IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10963 OF 2021

M/s. Ghai Constitutions,
Through its sole Proprietor,
Shri. Jaspalsingh Hardayalsingh Ghai,
Age: 57 years, Occu: Business,
Having office at Ghai Tower, Plot No.14,
Town Centre,CIDCO, Cannught,
Aurangabad. ..Petitioner

Versus

1. The State of Maharashtra,
Through Secretary,
Public Works Department,
Government of Maharashtra,
Mantralaya, Mumbai 32.

2. The Maharashtra State Road Development Corporation Ltd.,
Through its Vice Chairman and Managing Director,
Having office at Opp. Bandra Reclamation Bus Depot, Near Lilavati Hospital K.C. Margh,
Bandra (West), Mumbai 400050.

3. The Chief General Manager, (TAD),
MSRDC Ltd.
Having office at Opp. Bandra Reclamation Bus Depot, Near Lilavati Hospital K.C. Margh,
Bandra (West), Mumbai 400050. ..Respondents

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Mr. Amol K. Gawali, Advocate for Petitioner.
Mr. A. R. Kale, A.G.P. for Respondent-State.
Mr. S. V. Adwant, Advocate for Respondent No.1.

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CORAM : S. V. GANGAPURWALA &
S. G. Dige, JJ.

Judgment Reserved on : 16.12.2021.
Judgment Pronounced on : 10.01.2022.

<u>JUDGMENT</u> (Per S. V. Gangapurwala, J.) :-

1. The petitioner is issued with the work order on 08.03.2017 and appointed as contractor for collection of toll at three toll location viz. (i) Toll station near village Lasur on Aurangabad-Lasur Road, State Highway No.30 (ii) at kilometer 336/800 near Nakshatrawadi on Aurangabad-Paithan Road and (iii) at Sawangi Toll station on Aurangabad-Jalgaon Road at Km 238/700 Maharashtra State Highway No.8. The offer of petitioner of Rs.40,14,00,000/- for toll collection at the subjected toll stations for a period of 156 weeks was accepted. The petitioner was required to pay the respondent-Corporation performance security amounting Rs.4,01,40,000/-. The petitioner submitted bank guarantees of Rs.1,90,60,000/- and Rs.2,10,80,000/- totaling to Rs.4,01,40,000/- valid for 156 weeks.

2. It is case of the petitioner that, since the National Highway Authority had changed the scope of work of Aurangabad-Jalgaon Road, the contractor who had carried excavation on major part of the pre-existing road had left the work midway, thereby reducing the traffic intensity on Aurangabad-Jalgaon Road to 40%, so also by reasons of non-maintenance of 25 km of Lasur Vaijapur Road wherein big pot holes were created during the rainy season, the traffic intensity reduced to 60% by reasons of the travelers using alternate road. The learned counsel for the petitioner submits that, the MSRDC failed to perform its fundamental obligation to maintain the three roads in motorable

condition on which the three toll stations of IRDP Aurangabad were located. The traffic intensity on the Sawangi toll plaza situated at Aurangabad-Jalgaon Road and Lasur toll plaza at Aurangabad-Lasur road had reduced to 30% of its original collection. As per the assurance given to the petitioner a video graphic transaction survey was carried out by respondent-Corporation through M/s. UTES Consultancy Pvt. Ltd. for a period from 29.01.2020 to 04.02.2020 (7 days). The survey report reflected that, the average toll collection at three toll booths of IRDP at Aurangabad was Rs.1,70,167/- per day i.e. Rs.47,64,676/- per month. According to Mr. Gawali, the learned counsel, on 26.03.2020 nation wide lock down was declared on account of Covid 19 pandemic and the toll booth was closed from 26.03.2019 to 19.04.2020. Again on 28.10.2020, M/s. UTES Consultancy Pvt. Ltd. was appointed to carry out video graphic traffic intensity survey for 15 days at three toll stations of IRDP Aurangabad by MSRDC for a period from 06.11.2020 to 20.11.2020. M/s. UTES Consultancy Pvt. Ltd. in its report submitted that, the average daily collection at three toll stations was Rs.1,04,542/- i.e. Rs.29,27,176/- per month. However, the petitioner was required to pay the toll collection at the initial rate.

3. The petitioner persuaded the Vice Chairman and Managing Director to give him hearing as per Clause 39. The Vice Chairman and Managing Director under order dated 07.07.2021 directed the

petitioner to pay a reduced installment at the rate of Rs.65,80,710/- per month with effect from 31.10.2019.

4. The learned counsel for the petitioner submits that, the said order dated 07.07.2021 does not reflect the effect of complete and partial lockdown at the behest of Central and State Government. The Chief General Manager (TAD), MSRDC based upon the order of the Vice Chairman and Managing Director, directed the petitioner to pay an arrears of Rs.8,05,36,957/-. The petitioner without getting basis of calculation of the monthly installment of Rs.65,80,710/- calculated by the Vice Chairman and Managing Director paid the amount demanded under financial duress. The Chief General Manager (TAD) invoked the bank guarantee of Rs.1,90,60,000/- furnished by the petitioner. The petitioner by detailed letter gave reference to the traffic intensity survey carried out by MSRDC. According to the learned counsel, as per the report of M/s. UTES Consultancy Pvt. Ltd. appointed by the respondent-Corporation the respondents can recover only Rs.29,27,176/- per month. According to the learned counsel, it is erroneous on the part of the respondents to seek higher amount than Rs.29,27,176/- per month as per the video graphic survey report. The respondents are required to repay the excess amount recovered from the petitioner. The petitioner is entitled for the rebate as per the Clause 26 for the period of

closer of toll booth due to Covid 19 pandemic. According to the learned counsel, the action of the respondents is high handed and does not stand to reason. The learned counsel relies upon the judgment of the Apex Court in a case of **Zonal Manager, Central Bank of India Vs. Devi Ispat Limited and Others** reported in **(2010) 11 SCC 186** and submits that, in deserving cases this Court can issue mandamus and writ petition is maintainable even in contractual matters, if action on the part of the State or its instrumentality is unfair or arbitrary.

5. Mr. Adwant, learned counsel for respondent-Corporation submits that, petition lacks basic pleadings in respect of the relief claimed. Initial burden of showing the violation of the mandate of Constitution lies upon the person approaching the Court. The alleged irregularities or illegalities or unconstitutionality cannot be presumed nor the Courts can substitute their opinion for the bonafide opinion of the State Executive. Reliance is placed on the judgment of the Apex Court in a case of **Netai Bag and Others Vs. State of W. B. and Others** reported in **(2000) 8 SCC 262.** The learned counsel further submits that, the contract entered into between the respondents and petitioner is non-statutory and purely contractual. The rights are governed by the terms of contract and no writ or order can be issued under Article 226 of the Constitution of India. The learned counsel relies upon the judgments of the

Apex Court in a case of **Barbeilly Development Authority and Another Vs. Ajai Pal Singh and Others** reported in **(1989) 2 SCC 116**, judgment in a case of **Indsil Hydro Power and Manganese Limited Vs. State of Kerala and Others** reported in **(2020) 16 SCC 276**, judgment in case of **M/s Radhakrishna Agarwal and Others Vs. State of Bihar and Others** reported in **(1977) 3 SCC 457** and judgment in a case of **Joshi Technologies International Inc. Vs. Union of India and Others** reported in **(2015) 7 SCC 728.** According to the learned counsel the present writ petition is not tenable and deserves to be dismissed in limine.

6. The learned counsel further submits that, the petitioner is a defaulter. He has not approached the Court with clean hands. The parties are governed by the contractual terms. Before issuance of the letter of acceptance and work order, the petitioner under letter dated 03.09.2019 raised a claim on the ground that the National Highway Authority had initiated repair work that led to diversion of traffic, therefore, heavy loss of toll revenue would be incurred and that the revenue collected at Sawangi toll plaza was only 40%. Thereafter, on 23.10.2019 the petitioner raised a claim pursuant to the repair work commenced by the National Highway Authority on Sawangi toll plaza stretch and alleged that because of bad road conditions on Lasur toll plaza stretch, there was diversion in traffic and the revenue collected on this toll plaza was only 20% of the original revenue. The petitioner requested for a

rebate under Clause 26 of the agreement. In furtherance of the request, respondent-Corporation appointed M/s. UTES Consultancy Pvt. Ltd. for conducting 7 days traffic survey at Sawangi, Lasur and Nakshtrawadi toll plazas. The survey report was given. Additionally due to Covid 19 pandemic in view of the direction of the Central and State Government, the MSRDC framed a Covid Relief Policy to be made applicable to all the toll collection contractors including the petitioner and a board resolution was passed on 09.11.2020. The same is as under:

	Period	Installment Payable
1	26/03/2020 to 19/04/2020 @ 25 days	The installment amount should be waived completely
2	20/04/2020 to 10/08/2020 @ 112 days	40% of current Installment due
3	11/08/2020 to 31/10/2020 @ 82 days	70% of current Installment due
4	01/11/2020 to onwards	100% of Installment be charged s per the terms of contract

7. The petitioner was informed about the relief granted, so also the amount due and payable by him. Time to time communications were made to the petitioner about the amount outstanding. After perusal and the analysis of the report submitted by the M/s. UTES Consultancy Pvt. Ltd. and upon a site visit by the officers of MSRDC, the concerned department of MSRDC manned by the technical experts, observed that there is a monthly loss of toll revenue of Rs.37,11,598/- at Lasur and Sawangi toll plazas and hence proposed revision in toll

installment payable by petitioner from Rs.1,02,92,308/- to Rs.65,80,710/-. The petitioner under its letter dated 02.04.2021 invoked Clause 39 (Dispute Resolution) of the offer documents and sought resolution of dispute by giving personal hearing. The Vice Chairman and Managing Director as per request of the petitioner heard the petitioner and thereafter, took a decision that the toll revenue be paid by the petitioner at the reduced rate from monthly upfront amount of Rs.1,02,92,308/- to Rs.65,80,710/- with effect from 31.10.2019 i.e. from the date of commencement of the contract till completion of road works or the expiry of the contract whichever is earlier. The petitioner thereafter, also has not paid the amount regularly and is in default of payment of amount. The petitioner is bound by the terms and conditions of the contract. The petitioner is defaulter. No relief can be given to the petitioner and the petitioner is not entitled for any relief from this Court.

8. We have considered the submissions canvassed by the learned counsel for respective parties.

9. The dispute between the parties is dispute arising out of a contract.

10. The respondent is an instrumentality of the State. The scope of judicial review in matters within the domain of the contractual obligation is limited. There is no absolute bar to the

maintainability of the writ petition in contractual matter or even when monitory claim is raised. The discretion lies with the High Court which under certain circumstances it can refuse to exercise. Even if the High Court exercised the jurisdiction under Article 226 of the Constitution of India it would be in a very limited compass. This Court certainly would not enter into the fora of disputed questions of facts and decide the matters wherein evidence would be required.

11. This Court would limit itself to the due adherence to the decision making process. The contract between the parties is entered into. Under the contract the petitioner is appointed as toll collection agent at three toll stations. Dispute, it appears, has arisen between the parties regarding the amount of collection of toll because of the reasons such as reduced traffic due to Covid 19 pandemic, reduced traffic due to repair works and non maintenance of road condition, so also work in progress of the road by the National Highway Authority.

12. It appears that, the petitioner was issued with the work order. Under the said work order duly accepted by the petitioner, the petitioner was liable to pay Rs.40,14,00,000/- for a period of 156 weeks. The monthly payment was Rs.1,02,00,000/-.

13. Pursuant to the grievance raised by the petitioner, the respondents appointed M/s. UTES Consultancy Pvt. Ltd. for carrying out video

graphic transaction survey. First survey was carried out for a period from 29.01.2020 to 04.02.2020. As per the said survey report, the average toll collection at three toll booths awarded to the petitioner was Rs.1,70,167/- per day i.e. Rs.47,64,676/- per month. The said survey was conducted for a period from 29.01.2020 to 04.02.2020 (7 days). Subsequently, in March 2020, nationwide lockdown was declared on account of Covid 19 pandemic and the toll booths were closed upto 19.04.2020. The petitioner again requested the respondent that, the toll collection is too less because of the reasons such as work of the road being carried out by National Highway Authority and the traffic being diverted, the maintenance work not being carried out and the vehicles being diverted due to diversion, so also Covid 19 pandemic. The MSRDC again for the second time appointed M/s. UTES Consultancy Pvt. Ltd. to carry out the video graphic traffic intensity survey on 28.10.2020 for 15 days at all the three toll stations. M/s. UTES Constitution Pvt. Ltd. carried out video graphic traffic intensity survey for 15 days at three toll stations for a period from 06.11.2020 to 20.11.2020. The survey report of the M/s. UTES Constitution Pvt. Ltd. suggested that, average daily collection at the three toll stations was Rs.1,04,542/- i.e. Rs.29,27,176/- per month. The petitioner is insisting that, the same ought to be the amount payable by the petitioner per month to the respondent-Corporation. The petitioner raised dispute under Clause 39 before the Vice Chairman and Managing Director. Clause 26 deals with the Corporation's risks. One such Corporation's risks is repair work undertaken by the Corporation, Government, other Government Authorities on section of road resulting in total closure of traffic at the site of toll collection. Clause 28.4 deals with the sharing of toll revenue. The surplus toll income shall be shared in the ratio of 90:10 between the Contractor and MSRDC. Clause 39 deals with the disputes and resolution. In case of disputes or difference of opinion arising, the decision of the Vice Chairman and Managing Director shall be final and binding on the Contractor. The Contractor shall be given reasonable opportunity to represent his case before the Vice Chairman and Managing Director. Pursuant to the grievance made by the petitioner, Clause 39 was invoked by the parties. The Vice Chairman and Managing Director gave opportunity of hearing to the petitioner through video conferencing and passed an order reducing monthly upfront installment from Rs.1,02,92,308/- to Rs.65,80,710/-.

14. Under the said order the Vice Chairman and Managing Director has observed that opportunity was given to the petitioner and he came to the conclusion that there is loss of toll revenue of Rs.1,32,587/- per day i.e. Rs.37,11,598/- per month.

15. M/s. UTES Consultancy Pvt. Ltd. conducted survey for 7 days at three toll stations from 29.01.2020 to 04.02.2020 and according to the said report 7 day's average daily traffic had reduced at Sawangi toll plaza and Lasur toll station. The said report of M/s. UTEC Consultancy Pvt. Ltd. was on the basis of the traffic survey from 29.01.2020 to 04.02.2020. It appears from the record that, under the instruction of the respondent-MSRDC on 28.10.2020 M/s. UTES Consultancy Pvt. Ltd. was again appointed to carry out video graphic traffic intensity survey for 15 days. Under letter dated 28.10.2020 respondent-MSRDC appointed M/s. UTES Consultancy Pvt. Ltd. for carrying out 24 hours video graphic traffic count survey using video camera for 15 days at all three toll stations awarded to the petitioner. Accordingly it appears that, M/s. UTES Consultancy Pvt. Ltd. had carried out 24 hours video graphic traffic count survey using video camera for a period of 15 days from 06.11.2020 to 20.11.2020. It appears to have shown a reduced traffic.

16. Perusal of impugned order dated 07.07.2021 of the Vice Chairman and Managing Director it does not appear that, second report from M/s. UTES Consultancy Pvt. Ltd. of the video graphic traffic count survey from 06.11.2020 to 20.11.2020 was taken into consideration. The effect and relevancy of the said report does not appear to have been dealt with under the impugned order.

17. As observed supra and held by the Apex Court in its judgments referred to above that this Court under writ jurisdiction would not embark upon the investigation of the fact. More particularly, when the same are disputed questions of fact requiring evidence. This Court certainly would not enter into the said arena. This Court only would consider whether material on record has been considered by the Authority while passing order. Perusal of the impugned order it does not transpire that the Vice Chairman and Managing Director considered 24 hours video graphic traffic count survey report using video camera for 15 days at all three toll stations from 06.11.2020 to 20.11.2020. The M/s. UTES Consultancy Pvt. Ltd. was appointed by the MSRDC to conduct and carry out 24 hours video graphic traffic intensity survey for 15 days. However, the report does not appear to have been considered while passing order assailed in the present petition. It is for the Authority to consider the effect of the said report and how far the said report has to be considered for arriving at a conclusion.

18. It is only because the said report has not been referred to in the impugned order, as such we direct the Vice Chairman and Managing Director to reconsider the whole issue and take decision afresh of the amount payable by the petitioner per month. The entire material on record certainly would be required to be considered. Otherwise, provision for disputes and resolution would be meaningless.

19. In light of the above, we direct the Vice Chairman and Managing Director to reconsider the issue afresh on its own merits and fresh decision be taken. The petitioner may appear before the Vice Chairman and Managing Director within a period of seven (07) days from the date of the order and fresh order be passed by the Vice Chairman and Managing Director of the respondent-Corporation. Till the fresh order is passed, the Bank guarantee may not be invoked.

20. We have restricted ourselves to the decision taken by the Vice Chairman and Managing Director pursuant to Clause 39 of the contract and we have asked the Vice Chairman and Managing Director to take fresh decision only because the order does not depict the consideration of second report of M/s. UTES Consultancy Pvt. Ltd. appointed by MSRDC for carrying out 24 hours video graphic traffic count survey using video camera for 15 days at all three toll stations and the same was carried out from 06.11.2020 to 20.11.2020.

21. We make it clear that, we have not opined about the amount payable by the petitioner or recoverable by the respondent.

22. As far as other reliefs are concerned, such as seeking direction against respondent to calculate monthly installment from 31.10.2019 at Rs.29,27,176/- and to repay the excess amount is

not considered by us. The same would be beyond the scope of writ jurisdiction. The petitioner may avail remedy as may be permissible under law.

23. Writ Petition accordingly disposed of. No costs.

(S. G. Dige)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

Devendra/December-21