

Arun

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 9199 OF 2021**

Arun Kumar Deedwania	...Petitioner
<i>Versus</i>	
Head Quarter Chief Engineer, Southern Command And Anr	...Respondents

Mr Arup Dasgupta, with Jinal Vani, i/b M/s Jhangiani, Narula & Associates, for the Petitioner.
Mrs Shehnaz V Bharucha, with BB Sharma, i/b AA Ansari, for the Respondents-Union of India.

**CORAM G.S. Patel &
 Madhav J. Jamdar, JJ.
DATED: 8th March 2022**

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1. Rule. There is an Affidavit in Reply. Rule is made returnable forthwith and the Petition is taken up for hearing and final disposal.
2. The Petition challenges an order dated 30th October 2021 issued by the 1st Respondent, the Head Quarter Chief Engineer, Southern Command, Pune 411 001. The second relief is for a mandamus to the 1st Respondent to renew the enlistment of the Petitioner as a class 'S' contractor for a cyclic period from 2021 to 2025 with an upper tendering limit of Rs. 15 crores.

3. These are the facts. The Petitioner, a qualified civil engineer, was enlisted in June 1988 as a class 'A' contractor in Southern Command Pune, Defence Establishment, for categories of works enumerated in a letter dated 1st June 1988. By an order dated 22nd March 1993, the 1st Respondent increased the tendering limit of 'A' class contractors from Rs.60 lakhs to Rs. 1 crore. The Petitioner's enlistment was renewed for five years from 1st January 1996 to 31st December 2000 by a subsequent order dated 1st March 1996. It was further extended for another five years from 1st January 2001 to 31st December 2005 and the tendering limit was also increased to Rs.1.50 crores. As the Petitioner's performance was satisfactory, the 1st Respondent upgraded the Petitioner to class 'S' with an enhanced tendering limit of Rs.12 crores for a five-year period from 1st January 2006 to 31st December 2010. That enlistment in class 'S' was again renewed from 1st January 2011 to 31st December 2015, but this time with an enhanced tendering limit of Rs. 15 crores.

4. The Petitioner says that through all these cyclic renewals, he duly executed several works in different zones with no complaints.

5. As is already evident, these enlistment renewals are for five-year cyclic periods. The 1st and 2nd Respondent called on all MES contractors by a website notice to submit their respective applications for a renewal for the next cyclic period from 1st January 2016 to 31st December 2020. The Petitioner submitted his application dated 5th August 2015.

6. This is where the trouble starts.

7. In response, the Petitioner received a letter dated 12th December 2015 from the 1st Respondent rejecting the Petitioner's renewal application on the ground that the Chief Engineer, Chennai Zone had cancelled two contracts awarded to the Petitioner, and that government recovery under those contracts was anticipated. The 1st Respondent said that the Petitioner could appeal by 31st January 2016.

8. In fact, the Petitioner had dispute the validity of the purported cancellations by the CE, Chennai. The Petitioner invoked arbitration regarding both cancellations. At the time of the 1st Respondent's rejection, those arbitration proceedings were actually pending; and there was no adjudication in favour of the CE, Chennai sufficient to justify the 1st Respondent's renewal refusal. It was, Mr Dasgupta says, and, in our view, with complete justification, wholly impermissible for the 1st Respondent to reject a renewal application on the ground that the CE, Chennai had purportedly cancelled two contracts when those very cancellations were the subject matter of properly invoked arbitrations pending adjudication. At the time of the 1st Respondent's rejection, there was simply no concluded determination against the Petitioner and in favour of CE, Chennai.

9. In any case, we do not see how the 1st Respondent could have rejected the renewal application without minimally hearing the

Petitioner and giving him an opportunity to explain what was happening in regard to the two CE, Chennai contracts.

10. On 23rd December 2015, the Petitioner appealed to the 2nd Respondent and once again sought a renewal of his enlistment.

11. The 2nd Respondent did nothing. Consequently the Petitioner's application for renewal before the CE, Southern Command lapsed, and the Petitioner was not re-enlisted for 2016 to 2020.

12. The scene shifts back to Chennai. In the arbitration against CE, Chennai, there were two awards of 14th March 2017 and 20th May 2017. In both, the Petitioner succeeded fully. He was awarded damages. In both matters, the purported cancellations by the CE, Chennai contracts were held to be illegal.

13. We pause here for a moment to note that this in itself completely took away the entire basis of the 1st Respondent's renewal refusal.

14. What did the Petitioner do? On 27th May 2019, he immediately wrote to the 1st Respondent informing him of these two awards and asking that his renewal application be reviewed, viz., that the Petitioner be enlisted or re-enlisted as an approved contractor from 1st January 2016 to 31st December 2020.

15. If the conduct of the 1st Respondent up to this point was strange, it now becomes bizarre. For, by his letter 2nd July 2019, the 1st Respondent rejected that the Petitioner's renewal application again, this time on the ground that CE, Chennai had challenged those awards in the High Court.

16. As we can see, this was now running to a pattern. First, there was a rejection on the ground that CE, Chennai has cancelled two contracts — unmindful of the fact that those cancellations by CE, Chennai were disputed and in arbitration. Then, when the CE, Chennai failed and damages were awarded against it, the 1st Respondent compounded its error by saying that the CE, Chennai has filed challenges under Section 34 against those two Awards. Clearly, it did not matter to the 1st Respondent how much the Petitioner did to safeguard his reputation and the sanctity of his contracts. The littlest thing was enough to trigger a rejection by the 1st Respondent and to persuade him to pile a new error on a previous mistake.

17. But it does not end even there. The Petitioner repeated his request on 11th July 2019 and, in a now utterly predictable fashion, the 1st Respondent refused on 23rd July 2019. The Petitioner sent an Advocate's notice. This also met with refusal.

18. The Petitioner filed Writ Petition No. 2126 of 2021 impeaching these orders of the 1st Respondent refusing to renew the Petitioner's enlistment. While that Petition was pending here, on

2nd November 2020, the Madras High Court dismissed the challenge petitions by the CE, Chennai.

19. Obviously, the 1st Respondent was now left with fewer and fewer choices. We should have thought that by now the 1st Respondent could have had both the wit and the grace to see the error of his ways and to remedy the situation. The Petitioner sent a copy of the Madras High Court order to the 2nd Respondent seeking relief. In parallel, the Petitioner amended his pending Writ Petition before this Court. That Writ Petition was also decided in the Petitioner's favour by an order of 27th August 2021, directing the 1st Respondent to decide the Petitioner's renewal application dated 24th November 2020 before 30th October 2021. The Petitioner was allowed to file further documents.

20. Pursuant to this, the Petitioner by his letter of 3rd September 2021 once again submitted an application to the 1st Respondent with a copy to the 2nd Respondent for the renewal of his enlistment until 2025.

21. In reply to this, the 1st Respondent now took another tack. By a letter of 14th September 2021, the 1st Respondent said that the Petitioner must apply in a format specified in the 2nd Respondent's guidelines dated 24th April 2020. Since the application was not in conformity with those guidelines, the Petitioner's application could not be considered.

22. On 18th September 2021, the Petitioner, who, if nothing else, deserve full mark for tenacity, submitted a revised application to the 1st Respondent in the correct format. Other documents followed. By a letter of 28th September 2021, the 1st Respondent sought additional details including relating to other contracts. One of these was a contract cancelled by CE, Pune against which the Petitioner had also initiated arbitration. The Petitioner supplied the necessary documents including a statement that even in this arbitration against CE, Pune the Petitioner had received a favourable award dated 30th April 2019 (amended on 27th June 2019). This award held CE, Pune's cancellation to be invalid and illegal and also awarded the Petitioner damages. Of course, the authority had filed a Section 34 petition on 31st August 2021. On that, this Court required the authority to deposit a sum of Rs. 1 crore in this Court and granted a stay.

23. On 30th October 2021, absolutely obdurate in its refusal to accept the Petitioner's application, and intransigent at every turn, the 1st Respondent once again refused to renew the Petitioner's enlistment. If the first refusal was wrong, the second bizarre, the third one was preposterous. The 1st Respondent now said the Petitioner had 'remained dormant' since 2014 and had not done any work in any sector and therefore could not be considered. It surely must have occurred to the 1st Respondent that the 1st Respondent itself was the prime cause of any such alleged dormancy. We do not see how the 1st Respondent could have sought to make a virtue out of its own cardinal errors and sins of omission and commission.

24. It is against this order of 30th October 2021 that the Petitioner has filed this Writ Petition.

25. We have heard both sides.

26. There is no answer to this Petition. Usually, in judicial review, a writ court will only look at the decision-making process. One of the few known exceptions to this salutary rule, is where the decision is shown to be perverse, irrational and arbitrary. The decision of the 1st Respondent — especially the very last one — is, to our minds, one that fails every known test of judicial review of administrative action. It violates the principle of Wednesbury unreasonableness. It fails the doctrine of proportionality. It betrays a completely and wanton non-application of mind. We go further. It shows a refusal to apply the mind fairly to relevant factors. It proceeds only on the basis of self-serving irrelevancies. It would not be too far-fetched to say that the entire series of orders discloses a pronounced departmental bias. There is a complete and egregious violation of every principle underlying Articles 14 and 19(1)(g) of the Constitution of India. At every turn, the 1st Respondent has acted in a manner that can only be described as perverse. Not one of its renewal rejections are such that any reasonable and fair-minded person could have taken, given the material before it. Repeatedly, the 1st and 2nd Respondents were given opportunity after opportunity to correct course. Nothing worked. The 1st Respondent in particular seems to have been bent on doing one thing and one thing only — to reject the Petitioner's applications for renewal at any cost. All the rejections were only on conjecture and surmise.

27. We deprecate this conduct of the 1st Respondent and we censure it. This is not the approach we expect of responsible authorities of the state under our writ jurisdiction. We equally disapprove of the conduct of the 2nd Respondent in not addressing the grievances of the Petitioners when given an opportunity. How many times should the Petitioner have demanded justice, again and again and again, only to be met with the same mulish refusal?

28. In fairness, Ms Bharucha tries to defend this position as best she can. There is an Affidavit in Reply. She says that the Petitioner could have worked elsewhere to avoid the 'dormancy'. But this is surely a self-serving argument by the 1st Respondent on affidavit. If the bulk of the Petitioner's work was for decades with MES Pune, it was not for the 1st Respondent to theorise that government work elsewhere was possible. Indeed, the 1st Respondent's renewal rejection would no doubt have come in the way of the Petitioner being enlisted anywhere else.

29. The Affidavit in Reply refers to guidelines. These are dated 24th April 2020, well after the rejection cycle. They cannot apply to the Petitioner. A disadvantageous guideline cannot be retrospectively added. That apart, these guidelines and the criteria for renewal in clause 7 seem almost designed to result in a rejection of the Petitioner on the last ground, namely that there has been no work in the last cyclic period. But the Petitioner not having work is a Catch-22 situation. As we noted, this is easier said than done. The 1st Respondent's cancellation of enlistment would undoubtedly have had an impact on any other contract. This is why we believe

that the 1st Respondent cannot and should not be allowed to make a virtue of its own wrongs.

30. We do not want to send this back to the 1st Respondent for a decision afresh. We have now every confidence that the only decision the 1st Respondent will take will be the wrong one. To paraphrase Shakespeare in *Julius Caesar*, thrice was the 1st Respondent offered the opportunity to mend his ways and thrice did he refuse. There will not be a fourth opportunity.

31. Rule is made absolute in terms of prayer clauses (a) and (b) which read thus:

“(a) That this Hon’ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ or Order or direction as this Hon’ble Court may deem fit, calling for the records of the Petitioner’s case before the Respondent Nos. 1 and 2 and the Order dated 30th October 2021 and after examining the legality and propriety for the Order dated 30th October 2021 at Exhibit “DD” hereto, quash and set aside Order dated 30th October 2021 bearing Reference No. 800006/S-106/674/E8 passed by the Respondent No. 1;

(b) that this Hon’ble Court be pleased to issue a Writ of Mandamus or any other Writ in the nature of Mandamus or any other appropriate Writ or Order or direction as this Hon’ble Court may deem fit directing the Respondent No. 1 to renew the enlistment of the Petitioner as a class ‘S’ Contractor for the cyclic period from 2021 to 2025 with an upper tendering limit of Rs. 15,00,00,000/- (rupees Fifteen Crores Only).”

32. Mr Dasgupta, with his usual fairness, does not press for an order of costs, although, given this history, he might well have been within his rights to do so, including seeking an order of punitive costs. But even had Mr Dasgupta made a plea for costs, we would have been inclined to reject it for one over-riding reason, and that is the measured, precise and fair way in which Ms Bharucha has conducted her case in opposition.

33. The 1st Respondent will ensure the re-enlistment of the Petitioner within one week of this order being uploaded.

34. The 1st Respondent will not insist on having a certified copy of this order. The 1st Respondent will act on production of an authenticated or digitally signed copy of this order.

(Madhav J. Jamdar, J)

(G. S. Patel, J)