

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.254 of 2018

In
Civil Writ Jurisdiction Case No.21975 of 2012

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1. The National Highway Authority Of India Ministry Of Road Transport And Highways
 2. Chief General Manager CO, National Highway Authority of India Ministry of Road Transport and Highwar
 3. General Manager CO, National Highway Authority of India Ministry of Road Transport and Highway,

... .. Appellant/s

Versus

M/s U Toll Corporation Ltd.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Dr. Maurya Vijay Chandra, Advocate Mr. Gaurav Govinda, Advocate
For the Respondent/s	:	Mr. Sanjay Singh, Sr. Advocate Mr. Priyajeet Pandey

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
CAV JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 05-10-2023

The appeal by the National Highways Authority of India, (for brevity “NHAI”) impugn the judgment of the learned Single Judge which not only asserted jurisdiction to decide the case, but also interfered with the action of the respondent NHAI in having cancelled the Letter of Award (for brevity “LoA”) issued to the writ petitioner and set aside the fresh tender notification issued by the NHAI pursuant to the cancellation. The learned Single Judge also directed the bank



guarantee invoked on alleged misdemeanor of producing false documents to be refunded to the writ petitioner.

2. Learned Counsel Dr. Maurya Vijay Chandra appearing for the NHAI seriously assailed the findings in the impugned judgment regarding jurisdiction insofar as the entire tender process having been carried out from Delhi, wherein the writ petitioner also had their office and so were the further transactions including the cancellation carried out from Delhi. There was also this specific clause excluding jurisdiction anywhere other than those of the Courts within Delhi, in the bid document the Request For Proposal (RFP); which term is deemed to have been agreed to by the petitioner who participated in the bid and came out successful. The mere fact that the subject of the tender was to be carried out inside the State of Bihar does not by itself confer jurisdiction by reason of the specific clause agreed to by both the parties. Though it could be argued that there was cause of action within the State of Bihar also, when by consensus, the parties had agreed to exclude all other jurisdiction, but for Delhi wherein also there was part of cause of action for reason of initiation of and finalization of the tender proceedings being carried out in that State; clearly excludes the jurisdiction of this Court. The



respondent had taken up the contention of lack of jurisdiction at the very first instance of an affidavit being filed in the above proceedings and the finding of the learned Judge of the respondent having acquiesced to the jurisdiction of this court cannot at all be sustained.

3. A list of dates is proffered by the learned counsel to specifically contend that there were no *mala fides* in the cancellation of the tender and that it emanated from an inquiry conducted into the net worth of the tenderer, which ended in the finding that the certificate of net worth furnished by the writ petitioner was fraudulent. It is hence, by virtue of the specific clause of the agreement, the LoA was cancelled. There is no question of any *mala fides* being alleged on the respondents nor are the submissions regarding that sustainable for reason of none having been impleaded in the personal capacity.

4. As for the finding regarding the net worth, it is argued that the same cannot be gone into in judicial review, especially since the verification has been done by experts and there is insufficient material on record to find the said decision to be faulty or illegal. It was also pointed out that the fresh notification had come to its logical conclusion by appointment of the successful bidder who had also taken up the work and had



been carrying on the same while the proceedings were pending before this Court. There is no question of cancellation of the work, especially since there is no interim order granted in the writ petition and even at the stage of filing of the appeal, it was noted by a Division Bench, while considering the interim prayer, in order dated 23.10.2019 that the matter primarily survives for the second relief relating to refund of the amount of bank guarantee. There was also a stay of refund of the bank guarantee granted as per the said order. It is contended that the appeal has to be dismissed not only on the question of jurisdiction, but also on the merits, even if it is examined by this Court.

5. Sri. Sanjay Singh, learned Senior Counsel, appearing for the writ petitioner, however, points out from the judgment itself that the appellant has acquiesced to the jurisdiction of this Court and had never raised the question before the learned Single Judge other than at the time of final hearing. The specific term spoken of by the appellant is in the bid document which has no relevance after the successful bidder has been issued with the LoA. The LoA was cancelled without a hearing and from the very fact that a fresh notification was issued 5 days after the cancellation of the LoA, clearly



demonstrates that the appellant had, beforehand decided to cancel the LoA and initiated the process of fresh tender followed up with the cancellation. There is no ground to implead the parties in the personal capacity, since what is alleged is institutional *mala fides* and it is pointed out that the verification of the petitioner's net worth is also said to have been initiated by reason of a complaint raised by a total outsider through an Hon'ble Member of the Parliament. In any event, the finding that the writ petitioner had produced fraudulent documents to establish the net worth was without giving them an opportunity for explanation and even the verification carried out by the experts was behind the back of the writ petitioner.

6. It is urged that even going by the net worth found by the NHAI, the writ petitioner was entitled to be qualified. There was absolutely no misdemeanor which could lead to forfeiture of earnest money deposit, since the cancellation has occurred unilaterally at the hands of the NHAI, without notice to the writ petitioner. As of now, it is admitted that what remains is only the refund of the bank guarantee which has to be with interest as would be the liability of the writ petitioner to the bank for satisfaction of the amounts paid to the NHAI on enforcement of the bank guarantee.



7. Learned Single Judge has elaborately dealt with the contention regarding jurisdiction or the lack of it, as raised by the learned counsel for the NHAI in Paragraphs 6 to 8 of the impugned judgment. The entire tender process originated in Delhi and was finalized therein. The transactions which led to the cancellation also originated from Delhi, but it is to be noticed that the very tender was for collection of toll at the Parsoni Toll Plaza located at Km. 468.800 on Km. 520.002 to Km. 440.000 (Muzaffarpur-Kotwa-Mehsi) of National Highway No. 28 in the State of Bihar, which is admittedly within the State of Bihar. What has been emphasized by the NHAI is Clause 25 of the agreement of the RFP produced as Annexure-2. The Courts at New Delhi was to have exclusive jurisdiction on all disputes arising 'under, pursuant to and/or in connection with the bidding process'. The petitioner was issued with LoA by the NHAI, but admittedly, the contract was not signed. In the above circumstances, it cannot be said that the terms in the bidding process would not bind the parties. The bidding process comes to an end when the contract is signed; which stage had not reached between the petitioner, the bidder and the respondent, the awarder.

8. However, it has to be noticed that the subject of the



tender, the collection of fees for the toll implemented was within the State of Bihar and the jurisdiction of the Courts within Bihar stood excluded because of the specific condition in the bid document. As has been noticed by the learned Single Judge, “cause of action”: *‘means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court’*. It cannot for a moment be doubted that this Court having jurisdiction over the State of Bihar would have had jurisdiction over the matter, but for the fact that there is an ouster of jurisdiction in the bid document and the writ petitioner who applied under the bid document would be regulated by such exclusion. What has been agreed upon between the parties to be excluded can also be later agreed to be included; or in other words, the specific terms agreed upon by the parties can also be waived, which can be either expressed categorically or inferred from subsequent conduct. It was the specific contention of the writ petitioner that the petitioner had proceeded based on the LoA and had even deposited the performance security by way of demand draft. There was also a request made by the NHAI on 23.05.2012 to sign the contract within three days after which the NHAI made a U-turn and sought for clarification of the net worth of the petitioner, which



eventually led to the cancellation of the LoA without affording any opportunity to the petitioner to explain the alleged reduction in net worth. As has been noticed from ***Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd.; (2013) 9 SCC 32***, the intention of the parties to confer jurisdiction on a particular Court, if it is clear and unambiguous, the expression of one such place where the cause of action arises would be in exclusion to another location wherein also part of the cause of action arises. The conferment of jurisdiction by consent of parties confining it to any place, should also be where part of such cause of action arises. Herein both Delhi, where the tender proceedings were initiated & finalized and Bihar, the location of the toll, are places where part of the cause of action arise. However, this can be varied by the parties and disputes can be agitated in any other location where part of the cause of action arises, if by express or implied conduct the restriction is waived.

9. In the present case, the writ petition was filed in the State of Bihar in 2012 and the same was finally heard and allowed only in the year 2017. Though, in the first counter affidavit filed, the issue of jurisdiction was raised, it was never addressed or decided even while passing the interim order. As early as on 13.05.2013 an interim order was passed restraining



the Bank of Baroda from paying the bank guarantee to NHAI and if already paid, restraining the NHAI from withdrawing the amounts. There were many more proceedings recorded by way of altogether 23 orders mostly prayers for adjournments, at which time the question of jurisdiction was never raised. It cannot be doubted that the State of Bihar has jurisdiction since the location of the subject of the tender was within the State of Bihar. The learned Single Judge who heard the writ petition had recorded in Paragraph 26 of the impugned judgment that, at no point when the matter was pending, there was raised a question of jurisdiction. It has been specifically observed that even on the last occasion when the matter was taken up by the very same Single Judge, no such jurisdictional issue was raised and only when the hearing was found to go against the respondent, the question of jurisdiction was raised.

10. Specific reliance was placed on *Nawal Kishore Sharma v. Union of India; (2014) 9 SCC 329*, wherein it had been categorically declared that the Court having entertained the application and also passed interim order ought not to have dismissed the writ petition for want of total jurisdiction. Reliance was also placed on *Harihar Prasad v. Union of India, 2009 SCC OnLine Pat 1511* wherein the question of alternate



remedy was held to be not possible of consideration, if raised at a later juncture. We are inclined to agree with the learned Single Judge that since part of the cause of action, the specific location for which the RFP was issued for collection of toll was within the State of Bihar and the petitioners having invested substantial amounts towards establishing the toll plaza, a right had accrued to the petitioner to function the toll within the State of Bihar, by which alone there is jurisdiction within the State, which can be validly invoked but for the clause otherwise in the bid document. The respondent NHAI had appeared and contested the matter and despite raising the question of lack of jurisdiction in the counter affidavit, never pressed it seriously. The writ petition was pending for more than five years in this Court; with an interim order passed. The NHAI has acquiesced to the jurisdiction of the High Court at Patna and part of the cause of action, by way of the location of the toll plaza being within the State of Bihar, having arisen within the jurisdiction of this Court, we are inclined to uphold the order of the learned Single Judge on that aspect. There is no inherent lack of jurisdiction insofar as this High Court is concerned.

11. As far as the merits are concerned, the cancellation was for reason of the certificate submitted by the



writ petitioner/respondent regarding its net worth being fraudulent; which also led to the forfeiture. One of the grounds raised by the learned counsel for the NHAI was that the forfeiture of bank guarantee was as per clause 11(iv) of Annexure-3 NHAI which is a copy of the bid document submitted by the petitioner to the NHAI. The specific clause speaks of the performance security being forfeited by the authority under the following circumstances:

- (a) if the successful bidder fails to sign the contract.
- (b) if the successful bidder fails to get the contract engrossed within the stipulated period or
- (c) in accordance with the provision of the contract.

12. Clause (b) and (c) are not relevant, since the contract itself was not entered into. The contention of the NHAI, the appellant, is that the respondent failed to sign the contract within the stipulated time. In this context, we have to notice clause 11 itself which speaks of bid security, the form and the amount for which it has to be furnished which has to be returned without any interest within 120 days from the date of opening of bids. Sub-clause (iii) also speaks of forfeiture by the NHAI, if the bidder withdraws his bid, does not accept the correction of the bid price or fails within the specified period to furnish the required performance security. The bid security can be adjusted



in the amount of performance security as per clause (5). The forfeiture carried out in the present case is of the performance guarantee and the same can only be for reason of the respondent having failed to sign the contract; which failure definitely has to be attributable to the respondent-successful bidder.

13. The relevant dates as pointed out by the NHAI assumes relevance and we notice it from the tabulation produced by the learned counsel for the NHAI. Looking at the above tabulated dates, the NHAI had requested the petitioner to sign the contract within three working days on 23.05.2012 and had issued a further notice on 30.07.2012 directing the petitioner to clarify their net worth. Hence, it has to be understood that the execution of contract was kept in abeyance while clarification was pending. The NHAI again issued a reminder on 16.08.2012 regarding the net worth to which on 24.08.2012, a clarification was given. Almost 2 months from that date on 18.10.2012, the NHAI issued show cause notice to the respondent for termination of the LoA and forfeiture of performance guarantee. A fresh tender for the very same Parsoni Plaza was issued on 23.10.2012 without waiting for the show cause to be furnished by the writ petitioner. The writ petitioner showed cause by letter dated 05.11.2012 and the cancellation of



the LoA was by the communication of the NHAI on 04.12.2012. From the dates afore noticed as supplied by the NHAI itself, it cannot be said that the bidder had refused to sign the contract though a letter was issued on 23.05.2012, asking the bidder to sign the contract within three working days. Admittedly, the matter was kept in abeyance, since a complaint was raised by a Member of Parliament about the net worth certificate submitted. The complaint from the Member of Parliament is also said to be on 11.05.2012, on which date itself the Central Government had entrusted the stretch in which the toll plaza was to be established to the NHAI. It is the said complaint which gave rise to the inquiry regarding the net worth certificate furnished by the respondent; initiated by the NHAI, and in that circumstance, the notice issued on 23.05.2012 can only be viewed with suspicion. When an inquiry was pending, there was no reason why a demand should be made for execution of the contract itself. Be that as it may, after the said demand, again the NHAI issued a letter dated 30.07.2012 directing the writ petitioner to clarify its net worth. Hence, despite the letter issued on 23.05.2012 to sign the contract within three working days, the failure did not lead to a cancellation or forfeiture of the security offered.



14. Now, we come to the cancellation itself, which was on the ground that the net worth certificate issued by the respondent was false and fraudulent. In fact, it is very pertinent to notice that the net worth required for the purpose of the specific tender was Rs. 4.53 crores whereas even according to the NHAI, the net worth of the respondent, as verified came to Rs. 4.93 crores. The allegation was that the net worth submitted of Rs. 16.15 crores was fraudulent. We cannot, but notice that a fraud perpetrated, would vitiate the bid process in which the respondent was found to be successful; if the net worth certificate was fraudulent despite the respondent otherwise satisfying the net worth requirement. However, herein the NHAI, or the agency which verified the net worth asserts the net worth to be far less than that projected; which net worth found, also is in excess of the minimum required. In that circumstance the defect if at all, is of an over valuation, which cannot result in a finding of fraud having been employed. The enquiry conducted of the net worth, behind the back of the respondent, assumes more relevance in the said context. There is no opportunity afforded to the petitioner to establish its net worth and also validate the certificates produced by them along with the bid document. The action of finding the net worth to be far



lesser than that certified, as also the certificates to be fraudulent & false was a unilateral action without notice or affording an opportunity to the respondent to show cause; which attempt as we saw from the admitted facts was illusory, since even before showing cause, a fresh tender was floated. Despite a show cause having been issued, without waiting for an explanation from the respondent and even before cancelling the LoA issued, a fresh tender for procurement of fee collection agency was issued as per letter 23.10.2012. It was after the fresh notification that the cancellation itself was carried out, which reveals the prejudged mind of the authority who passed a prejudicial order against the successful bidder after issuance of the LoA; arbitrarily and without complying with the principles of natural justice.

15. We do not examine whether there are any *mala fides* on the officers of the NHAI or the NHAI itself as an institution, but however, there are very serious procedural irregularities vitiating the entire process of cancellation of LoA. There is also violation of principles of natural justice and as has been held in ***Mohinder Singh Gill v. Chief Election Commissioner; (1978) 1 SCC 405***, the principles of natural justice cannot be inferred as absent, merely for reason of absence of a provision to provide such an opportunity. The



silence does not exclude it totally, unless it be so excluded by necessary implication. When there is an order passed visiting the party against whom it is passed, with some consequence, then the functional obligation should be read in as mandatory was the declaration in Paragraph 76.

16. We find no reason to interfere with the judgment of the learned Single Judge and dismiss the appeal. As we noticed and as has been stated by the NHAI and the contractor who has been additionally impleaded in the appeal, there is no scope for cancellation of the further contract awarded or restoration of the petitioner to the contract. What remains is only the question of whether the performance security enforced by the NHAI was proper or not. We have found that there can be no failure alleged on the writ petitioner to sign the contract. The NHAI had sought for a clarification of the net worth and before such clarification was furnished and even before the cancellation of the LoA issued to the writ petitioner was cancelled, a fresh tender was floated. The writ petitioner, in the fact and circumstances cannot be said to have failed to sign the contract. Allegation of fraud on the successful bidder does not permit for forfeiture of either the bid security or the performance security offered by the bidders; which allegation in



the present case was unilaterally declared by the NHAI, without any opportunity being granted to the successful bidder, leading to an arbitrary cancellation of LoA; that too after a new tender, for the contract covered by the LoA was issued.

17. The writ petitioner on the above finding is entitled to be refunded the entire performance guarantee; which shall be done within a period of three months. If the amounts are not refunded within the stipulated time, then the writ petitioner/respondent shall be entitled to claim interest at the rate at which they were made liable to pay to the bank, in repayment of the enforcement of the bank guarantee. The appeal stands dismissed, leaving the parties to suffer their respective costs.

(K. Vinod Chandran, CJ)

Partha Sarthy, J

I agree

Anushka/-

(Partha Sarthy, J)

AFR/NAFR	
CAV DATE	21.09.2023
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