IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 4735 of 2023

M/s. Shiv & Sons
Through its proprietor,
Shiv Bhushan Pandey,
R/o. Jacob Compound,
Near Vishwanath Cinema,
Suraj Ganj, Itarsi, MP_461 111 ..... **PETITIONER**

...V E R S U S...

1. Union of India,
Through Chairman, Railway Board,
Ministry of Railways, Room No. 235,
Rail Bhawan, Raisina Road,
New Delhi-110 001.

2. Central Railway,
Through Principal Chief Commercial Manager,
2nd floor, New Administrative Building,
D.N.Road, Mumbai-400 001.

3. Central Railway,
Commercial Branch, Nagpur.
Through Divisional Railway Manager,
DRM Office, 1st floor,
Central Avenue, Mohan Nagar,
Nagpur- 440001. .... **RESPONDENTS**

Shri Akshat Bajpai, Advocate, through Video Conferencing, with Ms. Aastha Sharma, Advocate for petitioner.
Shri Anup J. Gilda, Advocate for respondents.

CORAM :- **DEVENDRA KUMAR UPADHYAYA, C J. and**
A.S.CHANDURKAR, J.

DATE :- **19th OCTOBER, 2023**

<u>ORAL JUDGMENT</u> (Per A.S.CHANDURKAR, J.)

Rule. Rule made returnable forthwith and heard the learned counsel for the parties.

2. On 01.03.2023 the Nagpur Division of the Central Railway, Commercial Branch- the third respondent published a tender notice inviting bids for provision of catering services at the General Minor Unit at Nagpur Railway Station. As per the said invitation, the bid documents were to be obtained from 03.03.2023 to 27.03.2023. The bids were to be uploaded by 15:00 hours on 27.03.2023. In response to the aforesaid tender notice, the bid of the petitioner, a proprietory concern, was found eligible for being awarded the work as advertised. The petitioner was issued a letter of allotment by the third respondent on 15.05.2023. In the said work order, performance security deposit to the extent of 10% of the total contract value was demanded. According to the petitioner, this was a departure from the prevailing policy based on the Circular of the Railway Board dated 20.11.2020. As per the said policy, the performance guarantee was to be furnished to the extent of 3% of the value of the contract and not 10% as indicated in the letter of acceptance dated 15.05.2023. The petitioner on 23.05.2023 issued a

communication to the third respondent stating therein that the benefit of reduction in performance security deposit was admissible till 31.03.2023 and as the tender notice had been issued prior to that date, the performance security deposit that was required to be furnished was only 3%. This request was not accepted by the third respondent on 25.05.2023. A similar request made by the petitioner on 29.05.2023 was again turned down on 03.07.2023 by the third respondent. After making a similar request to the Principal Chief Commercial Manager-the second respondent, the petitioner has approached this Court by filing the present writ petition under Article 226 of the Constitution of India seeking a direction against the respondents to charge performance security deposit in accordance with the Office Memorandums dated 12.11.2020 and 30.12.2021 alongwith the Circulars of the Railway Board dated 20.11.2020 and 10.01.2022.

3. Shri Akshat Bajpai, learned counsel for the petitioner inviting attention to Office Memorandum dated 12.11.2020 issued by the Railway Board, Ministry of Railways as well as Office Memorandum dated 30.12.2021 issued by the Department of Expenditure, Ministry of Finance, submitted that in the light of the original Office Memorandum dated 12.11.2020 the amount of

performance security deposit which varied from 5% to 10% was reduced to 3% of the value of the contract in view of slow down in the economy due to the pandemic. He submitted that the aforesaid benefit of reduction in the amount of performance security deposit was extended from time to time and finally on 10.01.2022 with the issuance of the Circular by the Railway Board stating therein that the validity of Office Memorandum dated 12.11.2020 had been extended upto 31.03.2023. It was thus urged that since reduction in the amount of performance security was applicable to the existing works, contracts as well as for tenders issued till 31.03.2023, the petitioner was entitled to such benefit of reduction as the tender notice in the present case was issued on 01.03.2023 and the bids in question were to be submitted by 27.03.2023. Merely because the work order was issued to the petitioner on 15.05.2023 the same could not be a reason to require the petitioner to pay performance security deposit at 10% of the value of the contract since such demand was contrary to the policy of the Railway Board. The third respondent was bound by the Circulars issued by the Railway Board and it was not permissible for the said respondent to interpret these Circulars in a contrary manner. Inviting attention to the Master Licence Agreement that was required to be entered into pursuant to the issuance of the work order and especially Article 20.1 thereof, it was submitted that while interpreting the provisions of the agreement and arrangements between the parties, the documents were required to be read in a manner that would require giving precedence to the latest policies of the Railway Ministry rather than the articles of the agreement or the bid. Thus interpreted, it was clear that the third respondent was not justified in requiring the petitioner to furnish performance security deposit at 10%. It was thus submitted that the petitioner be required to furnish performance security deposit at 3% of the value of the contract in terms of the Office Memorandums dated 12.11.2020, 20.11.2020 and 10.01.2022. It was accordingly prayed that appropriate relief be granted to the petitioner.

4. Shri A.J.Gilda, learned counsel appearing for the respondents vehemently opposed the aforesaid submissions. At the outset, he submitted that the petitioner was seeking alteration in the terms of the contract and such relief was not liable to be granted in exercise of writ jurisdiction. The work order having been issued to the petitioner on 15.05.2023 and the same having been accepted by the petitioner, it was not permissible for the petitioner to attempt to wriggle out of the obligations indicated

therein. Granting the relief sought by the petitioner would amount of novation of the contract which was not permissible. Referring Article 5.1 of the Master Licence Agreement, it was submitted that the same clearly indicated that a licencee such as the petitioner was required to furnish performance security deposit of an amount equal to 10% of the value of the contract. Since the work order was issued on 15.05.2023 which was after the period during which the Office Memorandums referred by the petitioner were to operate, no illegality was committed by the respondents in requiring the petitioner to furnish performance security deposit to the extent of 10%. The benefit of the said Office Memorandums was available only to work orders issued prior to 31.03.2023 and as the present work order was issued thereafter, it was clear that no relief could be granted to the petitioner. To substantiate his contentions, the learned counsel placed reliance on the decision in *Bharat Sanchar Nigam Limited and another vs. BPL Mobile Cellular Limited and others* ***[(2008) 13 SCC 597]*** and urged that what was stated in the Circulars could not be made binding on the parties unless such terms were made part of the contract. He also referred to the decision in *Sainik Mining and Allied Services Limited vs. Western Coalfields Limited and others* **[*2022 (5) Mh.L.J.106*]** to substantiate the said contention. It was thus urged that since the Circulars relied upon by the petitioner had ceased to operate when the work order was issued to the petitioner, the writ petition was liable to be dismissed. He thus prayed for dismissal of the writ petition.

5. We have heard the learned counsel for the parties and we have perused the documents on record. Since the petitioner prays that it be granted the benefit of Office Memorandums dated 12.11.2020 and 30.12.2021 issued by the Department of Expenditure, Ministry of Finance as well as the Circulars issued by the Railway Board, it would be necessary to briefly refer to the same. In view of the pandemic situation prevailing, the Department of Expenditure, Ministry of Finance, issued Office Memorandum on 12.11.2020 directing that the performance security deposit which was existing at 5% to 10% was required to be reduced to 3% of the value of the contract for all existing contracts. The initial benefit of this reduction was to operate till 31.12.2021. By another Office Memorandum dated 30.12.2021 the validity of the earlier Office Memorandum dated 12.11.2020 was extended till 31.03.2023.

The Railway Board in accordance with initial Office Memorandum dated 12.11.2020 reduced the performance security deposit to 3% of the value of the contract for all existing contracts and also for all tenders issued till 31.12.2021. In view of Office Memorandum dated 30.12.2021 the Railway Board on 10.01.2022 extended the validity of its earlier Memorandum dated 20.11.2020 upto 31.03.2023. Same was made applicable to all existing works, contracts and for tenders till 31.03.2023. From the aforesaid, it is clear that the Railway Board acted in accordance with the Office Memorandum issued by the Department of Expenditure, Ministry of Finance and reduced the performance security deposit to 3% of the value of its contracts for all existing works, contracts and for tenders issued till 31.03.2023. It may be noted that these instructions were made applicable also to service contracts by the Railway Board on 07.02.2022.

6., Undisputedly, the tender notice in question was published by the third respondent prior to 31.03.2023. The bid documents were available from 03.03.2023 to 27.03.2023 and last date of submission of sealed bids was upto 15:00 hours on 27.03.2023. Thus when the bidders responded to the aforesaid tender notice, the Circular issued by the Railway Board on 10.01.2022 was operating and the performance security deposit to be furnished was required to be 3% of the value of the contract. It is true that the work order was issued to the petitioner pursuant to acceptance of its bid only on 15.05.2023. It is on this basis that the third respondent contends that the work order would not be governed by the Circular dated 10.01.2022 as the work order was issued after 31.03.2023.

We are not in a position to accept this contention. The Circular dated 10.01.2022 issued by the Railway Board was binding on the third respondent and it required performance security deposit of 3% to be furnished for all tenders issued till 31.03.2023. The tender notice in question has been issued prior to 31.03.2023. Article 20.1 of the Master Licence Agreement indicates the order of preference in which the Railway's latest policies, the articles of agreement, contents of annexures to the agreement, the licencee's response to the bid and the bids have to be read. As per the order of preference, the Railway's latest policies would prevail over the articles of the agreement. Thus, if the policy of the Railway Board was to require furnishing of performance security deposit to the extent of 3% for tenders issued till 31.03.2023, the said policy would prevail over the work order dated 15.05.2023. It would not be open for the third respondent to ignore the Circulars issued by the Railway Board or to interpret such Circulars issued by the Railway Board in a manner contrary to what has been stated therein. Since the tender notice was issued when the Circular dated 10.01.2022 was in operation, full effect to the same would have to be given. The defence of novation sought to be raised by the respondents cannot be accepted in view of Article 20.1 which requires precedence to be given to the policies of the Railway's rather than the articles of the agreement itself. Rather it was incumbent upon the third respondent on whom the Circulars were binding to have acted in accordance with the same than to ignore them. We therefore do not find that by making a prayer to direct the respondents to act in accordance with the Circulars issued by the Railway Board, the petitioner is seeking novation of the terms of the contract. On the contrary, the petitioner prays that the third respondent should act as per the Circulars of the Railway Board.

7. The decisions relied upon by the learned counsel for the petitioner are clearly distinguishable. In *BSNL* (supra), the Hon'ble Supreme Court has held that when parties are *ad idem* the terms of the contract, no change therein can be made unilaterally. Any novation in the contract is required to be done on the same terms as required for a contract to be entered into. In the present case, there is no question of novation of the terms of

the contract. The third respondent was bound by the Circulars issued by the Railway Board and the clause relating to performance security deposit as required by the Circulars ought to have been inserted accordingly. This is clear from Article 20.1 of the Master Licence Agreement. For same reason, the ratio of the decision in *Sainik Mining and Allied Services Ltd.* (supra) cannot be made applicable to the facts of the present case.

8. For aforesaid reasons, we are satisfied that the petitioner is entitled to relief in terms of Circular dated 10.01.2022 issued by the Railway Board. Hence, the following order:

(a) The respondents in accordance with Circular dated 10.01.2022 issued by the Railway Board, Ministry of Railway shall charge performance security deposit at 3% of the value of the work order dated 15.05.2023 issued to the petitioner. The work order shall be amended accordingly.

(b) Rule is made absolute in aforesaid terms with no order as to costs.

(A.S.CHANDURKAR, J.) **(CHIEF JUSTICE)**

Andurkar..