



WP(MD)No.18471 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 27.06.2023

PRONOUNCED ON : 22.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

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and

MP(MD)Nos.1 to 4 of 2013

M/s.Premier Car Sales Ltd.,
9, Shahnajaf Road,
Lucknow,
Through its Authorized Signatory and
Pudukottai Toll Plaza in-charge
Anupsingh

: Petitioner

Vs.

1.The National Highways Authority of India,
G-5 & 6, Sector - 10, Dwarka,
New Delhi - 110 075.

2.The General Manager,
Commercial Operations,
The National Highways Authority of India,
G-5 & 6, Sector - 10, Dwarka,
New Delhi - 110 075.



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3.M/s.Inderdeep Construction Co.,
Rep. by its Authorized Person,
P.Saravanan

: Respondents

[R.3 impleaded vide order dated 27.11.2013]

PRAYER: Writ Petition filed under Article 226 of the Constitution of India seeking issuance of a Writ of Certiorarified Mandamus calling for the records relating to the proceedings of the second respondent dated 14.11.2013 in No.NHAI/CO/Legal/Tirunelveli-Tuticorin/45842, quash the same and consequently, directing the respondents to refund the Bank Guarantee amount of Rs.3,19,46,310/- at HDFC Bank, Lucknow Branch, furnished by the petitioner to the respondents 1 & 2 at the time of initiation of the contract.

[Prayer amended vide order dated 25.07.2022]

For Petitioner : Mr.Isaac Mohanlal,
Senior Counsel
for Mr.D.Gnanasekaran

For Respondents: Mr.C.Arul Vadivel @ Sekar,
Standing Counsel
for Mr.S.Sankarapandian for R.1, R.2

Mr.C.Susi Kumar for R.3



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ORDER

This writ petition is filed by the petitioner against the order passed by the second respondent terminating the contract with the petitioner and also for a direction to refund the bank guarantee of Rs.3,19,46,310/- to the petitioner.

2.The respondent / NHAI has issued a tender notification on 22.04.2013 calling for bids for collecting user fee at Toll Plaza in Tirunelveli - Tuticorin National Highways, for a period of one year. The petitioner Company participated in the tender process, quoted Rs.19,16,77,860/- as annual remittance and was selected as the successful bidder. Letter of Acceptance was issued by the NHAI on 21.05.2013 and the petitioner has furnished a bank guarantee of Rs.3,19,46,310/-. The contract was signed by both the parties on 17.06.2013 and the petitioner has taken over the toll plaza on 22.06.2013. As per the contract, the petitioner Company is to remit Rs.36,70,014/- per week, ie., Rs.5.25 Lakh per day, for a period of one year. This contract was cancelled and the bank guarantee was forfeited.



3.Learned Senior Counsel appearing for the petitioner Company

made his submissions as follows:-

3.1.Before submitting the offer letter, the petitioner has made a site visit and found that the construction work of the buildings and booths were not fully completed. The NHAI gave an assurance that all the pending infrastructural works would be completed before the commencement of the Toll Plaza and on their assurance, the petitioner has participated in the tender and quoted the amount. However, without completing the toll booth and other infrastructural works, the petitioner was asked to take charge of the Toll Plaza on 21.06.2013.

3.2.Accordingly, on 22.06.2013, the petitioner started collecting the user-fee from the commuters. But, all of a sudden, the local people gathered at the plaza and restrained the petitioner's staff from collecting the toll. There was a commotion and the staff was assaulted and the properties were ransacked. On the instructions given by the Superintendent of Police, the staff members were temporarily evacuated from the place. Only then the petitioner came to know that even prior to



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the petitioner Company taking over the operation, several organizations have made representations to the District Administration to shift the Toll Plaza to a different location and frequent protests and agitations have been made in this regard.

3.3.The petitioner Company has made a detailed representation to NHAI pointing out the practical difficulties in collecting the toll fee. The petitioner also sought for basic needs viz., police protection to the staff, minimum infrastructure, etc. Again on 02.07.2013 and 07.07.2013, there was a commotion owing to collection of user fee and the District Collector has made a statement that the subject Toll Plaza would be shifted to another place within a period of six months.

3.4.In the meantime, on 11.07.2013, NHAI has issued a show cause notice as to why the contract should not be terminated for non-collection of user fee. The petitioner has made a detailed representation citing out the difficulties in collecting the fee. The District Collector has made a field inspection and gave an inspection note to the petitioner as well as NHAI



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pointing out certain deficiencies in the Toll Plaza and to rectify the same.

On 16.08.2013, the petitioner has made a representation to the District Collector intimating the completion of work and requesting to start the user-fee collection.

3.5. On 03.09.2013, NHAI issued a proceedings directing the petitioner to remit the weekly collection of Rs.4,24,21,958/- (including penalty of Rs.61,58,610/-). The petitioner has submitted representations on 16.09.2013 & 20.09.2013 explaining the matter in detail regarding the huge loss incurred due to the non-operation of Toll Plaza. In the meantime, newspaper reports were published that the toll plaza will be shifted beyond Airport; that the local commuters will have to pay no fee; and that the commercial vehicles will have to pay half of the fee alone. On 08.10.2013, District Collector has granted permission to resume the toll fee collection, however, with a condition that the toll plaza would be shifted to a permanent place at Vagaikulam before March, 2014. The District Collector has also announced certain exemptions in favour of the people of surrounding 11 villages in payment of toll fee.



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3.6. Several writ petitions were filed before this Court to shift the subject Toll Plaza, wherein, NHAI took a stand that the subject Plaza would be shifted to Vagaikulam. On the other hand, NHAI insisted the petitioner to resume operation of user-fee collection. Without getting clarifications as to the new terms and conditions regarding the exemptions given to the people of the 11 villages, the petitioner could not collect the user fee and therefore, the petitioner has submitted a representation on 12.11.2013 & 13.11.2013. While being so, on 14.11.2013, NHAI has terminated the contract and also forfeited the bank guarantee, stating that the petitioner has failed to collect the user fee.

3.7. It is not that the petitioner Company has intentionally stopped the operation of the Toll Plaza. The contract entered into between the petitioner and NHAI was for the collection of user-fee from all the vehicles excepting the statutorily exempted vehicles. However, the later exemption granted to various other set of vehicles and shifting of toll plaza to other locations is nothing but frustration of the contract. The petitioner has not



abandoned the collection of user-fee. There was no default on the part of the petitioner, but because of the untoward incidents happened beyond the control of the petitioner, the user-fee could not be collected. Therefore, the bank guarantee amount is bound to be refunded to the petitioner Company, in terms of Clause 8(c) of the Contract.

3.8. This writ petition under Article 226 of the Constitution of India is maintainable even in contractual matters, where the State or its instrumentalities have acted in illegal, arbitrary and in violation of principles of natural justice. NHAI is a statutory body incorporated under the National Highways Authority of India Act, 1988 and as such, the contract between the petitioner and NHAI has statutory force. NHAI is discharging public duty by entering into a contract with the private party. The availability of arbitration clause in the contract is not a bar to avail the efficacious remedy under Article 226 of the Constitution of India, inasmuch as the impugned order is challenged under the grounds of arbitrariness and violation of principles of natural justice.



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4. In response, learned Standing Counsel appearing for NHAI made his submissions as follows:-

4.1. As per Clause 26 of the Contract, in case of any dispute, the petitioner has to invoke the arbitration proceedings. Moreover, this is not a statutory contract. Therefore, this writ petition itself is not maintainable.

4.2. Even otherwise, before the petitioner Company, the toll plaza was run by one M/s. Eagle Infra Pvt. Ltd., for a period of two months from 05.04.2013 to 22.06.2013. The said M/s. Eagle Infra Pvt. Ltd., has remitted a sum of Rs.4.12 Lakh per day and they have not made any complaints regarding the infrastructure of the plaza. Therefore, the contention of the petitioner that the toll plaza lacks infrastructural facilities is wrong.

4.3. In any event, before placing the bid, as per Clause 2.3 of the tender proposal, it is the responsibility of the bidder to visit the site and thereafter, to make the proposal. Having made the proposal and having agreed to abide by the terms and conditions in the Contract, the petitioner



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raised frivolous issues and stopped the collection as well as the weekly remittance to NHAI on the fourth day itself.

4.4.The protests were, in fact, mainly due to the conduct and misbehavior of the petitioner's staff with the commuters. It is the responsibility of the Contractor to run the Toll Plaza smoothly by managing the staff. NHAI, in good faith, had gone out of the way and taken up the issue with the State Government. Several steps were taken by NHAI to run the toll plaza with the help of District Administration and Police Protection. The Principal Secretary to Government, Highways Department, Chennai, has issued instructions to the District Collector and the Superintendent of Police. Temporary toll fee signs were also newly provided by NHAI, since the previous boards were damaged. With police protection, on 06.07.2013 at about 06.30 pm, the petitioner Company resumed collection, however, on the very next day, the petitioner Company stopped the collection stating some untoward incidents. Thereafter, the petitioner Company did not show any intention to collect the user fee. Therefore, a show cause notice was issued to the petitioner



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Company as to why the contract should not be terminated and also to forfeit the performance security amount.

4.5.The contention of the petitioner that the toll collection was stopped since it was widely reported in the newspaper that the District Collector had temporarily ordered stopping of collection of fee at the Toll Plaza is wrong. Any news from the newspaper cannot be considered as a proper direction to the Contractor to stop the toll collection, unless a specific order is passed and served to that effect. The petitioner has not produced any direction / notice issued by the District Collector to stop the toll collection. Under such circumstances, NHAI has provided an opportunity of personal hearing to the petitioner on 26.07.2013.

4.6.On 01.08.2013, the District Collector along with Superintendent of Police made a local inspection and observed that despite the District Administration taking effective measures and extending full support, toll collection was abruptly stopped due to improper behavior of staff appointed at the collection centers leading to skirmish and physical



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altercation between the staff and road users. Therefore, it is clear that the petitioner Company has deliberately abandoned the plaza.

4.7.Though it was assured by the petitioner Company that they would resume the toll fee collection, the petitioner Company failed to fulfill the commitment, despite the efforts taken by the District Administration and the Police. This has caused heavy loss to NHAI. As a final opportunity, NHAI issued a notice dated 08.11.2013 for resumption of user fee collection on or before 13.11.2013 @ 06.00 pm. On 12.11.2013, the Project Director, Tirunelveli, has made a letter to the petitioner by referring the NHAI Headquarters' letter dated 08.11.2013 and the District Collector's permission exempting 11 villages, asked the petitioner to start the toll collection on 13.11.2013 without any further delay. In the said communication, the Project Director has assured that the list of exempted vehicles will be identified and provided to the petitioner shortly and that the financial implication will also be settled by NHAI in due course of time.



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4.8. However, the petitioner Company did not avail the same and therefore, final orders were passed on 14.11.2013 @ 06.00 pm terminating the contract dated 17.06.2013 entered into between the petitioner Company and NHAI as per Clause 17(c)(ii) of the Contract and for forfeiting the performance security amount. After the termination of the petitioner's contract, the toll plaza was handed over to the third respondent, viz., M/s. Inderdeep Construction Co., vide NHAI letter dated 15.11.2013 and the new agency has also started collections on 16.11.2013. The third respondent Company is operating the toll plaza by collecting the tolls as per the directions of the District Collector and NHAI, by giving exemptions to the 11 villages. The bank guarantee given by the petitioner was also encashed by NHAI Headquarters on 18.11.2013 (forenoon) even before the filing of this writ petition.

5. This Court paid it's anxious consideration to the rival submissions made on either side and perused the materials placed on record.



6.The petitioner is a public limited company, which was awarded with a contract by the respondents vide agreement dated 17.06.2013 for collection of toll fees in the toll gate. Since the dispute is arising out of a contract, the preliminary issue which has to be decided, is the scope of this writ jurisdiction under Article 226 of the Constitution of India in contractual matters.

7.In contractual matters under Article 226 of the Constitution of India, the first test is whether the contract is statutory or non-statutory. In the case of a non-statutory contract, writ jurisdiction can be invoked only on limited grounds and if the contract is a statutory contract, writ jurisdiction can be invoked on breach of simple terms and conditions of the contract.

8.Learned Senior Counsel appearing for the petitioner contended that the contract between the petitioner and the respondent is a statutory contract, inasmuch as the respondent / NHAI is a statutory body and it is



discharging the public duty of maintaining national highways. This Court is not inclined to accede this submission. A contract does not become a statutory contract, merely because it was entered into in the exercise of an enabling power conferred by a State. For a contract to be statutory, some of the terms and conditions of the contract have to be statutory. The issue in this writ petition does not pertain to any terms and conditions of statutory character.

9.The term statutory contract is defined by the Hon'ble Supreme Court in *India Thermal Power Ltd. v. State of M.P.*, [2000 (3) SCC 379] as follows:-

“If entering into a contract containing the prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it which are statutory then the said contract to that extent is statutory. A contract may contain certain other terms and conditions which may not be of a statutory character and which have been incorporated therein as a result of mutual agreement between the parties.”



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10. However, both in the case of statutory and non-statutory contracts, despite the existence of an alternate remedy such as an arbitration clause, a writ petition can be entertained by a Court in specific circumstances. The Hon'ble Supreme Court enumerated such conditions in ***U.P. Power Transmission Corpn. Ltd. v. CG Power & Industrial Solutions Ltd.***, [(2021) 6 SCC 15] as follows:-

“67. It is well settled that availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case. The High Court may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly:

- (i) where the writ petition seeks enforcement of a fundamental right;*
- (ii) where there is failure of principles of natural justice or*
- (iii) where the impugned orders or proceedings are wholly without jurisdiction or*
- (iv) the vires of an Act is under challenge.”*



11. Further, the Hon'ble Supreme Court in ***M.P. Power Management Co. Ltd. v. Sky Power Southeast Solar India (P) Ltd.***, [(2023) 2 SCC 703]

has held that if an action or inaction of the State is *prima facie* arbitrary, the writ petition is maintainable even if the action of the State is in relation to a non-statutory contract. The Court also went on to explain in a detailed way when an order can be termed as arbitrary. The relevant portion is extracted as follows:-

“75. We would, therefore, sum up as to when an act is to be treated as arbitrary. The Court must carefully attend to the facts and the circumstances of the case. It should find out whether the impugned decision is based on any principle. If not, it may unerringly point to arbitrariness. If the act betrays caprice or the mere exhibition of the whim of the authority it would sufficiently bear the insignia of arbitrariness. In this regard supporting an order with a rationale which in the circumstances is found to be reasonable will go a long way to repel a challenge to State action. No doubt the reasons need not in every case be part of the order as such. If there is absence of good faith and the action is actuated with an oblique motive, it could be characterised as being arbitrary. A total non-application of mind without due regard to the rights of the parties and public interest may be a clear indicator of arbitrary action. A wholly unreasonable decision which is little different



from a perverse decision under the Wednesbury doctrine would qualify as an arbitrary decision under Article 14. Ordinarily visiting a party with the consequences of its breach under a contract may not be an arbitrary decision."

12. In the given case at hand, there are no apparent grounds regarding the failure of principles of natural justice or lack of jurisdiction. Hence the decision of the respondents has to be decided on the touchstone of arbitrariness as enumerated by the Hon'ble Supreme Court.

13. The necessary facts for proper adjudication of the issue are that the petitioner company was the successful bidder for the collection of toll fee in the toll plaza situated at Pudukottai village and the company was awarded with the contract for a period of one year from 22.06.2013 to 21.06.2014 by the respondents vide agreement dated 17.06.2013. The issue arose when the petitioner company stopped collecting toll fees in the toll plaza and a show cause notice dated 11.07.2013 was issued by the respondents, asking why the contract should not be terminated and why



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the bank guarantee should not be forfeited in terms of Clauses 29, 35(3) of the agreement.

14. For this show cause notice dated 11.07.2013, the petitioner replied on 17.07.2013 stating the following reasons for non-collection of toll fee:-

- a. that there was no infrastructure provided for the collection of toll fees,
- b. that the collection could not be resumed due to violent protests from anti-social elements and
- c. the collection was stopped as it was reported in a newspaper that the Collector had temporarily stopped of collection of toll fees.

15. The respondents refuted these contentions and have reasoned the impugned order dated 14.11.2013 with the following explanations:-

- a. that lack of infrastructure cannot be accepted inasmuch as the toll plaza was run by one M/s. Eagle Infra Pvt. Ltd. before 22.06.2023



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i.e., until the petitioner took over and as per Clause 2.3 of the Request for Proposal Document, it is the responsibility of the petitioner to quote the remittance after duly visiting the toll plaza and ascertaining the site.

b. the stoppage of collection due to violent protests from anti-social elements was also denied and the protest was mainly due to the misbehavior of the petitioner's staff. It was also said that the respondents had taken the issue to the police and it was communicated to the petitioner that adequate police protection would be provided to ensure no disturbance in the toll collection. However, the petitioner still failed to collect toll fees causing a loss to the department.

c. the respondents also denied the allegation that the collection of toll fee was temporarily stopped due to the news in the newspaper, since any news from the newspaper cannot be considered as proper direction from a competent authority to stop the collection.



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16.It is pertinent to note that before the passing of the impugned order, the District Collector along with the Superintendent of Police, Regional Transport Officer and Project Director, NHAI inspected the toll plaza on 01.08.2013 to study the feasibility of revenue collection and to maintain law and order in the toll plaza. The District Collector in his letter dated 01.08.2013 has recorded that the toll collection was abruptly stopped due to improper behavior of the staff appointed at the collection centre, despite full support from the District Administration. Hence the allegation of the petitioner regarding violent protests from anti-social elements cannot be accepted.

17.On the other hand, from the District Collector's inspection, it can also be seen that there was a lack of infrastructure at the Toll Plaza as claimed by the petitioner. The observations made by the District Collector show that the road was not properly laid, sign and information boards have not been erected and sufficient lighting facilities were also not provided by the respondents. However, it is the duty of the petitioner company to have taken into consideration these circumstances before



submitting their bid for the project. Clause 2.3 of the Request for Proposal Document provides that the bidders ought to have submitted their bids after visiting the project site and ascertaining the conditions there. Hence, the petitioner should have been aware of what he is getting into before submitting the bid. Clause 2.3 of the Request for Proposal Document is extracted hereunder for easy reference,

“2.3 Site Visit and Verification of Information.

2.3.1. Bidder are encouraged to submit their respective bids after visiting the project site and ascertaining for themselves the site conditions, traffic, location, surroundings, climate, availability for power, applicable laws and regulations, and any other matter considered relevant by them.

2.3.2. it shall deemed that by submitting a Bid, the Bidder has:

(a) made complete and careful examination of thr Bidding Documents;

(b) received all relevant information requested from the Authority;

(c) accepted the risk of inadequacy, error or mistake in the information provided in the bidding documents or furnished by or on behalf of the authority relating to the any of the matter referred to in clause 2.3.1 above;



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(d) satisfied itself about all matters, things and information including matters referred to clause 2.3.1 herein above necessary and required for submitting an informed Bid, carrying out of the toll collection in accordance with all Bidding documents and performance of all its obligations hereunder;

(e) acknowledged and agreed that inadequacy, lack of completeness or incorrectness of information provided in bidding documents or ignorance of any of the matters referred to in clause 2.3.1 hereinabove shall not be a basis for any claim for compensation, damages, for performance of its obligations, loss of profits etc from the authority, or a ground for termination of the contract agreement by the contractor; and

(f) agree to be bound by the undertaking provided by it under and in terms hereof.

2.3.2 The authority shall not be liable for any omission, mistake or error in respect of any of above or an account of any matter or things arising out of or concerning or relating to RFP, Bidding Documents or the Bidding process, including error or mistake therein or in any information or data given by the authority."

18.As a result of the inspection on 01.08.2013 by the District Collector, both the petitioner and respondents were instructed to take certain actions



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regarding the infrastructure in the toll plazas. The petitioner was expected to establish communication systems, fix monitoring cameras, automatic road barriers and appoint sufficient staff at the toll plaza. It was also mentioned in the letter that these directions should be carried out before 10.08.2013 and the action taken report has to be sent to the Project Director, NHAI. The same was also complied with by the petitioner vide his letter dated 16.08.2013. Likewise, the respondents have also complied with the instructions given to them such as laying speed breakers, sign boards / information boards, and lighting arrangements. Hence, they prayed for the resumption of toll fee collections in their letter dated 16.08.2013. These events denote that the infrastructural defects pointed out by the petitioner were rectified pursuant to the inspection done by the District Collector. Hence, the petitioner cannot seek recourse on the ground of lack of infrastructure.

19.It also appears that the District Collector vide his letter dated 08.10.2013, has granted monthly free passes to vehicles in eleven villages falling within the vicinity between the present Pudukottai toll plaza and



the proposed toll plaza near Vaigaikulam Village. It was also mentioned in this communication that the toll plaza will be shifted to a permanent place at Vaigaikulam before the end of March 2014. The petitioner was thus instructed to resume the collection of toll fee at the Pudukottai toll plaza after exempting the vehicles from the eleven villages.

20. Even after this communication, the petitioner has not resumed collection of toll fees stating that the exempted vehicles could not be identified and that this exemption was violative of the contract and it makes the contract incapable of being performed. The petitioner on these aspects sought further clarification through their letter dated 12.11.2013. For which the respondents on the same day replied stating that people from the exempted villages were instructed to get a pass for their vehicles from the concerned officials and since the District Collector permitted to start the toll collection, the police were also requested to give protection.

21. It appears that the petitioner still refrained from collecting the toll fee even after such assurances. Hence, the respondents issued a final notice



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dated 08.11.2013 for termination and forfeiture of performance security

unless the petitioner resumes the collection of the toll fee on or before 13.11.2013. Consequently, the final order terminating the contract and forfeiting the security deposit came to be passed on 14.11.2013 as the petitioner failed to resume the collection of the toll fee on 13.11.2013.

22.In this writ jurisdiction, the impugned order terminating the contract can be interfered by the Court only if it was passed arbitrarily and if the decision made by the respondents was devoid of any rationale or principle. Since the impugned order has adequate reasons for the decision, this Court is not inclined to entertain this writ petition. Accordingly, this writ petition is dismissed with a liberty to the petitioner to seek remedy by invoking the arbitration clause in the agreement.

There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

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