

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 10th APRIL, 2023

IN THE MATTER OF:

+ **W.P.(C) 6174/2020 & CM APPLs. 34249/2020 & 13601/2021**

SCORE INFORMATION TECHNOLOGIES LIMITED & ANR.

..... Petitioners

Through: Mr. Gautam Narayan and Mr. Pankaj Jain, Advocates.

versus

BHARAT SANCHAR NIGAM LIMITED & ORS Respondents

Through: Ms. Sangeeta Sondhi, Advocate for R-1

Ms. Ruchi Gour Narula, Mr. Rajat Prakash, Advocates for R-2

Mr. Chetan Sharma, Additional Solicitor General with Ms. Monika Arora, CGSC, Mr. Amit Gupta, Mr. Saurabh Tripathi, Mr. Yash Tyagi, Advocates for UoI

Mr. Abhinav Vashisht, Sr. Advocate for Mr. Sudhir Sharma, Mr. Mohit Bakshi, Mr. Naman Singh Bagga, Advocates for R-3

Mr. H. S. Chandhoke, Ms. Shikha Thakur, Mr. Hriday Kochhar, Advocates for R-4

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. A Complaint regarding the conscious inaction on the part of Respondent No.1 in not taking recourse to the remedies available under law for plugging losses to the public exchequer being caused by over-pricing and delay by the successful tenderer company in the matter of execution of a

work awarded to Respondent No.4, the Petitioners have filed the instant Public Interest Litigation (PIL) with the following prayers:-

"a) Issue a writ of Mandamus and/or any other appropriate writ, order, direction directing the Respondents No. 5 and 6 and/or its men, agents, servants and/or assigns :-

- i. To forthwith initiate an appropriate enquiry into the execution of the Package F totaling 6021 Km under Tender No. CA/CNP/NFS- OFC/T-441/2013 dated 21st June, 2013 with special emphasis on the points mentioned in paragraph 54 to 56 and 63 of the writ petition and to pass further orders as may be deemed appropriate based on the outcome of such enquiry;*
- ii. To submit periodic status reports and final report to this Hon'ble Court in respect of the investigation to be carried out pursuant to orders of this Hon'ble Court;*
- iii. To take appropriate steps against all wrongdoers in accordance with the final report of investigation to be carried out pursuant to orders of this Hon'ble Court;*

b) Issue a Writ of Mandamus or any other appropriate Writ, Order or Direction, directing the Respondent No.1/BSNL to forthwith initiate appropriate action in terms of Clause 73 of the General Commercial Conditions of BSNL Tender annexed as Annexure P-1 read with Clause 23 of the BSNL Purchase Order annexed as Annexure P-2 in the instant writ petition thereby calling for the Respondent No.2 to supply the balance services and product as per the discovered rates;

c) Issue a Writ of Mandamus or any other appropriate Writ, Order or Direction, directing the Respondent No.1/BSNL to initiate action against Respondent No.2 for the delay in execution of the project and by interalia invoking Clause 73 of the General Commercial Conditions of BSNL Tender annexed as Annexure P-1 read with Clause 23 of the BSNL Purchase Order annexed as Annexure P-2 in the instant writ petition to recover the balance amounts excessively charged from BSNL by the Respondent No.2 in view of the lower price discovered by the services rendered by the Petitioner No.1 to the Respondent No.4 for a portion of the subject project pertaining to Package F;

d) Issue a Writ of Certiorari or any other appropriate Writ, Order or Direction, commanding Respondents No. 1 to 4 and/or its men, agents, servants and/or assigns to forthwith certify and transmit to this Hon'ble Court all records relating to the instant case so that after perusing the same appropriate orders may be passed by this Hon'ble Court and conscionable justice may be rendered to the petitioners; and

e) Pass such further or other order or orders and/or direction and/or directions in favour of the Petitioners to which the Petitioners may be found entitled to at the time of hearing in the facts and circumstances of the case;

f) Pass such further or other order or orders and/or direction and/or directions as this Hon'ble Court may deem, fit and proper in the facts and circumstances of the case. "

2. Respondent No.1 issued tender No.CA/CNP/NFS-OFC/T-441/2013 for procurement, supply, trenching, laying, installation, testing and

maintenance of optical fibre cable, PLB duct and accessories for construction and exclusive optical NLD backbone and optical access routes on turnkey basis for defence network. The tender was for the Network for Spectrum (NFS) Project.

3. The tender for the aforesaid project of the Ministry of Defence was for 57,015 kilometres and the tender was divided into seven packages numbered as A to G for the entire country.

4. The project was undertaken by BSNL, i.e., Respondent No.1 herein, and the Project Implementation Core Group (*hereinafter referred to as the 'PICG'*). PICG was created by the Ministry of Defence for the purpose of planning, operations and maintenance requirements of the defence project and the implementation of the project was to be jointly undertaken by Respondent No.1/BSNL and PICG. After the successful implementation of the project, all the network assets created for the project were to be handed over by BSNL to the PICG for the subsequent operation and maintenance.

5. It is stated that the aforesaid tender was awarded to Respondent No.2 herein by Respondent No.1 for Package F which comprises of 6012 kilometres in the State of West Bengal, Orrisa, Bihar, Jharkhand, Sikkim, Andaman & Nicobar Islands and the project was to be completed within 18 months.

6. It is stated that Respondent No.2, sub-contracted the entire Package F of the tender to A2Z Infra Engineering Limited, i.e., Respondent No.3 herein. It is stated that on 24.02.2015, i.e., virtually after two years of the allotment of work, Respondent No.3, sub-contracted the entire Package F of the tender to GR Infra Projects Limited, i.e., Respondent No.4 herein.

7. It is the contention of the Petitioners that the tender in question was floated in the year 2013 and work was to be completed within 18 months. The present writ petition was filed on 31.08.2020. It is the contention of the Petitioner that though the tender was invited in the year 2013 and work was awarded in 2014, the work has not been completed. It is contended that the delay in completion of the work has resulted in severe price escalation and that the cost of project has increased manifold.

8. It is stated that time was allotted since it was a defence project and the clauses in the contract indicates that extension of time could be given only in exceptional circumstances. It is stated by the Petitioner that Clause 73 of the tender is a Fall Clause which is reproduced as under:-

"73. FALL CLAUSE

73.1 The prices once fixed will remain valid during the scheduled delivery period except for the provisions in clause 63.1 above of Section III Further, if at any time during the contract.

*73.1.1 It comes to the notice of purchaser regarding reduction of price for the same or similar equipment/ service,
and/or*

73.1.2 The prices received in a new tender for the same or similar equipment/ service are less than the prices chargeable under the contract, The purchaser, for the purpose of delivery period extension, if any, will determine and intimate the new price, taking into account various related aspects such as quantity, geographical location etc. and the date of its effect for the balance quantity/ service to the vendor. In case the vendor does not accept the new price to be made

applicable during the extended delivery period and the date of its effect, the purchaser shall have the right to terminate the contract without accepting any further supplies. This termination of the contract shall be at the risk and responsibility of the bidder and the purchaser reserves the right to purchase the balance unsupplied quantity/ service at the risk and cost of the defaulting vendor besides considering the forfeiture of his performance security.

73.1.3 The bidder while applying for extension of time for delivery of equipment/services, if any, shall have to provide an undertaking as "We have not reduced the sale price, and/ or offered to sell the same or similar equipment/ service to any person/organization including Department of central/ state Government or any central/ state PSU at a price lower than the price chargeable under the contract for scheduled delivery period."

73.1.4 In case under taking as in Clause 73.1.3 above is not applicable, the vendor will give the details of prices, the name(s) of purchaser, quantity etc to the purchaser, while applying extension of delivery period. "

9. It is stated that the said clause provides that if any reduced price is discovered or came to the notice of the purchaser, i.e., BSNL, at the time of granting extension to Respondent No.2, it was required to seek the supply in the extended period at such discovered reduced price. It is stated that though there has been discovery of reduced price, the Respondents have not resorted to the Fall Clause and failure to resort to the Fall Clause has affected public interest and has caused loss to the public exchequer. The allegation of the Petitioners is that Respondents No.1 to 4 are in cahoots

with each other in granting innumerable extensions without making efforts to resort to legal remedies to bring down the cost.

10. *Per contra*, it is the case of Respondent No.3 and 4 that this writ petition is an abuse of the process of law and has not been filed in public interest. It is stated that the Petitioner No.1 was in fact the sub-contractor for the very same Package and Respondent No.4 had placed a Letter of Intent dated 20.02.2015 on Petitioner No.1 for obtaining row surface, survey, trenching, laying, installation, testing and commissioning of optical fibre cable, PLB duct & accessories for construction of exclusive optical NLD backbone and optical access route for defence network for specified part of Package F totalling to 224 kilometres. It is stated that Petitioner No.1 has miserably failed in carrying out the sub-contract which has led to a dispute, which is pending arbitration. It is, therefore, contended that this petition cannot be said to be in public interest as the Petitioners are only attempting to settle scores with the Respondents.

11. On 04.10.2021, this Court after hearing submissions of both the parties, directed the Chairman-cum-Managing Director, BSNL to file an affidavit which was to include the following aspects:-

" (a) within what least possible time the balance work, under the Tender in question, which was floated way back in the year 2013 and was to be completed within 18 months, will be completed by the concerned Respondent(s) responsible for the execution of the project;

(b) how much work under the Tender remains to be completed as on the date of filing of the affidavit;

(c) furnish the reason why the penalty/Fall clause has not been invoked by Bharat Sanchar Nigam Limited, despite the delay in completion of the work under the Purchase Order;

(d) whether Bharat Sanchar Nigam Limited is contemplating any action, under the Contract or any other applicable law against the concerned Respondent(s) responsible for delay in execution;

(e) whether any price escalation has been awarded by Bharat Sanchar Nigam Limited to the concerned Respondent(s) to whom the work was assigned and if the answer is in affirmative, what is the differential amount between the value of the work when it was originally awarded and the escalation allowed. "

12. Since the affidavit was not filed, this Court on 12.01.2023 directed the Respondents to comply with the order dated 04.10.2021 and also to inform status relating to all the packages of the project. In compliance of the said order, an affidavit dated 06.03.2023 has been filed. The relevant portion of the said affidavit read as under:-

"Status of NFS OFC Project"

Sl. No.	Packages	Area covered under package	Total Scope (Km)	Total number of Links	No. of Links Commissioned	No. of Links pending
1	A	Jammu and Kashmir	9,324	239	234	5
2	B	Punjab, Himachal Pradesh, Haryana and NCR	7,670	139	138	1
3	C	Rajasthan, Uttar Pradesh and Uttarakhand	9,796	158	154	4
4	D	Maharashtra, Goa, Gujarat, Chattisgarh and Madhya Pradesh	9,554	114	114	Nil
5	E	Tamil Nadu, Andhra Pradesh, Kerala, Karnataka and Lakshdweep	7,457	63	63	Nil

6	F	West Bengal, Bihar, Jharkhand, Odisha, Andaman & Nicobar Islands and Sikkim	5,923	102	95	7
7	G	Assam, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, Nagaland and Tripura	7,694	110	99	11

Package-A

234 Links have been commissioned out of total 239 Links (9,324 km). 5 links (with link Id 5034, 5041, 5048, 5051 & 6094) are pending for commissioning due to road widening.

Status of Un-commissioned Links under Package-A

Sl. No	Link ID	Section	Reason of Pendency	Tentative date of completion of the Road widening work by NHAI	Commissioning Target	Remark
1	5034	Palma to Mahare	Road widening in Palma to Budhal completed and Budhal to Mahare road Widening yet to start. BRO agreed to accord permission on Palma to Budhal section but not agreed to accord permission in Budhal to Mahore section		These links are to be commissioned after NHAI road widening which is likely to be completed by December-2024	As an interim arrangement, BSNL has planned to hire dark fibres (4 pairs) from M/s. VTL (private operator) for commissioning the link (Id: 5034). The process of hiring has already been initiated in the Field.

2	5041	Udhampur to Patni top	Several meeting were conducted with NHAI along with PICG but NHAI denied to accord permission for underground cable and agreed to provide overhead permission.	March 2023		As an interim arrangement, it is planned to lease out BSNL owned dark fibres to NFS project for commissioning the two links. The process of hiring has already been initiated in the Field.
3.	5048	Chanderkot to Dharmund	Several meeting were conducted with NHAI alongwith PICG but NHAI denied to accord permission for underground cable and agreed to provide overhead permission	December 2023		
4	5051	Ramban to Banihal	Road widening is still in progress	December 2024		On hold
5	6094	Canderkot Access	Road widening is still in progress	December 2024		On hold

Package-B

138 Links have been commissioned out of total 139 links (7,670 km). Due to road widening, one link (with link Id 3029) is pending for commissioning. Route of this pending link was re-planned and decided to execute through available alternate path. Now the work is under progress. Around 106 km of additional work has been carried out for this link.

Status of Un-commissioned Links under Package-B

Sl. No	Link ID	Section	Reason of Pendency	Status	Commissioning Target	Remark
1	3029	Pandoh-Bhuntar-Palhan	This link got damaged during execution due to road widening. Alternate route was finalized through a Board comprising of officer from BSNL, Army & DoT. For the	Work in progress	March-2023	A/T (Acceptance Testing) is in progress which is likely to be commissioned by March-2023

			point of Indian Army, this link was on priority as it will provide an alternate connectivity to Leh			
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Package-C

154 Links have been commissioned out of total 158 links (9,496 km). Due to road widening, 4 links (with link Id 4041, 4042, 4044 & 6015) are pending for commissioning.

Status of Un-commissioned Links under Package-C

Sl. No	Link ID	Section	Reason of Pendency	Status	Tentative date of completion of the Road widening work by NHAI	Commissioning Target	Remark
1	4041	Karnprayg-Kaushani	Work stopped in these routes due to Raod widening under All Weather Road Project.	On hold	December 2024	Within 6 Months after completion of Road Widening work	-
2.	4044	Rudraprayag-Karnprayag		On hold	June 2023		-
3.	4042	Karnprayag-Joshimath		On hold	December 2023		As an interim arrangement, it is planned to lease out BSNL owned dark fibres to NFS project for commissioning the two links (Id: 4042 & 6015). The process of hiring has already been initiated in the Field.
4.	6015	Joshimath-Manna		On hold	March 2024		

Package D:- This package has 114 links (9,554 km). All links have been commissioned.

Package E:- This package has 63 links (7,457 km). All links have been commissioned.

Package-F

95 Links have been commissioned out of total 102 links (6,021 km). 7 links are pending in which 2 links (link Id: 2023 & 2031) are presently non-doable due to road widening.

Status of un-commissioned Links under Package-F

Sl. No	Link ID	Section	Scope (km)	Reason of Pendency	Status	Commissioning Target
1	6078	Thegu Access	29.7	Only Sabula Connectivity is pending as area is under snow bound.	Work to be taken up in next working window after mid April 2023	June 2023
2.	2036	Damdin-Binnaguri	52.7	Work is pending due to non-availability of permission of NHAI. Demand for License fees, Bank Guarantees (BG) has been issued by NH Division on 14th Dec 2022. Licence fee amount has been paid on Jan 2023 in Bharatkosh Portal. BG also has been submitted.	Work not yet started. Permission from Road Authority is awaited.	3 months after getting permission from NHAI.
3.	2018	Kalimpong-Sevok Road	64.1	Work is pending due to non-availability of permission from West Bengal Forest Department.	Work not yet started	3 months after getting permission from Forest Authorities. Permission is awaited.
4.	2038	Binaguri-Hasimara	39.8	Permission from Asian Highway Authority has been issued on 15th Dec 2022.	Work in progress. 30 km work has been completed.	March 2023
5.	6054	Kolkata Access	117.9	1. 30 sub-links commissioned out of total 38. 2. Work under progress in 4 sub-link	Work in progress.	2 months after getting permission from the Authorities.

				(30.2 km). 3. For rest 4 sub links (33.052 km), Work is pending due to non-availability of RoW permission from the Authority like KMC, PWD, Railway & National Highway.		
6	2023	Ranipool-Pakyong	15.2	Link is deferred by PIGC due to road expansion.	On hold	Within 45 days after completion Road Widening work.
7	2031	Thegu-Rhenok	102	PICG has deferred the route till the completion of road construction activities.	On hold	Within 2 months after completion Road Widening work.

Package-G

99 Links have been commissioned out of total 110 links (7,694 km). 11 links are in different stages of execution which are pending due to road widening. Out of that, 6 links (with link Id: 2048, 2058, 2072, 2100, 2062 & 2094) are presently non-doable links due to road widening. For the remaining 5 links (with link Id 2053, 2080, 6071, 2076 & 2064), proposal were sent to DoT (Dept, of Telecom under Ministry of Communication & IT) for consent for overhead OFC execution so that links may be commissioned. "

13. A perusal of the aforesaid affidavit shows that the all the links in respect of Package D and Package E have been commissioned. As far as Package A is concerned, out of 239 links, 234 links have been commissioned and only 5 links are pending. In respect of Package B only one link is pending for commissioning due to road widening. In respect of Package C four links are pending for commissioning due to road widening. In respect of Package F, seven links are pending for commissioning and two

of which are presently non-doable due to road widening. In respect of Package G, 11 links are pending, out of which 6 are presently non-doable due to road widening and for the remaining 5 links, proposals have been sent to Department of Telecom for consent of overhead OFC execution so that links are commissioned. The reason as to why the work is still pending has now been stated in the affidavit.

14. The present tender pertains to a contract for the defence services. The work has to be carried out in the entire country and that the terrain in substantial part of the country is different and inaccessible.

15. The scope of judicial interference while dealing with contracts pertaining to national security or of national importance is low and the Courts are inadequate to sit over appeals over the Government's views pertaining to national security.

16. The Apex Court in Indian Rly. Construction Co. Ltd. v. Ajay Kumar, 2003 (4) SCC 579, while referring to the doctrine of immunity relating to defence contracts from judicial review, has observed as under:-

"14. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops, entering into international treaties etc. The distinctive features of some of these recent cases signify the willingness of the courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised... The effect of several decisions on the question of jurisdiction has been summed up by Grahame Aldous and John Alder in their book Applications for Judicial Review, Law and Practice thus:

*“There is a general presumption against ousting the jurisdiction of the courts so that statutory provisions which purport to exclude judicial review are construed restrictively. **There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited.** It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service [(1984) 3 All ER 935 : 1985 AC 374 : (1984) 3 WLR 1174 (HL)] this is doubtful. Lords Diplock, Scarman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. **Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved.** Another non-justiciable power is the Attorney-General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.”*

(Also see Padfield v. Minister of Agriculture, Fisheries and Food [1968 AC 997 : (1968) 1 All ER 694 : (1968)2 WLR 924] .)” (emphasis supplied)

17. Similarly, in Manohar Lal Sharma v. Narendra Damodardas Modi, **2019 (3) SCC 25**, the Apex Court has observed as under:-

“6. Keeping in view the above, it would be appropriate, at the outset, to set out the parameters of judicial scrutiny of governmental decisions relating to defence procurement and to indicate whether such parameters are more constricted than what the jurisprudence of judicial scrutiny of award of tenders and contracts, that has emerged till date, would legitimately permit.

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9. We also cannot lose sight of the tender in issue. The tender is not for construction of roads, bridges, etc. It is a defence tender for procurement of aircrafts. The parameter of scrutiny would give far more leeway to the Government, keeping in mind the nature of the procurement itself. This aspect was even emphasised in Siemens Public Communication Networks (P) Ltd. v. Union of India [Siemens Public Communication Networks (P) Ltd. v. Union of India, (2008) 16 SCC 215] . The triple ground on which such judicial scrutiny is permissible has been consistently held to be “illegality”, “irrationality” and “procedural impropriety”.

10. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India [Reliance Airport Developers (P) Ltd. v. Airports Authority of India, (2006) 10 SCC 1] the policy of privatisation of strategic national assets qua two airports came under scrutiny. A reference was made in the said case (at SCC p. 49, para 57) to the commentary by Grahame Aldous and John Alder in their book Applications for Judicial Review, Law and Practice:

“57. ... ‘There is a general presumption against ousting the jurisdiction of the courts, so that

*statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in Council of Civil Service Unions v. Minister for the Civil Service [Council of Civil Service Unions v. Minister for the Civil Service, 1985 AC 374 : (1984) 3 WLR 1174 (HL)] this is doubtful. Lords Diplock, Scaman and Roskili (sic.) [To be read as "Roskill".] appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative **but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.**"*

11. It is our considered opinion/view that the extent of permissible judicial review in matters of contracts, procurement, etc. would vary with the subject-matter of the contract and there cannot be any uniform standard

or depth of judicial review which could be understood as an across the board principle to apply to all cases of award of work or procurement of goods/material. The scrutiny of the challenges before us, therefore, will have to be made keeping in mind the confines of national security, the subject of the procurement being crucial to the nation's sovereignty.”

(emphasis supplied)

18. At the moment, this Court has no reason to doubt the affidavit filed by the Respondent No.1. This Court is not going into the question whether the present writ petition has been filed in public interest or not for the reason that the project is more or less complete.

19. Respondent No.1 has also filed an affidavit on 22.12.2020 showing the progress in the project. A perusal of the said affidavit shows that the Government is aware of the delay. It is needless to mention that if Government finds any irregularity in executing the contract, it is always open for the Government to refer the matter to the Central Vigilance Commission (CVC). However, it is pertinent to mention that even as per the affidavit dated 06.03.2023, there is delay in the project. Be that as it may, this Court is not making any observation that the Government should make a complaint, take action against the Respondents, lest it will prejudice the rights of the Respondents herein.

20. This Court is, therefore, not referring the matter to the CVC, in view of the subsequent developments in the case and keeping in view the nature of the tender and the fact that the Government is aware of the delay. This Court while ignoring the maintainability of the public interest litigation on the ground that the Petitioner has personal interest, is not inclined to pass any further order in the matter. It is always for the Government to take

recourse to such steps as is permissible under law, including referring the case to CVC if it finds that public interest has been compromised in the completion of the project.

21. The petition is disposed of, along with all the pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

APRIL 10, 2023

hsk/arsh

