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

Date of decision: 06th January, 2023

IN THE MATTER OF:

\+ **W.P.(C) 16768/2022**

RANCHOR INFRA DEVELOPERS PVT. LTD. ..... Petitioner

Through: Mr. Roopansh Purohit, Mr. Rohit Yadav and Mr. Ankit Chaubey, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through: Mr. Manish K Bishnoi and Mr. Nirmal Prasad, Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

CM APPL. 52962/2022 (Exemption)

Allowed, subject to all just exceptions.

W.P.(C) 16768/2022 & CM APPL. 52960/2022

1. The instant Writ Petition has been filed by the Petitioner herein seeking quashing of tender dated 24.11.2022 issued by the National Highways Authority of India (NHAI) inviting tenders for engagement of user fee agency through e-tender, being E-Quotation No. NHAI/13013/547/CO/22-23/ EQ/Bideibadkudar Toll Plaza.

2. Facts of the case reveal that the NHAI had floated a tender dated 25.07.2022 for engagement of user fee collection agency at Bideibadkudar

Toll Plaza at Orissa. It is stated that the Petitioner herein had quoted Rs.16,42,500/- towards daily remittances in the said tender and was declared as the H-1 bidder. It is stated that a Letter of Acceptance (*hereinafter referred to as 'the LOA'*) dated 26.08.2022 was issued to the Petitioner and the Petitioner was engaged for a period of three months i.e., from 27.08.2022 to 27.11.2022, by the NHAI to collect user fee at the said Toll Plaza.

3. It is stated that before expiry of three months, the Respondent/NHAI floated another tender dated 19.10.2022 for the same toll plaza inviting fresh bids from eligible bidders for a period of three months. It is stated that the Petitioner herein participated in that tender as well and quoted Rs.20,12,000/- towards daily remittances. The Petitioner herein was declared as the highest bidder for the said tender as well and was awarded the tender *vide* LOA dated 02.11.2022 engaging the Petitioner for a period of three months, i.e. from 10.11.2022 to 10.02.2023. It is stated that *vide* contract dated 09.11.2022, the Petitioner and Respondent herein entered into a contract. Relevant portion of the contract reads as under:

> ***"2. PERIOD OF CONTRACT:***
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> *(i) "The Contract shall be for a period of* ***three months beginning on 10/11/2022, from 10/11/2022 (08:00:00 hrs.) to 10/02/2023 (07:59:59 hrs.)****, (hereinafter referred to as "****three months****").*
>
> ***OR***
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> *till the plaza is handed over to the other collection agency(OMT Concessionaire/BOTConccssionaire/ToT Contrnctor/4 year Tolling Contractor etc.) as per directions issued by NHAI, whichever is earlier. However, in case of certain stretches going for*

BOT/OMT/TOT/Four Year Tolling Contract, the Authority reserves the right to reduce the period of contract without any compensation and in such cases of early termination of contract, the total amount payable by the bidder to the Authority will be proportionately modified depending upon the period.

(ii) The period of contract shall be three months. In case the Authority is not getting a bid higher than the remittance under this contract or in case of urgency, the Authority reserves the right to increase the contract period at same remittance and terms & condition under the contract upto 01 month."

4. It is stated that on 24.11.2022, i.e. before the expiry of the earlier contract, the Respondent herein floated another tender for engagement of user fee collection agency at the same toll plaza. It is stated that the Petitioner wrote letters dated 25.11.2022 and 28.11.2022 to the Respondent herein requesting it to cancel the Impugned Tender in light of the contract subsisting between the Petitioner and Respondent. It is stated that despite giving representation, the Petitioner once again participated in the tender, however, when the bids were opened on 01.12.2022, the Petitioner was declared as H-4 and one Sashikant Jena who had placed a bid for Rs.25,92,486/- towards daily remittances was declared as H-1 bidder. The Petitioner has, thereafter, filed the instant Writ Petition seeking the following reliefs:

"(i) issue an appropriate writ, order or direction thereby quashing the impugned Invitation for e-quotation No. NHAI I 13013 I 547 I CO I 22-23 I EQ I Bideibadkudar Fee Plaza dated 24.11.2022, issued by the respondent for engagement of user fee agency through e-tender at bideibadkudar fee Plaza at design Km, 414.000 to Km. 491.710 (Design Chainage from

Km. 414.982 to Km 493.000) of NH-6 (New NH-49) in the State of Odisha under Hybrid Annuity Mode and upkeep I maintenance of adjacent Toilet blocks including recouping the consumable items;

(ii) issue an appropriate writ, order or direction thereby directing the respondent that the implementation of the fresh Request for Proposal should not in any manner prejudicially effect the petitioner's rights in the subsisting contract dated 09.11.2022;

(iii) issue an appropriate writ, order or direction thereby declaring that the condition of clause 35 (2) of the agreement dated 09.11.2022 that provide for unilateral termination of the agreement without assigning any reason is unlawful and invalid being violative of Article 14 of Constitution of India;

(iv) issue an appropriate writ, order or direction thereby directing the respondent that the start date I award of work to any successful bidder to be after 10.02.2023;

(v) award the cost of the present proceedings in favour of the Petitioner and against the Respondent; and/or

(vi) pass any such other or further orders as this Hon'ble Court may deem fit and proper in the interest of justice and in favour of the Petitioner. "

5. Material on record shows that the Petitioner herein was a successful bidder for the tender dated 25.07.2022 for which the Petitioner had quoted Rs. 16,42,500/- towards daily remittances and LOA was issued by the NHAI which specified the period of engagement of the Petitioner from 27.08.2022 to 27.11.2022. Before the expiry of the mentioned period, the NHAI floated another tender dated 19.10.2022 inviting fresh bids from eligible bidders for

a period of three months for the same Toll Plaza. It is pertinent to mention here that at that point of time the Petitioner did not seek to come to Court contending that the NHAI ought not to have issued a fresh tender when the earlier contract was already in force. The Petitioner herein chose to participate in the tender and again emerged as the highest bidder having quoted Rs.20,12,000/- towards daily remittances. LOA was issued to the Petitioner on 02.11.2022 and on 09.11.2022 the Toll Plaza was handed over to the Petitioner herein for a period of three months, i.e. from 10.11.2022 to 10.02.2023.

6. NHAI invited another tender for the very same Toll Plaza on 24.11.2022, i.e. within 22 days of issuance of LOA to the Petitioner herein. The Petitioner herein once again participated in the tender but this time it lost to one Shashikant Jena who was declared as the highest bidder and had quoted Rs.25,92,486/- towards daily remittances. After failing to successfully get the tender on the third occasion (being successful in earlier two rounds), the Petitioner chose to file the instant Writ Petition on 05.12.2022. LOA had already been issued to the highest bidder - Shashikant Jena on 05.12.2022 and in terms of the contract, the NHAI has already issued a termination letter to the Petitioner herein on 06.12.2022.

7. The short question which arises for consideration is whether the action of the Respondent herein/NHAI in inviting a fresh tender within 22 days of issuance of LOA to the Petitioner herein for the very same Toll Plaza for which possession was granted to the Petitioner to run the Toll Plaza from 10.11.2022 to 10.02.2023, is arbitrary and is violative of Article 14 of the Constitution of India or not.

8. The Petitioner herein was aware that the NHAI was inviting tenders for the Toll Plaza in question before the expiry of the stipulated time. As stated earlier, the Petitioner was the highest bidder in the tender dated 25.07.2022 and it was engaged by the NHAI for a period of three months from 27.08.2022 to 27.11.2022. On 19.10.2022, i.e. before expiry of the aforementioned period, the NHAI floated another tender for the very same Toll Plaza. The Petitioner herein participated in it, and was declared the highest bidder and was again engaged by the NHAI for a period of three months, i.e. from 10.11.2022 to 10.02.2023. The Petitioner did not challenge the modus of the NHAI because he was the successful bidder.

9. Once again on 24.11.2022, i.e. before expiry of the period of tender which was allotted to the Petitioner herein on 10.11.2022, the NHAI floated another tender for the very same Toll Plaza. The Petitioner herein once again participated in the tender process without challenging the same. However, this time the Petitioner lost to one Shashikant Jena who out bid the Petitioner. After participating in the tender and after losing out to Shashikant Jena, it is now not open to the Petitioner herein to challenge the tender process. The Petitioner ought to have challenged the tender dated 19.10.2022 which was issued by the NHAI before expiry of the time specified in the tender dated 25.07.2022. By participating in the tender dated 19.10.2022, the Petitioner has accepted the modus of NHAI in inviting the tender before expiry of the specified time period of the earlier tender. The Petitioner herein has also not challenged the tender dated 24.11.2022 which was floated by the NHAI just after 22 days of issuance of LOA to the Petitioner herein for the tender dated 10.11.2022.

10. The Petitioner was, therefore, a fence sitter and chose to come to the Court only when he lost in the tender process and the LOA was issued to Shashikant Jena. The Petitioner ought not to have participated in the tender and even if he had participated, he would not have waited from 24.11.2022 to 05.12.2022 for the outcome of the tender process and issuance of LOA to Shashikant Jena. It is well known that in matters of tender, the aggrieved must approach the Court at the earliest without third party rights being created. In State of M.P. v. Nandlal Jaiswal, **(1986) 4 SCC 566,** the Apex Court has observed as under:

> *"**24. Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction.** The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. **When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction.** We do not think it necessary to burden this judgment with*

reference to various decisions of this Court where it has been emphasised time and again that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal. ....”

(emphasis supplied)

11. The conduct of the Petitioner in first participating in the tender dated 24.11.2022 and choosing to come to Court only after losing out in the tender process cannot invoke the equitable jurisdiction of the High Court under Article 226 of the Constitution of India. The Petitioner has actually come to the Court with unclean hands. The Petitioner has first participated in the tender process and on being unsuccessful it has challenged the tender process. Furthermore, it becomes pertinent to note that it is not open to the Petitioner to challenge the tender process or a condition clause which not suit them or be convenient to them [refer: Balaji Ventures Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd. and Anr., **SLP(C) 1616/2022**].

12. In any event, Clause 27 of the contract provides for alternate dispute resolution mechanism. The said Clause reads as under:

*“**27**. ARBITRATION & CONCILIATION:*

(a) All disputes/differences except those mentioned in the matters non arbitrable under Clause 26 above arising between the parties out of this contract shall be settled by way of conciliation under and in accordance with the provision of the Conciliation Policy of NHAI through CCIE (Conciliation Committee of Independent Experts). The proceedings shall be held at New Delhi or any other place as per policy of NHAI.

(b) Pending resolution of any dispute pursuant to Conciliation, under all circumstances the Contractor shall continue to remit the agreed instalments of money to the Authority as prescribed in this Contract including when the dispute is about the amount to be remitted,

(c) In case of non-agreement through the Conciliation, both Parties can opt for Arbitration through sole Arbitrator under and in accordance to the provisions of the Arbitration and Conciliation Act, 1996. The Sole Arbitrator shall be appointed by Chairman of the Authority.

(d) The proceedings of the Arbitration shall be held in English language and shall be held at such place as may be decided by the Chairman of the Authority or his nominee.

(e) Pending resolution of any dispute pursuant to Arbitration, under all circumstances the Contractor shall continue to remit the agreed instalments of money to the Authority as prescribed in this Contract including when the dispute is about the amount to be remitted.

(f) The contract agreement shall he governed by and construed in accordance with the laws of India and the Courts at New Delhi shall have the exclusive jurisdiction over all disputes arising under, pursuant to and/or in connection with the contract agreement"

13. The existing jurisprudence on the subject pertaining to availability of alternative remedy is well settled. In <u>Transport & Dock Workers Union v. Mumbai Port Trust</u>, **(2011) 2 SCC 575,** the Apex Court has observed as under:

> *"**14**. In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of an alternative remedy under the Industrial Disputes Act. **It is well settled that writ jurisdiction is discretionary jurisdiction, and the discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant.** In this case there was a clear alternative remedy available to the appellants by raising an industrial dispute and hence we fail to understand why the High Court entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on merits."*
>
> (emphasis supplied)

14. In Gail (India) Ltd. v. Gujarat State Petroleum Corpn. Ltd., **(2014) 1 SCC 329,** the Apex Court has observed that a writ before the High Court would not be maintainable if an alternate remedy of arbitration was available. Relevant portion of the said judgment reads as under:

> *"28. **We also agree with Shri Nariman that the remedy of arbitration available to the respondent under Para 15.5 of the GSA was an effective alternative remedy and the High Court should not have entertained the petition filed under Article 226 of the Constitution of India**. The contents of the GSA, the price side letters and the correspondence exchanged between the appellant and the respondent give a clue of the complex nature of the price fixation mechanism. Therefore, the High Court should have relegated the respondent to the remedy of arbitration and the Arbitral Tribunal could have decided complicated dispute between the parties by availing the services of experts. Unfortunately, the High Court presumed that the negotiations held between the*

> *appellant and the respondent were not fair and that the respondent was entitled to the benefit of the policy decision taken by the Government of India despite the fact that it had not only challenged that decision but had also shown disinclination to accept the offer made by the appellant to supply gas at the pooled price and had insisted on mutually agreed price."*
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> (emphasis supplied)

15. What flows from the above is that even though writ jurisdiction is discretionary in nature, Courts must refrain from exercising this discretion if an alternative remedy is available to the person which has not been availed in any meaner. This practice assumes importance specially in view of judicial discipline that must be followed as well as the mounting burden that the judiciary faces.

16. In view of the above and in view of the conduct of the Petitioner herein in first participating in the tender and then on being unsuccessful challenging the very same tender process, this Court is not inclined to exercise its jurisdiction under Article 226 of the Constitution of India to interfere with the impugned tender.

17. Accordingly, Writ Petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JANUARY 06, 2023
Rahul