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

Date of decision: 18th MARCH, 2024

IN THE MATTER OF:

\+ W.P.(C) 3170/2024

VINOD KUMAR MALIK ..... Petitioner

Through: Mr. Ravi Sikri, Sr. Advocate with Mr. Anand Mishra, Mr. Deepank Yadav, Ms. Kanak Grover and Mr. Nachiket, Advocates.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA & ORS. ..... Respondents

Through: Mr. Santosh Kumar and Mr. Kushagra Aman, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The Petitioner has approached this Court with the following prayers:

> *"a) ISSUE A WRIT OF MANDAMUS OR ANY OTHER WRIT, DIRECTION/DECLARATION SIMILAR OF THE SAME NATURE:-*
>
> *i) FOR DECLARATION OF UNILATERAL EXTENSION BY RESPONDENTS OF CONTRACT NHAI/13013/547/CO/22-23/EQ/ BHUNI FEE PLAZA / E214616/2 POST CONCLUSION OF CONTRACT ON 22.03.2024 EMANATING FROM LOA BEING NHAI/13013/ 547/ CO/22-23/EQ/BHUNI FEE PLAZA / E214616/2 ILLEGAL, ARBITRARY AND UNFAIR;*

ii) COMMANDING RESPONDENTS NO.1-3 TO RELIIEVE THE PETITIONER FROM ITS OBLIGATIONS UNDER CONTRACT EMANATING FROM LOA BEING NHAI/ 13013/547/CO/22-23/EQ/ BHUNI FEE PLAZA /E214616/2 FROM 23.03.2024;

iii) PASS SUCH OTHER AND FURTHER ORDER(S) IN FAVOUR OF PETITIONER AS THIS HON'BLE COURT MAY DEEM FIT AND PROPER."

2. Material on record indicates that the Petitioner herein was a successful bidder for being engaged as a collection agency for Bhuni fee plaza for Meerut to Haryana/UP Border Highway. The Petitioner quoted a daily remittance of Rs.16,49,000/- and a contract was entered into between the Petitioner and Respondents on 30.10.2023. In terms of Clause 35 of the contract, the Petitioner gave a letter within 15 days of execution of contract i.e., on 10.11.2023 seeking premature termination of the contract on the ground that yield of fee collection was much lesser than the bid value. In view of the fact that the contract had been prematurely terminated, the Respondents once again issued the tender and called for E-Quotation for operating the said toll plaza. The tender was floated and the Petitioner again participated in the subsequent tender on 28.11.2023. The Petitioner quoted a daily remittance of Rs.12,99,999/- which was accepted and a new contract was executed between the Petitioner and the Respondents on 21.12.2023. This time the Petitioner did not exercise his right under Clause 35 of the contract, however, he wrote letters on 29.01.2024, 05.02.2024 and 19.02.2024 stating that the Petitioner would not be able to continue with the toll plaza more than the period of three months and, therefore, requested the Respondents to take steps to ensure that the bidding process is undertaken at

the earliest stage so that a new contractor/bidder can take over the business on the termination of the contract.

3. Since the Respondents did not initiate the fresh bidding process, the Petitioner has approached this Court by filing the instant writ petition with the aforesaid prayers.

4. Issue notice.

5. Mr. Santosh Kumar, learned Counsel, accepts notice on behalf of the Respondents.

6. It is stated that the Respondents have issued a fresh advertisement inviting bids for appointment of a toll collection agency for the Bhuni fee plaza on 27.02.2024. It is stated that the bid was opened on 13.03.2024 wherein the Petitioner herein was the sole bidder, however, since the Petitioner quoted a daily remittance below the threshold quotation, the Respondents have no other option but to call for a fresh bid.

7. To consider the issue as to whether the Petitioner is obliged to continue to run the plaza upto 22.04.2024 or not, it is apposite to extract Clause 2 of the contract which reads as under:

> ***"2. PERIOD OF CONTRACT:***
>
> *(i)" The Contract shall be for a period of* ***three months beginning on 22/12/2023, from 22/12/2023 (08:00:00 hrs.) to 22/03/2024 (07:59:59 hrs.)****, (hereinafter referred to as "* ***three months"****).*
>
> *OR*
>
> *till the plaza is handed over to the other collection agency (OMT Concessionaire/BOT Concessionaire/ToT Contractor/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."

8. A perusal of the aforesaid Clause 2 indicates that it was the obligation of the Petitioner to run toll plaza from 22.12.2023 to 22.03.2024. However, Clause 2(ii) states that in case the Authority does not get 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 the same remittance and terms & condition under the contract for upto 01 month.

9. Learned Senior Counsel appearing for the Petitioner submits that since the Petitioner had intimated the Respondents well in advance that steps must be taken to ensure that a fresh contractor be appointed before the last date of contract for the reason that the Petitioner is not able to earn sufficient revenue, to even meet his cost, the Petitioner ought not to be saddled with the obligation of continuing with the contract for a period of one more month. He, therefore, states that the action of the Respondents in not taking steps well in advance is violative of Article 14 of the Constitution of India and, therefore, the reliefs as sought for in the writ petition must be granted.

10. It is well settled that the parties entering into commercial contracts are

well aware of the terms of the contract and after entering into the contract, it is not open for the parties to turn around and question a particular term of the contract or expect that the other party to the contract should be directed to act contrary to the terms of the contract. The Apex Court in Kerala State Electricity Board vs. Kurien E. Kalathil, **(2000) 6 SCC 293** has observed as under:

> *"10. We find that there is a merit in the first contention of Mr. Raval. Learned Counsel has rightly questioned the maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.*

11. A Co-ordinate Bench of this Court in MEP Infrastructure Developers Ltd. vs. South Delhi Municipal Copr & Ors, **2023 SCC OnLine DEL 2088,** has observed as under:

> *"24. But at the same time, it is also trite law that the award of contract whether by a State or by a private party is essentially commercial transaction having its*

own terms. The tender is an invitation to offer and if a person is interested in participating in the tender, the person, after scrutinizing all the requirements of the tender, gives his willingness to participate in the tender by bidding in the tender which is a term of an offer and the State accepts the best bidder which results in a contract. The person who bids in the tender and makes an offer with open eyes is aware of the obligations to be performed under the contract. ***After participating in the tender and after being a successful bidder, it is not open for the person who is the successful bidder to then turn around and state that the clauses were unfair or have become unworkable.*** *If there are clauses in the tender to resolve the disputes then the parties are normally expected to invoke those clauses which in the common parlance are called as dispute resolution clauses. It is not uncommon that in executory contracts, there is an element of uncertainty and there can be events which can make the contract not viable. There may or may not be clauses in the contract which provides for warranty/guarantee in such terms. The person, who bids in the contract, has to take into account the risks that can occur in future and resort to available remedies under the contract itself. The parties can sit on a table for negotiation and may go for a novation of contract. If such discussion fails, then the parties have to invoke such remedies available under the contract and prove their case by leading oral and documentary evidence."*

(emphasis supplied)

12. In view of the above and in view of the fact that the Petitioner has entered into the contract with the Respondents with his open eyes, the Respondents are entitled to extend the contract period upto 22.04.2024 in

terms of the contract. This Court is not inclined to accede to the request made by the Petitioner.

13. The writ petition is dismissed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

MARCH 18, 2024
S. Zakir