

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

Date of decision: 13th JANUARY, 2023

IN THE MATTER OF:

+ **W.P.(C) 14848/2022 & CM APPLs. 45667/2022, 48076/2022, 53564/2022, 53565/2022**

M/S JAI SINGH AND CO

..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Advocate with 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.

+ **W.P.(C) 14884/2022 & CM APPLs. 45752/2022, 48078/2022, 53600/2022, 53601/2022**

M/S DIMPLE CHAUDHARY

..... Petitioner

Through: Mr. V. Giri, Sr. Advocate with 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.

1. W.P.(C) 14848/2022 has been filed by the Petitioner seeking quashing of the fresh Request for Proposal (*hereinafter referred to as 'the RFP'*) dated 13.10.2022, bearing No. NHAI/13013/547/CO/22-23/CB/Saini Mazra FP,

issued by the Respondent herein for engagement of User Fee Collecting Agency for Saini Majra Fee Plaza at Kilo meter 28.160 Ambala-Kaithal (PKF-1) KM 0.000 to KM 50.860 of NH-65, on the ground that the Petitioner is operating the toll plaza and the contract, under which the Petitioner was engaged as a user fee collecting agency, is still in existence and there is no allegation against the Petitioner that it has breached/not-fulfilled the conditions subject to which the tender has been awarded to the Petitioner herein. It is the contention of the Petitioner that mere commercial consideration cannot give the State a leeway to cancel an ongoing contract which is to expire in about six month's time.

2. Shorn of details, the facts leading to W.P.(C) 14848/2022 are as under:

- a) The Respondent herein, *vide* an e-tender dated 19.11.2021, bearing No. NHAI/13013/547/CO/20-21/EQ/Saini Mazra, invited submissions of e-quotations for engagement of User Fee Collecting Agency for Saini Majra Fee Plaza at Kilo meter 28.160 Ambala-Kaithal (PKF-1) KM 0.000 to KM 50.860 of NH-65. It is stated that the Petitioner herein participated in the tender process and was declared as a successful bidder. It is stated that on 16.12.2021 the Petitioner was temporarily engaged as the user fee collecting agency for a period of three months. It is stated that on 07.12.2021 a contract was signed between the Petitioner and the Respondent herein engaging the Petitioner as a user fee collecting agency for a period of three months from 08.12.2021 to 08.03.2022.
- b) It is stated that even before the expiry of three months, the Respondent herein invited bids for the very same toll plaza *vide*

RFP dated 07.01.2022, bearing No. NHAI/13013/547/CO/21-22/CB/Saini Mazra Fee Plaza. It is stated that the Petitioner once again participated in the tender process and was once again declared a successful bidder. A contract dated 15.02.2022 was signed between the Petitioner herein and the Respondent herein engaging the Petitioner as a user fee collecting agency for a period of one year from 16.02.2022 to 16.02.2023. It is stated that the Petitioner herein also furnished a bid security deposit of Rs.2,08,00,000/- which was valid for a period of fourteen months from 31.01.2022, towards performance security and for due observance of the terms and conditions of the contract and performance of its obligations as per contract for a period of one year.

- c) It is stated that on 13.10.2022, i.e. before expiry of the earlier contract, the Respondent herein once again issued a fresh tender, bearing No. NHAI/13013/547/CO/22-23/CB/Saini Mazra FP, for the very same toll plaza. It is this tender which has been challenged in the instant Writ Petition on the ground that issuing a fresh tender amounts to termination of earlier contract and without there being any allegation that the Petitioner herein has not performed his obligations under the contract, the Respondent herein cannot issue a fresh tender before expiry of the subsisting tender.
- d) It is pertinent to mention here that the Writ Petition was filed on 18.10.2022. Even though the Petitioner has filed the instant Writ Petition, the Petitioner participated in the tender process and has been declared as the highest bidder and is currently

operating the toll plaza. The matter came up for hearing on 20.10.2022, i.e. before the Petitioner submitted his bid, and this Court directed the Respondent not to issue any work order in response to the tender notice dated 13.10.2022 till the next date of hearing. Since there was no stay, the Respondent herein went on with the tender and the Petitioner submitted its bid and it was declared as the highest bidder. The Respondent herein moved an application, being CM APPL.48076/2022, seeking modification of the Order dated 20.10.2022, however, no orders were passed in the application as the Writ Petition itself was coming up for hearing on 12.12.2022.

- e) Orders dated 20.10.2022 & 10.11.2022 were challenged by the Respondent herein before the Apex Court by filing SLP(Civil) Nos.21618-19/2022. The Apex Court *vide* Order dated 05.12.2022 dismissed the said SLP. However, the Apex Court requested this Court to dispose of the Writ Petition at the earliest.
- f) Pleadings were completed, parties were heard and the matter was reserved on 14.12.2022.

3. W.P.(C) 14884/2022 has been filed by the Petitioner seeking quashing of the fresh Request for Proposal (*hereinafter referred to as 'the RFP'*) dated 13.10.2022, bearing No. NHAI/13013/547/CO/22-23/CB/Sirohi Bahali FP, issued by the Respondent herein for engagement of User Fee Collecting Agency for Sirohi Bahali Fee Plaza at Kilo meter 23.00 in Mahendergarh Mor Narnaul Pacheri Kalan Section in the State of Harayana, on the ground that the Petitioner is operating the toll plaza and the contract, under which the Petitioner was engaged as a user fee collecting agency, is still in

existence and there is no allegation against the Petitioner that it has breached/not-fulfilled the conditions subject to which the tender has been awarded to the Petitioner. It is the contention of the Petitioner that mere commercial consideration cannot give the State a leeway to cancel an ongoing contract.

4. Shorn of details, the facts leading to 1.W.P.(C) 14884/2022 are as under:

- g) The Respondent herein, *vide* an e-tender dated 11.05.2022, bearing No. NHAI/13013/547/CO/20-21/EQ/Saini Mazra, invited submissions of e-quotations for engagement of User Fee Collecting Agency for Sirohi Bahali Fee Plaza at Kilo meter 23.00 in Mahendergardh Mor Narnaul Pacheri Kalan Section in the State of Harayana. It is stated that the Petitioner herein participated in the tender process and was declared as a successful bidder *vide* letter of award dated 17.06.2022. It is stated that on 17.06.2022 a contract was signed between the Petitioner and the Respondent herein engaging the Petitioner as a user fee collecting agency for a period of one year, i.e. from 09.06.2022 to 09.06.2023. It is stated that the Petitioner herein also furnished a bid security deposit of Rs. 2,21,12,000/- which was valid for a period of fourteen months, i.e. from 09.06.2022 to 08.08.2023, towards performance security and for due observance of the terms and conditions of the contract and performance of its obligations as per contract for a period of one year.
- h) It is stated that on 13.10.2022, i.e. before expiry of the earlier contract, the Respondent herein once again issued a fresh

tender, bearing No. NHAI/13013/547/CO/22-23/CB/Sirohi Bahali FP, for the very same toll plaza. It is this tender which has been challenged in the instant Writ Petition on the ground that issuing a fresh tender amounts to termination of earlier contract and without there being any allegation that the Petitioner herein has not performed his obligations under the contract, the Respondent herein cannot issue a fresh tender before expiry of the subsisting tender.

- i) The instant Writ Petition was filed on 18.10.2022. The matter came up for hearing on 20.10.2022 and this Court directed the Respondent not to issue any work order in response to the tender notice dated 13.10.2022 till the next date of hearing. Since there was no stay, the Respondent herein went on with the tender. The Respondent herein moved an application, being CM APPL.48076/2022, seeking modification of the Order dated 20.10.2022, however, no orders were passed in the application as the Writ Petition itself was coming up for hearing on 12.12.2022.
- j) Orders dated 20.10.2022 & 10.11.2022 were challenged by the Respondent herein before the Apex Court by filing SLP(Civil) Nos.21618-19/2022. The Apex Court *vide* Order dated 05.12.2022 dismissed the said SLP. However, the Apex Court requested this Court to dispose of the Writ Petition at the earliest.
- k) Pleadings were completed, parties were heard and the matter was reserved on 14.12.2022.

5. Mr. Sandeep Sethi, learned Senior Counsel appearing for the Petitioner in W.P.(C) 14848/2022, and Mr. V. Giri, learned Senior Counsel appearing for the Petitioner in W.P.(C) 14884/2022, contend that during the subsistence of contract, the Respondent ought not to have issued a fresh RFP for the very same toll plazas without there being breach of any condition of the contract on the part of the Petitioners herein. They have drawn the attention of this Court to Clause 35 of the contract. They states that under Clause 35, the Authority is entitled to terminate the contract once the decision is taken to transfer the road section to BOT/OMT concessionaire (reference clause 2 of the contract) at any time but it can be done only after giving a written notice to the Contractor and in that event, the Contractor shall not be entitled to any claim, or any compensation whatsoever on account of such termination. They submit that even if the Authority does not take a decision to transfer the road section to BOT/OMT concessionaire, the Authority can terminate the contract at any time without assigning any reason but it can be done only after giving a written notice to the Contractor and in that event, the Contractor shall not be entitled to any claim, or any compensation whatsoever on account of such termination. They further submit that the decision of the Respondent to call for a fresh RFP for the very same toll plaza during the subsistence of earlier contract virtually amounts to termination of that contract without following the procedure of termination as stipulated in Clause 35 of the Contract. They submit that the only reason given by the Respondent herein for terminating the contract is that the Trans-Haryana project on NH-152D, which is acting as feeder route to the toll plazas in question, has become operational recently and commercial operation on the said Highway started on 01.08.2022 due to which the number of passenger car units crossing the toll plazas have seen a

sharp rise and as a result, toll collection has been enhanced and the Respondent is losing out on revenue. Learned Counsel, therefore, submits that just because the toll collection has enhanced and the Respondent is apparently losing out on revenue, they cannot terminate the contracts midway. They submit that when a party enters into a contract with the State, it is expected that the contract will run full term and would be terminated only for some valid reasons. They further contend that it is not as if the Government was unaware that the work on Trans-Haryana project on NH-152D is underway and on its completion, toll collection is going to be enhanced and, therefore, there was no reason for it to not fix a minimum amount as post bid price. They further contend that there are a number of feeder roads which connect to NH-152D and on these feeder roads there are 11 toll plazas which have also seen a sudden influx of traffic due to opening of Trans Haryana Expressway and out of 11 of those toll plazas the Respondent has floated fresh tenders for only two toll plazas, i.e. the toll plazas in question. They, therefore, submits that the State is following the principle of pick and choose. Learned Counsel further contends that the contract specifically provides that in case there is a sharp decline in the traffic flow then the Contractor cannot claim for any loss and if the Contractor wants to terminate the contract on the ground of sharp decline then it can be done only after receiving the approval of NHAI.

6. *Per contra*, Mr. Manish K. Bishnoi, learned Counsel for the Respondent, submits that the Petitioner in W.P.(C) 14848/2022 was operating the toll plaza at its offered rate of Rs.24.96 crores as annual remittance, however, since there was no stay from this Court in proceeding ahead with the tender, the Petitioner in W.P.(C) 14848/2022 participated in the impugned tender and submitted its bid at Rs.44.24 crores which is

around Rs.20 crores more than the bid at which the contract was awarded to it in the previous round. He states that as opposed to Rs.24.96 crores, the Petitioner in W.P.(C) 14848/2022 is now ready to operate the toll plaza at Rs.44.24 crores which is equal to Rs.12,12,055/- per day as opposed to Rs.6,83,836/- at which the Petitioner is currently operating the toll plaza. He further submits that the Petitioner in W.P.(C) 14884/2022 was operating the toll plaza at its offered rate of Rs. 26,53,37,115/- as annual remittance, however, since there was no stay from this Court in proceeding ahead with the tender, the H1 bidder has offered Rs.50,18,77,777/- as annual remittance which is around double the amount offered by the Petitioner in W.P.(C) 14884/2022.

7. Mr. Bishnoi states that the increase in bid amount shows that the Contractors were well aware of increase in traffic on the toll plaza due to completion of work on the Trans-Haryana project on NH-152D which is acting as a feeder route to the toll plaza in question. He states that the Government is using substantial amounts of money for infrastructure development and, therefore, the Respondent is well within its right to issue a fresh RFP. Mr. Bishnoi further contends that the practice of issuing fresh tenders when the contract is still in subsistence is not new. He states that the Petitioner in W.P.(C) 14848/2022 was initially awarded tender No. NHAI/13013/547/CO/20-21/EQ/Saini Mazra for a period of three months from 08.12.2021 to 08.03.2022 and during the subsistence of the said contract, the Respondent herein invited fresh bids *vide* RFP dated 07.01.2022, bearing No. NHAI/13013/547/CO/21-22/CB/Saini Mazra Fee Plaza, which was for a period of one year from 16.02.2022 to 16.02.2023, and the Petitioner in W.P.(C) 14848/2022 participated in the said tender and placed its bid for Rs.24.96 crores. Mr. Bishnoi, therefore, states that after

being well aware of the process adopted by NHAI and after participating in the tender process, the Petitioners now cannot turn around and challenge the well accepted procedure as adopted by the NHAI. He further contends that it is for the State to decide what is in the best interest of public. He states that there is no allegation that the NHAI has terminated the contract and has issued a fresh RFP in order to favour some other company or that the decision making process is opaque. He relies on the judgment of the Apex Court in National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410, and more particularly on paragraph No.6 of the said judgment which reads as under:

"6. The respondent then filed a writ petition in the High Court for refund of the amount. On the pleadings before it, the High Court raised two questions viz.: (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of a breach of contract. Question (b) should have been first answered as it would go to the root of the matter. The High Court instead considered Question (a) and then chose not to answer Question (b). In our view, the answer to Question (b) is clear. It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in the cases of Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293] , State of U.P. v. Bridge & Roof Co. (India) Ltd. [(1996) 6 SCC 22] and Bareilly Development Authority v. Ajai Pal Singh [(1989) 2 SCC 116] . This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of Verigamto Naveen v. Govt. of A.P. [(2001) 8 SCC 344] and Harminder Singh Arora v.

Union of India [(1986) 3 SCC 247] . These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed. "

8. Mr. Bishnoi has also drawn the attention of this Court to the judgment of the Apex Court in Joshi Technologies International Inc. v. Union of India, (2015) 7 SCC 728, wherein the Apex Court has observed as under:

"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different

situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

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70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a

distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. "

9. He has also placed reliance on Kerala State Electricity Board & Anr. v. Kurien Kalathil & Ors., (2000) 6 SCC 293; State of U.P. & Ors. v. Bridge & Roof Company (India) Ltd., (1996) 6 SCC 2; Purvankara Projects Ltd. v. Hotel Venus International & Ors. (2007) 10 SCC 33; New Bihar Biri Leaves Co. & Ors. v. State of Bihar & Ors. (1981) 1 SCC 537; Bharat Coking Coal Limited & Ors. v. Amr Dev Prabha & Ors., (2020) 16 SCC 759; Raunaq International Ltd. v. IVR Construction Ltd. & Ors., (1991) 1 SCC 492; National High Speed Rail Corporation Limited v. Montecarlo Limited & Anr., (2022) 6 SCC 401.

10. Mr. Bishnoi further contends that the present case is not one of build, operate and transfer where a contractor has to invest some amount and, therefore, the Petitioners herein cannot claim equities. He also relies on Section 20 of the Specific Relief Act, 1963, which prevents Courts from granting injunctions in infrastructure contracts. He further states that in any event, the contract entered into by the Petitioners herein with the NHAI provides for an Alternate Dispute Resolution mechanism and it is always open for the Petitioners to invoke those provisions.

11. In rejoinder, Mr. Sethi has relied on the judgment of the Apex Court in M.P. Power Management Company Limited, Jabalpur v. Sky Power

Southeast Solar India Private Limited and Others, 2022 SCC OnLine SC 1591, to contend that the Government cannot act arbitrarily and terminate contracts purely blinded by the enhanced revenue.

12. Heard the counsel for the parties and perused the material on record.

13. Though disputes arising out of purely contract matters are not amenable to writ jurisdiction but keeping in mind the obligation of the State to act fairly and not arbitrarily or capriciously, it is now well settled that when contractual power is being used for public purpose, it is certainly amenable to judicial review. When a person enters into a contract with the Government the least he can expect is consistency on the part of the State and that the State will not act as a private individual to terminate contracts which are for a fixed duration just because the State can earn more profits by re-floating the tenders before expiry of the earlier contract. NHAI is a public authority and the public position it holds is fortified by the statute. As noted by the Apex Court in Shrilekha Vidyarthi (Kumari) v. State of U.P., (1991) 1 SCC 212, there is an obvious difference in contracts between private parties and contracts in which State is a party. Private parties are only concerned with their personal interests whereas the State will exercise its powers and discharge its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. State action can be challenged on the ground of violation of Article 14 of the Constitution by alleging that the impugned act is arbitrary, unfair or unreasonable, and this can also be extended to the domain of contractual matters and the State is under obligation to comply with the basic

requirements of Article 14 of the Constitution of India and not act in an arbitrary, unfair and unreasonable manner. The Apex Court in Shrilekha Vidyarthi (Kumari) (supra) has observed as under:

“24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

25. In Wade: Administrative Law (6th edn.) after indicating that ‘the powers of public authorities are essentially different from those of private persons’, it has been succinctly stated at pp. 400-01 as under:

“... The whole conception of unfettered discretion is inappropriate to a public authority, which

possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law: it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere.”(emphasis supplied)

The view, we are taking, is, therefore, in consonance with the current thought in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.”

14. In the present case, the contract entered into between the Petitioner in W.P.(C) 14848/2022 and the NHAI was for a period of one year, i.e. from

16.02.2022 to 16.02.2023 and that of Petitioner in W.P.(C) 14884/2022 and the NHAI was also for a period of one year from 19.06.2022 to 19.06.2023. It cannot be said that the NHAI was not aware of the fact that work on Trans-Haryana project on NH-152D, which is acting as feeder route to toll plazas in question, is underway and it would be operational during the subsistence of the contract. It also cannot be said that NHAI, which is responsible for the development and maintenance of national highways in the country, was not aware of the fact that traffic on the toll plaza in question will increase once work on Trans-Haryana project on NH-152D is complete and it becomes operational. It is not as if NHAI did not factor in these considerations at the time of floating the tender. When the earlier contracts were to end in February, 2023 and June, 2023 respectively, purely ridden by profit motives, the action of NHAI, in terminating the contract of the Petitioner herein midway without following the terms and conditions of contract, is arbitrary and blatant mis-use of the power in the hands of the State.

15. Termination of a contract deprives a person of very valuable rights. It cannot be said that there was no investment on the part of the Petitioners herein before they entered into the contract with NHAI. A performance guarantee of Rs.2,08,00,000/- was given by the Petitioner in W.P.(C) 14848/2022. The Petitioner in W.P.(C) 14884/2022 had also given a performance security of Rs.2,21,12,000/-. Apart from the bank guarantee, the Petitioners had to also arrange for the manpower to man the toll plaza in question. The fact that the Petitioner in W.P.(C) 14848/2022 himself has offered a sum of Rs.44.24 crores which is equal to Rs.12,12,055/- per day as opposed to Rs.6,83,836/- cannot be the sole reason to justify premature termination of contract. State cannot be driven purely on profit motive.

16. The Apex Court in Vice Chairman & Managing Director, City and Industrial Development Corporated of Maharashtra Ltd. v. Shishir Realty P. Ltd., 2021 SCC OnLine SC 1141, has observed as under:

“58. When a contract is being evaluated, the mere possibility of more money in the public coffers, does not in itself serve public interest. A blanket claim by the State claiming loss of public money cannot be used to forgo contractual obligations, especially when it is not based on any evidence or examination. The larger public interest of upholding contracts and the fairness of public authorities is also in play. Courts need to have a broader understanding of public interest, while reviewing such contracts.”

(emphasis supplied)

17. The Apex Court in M.P. Power Management Company Limited (supra) after relying upon the judgments of the Apex Court in Vice Chairman & Managing Director, City and Industrial Development Corporated of Maharashtra Ltd (supra); Michigan Rubber (India) Limited v. State of Karnataka, (2012) 8 SCC 216 & Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492; has held as under:

“95. Therefore, on a conspectus of the case law, we find that the concept of overwhelming public interest has essentially evolved in the context of cases relating to the award of contract by the State. It becomes an important consideration in the question as to whether then the State with whatever free play it has in its joints decides to award a contract, to hold up the matter or to interfere with the same should be accompanied by a careful consideration of the harm to public interest. We do not go on to say that consideration of public interest should not at all enter the mind of the court when it deals with a case involving repudiation of a claim under a contract or for that matter in the termination of the contract. However, there is a qualitative

*difference in the latter categories of cases. Once the State enters into the contract, rights are created. If the case is brought to the constitutional court and it is invited to interfere with State action on the score that its action is palpably arbitrary, if the action is so found then an appeal to public interest must be viewed depending on the facts of each case. **If the aspect of public interest flows entirely on the basis that the rates embodied in the contract which is arbitrarily terminated has with the passage of time become less appealing to the State or that because of the free play of market forces or other developments, there is a fall in the rate of price of the services or goods then this cannot become determinative of the question as to whether court should decline jurisdiction. In this case, it is noteworthy that the rates were in fact settled on the basis of international competitive bidding and in which as many as 182 bidders participated and the rate offered by the first respondent was undoubtedly the lowest. The fact that power has become cheaper in the market subsequently by itself should not result in non-suiting of the complaint of the first respondent, if it is found that a case of clear arbitrariness has been established by the first respondent.***

96. In other words, public interest cannot also be conflated with an evaluation of the monetary gain or loss alone.”

(emphasis supplied)

18. The upshot of the said discussion would show that mere possibility of more money in a public contract itself cannot be the sole criteria for terminating contracts and more particularly, the contracts which are for a fixed duration. It is to be considered that a sharp decline in traffic would not have enabled the contractors from terminating the contract. Clause 9 of the Contract provides that the Contractor has submitted its bid only after taking

into consideration any access or diversion(s) or any diversion of traffic due to deterioration in road conditions or closure of road for maintenance work, whether existing or likely to come in the future which any road user may opt, inter-alia, to avoid payment of the user Fee by bypassing the toll plaza and the Contractor shall not make any claim for any decrease in traffic on the ground of diversion of the traffic, even if such diversion did not exist at the time of submission of the bid by the Contractor. Therefore, the Contractors were not allowed to claim any decrease in profits on the ground of any diversion even if such a diversion did not exist at the time of submission of the bid. Applying this analogy, if the Contractors cannot claim any damage for decrease in traffic, then NHAI also cannot terminate the contract because of increase of traffic on the toll plaza due to commencement of operation of Trans-Haryana project on NH-152D which was under construction at the time of submission of bid by the Petitioners herein, which the NHAI also knew would be operational during the subsistence of contract.

19. Further, fact that the Petitioner in W.P.(C) 14848/2022 participated in the tender is of no consequence because the Petitioner has challenged the fresh RFP even before the last date of submission of tender. It would have been a different case had the Petitioners challenged the tender after having failed to get the tender. Since there is no delay on the part of the Petitioners in approaching this Court and the Petitioners have not been a fence sitter, this Court is not inclined to reject the instant petition only on the ground that the Petitioner in W.P.(C) 14848/2022 has participated in the tender.

20. A perusal of the counter shows that the increase in traffic was the sole reason for calling for a fresh RFP by the NHAI which has resulted in termination of the contract of the Petitioners without following the due

process of contract and, therefore, it was arbitrary, capricious and whimsical on the part of the NHAI. The same cannot be permitted by this Court while exercising its jurisdiction under Article 226 of the Constitution of India and considering the principles of equity.

21. Accordingly, Writ Petitions are allowed. Pending application(s), if any, stand disposed of.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JANUARY 13, 2023

Rahul

भारत्यमेव जयते