
(2010) 09 AHC CK 0569
In the Allahabad High Court
Case No : C.M.W.P. No. 48011 of 2010

Dasa Management

APPELLANT

Vs

National Highways Authority of India and Others

RESPONDENT

Date of Decision : 29-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226

National Highways Authority of India Act, 1988 — Section 10, 16

Citation : (2011) 2 AWC 1666

Hon'ble Judges : Vineet Saran, J; Abhinava Upadhyaya, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Abhinava Upadhyaya, J.—Heard Sri V.K. Singh, learned Senior Counsel appearing for the Petitioner assisted by Sri S. Shekhar, learned Counsel and Sri Shashi Nandan, learned Senior Counsel appearing for the Respondents assisted by Sri Mohd. Ali and Sri R.K. Singh, learned Counsel and have perused the averments made in the writ petition and annexures filed thereto.

2. The question posed before us is to consider the right of the Petitioner to collect toll on highway on behalf of Respondent No. 1 after the expiry of the term of contract with the Petitioner for the said purpose.

3. The facts, in brief, are that the Petitioner was engaged by the National Highway Authority of India to collect toll on its behalf from the users of the NH-2 at Anant-Ram Toll Plaza, district Auraiya upon the terms and conditions mentioned in the deed of contract. The consideration of the contract was that the Petitioner would be entitled to service charge at the rate of 14% per month of the total emoluments/wages payable by the Authority to the employees engaged by the Petitioner at the prescribed rates. The contract was for a period of one year commencing from 11.5.2009 upto 10.5.2010. Just before the term of the contract was to come to an end on 10.5.2010, the Petitioner was permitted to continue to collect toll until further orders vide letter dated 7.5.2010

(Annexure-6 to the writ petition). Pursuant to this the Petitioner continued. However, vide order dated 6.8.2010 of the Project Director, the Petitioner was informed that the competent authority has decided not to continue with the Petitioner beyond 10.8.2010 and was directed to hand over the charge of the Toll Plaza to the authorized representative of the National Highways Authority of India.

4. A statement has been made at the Bar, which is not disputed by the parties, that fresh tenders have been invited by publication for the collection of toll fee at Anantram Toll Plaza on 1.7.2010 pursuant to which technical and financial bid has also been offered by the interested parties and the matter is likely to be finalized soon.

5. Sri V.K. Singh, learned senior advocate has submitted on behalf of the Petitioner that the termination of the extended period of contract by the authorities is as a result of prejudice and bias against the Petitioner and is in fact punitive in nature. He further contends that since fresh tenders have already been invited and the Petitioner was asked to continue beyond the term of contract, the fair play demands that the Petitioner should have been allowed to continue till the fresh auction was finalized. Sri Singh alleges that the extended period of contract is nothing but an ad hoc arrangement made by authorities till regular arrangement is made and thus there was no justification with the authorities to have terminated the ad hoc arrangement and replacing it by another ad hoc arrangement, inasmuch as, now for this intervening period, M/s. Marshal Security Services, Agra has been engaged from 11.8.2010 for collection of tolls. It is submitted that earlier there was some dispute between the Petitioner and the Respondents-authorities with regard to payment of wages to the workers and the Petitioner which under the contract, the Highways Authority was obliged to pay but in view of certain penalty imposed upon the Petitioner by the authority, the same was adjusted from the security deposit of the Petitioner and the amount that was to be paid to the workmen under the contract by the authority. Aggrieved, the Petitioner filed Civil Misc. Writ Petition No. 42800 of 2010 and in the said writ petition the counsel for the Respondent-authority was directed to seek instruction. According to the learned Counsel for the Petitioner the filing of the aforesaid writ petition against the authority which is still pending, is the sole reason for termination of the extended period of contract of the Petitioner and replacing it by another ad hoc arrangement and as such on the principle one ad hoc cannot be replaced by another ad hoc, the Petitioner is entitled to continue to collect the toll on behalf of the authority till regular arrangement is made, which in any case, is likely to happen soon since the fresh tenders have already been invited on 1.7.2010.

6. To substantiate the aforesaid claim the Petitioner has relied upon a letter written by the Project Director dated 7.8.2010 to the District Magistrate, Auraiya and the Senior Superintendent of Police, Auraiya for granting Police protection at Anantram Toll Plaza wherein it has been mentioned that the collection of toll at

Anantram Toll Plaza will be made by M/s. Marshal Security Services, Agra from 11.8.2010 since the term of the earlier contract, i.e., the Petitioner has expired. The said letter has been filed as Annexure-SA-1 to the supplementary-affidavit by the Petitioner. Further, by Annexure-SRA-1 to the supplementary rejoinder-affidavit, which is a document said to be a bank guarantee for performance of security in favour of the National Highways Authority of India by M/s. Marshal Security Services, Agra for the collection of toll fee at the Toll Plaza.

7. On the other hand, Sri Shashi Nandan, learned Senior Counsel appearing for the Respondents has emphatically denied the contention of the Petitioner that he has been replaced by another ad hoc arrangement. It is submitted that the Petitioner's contract was for a period of one year from 11.5.2009 to 10.5.2010 upon a consideration of service charge @ 14% of the total amount paid by way of wages to the employees engaged by the Petitioner. So far as Respondents are concerned, there is no breach on their part with regard to the aforesaid contract. Sri Shashi Nandan has further submitted that the principle of ad hoc not to be replaced by another ad hoc is a principle generally applied in employment/service related dispute. The same principle cannot be applied in business or commercial transactions. Besides the aforesaid, he has also submitted that assuming without admitting, that even if the principle of ad hoc not to be replaced by another ad hoc is applied, then too the Petitioner cannot have any grievance since he has not been replaced by any other ad hoc arrangement but the department/authority has decided to collect the tolls itself, which in any case, is its exclusive privilege. However, to undertake such collection by the Authority itself, it required certain man power to assist in the said collection and, therefore, M/s. Marshal Security Services, Agra was asked to provide only man power for the aforesaid purpose.

8. Sri Shashi Nandan explained that M/s. Marshal Security Services was engaged on account of the fact that the department had been previously engaging its services for other Toll Plazas as and when so required, for providing man power assistance and he has categorically submitted that no contract whatsoever has been drawn with M/s. Marshal Security Services for collection of toll and no consideration, which is an essential element of a contract, has been determined for the purpose of collection of toll and as such the allegation of the Petitioner that the aforesaid agency has been engaged for collection of toll replacing the Petitioner is without any foundation or basis. He submits that in the letter dated 7.8.2010 it has wrongly been mentioned that M/s. Marshal Security Services will now be the collecting agency. This fact is also stated in para 11 of the short counter-affidavit filed and also bears out from the order of the Chief General Manager dated 5.8.2010 wherein the Project Director has been directed to collect the tolls departmentally. This order dated 5.8.2010 although not filed but was shown to us in the presence of the counsel for the Respondents during the hearing of the case. Office order dated 11.8.2010 filed as Annexure-S.C.A.-1 also mentions that the authority has decided to collect the tolls itself. Although this order has been termed as an afterthought by the Petitioner.

9. On the other hand, learned Counsel for the Petitioner reiterating his stand, submitted that the recital in the said letter of the Project Director dated 7.8.2010 to the District Magistrate and the Senior Superintendent of Police, Auraiya leaves no room for doubt that the intention of the Authority was to hand over the Toll Plaza for collection of toll to M/s. Marshal Security Services and the Authority cannot change their stand now by submitting affidavit stating therein that the department itself is collecting toll and M/s. Marshal Security Services is merely providing man power to the Authority. In support of the aforesaid assertion, Sri Singh has relied upon a decision of the Constitution Bench of the Hon''ble Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, whereof is quoted herein below:

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order had in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Commissioner of Police, Bombay Vs. Gordhandas Bhanji,

Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Orders are not like old wine becoming better as they grow older.

10. There cannot be any dispute with the aforesaid proposition laid down by the Constitution Bench of the Apex Court. In the present context what has to be seen is the nature of the alleged document/order dated 7.8.2010 filed as Annexure S.A.-1 to the supplementary-affidavit, as much emphasis has been laid on this document. The aforesaid letter is a communication by the Project Director of the National Highways Authority of India asking the district administration, namely, the District Magistrate and the Senior Superintendent of Police, Auraiya to provide security at the said Toll Plaza and also gives an information that the term of the existing contractor having come to an end, further collection will be made by another agency, namely, M/s. Marshal Security Services. According to the Petitioner this letter clearly reflects the intention of the Highway Authority of India to give contract for the collection of toll for the remaining period to M/s. Marshal Security Services and the stand of the Authority that it has decided to collect toll itself is an afterthought and the same cannot be improved by affidavit, as held by the Hon''ble Supreme Court in the case of Mohinder Singh Gill v. Chief Election Commissioner (supra).

11. The argument of the learned Counsel attractive as it may sound, is not

acceptable for the simple fact that the said letter is only a communication to the local administrative authorities and it is in no way an order which can be said to be determining or affecting any one's right. Therefore, in our considered view, Mohinder Singh Gill's case (supra), has no application in the present case. On the other hand, Respondents have come out with a clear case that it is the department itself which is now collecting toll at the Plaza and M/s. Marshal Security Services has been engaged to provide only the man power at the said toll Plaza to assist the department in collecting toll upon an already existing agreement dated 28.3.2009 filed as Annexure-S.C.A. 1 and 2. In the deed of contract upon which the Petitioner was collecting toll, Clause 17 of the said agreement filed as Annexure-5 to the writ petition provides that for the purpose of various functions the collecting entity shall be entitled to a consolidated service charge of 14% per month on the total remuneration payable to the persons employed. This 14% was the consideration of the contract. But in the present case while engaging M/s. Marshal Security Services for deployment of man power, no such consideration has been fixed to indicate that there is any valid contract or even an agreement between the Respondent Authority and M/s. Marshal Security Services for collection of toll. Therefore, upon the material available on record and nothing contrary having been shown, we are unable to draw a presumption much less hold that the Petitioner has been replaced by M/s. Marshal Security Services for collection of toll at the Plaza in question.

12. The other case relied upon by the learned Counsel for the Petitioner is the decision of a Division Bench of this Court in the case of M/s. B.P. Sharma and Co. v. Bharat Petroleum Corporation Ltd. and Anr. 2009 (7) ADJ 509. This case has been relied upon by the Petitioner for two aspects. Firstly, on the point of legitimate expectation and secondly, that one ad hoc cannot be replaced by another ad hoc. The facts of this case as enumerated in para 3 of the said judgment is quoted herein below:

Brief facts necessary for deciding the writ petitions are the Petitioner of Writ Petition No. 32164 of 2009 by an order dated was appointed as ad hoc dealer for retail outlet at Turra, Pipari, Sonbhadra for carrying out business of Motor Sprit, High Speed Diesel and Lubricants by Bharat Petroleum Corporation Ltd. The order dated 12.1.2005 contemplated that Corporation was in process of finalising regular dealership for carrying out the business from the aforesaid location and pending final decision, the Petitioner was appointed directly on temporary basis to run the outlet. Initially, the dealership was granted to the Petitioner for a period of one year, i.e., up to 12.1.2006 with stipulation that if the Petitioner was interested to carry on business even after expiry of the aforesaid date, the formal application had to be made to the Company for the said purpose. After having been appointed as ad hoc dealer, the Petitioner also obtained licence under U.P. High Speed Diesel and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981, which is renewed up to 31.3.2011. The Petitioner was allowed to continue as ad hoc dealer even after and continued as such till the impugned order dated 24.6.2009 was passed terminating the ad hoc licence

w.e.f. 30.6.2009 and directing the Petitioner to close its business. The Petitioner in this writ petition has come up with a prayer to quash the order dated 24.6.2009 and further seeks a writ of mandamus to allow the Petitioner to continue it as ad hoc dealer as per existing terms and conditions.

13. In para 19 of the aforesaid judgment, the Division Bench held as under:

The appointment of the Petitioner being specifically made pending final decision of regular dealership, the Petitioner has legitimate expectation that it shall be allowed to continue till a final decision regarding appointment of dealership is taken by the Corporation. The legitimate expectation can be said to arise on the representation of the Corporation itself that it is appointing the Petitioner pending finalisation of the regular dealership. It is true that mere legitimate expectation alone cannot be a ground to interfere with a decision which is not in accord with legitimate expectation but legitimate expectation furnishes a foundation to an aggrieved person to seek judicial review and such person, if satisfies that decision taken is arbitrary and unreasonable or unfair, he is entitled for relief from the Court. The principle governing the concept of legitimate expectation were elaborated by the Apex Court in *Union of India and others Vs. Hindustan Development Corpn. and others*,

14. The aforesaid case of *M/s. B.P. Sharma and Co. (supra)*, also does not render any help to the Petitioner, as in that case, the Petitioner was engaged only as an ad hoc arrangement. The contract itself was for ad hoc arrangement till the regular dealer was appointed. And in due performance of the contract, the Petitioner therein had to obtain licence under the U.P. High Speed Diesel and Light Diesel Oil (Maintenance of Supply and Distribution) Order, 1981 and, therefore, he had legitimate expectation that till the regular dealer is appointed he would be permitted to continue. But in the present case, the Petitioner was a regular contractor for collection of toll for a period of one year. Upon expiry of the period he was merely permitted to continue but only until further orders. There was no contemplation of period or that he would continue until the regular contractor is appointed. Whatever right the Petitioner had flowed from the contract entered into between the parties. The contract was for a period of one year which came to an end on 10.5.2010 and beyond that the Petitioner continued at the sole discretion of the Authority concerned and once the Authority decided not to continue the Petitioner any further, the Petitioner cannot turn around and claim continuance on the ground of legitimate expectation, specially in view of the fact that the Authority has itself taken upon the task of collecting toll, which is one of the function of the Authority as provided u/s 16(k) of the National Highways Authority of India Act, 1988. Collection of toll fee is the exclusive privilege of the National Highways Authority of India and only in order to facilitate the said collection of toll fee contracts are drawn with the interested consenting parties upon the terms and conditions as enumerated in the contract. The right to collect toll on behalf of the Authority thus, flows from the terms of the contract and the parties are bound by the said contract Since it is the

privilege of the Authority, no other person has any indefeasible right to continue to collect toll even beyond the term expressly agreed upon in a validly drawn contract. It is the exclusive right of the Authority to either allow the existing contract to continue for any further period as it is deemed fit or at any point of time the said extension of period can be cut short without assigning any reason if the authority decides to collect the tolls itself.

15. So far as replacing one ad hoc by another ad hoc is concerned, the said principle is normally applied in service matters and cannot, in our opinion, be applied to business principles. The National Highways Authority of India as constituted under the Statute, is indeed an instrumentality of the State but in view of Section 10 of the Act, it has to discharge its functions under the Act, so far as may be, on business principles. But this aspect of the matter does not remain very relevant when we have already held that by taking over responsibility of collecting toll itself, the Authority has not entered into any ad hoc arrangement with any other person, which in any case, is its one of the primary functions.

16. In view of the facts stated above, the Petitioner's contract having come to an end and for the interregnum period the Authority having decided to collect toll itself, in our opinion, no prejudice can be said to be caused to the Petitioner to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

The writ petition lacks merit and it is accordingly dismissed.