(2015) 01 GUJ CK 0065

In the Gujarat High Court

Case No : Writ Petition (PIL) No. 254 of 2013

Jayantibhai Mohanbhai Patel APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 21-01-2015

Acts Referred:

Citation : AIR 2015 Guj 42

Hon'ble Judges : V.M. Sahai, A.C.J;R.P. Dholaria, J

Bench : Division Bench

Advocate : Zubin F. Bharda and Dilbur Contractor, for the Appellant; N.D. Gohil, Vandan Baxi, A.G.P., Maulik G. Nanavati and Nanavati and Co., Advocates for the Respondent

Final Decision : Dismissed

Judgement

V.M. Sahai, Acting C.J—We have heard Mr. Zubin F. Bharda, learned counsel appearing on behalf of petitioner, Mr. N.D. Gohil, learned counsel appearing on behalf of respondent No. 1, Mr. Maulik G. Nanavati, learned counsel appearing on behalf of respondent Nos. 2, 3, 5 and 6 and Mr. Vandan Baxi, learned AGP, appearing on behalf of respondent No. 4. This writ-petition in the nature of Public Interest Litigation has been filed by the petitioner who claims to be a freelance journalist and also is running a hotel on National Highway No. 59 near village Kathlal, praying for the following reliefs:--

"[A] Your Lordships may be pleased to issue appropriate writ, order and/or direction to appoint any person having technical know-how of construction of National Highway along with a retired Judge of the High Court or a Judge of subordinate Court not below the rank of retired District Judge to inquire into the entire affairs in awarding contract of construction of National Highway Toll Road of National Highway No. 59 between Ahmedabad to Godhra and ask them to make appropriate report regarding allegations made in the present Special Civil Application and submit the report within stipulated time as may be stipulated by this Hon''ble Court and after perusing such report, be pleased to pass appropriate orders in the interest of justice, inclusive of initiation of appropriate proceedings including criminal prosecution against the erring respondents.

[B] Pending admission hearing and final disposal of the present petition, Your Lordships may be pleased to restrain the respondents, their agents, servants etc., from permitting the respondent Nos. 5 and 6 to commence levy of toll tax by withholding Commercial Operating Date [COD] by an order of interim injunction and further be pleased to restrain the concerned respondent from refunding the amount of security deposited by the respondent No. 5 with the respondent No. 2.

XXX XXX XXX"

2. The petitioner, in this petition, has challenged the award of contract of Rs. 1155.40 Crores to the respondent No. 5 for the construction of National Highway No. 59 between Ahmedabad-Godhra Toll Road, which is a stretch of 117.66 kms. According to the petitioner, the respondent No. 5 who was awarded contract of Rs. 1155.40 Crores, has given sub-contract for Rs. 1000 Crores to Pan India Limited, who again, in turn, gave subcontract to the respondent No. 6 for an amount of Rs. 800 Crores.

3. The main relief claimed in this petition is that this Court may appoint any person having technical know-how of construction of National Highway along with retired High Court Judge or a District Judge to inquire into the entire affairs of awarding contract and launch appropriate criminal proceedings against the guilty persons as per the report that may be submitted by the Committee to be nominated by the High Court.

4. Pursuant to the issuance of notice, the respondent No. 3-Project Director [PIU], Ahmedabad of the National Highway Authority of India has filed two affidavits-in-reply, one in November, 2013 and the additional affidavit-in-reply in April, 2014. The facts with regard to the award of contract have been stated in paragraphs-8, 9 and 10 of the additional affidavit-in-reply filed on 2nd April, 2014, which are extracted as under:--

"8. I say that the prescribed procedure for approval and allotment of any project on Public-Private partnership model to a private party is well defined. Ordinarily, the sponsoring Ministry identifies the projects to be taken up through public-private partnership and undertake preparation of feasibility studies, project agreements, etc. with the assistance of legal, financial and technical experts, as necessary. The proposal is first submitted for ''In Principle'' clearance of Public-Private partnership Appraisal Committee. After the ''in principle'' clearance, the Ministry invites expressions of interest in the form of Request for Qualification [RFQ] which is followed by shortlisting of pre-qualified bidders. After formulating the draft Request for Proposal [RFP], the sponsoring Ministry seeks clearance of Public-Private Partnership Appraisal Committee before inviting the financial bids. Based on the recommendations of Public-Private Partnership Appraisal Committee, the final approval for a project is granted by the Competent

Authority. In cases where the Public-Private Partnership project is based on a duly approved Model Concession Agreement [MCA], ''In principle'' clearance by the Public-Private Partnership Appraisal Committee is not necessary. In such cases, approval of the Public-Private partnership Appraisal Committee is to be obtained before inviting the financial bids. The selection of the concessionaire is based on open competitive bidding. A two stage bidding process is adopted for such projects. In the first stage, that is the RFQ stage, the eligible and prospective bidders are pre-qualified. The second stage is RFP or the bidding stage. The Model RFQ document lays down the norms, principles and parameters to be followed for pre-qualification of bidders in a fair and transparent manner with low transaction costs. The RFQ document aims at identification of experienced bidders who have the requisite technical and financial capacity for undertaking the project. The technical capacity is mainly determined on the basis of past relevant experience of the firm. The financial capacity is determined on the basis of net worth of the firm. The Model RFP document addresses the key requirements that must be observed for conducting a fair and competitive bidding process. The response sought at this stage is restricted to financial offers only, requiring the bidder to quote on the basis of a single bidding parameter. The detailed terms of the project are specified in the Concession Agreement which forms an integral part of the Bid Documents to be provided to the bidders along with RFP document. The Model Concession Agreement spells out a precise policy and regulatory framework for implementing the project. It addresses the critical issues of a public-private partnership framework such as mitigation and unbunding of risks; allocation of risks and rewards; symmetry of obligations between the principal parties; precision and predictability of costs and obligations; reduction of transaction costs; force majeure; and termination. The technical parameters are based mainly on output specifications, as these have a direct bearing on the level of service for users. The Agreement specifies only the core requirements of design, construction, operation and maintenance of the Project Highway while leaving enough room for the Concessionaire to innovate and add value. The Agreement also allocates risks to the parties that are best suited to manage them. The commercial and technical risks relating to construction, operation and maintenance as well as the traffic risks are allocated to the Concessionaire. All direct and indirect political risks are assigned to the Authority. The Agreement further stipulates a time limit of 180 days [extendable up to 120 days on payment of a penalty] for achieving financial close failing which the bid security is to be forfeited. Also, a balanced and precise mechanism for determination of user fee has been specified for the entire concession period since this would be of fundamental importance in estimating the revenue streams of the project and, therefore, its viability. In the event of termination, the Agreement provides for substitution of the Concessionaire by the senior lenders, failing which a compulsory buy-out by the Authority. I say that all project parameters such as the concession period, toll rates, price indexation and technical parameters are clearly stated upfront, and short-listed bidders are required to specify only the amount of grant sought by them. The bidder who seeks the lowest grant is awarded the contract. In exceptional cases, instead of seeking a grant, a bidder may offer to share the project revenues with the Government. Based on competitive bidding, the Government may provide a capital grant of up to a maximum of 20 per cent of the project cost. This would help in bridging the viability gap of the public-private partnership projects. Where such assistance is inadequate for making a project commercial viable an additional grant not exceeding 20 per cent of the project costs may be provided for Operation and Maintenance support during the period following the commissioning of the Project Highway.

9. In the present case, as stated hereinabove, the project road sought to be developed has already been identified by the Government of India. The design and construction of all highways identified in Phase III of NHPD is to be performed in two steps, namely preparation of feasibility-cum-preliminary design by a technical consultant followed by the detailed design and construction by the Concessionaire as Design, Build, Finance, Operate and Transfer project for each highway in the program. Accordingly, the National Highways Authority of India retained M/s. Scot Wilson Private Limited as consultants for the Preparation of Feasibility-cum-Preliminary Design for the Ahmedabad-Godhra Project of NH-59 from Ks 4+200 to Km 122+420. The Technical Consultant undertook a comprehensive study with the focus on Engineering Investigations, Traffic Analysis and Forecasts, Design Standards, Environment and Social Impact Assessment, Resettlement Plan and Project Cost to determine the technical, economical and financial viability of the project. The primary focus of the study was to ensure safety of the traffic, road users and people living close to the highway while adhering to the standards and specifications stipulated by Indian Road Congress and the Ministry of Road Transport and Highways, Government of India, achieve enhanced operational efficiency of the highway, fulfil the access needs of the local population, minimize the adverse impact on the environment due to construction and determine feasible and constructible options for the project with least cost. After exhaustive study, the consultant opined that the project designed as a Partially Access controlled facility would enhance the development of the region and improve infrastructure facilities. Being technically feasible and economically advantageous, it recommended its implementation in larger public interest. The Authority accepted the recommendations of the technical consultant and submitted a proposal to the Public Private partnership Approval Committee to accord its approval for undertaking the project. The Committee after considering the application of the Authority and examining the importance of the project road accorded its approval to proceed with the work of widening the present stretch of national highway. A copy of the minutes of the meeting of the Public Private Partnership Approval Committee held on 9.7.2009 wherein a decision was taken to approve the project is annexed herewith and marked as Annexure:R/1. I say that the Cabinet Committee on Infrastructure thereafter approved the implementation of the project of 117.600 km long section in the State of Gujarat of four laning of Ahmedabad-Godhra section of

NH-59 under NHDP Phase III on Design, Build, Finance, Operate and Transfer [DBFOT] basis. It estimated the project cost at Rs. 1008.50 crores under the DBFOT pattern. I say that Essel Ahmedabad-Godhra Toll Roads Limited, a company promoted by the consortium comprising M/s. Essel Infraprojects Limited and China Railway 18th Bureau [Group] Corporation Limited, offered to undertake the project work and submitted its bid requesting for a grant of 108.00 crores. Since the bid submitted by the said respondent was the most competitive and involved minimum expenditure of public money, the Authority entered into a Concession Agreement for a concession period of 30 years with the respondent. I submit that the contract has thus been awarded to the Concessionaire after following the due process of law.

10. I say that the Total Project Cost has been defined in the Concession Agreement to mean the lowest of [a] the capital cost of the project, less equity support as set forth in the financial package : [b] the actual capital cost of the project upon completion of four laning of the project highway less equity support; and [c] a sum of Rs. 1008.50 crores less equity support. In the present case, the project cost estimated by the Concessionaire and submitted to the Authority is Rs. 1155.40 crores and the request for grant amount is Rs. 108.00 crores. Under the circumstances, the total Project Cost for the present project continues to remain the project cost as estimated and approved by the Cabinet Committee on Infrastructure, namely Rs. 1008.50 crores. I submit that the project cost as determined by the Concessionaire has limited relevance for the purpose of disbursement of equity support and other related issues dependent upon the achievement of certain milestones under the agreement by the Concessionaire. For the purpose of settling the accounts between the parties in the event of termination of the contract, the project cost as estimated by the Government less the equity support shall be considered. I submit that since the project cost, as estimated by the Concessionaire, has absolutely no relevance to the working of the present project insofar as public spending is concerned, the allegation about the Concessionaire sub-contracting the work to another related company at a lesser price and the said contractor in turn engaging a sub-contractor at an even less price assume no significance and speak of nothing but an internal arrangement between the contractor and his sub-contractor. In view of these facts, I submit that the allegation of irregularity in awarding of the contract suffers from ignorance of the elaborate and detailed process required to be followed prior to clearance of any project on public private partnership basis and methodology of working of a public private partnership project. I, therefore, submit that the petition does not merit consideration and deserves to be dismissed in limine."

5. Before we proceed any further, it is made clear that the petitioner has not challenged the non-payment of royalty by the contractor in this petition as there is no relief claimed in the petition with regard to royalty.

6. Mr. Bharda, learned counsel for the petitioner urged that since the petitioner

has sought relief to inquire into the entire contract, it will cover everything, namely, sand, cement, steel, payments to be made to the labourers etc. We are not convinced by the argument made by Mr. Bharda in view of the decision of the Apex Court in the case of Manohar Lal (D) by Lrs. Vs. Ugrasen (D) by Lrs. and Others, (2010) 6 JT 41 : (2010) 6 SCALE 151 : (2010) 11 SCC 557 : (2010) AIRSCW 6282 : (2010) AIRSCW 6821 : (2011) AIRSCW 2158 , wherein, the Apex Court has held that Court cannot grant relief which has not been specifically prayed for. In view of this pronouncement of the Apex Court, unless a relief is prayed for by the petitioner, no such relief can be granted.

7. In paragraph-17 of the additional affidavit-in-reply filed by the respondent No. 3, assertions have been made with regard to royalty, sand and filing of complaint by the subcontractor. With regard to evasion of royalty, the same is the subject-matter of Special Criminal Application No. 2579 of 2013 which is still pending before the learned single Judge. Para-17 of the additional affidavit-in-reply is quoted hereunder:--

"17. I say that the allegation of non-payment of royalty amount by Dilip Buildcon Private Limited [respondent No. 6 in the present petition] - sub-contractor engaged by the EPC contractor appointed by the Concessionaire under the terms of the Concession Agreement, does not directly concern the Authority or for that matter the project highway. I say that it is a matter individual to the sub-contractor as the lease/license/permit for mining/excavating sand were obtained by the said sub-contractor in its individual capacity. In any case, a police complaint has been registered with allegations of evasion of payment of royalty by the same sub-contractor and the same is presently being investigated by the police. A copy of the First Information Report No. CR-I, 84 of 2014 registered with Kathlal Police Station, Kheda, Kheda Police Station is annexed herewith and marked as Annexure R-6. I say that said complaint has been filed by Shri Alpeshbhai Doshi, a contractor who had done some work for Dilip Buildcon Private Limited and who alleges non-payment of money by Dilip Buildcon Private Limited. I say that the said complainant has subsequently filed a writ petition before this Hon''ble Court, being Special Criminal Application No. 2579 of 2013, seeking a direction for handing over investigation of the police complaint either to the Central Bureau of Investigation or any other State level agency who would conduct the investigation under the direct supervision of the Director General of Police, Gujarat State. I say that the Investigating Officer has filed an affidavit-in-reply detailing the investigation carried out by him. A copy of the said affidavit-in-reply filed by Shri Rajendrasinh Solanki in the said proceedings is annexed herewith together with the annexures and marked as Annexure R-7. In the said affidavit, the police officer investigating the offence has stated that inquiry and investigation has revealed that "royalty of the excavated soil has already been paid by the company". As regards allegation of forging of the royalty pass or the royalty passes being fake is concerned, the Investigating Officer has stated on oath that "the Geologist vide letter dated 9.10.2013 stated that all the passes were generated through ATR system and all the passes are found to be valid". I say that the District Superintendent of Police, Kheda has also filed an affidavit in the said proceedings stating inter alia that "the E passes were inquired and further sent to the Geology Department, Nadiad to Commissioner''s Office, Geology Department, Gandhinagar and thereafter, after proper scrutiny of the same the department stated that the said passes are true and issued by the department and not concocted one. In fact the same can also be verified from internet site of the concerned department." A copy of the said affidavit-in-reply filed by Shri Makrand Chauhan, District Superintendent of Police, Kheda in the said proceedings is annexed herewith and marked as Annexure R-8. I say that the investigation of the complaint is still going on and the police is inquiry [sic] into the allegations. I say that the petition is also pending adjudication before this Hon''ble Court. I submit that in view of the fact that an authority competent in law to investigate an offence is seized of the allegations of evasion of royalty and fabrication of royalty passes by the sub-contractor - the very same allegations made in the present petition against the very same subcontractor, and further that a court of law competent to determine whether the allegations are being fairly probed by the local police and issue appropriate directions for further inquiry or inquiry by a different agency is seized of the subject- matter, it would not be proper to entertain the present petition which for obvious reasons is not bona fide and clearly is an attempt to abuse the process of law."

8. Mr. Vandan Baxi, learned AGP has pointed out that the respondent No. 4 has also filed affidavit, wherein it has been stated in paragraph-18 that royalty and penalty have been recovered from the respondent No. 6 and No Due Certificate will be issued. Paragraph-18 of me affidavit-in-reply filed by the respondent No. 4 is extracted hereunder:

"With respect to para 12, it is stated that after completion of the project, respondent No. 6 will apply for the "No Due Certificate" along with the statement and documents showing quantity of minerals used in the project. Thereafter, the verification will be done with the approved quantity of minerals and if any difference in quantity/other discrepancies will be noticed men penalty for the same will be recovered from the respondent No. 6 in accordance with law. As such, the approved quantity of ordinary clay mineral to respondent No. 6 is 41,05,600 Metric Tones, the application fees paid for the said excavation is Rs. 9,67,200 and royalty paid for the same is Rs. 4,92,67,200 [20% extra royalty paid is Rs. 70,46,400] and the penalty recovered for unauthorized excavation is Rs. 1,75,67,275."

9. The argument of the learned counsel for the petitioner that for recovery of the amount of the entire costs of the contract, 30 years'' period provided to the respondent No. 5 is excessive, which argument is not correct. Rule 4[1] of the National Highways Fees [Determination of Rates and Collection] Rules, 2008 provides that the rate of fee for use of the section of national highway, permanent bridge, by-pass or tunnel constructed through the public funded project or private investment project shall be identical. Sub-rule [2] of Rule 4 is

reproduced hereunder:

"[2] The rate of fee for use of a section of national highway of four or more lanes shall, for the base year 2007-08, be the product of the length of such section multiplied by the following rates, namely:--

Explanation.--For the purposes of this rule,-

[a] "car" or "jeep" or "van" or "light motor vehicle" means any mechanical vehicle the gross vehicle weight of which does not exceed seven thousand five hundred kilograms or the registered passenger carrying capability as specified in the certificate of registration issued under the Motor Vehicles Act, 1988 does not exceed twelve excluding the driver;

[b] "light commercial vehicle" or "light goods vehicle" or "mini bus" means any mechanical vehicle with a gross vehicle weight exceeding seven thousand five hundred kilograms but less than twelve thousand kilograms or the registered passenger carrying capability as specified in the certificate of registration issued under the Motor Vehicles Act, 1988, exceeds twelve but does not exceed thirty-two excluding the driver;

[c] "truck" or "bus" means any mechanical vehicle with a gross vehicle weight exceeding twelve thousand kilograms but less than twenty thousand kilograms or the registered passenger carrying capability as specified in the certificate of registration issued under the Motor Vehicles Act, 1988, exceeds thirty-two, excluding the driver;

[d] "heavy construction machinery" or "Earth moving equipment" or "Multi axle vehicle" means heavy construction machinery or earth moving equipment or mechanical vehicle including a multi axle vehicle with four to six axles or vehicle [inclusive of the axle of the trailer, if any] with a gross vehicle weight exceeding twenty five thousand kilograms but less than sixty thousand kilograms;

[e] "oversized vehicle" means any mechanical vehicle having seven or more axles or vehicle with a gross vehicle weight exceeding sixty thousand kilograms; and

[f] three axle vehicle means any mechanical vehicle having three axles [inclusive of the axle of the trailer, if any] and with a gross vehicle weight, less than or equal to twenty five thousand kilograms."

10. Rule 5 of the Rules of 2008 is quoted hereunder:

"5. Annual revision of rate of fee.--[1] The rates specified under Rule 4 shall be increased without compounding, by three per cent each year with effect from the 1st day of April, 2008 and such increased rate shall be deemed to be the base rate for the subsequent years.

[2] The applicable base rates shall be revised annually with effect from April 1 each year to reflect the increase in wholesale price index between the week

ending on January 6, 2007 [i.e., 208.7] and the wholesale price index for the month of December of the year in which such revision is undertaken but such revision shall be restricted to forty per cent of the increase in wholesale price index.

[3] The formula for determining the applicable rate of fee shall be as follows:--

Explanation.--For the purpose of this sub-rule,-

[a] applicable rate of fee shall be the rate payable by the user;

[b] base rate shall be the rate specified in rule 4 read with sub-rule [1] of rule 5;

[c] WPI A means the wholesale price index for the month of December of the immediately preceding year the date of revision under these rules; and

[d] WPI B means the wholesale price index of the week ending on 6th January, 2007 i.e. 208.7.

Illustration.--If the revision is to be made for the year 2008-09 by applying the wholesale price index for the month of December, 2007 [i.e. 216.4], then the rate for car, jeep or van will be 0.6794 as computed below:--

Applicable rate of fee: 0.6695 x [216.4-208.7] ? 0.4=0.6794]/[208.7]

[4] Annual revision of rate of fee under this rule shall be effective from first of April every year."

11. Thus, the argument of the learned counsel for the petitioner that 30 years'' period is excessive and if contract would have been awarded for an amount of Rs. 800 Crores then, the period would have been less and public would have been benefited for payment of toll is not correct. If the National Highway was to be constructed by the Central Government, then, it would have involved the expenditure of Rs. 1008 Crores. By awarding a contract to the contractor, the government has saved its money and interest on such money. It is open to the contractor to get a contract at a rate fixed by the Government and thereafter give it to sub-contractors at lesser amount, which is clear from the minutes of the Cabinet Committee of Infrastructure meeting. The relevant portion of the said minutes are quoted hereunder:

"Press Information Bureau" Government of India Cabinet Committee on Infrastructure

24-December-2009 13:6 IST

Project of four laning of Ahmedabad-Godhara section of NH-59 in the State of Gujarat under NHDP Phase III

CCI Decision

The Cabinet Committee on Infrastructure today approved the implementation of the project of 117.60 Km long section in the State of Gujarat of four laning of

Ahmedabad-Godhara section of NH-59 under NHDP Phase III on Design, Build, Finance, Operate and Transfer [DBFOT] toll basis.

The total project cost is estimated at Rs. 1008.50 crore under the DBFOT pattern. The concession period of the project shall be for 30 years including a construction period of 30 months.

The main object of the project is to expedite the improvement of infrastructure in the State. The project is one of the stretches approved by the Government under the NHDP Phase III. The project road runs between Ahmedabad and Godhara in the State of Gujarat and it will provide improved interstate connectivity between Gujarat and Madhya Pradesh and will facilitate in reducing the time and cost of travel.

xxx xxx xxx"

12. From the aforesaid material it is clear that there was no illegality in awarding of a contract or in fixing the time period of 30 years for recovery of the amount of the cost including the profits for a period of 30 years provided to the respondent No. 5. We do not find that the reliefs claimed in the writ petition can be granted to the petitioner, or any committee is required to be appointed.

13. This Public Interest Litigation has been filed by the petitioner after the contract for construction of the road in question has been awarded, entire road has already been constructed and the collection of toll tax has also commenced and thereby the contract has been executed. Therefore, at this stage, the petitioner wants the award of the entire contract investigated into, which is not permissible. Thus, the petition is devoid of merits and is accordingly dismissed. No costs. Interim relief, if any, is vacated.

