

(2016) 01 SC CK 0056

In the Supreme Court Of India

Case No : I.A. Nos. 366, 367, 368, 370 in I.A. No. 365 in I.A. No. 345, I.A. No. 369, 373, 374 In I.A. No. 366 In I.A. No. 365 In I.A. No. 345 in Writ Petition (Civil) No. 13029 of 1985.

M.C. Mehta

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 07-01-2016

Acts Referred:

Citation : (2016) 4 SCC 269

Hon'ble Judges : T.S. Thakur, CJI; Dr. A.K. Sikri; R. Banumathi, JJ.

Bench : Full Bench

Advocate : Harish N. Salva, Sr. Advocate, (A.C.), Aparajita Singh, (A.C.), Sidhartha Choudhary, (A.C.) and A.D.N. Rao, (A.C.), Advocates, M.C. Mehta, Advocate (Petitioner in person) and Shyam Divam, Sr. Advocate, Jatin Zaveri, Rakesh Sinha and Neel Kamal Mishra, Advocates, for the Appellant; Pinky Anand, ASG, V. Mohana, Sr. Advocate Ajay Bansal, Praveen Swarup, Vritika Sachdeva, Rishabh Jain, Praveen Swarup, Gaurav Yadav, Advocates Harpreet S. Sandhu, Meenakshi Grover, Mukul Singh Sandhu, Kaushal Yadav, Neeraj Kr. Sharma, S.N. Terdal, B. Krishna Prasad, Wasim A. Qadri, Ajay Kumar Singh, Rashmi Malhotra, Zaid, Mohan Prasad, Shadman Ali, D.S. Mahra, Anil Grover, AAG Sanjay Kr. Visen, Satish Kapoor, Gaurav Bhatia, AAG Utkarsh Jaiswal, Aditya Narayan Singh, Samir Ali Khan, Chirag M. Shroff, Bhaskar Das, Rohit Kumar, Ashwin Reddy, Rakesh Kumar, D.N. Goburdhan, Parbal Bagchi, Abhishek Aggarwal, Pallavi Chopra, Vijay Panjwani, S.R. Setia, Advocates and S. Narain & Co, for the Respondent

Final Decision : Disposed Of

Judgement

1. This order shall dispose of W.P. (C) No. 817 of 2015 filed under Article 32 of the Constitution of India and I.As. No. 366, 369, 370, 373 and 374 filed by the SMYR Consortium LLP and I.As. No. 367 and 368 filed by the South Delhi Municipal Corporation (SDMC) in W.P.(C) No. 13029 of 1985.

2. Writ Petition (Civil) No. 13029 of 1985 pending in this Court for over three decades has been filed in public interest by Shri M.C. Mehta, a noted environmentalist, in which the petitioner primarily seeks directions considered

suitable for improving the environment in the national capital region. A series of orders have been passed by this Court in the said petition over the past 30 years. What, however, has triggered the controversy raised in Writ Petition (c) No. 817 of 2015 and the connected applications being disposed of by this Order is an order passed by this Court on 9th October, 2015, by which this Court had, inter alia, directed levy of "Environmental Compensation Charge" (ECC) of Rs. 700/- and Rs. 1300/- for the categories of vehicles, mentioned in the said order. Passenger vehicles, ambulances and vehicles carrying essential commodities like food-stuffs were, however, exempted from the said charge and so were oil tankers. The collection of ECC, from the vehicles entering Delhi from several entry points at the periphery was entrusted to the petitioner in Writ Petition (Civil) No. 817 of 2015 viz. SMYR Consortium LLP (hereinafter referred to as "SMYR" or "toll collector") who is the toll collector, by virtue of a contract entered into between the SMYR and South Delhi Municipal Corporation. The proceeds of the collections are to be eventually handed over to the Government of NCT of Delhi by the Friday of every week. Delhi Government was in turn directed to furnish accounts of the receipts and the expenditure incurred to Environment Pollution (Prevention and Control) Authority (EPCA) and to this Court on a quarterly basis. This Court had further directed the toll collector to put in place a Radio Frequency Identification (RFID) system at its own cost at nine main entry points in the city by November 30, 2015 and on the remaining 118 entry points by 31st January, 2016 failing which the toll collector was to be treated as being in breach of their contractual obligation. Several other directions were issued by this Court which are of no immediate relevance for disposal of the present writ petition and the interlocutory applications. Pursuant thereto, Govt. of NCT of Delhi has issued notification dated 20th October, 2015 and modified notification dated 30th October, 2015 imposing ECC as per the rates mentioned in the order dated 9th October, 2015.

3. The above directions were then followed by yet another order passed by us on 16th December, 2015, by which we had, apart from raising the levy, issued certain further directions including a direction that traffic from N.H.-1 connecting the Northern States to Delhi and N.H.-8 connecting Jaipur and Western parts of the country to the national capital Delhi shall be diverted to bypass the city. Certain other directions regarding conversion of diesel taxis into C.N.G.-run vehicles and regarding registration of SUVs and private cars of the capacity of 2000 cc and above running on diesel fuel were also issued. This order paved way for yet another notification dated 23rd December, 2015 revising the rates of ECC.

4. As pointed out above, SMYR has a toll-collecting contract from respondent No. 2-South Delhi Municipal Corporation (SDMC) effective from 16th May, 2015. The contract is meant to last for a period of three years ending 16th May, 2018. The contract, inter alia, provides for installation of RFID system by the contractor at its own costs at 9 entry points within a period of six months and the remaining over an unspecified period of time. The contract envisages payment of a sum of Rs. 10,54,13,115/- to be made by SMYR on every Tuesday of every succeeding

week. SMYR, in terms of the contract, is required to furnish bank guarantees for the due and faithful performance of the contractual obligations undertaken by it.

5. The case of the SMYR is that on account of the direction issued by this Court in terms of our orders dated 9th October, 2015 and 16th December, 2015, the vehicular traffic entering the national capital has been reduced considerably not only on account of the direction regarding diversion of vehicles that are not Delhi-bound, away from Delhi but also on account of the imposition and later enhancement of the levy towards ECC. The petitioner's further case is that on account of the orders passed by this Court and the adverse impact it has had on the collection of toll, it has been unable to remit the stipulated amount of Rs. 10.54 crores per week for the weeks commencing 2nd November, 2015. The petitioner's further grievance is that on account of the fall in the vehicular traffic and the resultant lower levels of collection, it could remit to the respondent-Corporation a lesser amount proportionate to the incoming vehicular traffic i.e. 70% of the contractual amount, which left a deficit of nearly Rs. 28.46 crores between 2nd November, 2015 and 28th December, 2015. Taking note of the said deficit, the SDMC has, it appears, encashed three of the bank guarantees furnished by the petitioner-toll collector for a sum of Rs. 21.19 crores (approximately).

6. Aggrieved by the imposition of the ECC in terms a notification dated 20th October, 2015, as modified by notifications dated 30th October, 2015 and 23rd December, 2015, the SMYR has filed the present writ petition in which it has prayed for a certiorari, quashing the said notifications and a writ of prohibition restraining respondent no.1-Government of NCT of Delhi from acting in terms or in furtherance thereof. The petitioner has, apart from WP No. 13029 of 1985, filed interlocutory applications mentioned above for modification of the Orders passed by this Court, imposing ECC on the Delhi bound vehicles.

7. Appearing for SMYR - Mr. Shyam Divan, learned senior counsel, strenuously argued that the imposition of ECC by the Government of NCT of Delhi in terms of the impugned notification was unsupported by any legal sanction. He urged that the notification was no more than an executive order by which no levy like the one imposed there under could be lawfully imposed. He submitted that although the notifications in question have been issued pursuant to the orders passed by this Court yet the same have to be tested on their own merit and by reference to the constitutional provisions which do not permit levy of any such charge on vehicles entering any local area. He submitted that there was no legislative sanction leave alone any constitutional authority under which a notification could impose or legitimise recovery of any such charge especially when the same impacted an existing contract, lawfully entered between two independent and unrelated parties.

8. Alternatively, it was submitted by Mr. Divan that keeping in view the changed scenario and the fact that the number of vehicles entering Delhi would stand further reduced on account of further directions issued by this Court, the contract

awarded in favour of the petitioner was no longer feasible. He urged that the petitioner could be given the option to exit on terms considered reasonable to avoid complication including litigation that may inevitably follow any action which the parties to the contract may choose to take. It was submitted that the petitioner was ready and willing to continue on the existing contractual terms upto 31st January, 2016, to enable any alternative arrangement made by the respondent-Corporation to take effect from 1st February, 2016. It was urged that in order to give a quietus to the controversy relating to the legality of the notifications as also the rights and obligations of the parties under the contract executed between the petitioner and the respondent-Corporation, this Court could in exercise of its power under Article 142 of the Constitution of India, pass appropriate directions to ensure a smooth transition for a take-over by the new contractor to be appointed by the Corporation.

9. Elaborating that submission, Mr. Divan pointed out that consequent upon the directions issued by this Court the petitioner had made arrangements for collection of the ECC at the stipulated rate by engaging an additional work force comprising nearly 800 persons to man the entry points for the collection work. This, according to Mr. Divan, involved an additional expenditure towards salaries/wages of those engaged by the petitioner was in range of Rs. 1,00,00,000/- (Rupees one crore) per month approximately. The petitioner had according to Mr. Divan, incurred additional monthly running expenses to the tune of rupees one crore approximately. This according to Mr. Divan entitled the petitioner toll-collector to claim service charge for the service provided by the petitioner to the Government of NCT by way collection of the ECC on its behalf. Directions for payment of the service charge could, according to the learned counsel, issue by debiting to the ECC amount deposited with the Government. Relying upon a Circular dated 15th June, 2007 issued by NHAI, Mr. Divan argued that according to the said circular, the service charge prescribed by the Highway Authority ranged from 14% to 20%.

10. It was further submitted that the petitioner itself was paying a service charge of 13.5% to M/s. ITNL Toll Management Services Limited which was rendering service to the petitioner at Delhi-Noida-Delhi (D.N.D.) flyover. Reliance was also placed on a similar charge being paid by him at the rate of 7% to M/s. Badarpur Faridabad Tollway Limited which was engaged for rendering similar toll collection service to the petitioner at the Badarpur entry point. It was urged that keeping in view the circular issued by the National Highways Authority of India (NHAI) as also the service charge being paid by the petitioner to its service providers, the petitioner would be entitled to a service charge of a minimum of 10% if not more of the amount collected towards ECC.

11. Mr. Divan further submitted that in addition to the payment of service charge, the petitioner ought to be suitably compensated for transfer of the infrastructure put in place in connection with the collection of toll and ECC. The infrastructure comprises computer software, hardware, CCTV, lights, stationary

and fixtures etc. which were under the terms of the contract liable to be handed over to the Corporation at the end of the contractual but will now be made over to the corporation or its contractor due to premature exit of the petitioner. It was submitted that if this Court were to find it difficult to estimate the value of the equipment so installed for purposes of assessing the amount of compensation payable to the petitioner, the least this Court could do was to keep the said aspect in mind while determining the extent of service charge payable to it.

12. On behalf of the respondent-South Delhi Municipal Corporation (SDMC), it was contended by Ms. Pinky Anand that the Corporation considers the writ-petitioner to be in default and proposes to terminate the contract, invoke the bank guarantees furnished by it and recover the amount otherwise contractually payable by the contractor. She urged that the contractor had defaulted in the performance of its contractual obligations as it had failed to pay the contracted amount of Rs. 10.54 crores (approximately) every week between 2nd November, 2015 and 3rd January, 2016. There was, according to Ms. Pinky Anand, a deficit of Rs. 28.46 crores (approximately) for the above period which has been partially recovered by the respondent-Corporation by invoking three bank guarantees totalling a sum of Rs. 21.19 crores (approximately) leaving a balance of Rs. 7.26 crores (approximately). She submitted that if the contract were to be terminated as the Corporation proposes to do, the Corporation would in addition be entitled to claim a penalty of 20% of the total toll-contract fees amounting to Rs. 330.69 crores against which the petitioner was required to furnish a performance bank guarantee of Rs. 179.98 (approximately), but has furnished bank guarantees for a lesser amount promising to make up the deficiency in due course. The petitioner could also be blacklisted and so could its LL.P partners. She submitted that all these options were open to the Corporation yet the Corporation was not averse to allowing the contractor to exit if such exit is considered just and proper by this Court in the peculiar circumstances of the case.

13. Mr. Harish N. Salve, learned senior counsel who has been assisting us in these matters submitted that the changed situation in which the contractor is placed, on account of the orders passed by this Court, may have really made the toll collection contract unworkable, although the contractor has had from the very beginning a clear idea that vehicles that were not Delhi bound, were not supposed to enter Delhi and were in terms of the contract required to be diverted to bye-pass Delhi. The directions issued by this Court restraining of vehicles from entering Delhi may, in that view, have had no real impact on the collection of toll legitimately payable by such vehicles. Even so, the Corporation may, argued Mr. Salve, be justified in annulling the arrangement as the earlier contract, inter alia, provides for installation and operation of the Radio Frequency Identification (RFID) systems by the toll collecting contractor which may not be the right thing to do keeping in view the fact that RFID system will remain available to the toll collecting contractor for any possible manipulation. The ideal thing which according to Mr. Salve, could be done was to direct installation and operation of RFID system by an agency other than the contractor, appointed to collect the toll.

This, according to Mr. Salve, may not be possible in the given situation as the contract, executed between the parties, is a composite contract for collection of toll as well as for installation of RFID system. The exit proposal given by Mr. Divan, could, therefore, be a reasonable solution not only for the contractor to part company but also for the Corporation to take a call on appointing independent agencies for collection of toll and installation of the RFID system.

14. On the question of payment of service charge to the petitioner towards the service provided by way of collection of the ECC in terms of the orders passed by this Court, Mr. Salve submitted that the additional duty cast upon the petitioner toll contractor may have certainly involved engagement of additional man-power but the determination of the extent of expenditure on the same may require a comprehensive exercise which may not be feasible in these proceedings.

15. Even so, the figures provided by the petitioner, contended Mr. Salve, suggest that there was an additional outlay towards employment of additional hands for manning the system and for collection of the ECC and other expenses incurred in that regard. All such expenses would not, however, exceed Rs. 2,00,00,000/- (Rupees two crores) per month. The service charge claimed by the contractor should not exceed Rs. 2,00,00,000/- (Rupees two crores) per month for a period of three months i.e. November 2015, December 2015 and January 2016. The total amount for those three months would work out to Rs. 6,00,00,000/- (Rupees six crores) in all, which amount this Court could consider awarding in favour of the petitioner towards compensation for the service rendered by it in the matter of collection of ECC. Mr. Salve was not averse to this Court taking into consideration the fact that the present set-up/system put in place by the petitioner would now be transferred to the new contractor/agency to be chosen by the Corporation which could also be suitably assessed for purposes of compensating the outgoing contractor. He urged that taking an overall view of all the aspects a total amount of Rs. 7,26,30,799/- representing the differential which should have been paid and which remained short-paid by the petitioner could be set-off against the amount payable to the petitioner towards service charge/compensation for the infrastructure and premature termination of the toll collection contract and the petitioner be allowed to exit the contractual arrangement subject to the petitioner depositing, on a weekly basis, the contracted amount Rs. 10,54,13,115/- for the remaining three weeks of January 2016.

16. We have given our anxious consideration to the submissions made at the Bar. It is rarely, if ever, that this Court interferes with an arrangement in the realm of contract by exercising its powers under Article 142 of the Constitution especially when it is an on-going contract. But the present is a case where the parties agree that their rights and obligations be decided by this Court in these proceedings only. Recourse to separate legal proceedings would lead to multiplicity and unnecessary procrastination. The case at hand is in that sense distinguishable from the rest. We say so because we are dealing here with a

situation where an on-going contract has been affected by what is perceived to be a fall-out of judicial orders passed by this court. Diversion of vehicles whether on account of orders directing such diversion or on account of environment cess imposed upon those entering Delhi, has had its impact, no matter the extent of such impact cannot be accurately assessed on a scientific basis. That apart, the proposed installation of RFIDs to improve the existing method of collection will, according to M/s. Harish N. Salve and Pinky Anand, take around nine months. An end of the current arrangement will help in taking steps for improving the system by using modern technology. We are also of the view that the existing contractual arrangement if terminated will not reduce litigation but also pave way for an all round improvement in the system; particularly when the proposed termination of the contract by the corporation on the ground that there was a default on the part of the contractor has not fructified so far. Even today, when the matter came up for final hearing and disposal, Ms. Anand was not armed with a termination order to be served upon the respondent. All that was said was that the option of terminating the contract was available, as indeed it would be, if a default is committed by the contractor, but the fact of the matter is that no termination has yet taken place. That being the position the parties have upon consideration of the pros and cons of the situation and eventually agreed to the petitioner being given an honourable exit upon terms and conditions that have been worked out by them with the help of Mr. Salve, learned amicus.

17. As rightly mentioned by Mr. Salve, there is a total deficit of Rs. 7,26,30,799/- upto 5th January, 2016. That amount if set-off against the claim which the petitioner makes towards service charge and compensation for the infrastructure payable to it, including software, hardware, CCTV, lights, stationary and fixtures etc. and further including compensation for a premature termination of the contract will put an end to the uncertainty that looms large over the entire arrangement. Any such settlement will finally determine rights and obligations of the parties flowing from the contract. In the circumstances, therefore, it is unnecessary for us to deal with the merits of the challenge mounted by the petitioner. Instead, the matters, with the consent of counsel for the parties, stand disposed of with the following directions:

(1) The petitioner-SMYR Consortium LLP shall continue to collect toll and ECC as before, at the rates stipulated for that purpose and deposit Rs. 10,54,13,115/- towards toll every week with the respondent-South Delhi Municipal Corporation (SDMC) till the end of January, 2016.

(2) The amount collected towards ECC shall be deposited with the Government of NCT of Delhi.

(3) In the event of default in the making of deposit(s), as mentioned above, the respondent-Corporation shall be free to encash the bank guarantees available with it and forfeit the securities provided by the petitioner.

(4) The managing partner(s) of the petitioner-SMYR Consortium LLP shall in

addition file individual undertakings in this Court undertaking to faithfully comply with the above directions. Undertakings shall be filed by the managing partner(s) within one week from today.

(5) The amount Rs. 7,26,30,799/- short deposited by the Writ Petitioner shall stand set-off towards compensation payable to the petitioner for services rendered by it and for premature termination of the contract. The said amount shall, however, be reimbursed to respondent-Corporation by the Govt. of NCT of Delhi from the amount collected towards ECC and deposited with the Government of NCT of Delhi. The reimbursement shall be made within four weeks from today.

(6) The respondent-Corporation shall be free to make any alternative arrangement in the manner considered appropriate but whatever be the arrangement made by it, the same shall be made effective not only for collection of the toll but also the ECC. The Corporation would do well to initiate proper action in that direction well in time so that necessary arrangement is put in place by Monday, the 1st February, 2016.

(7) The petitioner and the respondent-Corporation shall have no further claims against each other, on any count whatsoever, arising out of or in connection with the contract which shall w.e.f. 1st February, 2016 stand terminated as fully satisfied on the terms, mentioned above.

(8) We make it clear that this order has been passed in the peculiar circumstances of this case in exercise of our power under Article 142 of the Constitution of India and shall not be a precedence for other cases.

(9) Upon satisfactory compliance with the above directions in regard to deposit of the money etc. and handing over of the existing system with all the related infrastructure, after proper inventorisation etc., the bank guarantees lying with the respondent-Corporation shall be returned to the petitioner-SMYR Consortium LLP.