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In the Bombay High Court

Case No : Writ Petition (L) No. 1419 of 2015

Design Dialogues (India) Pvt. Ltd. APPELLANT

Vs

Bharat Petroleum Corporation Ltd. and Others RESPONDENT

Date of Decision : 20-08-2015

Acts Referred:
Constitution of India, 1950 — Article 14, 226

Citation : (2016) 1 ALLMR 597

Hon'ble Judges : S.C. Dharmadhikari, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : Jitendra Choudhary and Girish Paryani, for the Appellant; Nikhil Sakhardande and S.R. Page, Advocates for the Respondent

Judgement

S.C. Dharmadhikari, J—This Writ Petition under Article 226 of the Constitution of India impugns the order dated 30th December, 2014 which has been issued by Respondent Nos. 1 and 2.

2. The further relief that is sought is to direct Respondent No. 1 to evaluate the tender the details of which are set-out in prayer clause(b) dated 13th February, 2015 on merits and not reject the same only on the ground of any earlier adverse order against the Petitioner.

3. The Writ Petition was placed before a Division Bench of this Court on 16th June, 2015 and after hearing both sides, this Court directed that no interim relief can be granted but Petition would have to be placed for admission and disposal.

4. Accordingly, it was listed before us and with the consent of both sides, we have heard the Petition finally. Hence, Rule. The Respondents waive service.

5. The first Respondent to this Petition is Bharat Petroleum Corporation Limited which is a Government Company and registered as such under Section 617 of the Indian Companies Act, 1956. The second Respondent is the officer and who has issued the order impugned in the Writ Petition. The third Respondent is the Union of India.

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6. The Petitioner before us is a Private Limited Company registered under the Indian Companies Act, 1956 having its office at the address mentioned in the cause title.

7. The first Respondent invited bids by issuing a public tender. That was a annual rate contract for fabrication, supply and erection of new Retail Visual Identity ("RVI" for short) element at retail outlets for the western region in the year 2013. The Petitioner applied for the same. It is the case of the Petitioner that it was declared eligible and the contract was awarded to them.

8. It is the claim of the Petitioner that the western region was comprising of fifteen territories for which six contracts were entered into between the parties. The nature of the work mandating the scope thereof is outlined under an agreement dated 3rd October, 2013. The duration of this contract was one year from 27th September, 2013 till 26th September, 2014. Annexure-C to the Writ Petition is a copy of this contract.

9. The Petitioner and the first Respondent executed a separate document styled as an integrity pact. This integrity pact was signed, according to the Petitioner, separately along with the main contract. In total, six contracts were executed for fifteen regions. The integrity pact was entered into with an intention to prevent corruption and adoption of unfair means or trade practices. The main contract was to outline the basic terms and conditions regarding the quality of work to be performed in each of these territories. The Petitioner has annexed a copy of one such integrity pact and submitted that a complete reading of the same will denote as to how to achieve the aforementioned intent and to comply with the contractual obligations and work to be performed and completed by the Petitioner that it was executed. The Petitioner, therefore, has submitted that the provisions of "holiday listing and blacklisting" are to be found in the integrity pact. The contract on the other hand deals with performance standards and remedy of Respondent No. 1 was to financially penalize the Petitioner, in case the Petitioner''s work is found to be deficient. It is then, argued and submitted that the legal remedy of arbitration is unavailable, if there is a breach of the integrity pact whereas that remedy can be availed of in the event of any contractual dispute arising out of the separate contractual agreement.

10. There was no dispute regarding integrity of the Petitioner. According to the Petitioner, certain work could not be executed and completed within a time bound manner. The Petitioner has its version for not being able to carry out the contractual obligation within the time stipulated. It blames the Respondents for the delay whereas Respondent No. 1 has its own version with regard to the quality and workmanship of the Petitioner.

11. We are not concerned with this issue. All that we are concerned with is the fact that the time to carry out the contract and complete the work was extended and that correspondence is at Annexure-H colly. It is the claim of the Petitioner that it completed the work to the satisfaction of Respondent Nos. 1 and 2.

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However, the stand of Respondent Nos. 1 and 2 is to the contrary.

12. The contention raised before us is that while Respondent Nos. 1 and 2 may have all the powers to terminate the contract or to claim and recover monies in the event of any damage or loss caused to them, they could not have resorted to the powers under the integrity pact virtually blacklisting the Petitioner. If the impugned order is perused in the light of the above argument then, the same cannot be sustained and must be quashed and set aside, as it violates the mandate of Article 14 of the Constitution of India. Article 14 demands that even in matters of contract, the authorities like Respondent Nos. 1 and 2 have to act fairly, reasonably and in a non-arbitrary and non discriminatory manner. That mandate has not been fulfilled but flouted, is the contention.

13. Counsel for the Petitioner Mr. Choudhary argued before us that if the nature of the integrity pact and the outline contract/agreement dated 3rd October, 2013 and the difference in them is noted, then, the impugned order cannot be sustained. He has brought to our notice the order copy which is at Annexure-J to submit that the same refers to performance on the parameters of quality of the materials, workmanship and delivery schedule and that the same for the last one year have been far from satisfactory. The same outlines the defects stated to be of a recurring nature. It has, thus, been emphasized that the work is of poor quality and shabby and has, therefore, brought bad name to the first Respondent Corporation. In spite of several opportunities, oral and written reminders, the issue of quality and delay have not been addressed to the satisfaction of the first Respondent. It is in these circumstances, that the Petitioner has been put on holiday listing for a period of one year with effect from 18th December, 2014. The Counsel submits that net effect of all this is that the Petitioner will not be able to place its bids for not only any contract which could be awarded by the first Respondent in future but there is a threat that all public sector corporations and particularly oil companies would be communicated this decision and persuaded by the first Respondent not to award any contract to the Petitioner. The impact of any damage that would be caused by such illegal and unsustainable act, is thus underlined before us. It is, in these circumstances, that it is submitted that the Petition be allowed by quashing and setting aside the impugned order.

14. On the other hand, Mr. Sakhardande appearing on behalf of Respondent Nos. 1 and 2 would submit that there are ample powers vesting in this first Respondent Corporation by which it can deal with lapses and defaults on the part of the parties like the Petitioner. While the public sector corporations discharging public duties insist on contractors signing and executing the integrity pact so that they do not resort to illegal and unfair means, corrupt practice while executing the work and in the course of the contract or prior thereto, a separate agreement having been executed, does not mean that there is no power either to blacklist or to put a contracting party on the holiday list thereby debarring them from award of any future contracts for a stipulated period. That there is no challenge to this

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power, is apparent from the reading of the Petition and the averments. All that is submitted is that the power to blacklist or put a contractor on holiday list cannot be exercised when there are contractual disputes or on the allegation that the work is not as per the required standard or quality. If there is a power to blacklist, then, merely because the source of that power is not mentioned or a wrong clause in the contract has been invoked, does not mean that there is no power or that the authority lacks the power. Mr. Sakhardande relied upon well settled principles that mere mention of a wrong provision or clause in any regulation, rules or contract will not vitiate the decision, if the authority taking the action otherwise possesses such powers. Similarly, his argument is that there are inherent powers to blacklist a contractor and that power can be invoked irrespective of any inconsistent stipulation in the contract or absence thereof. The power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work is inherent in the party allotting the contract. Thus, the power to award the contract by implication includes the power to terminate the relationship or bring an end to it. It can also include the power to ban the contractor from awarding of any further contract. Reference is made to the decision of the Hon''ble Supreme Court in the case of Kulja Industries Limited Vs. Chief Gen. Manager W.T. Proj. BSNL and Others, (2013) 6 ABR 662 : AIR 2014 SC 9 : (2013) 13 JT 242 : (2013) 12 SCALE 423 .

15. Thus, essential argument and submission is that the Writ Petition is devoid of merits and should be dismissed for the forum chosen, is not appropriate to resolve the contractual dispute.

16. With the assistance of the counsel appearing for both sides, we have perused the Writ Petition and all Annexures thereto including the impugned order. There is no dispute about the essential facts that the bidder/contractor like the Petitioner applied pursuant to the public tender and thereafter was awarded the contract by the public corporation. That is beyond doubt. The parties executed the integrity pact, copy of which is at Annexure-D, laying down the commitment of the principal namely Bharat Petroleum Corporation Limited, in Section-1. The intent of the parties is that there is a demand for full compliance with all relevant Laws and Regulations and the principles of economic use of resources and of fairness and transparency in relation with the bidders, contractors and suppliers. It is with that intention and purpose that there are certain commitments of Bharat Petroleum Corporation enlisted in Section-1 which inter alia is equal treatment to all bidders during tender process. There would be no discrimination and by a fair and transparent method bids would be scrutinized and final decision taken.

17. Section-2 contains the commitments of the bidder/contractor and supplier that he would take all measures to prevent corruption, that he would not indulge in the same during the tender process or execution of contract nor will he indulge in acts which would result in an undisclosed agreement or understanding to the detriment of others, that the bidder/ contractor/supplier will not commit any

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offence under the relevant Anti Corruption Laws of India and will not use improperly so as to avoid competition or personal gain, or to pass on to others, any information or document provided by the Principal. All disclosures will be made fairly and accurately, that the bidder/ contractor/supplier would not instigate third party to commit offences. For the disqualification in Section-3, possibly the impugned drastic action is proposed. That section opens with the words a transgression is committed before contract is awarded through violation of Section-2 or in any other form so as to put reliability of bidder into question, in that event principal is entitled to disqualify the bidder from the tender process or terminate the contract, if already signed for such reason. We have no doubt in our mind that the power of awarding the contract would take in its import the power to terminate it. That there is such power vested, is also not doubted. Thus Section-3 provides for disqualifying the bidder or contractor from tender process and further contracts. However, that can be done provided the bidder or contractor violates Section-2 of this integrity pact. That is apparent from reading of Section-3 (Clauses 1 to 4 thereof). The other sections provide for compensation or damages and to take into account any previous transgression. There are powers to take punitive action. Section 6 provides for equal treatment for all bidders/ contractors/suppliers/sub-contractors and Section 8 provides for independent external monitors. Duration of the pact is also provided by Section-9, and by Section-10 it is clearly stated that the agreement is subject to Indian law, place of performance and jurisdiction is the registered office of the Principal i.e. Mumbai. The Arbitration clause provided in the main tender document/contract would not be applicable for any issue/dispute arising under integrity pact.

18. That this has been signed by both sides and there is no dispute about the wording of sections and sub-clauses, is apparent. This pact is signed on 4th May, 2013.

19. Reading thereof would denote as to how Respondent No. 1 Corporation understood it as a different and distinct pact and binding the contractor or the bidder by agreeing not to indulge in such acts which have a direct impact on the integrity of the bidder/contractor. By agreeing not to indulge in such acts which have a direct impact on the integrity of the bidder/contractor, to promote transparency and fairness even in contractual matters, therefore, execution of such a pact is contemplated, would not mean that such pact has been understood by the first Respondent to contain similar stipulations, as are to be found in the agreement, copy of which is at Annexure-E page 102. That a separate and distinct pact holding bidder/contractor liable for lack of probity and indulging in corruption or similar acts would be unnecessary, if one or a single agreement of comprehensive nature as is projected now, is executed by the parties. If the memorandum of agreement for jobs executed under schedule of rates/annual rate contract, the description of work, other terms including the validity period is contemplated by parties while awarding the contract, is apparent from the record. Else there was nothing in the integrity pact which

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would outline the nature of the work, the manner in which it is to be carried out, with what materials and all similar and such stipulations particularly to deal with any default on the part of the contractor was unnecessary and not required. If we may briefly indicate, this agreement contains clauses such as period of completion, supply of materials/labour and of the quality demanded by the first Respondent, the damage on account of incomplete work, termination of contract, distinctive work/materials, substitution of contractor, inspection of work, supervision, payment of work done, retention money, measurements, requirements etc. That there is a Arbitration clause in this contract-document is also apparent. The separate agreement, therefore, deals with the contractual dispute and issues arising during the course of execution and implementation of the contract work, that may or may not empower Respondent No. 1 to penalize the contractor by holiday listing or blacklisting in addition to terminate the contract itself. Having found that such a stipulation is not there in the distinct agreement of the above nature, it is not possible to agree with Mr. Sakhardande. Thus, the absence of a clause enabling placing the contractor on a Holiday list or Black list in the contract and its specific insertion in the Integrity Pact would demonstrate the intent of the parties. Thus, violation of Integrity Pact alone by the contractor visits him with the consequences of Holiday Listing or Black Listing and not otherwise. The Contractor''s failure to abide by the clauses of the contract visits him with distinct consequences and except Blacklisting or Holiday listing.

20. That the first Respondent understood the matter in this manner, is apparent from a reading of the impugned order. The impugned order to the extent relevant, reads as under:-

"You have been awarded the work of "Providing New RVI Elements at Retail Outlets in Western Region as per details below with validity from 27.09.2013 to 26.09.2014. Your performance on parameters of Quality of the material, workmanship and Delivery schedule for the last one year has been far from satisfactory. The nature of some of the recurring defects observed during the last one year are listed below.

a) Material dispatched to site in loose condition without proper packing as per the tender.

b) Canopy Fascia frame provided is non standard resulting in misalignment of Blue fascia.

c) Tube lights in canopy fascia not staggered.

d) Vinyl on Bharat Petroleum logo on canopy fascia is peeling off.

e) Top GI flashing not installed as per standard.

f) Scratches, cracks and pitting observed in Column cladding.

g) Column cladding provided is non standard with grooves.

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h) Column skirting is non standard.

I) Column Arch colour mismatch with column cladding.

j) Gap observed between column arches and false ceiling.

k) Spreader frame provided not as per standard and not confirming to tender specifications.

l) Spreader vinyl and art work(lettering and font) not confirming to tender specifications.

m) Vinyl on No sign and Spreader Extension is peeling off and art work is not as per standard.

n) Vinly on No sign and spreader pasting done at site resulting in improper finish.

o) Gap observed between column and spreader extension.

The above defects were observed in majority of the sites executed by you. In addition to the above, abnormal delay in execution and rectification of defective jobs and very poor workmanship was observed at all the sites executed by you resulting in very shabby look to the retail outlets and loss of Brand Image of BPCL. Meetings were held with your representatives on following dates on the above issues.

Meeting held at Maker Towers on 24.03.2014 attended by SMRE West, Manager Engg.(Retail), West, Manager CG, Thane and Mr. Roopak Trehan of M/s. Design Dialogue Pvt. Ltd.

RVI sites executed by your firm visited in Nasik city on 28.04.2014 by SMRE West, Manager CG, Thane, Territory Engineer Nasik and Mr. Roopak Trehan of M/s. Design Dialogue Pvt. Ltd.

Meeting held at Maker Towers on 18.07.2014 attended by SMRE West, Dy. Mgr. Automation, West and Mr. Roopak Trehan of M/s. Design Dialogue Pvt. Ltd.

Several communications were exchanged with you in various forms by our Territory Engineers, Construction Group Managers, and Regional Office on the above issues at different points of time during the last one year.

In spite of our several communications and your assurances, quality and delay issues continued unabated. Quality of the work executed by you has not been satisfactory throughout the year and without any significant improvement."

21. Then, there is reference to several meetings and the advice given to carry out rectification jobs and complete them in time bound manner. Thereafter, there is allegation that even this stipulation has not been adhered to nor the rectification work or job carried out to the satisfaction of the first Respondent/ principal. Then, there is allegation as to how this alleged non performance has painted the corporation in bad light and tarnished its image. It is, therefore, that

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the holiday listing is resorted to. That it is resorted to on account of lack of quality of job or work being unsatisfactory, is therefore, clear from a reading of this order. That this power does not flow from the agreement at page 102, stipulations of which have been referred extensively, is also apparent. That the power under the integrity pact is sought to be invoked and exercised, is also apparent. In such a backdrop and situation, the law laid down by the Hon''ble Supreme Court in Kulja(supra) will not be of any assistance. One must understand that the Supreme Court was considering a case of blacklisting of contractor for future works or contracts and for all times to come. The Writ Petition of the contractor was dismissed and that is how he approached the Hon''ble Supreme Court against the adverse decision of the High Court. In dealing with such challenge, the facts have been noted from paragraph no.2 onwards and in paragraph no.7 what has been held is that on account of the position noted namely fraudulent payments made to the contractor by the officers of Bharat Sanchar Nigam Ltd., a prosecution under the Prevention of Corruption Act, 1988 and resultantly blacklisting permanently. There is a reference made to the show cause notice, the stand of the parties and the blacklisting order. Thereafter, the contentions of both sides have been noted from paragraph nos.12 to 14. The argument was that, only paragraph nos.31 and 32 of the bid documents are the source of the powers to blacklist the defaulting contractor. In that regard, the Court held that if a literal construction of these paragraphs denotes the power to disqualify or blacklist the supplier is available to the purchaser only in the three situations enumerated in paragraphs 31 and 32 and no other, any such interpretation would give rise to anomalous results. A supplier found guilty of much graver offences, failure or violations, resulting in much heavier losses and greater detriment to the purchasers in terms of money, reputation or prejudice to the public interest may go unpunished simply because all such acts of fraud, misrepresentation having not been specified. It is that submission which was dealt with and negated by the Hon''ble Supreme Court. It is in that context one must read paragraph no.17 of the judgment, else the reading thereof in isolation, will not be proper. It is in the backdrop of that situation that the Hon''ble Supreme Court held that the clauses and sub-clauses thereof are not exhaustive of the power of blacklisting which is inherent in the power to award the contract. In the present situation, the power of blacklisting is not flowing from the contract. That power could have been exercised only if there was a breach of the integrity pact and not for any deficient quality of work or failure to carry out the job to the satisfaction of Respondent No. 1. It is in that regard that we find that Respondent No. 1''s action does not comply with the mandate of Article 14 of the Constitution of India. If there was a power to be invoked only to deal with the situation arising out of violation of the integrity pact by the contractor, then, absent such a case or allegation that power cannot be exercised. Having invoked that power not to deal with the situation warranted and provided in the integrity pact vitiates the exercise carried out. If that power is not available, then, the impugned order and action can safely be termed as arbitrary and untenable in law.

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22. As a result of the above discussion, we find that the impugned order cannot be sustained. It is quashed and set aside. Rule is made absolute in terms of prayer clause (a). As a result of the impugned order being set aside, the Petitioner is free to bid for any future contracts of Respondent No. 1 Corporation and such bids shall be considered and dealt with in accordance with law uninfluenced by the holiday listing order or any observations therein.

23. At this stage, Mr. Sakhardande prays for stay of this order. His submission is that the order passed today would result in Petitioner''s being held eligible for bids or award of future contracts and within a short time, Respondent No. 1 desires to invite bids from interested parties. If Respondent No. 1 is obliged to consider the bid of the Petitioner, then, in that event it may not be able to challenge the order in a higher court, therefore the operation and implementation of this order be stayed.

24. On the other hand, counsel for the Petitioner would submit that far from granting any stay, Respondent No. 1 be directed to act on an authenticated copy of this order.

25. Having considered the rival contentions on this limited point, we are of the view that once first Respondent Corporation''s action is found to be unsustainable in law and arbitrary, then, it will not be proper to grant stay of this order. By this indirect method, the order of holiday listing will continue to operate and that can never be the purport and result of our order. Hence, request of Mr. Sakhardande is refused.

Parties to act on an authenticated copy of this order.

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