

(2023) 08 OHC CK 0114

In the Orissa High Court

Case No : Writ Petition (C) No. 21445 Of 2022

M/s. S. Mund Constructions Private Limited

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 18-08-2023

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 19(6)(i), 20(2), 226, 227, 367
Contract Act, 1872 — Section 23, 27, 65
Mental Deficiency Act, 1913 — Section 2(I)(b)(i)
Delhi Municipal Corporation Act, 1957 — Section 418(1)
General Clauses Act, 1897 — Section 3(38)

Citation : (2023) 08 OHC CK 0114

Hon'ble Judges : Dr. B.R. Sarangi, J; Murahari Sri Raman, J

Bench : Division Bench

Advocate : Asok Mohanty, B.K. Nayak, N.R. Mohanty, L. Pradhan, P.C. Nayak, T. Patnaik

Final Decision : Dismissed

Judgement

Dr. B.R. Sarangi, J

1. M/s. S. Mund Constructions Private Limited, a company registered under the Companies Act, 1956, represented through its Managing Director, has filed this writ petition seeking following reliefs:-

"i) Admit the writ petition.

ii) Call for the Records

iii) Issue notice to the Opp. Parties to show cause as to why the writ petition shall not be allowed and upon their filing no cause or insufficient cause allow the writ petition and issue a writ in the nature of mandamus, declaring the Clause-11 of the DTCN to be illegal, irrational, un-constitutional and arbitrary and further prays to strike down the said clause from the DTCN.

And pass any other order which will be deemed fit and proper for the end of

justice;

And for this act of kindness the petitioners as in duty bound shall ever pray.”

2. The factual matrix of the case, in precise, is that the petitioner is a registered Super Class Contractor and has executed several contracts for different departments of the Govt. of Odisha and has never been blamed for any irregularity in completion of the contracts. It has vast experience of civil contract works and has earned a good reputation under the Government of Odisha. In the year 2017-18, pursuant to a public tender notice invited for the work “Construction of H.L. Bridge over River Indravati at 18th K.M on Kodinga Chirma Nadighat road in the District of Nabarangpur under Biju Setu Yojana”, the petitioner entered into an agreement/contract, vide Agreement No. 01 P1 /2017-18, with the date of commencement as 05.05.2017 and date of completion as 04.11.2019. Consequent upon such agreement and the work order issued in its favour, the petitioner complied with all the requirements and moved its men and machinery to the work site. But the RD (Rural Development) Department, after six months from the date of execution of the agreement, handed over the project site and drawing to the petitioner. Further, due to heavy rain and flood during monsoon season, for about 4 months the work could not be progressed. Thereafter, during execution of the contract, COVID-19 pandemic spread out followed by lock-down, shut-down, containment zone, local problem, labour problem and the delay in payment of running bill amount by the department, for which execution of the work was delayed substantially. Consequentially, the petitioner submitted a representation on 07.09.2020 for extension of time up to 11.06.2021, but no action was taken on such representation. However, the Superintending Engineer, Southern Circle Rural Works, Sunabeda, vide his letter dated 12.11.2020, submitted a rescission proposal to the Engineer-in-Chief, Rural Works Odisha. After submission of the rescission proposal, the Executive Engineer, vide his letter dated 11.12.2020, intimated that there was heavy rain and flood at the work site and sought for instruction in the matter. However, the State authorities, without considering the reasons for delay in execution of the contract, passed an order rescinding the contract, vide order dated 31.12.2020, which was communicated by the Executive Engineer, vide his letter dated 14.01.2021, with 20% penalty of the value of the left over work.

2.1 Aggrieved by such action, the petitioner approached this Court by filing W.P. (C) No. 7598 of 2021. The said writ petition was disposed of at the stage of admission, vide order dated 04.03.2021, with an observation that the matter involves disputed questions of fact and the petitioner has to seek other appropriate remedies as may be available to him in accordance with law. As a result, the petitioner has filed a civil suit bearing C.S. No. 58 of 2021 before the learned Civil Judge (Senior Division), Nabarangpur challenging the said order of rescission which is pending for adjudication.

2.2 While the matter stood thus, the Engineer-in-Chief (Civil), Odisha issued

tender notices in respect of several works. The petitioner, after purchasing the tender papers/documents, participated in four numbers of works, but its tender papers were not considered. On enquiry, the petitioner came to know that, in view of Clause-11 of the DTCN (Detailed Tender Call Notice), its tenders would be disqualified as one of its tender had been rescinded, vide order dated 14.01.2021, which was within last five years. Apprehending rejection of the tender, the petitioner submitted a representation dated 25.04.2022 to the Chief Engineer, DPI (Roads), Odisha, with a request not to disqualify its tenders as its previous tender had been rescinded illegally and a civil suit challenging such rescission order is pending. Without taking into consideration of the same, the four tenders of the petitioner were declared disqualified in the proceeding of the Technical Evaluation Committee meeting held on different dates in respect of all the tenders in view of the Clause-11 of the DTCN.

2.3 The Office of the Engineer-in-Chief, (Civil), Odisha-opposite party no.2 issued a tender notice dated 14.07.2022 inviting tenders in respect of 30 numbers of works and the last date for submission of the bid was fixed to 22.08.2022 at 5.30 PM, which was extended to 08.09.2022 by way of a corrigendum. Pursuant thereto, even though the petitioner submitted its tender, the same was also not accepted, in view of Clause-11 of the DTCN. Hence, this writ petition.

3. Mr. Asok Mohanty, learned Senior Advocate appearing along with Mr. P.C. Nayak, learned counsel for the petitioner vehemently contended that the debarment of the petitioner from participating in the tender for a long period of five years, in view of Clause-11 of the DTCN, amounts to violation of the fundamental rights of the petitioner guaranteed under Article-19(1)(g) of the Constitution of India. Such a condition in the DTCN is also irrational and unreasonable and hit by "Wednesbury Principle". It is also contended that for rescission of the contract the tender inviting authority has the power to impose penalty and it has also imposed the penalty @ 20%, but the stipulation in the Clause-11 that whose contract for any work has been rescinded or who has abandoned any work in the last five years, prior to the date of the bid, shall be debarred from qualification, is itself very unlawful, irrational and arbitrary. It is further contended that as per the provisions of Sections 23, 27 and 65 of the Indian Contract Act, it is very clear that when an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. He further contended that in the DTCN, pursuant to which the petitioner was awarded with the contract, an express clause is available that in case the contract is rescinded, it shall be liable for imposition of penalty at the rate of 20% of the value of the balance work. When there is already one penalty provision available, again the stipulation in Clause-11, that such contractor will be disqualified, if a contract has been rescinded within the last five years, is irrational and unlawful. Therefore, such a stipulation in Clause-11 amounts to imposition of double penalty as the Contractor will be declared disqualified for a period of five years from the date of

rescission of the contract. Under the circumstances, he seeks for interference of this Court at this stage and prays that the said Clause-11 should be struck down from the DTCN. To substantiate his contention, learned Senior Advocate appearing for the petitioner has placed reliance on the judgment of the apex Court in *Icomm Tele Limited v. Punjab State Water Supply and Sewerage Board*, (2019) 4 SCC 401.

4. Per contra, Mr. Tarun Patnaik, learned Addl. Standing Counsel appearing for the State-opposite parties vehemently contended that the argument advanced by the learned Senior Advocate, that the condition stipulated under Clause-11 of the DTCN is illegal, irrational and arbitrary, is not correct and the same is speculative one. The said Clause-11, which was Clause-13 earlier, has been incorporated since 2008 by the Public Works Department, Government of Odisha. The embodiment of the conditions in the DTCN are all informative and intended to aware the potential bidders/ contractors to participate in the tender process. The reason for incorporation of said Clause-11 is only to filter the qualified contractor to participate in the tender process and to debar those bidders who either failed to complete the contract or abandoned the contract causing a loss to the public and government exchequer for last 5 years prior to the date of bid. There is a provision in the DTCN for imposition of penalty of 20% amount of the balance work left at the time of rescission of the contract and debarring the contractor to participate in tender process. As such, both the provisions, such as Clause-11 and Clause-121 are distinct to each other in context of the purpose. The same cannot be equated. Even though there is a provision for rescission of contract and imposition of penalty for non-performance of the contract within the time specified, that is completely separate from the provision contained in Clause-11 of the agreement, which is meant for consideration of eligibility criteria to participate in the bid itself. The debarment of a bidder under Clause-11 of DTCN is an outcome of the self-declaration of the bidder, vide Schedule-E, and Affidavit, vide Schedule-F of the bidding document, that is adherence to the legal process. As such, the contention raised, that the provision of Clause-11 of DTCN is not in consonance with Article-19(1)(g) of the Constitution, is not correct and discriminatory, in view of the provisions contained in Article-19(6)(i), which empowers the State for laying down reasonable restrictions on freedom of profession, occupation, trade or business. Here restriction of bidders, on rescission of any contract, is not in violation to the Article-19 (1)(g) of the Constitution.

4.1 He further contended that reliance was heavily placed by the learned Senior Advocate on the provisions of Sections 23, 27 and 65 of the Indian Contract Act, 1872 but the said sections will come into play only if the bi-partite agreement between the parties is signed. Therefore, said provisions are not applicable during tender process. Thereby, the petitioner has referred to wrong provisions to justify its action, for which it is not sustainable in the eye of law.

4.2 It is further contended that knowing fully well the conditions stipulated in the

DTCN, the petitioner participated in the bid and executed the agreement. Having not performed in terms of the agreement, the order of rescission has been passed and the petitioner has been penalised, now therefore he cannot turn around and say that the Clause-11 is arbitrary, unreasonable and contrary to the provisions of law and, as such, it should be struck down. Otherwise also the petitioner is estopped from taking such a stand at a belated stage. As a result thereof, the prayer made in this writ petition cannot be sustained and is liable to be rejected. He further contended that the condition stipulated in the DTCN or Agreement is within the complete domain of the tendering authority. On the basis of such condition, if it has been acted upon by executing agreement, the petitioner cannot say that Clause-11 should be struck down. Consequentially, he seeks for dismissal of the writ petition. To substantiate his contention, reliance has been placed by the learned Addl. Standing Counsel on *Balaji Ventures Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd.*, 2022 LiveLaw (SC) 295.

5. This Court heard Mr. Asok Mohanty, learned Senior Advocate appearing along with Mr. P.C. Nayak, learned counsel for the petitioner and Mr. Tarun Patnaik, learned Addl. Standing Counsel appearing for the State-opposite parties in hybrid mode and perused the records. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. Before delving into the merits of the case, it is relevant to refer to the following provisions of the Constitution of India, Indian Contract Act and the Clauses of the DTCN:-

Article 19 (1) (g) & 19 (6)(i) of the Constitution of India.

"19. Protection of certain rights regarding freedom of speech, etc

(1) All citizens shall have the right

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(g) to practice any profession, or to carry on any occupation, trade or business.

xxx xxx xxx

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or"

Sections 23, 27 and 65 of the Indian Contract Act:-

"23. What considerations and objects are lawful, and what not.

The consideration or object of an agreement is lawful, unless —

it is forbidden by law;

or is of such a nature that, if permitted. it would defeat the provisions of any law:

or is fraudulent ;

or involves or implies, injury to the person or property of another: ,

or the Court regards it as immoral,

or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

xxx xxx xxx.

27. Agreement in restraint of trade, void.

Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind. is to that extent void.

xxx xxx xxx.

65. Obligation of person who has received advantage under void agreement, or contract that becomes void-

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

Clause-11, 120 (relevant provisions) and 121 (c) & (d) of the DTCN.

"11. An applicant or any of its constituent partners of whose contract for any work has been rescinded or who has abandoned any work in the last five years, prior to the date of the bid, shall be debarred from qualification. The bidder is to furnish scanned copy an affidavit at the time of submission of bid about the authentication of bid documents. An affidavit to this effect is to be furnished in Schedule-F. Non furnishing of the scanned copy of information in Schedule-E and required affidavit in Schedule-F, the bid document will be summarily rejected.

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120 ADDENDUM TO THE CONDITION OF P1 CONTRACT

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2.3 Compensation for Delay.

2.3.1 If the contractor fails to maintain the required progress in terms of clause 2 of P-1 Contract or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the Superintending Engineer (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day f month (as applicable) that the progress remains below that specified in Clause 2 of P-1 Contract or that the work remains incomplete.

This will also apply to items or group of items for which a separate period of completion has been specified. Compensation @ 1.5% per month for delay of work, delay to be completed on per Day basis.

Provided always that the total amount of compensation for delay to be paid under this condition shall not exceed 10% of the Tendered Value of work. The amount of compensation may be adjusted or set-off against any sum payable to the Contractor under this or any other contract with the Government. In case, the contractor does not achieve a particular milestone mentioned in contract data, (which is in this case the original work programme furnished by the Contractor and approved by the Engineer-in-Charge which formed a part of agreement) or the rescheduled milestone(s) in terms of Clause 2.5 of P-1 Contract, the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied at the final grant of extension of time. Withholding of this amount on failure to achieve a milestone, shall be automatic without any notice to the contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld, However no interest whatsoever shall be payable on such withheld amount.

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2.5 Management Meetings.

2.5.1 Either the Engineer or the Contractor may require the other to attend a management meeting. The business of a management meeting shall be to review the plans for remaining work and to deal with mailers raised in accordance with the early warning procedure.

2.5.2 The Engineer shall record the business of management meetings and is to provide copies of his record to those attending the meeting and to the Employer. The responsibility of the parties for actions to be taken to be decided by the Engineer either at the management meeting or after the management meeting and stated in writing to all who attended the meeting.

Clause-2 (b) of Percentage Rate P-1. Agreement: - Rescission of Contract

(Amendment as per letter No.10639 dt.27.05.2005 of Works Department, Odisha):-

To rescind the contract (of which rescission notice in writing to the contractor under the hand of the Executive Engineer shall be conclusive evidence), 20% of the value of left over work will be realised from the contractor as penalty

121 A contractor may be black listed as per amendment made to Appendix XXXIV to OPWD code Vol-II on rules for black listing of Contractors vide letter no.3365 dt. 01.03.2007 of Works Department, Odisha.

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c. Constant non-achievement of milestones on insufficient and imaginary grounds and non-adherence to quality specifications despite being pointed out.

d. Persistent and intentional violation of important conditions of contract.”

7. The moot question to be considered by this Court is whether Clause-11, as provided in the DTCN, can be declared as arbitrary, unreasonable and contrary to the provisions of law and be struck down. Answering to the said question, if the provision of Clause-11 is taken into consideration, it would be seen that under the DTCN this condition is required for consideration of a tender document to be submitted by the bidder, which specifically prescribes that an applicant or any of its constituent partners of whose contract for any work has been rescinded or who has abandoned any work in the last five years, prior to the date of the bid, shall be debarred from qualification. Thereby, this is an eligibility criteria put for participation in the bid. More elaborately if it is considered, then it would mean, that if the applicant or any of its constituent partners of whose contract for any work has been rescinded or who has abandoned any work in the last five years, prior to the date of the bid, shall suffer disqualification to participate in the bid. To that extent, the bidder has to furnish scanned copy of the information in Schedule-E and an affidavit in Schedule-F. For non-furnishing of the scanned copy of information in Schedule-E and required affidavit in Schedule-F, the bid document will be summarily rejected. Therefore, Clause-11 puts a restriction on participation in the bid to be considered for award of any work for which the advertisement is issued. An applicant incurs a disqualification, if in preceding five years the contract has been rescinded or the contractor has abandoned the work..

8. Clause-11 postulates two stages, namely, (1) an applicant or any of its constituent partners of whose contract for any work has been rescinded; and (2) who has abandoned any work in the last five years, prior to the date of the bid. Then only, one can incur disqualification to participate in the bid.

9 To ‘rescind’ a contract means to abrogate, annul, avoid or cancel or to do away with a contract. In other words, a contract may be rescinded by agreement between the parties at any time before it is discharged by performance or in some other way. Rescission operates as if the agreement never had any effect. If we will simplify the meaning, the rescission is unmaking of a contract requiring

the same concurrence of wills and that which made it and nothing short of this will suffice. Rescission, in other words, is tendering a contract null and void and the contract is no longer recognized as legally binding. A rescission can be unilateral when a party rightfully revokes a contract on account of breach by another party to contract. It can also be mutual when the parties to contract agree to discharge all remaining obligations. Therefore, there is a wide difference between rescission of contract and its mere termination or cancellation. Thereby, there is distinction between rescission of contract and termination of contract. Rescission is utilised as a term of art to refer to a mutual agreement to discharge contractual duties. Thus, rescission of contract means the undoing of a thing.

10. Whereas 'abandoned' means totally withdraw from the work. In *R. v. Board of Control, ex. p. Ratty* [1956] 2 QB 109, while considering the provisions contained in Section 2 (I)(b)(i) of the Mental Deficiency Act, 1913, it has been held that 'abandoned' is a word which connotes a positive act on the part of someone who is responsible for the defective whereby that person has relinquished all care and control and forsaken the defective, thus leaving the defective wholly unprotected and un-provided for.

11. In *Kanwar Singh v. Delhi Administration*, AIR 1965 SC 871, while considering Section 418 (1) of Delhi Municipal Corporation Act, the apex Court held that the meaning which can reasonably be attached to the word 'abandoned' is "let loose" in the sense of being "left unattended" and certainly not 'ownerless'.

12. Taking into consideration the meaning attached to Clause-11, in so far as the words "rescinded" and "abandoned" are concerned, it is made clear that if for some reason or other the contract is rescinded and if the party abandoned the work in preceding five years period of the bid wants to participate, incurs a disqualification and cannot participate in the process of bid and its bid documents are not eligible to be considered for which it has submitted.

13. Therefore, Clause-11 is a requirement for consideration of the bid before any agreement has been executed between the parties, whereas Clause-120 states about addendum to the condition of P1 contract. Sub-clause 2.3 thereof states about compensation for delay. Sub-clause 2.3.1 makes it clear that if the contractor fails to maintain the required progress in terms of Clause 2 of P-1 contract or to complete the work and clear the site on or before the contract or extended date of completion, then necessary steps shall be taken against him. Sub-clause 2.5 deals with the management meetings. Under Clause 2 (b) of Sub-clause 2.5.2 there is rescission of contract and in that case to rescind the contract (of which rescission notice in writing to the contractor under the hand of the Executive Engineer shall be conclusive evidence), 20% of the value of left over work will be realised from the contractor as penalty. Therefore, a penalty will be imposed on the contract while rescinding the contract due to non-performance within the time specified. That itself is a penal action against him after execution of the agreement and due to non-performance as per the terms and conditions stipulated in the agreement itself. Clause 121 of the DTCN makes

it clear that a contractor may be blacklisted as per amendment made to Appendix XXXIV to OPWD Code Vol-II on the rules for blacklisting of contractors vide letter no.3365 dated 01.03.2007 of Works Department, Odisha. For non-performance of the work as per the terms and conditions of the agreement and as per the amendment made to Appendix XXXIV of OPDW Code Vol-II, a contractor may be blacklisted if he has not adhered to the sub-clauses (a) to (h). Therefore, the authorities dealing with the contractors may blacklist the contractor against whom there were allegation of business malpractices or he has not satisfied the requirement under sub-clauses (a) to (h) as per the amendment to the Appendix XXXIV of OPWD Code Vol- II. The blacklisting has the effect of preventing the person blacklisted from the privilege of entering into contracts with the authority, which blacklisted the person. The authority blacklisting the contractor should observe the fundamentals of fair play before the contractor is blacklisted.

14. As such, a detailed procedure has been envisaged in Appendix XXXIV to OPWD Code Vol-II under Clause 'A' which reads as follows:-

"APPENDIX-XXXIV

CODAL PROVISIONS FOR BLACKLISTING

CONTRACTORS

A. The Chief Engineer of a department may blacklist a contractor with the approval of concerned Administrative Department on the following grounds.

a) Misbehavior/threatening of departmental and supervisory officers during execution of work/tendering process.

(b) Involvement in any sort of tender fixing.

(c) Constant non-achievement of milestones on insufficient and imaginary grounds and non-adherence to quality specifications despite being pointed out.

(d) Persistent and intentional violation of important conditions of contract.

(e) Security consideration of the State i.e., any action that jeopardizes the security of the State.

(f) Submission of false/fabricated/forged documents for consideration of a tender.

The Divisional Officer shall report to the Chief Engineer if in his opinion any of the above wrong has/ have been committed by any contractor. On receipt of such a report from the Divisional Officer the Chief Engineer shall make due enquiry and if considered necessary, issue show cause notice to the concerned contractor who in turn shall furnish his reply, if any, within a fortnight from the date of receipt of the show cause notice. Therefore, if the Chief Engineer is satisfied that there is sufficient ground, he shall blacklist the concerned contractor with the approval of the Administrative Department. After issue of the order of blacklisting of the said contractor, the Chief Engineer shall intimate to all Chief Engineers of

other Administrative Departments, the Registering Authority as provided under Rule 4 of PWD Contractor's Registration Rules, 1967 and Department of Information & Technology for publication in web site of State Government."

From the aforementioned provisions, it is made clear that the contractor blacklisted should be given a reasonable opportunity to represent his side of the case. A contractor blacklisted by one authority need not be treated as blacklisted by all or any other authorities or persons dealing with him. If this meaning of blacklisting is taken into consideration, then the meaning of blacklisting, as prescribed in Clause 121 of the DTCN, is absolutely distinct and separate from Clause-11 of the DTCN. When Clause-11 requires consideration of the eligibility of a bidder to participate in the bid, whereas Clause-121 is invoked after the agreement is executed between the parties, when the contractor fails to discharge his part of obligation in terms of the DTCN/Agreement.

15. Thus, the contention raised that Clause-11 is in gross violation of provisions contained in Article-19(1)(g) cannot be sustained, as the same is being invoked by putting a restriction under Article-19(6)(i) of the Constitution. To maintain an harmony, if by invoking the provision contained in Article-19(6)(i) certain restriction has been imposed, it cannot be said that it is in violation of Article 19 (1)(g) of the Constitution. Thereby, the arguments advanced to this extent by learned Senior Counsel appearing for the petitioner cannot be sustained.

16. Much argument was advanced by the learned Senior Advocate appearing for the petitioner that Clause-11 of the DTCN is arbitrary, unreasonable and contrary to the provisions of law. But fact remains, the petitioner by following bid process participated in the bid and qualified and by that time the very same Clause-11 was available in the DTCN. The petitioner became eligible taking into consideration the very same Clause-11, as there was no rescission or abandonment of contract by him prior to five years of his participation in the bid. On the basis of the affidavit filed in Appendix-F, his bid was considered and he was selected and thereafter the agreement was executed. But having failed to discharge his duties and responsibility, in terms of the agreement, he has been blacklisted and penalty has been imposed. Though initially, he had approached this Court by filing a writ petition, but the same was not entertained and the petitioner was relegated to the civil court for filing civil suit and, as such, he has already filed the civil suit, which is pending for consideration. Therefore, with eyes wide open the petitioner had participated in the process of bid in terms of Clause-11 and for having not discharged his duty in terms of the agreement executed between the parties he has been blacklisted invoking Clause 121, he cannot turn around and say that Clause-11 is arbitrary, unreasonable and contrary to the provisions of law. As such, he is estopped from making such contention at this point of time.

17. In Black's Law Dictionary, 7th Edn. at page 570, 'estoppel' has been defined to mean a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.

18 In *B.L. Sreedhar v. K.M. Munireddy*, (2013) 2 SCC 355 (365), it has been held by the apex Court that 'estoppel' is based on the maxim *allegans contrariis non est audiendus* (a party is not to be heard contrary) and is the spicing of presumption *jures et de jure* (absolute, or conclusive or irrebuttable presumption).

19. In the case of *H.R. Basavaraj v. Canara Bank*, (2010) 12 SCC 458, the apex Court while dealing with the general word, 'estoppel' stated that 'estoppel is a principle applicable when one person induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/ her position. In such a case, the former shall be estopped from going back on the word given. The principle of estoppel is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

20. Similar view has also been taken by this Court in the case of *M/s. Balasore Alloys Ltd. & Anr. Vs. State of Odisha & Ors*, 2019 (I) ILR-CUT-214.

21. In *Om Prakash Sukla v. Akhilesh Kumar Sukla*, AIR 1986 SC 1043, the apex Court was pleased to hold that when the petitioner therein appeared at the examination without protest and when he found that he would not succeed in the examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

22. In *Madan Lal and others v. State of Jammu and Kashmir and others*, AIR 1995 SC 1088, the apex Court held that if a candidate takes a calculated chance and appears at the interview, then only because the result of the interview is not palatable to him he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted.

23. Similarly, in *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others*, (2011) 1 SCC 150, in paragraphs, 25 to 28, the apex Court held as follows:

"25. In this connection, we may refer to the decision of the Supreme Court in *G. Sarana (Dr.) v. University of Lucknow* [(1976) 3 SCC 585 : 1976 SCC (L&S) 474] wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 *inter alia* reads thus: (SCC p. 591).

"15. ... He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee."

26. In *P.S. Gopinathan v. State of Kerala* [(2008) 7 SCC 70 : (2008) 2 SCC (L&S) 225] this Court relying on the above principle held thus: (SCC p. 84, para 44)

"44. ... Apart from the fact that the appellant accepted his posting orders without any demur in that capacity, his subsequent order of appointment dated 15-7-1992 issued by the Governor had not been challenged by the appellant. Once he chose to join the mainstream on the basis of option given to him, he cannot turn back and challenge the conditions. He could have opted not to join at all but he did not do so. Now it does not lie in his mouth to clamour regarding the cut-off date or for that matter any other condition. The High Court, therefore, in our opinion, rightly held that the appellant is estopped and precluded from questioning the said order dated 14-1-1992. The application of principles of estoppel, waiver and acquiescence has been considered by us in many cases, one of them being G. Sarana (Dr.) v. University of Lucknow [(1976) 3 SCC 585 : 1976 SCC (L&S) 474]"

27. In Union of India v. S. Vinodh Kumar [(2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] in SCC at para 18 it was held that: (SCC p. 107)

"18. ... It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."

28. Besides, in K.H. Siraj v. High Court of Kerala [(2006) 6 SCC 395 : 2006 SCC (L&S) 1345] in SCC paras 72 and 74 it was held that the candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel."

24. Though some of the cases cited above relate to service matter, but the principle laid down therein by the apex Court is applicable to the present context. Therefore, by applying the said well settled principle of the apex Court to the present context, it can be construed that the petitioner, having participated in the process of tender, should not have turned around and challenged the conditions of tender by filing this writ petition. As such, the writ petition at the instance of the petitioner is not maintainable.

25. In view of such position and the plethora decisions cited above, the petitioner is now precluded from raising the contention that Clause-11 of the DTCN as arbitrary, unreasonable and the same should be struck down.

26. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner relies upon Sections 23, 27 and 65 of the Indian Contract Act, as mentioned above. But on perusal of the aforementioned provisions, it is made clear that the said provisions can be evoked only after the bipartite agreement between the parties is signed. Therefore, applicability of such sections of the Indian Contract Act during tender process is unwarranted. Rather, Clause-11 of the DTCN is placed into service for selection of a bidder for a particular contract. In other words, by filing an affidavit in Schedule-F of the bid document, the bidder has to certify himself that he has never been indulged in any act of rescission of contract or

abandonment of the contract for the last five years. Thereby, he has to make a certificate about his good conduct by way of an affidavit in prescribed Schedule-F so as to consider his bid in terms of the clauses of the DTCN. That has got nothing to do with the provisions contained in Sections 23, 27 and 65 of the Indian Contract Act. Needless to say that the bidder is aware of the stipulation contained in the DTCN while bidding. Therefore, if at all it has been included in the rescission of contract or abandonment of the contract and incurred a disqualification to participate in the bid, that cannot be treated as unreasonable, arbitrary and contrary to the provisions of law. Therefore, an administrative process and commercial decision, which is taken fairly on the commercial viability of the party, cannot be construed to be mala fide in the decision making process so as to cause interference of this Court at this stage. Once the bidder has submitted his bid, he cannot challenge the terms and conditions mentioned in the clauses of the DTCN, reason being after perusing the clauses containing the conditions of the tender, he had submitted his bid and his bid was rejected pursuant to the clauses of the DTCN. It is well settled principle of law decided by the apex Court time and again that one unsuccessful bidder cannot challenge the terms and conditions of the tender having participated in the tender process.

27. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner contended that taking into consideration preceding five years record of the petitioner, with regard to rescission or abandonment of the contract, if his bid will be considered under Clause-11, it will amount to punishing him. Similarly, under Clause-121, if the petitioner is blacklisted for three years and penalty of 20% of value of the remaining work is imposed, thereby, it will hit by Article 20(2) of the Constitution of India as the petitioner would suffer from double jeopardy.

28. As has been discussed above, both Clauses, i.e. Clause-11 and Clause-121 are being discussed in two separate situations and two separate contexts altogether. They are totally distinct and separate from each other and, thus, cannot be equated at any point of time. Reason being, Clause-11 is a stage, when the petitioner has to participate in the bid, his previous conduct of 5 years has to be taken into consideration. If at all there is rescission or abandonment of contract, preceding to the bid for which he has participated, he incurs a disqualification or in other words, his bid will not be taken into consideration by the tendering authority. Whereas, Clause-121 is a stage, i.e., after execution of the agreement, if the petitioner has not discharged his duty in terms of such agreement, then only the same will be invoked for blacklisting and imposing penalty against him. As regards Article 20(2) dealing with double jeopardy, what it bars is prosecution and punishment, after an earlier punishment for the same offence. 'Offence' here means an offence as defined in Section 3(38) of the General Clauses Act, 1897 applied to the Constitution by Article 367. This question, no more remains res integra, in view of the law laid down by the apex Court in the cases of *Makbool v. State of Bombay*, AIR 1953 SC 325, *Kalawati v. State of Himachal Pradesh*, AIR 1953 SC 131; *State of Bombay v. S.L. Apte*, AIR 1961 SC 578; *Raja Narayan Lai Bansilal v. Manek Phioz Mistry*, AIR 1961 SC

29; *Leo Roy Frey v. Superintendent, District Jail, Amritsar*, AIR 1958 SC 119. The apex Court in *Jitendra Panchal v. Intelligence Officer, NCB*, (2009) 3 SCC 57: AIR 2009 SC 1938, where it has been held the offences for which accused was tried and convicted in foreign country and for which he is tried in India are distinct and separate.

Taking into account, the above settled principles of law and applying the same to the present context, it is made clear that the arguments advanced by Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner on the question of double jeopardy cannot be sustained and the same is hereby rejected on the ground that Clause-11 deals with disqualification, whereas Sub-Clause 2(b) of Clause 2.5 is the penalty on rescission of contract are contrary to each other and no way amounts to double jeopardy, as one is general in nature and the other is outcome of poor performance of the individual contract agreed by the parties.

29. Mr. Asok Mohanty, learned Senior Advocate appearing for the petitioner relies on the judgment of the apex Court in the case of *Icomm Tele Limited (supra)*, wherein Clause-25(viii) of the notice inviting tender was under consideration as in paragraph-19, the apex Court considered that whether Clause 25 (viii) can be said to be arbitrary and violative of Article 14 of the Constitution of India. The apex Court held, a "deposit-at-call" of 10% of the amount claimed, which could amount to large sums of money, was without any direct nexus to the filing of frivolous claims, as it applied to all claims (frivolous or otherwise) made at the very threshold. Therefore, the clause led to a wholly unjust result of a party who had lost an arbitration being entitled to forfeit such part of the deposit as falling proportionately short of the amount awarded as compared to what was claimed. Further, deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive. Thereby, the apex Court held, the sub-clause 25 (viii) being severable from the rest of Clause 25, is struck down. As such, said principle is applicable to the terms and conditions mentioned in telecom agreement executed between the parties. In other words, the ratio laid down by the apex Court is applicable to the facts and circumstances of the respective cases and not to the fact of the present case. Thereby, the said case is distinguishable from the facts and circumstances of the present case.

30. In *Balaji Ventures Pvt. Ltd. (supra)*, which has been relied by Mr. Tarun Patnaik, learned Addl. Standing Counsel appearing for the State-opposite parties, at paragraph 5.1 of the judgment, it has been stated as follows:-

"5.1 Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner

should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document."

31. In the case of *Silppi Constructions Contractors vs. Union of India*, (2020) 16 SCC 489, the apex Court at Paragraph-20 of the said judgment observed as follows:

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

32. In the case of *Montecarlo Limited vs. National Thermal Power Corporation Limited*, (2016) 15 SCC 272, the apex Court observed and held that the tender inviting authority is the best person to understand and appreciate its requirement and tender documents, so long as there are no mala fides/arbitrariness etc. It is further observed and held that the Government must have freedom of contract and such action can be tested by applying "Wednesbury Principle" and also examining whether it suffers from arbitrariness or bias or mala fides.

33. Taking into consideration the fact and law, as discussed above, it is made clear that the tender inviting authority is the best person to appreciate its requirement and the tender documents, so long as there are no mala fides/arbitrariness etc. Thereby, the tendering authority must have freedom of contract and such action can be tested by applying the "Wednesbury Principle", whether it suffers from arbitrariness or bias or mala fides.

34. In view of the above, this Court is of the opinion that Clause-11 of the DTCN does not suffer from arbitrariness or bias or mala fides, as examined on the touchstone of "Wednesbury Principle".

35. In the result, therefore, the writ petition merits no consideration and the same stands dismissed. But, however, under the circumstances of the case, there shall be no order as to costs.

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