

(2022) 04 DEL CK 0203

In the Delhi High Court

Case No : Civil Writ Petition No. 8599 Of 2021, Civil Miscellaneous Application
No. 26620 Of 2021

M/S Satish Chand Rajesh Kumar Pvt. Ltd.

APPELLANT

Vs

New Delhi Municipal Council & Anr.

RESPONDENT

Date of Decision : 29-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Civil Procedure, 1908 — Section 151
Arbitration And Conciliation Act, 1996 — Section 9, 11

Citation : (2022) 04 DEL CK 0203

Hon'ble Judges : Manoj Kumar Ohri, J

Bench : Single Bench

Advocate : Sanjay Bansal, Karan Sharma, Mohit Siwach, Harsh Gautam, Rohit Kaliyar

Final Decision : Dismissed

Judgement

Manoj Kumar Ohri, J

1. The present petition has been filed under Article 226 of the Constitution of India read with Section 151 CPC on behalf of the petitioner, assailing the decision dated 04.08.2020 of the respondent No. 1/Council and communication of same vide letter dated 06.11.2020, whereby the petitioner has been debarred from participating in the NDMC tenders for a period of 3 years with effect from the date of the decision i.e., 04.08.2020.

2. It is claimed by the petitioner that being the lowest bidder, it was awarded the tender by respondent No. 1/Council for the redevelopment work of Bapu Samaj Sewa Kendra, Panchkuian Road, New Delhi. The value of the work awarded was Rs.24,66,00,663/-, which was later on modified to Rs.24,54,00,633/-. In terms of the letter of acceptance dated 07.02.2018, the petitioner furnished Performance Guarantee(s) to the Council in the form of Bank Guarantee(s) as security for due performance of the contract which was to be completed within a

period of 18 months with effect from 22.02.2018, i.e., the date of the start of work.

3. According to the petitioner, when it proceeded to the project site to commence the work, the site was found to be occupied and via letter dated 29.03.2018, it requested the Council to handover the project site free of all occupation. Eventually, the site was handed over to the petitioner after much delay, which in turn delayed the commencement of work. Even during the course of construction, the petitioner faced various difficulties, which inter-alia included, faulty drawings provided by the respondents, non-supply of structural drawings of beam and basement slab, stoppage of the use of batch mix plant at construction site by the CPWD, delay in approval of design mix etc. It is the petitioner's grievance that due to various reasons attributable to respondents, the work awarded to it was delayed.

4. The petitioner claims that until the termination of contract, it had completed works amounting to Rs. 6,71,83,639/- for which it raised its bills on 21.09.2019 that are still outstanding.

5. Learned counsel for the petitioner has argued that the Council vide its letter dated 11.11.2019 had first arbitrarily extended the time for completion of contract till 31.05.2020, and thereafter, the contract was terminated arbitrarily vide letter dated 15.11.2019. He has further submitted that the impugned decision of debarring the petitioner from participating in NDMC tenders for a period of 3 years was passed without complying with the principles of natural justice, as neither any Show Cause Notice nor any opportunity of hearing was granted to the petitioner prior to passing of the order. It is contended that the petitioner had rightly requested for termination of the contract, as the respondent failed to fulfil its obligations of handing over the vacant site and drawings to the petitioner, which prevented the completion of works within the stipulated time.

6. The petitioner has placed reliance on the decisions of the Supreme Court in *Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Another* reported as (1975) 1 SCC 70 and *Patel Engineering Limited v. Union of India and Another* reported as (2012) 11 SCC 257, as well as the decision of this Court in *Prakash Atlanta JV & Ors. v. National Highways Authority of India & Ors.* reported as 2010 SCC OnLine Del 471 to contend that where after termination of contract, further action of debarring/blacklisting is taken during the pendency of challenge to termination of contract and without following the principles of natural justice, the same is liable to be set aside.

7. On the other hand, learned Standing Counsel for the respondent/Council has raised a preliminary objection to the maintainability of the present petition. It is argued that the petitioner has already invoked the arbitration clause provided in the agreement entered into between the parties. The petitioner has already filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996

(hereinafter, referred to as the 'Act') challenging the notice of termination dated 15.11.2019 and seeking an injunction against invocation of the Bank Guarantee(s) furnished by it, which is registered as OMP(I)(Comm.) No. 452/2019 and is pending before this Court. The petitioner is also stated to have filed ARB.P. No. 241/2020 before this Court, under Section 11 of the Act seeking appointment of an Arbitrator for adjudication of disputes in relation to the contract between the parties.

It is the case of the respondent that the order debarring the petitioner from participating in the NDMC tenders has been passed under Clause 15 of the Special Conditions of the Contract. In view thereof, the dispute raised by the petitioner challenging the order is an arbitrable dispute, arising out of the contract, for which reason the present petition invoking writ jurisdiction of this Court is not maintainable. Learned counsel for the respondent has placed reliance on the decision of a Co-ordinate Bench of this Court in Prabhatam Advertisement Pvt. Ltd. v. Municipal Corporation of Delhi (South Zone) New Delhi reported as 2015 SCC OnLine Del 14501.

8. I have heard learned counsels for the parties and examined the controversy.

9. The petitioner faced termination of the contract and consequent debarring order on the allegation of failure of performance of its contractual obligations. The respondent, rightly, or otherwise, has invoked performance bank guarantee(s) furnished by the petitioner under Clause 3 of the contract.

10. Notably, the impugned decision of debarring the petitioner has been taken in terms of Clause 15 of the Special Conditions of the contract, which reads as follows:-

"15. If the contractor does not start work or does not perform the assigned work properly and/ or in time, it shall be dropped from the list of approved/ shortlisted agencies and their deposits including, performance guarantee etc. shall be forfeited such contractor shall be debarred for tendering for a period of three years."

11. It is thus apparent that the impugned order was a consequence of non-performance of contractual obligations by the petitioner. Both, termination of contract by the respondent, and its decision to debar the petitioner, are a contractual recourse that the respondent has taken against the petitioner. The petitioner has already invoked the arbitration clause and has also approached the Court under Section 9 of the Act for interim orders. In these circumstances, this Court is of the view that the petitioner's choice of this forum to challenge the debarring decision dated 04.08.2020, is misplaced as splitting of reliefs between two Courts is not proper.

12. At this stage, it is observed that in Prabhatam Advertisement Pvt. Ltd. (Supra), while considering the issue of the petitioner's blacklisting on account of non-payment of outstanding dues, it was noted as follows:-

"18. A question would however still arise that if during the pendency of legal proceedings the power to blacklist has been invoked, what would be the proper fora for entertaining a challenge if any made to the exercise of such power - whether by way of an independent proceeding or by way of an independent proceeding or by way of an application for interim relief in the pending legal proceedings.

19. In my view, if blacklisting is on the same grounds which are subject matter of pending legal proceedings, the proper mode for challenging the said action of blacklisting would be by way of an application for interim relief in the same legal proceedings.

20. The adjudication of a challenge to the order of blacklisting would necessarily entail determination, at least prima facie, of the grounds of blacklisting. I am of the opinion that the Court/Arbitral Tribunal before which the disputes are already pending adjudication, would be a more appropriate fora for determining the said factor and/or for balancing the equities, being already seized of the matter. Permitting such challenge to be made by an independent proceeding, whether by way of a suit or a writ petition, would not only lead to multiplicity of proceedings but may also be capable of conflicting views and decisions and which are to be best avoided.

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23. I am therefore of the opinion that in so far as the challenge by the petitioner to the blacklisting order on the grounds of pendency of the arbitration proceedings is concerned, this Court is not the appropriate fora for adjudicating the same and the stay of the blacklisting order ought to be sought before the Arbitral Tribunal which would be in a better position to appreciate the prima facie merits of the rival claims."

13. Though, learned counsel for the petitioner has placed reliance on the decisions in Erusian Equipment & Chemicals Ltd. (Supra) and Prakash Atlanta JV (Supra), the said authorities do not apply to the facts of this case. In the said cases, the blacklisting order was not passed as a contractual right of the Government under a contractual provision. However, in the present case, the respondent has exercised its contractual right under Clause 15 of the Special Conditions of the contract. The action is not pursuant to a sovereign act of the respondent but the same is a purely contractual action in its capacity of a contracting party under a commercial contract.

14. Having said that, the petitioner is free to challenge the decision dated 04.08.2020 before the Arbitrator as a contractual dispute, in terms of the remedies provided under the contract.

15. In the above terms, the present petition is dismissed, with liberty to the petitioner to approach the Arbitral Tribunal for appropriate reliefs.

16. Needless to state, this Court has not gone into the merits of the present

case. All rights and contentions of the parties shall remain reserved.