
(2015) 01 BOM CK 0346
In the Bombay High Court
Case No : Writ Petition No. 6400/2014

Punya Coal Roadlines and Others	Vs	APPELLANT
Western Coalfields Limited and Others		RESPONDENT

Date of Decision : 22-01-2015

Acts Referred:

Citation : (2015) 01 BOM CK 0346

Hon'ble Judges : B.R. Gavai and Mridula Bhatkar, JJ.

Bench : Division Bench

Advocate : M.G. Bhangde, Senior Counsel and S.N. Tapadia, Advocate, for the Appellant; S.P. Dharmadhikari, Senior Counsel and M. Anilkumar, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

Mridula Bhatkar, J.—Rule. Rule made returnable forthwith. Heard by consent.

2. This Writ Petition is directed against the order dated 10th November, 2014 passed by the respondents of cancellation of the contract and debarring the petitioners for a period of three years. The petitioner No. 1 is a proprietary concern of petitioner No. 7; petitioner No. 2 is a registered partnership firm of petitioner Nos. 8 to 11; petitioner No. 3 is a Private Limited Company, duly registered under the Companies Act and petitioner Nos. 4 to 6 are the shareholders/Directors. The petitioner No. 3-A is a joint venture of the petitioner Nos. 1 to 3.

3. The petitioners, by way of joint venture, (in short "J.V.") have participated in the tender notice dated 18.2.2013 for removal of overburden at Padmapur OCM (Sector 4 of Chandrapur Area). Since the bid of the J.V. was the lowest they were given letter of acceptance on 20th September, 2013. Thereafter, the formalities of filling up necessary documents, furnishing bank guarantee, payment of earnest money etc. were done by the J.V. One of the conditions of the tender documents was to commence the work within ten days from the receipt of letter

of acceptance or handing over of the possession of the camp site, whichever is later. However, for one reason or the other, the work could not start. The respondents, therefore, by letter dated 19.2.2014 forfeited the bank guarantee, cancelled the contract and debarred the J.V. from participating in the tender process of Western Coalfields (in short "WCL") for a period of one year. The WCL have also forfeited the bank guarantee.

4. Being aggrieved by the said communication, the J.V. filed Writ Petition No. 1258/2014 in this Court. The said Writ Petition was contested by the respondents-WCL, however, the Division Bench of this Court, after hearing both the parties quashed and set aside the said letter dated 19.2.2014 and directed the respondents to re-enquire into the matter and not to pass orders in a rather pedantic and mechanical manner. It was further held that the decision-making process had been vitiated and, therefore, it was illegal. Pursuant to the said judgment, the respondents re-enquired into the matter and they served a fresh show cause notice on the J.V. on 19.5.2014. It was replied by the J.V. on 26.5.2014. The respondents thereafter, in the meanwhile, dropped the notice. There was correspondence between the parties in respect of the problem of the J.V. and the inordinate delay in commencement of the work. Finally, the respondents issued show cause notice on 4.10.2014 to the petitioners, invoking action under Clause 6.1 of the Conditions of Contract. The J.V. submitted its reply to the show cause notice by letter dated 9.10.2014 which was again replied by the respondents by letter dated 13.10.2014. The respondents heard the matter between 24th October and 28th October 2014 and, thereafter, the respondents, finally, by its order dated 10.11.2014 cancelled the letter of acceptance of giving contract, forfeited the earnest money and the performance security deposit and have also debarred the petitioners from participating in future tenders of the respondents for a period of three years. Hence this petition

5. Mr. M.G. Bhangde, learned senior counsel with Mr. S.N. Tapadiya for the petitioners/J.V. submitted that the decision of the respondents is highly illegal, harsh and arbitrary. There was no rightful cause for the respondents to cancel the contract and to take such a punitive step against the J.V. He submits that it was not possible for the J.V. to commence the work because the complete camp site was not handed over to the J.V. well in time, so also the condition of the site was such that the J.V. could not commence the work. He pointed out that the two high tension lines were running through the camp-site and unless those lines would have been removed it was not possible for the J.V. to commence the work inasmuch as there were 35 towers of 220 KW HT lines and only after shifting of those lines the work could be started. He further submitted that as per Clause 6.1 of the conditions of contract, it is necessary for the respondents to specify the defaults in commencing the execution of work within a stipulated period. The respondents ought to have considered that there was a reasonable cause and valid reason for the J.V. not to commence the work, unless the entire camp-site would have been handed over to the J.V., it was not possible for the J.V. to proceed with the work. From time to time the petitioners have taken care to

inform the said difficulty to the respondents. Learned senior counsel relied heavily on the findings given by the Division Bench of this Court in Writ Petition No. 1258/2014. He submitted that when the Division Bench has given findings that the earlier letter of cancellation of the contract was illegal so the issuance of similar notice and the decision of taking action is mala fide and illegal and deserves to be set aside. Learned senior counsel submitted that the respondents have handed over only part of the site and not the entire camp site. He submitted that the WCL is conspicuously silent on the reasons of debarment, inasmuch as it has not applied its mind to the facts, but arbitrarily passed the order of debarment. As the reasons are not specifically mentioned in the impugned order, such reasons cannot be supplied in the affidavit filed by the respondents.

6. Mr. Bhangde, learned senior counsel, further, argued that the order of cancellation of the contract and debarment is very harsh and violative of the doctrine of "proportionality". It was submitted that the petitioners have adequate and long work experience with the respondents of more than 20 years and they have completed more than 200 contracts successfully. Therefore, no such decision should have been taken. Mr. Bhangde, senior. Counsel has submitted that under Clause 6.1 it is necessary for the WCL to show the reasons to justify its additional action of debarment.

7. In support of the above submissions, Mr. Bhangde, Sr. Counsel relied on the decisions of the Apex Court in the case of Gorkha Security Services Vs. Govt. of NCT of Delhi, ; and Union of India (UOI) and Others Vs. Shiv Raj and Others,

8. Per contra, Mr. S.P. Dharmadhikari, learned senior counsel for respondents/ WCL, has submitted that pursuant to the judgment of the Division Bench dated 6th May, 2014 in Writ Petition No. 1258/2014, the WCL had re-enquired into the matter. In the earlier show-cause notice, there was no specific mention of the debarment and, therefore, the Writ Petition was allowed, with a specific direction to the WCL to reconsider the issue. He submitted that the J.V. did not commence the work though they were asked to start the work from time to time. The possession of a portion of the site was handed over to the J.V. on 12.11.2013. The period of contract was a total of 35 months and the petitioners were supposed to commence the work on expiry of 10 days from the issue of letter of acceptance or handing over the site of work, whichever is later. The possession was handed over on 12.11.2013. He submitted that though by letter dated 26.9.2013 it was communicated by the petitioners to the respondents of the shifting of two high tension lines for smooth working, the respondents vide its letter dated 4.10.2013 have informed that the high tension lines are not supposed to pose any hindrance for the dumping area for an initial work of approximately 10- months; however they have also given the orders of the diversion of both HT lines. He further pointed out that as per the conditions of contract and the instructions to the bidders, admittedly, at clause 6, there is a specific clause of site visit. Thus, the petitioners are presumed to have visited the

site before the bidding and, therefore, they now cannot complain about any hindrance of the high tension lines. They cannot make an issue of the lying of HT lines on the site. Learned senior counsel further relied on the letter of the petitioners on 26.5.2014 i.e. after the judgment of the Division Bench in which the petitioners have communicated that after monsoon, they would conduct a joint initial survey and thereafter they would deploy all machineries and start the work immediately and they are ready to execute whatever quantity available within the area of contract as per the terms of Notice Inviting Tender. Thereafter, learned Sr. Counsel relied on the notice dated 25.9.2014 given by the respondents wherein it was specifically denied that the claim of the petitioners of handing over incomplete site and they were again asked to start the work immediately in line with the terms and conditions of the LOA. and, in the event of delay, the WCL would be constrained to take punitive action including cancellation of the work. He further pointed out that in the show cause notice dated 4.10.2014 it was mentioned that the WCL would revoke the contract; forfeiture and also mentioned about the debarment for a period of three years. Thereafter by the letter/order dated 10.11.2014 the respondents have taken a decision of cancellation of contract and debarment. He submitted that the action of the respondents is justified and there is no illegality in taking such steps. He submitted that the scope of interference by the Court while exercising power of judicial review of the action of the executive is limited. In support of the submission he relied on the decision in *Tata Cellular Vs. Union of India*, .

9. In the matter of tenders, this Court cannot go into the aspect as to whom the tender is to be given or what decision is to be made by the Government. The ratio laid down in the case of *Tata Cellular (supra)* that the judicial review has inherent limitations in the matters where the Government bodies exercise their contractual powers in the tender process and the Court should not go into the aspect of what decision the Government should take or should have been taken still holds the field. The Court has to confine itself to question the legality of the decision-making process. The power of judicial review is not an appeal from the decision and the Court cannot substitute its own decision. However judicial intervention is permissible to quash an administrative decision on its merits, if it is taken arbitrarily and illegally and the decision-making process is found to be vitiated.

10. The contract was cancelled by the letter dated 19.02.2014 by invoking the condition of contract under Clause 6.1.

Clause 6.1 of the Conditions of Contract reads thus,

"6.1 If the contractor, without reasonable cause of valid reason, commits default in commencing the execution of the work within the aforesaid date, the company shall, without prejudice to any other right or remedy, be at liberty, by giving 15 days notice in writing to the contractor to commence the work, failing which to forfeit the Earnest Money deposited by him.

Additionally, the Company will reserve the right to debar such defaulting Contractors from participating in future Tenders for a minimum period of one year."

Admittedly, the Government cannot cancel the contract without verifying the reasons for non-compliance by a successful bidder. Before cancelling the contract as per clause 6.1, the respondent-Company has to ascertain and fulfil the following conditions:--

"i) Whether the work is not commenced within aforesaid date.

ii) Whether there was a prior notice of 15 days in writing to the contractor to commence the work;

iii) Whether there is a reasonable cause or valid reason for the default."

Clause 6.1 does not stop there, but additionally a special right is given to the company to debar such contractor from participating in future tenders for a minimum period of one year. Undoubtedly, this additional power given to the respondents is very harsh and punitive and expected it is that it is not to be used routinely but sparingly, considering the severe consequences of the debarment. In the case of Gorkha Security Services (*supra*), while dealing with the issue of blacklisting the Hon"ble Supreme Court, held that it is a mandatory requirement that there has to be a stipulation contained in the show- cause notice that the action of blacklisting is proposed. It has been held that the blacklisting is termed as "civil death", therefore, it is difficult to accept the proposition that without even putting the notice of such a contemplated action and without giving him a chance to show cause, finally the order can be passed. In the said judgment, the order of blacklisting the respondents was passed on 11.9.2013 without giving the appellant notice thereto and it was thus held to be contrary to the principles of natural justice as there was no specific show-cause notice for blacklisting.

11. The findings given by the Division Bench of this Court in Writ Petition No. 1258/2014 filed by the present petitioners that it is necessary for the company to give show cause notice under clause 6.1 are correct. In paragraph 29 of the said judgment it was rightly held that the show cause notice gives time of fifteen days to start work and simultaneously warns J.V. of adverse consequences in default; so also it offers J.V. an oral hearing or opportunity to file defence in writing and thereafter within 15 days the company can take a decision. But if the decision is postponed the consequent changes must enter the consideration process.

12. Insofar as the said Writ Petition is concerned, the Division Bench on the basis of material placed on record, came to a finding that the respondents-authorities have not arrived at a finding that non-start of the work by the J.V. was without any reasonable cause or valid reason. As such, the learned Division Bench allowed the respondents, if found suitable, to extend the opportunity to the petitioners to file defence statement, opportunity of hearing and also the fresh

decision shall be taken within three weeks from the date of the order. Thereafter as per the submission of the learned counsel for the respondents Mr. Dharmadhikari, Sr. Counsel, the respondents again sent impugned show cause notice. Subsequently there was correspondence between the two parties. Thus, thereafter, the petitioners had an opportunity to commence the work as per the contract. Accordingly on 26.5.2014, the petitioners sent letter to the General Manager, CMC, WCL/respondent No. 2.

13. As per the submissions of Mr. Bhangde, learned sr. counsel, the petitioners were facing problem to commence the work as there were two high tension lines on the camp site and, secondly, the entire camp site was not handed over.

It will be relevant to refer to clause 6 of the Tender Document:--

"6. SITE VISIT

6.1 The Bidder, at the Bidder's own responsibility, cost and risk, is encouraged to visit and examine the Site of Works and its surroundings and obtain all information that may be necessary for preparing the Bid and entering into a contract for construction of the Works. The costs of visiting the Site shall be at the Bidder's own expense.

6.2 It shall be deemed that the tenderer has visited the site/area and got fully acquainted with the working conditions and other prevalent conditions and fluctuations thereto whether he actually visits the site/area or not and has taken all the factors into account while quoting his rates."

It is to be noted that as per the tender conditions it is mandatory to conduct site visit by the tenderers to enable them to assess the nature of the work and the conditions under which they have to carry on the work. It is to be noted that as per the tender conditions, even if a tenderer failed to conduct a site visit, it will be presumed that he has conducted site visit and aware about the situation existing on the site. Since those, HT lines were there since the beginning. the petitioners cannot say that it is a valid and justifiable reason for not commencing the work. If it was not possible for the petitioners to commence the work, they should not have accepted the contract. Secondly it was assured that some portion of the camp site would be given and the possession was given in November, 2013 then it should have commenced the work. The reasons given by the JV cannot constitute reasonable cause or valid reason as contemplated under clause 6.1 of the Conditions of Contract.

14. Learned senior counsel further submitted that in the present case the order was passed by the WCL without giving personal hearing to the J.V. In support of the submission, he relied on the UOI v. Shiv Raj and others. (supra) The issue before the Hon'ble Supreme Court in the said case was of right to have a fair compensation and transparency in the Land Acquisition Rehabilitation and Resettlement Act. It was held by the Supreme Court that after hearing the objections, the same authority shall take a final decision and the persons who

hears the matter must decide the same and if a successor decides, without giving a fresh hearing to the party concerned, then the order would stand vitiated having been passed in violation of the principles of natural justice. In the present case, undisputedly, the show-cause notice specifically calls upon the J.V. to show-cause as to why they should not be blacklisted for a period of three years. As such, the J.V. were very much put on notice regarding the proposed action regarding blacklisting. The said judgment of the Apex Court is therefore, not applicable to the facts of the present case.

15. In the present case, it is not binding to give personal hearing to the J.V. But they were given opportunity to file statement of defence and the matter was considered on the basis of the documents and admittedly the members of the WCL who deliberated and considered the matter, they only passed the orders therefore the said ruling is not helpful to the petitioners.

16. In the present case, it is to be noted that after the order was passed by the Division Bench in the earlier proceedings, a show-cause notice was given by the respondent/authorities to the J.V. However during pendency of those proceedings, a communication came to be addressed by the petitioners dated 26th May, 2014. It will be relevant to refer to the said communication:--

"In continuation of our letter dated 26.05.2014 we wish to inform you that if we are permitted to restart the work we want to clear our position of following points.

1. Deposit of full Performance Security Deposit: We will submit BG of Required amount within 28 days from the receipt of your order.

2. Resumption of work and deployment of Plant and machinery: In this regards we wish to inform you that since monsoon has already approached and as you are aware OB work could not be continued during monsoon due to muddy condition of black soil. After monsoon we will conduct joint initial survey and soon after completion of initial joint survey of site we will deploy all machinery and start work immediately.

3. On the basis of finding of joint initial survey we are ready to execute whatever quantity available within the area of contract as per the terms of NIT.

4. We assure you that we will complete the awarded work with your maximum satisfaction as per the terms of NIT and within the scheduled period of initial conduct."

It could, thus, be clearly seen that the J.V. very well knowing about the situation on the site, had expressed its willingness to execute whatever quantity was available at the site. Not only that, but they had assured that they would complete the awarded work with maximum satisfaction of the respondents as per the terms of N.I.T. and within the scheduled period of initial contract. It can thus very well be seen that the petitioners very well knowing as to what is the situation at the site i.e. existence of HT lines, had unequivocally assured to start

the work after joint survey. It is to be noted that as per Clause 6 of the Tender Document, it is the responsibility of the bidder to examine the site and surroundings and obtain all information that may be necessary for preparing the bid. It is further provided that it shall be deemed that the tenderer has visited the site and got fully acquainted with the working conditions and other prevalent conditions and fluctuations thereto, whether the tenderer in fact visits the site or not; or, whether he has taken all the factors into account while quoting his rates. As such, it was presumed that the J.V. very well knew about the working conditions and other prevalent conditions and fluctuations before offering his bid. However, even inspite of giving an unequivocal undertaking vide communication dated 26th May 2014 and a joint survey being conducted, the J.V. have for one reason or the other, did not start the work. As such, the respondents were required to issue another show cause notice dated 4th October, 2014. Perusal of the said show cause notice would reveal that the entire conduct of the J.V. has been reflected therein. The conduct of the petitioners, as it is apparent, for one reason or the other, did not want to start the work.

17. Insofar as the contention of the petitioners that the resolution of the Board not giving reasons for passing the order regarding cancellation of contract and blacklisting the petitioners are concerned, we do not find much force in the contention of the petitioners. Perusal of Annexure R-15 would reveal that hearing was given to the petitioners by four senior officers of the respondent/authorities. Not only that but on the basis of the factual situation, a detailed note has been prepared which is placed at Annexure R-16. Perusal of the Board Resolution dated 8th November, 2014 would reveal that before the Board took the decision, the General Manager (CMC) has explained the matter before the Board. It would further reveal that it was specifically brought to the notice of the Board that inspite of repeated persuasion, the petitioners had failed to commence the work. In administrative matters, the authorities cannot be expected to pass an elaborate judgment like the Courts. The only requirement would be that the decision of the authorities should be rational and arrived at in a fair and transparent manner. Perusal of the material on record would reveal that before the impugned order was passed, an opportunity was given to the petitioners by four senior officers of the respondents, so also a detailed note containing actual factual data was prepared, the same was explained to the Board by the General Manager (CMC) and thereafter the Board has taken the decision. It could thus be seen that the decision has been taken in a fair and transparent manner. All the factors which are relevant for taking into consideration the impugned decision and mainly the fact that the petitioners on one pretext or the other was reluctant to start the work, have been taken into consideration by the Competent Authority. In that view of the matter, we do not find any substance in the contentions raised on behalf of the petitioners in that regard.

However, we find that insofar as forfeiture of Performance Security Deposit is concerned, there is no provision in the contract which provides for forfeiture of Performance Security Deposit. In that view of the matter, we find that the

impugned order insofar as forfeiture of Performance Security Deposit is concerned, is without jurisdiction and the same is liable to be set aside.

18. In view of the above, we pass the following order:--

The Writ Petition is partly allowed.

The impugned order insofar as it forfeits the Performance Security Deposit deposited with the respondents by the petitioners is concerned, the same is quashed and set aside.

Insofar as the rest of the impugned order is concerned, no interference is warranted and the petition is dismissed in respect of challenge to that part of the order.