(2023) 03 DEL CK 0187

In the Delhi High Court

Case No : Civil Writ Petition No. 3608 Of 2023, Civil Miscellaneous Application No. 13965, 13966 Of 2023

V R Techniche Consultant Pvt Ltd — APPELLANT

Vs

National Highways Authority Of India — RESPONDENT

Date of Decision : 23-03-2023

Acts Referred:
General Financial Rules, 2017 — Rule 151

Citation : (2023) 03 DEL CK 0187

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Arvind Nayar, Nandadevi Deka, Rohan Chandra, Savyasachi, A.P. Singh, Padma Priya, Akshada Mujwar

Judgement

Prathiba M. Singh, J

1. This hearing has been done through hybrid mode.

CM APPL. 13966/2023 (for exemption)

2. Allowed subject to all just exceptions. Application is disposed of.

W.P.(C) 3608/2023 and CM APPL. 13965/2023

3. This is a petition filed by the Petitioner- M/s V R Techniche Consultant Pvt. Ltd. against the Respondent- National Highways Authority of India (hereinafter 'NHAI') challenging the impugned order dated 10th March, 2023. By the said order, the NHAI has barred the Petitioner for a period of three years from participating/engagement in any future projects or bids of NHAI. The impugned debarment order dated 10th March, 2023 issued by the NHAI is extracted as under:

"ORDER

Sub: Debarring M/s VR Techniche Consultant Private Ltd. from Prequalification/

particing/ engagement or bidding for future projects of/or to be undertaken by NHAI- reg.

It is brought to the notice of all Divisions/Units of NHAI that M/s VR Techniche Consultant Private Ltd. was awarded the consulting services work for preparation of a report on physical condition of the National Highways stretches under consideration for award on Toll Operate Transfer (Model) for Bundle-1 which included the Bhiladi-Jetpur Section of NH-8B in the State of Gujarat. The consultants did not observe any structural unsoundness and quality issue of the Major Bridge constructed over river Bhadar (114.00 LHS) and suggested very generic measures for its repair in the schedules and failed to provide any major interventions, which could have been added to the scope of the TOT concessionaire at the time of bidding and could have avoided inconvenience to public. Therefore, the Competent Authority has decided to debar M/s VR Techniche Consultant Private Ltd. for period of 3 (Three) years from a Participating/engagement in any future project/bid of NHAI projects of/or to be taken by it either directly or indirectly, effective from the date of this order. The brief details of M/s VR Techniche Consultant Private Ltd. is as under:-

M/s VR Techniche Consultant Private Ltd.

1110. Advant Navis Business Park.

7, Sector – 142, Noida – 201305 (U.P.)”

4. The brief background is that the Petitioner is a consultancy firm which provides consulting, planning and engineering design services to commercial and government clients in the field of transportation infrastructure besides project management services for construction as well as periodic maintenance of highways, including routine operations and maintenance. The Petitioner in association with Indian Road Survey and Management Pvt. Ltd. (IRSM) submitted a bid on 19th April, 2017 for empanelment as an agency for preparation of a report on physical condition of the National Highways stretches under consideration for award on Toll Operate Transfer (ToT) model The said empanelment was awarded to the Petitioner on 26th April, 2017 for Bundle- I which comprised of 10 projects aggregating to almost 646km of length of roads and included the Bhiladi-Jetpur Section of NH-8B in the State of Gujarat.

5. The Petitioner then submitted to the Respondent on 5th September, 2017 a detailed project report including detailed checklists and schedules, observing no irregularities or defects in the physical condition of the Project. The said report was accepted by the NHAI. Thereafter tenders were also called by the NHAI in respect of further works for the said roads/bridges.

6. However, an independent assessment was carried out by the NHAI through CSIR-Central Road Research Institute (CRRI) sometime in 2021-2022 which according to the Respondent pointed out various defects in the structure. According to the NHAI, the said report clearly showed that the construction

defects were due to the contractor who had executed the project sometime in 2007. On the basis of the report, a show cause notice dated 21st October, 2022 was issued by the Respondent alleging that the technical credibility of the Petitioner was in question inasmuch as the deficiencies in the projects were not pointed out by the Petitioner which were pointed out by the CSIR-CRRI report. The show cause notice is extracted as under:

"Show Cause Notice

Sub: Complaint regrading construction of bridge over River Bhadar (114.00 LHS) at NH-27, Jetpur from Gondal to Porbandar-reg

M/s VR Techniche Consultant Private Ltd. was awarded the consulting services work for preparation of a report on physical condition of the National Highways stretches under consideration for award on Toll Operate Transfer (Model) for Bundle-1 which included the Bhiladi-Jetpur Section of NH-8B in the State of Gujarat. However, as consultants your firm did not observe any structural unsoundness and quality issue of the Major Bridge constructed over river Bhadar (114.00 LHS) and suggested very generic measures for its repair in the schedules and failed to provide any major interventions, which could have been added to the scope of the TOT concessionaire at the time of bidding and could have avoided inconvenience to public. Further, CSIR-CRRI has recently submitted its report wherein serious defects/distresses have been observed in other structures as well and the same were not brought out in your firms reports. Details of the same are enclosed as Annex-I.

2. The repair & rehabilitation work carried out on the Major Bridge (114.00 LHS) as well as the repair & rehabilitation work to be carried out for other structures of the project highway will cost significantly to the exchequer and has caused tremendous inconvenience to the road users. Therefore, in view of the aforesaid lapses in your consultancy assignment, you have put your technical credibility into question and are liable to be proceeded with the actions envisaged under NHAI policy guidelines and GFR,2017 for debarment from Prequalification/ participating/ engagement or bidding for future projects of/or to be undertaken by NHAI. However, before taking any action and in order to comply with the principles of natural justice, we hereby issue a Show Cause Notice to you to explain that why for the above lapses on your part, NHAI should not take action and debar M/s VR Techniche Consultant Private Ltd. for 03 years.

3. Your reply in the matter should be received within 10 days of issuance of this letter i.e., on or before 31.10.2022. In case, no response is received by the said date it will be presumed that you don't have to say anything in the matter and Authority will take decision on the basis of merits of the available facts in this regard.

4. This is without prejudice to any other rights and remedies that Authority may have in the law and contract."

7. The said show cause notice was replied to in detail by the Petitioner on 31st October, 2022. Thereafter the impugned order dated 10th March, 2023 has been passed.

8. The submissions of Mr. Arvind Nayar, ld. Senior Counsel for the Petitioner is that the project report was submitted way back in 2017 and the CSIR-CRRI report also clearly puts the blame on the earlier project implementer and the entity which had carried out the construction and not on the Petitioner. The Petitioner had, in fact, submitted the DPR which was duly accepted as it is evident from the disclaimer issued on 16th October, 2017 when the further queries etc were being considered in respect of RFP qua the said very bridges.

9. He further submits that even a perusal of the General Financial Rules, 2017 would show that none of the grounds for blacklisting or debarring the Petitioner are made out. He relies upon the judgment of the Supreme Court in Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited, (2014) 14 SCC. In the said decision, while considering the principles applied in debarment order, it was held as under:

"21. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official

22. As regards the period for which the order of debarment will remain effective, the guidelines state that the same would depend upon the seriousness of the case leading to such debarment.

23. Similarly in England, Wales and Northern Ireland, there are statutory provisions that make operators ineligible on several grounds including fraud, fraudulent trading or conspiracy to defraud, bribery etc.

24. Suffice it to say that 'debarment' is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the Regulations under which such contracts were allotted. What is notable is that the 'debarment' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.

10. Ld. Counsel appearing for the NHAI firstly submits that bridges in question have a life of a hundred years. The Petitioner was engaged as an expert-entity for giving a proper report which had submitted in 2017, it is only thereafter when one of the bridges are closed for a period of one year

11. It is the case of the Petitioner that the subsequent concessionaire had raised issues relating to the distress which was there in the bridge and was not reported by the Petitioner. It was then that the CSIR-CRRI was engaged for submitting a proper report from which it has been revealed to the NHAI that there were discrepancies in the report which was submitted by the Petitioner.

12. Ld. Counsel for the Respondent relies upon the order dated 21st February, 2014 of the Supreme Court in Civil Appeal No. 2732/2014 titled NHAI v. Neeraj Upadhyay, and order dated 26th March, 2021 of the Division Bench of this Court in LPA No. 56/2021 titled NHAI v. Theme Engineering Services Private Ltd. to argue that in such matters such as this, the granting of any interim relief would in effect amount to granting final relief which ought not to be granted.

13. The relevant extracts of the order dated 21st February, 2014 of the Supreme Court in Neeraj Upadhyay (supra) while disposing the appeal are extracted as under:

" On complaint filed by another competitor alleging that the Company had submitted wrong information qua its net worth in the tender documents submitted by it, a show cause notice was issued on 18th March, 2003 to the

Company as well as its Directors including the respondent as to why the Company and the Directors be not debarred from pre-qualification, participating or bidding for future project of/or to be undertaken by the NHAI either directly in the name of the Company or indirectly in any other name or in association/joint venture/or with any other name or entity with which the Company chooses to carry on their business. Since no reply was received, another notice was issued on 22nd April, 2013 granting a last opportunity for this purpose. This time, the Company filed reply dated 25th April, 2013. The appellants, after considering the show cause notice passed orders dated 30th July, 2013 debarring the Company and its Directors including the respondent herein for a period of two years.

Challenging this order, the respondent has filed civil writ petition no. 49861 of 2013 in which the impugned orders have passed as mentioned above.

The writ petition is still pending in the High Court of Allahabad. Along with the writ petition, the respondent had also filed application seeking interim relief. In this application, impugned orders dated 30th September, 2013 have been passed directing that pending disposal of the writ petition, the appellants be permitted to participate in the future tender processes floated by the appellant Authority in future. The primary challenge led to the aforesaid order is that it amounts to giving final relief to the respondent at the interim stage itself which is not permissible.

When this matter had come up for hearing on 29th October, 2013, while issuing notice in the SLP, following order was passed:-

"Taken on board.

Mr. Parag P. Tripathi, learned senior counsel submits that under the garb of interim order, the final relief which could have been granted at the time of final disposal of the writ petition has been granted by the High Court, issue notice.

In the meanwhile, there shall be stay of the operation of the impugned judgment"

It is clear from the above that the operation of the impugned order passed by the High Court has been stayed with the aforesaid orders. It is the submission by learned counsel for the respondent that the impugned order is passed after taking into consideration all the relevant factors and even if one has to discount the so called misrepresentations made by the Company in submitting the tenders in respect of the projects mentioned above, it would not have made any difference to the award of the contract.

These are the issues which have to be taken into consideration by the High Court at the time of hearing of the petition filed by the respondent. We are in agreement with the learned counsel for the appellants that granting of such order amounts to giving final relief. However, at the same time, since the order visits the respondent herein with civil and/or evil consequences, we are of the opinion that the main writ petition itself be heard by the High Court at an early date. We thus dispose of this appeal by requesting the High Court to decide the writ petition finally on merits within a period of two months from the date of the receipt of a copy of this order. Till that time, the orders dated 29th October, 2013 passed by this Court shall remain in force.

The appeal is disposed of accordingly.”

14. In order dated 26th March, 2021, the Division Bench of this Court in Theme Engineering (supra) had also passed an order relying on the order of the Supreme Court in Neeraj Upadhyay (supra). The relevant extracts of the said order are extracted as under:

10. In the present case, the learned Single Judge has passed the impugned order dated 01.02.2021 on the premise that the only reason for passing the order of debarment dated 12.01.2021 was giving of false CVs of two personnels.

11. We are unable to agree. That the order of the debarment, especially in para 10 categorically states as under:-

“Having considered the explanations and other relevant material submitted by Supervision Consultant, more particularly, set out in Annexure VI, the Review Committee after due consideration of representations of Consultant and facts, is of the view that the same are not tenable for the reasons recorded therein. The Review Committee, therefore, reject all the contentions raised by Supervision Consultant. As regards the debarment period of 2 years, the Review Committee is of the view that it would be just and fair to reduce to 6 months and to give opportunity to the consultant to improve the quality of its services.”

12. The bare perusal of the above shows that the Review Committee categorically considers all the allegations set out in Annexure-VI and after due consideration passed the order of blacklisting of the respondent for the period of 6 months.

13. The order of debarment dated 12.01.2021 is not simpliciter is an order of debarment under order of 3.7(ix)(b) but for all the charges set out in Annexure-VI.

14. The learned Single Judge while passing the impugned order, has granted final relief to the respondent. We are of the view that since the impugned order dated 01.02.2021 visits the respondent herein with civil and evil consequences, it would be desirable if the writ petition is completely heard by the learned Single Judge and disposed off, expeditiously.

15. The said approach has found favour with the Hon’ble Supreme Court in National Highways Authority of India Vs. Neeraj Upadhyay supra.

15. The Court has considered the matter. Clearly, the project report of the Petitioner was submitted in 2017 and the debarment order has been passed more than five years later i.e., on 10th March, 2023 that too for a period of three years which is the maximum period provided for in GFR, 2017. The main ground raised in the debarment order is that only generic measures were suggested and

major intervention has not been suggested by the Petitioner.

16. A perusal of the cover letter of the CSIR-CRRI report, however, clearly shows that the construction defects of the erstwhile EPC contractor. The said letter reads as under:-

"Sub. Projects comprising of 9 national highway stretches (Bundle-1) on Toll Operate Transfer Mode Porbandar - Jetpur section (from km 001 +960 to km 117+600) of NH8B in the state of Gujarat.

Submission of Report of the Inspection of Structures Conducted by CRRI - Regarding

Ref. Concession Agreement dated 26.04.2018

Dear Sir,

With reference to the inspection of existing structures conducted by Central Road Research Institute (CRRI) in the month of Aug.21 on account of various structural defects witnessed during the Concession Period, the Concessionaire hereby submits the detailed report of the structures in severely distressed condition as submitted by the CRRI for your information and approval to undertake the repair works under Change of Scope as the defects are the construction defects on account of erstwhile EPC contractor of the Project.

Thanking you and assuring you of our best services at all times."

17. Rule 151 of the GFR Rules, 2017 which provides for debarment reads as under:-

"(i) A bidder shall be debarred if he has been convicted of an offence--

(a) under the Prevention of Corruption Act, 1988; or

(b) the Indian Penal Code or any other law for the time being in force, for causing any loss of Life or property or causing a threat to public health as part of execution of a public procurement contract.

(ii) A bidder debarred under sub-section (i) or any successor of the bidder shall not be eligible to participate in a procurement process of any procuring entity for a period not exceeding three years commencing from the date of debarment. Department of Commerce (DGS&D) will maintain such list which will also be displayed on the website of DGS&D as well as Central Public Procurement Portal.

(iii) A procuring entity may debar a bidder or any of its successors, from participating in any procurement process undertaken by it, for a period not exceeding two years, if it determines that the bidder has breached the code of integrity. The Ministry/Department will maintain such list which will also be displayed on their website.

(iv) The bidder shall not be debarred unless such bidder has been given a reasonable opportunity to represent against such debarment.”

18. A perusal of the orders in NHAI v. Neeraj Upadhyay (supra) and NHAI v. The ME Engineering Services Private Ltd. (supra) would show that staying of the debarment/blacklisting is, in effect, construed as a final relief. However, facts of the present case would clearly show to the Court that five years' gap in the debarment and in terms of Kulja Industries (supra), proportionality would have to be considered by the Court. There is no reasoning given in the form of a chart as to in what manner the Petitioner’s report was lacking. The same would require examination of the Petitioner’s report and the CSIR’s report. Neither in the show cause notice nor in any of the communications, the differences and the discrepancies have been pointed out specifically.

19. Moreover, the three-year debarment period is like the maximum period under the GFR, 2017 which has been resorted to, that too after five years of submitting the requisite report. The Court observes that in the meantime, the Petitioner must be undertaking various projects and also may be involved in various other bids as well. Under these circumstances, at the prima facie stage, in order to balance the interest of all parties, the following directions are issued:-

i) The Petitioner shall not be restrained or obstructed from executing the ongoing projects or submitting the bids in respect of the projects which have already been announced prior to the date of the debarment order dated 10th March, 2023.

ii) In respect of future debarment, if there is any other bid/RFP which is floated by NHAI, for which the Petitioner intends to submit a bid, it is free to approach the Court at that stage.

iii) The debarment would also not apply qua any third party bids or tenders.

20. The NHAI shall file a detailed counter affidavit which shall also state the discrepancies in the Petitioner’s report, within six weeks. The NHAI to also file the complete report of CSIR-CRRI.

21. List before the Registrar for completion of service and pleadings on 16th May, 2023.

22. List before the Court on 25th July, 2023.

