(2019) 01 DEL CK 0052

In the Delhi High Court

Case No : Civil Writ Petition No. 5789 Of 2018, Civil Miscellaneous No. 22544 Of 2018

Wadia Techno Engineering Services Ltd	APPELLANT
Vs	
National Highways & Infrastrctural Development Corporation Limited & Ors	RESPONDENT

Date of Decision : 08-01-2019

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2019) 01 DEL CK 0052

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Dayan Krishnan, Aakanksha Kaul, Debal Kumar Banerji, Manu Beri, Varun Varma

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition under Article 226 of the Constitution of India, inter alia, impugning an order dated 06.04.2018 passed by respondent no.1 (National Highway and Infrastructural Development Corporation Ltd. - hereafter ?NHIDCL"), whereby the punitive measure of debarring the petitioner from participating in any contract or tender floated by NHIDCL for a period of two years, was confirmed.

2. The petitioner has also impugned a letter dated 27.04.2017 issued by NHIDCL to Kotak Mahindra Bank Ltd. invoking the bank guarantee furnished by the petitioner. Mr Krishnan, learned senior counsel appearing for the petitioner did not press the aforesaid relief. In any event, no such relief can be granted to the petitioner. First of all for the reason that the law relating to the bank guarantees is well settled and the invocation of the bank guarantee cannot be interdicted except in cases of egregious fraud, special equities and irretrievable injury. In the present case, no such ground is established. Secondly, the petitioner had filed a

writ petition (W.P.(C) 1143/2018), inter alia, seeking a similar relief, which was not pressed.

3. By an order dated 20.11.2017, NHIDCL had debarred the petitioner from participating in any contract with NHIDCL for a period of three years. The petitioner had made a representation against the said order and the quantum of punishment imposed on the petitioner was - by an order dated 23.01.2018 - reduced to a period of two years. The petitioner had preferred a writ petition (W.P.(C) 1143/2018 captioned ?Wadia Techno Engineering Services v. National Highways and Infrastructural Development Corporation Limited and Ors." impugning the decision of NHIDCL to blacklist the petitioner. The said punition was imposed on the petitioner for the reason that a fake Curriculum Vitae (CV) of one Mr Umesh Chand Shrivastava, who was disclosed as key personnel to provide the services as Traffic-cum-Safety Expert, had been furnished under the INFRACON User ID "ucshrivastava2519@gmail.com". This ID has been found to be fake and the CV uploaded on the same was incorrect. Mr Shrivastava had filed a complaint that he had not created that ID or furnished the CV. He had also confirmed that the details in the CV were incorrect. This was informed to the petitioner and he was called upon to show cause as to why action should not be taken against the petitioner in terms of the RFP. The petitioner had responded by stating that there was some communication gap and that Mr Shrivastava was in discussion with petitioner"s associate - M/s ZOMA Consulting Engineers (respondent no.4). The petitioner also explained that there was an anomaly by an oversight. Since, it was evident that an incorrect CV of key personnel under a fake ID had been submitted, the petitioner was visited with the punitive measure. The petitioner challenged the same on several grounds including that the petitioner was not responsible for submission of fake CV and that the same was committed by its associate M/s ZOMA Consulting Engineers. The petitioner had also claimed that the punishment imposed was disproportionate. This Court had examined the aforesaid challenge and concluded that no interference with the decision of NHIDCL to impose punishment on the petitioner was warranted. The contention that the petitioner was not aware of the incorrect statement was found to be unmerited, as the petitioner had expressly confirmed that "the information submitted in Infracon is true and correct to the best of my knowledge and I would be personally responsible for any misrepresentation in this regard" and, therefore, the petitioner could not be absolved of the responsibility of an incorrect statement in the bid document.

4. However, this Court was of the view that the NHIDCL had not taken into account the relevant factors as articulated by the Supreme Court in its decision in Kulja Industries Ltd. v. Chief General Manager, BSNL: AIR 2014 SC 9, while determining the quantum of punishment and had, therefore, remanded the matter for a decision afresh on the said question. It was also clarified that the petitioner had not pressed the challenge with regard to the rejection of its bid and invocation of the bank guarantee.

5. In view of the above, the only question that requires to be examined is whether the punishment of debarring the petitioner for a period of 2 years is excessive and disproportionate.

Factual Background

6. The petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of providing engineering consultancy services.

7. On 22.06.2016, NHIDCL issued a notice inviting tender (NIT) for providing "Consultancy Services for carrying out feasibility study, preparation of detail project report and providing pre-construction services with respect to two lanning of (i) Maram - Peren - Dimapur section NH 129A (Manipur & Nagaland) (ii) PallelChandel Section of NH- 102C and (iii) Sangshak - Nampisha on NH 102A (A Bharatmala Project) on Engineering, procurement and construction made in the state of Manipur" (hereafter ?the Project").

8. Alongwith the NIT, NHIDCL also issued a Request for Proposal (RFP) specifying terms and conditions and instructions for bidders. Clause 1.8.2 of the RFP provided for the proposal of joint bidding by the association of firms and, for that purpose, the proposal had to be accompanied by a Memorandum of Understanding (MoU) signed by all such associated firms.

9. The petitioner entered into a MoU with M/s. Zoma Engineers (respondent no.4) on 19.07.2016. The petitioner further submitted the bid document dated 03.08.2016 alongwith a security of Rs. 2 lakhs in terms of Clause 1.10.1 of the RFP. In terms of Clause 3.2.4 of the RFP, CVs of all the key personnel were to be submitted through INFRACON. Accordingly, the CVs of all the key personnel were submitted, which also included the CV of one Mr. Umesh Chand Shrivastava. Mr U.C. Shrivastava was to provide his services in the Project as a Traffic-cum-Safety Expert.

10. Thereafter, respondent no.3 (General Manager (Technical), NHIDCL), by a letter dated 07.10.2016, selected the petitioner as the most preferential bidder and, further, requested to provide justification for the quoted price. In addition to that, the petitioner was also called upon to bring all the key personnel for interaction with the committee within seven days.

11. Thereafter, Mr. U.C. Shrivastava (one of the key personnel of the petitioner company) submitted an affidavit to respondent no.3 stating that he had not given consent to the petitioner company to participate in the bidding process under his name and his INFRACON ID, as furnished by the petitioner, was not created by him. Accordingly, respondent no.3, by a letter dated 27.10.2016, called upon the petitioner to explain as to why action should not be taken against the petitioner as per provisions of the RFP.

12. The petitioner responded to the said letter stating that Mr. U.C. Shrivastava was in discussions with respondent no.4 and further explained that "there was an anomaly which was by an oversight". Thereafter, respondent no.3 sent a letter

dated 25.01.2017, inter alia, calling upon the petitioner to submit a joint affidavit executed between Mr. U.C. Shrivastava and the petitioner agreeing to work on the Project.

13. In response to the aforesaid letter, the petitioner sent a letter dated 06.02.2017 confirming that Mr. U.C. Shrivastava would be supervising the Project and thus there is no need to submit an affidavit in that regard.

14. Subsequently, the bid validity was also extended upto March, 2017.

15. Thereafter, respondent no.2 (Managing Director, NHIDCL) debarred the petitioner for failing to meet the RFP conditions and invoked the bid security of Rs. 2 lakhs submitted by the petitioner, and sent a letter dated 27.04.2017 to the concerned bank in this regard. In response, the petitioner sent a letter dated 28.04.2017 urging respondent no.2 to withdraw the invocation of bid security and further seeking time to file a fresh affidavit within a period of seven days.

16. Subsequently, respondent no.3 sent a notice of debarment dated 30.05.2017, inter alia, calling upon the petitioner to show cause within seven days as to why the petitioner should not be debarred from taking part in the future bidding process of NHIDCL for a period of three years, on account of submitting fake CV of one of the key personnel. The petitioner replied to the said show cause notice by a letter dated 19.06.2017, inter alia, attributing the liability of submitting the incorrect CV of the key personnel to respondent no.4 and stated that the said dispute stood resolved. Respondent no.4 also corroborated the above stand taken by the petitioner and sent a letter on the same day intimating respondent no.1 regarding the same.

17. On 20.11.2017, respondent no.3 sent a letter to the petitioner debarring the petitioner and respondent no.4 for a period of three years from participating in future tenders of NHIDCL for "failing to exercise due diligence and complicity in preparation of fake ID".

18. In reply to the aforesaid letter, the petitioner sent a letter dated 30.11.2017 requesting a review and recall of the decision of debarment and further requesting to refund the amount of bid security encashed by the respondents. Consequently, the period of debarment was reduced to two years by the respondents and the same was communicated to the petitioner by a letter dated 23.01.2018.

19. Aggrieved by the order of debarment dated 20.11.2017 and 23.01.2018, the petitioner preferred a writ petition - W.P.(C) 1143/2018 - before this Court. By an order dated 07.02.2018, this Court set aside the aforesaid impugned orders and remanded the matter to the concerned authority to consider the quantum of punishment imposed on the petitioner having regard to the decision of the Supreme Court in Kulja Industries Limited v. Chief General Manager, Western Telecom Project BSNL & Ors.: AIR 2014 SC 9. Subsequently, the said petition was withdrawn by the petitioner on 16.02.2018.

20. NHIDCL appealed against the said direction (being LPA no. 103/2018) before the Division Bench of this Court. The said appeal was dismissed by an order dated 13.03.2018.

21. Thereafter, in compliance with the order dated 07.02.2018 passed by this Court, the concerned authority reconsidered the petitioner"s case and passed the impugned order realising its direction to debar the petitioner for two years with effect from 20.11.2017.

22. Aggrieved by the said order, the petitioner filed the present petition.

Submissions

23. Mr Krishnan, learned senior counsel appearing for the petitioner contended that the concerned authority had committed a patent error while considering the quantum of punishment. He indicated that the concerned authority had proceeded on the basis that the petitioner had a history of wrongdoing and the petitioner had also been debarred by the Government of Assam for projects undertaken by the Assam PWD. He submitted that the said decision referred to had been stayed by the Guwahati High Court by an order dated 28.02.2018, therefore, the petitioner had an unblemished record. He submitted that since the concerned authority had proceeded on the basis that the petitioner had a history of wrongdoing, the impugned order is liable to be set aside.

Reasons & Conclusion

24. It is seen that the impugned order contains a tabular statement, whereby the concerned authority has stated its observations against each of the facts considered to be relevant for deciding the quantum of punishment as set out by the Supreme Court in Kulja Industries Limited (supra). It would be relevant to refer to the tabular statement to examine whether there is any patent error as contended on behalf of the petitioner.

25. Against the factor whether there is a pattern of prior history of wrongdoing, the concerned authority had observed as under:-

(c)

Whether there is a pattern of prior history of wrongdoing.

Yes, there is a pattern. M/s Wadia Techno Engineering Services Limited in consortium of M/s Yooshin Engineering Corporation has been debarred by the Assam Government for the projects undertaken by the Assam PWD NH Works as well as works of MoRT&H implemented by Assam PWD NH Works for period of 2 years vide letter no.NHR.26/2016/Pt/50 dared 11.12.2017 on account of forgery.

26. It does appear from the above that the concerned authority had overlooked the fact that the blacklisting order dated 11.12.2017 had been set aside by the Guwahati High Court. However, on examination of further remarks, it is clear that the concerned authority was fully aware of the order passed by the Guwahati

High Court setting aside the blacklisting order dated 11.12.2017. This is evident from the observations made in respect of the factor whether the contractor had been excluded or disqualified by any other agency. Against said factor, the concerned authority has observed as under:-

(d)

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

Yes, the following companies have been debarred from participating in projects undertaken by the Assam PWD NH Works as well as works of MoRT&H implemented by Assam PWD NH Works for a period of 2 (two) years vide letter no.NHR.26/2016/Pt.50 dated 11.12.2017.

27. It is apparent from the above that the authority was duly aware of the fact that the blacklisting order passed against the petitioner by the Chief Engineer, PWD (NH Works), Assam had been set aside by the Guwahati High Court by an order dated 28.02.2018. It is also relevant to note that a perusal of the said order indicates that the blacklisting order was not set aside. The court was of the view that the petitioner deserves an opportunity of being heard and, therefore, remanded the matter to the Chief Engineer, Assam PWD, for deciding the matter afresh. It is specified that until the exercise is carried out, the order of blacklisting dated 11.12.2017 impugned therein would not be given effect to.

28. In the aforesaid view, it cannot be apposite to state that the petitioner has an unblemished history. In any view, this Court is not inclined to examine the weightage that is required to be given to the aforesaid incident. Suffice it to state that the concerned authority of NHIDCL has considered the same while determining the question of quantum of punishment.

29. At this stage, it is relevant to refer to Clause 3.2 4(i) of the RFP, the same is set out below:-

"3.2.4 (i) The CV of the Key Personnel would have to be submitted through INFRACON. It may please be ensured that information is correct. If at any stage information is found incorrect action including termination and debarring of the personnel and the Firm from future NHIDCL/Ministry projects up to 3 years may be taken by NHIDCL. Such submissions would also make the concerned key personnel liable for criminal action, as deemed fit."

30. It is seen from the above that the NHIDCL had made it amply clear that furnishing of incorrect information would invite an action of, inter alia, debarment for a period of three years. In this case, NHIDCL had decided not to award the punishment for full term of three years but has reduced the same to two years. Plainly, the same has been done by taking into account certain mitigating facts, including that the petitioner"s associate has admitted to provide incorrect

information.

31. In view of the above, this Court does not find any merit in the contention that the punishment imposed is highly disproportionate or unconscionable. It is well settled that the action of blacklisting a contractor is a necessary concomitant of the executive power of the State to enter into contracts. (See: Patel Engineering Ltd. v. Union of India and Anr.: (2012) 11 SCC 257). Any such action cannot be interfered with unless it is found that the same is arbitrary, unreasonable or is wholly disproportionate.

32. For the reasons stated above, the petition is dismissed. The pending application stands disposed of. The parties are left to bear their own costs.

