

GAHC010117432022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4021/2022

M/S DRILLMEC S.P. A
A COMPANY INCORPORATED UNDER THE LAWS OF ITALY HAVING ITS
REGISTERED OFFICE AT VIA 1, MAGGIO, 12 PONDENZANO, PIACENZA,
29027, ITALY AND REP. BY ITS AUTHORIZED SIGNATORY, SRI THUMMALA
PRASHANTH

VERSUS

OIL INDIA LTD. AND ANR.
A PUBLIC SECTOR UNDERTAKING INCORPORATED UNDER THE
PROVISIONS OF THE COMPANIES ACT, 1956 HAVING ITS REGISTERED
OFFICE AT P.O. DULIAJAN DIST. DIBRUGARH-786602, ASSAM

2:CHIEF GENERAL MANAGER (C AND P)
OIL INDIA LTD.
P.O. DULIAJAN DIST. DIBRUGARH-786602
ASSAM

3:BHARAT HEAVY ELECTRICALS LTD.
A COMPANY INCORPORATED UNDER THE INDIAN COMPANIES ACT
1956
HAVING ITS REGISTERED OFFICE AT BHEL HOUSE SIRI FORT
NEW DELHI PIN-110049.
ALSO AT INDUSTRY SECTOR INTEGRATED OFFICE COMPLEX LODHI
ROAD NEW DELHI
PIN-110003.
THROUGH ITS AUTHORIZED REPRESENTATIVE MR. S.K. GROVER
EXECUTIVE DIRECTOR (ESSG
NEW BUSINESS AREA AND IPM)

Advocate for the Petitioner : DR. A SARAF

Advocate for the Respondent : SC, OIL

BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the petitioner: Dr. A. Saraf, Sr. Adv.
For the respondents: Mr. P.C. Sen, Sr. Adv., Mr. K. Kalita (Res. 1 and 2)
Mr. K.N. Choudhury, Sr. Adv., Mr. S. Raheja (Intervenor)
Date of hearing : 20.04.2023.
Date of judgment : 26.04.2023.

JUDGMENT AND ORDER

(C.A.V.)

Heard Mr. K.N. Choudhury, learned senior counsel, assisted by Mr. S. Raheja, learned counsel for the intervenor. Also heard Mr. P.C. Sen, learned senior counsel, assisted by Mr. K. Kalita, learned counsel for the respondent nos. 1 and 2.

2. On 20.04.2023, when the matter was heard, the learned senior counsel for the intervenor had raised a preliminary issue of maintainability. Accordingly, the Court had permitted the learned senior counsel for the intervenor to first make his submissions. It may be mentioned that the learned senior counsel for the petitioner had submitted that he would file his written note of submissions by 21.04.2023. The said prayer was allowed. Accordingly, the written note of submissions has been submitted to the Court Master, which is made a part of record.

3. This Court by order dated 19.09.2022 passed in I.A.(C) 2059/2022, allowed the said interlocutory application by allowing the applicant therein, namely, Bharat Heavy Electricals Ltd. to be arrayed as an intervenor and moreover, this Court had also allowed the intervenor to file his pleadings for

consideration by providing that the writ petitioner will have all the opportunities to rebut by way of a rejoinder affidavit.

4. The learned senior counsel for the intervenor had raised two preliminary objections as to the maintainability of this writ petition, firstly, taking a ground that in this writ petition the challenge is made in respect of the speaking order no. MM/25/F/257/2021-22 dated 09.11.2021 of debarring M/s. Drillmec S.p.A. from entering into any contract/ business with Oil India Ltd. (respondent no.1) for a period of three years, further claiming that the said order has been merged with the order dated 21.02.2022, passed by the appellate authority of Oil India Ltd. on an appeal against the order dated 09.11.2021, thereby the duration of debarment was reduced to one year from the date of the speaking order, i.e., 09.11.2021. Accordingly, it is submitted that although the doctrine of merger is applicable, the said appellate order has not been put to challenge although this writ petition was filed on 13.06.2022. The second preliminary objection of maintainability of this writ petition is on the ground that although the writ petitioner was aware of the appellate order dated 21.02.2022, but the same was suppressed and therefore, for suppression of material and vital fact which had a bearing in this writ petition, the writ petition should also be dismissed at threshold to maintain purity of the writ petition under Article 226 of the Constitution of India. In support of his submissions, the learned senior counsel for the intervenor has cited the case of (i) *K.D. Sharma v. Steel Authority of India Limited & Ors.*, (2008) 12 SCC 481, and (ii) *Kunhayammed & Ors. V. State of Kerala & Anr.*, (2000) 6 SCC 359.

5. The learned senior counsel for the respondent nos. 1 and 2 has submitted that the order dated 20.06.2022 passed by this Court in this writ petition would show that the learned senior counsel for the respondent nos. 1

and 2 had produced before this Court the copy of order bearing Ref. No. DO:OIL:03:04(B)-379 dated 21.02.2022, which was passed by the Director (Operations), on behalf of Chairman and Managing Director, Oil India Ltd., who is the appellate authority of respondent no. 1. It has been submitted that as per his instructions, a copy of the said order is in the record. Accordingly, it has been submitted that when this writ petition was considered at the *motion stage*, the said appellate order was on record. It was fairly submitted that the issue of maintainability of the writ petition has to be responded to by the writ petitioner.

6. In the written synopsis of submissions filed on behalf of the petitioner, the learned senior counsel for the writ petitioner had referred to various clauses of the Integrity Pact dated 06.05.2014. It is projected that as per the "duration clause" provided under Section 9 of the Integrity Pact, the pact begins when both the parties had legally signed it and that for the contractor, the pact expired 12 months after the last payment under the respective contracts. It is projected that the Purchase Order was issued on 05.09.2015 and payment was last made on 29.05.2018 and moreover the bank guarantee was also discharged. It is projected that in order to execute proper performance of the contract awarded to it, the petitioner had engaged the services of its associate Company, namely, M/s. Continent Project Technologies Pte. Ltd. (CPTPL for short) pursuant to the terms of Exclusive Agency Agreement dated 01.06.2015, *inter alia*, providing therein that the CPTPL would promote the sale of the products for Oil and gas (Onshore and Offshore) of the petitioner and they had also entered into another Exclusive Agency Agreement dated 15.12.2015 in respect of commission for direct sales made by Drillmec India Pvt. Ltd. It is projected that the petitioner and other Companies hold equity in certain Companies and therefore, it is projected that Drillmec India Pvt.

Ltd., Kakinada Marine & Offshore Complex Ltd., Vision Projects Technologies Pvt. Ltd., CPTPL, etc., are having “associate” relationship. Nonetheless, the respondent no. 1 had issued a show-cause notice dated 24.03.2021, which was responded to by reply dated 07.04.2021, denying the allegations, followed by a representation dated 25.08.2021, nonetheless, the Chief General Manager of respondent no. 1 had passed the impugned debarment order dated 09.11.2021. Thus, it is projected that the debarment order was issued in violation of Section 9 of the Integrity Pact. It is also projected that as the relationship between the Companies entering into Exclusive Agency Agreement was that of “associate Company”, there was no violation of the integrity pact. It is claimed that the appellate order was never served on the petitioner and the petitioner was not aware of the same.

7. In the written synopsis of submissions, it is also mentioned that an intervenor only had a right to address the Court and cannot take active part in the proceeding and in this regard, the case of *Saraswati Industrial Syndicate Ltd. v. Commissioner of Income Tax, Haryana, Rohtak*, (1999) 3 SCC 141, decided by the Supreme Court of India, and *Vilas Dadarao Chavan v. Kiran Ashok Patil Dongaonkar & Ors.*, 2008 SCC OnLine Bom 1167, had been referred to.

8. In the said context, at the cost of repetition, it is reiterated that this issue was taken up when the interlocutory application for appearing as intervenor was heard. Vide order dated 19.09.2022, passed in I.A.(C) 2059/2022, this Court had allowed the said interlocutory application by permitting the applicant therein, namely, Bharat Heavy Electricals Ltd. to be arrayed as an intervenor and moreover, this Court had also permitted the intervenor to file his pleadings for consideration by providing that the writ

petitioner will have all the opportunities to rebut by way of a rejoinder affidavit. The said order dated 19.09.2022, passed in I.A.(C) 2059/2022 has attained finality.

9. From the contents of appellate order dated 21.02.2022, it has been mentioned that "a copy of this order is to be served upon M/s. Drillmec S.p.A. for information." This writ petition was filed by the petitioner i.e. M/s. Drillmec S.p.A. on 13.06.2022. On 07.10.2022, the intervenor had filed affidavit-in-response and in paragraph 3 of the said affidavit, it has been stated to the effect that the contents of its interlocutory application being I.A.(C) 2059/2022 and reply dated 09.09.2022 to the objection filed by the petitioner to the said application be treated as the intervenor's reply to the present writ petition. In paragraph 6 of said I.A.(C) 2059/2022, it has been specifically stated that the petitioner has concealed the fact that in appeal the debarment order dated 09.11.2021 has been modified by reducing the period of debarment from three years to one year and that it appears from the order dated 20.06.2022 passed in this writ petition that the appellate order dated 21.02.2022 was brought to the attention of this Court by respondent no.1 and it has also been stated to the effect that the order dated 09.11.2021 has merged with order dated 21.02.2022 of the appellate authority. The response to statement made in paragraph 6 of the interlocutory application is made in paragraph 11 of the objection filed by the writ petitioner on 22.08.2022 wherein the petitioner had denied that he had tried to conceal the fact that the appellate authority had reduced the duration of debarment.

10. In the list of dates appended to this writ petition, in respect of date 16.11.2021, the following statement has been made on behalf of the petitioner- "The petitioner filed an appeal against the Debarment Order dated

09.11.2021 with the Chairman & Managing Director (CMD), Oil India Ltd. It is pertinent to note that the appellant authority (i.e. the CMD) has not processed the Petitioner's appeal and in any event has no powers to place the Debarment Order in abeyance." By referring to the letter of appeal dated 16.11.2021 preferred by the petitioner against the speaking order dated 09.11.2021, the learned senior counsel for the intervenor has demonstrated that in the said appeal, the C.E.O. of the petitioner had not only prayed for setting aside the debarment order, but had also prayed to grant interim stay of the operation of the said debarring order.

11. The Court is unable to envisage a situation where the appellate authority of Oil India Ltd. had allowed the appeal of the petitioner that was preferred against the debarment order dated 09.11.2021, and that despite being it being mentioned in the said appellate order dated 21.02.2022 that it is to be served on the petitioner, yet the respondent nos. 1 and 2 had not served the said appellate order upon the petitioner, as submitted by the petitioner in their written submissions. Although the said submissions appear to be attractive, but in this case in hand, the petitioner is not entitled to feign ignorance about the passing of the appellate order dated 21.02.2022, because of the fact that reference to the said appellate order dated 21.02.2022 has been made by this Court in paragraph 5 of the order dated 20.06.2022 passed in connection with this writ petition. However, subsequent to the passing of the said order dated 20.06.2022, the petitioner did not take a stand in this proceeding that they were not served with the appellate order.

12. The learned senior counsel for the intervenor had made a forceful submission that the reason for the petitioner to not bring on record the appellate order dated 21.02.2022 along with supported pleadings as it would

have been revealed that the reduction of the debarment period from three years to one year was taken into account as envisaged in the Rule 151(iii) of the GFR, 2017 (i.e. General Financial Rules, 2017). The said disclosure, as submitted by the learned senior counsel for the petitioner, would have exposed that the GFR, 2017 would have applied in connection with the "OIL's Tender No. SDG8439P22/09 for procurement of five numbers of 2000 HP VFD Drilling Rigs with Top Drive and Accessories". The Court is not inclined to make any comment thereon at this stage.

13. It emerges from the discussion above that the debarment order dated 09.11.2021 would stand merged with the appellate order dated 21.02.2022. Having preferred the appeal before the appellate authority, it is not open for the petitioner to take a stand that the appellant authority would not have any power to entertain the appeal or to pass any interim order thereon. In the considered opinion of the Court the petitioner cannot be permitted to take a stand that the appellate order dated 21.02.2022 had no authority of law for the simple reason that the petitioner cannot be permitted to approbate and reprobate in the same breath because they cannot take advantage of reduction of the debarment period from three years to one year, which the petitioner is enjoying from the appellate order dated 21.02.2022, and yet deny the power of the appellate authority to entertain the appeal. Therefore, having accepted the benefit flowing from the appellate order dated 21.02.2022, the stand-alone challenge to the order dated 09.11.2021 is *ex facie* not maintainable.

14. The debarment order dated 09.11.2021 cannot be accepted to be a stand-alone order, as the same stands merged with the appellate order dated 21.02.2022. Thus, the present writ petition to challenge the order dated 09.11.2021 is held to be not maintainable on facts and in law.

15. On the aforesaid point, it would be appropriate to quote the paragraph 44 (i) of the case of *Kunhayammed (supra)* below:-

- (i) *Where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the sub-ordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.*

16. On the second ground urged by the learned senior counsel for the intervenor, the Court is of the considered opinion that as the petitioner has approached this Court under Article 226 of the Constitution of India, the petitioner ought to have disclosed all material facts even if those facts were against their interest. In the present case, the petitioner has not disclosed about the appellate order dated 21.02.2022 although this writ petition was filed on 13.06.2022. In the aforesaid context, it would be appropriate to quote below paragraphs 34, 36, 38, 39 and 51 of the case of *K.D. Sharma (supra)*:-

34. *The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the Writ Court must come with clean hands, put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim.*

* * *

36. *A prerogative remedy is not a matter of course. While exercising extraordinary power a Writ Court would certainly bear in mind the conduct of the party who invokes the jurisdiction of the Court. If the applicant makes a false statement or suppresses material fact or attempts to mislead the Court, the Court may dismiss the action on that ground alone and may refuse to enter into the merits of the case by stating "We will not listen to your application because of what you have done." The rule has been evolved in larger public interest to deter*

unscrupulous litigants from abusing the process of Court by deceiving it.

38. *The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of Writ Courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because, "the Court knows law but not facts".*

39. *If the primary object as highlighted in Kensington Income Tax Commrs., (1917) 1 KB 486, is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the Court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the Court, the Court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the Court does not reject the petition on that ground, the Court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of Court for abusing the process of the Court.*

51. *Yet in another case in Vijay Syal v. State of Punjab, (2003) 9 SCC 401, this Court stated:*

"24. In order to sustain and maintain sanctity and solemnity of the proceedings in law courts it is necessary that parties should not make false or knowingly, inaccurate statements or misrepresentation and/or should not conceal material facts with a design to gain some advantage or benefit at the hands of the court, when a court is considered as a place where truth and justice are the solemn pursuits. If any party attempts to pollute such a place by adopting recourse to make misrepresentation and is concealing material facts it does so at its risk and cost. Such party must be ready to take consequences that follow on account of its own making. At times lenient or liberal or generous treatment by courts in dealing with such matters are either mistaken or lightly taken instead of learning proper lesson. Hence

there is a compelling need to take serious view in such matters to ensure expected purity and grace in the administration of justice."

17. In view of the ratio laid down in the case of *K.D. Sharma (supra)*, the Court is inclined to reject this writ petition on the ground of suppression of material facts as the learned senior counsel for the intervenor has asserted that those facts have a bearing in this case.

18. Resultantly, on applying the doctrine of merger and taking note of the fact that there is no challenge to the appellate order dated 21.02.2022, this writ petition stands dismissed. Moreover, for suppression of material facts and non-disclosure of such facts, specifically the existence of the appellate order dated 21.02.2022, this writ petition stands rejected.

19. Under such circumstances, the petitioner is directed to pay a cost of Rs.10,000/-, which shall be deposited by the petitioner before the Registry of this Court within a period of 30(thirty) days from the date of this order, failing which the cost shall be recovered in accordance with law. On such cost being deposited, the Registry shall handover the same to the Gauhati High Court Legal Aid Committee.

20. Before parting with the records, it is clarified that this writ petition was heard on preliminary issue of maintainability, raised by the learned counsel for the intervenor and as such the merit of the case of the petitioner has not been gone into and/or adjudicated.

JUDGE