

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.03.2015

Date of Reserving the Order	Date of Pronouncing the Order
09.03.2015	23.03.2015

CORAM

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P. Nos.10622, 10660 & 13160 of 2014

M/s.Riththika Construction,
(Previously Partnership firm
Now Proprietary concern),
Rep., by its Proprietor,
No.42, Thanthaiperiyar Nagar,
Gandhi Nagar Post, Kurinjipadi Taluk,
Cuddalore District.

... Petitioner in all W.Ps.

Vs

1. The Director/Power,
Neyveli Lignite Corporation Ltd.,
Neyveli - 607 801.
2. The Chief General Manager,
Thermal Power Station-I Expansion,
Neyveli Lignite Corporation Ltd.,
Neyveli - 607 807.

...1st & 2nd Respondents in all W.Ps.

- 3.The Deputy General Manager (Civil),
Thermal Power Station-I Expansion,
Neyveli Lignite Corporation Ltd.,
Neyveli - 607 807.

4. Sathish & Co.,
Rep., by its Proprietor,

C.Selvaraj,
Chinnakappankulam,
Periyakappankulam Post,
Virudhachalam Taluk,
Cuddalore District.

... Respondents in W.P.No.13160/2014

3. Mr.Shankaran
The Deputy General Manager (Civil),
Thermal Power Station-I Expansion,
Neyveli Lignite Corporation Ltd.,
Neyveli - 607 807.

4. The Chief Vigilance Officer,
Neyveli Lignite Corporation Ltd.,
Neyveli - 607 801.

... 3rd & 4th Respondents in W.P.Nos.10622 & 10660/2014

Prayer in W.P.No.10622 of 2014 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Mandamus, to direct the fourth respondent to take appropriate action against the third respondent for the alleged violations on the basis of the representation dated 28.11.2013.

Prayer in W.P.No.10660 of 2014 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Mandamus, to direct the respondents not to insist the special condition of minimum man power requirement for the contract work or alternatively directing the respondents 1 and 2 to increase the tender value amount proportionately as per special conditions in the contract of "Up keep of main plant building, service building and plant and non plant buildings in Thermal Power Station-I Expansion including manning of parking sheds for the year 2013-2015".

Prayer in W.P.No.13160 of 2014 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorarified Mandamus, to call for the records relating to the second respondent's proceedings made in Lr.No.017/CGM/TPS-1 Expn/Cont/2500/Civil/T.No.09113-14/intimation/2014, dated 29.04.2014, and quash the same and direct the respondents 1 to 3 to allow the petitioner to continue the contract work of Up keep off main plant building, service building and plant and Non plant building in TPS-1 Expansion including manning of parking sheds for the years 2013-2015.

For petitioner : Mr.M.Muthappan

For Respondents : Mr.N.A.K.Sharma and
N.Nithianandan

C O M M O N O R D E R

The petitioner in these Writ Petitions is a contractor, who had been awarded the work of "Up keep of main building, service building and plant and non plant buildings in Thermal Power Station-I Expansion of the Neyveli Lignite Corporation Limited (NLC)" (hereinafter referred to as the "respondent corporation").

2. In W.P.No.10622 of 2014, the petitioner has sought for issuance of a Writ of Mandamus to direct the Chief Vigilance Officer of the respondent Corporation to take action against Mr.Sankaran, Deputy General Manager (Civil), of the respondent Corporation for alleged violations by considering his representation, dated 28.11.2013.

3. In W.P.No.10660 of 2014, the petitioner seeks for a direction to the respondent Corporation not to insist the special condition of minimum man power requirement for the contract work or alternatively direct the respondent Corporation to increase the tender value proportionately as per the condition in the contract.

4. In W.P.No.13160 of 2014, the petitioner has challenged the order dated 29.04.2014, and to quash the same and to allow the petitioner to continue the contract work. By the said impugned order, the petitioner was informed that since the partnership firm M/s.Riththika Construction ceased to exist the work allotted to the petitioner under the contract agreement, dated 27.09.2013, cannot be continued. As by virtue of the impugned order, the petitioner has not been permitted to continue the work, W.P.No.13160 of 2014, is taken up first for consideration and the result of the other two Writ Petitions would depend upon W.P.No.13160 of 2014. The learned counsel appearing for the petitioner fairly concedes to the said position and accordingly W.P.No.13160 of 2014, is taken up for consideration.

5. The relevant facts leading to the filing of the Writ Petition are that the petitioner was awarded the said contract and an agreement was entered into on 27.09.2013. The Petition states that they have been carrying on the contract work without any complaint or remarks. The petitioner further states that the respondent

Corporation was insisting the petitioner to engage the workman of their choice, as a result of which, difference of opinion arose between the petitioner and the officials of the respondent Corporation. In this regard, there are certain averments and allegations made against the Deputy General Manager (Civil), who has been impleaded in his personal capacity as a respondent in W.P.No.10622 of 2014. However for the purpose of considering the correctness of the impugned order, dated 29.04.2014, the allegations made against the Deputy General Manager (Civil) in his personal capacity need not be gone into at this stage.

6. The petitioner would further state that the show cause notice was issued to the petitioner on flimsy grounds and therefore, the petitioner was constrained to approach this Court by filing the other two Writ Petitions and the Writ Petitions were admitted on 11.04.2014, and they were pending. It is submitted that on 28.03.2014, the petitioner's partnership firm was dissolved and became a proprietary concern and this was informed to the Chief General Manager of the respondent Corporation vide letter dated 01.04.2014. Pursuant to which the petitioner was informed by letter dated 19.04.2014, the matter has been referred to the Legal Department. Subsequently, by letter dated 29.04.2014, the petitioner's request for reconstitution of partnership firm to proprietary concern was rejected and contract was terminated. It is stated that the said order was served on the petitioner only on 30.04.2014, but before serving the order, the fourth respondent a proprietorship concern was engaged as a contractor and entry passes were issued to their workman. This according to the petitioner establishes that the respondent Corporation was pre-determined to terminate the petitioner's contract. The order dated 29.04.2014, is impugned in this Writ Petition.

7. The learned counsel appearing for the petitioner elaborately referred to the terms and conditions of the contract agreement more particularly clause Nos.19 & 28 and submitted that in terms of clause 19, if the tenderer is a partnership firm and there is any reconstitution, the same has to be intimated to the respondent Corporation and only if intimation is not given, the contract was liable for termination and the petitioner having intimated the respondent Corporation about the reconstitution, the contract could not have been terminated. Further, it is submitted that the present proprietor of the concern was holding 80% of the shares in the partnership firm and he has become the sole proprietor and he is not withdrawing from the organisation till the completion of the work and therefore, clause 19, could not have been invoked by the respondent Corporation. Further, it is submitted that the termination of the

contract without notice is illegal and contrary to clause 28(i) of the contract agreement. Further, it is submitted that the contract was awarded on the basis of work done by the petitioner and not on the basis of any individual partnership work and therefore, there is no violation of clause 19 of the General Terms and Conditions of the contract. Further, it is submitted that there is no legal impediment to reconstitute a partnership firm to a proprietary concern for the purpose of continuing the contract, since the proprietor is the major shareholder of the partnership firm, which was awarded the contract. Further, it is submitted that if there was any difference of opinion arising out of the contract, there is an arbitration clause available as per clause 31, to sort out differences and this procedure could have been resorted to by the respondent Corporation. Further, it is submitted that the respondent had pre-determined to terminate the contract which are evident from the date on which the entry passes were given to the employees of the fourth respondent much prior to serving the impugned order on the petitioner. Therefore, it is submitted that the impugned order is unsustainable and liable to be set aside. The learned counsel referred to the decision of this Court in the case of Zodiac Traders India, vs. Seychelles Public Transport Corpn., reported in 2013 (6) CTC 301, to support the contention that the proprietor was the major shareholder in the partnership firm and he is continuing as the proprietor and there is no impediment for the respondent Corporation to execute the work through the proprietor.

8. The learned counsel appearing for the respondent referring to the counter affidavit submitted that the partnership firm was awarded the contract for a period of two years from 01.08.2013 and the firm was dissolved on 28.03.2014, by virtue of deed of dissolution and one of the partners is continuing the business activity under the same trade name, but as a proprietorship. Upon dissolution of the firm, the proprietor reported the same to the respondent Corporation and requested permission to continue to operate the contract, as a sole proprietor for the rest of the contract period.

9. The learned counsel raised a preliminary objection regarding the maintainability of the Writ Petition by referring to clause 31 of the contract agreement, according to which all disputes or differences between the parties shall be settled by Arbitration. It is further submitted that the issue raised by the petitioner squarely falls within the dispute referable to Arbitration under clause 31 of the contract agreement and the contract being a non-statutory contract, Writ Petition is not the proper remedy for resolving the dispute and therefore, the Writ Petition is liable to be dismissed. It is submitted that as per the terms of the tender notification in

clause 2.1, the bidder should have carried out and completed any work for a minimum value of Rs.48.03 Lakhs under a single agreement in their name or in the name of the individual partner in the case of partnership firm in Government/ Quasi Government/PSU within the last seven years prior to the date of tender opening. Further in terms of clause 3.0 if the bidder is firm or a private limited company, they should furnish the copy of partnership deed/MAOA as the case may be and if it is a proprietary concern, they should furnish a declaration letter.

10. Further, the learned counsel submitted that the petitioner was a firm consisting of three partners submitted their bids enclosing partnership deed dated 27.04.2006 and also documentary proof as having completed work to the value of Rs.48.03 Lakhs under a single agreement in the name of "M/s.Riththika Construction" a partnership firm. It is further submitted that after scrutiny and evaluation of the bids received, M/s.Riththika Construction being L-1 tenderer, contract was awarded and the partnership firm commenced execution of the contract work from 01.08.2013. It is further submitted that the work was not satisfactory and therefore, the respondent Corporation had issued notices, pointing out the deficiencies in the execution of the work. When the petitioner's sought for converting the partnership firm to a proprietary concern, the request was rejected and the petitioner was informed that the partnership firm ceased to exist and cannot be continued by the sole proprietor in terms of the agreement. It is submitted that the case is not reconstitution of a firm, but the partnership firm ceased to exist and it has become a proprietorship. The pre-qualification requirement was satisfied not individually by any one partner, but collectively by all three partners in the name of the firm. Therefore, on account of the dissolution of the firm, the proprietor cannot be treated to have satisfied the bid requirement as well as the stipulation in clause 19. Further, it is submitted that the respondent Corporation has no privity of the contract with the proprietor and the proprietorship has come into existence only on 28.03.2014. Therefore, it is submitted that the decision taken by the respondent Corporation is valid and proper.

11. Heard the learned counsels appearing on either side and perused the materials placed on record.

12. The contract which was awarded in favour of the partnership firm is admittedly a non statutory contract. Clause 31 of the contract states that if any dispute or difference of any kind whatsoever arises between the respondent Corporation and the contractor out of the contract for the performance of the work has

to be dealt with in terms of the said clause, which provides for "Arbitration" in accordance with the provisions of the Arbitration and Conciliation Act, 1996. In the light of a binding arbitration agreement, unless the petitioner brings his case under any one of the contingencies which are generally considered fit to by-pass the Arbitration remedy, the Writ Petition cannot be entertained.

13. Admittedly, the petitioner after the partnership firm became a proprietorship sought for permission to continue the contract by resorting to the procedure under clause 19 of the General Terms and Conditions of the Contract. Clause 19 of the General Terms reads as follows:-

19. If the tenderer is a partnership firm and if there is any reconstitution of the partnership, the same should be intimated to NLC immediately; otherwise, the contract will be liable for termination at the risk and cost of the tenderers. The partner on whose pre-qualification, the work was awarded should not withdraw from the partnership till the completion of the work, in case they happened to be the successful bidder.

14. In terms of the above clause, if the tenderer is a partnership firm and if there is any reconstitution of the partnership that should be intimated to NLC immediately, otherwise the contract will be liable for termination at the risk and cost of the tenderers. The petitioner would state that immediately on the partnership firm becoming a proprietorship, they addressed the respondent Corporation intimating the same. Therefore, it is submitted that they have fulfilled the requirement and the question of termination does not arise. However clause 19 only speaks of reconstitution of the partnership, but does not provide for contingencies, where the tendering entity itself ceased to exist. In the instant case, it is not a reconstitution of a firm, but dissolution of the partnership firm.

15. Admittedly, the contract was awarded to a partnership firm, this fact is not in dispute nor can it be disputed by the petitioner. In such circumstances, if among the partners there is a reconstitution and a deed of reconstitution was entered to either inducting new partners or permitting resignation of existing, then the same would fall within the clause 19 of the General Terms and Conditions of the contract. However, in the instant case firm stood dissolved and a deed of dissolution was entered into on 28.03.2014 and the sole proprietorship came into existence on and from the said date which is a new legal entity distinct from the tendering entity. Therefore, the deed of dissolution would not fall within the scope of

clause 19 of General Terms and Conditions, which only speaks of reconstitution. The net result is the partnership firm, which was awarded the contract ceased to exist. In such circumstances, the respondent Corporation cannot be faulted for rejecting the petitioner's request to continue the contract through the petitioner as a proprietorship. Therefore, the petitioner has been under a misconception that they having intimated about the firm becoming a proprietorship, they had satisfied the requirement in clause 19, rather clause 19 would have no application to the facts of this case, since it is the case of dissolution of a partnership firm and the partnership firm becoming a proprietorship. The said new entity cannot be equated to the entity which was awarded in the contract. Therefore, there can be no error attributable to the impugned order.

16. Reliance was placed on the decision of this Court in the case of Zodiac Traders India, vs. Seychelles Public Transport Corpn., (supra). The said decision would have no application to the facts of this case, since the facts have to be considered in the light of the agreement entered into between the parties.

17. The petitioner would contend that the impugned order has been passed on account of malafide intentions and with a biased attitude and they have pre-determined the whole issue. These contentions involved adjudication into serious disputed questions of fact, which cannot be dealt with in a Writ Petition. In the light of the above, there is no error in the impugned order warranting interference under Article 226 of the Constitution of India.

18. In the result, the Writ Petition in W.P.No.13160 of 2014, fails and the same is dismissed. However, if the petitioner is advised to resort to Arbitration in terms of the contract and such option is exercised by the petitioner and the matter is referred to the Arbitrator, the same shall be considered independently based on the oral and documentary evidence placed before the Arbitrator and he shall not be in any manner influenced by the observations made in this order.

19. In the light of the fact that W.P.No.13160 of 2014, is dismissed and the order impugned therein holding that the work under the agreement cannot be continued by the proprietor having been upheld, there is no necessity to examine the contentions in W.P.Nos.10622 and 10620 of 2014 and accordingly, both the Writ Petitions are closed. However, it is open to the petitioner to raise the factual contentions raised in these two Writ Petitions before the Arbitrator in the event of the petitioner exercising such option.

In the result, W.P.No.13160 of 2014 is dismissed and consequently, W.P.No.10622 & 10620 of 2014 are closed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

pbn.

To

1. The Director/Power,
Neyveli Lignite Corporation Ltd.,
Neyveli - 607 801.
2. The Chief General Manager,
Thermal Power Station-I Expansion,
Neyveli Lignite Corporation Ltd.,
Neyveli - 607 807.
3. The Deputy General Manager (Civil),
Thermal Power Station-I Expansion,
Neyveli Lignite Corporation Ltd.,
Neyveli - 607 807.

+1cc to Mr.N.A.K.Sharma, Advocate, S.R.No.16286

W.P. Nos.10622, 10660 & 13160 of 2014

LRS (CO)
CA(01/04/2015)

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