NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No.451 of 2016

WILO Mather and Platt Pumps Private Limited, previously known as Mather & Platt Pumps Private Limited, is a company incorporated under the Companies Act, 1956 having its registered office at Greaves Compound, Chinchwad works, Bombay – Pune Road, Chinchwad, Pune – 411019, and is represented through its branch manager, Arnab Bhattacharya S/o Dipankar Bhattacharya, aged about 36 years, having zonal office at: WILO Mather and Platt Pumps Pvt. Ltd., Office No.2, 3rd floor, Maruti Heights, Amanaka, G.E. Road, Raipur – 492099 having fax No. +91 771 4055911 and email id: arnab.bhattacharya@matherplatt.com

---- Petitioner

versus

1. South Eastern Coalfields Limited, a Union Government Company incorporated under the Companies Act, 1956, and a Miniratna Public Sector Undertaking, having its registered address at Seepat Road, Bilaspur, Chhattisgarh – 495006, through Shri Om Prakash, Chairman cum Managing Director
2. Coal India Limited, a Union Government Company incorporated under the Companies Act, 1956, and a Maharatna Public Sector Undertaking, having its registered address at Coal Bhawan, Premises No. 04-MAR, Plot No. AF-III, Action Area – 1A, New Town, Rajarhat, Kolkata, West Bengal – 700156
3. Union of India, through the Secretary, Ministry of Coal, New Delhi
4. Deutsche Bank AG, a German banking and financial services company, having its Branch Office at Supreme CTS No.1337/2 Shop No.133/1 and 134/2 Main ITI Road, Aundh Branch, Pune – 411 007, Maharashtra

---- Respondents

For Petitioner	:	Shri Prashant Jayaswal, Senior Advocate with Shri Ashutosh Shukla and Shri Aayush Singhvi, Advocates
For Respondents No.1&2	:	Dr. N.K. Shukla, Senior Advocate with Shri Vinod Deshmukh, Advocate
For Respondent No.3	:	Shri Narendra Kumar Vyas, Assistant Solicitor General

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Order on Board

Per Navin Sinha, Chief Justice

15/3/2016

1. The Petitioner is aggrieved by order dated 29.1.2016 banning all business dealings with it, euphemistically described as black listing, for a period of three years and also directing it to refund payment of Rs.4,20,61,885.00 for the 14 pump sets supplied by it, failing which other subsidiaries of Coal India Limited and areas of South Eastern Coalfields Limited (hereinafter referred to as 'SECL') would be advised to stop payment and recover the amount paid against the supply of the 14 pump sets, along with encashment of all performance bank guarantee lying with the SECL and forfeiture of earnest money deposited.

2. Learned Senior Counsel for the Petitioner submitted that the order of black listing was not sustainable since there was no such provision in the Notice Inviting Tender (hereinafter referred to as 'NIT) or the contract agreement between the parties. It was next submitted that under the NIT, the guarantee/warranty for performance of the 14 pumps in question was valid for a period of one year from the date of commissioning. The pumps having been commissioned on 18.11.2013 the guarantee stood lapsed on 17.11.2014. Banning of business could not be ordered for reason of any defects in the pumps that may have occurred after the guarantee/warranty period. The action of the Respondents purporting to recover the dues from other contracts was totally unjustified and reflects arbitrariness as also high handedness. The Petitioner carried out all necessary repairs of the pump sets during the guarantee/warranty period. Reliance was placed on (2014) 9 SCC 105 [Gorkha Security Services v. Government (NCT of Delhi)] to urge that if no term of the agreement had been breached, black listing was unjustified. The writ petition was maintainable as there existed no arbitration clause in the agreement.

3. Learned Senior Counsel for the SECL submitted that there was no procedural infirmity in the decision making process for black listing. Proper and repeated opportunities have been granted to the Petitioner and its reply considered. The 14 pump sets failed during the guarantee/warranty period itself explicit from the letter of SECL dated 13.4.2015. There is no denial of the fact either in the reply to the same or in the pleadings of the writ petition. In any event, these are all disputed questions of fact. No writ petition lies in a contract matter raising disputed questions of fact with regard to the quality of pump sets supplied, whether they went defective during the guarantee/warranty period, if repairs were carried out leading to satisfactory performance or not. Blacklisting having been ordered after compliance with principles of natural justice the writ petition is not maintainable. Referring to Clause 16(e) of the NIT dated 3.12.2012, it is submitted that it specifically provided for recovery by appropriating in part or in whole by deducting any sum which may be due under the present contract or any other contract should this sum be not sufficient to recover the full amount recoverable and the successful tenderer shall so pay. The Petitioner had voluntarily agreed to this term of the contract and cannot contend to the contrary now. If the parties had signed a contractual agreement containing specified terms and conditions, the Petitioner cannot renegade from the same if he now finds a particular clause uncomfortable.

4. We have considered the submission on behalf of the parties and perused the materials on record also.

5. Pursuant to the NIT published by the Respondents, the Petitioner supplied 14 pump sets for use at the Gevra area. The machines were commissioned on 18.11.2013. The guarantee/warranty period was for twelve months. According to the Respondents the pumps started to fail within the guarantee/warranty period itself as mentioned in their letter dated 13.4.2015. This fact was not disputed or denied by the Petitioner either in its reply dated 2.5.2015 or subsequent thereto and there is no such assertion in the pleadings of the writ petition also. The submission that blacklisting was unjustified for failure of the pumps that may have taken place after expiry of the guarantee/warranty period becomes a disputed question of fact for which no enquiry is permissible in the writ jurisdiction as it will require taking of evidence also. The reply dated 2.5.2015 by the Petitioner is detailed in nature, disclosing full awareness and knowledge of the issues arising for determination.

6. After considering the Petitioners reply dated 2.5.2015, the Respondents gave a final notice on 11.5.2015. It explicitly states that the pumps were installed in 2013. On operation, these pumps failed one by one after initial running of specified hours as mentioned therein within a period of seven days to two months. Despite rectification efforts by the Petitioner the pumps continued to fail in the same pattern. A final opportunity for rectification was then given to the Petitioner. It also mentioned the fact that action would be initiated including suspension/banning of business. The Petitioner reiterated its reply dated 2.5.2015 requesting for withdrawal of the final notice and to continue business dealings with it. The impugned order of black listing has then followed.

7. It is therefore apparent that whether the pumps supplied were of specified quality or not, whether they went defective during the guarantee/warranty period or not, whether rectification work was done to the satisfaction of the Respondents during the guarantee/warranty period or not, whether the defects had surfaced after expiry of the guarantee/warranty period and why the pumps kept failing repeatedly are all disputed questions of facts for which no enquiry is permissible in the writ jurisdiction.

8. In (2015) 7 SCC 728 (Joshi Technologies International Inc. v. Union of India), it has again been reiterated that if there are very serious disputed questions of fact which also requires oral evidence for determination, the writ jurisdiction cannot be invoked, observing at paragraph 70.8 as follows:

> "70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law,

> the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction."

9. No person has any right to insist that the Government must do business with him. The only right available is that there should be no arbitrariness or discrimination in the process. If the Government does not wish to do business with any person, it cannot act in an arbitrary or whimsical manner. The decision must be supported by reasons to be disclosed, if challenged. The reasons again must be relevant and germane and not arbitrary or fanciful. Once reasons are disclosed, judicial review will apply in the restricted sense to consider whether the reasons were germane or irrelevant. If they are germane or relevant from the commercial point of view, the Court cannot go into the sufficiency of the reasons or re-examine them to its satisfaction sitting in judgment over that of one of the contracting parties. Black listing is a method evolved in the commercial world by which one of the parties to the agreement decides not to deal with the other in future based on its own commercial experiences and expediency. It is considered an inherent part of the commercial world giving the authority to decline dealings with one where experiences of commercial expediency may not have been good. In (2012) 11 SCC 257 (Patel Engineering Limited v. Union of India), it was observed as follows:

> "15. It follows from the above judgment in *Erusian Equipment & Chemicals Ltd.* v. *State of W.B.,* (1975) 1 SCC 70 that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally

> without in any way being arbitrary – thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

10. That there need not be a specific clause providing for blacklisting and that it was inherent in contractual matters keeping in mind matters of commercial expediency was considered in (2014) 14 SCC 731 (Kulja Industries Ltd. v. Western Telecom Project BSNL) observing as follows:

> "17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto….."

11. The only question for consideration in exercise of powers for judicial review is whether the order of black listing has been passed in accordance with the principles of natural justice after proper opportunity of defence to the Petitioner for convincing the Respondents that it was not at fault or that black listing was not justified in the facts and circumstances of the case. The pumps were supplied on 18.11.2013. The Respondent informed the Petitioner on 13.4.2015 that the pumps had failed during the guarantee/warranty and rectification work was not upto the mark requiring immediate action for rectification/replacement. The Petitioner replied on 2.5.2015. Thereafter, the SECL gave another notice on 11.5.2015 reiterating that the pumps had worked barely for a period of seven days to two months and that even after repairs the pumps were failing in the same pattern. The Petitioner was specifically put on notice that failure to rectify/replace within 30 days would lead to initiation of action under Clause 16 of the purchase order dealing with the liquidated damages clause. It was also mentioned that suspension/banning of business may also be resorted to in absence of adequate response. The Petitioner replied to it on 20.5.2015 referring to its earlier reply dated 2.5.2015 contending that it had not received a proper reply to it and that till the Respondents did not do so, it would not be possible for the Petitioner to do anything further with regard to the working of the pumps. It specifically acknowledges the reference to the contemplation for suspension/banning of business dealings with it. On 4.6.2015, it was given an opportunity for personal hearing also which was provided as acknowledged by the Petitioner in its letter dated 11.6.2015. On 28.7.2015, the Respondents again wrote to the Petitioner that nothing had been heard from its end and that the pumps were urgently required to be put into action otherwise it would be forced to take punitive action as mentioned in the letter dated 12.5.2015 (read as 11.5.2015) which included suspension/banning of business. The records reveal further communication exchanged between the parties even thereafter culminating in the impugned order dated 29.1.2016. A bare perusal of the impugned order more than adequately reflects in 15 stages the exchange of correspondence and minutes between the parties before culminating in the order for banning of business.

12. The Court is therefore unable to hold that the order for banning/black listing has been done arbitrarily or whimsically much less in violation of the principles of natural justice. Natural justice cannot be put in any straitjacket formula and its applicability will have to be tested in the facts of each case as to what would be sufficient opportunity. In the present case, not only has there been regular exchange of correspondence between the parties, acknowledgment of deficiency on part of the Petitioner with attempts at rectification, personal hearing has also been granted. The Petitioner was more than adequately put on notice with regard to the contemplated action of blacklisting by the Respondents. We do not think that the SECL was required to do anything further for displaying fairness in the decision making process. In (2001) 8 SCC 604 (Grosons Pharmaceuticals (P) Ltd. v. State of U.P.), it was observed as follows:

> "2……It was sufficient requirement of law that an opportunity of show-cause was given to the appellant before it was blacklisted. It is not disputed that in the present case, the appellant was given an opportunity to show cause and it did reply to the show-cause which was duly considered by the State Government. We are, therefore, of the view that the procedure adopted by the respondent while blacklisting the appellant was in conformity with the principles of natural justice."

13. The conclusion that the order of blacklisting calls for no interference is fortified by the observations in Patel Engineering Limited (supra):

> "36. We cannot say the reasoning adopted by the second respondent is either irrational or perverse. ….. No doubt, the fact that the petitioner is blacklisted (for some period) by the second respondent is likely to have some adverse effect on its business prospects, but, as pointed out by this Court in *Jagdish Mandal* v. *State of Orissa,* (2007) 14 SCC 517:
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>> "Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

14. That leaves the only issue with regard to deductions under Clause 16(e) of the NIT from dues payable under other contracts. In view of the Petitioner having accepted Clause 16(e) of the NIT permitting the same, the dispute falling purely in the realm of a private contract, the Petitioner cannot renegade from his agreed obligations between the parties. The Respondents cannot be stated to be acting dehors the terms of the contract. In conclusion, the impugned order calls for no interference. If so advised, the Petitioner may pursue such other remedies before the appropriate forum as may be available to it when nothing in the present order can be deemed or construed as adverse to the Petitioner and which proceeding will have to be decided on its own merits in accordance with law.

15. The writ petition is dismissed.

Sd/-
(**Navin Sinha**)
CHIEF JUSTICE

Sd/-
(**P. Sam Koshy**)
JUDGE

Gopal