

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 27.02.2018

Judgment pronounced on: 17.07.2018

+ **W.P. (C) 4214/2017, CM APPL.18452, 28395 & 38814/2017
TECHNOCRATS ADVISORY SERVICES PRIVATE LIMITED**

..... Petitioner

Through: Mr. Dayan Krishnan, Sr. Advocate with
Ms. Mani Gupta, Mr. Sanjeevi, Ms. Aakashi
Lodha and Mr. Sashidhar S., Advocates.

Versus

**UNION OF INDIA THROUGH: THE MINISTRY OF ROAD
TRANSPORT & HIGHWAYS**

..... Respondent

Through: Mr. Vikas Mahajan, CGSC with Mr.
Shyam Sundar and Mr. Deepak Goyal,
Advocates.

**CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J.

Prefatory Facts:

1. This is a writ petition in which the petitioner seeks, principally, two reliefs:

(i) First, that its name be substituted in respect of the seven projects which have been referred to in paragraph 8 of the writ petition.

(ii) Second, that a direction be issued to the respondent to substitute its name in place of an entity known as M.C. Consulting in the list of empanelled consultants, maintained by it, qua Category I (B) projects.

(ii)(a) In other words, it seeks issuance of a revised list of empanelled consultants for the aforementioned projects with its name included in it.

2. The petitioner has had to move this Court under Article 226 of the Constitution for seeking the aforementioned reliefs in the background of the following broad facts:

2.1 The record shows that petitioner company, which was incorporated on 12.12.2014, was part of a Scheme of Arrangement-cum-Demerger (in short 'Scheme'), which was presented in pursuance of the provisions of Sections 391 to 394 and other applicable provisions of the Companies Act, 1956 (in short '1956 Act'). Since, the company being demerged had its registered office located in Hyderabad, Telangana and the petitioner company, which is the resulting company, had its registered office located in Delhi, the Scheme was presented both before the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh and in this Court.

2.2 Furthermore, the record shows, a fact, which is not disputed by the parties before me, that on 17.08.2015, the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh sanctioned the Scheme while this Court sanctioned the very same Scheme on 30.05.2016.

2.3 The Scheme was made effective from 27.06.2016, whereas the appointed date, which was incorporated in it, was fixed as 01.01.2015.

2.4 The Scheme, so sanctioned by the two High Courts, envisaged that the demerged company, which goes by the name of M.C. Consulting Engineers Private Limited, would shed its consultancy business pertaining to the field of roads, highways and other bridges which was being executed along with National Highway Authority of India (in short 'NHAI') to leverage its consultancy activity in the field of buildings, townships, irrigation etc.

2.5 It is with this broad theme and purpose in mind that the aforementioned Scheme was devised and presented for sanction before the concerned High Courts.

2.6 The scheme as sanctioned comprises three parts. Part A deals with the definition of 'terms' used in the Scheme and sets out the share capital

of the demerged-company and the petitioner company (i.e. transferee company) as also the effective and operative dates pertaining to the Scheme.

2.7 Part B sets out the details of the demerged business which has been hived off from the demerged company and placed within the fold of the petitioner company i.e. the transferee company.

2.8 The last part i.e. part C deals with the general terms and conditions applicable to the Scheme and other consequential and integrally connected matters.

2.9 The record also shows that the Scheme, upon being sanctioned, was filed with the Registrar of Companies (ROC) on 27.06.2016, which is when it was made effective.

2.10 It appears that the petitioner company wrote to the respondent on 28.06.2016 informing it about the factum of demerger of the consulting business and its transfer to the petitioner company.

2.11 The petitioner company attempted to impress upon the respondent that upon the Scheme becoming effective, all assets, liabilities, experience, turn-over, company profile, agreements, tenders, empanelment, registration etc. existing in the name of the demerged company stood transferred in the

name of the petitioner company i.e. the resulting company. A specific reference was made to the fact that the demerged company was empanelled for Category I (B) projects at serial No. 28 of the list enclosed with the respondent's letter dated 23.12.2013 and that in view of the aforesaid, the petitioner company's name ought to be replaced with that of the demerged company.

3. It appears that another letter on similar lines dated 30.06.2016 was addressed by the petitioner company to the respondent, whereby, it requested that its name be substituted in the LOA issued qua J & K Authority Engineer vide the respondent's letter dated 15.09.2014. The assertion was that in terms of the sanctioned scheme, all tenders submitted by the demerged company vis-à-vis consultancy business and the resultant agreements should now stand transferred in the name of the petitioner company.

3.1 In response thereto, the respondent wrote a letter dated 04.08.2016 to the petitioner company as well as the demerged company. Via this communication, after making certain observations, documents were sought from the petitioner company, which included a complete set of the Scheme of arrangement as approved by the concerned High Courts.

3.2 The petitioner company vide a written communication dated 08.08.2016, sent a detailed response to the concerns/observations made in the respondent's letter dated 04.08.2016. Furthermore, the petitioner company undertook to replace the three bank guarantees submitted by the demerged company. The manner in which the petitioner company proposed to do the same was also indicated in the said communication. The letter concluded by the petitioner company making the same request, which it had made vide its earlier communications dated 28.06.2016 and 30.06.2016. In addition thereto the documents sought were also furnished.

3.3 It appears that since no response was received from the respondent, the petitioner company sent a reminder on 06.10.2016. In this letter, the petitioner company sought to lay emphasis on the fact that because in the empanelment panel, its name was not substituted against that of demerged company, it was unable to submit fresh tenders, causing great financial loss to it.

3.4 On 21.10.2016, the respondent wrote to the demerged company that it had not received reply from it to its letter dated 04.08.2016, and that, if no reply was received qua the same within the next 10 days, it would be

assumed that it had nothing further to state in the matter qua the orders passed by the concerned High Courts.

3.5 On 09.11.2016, the respondent conveyed to the petitioner company that its proposal dated 30.06.2016, requesting for substitution of its name in place of demerged company qua on-going consultancy contracts for National Highways works was examined and that, accordingly, a decision had been taken to effect the change. Reference was also made to the fact that the de-merged company, despite being intimated by the respondent vide letter dated 21.10.2016, had not responded to the same and, therefore, it was presumed that it had nothing to say with regard to the matter at hand. The letter concluded by calling upon the petitioner company to submit draft supplementary agreements for all seven on-going contracts. Furthermore, the petitioner company was also advised to submit a copy of the joint venture agreement executed between itself and J.V. Partners qua the joint venture projects.

3.6 As requested, the petitioner company under the cover of its letter dated 10.11.2016 submitted seven supplementary agreements qua on-going projects as was desired by the respondent. This apart, a copy of a new joint venture agreement was enclosed, which, according to the petitioner, was

the only joint venture project. Furthermore, it was indicated that all three umbrella bank guarantees had also been replaced by the petitioner company.

3.7 Pursuant to the steps taken by the petitioner company, on 06.02.2017, the respondent wrote to the petitioner company that its proposal had been examined for substitution of its name for on-going consultancy contracts pertaining to national highway works, carried out under its aegis. It is further communicated that inputs of Ministry of Law had also been obtained, whereupon, a decision had been taken that the petitioner company should submit draft agreements for on-going projects along with the bank guarantees, and that, thereafter, substitution agreements would be signed upon confirmation of the said BGs. The petitioner company was advised to send the power of attorney of the person who would have the authority to sign the substitution agreement.

3.8 Consequently, on 10.02.2017, the petitioner company confirmed issuance of three bank guarantees, referred to therein, on its request, by the concerned bankers, favouring the respondent.

3.9 The immediate impact of the same was that the petitioner company's name was replaced in respect of two on-going consultancy contracts. This

fact is reflected in the letter dated 13.02.2017, issued by the respondent to its regional office at Guwahati; a copy of which was sent to the petitioner company.

4. The Substitution Agreement dated 10.02.2017 executed between the petitioner company and the respondent is also placed on record.

4.1 However, since the same methodology was not adopted for the remaining contracts, the petitioner company on 27.03.2017 wrote a letter to the respondent setting out its concerns with regard to the delay in execution of supplementary agreements vis-à-vis the other contracts.

4.2 The said letter was, as it appears, followed by several reminders qua which it received no response. The reminders sent by the petitioner in this behalf are dated 15.04.2017 and 17.04.2017. In fact these reminders were followed by a communication of the demerged company dated 19.04.2017.

4.3 Being constrained, the petitioner company filed the instant writ petition, which came up for hearing before the Court on 17.05.2017. On that date, notice was issued both in the writ petition as well as in the interlocutory applications. Via an order dated 08.11.2017, an interim direction was issued restraining the respondent from implementing any decision, whereby, the petitioner company was prevented from using its

name in executing the contracts. Furthermore, by virtue of the very same order, the respondent was also restrained from taking any decision which ran contrary to the Scheme.

4.4 On completion of pleadings, the matter was finally heard and the judgment was reserved on 27.02.2018. Parties in support of their respective stands have also filed written submissions in the matter.

Submissions of Counsel:

5. Briefly, arguments on behalf of the petitioner company have been advanced by Mr. Dayan Krishnan, Senior Advocate, assisted by Ms. Mani Gupta. Likewise, on behalf of the respondent, arguments have been advanced by Mr. Vikas Mahajan, Central Government Standing Counsel (CGSC), assisted by Mr. Shyam Sundar Rai and Mr. Deepak Goyal, Advocates.

6. In support of the petitioner's stand, it has been, broadly, submitted as follows:

6.1 The petitioner company having taken over the consultancy business of the demerged company, it was entitled in law to carry forward the on-going contracts in its own name and, thus, also be empanelled as a consultant for Category I (B) projects. The argument was that with the

consulting business coming within the fold of the petitioner company, its assets, liabilities, contracts, stood vested in the latter, i.e. the petitioner company. A reference in this behalf was made to part B, clause 4 and other sub-clauses of Clause 4 of the Scheme.

6.2 Furthermore, it was argued that since the consultancy business pertaining to field of roads, highways and bridges was acquired by the petitioner company and the persons engaged with the demerged business having the relevant experience were now the employees of the petitioner company, the respondent ought to have carried out the substitution as requested.

6.3 A great amount of emphasis was laid on the fact that once a Scheme, is sanctioned by the Court, it is binding, not only on concerned companies, but also on its creditor and shareholders, including those who express their dissent or who might have opposed its sanction.

6.4 In support of his submissions, reliance was placed by Mr. Krishnan on the following judgments: (i) *Telesound India Ltd., In re 1980 SCC OnLine Del 327*, (ii) *Sadanand S. Varde & Others Vs. State of Maharashtra & Others, 2000 Vol.102 (2) Bom. L.R. 930* and (iii) *New*

Horizons Limited And Another Vs. Union of India And Others, (1995) 1 SCC 478.

7. Mr. Vikas Mahajan, who, appeared on behalf of the respondent, vehemently opposed the prayers made in the writ petition. It was argued by the learned counsel that the Scheme did not spell out that the subject contracts or empanelment, stood transferred in favour of the petitioner company.

7.1 Learned counsel also vehemently argued that there had been concealment of material facts, inasmuch as the petitioner company had failed to disclose to the two High Courts, which had sanctioned the Scheme, the contents of the letter dated 23.12.2013. As per the learned counsel, in terms of clause 5 of the said letter, empanelment of the consultant was subject to the condition that there would be no change in its structure or constitution during the validity period of the panel.

7.2 According to the learned counsel, the said clause barred the consultant absolutely from changing its structure or constitution. It was, thus, the contention of the learned counsel that had this aspect been disclosed, the Scheme may not have been sanctioned.

7.3 Furthermore, it was contended by the learned counsel that the petitioner company was insisting on its empanelment as that was a pre-requisite for participation in the future tenders. Learned counsel submitted that the contracts, which had been executed by the demerged company, clearly provided that they could neither be assigned or sub-contracted without the prior permission of the respondent.

7.4 In sum, the assertion made on behalf of the respondent is that the petitioner company was using, in a manner of speech, a backdoor route to get empanelled and have on-going contracts transferred to its name.

7.5 The argument was that sanction qua the Scheme had been obtained by fraud and, therefore, it was not binding on the respondent. This aspect was elaborated by referring to sub-Section (2) of Section 391 of the 1956 Act. It was also stressed by the learned counsel that while the Scheme, so sanctioned, was binding on the concerned company, its creditors and shareholders and that it could not bind a third party, who had entered into a contract with the demerged company. The right of the third party, as per Mr. Mahajan, under such contracts would depend on the terms of the contract and consent of such third party.

7.6 Mr. Mahajan also, quite curiously, submitted that while the experience of the demerged company would become the experience of the petitioner company (i.e. transferee company) via operation of law, *albeit*, only vis-à-vis future contracts and future empanelment, it would not help in the execution of the existing contracts or empanelment, in view of the bar contained in clause 5 of the letter dated 23.12.2013.

7.7 However, the fact that two substitution agreements had been executed despite the so called bar contained in clause 5 of letter dated 23.12.2013 was sought to be explained by the learned counsel by labeling the said act a ‘mistake’ which, according to him, could not be perpetuated and, therefore, the petitioner company could not plead parity or in other words, negative equality based on the mistake committed by the respondent in the past.

7.8 In support of his submissions, learned counsel relied upon the following judgments: (i) *Asharfi Lal Vs. Koili*, (1995) 4 SCC 163, (ii) *Ramesh Kumar & Anr. V. Furu Ram & Anr.*, (2011) 8 SCC 613, (iii) *M/s. Spice Communications Ltd. & Anr.*, 2011 (165) Comp Cas 334, (iv) *Idea Cellular Ltd. Vs. UOI*, 2012 (195) DLT 594 (DB) and (v) *Meghmala and Others Vs. G. Narasimha Reddy and Others*, (2010) 8 SCC 383.

Reasons

8. I have heard the learned counsel for the parties.

8.1 What emerges from the record is as follows:

8.2 The demerged company, which was in the business of consultancy, apparently, took a decision to hive off its consultancy business pertaining to roads, highways, bridges, etc contracts qua which were being executed by the respondent under the aegis of NHAI. This step was taken, in view of the fact that the demerged company was desirous of leveraging its business with regard to its consulting activities pertaining to construction of buildings, developing town-ships and irrigation projects.

8.3 This aspect of the matter comes through on a perusal of recital 'B' of the sanctioned Scheme.

8.4 Undoubtedly, the Scheme has been sanctioned by the concerned High Court. The High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh sanctioned the Scheme on 17.08.2015, whereas this Court sanctioned the Scheme on 30.05.2016. The Scheme, thus, became operational from the appointed date, i.e. on 01.01.2015.

8.5 A perusal of the Scheme would show that it, inter-alia, had appended to it Annexures A-4 & A-5. Annexure A-4 alluded to the on-going projects of the de-merged company while Annexure A-5 referred to projects for which tenders had been submitted. Amongst the on-going projects, there was an agreement for collection and analysis of bridge condition and bridge inventory data by the demerged company or any other equipment for the purpose of major-minor bridges on national highways, including those for the period of three years in the State of Arunachal Pradesh. This agreement is dated 07.12.2015 and, therefore, does not find reference in the Annexures appended to the Scheme as it was executed after the appointed date i.e. 01.01.2015. However, a provision for such an eventuality was made by inserting Clause 8 in the Scheme. Clause 8 provided for transfer of that part of the business of the demerged company, which emerged between the appointed date and the effective date.

8.6 Therefore, in my view, the argument advanced on behalf of the respondent that there was concealment and in that sense, a fraud played upon the concerned High Courts sanctioning the Scheme, is unsustainable. Thus, the judgments cited in that behalf, to my mind, need not detain me. The fact that the assets and liabilities, rights and obligations of the

demerged company stood transferred and, thus, vested in the petitioner company qua the demerged business is, to my mind, covered by clause 4, Part B of the Scheme. Therefore, as has been correctly pleaded and argued on behalf of the petitioner company, it is entitled to claim benefit of all on-going contract and empanelment, provided it had, as claimed, necessary expertise in the relevant area.

8.7 The petitioner company claims that it has necessary expertise, as not only the demerged business, which included its assets, both moveable and immovable, as also its liabilities, but also, its employees along with their employment contracts stood transferred to it — has not been refuted on facts by the respondent. Therefore, to my mind, the respondent acted with due prudence in seeking the relevant information vide its communication dated 04.08.2016. It may be relevant in this behalf to quote paragraphs 2 to 4 of the said letter.

“...2 The proposal has been examined and the following observations have been made:

(i) Outcome of application made by M/s Technocrats Advisory Services Pvt. Ltd. in the Registrar of Company may be submitted.

(ii) Please specify the clause/directions vide which the Hon’ble High Court directed this Ministry/client for change

in name of firm from M/s MC Consulting Engineers (P) Ltd. to M/s Technocrats Advisory Services Pvt. Ltd. in respect of the existing ongoing contract which is with M/s MC Consulting Engineers (P) Ltd.

(iii) The legal standing of de-merger of M/s MC Consulting Engineers (P) Ltd for not doing consultancy work in the field of Highway sector under the experience of its own has not been clarified.

The undertaking from M/s MC Consulting Engineers (P) Ltd for not carrying out any consultancy services on account of its experience shall be obtained & be submitted supported with Memorandum of Association of M/s MC Consulting Engineers (P) Ltd duly modifying the object to be perused by the company.

It may result in non-assignment of any consultancy work to M/s MC Consulting Engineers (P) Ltd.

3 Further, a complete set of scheme of arrangement as approved by Hon'ble High Court shall also be submitted.

4 The contract Agreements have been executed between M/s MC Consulting Engineers (P) Ltd and the Ministry/Client. The provision of the ongoing contract under which the change in name from M/s MC Consulting Engineers (P) Ltd to M/s Technocrats Advisory Services Pvt. Ltd. as proposed by M/s Technocrats Advisory Services Pvt. Ltd. may please be given. ”

8.8 As indicated in the earlier part of my discussion, a detailed reply was sent by the petitioner company on 08.08.2016. Apart from other things, in respect of the experience and the undertaking of the demerged company not to take up the demerged business, the petitioner company had following to say:

“... The effect of the demerger is that MC Consulting Engineers Private Limited stands divided into two verticals: (i) Consultancy in Road/Highways & Bridge; and (ii) Consultancy in Buildings and Township. The preamble of the scheme of ‘Arrangement and Demerger’ may be perused in this regard, which, inter alia envisages carrying on the business of verticals under independent companies. Therefore, legally, after the Scheme has come into effect, MC Consulting Engineers Private Limited loses all its experience, turnover, past track record and other capabilities, personnel and all resources in connection with the Demerged Business (paragraph 1.4 under Part A) in favour of Technocrats Advisory Services Private Limited, and therefore cannot submit any bid for any consultancy in Roads/Highways, Bridges on account of its own experience possessed prior to the scheme coming into existence, which stands transferred in favour of Technocrats Advisory Services Private Limited.

However, a copy of the undertaking in this behalf given to us on 27.06.2016 is enclosed herewith as Annexure III-A.”

(emphasis is mine)

9. It is only thereafter that the respondent vide letter dated 09.11.2016 informed the petitioner company that a decision had been taken to effect the change in name and to achieve this end, the petitioner company should submit draft supplementary agreements for all seven on-going contracts. These were furnished by the petitioner company under the cover of its letter dated 10.11.2016.

9.1 The respondent, quite curiously, vide its letter dated 13.02.2017, communicated that it had executed its substitution agreements for only two projects. This position continued to obtain despite the petitioner company, thereafter, writing a letter dated 27.03.2017 followed by three reminders in the month of April, 2017 to effect the change with respect to the remaining contracts.

9.2 Given this situation, the argument advanced on behalf of the respondent that clause 5 of the letter dated 23.12.2013 would present an absolute bar in the petitioner company seeking execution of substitution agreements and change in empanelment panel does not seem to hold water.

The argument may have had some ring of consistency, if not merit had the respondent put up a red flag and stated that it would not affect any change in the empanelment or would not substitute the petitioner company qua the on-going projects, had it, after being put to notice not taken proactive steps in that behalf. The respondent, as indicated above, examined the entire issue and, thereafter, agreed to execute two substitution agreements dated 10.02.2017 pertaining to projects referred to therein.

9.3 Thus, the respondent, in my view, cannot take the stand that while it has already effected the change in name with respect to two projects it would not do so with respect to the remaining projects. The reasons being that clause 5 has been put in place for the benefit of the respondent to ensure that the post empanelment of a consultant, its structure or constitution is not changed to an extent that the relevant expertise for which the consultant has been enlisted does not inhere in it anymore and cause detriment to its interests. In this case, such is not the situation. The relevant experience and expertise stands transferred to the petitioner company, as is plainly obvious, upon perusal of the Scheme itself. It is this aspect which was examined by the respondent, while substituting the petitioner company vis-à-vis two projects. The respondent, therefore,

cannot now put up a hurdle to effect the change, vis-a-vis, the remaining contracts so as to deny the benefit which should normally flow to the petitioner upon transfer of the demerged business.

10. Thus, having regard to the aforesaid fact and circumstances, I am of the view that the writ petition deserves to be allowed. It is ordered accordingly. The respondent will substitute the name of the petitioner company with regard to all seven on-going projects qua which reference is made in paragraph 8 of the writ petition. Furthermore, the respondent will also replace the petitioner company with MC Consultants Limited in the list of empanelled consultants qua Category I (B) projects. Consequently, a revised list containing the petitioner company's name shall be issued by the respondent and requisite substitution agreement shall also be executed, vis-à-vis, the remaining contracts.

11. Petition disposed of in the aforementioned terms. There shall, however, no order as to costs.

RAJIV SHAKDHER
(JUDGE)

JULY 17, 2018/A