IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: February 06, 2019
Judgment delivered on: February 15, 2019

\+ LPA 61/2019, CM No. 4374/2019

NTPC LTD & ANR ..... Appellants

Through: Mr. Tushar Mehta, SG with Mr. Puneet Taneja, Mr. Kanu Agarwal, Ms. Shaheen and Ms. Laxmi Kumari, Advs. for NTPC

versus

NCC BGR CONSORTIUM & ANR ..... Respondents

Through: Mr. Dayan Krishnan, Sr. Adv. with Ms. Filza Moonis, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This Intra-Court appeal has been filed by the NTPC Ltd. and another challenging the judgment dated January 21, 2019 passed by the learned Single Judge in W.P.(C) No. 702/2018 where by the learned Single Judge has allowed the writ petition and directed the appellant NTPC to hold *'Good Faith Discussions'* with the respondent herein in terms of Clause 23.1 (b) of the Project Agreement, which shall also be construed as compliance of Clause 24.4(c) of the said Agreement.

2. Some of the facts as noted from the record are the

respondent No.1 is a consortium constituted by the respondent No.2 NCC and BGR Mining and Infra Ltd. NTPC is a Government of India Enterprise and is inter-alia engaged in business of generation of power. NTPC had issued a Request for Proposals (RFP) for development and operation of Talaipalli Coal Mining Block in the State of Chhattisgarh. In terms of the RFP, NCC-BGR submitted a bid with petitioner no.2 (NCC Ltd.) as the consortium leader. NCC-BGR was successful in the bidding and NTPC issued a Letter of Acceptance (LoA) dated November 13, 2017 awarding the contract for Development and Operation of Talaipalli Coal Mining Block, in the State of Chhattisgarh to the respondent. The said LoA was subsequently amended on November 27, 2017. It is stated that in terms of the RFP documents, the respondent was required to constitute a Joint Venture Company, which would enter into the Project Agreement and execute the Project. It is stated that in compliance with the aforesaid requirements, NCC Ltd and BGR Mining & Infra Ltd. – the consortium members – incorporated a Joint Venture Company named Talaipalli Coal Mining Block Pvt. Ltd on December 12, 2017. Clause 6.4.3 of the Instructions to Bidders expressly provided that *"upon issuance of the Letter of*

Acceptance, the Project Agreement shall come into effect and force on the date of issuance of the Letter of Acceptance and shall constitute valid and binding obligations enforceable against either Party."

3. It was the case of the respondents before the learned Single Judge that in terms of the Project Agreement, NCC-BGR mobilized resources and personnel for executing the Project. It is noted that by an email dated December 18, 2017, NTPC informed NCC-BGR that an FIR had been registered by CBI. Thereafter, on December 20, 2017, NTPC sent a notice to NCC-BGR under Clause 24.1 of the Project Agreement calling upon NCC-BGR to suspend mining services. The said notice also indicated that an FIR had been registered by CBI against Mr. Kulamani Biswal, Director (Finance), NTPC, Mr. Rohit Reddy, one of the Directors of M/s BGR Mining and Infra Limited and his associate Mr. Prabhat Kumar. NCC-BGR responded to the said notice by a letter dated December 25, 2017, inter alia, contending that the matter relating to BGR Mining and Infra Ltd. had been referred to the Independent External Monitors (IEMs) and a hearing in this regard was scheduled on December 26, 2017. NCC-BGR contended that in the circumstances, the decision to suspend

mining services was unjust and untenable. Thereafter, on December 29, 2017, NTPC issued a notice under Clause 24.3(b) of the Project Agreement calling upon NCC-BGR to show cause why the Project Agreement should not be terminated. On January 08, 2018, NCC-BGR sent a letter calling upon NTPC to confirm a convenient date for signing of the Project Agreement in terms of the Clause 6.4.4 of Instruction to Bidders – Volume I. Further, NCC-BGR also sought release of the bank guarantees submitted towards security/EMD. By a separate letter sent on the same date NCC-BGR also sought an opportunity for holding good faith discussions in terms of Clause 24.4(c) of the Project Agreement. By a letter dated January 10, 2018, NTPC informed NCC-BGR that it had decided to keep the signing of the Project Agreement and other compliances under abeyance. Thereafter, by a letter dated January 17, 2018, NCC-BGR called upon NTPC to enter into discussions for an amicable resolution of the disputes in terms of Clause 23.1(b) of the Project Agreement.

4. The issue before the learned Single Judge was, whether the appellant NTPC is required to enter into '*Good Faith Discussions'* for resolution of the disputes in terms of Clause 23 of the Project Agreement and whether the notice dated December

20, 2017 whereby NTPC had called upon the respondents to suspend mining operations, is liable to be interfered with the proceedings. It was the case of the NTPC that the notice dated December 20, 2017 was issued in view of the FIR lodged by CBI against Mr. Kulamani Biswal, Director (Finance), NTPC, Mr. Rohit Reddy Bathina, Director of M/s BGR Mining & Infra Pvt. Ltd., Mr. T. Prabhat Kumar and other unknown persons. The contents of the said FIR are relevant and are set out below:-

INFORMATION

> *A reliable source information has revealed that Sh. Kulamani Biswal is presently posted as Director (Finance), NTPC Limited, New Delhi and is on the Board of Directors of the company. M/s BGR Mining & Infra Private Limited is a private limited company which is part of a consortium with NCC Limited and this consortium has recently been awarded the project relating to Mine Development and Operation of Talaipalli Coal Block by NTPC Limited. Sh. Rohit Reddy Bathina is a director of M/s BGR Mining & Infra Private Limited. Sh. Prabhat Kumar is an associate of Sh. Reddy and handles his tasks in Delhi.*
>
> *2. Source has further informed that Sh. Kulamani Biswal is going abroad with his wife and daughter on 08.12.2017 from Bhubaneswar. Today, on 07.12.2017, Sh. Prabhat Kumar went and personally met Sh. Kulamani Biswal and during this meeting he engaged Sh. Rohit Reddy Bathina. Sh. Kulamani Biswal initially had asked Sh. Rohit Reddy Bathina to arrange US Dollars equivalent to Rs.5 lakhs for him for the trip abroad. Sh. Rohit Reddy Bathina offered to deliver the same at Delhi or Bhubaneshwar. Sh. Kulamani Biswal*

then asked Sh. Reddy to give him the cash in Indian currency at Delhi itself which he would convert to USD himself. Sh. Reddy then informed Sh. Biswal that Sh. Prabhat Kumar would deliver the amount of Rs.5 lakhs to Sh. Biswal at Delhi today.

3. Source has further informed that Sh. Rohit Reddy Bathina arranged for the delivery of Rs.5 lakhs cash through Hawala channels to Sh. Prabhat Kumar for further delivery to Sh. Kulamani Biswal at Delhi. Sh. Prabhat Kumar is likely to deliver the amount to Sh. Kulamani Biswal at his residence in Asian Games Village Complex, New Delhi shortly.

4. Sh. Kulamani Biswal, being a public servant, has attempted to obtain for himself valuable things without any consideration from a party, namely M/s BGR Mining & Infra Private Limited, with whom he has been dealing due to the business transacted between NTPC Limited and M/s BGR Mining and Infra Private Limited. Sh. Rohit Reddy Bathina alongwith Sh. Prabhat Kumar have conspired and abetted the aforesaid act of Sh. Kulamani Biswal, Director (Finance), NTPC.

5. The above mentioned acts of Sh. Kulamani Biswal, a public servant, Sh. Rohit Reddy Bathina and Sh. Prabhat Kumar both private persons, discloses prima facie commission of criminal offenses under Sec 11 and 12 of the PC Act 1988 r/w 120-B of IPC.

6. Hence, a regular case has been registered vide RC No.07(A)/2017 dated 07.12.2017 u/s 11 & 12 of PC Act, 1988 r/w 120-B IPC against Sh. Kulamani Biswal, Sh. Rohit Reddy Bathina and Sh. Prabhat Kumar and unknown others and entrusted to Sh. Dharmender Kumar, Inspector, CBI AC.I for investigation and report.

(Rajiv Ranjan, IPS)
SP CBI Act-1 New Delhi.

5. The learned Single Judge was of the view that the principal allegation is that one of the Directors of NTPC had attempted to obtain an amount of ₹5 lakhs without any consideration from the Director of BGR Mining and Infra Pvt. Ltd. According to NTPC, the same constitutes fraudulent and corrupt practices in terms of Clause 9.1 of the Project Agreement. The learned Single Judge, in the impugned order has also referred to other provisions of the Project Agreement like Clause 24.3, which deals with Termination by the Owner and sub Clause (b) thereof stipulates Mine Operator's Events of Default. The said provisions are reproduced as under:-

"24.3 Termination by the Owner

XXXX XXXX XXXX

(b) Mine Operator's Events of Default

XXXX XXXX XXXX

(xi) If the Mine Operator, in the reasonable judgment of the Owner has engaged, in corrupt or fraudulent practices in competing for or in executing the Agreement pursuant to Clause 9.1;

6. The learned Single Judge also referred to Clause 24.1 of the Project Agreement, which relates to suspension of mining

services. The same is reproduced as under:-

> ***<u>"24.1 Suspension of Mining Services</u>***
>
> *(a) The Owner may by notice to the Mine Operator at any time during the Term, including for convenience or for Mine Operator"s defaults, suspend all or any part of the Mining Services, stating the estimated length of and reason for the suspension. The Mine Operator shall on receipt of a notice of suspension take all reasonable steps to reduce any cost consequent upon the suspension. If requested by the Owner"s Representative to do so, the Mine Operator shall promptly re-direct its workers/labour force and/or the Mine Operator's Plant and Equipment and the Owner's Facilities to work on a portion of the Site unaffected by the reason for the suspension.*
>
> *(b) A suspension under this Clause 24.1 shall not terminate this Agreement. However if the suspension on any one occasion is for a continuous period of more than 90 days for any reason other than the fault, act or omission attributable to the Mine Operator or an Event of Default of the Mine Operator, the Mine Operator may by written notice to the Owner request for cessation of the suspension and direction in writing to recommence providing the Mining Services. Within 30 days of receipt of notice, if the Owner does not direct for recommencement, the Mine Operator may terminate this Agreement pursuant to Clause 24.2.*
>
> *(c) The Owner shall pay to the Mine Operator compensation specified in Clause 15 for non off take of coal for the period, the Mining Services are suspended under this Clause 24.1 except where, in the opinion of the Owner's Representative, the suspension is necessary because of the act or omission or Event of Default of the Mine Operator or its employees or its sub-contractors.*
>
> *(d) The Owner's Representative shall, as soon as*

reasonable after the reason for any the suspension under this Clause 24.1 no longer exists, direct the Mine Operator in writing to recommence providing the Mining Services and the Mine Operator shall comply with the direction promptly, and in no event later than 15 days of receipt of notice from the Owner requiring such recommencement. Within 15 days of receipt of notice, if the Mine Operator does not recommencement providing the Mining Services, the Owner may terminate this Agreement pursuant to Clause 24.3."

7. The learned Single Judge, in paras 24 to 26 of the impugned judgment has come to the following conclusion:-

> *"24. It is apparent from the plain language of Sub Clause (a) of Clause 24.1 of the Project Agreement that NTPC is duly empowered to suspend mining operations including for its convenience or for Mine Operator's defaults. In this case, NTPC alleges a Mine Operator's Event of Default. The question, whether the allegation that Mine Operator's Event of Default has occurred is a subject matter of disputes and NTPC cannot be compelled to accept mining services from NCC-BGR, pending resolution of the said disputes. This Court is of the view that no interference at this stage is warranted except to direct the parties to enter into good faith discussions in terms of Clause 23.1(b) of the Project Agreement.*
>
> *25. This court is refraining from entering into the controversy, whether the fact that an FIR has been lodged is sufficient for NTPC to form a reasonable judgment that NCC-BGR had indulged in corrupt or fraudulent practices in competing for or in executing the Project Agreement pursuant to Clause 9.1. As noticed above, this is the essence of the disputes between the parties and the same is required to be resolved/adjudicated in accordance with Clause 23.1(b) of the Project Agreement.*

> *26. In view of the above, NTPC is directed to hold good faith discussions with the petitioner in terms of Clause 23.1(b) of the Project Agreement. It is, however, clarified that the said discussions shall also be construed as compliance of Clause 24.4 (c) of the Project Agreement and it would not be necessary for the parties to hold separate discussions under the said clause.*

8. The submissions of Mr. Tushar Mehta, learned Solicitor General are akin to the one's, he made in LPA 57/2019, which also deals with a similar issue, which fall for our consideration in this appeal. According to him, the learned Single Judge has erred in giving a direction to comply with the mandate of Clause 23.1 (b) of the Project Agreement, which direction is, in the nature of specific performance, which the learned Single Judge could not have given without adverting to any legal right or fundamental right which has been violated by the appellant NTPC, that too at a show cause notice stage. According to him, in view of serious charges alleged in the FIR filed by the CBI against the Director (Finance), NTPC a reference of which is made above, which indeed amounts to corrupt practice, the *event of default* is of such a nature that cannot be remedied by good faith discussions and therefore, no purpose will be served by holding any discussion under Clause 23.1(b) of the Project Agreement. He also stated

that a charge sheet under the conduct rules for major penalty has also been issued against Mr. Biswal. In view of such seriousness of the charges, interdicting the appellant NTPC from taking further action on the notice issued to the respondents is unsustainable when the contract is with regard to coal block and a larger public interest is involved. That apart, it has been his endeavor to contend that if the respondents are aggrieved by any order to be passed by the appellant on the notice, they are at liberty to invoke the remedy of arbitration against NTPC / appellant, which may include a claim for compensation for wrongful termination.

9. On the plea of Mr. Dayan Krishnan that the respondents have not resorted to the examination of the issue by Independent External Monitors, he stated that no purpose would be achieved in the peculiar facts of this case.

10. On the other hand, Mr. Dayan Krishnan, learned counsel for the respondents had argued that it was the case of the NTPC that they will not hold '*Good Faith Discussions*' with the respondents under Clause 23.1(b) but only under Clause 24.4(c). He stated if the appellant NTPC is ready and willing to hold discussion in good faith under Clause 24.4(c) there is no reason

why such a discussion cannot take place under Clause 23.1(b), which is for amicable settlement. According to him, the action of the NTPC is a mala fide one. He stated that the subject matter of an FIR is on the premise of a probable happening, which in fact had not taken place. That apart, it was his submission that the allegation in the FIR is with regard to coal mine at Chatti Bariatu whereas the coal mine with which the respondent / consortium was concerned was one at Talaipalli. Hence, the allegation in the FIR cannot be the basis for action against the respondents.

11. He further stated, the unfairness of the action is apparent as the NTPC has not adhered to the provisions of Independent External Monitors in this case, except issuing notice to BGR Mining and Infra Ltd.

12. Having heard the learned counsel for the parties, the only issue which needs to be decided is whether the learned Single Judge was justified in directing the NTPC / appellant to hold *'Good Faith Discussions'* under clause 23.1(b) of the Project Agreement, which shall be construed as discussion under Clause 24.4(c) of the said agreement,. Some of the relevant contractual provisions, apart from the one noted above are reproduced as

under:-

"9.1 Corrupt or Fraudulent Practices

The Mine Operator shall observe the highest standard of ethics during the execution of the Project Agreement. For the purposes of this provision, the terms set forth below are defined as follows:

(a) ***"corrupt practice"*** *means the offering, giving, receiving or soliciting in any manner whatsoever, directly or indirectly, of anything of value to influence the decision or action of a public official or Owners official or its engaged consultant(s) or advisor(s) during any stage of the procurement process or execution of the Project Agreement; and*

(b) ***"fraudulent practice"*** *means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of Owner and includes collusive practice among Mine Operators (prior to or after Project Proposal submission) designed to establish Project Proposal prices at artificial non competitive levels and to deprive Owner of the benefits of free and open competition, if the Mine Operator, in the judgment of the Owner has engaged in corrupt or fraudulent practices in competing for or in executing the Agreement, the Owner shall take any and all such actions including termination as may be considered necessary or desirable by Owner in such circumstances".*

"23.1 Amicable Settlement

(a) In the event of any dispute or claim of any kind whatsoever that may arise between the Parties as a result of construction, interpretation or application of any of the terms and conditions of this Agreement or performance of it, either Party may be written notice inform the other Party of such dispute ("Dispute Notice").

(b) The Parties shall within a period of 30 days from the date of receipt of Dispute Notice by such other Party meet and endeavour to settle such dispute in an amicable manner through good faith discussions."

13. Sub-clause (b) of Clause 24.3, which defines mine operator's *"event of default"*, the same stipulates if in the judgment of the owner, the mine operator is engaged in *corrupt or fraudulent practices* in competing for or in executing the Agreement pursuant to Clause 9.1, would be an event of default. Clause 24.4(c) contemplates the procedure to be followed on receipt of notice of termination by non-terminating party, that the parties shall discuss in good faith for a period of 30 days, the options for cessation of event that led to the issuance of notice, during which period, the obligation of the parties shall continue to subsist. Clause 23.1(b) contemplates the procedure to be followed on receipt of notice by such other party, they within 30 days meet and endeavour to settle such dispute in an amicable manner through *'Good Faith Discussions'*.

14. It was contended by Mr. Mehta that the FIR has been filed at the instance of CBI and the same is pending investigation and the FIR reflects serious charges under the provisions of Prevention of Corruption Act and IPC, is unmerited. Surely, when the parties have incorporated the clause of this nature where corrupt / fraudulent practices are events of default, they knew well such allegations shall include offences under IPC /

Prevention of Corruption Act but still they thought it fit to discuss such events of default for 30 days. The appellant cannot now take a stand that no purpose will be served in holding discussions in good faith. Insofar as, the plea of Mr. Mehta that the direction of the learned Single Judge is in the nature of Specific Performance and could not have been given that too at the show cause notice stage is unmerited for the reason, the parties having agreed to incorporate such a clause in the agreement, and are surely required to follow it whatever be the outcome. The learned Single Judge having found that in the facts, the said clause need to be followed has given the direction. The same cannot be faulted. The plea that, any order to be passed by NTPC on the show cause notice dated December 29, 2017, can be challenged by the respondents, in arbitration proceedings, which challenge may include a claim for compensation also does not impress us, as such a procedure / action of arbitration presupposes the process of discussions under Clauses 23.1(b) and 24.4(c). The arbitration in the last resort, if other processes fail.

15. The direction of the learned Single Judge is to comply with the mandate of Clause 23.1(b) and also 24.4(c) and nothing more. Suffice it to state, the spirit underlying the provisions of the

contract i.e Clause 23.1(b) and Clause 24.4(c), as directed to be followed by the learned Single Judge, is that if dispute arises, the parties may sit together and workout an amicable settlement or for that matter ensure cessation of the said event, which is the event of default.

16. The plea of Mr. Mehta that the contract pertains to coal block and time should not be lost as it would cost the exchequer, is untenable for the reason, the delay occurred has to be attributed to NTPC / appellant for the reason (i) they should not have at the first instance, issued show cause notice for discussion under Clause 24.4(c) and not under Clause 23.1(b); (ii) even if they had issued, they should have during the course of the proceedings before the learned Single Judge accepted to hold such discussions as it entailed a matter 30 days only; (iii) that apart, they have decided to challenge the decision of the learned Single Judge in this appeal, resulting in further delay. In short, instead of 30 days, the issue has stretched to more than one year.

17. Even the plea of Mr. Mehta, that the learned Single Judge could not have interfered at the show cause notice is also untenable, when the very show cause notice is contrary to the terms of the Project Agreement. The learned Single Judge was

right in giving directions which are in conformity with the Project Agreement, more particularly when NTPC being a "*State*" within the meaning of Article 12, is required to act fairly. The plea urged by Mr. Mehta that IEM had not considered the issue as no purpose would have been achieved, also does not appeal us. The decision of the NTPC in that regard is also illegal. We also agree with the learned Single Judge whereby he, in para 25 stated as under:-

> *"25. This court is refraining from entering into the controversy, whether the fact that an FIR has been lodged is sufficient for NTPC to form a reasonable judgment that NCC-BGR had indulged in corrupt or fraudulent practices in competing for or in executing the Project Agreement pursuant to Clause 9.1. As noticed above, this is the essence of the disputes between the parties and the same is required to be resolved/adjudicated in accordance with Clause 23.1(b) of the Project Agreement."*

18. From the above, we are of the view that the learned Single Judge was justified in allowing the writ petition by directing the appellant NTPC to hold *'Good Faith Discussions'* with the respondent in terms of Clause 23.1(b) which shall be construed as discussions under Clause 24.4(c) of the Project Agreement. We find no merit in the appeal, the same is dismissed.

CM No. 4374/2019 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

FEBRUARY 15, 2019/*ak*