

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 21.01.2019

+ **W.P.(C) 702/2018 & C.M. Nos. 3014-3015/2018, 31940/2018
& 31942/2018**

NCC-BGR CONSORTIUM AND ANR.

..... Petitioners

versus

NTPC LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioners: Mr Sandeep Sethi, Sr Advocate with Ms Priya Kumar, Mr Adhish Srivastava, Mr Tejas Chhabra, Mr Anand Chichra and Mr Sujit Kumar Singh.

For the Respondent: Mr Tushar Mehta, SGI with Mr Puneet Taneja, Ms Shaheen, Ms Laxmi Kumari, Mr Kanu Agarwal and Ms Khushboo.

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HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition, *inter alia*, praying that directions be issued to the respondent to comply with Clause 23 of the Project Agreement and to convene a meeting for discussion/amicable resolution of the disputes. The petitioner further

impugns a notice dated 20.12.2017 issued by the respondent (hereafter ‘NTPC’).

2. The petitioner no.1 (hereafter NCC-BGR) is a consortium constituted by petitioner no.2 (NCC Ltd.) and BGR Mining and Infra Ltd.

3. 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.

4. NCC-BGR was successful in its bid and NTPC issued a Letter of Acceptance (LoA) dated 13.11.2017 awarding the contract for Development and Operation of Talaipalli Coal Mining Block, in the State of Chhattisgarh (hereafter ‘the Project’) to NCC-BGR. The said LoA was subsequently amended on 27.11.2017.

5. It is stated that in terms of the RFP documents, NCC-BGR 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 12.12.2017.

6. Clause 6.4.3 of the Instructions to Bidders (ITB) 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.”

7. The petitioners state that in terms of the Project Agreement, NCC-BGR mobilized resources and personnel for executing the Project.

8. By an email dated 18.12.2017, NTPC informed NCC-BGR that an FIR had been registered by CBI. Thereafter, on 20.12.2017, NTPC sent a notice to NCC-BGR issued 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 Shri 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.

9. NCC-BGR responded to the aforesaid notice by a letter dated 25.12.2017, *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 for 26.12.2017. NCC-BGR contended that in the circumstances, the decision to suspend mining services was unjust and untenable.

10. Thereafter, on 29.12.2017, 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.

11. On 08.01.2018, 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 (that is on 08.01.2018) NCC-BGR also sought an opportunity for holding good faith discussions in terms of Clause 24.4(c) of the Project Agreement.

12. By a letter dated 10.01.2018, NTPC informed NCC-BGR that it had decided to keep the signing of the Project Agreement and other compliances under abeyance.

13. Thereafter, by a letter dated 17.01.2018, 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.

Discussion and Conclusion

14. The controversy raised in the present petition is twofold. First, whether NTPC is required to enter into good faith discussions for resolution of the disputes in terms of Clause 23 of the Project Agreement. And second, whether the notice dated 20.12.2017, whereby NTPC had called upon the petitioner to suspend mining operations, is liable to be interfered with in these proceedings.

15. By a notice dated 20.12.2017, the petitioner was called upon to suspend the mining services. NTPC had issued the notice in view of

the FIR lodged by CBI against Shri Kulamani Biswal, Director (Finance), NTPC, Shri Rohit Reddy Bathina, Director of M/s BGR Mining & Infra Pvt. Ltd., Sh. 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 Bhubaneswar. 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 offences under Sec 11 and 12 of 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 AC-1 New Delhi

16. As is apparent from the above, 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. This is seriously disputed by NCC-BGR.

17. Clause 9.1 of the Project Agreement which, *inter alia*, defines corrupt and fraudulent practices is set out below:-

“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 Owner's 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.”

18. In order for any act to constitute a corrupt practice, it would be essential to consider whether anything of value has been offered or given to influence the decision or action of a public official during any stage of the procurement process or execution of the Project Agreement. The allegation made in the FIR is with respect of a bribe to one of the senior officials of NTPC. Clearly, if this allegation is substantiated it would not be unreasonable for NTPC to form an opinion that the said bribe was to influence the decisions of the concerned official.

19. If NTPC comes to a conclusion that the petitioner or its constituted members had indulged in any fraudulent or corrupt practices, the same would qualify as a Mine Operator's Event of Default in terms of sub-clause (xi) of Clause 24.3(b) of the Project Agreement. The said Clause reads as under:-

“24.3 Termination by the Owner

XXXX XXXX XXXX XXXX

(b) Mine Operator's Events of Default

XXXX 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”

20. NTPC has concluded on the basis of an FIR that BGR Mining and Infra Ltd. has engaged in a corrupt practice in competing for or in

execution of the Project Agreement. According to NTPC, the fact that an FIR has been lodged is sufficient to form such an opinion.

21. This is essentially the dispute between the parties and the petitioner has already issued notice under Clause 23.1(a) of the Project Agreement to call upon NTPC to enter into discussions for an amicable resolution of the same.

22. Clause 23 of the Project Agreement provides for a 3-tier dispute resolution mechanism. The first tier entails the parties entering into discussion for an amicable resolution of the disputes. If the said disputes are not resolved either party can escalate the same to an adjudicator. The decision of the adjudicator is final and binding on the parties if it is not challenged by either of them. If any of the parties does not accept the decision of the adjudicator, the said parties are at liberty to invoke the arbitration clause for adjudication of the disputes by an Arbitral Tribunal. The question whether NTPC is liable to be directed to enter into discussions for an amicable resolution of disputes is covered by the decision of this court rendered in a Writ Petition filed by BGR Mining and Infra Limited being *W.P.(C) 463/2018 captioned BGR Mining and Infra Limited vs NTPC Ltd.* Thus, for the reasons stated in the order passed in *W.P.(C) 463/2018*, the petitioners' prayer for directing NTPC to enter into discussions for an amicable resolution of the disputes in terms of Clause 23.1(b) of the Project Agreement is liable to be allowed.

23. In so far as the impugned notice dated 20.12.2017 is concerned, it is relevant to refer to Clause 24.1 of the Project Agreement, which is set out below:

“24.1 Suspension of Mining Services

- (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-offtake 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 recommence providing the Mining Services, the Owner may terminate this Agreement pursuant to Clause 24.3."

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.

27. It is also clarified that this Court has not expressed any opinion on the merits of the controversy between the parties, including whether the petitioner has indulged in any corrupt or fraudulent practice and whether there is sufficient material for NTPC to have held so in its reasonable judgment. All rights and contentions of the parties are, accordingly reserved.

28. The petition is disposed of in the aforesaid terms along with the pending applications, if any.

VIBHU BAKHRU, J

JANUARY 21, 2019
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