IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 22.05.2019

\+ **W.P.(C) 1936/2015**

MERITTRAC SERVICES PVT. LTD. ..... Petitioner

Versus

OIL AND NATURAL GAS CORPORATION LIMITED ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr N. Sai Vinod.

For the Respondent : Mr Sharmistha Ghosh and Mr Mahipal Singh.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (MeritTrac Services Pvt. Ltd), *inter alia*, impugns the termination letter (No. HQ/CAMM/29/GT/2013-14- hereafter 'the impugned termination letter') dated 13.01.2015, whereby the Service Agreement (bearing Contract No. 5010087419 – hereafter 'the Agreement') dated 27.02.2014, was terminated by the respondent (Oil and Natural Gas Corporation Limited – hereafter 'ONGC')

2. The petitioner also impugns an enquiry notice (DDN/HCA/Enquiry-R & P/2015 – hereafter 'the impugned enquiry notice') dated 16.02.2015, whereby an enquiry in terms of Clause 18.6

(i) of the Agreement was initiated against the petitioner. And, the petitioner was called upon to submit its defense in the said matter.

3. The petitioner seeks directions for the quashing of the automatic "holiday" imposed on the petitioner in terms of clause 18.6(ii) of the General Conditions of Contract (GCC) pending the enquiry. The petitioner seeks further directions for the repayment of the bank guarantee invoked by ONGC, amounting to ₹27,52,750/, along with interest.

Factual Background

4. The petitioner is a competence assessment company, which develops and delivers standardized and customized tests across the country for educational institutions, government organizations, corporate entities, schools and vocational institutions.

5. ONGC is a government company. For the purpose of recruitment of Graduate Trainees, ONGC conducts examinations by hiring external agencies, which look after the examination process in various parts of the country.

6. On 30.08.2013, ONGC issued a notice inviting bids through its e-procurement site for hiring of an agency for conducting activities in relation to the recruitment of Graduate Trainees. The petitioner submitted its bid pursuant to the said notice and the same was accepted by ONGC.

7. Pursuant to the acceptance of the bid of the petitioner, on 27.02.2014, the Agreement was executed between ONGC and the petitioner. On 11.02.2014, the petitioner in compliance with the condition of Clause 10 of the GCC, had already submitted a performance bank guarantee of a sum of ₹27,52,750/-.

8. The petitioner identified the Holy International School, Om Vihar, Phase V, Uttam Nagar, Delhi (hereafter 'the Test Centre') as one of the test centres for conducting the said examination. In terms of the Agreement, the examination for the graduate trainees was scheduled to be conducted on 22nd June, 2014 from 10:00 am to 1:00 pm.

9. On 22.06.2014, at around 7:30 am, the petitioner and ONGC's representatives, who were present at the Test Centre, were informed by the Crime Branch, New Delhi that they had arrested three persons in connection with the attempt to leak the Graduate Trainee test papers of ONGC. The sealed packets of the question papers, at the Test Centre, were found to be tampered with.

10. Thereafter, the petitioner was advised to continue with conducting the examination, in the normal manner as decided. Hence, in pursuance of the said advice, the petitioner conducted the examination all over India, as per the schedule.

11. A First Information Report – FIR No. 0072 of 2014 u/s 420/406/120-B/34 of IPC, 1860 – was registered with reference to the leakage of the papers on 22nd June, 2014 with the Delhi Police. ONGC received a copy of the FIR, relating to the incident from the police

authorities on 23.06.2014. On receipt of the said information, ONGC lodged a complaint against the petitioner and Sh. Som Nath Gupta, the Vice-Principal of the Test Centre with reference to the said incident.

12. In the complaint dated 23.06.2014, ONGC stated that Shr. V.K. Singh, Manager (HR) ONGC, New Delhi was entrusted with the duty of Venue Observer at the Test Centre. When he arrived at the Test Centre, he was telephonically informed that on 21.06.2014, Sh. Somnath Gupta, Vice- Principal of the school, had been taken into custody by the Crime Branch, Delhi along with two other persons at the gate of the school. He was also informed that certain persons had been arrested while they were trying to leak the Question Papers on the previous night.

13. On examination, it was found that the seal of the cabinet, where the packets of the Question Papers were kept, had been tampered with. The carton containing the packets containing the Question Papers and Optical Mark Recognition (OMR) sheets for Mechanical Engineering and Human Resource disciplines, which were kept in the cabinet, were also found tampered with. It was also observed that Question Papers bearing serial nos. 100613, 125614, 150616 and 175616 were missing from the packet containing papers relating to Mechanical Engineering-discipline. Four Question Papers bearing Serial nos. 650039 660038, 670039 and 680040, containing papers relating to Human Resource discipline, were also found missing from the packet.

14. The complaint made by ONGC stated that the aforesaid incident showed gross negligence on part of the petitioner. ONGC alleged that Sh. Somnath Gupta, Vice Principal of Holy International Senior Secondary School, the petitioner and some other persons were guilty of criminal breach of trust and conspiracy, to leak the papers with the dishonest intent to benefit certain unknown candidates.

15. On 30.06.2014, the petitioner issued a letter to ONGC, wherein it apprised ONGC that the petitioner had conducted the examination and that the attempted leakage was successfully thwarted and confined by the timely action of the police authorities. ONGC was requested to take the next steps for processing the results. The petitioner, thereafter, vide various e-mails from 23.06.2014 till 25.06.2014, urged ONGC to take the next steps as per the contract for processing the results.

16. On 23.06.2014, the petitioner submitted the incident report prepared by the petitioner, detailing the incident that happened at the Test Centre. On 25.06.2014, the petitioner sent a mail to ONGC informing them of the fact that the Crime Branch had contacted the petitioner and had called upon the petitioner to submit certain documents. ONGC responded to the same, advising the petitioner to share the concerned documents.

17. In respect to the aforesaid incident, deliberations were held between the senior officers of ONGC. And on 02.07.2014, ONGC decided that since the sanctity of the selection process had come under cloud, written examinations held on 22.06.2014 should be cancelled.

18. On 24.07.2014, ONGC uploaded a public notice cancelling the recruitment exercise for which the written test was held on 22.06.2014, and refunded the fees to the candidates.

19. On 26.08.2014, ONGC uploaded an advertisement on their website for the recruitment of graduate trainees and stated that the same shall be done through GATE- 2015 scores, and the remaining disciplines would be covered though a separate online examination.

20. On 01.01.2015, the final report with reference to FIR No. 0072/2014 dated 22.06.2014, was filed before the Ld. Chief Metropolitan Magistrate, Tis Hazari Courts, Delhi. In the final report, it was submitted that on 21.06.2014, two accused persons were in possession of photocopies of 8 sets of question paper booklet of the exam. One of the accused was in possession of cash of ₹50,000/- and was apprehended on the spot. As per the investigations conducted, there was sufficient evidence on record for prosecuting the accused persons under section 120B/34 IPC read with 406/420 IPC.

21. In pursuance of its advertisement for the recruitment of Graduate Trainees through GATE 2015 scores, ONGC issued a tender for the same. The petitioner participated in the bidding for the fresh tender dated 07.01.2015, bearing Tender No. ZN6SC14016.

22. On 13.01.2015, ONGC issued the impugned termination letter, whereby the Agreement with the petitioner was terminated. The petitioner alleges that the same was done without providing any detailed reasoning or granting an opportunity of hearing to the petitioner. The

petitioner contends that the impugned termination letter was in violation of Clause 18.4 of the GCC as the petitioner was not provided the period of thirty days to rectify the performance as stipulated. ONGC disputes that a thirty day notice period was required as, according to ONGC, it was not possible for the petitioner to take any remedial measures to rectify its unsatisfactory performance.

23. ONGC, by its letter dated 15.01.2015, invoked the performance bank guarantee of the petitioner for a sum of ₹27,52,750/-.

24. On 16.02.2015, ONGC issued the impugned enquiry notice whereby, it had started an enquiry in terms of Clause 18.6 (i) of the GCC against the petitioner and called upon the petitioner to appear for the enquiry on 02.03.2015. The effect of the said notice was that the petitioner was unable to participate in other tenders issued by ONGC as Clause 18.6 (ii) of the GCC stipulates that pending completion of the enquiry, the contractor would be put on a holiday and ONGC shall neither issue any tender enquiry to the defaulting Contractor nor consider their offer in any ongoing tender.

25. In view of Clause 18.6 (ii) of the GCC, the petitioner's bid dated 07.01.2015 pursuant to the tender bearing Tender No: ZN6SC14016, for hiring of an agency for conducting activities relating to the recruitment of Graduate engineer trainees in 2015, was not considered by ONGC. In the affidavit filed on behalf of ONGC, it is stated that ONGC had awarded the said tender by its Notification of Award dated 25.02.2015, in favour of M/s Aptech Ltd.

Reasoning and Conclusion

26. The petitioner is, essentially, aggrieved by the impugned termination notice and the enquiry instituted as a consequence of the aforesaid termination. It is the petitioner's case that the termination is contrary to Clause 18.4 of the GCC entered into between the parties. This contention is founded on the basis that (a) the impugned termination notice does not specify the cause of dissatisfaction; and (b) does not afford the petitioner an opportunity to rectify the same. It is further contended that the impugned termination notice is also contrary to the principles of natural justice.

27. Clause 18 of the GCC contains provisions for the termination of the Agreement. Sub-clause 18.1 of the GCC relates to the termination of the Agreement on expiry of the term of the contract. Sub-clauses 18.2 and 18.3 of the GCC relate to the termination on account of force majeure and on account of insolvency of the contractor, respectively. Sub-clause 18.4 of the GCC relates to termination for the unsatisfactory performance and sub-clause 18.5 of the GCC relates to termination on account of delay in mobilization.

28. Clause 18.4 of GCC is relevant as the Agreement is stated to have been terminated in terms of the said clause. Sub-clause 18.6 of the GCC provides for the consequences of termination. Sub-clause 18.4 and 18.6 of GCC are set out below:-

"18.4 Termination for unsatisfactory performance

If the ONGC considers that the performance of the CONTRACTOR is unsatisfactory or, not up to the expected standard, the ONGC shall notify the CONTRACTOR in writing and specify in detail the cause of such dissatisfaction. The ONGC shall have the option to terminate this Agreement by giving 30 days notice in writing to the CONTRACTOR, if, CONTRACTOR fails to comply with the requisitions contained in the said written notice issued by the ONGC."

xxxx xxxx xxxx

18.6 Consequences of termination

In all cases of termination herein set forth, the obligation of the ONGC to pay shall be limited to the period up to the date of termination. Notwithstanding the termination of this Agreement, the parties shall continue to be bound by the provisions of this Agreement that reasonably require some action or forbearance after such termination.

In case of termination of Contract herein set forth, except under 18.1 and 18.2, and / or annulment of the contract due to non-submission of Performance Security (as per clause 36 of Annexure-I), following actions shall be taken against the Contractor:

i. ONGC shall conduct an inquiry against the Contractor and consequent to the conclusion of the inquiry, if it is found that the fault is on the part of the Contractor, then they shall be put on holiday [i.e neither any tender enquiry will be issued to such a Contractor by ONGC against any type of tender nor their offer will be considered by ONGC against any ongoing tender(s) where contract between ONGC and that particular Contractor (as a bidder) has not been concluded] for a period of two years from the date the order for putting the Contractor on holiday is issued. However, the action taken by ONGC for putting that Contractor on holiday shall not have any effect on other ongoing contract(s), if any with that Contractor which shall continue till expiry of their term(s).

ii. Pending completion of the enquiry process for putting the Contractor on holiday, ONGC shall neither issue any tender enquiry to the defaulting Contractor not shall consider their offer in any ongoing tender."

29. A plain reading of sub-clause 18.4 of the GCC indicates that ONGC has the right to terminate the Agreement if it considers that the performance of the contractor is unsatisfactory, or not up to the expected standards. Admittedly, the petitioner was responsible for conducting the examination. It is also not disputed that one of the sealed packets containing question papers was found to be tampered with at the Test Centre – examination centre located at Holy International Senior Secondary School, Uttam Nagar, New Delhi. Prior to the conduct of the said examination on 22.06.2004, the officials of the Crime Branch, Delhi Police had informed that in the intervening night of 21.06.2014, three persons had been arrested in connection with an attempt to leak the question papers of the Graduate Trainee Test scheduled to be held on 22.06.2014 and an FIR in this regard was also registered.

30. In view of the aforesaid incident, ONGC had, on 23.06.2014, lodged a complaint with the police authorities.

31. It was, *inter alia,* stated in the said complaint that the seal of the cabinet at Holy International Secondary School where the test material

was stored was examined and was found to be tampered. It was further stated that the carton containing packets of question papers and the OMR sheets for Mechanical Engineering and Human Resource Discipline were also found to be tampered with.

32. Certain question papers relating to Mechanical Engineering and Human Resource Discipline were also found to be missing.

33. It is material to note that in the said complaint it was alleged that there was gross negligence on part of the petitioner in not ensuring the security of the question papers and allowing leakage of the same. ONGC further alleged criminal breach of trust and conspiracy on part of the petitioner.

34. Indisputably, the petitioner was fully aware of the contents of the said complaint at the material time.

35. The final report submitted before the learned CMM with regard to the FIR lodged in relation to the aforesaid incident also indicates that the original question booklets had been removed from the sealed cabinet and were photocopied. Two of persons accused in the FIR were found to be in possession of eight sets of question papers.

36. In view of the fact that the question papers had been leaked, ONGC had decided to cancel the written examinations held on 22.06.2014.

37. The impugned termination notice was issued in the context of the aforesaid facts, which were well in the knowledge of the petitioner.

38. At this stage, it would be relevant to refer to the contents of the impugned termination notice. The same is set out below:-

"No.HQ/CAMM/29/GT/2013-14 Dated: 13.01.2015

To

M/s. MeriTrac Services Pvt Ltd,
125/1-18 GK Arcade,
T. Marriappa Road, Ist Block, JayaNagar,
Bangalore 560 011,

Ref: Contract No. 5010087419 dated 27.02.2014 for Hiring of Agency for conducting activities for Recruitment of Graduate trainees-2013.

Sub: Termination of Contract – Intimation – Reg.

With reference to the above contract, as you have not conducted the examination satisfactorily as per the contract conditions, the above contract is hereby terminated with immediate effect.

No further communication in this regard will be entertained in future.

S/d

(R.A. Bahadur)
CM(MM)-I/CMM"

39. Although the impugned termination notice does not clearly spell out the reason for the unsatisfactory conduct of examination, the said notice is also to be read in the context of the question papers having been leaked and the examination having been cancelled.

40. In view of the above, the contention that the termination notice did not specify the necessary reasons is unmerited. The notice had clearly indicated the reason for considering the petitioner's performance of the contract to be unsatisfactory, inasmuch as it specified that the petitioner had not conducted the examination satisfactorily and in accordance with the terms of the contract.

41. Given the background of the complaint made against the petitioner, there was little doubt as to the reasons why ONGC had found the conduct of the examination to be unsatisfactory.

42. The contention that the impugned termination notice is bad as a thirty day prior notice was not issued to the petitioner is also, *prima facie,* unpersuasive. Given the reason for ONGC considering the petitioner's performance to be unsatisfactory, there was no scope for the petitioner to have rectified the same.

43. It is also apparent from the above that the petitioner's claim that the Agreement was wrongfully terminated as the termination notice does not comply with the requirements of Clause 18.4 of the GCC, is a dispute relating to the contract entered into between the parties. In essence, the petitioner claims that ONGC has acted contrary to the terms of the Agreement. The aforesaid controversy is squarely covered within the scope of the arbitration clause and, thus, the said dispute is required to be resolved by arbitration as contracted by the parties. However, it is contended that the action of ONGC amounts to effectively blacklisting the petitioner and casts a slur on the petitioner's reputation.

44. The petitioner had also been aggrieved by the enquiry instituted under Clause 18.6(i) of the GCC. More particularly, the petitioner is aggrieved by Sub-clause (ii) of Clause 18.6 of the GCC inasmuch as it proscribes ONGC to issue any tender enquiry to the petitioner or consider its offer in any ongoing tender.

45. In view of the aforesaid contention, this Court considers it apposite to examine whether the actions of ONGC can be assailed as being arbitrary or unreasonable or otherwise violative of the constitutional guarantees.

46. It was contented on behalf of the petitioner that the same effectively amounts to blacklisting the petitioner. It is further contended that such action without affording the petitioner an opportunity of being heard is arbitrary and unreasonable and violative of Article 14 of the Constitution of India.

47. The learned counsel for the petitioner had relied upon the decision of the Supreme Court in ***Gorkha Security Services v. Govt. (NCT of Delhi): (2014) 9 SCC 105***; ***Erusian Equipment & Chemicals Ltd. V. State of West Bengal & Another: (1975) 1 SCC 70***; ***Raghunath Thakur v. State of Bihar: (1989) 1 SCC 229*** and ***Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited reported in (2014) 14 SCC 731***.

48. The aforesaid contention is also unpersuasive. Clause 18.6 only contemplates an enquiry to be conducted against a contractor whose

contract has been terminated on account of insolvency, unsatisfactory performance or delay in mobilization. It further specified that if after enquiry, the contractor is found to be at fault, then he would be placed on a 'holiday' list. It is well settled that the right of an authority to enter into the contract also includes, by necessary implication, the right to not enter into contracts in appropriate cases.

49. Thus, the decision of any authority to not enter into a contract with a party cannot be faulted if the said decision is founded on cogent reasons and does not fall foul of Article 14 of the Constitution of India; that is, it is not arbitrary, capricious or unreasonable.

50. In ***Patel Engineering v. Union of India and Another: (2012) 11 SCC 257***, the Supreme Court had observed as under:-

> "15. ….The State can decline to enter into a contractual relationship with a person or class of persons for 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.
>
> xxxx xxxx xxxx"
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> 23. The authority of the second respondent to enter into contracts, consequently, the concomitant power not to enter into a contract with a particular person, does not flow from Article 298, as Article 298 deals with only the authority of the Union of India and the States. The authority

of the second respondent to enter into a contract with all the incidental and concomitant powers flows from Sections 3(1) and (2) of the National Highways Authority of India Act, 1988. The nature of the said power is similar to the nature of the power flowing from Article 298 of the Constitution, though it is not identical.

24. The second respondent, being a statutory corporation, is equally subject to all constitutional limitations, which bind the State in its dealings with the subjects. At the same time, the very authority to enter into contracts conferred under Section 3 of the NHA Act, by necessary implication, confers the authority not to enter into a contract in appropriate cases (blacklist). The "bid document" can neither confer powers, which are not conferred by law on the second respondent, nor can it substract the powers, which are conferred by law either by express provision or by necessary implication.

25. The bid document is not a statutory instrument. Therefore, the rules of interpretation, which are applicable to the interpretation of statutes and statutory instruments, are not applicable to the bid document. Therefore, in our opinion, the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the second respondent from blacklisting a delinquent bidder, if it is otherwise justified. Such power is inherent in every person legally capable of entering into contracts."

51. It is well settled law that even if a bid document or a contract does not expressly provide for blacklisting of the contractor, the contracting authority, nonetheless, has an inherent right to not enter into contracts with any particular party if there are sufficient reasons warranting such a decision. Thus, *de hors* Clause 18.6(i) of the GCC, ONGC has the right to institute proceedings to debar the petitioner from any tender

enquiry or from participating in any contract with ONGC. However, it would be necessary for ONGC to not only give full opportunity to a contractor to meet the allegations raised against him but also to ensure that if the contractor is found to be delinquent, the punitive measure imposed on him is commensurate (and not disproportionate) with the gravity of his misconduct.

52. At this stage it is also necessary to observe that Clause 18.6(i) merely provides for the conduct of an enquiry. There is no reason to believe that such enquiry would not be conducted in accordance with principles of natural justice. The petitioner is entitled to a full opportunity to meet the allegations on the basis of which the action of blacklisting the petitioner (placing the petitioner on a holiday list) is proposed.

53. Having stated the above, the contention that the petitioner ought to be afforded a hearing prior to the institution of the enquiry is, plainly, unmerited. The petitioner is not required to be heard at two stages, one prior to institution of an enquiry and second during the course of enquiry. The principles of natural justice require that the petitioner to be afforded an opportunity to be heard and the said principle would be fully complied with if a hearing is afforded to the petitioner, during the course of enquiry.

54. The contention that ONGC cannot debar the petitioner from participating in any tender, pending enquiry under Clause 18.6(i) is also unpersuasive. Plainly, ONGC cannot be expected to issue further

contracts to the petitioner while considering the action to debar the petitioner from participating in any further tender.

55. In view of the above, the present petition is unmerited and is, accordingly, dismissed.

VIBHU BAKHRU, J

MAY 22, 2019
RK