

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.12.2020

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.Nos.16121, 16122 and 16514 of 2020
and W.M.P.Nos.20108, 20834, 20836, 20838, 20106, 20109, 20487
and 20488 of 2020

M/s.Nirmal Cabs
Rep. by its Proprietor Mr.Nirmal Nath
No.36/1, 2nd Cross
P.K.Salai, Karaikal - 609 603

... Petitioner in
W.P. No.16121 of 2020

M/s.R.Sundaramurthy
Represented by its Proprietor
Mr.R.Sundaramurthy
4, Thennamara Salai
Thiruvianthur
Mayiladuthurai

... Petitioner in
W.P. No.16122 of 2020

S.Shahul Hameed
S/o.T.S.Sickander
Proprietor, S.R. Cabs
No.54, Mamathambi Maraicar Street
Karaikal

... Petitioner in
W.P. No.16514 of 2020

Vs

The Chief General Manager, In-charge
Materials Management Division: Cauvery Asset
Oil & Natural Gas Commission Limited
Neravy Complex, Neravy
Karaikal - 609 604

... Respondent in W.P. Nos.
16121 & 16122 of 2020

Oil and Natural Gas Corporation Ltd.
Rep by its Chief General Manager
Incharge-Materials Management (CGM-Incharge-MM)
Materials Management Department
Cauvery Asset, Neravy Complex
Karaikal, Puducherry

... Respondent in
W.P. No.16514 of 2020

Prayer in W.P. No.16121 of 2020: Writ Petition is filed under Article 226 of the Constitution of India praying for a Writ of Certiorari, to call for the records of the respondent in letter No.KKL/MM/V16XC19003/2020 dated 07.10.2020 giving notice for pre-closure of the contract No.9010030651 for hiring 4 Nos of Bolero Camper on 23.11.2020 awarded to the petitioner and to quash the same.

Prayer in W.P. No.16122 of 2020: Writ Petition is filed under Article 226 of the Constitution of India praying for a Writ of Certiorari, to call for the records of the respondent in letter No.KKL/MM/V16XC19003/2020 dated 07.10.2020 giving notice for pre-closure of the contract No.9010030653 for hiring 17 Nos of Bolero and contract No.9010030654 for hiring 4 Nos of Bolero Camper on 23.11.2020 awarded to the petitioner and to quash the same.

Prayer in W.P. No.16514 of 2020: Writ Petition is filed under Article 226 of the Constitution of India praying for a Writ of Certiorari, to call for the records of the respondent dated 7.10.2020 and made in KKL/MM/V16XC19003/2020 and to quash the same.

For Petitioner : Mrs.Radha Gopalan
in W.P.Nos.16121
and 16122

For Petitioner : Mr.N.A.Nissar Ahmed
in W.P. No.16514

For Respondent : Mr.Sai Srujan
in all WPs for M/s.Giridhar & Sai

COMMON ORDER

These writ petitions are directed against the impugned notification dated 07.10.2020, pre-closing the contracts of the petitioners viz.Contract No.9010030651 for hiring 4 Nos. of Bolero Camper, 9010030653 for hiring 17 Nos of Bolero, Contract No.9010030654 for hiring 4 Nos of Bolero Camper, Contract No.9001030648 for hiring 23 Nos of Mahindra Bolero and Contract No.9001030649 for hiring 4 Nos of Mahindra Camper.

2. The respondent, which is a Oil Corporation (Oil and Natural Gas Corporation Limited) has floated a tender vide No.V16SC17013 dated 06.06.2017 for hiring 133 Nos of light vehicles for providing services of vehicles on hire on regular basis for transportation of its personnel to different work

sites for a period of three years for Cauvery Asset, Karaikal.

3. There were six different categories of vehicles, sought to be hired, classified as Group A, B, C, D, E & F. One of the bidders, namely Mr.Ayyappan, who was not successful, had filed a writ petition in W.P. No.31223 of 2017, to declare the contract awarded by the respondent herein with respect to Tender No.V16SC17013, opened on 03.07.2017, as null and void and obtained an order of status quo. The said writ petition came to be dismissed on 13.01.2020. Aggrieved by the same, intra court appeals have been preferred in W.A. Nos.246, 247 and 656 of 2020. The said writ appeals have also been dismissed on 11.09.2020. It had taken almost 1-1/2 years for the litigation to end. While so, the respondent had issued a fresh Notice Inviting Tender on 12.03.2019 vide No.V16XC190003 for hiring 77 Nos of light vehicles for a period of two years under three categories. On 17.06.2019 under various categories separate contracts have been entered into between the petitioners and the respondent, for each group of vehicles.

4. Clause 7 of the tender document prescribes the duration of the contract as two years from the actual date of mobilisation i.e. the date when the vehicle is deployed for ONGC duty. In case the mobilisation period is delayed on account of ONGC, the same will be allowed without LD.

5. Clause '8' of the tender document is on pre-closure of contract, as per which, ONGC reserves their right to pre-close the contract by giving 45 days notice to the contractor. The above said clause '8' has triggered the issue now in question.

6. The case of the petitioners is that though the earlier tender dated 06.06.2017 had called for certain type of vehicles, the very same type of vehicles had been called for in the present tender notice also. The petitioners had the apprehension that the pre-closure clause was introduced in view of the status quo order that was granted in the earlier writ petitions which were pending at that point of time. Therefore, they had asked for a clarification raising a query that "assuming that the court stay is vacated and the petitioners become successful bidders for the present tender how the matter would be proceeded further for the purpose of implementation."

7. The petitioners further apprehended that they may have complications once the writ petitions are dismissed. According to the petitioners, the respondent/ONGC had stated that Tender No.V16XC19003 will be governed by the terms and conditions in the document and it is independent of the previous tender. Further, the respondent had stated that Tender No.V16SC17013 will be subject to the order of the Hon'ble High Court, Chennai.

8. On the strength of the reply given by the respondent herein, the petitioner in W.P. No.16121/2020 had purchased 4 Nos of Tata Xenon vehicle and deployed them on 29.07.2019. Similarly, the petitioner in W.P. No. 16122 of 2020 had deployed 17 Bolero vehicles in Group 'A' and 4 TATA Xenon vehicles in Group 'B' and 4 TATA Tiago in Group 'C'. after having invested huge amounts to suit the requirement of the tender document which required ownership of the vehicle at the time of bidding, including the order of manufacture and the other modification mentioned in the document etc.

9. It is stated by the petitioner that as expected, after the dismissal of the writ appeal mentioned supra, on 11.09.2020, the respondent had sent a letter requesting the petitioners to confirm the acceptance of pre-closure of the contract for hiring 3 Nos of Group 'B' vehicle against Contract No.9010030651 by giving 45 days notice on 16.09.2020. In short, though the petitioner in W.P. No.16121/2020 was awarded contract for four vehicles, the respondent wanted to pre-close the contract in respect of three vehicles and only one vehicle would be available in the contract. Immediately, the petitioner had sent a letter specifically stating that the vehicles that were deployed and operated were to the fullest satisfaction of the respondent and in conformity with the terms and conditions of the contract dated 14.11.2019 and therefore, the respondent cannot have any reason to invoke clause 5 of the scope of the work and clause 8 of the Special Conditions of the Contract to disturb the contractual obligations and operation of the vehicles. If the same was responded by the Corporation on 23.09.2020 stating that since the tender document contained a pre-closure clause, the same cannot be recalled. The petitioner also had given a reply on 29.09.2020 for which the respondent had sent a notice for pre-closure of the contract by terminating the entire contract, namely Contract No.9010030651 for hiring 4 Nos of Bolero Camper though in the earlier notice, the termination was only with respect to three vehicles.

10. The pre-closure was only with respect to Group 'B'. However, Group 'C' vehicles are continuing, though they were running at a huge loss. The said pre-closure is now challenged by the petitioners on the ground that the said pre-closure is arbitrary and invocation of the same is without any reason excepting quoting clause 8 of the tender documents.

11. The second contention is that when the respondent had specifically stated that Contract Nos.V16SC17013 and V16XC19003 are independent of each other, the present contract is now cancelled as the previous contract of the year 2017 is revived by the order of dismissal in the writ appeal. Excepting the pre-

closure clause, there is no other reason for the pre-closure of the contract because it is not the case of the respondent that the requirement of these vehicles was not there at the relevant point of time. When the petitioners had legitimate expectation of holding the contract for a period of two years, the same is frustrated by the pre-closure notice without giving any reason or even an opportunity of hearing before issuing the same.

12. The learned counsel for the respondent would argue that it is only in view of the High Court upholding the tender process issued during the year 2017, the respondents were bound to honour the said Letter of Acceptances. Apprehending the hardship that may be put to the successful bidders of 2019 contract, the Corporation decided to pre-close only certain number of vehicles under each category. The respondent also had issued a notice of 45 days as mentioned in clause 8. Since the petitioners were not willing to accept the said proposal of partial pre-closure, the respondent was constrained to pre-close the entire contract. In fact few of the other contractors had agreed for the partial pre-closure. The petitioner in W.P. No.16122/2020 had asked for an extension and the respondent had also granted time till 05.10.2020 however, he did not provide the details of the vehicle to be de-hired, hence the entire contract for Group 'A' and Group 'B' vehicles were cancelled retaining Group 'C' vehicles.

13. The respondent further denied that there is any malafide intention for pre-closing as the very clause was introduced in the subsequent tender document only with a view to uphold the court verdict which was given against the tenderer in 2017 contract. The petitioners were also very well aware that there is a pre-closure condition in the contract entered by them and the same was clarified with them in the pre-bid meeting which was conducted on 28.03.2017. In pre-bid meeting it was clarified that the 2017 contract will be governed by the verdict of the High Court due to which the pre-closure clause was incorporated in the tender document. Besides it is only after the elaborate discussion about the pre-closure which would be after 45 days of prior notice, the petitioners had agreed at the time of signing the contract. Therefore, they cannot now raise any plea against the pre-closure clause without a specific challenge to the same.

14. Clause 8 of the special conditions itself only was intended to accommodate the 2017 contract letter of awardees subject to the result of the earlier writ proceedings.

15. The partial pre-closure of the contract itself was offered only in order to help the petitioners. Only when they

refused to accept for the partial pre-closure, the entire contract had to be closed. In fact as mentioned earlier, so far as petitioner in W.P. No.16121 of 2020 is concerned, there is no closure of Group 'C' vehicles. In W.P. No.16122 of 2020, who is the contractor for all the three groups of vehicles, out of 17 vehicles in 'A' Group, only 10 vehicles are pre-closed and in Group 'B', out of 4 vehicles, three vehicles were pre-closed. Group 'C' remains in tact. Whether it is Group 'B' or Group 'C', they are independent contract and there is separate contract agreement for each group of vehicles. The respondent had also lot of uncertainties due to which there was a reduction in their activities, which also had to be considered for the purpose of pre-closure. Therefore, when the petitioners had taken a calculated risks including the one of pre-closure and participated in the bid, cannot be allowed to challenge the said clause of pre-closure.

16. The learned counsel for the respondent also specifically pointed out that clause 27 of the Model Contract and General Contract Conditions of the tender provides for arbitration. Clause 27.1 deals with arbitration in case of supply orders/contracts with firms, other than Public Sector Enterprises. Sub clause (1) of 27.1 specifically mentions that there shall be no arbitration for disputes involving claims up to Rs.25.00 Lakhs and more than Rs.100 Crores. For the purpose of brevity, the said clause is extracted hereunder:

27.1 Arbitration (Applicable in case of supply orders/contracts with firms, other than Public Sector Enterprises)

1. There shall be no arbitration for disputes involving claims up to 25 lakhs and more than Rs.100 crores. Disputes involving claims above Rs.100 crores shall be adjudicated under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

17. In the case on hand, neither the petitioner nor the respondent has mentioned whether the dispute involved herein is within the permissible limit of less than Rs.100 Crores and more than Rs.25.00 Lakhs. In the absence of the above particulars, this court cannot say whether the petitioner has to only invoke the arbitration clause.

18. Appendix - 10 of the tender document provides for changes/modifications sought by the bidders to the bidding conditions. It is not the case of the petitioners that they have asked for modification of clause 8 of the special conditions. They had only sought for a pre-bid clarification about the pre-

closure clause which was explained to them that Tender 16XC19003 will be governed by the terms and conditions contained in the document and is independent of any other previous tender. The Tender V16XC17013 (2017 contract) would be subject to the order of the Hon'ble High Court of Chennai. Thus, ONGC had put the bidders on notice about the pending case and how it could be modified subject to the result of the writ petitions. Despite the same, none of the petitioners had sought for any modification.

19. There are disputed question of facts involved in this case, as the petitioners had knowledge about the cases pending based on the previous tender notification and the impact of the result of the challenge before the court also was made known to them.

20. In Joshi Technologies International Inc. vs. Union of India (UOI) and Ors. reported in (2015) 7 SCC 728, the Hon'ble Supreme Court in paragraph No.70, held as under:

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation

voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes."

21. Clause 8 of the Special Conditions giving a right of pre-closure to the respondent is a term of contract, therefore, when the contract is being enforced by giving 45 days notice as prescribed, the petitioners cannot be said to be aggrieved. The impugned pre-closure of the contract cannot be termed to be whimsical because the respondent offered a reduction in the number of vehicles to the petitioners. Only when they refused to accept it, they were compelled to close the entire contract. The said act also was only to honour the order passed by the Hon'ble Division Bench. When everything was made transparent to the petitioners, there is no element of prejudice that can be attributed to the petitioners. The contract of the year 2017, became final only after the order of the court was passed. Therefore, the act of the respondent cannot be said to be arbitrary or prejudicial. If the petitioners are so aggrieved that the pre-closure had resulted in a monetary loss to them, it is always open to them to take recourse under the common law remedy.

22. With the above observation, the writ petitions are dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

Asr

To

1. The Chief General Manager, In-charge
Materials Management Division: Cauvery Asset
Oil & Natural Gas Commission Limited
Neravy Complex, Neravy
Karaikal - 609 604

2. The Chief General Manager
Oil and Natural Gas Corporation Ltd.
Incharge-Materials Management (CGM-Incharge-MM)
Materials Management Department
Cauvery Asset, Neravy Complex
Karaikal, Puducherry

+3cc to Mr.Giridhar Sai, Advocate, S.R.No. 39765, 39766, 39767
+1cc to Mr.N.A.Nissar Ahmed, Advocate, S.R.No. 39707
+2cc to Mr.S.Radhagopalan, Advocate, S.R.No. 39907, 39908

W.P.Nos.16121, 16122
and 16514 of 2020

MJB(CO)
GN(19/01/2021)