

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

Reserved on: 18.11.2019
Date of Decision: 08.01.2020

+ **W.P.(C) 12068/2019 & CMs 49433-34-35/2019**

NCC-BGR CONSORTIUM AND ANR. Petitioners

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

versus

NTPC LIMITED AND ANR. Respondents

Through: Mr.Tushar Mehta, SGI,
Ms.Maninder Acharya, ASG
with Mr.Puneet Taneja,
Ms.Laxmi Kumari,
Mr.M.S.Narula, Mr.Viplav
Acharya, Adv.

AND

+ **W.P.(C) 12077/2019 & CMs 49474-75-76/2019**

M/S BGR MINING AND INFRA LIMITED Petitioner

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

versus

NTPC LIMITED AND ANR. Respondents

Through: Mr.Tushar Mehta, SGI,
Ms.Maninder Acharya, ASG
with Mr.Puneet Taneja,
Ms.Laxmi Kumari,
Mr.M.S.Narula, Mr.Viplav
Acharya, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. WP(C) No. 12068/2019 has been filed by the petitioners challenging the order dated 30.09.2019 passed by the respondents banning the business dealings with the petitioners for a period of three years from the date of issuance of the said order.
2. WP(C) No.12077/2019 has been filed challenging the order dated 17.09.2019 passed by the respondents against the petitioner therein to the similar effect.
3. As common questions of facts and law are raised in both the above petitions, they are being disposed of by this common judgment. For the sake of brevity, facts mentioned in WP(C) No.12068/2019 are noted hereinbelow.
4. The petitioner no.1 is a consortium of NCC Ltd. and the petitioner no.2 (which is also the petitioner in WP(C) No.12077/2019). It is stated that in accordance with the Consortium Operating Agreement and the Instructions to Bidders, NCC is the Consortium Leader. The Consortium has also incorporated a company named Talaipalli Coal Mining Pvt. Ltd. for the purposes of execution of the Project.
5. The petitioner no.1 was a successful bidder in the tender floated by the respondent no.1 for 'Development and Operation of Talaipalli Coal Block' in the State of Chhattisgarh and was issued a Letter of Award dated 13.11.2017 in its favour.

6. Similarly, in WP(C) No.12077/2019, the petitioner therein was a successful bidder in the tender for selecting a Mine Operator-cum-Developer for development and operation of the respondent's Chatti Bariatu Coal Block in the State of Jharkhand and was issued a Letter of Acceptance dated 13.11.2017.

7. An FIR No. RC AC-1 2017 A0007 dated 07.12.2017 was registered by the Central Bureau of Investigation (CBI) under Sections 11 and 12 of the Prevention of Corruption Act, 1988 read with Section 120-B of the Indian Penal Code, 1860 (IPC) against one of the Directors of the petitioner no.2, Mr. Rohit Reddy and his associate Mr. Prabhat Kumar, who is alleged to be handling his tasks in Delhi as also Mr. Kulamani Biswal, the then Director (Finance) of the respondent no.1, alleging therein that Mr. Biswal was a part of the Board of Directors of the respondent no.1 and was also a Member of the Expert Committee which reviewed the recommendations of the Tender Committee related to Development and Operation of Talaipalli Coal Block in Chattisgarh. After Award of Tender to the petitioner no.1, a Kick Off meeting was held on 28.11.2017 between the consortium members of the petitioner no.1 as also the officers of the respondent no.1. This meeting was chaired by Mr. Biswal and also attended by Mr. Rohit Reddy and others. Similar Kick Off meeting was held on 28.11.2017 for the Chatti Bariatu Coal Block, again chaired by Mr. Biswal and attended by Mr. Rohit Reddy. It was further alleged in the FIR that Mr. Biswal and Mr. Reddy entered into a criminal conspiracy for obtaining a legal gratification of USD

equivalent to Rs.5 lacs in cash for Mr. Biswal, which was arranged by Mr. Reddy through Hawala Transaction to be delivered to Mr. Biswal through Mr. Prabhat Kumar.

8. The respondent no.1 by its letter dated 20.12.2017, relying upon Clause 24(c) of the Project Agreement regarding 'Suspension and Termination' and based upon the registration of the FIR, directed Suspension of all the Mining Services till further notice as per Clause 24.1 of the Project Agreement.

9. The petitioner no.1 represented against the same vide its letter dated 25.12.2017 *inter alia* contending therein that as the matter has been referred to the Independent External Monitors and was being investigated by them, the respondent no.1 could not have taken the above action of suspension of mining operation without any prior notice to the petitioner no.1.

10. The respondent no.1, however, on 29.12.2017 issued a Show Cause Notice under Clause 24.3 (b) of the Project Agreement calling upon the petitioner no.1 to show cause as to why the Project Agreement be not terminated.

11. The petitioner no.1, instead by its letter dated 08.01.2018, called upon the respondent no.1 to sign the Project Agreement as also release its bank guarantee submitted towards bid security (EMD) as the petitioner no.1 in the meantime had submitted the Performance Bank Guarantee.

12. The respondent no.1, in turn by its letter dated 10.01.2018, referring to the Suspension Notice dated 20.12.2017 and Show Cause Notice dated 29.12.2017, stated that the process of signing of the Project Agreement had been kept in abeyance.

13. The petitioner no.1 by its letter dated 17.01.2018 issued notice under Clause 23.1 of the Project Agreement invoking the 'Dispute Resolution Mechanism', calling upon respondent no.1 for good faith discussion and in the meantime to sign the Project Agreement.

14. The petitioner no.1 further proceeded to file a Writ Petition, being WP(C) No.702/2018, before this Court, *inter alia*, praying for a direction to be issued to the respondent no.1 to comply with Clause 23 of the Project Agreement and to convene a meeting for discussion / amicable resolution of the disputes.

15. This Court, by an *ad interim* order dated 24.01.2018, was pleased to restrain the respondents from taking any coercive steps against the petitioner. Further, by its judgment dated 21.01.2019, this Court was pleased to direct the respondent no.1 to hold good faith discussions with the petitioners in terms of Clause 23.1 (b) of the Project Agreement and clarifies that the said discussions shall also be construed as compliance of Clause 24.4(c) of the Project Agreement, providing for the parties to hold good faith discussions where a Show Cause Notice for termination is issued by the respondent no.1.

16. As far as the Suspension Notice is concerned, this Court did not deem it proper to interfere with the same at that stage, observing as under:

“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 the slid 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.”

17. Feeling aggrieved of the above judgment, the respondents challenged the same by way of an appeal, being LPA no.61/2019. The same was, however, dismissed by the Division Bench of this Court by its judgment dated 15.02.2019. The respondents still feeling aggrieved of the same, challenged the same by way of SLP (C)

Nos.9324-25/2019, which also was dismissed by the Supreme Court by its order dated 26.04.2019.

18. Thereafter, the parties entered into good faith discussions.

19. In the meantime, the petitioners filed yet another Writ Petition, being WP(C) no.5566/2019, which was dismissed as withdrawn on 21.05.2019 with liberty to file an application under Section 9 of the Arbitration and Conciliation Act, 1996 or avail any other alternative remedy.

20. That while the good faith discussions were being carried on, the respondent no.1 proceeded to invoke the Performance Bank Guarantee as also by its letter dated 04.07.2019 proceeded to terminate the Project Agreement under Clause 24.4 (d) of the Project Agreement. It is relevant to note that in the meantime, a Charge Sheet dated 14.05.2019 had been filed arraying Mr. Biswal, Mr. Reddy and Mr. Prabhat Kumar as accused under Sections 11 and 12 of the Prevention of Corruption Act read with Section 120-B of the IPC.

21. The petitioners filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the A&C Act), being OMP(I)(COMM) No.260/2019, praying for staying of the operation of the termination letter dated 04.07.2019 as also seeking refund of the amount received through invocation of the Performance Bank Guarantee.

22. During the pendency of the above petition, the respondent no.1 further issued a Show Cause Notice dated 07.08.2019 to the

petitioners calling upon the petitioners to show cause as to why the business dealings with the petitioners be not banned for a period of three years.

23. In the petition under Section 9 of the A&C Act filed by the petitioners, this Court by its order dated 13.08.2019, taking into account that the good faith discussions had failed, observed that an Adjudicator needs to be appointed in terms of Clause 23.2 of the Project Agreement on a request being made in that behalf by the petitioners. As far as the Show Cause Notice dated 07.8.2019 was concerned, this Court observed as under:

“8.3 Mr. Bhushan further submits that the respondent has triggered steps for banning the petitioner for a period of three years by issuing a show cause notice dated 07.08.2019 (SCN). This aspect presently is not a part of the petition. Even according to Mr. Bhushan, the petitioner has been called upon to show cause as to why a banning order should not be passed against the petitioner. Therefore, the petitioner has, at this stage, an opportunity to persuade the respondent to withdraw the SCN by filing a reply.”

24. The petitioner no.1 thereafter, by the letter dated 21.08.2019, submitted its response to the Show Cause Notice, however, by the Impugned Order dated 30.09.2019, the respondent no.1 has proceeded to ban the petitioners for further business dealings for a period of three years from the date of the said order.

25. I must at this stage also refer to the fact that a similar banning order has been passed against the other consortium member of the petitioner no.1, being NCC Ltd. NCC Ltd. challenged the same before this Court by way of a Writ Petition, being WP(C) no.10805/2019. The same was disposed of vide order dated 11.10.2019 by this Court on a statement of the learned senior counsel for the petitioner therein and of the learned Solicitor General of India (hereinafter referred to as SG), appearing for the respondent no.1, and clarifying that in view of the peculiar facts, the Impugned order would not operate against the petitioner therein with respect to its bidding for tenders with other entities. By a subsequent order dated 17.10.2019 passed in application filed by the petitioner therein seeking certain clarifications in the order dated 11.10.2019 of this Court, being CM No.45581/2019, this Court directed the respondent no.1 to remove the name of the petitioner therein from the list of banned entities on its website.

26. The learned senior counsel for the petitioners submits that the Impugned Order banning the petitioners from further business dealings cannot be sustained inasmuch as the parties are in process of Dispute Resolution before the Adjudicator appointed under Clause 23.2 of the Project Agreement. Relying upon the judgments of this Court in *Indian Oil Corporation Ltd. vs. SPS Engineering Ltd.* 2006 (88) DRJ 93 (DB) and *Prakash Atlanta JV vs. National Highway Authority of India* 2010(169) DLT 664, he submits that where the blacklisting order is based on the allegations which are pending before the Arbitrator (in this case the Adjudicator), the respondents should

have awaited the decision of the Adjudicator before taking the Impugned decision with undue haste.

27. The learned senior counsel for the petitioners further submits that the Charge Sheet that has been filed by the CBI does not array the petitioner companies as accused therein. He submits that therefore, even the CBI has not found any evidence to implicate the petitioner companies, who are separate legal entities, in any wrongdoing and the allegations are only against the individuals arrayed as accused in the Charge Sheet. Placing reliance on the judgment of the Supreme Court in *Aneeta Hada vs. Godfather Travels and Tours Pvt. Ltd.* (2012) 5 SCC 661, he submits that the company being a juristic person, could have been fastened with criminal liability and that having not been done, clearly the respondents could not have taken a decision to ban dealings with the petitioners only on basis of such Charge Sheet.

28. The learned senior counsel for the petitioners further submits that even otherwise, the allegations made in the Charge Sheet would not be a sufficient ground for passing of the Impugned Orders under the 'Policy & Procedure for Withholding and Banning of Business Dealings' (hereinafter referred to as the Policy) of the respondent no.1. He submits that in terms of Clause 5.1 (e) of the said Policy, it is only on conviction of the Director that such a banning order can be passed.

29. Further, placing reliance on the orders dated 11.10.2019 and 17.10.2019 passed by this Court in WP(C) no.10805/2019 filed by the NCC Ltd., the learned senior counsel for the petitioners submits that

even the petitioners herein are ready and willing to make a statement that on their own and without prejudice to their rights and contentions, the petitioners shall not participate independently or as a consortium in any tender or seek any award of contract from the respondent no.1, its Joint Ventures/subsidiaries for a period of three years from the date of the Impugned Order. Having stated so, the clarification as given by this Court in favour of the NCC Ltd. should also be extended to the petitioners herein.

30. On the other hand, the learned SG submits that the allegations against the petitioners in the Charge Sheet filed by the CBI are of a grave nature. The respondent no.1 having passed the Impugned Orders in terms of its Policy and the Project Agreement and after having fully complied with the Principles of Natural Justice, this Court would not interfere with the same in exercise of its writ jurisdiction.

31. As far as the orders passed by this Court in favour of NCC Ltd. is concerned, the learned SG submits that the Charge Sheet having been filed against one of the Directors of the petitioner no.2, M/s BGR Mining and Infra Ltd., its case was clearly distinguishable from NCC Ltd. and the same benefit could not be granted to the petitioners herein.

32. As far as the proceedings before the Adjudicator are concerned, he submits that in fact, the present petition would not be maintainable as the petitioners have an alternative Dispute Resolution Mechanism mentioned under Clause 23 of the Project Agreement, which it has invoked not only by filing a petition under Section 9 of the A&C Act

but also raising the dispute before the Adjudicator appointed under Clause 23.2 of the Project Agreement. He submits that merely because such proceedings are pending before the Adjudicator, the respondent no.1 cannot be restrained from exercising its independent right to ban further business dealings with the petitioners.

33. I have considered the submissions made by the learned senior counsels appearing for the parties.

34. At the outset, one may take note of Clause 5.1 of the Policy of the respondent no. 1, which *inter alia* empowers the respondent no.1 to ban its business dealings with any Agency if the proprietor of the Agency has been guilty of malpractices such as, bribery, corruption, etc., or has resorted to corrupt, fraudulent practices including misrepresentation of facts. Sub-Clause (e), (f) and (j) of Clause 5.1 of the Policy are reproduced hereunder:

“5. Banning of business dealings

5.1 Grounds on which Banning of business dealings can be initiated

Banning of business dealings can be initiated against Agency, on following grounds:

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e) If the Director/Owner of the Agency, proprietor or partner of the Agency, is convicted by a court of law for offences involving corrupt and fraudulent practices including moral turpitude in relation to its business dealings with the government or NTPC or NTPC's group companies, during the last five years.

f) If the proprietor of the Agency have been guilty of malpractices such as bribery, corruption, fraud, substitution of the tenders, interpolations, etc.

xxxxx

j) If it is established that Agency has resorted to corrupt, fraudulent practices including misrepresentation of Facts.”

35. It is also to be noted that in the Charge Sheet, grave allegations have been made *inter alia* against one of the Directors of M/s BGR Mining and Infra Ltd. with respect to the LOAs under both the Chatti Bariatu Coal Block and Talaipalli Coal Block Projects.

36. It should further be noted that Mr. Biswal had played a major role in not only the Award of Tender in favour of the petitioners but also in the Kick Off meeting with respect to the two Coal Blocks. Prima facie therefore, it cannot be said that the above conditions of the respondent no.1's Policy would not be applicable to the facts of the present case.

37. In fact, this Court in its judgment dated 21.01.2019 passed in WP(C) No.702/2018, in relation to the Clause 24.3(b) (xi), which provides for termination of the Project Agreement when the Mine Operator is found to be engaged in corrupt or fraudulent practices in competing for or in executing the Agreement, left the said issue to be determined in accordance with the Dispute Resolution Process as provided in Clause 23 of the Project Agreement.

38. Further, it cannot be seriously contended that the respondent no.1 has failed to comply with the Principles of Natural Justice while passing the Impugned Orders. As noted hereinabove, the Impugned Orders were preceded with a Show Cause Notice dated 07.08.2019; the Impugned Orders reflects consideration of the reply submitted by the petitioners; as also give detailed reasons for not agreeing with the same; and thereafter proceeds with the Impugned decision to ban business dealings with the petitioners for a period of three years.

39. It is no longer *res integra* that the State can decline to enter into a contractual relationship with a person or a class of persons for a 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. The only legal limitation upon the exercise of such an authority is that the State has to act fairly and rationally without in any way being arbitrary. Such power is inherent and need not be specifically conferred by a statute or reserved by contract. It is also well settled that even though the right of the contracting party is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. Reference can be made to *Erusian Equipment & Chemicals Ltd. Vs. State of W.B.* (1975) 1 SCC 70; *Patel Engineering Ltd. vs. Union of India & Anr.* (2012) 11 SCC 257; and *Kulja Industries Ltd. Vs. Chief*

General Manager, Western Telecom Project Bharat Sanchar Nigam Ltd. & Ors. (2014) 14 SCC 731.

40. In the present case, applying the above test, it cannot also be said that the decision of the respondent no.1 to ban business dealings with the petitioners based on the above facts is arbitrary or unreasonable. It must be remembered that while testing such decision in exercise of powers of judicial review, this Court does not act as an Appellate Authority and cannot substitute its decision for that of the Authority.

41. As far as the submission of the petitioners that such decision could not have been taken while the dispute was pending before the Adjudicator, in my opinion, it cannot be laid down as a hard and fast rule that in all cases where the dispute is pending arbitration/dispute resolution, the Authority would be denude of its powers to blacklist / ban a party from further business dealings during the pendency of such proceedings. To hold so, would be contrary to the dictum of the Supreme Court that such power to blacklist need not necessarily be contractual or statutory in nature. It will be dependent of facts of each case as to whether it would have been proper and more prudent for the Authority to await the outcome of the Dispute Resolution Process before taking action of blacklisting/ banning.

42. In ***Indian Oil Corporation Ltd., (supra)***, the respondent therein was placed on the Holiday List on allegations of failure to perform the contract in a timely manner. The Court came to a conclusion that as

such allegations were pending before the Arbitrator, the Authority should not have proceeded with undue haste.

43. Similarly, in *Prakash Atlanta JV (supra)*, the Court found that one of the allegations in the blacklisting order was termination of the contract. As the issue of validity of such termination was pending reference before an Arbitral Tribunal, the Court did not find favour with the respondent therein issuing the blacklisting order.

44. In the present case, however, and as noted above, the allegations against the petitioners are grave in nature and have not only contractual ramifications with respect to the two LOA(s) in question but also of public nature. For such grave allegations, it cannot be said that the respondents must await the outcome of the Dispute Resolution Mechanism, which unfortunately would be a long drawn process.

45. The submission of the learned senior counsel for the petitioners that the petitioners not having been arrayed as accused in the Charge Sheet, the allegations contained in such Charge Sheet could not have been taken cognizance of in passing the Impugned Orders, also cannot be accepted. As noted hereinabove, the Charge Sheet makes specific reference to the two LOA(s) of the petitioners. Mr. Reddy was one of the Director of M/s BGR Mining and Infra Ltd. and therefore, cannot be said to be a stranger or acting only at his own behest or for his individual benefit. In any case, the principles of criminal justice jurisprudence cannot be fully applied for testing the administrative decision to blacklist / ban a party from business dealings. As noted hereinabove, such decision can be tested on limited grounds of judicial

review, and tested on such touchstone, the decision to ban further business dealings with the petitioners in the present case does not suffer from any vice of arbitrariness or unreasonableness.

46. The submissions of the learned senior counsel for the petitioners based on the orders passed by this Court in favour of NCC Ltd., also cannot be accepted. As noted hereinabove, the said orders were passed recording the submissions of the learned SG appearing for the respondents and taking note of the peculiar facts that even in the Charge Sheet there were no allegations made against NCC Ltd. or any of its Officers. In any case, the Impugned Orders merely ban the petitioners from business dealings with the respondent no.1 and its Joint Venture/subsidiaries for a period of three years from the date of the order. What shall be its effect on the contracts with other entities cannot be a ground for interfering with the said Impugned Orders.

47. In view of the above, I find no merit in the present petition(s). The present order shall not however, prejudice the petitioners from pursuing their Alternative Dispute Resolution Mechanism. The observations made herein are confined to the present Writ only.

48. The petition(s) are dismissed. The parties shall bear their own costs.

NAVIN CHAWLA, J

JANUARY 08, 2020
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