In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 18440 of 2019
IA No: CAN 3 of 2020 (CAN 3997 of 2020)
+
CAN 4 of 2020 (CAN 3998 of 2020)
+
CAN 5 of 2021
With
WPA No.1404 of 2020

Archon Powerinfra India Private Limited
Vs.
Indian Oil Corporation and others

For the petitioner	:	Mr. Sakya Sen, Mr. Amritam Mondal, Ms. Jeenia Rudra.
For the respondent-authorities	:	Mr. Saptangshu Basu, Mr. Amit Kumar Nag, Mr. Abhishek Nag, Ms. Ranjabati Ray
Hearing concluded on	:	22.04.2021
Judgment on	:	11.06.2021

Sabyasachi Bhattacharyya, J:-

1. The brief facts of the case are:

The Indian Oil Corporation Limited (IOCL), the first respondent in both the writ petitions, issued a Letter of Intent (LoI) to the petitioner for construction of new plant shed and allied civil, structural and enabling works at LPG Bottling plant, Budge Budge, West Bengal. A contract was duly executed in terms of the said LoI.

2. Despite the scheduled time for completion of the work having expired, extensions were granted to the petitioner on multiple occasions for completion of all the works.

3. The respondents allege that the contract work was not completed even within the extended time and that the performance of the petitioner (Archon Power Infra India Private Limited) was unsatisfactory.

4. Subsequently on July 16, 2018 M/s. Enoch Infra Build LLP sent a written complaint to the respondents regarding the petitioner having entered into a sub-contract with the said concern in connection with the subject contract, payment in connection with which was allegedly due. The complaint further indicated that the petitioner had been diverting payments received from the respondents to third parties without reimbursing M/s. Enoch. Two agreements dated March 7, 2017 and July 24, 2017 were allegedly executed between the petitioner and M/s. Enoch and certain bank statements reflecting payments from Enoch to the petitioner pursuant to the contract were also included in the complaint.

5. The contract with the petitioner was terminated by the IOCL primarily on the ground that the sub-contracts referred to above were in contravention of Clause 4.8.1.1.1 and Clause 7.0.1.0(x) of the General Conditions of Contract (GCC). Such sub-contract was allegedly entered into without prior written approval from IOCL, which entailed violation of the clauses of the contract and ultimately resulted in termination of the contract. Such termination was preceded by a show-cause notice dated August 23, 2018, to which the petitioner gave a written reply on September 5, 2018, in which the petitioner apparently admitted the execution of the two agreements.

6. The termination took place on November 2, 2018 and was challenged in a writ petition, bearing WP No.23928 (W) of 2018. By an order dated December 12, 2018, the writ petition was dismissed, upholding the order of termination. MAT 36 of 2019 was preferred against such order which was dismissed on February 7, 2019 by a Division Bench of this Court. The dismissal order recorded the admission of the petitioner that the petitioner had sub-contracted the work entrusted to it. Both the said orders observed that the sub-contracts had violated Clause 7.0.1.0(x) of the GCC and Article 8 of the contract dated December 1, 2016.

7. In the order of termination, the respondents had intimated to the petitioner that the balance work would be done through alternate parties at the risk and cost of the petitioner as per terms and conditions of the contract/work order.

8. Subsequently, the respondent authorities floated Tender No.BGB/BP/PT-03/2019-20 inviting bids for the balance work. The petitioner was specifically debarred from participating in the said tender since the original contract was terminated on the ground of violation of the same.

9. Challenging the debarment of the petitioner to participate in the new tender, the petitioner filed another writ petition bearing WPA 18440 of

2019. The said writ petition is one of the subject-matters of the present adjudication.

10. Meanwhile, a show-cause notice was issued by the respondent-authorities to the petitioner on May 3, 2019 seeking explanation as to why the petitioner should not be put on Holiday List. A reply was given by the petitioner on May 30, 2019. Personal hearing was granted to the petitioner, which was attended by the petitioner's representative, who also submitted certain documents. Based on such hearing and documents, the respondents decided to put the petitioner on Holiday List, which order was communicated *vide* letter dated September 18, 2019 to the petitioner.

11. The said letter dated September 18, 2019 was set aside on October 30, 2019 in WP No.19486 (W) OF 2019. Liberty was granted to the petitioners to participate with the debarment proceeding by affording another opportunity of hearing to the petitioner on November 8, 2019 at 11 a.m. In compliance thereof, a notice dated October 31, 2019 was issued to the petitioner and a hearing was given on the appointed date and time to the representative of the petitioner and its advocate.

12. By a letter dated November 21, 2019, based on such hearing, the petitioner was again put on Holiday List for a period of three years.

13. The petitioner contends that such debarment of the petitioner to participate in Tender No.BGB/BP/PT-03/2019-20 was illegal and without jurisdiction, since the proceeding for Holiday Listing was pending at that juncture.

14. The petitioner challenged such debarment/Holiday Listing in WPA No.1404 of 2020, which is also the subject-matter of the present adjudication.

15. Learned counsel for the petitioner alleges that the order of debarment, challenged in WPA No.1404 of 2020, was a verbatim reproduction of the termination order dated November 2, 2018. The said order quotes a portion of the order passed by the Division Bench while affirming the order upholding the termination.

16. Hence, it is argued by the petitioner, the debarment order does not reflect application of mind and/or independent consideration of the defence put up by the petitioner in its reply to the show-cause notice and, as such, is unreasoned.

17. In this context, the petitioner refers to *B.A. Linga Reddy and others Vs. Karnataka State Transport Authority and others [(2015) 9 SCC 515]* and *Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others [(2010) 9 SCC 496].*

18. It is further argued by the petitioner that the reasons cannot be supplemented subsequent to the impugned order and places reliance in such context on *Mohinder Singh Gill and another Vs. The Chief Election Comissioner, New Delhi and others [(1978) 1 SCC 405].*

19. Hence, since the original order of debarment did not reflect any reason, the *post facto* furnishing of reasons in the pleadings of the respondents in the present writ petition ought not to be looked into by the court, the petitioner contends.

20. Learned counsel for the petitioner further argues that the agreements with M/s. Enoch (respondent no.4) was in the nature of finance agreements and not sub-contracts. This fact, it is contended, was admitted by M/s. Enoch, as reflected from a resolution passed at a meeting of the designated persons of M/s. Enoch and an application by M/s. Enoch under Section 7 of the Insolvency and Bankruptcy Code (IBC), in the capacity of a financial creditor. A legal notice dated July 17, 2019 also reflects the same stand taken by respondent no.4, which itself shows that respondent no.4 admitted that the nature of the agreements-in-question was financial and not sub-contracts. Such documents, it is argued were not considered in the debarment order.

21. The petitioner contends that the IOCL failed to produce any document to show that any part of the work was actually done by respondent no.4 (M/s Enoch) as sub-contractor or any document to show manpower or material being supplied by respondent no.4 to the project site.

22. Moreover, learned counsel for the petitioner argues, a sub-contract would require the petitioner to make payment to respondent no.4 and not the converse. However, the bank statement of the petitioner disclosed before the authority reveals amounts being paid by respondent no.4 to the petitioner, which indicates that the agreements were financial in nature, as opposed to sub-contracts.

23. The next limb of argument by the petitioner is that the IOCL had full knowledge of the arrangement between the petitioner and respondent no.4 prior to the written complaint dated July 16, 2018. In support of such contention, the petitioner places reliance on several instances of correspondence between the IOCL and respondent no.4, including e-mails of December, 2017, January, 2018, February, 2018 and March, 2018. Since IOCL never objected to such arrangement, despite having correspondence with respondent no.4 directly in connection with the contract given to the petitioner, the requirement of prior written approval, contained in Clause 7.0.1.0 (x) of the GCC is argued to have been waived. In support of the contention that contractual provisions can be waived by conduct, learned counsel for the petitioner cites *Ramdev Food Products (P) Ltd. Vs. Arvindbhai Rambhai Patel and others [(2006) 8 SCC 726]* and *Dr. Karan Singh Vs. State of J&K and another [(2004 5 SCC 698].*

24. That apart, it is contended, there was no finding in the debarment order regarding the other allegation of continuous poor progress of work. The petitioner alleges that it completed almost ninety per cent of the work at the time of termination.

25. In reply, learned counsel for the respondents places reliance on certain relevant clauses of the arguments dated March 7, 2017 and August 24, 2018 entered into by the petitioner with M/s. Enoch which categorically described the agreements as sub-contracts. The respondents contend that the language of the documents clearly shows that the major part of the work given to the petitioner was delegated by sub-contract to M/s. Enoch. In view of the express terms of the said agreements, it is argued, those were not paper arrangements for obtaining financial assistance but were clearly sub-contracts assigning 50 per cent and 68 per cent of the petitioner's work respectively, under the contract with IOCL, in favour of M/s Enoch, a third party.

26. It is also argued that the petitioner has admitted before the Division Bench that the said agreements were sub-contracts, as revealed from the observations made in the said order.

27. In the absence of any pleading or proof as to prior written approval of the IOCL, such sub-contracts were in clear violation of Clause 4.8.1.1.1 and Clause 7.0.1.0 (x) of the GCC.

28. It is further argued that since the Division Bench affirmed the order of the learned Single Judge upholding the termination of contract, also on the ground that there was violation of the aforementioned clauses due to the petitioner having sub-contracted the work to M/s. Enoch, such findings have attained finality and the petitioner cannot reopen the issue for fresh consideration by this court.

29. The ground for subsequent debarment, challenged in WPA 1404 of 2020, is primarily such contravention of contractual clauses by the petitioner and, as such, since sufficient reasons were reflected in the order of debarment, including the findings of the Division Bench, the debarment order was passed absolutely within the authority of the respondents.

30. Learned counsel for the respondents further argues that the subject-matter challenged in WPA 18440 of 2019, that is, exclusion of the petitioner from the subsequent tender, was not connected in any manner with the proceeding for Holiday Listing which was then pending against the petitioner. It is submitted that since the petitioner's violation of the terms of the contract resulted in the issuance of the subsequent tender for completion of the balance work, allowing the petitioner to participate in the fresh tender would operate as a negation of the order of termination of the petitioner, which has been upheld up to the Division Bench of this court. Hence, there was no irregularity on such score as well.

31. Upon a consideration of the respective submissions of counsel for the parties and going through the materials-on-record, the primary question which acquires relevance is whether this court can reopen the question of the nature of the agreements dated March 7, 2017 and August 24, 2017; if so, whether such agreements were sub-contracts or financial agreements.

32. That apart, the question whether the order of debarment was unreasoned or tainted by non-application of mind is also relevant.

33. Although the petitioner has argued that the Division Bench order in connection with the termination of the contract with the writ petitioner cannot operate as *res judicata,* since the subject-matter of the challenge was termination and not whether the agreements-in-question were sub-contracts, such contention cannot be accepted on the face of it. The issue as to whether the concerned agreements were sub-contracts was the cardinal question which had to be decided to adjudicate upon the legality of the termination. As such, the said question directly fell for consideration before the learned Single Judge and attained finality upon being decided in the positive, as affirmed by the Division Bench.

34. That apart, a bare perusal of several clauses of the agreements dated March 7, 2017 and July 24, 2017 clearly indicates that those were not financial agreements but delegated a major portion of the work which was originally allocated to the petitioner by the IOCL, under sub-contracts.

35. It is specified in the agreements that the writ petitioner would be the main contractor and the respondent no.4 herein the sub-contractor. The agreements further provided that all men, materials, machinery, tools and plants, infrastructure, resources, etc., as required for the execution of the work was provided and arranged by the writ petitioner. All charges, materials, labour, plants and equipments, transportation and overhead expenses incurred on execution, completion and maintenance of the work was also to be arranged by the writ petitioner and M/s. Enoch equally. The responsibility of the work, under the said agreements, was clearly distributed equally among the contractor and the sub-contractor. The terms and conditions of the original agreements between the writ petitioner and the IOCL were also made applicable between the writ petitioner and M/s. Enoch.

36. The second agreement dated August 24, 2017, went one step further by assigning the execution of sixty-eight per cent of the project, instead of fifty per cent as contemplated in the agreement dated March 7, 2017. Thus, in fact, the majority of the responsibility to do such work was delegated to the sub-contractor.

37. The argument of the petitioner, that payments made by M/s. Enoch to the petitioner indicated the nature of the agreements to be financial, is not substantiated by the clauses of the agreements themselves.

38. Since charges and expenses were also to be shared between the contractor and the sub-contractor, there could very well have been occasions for the sub-contractor to make payments to the contractor, that is, the writ petitioner.

39. Hence, there cannot be any doubt that the agreements dated March 7, 2017 and August 24, 2017 were clearly sub-contracts and not financial agreements.

40. The other argument of the petitioner, as regards the implied consent of the IOCL to the arrangements between the petitioner and M/s. Enoch is also not tenable. Mere communication between the IOCL and respondent no.4 does not necessarily indicate that there was any prior written approval, as contemplated in Clauses 7.0.1.0(x) of the GCC, read with Clause 4.8.1.1.1 of the same. It is neither pleaded nor proved by the writ petitioner that there was any specific written approval, as mandated by the work contract issued by the IOCL to the petitioner, prior to the petitioner entering into such agreements with a third party.

41. That apart, since deliberate violation of the clauses of the GCC on the part of the petitioner entailed termination of the contract, the same logic afforded sufficient basis for debarment/Holiday Listing of the petitioner.

42. As far as the cited judgments are concerned, although reasons are required to be given by judicial/quasi-judicial authorities, the impugned order of debarment sufficiently indicated the grounds for debarment. Quotation of portions of the orders passed by the learned Single Judge and the Division Bench upholding the termination of contract was fully justified in view of such findings having attained finality. More detailed reasoning was not necessary or expected in an administrative or at best quasi-judicial order, on a similar footing as a judgment delivered by a court of law/tribunal.

43. The reasons indicated in the debarment order were sufficient to justify the same. As such, it cannot be said that the said decision was unreasoned or not tenable in the eye of law.

44. Regarding the unsatisfactory execution of the work, the failure of the petitioner to conclude the work even after being granted several extensions itself justified such conclusion. There is no dispute regarding the grant of such extensions having actually been given and the failure of the petitioner to complete the work even within the extended period.

45. Even if it is supposed hypothetically that the debarment order failed to disclose sufficient reasons for the execution of work by the petitioner being labelled 'unsatisfactory', the other ground, that is, the deliberate violation of the GCC by the petitioner by entering into sub-contract agreements with M/s. Enoch entitled the respondent-authorities to debar the petitioner.

46. As far as the challenge in WPA No.18440 of 2019 is concerned, it would be a ridiculous proposition to reconsider the writ petitioner itself as a participant in the fresh tender issued for completion of the balance work, which was itself necessitated by the deliberate violation of the clauses of the work contract by the petitioner. It defies all logic as to why the petitioner, which had violated the contract, requiring such additional tender to be floated, would be invited to participate in the fresh tender for the balance of the same work. Hence, there is no basis to the writ petitioner’s challenge to its debarment from participating in Tender No.BGB/BP/PT-03/2019-20.

47. Another ingredient which has to be considered is whether the "admission" of M/s. Enoch that it was a financial creditor to the writ petitioner has any bearing upon the present adjudication.

48. First, *inter se* communications between the writ petitioner and respondent no.4 and/or pleadings of respondent no.4, being the sub-contractor itself, cannot have any direct relevance to the debarment of the petitioner, particularly in view of the termination order being affirmed up to the Division Bench of this Court.

49. More importantly, an admission, even if any, by respondent no.4 cannot, by any stretch of imagination, bind the IOCL and its functionaries. As such, such arguments of the writ petitioner has no legs to stand upon.

50. Even if the said description of the respondent no.4 by itself as a 'financial creditor' could be broadly taken as an admission by respondent no.4 in that regard, it cannot be said that such admission would prevent the IOCL from terminating and debarring the writ petitioner, by application of the principle of estoppel. The complaint of M/s. Enoch was a mere trigger, and not the sole basis, for the decision of termination and subsequent debarment of the writ petitioner. The said complaint was only the genesis of the inquiry by the IOCL against the writ petitioner. The complaint was neither treated to be sacrosanct nor the only basis for terminating the contract, suspending or Holiday Listing the writ petitioner. The respondent-authorities independently arrived at findings upon considering the materials produced by the writ petitioner itself as well as other connected documents for the purpose of termination, leading to suspension and subsequent debarment of the writ petitioner. Hence, the alleged admission of respondent no.4 is utterly irrelevant in the context. In its reply to the show cause and representation, the writ petitioner did not specifically raise the question of prior knowledge of the respondent-authorities about the arrangement between the writ petitioner and M/s. Enoch. Rather, the factum of the agreements being sub-contracts was admitted before the Division Bench on behalf of the petitioner. Mere pendency of a review application before the Division Bench, that too for an indefinite period, cannot automatically operate as stay of such order. It is unacceptable that mere allegation of previous knowledge of the arrangement between the petitioner and M/s. Enoch would amount to 'prior written approval' for grant of sub-contract, as mandated in the GCC and work order issued to the writ petitioner by the IOCL. It cannot be said that the clauses-in-question of the GCC were ancillary ones. The said clauses contemplated consequential termination and award of the balance work to third parties, hence integral to the work contract between the petitioner and the IOCL.

51. In view of the above discussions, both the writ petitions fail on merits. Accordingly, WPA No. 18440 of 2019 and WPA No.1404 of 2020 are dismissed on contest without any order as to costs. All connected applications are disposed of accordingly.

52. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)