

W.P.A. No. 2833 OF 2020
With
CAN 4 of 2021
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Srei Infrastructure Finance Limited & Anr.
Vs.
Union of India & Ors.

For the Petitioners : Mr. S.N. Mookerji, Senior Advocate
 Mr. Soumabho Ghosh, Advocate
 Mr. Deepan Kr. Sarkar, Advocate
 Ms. Ashika Daga, Advocate
 Ms. A. Bhattacharya, Advocate

For the NHAI : Mr. Siddhartha Mitra, Senior Advocate
 : Mr. Shamit Sanyal, Advocate
 : Mr. S. Chowdhury, Advocate
 : Ms. Monika Roy, Advocate

Hearing concluded on : July 13, 2021

Judgment on : July 29, 2021

DEBANGSU BASAK, J.:-

1. The petitioners have assailed an order dated January 28, 2020 issued by the National Highway Authority (NHAI) blacklisting the petitioner No. 1 from participating in any ongoing or future tender of the NHAI for a period of three years.

2. Learned Senior Advocate appearing for the petitioners has referred to the Memorandum of Understanding dated January 28,

2006. He has submitted that, the petitioner No. 1 had entered into Memorandum of Understanding with Madhucon Projects Limited (MPL) and Madhucon Granites Limited (MGL) to form a consortium for the purpose of bidding for a project of NHAI to construct, operate and maintain the Madurai-Tuticorin section of National Highway 45B from Kochi Km 138.800 to Km 254.500 in the State of Tamil Nadu for a concession period of twenty years including construction period. The parties had formed a Special Purpose Vehicle (SPV) in terms of the Memorandum of Understanding. Such SPV had entered into a concession agreement with NHAI. He has submitted that, MPL was the lead member and that the petitioner No. 1 was the financial member holding only equity stake of 10 per cent of the share holding of the SPV. According to him, the role of the petitioner No. 1 had been restricted to being a financial member. He has submitted that, the SPV being Madurai – Tuticorin Expressways Limited (MTEL) was incorporated on May 11, 2006 with the petitioner No. 1 having 10 per cent stake therein.

3. Learned Senior Advocate appearing for the petitioners has submitted that, MGL, MPL and the petitioner No. 1 had entered into a shareholders' agreement on December 12, 2006 after emerging as the successful bidders in respect of the project of NHAI. He has referred to

various clauses of the shareholders' agreement particularly Clause 3 and 5 thereof. He has contended that, the responsibility for execution of the project was with MPL and that the responsibility of the petitioner No. 1 was restricted to the extent stated in Clause 3 of the agreement. He has submitted that, the NHAI authorities had knowledge of such shareholders' agreement.

4. Learned Senior Advocate appearing for the petitioners has submitted that, NHAI entered into a concession agreement with the SPV on July 24, 2006. He has pointed out that, NHAI did not entered into any agreement with the petitioner No. 1. The concession agreement had defined the expression "concessionaire" to mean MTEL exclusively. He has referred to the various recitals in concession agreement and submitted that, the same recites that the petitioner No. 1 holds only 10 per cent of the shares in the consortium with MPL as the lead member. He has pointed out that, the performance security under the contract was given by the concessionaire alone. He has contended that, all obligations under the concession agreement vested with the SPV and all liability in the event of default was also to be borne by the SPV. The responsibilities for operation and maintenance of the project have been vested with the SPV. The right of termination of NHAI had also been only in respect of SPV. In the event of material

breach of contract the SPV had retained opportunity to rectify and cure such defect before NHAI took the decision to terminate or suspended the SPV.

5. Learned Senior Advocate appearing for the petitioners has contended that, disputes and differences had arisen between the SPV and NHAI in respect of the contract. Such disputes had been referred to arbitration and that such arbitration proceedings are pending.

6. Referring to Show Cause Notice issued on behalf of NHAI, learned Senior Advocate appearing for the petitioners has submitted that, the same was replied to by the petitioners on September 7, 2019. The petitioners had contended that, since the petitioners were not parties to the concession agreement, the petitioner No. 1 requested time to confer the lead partner before submitting further response. The petitioners had discussed the matter with the other members of the consortium. Since MPL being the lead member of the SPV had given a detailed response, the petitioners chose not to give any further response to NHAI.

7. Referring to impugned decision of NHAI dated January 28, 2020, learned Senior Advocate appearing for the petitioners has submitted that, the petitioners responded thereto by a letter dated January 29, 2020. He has contended that, there was no privity of

contract between the petitioner No. 1 and NHAI for the NHAI to impose the order of blacklisting as done. He has contended that the concession agreement was entered into between the SPV and NHAI. The SPV was an independent juristic entity with the petitioner No. 1 being a minor 10 per cent stakeholder in the SPV. He has contended that, the petitioner No. 1 does not have a nominee in the Board of SPV. According to him, the petitioner No. 1 could not have been punished for the alleged defaults of the concession agreement as the petitioner No. 1 was not a party thereto.

8. Learned Senior Advocate appearing for the petitioners has contended that, the disputes relating to the Concession Agreement are already pending adjudication in the arbitration proceedings between the SPV and NHAI. Till such time such disputes attend finality, it cannot be said that, the petitioners are guilty of violating any provisions of the Concession Agreement. He has contended that all obligations under the concession agreement were to be performed by the SPV. The petitioner No. 1 not being obliged under the concession agreement and not being party to the agreement, no steps could have been taken by NHAI against the petitioner No. 1 for violation of the concession agreement.

9. Learned Senior Advocate appearing for the petitioners has submitted that, letters relied upon by NHAI in the Show Cause Notice and the impugned order were not addressed to or shared with the petitioner No. 1. He has submitted that the petitioner No. 1 was never asked to cure any alleged breach by NHAI. In any event, the obligations under the concession agreement of the provisions thereof whose breach has been alleged by the NHAI are not applicable to the petitioner No. 1.

10. Learned Senior Advocate appearing for the petitioners has submitted that, the blacklisting of MPL by NHAI on the self same cause of action was stayed by the Hon'ble Delhi High Court. He has referred to the order dated March 16, 2020 passed by the Hon'ble Delhi High Court. He has submitted that, the claim of NHAI for the impugned decision does not tantamount to blacklisting is misplaced. He has submitted that, the reliance of NHAI on the Memorandum of Understanding to the contend that the petitioner No. 1 was responsible to carrying out the project is misconceived, perverse and demonstrate non-application of mind.

11. Learned Senior Advocate appearing for the petitioners has relied upon **1975 Volume 1 Supreme Court Cases Page 70 (M/S Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal &**

Anr.) and contended that, the decision of NHAI is discriminatory, arbitrary, illegal and unfair. He has referred to **2014 Volume 14 Supreme Court Cases 731 (M/S Kulja Industries LTD. Vs. Chief General Manager Western Telecom Project Bharat Sanchar Nigam Limited & Ors.)** and submitted that the punishment imposed by NHAI against the petitioner No. 1 is disproportionate.

12. Learned Senior Advocate appearing for NHAI has referred to the facts of the case. He has submitted that, a Memorandum of Understanding dated January 28, 2006 was entered into between the petitioner No. 1 and MPL and MGL. He has referred to Clause 1 of the Memorandum of Understanding which contemplates formation of the SPV. He has contended that, on the basis of the Memorandum of Understanding dated January 28, 2006, the petitioner No. 1 and MPL and MGL had formed a consortium for the purpose of bidding in the project of NHAI. He has referred to Clauses 9 and 10 of the Memorandum of Understanding.

13. Learned Senior Advocate appearing for the NHAI had submitted that, the SPV of the petitioner No. 1, MPL and MGL became successful in the tender process. NHAI had issued a letter of award dated February 23, 2006 for the project with the commencement date as January 20, 2007. The petitioner No. 1, MPL and MGL had

incorporated the SPV on May 11, 2006 for the purpose of entering into the concession agreement with NHAI. NHAI had entered into a concession agreement of July 24, 2000. He has referred to the shareholders agreement dated December 30, 2006 defining the shareholders pattern of the SPV.

14. Learned Senior Advocate appearing for the NHAI has submitted that, NHAI in its 384th Executive Committee Meeting held on April 10, 2019 decided to identify nonperforming contractors. Consequent to such decision being taken, NHAI issued a Show Cause Notice dated August 21, 2019 to the SPV and to all the promoters of SPV which included petitioner No. 1. He has submitted that, the three promoters of the SPV which included the petitioner No. 1 had committed defaults and failed to meet the contractual obligations in terms of the contract. He has referred to the defaults committed. He has submitted that, the petitioner No. 1 had replied to such show cause on September 7, 2019. It is after consideration such reply that, NHAI had taken the impugned decision dated January 28, 2020.

15. Learned Senior Advocate Appearing for NHAI has submitted that, the impugned decision dated January 28, 2020 is not an order of permanent blacklisting. He has pointed out that the impugned order declare the petitioner No. 1 as a non-performer and restrain the

petitioner No. 1 from participating in any ongoing and future bid of NHAI for a period of three years. He has pointed out that, the impugned order reserves the right of NHAI to recall the impugned order upon the petitioner No. 1 furnishing satisfactory response along-with the documents showing improvement in its performance and commitments to cure the defaults within the time fixed by NHAI. He has pointed out that, the contract is for a period of twenty years and is still being developed and operated by the SPV of which the petitioner No. 1 is one of the promoters. The impugned decision has not affected the right of the petitioner No. 1 in the ongoing contract.

16. Learned Senior Advocate appearing for NHAI has relied upon Order dated January 28, 2020 passed in the present writ petition. He has submitted that, ad-interim relief was refused by such order. Referring to Article 298 of the Constitution of India and the Wednesbury Principle of Reasonableness learned Senior Advocate appearing for the NHAI has submitted, the impugned decision cannot be said to be unreasonable.

17. Learned Senior Advocate appearing for NHAI has relied on **2012 Volume 11, SCC 257 (M/S Patel Engineering Ltd. Vs. Union Of India & Anr.)** and submitted that, no ground exist for a judicial review of the impugned decision. Relying upon **2001 Volume 8**

Supreme Court Cases 604 (Grosos Pharmaceuticals(P) Ltd. & Anr. Vs. State of U.P & Ors.) learned Senior Advocate appearing for NHAI has submitted that, the petitioners are failed to established that there was any breach of the principles of natural justice in the impugned order. Referring to **M/S Kulja Industries LTD. (supra)** learned Senior Advocate appearing for NHAI has submitted that the impugned decision cannot be said to be disproportionate.

18. Learned Senior Advocate appearing for NHAI has submitted that, the documents disclosed by the writ petitioners will demonstrate and establish that the writ petitioner were aware of the steps taken by NHAI against all the three parties forming SPV. The writ petitioner No. 1 has not been singled out arbitrarily and proceeded against as sought to be wrongly contended by the petitioners.

19. Learned Senior Advocate appearing for the NHAI has submitted that, the petitioner No. 1 has applied on January 13, 2021 in terms of the NHAI policy circular No. 18.63/2021 dated January 08, 2021. He has submitted that, instant writ petition should be dismissed.

20. The petitioners have claimed that, MPL and MGL had entered into an agreement for NHAI for the purpose of construction, operation and maintenance of Madurai-Tuticorin section of National

Highway 45B from Kochi Km 138.800 to Km 254.500 in the State of Tamil Nadu for a specific concession period of twenty years including the construction period. The petitioners have claimed that, MPL and MGL had approached the petitioner No. 1 for financing such project. MPL, MGL and the petitioner No. 1 had entered into a Memorandum of Understanding dated January 28, 2006 governing such project. They had also entered into the shareholders' agreement on December 30, 2006. MPL, MGL and the petitioner No. 1 had incorporated the SPV on May 11, 2006. The SPV had entered into a concession agreement with NHAI on July 24, 2006.

21. The Memorandum of Understanding dated January 28, 2006 has specified that the parties therein shall be jointly and severally liable for the execution of the project in accordance with the terms of the concession agreement. The minimum shareholding of each party to the Memorandum of Understanding has also been defined. The Memorandum of Understanding has specified that the minimum shareholding of the petitioner No. 1 and MGL shall be 10 per cent. However, the Memorandum of Understanding as noted above stated that, all the parties to the Memorandum of Understanding shall be jointly and severally liable for the execution of the project in accordance with the terms of the concession agreement. The parties to

the Memorandum of Understanding which includes the petitioner No. 1 had contemplated that, the SPV shall be formed. The Memorandum of Understanding has defined the relationship between the three parties in the execution of the project. It had contemplated entering into a concession agreement with NHAI through a SPV to be incorporated.

22. In terms of the Memorandum of Understanding, the SPV was formed which ultimately had entered into the concession agreement with NHAI.

23. NHAI had decided in its Executive Committee meeting that there would be proceeding against contractors who were in default. In terms of such decision, NHAI had issued a Show Cause Notice dated August 21, 2019 to the petitioner No. 1 detailing the defaults committed by the SPV. As has been noted above, there are three parties to the SPV with the petitioner No. 1 being one of them.

24. NHAI had issued a Show Cause Notice dated August 21, 2019. NHAI had called upon the petitioner No. 1 to show cause as to why the petitioner No. 1 would not be declared as nonperformer and not allowed to participate in future bids of NHAI till the petitioner No. 1 had improved its performance and cured the defects in the contract. The Show Cause Notice had specified the clauses of the contract

under which the defaults had occurred. The petitioner No. 1 had by a letter dated September 7, 2019 contended that, the contract was between NHAI and the SPV and that the petitioner No. 1 was only a minor stakeholder to the extent of 10 per cent. The petitioner No.1 had asked for three weeks time to enable the petitioner No. 1 to address the issues and clarifications raised by NHAI. Apparently, MGL had been issued a Show Cause Notice by NHAI in respect of the same contract. MGL by its writing dated September 6, 2019 had taken the same stand as of the petitioner No. 1 that MGL was a lesser stakeholder in the SPV. MPL had replied to a show cause of NHAI by its reply dated September 6, 2019. NHAI had by its letter dated January 28, 2020 communicated its decision to the petitioner No. 1 on the show cause. The decision of NHAI as contained in the letter dated January 28, 2020 specified the reasons why NHAI had taken the decision as noted therein. It had dealt with the reply given by the petitioner No. 1 to the Show Cause Notice. It had noted that the petitioner No. 1 did not choose to present any explanation through it's authorised representative to NHAI. NHAI had proceeded to declare the petitioner No. 1 as a nonperformer and restrained the petitioner No. 1 in the ongoing and future bids of NHAI for a period of three years. NHAI had however retained its right to recall the order upon the

petitioner No. 1 furnishing satisfactory response along with documents showing improvement in the performance and commitments to cure the defaults within the time frame fixed by NHAI.

25. NHAI has taken a stand that the SPV of which the petitioner No. 1 is a part had failed to cure the defects and defaults of the existing contract. NHAI has imposed a bar on the petitioner No. 1 from participating in the ongoing and future bids of NHAI for a period of three years. NHAI however has given an opportunity to the petitioner No. 1 to cure the defects in the execution of the existing contract to the satisfaction of NHAI for NHAI to recall or revisit its decision as contained in the letter dated August 21, 2020.

26. The petitioners have not placed any material on record to substantiate that there was no defect in the execution of the contract as tabulated in the Show Cause Notice of NHAI or that the petitioner No. 1 or the SPV had cured the defects alleged to the satisfaction of NHAI.

27. The petitioners have contended that, the petitioner No. 1 cannot be proceeded against on the basis of a contract between NHAI and SPV. In the facts of the present case, such a contention of the petitioners cannot be accepted. The SPV had been incorporated on the

basis of the principles of partnership with the petitioner No. 1 having a stake therein and has to be considered as a partner thereof. On the principles of partnership, and as a partner of the SPV, the petitioner No. 1 cannot absolve itself of any or all of the responsibilities to execute the contract entered into between NHAI and SPV. The Memorandum of Understanding which has resulted in the incorporation of the SPV which in turn had persuaded NHAI to award the contract clearly specifies that, the parties to the Memorandum of Understanding shall be jointly and severally liable for the execution of the project in terms of the concession agreement. Consequently, in my view, the petitioner No. 1 having made a representation as to its extent of liability and responsibility in the execution of the contract that NHAI would be entering into with the SPV, the petitioner No. 1 cannot now be heard to resile from its declared position as contained in the Memorandum of Understanding. The Memorandum of Understanding had led to the incorporation of the SPV which had been granted the contract. The Memorandum of Understanding is an integral part of the claim leading up to the contract. The Memorandum of Understanding now cannot be overlooked as it has become inconvenient for the petitioners. Apart therefrom on the principles of partnership forming

the SPV also, the petitioner No. 1 cannot be heard to contend that it has no liability in respect of the contract between NHAI and the SPV.

28. The impugned decision of NHAI as contained in the writing dated January 28, 2020 cannot be said to have been passed in breach of principles of natural justice. The impugned decision has been arrived at after issuance of a Show Cause Notice and after affording the petitioners opportunity to correct the defects and defaults. The petitioners had been afforded opportunity to reply to the Show Cause Notice. The impugned decision has noted the choice of the petitioner No. 1 not to ask for presenting any explanation through its authorised representative before NHAI. The impugned decision has specified the reasons why NHAI took the impugned decision. It cannot be said that the impugned decision has been passed in excess jurisdiction.

29. **Patel Engineering Ltd. (supra)** has noted **Erusian Equipment & Chemicals Ltd. (supra)**. It has considered the doctrine of proportionality. It has noted that, under the doctrine of proportionality, a Court has to examine the purpose sought to be achieved by the impugned decision and the adverse effects the impugned decision may have on the rights of the petitioner. In the facts of that case, the Supreme Court had held that, there was no

legality or irrationality in the conclusion reached by the authority in taking the impugned decision.

30. In the facts of the present case, the petitioner has not established that, the decision taken by NHAI suffers from breach of principles of natural justice or was vitiated by mala fides or was beyond jurisdiction or perverse. The petitioners have not substantiated that, the defects and defaults under the contract as enumerated in the Show Cause Notice did not occur or that the same were cured.

31. ***Erusian Equipment & Chemicals Ltd. (supra)*** has held that equality of opportunity applies to matters of public contract. The Government cannot choose to exclude by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. It has held that, fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before the decision on the blacklisting is taken. ***Kulja Industries LTD. (supra)*** has dealt with the issue of judicial review of a decision of blacklisting. It has held that, if the State or its instrumentalities takes a decision on blacklisting then such decision is subject to judicial review on the grounds of principles of natural justice, doctrine of proportionality, arbitrariness and discrimination.

32. **Grosos Pharmaceuticals(P) Ltd. (supra)** has held that, issuance of a Show Cause Notice with the opportunity to reply thereto is sufficient compliance of the principles of audi alteram partem.

33. In the facts of the present case, it cannot be said that NHAI has not discriminated between the three partners forming the SPV. It has proceeded against all three of them. So far as the doctrine of proportionality is concerned, although the petitioner No. 1 has the least of the financial stakes of the three partners in the SPV, the petitioners cannot be allowed to contend that, as a partner of the SPV, it will not bear the responsibilities and liabilities of the SPV. The financial arrangements amongst the three partners of the SPV is an affair between the partners of such SPV. However, in the facts of the present case, all the three partners of the SPV had made a representation through the Memorandum of Understanding that, they would be jointly and severally liable to NHAI under the contract between NHAI and SPV. Viewed from such perspective, it cannot be said that, NHAI has discriminated against the petitioners. Moreover, the decision of blacklisting is for a limited period and is subject to review of such decision should the partners of the SPV including the petitioner No. 1 substantiate that they cured the defects under the contract within the time period stipulated.

34. In such circumstances, none of the ground for sustaining a challenge to a decision of blacklisting as enumerated in ***Kulja Industries LTD. (supra)*** have been substantiated by the petitioners.

35. W.P.A. No. 2833 of 2020 along with the connected application being CAN 4 of 2021 therefore fails and are dismissed however without any order as to costs.

[DEBANGSU BASAK, J.]