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HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on: 02/02/2021****Order Delivered on : 12/02/2021****Writ Petition (C) No. 2856 of 2020**

M/s. SBJ Projects (P) Ltd. Registered office at 1st Floor, 37 Friends Colony, Raigarh, Chhattisgarh, Through its Director, Amit Kumar Bansal S/o Suresh Kumar Agrawal, aged about 36 years, residing at HN 15, Friends Colony, Near Dhimrapur Chowk, District Raigarh, Chhattisgarh.

---- Petitioner**Versus**

1. South Eastern Coalfields Limited, through its Chairman-cum-Managing Director, SECL Headquarters, Seepat Road, Bilaspur, Chhattisgarh 495006
2. General Manager, Raigarh Area, South Eastern Coalfields Limited, District Raigarh, Chhattisgarh.

---- Respondents

For Petitioner : Shri Aman Saxena, Advocate.
For Respondents/SECL: Ms. Astha Shukla, Advocate.

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

CAV ORDER**Per P.R. Ramachandra Menon, Chief Justice**

1. 'Correctness and sustainability' of Annexure P/1 proceedings to the extent it has 'ordered' forfeiture of the Earnest Money Deposit (for short 'the EMD') and the subsequent Annexure P/2 order whereby the Letter of Intent (for short 'the Lol') has been cancelled, EMD has been forfeited, Blacklisting has been 'enforced and ordered' for a period of 24 months and a Penalty of Rs.5,4068,855.43 has been imposed; is put to challenge in this writ petition.
2. The sequence of events shows that Annexure P/4 tender notice was issued by the 1st Respondent on 03.12.2019 inviting bids for (i) hiring of pay loader for mechanical transfer of coal into tippers at stock yard, (ii) hiring of tippers for transportation of coal from coal stock yard for a certain quantity and duration of time. On coming out successful in the tender and on getting placed at L-1, the Petitioner was awarded Annexure P/5 Lol on 15.02.2020,

informing that the EMD of Rs. 15,04,900/- remitted by the Petitioner would be retained by the 1st Respondent, to be adjusted against the Performance Security Deposit (for short, 'the PSD') to be satisfied (Rs. 40,07,449/-) within 28 days and further alerting the necessity to satisfy the Additional Performance Security Deposit of Rs. 2,66,91,053/- in terms of Clause 4.6 of the General Terms & Conditions of the contract alongwith the Normal Performance Security. As per the very same proceedings, the Petitioner was also required to mobilise the equipments for executing the work and to commence the work within 10 days from the date of issuance of the Lol.

3. It is the case of the Petitioner that before getting the Lol, the Petitioner had submitted Annexure P/7 application to the Bankers on 20.01.2020 for renewal of the Bank Guarantee limit which came to be approved by the Bank as per Annexure P/8 dated 19.02.2020. In view of the stipulation to furnish Additional Performance Security in terms of the tender and as pointed out in Annexure P/5, the Petitioner vide Annexure P/9 dated 20.02.2020 requested the Bankers to enhance the Bank Guarantee limit to Rs. 4,00,00,000/- from the already sanctioned limit of Rs.2,00,00,000/-. On 02.03.2020, the Petitioner submitted Annexure P/10 representation before the Respondents seeking waiver of the requirement to satisfy the Additional Performance Security. But since the requirements as per the tender conditions were not satisfied and the work was not commenced, Annexure P/12 show-cause notice was issued by the Respondents on 11.03.2020. The Bankers rejected the request of the Petitioner to enhance the Bank Guarantee limit on 17.03.2020, when the Petitioner submitted Annexure P/13 representation dated 18.03.2020, in reply to Annexure P/12 notice, expressing the inability to meet the requirement as to the satisfaction of Additional Performance Security. The very next day, the Petitioner was served with Annexure P/1 dated 19.03.2020, styled as a 'Notice' but conveying the course of action by the Management for:

- (i) cancellation of the Lol,
 - (ii) forfeiture of the EMD and
 - (iii) debarring the Petitioner from participating in the future tender for a period of 12 months.
4. Nothing transpired for nearly six months and on 28.09.2020, Annexure P/2 order of termination/penal action was issued, referring to the lapse of the Petitioner and also as to the infringement of the various Clauses (Clause 4.3, 4.6 and 9.2) of the General Terms and Conditions of the tender and passing the orders to the following effect:
- "(i) Cancellation of LOI No. SECL/BSP/CMC/78 dated 15.02.2020.
 - (ii) Forfeiture of Earnest Money Deposit of the successful bidder M/s. SBJ Projects Private Limited.
 - (iii) Debarring of successful bidder M/s. SBJ Projects Private Limited from participating in future bids in SECL for a period of 24 (twenty four) months.
 - (iv) Imposition of penalty of Rs. 5,40,68,855.43 (excl. GST) as per Clause 9.2(b)(iii) i.e. 20% of value of incomplete work including price variation as applicable on the date, when notice in writing for termination of work was issued to the contractor."
5. It is contended that there is absolutely no rhyme or reason for having passed two different orders (Annexure P/1 and Annexure P/2) at different times imposing different punishments, that too, Blacklisting the Petitioner virtually doubling the extent from '12 months' in Annexure P/1 to '24 months' in Annexure P/2 and mulcting a huge Penalty of Rs.5,40,68,855.43 (vide Annexure P/2), besides forfeiture of the EMD. It is further contended that the proceedings are *per-se* wrong and illegal, more so when no proper opportunity of hearing was given before ordering the Penalty and also the Blacklisting of the Petitioner.
6. A reply has been filed on behalf of the Respondents pointing out that the writ petition itself is not maintainable by virtue of the availability of alternate remedy by way of 'Arbitration' as provided under Clause 13 of the General Terms & Conditions. Maintainability is also questioned, for the reason that

the matter involves disputed questions of facts which cannot be adjudicated in a writ petition under Article 226 of the Constitution. The facts and sequence have been given in the reply, pointing out that despite the clear instructions given as per Annexure P/5 Lol, the work was never commenced by the Petitioner, nor had they satisfied the Performance Guarantee and the Additional Performance Guarantee in terms of the tender conditions. This made the Respondents to issue Annexure P/12 show cause notice which was replied as per Annexure P/13, wherein the factual position stands conceded, however stating that due to "financial crunch", the Petitioner was having difficulty in arranging such a large amount of Additional Bank Guarantee within the stipulated period of time.

7. According to the Respondents, Annexure P/1 is not an Order but a Notice issued by the 2nd Respondent as to the consequences that would be resulted because of the lapse on the part of the Petitioner, and on intimating the position to the Competent Authority, decision was taken as shown in Annexure P/2. For this reason, it is stated that the Blacklisting mentioned in Annexure P/1 as of '12 months' as against the order of Blacklisting for '24 months' vide Annexure P/2 is of no consequence, as the terminology used in the relevant Clause is 'minimum 12 months'. It was after considering all the facts and figures, that the Competent Authority decided to have the Blacklisting effected for '24 months'. It is also pointed out that the Penalty has been imposed strictly in terms of the relevant Clauses in the tender conditions as specifically mentioned in Annexure P/2 (Clause 9.2) and there is no violation of the principles of natural justice under any circumstance. The Respondents have also pointed out that as per Clause 23 of the NIT, the award of work would constitute the formation of contract and on participating in the tender, the Petitioner had accepted all the terms and conditions of the tender. More so, since Clause 7 of the 'Instructions to Bidders' categorically specified the set of bidding documents which included

(i) E-tender notice, (ii) Instructions to bidders, (iii) conditions of contract (General Terms & Conditions, Special Terms and Conditions, Special Note and Additional Terms and Conditions, Vocational Training and Safety Norms etc.). It is pointed out that as per Clause 4.5 of the General Terms & Conditions, the Additional Performance Security had to be deposited within a period of 21 days from the date of issuance of the Lol which was well within the knowledge of the Petitioner, who hence cannot plead ignorance. The failure to satisfy the Performance Security and Additional Performance Security will constitute sufficient ground for cancellation of the award of work and forfeiture of the bid security. As mentioned in the relevant Clauses referred to in Annexure P/2, it is further pointed out that the contention of the Petitioner that lapse of the Petitioner having been resulted due to 'Covid-19' pandemic is an act of '*Force Majeure*'-is not at all correct and that the Lol was issued way back in February 2020; adding that all the other contractors were functioning under similar circumstances in the Respondent-Company and its various subsidiaries.

8. Shri Aman Saxena, the learned counsel for the Petitioner made submissions in tune with the pleadings raised in the writ petition, while Ms. Astha Shukla, the learned counsel representing the Respondent/SECL addressed the Court in conformity with the pleadings raised in the reply statement.
9. Citing the judgment rendered by the Apex Court in ***Surjit Singh & Others v. State of Punjab***; {1984 (Supp) SCC 518}, the learned counsel for the Petitioner submits that enhancement of punishment without proper notice is not correct or sustainable. Since the Blacklisting ordered in Annexure P/1 is only for a period of 12 months, it has been quite arbitrarily enhanced to 24 months in Annexure P/2 which hence is sought to be interdicted. The learned counsel also submits that there is absolutely no rhyme or reason for imposing a huge Penalty of Rs. 5,4068,855.43, more so, when Clause 9.2

sought to be relied on by the Respondents is not applicable and further since no agreement has been executed between the Petitioner and the Respondents. After obtaining the Lol, though the Petitioner requested the Bankers to enhance the Bank Guarantee, it came to be rejected as per Annexure P/11 referring to Covid-19 pandemic, the skeletal staff strength and the risk measures to be followed as per the new RBI guidelines (in the light of Covid-19-informing that they cannot do the needful "at the juncture"). According to the learned counsel, it is an act of 'Force Majeure' and in the said circumstance, forfeiture of EMD and imposing huge Penalty, going further by Blacklisting the Petitioner for 24 months as per Annexure P/2, that too, without any notice (while mentioning in Annexure P/1 as it is of '12 months') is highly arbitrary and liable to be interfered by this Court.

10. Ms. Astha Shukla, the learned counsel for the Respondents submits that the bid quoted by the Petitioner was much less than the estimated cost and by virtue of the extent of gap, it was clearly stipulated in the tender that the Additional Performance Security has to be satisfied which was very much known to the Petitioner at the time of participating in the tender and quoting the bid amount. The satisfaction of the Additional Performance Security was required to be satisfied as per Annexure P/5 Lol, which admittedly has not been done. The Petitioner has not deposited the normal Performance Guarantee as well. Annexure P/13 reply, in response to Annexure P/12 show cause notice, is virtually conceding the inability because of the 'financial constraints'; which substantiates the lapse on the part of the Petitioner. Admittedly, the work was never commenced, and as such, the Respondents were justified in proceeding with further steps strictly in terms of the tender conditions as notified, relevant Clauses of which have been referred to and relied on while passing Annexure P/2 order by the Competent Authority. The learned counsel submits that there is no conflict between Annexure P/1 and Annexure P/2.

11. On hearing both the sides and on going through the materials on record, it is evident that the Petitioner challenges Annexure P/1 only to the extent it forfeits the EMD, while there is no grievance with regard to the cancellation of the Lol or as to the debarring for participation in the future tender for a period of 12 months, which is stated as being challenged separately before other appropriate forum, by way of other appropriate measures. According to the Respondents, Annexure P/1 is not an order, but a 'proposal' and if so, the first question to be considered is with regard to the justifiability of the forfeiture of the EMD ordered as per Annexure P/2 alongwith imposition of Penalty of Rs.5,40,68,855.43.
12. Clause 4.3 of the General Terms & Conditions of the tender stipulates that the failure of the successful bidder in providing the Performance Security **shall** constitute sufficient ground for cancellation of the award of work and forfeiture of the bid security. But while coming to Clause 4.6 of the General Terms & Conditions with regard to the burden of the successful bidder to provide Additional Performance Security (if the bid price is below 15% of the estimated cost put to tender), the amount of such Additional Performance Security shall be the difference between 85% of the estimated cost put to tender and the quoted price. The said Clause stipulates that failure to satisfy the Additional Performance Security **may** result in termination of the contract. From this, it is evident that different terminology has been used with reference to the failure to deposit the 'Performance Guarantee' under Clause 4.3 (where it 'shall constitute' a ground for cancellation of the award of work) while under Clause 4.6, dealing with the failure to satisfy the 'Additional Performance Security', it involves some discretion because of the usage of the term 'may'. However, the Petitioner has neither satisfied the Performance Security nor the Additional Performance Security as on the date of passing of Annexure P/2 order. Clause 4.3 of the General Terms & Conditions, besides giving the right for cancellation of the award of work for

failure of the successful bidder to satisfy the Performance Security, also enables the awarder Company to debar such defaulting contractor from participating in future bids for a "minimum period of 12 months". It may be with reference to this Clause that the Blacklisting is mentioned as for a period of '12 months' in Annexure P/1.

13. **Clause 9.2(b)** of the notice inviting tender also stipulates that on termination of the contract, the contractor shall not be allowed to participate in the future bid for a minimum period of '12 months'. It may be with reference to the said Clause as well, that the debarring mentioned in Annexure P/1 is stated as of '12 months'. But when it comes to Annexure P/2 order stated as passed by the Competent Authority, the Blacklisting is ordered for a period of '24 months'. The explanation made by the learned counsel for the Respondents is that the provision only mentions the "minimum period" and hence the Competent Authority is justified in imposing Blacklisting for '24 months'. But after having mentioned the proposal (if it be so) to Blacklist for a period of '12 months' in Annexure P/1, even if the version of the Company is accepted that it is only a 'notice/proposal', no reason is stated or discernible from Annexure P/2 as to why it was sought to be enhanced from the minimum period of 12 months to 24 months. Non-mentioning of reason for such a drastic course of action in Annexure P/2 (and even in the reply filed from the part of the Respondents) makes the said proceedings not legally acceptable. This is more so, since no opportunity of hearing was given to the Petitioner as to the Blacklisting in Annexure P/12 show-cause notice. That apart, but for informing the 'proposal' as to the consequence in Annexure P/1 (even if it is treated as a 'notice') no explanation was called for as to the proposal to Blacklist the Petitioner; which presumably made the Petitioner to conceive Annexure P/1 as an 'order' (which apparently gives such an idea) though it is styled as a 'Notice'. It is settled law, as per the rulings rendered by the Apex Court on many an occasion, that the act of

Blacklisting is having serious consequences and as such, it cannot be ordered without calling for explanation as to the proposed step for Blacklisting. The period for which Blacklisting is ordered also depends upon the facts and circumstances of each case, which can be decided only after considering the explanation to be offered by the party in this regard. [See: **Gorkha Security Services v. Government (NCT of Delhi) and Others**; {(2014) 9 SCC 105}, **Vetindia Pharmaceuticals Limited v. State of Uttar Pradesh and Another**; {Civil Appeal No.3647 of 2020 vide judgment dated 06.11.2020}, **UMC Technologies Private Limited v. Food Corporation of India and Another**, {Civil Appeal No.3687 of 2020 vide judgment dated 16.11.2020}, **Medipol Pharmaceuticals India Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research and Another**; {Civil Appeal No.2903 of 2020 vide judgment dated 05.08.2020}].

14. Similarly, the Quantum of Penalty, if to be awarded in terms of Clause 9.2, also depends on various facts and circumstances as Penalty cannot be imposed as a matter of course; but to be ordered with proper application of mind, depending upon the culpability involved. Further, the 'Penalty' to be imposed as per Clause 9.2 of the General Terms & Conditions of the tender is with reference to the loss caused to the Company. This shows that there has to be proper application of mind with regard to the relevant facts and figures in computing the 'loss' as well and to have it realised in the form of Penalty to be mulcted on the parties concerned. Here again, the Respondents have gone wrong in pursuing the proper 'decision making process' and hence it requires reconsideration.
15. We however accept the submissions made on behalf of the Respondents, as to whether the circumstances mentioned by the Petitioner (the inability of the Petitioner connecting it to the consequence of 'Covid-19' pandemic situation) could be treated as an act of '*Force Majeure*' or not in view of the

disputed facts and circumstances, cannot be adjudicated by this Court in a proceeding under Article 226 of the Constitution. This is more so in view of the limited scope of judicial interference in contract matters, by virtue of law declared by the Apex Court in ***Jagdish Mandal v. State of Orissa & Others; (2007) 14 SCC 517***. In the said circumstances, the challenge raised by the Petitioner against the forfeiture of the EMD mentioned in Annexure P/1 and the same ordered as per Annexure P/2 as well as the cancellation of the Lol and forfeiture of the EMD ordered as per Annexure P/2, stands repelled. If the Petitioner is aggrieved of the same, it is open for them to pursue their grievance, by way of other appropriate remedies including Clause 13 of the General Terms & Conditions of the tender; in accordance with law.

16. The Blacklisting of the Petitioner ordered for a period of '24 months' and imposition of Penalty of Rs. 5,40,68,855.43 as per Annexure P/2 having not issued any prior notice seeking explanation, stand set aside as the 'decision making process' is bad. This is without prejudice to the rights and liberties of the Respondents to proceed with further steps in this regard by issuing a proper notice calling for explanation and after affording an opportunity of hearing in this regard, before passing a 'speaking order' to sustain the course of action sought to be pursued.

17. The writ petition stands allowed in part.

Sd/-
(P.R. Ramachandra Menon)
CHIEF JUSTICE

Sd/-
(Parth Prateem Sahu)
JUDGE