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

+ **O.M.P.(I) (COMM.) 80/2021 & I.A.3053/2021, I.A.6056/2021**

GAURAV ENTERPRISES

..... Petitioner

Through: Mr. Tarkeshwar Nath,
Mr.Saurabh Kumar Tuteja and Mr. Harshit
Singh, Advs.

versus

**INDIAN COUNCIL OF AGRICULTURAL RESEARCH &
ANR.**

..... Respondents

Through: Mr. Rajeev Sharma, Sr. Adv.
with Mr. S.S. Lingwal, Mr. Rajat Krishna,
Mr. Saket Chandra and Mr. Bhaskar Anand,
Advocates for Respondent No. 1.
Mr. Vikram Jetly, CGSC for R-2.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

%

13.08.2021

(Video-Conferencing)

1. This petition, under Section 9 of the Arbitration and Conciliation Act, 1996 ("the 1996 Act") seeks pre-arbitral interim reliefs.

Facts

2. On 25th March, 2020 a notice, inviting tenders, was circulated by Respondent No.1, for providing of Human Resource Outsourcing Services for 10 months and 30 days. The petitioner was the successful bidder and, consequent thereon, the contract was awarded to the

petitioner on 23rd June, 2020, to provide 76 Data Entry Operators and 90 Multi-Tasking Staff for the period from 1st July, 2020 to 30th May, 2021. The petitioner accepted the award of the contract and, as per the recitals in the petition, provided the requisite services by way of supply of staff.

3. The petition raises a grievance regarding the respondent having required the petitioner to furnish performance bank guarantees which, according to the petition, were not contemplated in the contract between the parties. That aspect, however, does not seriously impact these proceedings, or the relief sought herein. Accordingly, I do not propose to travel down that path.

4. We may now proceed directly to 6th October, 2020, when the respondent addressed a communication to the petitioner, informing the petitioner that certain complaints had been received regarding the manner in which the petitioner was discharging its services and seeking certain clarifications in that regard. Though the petitioner refutes the allegations in the complaint, that, too, cannot be decided in proceedings under Section 9 of the 1996 Act. The petitioner, however, responded on 9th October, 2020, denying the allegations against it.

5. On 29th October, 2020, the following communication was issued by the respondent to the petitioner:

“INDIAN COUNCIL OF AGRICULTURAL RESEARCH
KRISHI BHAVAN, NEW DELHI-110001

F. No. Admn. 2(2)/2020-Estt.II (Pt.)

Dated the: 29th October, 2020

To

M/S Gaurav Enterprises,
A-467, Gali No. 2,
Meet Nagar, New Delhi-110094.

Subject: Cancellation of contract for providing the services of
76. DEOs and 90 MTSs at ICAR Hqrs-reg.

Contract No. GEMC-511687756040636
Bid/RA/PR NO. GEM/2020/B614774

Sir,

Kindly refer to the Council's letter of even number dated 06.10.2020 wherein clarifications were sought on the irregularities reported against your firm in the process of deployment of manpower in the Council. Your clarification dated 09.10.2020 in response to the Council's letter has not been found satisfactory by the Competent Authority and accordingly, the Competent Authority of the Council has ordered cancellation of the aforementioned contract with your firm. However, your firm shall continue to provide manpower services for next 45 days or any further communication from the Council whichever is earlier.

Yours faithfully,

Sd/-

(Neha Agarwal)

Under Secretary (Admn.)

Ph. No. 23386978"

6. The petitioner asserts that the aforesaid communication was completely unreasoned in nature and did not point out any default on the part of the petitioner. As such, contends the petitioner, such a termination of the contractual relationship between the petitioner and

the respondent was unsustainable in law. Asserting this position, the petitioner addressed a legal notice, to the respondent, on 2nd November, 2020, alleging the termination of the contract to be illegal and therefore, exhorting the respondent to allow the petitioner to complete rendering its services for the originally fixed tenure of the contract.

7. The respondent replied on 16th December, 2020, denying the request of the petitioner and stating that the contract stood validly terminated.

8. On 6th January, 2021, fresh bids were invited by the respondent for the services which were being rendered by the petitioner. Nevertheless, for the interregnum, the respondent requested the petitioner to continue to render services till 28th February, 2021 *vide* communication dated 18th January, 2021. That period was subsequently extended, and the petitioner, as such, continues to render the said services to the Respondent No.1. Respondent No.1, however, asserts that this was only a stop gap arrangement and reasserts the termination of the contract, as effected by the respondent, as being valid and subsisting.

9. The contract between the parties provides for resolution of disputes by arbitration. Inasmuch as this aspect is not under challenge, it is not necessary for me to advert to the relevant clause in that regard.

10. Arbitration being the preferred mode of resolution of disputes between the parties, the petitioner has invoked Section 9 of the 1996

Act by means of the present petition. The prayer clause in the petition reads as under:

“Therefore, it is prayed that this Hon'ble Court may graciously be pleased to:-

A. Pass interim measures of protection order staying the action of the respondents of pre-mature cancelation of contract vide letter no F.No. Admn. 2(2)/2020-Estt.II(Pt.) dated 29.10.2020, till the adjudication of the issue by the Ld. Arbitrator.

B. Pass interim measures of protection order directing the respondents to permit the petitioner to continue rendering his contractual services interms of award of contract vide Contract No. GEMC-511687756040636 dated 23.06.2020, till the adjudication of the issue by the Ld. Arbitrator.

C. Pass interim measures of protection in form of injunction restraining the respondents from awarding the present contractual work to any other agency/contractor pursuant to tender issued vide Bid No. GEM/2021/B/956761 dated 06.01.2021, till the adjudication of the issue by the Ld. Arbitrator.

D. Pass any other order that is deemed fit and proper under the facts and circumstances of the case.”

Rival Contentions

11. Arguments were advanced, on behalf of the petitioner, by Mr. Tarkeshwar Nath and on behalf of the respondent-ICAR by Mr. Rajeev Sharma, learned Senior Counsel.

12. Mr. Nath's contentions are, essentially, the following.

12.1 No order of termination

12.1.1 There has been no valid termination of the contract between the petitioner and the respondent (ICAR) at all. The communication dated 29th October, 2020, reproduced *supra*, refers to an order of the competent authority of the respondent (ICAR), for cancellation of the contract between the petitioner and the respondent. No such order is in existence. In view of this submission, this Court had, *vide* its order dated 26th March, 2021, directed the petitioner to place, on record, the relevant notings. This has, subsequently, been done. I may reproduce, for ready reference, some of these notings, which are relevant to a decision on the controversy, thus:

“Note No. # 20

1. This is a serious matter, where the MTSs/DEOs who had been working in ICAR for a long time have complained that they have not been retained by the new contractor since they could not provide the heavy amount demanded by the contractor in lieu of retaining them. A large number of them have been agitating for quite some time and meeting the higher echelons. They met the Honourable Minister of State of Agriculture (MoS) and two complaints (dated 29/09/2020 and 30/09/2020) were also received at the level of Honourable MoS and one of these had the signature of around 50 personnel. Despite this the section did not deem fit to take any suitable action against the alleged wrongful conduct of the contractor. One fails to understand what precluded the section from ascertaining the facts and placing the exact facts on file? This needs to be looked into at a later stage.

2. The note of the section stated that the personnel, who complained to Honourable MoS and whose names were on the signed complaint did not corroborate that the contractor was demanding money from them in lieu of retaining them. This stand of the section was proved incorrect when some of the complainant DEOs/MTSs (a large number were not

permitted to meet in the background of prevalent covid-19) met the undersigned and restated that the “contractor was demanding large sum of money from them to retain them”. They further stated that the contractor demands money from all who are retained or provided employment by him, those who pay the required amount are engaged by the contractor. These facts were also stated in writing to the undersigned, which is attached. In essence such an act of the contractor amounts to extortion and attempt to extort, as well as coercion, which are punishable offences under IPC and are prohibited under the Contract Act. One of the terms in the present contract as well mandates the contractor to abide by and follow all the prevalent laws.

3. I was also told that it is a common practice of contractors bidding for such contracts in the Government/Organisations that they tend to bid at the lowest possible rates (without any provision for service charges) to get the contract and then engage in extortionary practices from the human resources they engage. Under this arrangement the payments are made by the engaged human resource to the contractor periodically (most of the times monthly). This is a very serious matter and this practice needs to be checked with strong hand. It was also learnt that such payments are made by the engaged employees through paytm, UPI, ATM cards (which at times are retained by the contractor), i.e. in digitally mode. Further, such digital transaction are not difficult to track and find out by the investigating agencies. As of now, it is imminent that all out effort is made to root out such corrupt practices and appropriate action is taken against wrong doers. Therefore, the following is required to be done:

a. *The Current contract should be cancelled for the contractor not abiding with the condition stated in para 2 above and amounts to breach of contractual obligation.*

b. For continuity in the office work, the present contractor to continue the service till the new contract is put in place. New contract should be put in place within next 45 days.

c. The new contract should be so designed that it is realistic and checks the possibility of such extortions or bad practices.

d. Since this is a widespread pernicious practice, the Section can mull over providing such cases to the investigating agency for appropriate action at a later stage.

4. Concurrence on the above is kindly requested.

26/10/2020 11.34 AM

SANJAY SINGH
(AS(DARE) and Secretary (ICAR))

Note No. # 21

27/10/2020 7:16 PM

TRILOCHAN MOHAPATRA
(Director General)

Note No. # 22

1. Notes 20, *its approval at Note 21* is confidential in nature, should accordingly be treated.

2. Please do the needful immediately, in accordance with the approval.

28/10/2020 12:22 PM

SANJAY SINGH
(AS(DARE) and Secretary (ICAR))

(Emphasis supplied)

12.1.2 Thereafter, a further supplementary affidavit was filed by the respondent, in which it is averred that the Secretary ICAR, *vide* his note dated 26th October, 2020 *supra*, proposed termination of the contract of the petitioner, and sought the approval of the Director

General, ICAR (“DG”, hereinafter), as the Principal Executive Officer of the ICAR, and that such approval was also granted, by the DG, *vide* Note No. 21 dated 27th October, 2020. The affidavit filed by the respondent also states that, under the e-system of functioning of the government, the file travels electronically, and the forwarding of the file by one officer, with the date and time appended alongside his name, constitutes approval of the noting put up to him. Mr. Rajeev Sharma, learned Senior Counsel for the respondent (ICAR) pointed out, in this regard, that the notings whereby the contract was awarded to the petitioner were also in similar terms. These notings, which have also been appended to the supplementary affidavit filed by the ICAR on 31st May, 2021, read thus:

“Note No. # 126

20/06/2020 1:18 PM

(K.K. KULSHRESHTA)
(Director)

Note No. # 127

As desired by SS&FA, the calculation sheet is attached at Corr./Page No.37 for 76 DEOs and 90 MTSs after exercising 10% cut. The gross amount is coming to Rs. 4.72 crores and another Rs. 8 lakhs is kept as a cushion to meet out 3 variable dearness allowances to be paid rounded to Rs. 4.80 crores.

Resubmitted for consideration and concurrence urgently as bid is going to lapse tomorrow second time, i.e., on 23.06.2020, and will be re-validated and likely to be accepted by the vendor.

Director (Finance) may kindly see for obtaining urgent financial concurrence of SS&FA to materialize this contract from 01.07.2020.

22/06/2020 2:58 PM

DILIP ROY
(Deputy Director)

Note No. # 128

Re-submitted to the SS&FA for concurrence. The bid validity is till tomorrow only as informed to me over phone by the DS (NAHEP).

22/06/2020 5:05 PM

(GOVIND PRASAD SHARMA)
(Director)

Note No. # 129

We should ensure that we outsource against live vacant posts only.

Proposal be approved.

22/06/2020 5:19 PM

Bimbadhar Pradhan
(Financial Advisor)

Note No. # 130

23/06/2020 3:10 PM

Trilochan Mohapatra
(Director General)

Note No. # 131

23/06/2020 3:36 PM

Bimbadhar Pradhan
(Financial Advisor)

Note No. # 132

Consequent upon Administrative Approval and Financial Concurrence the contract was awarded to M/s Gaurav Enterprises (Page-47-78/Cor.). Subsequently general notice for disengagement of existing manpower is also issued yesterday i.e. 23rd June, 2020 (Page-79/Cor.) from CMMC.

Now Director (Administration) is requested to engage the required reduced manpower agreed by them vide note-117 and note-118 through the new contract awarded by CMMC accordingly as per their requirement. The detail of contractor is given in the award letter.

File may be returned to the u/s after keeping the extract. All the best from CMMC for effective and efficient execution after the successful award of this contract.

24/06/2020 8:13 PM

Dilip Roy
(Deputy Director)

Note No. # 133

24/06/2020 8:55 PM

K.K. Kulshreshta
(Director)''

12.1.3The petitioner has also filed a response to the additional affidavit of the respondent, the contents of which have been pressed into service by Mr. Nath orally during arguments. Mr. Nath submits that there is, in fact, no order of any competent authority, directing cancellation of the petitioner's contract. He draws my attention to

Note No. 22 *supra*. Though the said note states that the approval of Note No. 20 at Note No. 21 is confidential in nature, he submits that there is, in fact, no such approval, as no noting has been entered in the space above the signature of the DG at Note No. 21. As such, he submits, the letter dated 29th October 2020 *supra*, in so far as it avers that the competent authority of the ICAR had ordered cancellation of the contract of the petitioner, was incorrect and that, in fact, there was no such order of cancellation. As such, he submits, his client is entitled to continue till the original tenure of the contract with the respondent, expires.

12.2 “Competent authority”

Mr. Nath submits that the ICAR was itself unclear as to whether the “competent authority”, to cancel the petitioner’s contract, was the DG or the Secretary. This, too, he submits, vitiates the cancellation.

12.3 Cancellation violative of contractual terms

That apart, Mr. Nath submits that the termination of the contract was in violation of its terms and conditions. He submits that, as per Clause 19 of the General Terms and Conditions governing the Contract (GTC), the respondent could cancel or withdraw the contract only in the event of a breach. “Breach of contract”, submits Mr. Nath, stands defined, in the contractual documents between the petitioner and the respondent, thus:

“Breach of Contract

The following conditions shall specify breach of contract and buyer shall have right to immediately terminate the contract.

Cumulative penalties reach 10% of the contract value.

Repeated breach of SLAs beyond 3 instances in the entire contractual period shall be treated as breach of contract. Breach of SLA is defined as performance lower than defined lower performance in this agreement.

In case of major default on the part of the Service Provider, the Buyer may provide a 24-hour written notice terminating the contract to the Service Provider.”

Mr. Nath submits that there is no allegation of repeated breach, by the petitioner, beyond three instances, during the contractual period. As such, he submits, the termination of the contract was *ex facie* illegal. He relies, for this purpose, on the judgments of a Coordinate Bench of this Court in *Well Project Manpower Services Pvt. Ltd. v. Delhi Transport Infrastructure Development Corpn. Ltd.*¹ and in *Ascot Hotels and Resorts Pvt. Ltd. v. Connaught Plaza Restaurants Pvt. Ltd.*²

12.4 “Determinable” nature of contract

The decisions in *Well Project Manpower Services*¹ and *Ascot Hotels*² submits Mr. Nath, also discountenance the contention of the respondent that the contract was determinable in nature and that, therefore, no interim protection by way of continuance of the contract could be allowed under Section 9 of the 1996 Act, once the contract had been terminated. The termination of the contract being in violation of Clause 19 of the GTC read with the provisions relating to “Breach

¹ Judgment dated 16th September, 2013 in W.P.(C) 5444/2013

² 2019 1 R.A.J. 750 (Del)

of Contract” as reproduced hereinabove, Mr. Nath submits that there could be no embargo on grant of relief, by the Court, under Section 9 of the 1996 Act by way of stay of operation of the termination order. Mr. Nath also relies, in this context, on the judgments of the High Court of Kerala in *T.O. Abraham v. Jose Thomas*³ and the High Court of Madras in *Embassy Property Developments Ltd. vs. Jumbo World Holdings Ltd.*⁴, specifically inviting my attention to paras 17 and 18 of the former decision and paras 51 and 58 of the latter.

13. Responding to the submission of Mr. Nath, Mr. Rajeev Sharma, learned Senior Counsel asserts the fact that, given the manner in which government files moved electronically from one officer to the other, and in view of the contents of the supplementary affidavits and additional affidavit filed by the respondent consequent to directions issued by this Court, it could not be said that there was no order of termination, by the competent authority, of the petitioner’s contract.

13.1 Apropos the legality of such termination, Mr. Sharma places reliance on Clause 19 of the Miscellaneous Terms and Conditions for Services (in short, “the MTC”), which, according to him, governed the agreement between the parties, and reads thus:

“19. The agreement can be terminated by either party by giving one month's notice in advance. If the Service Provider fails to give one month's notice in writing for termination of the Agreement then one month's fees and any amount due to the Service Provider from the Buyer shall be forfeited. However, the provisions mentioned herein can be superseded by the STC/ ATC of each Service Contract, as applicable.”

³ (2018) 1 KLJ 128; 2017 SCC OnLine Ker 19872

⁴ (2013) 4 CTC 154 (DB); 2013 SCC OnLine Mad 1795

Mr. Sharma submits that, in fact, the provision for termination on default and, consequently, the provision for “breach of contract”, on which Mr. Nath relies, were of no relevance to the present case, as the termination had been effected in accordance with Clause 19 of the MTC. He has also advanced certain submissions to explain as to why Clause 19 of the MTC would apply. As I would be dealing with those submissions later in the course of this decision, to avoid repetition, I am not referring to them at this point.

13.2 Regarding the contention of Mr. Nath that the Court was empowered, under Section 9 of the 1996 Act, to grant stay of the termination of the contract of the petitioner, even if already effected, Mr. Sharma relies on the judgment of a Division Bench of this Court in *NHAI v. Panipat Jalandhar NH-I Tollway Pvt. Ltd.*⁵ Mr Nath disputes the precedential value of this decision, and points out that it was carried in appeal to the Supreme Court *vide* Civil Appeal 1691/2021. Though the order dated 27th April, 2021 of the Supreme Court disposing of the said Civil Appeal, does not specifically set aside the decision of the Division Bench, on which Mr. Nath relies, it holds, nevertheless, that the observations of the Division Bench in the said decision were to be treated only as *prima facie* and that the learned Single Judge would decide the Section 9 petition independently thereof. As such, I am in agreement with Mr. Nath to the extent that the precedential value of the decision of this Court in *NHAI v. Panipat Jalandhar NH-I Tollway*⁵ may be questionable.

13.3 Mr. Sharma, however, also places reliance on an earlier

⁵ 2021 SCC OnLine Del 2632

decision of a Division Bench of this court *Bharat Catering Corpn. v. IRCTC*⁶, which was followed by a learned Single Judge of this Court in *Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperative Vennootschap Met Beperkte Anasprakelijkheid*⁷. He also places reliance on another judgment of a learned Single Judge of this Court in *Kashyap's v. Bata India Ltd.*⁸

Analysis and findings

14. Three specific and distinct issues, albeit interconnected to an extent, arise for consideration in this case. They may be formulated, in the form of questions, thus:

- (i) Was any order or decision, to terminate the contract of the petitioner, taken, or not?
- (ii) If such a decision was taken, was the said decision in accordance with the contract between the parties?
- (iii) Can, in exercise of its jurisdiction under Section 9 of the 1996 Act, this Court grant the relief sought in the present petition?

15. Addressing, first, the issue of whether there was, in fact, any order or decision taken, to terminate the contract of the petitioner. As has already been noticed hereinabove, the petitioner was served with a

⁶ 164 (2009) DLT 530

⁷ 2020 SCC OnLine Del 351

⁸ 2013 (137) DRJ 39

letter dated 29th October, 2020, stating that, as the clarification furnished by the petitioner in response to the earlier communication, dated 6th October 2020 from the respondent was not found satisfactory, the competent authority of the ICAR had ordered cancellation of the contract of the petitioner.

16. Clearly, therefore, the petitioner was communicated the fact that a decision, to cancel the contract between the petitioner and the respondent (ICAR), had been taken by the competent authority.

17. On 26th March, 2021, when this matter was listed before the Court, Mr. Tarkeshwar Nath submitted that there was no separate order proving cancellation of the petitioner's contract and that, therefore, the said recital, in the letter dated 29th October, 2020, was not correct. This Court, therefore, directed the ICAR to file a supplementary affidavit, annexing the decision or order of the competent authority to cancel the contract with the petitioner.

18. On the said date, learned Counsel for ICAR submitted that not only had the contract with the petitioner being cancelled, tenders had been re-invited and the petitioner had also submitted his bid consequent to such fresh invitation, which was disqualified.

19. In the circumstances, the Court directed the ICAR to place on record, by way of a supplementary affidavit, the decision or order by which the contract of the petitioner was cancelled as well as the details regarding the fresh invitation to tender and the disqualification of the petitioner therein. An additional affidavit was, in compliance with the

said direction, filed by the ICAR on 31st March, 2021. It was averred, in the said affidavit, that complaints have been received from around 50 staff, whose services had been provided by the petitioner, that the petitioner had asked for money to ensure that they were retained in the new contract to be awarded. It was averred that, given the seriousness of the said allegation, the competent authority, i.e. the Secretary, ICAR had taken a decision to cancel the contract of the petitioner. This decision, it was submitted, was reflected in the official file *vide* Note No. 20 dated 26th October, 2020, which was approved by the DG, ICAR *vide* Note No. 21 dated 27th October, 2020. The said file notings were placed on record, and stand reproduced *supra*.

20. On 20th May, 2021, the respondent (ICAR) was directed to place the actual approval, as accorded by the DG, ICAR, for cancelling the contract with the petitioner, to which reference is contained in Note No. 22 dated 28th October, 2020 *supra*, on record. As confidentiality was claimed in respect thereof, the respondent was permitted to furnish the note by way of e-mail to the Court Master.

21. The said e-mail was accordingly sent, to which a letter dated 20th May, 2021, of the DG, ICAR was attached, certifying that “*vide* Note No. 21 dated 27th October, 2020 of e File no. 2(2)/2020-Estt.II(Pt.) (Computer No. 90463)”, he had approved the termination of the petitioner’s contract.

22. The ICAR was, thereupon, directed *vide* order dated 27th May, 2021 to file a supplementary affidavit, on the basis of which this Court could ascertain whether, in these facts the requisite approval, for

cancellation of the petitioner's contract, could be said to have been granted by the competent authority.

23. Accordingly, a further supplementary affidavit was filed by the ICAR, paras 3 to 9 of which read thus:

“3. I state that ICAR is following the system of e-office for the transaction of official business. Under the said system instead of a physical file being sent to officers in a hierarchy and notings being made by them/signature being appended, the proposals or notings are recorded in an e-office file.

4. An e-office file is not accessible to every person. For login into an e-office file, a GOI/NIC email id is required. In ICAR every officer has been given a unique User ID and Password to login into email/e-office and the said account is accessible to that particular officer only.

5. An officer can access a file marked to him only after login into the e-office system by using the unique User ID and Password. Thereafter the e-file can be seen, notings can be made and the file can be sent to another officer. When the e-file is sent by one officer to another higher officer in the hierarchy or vice-versa, the name and designation of the concerned officer alongwith date and time of forwarding of the file by that official, are by default incorporated in the e-note in the e-office module/system.

6. The name & designation of the officer concerned with date and time in the e-note is treated as his signature. An e-file can also be signed by Digital Signature Certificate. However, the practice being followed consistently in ICAR is to treat the default incorporation of the name of the officer by the system when he forwards the file, as his signature.

7. ICAR broadly follows the procedures laid down in Central Secretariat Manual of Office Procedure (CSMOP, 2019) issued by the Ministry of Personnel, Public Grievances and Pensions. Clause 7.2(v) of the said guideline provides that if an officer agrees to the line of action suggested in the proceeding note, he should merely append his signature. In case he takes a decision different from the one suggested on

the file, he may do so giving reasons for his decision. The said clause is reproduced hereunder

“7.2 Guidelines for noting:

- (i)
- (ii)
- (iii)
- (iv)
- (v) When passing orders or making suggestions, an officer will confine his/her note to the actual points he proposes to make without reiterating the grounds already covered in the previous notes. If he/she agrees to the line of action suggested in the preceding note, he/she will merely append his signature. In case, he/she takes a decision different from the one suggested on file, he may do so giving reasons for his decision.”

The relevant extract from the Central Secretariat Manual of Office Procedure (CSMOP, 2019) issued by the Ministry of Personnel, Public Grievances and Pensions is annexed herewith as **DOCUMENT-1**.

8. In view of the aforesaid Guidelines issued by the Government of India, it is not required to specifically record some textual material like ‘Approved’ while approving any proposal.

9. I state that the above procedure has been followed by ICAR both in the matter of award of the contract to the Petitioner as also the termination of the contract, as evident from the e-office notings already placed on record.”

24. The petitioner has filed a reply to this supplementary affidavit, in which it has been sought to be contended that there was no office order or circular, placed on record, whereby the Central Secretariat

Manual of Office Procedure (CSMOP 2019), issued by the Ministry of Personnel, Public Grievance and Pensions stood legally and validly adopted by the ICAR. That apart, the reply sought to highlight the fact that, though Note No. 22 stated that Note No. 21 was confidential, Note No. 21 itself was blank. As such, Mr. Tarkeshwar Nath, learned Counsel for the petitioner emphatically asserts that there was, in fact, no decision taken by the DG, ICAR, or by any other competent authority to cancel the petitioner's contract.

25. Having gone through the aforesaid documents, I am unable to subscribe to the view canvassed by Mr. Tarkeshwar Nath.

26. On the aspect of whether there was, in fact, a decision by the competent authority in the ICAR to cancel the petitioner's contract, Note No. 20, in the file notings, contains the unequivocal recommendation, of the Secretary, ICAR, recommending cancellation of the petitioner's contract. This was put up to the DG, ICAR. Though it is true that the official noting sheet does not reflect any comments or formal note of approval above the signature of the DG, ICAR in Note No. 21, Note No. 22 refers to the approval of the DG, ICAR as having been granted in Note No. 21. The DG, ICAR has also clarified, *vide* letter dated 31st March, 2021 *supra*, that, *vide* Note No. 21, he had granted his approval to the cancellation of the petitioner's contract, as recommended by the Secretary, ICAR. This system, it has also been pointed out, was similar to that which was followed while awarding the contract to the petitioner. The assertion to this effect, as contained in the supplementary affidavit filed by the ICAR, stands vouchsafed by the file notings at the time of award of contract to the

petitioner, which, too, reveal that no specific noting is contained in Notes Nos 130, 131 and 133, of the Director or the Director-General while forwarding the file. The petitioner, being the beneficiary thereof, can hardly seem to capitalise, now, on the fact that there is no formal file noting entered above the signature of the DG, ICAR in Note No. 21 dated 27th October, 2020. Paras 3 to 9 of the additional affidavit filed by the ICAR on 21st July, 2021, which stand reproduced hereinabove, also bear out the submission of Mr. Rajeev Sharma that, in the e-system of governance followed in central government offices, approvals are granted in such fashion.

27. In exercise of my jurisdiction under Section 9 of the 1996 Act, I am unable to hold that there is, *prima facie*, substance in the contention of Mr. Nath that there was no formal approval, by the competent authority, to cancel the petitioner's contract. As such, the said submission is rejected.

28. The decision to cancel the petitioner's contract having, thereby, been approved both by the Secretary as well as the DG, ICAR, the issue of the authority which, in fact, was competent to do so, does not survive for serious consideration.

29. *Prima facie*, therefore, I am of the view that the petitioner's contract was cancelled, as was communicated to him, *vide* letter dated 29th October 2020 *supra*.

30. Consequent to the cancellation of the contract, it is an acknowledged fact that the petitioner participated in response to the

fresh notice inviting tenders. The petition is conspicuously silent regarding the said participation, though it does mention the fact that fresh tenders were invited. This, in my view, tantamounts to suppression of facts and may, even by itself, be sufficient to disentitle the petitioner to any relief under Section 9 of the 1996 Act which is by its very nature, equitable in character.

31. Mr. Tarkeshwar Nath, however, admitted during hearing, on instructions, that his client, had, in fact, participated consequent to the fresh notice inviting tenders. A screenshot of the official website of the GeM portal has also been placed on record to indicate that the petitioner's bid was rejected. Though Mr. Nath submits that no such official communication of rejection was forwarded to his client, Mr. Rajeev Sharma submits that, in the case of tenders which were operated through the GeM portal, the decision to reject was reflected on the portal and individual letters of rejection were not required to issue to every tenderer.

32. Be that as it may, once the petitioner's contract stood cancelled, fresh bids were invited, and the petitioner also participated consequent to the fresh notice inviting tenders, in my view, the possibility of grant of any interim measure of protection, restoring the *status quo ante* prior to cancellation of the contract, stands irrevocably foreclosed. Mr. Tarkeshwar Nath points out that the fresh invitation for bids was later on cancelled/withdrawn. That, in my view, would not make any substantial difference, insofar as the possibility of grant of interim protection, under Section 9 of the 1996 Act, as sought by the petitioner, is concerned.

33. I may also note that the decisions, on which Mr. Tarkeshwar Nath placed reliance, do not pertain to cases in which, after the contract was cancelled, the contractor re-applied in response to the fresh notice inviting tenders and was again rejected. Those decisions, therefore, can hardly help, to entitle the petitioner to any relief. Even on this ground, therefore, no possibility of grant of any interim protection, as sought in the petition, exists.

34. I am also unable to agree with Mr Tarkeshwar Nath that the cancellation of the petitioner's contract, by the ICAR, was contrary to the terms and conditions of the contract. At the foot of the bid document, certain "Bid specific Additional Terms and Conditions" were entered, which included the following:

"This Bid is governed by the General Terms and Conditions, conditions stipulated in Bid and Service Level Agreement specific to this Service as provided in the Marketplace. However, in case if any condition specified in General Terms and Conditions is contradicted by the conditions stipulated in Service Level Agreement. then it will over ride the conditions in the General Terms and Conditions."

Clause 1 of the General Terms and Conditions, titled "Introduction" read thus:

"This document is an electronic record published by GeM under the provisions of the Information Technology Act, 2000 and the rules made there under (as applicable) and shall act as valid agreement between Seller / Service Provider and Buyer. Further the use of GeM Portal for Sale / Purchase of Goods / Services and the **resulting Contracts shall be governed by the following General Terms and Conditions (GTC) (unless otherwise superseded by Product / Service specific Special Terms and Conditions (STC), Product / Track / Domain Specific STC of Particular Service including its SLA (Service Level Agreement) and BID/Reverse Auction**

Specific Additional Terms and Conditions (ATC) as applicable).

Government e-Marketplace (GeM) is the National Public Procurement Portal; an end-to-end online Marketplace for Central and State Government Ministries/Departments, Central & State Public Sector Undertakings (CPSUs & SPSUs), Autonomous institutions and Local bodies, for procurement of common use goods & services. The portal is owned and managed by GeM SPV which is a Section 8 (Non-Profit) Company registered under the Companies Act, 2013. GeM SPV operates, monitors and supervises all the business transactions on the portal through the Managed Service Provider as per defined roles and responsibilities.”

(Emphasis in original)

35. Mr. Tarkeshwar Nath relies on these clauses as also the definition of “contract” in sub-clause (j) of Clause 2 of the “General Terms and Conditions” which read as under:

“**j. “CONTRACT”** shall mean the purchase order created/issued by the Buyer on GeM for supply of Goods/ Services in electronic form which includes scope of supply, delivery instructions and specifications etc. as ordered by Buyer against such Contract besides the subject GTC, STC/ATC as the case may be.”

36. As such, Mr. Nath submits that the pre-eminent covenants, governing the contract between the parties, were those contained in the General Terms and Conditions. He invites my attention to Clause 19 thereunder, which deals with “Termination for default” and reads thus:

“19. Termination for Default:

If the Seller does not perform its obligations within the Delivery Period/Date mentioned in the Contract, the same would constitute the breach of the Contract and the Buyer shall have the right to Cancel or withdraw the Contract for the unsupplied portion after the expiry

of the original or re-fixed delivery date or period stipulated in the Contract. Such cancellation of contract on account of non-performance by the Seller would entitle the Buyer to forfeit the performance security besides other actions such as downgrading the Seller's rating or debarment from the GeM for specified period as decided by GeM on merits."

37. Mr. Nath's contention is that any termination of the petitioner's contract had necessarily to be in accordance with the protocol envisaged in Clause 19 of the General Terms and Conditions (GTC) and that there was no other provision, whereunder the petitioner's contract could be cancelled or terminated. Clause 19 of the GTC, according to him, contemplates cancellation only in the event of "breach of the contract". "Breach of contract", he submits, stands defined in the "Additional terms and conditions" (ATC), thus:

"Breach of Contract

The following conditions shall specify breach of contract and buyer shall have right to immediately terminate the contract.

Cumulative penalties reach 10% of the contract value

Repeated breach of SLAs beyond 3 instances in the entire contractual period shall be treated as breach of contract. Breach of SLA is defined as performance lower than defined lower performance in this agreement.

In case of major default on the part of the Service Provider, the Buyer may provide a 24-hour written notice terminating the contract to the Service Provider."

38. As such, contends Mr. Nath, "breach of contract" could be said to take place only in the event of "repeated breach of SLAs beyond three instances in the entire contractual period". No such allegation, he submits, has been levelled, against the petitioner by the respondent.

As such, he submits that there was no “breach of contract” as envisaged in the ATC and consequently, Clause 19 of the GTC, which provided for termination for default, could not be legitimately invoked by the respondent.

39. Mr. Rajeev Sharma, learned Senior Counsel for the respondent, arguing *per contra*, draws my attention to Clause 5 of the GTC, which reads thus:

“5. Contract(s):

Following documents shall be construed to be part of the contract generated through GeM:

- i. Scope of supply including price as enumerated in the Contract Document.
- ii. General Terms and Conditions (GTC).
- iii. Product / Service specific Special Terms and Conditions (STC).
- iv. Product / Track / Domain Specific STC of Particular Service including its SLA (Service Level Agreement)
- v. Bid / RA specific Additional Terms and Conditions (ATC).

The Terms and Conditions stipulated in STC & SLA will supersede those in GTC and Terms and Conditions stipulated in ATC will supersede those in GTC and STC in case of any conflicting provisions.”

(Emphasis supplied)

40. As such, submits Mr. Sharma, the Special Terms and Conditions (STC) and the Service Leave Agreement (SLA)

superseded the GTC, and the Terms and Conditions in the ATC superseded the terms and conditions in the GTC and the STC. As such, he submits, in order of precedence, the ATC was superior to the STC and the SLA which were, in turn superior to the GTC. Mr. Sharma, thereafter drew my attention to the ATC which expressly includes “any other terms and conditions as mentioned in the Miscellaneous Terms and Conditions for Services”. As such, he contends that the MTC was part of the ATC. Clause 19 of the MTC provides thus:

“19. The agreement can be terminated by either party by giving one month's notice in advance. If the Service Provider fails to give one month's notice in writing for termination of the Agreement then one month's fees and any amount due to the Service Provider from the Buyer shall be forfeited. However, the provisions mentioned herein can be superseded by the STC/ ATC of each Service Contract, as applicable.”

41. The contention of Mr. Rajeev Sharma is that the termination of the contract was in accordance with Clause 19 of the MTC which was part of the ATC. As per the covenants of the ATC, it had precedence over the STC, the SLA or the GTC. This clause, according to him, is in the nature of an independent provision for termination/cancellation of the contract of the petitioner and, in so far as the cancellation of the petitioner's contract was in accord with this provision, nothing illegal can be said to exist therein. Clause 19, he points out is not dependent on any “breach of contract” and, as such, the reliance, by Mr. Tarkeshwar Nath on the provision for “breach of contract” as contained in the GTC, can be of no avail to him.

42. I find, *prima facie*, substance in the submissions of Mr. Rajeev

Sharma. I may note, here, that the manner in which the contracts were awarded and the manner in which covenants have been entered in the contracts, leaves much to be desired, and has contributed, to a large extent, to the confusion in this case. This Court has had considerable difficulty in navigating through the various contractual provisions. The contractual relationship between the parties, despite being singular, is divided into as many as five “compartments”: the GTC, the SLA, the STC, the ATC and the MTC. I see no reason why this process cannot be simplified and a single contract cannot be awarded, so that confusion, as has clearly arisen in this case, would be obviated. The governmental authorities would do well to cogitate on this aspect and re-work the manner in which said contracts are awarded.

43. Be that as it may, in view of Clause 5 of the GTC, read with the stipulation, in the ATC, to the effect that the MTC would be part of the ATC, and Clause 19 of the MTC, I am unable to hold, *prima facie*, that the termination/cancellation of the petitioner’s contract infringed, in any manner, the covenants governing the contractual relationship between the petitioner and the respondent.

44. The decisions, on which Mr. Tarkeshwar Nath relied, do not apply themselves to all these provisions. The judgment in *Ascot Hotels*² no doubt, did involve a “breach of contract” clause similar to that on which Mr. Nath relied in the present case, which envisages three breaches of the contract, prior to termination thereof. In the facts of this case and in view of other contractual provisions, to which I have already eluded hereinabove (and which were not under consideration in that case), however, I have already opined that this clause cannot come to the aid of the petitioner. As such, the

submission, of Mr. Nath, that *Ascot Hotels*² covers the issue at hand in the present case, cannot be accepted.

45. Some amount of debate also took place at the bar, on the issue of whether specific performance of the contract between the petitioner and the respondent could be directed, in a proceeding under Section 9 of the 1996 Act. Mr. Tarkeshwar Nath placed reliance on the judgment of the Kerala High Court in *T.O. Abraham*³ and the Madras High Court in *Embassy Property Developments Ltd.*⁴ whereas Mr. Rajeev Sharma relied on *Inter Ads Exhibition Pvt. Ltd.*⁷ and *Kashyap's*.⁸ I do not deem it necessary to enter into this aspect of the matter, in view of my submissions already returned hereinabove.

Conclusion

46. In view, of the aforesaid discussion, I am of the opinion that no relief can be granted to the petitioner in the present proceedings under Section 9 of the 1996 Act.

47. The petition alongwith all the pending applications is accordingly dismissed with no order as to costs.

48. All observations in this order are, needless to say, only *prima facie* in nature, for the purposes of disposing of the present petition under Section 9 of the 1996 Act. They shall not inhibit the Arbitral Tribunal in taking a view, on its own, on the dispute between the parties.

C. HARI SHANKAR, J

AUGUST 13, 2021/kr