

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

Reserved on: 23.11.2020

Date of decision: 07.01.2021

+ **W.P.(C) 6827/2018 & CM No.25959/2018**

+ **W.P.(C) 7393/2018 & CM No.28265/2018**

CJ DARCL LOGISTICS LIMITED
TRANSRAIL LOGISTICS LIMITED

..... Petitioner
.....Petitioner

Through Mr.Anil Goel, Mr.Manu Beri, Advs.

versus

OIL AND NATURAL GAS CORPORATION LIMITED

.....Respondent

Through Mr.Sandeep Sethi, Sr. Adv. with
Mr.Varun Mishra, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. These petitions have been filed by the petitioners challenging the Communication dated 06.06.2018 of the respondent by which the petitioners were banned by the respondent from all business dealings with it, for a period of six months. The petitioners further challenge the communication dated 19.06.2018 by which their representation against the abovementioned banning order had been rejected. The petitioners also pray for refund of the amount of security/earnest money deposit forfeited by the respondent.

2. The respondent by Notice Inviting Tender, dated 15.09.2017, invited quotation for Rate Contract for Hiring of Services for All India Material Transportation through Trucks and Trailers. The said tender was divided into 8 groups-4 groups for Trailer segment and 4 groups for Truck segment and the petitioner in W.P.(C) 6827/2018 had participated in all 8 segments, while its subsidiary company, that is petitioner in W.P.(C) 7393/2018, had participated in 4 groups of trailer segment only. The price bids were opened by the respondent on 05.03.2018, however, the price bids of the petitioners were not opened and considered by the respondent. By a letter dated 16.03.2018, received from the Silchar office of the respondent in relation to another tender, the petitioners were informed that their price bids were not opened in view of the banning proceedings initiated against the petitioners in respect to the tender in question before this Court. By another communication dated 26.03.2018, the petitioners were informed that their bids in the tender in question had been rejected for violation of the Integrity Pact. The bank guarantees submitted by the petitioners as security deposit/EMD were also invoked and forfeited by the respondent and the same was informed to the petitioners on 27.03.2018. The respondent thereafter issued a Show Cause Notice dated 09.04.2018 to the petitioners alleging violation of Section 2 of the Integrity Pact. After considering the reply submitted by the petitioners, the Impugned Order banning the petitioners was passed by the respondent and thereafter their representation against the same was rejected by the Impugned Order dated 19.06.2018. As noted hereinabove, these communications have been challenged by the petitioners in the present set of petitions.

3. The learned counsel for the petitioners has submitted that the fact that the two petitioners are related to each other as holding company and wholly owned subsidiary company was in full knowledge of the respondent and, therefore, there was no concealment of this fact by the petitioners. He further submits that Section 2 of the Integrity Pact was amended by the respondent vide its circular dated 04.10.2016. The restriction on the holding of the subsidiary company participating in the tender was done away with by such amendment. Therefore, in his submission, the petitioners could not be held to have violated the Integrity Pact merely because of their relationship with each other. He further submits that merely because Mr. Pradeep Bansal has been authorized by both the petitioners for administrative convenience and Mr. Pradeep Bansal in turn authorized Mr. Narendra Sharma to submit the bid on behalf of the petitioner, CJ Darcl, it could not be said that bids have been submitted by the petitioners in collusion with each other.

4. He further submits that in any case, in terms of Clause 2 of Section 3 of the Integrity Pact, it is only where the transgression by the tenderer is proved beyond a reasonable doubt that the banning order would be justified. He submits that in the present case, the Impugned Order passed by the respondent does not record such satisfaction and infact, proceeds on assumption rather than proof beyond doubt as is required under the Integrity Pact.

5. The learned counsel for the petitioners further submits that the report of the purported enquiry or the decision of the Tender Committee

was not supplied to the petitioners, thereby violating the Principle of Natural Justice.

6. The learned counsel for the petitioners further submits that the Impugned Order even otherwise is passed in violation of Principle of Natural Justice inasmuch as the Show Cause Notice was issued on an enquiry conducted by Mr. D.P Singh DGM, (Mechanical) P&E, Corporate M.M, while the Impugned Banning Order has been passed by Mr. Ashwini Nagia, E.D-Chief MM. He submits that therefore, the authority granting an opportunity of hearing to the petitioners has not passed the order thereby violating the Principles of Natural Justice.

7. As far as the invocation and forfeiture of the bank guarantee is concerned, the learned counsel for the petitioners submits that in terms of Clause 16.7 of the tender document and Section 3 of the Integrity Pact, the respondent was entitled to “demand and recover” from the petitioners liquidated damages equivalent to the EMD/bid security and not forfeit the EMD. The respondent, however, without any prior demand being made to the petitioners, went ahead and encashed the bank guarantee. He submits that in terms of Section 4 of Integrity Pact, the petitioners were entitled to prove and establish that no loss was suffered by the respondent because of the acts of the petitioners and in that event, even the respondent is obliged to refund the amount so forfeited. In the present case, the petitioners have asserted in the petitions that no such loss was caused to the respondent as there was no delay in finalization of the tender and the work of the tender was duly awarded to a third party. The respondent has not denied such assertion in its counter affidavit,

therefore, the petitioners are entitled to refund of the amount that was forfeited.

8. On the other hand, the learned senior counsel for the respondent has submitted that this Court, in exercise of its power of judicial review under Article 226 of the Constitution of India does not act as an Appellate Court to review the decision of the respondent-authority on merits. He submits that the amendment to the Section 2 of the Integrity Pact will have no effect on the allegations made against the petitioners. He submits that Section 2 of the Integrity Pact was amended to make it more liberal and for authorizing the participation of parent and subsidiary company in the same tender. In the present case, the Impugned Action has been taken against the petitioners not because they have a relationship of parent/subsidiary company, but because it was concluded that their bids were collusive in nature and therefore restricted competitiveness and introduced cartelization in the business. He submits that in the present case the bids for the two petitioners were infact submitted by one person alone, with one directly under his signature and the other through his power of attorney.

9. As far as the submissions of the petitioners on Section 3 of the Integrity Pact are concerned, the learned senior counsel for the respondent submits that from the circumstances on record, there was no doubt on the violation of the Integrity Pact by the petitioners. He submits that Section 3 of the Integrity Pact has to be read in a reasonable manner and not in a manner as suggested by the learned counsel for the

petitioners, putting the onus of beyond reasonable doubt on the respondent.

10. On the issue of forfeiture of the bid security/EMD amount, the learned senior counsel for the respondent submits that in the present case the Contract was yet to be entered into between the petitioners and the respondent and the forfeiture was at the stage of the bid itself. Placing reliance on the Judgment of the Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority and Anr.***, (2015) 4 SCC 136, he submits that Section 74 of the Indian Contract Act would not be attracted to the forfeiture of the EMD at the pre-contract stage. He also places reliance on the judgment of the Supreme Court in ***Villayati Ram Mittal (P) Ltd. v. Union of India and Anr.***, (2010) 10 SCC 532 in support of his above submission.

11. As far as the submission of the petitioners regarding supplying the copy of the report of the Tender Committee is concerned, he submits that the same had no prejudicial effect on the petitioners and therefore, cannot be a ground for interfering with the banning order.

12. As far as the submission of the petitioners that the authority granting an opportunity of hearing has not passed the order thereafter, he submits that under Clause 17.5.2 of the “Integrated Material Management Manual” of the respondent provides that upon obtaining approval from the concerned Director for initiating banning process against the erring firm, an enquiry officer is appointed by the concerned Director for conducting the enquiry proceedings. The enquiry officer then issues a Show Cause Notice to the erring firm bringing out allegations and

seeking its response. The enquiry officer then submits his report to the Key Executive of the work centre alongwith his recommendations. The Key Executive refers the case for obtaining approval of the Committee of Directors and on obtaining such approval, the Key Executive issues the order for banning the firm. In the present case, the Key Executive of the work center was Mr. Ashwini Nagia, E.D-Chief MM, who after obtaining the approval of the Committee of Directors, issued the Impugned Banning Order. He submits that therefore, there was no violation of Principle of Natural Justice nor the procedure as prescribed was violated in any manner.

13. I have considered the submission made by the learned counsels for the parties.

14. As much arguments have been made on the provisions of the Integrity Pact pre and post its amendment, the same are quoted hereinbelow:-

<i>Existing Provisions</i>	<i>Modified provisions</i>
<i>Section-2</i> <i>Commitments of the Bidder/contractor Para (1)-2</i> <i>The Bidder / Contractor will not enter with other Bidders into any undisclosed agreement or understanding, whether formal or informal. This applies in particular to prices, specifications, certifications, subsidiary</i>	<i>Section-2</i> <i>Commitments of the Bidder/contractor</i> <i>Para (1)-2</i> <i>The Bidder/Contractor will not enter with other Bidders into any undisclosed agreement or understanding, whether formal or informal. This applies in particular to prices,</i>

<i>contract, submission or non-submission of bids or any other actions to restrict competitiveness or to introduce cartelization in the bidding process. Further, no bidder should have a conflict of interest that effects the tender/bidding process, in any of the following manner:</i> <i>(i) such Bidder (or any constituent thereof) and any other Bidder (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this qualification shall not apply in cases where the direct or indirect shareholding in a Bidder or a constituent (thereof in the other Bidder(s) (or any of its constituents) is less than 1% of its paid up and subscribed capital; or</i> <i>(ii) a Constituent of such Bidder is also a constituent of another Bidder; or</i> <i>(iii) such Bidder receives or has received any direct or indirect subsidy from any other Bidder, or has provided any such subsidy to any other bidder; or</i>	<i>specifications, certifications, subsidiary contracts, submission or non-submission of bids or any other actions to restrict competitiveness or to introduce cartelization in the bidding process.</i>
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(iv) <i>such Bidder has the same legal representative for purposes of this Bid as any other Bidder; or</i> (v) <i>such Bidder has a relationship with another Bidder, directly or through common third parties, that puts them, in a position to have access to each other's information about, or to influence the Bid of either/or each of the other Bidder; or</i> (vi) <i>such Bidder has participated as a consultant to the authority in the preparation of any documents, design or technical specifications of the project.</i>	
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15. As noted hereinabove, the petitioner has based its claim on the deletion of Clauses (i) and (iv) in the amended Integrity Pact to submit that the relationship of a holding and subsidiary company or same legal representative of the two companies is no longer a bar to participate in the bid. I am, however, unable to agree to the above submission. The pre-amended Integrity Pact prohibited the bidders from entering into any undisclosed Agreement or understanding, whether formal or informal. The same has been retained even in the amended Integrity Pact. The pre-

amended Integrity Pact in addition spells out the circumstances of a bidder having conflict of interest that affects the tender/bidding process. Though this part has been deleted from the amended Integrity Pact, it does not affect the operation of the first part which prohibits the bidder/Contractor from entering into any undisclosed Agreement or understanding.

16. The Supreme Court, in *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation*, 2016 (16) SCC 818, has held that “the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirement and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given”. Applying the above test, no perversity is found in the interpretation put by the respondent to the terms of the Integrity Pact.

17. Even otherwise, in *Patel Engineering Limited v. Union of India & Anr.*, (2012) 11 SCC 257, and in *Khulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited & Ors.*, (2014) 14 SCC 731, it has been held by the Supreme Court that the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work

whatsoever, inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contract.

18. In the present case, the respondent has come to a conclusion that because the bids that were submitted by the petitioners were submitted by Mr. Pradeep Bansal; one under his own signatures for Transrail and the second through his Power of Attorney holder- Mr. Narendra Sharma, for CJ Darcl, the bids were designed and coordinated by the same person thereby violating the provisions of Integrity Pact. The respondent has not invoked the provision as is contained in the amended Integrity Pact for proceeding against the petitioners only because of their relationship as holding and subsidiary company. No fault can be found with the above finding of the respondent.

19. The petitioners have further placed reliance on Section 3(2) of the Integrity Pact to submit that the test to be applied by the respondent is one of 'no reasonable doubt' in terms of the Integrity Pact which is almost akin to the test that is applied in a criminal proceeding. Placing reliance on the language used in the Impugned Order dated 06.06.2018, the learned counsel for the petitioners has submitted that in the present case, the test applied by the respondent is one of probability rather than of having no reasonable doubt. He has specifically placed reliance on paragraph 10 of the Impugned Order which is quoted hereinbelow:-

“10. AND WHEREAS, on enquiry, examination of the case, considering the reply submitted by you and having given an impartial, prudent and careful consideration to the facts, ONGC has come to the

conclusion that the person submitting the bids is in effect one and same i.e. Mr. Pradeep Bansal. In Transrail, Mr. Pradeep Bansal submitted the bid himself and in Darcl he indirectly submitted the bid through his Manager. In the given circumstances, there is all possibility that commercial terms/rates submitted by both the bidders were known to each other. Hence, it is concluded that the bids submitted by you is in violation of the provisions of Integrity Pact.”

(Emphasis supplied)

20. I am unable to agree with the submission made by the learned counsel for the petitioners. It is first to be noted that the impugned orders are not to be read as a Statue; they have to be read in a reasonable manner. No doubt, in terms of Section 3(2) of the Integrity Pact the test to be applied is of one beyond any reasonable doubt, it is also a matter of settled law that in cases of conspiracy, where no direct evidence is available, the conviction can be on based of circumstantial evidence which has to be read in a reasonable manner as constituting a complete chain. Reference in this regard may be made to the judgment of the Supreme Court in ***State of Andhra Pradesh vs. IBS Prasada Rao and Others***, (1969) 3 SCC 896 where it was held under :-

“7. In regard to the question of the effect and sufficiency of circumstantial evidence for the purpose of conviction, it is now settled law that before conviction based solely on such evidence can be sustained, it must be such as to be conclusive of the guilt of the accused and must be incapable of explanation on any hypothesis consistent with the innocence of the accused. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet any and

every hypothesis suggested by the accused, however extravagant and fanciful it might be. Before an accused can contend that a particular hypothesis pointing to his innocence has remained unexcluded by the facts proved against him, the Court must be satisfied that the suggested hypothesis is reasonable and not farfetched. Further, it is not necessary that every one of the proved facts must in itself be decisive of the complicity of the accused or point conclusively to his guilt. It may be that a particular fact relied upon by the prosecution may not be decisive in itself, and yet if that fact, along with other facts which have been proved, tends to strengthen the conclusion of his guilt, it is relevant and has to be considered. In other words, when deciding the question of sufficiency, what the Court has to consider is the total cumulative effect of all the proved facts each one of which reinforces the conclusion of guilt, and if the combined effect of all those facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that any one or more of those facts by itself is not decisive.”

21. In **G.Parshwanath vs. State of Karnataka**, (2010) 8 SCC 593, the Supreme Court reiterated that:-

“....In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified

even though it may be that one or more of these facts by itself or themselves is/are not decisive”.

22. In the present case, as stated hereinabove, the respondent has based its conclusion on the circumstantial evidence of the bids being submitted by the two companies for and on behalf of only one person and there was no doubt that therefore, the companies knew of the bids submitted by each other, which is clearly in violation of the Integrity Pact.

23. It is also no longer *res integra* that testing a case of black listing like in the present, this Court is primarily concerned with the decision making process and cannot in exercise of power of judicial review act as an Appellate Authority to test the decision on merit unless it is found to be totally arbitrary, whimsical, unreasonable or disproportionate. Reference in this regard can be made to the judgment of Supreme Court in *Lalit Popli vs. Canara Bank*, (2003) 3 SCC 583 and *Afcons Infrastructure (supra)*. In the present case, no such case has been made by the petitioners to interfere with the Impugned Decision.

24. At this stage I may also note that the submission of the petitioners that the petitioners had fully disclosed their relationship to the respondent and therefore, cannot be accused of any concealment. I am however, not persuaded by the said submission. It is to be noted that such disclosure is in form of an Annual Report of the two companies. Therefore, the petitioners expect the respondent to scan through the documents submitted by them alongwith the bids to discover their relationship rather than stating it upfront. They have further tried to take shelter behind answer to a query raised by the respondent regarding their relationship.

This being post submission of the bid, cannot in any case come to the aid of the petitioners.

25. As far as the submission of the petitioners that the Impugned Order has been passed by the officer who has not granted the hearing to the petitioners and therefore, is in violation of the principles of natural justice, again cannot be accepted. The respondent has placed on record Clause 17.5.2 of the “Integrated Material Management Manual” which prescribes the procedure to be followed by the respondent while undertaking vendor banning. It is not alleged by the petitioner that the procedure followed by the respondent in the present case fell foul of the said laid down procedure.

26. On the non-supply of the copy of the enquiry report to the petitioner, the same again cannot be a ground to set aside the impugned orders debarring the petitioners. No prejudice has been shown to have been caused to the petitioners by reason of such non-supply. In fact, even today, there is no dispute on the facts forming basis of the impugned action of the respondent.

27. On the issue of forfeiture of the earnest money deposit, Section 4 of the Integrity Pact is relevant and is quoted hereinbelow:-

“Section 4

Compensation for Damages

(1) If the Principal has disqualified the Bidder from the tender process prior to the award according to Section 3, the Principal is entitled to demand and recover from

the Bidder liquidated damages equivalent to Earnest Money Deposit / Bid Security.

(2) If the Principal has terminated the contract according to Section 3, or if the Principal is entitled to terminate the contract according to Section 3, the principal shall be entitled to demand and recover from the Contractor liquidated damages equivalent to Security Deposit / Performance Bank Guarantee.

(3) The bidder agrees and undertakes to pay the said amounts without protest or demur subject only to condition that if the Bidder / Contractor can prove and establish that the exclusion of the Bidder from the tender process or the termination of the contract after the contract award has caused no damage or less damage than the amount of the liquidated damages, the Bidder / Contractor shall compensate the Principal only to the extent of the damage in the amount proved.

(Emphasis supplied)

28. A reading of the above Section of the Integrity Pact would clearly show that where the bidder is disqualified from the bid due to transgression of the Integrity Pact, the respondent is entitled to “demand and recover” from the bidder “liquidated damages” equivalent to earnest money deposit/bid security. The bidder has to pay the same without protest subject only to the condition that if the bidder/Contractor can prove and establish that the exclusion of the bidder from the tender process has caused no damage or less damage than the amount of the liquidated damages, then the bidder/Contractor shall compensate the Principal only to the extent of the damage in the amount proved.

Therefore, on a transgression of the Integrity Pact being found by the respondent to have been committed by a bidder, the respondent has to first raise a demand for the liquidated damages equivalent to the earnest money deposit/bid security. On such demand being raised, the bidder would be entitled to prove and establish that no loss or loss of a lesser amount has been caused to the respondent, in which event either no amount or lesser amount shall be claimed payable by the bidder.

29. In the present case, the bank guarantee of the petitioners towards the earnest money deposit was encashed by the respondent without any notice to the petitioners. The question therefore is whether the amount so received can be retained by the respondent in the facts of the present case. Admittedly, the respondent has not issued any notice to the petitioner demanding the above amount as liquidated damages. Infact, it is the case of the respondent that the same automatically stood forfeited. The petitioners have claimed that due to the disqualification of the petitioner, no loss was caused to the respondent. On the other hand the respondent claimed that no such loss is required to be shown. They have placed reliance on the judgment of the Supreme Court in ***Kailash Nath and Associates***, (Supra), wherein the Supreme Court has *inter alia* held as under:-

“41. It must, however, be pointed out that in cases where a public auction is held, forfeiture of earnest money may take place even before an agreement is reached, as DDA is to accept the bid only after the earnest money is paid. In the present case, under the terms and conditions of auction, the highest bid (along with which earnest money has to be paid) may well

have been rejected. In such cases, Section 74 may not be attracted on its plain language because it applies only "when a contract has been broken".

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43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

30. In the present case, though Section 74 of the Indian Contract Act, 1872 may not have any application, Section 4 of the Integrity Pact itself requires a demand to be raised on the earnest money deposit and a right is created in favour of the bidder to show on such demand that no damage is suffered by the respondent or that the damage suffered is lesser than the earnest money deposit, in which case, either no such amount can be recovered from the bidder or a lesser amount is to be recovered.

31. As noted, the respondent has not denied that no loss was suffered by the respondent due to the disqualification of the petitioners from the bid on account of their transgression of the Integrity Pact. There would therefore, be no disputed question of fact to be adjudicated. The forfeiture of the earnest money deposit of the petitioner, therefore, cannot be sustained and is ordered to be refunded to the petitioners.

32. Accordingly, while the impugned orders in so far as they ban the petitioners from all business dealings with the respondent for a period of six months are upheld. The respondent is however, directed to refund the

Security Deposit/Earnest Money Deposits of the petitioners forfeited by it, within a period of four weeks of this order.

33. The petitions are disposed of in the above terms.

34. The parties shall bear their own costs.

NAVIN CHAWLA, J

JANUARY 07, 2021/rv

