

24.03.2022
KC(AD3)

M.A.T. 580 of 2021
Sahakar Global Limited and Anr.
-versus-
The State of West Bengal and Ors.

Mr. Anindya Kumar Mitra,
Mr. Jishnu Saha,
Mr. Zeeshan Haque,
Mr. Tanay Agarwal,
Mr. Tirthankar Nandi.....For the appellants.

Mr. T.M. Siddique,
Mr. Raja Saha,
Ms. Tanusri Chanda,
Mr. Srikanta Paul.....For the respondents.

The appellant company (hereinafter the appellant) on 29th November, 2017 received a workorder from the respondent Government of West Bengal. Under it, for a period of 730 days from 30th November, 2017 it was given the responsibility of collecting toll from vehicles crossing the Ajoy bridge over the Ajoy river at Ilambazar in the district of Birbhum. The contractor was required to pay Rs. 5,13,000/- per day and about Rs. 76,95,000/- per fortnight to the government as consideration to collect the toll which was about Rs. 20/- for a private vehicle and much more for heavy vehicles.

According to Mr. Anindya Kumar Mitra, learned senior advocate appearing for the appellant, at one point of time the bridge became very weak and unable to withstand the load of traffic plying over it. The government was compelled to divert the traffic through

another route as a result of which the traffic flow over the bridge diminished. As a result of this, the collection of toll came down substantially.

At this stage, we are not required to go into the performance of the contract or its breach by the parties except to a very limited extent.

For alleged breach of contract, the appellant was suspended for a period of two years from participating in any tender process initiated by the government and ultimately debarred for two years from such participation by the impugned order of the Joint Secretary to the Public Works Department, Government of West Bengal dated 26th December, 2019.

At this point of time it is necessary to discuss some terms and conditions of the tender notice which became part of the contract prompting this action by the government. The contract was subject to the procedure for debarment of suppliers, contractors and consultants, issued by the Public Works Department of the Government dated 16th November, 2015, which was grafted into the contract as Clause 17.

Clause 17(c) sub-clause 4 of the tender notice relating to the procedure for suspension and debarment is very important. Particularly important in this case is sub-clause 4.13 which is inserted hereunder:

“Failure by the contractor to fully and faithfully comply with its contractual obligations without valid cause, or failure by the contractor to

comply with any written lawful instruction of the procuring entity or its representative(s) pursuant to the

Also relevant are sub-clauses 5.1 and 6.1 which are also set out below:

“5.1. First degree of offence; Sl. No. 4.1 to 4.16 to be considered as first degree of offence.

6.1. For committing 1 “Degree of offence; Disqualifying a bidder from participating in any procurement process under the Public Works Department, Government of West Bengal up to 2(two) years.”

Learned counsel for the appellant has attacked the debarment order dated 26th December, 2019 on many grounds, but the salient grounds are these.

Referring to sub-clause 4.13 learned counsel submitted that the provision in the clause “without valid cause” had a special meaning. In case of ordinary breach of contract, the ground for suspension and debarment would not be attracted. Only when the breach was wilful and blatant, that is to say, without valid cause, would this penalty be attracted. He contended that this allegation was neither put forward to the appellant to answer nor gone into by the authority pronouncing the debarment order. The allegation or charges against his client, according to well established principles of natural justice had to be laid in the form of a show cause notice. The answer to the show cause notice ought to have been considered by

the authority and only if the answer was considered to be unacceptable by it, could proceedings for suspension and debarment have been initiated, learned counsel added.

Next, reference was made by learned counsel to sub-clause 8 of the tender notice which laid down that the procedure for suspension and debarment had to be initiated by the Engineer-in-charge and referred to the Bid Evaluation Committee. The Bid Evaluation Committee could recommend initiation of proceedings for debarment. Only then could the proceedings for suspension or debarment be started. In this case this procedure was not followed.

The main cause of grievance of the appellant is this. The period of suspension is long over. The period of debarment is also over. Theoretically, the appellant does not face any bar to participate in a tender process in West Bengal or in other parts of the country.

Mr. Mitra submitted what was affecting the appellant was the impugned order of debarment dated 26th December, 2019. It stared on the face of the appellant, he said. In any invitation to tender by the government, whether in West Bengal or elsewhere in the country a declaration has to be made by a tenderer as to whether he was debarred or black-listed in the last five years. This order of debarment has to be declared by the appellant in all tender participation by them till

the end of 2024. This would have a prejudicial effect and is quite likely to result in contracts not being awarded to the appellant.

Mr. Siddique, learned advocate appearing for the respondent State tried to support the impugned order by pointing out the various breaches of the contract committed by the appellant. He also tried to show that the finding of the learned judge in the impugned judgment and order, based on such facts, was correctly arrived at. He submitted that the period of suspension and debarment was over and that the appellant had become eligible to get contracts from the respondent government as well as from the governments of other states and statutory agencies.

We have carefully examined the impugned debarment order dated 26th December, 2019. We agree with learned counsel for the appellant that the proper procedure for deciding whether a debarment proceedings could be initiated or not, by issuance of a show cause notice had not been followed.

An adjudicating authority gets the jurisdiction to decide provided the jurisdiction is properly vested in it. Here the jurisdiction could have been vested with the adjudicating authority had the alleged acts of commission or omission been referred by the Engineer-in-charge to the Bid Evaluation Committee and thereafter recommended by the Committee for action to

the Debarment Committee. Since this procedure was not followed, there was lack of jurisdiction of the adjudicating authority to embark upon the impugned decision making process.

Furthermore, there was no application of mind of the adjudicator to sub-clause 4.13 of the said terms and conditions. There is neither any enquiry nor discussion as to whether the appellant contractor had breached the terms and conditions of the contract willfully and blatantly without any valid cause necessitating the penalty of debarment.

If an adjudicator had to address a particular question and has not addressed that question and has come to the conclusion answering the wrong question, the decision falls within the error contemplated by the *Wednesbury* case. This kind of an error has been committed by the adjudicator in the impugned order, which is apparent on its face.

We are of the view that the learned trial court in its writ jurisdiction ought not to have gone into the performance or breach of the agreement save and except what was necessary to decide the issue of debarment. On examination of the facts, as stated above, we have found a grave procedural error in the conduct of this debarment proceedings. We are not commenting on the performance or breach of the contract by the parties.

On the above ground of failure to observe the principles of natural justice and the rules of fairness the impugned debarment order dated 26th December, 2019 is set aside. However, we give an opportunity to the respondents to revise its order, if it so desires, by initiating the proceedings de novo by issuing a show cause notice and upon following the procedure laid down in clause 17(c), sub-clauses 4, 5, 6 and 8 of the terms and conditions, pass a reasoned order after giving an opportunity of hearing to the appellant within a period of three months from this date.

We make it clear that the order of suspension or debarment cannot be reimposed or extended. The previous order, now set aside may only be reaffirmed, if warranted. We are giving an opportunity to the respondents to start the proceedings afresh as the impugned order gave them a valuable right not to award any contract to the appellant for five years.

The impugned judgment and order of the learned single judge dated 11th June, 2021 is set aside.

The appeal (M.A.T. 580 of 2021) is allowed.

(I.P. MUKERJI, J.)

(ANIRUDDHA ROY, J.)

