

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present :-

Hon'ble Justice Partha Sarathi Sen

W.P.A No. 75 of 2011

BCPL Railway Infrastructure Ltd. & Anr.

Vs.

Union of India & Ors

For the Petitioner : **Mr. Sabyasachi Choudhury,Adv.,**
Mr. Nirmalya Dasgupta, Adv.,
Mr. R.L Mitra, Adv.,
Ms. Priyanka Dhar, Adv.

The Union of India. : **Mr. Siddhartha Lahiri, Adv.**

Last Heard on: : **09.10.2023**

Judgment on. : **13.10.2023**

PARTHA SARATHI SEN, J. : -

1. In this writ petition as filed under Article 226 of the Constitution of India the writ petitioner has impugned an undated memorandum issued by the respondents/authorities more specifically respondent no.3 herein whereby and whereunder the respondents/authorities had asked the writ petitioner to show cause as against the action proposed to be taken by them on account of over payment to the tune of Rs.86,26,465/- in course of execution of *“Renewal/Re-habilitation of Over-head Equipment and Power Supply Equipment (Phase-VI)”* which according to the respondents/authorities have occurred on account of malpractices on the part of the writ petitioner. By the

said memorandum the writ petitioner was asked to submit its representation within a month from 03.12.2010 but not later than 05.03.2010.

2. Mr. Choudhury, learned counsel for the writ petitioner while challenging the legality and correctness of the impugned memo draws attention of this Court to the statement of imputation for banning of business of writ petitioner which has been annexed with the memo impugned. Drawing attention to the reply dated 05.02.2010 as given by the writ petitioner pursuant to the memo impugned it is argued on behalf of the writ petitioner that in the said reply the writ petitioner has taken a specific plea that identical issues i.e. issues regarding alleged overpayment was *sub judice* before the learned arbitral tribunal and therefore the writ petitioner has taken a specific defence in his said reply that there was no scope for continuing a parallel proceeding over the self same issue(s). Drawing attention to page nos.780 and 780A of the writ petition it is argued by Mr. Choudhury, learned counsel for the writ petitioner that though initially the respondents/ authorities were agreeable to keep the alleged banning process on hold which is evident from their letters dated 02.07.2010 and 06.07.2010 but all on a sudden by issuing a letter dated 03.11.2010 (*Annexure P10 of the writ petition*) the respondent/authorities had again changed their stance stating that the proceeding of black listing/ banning a business of a firm can be concluded even when arbitration proceedings are pending provided that proper show cause notice is issued to the defaulting firm and if the reply to the show cause notice is not found to be satisfactory it is imperative that personal hearing is given.

3. Mr. Choudhury, learned advocate for the writ petitioner submits before this Court that the letter dated 03.11.2010 being Annexure P17 of the writ petition as issued by the respondents/authorities is equally mala fide and the same also maybe quashed by issuing a writ of mandamus since the said letter dated 03.11.2010 is violative of Article 14 of the Constitution of India and principle of natural justice.

4. In course of his submissions, Mr. Choudhury further submits that during the pendency of the writ petition, the respondents/authorities have again changed their stance and practically they became agreeable to wait till the outcome of the arbitral proceeding which would be evident from the orders dated 11.01.2011, 15.02.2011, 08.03.2011 and 12.05.2011 as passed in this proceeding.

5. Mr. Choudhury, learned counsel for the writ petitioner submits before this Court that during the pendency of the instant proceeding the arbitral tribunal has passed its award and in the said award the arbitral tribunal duly considered the counter claim of the present writ petitioner and passed an award of Rs. 44,66,582.30 in favour of the writ petitioner which is to be paid by the respondents/authorities after adjusting a sum of Rs.4,48,387/- which has been calculated as overpayment made to the writ petitioner. It is thus argued that from the said award and the awarded value it has been unearthed that the respondents' claim of over payment to the tune of Rs.86,26,465/- is baseless, mala fide and unwarranted. Placing his reliance upon the reported decisions namely; **Siemens Ltd. Vs. State of Maharashtra and Ors.** reported in **(2006) 12 SCC 33** and **Joyous Blocks &**

Panels Limited and Anr. vs. Assistant Commissioner, Commercial Taxes, Ballygunge Charge and Anr. reported in **2022 SCC Online Cal. 4306** it is argued by Mr. Choudhury, that the impugned undated memo as well as the impugned letter dated 03.11.2010 as issued by the respondents/authorities is not only without jurisdiction in view of the passing of the arbitral award as mentioned above but also those undated memo and letter dated 03.11.2010 were issued with premeditation to black list and /or to ban the business of the writ petitioner with some mala fide motive.

6. Mr. Choudhury, thus submits that it is a fit case for issuance of writ of mandamus quashing the aforementioned undated memo and the letter dated 03.11.2010 as issued by the respondents/authorities.

7. Per contra, Mr. Lahiri, learned advocate for the Union of India and its officials/respondents in course of his argument at the very outset draws attention of this Court to the statement of imputation (*page no.776 of the writ petition*). It is argued by Mr. Lahiri from the statement of imputation it would reveal that as to how the writ petitioner fraudulently claimed bill for supply and works which were not at all executed at the site or not executed as per contract agreement causing a substantial financial loss to the railways authority. Drawing attention to the relevant pages of the award (*Annexure P20 of the writ petition*) as passed by arbitral tribunal it is argued by Mr. Lahiri that under the headings ‘*Discussion(s) of item wise*’ the arbitral tribunal has come to a specific finding that in respect of various items the present writ petitioner had either not erected the traction mast and /or of copper wire connection or did not do the work of fabrication or didn’t return

the balance quantity of materials supplied to them to the railway authority which would be evident from page nos. 803, 808, 811 and 812 of the writ petition. In course of his argument Mr. Lahiri also draws attention of this court to page nos. 880 and 881 to the writ petition which is a tabular statement of the account as made by the arbitral tribunal wherefrom it would reveal that the said tribunal on calculation of the rival claims has come to a finding that a substantial amount of Rs. 37,02,665.75 is recoverable from the present writ petitioner by the respondents/authorities though in the said calculation it has been shown much more amount is payable by the respondents/authorities to the writ petitioner.

8. Mr. Lahiri, learned counsel for the respondent/Union of India submits further before this court that before the arbitral tribunal dispute regarding accounts were the '*matter in issue*' and question of fraud as claimed to have been committed by the writ petitioner regarding over payment was never a '*matter in issue*' before the said tribunal and in view of such the principle of *res judicata* is not applicable in the proposed proceeding of black listing/banning of the business of the writ petitioner, if its reply is found to be not satisfactory. Placing reliance upon the reported decision of ***Union of India vs. Vicco Laboratories*** reported in **(2007) 13 SCC 270** it is argued on behalf of the respondents that in absence of a specific plea that impugned memo has been issued without jurisdiction and/or in clear abuse of process of Law, this Court ought to be very slow in granting relief to the writ petitioner. Mr. Lahiri thus submits that it is a fit case for dismissal of the instant writ petition.

9. This court has meticulously gone through the entire materials as placed before this Court by the contending parties. This court has given its anxious consideration over the submissions of the learned counsels for the writ petitioner and the respondents.

10. Undoubtedly, the dispute between the writ petitioner and the respondents/authorities centres around issuance of the aforementioned undated memo together with the statement of imputation and further issuance of memo no. CON/CEE/2A dated 03.11.2010 as issued by the respondents/authorities in favour of the present writ petitioner. From the alleged statement of imputation it appears that the respondents /authorities had specifically contended that pursuant to the contract agreement the job of ‘ *Renewal / Rehabilitation of Over-head Equipment and Power Supply Equipment (Phase –VI)*’ was awarded to the writ petitioner by the respondents/authorities and in course of the execution of such work it has been alleged that the writ petitioner had fraudulently claimed bill for supply of works which were not at all executed by them at the site and the said bill amount is Rs. 86,26,464/-. From the materials as placed before this Court it also appears to this Court that the respondents/authorities under cover of their impugned memo dated 03.11.2010 expressed their view that pendency of an arbitral proceeding cannot stand in the way of proceeding of a black listing/banning business of a firm.

11. It is admitted position that in execution of the work as entrusted to the writ petitioner by the respondents/authorities a dispute relating to account arose over which recourse to arbitral proceeding had been taken and on

conclusion of such proceeding the arbitral tribunal passed its award from where it reveals that the present writ petitioner is entitled to get payment of Rs.44,66,582.30 from the respondents/authorities vis-à-vis the writ petitioner has to pay to the respondents/authorities a sum of Rs. 4,48,378/- which has been paid in excess to them.

12. At this juncture a serious question arises as to whether the passing of the arbitral award debars the respondents/authorities to ask for show cause on account of over payment basically on the basis of their fraudulent claim. On perusal of the award as passed by the arbitral tribunal which has been annexed to the writ petition vide; *Annexure P20* it reveals to this Court that arbitral tribunal while passing its award had gone into the nitty gitty of the claim and counter claim of the writ petitioner and the respondents but the said tribunal had not taken any view with regard to the alleged fraudulent action of the writ petitioner since the same was beyond the scope of the arbitral tribunal. At this juncture this court proposes to look to the reported decision of **Siemens Ltd. (supra)** and the relevant portion of the reported decision is quoted herein below in verbatim:-

“8. The question as to whether jurisdictional fact existed for issuance of the said notice, order passed by the respondent was in question in the said writ petition.

9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of Uttar Pradesh v. Brahm Datt Sharma and Anr. AIR 1987 SC 943, Special Director and Another v. Mohd. Ghulam Ghouse and Another, (2004) 3 SCC 440 and Union of India and Another v. Kunisetty Satyanarayana, 2006 (12) SCALE 262], but the question herein has to be considered from a different angle, viz, when a notice is issued with pre-meditation, a writ petition

would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose [See K.I. Shephard and Others v. Union of India and Others (1987) 4 SCC 431 : AIR 1988 SC 686]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause notice.”

13. In considered view of this Court the cited decision of **Seimens Ltd.(supra)** is no way helpful to the writ petitioner in view of the fact that want of jurisdiction to issue impugned memo seeking show cause from the writ petitioner is never the subject matter of the instant writ petition and that nothing could be shown from the side of the writ petitioner that the respondents/authorities acted with premeditation that even after receipt of show cause from the writ petitioner by virtue of the aforementioned memo it would made up its mind to black list the writ petitioner for any reason whatsoever.

14. Similarly, the reported decision of **Joyous Blocks & Panels Private Ltd. (supra)** is also distinguishable from the facts and circumstances of the present case since the said reported decision has been passed in a completely different perspective.

15. As rightly argued by Mr. Lahiri, that the reported decision of **Vicco Laboratories (supra)** as cited from the respondents/ authorities is an established guideline as framed by the Hon'ble Supreme Court of India while entertaining a writ petition challenging a show cause notice. The relevant portion of the reported decision of *Vicco Laboratories (supra)* is reproduced hereinbelow:-

“31. Normally, the writ court should not interfere at the stage of issuance of show cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the concerned authorities and to satisfy the concerned authorities about the absence of case for proceeding against the person against whom the show cause notices have been issued. Abstinence from interference at the stage of issuance of show cause notice in order to relegate the parties to the proceedings before the concerned authorities is the normal rule. However, the said rule is not without exceptions. Where a Show Cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show cause notice. The interference at the show cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out.”

16. In considered view of this Court the proposition of law as enunciated in the case of **Vicco Laboratories (supra)** is clearly applicable in the case in hand in view of the fact that in absence of jurisdiction or in absence of proof of abuse of process of law which have not occurred in the case in hand this court is not inclined to interfere with the impugned undated memo as well as with the impugned memo no. No.CON/CEE/2A dated 03.11.2010 as issued by the respondents/authorities to the writ petitioner.

17. In view of the proposition of Law as discussed supra this Court also holds that passing of the arbitral award does not prevent the respondents /authorities from seeking show cause from the writ petitioner against their alleged fraudulent act regarding over payment.

18. In view of the discussion supra, this Court thus finds no merit in the instant writ petition. Accordingly, the instant writ petition is dismissed on contest but considering the facts and circumstances of the instant case without any order as to costs.

19. Interim order (s) if there be any, as passed in this writ petition stands hereby vacated.

20. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(Partha Sarathi Sen, J.)

Later

After passing of the instant judgement, a prayer has been made from the side of the writ petitioner for staying the operation of the judgement as pronounced in Court today, since Puja Vacation is ensuing.

Prayer for stay is considered and refused.

(Partha Sarathi Sen, J.)