

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

**WPA/12006/2021
C. DOCTOR & CO. PRIVATE LIMITED
VS
BHARAT HEAVY ELECTRICALS LIMITED & ANR.**

For the Petitioner : Mr. Jishnu Chowdhury,
Mr. Aritra Basu,
Ms. Sonia Sharmaadvocates

For the Respondent no.1 :Mr. Rohit Das,
Ms. Kishwar Rahman,
Ms. Sristi Roy ... advocates

Reserved on : 25.09.2023

Judgment on : 21.12.2023

Hiranmay Bhattacharyya, J.:-

1. The writ petitioner has prayed for issuance of a writ in the nature of mandamus to command the respondent to set aside and/or quash the decision contained in the letter dated 18.06.2021 issued by the General Manger of Bharat Heavy Electricals Ltd. and to direct the respondent no. 1 to act in terms of the Office Memorandum dated 12.11.2020.
2. The writ petitioner claims to be engaged in the business of construction of ventilation systems and other related works in power plants, metros, road and rail tunnels and other infrastructure development projects.
3. The writ petitioner company claims to have been awarded nine different tenders from various regions of Bharat Heavy Electricals Limited (for short "BHEL") power sectors for providing ventilation works at different places. Pursuant to signing of the agreement with BHEL, the petitioner had to

provide contract performance securities at the rate of 10% of contract values. The petitioner claims to have deposited some of such securities in terms of Bank Guarantee and for others it was partly in cash and the balance in the form of bank guarantee. The contracts which are the subject matter of this writ petition were awarded prior to the onset of COVID 19 pandemic.

4. Government of India issued an Office Memorandum (for short "O.M.") dated 12.11.2020 directing all Central Public Sector Enterprises (for short "CPSEs") to reduce the Performance Bank guarantee amount from 5-10% to 3% of the project value in all existing contracts. Petitioner submitted representation to the respondent no. 1 / BHEL requesting the said authority to implement the directions contained in the O.M. dated 12.11.2020 by reducing the existing Bank guarantees held by them from 10% to 3% of the total project value. Such request of the petitioner for reduction of the percentage of the Bank Guarantee was rejected by the respondent no. 1 vide letter dated 18.06.2021. Being aggrieved by the aforesaid decision of the respondent no. 1, the petitioner company has approached this Court.
5. BHEL being the respondent no. 1 contested the writ petition by filing an affidavit-in-opposition. It has been stated in the said affidavit that BHEL subcontracts portion of its work to third party contractors and the writ petitioner is one of such subcontractors. Contracts for setting up of power plants have been awarded to BHEL upon issuing Performance Bank Guarantees ranging from 7% to 15% and the same is subcontracted to the petitioner on Back to Back contract basis specifying the terms and conditions in Notice Inviting Tenders in relation to submission of performance Bank Guarantees with specific percentage of contract values on mutually agreed terms. Upon receipt of the O.M. dated 12.11.2020, respondent no. 1 issued a Circular dated 06.03.2021 which states that contract performance security to ensure due performance of the contracts shall be reduced to 3% of the value of the contract for all existing contracts

which is applicable only wherever similar benefits is provided by the end customer of the respondent no. 1.

6. Mr. Chowdhury, the learned Advocate assisted by Mr. Basu appearing in support of the writ petition contended that the O.M. dated 12.11.2020 was issued in terms of Rule 171 of the General Financial Rules 2017 and such rules have been framed in exercise of powers conferred by Article 77(3) of the Constitution of India. He further contended that BHEL being a government company cannot act contrary to the Office Memorandum issued by the Government of India. In support of such contention he placed reliance upon a decision of the Hon'ble Supreme Court of India in the case of **Union of India (UOI) & Ors. vs. Indo- Afghan Agencies Ltd.** reported at **AIR 1968(SC) 718**. He also referred to some letters and documents to support his contention that BHEL has implemented the O.M. dated 12.12.2020 and have reduced the contract performance guarantees in case of pending contracts.
7. Mr. Rohit Das, learned Advocate appearing for the respondent no. 1 seriously disputed the submissions made by the learned Advocate for the petitioner. He submitted that BHEL is under the Ministry of Heavy Industries and hence it is not bound by the O.M. dated 12.12.2020 issued by the Ministry of Finance. He further submitted that BHEL is a "Government Company" within the meaning of Section 2(45) of the Companies Act as approximately 63% of its shares are held by the President of India. He contended that merely because the majority of the shares of the respondent no. 1 is held by the President of India, the same will not make the incorporated company as Central Government or an establishment of the Central Government. In support of such contention he relied upon the decisions of the Hon'ble Supreme Court in the case of **A.K.Bindal & Anr. vs. Union of India & ors.** reported at **(2003) 5 SCC 163** and **Heavy Engineering Mazdoor Union vs. State of Bihar & ors.** reported at **(1969) 1 SCC 765**. He submitted that the said O.M. is nothing but executive

instructions/ order which have no force of law and, therefore, the same is not binding upon the respondent no. 1. He also contended that the terms of the contract and Bank Guarantees issued thereunder cannot be varied and amended by the respondent no. 2 by issuing administrative/ executive instructions. In support of such contention he placed reliance upon a decision in the case of ***Polytech Trade Foundation vs. Union of India & ors.*** reported at **2020 SCC Online Delhi 922**. Mr. Das contended that guidelines or executive instructions which are not statutory in character are not laws and any alleged violation or breach of such non-statutory guidelines cannot confer any right on any member of the public to seek a direction in a Court of law for compliance with such guidelines. In support of such contention he placed reliance upon the decisions of the Hon'ble Supreme Court in the case of ***Syndicate Bank vs. Ramachandran Pillai and ors.*** reported at **(2011) 15 SCC 398** and ***G.J. Fernandez vs. State of Mysore and ors.*** reported at **AIR 1967 SC 1753**. He further contended that industrial departmental communications which are in the process of consideration for appropriate decision cannot be relied upon as a basis to claim any right. In support of such contention he placed reliance upon a decision of the Hon'ble Supreme Court in the case of ***State of Uttaranchal and anr. vs. Sunil Kumar Vaish and ors.*** reported at **(2011) 8 SCC 670**. Mr. Das distinguished the decision in Indo-Afghan Agencies (supra) by contending that the O.M. has been issued by the respondent no. 2 and the respondent no. 1 being a separate juristic person cannot be said to have made any promise or representation which led the petitioner to alter its position. In support of such contention he placed reliance upon a decision of the Hon'ble Supreme Court of India in the case of ***Anil Joshi and Ors. vs. State of Himachal Pradesh and ors.*** reported at **(2015)12 SCC 669**.

8. Heard the learned Advocates for the parties and perused the materials placed.

9. The Government of India (Allocation of Business) Three Hundred and Sixty First Amendment Rules 2021 was framed by the President of India in exercise of the powers conferred by Article 77(3) of the Constitution of India to amend the Government of India (Allocation of Business) Rules, 1961. It appears from the 2021 Rules that Bharat Heavy Electricals Limited is under the Ministry of Heavy Industries.
10. The respondent no. 1 is a Government company incorporated under the Companies Act. It is well settled that the government company remains distinct from the Government and merely because if 63% of the shareholding of such company is owned by the President of India, the same cannot be identified with the Central Government.
11. In ***Mysore Paper Mills*** (supra), the Hon'ble Supreme Court observed that a Government Company can be said to be State under Article 12 of the Constitution of India. The Hon'ble Supreme Court held thus-

"11. A careful consideration of the principles of law noticed supra and the factual details not only found illustrated from the memorandum as well as Articles of Association of the appellant but enumerated from the day-to-day running of the business and administration of the company leave no room for any doubt as to the identity of the appellant-company being "other authority" and consequently "the State" within the meaning of Article 12 of the Constitution of India. The said definition has a specific purpose and that is part III of the Constitution, and not for making it a Government or department of the Government itself. This is the inevitable consequence of the "other authorities" being entities with independent status distinct from the state and this fact alone does not militate against such entities or institutions being agencies or instrumentalities to come under the net of Article 12 of the Constitution. The concept of instrumentality or agency of the Government is not to be confined to entities created under or which owes its origin to any particular statute or order but would really depend upon a combination of one or more of relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned."
12. The writ petitioner entered into the contract with BHEL for providing ventilation works. The cause of action of this writ petition is the decision of BHEL rejecting the prayer of the petitioner for reduction of the percentage of

Contract Performance Guarantee. Petitioner had to execute Contract Performance Guarantee in relation to contracts entered into with BHEL. The issue regarding percentage of Contract Performance Guarantee is directly relatable to the fundamental right of the petitioner guaranteed under Article 19(1)(g) of the Constitution of India.

13. It has not been disputed by the learned Advocate for the respondent no. 1 that BHEL falls within the expression “other authority” and, therefore, “State” within the meaning of Article 12 of the Constitution of India. This writ petition is thus maintainable against BHEL.
14. It is the specific case of the respondent no. 1 in its affidavit that BHEL is under the Ministry of Heavy Industries and no circular has been issued by such Ministry to reduce the contract performance security. It has also been contended that the Department of Expenditure, Ministry of Finance cannot compel the respondent no. 1 to act in terms of its directions.
15. Record reveals that the Ministry of Heavy Industries & Public Enterprises, Department of Public Enterprises issued an Office Memorandum dated 19.11.2020 requesting all the administrative Ministries/Departments of CPSEs to ensure compliance of the direction contained in the O.M. dated 12.11.2020 issued by the Department of Expenditure.
16. From the reply furnished vide letter of the NLC India Limited dated 03.09.2021 to the information sought for under the Right to Information Act, 2005, it is evident that BHEL had given their request to reduce the Performance Guarantee to 3% and action has also been initiated.
17. Therefore, the argument of the learned advocate for BHEL that after execution of contract the percentage value of Contract Performance Guarantee cannot be reduced as it would result in modification of existing contracts is self defeating as it is evident from records that BHEL also applied for reduction of the Contract Performance Guarantees in respect of its contracts.

18. It appears from the O.M. dated 12.11.2020 that pursuant to the request received for reduction in quantum of Security Deposits in the Government contracts, on account of slowdown in economy due to the pandemic, the Government of India decided to reduce Performance Security from existing 5-10% to 3% of the value of the contract for all existing contracts.
19. Considering the said O.M. dated 12.11.2020, BHEL issued circular no. 43 of 2020-21 dated 06.03.2021 stipulating that the Contract Performance Security shall be reduced to 3% of the value of the contract for all existing contracts which is applicable only wherever similar benefit is provided by the end customers of BHEL.
20. The O.M. dated 12.11.2020 as well as the Circular dated 06.03.2021 refers to all existing contracts. Therefore, it goes without saying that the benefit of reduced Contract Performance security was intended to be extended to contracts entered into prior to the issuance of the O.M. dated 12.11.2020 but were existing as on the date of issuance of the said O.M. In view thereof, this Court is of the considered view that the relevant consideration for applicability of O.M. dated 12.11.2020 is that the contract should be an existing one as on the date of issuance of the said O.M.
21. Therefore, the argument of the learned Advocate for BHEL that the directions contained in the circular dated 12.11.2020 cannot be applied to contracts entered into prior to the date of its issuance cannot be accepted.
22. The respondent no. 1 having applied for reduction of Contract Performance Guarantees in terms of the O.M. dated 12.11.2020 and having issued a Circular considering the said O.M. dated 12.11.2020 cannot turn around and contend that the O.M. dated 12.11.2020 is not binding upon the respondent no. 1.
23. Now the question arises as to whether the respondent no. 1 could have imposed a condition that the Contract Performance Security shall be

reduced only wherever similar benefits are provided by the end customers of BHEL.

24. O.M. dated 12.11.2020 was issued by the Government of India to boost the economy in view of slowdown in economy due to covid pandemic. The respondent no. 1 being a government company falling under the Ministry of Heavy Industries is bound by the O.M. dated 19.11.2020 which directed compliance of the directions contained in the O.M dated 12.11.2020. This Court has already held that the O.M. dated 12.11.2020 is binding upon BHEL. Therefore, respondent no. 1 could not have imposed restriction by issuing the circular dated 06.03.2021 as the same would ultimately frustrate the object behind the O.M. dated 12.11.2020. Therefore, the action of the respondent no. 1 in imposing a condition that the contract performance security shall be reduced only wherever similar benefits are provided by end customers while issuing the Circular dated 06.03.2021 calls for interference as the same was dehors the directions contained in the O.M. issued by the Ministry of Heavy Industries read with the O.M. dated 12.11.2020 and for such reason the said condition imposed in the circular dated 06.03.2021 is liable to be set aside and quashed.
25. In **Ramachandran Pillai** (supra), the issue that fell for consideration was whether an order validly made in accordance with the Public Premises Act can be interfered with on the ground that there has been transgression of the guidelines of the Central Government. The said decision being distinguishable on facts do not have any manner of application to the case on hand.
26. **G.J. Fernandez** (supra) is distinguishable on facts as the rules contained in the code of the concerned Public Works Department relating to the tenders were not followed. In the case on hand this Court has already held that the O.M. issued by the Government is binding upon BHEL.

27. In **Sunil Kumar Vaish** (supra) it was held that a noting recorded in the file merely represents expression of opinion by a particular individual and the same cannot be treated as a decision of the Government. The said decision being distinguishable on facts is of no assistance to the respondent no. 1.
28. There is, however, no quarrel to the proposition laid down in **A.K.Bindal** (supra). The issue involved therein was whether the employees of a government company will be treated to be government servants and it was held that the employees of the government company are not civil servants and so are not entitled to protection afforded by Article 311 of the Constitution of India. The said decision is therefore, not applicable to the case on hand.
29. The decision in the case of **Heavy Engineering Mazdoor Union** (supra) is distinguishable on facts as the issue which arose for decision in the said reported decision was whether State Government is an “appropriate Government” to refer dispute under Section 10 of Industrial Dispute Act in respect of a company incorporated under the Companies Act whose entire share capital was owned by the Central Government.
30. **Polytech Trade Foundation** (supra) is distinguishable on facts as it was observed that the circulars/ guidelines and advisories issued by the Union of India were not binding upon the association of Container Freight Stations and its members. In the case on hand, it has already been held that the O.M. of the Government is binding upon the respondent no. 1.
31. There is, however, no quarrel to the proposition of law laid down in **Anil Joshi and Ors.** (supra) that a plea of promissory estoppel can be set up by a person against the State only when he is able to prove with adequate evidence that the State has promised him in writing in express terms to grant benefit and acting upon such promise he has altered his position.
32. The writ petitioner has claimed reduction of percentage of the Contract Performance Guarantees in respect of the contracts entered into with BHEL

prior to issuance of the O.M. dated 12.11.2020 but are existing as on that date. Therefore, it does not lie in the mouth of the petitioner to contend that the petitioner has altered his position acting upon the promise of the Government. For such reason the decision in Indo-Afghan Agencies Ltd. does not have any manner of application to the case on hand.

33. The petitioner company seeks implementation of the O.M. dated 12.11.2020. This Court has already held that the said O.M. is binding upon the respondent no. 1. Therefore, the respondent no. 1 has to act in terms of the said O.M. in respect of the existing contracts as on the date of issuance of the said O.M. by accepting bank guarantee at the reduced rates.
34. For all the reasons as aforesaid, the writ petition stands allowed. The condition imposed in the Circular no. 43 of 2020-21 dated 06.03.2021 issued by the respondent no. 1 to the effect that the contract performance security shall be reduced only wherever similar benefits are provided by the end customers of BHEL stands set aside and quashed. Consequently the order of rejection contained in the letter dated 18.06.2021 stands set aside and quashed. The respondent no. 1 is directed to act in terms of the O.M. dated 12.11.2020 and accept Bank guarantee to the extent of 3% of the project value and simultaneously return the existing bank guarantee to the petitioner. There shall be, however, no order as to costs.
35. Urgent Photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(HIRANMAY BHATTACHARYYA, J.)

(P.A.-Sanchita)