

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya

W.P.A 28663 of 2022

M/s Essal – RRE Enterprises (JV)

vs.

The Coal India Limited & Ors.

For the petitioner : Mr. Srijib Chakraborty, Adv.
Mr. Sunny Nandy, Adv.
Mr. Deeptangshu Kar, Adv.

For the respondents : Mr. Tilak Bose, Sr. Adv.
Mr. Suddhasatva Banerjee, Adv.
Mr. Syed Nurul Arefin, Adv.
Mr. Rahul Singh, Adv.
Ms. Rashmi Binayak, Adv.

Last Heard on : 21.04.2023.

Delivered on : 01.05.2023.

Moushumi Bhattacharya, J.

1. The petitioner has challenged an order of banning and termination dated 2.12.2022 issued by Eastern Coalfields Limited (ECL). The reason for banning

is the petitioner's poor performance and continuous failure to improve its performance despite several letters issued by ECL. The impugned letter gives detailed particulars of the reminders sent to the petitioner and the petitioner's failure to rectify the situation. The letter also refers to a show-cause notice issued to the petitioner and a personal hearing given on 7.9.2022. The impugned letter also refers to Chapter 6, section 12 – Guidelines for Banning of Business and clause no. 2(v)(b) in relation thereto.

2. Learned counsel appearing for the petitioner submits that the petitioner faced several allegedly insurmountable difficulties in executing the project including non-availability of land which resulted in the delay. Counsel blames the ECL for not providing sufficient land within a reasonable time frame. Counsel submits that 21.47 acres of land was given to the petitioner on 22.7.2022 after which a fresh Target was given for August, 2022. Counsel complains that ECL terminated the contract on 19.8.2022 before the petitioner could meet the target. Counsel submits that the termination letter of 19.8.2022 was issued without giving the petitioner an opportunity of hearing and further that the contract was terminated under clause 10(a) and (b) of the General Terms and Conditions (GTC) of the e- tender notice dated 21.12.2015. Counsel submits that the said clause only speaks of cancellation of contract and not of termination. Counsel further submits that the petitioner has been banned for 3 years instead of 1 as provided under the Guidelines for Banning of Business. Counsel further submits that the impugned letter does not disclose any

subjective satisfaction as to the reason for banning and is hence arbitrary and bad in law.

3. Learned counsel appearing for the respondent ECL seeks vacating of an order passed by this Court on 22.12.2022 which records the stand taken by learned counsel appearing for the ECL that ECL shall not take any steps to the prejudice of the petitioner till 9.1.2023. Counsel submits that ECL continues to face prejudice by reason of the aforesaid order and points to numerous failures on the part of the petitioner to perform and complete the work. Counsel submits that the contract was terminated on 19.8.2022 and the petitioner has not challenged the same till date. It is further submitted that the petitioner was given several opportunities to rectify its conduct in terms of performance and was also given a show-cause notice and a personal hearing before the contract was terminated. Counsel urges that there were several allegations against the petitioner including the removal of coals to unspecified destination, driving on unauthorised routes and driving in protected areas which were admitted on behalf of the petitioner by way of hand written endorsements appearing from the Minutes of a meeting held on 7.9.2022. The extract of the Minutes is placed before the Court.

4. The respondent ECL engaged the petitioner as a contractor in terms of a tender floated by ECL for removal and extraction of coal from the New Kenda Quarries. Before dealing with the question of whether the petitioner failed to perform its obligations in accordance with the general terms and condition which was part of the e-Tender Notice dated 21.12.2015, the undisputed fact

which emerges from the records is that ECL terminated the contract with the petitioner on 19.8.2022.

5. The letter of termination mentions the reason thereof namely the petitioner's poor performance against the target resulting in substantial loss to ECL. ECL issued a show cause notice to the petitioner on 5.4.2022 and the petitioner was given an opportunity to reply to the show cause notice. The letter records that a meeting was held between the parties on 2.5.2022 where the petitioner could not give a satisfactory explanation for the poor performance. The letter further records a second show-cause notice dated 23.4.2022 alleging the violation of the NIT terms to which the petitioner did not respond. The contract was terminated on the ground of deviation and violation of the agreement/NIT. Significantly, there is no challenge to this letter of termination dated 19.8.2022. The only challenge made in the present writ petition is to a Letter of Banning dated 2.12.2022. Further the petitioner has not disclosed the second show-cause notice dated 23.4.2022 which has been referred in the termination letter of 19.8.2022.

6. Contrary to the submissions made on behalf of the petitioner, the termination was issued under Clause 10(a) and (b) of the General Terms and Conditions. Clause 10 relates to the termination, suspension, cancellation and foreclosure of the contract and empowers the ECL (described as the Company in the said Clauses) to cancel the contract in full or in part if the contractor (petitioner in this case) makes default in proceeding with the work with due diligence and continues to do so even after being put on notice (10(a)) or

commits default / breach in complying with any of the terms of the contract and fails to rectify the default to the satisfaction of the Engineer in-charge of ECL (10(b)). Clause 10.1 of the GTC further provides that the contract shall stand terminated under certain circumstances while clause 10.2 provides for a post-termination scenario where the Engineer-in-charge of ECL shall be empowered to carry out the incomplete work at the risk of the contractor. The petitioner has failed to place the above clauses which were relevant to the termination dated 19.8.2022 or place the complete documentation with regard to the termination.

7. As stated above, the termination notice itself indicates that ECL complied with the procedure which it was required to do before terminating the contract. The petitioner was issued two show cause notices, given sufficient opportunities to respond to the same and was also called for a meeting on 2.5.2022 to explain its unsatisfactory performance. These facts have been reiterated in the impugned letter dated 2.12.2022 banning the petitioner for a period of 3 years under Clause 2(v)(b) of section 12 of the Guidelines for Banning of Business. The impugned Letter of Banning makes detailed references to the series of letters issued by ECL to the petitioner in the form of reminders asking the petitioner to meet the short-fall of the target production. The contents of the impugned letter makes it evident that the petitioner was also issued a show cause notice dated 21.8.2022 under Clause 2(v)(b) of Guidelines for Banning of Business which was replied to by the petitioner on 29.8.2022. The respondent ECL gave an opportunity of a personal hearing on

7.9.2022 where the petitioner committed to restart the work from 12.9.2022 but failed in fulfillment of its commitments. In this context it is relevant to state that clause 2 of the Guidelines relates to the banning of a contractor under certain circumstances including continued and repeated failure to meet contractual obligations on termination of contract (2(v)(b)).

8. Therefore, the petitioner has not been able to disclose any evidence of ECL either terminating the contract or banning the petitioner in breach of principles of natural justice. The stand taken on behalf of the petitioner that ECL failed to give the petitioner an opportunity of hearing before terminating the contract on 19.8.2022 is contrary to the material on record.

9. The actions taken by ECL against the petitioner with reference to the termination and impugned banning finds support from several clauses in the NIT. Under the Special Notes and Terms and Conditions of the NIT, Clause 39 relates to the contractor's plying on specified routes, engaging skilled drivers of trucks (Clause 33) both of which find mention in the handwritten Minutes of a meeting dated 7.5.2022 attended by officials from the petitioner's side as well as by ECL. The Minutes contain specific admissions of non-compliance of these clauses by the petitioner's representatives. The authenticity and genuineness of these documents was proved by comparing the same with the original records maintained by ECL.

10. It is also significant that the petitioner acted upon the termination letter of 19.8.2022 by causing a joint measurement to be taken as required for

ascertaining the balance work. This is recorded in the impugned Letter of Banning dated 2.12.2022. The notice of final measurement given on 13.9.2022 was placed before the Court.

11. Apart from the Clause 2(v)(b) of the Guidelines for Banning of Business which has been referred to above, ECL was also authorised to ban the petitioner under Clause 6.2.5 of the GTC where defaulting contractor may be barred from participating in future tenders for a minimum period of one year. Since the petitioner has contended that the period of banning was contrary to the GTC, it is relevant to state that Clause 6.2.5 only mentions the minimum period of banning which is one year; there is no outer limit indicated. The petitioner has also not been able to give a satisfactory answer to the admitted fact of the petitioner stopping all activities including production from 10.6.2022 which finds specific mention in the show cause notice dated 21.8.2022 issued by ECL for banning of business.

12. The allegation of ECL not providing the required land to the petitioner is also belied by Clause 21 of the Special Terms and Conditions which provides that the land will be given for execution entirely or in a phased manner or restricting the magnitude of the work depending upon the availability of land. ECL's letter of 22.7.2022 further makes it clear that 21.47 acres of land was made available to the petitioner in Quarry 1 for machine deployment. Therefore, none of the allegations made by the petitioner for the non-performance on the part of ECL finds corroboration from the documents on record.

13. The respondent ECL has been restrained from taking any steps to the prejudice of the petitioner since 22.12.2022. Although, the restriction was put in place till 9.1.2023, ECL continues to be fettered from invoking Clause 10.2 of the GTC, which is a post-termination step where the Engineer in-charge of ECL is authorised to carry out the incomplete work by any other means at the risk of the contractor. The undisputed fact is that the petitioner could not show any work done post 10.6.22 despite land being made available to the petitioner. The petitioner has not been able to make out a case of wrongful banning of business or the banning not being in accordance with the terms of the GTC or the Guidelines for Banning of Business. The petitioner has not challenged the termination which was much prior to the banning. The petitioner has also not been able to make out a case of either the termination or the banning being done without giving an opportunity to the petitioner to present its case. The action of the respondent ECL is informed by fairness and transparency in terms of giving repeated opportunities to the petitioner to correct its failure and make up the for performance-shortfall.

14. ECL cannot be penalised for the admitted non-performance / failure to perform on the part of the petitioner and prevented from exercising its powers under the General Terms and Conditions. This is particularly relevant where the impugned banning of business letter of 2.12.2022 is found to be justified in the facts of the case. The restraint on ECL consequent to the order dated 22.12.2022 is hence lifted.

15. Although academic in the context of the above findings, *State of Punjab v. Banddeep Singh*; (2016) 1 SCC 724 and *S.J.S. Business Enterprises (P) Ltd. v. State of Bihar*; (2004) 7 SCC 166 cited on behalf of the petitioner are definitely of little relevance to the facts of the case; the first decision is on the requirement of a decision of an administrative nature to contain reasons and the second is on the effect of suppression of a material fact. The decision of this Court in *M/s. BGM and M-NS(JV) v. Eastern Coalfields Limited* in WPA 24457 of 2022 involved a case of blacklisting before termination where the Court found the conduct of the respondent to be contradictory and unconscionable.

16. In view of the foregoing discussion, this Court does not find any merit in the contentions made on behalf of the petitioner for quashing the impugned Letter of Banning dated 2.12.2022 or to restrain the respondent ECL from acting in pursuance thereof.

17. WPA 28663 of 2022 is accordingly dismissed without any order as to costs. All connected applications are disposed of.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)