

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 2335 of 2022

Pearl Corporation

Vs.

**West Bengal Police Housing and Infrastructure Development
Corporation Ltd. (WBPHIDCL) and others**

For the petitioner	:	Mr. Tapas Dutta, Adv., Mr. M. Halder, Adv.
For the respondents	:	Mr. Kishore Datta, Sr. Adv., Mr. Sayan Sinha, Adv., Mr. Adil Naseer, Adv., Mr. Steven S. Biswas, Adv., Mr. Soham Kumar, Adv.
Hearing concluded on	:	15.06.2023
Judgment on	:	05.07.2023

The Court:-

1. The petitioner has challenged the termination of the petitioner and debarment from participating in the respondents' contracts for two years.
2. Learned counsel for the petitioner submits that the respondents have acted *mala fide* and arbitrarily. During pendency of a previous writ petition by the petitioner, against the alleged *mala fide* action of the respondents', the respondents terminated the petitioner's contract. The previous writ petition thus became infructuous and the same was withdrawn with liberty to file a fresh writ petition on the subsequent

cause of action. Accordingly, the present writ petition was filed but during the pendency of the same, the remaining work has been given to a third party.

3. It is argued that the petitioner had substantially done the work under the contract between the parties and, if another extension was given, it would have completed the entire work.
4. It is argued that the petitioner was granted extension twice. As such, time was not the essence of the contract even as per the conduct of the respondents.
5. It is next argued that the termination of contract by the respondents was *de hors* the contract entered into between the parties.
6. Learned counsel places reliance on Clause 2D of the Conditions of Contract which contemplates that the contractor shall be liable to pay compensation if, during review of progress of work as per sub-clause C of Clause 2, it is found that the progress is falling behind schedule as given in the Approved Work Programme, and after the respondents intimating the contractor to expedite the work to achieve the progress.
7. Under sub-clause C, it is submitted that the contractor is to ensure good progress during the execution of the work in all cases in which the time allowed for any work exceeds one month after the Approved Work Programme. In the event of any shortfall in performance measured against the said programme, a penalty has been stipulated in the said Clause.
8. It is argued that the stipulation in the contract speaks about levy of compensation on the petitioner and, as per Clause 3, if the liability to

pay compensation amounts to the whole of his security deposit, only then the question of termination of contract arises.

9. In the absence of any such allegation, the termination is bad.
10. It is further argued that, in any event, since the petitioner was on the verge of completion of the work, it would be beneficial for all concerned if the petitioner was given a further opportunity to complete the work, instead of awarding the balance work to a third party.
11. It is argued that although extension of time was given till June 4, 2022, before the expiry of the same, that is, on March 29, 2022, the termination was effected.
12. Hence, the said termination is vitiated due to violation of the principles of natural justice as well as is in contravention of law and the contract between the parties.
13. No proper reason of termination was given by the respondents. Further, it is argued by the petitioner that no opportunity of hearing was given to the petitioner, nor was any show-cause notice issued prior to blacklisting the petitioner. Hence, the termination and the blacklisting ought to be set aside.
14. Learned counsel for the petitioner places reliance on a judgment of the Supreme Court reported at (2018) 6 SCC 157 [*Madhya Pradesh Power Management Company Limited Vs. Renew Clean Energy Private Limited and another*]. Placing particular reliance on paragraphs 13 and 14 of the same, it is argued that if the contract permits imposition of penalty, the contractor is liable to pay penalty. But the action of termination of the contract was held arbitrary and to have been rightly

set aside by the High Court in the said case. Accordingly, in the said case, the Supreme Court awarded penalty and set aside the termination.

- 15.** Learned senior counsel appearing for the respondent-Authorities controverts the petitioner's submissions and argues that upon an inspection held immediately prior to the termination, it was seen that work only up to about 27.23 per cent had been done by the petitioner. Since the work schedule provided for specific components of the work to be done by phases, it was evident that the petitioner was far behind the schedule and it would be impossible for the petitioner to conclude the work within the last date as per the extension lastly granted.
- 16.** It is argued that the petitioner was given several chances to conclude the work, over two years from 2020 to 2022. However, despite the same, the petitioner failed to complete the work on each occasion. It is only out of grace that the respondents did not impose any penalty on the petitioner, although under the contract, it was permissible for the respondents to do so.
- 17.** It is submitted that there was no arbitrariness in the termination. Rather, the debarment was within the discretion of the respondent-Authorities, in view of the palpable inefficiency and negligence of the petitioner.
- 18.** In view of the urgency of the nature of the work, the respondents had to assign the balance work to a third party for the purpose of completion of the same on expeditious basis.

- 19.** Learned senior counsel appearing for the respondents cites *M.P. Power Management Company Limited, Jabalpur Vs. Sky Power Southeast Solar India Private Limited and others*, reported at (2023) 2 SCC 703. It is submitted on the basis of the said judgment that normally the courts would not exercise their discretion to examine issues unless the action has some public law character attached to it. In the present case, the matter relates to a private contract between the petitioner and the respondent-Authorities.
- 20.** It is further argued that when it comes to a challenge to the termination of contract by the State, which is a non-statutory body, the action being in purported exercise of the powers/rights under a contract, it would be oversimplifying a complex issue to lay down any inflexible rule in favour of the court turning away the petitioner to alternate fora. However, ordinarily, the cases of termination of contract by the State, acting within its contractual domain, may not lend itself for appropriate redress by the writ court. This is undoubtedly so if the court is duty-bound to arrive at findings which involve untying knots, which are presented by disputed questions of fact.
- 21.** Learned senior counsel also places reliance on *Joshi Technologies Internationals INC. Vs. Union of India and others*, reported at (2005) 7 SCC 728, wherein it was held that if the rights are purely of private character, no mandamus can be issued. Even if the respondent is “State”, the other condition which has to be satisfied for issuance of such a writ is the public duty. In a matter of private character of

purely contractual field, no such public duty element is involved and, thus, mandamus will not lie. It was further observed that if there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination, the court would not normally exercise its discretion in interfering with the same. Even in cases where the question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence, the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. It was held that in such cases, the court can direct the aggrieved party to resort to the alternative remedy of civil suit, etc.

- 22.** Upon hearing learned counsel for the parties, a perusal of the conditions of the contract becomes necessary.
- 23.** The only specific provision as to termination of the contract is stipulated in Clause 2B of the Conditions of Contract. The said sub-clause stipulates that in the event of failure to start the work after 15 days from commencement of the work as per the Work Order due to the contractor's fault, a notice is to be issued to the contractor giving further 7 days to start the work. If the contractor fails to start even within the extended period, the contract will be terminated without giving any further notice. In the event of termination of contract

under the said Clause, the earnest money deposited would be forfeited and the contractor would be barred from applying in any tender of the Corporation for 2 years from the date of termination of the contract.

- 24.** However, Clause 2B was never resorted to or referred to in any of the correspondences by the respondent-Authorities, not even in the letter of termination and debarment.
- 25.** Sub-clause D is, in turn, dependent on sub-clause C, since it stipulates that during any review of progress of work as mentioned on sub-clause C, if it is found that the progress is falling behind schedule as given in the Approved Work Programme, the contractor would be intimated to expedite the work to achieve the progress with the Approved Work Programme. In the next review of progress, if the progress still fell behind the schedule, the contractor would be liable to pay compensation of 2 per cent or such smaller amount as the Managing Director may decide.
- 26.** Sub-clause C stipulates that the contractor shall ensure good progress and shall be bound, where the time allowed for work exceeds one month, by the Approved Work Programme. In the event of shortfall in performance measured against the said Programme, an amount at the rate of 1 per cent of the tendered amount can be retained as penalty from the successive bill. During the subsequent review, if it is found that the previous delay has been recouped, the retained penalty amount may also be refunded.
- 27.** In the present case, as admitted in the impugned termination letter dated March 29, 2022, no penalty was imposed on the petitioner

under Clause 2C. Although the respondents cite “good gesture” as the reason for non-imposition of penalty, the same does not justify such non-imposition. In fact, there is nothing on record to deduce that the same was merely good gesture, since the non-imposition of penalty may very well be interpreted also to mean that the petitioner was either not liable to pay penalty, since it had no fault of its own in the delay, or even that it had recouped the delay in execution, leading to refund of the penalty or adjustment of the same. In any event, a conclusion on such score would have to be based merely on conjecture. The fact remains that, admittedly, no penalty was imposed. As such, there did not arise any occasion to invoke sub-clause C of Clause 2 at all. As a result, sub-clause D does not come into the picture at all.

- 28.** Taking the worst case scenario against the petitioner, an initial default under Clause 2C might have led to steps being taken under Clause 2D. However, the maximum step which could be taken under sub-clause D was imposition of compensation of 2 per cent or smaller amount, as may be decided by the MD, of the tendered cost of the whole work for every week that the due quantity of work as per Approved Work Programmed remains incomplete.
- 29.** Again, sub-clause E of Clause 2 provides that the work shall be executed throughout the stipulated period of contract with all due diligence. In the event of the contractor failing to do so, he shall be liable to pay as compensation an amount equal to 2 per cent or smaller amount as may be decided by the MD.

- 30.** The sub-clause thereafter states that the entire amount of compensation to be paid under the provision of Clause 2 shall not exceed 10 per cent of the tendered amount of the work.
- 31.** Thus, nothing in Clause 2D, which has been cited in the termination letter, could invite the ultimate action of terminating the contract of the petitioner.
- 32.** It is important to note that Clause 3 of the Conditions of Contract (which has never been mentioned by the respondents in the Termination Letter) provides that where, under any Clause of the Contract, the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit, the Managing Director or his authorized representative shall have the power to adopt the courses given thereunder. Under Clause (a), one of such sanctions is to rescind the contract, in which case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of the Managing Director or his representative.
- 33.** However, the termination letter impugned in the present writ petition, dated March 29, 2022, shows that the same was issued not by the Managing Director but by the Executive Engineer (Zone-VII). As such, the said termination letter itself was vitiated by lack of authority.
- 34.** Even if it is construed that the Executive Engineer was duly authorized by the Managing Director, upon a consideration of the same, it is seen that the respondents have cited therein penal action under Clause 2D. However, there is nothing in Clause 2D to attract the ultimate punishments of termination and debarment.

- 35.** Hence, the termination effected by the impugned Communication dated March 29, 2022 is palpably *de hors* the contract.
- 36.** That apart, the same also violates natural justice, since as per the last Revised Work Schedule, annexed at page 89 of the writ petition, the last date of completion of the contract was June 4, 2022, much before which the impugned termination was effected.
- 37.** The argument that the petitioner had failed to complete even the initial phase of work schedule is not germane, since there is no provision in the contract for termination of contract if each phase was not completed within time.
- 38.** Although the respondents have alleged that the petitioner had failed even on March 29, 2022 to complete the component of the Work Schedule which was stipulated to be done by March 29, 2022, the Work Schedule itself shows that the first element of the activities to be done by the petitioner was 3rd Floor Tiles Rectification Work, which was to be completed by March 30, 2022. Notably, the termination letter was issued even prior to March 30, 2022, that is on March 29, 2022. That apart, the respondents have stated in the second paragraph of the termination letter that during inspection on the site on March 28, 2022 by the concerned Assistant Engineer, it was found that only rectification work at 3rd Floor Toilet had been taken up by dismantling 3rd Floor Toilet Wall Tiles and using two number of ‘Santras’.
- 39.** A bare perusal at the Revised Work Schedule shows that the activity with regard to 3rd Floor comprises of as many as five elements. The

first, that is, Tiles Rectification Work was to be done by March 30, 2022. The second, that is, Plaster Rectification Work was to be completed by April 1, 2022, the third, that is, Primer-Paint Work was to be concluded within April 15, 2022; thereafter the fourth component, that is, External Repairing Work, by April 25, 2022 and the fifth component, that is, External Primer-Paint Work was to be done by May 25, 2022. Hence, the termination, about two and half months prior to the end of the work, was palpably illegal and unlawful. The mere allegation, that an inspection of the site on March 28, 2022 (which was two days prior to the date of completion of even the first phase of the extended work schedule) showed that the 3rd Floor Toilet Work was being taken up by the petitioner, does not provide any ground to the respondents to terminate the contract all on a sudden.

- 40.** Mere previous delay of the petitioner, in the absence of anything else, is not sufficient to attribute fault for such delay solely on the petitioner, particularly since the respondents themselves had gone on extending time on several occasions, admittedly without imposing penalty as provided for in the contract.
- 41.** On a more serious footing, the respondents also debarred the petitioner from participating in any procurement process under the West Police Housing and Infrastructure Development Corporation Limited for the next two years. Such debarment tantamounts to blacklisting. It has been held time and again in several judgments of the Supreme Court and different High Courts that blacklisting cannot

be effected without giving prior opportunity of hearing/show cause to the contractor.

42. Since, in the present case, the only provision of blacklisting is found in Clause 3(a), in the absence of any allegation of the satisfaction of the conditions of Clause 3, that is, the whole of the security deposit having become equal to the liability of compensation to be paid by the petitioner, such blacklisting is palpably *de hors* the contract.
43. In fact, Clause 3(a) merely confers power on the respondents to terminate the contract and not to debar the contractor. The sole provision of debarment is found in Clause 2B of the contract. However, it was too late in the day for the respondents to resort to Clause 2B, since there is no allegation at all that the petitioner failed to start work after 15 days from the date of commencement of the work. In fact, the work had progressed over two years after the date of commencement, and, as such, Clause 2B had not or could not be invoked by the respondents at all.
44. Hence, the obvious conclusion is that the debarment took place *de hors* the provisions of the contract.
45. Although it cannot be denied that an employer may, under certain circumstances, being so dissatisfied with a contractor on serious grounds that the employer does not want to continue with the said contractor, blacklist him; however, in such cases, it is the well-settled position of law that a Show-Cause Notice has to be issued to the contractor and the allegedly recalcitrant contractor has to be given an opportunity of hearing before passing an order of debarment. In the

present case, none of such modalities have been resorted to by the respondents, thereby palpably vitiating and rendering arbitrary the action of the respondents in issuing the termination and debarment letter to the petitioner.

46. As such, the termination of contract and debarment of the petitioner by the respondents *vide* communication dated March 29, 2022 and the follow-up action of the respondents in awarding the balance work to a third party are tainted and vitiated by contravention of law, natural justice and the terms of the contract.
47. Insofar as the scope of interference of this Court under Article 226 of the Constitution is concerned, in view of the above discussions, it is well-settled in law that the respondent-Authorities, which come within the purview of 'State' as contemplated in Article 12 of the Constitution, have a higher responsibility than an ordinary employer to be transparent, follow natural justice and give a free play to fair play in all its actions. Let alone being transparent, the impugned action here was palpably arbitrary and, as such, calls for interference by this Court.
48. Insofar as the nature of the work is concerned, the urgency of the same has been harped on by the respondents themselves all along. The administrative authorities' repeated warning regarding alleged slow pace of work has been cited even in the impugned termination letter. Hence, there cannot be any doubt that the renovation and upgradation of the head quarters of the traffic guard of Kolkata Police assumes a public character, since the said Authorities discharge

public duties, for which the basic amenities pertaining to the work-in-question are essentially and integrally in public interest.

- 49.** Hence, the impugned termination and debarment are justiciable in a judicial review.
- 50.** However, in the present case, even if the termination and debarment are set aside, the relief of the petitioner lies in damages, since the remaining work has already been awarded to a third party and has, in all probability, been concluded by it by now.
- 51.** In such circumstances, WPO No.2335 of 2022 is allowed, thereby setting aside the communication dated March 29, 2022 (Annexure P-23 at page 91 of the writ petition), whereby the petitioner's contract was terminated and the petitioner was debarred from participating in any procurement process under the respondent no.1-Corporation for the next two years. The petitioner will be at liberty to participate in all such procurement processes in future, being undeterred by the impugned communication dated March 29, 2022.
- 52.** In view of the termination of contract being, thus, set aside, the petitioner will be at liberty to approach the competent civil court claiming appropriate damages for such illegal termination. For the purpose of limitation for filing such suit, the commencement of such limitation period shall be deemed to start from this day, since the cause of action therefor ripens with this order.
- 53.** It is made clear that although the termination and the debarment have been set aside herein, this Court has not entered into the merits of the quantum of the damages and compensation which is to be

awarded to the petitioner. Such consideration is left to the competent civil court, if so approached by the petitioner, to be assessed by taking detailed evidence and upon taking into consideration all factors involved.

- 54.** There will be no order as to costs.
- 55.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)