

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present: - Hon'ble Mr. Justice Subhendu Samanta.

WPA 15978 of 2024
IN THE MATTER OF

NPG Rice Mill Private Ltd. & Anr.

Vs.

The State of West Bengal & Ors.

For the Petitioners : **Mr. Debabrata Saha Roy, Adv.,**
Mr. Pingal Bhattacharyya, Adv.,
Mr. Subhankar Das, Adv.,
Mr. Neil Basu, Adv.
Mr. Sankha Biswas Adv.

For the State : **Mr. Swapan Kr. Datta, Adv.,**
Mr. Dipankar Das Gupta Adv.

Reserved on : **30.07.2024**

Judgment on : **09.08.2024**

Subhendu Samanta, J.

1. Affidavit of service filed on behalf of the petitioners is taken on record.

2. Present petitioner No. 1 is a Private Ltd. Company running a rice mill and petitioner No. 2 is one of the Directors of the company. The present petitioner company is running the rice mill with an agreement with the Government to carry out

procurement of paddy at Minimum Support Price (MSP) directly from the farmers at Centralized Procurement Centres (CPC) notified by the Government or by setting up Direct Purchased Camps (DPC) to be fixed by the District Administration and conversion of the same into Customs Milled Rice (CMR) and delivery of CMR to various State godown(s) of Food & Supplies Department, Government of West Bengal. The agreement usually executed between the petitioner and the State for each Kharif Marketing Season (KMS), It is the case of the present petitioner that initially the agreement was executed on 29th October, 2018 for KMS 2018-2019. After completion of the term, another agreement was also entered into for Kharif Marketing Season (KMS) 2022 2023 on 21st of October, 2022. It is the case of the present petitioner that they are executing the terms of the agreement by procurement of Customs Milled Rice (CMR) and by delivering the same to the department concerned without any objection or complaint from any corner. Suddenly, the present petitioners were de-empanelled for the Kharif Marketing Season (KMS)

2023-2024. The petitioner made representation to the concerned State authority wherein the State authority verbally submits that one of the Directors of the Company was arrested by the Enforcement Directorate, thus, the company has been de-empanelled.

3. The petitioners made specific representation to the Government authority but their representation was not considered. Thus, he moved before this Court in a writ petition being WP No. 4764 of 2024. The writ petition was disposed of by a Co-ordinate Bench of this Court directing the Government authority concerned to dispose of the representation by giving a reasonable opportunity for being heard.

4. The Government authority has disposed of a representation vide impugned order dated 09.05.2024.

5. Being aggrieved by and dissatisfied with the said impugned order the instant writ petition has been preferred.

6. Mr. Debabrata Saha Ray Learned Counsel appearing on behalf of the petitioner submits that the

impugned order passed by the principle secretary has no basis. The order was actually on the basis of speculations. The order of not empanelling petitioners company for Kharif Marketing season (KMS) 2023-24 is purposive and illegal.

7. Mr. Saha Ray submits that it is true one of the director of the rice mill has been arrested by the Enforcement Directorate and in the jail custody but for that reason the entire rice mill cannot be held liable. He further submits that there are more than 500 employees engaged in the said rice mill, due to the non-empanelment of the present rice mill the livelihood of the said employees are at stake. Mr. Saha Ray further argued that by filing this writ petition petitioner undertake to deposit 100% bank guarantee over the value of the procured paddy. Thus if situation arises the government shall suffer no loss.

8. Respondent no. 1-3 and 8 used the affidavit against the writ petition it is the contention of the state that the petitioners have no legal right to claim for re-empanelment after expiry of the agreement for Kharif Marketing Seasons (2022-23) on 21.10.2023.

The said agreement between the petitioners and the Government is purely commercial in nature and for a specific period of one year. The said agreement has not been enumerated any auto-renewal clause for further period after its expiry. Empanelment, re-empanelment or renewal of agreement by way of entering into a fresh agreement is solely at the discretion of either party based on the requirement of conversion of paddy to rice for distribution in PDS etc; and as such the petitioner cannot claim re-empanelment in the list as a matter of Fundamental Right under Constitution of India. It is further stand of the state that the petitioner cannot force the State to enter into an agreement or renew an agreement. If the further case of the State Authority that since one of the director of the rice mill was arrested by a law enforcing tendency and is in jail custody, there was a reasonable apprehension that if the petitioner's rice mill is empanelled and the paddy is given to them and any point of time if mill and its godown is sealed or the paddy is seized or confiscated by the investigating

agency, then the Government's Paddy will be at stake and the public distribution shall be hampered badly.

9. It is the further case of the State that in such an event there is also possibility of the paddy lying the said rice mill being perished is as much as paddy perishable in nature causing huge public money involved in purchasing the said paddy at stake.

10. Learned Counsel, Mr. Swapan Dutta appearing on behalf of the State submits that the agreement itself suggest if there is any dispute between the parties the same shall be referred for adjudication to a sole arbitrator to be appointed by the Secretary to the Government of West Bengal Food & Supplies Department and the decision of the said Arbitrator shall be final and binding on the parties. Mr. Dutta Further argued that the present petition is not maintainable as there is option for the petitioner to refer the matter before the Arbitrator. Mr. Dutta further argued that a writ court cannot forces the state to enter into agreement when there is no specific provision for the same. Mr. Dutta further argued that the contract between the petitioner and the

Government is a purely commercial contract, no public element is involved in such contract so it is not amenable to the writ jurisdiction. Mr. Dutta clarified that the contract for preparation of rice from paddy is purely commercial transaction between the company and the State itself so the obligation, arising out of such contractual transaction is not amenable to the writ jurisdiction.

11. In support of his contention he cited a decision of Hon'ble Apex Court reported in **KK Suxena Vs. International Commission of irrigation on Drainage and Ors.** reported in (2015) 4 SCC 670

Within a couple of years of the framing of the Constitution, this Court remarked in Election Commission of India v. Saka Venkata Rao¹⁴ that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for "any other purpose" has been held to be included in Article 226 of the Constitution with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King's Bench in England. It is for this reason ordinary "private law remedies" are not enforceable through extraordinary writ jurisdiction, even though brought against public authorities (see Administrative Law, 8th Edn., H.W.R. Wade and C.F. Forsyth, p. 656). In a number of

decisions, this Court has held that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review.

12. Mr. Dutta further argued that the writ petitioners are only maintainable under three situations

- i) where the writ petition seek enforcement of any fundamental rights
- ii) Where there is failure of principle of natural justice or
- iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

Mr. Dutta argued that no fundamental rights of the present petitioner appears to be violated in this case, thus the instant writ petition is not maintainable.

13. In support of his contention he cited a decision reported in **MP State Agro Industries Corporation Development Limited Vs. Jahan Khan (2007) 10 SCC 88**

Before parting with the case, we may also deal with the submission of learned counsel for the appellants that a

remedy by way of an appeal being available to the respondent, the High Court ought not to have entertained his petition filed under Articles 226/227 of the Constitution. There is no gainsaying that in a given case, the High Court may not entertain a writ petition under Article 226 of the Constitution on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar.

14. Mr. Dutta further argued that the State has used affidavit in opposition against the writ petition but the petitioner not filed any exception or reply. Thus the allegation levelled in the affidavit of the State would be tantamount admitted.

15. In support of his contention he cited a decision report in **Choksi Tube Company Limited**

**Vs. Union of India and Ors. reported in (1997) 11
SCC 179**

On 10-3-1992 and 11-3-1992 this writ petition and the civil appeals were part heard before this Court. On 11-3-1992, the Court noted that no counter-affidavit had been filed to the writ petition; that, having regard to the averments in the writ petition, a counter-affidavit was necessary; and that the counter-affidavit should be filed within 8 weeks. No affidavit having been filed, the matter was adjourned on 30-10-1996. On 28-11-1996, it was adjourned again, it being made clear that this would be the last opportunity. Despite the clear terms of the order dated 11-3-1992, no affidavit in reply to the writ petition has been filed up to date. An affidavit has been filed in reply to the civil appeals. There too the ground of arbitrariness has been "taken and the reply is that a notification under Section 25(2) of the Customs Act is in the discretion of the Government and cannot be claimed as a matter of right.

16. Mr. Dutta further argued that as one of the directors of the company was arrested in a criminal case. So the entire company is liable for the said criminal offence committed by the Director.

17. Refuting the contention of Mr. Dutta, Mr. Saha Ray submits that at the present there is no existence of agreement between the petitioner and

State thus, the arbitration clause as appended in the said agreement cannot be enforced.

18. Mr. Saha Rau argued that the agreement of the State regarding the alleged private contract between the State and the present petitioner is not tenable in the eye of law. The entire purpose for the agreement is procurement of paddy and after preparation of rice, distribution of the rice through Public Distribution System (PDS). The entire act and action of the state is public-in-nature, and it is violative to the statute, thus, it is challenged before this court, so the argument advanced by the State is not justified.

19. Mr. Saha Ray further argued that as per Order On Procurement of Paddy and Delivery of CRM KMS 2023-24, the present petitioner being a rice mill distributed 100% of the procured rice through public distribution system, reasons thereof, petitioner is statutorily allowed to continue as per the provision of the Order without any specific new agreement. On that score, fundamental right of present millers has

been violated. Thus the instant petition is correctly amenable under the writ jurisdiction.

20. Mr. Saha Ray further argued that the petitioner has filed the writ petition seeking necessary relief, the same was objected by the State by filing report in the form of affidavit, all the contents of their affidavit was not admitted by the present petitioner by any pleadings thus it is not required at this stage to file a replay/exception. The observation of the Hon'ble Supreme Court in **Choksi Tube Company (Supra)** is distinguishable. Mr. Saha Ray further argued that the company itself is not liable for acts and action of any of the director of that company.

21. Heard the Learned Counsel. It is the contention of the State that the dispute between the parties may be referred for adjudication to the arbitrator. It is true that the agreement is not in existence thus, the clauses of such agreement are unenforceable.

22. It is argued by Mr. Datta that the preparation of rise from paddy by the present petitioner rise mill is purely commercial transaction between the company

and the State itself. Thus, the obligations arising out of contractual transaction is not amenable to the writ jurisdiction. In support of his contention Mr. Datta also cited decision of Hon'ble Apex Court reported in **KK Saxena (supra)** wherein the Hon'ble Apex Court is held that the writ jurisdiction is not amenable to "private law remedies"

23. In the present case the petitioner's rice mill was enlisted with the State by strength of an agreement to carry out procurement of paddy at minimum support price [MSP] directly from the farmers from centralise procurement centres (CPC) notified by the Government or by setting up direct purchase Commissions (DPC) to be fixed by the district administration and conversion and the same into customs mill rice [CMR] and delivery of CMR to various State godowns of Food and Supplies Department of West Bengal, for the purpose of smooth functioning of said conduction of PDS. The State passed a set of Orders of procurements on delivery of CMR for each Kharif Season, the agreement in question between the present petitioner miller with

the State is by the strength of the said Government Orders. The said agreement between the State and the miller cannot be said to be private or commercial in nature. Thus, the submission of Mr. Datta is not acceptable. The ratio of **KK Saxena (supra)** is not applicable. in this case.

24. It is argued by Mr. Datta that no fundamental right has been violated by any enlisting the petitioner's rice mill in the KMC 2023-24.

25. Order No. 12.18 of order for KMC 2023-24 is read as follows:

12.18. Those Rice Mills who have delivered 100% RCMR of KMS 2022-23 within the cutoff date of 30th September 2023 and have performed very good throughout the year; need not apply for empanelment for KMS 2023-24. However, the DLMC has to recommend their names. They have also to fulfil the condition of signing of agreement and submission of valid and prescribed Bank Guarantee for KMS 2023-24.

26. It is provided that when a rice mill delivered 100% RCMR of KMS 2022-23 within the cut off date of 30th September, 2023 and performance was very good throughout the year, they need not apply for

empanelment for KMS 2023 -24. It is the case of the petitioner that they have delivered 100% RCMR of KMS 2022-23 within the stipulated period. The State respondent also not denied their contentions, thus, the statutory right of the present petitioner being a rice miller was violated. Alleged action of the State Authority de horse the statutory rules. Thus, the submission of Mr. Datta is not at all acceptable.

27. It appears that the State has used affidavit by assigning the reasons for not enlisting the present petitioner in KMS 2023-24 that one of the director of the rice mill was arrested by the law enforcing agency and he is in jail custody thus it is apprehension of the State that if petitioner's rice mill is empanelled and paddy is given to them and any point of time if the mill and its godown is sealed there would be a huge loss to the State Exchequer.

28. Mr. Datta on that point argued that the offence committed by any of the director of the company liable the company for the same offences.

29. In support of his contention he referred Section 10 of the Essential Commodities Act 1955. To

ascertain the real bone of contention of this matter, Section 10 of the Essential Commodities Act 1955 is set out as follows:

10. Offences by companies.-(1) If the person contravening an order made under section 3 is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation-- For the purposes of this section,-

(a) "company" means any body corporate, and includes a firm or other association of individuals; and (b) "director" in relation to a firm means a partner in the firm.

Section 10 of the Essential Commodities Act enumerated two situations:--

Firstly- what would be the situation, when the entire Company has committed an offence and,

Secondly- when a director, manager or Secretary or other officers bearers has committed an offence under the Act. Section 10 deals with the contravention of an order made u/s 3 of EC Act by a company or by any of the member. Section 3 deals with the power of the government to control production, supply, distribution etc of Essential Commodities.

30. No pleadings were made by the State authority that the arrested director of the petitioner's company is accused of an offence due to the contravention of an order made u/s 3 of the Essential Commodities Act 1955. Under the Partnership Act, every partner is liable for an

act or omission of any of the partners; but in view of the specific provisions of Essential Commodities Act so far as the criminal liability of the partners for an offence punishable under Essential Commodities Act is concern, the prosecution is clearly under a duty or obligation to show that the accused partner has committed the offence in furtherance of doing the activities of the company and in charge, and was responsibility of the company in the conduct of the business of the company as well as the company. At that situation, the act of the director can liable entire company to be guilty for the contraventions.

31. In **Iridium India Telecom Limited Vs. Motorola INC (2011) 1 SCC 74**. The Hon'ble Apex Court has discussed the principle of 'alter ego', that is to say, the persons who are controlling affairs of respective company, because of their control position they represent the directing mind and will of each company; state of minds of those persons is the state of

mind of the companies. Thus they are described as 'alter ego' of their respective companies in **Eradium India**, the Hon'ble Apex Court has held **the Courts of England** have emphatically rejected the notion that a body corporate could not commit a criminal offence which was an outcome of an act of will needing a particular state of mind. The aforesaid notion has been rejected by adopting the doctrine of attribution and imputation. In other words, the criminal intent of the 'alter ego' of the Companies/ body corporate i.e. the person or group of persons that guide the business of the company, would be imputed to the corporation. The Hon'ble Supreme Court in **Sunil Bharat Mittal Vs. CBI, (2015) 4 SCC 609** set out the principle of vicarious liability of a director of a Company for alleged criminal act of the director or partner of the company and how it affects the Company itself.

**(iii) Circumstances
when Director/person in charge of
the affairs of the company can also**

be prosecuted, when the company is an accused person

42. No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

43. Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

44. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada*, the Court noted that if a group of persons that guide the business of the

company have the criminal intent, that would be f imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there 9 has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.

32. Thus, the Hon'ble Supreme Court has specifically discussed the 'alter ego' in **Sunil Bharati Mittal (Supra)** and has held that without being any sufficient evidence of active role of the director who is perpetrated the commission of offence cannot liable the entire Company for such personal criminal intent. Moreover, the "mens ria" of a person cannot involve the entire group of persons/ companies

to be held liable for the offence of any particular person.

33. Under the above observations I am of view that involvement of a director company in a criminal offence cannot itself held liable the entire company for such offence.

34. Furthermore, in the present case the provisions of order 12.16 and 12.17 of order for KMS 2023-24 required to be set out .

12.16. In case of existing Rice Mill, the case will be recommended by the DLMC after considering the performance of the Rice Mill and delivery of CMR in the KMS in which the Rice Mill previously worked in paddy procurement. DCF&S has to place full information regarding Rice Mill before the DLMC which shall form part of the minutes.

12.17. For recommendation, the DLMC will satisfy itself that the Rice Mill has not been a defaulter in paddy procurement and CMR delivery in earlier KMSs and that there is no criminal case against the Miller(s) under EC Act, 1955 or any other act related to purchase, processing, storage, transportation, sale of food grains or that the Miller(s) is not in litigation with the Department of Food & Supplies in any capacity. DLMC, on sufficient

reasons to be recorded in writing, may also not recommend/ reject a Rice Mill for empanelment due to poor performance, non-cooperation and compliance to instructions in last KMS.

35. So from the above Order it appears that the DLMC shall not recommend a miller for procurement of paddy if the rice mill was a defaulter in paddy procurement and CRS delivered in early KMS, and there is not criminal case against the miller (s) under EC act 1955 or any act related to purchase, processing, storage, transportation, sale of food grains or that the miller is in litigation with the department of Food and Supplies in any capacity. So three situations were discussed in order 12.17 wherein DLMC may not recommend the miller for next KMS the situations are :--

- 1) if the rice mill has been defaulter for procurement and CRM delivery in earlier KMS.
- 2) if there is an criminal case against the miller(s) under EC Act 1955, provisions of or any other

act related to purchase process, storage, transportation, sale of food grains.

3) the miller is any litigation with the department of food & supplies in any capacity.

36. It is the stand of the state that one of the director of the present petitioner was arrested by the Enforcement Directorate in a criminal case. Nothing has been pleaded by the State to substantiate the fact that the arrested director was an accused in the criminal case under EC Act 1955 or any other act related to purchase, processing, storage, transportation, sale of food grains.

37. So the law and Order itself is specifically clear that if any director of a rice mill is cited as an accused in a criminal case other than the EC Act, or other than the violation mentioned in Order 12.17, the DLMC is statutory liable to made recommendation of the said mill for next KMS.

38. Regarding apprehension of the State for future seizures or confiscation at the rice mill of the petitioner shall not appears to me a bar to enlist the present petitioner in the next KMS as the petitioner has made a specific undertaking to deposit 100% bank guarantee of the value of the procured paddy.

39. under the above observations, the impugned act and action of the respondent authority and the impugned order dated 09.05.2024 passed by the concerned authority appears to me not justified and improper in the true perspective, thus, the same is hereby quashed.

40. The state authority is directed to enlist the petitioner's rice mill for next KMS.

41. Under the above observations the instant writ petition is disposed of.

42. Connected applications are also disposed of. Any order of stay passed by this court during the pendency of the writ petition is hereby vacated.

43. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)