

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

RESERVED ON: 20.03.2024
DELIVERED ON: 10.04.2024

CORAM:

**THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

MAT/2395/2023

WITH

IA NO. CAN 1 OF 2023

IA NO. CAN 2 OF 2023

M/S. BPCL AND ARETPL JV AND OTHERS

VERSUS

EASTERN COALFIELDS LIMITED AND OTHERS

Appearance:-

Mr. Saptangshu Basu, Learned Senior Advocate.

Mr. Swapan Banerjee, Advocate.

Mr. Debottam Das, Advocate.

.....For the Appellants.

Mr. Debnath Ghosh, Advocate.

Mr. Syed Nurul Arefin, Advocate.

Mr. Reshmi Binayak, Advocate.

Mr. Syed Moyeenul Arefin

**.....For the Respondent
ECL Authorities**

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. This intra court appeal by the writ petitioner is directed against the order dated 13.10.2023 in WPA 19005 of 2023. The said writ petition was filed by the appellant to quash the communications sent by the respondent dated March 15, 2023, March 29, 2023, April 1, 2023, May 28, 2023, June 10, 2023, July 21, 2023, and August 1, 2023; to quash the respondent ECL authorities with regard to the invocation of the bank guarantee and for other incidental and ancillary reliefs. By the impugned order, the writ petition was dismissed.
2. Mr. Saptangshu Basu, Learned Senior Advocate appearing for the appellant submitted that the only issue that the appellant canvasses before this court in this appeal is the correctness of the order passed by the respondent banning the appellant from participating in any tender/business with the respondent for a period of three years. It is contended that the appellant has been punished twice by terminating the contract awarded to the appellant and another by banning of business of the appellant which is not permissible in law and it is hit by the principles of double jeopardy.
3. Further it is submitted that the order impugned in the writ petition does not reflect that the appellant's reply to the show cause notice has been considered at all. It is further submitted that the Learned Single Bench ought to have considered that the respondents failed to fulfil their reciprocal obligations apropos handing over of adequate lands and/or mining area and it is manifest that the respondents had no intention of fulfilling the reciprocal obligations under the contract. It is submitted that the entire

proceedings initiated by the respondents is without application of mind and without considering any of the responses given by the appellants to the show cause notices. The order impugned in the writ petition is devoid of reasons and therefore liable to be set aside.

4. Mr. Debnath Ghosh, learned advocate appearing for the respondent on the other hand sought to sustain the order passed in the writ petition by contending that the learned Single Bench rightly took into consideration the conduct of the appellant and the various notices which were issued by the respondent to the appellant and that the appellant had been afforded adequate opportunity to put forth their contentions and the order “banning of business” is fully justified and the terms and conditions of contract clearly envisages such an order to be made considering the facts and circumstances of the case on hand. Therefore, it is submitted that the order under appeal does not call for any interference.

5. We have elaborately heard the learned advocates for the parties and carefully considered and materials placed on record.

6. The respondent issued a e-tender notice dated 26.02.2020 inviting tenders from experienced contractors having Digital Signature Certificate issued from any agency authorized by the Controller of Certifying Authority, (CCA) Government of India for the working of hiring of HEMM for Extraction and Transportation of 16.70 L.Te of Coal, Removal and Transportation of 106.80 L.Cum of OB and Re-handling of 37.30 L.Cum OB at Nincha (Amkola Extention) OC Patch in Satgram Area. The appellant participated in the e-tender and submitted its bid and ultimately by order dated 09.07.2020 letter of approval was granted to the appellant accepting their offer. The

appellant by letter dated 21.07.2020 accepted the work order and assured their best services at all times. The requisite documentations were completed and by order dated 21.07.2020 work order was issued in favour of the appellant. The appellant had signed all the documents that were required to be signed thereby irrevocably accepting the terms and conditions stipulated in the various documents.

7. On 15.03.2023, a show cause notice for termination of the contract was issued by referring to Clause 9(a) and Clause 9(b) as per the provision of the Notice Inviting Tender (NIT) and agreement besides other penal action which was permissible under the agreement. This was followed by a second show cause notice dated 24.03.2023 invoking the very same provisions of the NIT and the agreement and also proposing other penal actions. The reasons for issuance of the show cause notice is on account of failure to achieve a monthly agreed quantity of 75% for a period of six consecutive months or for cumulative of six months within a continuous period of 18 months. The appellant submitted their reply to the second show cause notice by reply dated 27.03.2023 alleging that the failure to achieve the target was due to shortage of land and it is not their fault. It was further stated that due to insufficient land they were unable to deploy their machinery in proper places that affected their production. Further it was alleged that the appellant did not get actual weight of coal to be transported from the mines to the coal depot. With these averments the appellant requested the respondent to drop the proceedings.

8. Subsequently, notice for termination of contract with banning of business was issued on 01.04.2023. The notice states that it is in

continuation of the first show cause notice issued to the appellant dated 15.03.2023 and the second show cause notice dated 24.03.2023. Several allegations were made and the appellant was called upon to explain as to why penal action vide Clause 9(a) and Clause 9(b) of the NIT and agreement for termination of contract should not be initiated besides other penal actions including banning of business of contract. The appellant by email dated April 3, 2023 contended that the notice for termination of work and banning of business was not justifiable and that they have made substantial investments and they will be facing huge financial loss. The appellant reiterated that they are unable to perform the work at a fast pace due to contractual failures by the respondents to make adequate prior arrangement for rehabilitation of the local village people over whose land the project work was to be carried out, large scale and frequently disruptive agitation by local people disrupted the flow of work and gradually slowed down and affected the progress of the work. After the reply was received, the respondent provided an opportunity of personal hearing to the appellant in which one Mr. Bhubaneshwar Pathak participated. The Minutes of personal hearing have been reduced into writing which has been appended in page 205 of the stay petition. However, one of the pages of the said minutes is missing and the learned advocate appearing for the respondent produced the full text of the minutes of the personal hearing held on 06.04.2023.

9. Subsequently another notice dated 28.05.2023 was issued regarding poor performance. After setting out certain facts, the appellant was directed to submit his explanation as to why the respondent should not start the process of termination of contract with banning of business again. The

appellant by communication dated 02.06.2023 requested for release of payment/part payment against the work order. There is also reference to a Title Suit No. 328 of 2023 filed before the Civil Court at Asansol and it is stated that an interim order has been passed by the said court maintaining status quo of the scheduled account. Further the appellant stated that they are taking all efforts to meet the expectations of the respondents and carrying out the work of OB removal and coal production. The appellant sought for release of the payments/part payment for the months of March 2023, April 2023 and May 2023.

10. By another communication dated 02.07.2023 addressed to the agent of Nimcha Extension OC Patch stating that the appellant was starting work from 20.04.2023 and stated that from the beginning, they are trying their best, but due to development work and some local issues the production was going slow and that the maximum issues are resolved and they will reach the target within one or two weeks. By another letter dated 10.06.2023 addressed to the agent, the appellant stated that the local employees have stopped coal production on account of non-payment and requested the respondent to resolve the issues. This request was reiterated by letters dated 14.06.2023, 16.06.2023, 21.06.2023, 07.07.2023, and 09.07.2023. Ultimately by order dated 21.07.2023, the contract was terminated along with imposing penalty and debarring the appellant for a period of three years from participating in future tenders of the respondent.
11. The sheer anchor of the argument of the learned Senior Advocate appearing for the appellant is that the explanation offered by the appellant was not considered and the appellant having banned the respondent had

imposed a double punishment that is not only terminating the contract and imposing penalty but also banning the appellant from participating in any tender for a period of three years. It is submitted that the order banning the appellant from participating in any future tender for a period of three years is in violation of principles of natural justice in as much as no show cause notice was issued in this regard and the order passed by the respondent is a non-speaking order without taking into consideration any of the replies given by the appellant and without taking note of the fact that the respondent had failed to fulfil the reciprocal obligations cast upon them under the contract.

12. The Hon'ble Supreme Court has time and again cautioned that the courts while exercising jurisdiction under Article 226 of the Constitution of India should seldom interfere in contractual matters. The scope of interference has been restricted and limited to the decision making process and not to the decision taken by the authorities. Therefore, we are required to see as to whether the appellant had adequate opportunity to put forth their grievance.

13. As noted above, the first show cause notice dated 15.03.2023 proposed termination of contract by referring to Clause 9(a) and 9(b) of the NIT and the agreement including other penal action. The same was reiterated in the second show cause notice dated 24.03.2023. Thus, the appellant cannot be heard to say that they were unaware about the powers which are exercisable by the respondent in the event of breach of contract. The appellant having agreed to the terms and conditions of contract is irrevocably bound by them. It cannot be disputed by the appellant that the

terms and conditions of the contract envisages not only termination of the contract in the event of default but also imposition of penalty and banning of business. Therefore, the wordings in the first and the second show cause notice makes it amply clear that the appellant was informed that apart from termination other penal action is also liable to be taken. In the notice dated 01.04.2023, this was explicitly stated and the said notice is in continuation of the first and the second show cause notices dated 15.03.2023 and 24.03.2023. Therefore, it has to be held that the appellant was fully aware about what action the respondents can take in terms of the contract in the event of a default. After the third notice, the appellant was afforded an opportunity of personal hearing. The minutes of the personal hearing have been recorded in writing and supplied to the appellant. The appellant's representative participated in the meeting and had signed the minutes. The minutes are in the form of questions and answers of which the answer to question No. 11 would be relevant which is quoted as herein below:-

Q11. Please pen down your thoughts regarding your future course of action regarding the project?

Ans: Whatever the deficiencies are, I will do my best to rectify it and will improve managerial skill too so that hired patch run smoothly and production target will be achieved. I want also to add here that currently our maximum machineries are under breakdown due to lack of proper maintenance. It will be kind enough to give me some time atleast 01 month so that the machineries can be maintained properly. In the meantime I will also set up the required manpower according to the mining condition so that the deployed machineries as per NIT. Apart from that, I will also ensure that no question

regarding availability of diesel will arise in coming future.

Lastly, I want to state that we would like to start production from 25th April, 2023 and will give my level best to achieve the targeted production given by the Company and if I have failed in producing coal and removing OB as per the target given, then the Management is free to proceed in continuation with the above mentioned letter (Ref no NIM/AGT/23/3457 dated 01.04.2023) for termination of contract with banning of business and the same will be accepted by me.

14. The final submission of the appellant has recorded in the minutes is as follows:-

Final Submission by the Contractor:

This is my humble request to give me the one last chance to operate the Mine with all my potential and available resources as per NIT's Terms and Conditions. I also want to hereby request you to give us relaxation for atleast 03 months in targeted coal production and OB removal by taking a lenient view as we are in the starting phase of re-developing of our Company and we need some time to strengthen it. I am also ensuring you that we will achieve the targeted production alongside the backlog production of relaxation months also.

15. From the above response made on behalf of the appellant, it is evidently clear that the appellant has pleaded inability and has also agreed to operate the mine with all potential and available resources as per the NIT terms and conditions and also requested the respondent to give them relaxation for at least three months in targeted coal production and OB

removal by taking a lenient view as they are starting the face of redeveloping their company and they require some time to strengthen it. Thus, the appellant cannot plead that adequate opportunity was not granted to them by the respondents before ultimate order of termination of contract and banning of business was passed. Apart from that, in terms of the conditions of the contracts disputes have to be resolved through arbitration. We are informed that the appellant has already invoked the arbitration clause with regard to the termination of the contract. If that be so, a piecemeal challenge to the common order passed by the respondent terminating the contract imposing penalty and banning the appellant from participating in any tender for a period of three years cannot be entertained. That apart, whether the respondents were guilty of not fulfilling the reciprocal obligations or not is a factual issue which cannot be adjudicated in a writ petition based on affidavits. As we are satisfied that the appellant had been afforded adequate opportunity to put forth their submissions and also afforded an opportunity of personal hearing, we find the case on hand to be not one where there has been any violation of principles of natural justice.

16. The Hon'ble Single Bench in paragraph 11 of the impugned order has taken note of the decision of the Hon'ble Supreme Court in **Gorkha Security Services Versus Government (NCT Of Delhi) and Others** ¹ wherein the Hon'ble Supreme Court had pointed out that once show cause notice is given and opportunity to reply to the show cause notice is afforded, it is not even necessary to give an oral hearing. The Hon'ble Single Bench rightly noted that in the present case, the appellant had an opportunity of

¹ (2014) 9 SCC 105

not only submitting their reply to the show cause notice but also an opportunity of personal hearing and therefore it cannot be said that the principles of natural justice were violated on the ground of non-compliance of the doctrine of *audi alteram partem*.

17. The Hon'ble Single Bench rightly noted that the respondents have mentioned in the show cause notice that it is in continuation of the earlier notices, they apprise the appellant that they had miserably failed to keep its commitments in terms of the OB removal and coal production. Further in the same notice the respondents have mentioned that the level of performance of the appellant is unacceptable and falls well below the standard set forth to achieve the targeted production given by the appellant vide their letter dated from April 06, 2023. Thus in the light of the above scenario, the appellant was called upon to submit their written explanation as to why the respondents should not start the process of termination and banning of business again.

18. The Hon'ble Single Bench rightly noted that the term "again" does not waive the previous notices but rather resumes to exercise from where it was left in terms of the previous notices which was enabled by none other than the appellant's own admission in the reply to the question No. 11 in the personal hearing given to the appellants. The Hon'ble Single Bench rightly held that the writ court can only scrutinise the decision making process and whether there was any palpable arbitrariness, malafides or unreasonableness in the action impugned, and on facts found that none of the yardsticks have been met in the present case to call for interference with

the decision of the respondents as there is no flaw in the decision making process.

19. The learned Senior Counsel appearing for the appellant placed reliance on the decision of the Hon'ble Supreme Court in ***M/s. Erusian Equipment and Chemicals Limited Versus State of West Bengal and Another***², wherein the Hon'ble Supreme Court held that blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on blacklist.

20. In the preceding paragraphs, this court has taken note that in the show cause notices, the allegations have been clearly spelt out and the tenor of the replies submitted by the appellant does not categorically take a stand to justify their contention that the respondents failed in their reciprocal obligations. Rather the response/reply to the show cause notices are vague without any specific details. As held by the Hon'ble Supreme Court, the appellant had been granted an opportunity to represent their case and an opportunity of personal hearing has also been granted to the appellant and the response of the appellant during the personal hearing clearly shows that they have accepted to the fact of non-performance to the required standard. Therefore, the decision in case of ***Erusian Equipment and Chemicals***

² (1975) 1 SCC 70

Limited does not support the case of the appellant but would rather assist the case of the respondents.

21. For all the above reasons, we find no good grounds to interfere with the order passed by the Hon'ble Single Bench and accordingly the appeal fails and is dismissed. No costs.

(T.S. SIVAGNANAM, C.J.)

I Agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A – SACHIN)

