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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P.(I) (COMM.) 264/2023**

M/S FORTUNE GROUP

.....Petitioner

Through: Ms. Kiran Suri, Sr. Advocate
with Ms. Vidushi Garg, Advocate

versus

CHIEF ENGINEER PWD (NH) & ANR.Respondent

Through: Ms. K. Enatoli Sema and Ms.
Chubalemla Chang, Advocates for R1
Mr. Amit Kumar Singh and Mr. Prang
Newmai, Advocates for R2

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

08.07.2024

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1. Ms. Kiran Suri, learned Senior Counsel appearing for the petitioner, at the outset, restricts her relief for the purposes of this petition to prayer (b) in this petition, which seeks a stay of notice of debarment dated 6 July 2023 issued by Respondent 1 (the State of Nagaland), admittedly on the instructions of the Ministry of Road Transport and Highways¹.

2. Respondent 1 is represented by Ms. K. Enatoli Sema and the MoRTH is represented by Mr. Amit Kumar Singh.

¹ "The MoRTH" hereinafter



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3. I have heard learned counsel for the parties at considerable length.

4. Ms. Suri, charts the course of events which resulted in the present petition coming to be filed. On 6 August 2020, a Request for Proposal² was issued by the MoRTH, inviting proposals from parties who wanted to bid for “Widening of existing single/intermediate lane road to 2 lane road from Km 101.00 to Km 125.00 on NH-61 in the State of Nagaland”. Consequent on the petitioner emerging as the successful bidder, Letter of Acceptance (LOA) was issued to the petitioner on 19 April 2021 by the Government of Nagaland as a representative of the MoRTH. As required by Clause 2.21 of the LOA, the petitioner furnished a Performance Bank Guarantee and an Additional Performance Bank Guarantee issued by the Punjab National Bank³ for ₹ 4,06,83,000/- and ₹ 6,04,34,500/- respectively. PNB issued the bank guarantees on 7 August 2021 and they were furnished by the petitioner to Respondent 1 on 11 August 2021. Consequent thereupon, the Engineering Procurement and Construction (EPC) Contract was awarded to the petitioner on 19 July 2021. On 5 October 2021, the PNB wrote to the Government of Nagaland confirming having issued the two bank guarantees which were furnished by the petitioner on 11 August 2021.

5. Nearly a year and half thereafter, on 24 January 2023, a show cause notice was issued to the petitioner by the Government of Nagaland on instructions of the MoRTH, relying on two

² “RFP” hereinafter



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communications dated 17 December 2022 and 19 January 2023 issued by the PNB to the effect that two bank guarantees furnished by the petitioner on 11 August 2021 had been issued by some miscreants. The petitioner responded to the show cause notice on 4 February 2023 denying the allegations.

6. Clause 23.1 of the EPC permits a party, who is in breach of the contract, a cure period of 60 days to cure the default. The petitioner therefore wrote on 13 March 2023 to the Government of Nagaland seeking permission to substitute the two bank guarantees which had been furnished by the petitioner on 11 August 2021, in order to avoid any controversy. The Government of Nagaland initially granted permission to the petitioner to substitute the bank guarantees on 24 April 2023, but later withdrew the permission on 3 May 2023, admittedly at the instance of the MoRTH. The petitioner again requested for permission to substitute the bank guarantees on 9 May 2023. Further, on 17 May 2023, the petitioner issued a cure notice to Government of Nagaland with a copy marked to the MoRTH.

7. Despite this on 26 May 2023, the Government of Nagaland issued a notice to the petitioner expressing its intent to terminate the EPC. The petitioner responded on 1 June 2023, denying the allegations in the notice dated 26 May 2023. The Government of Nagaland, however, terminated the EPC on 3 July 2023.

8. This was followed by the notice dated 6 July 2023 debarring the

³ "PNB" hereinafter



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petitioner from being awarded any work connected with the PWD or MoRTH for a period of two years. Thereafter in July 2023, the subject work was re-tendered by the Government of Nagaland to another contractor.

9. Learned counsel for the respondents are *ad idem* that all decisions taken by the Government of Nagaland in the present case were at the instance of the MoRTH.

10. Subsequently, an investigation has been initiated by the Central Bureau of Investigation⁴, into the allegation that the bank guarantees issued by the PNB and furnished by the petitioner were fraudulent.

11. Clause 26 of the EPC permits disputes that arise thereunder to be resolved by arbitration and grants exclusive jurisdiction to Courts at Delhi to deal with the matter.

12. It is, in these circumstances, that the petitioner has approached this Court by means of the present petition under Section 9 of the Arbitration and Conciliation Act, 1996⁵, seeking pre-arbitral interim relief.

13. Ms. Kiran Suri, learned Senior Counsel for the petitioner, very fairly states at the outset that it would be more apposite that other reliefs, claimed in this petition, are agitated in arbitral proceedings and therefore confines her relief, for the purposes of this petition, to

⁴ CBI



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interim stay of the notice of debarment dated 6 July 2023.

14. During the course of these proceedings, this Court, by order dated 15 February 2024, directed the MoRTH to place on record an affidavit indicating whether the petitioner or its officers were subject matter of the CBI investigation which had been initiated into the allegation that the bank guarantees furnished by the petitioner had been fraudulently issued by miscreants.

15. In compliance with the said direction, the MoRTH has placed on record an affidavit dated 16 April 2024 under the cover of an index dated 18 April 2024 in which it is stated, in para 3, thus :

“It is stated that information received from Investigating Officer of CBI states that *no role of M/s. Fortune Group / its officers in the issuance of bank guarantees surfaced during the investigation. It has further been informed that investigation has been completed and charge sheet has been filed on 30 December 2023 against M/s. Heyee Global Enterprises Pvt. Ltd. in the Court of Sh. Prashant Kumar, Ld. Special Judge, CBI cases, Rouse Avenue District Courts, New Delhi.*

A copy of the communication dated 10.4.2024 received from Deputy Superintendent of Police (IO) CBI is marked and annexed as Annexure R/1.”

(Emphasis supplied)

16. The letter dated 10 April 2024, received from the CBI, to which the afore-extracted para 3 alludes, has also been placed on record by the MoRTH with the affidavit ,and reads thus :

“To,
The Chief Engineer,
Public Works Department-NH
NPWD Building,
Kohima, Nagaland-797001

⁵ “The 1996 Act”, hereinafter



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Email – cenhnagaland@gmail.com

Sub: Investigation of case RC 074 2022E0006, BSFB, CBI,
New Delhi – PNB Fraudulent Bank Guarantee Case – reg.

Sir,

Kindly refer your letter No.CE/NH/NH(o)/2020-21/108/Gen/13 dtd. 05.04.2024 of Er.MZ AKHO, Chief Engineer, PWD-NH, Nagaland, Kohima, related to the status of M/s. Fortune Group or its officers in the investigation of the case RC 074 2022E0006, BSFB, CBI, New Delhi – PNB Fraudulent Bank Guarantee Case and stage of the said case.

2. *It is informed that no role of M/s. Fortune Group / its Officers, in issuance of fraudulent bank guarantees, surfaced during the investigation of the case mentioned above.*

3. *It is also informed that investigation of the case mentioned above has been completed and a charge sheet was filed on 30 December 2023 against M/s. Heyee Global Enterprises Pvt. Ltd. and others, in the court of Sh. Prashant Kumar, Ld. Special Judge, CBI cases, Room No.607, Rouse Avenue District Courts, New Delhi.*

Yours faithfully,

(Rakesh Kumar)
Dy Supdt. Of Police (IO)
CBI, BSFB, New Delhi.”
(Emphasis supplied)

17. Having heard learned counsel for the parties and examined the material on record, it is seen that the decision to debar the petitioner as contained in the notice dated 6 July 2023 was predicated on Clause 4.1 of the RFP⁶ which, in turn, contemplates debarment as taking place

⁶ The Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process and subsequent to the issue of the LOA and during the subsistence of the Agreement. Notwithstanding anything to the contrary contained herein, or in the LOA or the Agreement, the Authority may reject a BID, withdraw the LOA, or terminate the Agreement, as the case may be, without being liable in any manner whatsoever to the Bidder, if it determines that the Bidder, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process. In such an event, the Authority shall be entitled to forfeit and appropriate the BID Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/or the Agreement, or otherwise.

Signature Not Verified

Digitally Signed By: A.C.M.P.(I) (COMM.) 264/2023
KUMAR
Signing Date: 09.07.2024
16:49:57

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Signature Not Verified

Digitally Signed
By: CHANDRASHEKHARAN
HARI SHANKAR
Signing Date: 09.07.2024
16:48:00



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where it is determined that the bidder directly or indirectly or through an agent, engages in corrupt or fraudulent practices among other things. “Fraudulent practice” is defined in clause 4.3(b) of the RFP as meaning “a mis representation or omission of facts or suppression of facts or disclosure of incomplete facts *in order to influence the bidding process.*”

18. Ms. Suri points out, quite correctly, that, in any event, there is no allegation that the petitioner had resorted to any kind of fraudulent practice to influence the bidding process.

19. That apart, as things stand today, the CBI has ultimately exonerated the petitioner as well as its officers from any role in the issuance of the fraudulent bank guarantees. After investigation, a charge sheet was filed on 30 December 2023 in which the petitioner was not arrayed; indeed Ms. Suri points out that the petitioner was not even a party in the FIR initially filed by the CBI. This communication from the CBI has been cited by the MoRTH in para 3 of its affidavit dated 16 April 2024 issued as per the directions of this Court. In the said para, it is clearly stated that no role, either of the petitioner or of any of its officers, in the issuance of the allegedly fraudulent bank guarantees, surfaced during the CBI investigation.

20. That being so, it is obvious that the requirement of *a priori determination* that the bidder directly or indirectly engaged in corrupt or fraudulent practices, which is the *sine qua non* for debarring the bidder as per Clause 4.1 of the RFP, is itself absent in the present case.



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21. The Supreme Court has held time and again that debarment is an extreme penalty which partakes of the character of civil death. One may refer in this context to the judgments in *S.N. Mukherjee v. U.O.I.*⁷, *Mekaster Trading Corporation v. U.O.I.*⁸, *Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited*⁹ and *UMC Technologies Pvt Ltd v. FCI*¹⁰.

22. In view of the aforesaid circumstances, the petitioner is clearly entitled to interim relief against the notice of debarment dated 6 July 2023, pending the arbitral proceedings to be initiated in future.

23. For the aforesaid reasons, the operation of the notice of debarment dated 6 July 2023 shall stand stayed, and the respondents shall restrain from acting on the basis of the said notice against the petitioner. This interim protection shall continue during the arbitral proceedings which may come to be instituted and shall remain subject to further orders which may be passed in the said proceedings.

24. The petition is allowed in the aforesaid terms with no orders as to costs.

C.HARI SHANKAR, J

JULY 8, 2024/yg

Click here to check corrigendum, if any

⁷ (1990) 4 SCC 594

⁸ (2003) SCC Online Del 794

⁹ (2014) 14 SCC 731

¹⁰ (2021) 2 SCC 551