IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

<u>WPA No. 5558 of 2025</u>

M/s. IDL Explosives Limited & Ors.
Vs.
Union of India & Ors.

For the writ petitioners	:-	Mr. S. N. Mookherjee, Sr. Adv. Mr. Shubrojyoti Mookherjee, Adv. Mr. Neelesh Choudhury, Adv. Ms. Anuradha Poddar, Adv.
For the UOI	:-	Mr. Indrajit Dasgupta, Adv. Mr. Suryaneel Das, Adv.
For the respondent nos. 2 & 3	:-	Mr. Ayan Poddar, Adv. Mr. Soham Dutta, Adv. Ms. Khusboo Ruia, Adv.
Hearing concluded on	:-	18.03.2025
Judgment on	:-	10.04.2025

<u>Amrita Sinha, J.:-</u>

1. The order of ban of business passed by Coal India Limited (CIL) on 2nd July, 2024 was challenged by the petitioners in an earlier writ petition being no. WPA 1370 of 2025 which stood disposed of by the Court after hearing the parties on 20th January, 2025 directing the Chairman, CIL to decide upon the prayer of the petitioners seeking withdrawal or modification of the order of ban in accordance with the prevailing guidelines upon giving the petitioners an opportunity of hearing.

2. The prayer seeking review/ modification/ withdrawal of the order of ban was considered and rejected by the Chairman and the order of ban was upheld. The reasoned order passed by the Chairman, CIL on 27th February, 2025 is impugned in the instant writ petition.

3. The Chairman was of the opinion that the Local Content Certificate relied upon by the petitioners contained false declaration and the said certificate was issued on the basis of estimates and not on actual consumption as per the books of account of the company. All locations as mentioned in the Local Content Certificate were not considered. The purchase manual will not be applicable as there were more than three bidders in each category of the explosive products.

4. The petitioners participated in a tender process in response to a notice inviting tender-cum-e-auction dated 23rd July, 2021 for conclusion of running contracts and empanelment as reserve running contract holders for a period of two years from the date of issue of the running contract for supply of bulk explosives to all the subsidiary companies of CIL.

5. The tender document contained detailed instructions to bidders. In order to be eligible, a bidder has to fulfil the terms and conditions as mentioned under various sections of the tender document. Purchase preference is to be given under 'Make in India' policy of the Government of India.

6. As per the tender document 'Class-I local supplier' means, a supplier whose goods and/or services offered for procurement has Local Content equal to or more than 50%; 'Local Content' means the amount of value added in India which shall be the total value of the item procured (excluding net domestic indirect taxes) minus the value of imported content in the item (including all custom duties) as a proportion of the total value, in percent. Local Content will not include services such as transportation, insurance, installation, commissioning, training and after-sales services support like AMC/CMC etc. as local value addition.

7. Bidders offering imported products will fall under the category of non-local supplier and they cannot claim themselves as Class-I local suppliers/Class-II local suppliers.

8. For the purpose of verification of the Local Content, the Class-I local supplier/Class-II local supplier is required to provide a certification from the statutory auditor or cost auditor of the company or from a practising cost accountant or practising chartered accountant giving the percentage of local content. The certificate ought to indicate the details of the locations where the local value addition is made and also UDIN number wherever amended by statutory bodies. The format of the certificate is enclosed as annexure to the tender document and the same is to be submitted by the company as a whole in respect of the offered product and uploaded in 'COMMERCIAL DOCS'.

9. The instruction to bidders also mentions that wilful suppression of facts or furnishing wrong information, false declaration or manipulated or forged document may lead to ban of business. The period of banning is to be decided on the gravity of the offence and the quantum of loss suffered by CIL or the subsidiary company. For wilful suppression of facts or for furnishing wrong information or false declaration, the period of ban shall not exceed two years.

10. The other terms and conditions of the tender document mentions that the provisions of CIL produce manual and its subsequent amendments available on CIL website shall also be applicable, if not specified otherwise in the NIT.

11. A complaint was lodged against the petitioners as regards the Local Content Certificate relied upon by it. The Local Content Certificate relied upon by the petitioners was verified by the external expert engaged by CIL. On verification it was found that the Local Content Certificate submitted by the petitioners was not in accordance with the terms and conditions of the tender document.

12. It was found that the certificate issued by the cost auditor in favour of the petitioners certifying 51.40% local content in the offered product was incorrect and not in accordance with the requirement of the tender document. The period for which the Local Content Certificate was issued was also not mentioned.

13. The offered product of the petitioners was EMULKING-200. The certificate of the petitioners covered all three finished products whereas the certificate, as per the tender document, was required to be submitted in respect of the offered product only.

14. It was further noted that two locations were not mentioned in the certificate but the offered product was sold from one of those two locations. The said locations ought to have been included in the certificate. Four locations, though included in the certificate, no value addition was made at those locations based on the data submitted to the authority. The details of the locations at which the local value addition has been made were not supplied. The disclosure of details of the locations at which the local value addition has been made was not in compliance of the terms and conditions of the notice inviting tender.

15. The external expert also opined that for the purpose of issuance of the certificate, imported ammonium nitrate price has been considered on the basis of the budgeted estimates of the purchase price of ammonium nitrate. It has been assumed that the imported ammonium nitrate consumption is 47% of the landed cost of ammonium nitrate and the same applies to all the manufacturing bulk explosive plants. The basis of excluding transportation cost from port to factory location was in deviation of the accounting policy for valuation of inventories.

16. A detailed show cause notice was issued to the petitioners clearly mentioning that the actual Local Content for the offered product was lower than the claimed Local Content for which the petitioners ought to be disqualified from being a Class-1 local supplier.

17. CIL found that the petitioners made false declaration for which the penalty of ban of business for a period of two years may be attracted. To allow the petitioners an opportunity of hearing to defend as to why the penalty of imposing ban of two years from performing business with the company will not be imposed, a show cause notice was issued. The petitioners replied to the show cause and refuted the charges levelled against it. An opportunity of hearing was granted to the petitioners and thereafter the order of ban has been imposed. The petitioners have been banned for a period of two years from award of any contract by CIL or its subsidiaries. The order of banning has not been made applicable for the ongoing running contract.

18. Learned senior counsel representing the petitioners submits that there is a provision for relying upon estimates for the purpose of obtaining the Local Content Certificate. The petitioners availed the same. The order of banning has been passed without considering as to whether CIL suffered any loss or not. Maximum period of ban has been imposed upon the petitioners without considering the gravity of the offence. The principle of proportionality at the time of imposing the maximum punishment of ban, has been ignored.

19. It has been submitted that ammonium nitrate was not readily available either in the market or in the places mentioned in the certificate relied upon by the petitioners because of the ongoing Ukraine war for which the petitioners had to invest huge sum of money to procure the same at the given period of time. The petitioners provided all the relevant data to the chartered accountant and relying on such data the Local Content Certificate has been issued. It has been denied that the petitioners either made any false submission or supplied any false data for the purpose of registering itself as a Class-I contractor.

20. Two locations which were not mentioned in the Local Content Certificate were inadvertently missed out for which CIL did not suffer any loss. It has been submitted that because of such minor inadvertence, the petitioners ought not to be banned from performing business for two years.

21. Prayer has been made to set aside the order of ban and consequently permit the petitioners to participate in the bidding processes floated by CIL and its subsidiaries.

22. Learned counsel for the petitioners relies on the judgment delivered by the Hon'ble Supreme Court in ***Isolators and Isolators through its proprietor Sandhya Mishra –vs- Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd. & Anr.*** reported in ***(2023) 8 SCC 607*** and ***Kulja Industries Ltd. –vs- Chief General Manager,***

Western Telecom Project Bharat Sanchar Nigam Limited & Ors. reported in ***(2014) 14 SCC 731***.

23. Learned counsel representing the respondents opposes the prayer of the petitioners. It has been submitted that the petitioners intentionally and deliberately relied upon incorrect Local Content Certificate. The petitioners were fully aware that it did not comply the terms and conditions of a Class-I contractor but it intentionally and deliberately relied upon the said certificate to obtain preferential treatment from the respondent.

24. The act of the petitioners is contrary to the terms and conditions of the tender document. Enough opportunity was given to the petitioners to produce document in support of its stand. The petitioners were given fair opportunity of hearing and the case of the petitioners was duly considered by the Chairman in terms of the order passed by the Hon'ble Court but thereafter it was found that the certificate was deliberately relied upon by the petitioners to obtain the preference which is only meant for the Class-I contractors. Relying on such false/incorrect statement the petitioners ought not to be granted relief.

25. The Joint Financial Rules, 2017 published by the Government of India as updated up to 31st July, 2024 has also been relied upon by the petitioners and the procedure for calculating the Local Content or Indigenous Content or Domestic Value Addition published by the Institute of Cost Accountant of India has been produced.

26. The respondents rely upon the order of the Ministry of Commerce and Industry, Department for Promotion of Industry and Internal Trade (Public Procurement Section) dated 4th June, 2020 which highlights the Public Procurement (preference to Make in India) Order, 2017.

27. The order of the Ministry of Commerce and Industry mentions that it is the policy of the Government of India to encourage 'Make in India' and promote manufacturing and production of goods and services in India with a view to enhancing income and employment, and whereas; procurement by the Government is substantial in amount and can contribute towards the policy objective, and whereas; local content can be increased through partnerships, cooperation with local companies joint ventures with Indian suppliers increasing the participation of local communities in service and training them.

28. The purchase preference as mentioned in the order of the Government mentions that purchase preference shall be given to Class-1 local supplier in procurements undertaken by procuring entities. The order of the Ministry clearly mentions that false declaration will be in breach of the code of integrity under the General Financial Rules for which a bidder or its successors can be debarred for up to two years along with other actions as may be permissible under law.

29. It has been submitted that only the administrative department has the power to grant exemption and to reduce minimum local content. As the petitioners have been found to have relied upon a certificate which

does not contain the proper figure, accordingly, the said certificate relied upon by the petitioners cannot be accepted. The petitioners cannot be treated as a Class-1 bidder and as such the order of ban for the maximum period is just and proper in the instant case.

30. The authority contends that neither the order of ban nor the subsequent order passed by the Chairman suffer from any inconsistency.

31. Prayer has been made to reject the writ petition.

32. I have heard and considered the submissions made on behalf of both the parties and have perused the materials on record.

33. The Notice Inviting Tender-cum-e-Reverse Auction is annexed to the writ petition. The tender document comprises various sections including a section categorized as instruction to bidders. The said section lays down the provisions for eligible bidders. The purchase preference under the made in India policy is prescribed therein. The definitions of the Class-I local suppliers, Class-II local suppliers, Local Content are all mentioned therein.

34. The requirement of providing a certificate from the statutory auditor or cost auditor of a company for verification of the Local Content is also mentioned in the instruction to bidders. The format of the certificate to be submitted was also a part of the bid document.

35. The portion in the bid document relating to ban of business mentions about wilful suppression of fact or furnishing wrong information or false declaration. The period of ban is to be based on the gravity of the offence and the quantum of loss suffered by CIL or the subsidiary companies.

36. The order of ban was challenged by the petitioners in the earlier writ petition. The Court was pleased not to interfere with the same, however, the Court passed order directing the Chairman, CIL to consider the request made by the petitioner seeking review of the order of ban. The authority considered the petitioner's prayer for modification of the order of ban but stuck to its original decision to ban the petitioner for a period of two years.

37. The ground for which the petitioner has been banned, i.e. submitting false declaration/certificate carries a maximum ban period of two years. The period of ban is to be decided based on the gravity of the offence and the quantum of loss suffered by CIL. The petitioner alleges that the principle of proportionality while imposing punishment has been ignored.

38. Admittedly, in the instant case, the Chairman, CIL in the impugned order has mentioned about the reasons for banning the petitioner but has not given any reason as to why the ban is to be imposed for the maximum period. The impugned order also does not mention as to

whether CIL or any of its subsidiaries suffered any loss on account of submission of false declaration/certificate by the petitioner.

39. The authority may not accept the explanation or the interpretation given by the petitioner as regards the certificate relied upon by it; but the authority would be required to give reason as to why the maximum period of ban is to be imposed. The very fact that the tender document prescribes only the outer limit of the ban period but does not stipulate a fixed time period for the ban to be applicable, implies that there is scope for banning an offender for a period less than the prescribed outer limit.

40. Had the tender document specified that for the subject offence the ban shall be applicable for a period of two years, then there would not have been any scope for reduction of the ban period. However, since the tender document prescribes that the ban period shall not exceed two years, the same gives an indication that in a given case, the ban period may be less than two years. It is not mandatory that in each and every case where an offence is detected, the offender has to be mandatorily banned for the maximum period of punishment.

41. The Chairman appears to have missed out on this aspect of the period of ban. The period of ban is to be decided on two factors; first, the gravity of the offence and second, the quantum of loss suffered by CIL or the subsidiary companies. In the impugned order, there is no

reflection as to whether the period of ban has been decided keeping in mind the aforesaid two factors.

42. As the Court, in the earlier wit petition filed by the petitioner, did not interfere with the order of ban, and the only issue which was directed to be considered is the review/modification of the order of ban. The impugned order appears to be reiteration of the ban order. The Chairman, CIL appears to have misdirected himself and failed to appreciate the order of the Court in its proper perspective. The Chairman was not required to substantiate or fortify the reasons for the ban, but was required to consider the request of the petitioner seeking review of the period of ban. The impugned order is absolutely silent on it.

43. In Isolators (supra) the Hon'ble Court was of the view that the debarment order had been issued without due regard to the undeniable factual situation. In the case at hand, there is nothing on record to suggest that the reasons mentioned by the petitioners for reduction of the period of debarment was at all considered. The authority ought to consider the factors on which the maximum penalty can be imposed.

44. In Kulja Industries (supra) the Court held that a decision to blacklist a contractor may be open to judicial scrutiny on the doctrine of proportionality. The penalty imposed, ought to be proportionate to the

gravity of the offence. Here, the issue of proportionality does not appear to have been considered at all.

45. In view of the above, the Court is of the considered opinion that the impugned order does not address the issue of reduction of the period of ban as prayed for by the petitioner. The impugned order is liable to be set aside and is, accordingly, set aside.

46. The Chairman, CIL is directed to reconsider the prayer of the petitioner afresh only on the point of proportionality of the order of ban imposed. A reasoned order shall be passed addressing the fact as to why ban for the maximum period is to be imposed upon the petitioner. The reasoned order shall also disclose the gravity of the offence and as to whether any loss was suffered by CIL or any of its subsidiaries because of the Local Content Certificate submitted by the petitioner.

47. The writ petition stands disposed of.

48. No order as to costs.

49. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)