

GAHC010145692024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3688/2024

ANUPAM SAIKIA
S/O- LATE DHARMESWAR SAIKIA,
R/O- NO-2 RONGAGARH,
P.O- LILAPUR, DIST- DIBRUGARH, ASSAM, PIN-786602

VERSUS

THE STATE OF ASSAM AND 6 ORS
ENVIRONMENT AND FORESTS DEPARTMENT, GOVERNMENT OF ASSAM,
DISPUR, GUWAHATI- 781006.

2:THE PRINCIPAL CHIEF CONSERVATOR OF FORESTS
AND HEAD OF FORESTS FORCE
ASSAM
ARANYA BHAWAN

PANJABARI
GUWAHATI-37.

3:THE ADDL. PRINCIPAL CHIEF CONSERVATOR OF FORESTS (T)
UPPER ASSAM ZONE
JORHAT
ASSAM

4:THE CONSERVATORS OF FORESTS
EASTERN ASSAM CIRCLE
JORHAT
ASSAM

5:THE DIVISIONAL FOREST OFFICER
DIGBOI DIVISION
DIGBOI

ASSAM

6:THE MANAGING DIRECTOR
AMTRON
BAMUNIMAIDAM
GUWAHATI
ASSAM

7:TRINAYAN CHETIA
DIPA BHAWAN
NARSING GAON
TINSUKIA
ASSAM
PIN-78612

Advocate for the Petitioner : MR. B D KONWAR SR. ADV.

Advocate for the Respondent : SC, FOREST

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

23.07.2024

Heard Mr. Rajive Ranjan Raj, learned counsel for the petitioner, Ms. R. Devi, learned CGC, appearing for the respondent No.1 and Ms. R. Bora, learned standing counsel, NHIDCL, appearing for the respondent Nos.2 and 3.

2. The petitioner is aggrieved with the termination order dated 24.04.2024, issued by the respondent No.3, whereby the petitioner's contract for providing consultancy services for supervision of widening/improvement of 4(four) lane with paved shoulder from Km 95+400 to Km 113+330 near Ganpath Gaur Gaon to Kwaram Taro village section (Package 5) of NH-29 in the State of Assam under Bharatmala Pariyojana on EPC Mode, was terminated, in terms of clause 2.9.1 of the General Conditions of Contract.

3. The petitioner's counsel submits that the show-cause notice dated 19.10.2023, on the basis of which the impugned termination order dated 24.04.2024 has been issued, is

vague, as it fails to point out the alleged breach of contract on account of which the services of the petitioner has been terminated. As such, no opportunity of being heard on a relevant point/issue was given to the petitioner by the show-cause notice dated 19.10.2023.

4. The petitioner's counsel submits that in view of the termination order dated 24.04.2024, the petitioner has not been allowed to participate in other tenders, as there are clauses in various tenders, wherein parties who have had their contract terminated, are not allowed to participate and are not considered for award of the other contract works. He, accordingly, submits that the impugned termination order dated 24.04.2024 is akin to blacklisting/debarring the petitioner and as such, the impugned termination order dated 24.04.2024 should be set aside. In this regard, he has relied upon the judgments of Hon'ble Supreme Court in the case of **Gorkha Security Services v. Govt. of NCT of Delhi & Ors.**¹ and **UMC Technologies Private Limited v. Food Corporation of India & Anr.**² He also submits that the termination of contract of the petitioner only because the petitioner had not been able to post key personnel for supervising the contract work, amounts to inflicting a penalty disproportionate to the offence. In this regard, he has relied upon the judgment of the Hon'ble Supreme Court in **M/s Kulja Industries Limited v. Chief General Manager W.T. Proj. BSNL & Ors.**³ He accordingly prays that the impugned termination order dated 24.04.2024 should be set aside.

5. On the other hand, the counsels for the respondents submit, at the outset, that as there is an arbitration clause in the contract agreement between the parties, the petitioner would have to avail the arbitration clause for making a challenge to the termination of contract. Ms. Bora, learned counsel for the respondent Nos.2 and 3 submits that the show-cause notice dated 19.10.2023 issued to the petitioner is not vague and the same clearly shows that due to the petitioner failing to deploy key personnel for consultancy services, for supervising the road widening contract, the said

1 (2014) 9 SCC 105

2 (2021) 2 SCC 551

3 (2014) 14 SCC 731

road widening contract work has not been completed till date. She also submits that the show-cause notice dated 19.10.2023, on the basis of which the termination order has been issued by the respondent No.3, was not replied to by the petitioner. As such, the petitioner cannot now agitate that the show-cause notice was vague or that he did not have any material particulars, which was to be explained.

6. I have heard the learned counsels for the parties. As can be seen from the submissions made by the counsels for the parties and the contents of the writ petition, the petitioner was given the contract for consultancy services, for supervising the widening of a road construction work given to some other contractor. A contract agreement was signed between the petitioner and the respondent authorities on 21.10.2022 and the contract agreement was to be valid for a period of 2 years. Two days shy of the expiry of the contract period, i.e. on 19.10.2023, a show-cause notice was issued to the petitioner by the respondent Nos.2 and 3, stating that the petitioner had failed to perform its duties and responsibilities, by not mobilizing key personnel at the site to supervise the road contract. Para 11, 12, 13, 18, 19 and 20 of the show-cause notice dated 19.10.2023 are reproduced herein below as follows:-

"11. WHEREAS, approval conveyed vide HQ letter no.1558 dated 29.04.2022 for replacement of Team Leader cum Sr. Highway Engineer, Resident cum Highway Engineer & Sr. Quality cum Material Expert. However, the consultant failed to deploy the team.

12. WHEREAS, the by PMU-Diphu vide letter dated 21.06.2023, the actual deployment of the Team Leader cum Sr. Highway Engineer (TL) was from 22.06.2022 but the individual has been absent since 18.07.2022 to till date and having attendance only 4.3%.

13. WHEREAS, the Resident Engineer joined the project site on 01.03.2023 but has been absent since 29.03.2023 having attendance 4.6% only. Similarly, the Senior Quality cum Material Expert joined on 21.05.2022 but has also left the project sited since 01.03.2023 having attendance 47.17%. At present there is no Key Personnel mobilized at site.

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18. WHEREAS, the Authority's Engineer has failed to perform the deliver its duties and responsibilities as Authority's Engineer in absence of Key Personnel in the project site.

19. WHEREAS, the authority under CL. 2.9.1 (f) of GCC “If the client in its sole discretion and for any reason whatsoever, decides to terminate this contract” in reference of occurrence of any of the events specified under CL. 2.9.1 (a) to (h).

20. In light of the above, the authority has issued this Show Cause Notice without prejudice to rights of NHIDCL available under the relevant provisions of the Consultancy Agreement as well as under applicable laws on failure of the firm to remedy the failures. The Authority's Engineer to submit its reply and action taken within 60 days under CL. 2.9.1 (a) to (h) failure to which the Contract shall be terminated.”

7. The petitioner, however, did not submit any reply to the show-cause notice dated 19.10.2023. Subsequently, the impugned termination order dated 24.04.2024 was issued, whereby the contract between the petitioner and the respondent NHIDCL was terminated, as can be seen from Para 14 to 19 of the impugned termination order, which are as follows:-

“14. However, till date, no response from the Consultant has been received regarding the Show Cause Notice dated 19.10.2023 and neither the Consultant has improved its performance, which clearly depicts the lackadaisical attitude of the Consultant towards the execution of the project.

15. Whereas, even after the lapse of 60 days time period for replying to the Show Cause Notice, the Authority provided time to the Consultant to improve its performance, but the Consultant has terribly failed to show any improvement.

16. In light of the aforesaid, non-exhaustive fundamental breach and in view of the Consultant's persistent & sustained gross default in fulfilling contractual obligation, the Authority is left with no other option but to Terminate this contract in accordance with the provisions under CL. 2.9.1 of GCC of the Contract Agreement on account of Consultant default with immediate effect.

17. Upon termination of the Contract on account of Consultant's Default, the relevant provisions of the Contract Agreement would henceforth apply.

18. In pursuance of this Termination order, your firm shall perform no further services other than those reasonably necessary to close this Contract Agreement.

19. This Termination Order is being issued without prejudice to Authority's right to claim damages and/or to realize any dues, losses and damages and/or to exercise any other right or remedy on account of Consultant's failure to comply with its obligations under this Contract Agreement, which may be available now or in future under the Contract Agreement or under the applicable laws or otherwise, as the case may be."

8. In view of clause 8.4 of the contract agreement providing for arbitration for resolution of disputes between the parties, this Court is of the view that the petitioner would have to avail the arbitration clause for making a challenge to the impugned termination order. Clauses 8.4, 8.4.1 and 8.4.2 of the contract agreement are reproduced herein below as follows:-

"8.4 Arbitration

8.4.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 8.3, shall be finally decided by reference to arbitration by an Arbitral Tribunal appointed in accordance with Clause 8.4.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 as amended. The venue of such arbitration shall be ***** and the language of arbitration proceedings shall be English.

8.4.2 Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator to be appointed as per the procedure below

- (a) Parties may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty(30) days after receipt by the other Party of the proposal of a name for such an appointment by the Party who

Initiated the proceedings, either Party may apply to the President, Indian Roads Congress, New Delhi for a list of not fewer than five nominees and, on receipt of such list, the Parties shall alternately strike names there from, and the last remaining nominee on the list shall be sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list, the president, Indian Roads Congress, New Delhi, shall appoint, upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute.”

9. The petitioner's counsel has also taken a stand that the impugned termination order is a blacklisting/debarment order, which does not allow him to participate in other tenders. A perusal of the impugned termination order, however, does not indicate that the same is a blacklisting/debarment order. Though the petitioner has annexed two tenders, which prohibits the petitioner from participating in the bidding process due to the petitioner's termination from a contract work, in terms of the impugned order dated 24.04.2024, this Court finds that the petitioner has not put to challenge the said clauses in the tenders, where the petitioner has been barred from participating in the bid process. In any event, the impugned termination order, is not an order blacklisting the petitioner from participating in any future bidding process.

10. In the case of **Gorkha Security Services** (supra) and **UMC Technologies Private Limited** (supra), the Supreme Court has held that a show-cause-notice prior to blacklisting has to be issued, giving the precise case set up against the person against whom the penalty of blacklisting is to be imposed. However, the present case is not related to blacklisting the petitioner from participating in any future tender. The problem lies in the fact that in the two tenders that have been annexed to the writ petition, there is a clause barring persons whose contracts have been terminated, from participating in the bidding process. This clause barring the petitioner from participating in the bidding process, does not ipso facto mean that the impugned termination order issued to the petitioner is a blacklisting order. The petitioner had all the time to make a challenge to the clause in the tender notice denying him participation from the bidding process. However,

the petitioner has however not done the same. Further, the petitioner has only annexed two tender notices. There is nothing to show that all the tender notices issued by different authorities have a clause barring a person whose contract was terminated from participating in the bidding process. The petitioner has also not made any reply to the show-cause-notice issued by the respondents. In that view of the matter, this Court is of the view that the two Supreme Court cases cited above are not applicable to the facts of this case.

11. In the case of **M/s Kulja Industries Limited** (supra), the Supreme Court has held that because blacklisting is in the nature of penalty, the quantum whereof is a matter that rests primarily with the authority competent to impose the same. As stated earlier, the petitioner had not may any reply to the show-cause-notice dated 19.10.2023, though the show-cause-notice had clearly stated that failure to submit any reply within 60 (sixty) days could result in the contract being terminated. As such, this Court is of the view that the judgments relied upon by the petitioner does not support the petitioner's case that the termination of the contract was disproportionate. In any event, this issue is to be decided by the competent authority.

12. In the case of **Union of India & Others vs. Tantia Construction Private Limited**⁴, the Supreme Court has held that an alternative remedy, including an Arbitration Clause in a contract agreement, is not an absolute bar to the invocation of the writ jurisdiction of a High Court. It has held that even without exhausting such alternative remedy, a writ petition would be maintainable. However, it is clear that the writ jurisdiction of a High Court is a discretionary power and only because there is no bar for this Court to invoke it's writ jurisdiction, it does not mean that it has to invoke the said jurisdiction.

13. In the case of **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Others**⁵, the Supreme Court has held that the High Court under Article 226 has the discretion to entertain or not to entertain a writ petition in at least 3 contingencies,

4 (2011) 5 SCC 697

5 (1998) 8 SCC 1

namely where the writ petition has been filed for (i) the enforcement of any of the fundamental rights or (ii) where there has been a violation of principles of natural justice or (iii) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In the present case, none of the three contingencies stated above are present. Further, as the petitioner had not submitted any reply to the show-cause-notice dated 19.10.2023 and as there is an Arbitration Clause for resolving the disputes between the parties, this Court is not inclined to exercise its discretion in the present case.

14. In view of the reasons stated above, the writ petition stands dismissed, with liberty being given to the petitioner to invoke the arbitration clause for redressal of its grievance.

Sd/- Michael Zothankhuma
JUDGE

Comparing Assistant