

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 15973 of 2021

Cognition Projects Pvt. Ltd. & Anr.

vs.

Damodar Valley Corporation & Ors.

For the petitioners : Mr. Abharatosh Mazumdar, Adv.
Mr. Subhabrata Datta, Adv.
Mr. Aranya Saha, Adv.

For the DVC : Mr. Kishore Dutta, Sr. Adv.
Mr. Swarajit Dey, Adv.
Mr. Subhadeep Basak, Adv.
Ms. Riddhi Jain, Adv.

Last Heard on : 22.12.2022

Delivered on : 19.01.2023.

Moushumi Bhattacharya, J.

1. The petitioners challenge a communication dated 21st June, 2022 issued by the respondents, Damodar Valley Corporation (DVC), by which the petitioner no. 1 was informed that the first petitioner's name will not be

recommended for issue of future tender enquiries of DVC for a period of 2 years. The impugned communication was issued under Clause 29 of the Notice Inviting Tender (NIT) under which the petitioner no. 1 was engaged as a Contractor for construction of an integrated township and other sanitation and electrification works in the CISF area, Purulia, West Bengal. The impugned communication refers to a notice of termination dated 26th February, 2022 issued by DVC under Clause 24.2 of the General Conditions of Contract (GCC) forming part of the agreement between the parties. The said notice of termination is not under challenge in the present writ petition.

2. According to learned counsel appearing for the petitioners, Clause 29 of the NIT is connected to Clause 23.3 which is “Banning of Business Dealings” and hence the petitioners should have been given notice before the impugned debarment. Counsel submits that the procedure for putting the petitioner no. 1 on notice including issuance of show-cause notice was not followed by DVC. Counsel submits that the reply of DVC dated 8th March, 2022 cannot be treated as a show-cause notice and further that the petitioner was not given an opportunity to rebut the allegation made in the said notice. Counsel submits that a contractor is left with no option but to sign the Joint Inspection Report referred to in clause 29 of the NIT and that the delay in the execution of the work was directly attributable to the inaction on the part of the DVC in issuing necessary certificates for deployment of contract labour and gate passes. It is submitted that the Joint Inspection Reports under clause 29 were in any event not provided to the petitioners.

3. Learned counsel appearing for the respondents – DVC - submits that the contract was terminated on 26th February, 2022 and the same was accepted by the petitioners. Counsel submits that the letter of 8th March, 2022 issued by DVC was in essence a show-cause notice since the letter alleged the unsatisfactory monthly performance rating of the petitioner no. 1 and put the petitioner on notice of the invocation of the debarment clause under Clause 29 of the NIT. Counsel relies on the petitioners' response dated 11th April, 2022 to the letter of termination by which the petitioners requested for withdrawal of the termination notice but, on the other hand, chose not to reply to the letter of 8th March, 2022. Counsel relies on the petitioners' signing the performance evaluation sheets without reservation and urges that the impugned debarment is hence not a unilateral assessment on the part of the employer DVC. Counsel submits that the petitioners have failed to disclose material facts including the monthly performance evaluation reports signed by the petitioners and other letters exchanged between the parties relating to the termination of the contract. It is submitted that the monthly performance evaluation reports, if disclosed, would have a material bearing on the issues under adjudication and the petitioners are hence not entitled to any equity having suppressed relevant material.

4. The issue which is relevant to the adjudication required in the present facts is whether the respondents - Damodar Valley Corporation - followed the procedure set down in the Notice Inviting Tender before issuing the impugned communication dated 21st June, 2022 debarring the petitioner

from tender enquiries of DVC for 2 years. The impugned communication was issued under Clause 29 of the NIT which the petitioners say is a specie of “Banning of Business Dealings” under Clause 23.2 of the NIT while DVC says otherwise.

5. Clause 29 and the relevant parts of Clause 23.3 are set out for understanding the specific import of the clauses.

Clause 29.0 Contractors Performance Evaluation:

In order to have smooth progress of the work, there is a need for contractors who will execute the job in time and as per stipulated specification quality in the Contract. In order to ensure the same, a standard evaluation format has been framed. The Project Manager of DVC/Engineer in charge will fill in the details as per format enclosed, which is to be signed by the authorized representative of the Contractor (owner/proprietor/site in charge). If the contractor refuses to sign, the evaluation of engineer in charge will be final. The performance rating as emerged out will be kept in the system.

In case Performance Rating obtained above is ‘Unsatisfactory’, twice consecutively, the Contractor shall not be recommended for issue of tender enquiry for a period as deemed fit not more than 2 years.

Clause 23.3 Banning of Business Dealings:

Banning of business dealings with a firm/contractor irrespective of whether it is known/approved or otherwise may be ordered by the Senior Chief Engineer/Chief Engineer/CMM, DVC subject to observation of Vigilance as per above para 25.2.2

Clause 23.3.2 Procedure for Banning of Business Dealings:

User department or Engineer in charge will move the case which will be processed by concerned Material Head/Chief Purchase Officer and put up to TAA.

(i) A show cause Notice will be issued by the TAA indicating clearly and precisely the charges/misconduct which should be based on facts as can be proved as distinct from mere allegations.

(ii) The firm/contractors may be given a period of 30 days to submit their representation if any, against the Show Cause Notice.

(iii) Thereafter, the appropriate orders for Banning of business dealings with the firm/contractor may be taken only after perusing the representation of the firm/contractor, if any, received in reply to Show Cause Notice incorporating the reasons for taking such action.

(iv) In case no reply to show cause notice is received within stipulated time, appropriate speaking order for suspension of the firm/contractor shall be passed ex-parte.

(v) The orders must specifically mention the fact that the reply to the show cause Notice, if any, has been considered by the said authority. The ex-parte order shall contain the fact that the reply to show cause notice has not been received within stipulated time.

(vi) Once the proposal for issuance of Notice of default is approved by the TAA, a "Notice of Default" duly vetted by legal Deptt shall be issued by the TAA himself or by a person authorised for the said purpose to the Agency giving them a period of 30 (thirty) days to remedy the default.

In cases where investigation has been carried out by Vigilance Department or CBI etc. the Notice of default will also be vetted by vigilance department before issuance.

If agency fails to remedy or take adequate steps to remedy the default to the satisfaction of DVC within the Notice period mentioned above, the business dealings shall be withheld with the Agency after approval of the TAA. The order of such withholding of business dealings shall be communicated to the Agency (after vetting by legal deptt.) by the TAA himself or by a person authorised for the said purpose.

(vii) The entire process of banning be completed within 45 days from the date of show cause notice.

(viii) Where TAA is Board or Chairman approval from concerned Member to be obtained.

Clause 23.3.3 Banning order shall specify:

(i) The specific period (permanent, if required) for which it will be effective;

(ii) The names of all the Partners, Directors etc. of the firm and its affiliates.

(iii) A decision to withhold business dealings with any Agency for project awarded contracts shall be restricted to such project only and for Head Quarters awarded contracts withholding shall apply throughout the

company. The duration of withholding the Agency shall be for a period of minimum 01(one) year & maximum 03 (three) years.

6. It would be evident from a conjoint reading of the clauses namely, 29.0 and 23.3 that Banning of Business Dealings with a Contractor is simply part and parcel of the punishment of not recommending the contractor for issue of tender inquiry. Both the clauses contemplate punishing a contractor for acts of non-performance, unsatisfactory performance or moral turpitude/loyalty issues. The acts envisaged must be such as to result in loss and prejudice to DVC (Clause 23.2). The consequence of both the clauses on the Contractor is being excluded from future business dealings with DVC. In other words, the effect of both the clauses is loss of future business opportunities for the Contractor with reference to DVC. This would be clear from Clause 25.4 - "Effect of Banning" which specifically states that the Contractor who has suffered an order of banning of business dealings would not be allowed to participate in any future tender enquiry and is set out below:-

Clause 25.4 Effect of Banning

The agency, after issue of order of banning of business dealings, would not be allow to participate in any future tender enquiry and if the agency has already participated in any tender process and the price bids are not opened, his techno-commercial bid will be rejected and price bid will not be opened/returned unopened. However, where the price bids of agency have been opened prior to order of banning, bids of the agency shall not be rejected.

7. Hence, the singular absence of a due process in Clause 29, as compared to Clause 23.2.1, is significant. While Clause 23.2.1 sets out sequential steps before an order of suspension of business dealings can be made against a contractor and Clause 23.2.2 also provides for suspension as a prelude to Banning, Clause 29.0 is stark in its finality. There is no procedure envisaged under Clause 29.0 either for giving notice to a contractor or giving the contractor an opportunity of hearing before the contractor is recommended for exclusion from tender enquiries for an outer limit of 2 years. The only stated condition before the penalty can be imposed under Clause 29.0 is two consecutive “unsatisfactory” Performance Ratings. Further, the wording of Clause 29.0 also makes it evident that the clause is tilted towards a unilateral evaluation of a contractor’s performance. The fact that the Project Manager is given the leeway to fill in the details in the provided format (designed by DVC) if the Contractor refuses to sign and the evaluation of the Project Manager is treated as final makes for a one-sided clause and leaves enough room for DVC to prevail over the contractor. Thus, the defense of DVC that the petitioners put their signatures on the evaluation forms and were thus aware of their gaps in performance does not take away the uneven balance of Clause 29.0 or make it fair to all the concerned parties.

8. The absence of procedural fairness becomes all the more aggravated in the stated impact of the clause including the absence of a provision for appeal, the certainty of loss of reputation, deprivation of work and the arbitrary nature of keeping the period of loss of business uncertain and all

of these at the whim of DVC. The absence of any opportunity to the Contractor to rebut the imputation of a poor performance rating including the absence of personal hearing/representation makes clause 29.0 draconian and arbitrary. It is now well established that unless a statutory provision specifically or by necessary implication excludes the application of the rules of natural justice, any action prejudicially affecting another, must conform with the rules of natural justice: *Gorkha Security Services v. Government (NCT of Delhi)*; (2014) 9 SCC 105.

9. This Court is hence of the view that the principles of natural justice namely, that of the petitioners being given a chance to represent their case and rebut the contents in the performance evaluation reports must be read into Clause 29.0 of the NIT.

10. The argument of DVC giving a short shrift to the principles of natural justice would also be reinforced by the nature of the letter dated 8th March, 2022 from DVC to the petitioner no. 1. DVC describes its letter as a show cause notice in its attempt to make out a case of compliance with the principles of natural justice. DVC says that the letter of 8th March, 2022 put the petitioners on notice of the debarment before the impugned decision of 21st June, 2022 was issued to the petitioner.

11. The content of the letter of 8th March, 2022 however belies the contention of DVC. The letter merely refers to the points raised by the petitioner in its letter of 2nd March, 2022 and debunks such points as being “totally baseless”. The letter comes with a demand on the petitioner no. 1 to

complete the facilities by engaging an agency of DVC at the petitioner's cost and that the petitioner no. 1 shall be considered ineligible for participation in future tenders for a period which may be decided by DVC under Clause 29.0 of the NIT.

12. Contrary to the position taken by DVC, the letter of 8th March, 2022 cannot be treated as a show cause notice for the following reasons.

13. A show cause notice must essentially disclose the charges upon the person/entity to who the notice is being addressed and must also afford a reasonable opportunity to the person to reply to the charges made in the show cause notice; Ref.: *Gorkha Security Services*. The necessity of a show cause notice and the consequent opportunity to the person of a hearing assumes importance in the context of the punishment to be suffered by the person for who the show cause notice is intended.

14. In the present case, the letter of 8th March, 2022 threatens the petitioner no. 1 with debarment for a period to be fixed by DVC; hence the requirement to give a detailed show cause notice becomes even more imperative. In *Gorkha Security Services*, the Supreme Court stressed on the necessity of compliance with the principles of natural justice with reference to the person against who an action of blacklisting is sought to be taken on the rationale that blacklisting entails "civil death" and is stigmatic in nature. In *UMC Technologies Private Limited vs. Food Corporation of India; (2021) 2 SCC 551*, the Supreme Court strongly opined that the first principle of civilised jurisprudence is that a person against who any action is sought to

be taken or whose rights and interests are to be affected should be given a reasonable opportunity to defend himself. The Supreme Court proceeded to hold that the notice to be served on the person should clearly mention the grounds necessitating action and should also specifically mention the penalty proposed.

15. The fundamental criterion of a show cause notice is an opportunity to the intended person to show cause as to why the threatened punitive action should not be followed. The petitioners admittedly were not given an opportunity to rebut the imputations made in the said letter. The petitioners were served with the impugned letter of debarment soon thereafter on 21st June, 2022 without being heard in the matter.

16. The above reasons persuade this Court to hold that the DVC's letter of 8th March, 2022 does not satisfy the requirements of a show cause notice.

17. The charge of suppression of material fact also does not help DVC. According to DVC, the petitioners suppressed the Monthly Performance Evaluation Reports signed by the petitioners and other letters exchanged between the parties from 4th October, 2021 to 11th April, 2022. DVC also says that the petitioner did not disclose the Minutes of the Meetings held on 26th August, 2021 and 25th November, 2021. These letters however relate to the alleged non-performance on the part of the petitioner leading to the Notice of Termination dated 26th February, 2022. Since the petitioners have not challenged the termination in the present proceedings, these letters do not have a material bearing on the issue of debarment which is under

challenge in the writ petition. The correspondence between the parties in relation to the impugned debarment is already on record.

18. The Performance Evaluation Reports signed by the petitioner would also not assist DVC in establishing a good defence since Clause 29.0, as stated above, is unmistakably-tilted towards DVC. Clause 29.0 makes it clear that the contractor would have little choice but to sign the Evaluation Reports since DVC would be at liberty to do the same in the absence of the contractor. The letters which have not been disclosed in the writ petition would not have a material bearing on the dispute before the Court and hence the allegation of suppression of material facts is decided against the respondents.

19. *Prestige Lights Ltd. vs. State Bank of India; (2007) 8 SCC 449* cited on behalf of DVC on suppression involved the appellant company not disclosing material facts and creating encumbrances in respect of the properties mortgaged with the Bank despite an undertaking given by the Company. *K.D. Sharma vs. Steel Authority of India Limited; (2008) 12 SCC 481* involved the appellant giving a wrong information to the Court contrary to the material before the Court in relation to service of a notice. Both decisions were on totally different facts. In any event, this Court has found that the petitioners have not suppressed any material facts which would have a bearing on the adjudication.

20. This Court is inclined to allow the writ petition and grant the relief for the above reasons. The impugned letter dated 21st June, 2022 issued by

DVC to the petitioner no. 1 is quashed; the respondent no. 1 DVC is directed to revoke the same. DVC shall not restrain the petitioner no. 1 from participating in future tenders issued by DVC.

21. WPA 15973 of 2022 is disposed of accordingly.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfilment of requisite formalities.

(Moushumi Bhattacharya, J.)