

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.01.2019

+ **W.P.(C) 463/2018 and CM Nos. 2006/2018, 11943-11944/2018, 16245/2018 & 16371/2018**

M/S BGR MINING AND INFRA LIMITED Petitioner

versus

NTPC LIMITED AND ANR. Respondents

Advocates who appeared in this case:

For the Petitioner :Mr Dayan Krishnan, Sr. Advocate
with Mr Mohd. Wasay Khan and
Ms Filza Moonis, Advocates.

For the Respondents :Mr Tushar Mehta, SGI with Mr Puneet
Taneja, Ms Shaheen, Ms Laxmi Kumari,
Ms Khushboo, Advocates for NTPC.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition, *inter alia*, praying that the respondent be directed to act in compliance with Clause 23 of the Project Agreement dated 28.11.2017 (hereafter 'the Project Agreement') entered into between the petitioner and respondent No.1 (hereafter 'NTPC'). The petitioner is, essentially, aggrieved by a

show cause notice dated 29.12.2017 issued by NTPC calling upon the petitioner to show cause why the Project Agreement should not be terminated. The petitioner alleges that NTPC is proceeding on a predetermined path to terminate the Project Agreement without following the procedure for an amicable resolution of disputes as contemplated under the contract.

2. According to NTPC, the show cause notice has been issued to the petitioner as it is alleged that the petitioner has indulged in corrupt and fraudulent practice. NTPC contends that in view of the aforesaid allegation, the event of default as alleged is not of a nature that can be remedied by good faith discussions and, therefore, no purpose will be served by holding any discussion under Clause 23 of the Project Agreement.

Factual Context

3. The petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of mining and infrastructure. NTPC is a Government of India enterprise and is, *inter alia*, engaged in the business of generation of power.

4. On 05.03.2016, NTPC issued a Request for Proposals (RFP) inviting online bids for selection of a 'Mine Operator cum Developer' for developing and operating the Chatti Bariatu Coal Block situated in the state of Jharkhand (hereafter 'the Project'). In response to the RFP, the petitioner submitted its techno-commercial and price proposal through the online mode on 02.05.2016.

5. The techno-commercial proposals submitted by various bidders were opened on 04.05.2016. Thereafter, NTPC opened the price proposal submitted by all eligible bidders and conducted a reverse auction on 09.12.2016. The proposal submitted by the petitioner was accepted and NTPC issued a letter of acceptance (LoA) on 13.11.2017. The petitioner accepted the LoA on the same date (that is, 13.11.2017).

6. Thereafter, on 28.11.2017, the parties entered into the Project Agreement. It is stated that a meeting was held between NTPC and the representatives of the petitioner and the petitioner committed that it would commence the work of removing overburden by the end of December, 2017.

7. On 07.12.2017, an FIR was registered by the Central Bureau of Investigation (CBI) against one Sh. Kulamani Biswal, Director (Finance) NTPC, Sh. B. Rohit Reddy, Director of the Petitioner Company, Sh. T. Prabhat Kumar and other unknown persons. The FIR indicates that information was received that Mr. Biswal was to travel abroad with his wife and daughter on 08.12.2017, from Bhubaneshwar. It was alleged that Sh. Biswal requested Mr. Rohit Reddy to arrange US Dollars equivalent to ₹5 lakhs for him to travel overseas and Sh. Reddy offered to deliver the same at Delhi or Bhubaneshwar. It was alleged that subsequently, Sh. Kulamani Biswal asked Sh. Reddy to give him cash in Indian currency which he would convert to US Dollars on his own. It is alleged that Sh. Reddy informed Sh. Biswal that one Sh. T. Prabhat Kumar (an employee of

the petitioner) would deliver the said amount to Sh. Biswal at Delhi. CBI alleged that it had information that Sh. Reddy had arranged to deliver ₹5 lakhs in cash through *hawala* channels to Sh. T. Prabhat Kumar to further deliver to Sh. Biswal at Delhi. It was further alleged that Sh. T. Prabhat Kumar was likely to deliver the aforesaid amount to Sh. Biswal at his residence shortly. CBI had alleged that Sh. Biswal had attempted to obtain for himself, valuable things without consideration from the petitioner with whom he had dealings due to business transacted between NTPC and the petitioner. According to CBI, the information disclosed, *prima facie*, commission of an offence under Sections 11 and 12 of the Prevention of Corruption Act, 1988 r/w Section 120-B of the Indian Penal Code, 1860.

8. The petitioner claims that immediately on becoming aware of the FIR dated 07.12.2017, the Managing Director of the petitioner company along with other directors visited the office of CBI and joined the investigation. Certain employees of the petitioner also joined the investigation process.

9. On 12.12.2017, NTPC issued a letter calling upon the petitioner to explain why suitable action under the provisions of the Project Agreement should not be initiated against the petitioner in view of the registration of the FIR. The petitioner responded to the same by a letter dated 14.12.2017, *inter alia*, stating that it was “too premature to comment anything” as the matter was under investigation. However, the petitioner denied all allegations levelled in the FIR and stated that neither the petitioner company nor its directors had indulged in any

corrupt practices. It is further alleged that the FIR dated 07.12.2017 and media reports were based on false information supplied by persons under undue influence.

10. Thereafter, on 16.12.2017, the Secretariat of Independent External Monitors (IEMs) issued a letter referring to the FIR registered by the CBI and called upon the petitioner to present the necessary facts, documents and evidence with regard to the aforesaid allegations. The said communication indicated that it was in reference to the Project Agreement dated 28.11.2017 and LoA dated 13.11.2017 entered into by NTPC for appointment of a Mine Operator for the Chatti Bariatu Coal Mine and the LoA dated 13.11.2017 issued to a consortium (of which the petitioner is a member) for appointment of a Mine Operator for the Talaipalli Coal Mine.

11. In response to the aforesaid letter, representatives of the petitioner appeared before the IEMs and made oral and written submissions along with supporting documents.

12. On 20.12.2017, NTPC issued a notice under Clause 24.1 of the Project Agreement directing the petitioner to suspend all mining services under the Project Agreement till further notice.

13. In response to the aforesaid notice, the petitioner sent a letter dated 22.12.2017 disputing that the registration of an FIR would fall within the scope of Clause 24(c) of the Project Agreement as the same did not constitute any material breach of obligation, which was not capable of being remedied. The petitioner further stated that it had

mobilized its resources and requested NTPC to withdraw the letter dated 20.12.2017 suspending the mining operations. The aforesaid letter was followed by another letter dated 24.12.2017 claiming that there were certain inadvertent errors in the letter dated 14.12.2017; the principal concern being that the petitioner desired eight weeks to respond to the allegations but that request was not incorporated in the said letter. The petitioner requested that the same be considered.

14. On 29.12.2017, NTPC issued a notice, *inter alia*, stating that in view of the seriousness of the allegations made in the FIR, in the reasonable judgment of NTPC, the petitioner had engaged in a corrupt practice constituting an event of default under the provisions of Clause 24.3(b) of the Project Agreement.

15. Thereafter, on 06.01.2018, the petitioner issued a Dispute Notice under Clause 23.1(a) of the Project Agreement. The petitioner disputed that an event of default had occurred in terms of Clause 24.3(b) of the Project Agreement. The petitioner claimed that mere registration of an FIR did not amount to an event of default. According to the petitioner, NTPC could not form a reasonable judgment that the petitioner had engaged in corrupt practices merely on the basis of an FIR.

Discussion and Conclusion

16. Mr Dayan Krishnan, learned Senior Counsel appearing for the petitioner had contended that there was no material to hold that the petitioner had indulged in any corrupt or fraudulent practice. He

submitted that mere filing of an FIR was wholly insufficient for NTPC to have concluded that the petitioner had indulged in any such practice. He further referred to Article 9 of the Project Agreement which contains provisions with regard to the corrupt or fraudulent practices and fraud prevention policy of NTPC. He submitted that even if the allegation made against the director of the petitioner is accepted, the same would not constitute a corrupt practice within the meaning of the said expression as defined under sub-clause (a) of Clause 9.1 of the Project Agreement. He earnestly contended that the concerned court had not even formed a *prima facie* opinion whether any offence had been made out and thus even the charges had not been framed. Thus, no further action was required to be taken by NTPC at this stage.

17. Mr Tushar Mehta, learned Solicitor General countered the aforesaid submissions. In addition, he raised a preliminary objection with regard to the maintainability of the present petition. He submitted that no element of public law is involved in the present petition and even if it is accepted that NTPC was acting contrary to the terms of the Project Agreement, the petitioner was required to avail of private law remedies. He referred to the decisions of the Supreme Court in *Joshi Technologies International Inc. v. Union of India & Ors.: 2015 (7) SCC 728* and *Rishi Kiran Logistics Pvt. Ltd. v. Board of Trustees of Kandla Port Trust and Ors.: (2015) 13 SCC 233* in support of his contention.

18. Mr. Mehta also cited the decision of a Coordinate Bench of this Court in *Israel Military Industries Ltd. v. Union of India & Anr.:* (2013) 201 DLT 1. On the strength of the said decision, he submitted that at this stage, all that was required to be considered by the court is whether there is enough basis for NTPC to have taken the decision as it has. He submitted that in *Israel Military Industries Ltd. (supra)*, the fact that an FIR had been filed was considered by the court as a sufficient basis for the respondent to take the decision not to deal with the petitioner therein.

19. The controversy involved in the present case is limited. This Court is not called upon to examine the merits of the allegations made against the petitioner and / or its directors. The limited scope of controversy involved in the present petition is whether NTPC is bound to join the petitioner in an endeavour to settle the disputes in an amicable manner.

20. Before proceeding further, it would be relevant to refer to certain contractual provisions. Clause 9.1 of the Project Agreement defines the expression ‘corrupt practice’ and ‘fraudulent practice’. The said clause is set out below for ready reference:

“9.1 Corrupt or Fraudulent Practices

The Mine Operator shall observe the highest standard of ethics during the execution of the Project Agreement. For the purposes of this provision, the terms set forth below are defined as follows:

(a) “**corrupt practice**” means the offering, giving,

receiving or soliciting in any manner whatsoever, directly or indirectly, of anything of value to influence the decision or action of a public official or Owner's official or its engaged consultant(s) or advisor(s) during any stage of the procurement process or execution of the Project Agreement; and

(b) "**fraudulent practice**" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of Owner and includes collusive practice among Mine Operators (prior to or after Project Proposal submission) designed to establish Project Proposal prices at artificial non competitive levels and to deprive Owner of the benefits of free and open competition, if the Mine Operator, in the judgment of the Owner has engaged in corrupt or fraudulent practices in competing for or in executing the Agreement, the Owner shall take any and all such actions including termination as may be considered necessary or desirable by Owner in such circumstances"

21. The petitioner, *inter alia*, contends that the allegation contained in the FIR does not evidence or establish that the petitioner has indulged in any corrupt practice within the meaning of Sub-Clause (a) of Clause 9.1 of the Project Agreement. It is stated that the procurement process was completed in a transparent manner and there is no allegation that the petitioner had offered or solicited anything of value to influence the decision of NTPC's officials. It is further submitted that there is no allegation of paying any bribe for execution of the Project Agreement. According to the petitioner, the expression 'execution of the Project Agreement' does not mean performance of

the contract in question but the act of entering into (signing) the Project Agreement.

22. In addition, the petitioner claims that the FIR was lodged without any material or basis and merely at the behest of certain persons whose interests are adverse to the petitioner.

23. As noted above, this Court is not called upon to address the aforesaid contentions. The same are merely noticed to indicate the principal controversy between the parties.

24. According to NTPC, the FIR itself contains serious charges and provides NTPC with sufficient material to determine in its reasonable judgment that the petitioner has indulged in corrupt practices. NTPC disputes the petitioner's interpretation of the expression 'execution of the Project Agreement'. NTPC further claims that the allegation in the FIR not only establishes that the petitioner has indulged in a corrupt practice but also falls within the scope of fraudulent practice as defined under Sub Clause (b) of Clause 9.1 of the Project Agreement.

25. NTPC asserts that in view of the allegation, the petitioner has, in the reasonable judgment of NTPC, engaged in corrupt or fraudulent practice; and this constitutes an event of default under Clause 24.3 (b) of the Project Agreement.

26. Clause 24.3 of the Project Agreement contains provisions for termination of the Project Agreement by NTPC and Clause 24.4 of the

Project Agreement contains the procedure for such termination. The relevant extracts of Clause 24.3 and 24.4 are set out below:

“24.3 Termination by the Owner

XXXX

XXXX

XXXX

(b) Mine Operator's Events of Default

The following events or the circumstances shall be "Mine Operator's Events of Default:

- (i) Any of the warranties offered by the Mine Operator in Clause 3.1.2 is not true or incorrect;
- (ii) The Mine Operator fails to renew the Contract Performance Guarantee, in accordance with Clause 6.2, at least 3 months prior to its expiry;
- (iii) The Mine Operator fails to make satisfactory progress or achieve milestones in accordance with the agreed Operational Plan specified at Clause 8.2(a) (duly considering any extension under Clause 8.3 or subsequently), except where the progress has been held up because of delay in achieving Owner's milestones identified in the Operational Plan (duly considering any extension under Clause 8.3 or subsequently);
- (iv) The Mine Operator does not maintain or timely renew the required Approvals, as specified in Clause 7.2, resulting in material suspension of Mining Services for a continuous period of 3 months during the Operations Stage;
- (v) The Short Delivery is more than 50% pursuant to Clause 15.3.1 for a continuous period of three (3) months or the Short Delivery, in aggregate for any Operating Year is more than 30% of ACQ specified in AAPP for that Operating Year;

- (vi) The coal delivered by the Mine Operator continues to be rejected for a continuous period of three months in any Operating Year on account of quality of coal not meeting the criteria specified in Clause 15.6.5
- (vii) If the Mine Operator disposes of all or a substantial part of the Mine Operator's Plant and Equipments without the prior written consent of the Owner;
- (viii) If the Mine Operator disposes of any of the Owner's Facilities without the prior written consent of the Owner in violation of Clauses 13.5(c) and 13.5(d);
- (ix) If the Mine Operator becomes bankrupt or insolvent, has a receiving order issued against it, enters into a compromise with its creditors, or, its governing body approves a resolution or order is made for its liquidation/winding up (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), a receiver is appointed over any part of its undertaking or assets, or if the Mine Operator takes or suffers any other analogous action in consequence of debt;
- (x) If the Mine Operator assigns or transfers the Agreement or any right or interest therein in violation of the provisions of this Agreement;
- (xi) If the Mine Operator, in the reasonable judgment of the Owner has engaged, in corrupt or fraudulent practices in competing for or in executing the Agreement pursuant to Clause 9.1;
- (xii) If the Mine Operator does not recommence providing the Mining Services within 15 days of receipt of the Owner's notice under Clause 24.1(d);

- (xiii) If the Mine Operator fails to meet the obligations setout in Clause 8.2;
- (xiv) Change in the shareholding of paid up share capital of the Joint Venture Company without the prior written approval of NTPC.
- (xv) Any other Event of Default in respect of the Mine Operator, not explicitly covered above.”

“24.4 Show cause/Termination for an Event of Default

- (a) In case of an occurrence of a Mine Operator’s Event of Default, the Owner may issue the Mine Operator a written notice confirming its intent to terminate this Agreement.

Such notice shall:

- (i) state that it is a notice under Clause 24.3(b) of this Agreement; and
- (ii) specify the alleged event along with supporting information/documents that the Owner may have.

- (b) In case of an occurrence of an Owner’s Event of Default, the Mine Operator may issue the Owner a written notice confirming its intent to terminate this Agreement.

Such notice shall:

- (i) state that it is a notice under Clause 24.2(b) of this Agreement; and
- (ii) specify the alleged event along with supporting information/documents that the Mine Operator may have.

- (c) Upon receipt of notice of termination by the non-terminating Party pursuant to Clause 24.4 (a) or 24.2 (b), as the case may be, the Parties shall discuss in good faith for a period of thirty (30) days the options for the cessation of event that led to the issue of the notice. It is clarified that during the period of thirty (30) days the obligations of the Parties shall continue to subsist.
- (d) At any time after the expiry of such period of thirty (30) days after the terminating Party gave notice to the other Party pursuant to 24.4(a) or 24.4(b), as the case may be, unless the circumstances constituting the termination event have either been fully remedied to the satisfaction of such terminating Party or have ceased to apply, such terminating Party may terminate this Agreement by giving a forty five (45) day prior written notice of such termination to the non terminating Party.”

27. Clause 23 of the Project Agreement contains the provisions for dispute resolution. The relevant extracts of Clause 23 are set out below:

“23.1 Amicable Settlement

- (a) In the event of any dispute or claim of any kind whatsoever that may arise between the Parties as a result of construction, interpretation or application of any of the terms and conditions of this Agreement or performance of it, either Party may be written notice inform the other Party of such dispute (“Dispute Notice”).
- (b) The Parties shall within a period of 30 days from the date of receipt of Dispute Notice by

such other Party meet and endeavour to settle such dispute in an amicable manner through good faith discussions.

23.2 Adjudicator

(a) If the Parties fail to resolve such a dispute or difference by good faith discussions, then the dispute shall be referred in writing by either Party to the Adjudicator, with a copy to the other party.

(b) The Adjudicator shall be a retired judge of High Court/Supreme Court of India as may be appointed by the Chairman & Managing Director of Owner. The Adjudicator shall give its decision in writing to both Parties within twenty eight (28) days of a dispute being referred to it. If the Adjudicator has done so, and no notice of intention to commence arbitration has been given by either the Owner or the Mine Operator within fifty six (56) days of such reference, the decision shall become final and binding upon the Owner and the Mine Operator. Any decision that has become final and binding shall be implemented by the Parties forthwith.

(c) xxxxxxxx

23.3 Arbitration

(a) If either the Owner or the Mine Operator is dissatisfied with the Adjudicator's decision, or if the Adjudicator fails to give a decision within twenty eight (28) days of a dispute being referred to it, then either the Owner or the Mine Operator may, within fifty six (56) days of such reference, give notice to the other party, with a copy for information to the Adjudicator, of its

intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.

(b) Any dispute in respect of which a notice of intention to commence arbitration has been given, in accordance with Clause a), shall be finally settled by arbitration.....”

28. It is apparent from the above that NTPC is proceeding in terms of Clause 24.4 of the Project Agreement as, according to NTPC, a ‘Mine Operator’s Event of Default’ has occurred. The petitioner, on the other hand, has invoked the Dispute Resolution Clause.

29. Mr. Mehta contended that the provisions relating to suspension and termination of the Project Agreement (as contained in Clause 24 of the Project Agreement) are independent of the Dispute Resolution mechanism as envisaged in Clause 23 of the Project Agreement.

30. It is seen that the dispute resolution mechanism as agreed between the parties is a three tier process. In the first instance, the parties have agreed that the parties would endeavour to resolve a dispute in an amicable manner through ‘good faith discussions’. If the parties are unable to resolve disputes and differences by any such ‘good faith discussions’, then the same are to be escalated to the second stage by referring the same to an Adjudicator. The Adjudicator is required to decide the said disputes. If the Adjudicator’s decision is not challenged, the same would be binding

on the parties. However, either party has the right not to accept the same and take steps for reference of the dispute to arbitration.

31. Although provisions relating to suspension and termination of the Agreement are independent of the dispute resolution mechanism, some of the procedures are similar. In terms of Clause 24.4 (c), the parties have agreed to hold ‘good faith discussions’ for a period of thirty days. As noticed above, such good faith discussions are envisaged as a part of first tier of the dispute resolution mechanism (as contemplated under Clause 23.1(b) of the Project Agreement) as well.

32. NTPC does not dispute that the Dispute Resolution Clause is binding on the parties. However, it is contended on behalf of NTPC that no purpose would be served by holding such ‘good faith discussions’ as are contemplated under Clause 23.1(b) of the Project Agreement. However, it is seen that NTPC is not averse to complying with the provisions of Clause 24.4 (c) of the Project Agreement, which also provides that the parties shall discuss in good faith, the options for cessation of an event that led to the issuance of the notice of termination under Clause 24.4 of the Project Agreement. In this regard, NTPC had sent a notice dated 10.01.2018 (which was sent in response to the petitioner’s Dispute Notice dated 06.01.2018) calling upon the petitioner to hold ‘good faith discussions’ in terms of clause 24.4(c) of the Project Agreement.

33. Thus, whereas NTPC is willing to hold ‘good faith discussions’ under Clause 24.4(c) of the Project Agreement, it resists holding any

such discussions under Clause 23.1(b) of the Project Agreement. Clearly, the stand of NTPC in this regard is not sustainable. If NTPC is willing to hold ‘good faith discussions’ in terms of Clause 24.4 (c) of the Project Agreement to discuss the options for cessation of the event that had led to the issuance of the notice, there is no reason whatsoever for NTPC to resist holding of such discussions in terms of Clause 23.1(b) of the Project Agreement.

34. Having stated the above, it is obvious that it would not be necessary for the parties to hold two separate rounds of discussion on the same subject. The object of ‘good faith discussions’ is not to comply with the mere formalities of procedure but to genuinely explore the possibilities of resolving issues. There may be a slight difference in the scope of such discussion inasmuch as the discussion under Clause 24.4 would relate to “the options for the cessation of event that led to the issuance of notice” and the scope of discussion under Clause 23.1(b) of the Project Agreement is to discuss settlement of disputes that have arisen between the parties. However, in the facts of the present case, the subject matter of ‘good faith discussions’ would essentially remain the same. In fact, the discussions under Clause 24.4 (c) of the Project Agreement seem to be a mere formality as there is no possibility of cessation of an event that is stated to have occasioned the issuance of the notice. The controversy between the parties, essentially, is whether the petitioner has committed any corrupt practice and plainly the ‘good faith discussions’ would necessarily entail an attempt to resolve this controversy.

35. In view of the above, it would be apposite to direct parties to hold 'good faith discussions' which would not only be in accordance with Clause 23.1(b) of the Project Agreement but would also be construed as good faith discussions for the purpose of Clause 24.4 (c) of the Project Agreement.

36. NTPC's contention that the present petition is not maintainable is not persuasive. All actions of the State, whether administrative or otherwise have to be fair, reasonable and informed by reason. Plainly, it is not open for any agency of the State to enter into a contract and not perform the obligations undertaken thereunder. In the present case, there is no dispute that the dispute resolution mechanism contemplated under Article 23 of the Project Agreement is binding on the parties and NTPC is obliged to comply with the same. It is thus not open for NTPC to contend otherwise.

37. In view of the above, NTPC is directed to hold good faith discussions with the petitioner in terms of Clause 23.1(b) of the Project Agreement. It is, however, clarified that the said discussions shall also be construed as compliance of Clause 24.4 (c) of the Project Agreement and it would not be necessary for the parties to hold separate discussions under the said clause.

38. It is also clarified that this Court has not expressed any opinion on the merits of the controversy between the parties, including whether the petitioner has indulged in any corrupt or fraudulent practice and whether there is sufficient material for NTPC to have

held so in its reasonable judgment. All rights and contentions of the parties are, accordingly reserved.

39. The petition is disposed of in the aforesaid terms. The pending applications, if any, are also disposed of.

JANUARY 21, 2019

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VIBHU BAKHRU, J

HIGH COURT OF DELHI



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