

GAHC010008992024



undefined

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

WP(C) 210/2024

- 1. M/s Spectron Engineers Private Limited,**
Represented by its Area Manager, Sri Kamal Phukan and having its office at 129, Andheri Industrial Estate,
Off Veera Desai Road, Andheri West, Mumbai-400053,
Maharashtra.

- 2. Sri Kamal Phukan,**
S/O Benu Phukan,
R/O Kathpara Gaon,
P.O. Banmukh, Pin-785663, Dist- Sivasagar, Assam

.....Petitioners.

Versus

- 1. Oil & Natural Gas Corporation Limited,**
Represented by its Chairman and having its office at Nelson Mandela Marg, Vasant Kunj, New Delhi-110070.

- 2. The Assistant Manager,**
AAFB Exploratory Asset, ONGC, Srikona,
Silchar-788026, Assam.

- 3. The General Manager (E&T),**
AAFB Exploratory Asset, ONGC, Srikona,

Silchar-788026, Assam.

- 4. The General Manager-I/C MM,**
AAFB Exploratory Asset, ONGC, Srikona,
Silchar-788026, Assam.
- 5. The Assistant Executive Engineer (P),**
AAFB Exploratory Asset, ONGC, Srikona,
Silchar-788026, Assam.

...Respondents.

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

Advocate for the petitioners : Mr. I. Choudhury, Sr. Advocate
Mr. K.P. Pathak, Advocate

For the respondents : Mr. D. Saikia, Sr. Advocate
Mr. N. Anix Singh, Advocate

Dates of hearing : 21.10.2024

Date of Judgment : 29.10.2024

JUDGMENT AND ORDER (CAV)

Heard Mr. I. Choudhury, learned Sr. Counsel for the petitioners assisted by Mr. K.P. Pathak. Also heard Mr. D. Saikia, learned Sr. Counsel for the respondent ONGC assisted by Mr. N. Anix Singh.

2. The petitioners are aggrieved by the impugned order dated 09.01.2024 issued by the ONGC, by which the petitioners have been banned from having any further business dealings with the ONGC in any capacity and for participating in future tenders of the ONGC for a period of 1 year, i.e., till 08.01.2025. The petitioners' case is that the petitioners were awarded the contract work for operation and maintenance of gas compression services at South Banskandi in the district of Cachar vide contract bearing No.9010030760 dated 16.10.2019, for a period of 3 years, which was extended till 09.11.2023. An agreement was executed between the parties on 16.10.2019 and in terms of the said agreement, the termination of a contract of the contractor entailed the blacklisting of the contractor in terms of Clause 18 of the contract agreement. Further, Section 2 and 3 of the Integrity Pact, which is a part and parcel of the contract agreement, provided the manner in which a contractor could be disqualified from the tender process and also from being excluded from any future contracts of the ONGC.

3. The petitioners' counsel submits that the contract between the parties expired on 09.11.2023, when the work was completed, while the impugned order dated 09.01.2024 blacklisting the petitioners, was issued 2 months later. The petitioner's counsel submits that in view of there being no privity of contract between the parties as on 09.01.2024, the ONGC could not have issued any order blacklisting the petitioners for a period of 1 year, either in terms of Clause 18 of the contract agreement or in terms of Section 3 of the Integrity Pact.

4. The learned Sr. Counsel further submits that the show-cause-notice dated 05.10.2023 issued to the petitioner was only with reference to Clause No.36 of

the contract agreement executed between the parties and there was no mention of either Clause 18 or the Integrity Pact in the show-cause-notice. As such, when the petitioners have not been put to notice with regard to the intention of the ONGC to blacklist the petitioners in terms of either Clause 18 of the contract agreement or Sections 2 & 3 of the Integrity Pact, the impugned order blacklisting the petitioners was not sustainable and has to be set aside. In this respect, he has relied upon the judgments of the Hon'ble Supreme Court in the case of **(1) M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal & Anr**, reported in **(1975) 1 SCC 70**; **(2) Gorkha Security Services Vs. Government (NCT of Delhi) and Ors.**, reported in **(2014) 9 SCC 105** and **(3) Kulja Industries Ltd. Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Ltd. and Anr**, reported in **(2014) 14 SCC 731**.

5. The petitioners' counsel further submits that the enquiry report, on the basis of which the petitioners have been blacklisted, has been made on the basis of Clause 17.5.1.f of the Integrity Material Management Manual (IMMM), which is not a part of the documents which has to be considered as a part of the agreement executed between the parties.

6. The learned Sr. Counsel for the ONGC, on the other hand, submits that even though Clause 18 of the contract agreement executed between the parties is not applicable to the case in hand, there was no infirmity in blacklisting the petitioners in terms of Section 3 of the Integrity Pact. He submits that when there is no dispute with regard to the fact that there had been a manipulation of dates in the insurance certificate issued by the insurance company by an employee of the petitioners, the petitioners being vicariously liable for the acts

of the employees, the fraud committed by the petitioners came within the provisions of Section 3 of the Integrity Pact. He also submits that though the petitioners have taken a stand that the enquiry report made by the ONGC had not been furnished to the petitioners, the same could not have caused any prejudice to the petitioners, as there was no denial of the fact that there had been a fabrication of the dates by an employee of the ONGC in the insurance certificate.

7. The learned Sr. Counsel for the ONGC submits that the action of the petitioners in manipulating the dates in the insurance certificate was in violation of Clause 17.5.1.f of the Integrity Material Management Manual (IMMM) of the ONGC, which is as follows:

17.05.1. Removal from the approved list: *The name of the contractor may be removed from the approved list of contractors, by the enlisting authority, if it*

.....

f. Has indulged in any type of forgery or falsification or records; or"

As such, when there is no denial of the fact that there has been a breach of Clause 17.5.1.f of the IMMM, which provides that a contractor may be removed from the list of contractors by the ONGC, if the contractor has indulged in any type of forgery or falsification of records, the blacklisting of the petitioners by the ONGC was valid/proper in terms of the Integrity Pact provided in the contract agreement. He submits that in view of there being a fraud being

committed by the petitioners in the insurance certificate, which was to give insurance cover to the employees of the petitioners during the contract period, the respondents can impose reasonable conditions regarding rejection and acceptance of bids of the bidders. In support of his submission, he has relied upon the judgments of the Hon'ble Supreme Court in the case of **(1) Bhauraog Dagdu Paralkar Vs. State of Maharashtra and Ors**, reported in **(2005) 7 SCC 605** and **(2) M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal & Anr**, reported in **(1975) 1 SCC 70** respectively. He accordingly submits that there being no infirmity with the blacklisting of the petitioners due to the act of forgery committed by the petitioners, during the subsistence of their contract, the writ petition should be dismissed.

8. I have heard the learned counsels for the parties.

9. The brief facts of the case is that the petitioners were handed over the contract work of operation and maintenance of Gas Compression Services at South Banskandi in the district of Cachar, vide the Contract bearing no.9010030760 dated 16.10.2019, for a period of 3 years by the respondent ONGC. The contract period was extended upto 09.11.2023, i.e. the date the contract between the petitioners and the ONGC expired. In terms of Clause 16(C) of the contract agreement, the contractor was to arrange workmen compensation/ employers Liability Insurance Policy to cover the Statutory Liability of an employer for the workman engaged under the contract, thereby to cover all risks assumed by the contractor in respect of it's personnel deputed under the contract. The Clause further provided that if any of the insurance policies expired or were cancelled during the term of the contract and the contractor failed for any reason to renew such policies, then the Corporation

may replace the same and charge the cost thereof to the Contractor. Any lapse in the insurance required to be carried out by the contractor for any reason and the losses resulting therefrom would be solely accountable by the Contractor.

10. The problem arose with the Insurance Certificate submitted by the petitioner covering the period from 01.11.2022 to 31.10.2023, which had been submitted by the petitioner to the ONGC. When the ONGC asked for a physical copy of the Insurance Certificate covering the period from 02.11.2022 to 31.10.2023, the petitioners submitted the physical copy of the Insurance Certificate, the same covered the period from 02.12.2022 to 01.12.2023 and not 01.11.2022 to 31.10.2023. The different dates on the same insurance policy was sought to be explained by the petitioners, vide letter dated 22.06.2023, by stating that the earlier insurance policies were originally opened at Mumbai, where the Head Office of the petitioners was located. However, due to a request made by the employees of the petitioners for opening the insurance policies at Silchar, wherein the contract work was located, they allowed their employees at Silchar to open the insurance policies at Silchar. Thereafter the petitioners came to know that the different dates in the insurance policy was due to the fact that the renewal of the insurance policy had been done by the site employees later than the actual date it was supposed to be done. Further, though there was an insurance claim made by one of the petitioners' employee, the entire claimed amount was paid by the petitioners.

11. The ONGC thereafter vide letter dated 05.10.2023 issued a Show-Cause Notice to the petitioners requiring them to show-cause in writing as to why the petitioners should not be barred from entering into any contracts with the ONGC

as they had submitted the same insurance policy bearing no. P/191310/01/2023/000244 with the period of policy being different, which was in violation of Contract Clause No.36, i.e. relating to submission of forged documents, which was in violation of the terms and conditions of the agreement. The Show-Cause Notice also stated that as per the Fair Wage policy, the petitioners were required to provide ESI/Mediclaim coverage as applicable for all employees and their dependents, deputed for execution of the contract as per the agreement for the whole period of execution of the contract. However, for the period starting from 01.11.2022 to 01.12.2022, there existed no mediclaim coverage for the employees deputed at site, which was in violation of the terms of the agreement.

12. The petitioners made a reply to the Show-Cause Notice on 26.10.2023 stating that any negligent act of the employee of the petitioners, without the knowledge of the petitioners should not be a reason to penalize the petitioners. Further, the responsibility of any insurance claim made by an employee was solely on the petitioners. Subsequent to the above Show-Cause Notice and the reply, the ONGC issued the impugned letter dated 09.01.2024 stating that as there was a period of 31 days when no insurance policy was in force and that the present case was a case of submission of fake/forged documents, which was proven in an inquiry held against the petitioners, the petitioners were banned/blacklisted from having any further business dealings with the ONGC for a period of 1 (one) year till 08.01.2025.

13. The fact that the petitioners are vicariously liable for the acts of their employee is clear. Further, the concerned employee who had manipulated the

dates in the insurance policy has written a letter dated 18.10.2023 to the petitioners, admitting that he had done the same out of fear of losing his job, as he did not renew the insurance policy in time. He accordingly apologized in his letter dated 18.10.2023 issued to the CMD, Spectron Engineers Private Limited. In light of the above facts, there is no doubt that the petitioners were liable for the fabrication of the dates of the insurance policy.

14. In the case of **Bhauraao Dagdu Paralkar (supra)**, the Supreme Court held that fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a cheating intended to get an advantage. The Supreme Court further stated that fraud and collusion vitiates even the most solemn proceedings in any civilized system of jurisprudence. It also held that suppression of material document would also amount to a fraud on the Court. The Supreme Court in paragraph-11 stated as follows :

“11. “Fraud” as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud

and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See Ram Chandra Singh v. Savitri Devi)"

15. In the present case, it is clear that the misrepresentation of facts due to the manipulation of dates in the insurance policy amounts to fraud. A fraudulent misrepresentation is meant to deceive and it can be implied that a benefit would accrue to the deceiver. The above being said, the question to be decided is whether the fraud committed by the petitioners could result in them being blacklisted for one year in terms of the Integrity Pact or in terms of the IMMM, due to the fact that the counsel for the ONGC has admitted that Clause 18 would not be applicable to blacklist the petitioners, vide the impugned order dated 09.01.2024.

16. Though paragraph-4 of the additional-affidavit filed by the respondent nos.1 to 5 on 11.09.2024 states that the inquiry report had concluded that the petitioners had committed a breach/transgression of Clause 17.5.1.f of the IMMM and the terms and conditions of the contract agreement by submitting manipulated/illegally altered documents during execution of the agreement, there is nothing in the contract agreement executed between the parties to show that IMMM was to form or be read or to be construed as a integral part of the contract, in case of any discrepancy, conflict or dispute between the parties. In fact, the contract agreement clause provides at "b" that the following documents annexed to the contract agreement would be taken as mutually explanatory of one another and would be deemed to form and read and

construed as integral parts of the contract, in case of any discrepancy, conflict and dispute :-

General Terms and Conditions of contract	Annexure-A
Scope of Work and Special Conditions of Contract	Annexure-I
Price Schedule	Annexure-II
Integrity Pact	Annexure-III
Notification of Award (NOA)	Annexure-IV
Copy of NOA acceptance letter.	Annexure-V
Copy of Performance Bank Guarantee	Annexure-VI
Bank Confirmation of PBG	Annexure-VII
Pre Bid Replies and record note	Annexure-VIII

17. When the IMMM is not a part of the contract agreement and application for the same has not been provided in the contract agreement, this Court is of the view that the IMMM cannot be read or construed to be an integral part of the contract. As such, the same cannot be applied to the present case. In any event, though Clause 17.5.1.(f) and (l) provides for removal of contractors from the approved list of contractors by the enlisting authority, for indulging in forgery, falsification of records, fraudulent activity or misrepresentation etc., Clause 17.5.1 of the IMMM can be applied only for removal of contractors from the list of approved contractors. When there is no privity of contract between the parties as on the date when the impugned order dated 09.01.2024 was

issued, the question of application of Clause 17.5.1.f of the IMMM does not arise.

18. In the present case, as the petitioners have forged/falsified the insurance policy, which is an admitted fact after the contract was awarded, this Court finds that the petitioners have put its reliability, credibility as a bidder into question. As such, the ONGC is accordingly entitled to terminate the contract only. However, in the present case, the contract was already over before the impugned order was issued.

19. In the case of ***M/s Erusian Equipment & Chemicals Limited*** (supra), the Supreme Court held that the Government is a Government of laws and not of men and as such, everyone is entitled to equal treatment with others, who offer tender or quotations for the purchase of the goods. The activities of the Government have a public element and, therefore, there should be fairness and equality. It further held that the reputation is a part of person's character and personality. Blacklisting tarnishes one's reputation. It further held that the State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders.

It further held that when the State acts to the prejudice of a person, it has to be supported by legality. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

20. In the case of ***Gorkha Security Services*** (supra), the Supreme Court held that blacklisting has to be preceded by a show cause notice. Blacklisting is

described as civil death and that the requirement of stating the action proposed to be taken has to be stated in the notice. The statement of imputations detailing out the alleged breaches and defaults one has committed has to be set out in the notice, so that the noticee is able to rebut the same. Thus, the show cause notice should meet the following two requirements viz:

- i) The material grounds to be stated on which according to the Department, necessitates an action;
- ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

21. In the case of ***Kulja Industries Limited*** (supra), the Supreme Court held that blacklisting is subject to judicial review when the same is taken by the State or any of its instrumentalities, not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. The Supreme Court further held that the question whether the blacklisting order was reasonable, fair and proportionate to the gravity of the offence was examinable by a writ Court.

22. A Court is to look into whether the show cause notice issued to the petitioners has provided the statement of imputation, dealing out the alleged default/breach committed by the petitioners and whether the penalty/action proposed to be taken has been communicated to the petitioners. The show cause notice dated 05.10.2023 has specifically stated that the petitioners should submit a reply as to why the business dealings of the petitioners should not be placed in the banning list and why they should not be debarred from entering

into any contract with the ONGC. The forgery or falsification on records has already been clearly spelt out in the show cause notice and the fact that the same was in violation of the contract agreement executed between the parties.

23. On considering the above, this Court is of the view that no prejudice has been caused to the petitioners, as the requirements for taking the impugned action against the petitioners has been spelt out in the show cause notice. The fact that the petitioners had allowed their employees in Silchar to take out the insurance policies from Silchar is an admitted fact. It is also an admitted fact that the employee of the petitioners has forged/falsified the insurance policy particulars, as can be seen from the letter dated 18.10.2023, issued by Mridul Subhra Dey, SEPL, Silchar to the CMD, Spectron Engineers Private Limited. It is also admitted by the petitioners that they had paid the insurance policy claim of one of their employees during the period when there was no insurance claim cover for the employees of the petitioners. This Court finds that that the inquiry report dated 30.10.2023 conducted with respect to falsification of the insurance policies by the petitioners found that there has been breach/transgression of Clause 17.5.1.f of the IMMM. Though the show cause notice dated 05.10.2023 does not make a mention of the inquiry report dated 30.10.2023, this Court is of the view that the same does not cause any prejudice to the petitioners, inasmuch as the forgery/falsification of the insurance policy cover is an admitted fact. As such, even if the inquiry report was made available to the petitioners, no different conclusion could have been arrived at by the petitioners or the respondents, except that the falsification had been made by the employees of the petitioners, after the petitioners had allowed their employees in Silchar to open the insurance policy cover for its employees at Silchar.

24. Now the main issue is with regard to whether Section 3 of the Integrity Pact can be applied for blacklisting the petitioners, in terms of the impugned letter dated 09.01.2024. Section 2 of the Integrity Pact provides that the bidder/contractor commits itself to take all measures necessary to prevent corruption. Section 2 of the Integrity Pact states as follows:-

“(1) The Bidder/Contractor commits itself to take all measures necessary to prevent corruption. He commits himself to observe the following principles during his participation in the tender process and during the contract execution.

- 1. The Bidder/Contractor will not, directly or through any other person or him, offer, promise or give any of the Principal employees involved in the tender process or the execution of the contract or to any third person any material or immaterial benefit which he/she is not legally entitled to, in order to obtain in exchange any advantage of any kind whatsoever during the tender process or during the execution of the contract.***
- 2. The Bidder/Contractor will not enter with other Bidders into any undisclosed agreement or understanding, whether formal or informal. This applies in particular to prices, specifications, certifications, subsidiary contracts, submission or non-submission of bids or any other actions to restrict competitiveness or to introduce certalisation in the bidding process.***
- 3. The Bidder/Contractor will not commit any offence under the relevant Anti-corruption Laws of India, further the Bidder/Contractor will not use improperly, for purposes of corruption or personal gain, or pass on to others, any information or document provided by the Principal as part of the business relationship, regarding plans, technical proposals, and business details, including information contained or transmitted electronically.***

(2) The Bidder/Contractor will not instigate third persons to commit offences outlined above or be an accessory to such offences.

25. Section 3 of the Integrity Pact provides that if the bidder, before the contract has committed a transgression through a violation of Section 2 or in any other form, such as to put his reliability or credibility as bidder into question, the principal is entitled to disqualify the bidder from the tender process or to terminate the contract, if already signed for such reason. Section 3 of the "Integrity Pact" states as follows :

"Section 3

Disqualification from tender process and exclusion from future contracts

If the Bidder, before contract award has committed a transgression through a violation of Section 2 or in any other form such as to put his reliability or credibility as Bidder into question the Principal is entitled to disqualify the Bidder from the tender process or to terminate the contract, if already signed, for such reason.

(1) If the Bidder/Contractor has committed a transgression through a violation of Section 2 such as to put his reliability or credibility into question, the Principal is entitled also to exclude the Bidder / Contractor from future contract award processes. The imposition and duration of the exclusion will be determined by the severity of the transgression. The severity will be determined by the circumstances of the case, in particular the number of transgressions, the position of the transgressors within the company hierarchy of the Bidder and the amount of the damage. The exclusion will be imposed for a minimum of 6 months and maximum of 3 years

(2) A transgression is considered to have occurred, if the Principal after due consideration of the available evidence, concludes that no reasonable doubt is possible.

(3) The Bidder accepts and undertakes to respect and uphold the

Principal's absolute right to resort to and impose such exclusion and further accepts and undertakes not to challenge or question such exclusion on any ground, including the lack of any hearing before the decision to resort to such exclusion is taken. This undertaking is given freely and after obtaining independent legal advice.

(4) If the Bidder/Contractor can prove that he has restored / recouped the damage caused by him and has installed a suitable corruption prevention system, the Principal may revoke the exclusion prematurely'

26. A perusal of the contents of Section 3, prior to Section 3(1) of the "Integrity Pact", clearly shows that Principal can disqualify the bidder from the tender process or terminate a contract, if the bidder has violated Section 2 of the Integrity Pact or has put his reliability or credibility as a bidder into question in any other form. In the present case, it can be said that the manipulation of the dates in the insurance policy is a transgression "in any other form", which puts the reliability or credibility of the petitioners as a bidder into question. However, this Court cannot lose sight of the fact that the contents of Section 3, prior to Section 3(1), does not provide for debarment/blacklisting of a bidder. The debarment/blacklisting is only provided in Section 3(1) if the "Integrity Pact", that too, only if the bidder has committed a transgression through a violation of Section 2. However, it is clear that Section 2 of the "Integrity Pact" is not attracted to the facts of this case and consequently Section 3(2).

27. As stated in the forgoing paragraphs, it is agreed by both the parties that the ban imposed upon the petitioner by the ONGC for a period of one year, vide the impugned letter dated 09.01.2024, has not and cannot be made on the basis of Clause 18 of the contract agreement. Though the learned senior counsel for the ONGC has taken the stand that Clause 17.5.1.f of the IMMM had

been applied, as there was a breach of Clause 17.5.1.f of the IMMM, which provides that a contractor can be removed from the list of contractors, if a contractor indulges in forgery or falsification of the records, this Court has already held that the IMMM was not a part of the contract agreement made between parties, as has been clearly spelt out at Clause 'b' of the contract agreement (page 21 of the writ petition). In any event the said provision only provides for removal of contractors from the list of contractors. However, the petitioners in any event are apparently not in list of contractors maintained by the ONGC.

28. In the present case, the forgery or falsification of records has been done only after the contract has been awarded and after the petitioners had been working for more than one year on the contract and as such, the contents/provision of Section 3, prior to Section 3(1) of the "Integrity Pact", is applicable. However, the penalty that can be given under the contents/provision of Section 3, prior to Section 3(1), pertains only to disqualification of the bidder or termination of the contract. For debarment/blacklisting, the bidder has to commit a transgression through a violation of Section 2 of the "Integrity Pact", in terms of Section 3(1).

29. A perusal of Section 2 of the "Integrity Pact" shows that the bidder is to take all necessary measures to prevent corruption and it is only when there is corruption on the part of the bidder, as envisaged under Section 2 that action under Section 3(1) of the Integrity Pact can be taken against the bidder.

30. It was fortunate that there was no requirement for submission of a major claim by a large number of employees during the period when there was no

insurance policy cover for the employees of the petitioners. There was no privity of contract between the parties on 09.01.2024, when the impugned order was issued, inasmuch as, the contract had expired on 09.11.2023. Though transgression "in any other form" had been made during the pendency of the contract and validity of the contract agreement between the parties, the provisions of 3(1) of the "Integrity Pact" is not attracted to this case.

31. In view of the reasons stated above, this Court is of the view that the impugned letter/order dated 09.01.2024 is not sustainable . The same is accordingly set aside. The writ petition is accordingly allowed.

JUDGE

Comparing Assistant