



Serial No. 01
Supp. List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C). No. 180 of 2021

Date of Decision: 05.04.2022

Pioneer Carbide Pvt. Ltd & Anr. Vs. Union of India & Ors.

Coram:

Hon'ble Mr. Justice H.S.Thangkhiew, Judge.

Appearance:

For the Petitioner/Appellant(s) : Mr. K.Paul, Sr. Adv. with
Mr. S.Thapa, Adv.

For the Respondent(s) : Dr. N.Mozika, Sr. Adv. with
Ms. S.Rumthao, Adv. for R 2-6.
Mr. S.Jindal, Adv. for R 7.

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| i) | Whether approved for reporting in Law journals etc: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

JUDGMENT AND ORDER

1. The petitioner company by way of this instant writ application challenges the Risk Purchase Notice dated 01-05-2021, whereby the respondents had directed the petitioner to dispatch 1000 metric tonnes of Ferro Silicon, failing which the material would be procured from an alternate source at the risk and cost of the petitioner company and that any extra amount incurred in procurement of the material from other sources, were to be recovered from the petitioner company. This it is contended, is inspite of the



petitioners' company non acceptance of the impugned Purchase Order No. 4140071156 dated 21-01-2021 (hereinafter referred to as PO for the sake of brevity) issued by the respondents, which was followed by issuance of a pre-emptory notice dated 07-04-2021 for breach of contract. The challenge so put up, is on the ground of arbitrariness, illegality and lack of transparency and fair practice in the tender process.

2. The brief facts of the case is that, in response to a Request For Quotation (RFQ) dated 26-10-2020, for supply of 1600 metric tonnes of Ferro Silicon to Bhilai Steel Plant, Chhattisgarh, the petitioner company had submitted a bid for supply of 1000 MT, along with techno commercial bid documents and was informed on 06-01-2021, that it had been shortlisted by the respondents to participate in the online option for procurement of the Ferro Silicon. After the conclusion of the tender process, the respondents then issued the impugned Purchase Order (PO) dated 21-01-2020, calling upon the petitioner company to supply 1000 MT of Ferro Silicon. The petitioner then by email dated 25-01-2021, communicated their non-acceptance of the PO for supply of Ferro Silicon citing various reasons especially the current price of the material and also cited irregularities in the process adopted by the respondents. Thereafter, there were several correspondences between the respondents and the petitioner and repeated demands were raised for dispatch of the Ferro Silicon by the respondents, which on the non-supply by the petitioner company, culminated in the Risk Purchase Notice, wherein it was stated that unless the consignment was dispatched immediately as per the PO, it would be taken that the petitioner company did not intend to supply and that the same would be procured alternately (Risk Purchase Action) and consequently the extra cost



incurred in the said procurement was to be recovered from the petitioner company.

3. Alleging that the action of the respondents to be unfair and arbitrary, the writ petitioner has prayed for appropriate orders and directions to not give effect to the Risk Purchase Notice dated 01-05-2021 and for quashing of the Purchase Order dated 21-01-2021 as also the Risk Purchase Notice dated 01-05-2021.

4. Mr. K.Paul, learned Senior counsel submitted that in the PO itself, it has been provided that any discrepancy in the PO could be intimated within ten days and that the petitioner had within five days itself, of receipt thereof, had communicated the non-acceptance of the PO, alongwith reasons for the refusal vide several emails, as the petitioner had reservations to the manner in which the respondents conducted the reverse auction process and the fixation of the Start Bid Price which he contended was in gross violation of the mandated terms and regulations especially Clause 17 of the Auction Notice for online price negotiations dated 06-01-2021.

5. It is further submitted by the Senior Counsel, that there was deviation from the terms which is impermissible in law and the same being arbitrary and forceful, the same is liable to be interfered with by this Court under its exercise of writ jurisdiction under Article 226 of the Constitution of India. Though Mr. Paul concedes that there is provision for arbitration and conciliation, he submits that the same will not be attracted in the present case, inasmuch as, there is no concluded contract and that for the arbitration clause to be applicable, there should be an existing contract. He further submits that the general conditions of contract for purchase have defined 'Supplier' at clause 5 of condition 1.0 and has read out the same as follows; "*Supplier*"



means the “Successful Bidder”/ “Successful Tenderer” i.e. the individual, firm or company etc. whose Bid has been accepted and on whom Purchase Order has been placed and who enters into the Contract to supply the material. The term includes the Supplier’s authorized representatives, legal successors and permitted assigns. Learned Senior counsel contends that as the petitioner has not entered into the contract for supply of the material, it therefore will not come within the definition of ‘Supplier’.

6. It is then further contended that as the general conditions at clause 11.0 only provide for consequences on the failure of a supplier to deliver any consignment which includes Risk Purchase at clause (ii) of clause 11.0, the petitioner by not coming within the definition of supplier in the instant transaction, is therefore not liable to be saddled with the responsibility of a supplier, or inflicted with the Risk Purchase clause. He concludes his submissions by reiterating the above stated contentions that the presence of an arbitration clause will in no manner prevent the petitioner from seeking relief before this Court as the respondents have acted arbitrarily, illegally and unfairly.

7. Dr. N.Mozika, learned Senior counsel assisted by Ms. S. Rumthao, learned counsel on behalf of respondents No. 2-6 in reply, has raised strong objections as to the maintainability of the writ petition on the following counts:

(a) The issue involved is a purely contractual dispute which cannot be adjudicated by this Court under Article 226 and that no public law element is involved.



(b) The case involves disputed questions of fact which cannot be adjudicated under Article 226.

(c) That the General Conditions of Contract for Purchase (SAIL P1) which governs the instant contract provides for settlement of disputes through conciliation and arbitration.

(d) That the General Conditions of Contract for Purchase (SAIL P1) defines the jurisdiction and provides that the Courts where the purchaser is located shall have the jurisdiction (in this case, purchaser/ respondents are located in Bhilai, Chhattisgarh).

(e) That the tendering process was held and work order was issued at Bhilai, Chhattisgarh and the material was to be supplied at Bhilai and no cause of action or any part of the cause of action has arisen within the territorial jurisdiction of this Court.

8. The learned Senior counsel submits that on the above specified objections, the writ petition is liable to be dismissed in limine. With regard to the submission of the petitioner's counsel that the PO had given latitude to the petitioner to intimate any discrepancy, he submits that the latitude so given, does not include the choice to refuse the offer as it was only to indicate if there was any discrepancy in the PO. He further contends that once an entity becomes a successful bidder, they come within the definition of a 'Supplier' and are bound as such. The learned Senior counsel has also referred to the clause in the Purchase Order itself, which provides for the initiation of Risk Purchase Action and submits that there was no alternative for the respondents, but to invoke the said clause and procure the material from another agency.



9. On behalf of respondent No. 7, Mr. S.Jindal, learned counsel apart from supporting the submissions of the learned Senior counsel on the question of maintainability, has submitted that the PO dated 21-01-2021 had been issued by Bhilai Steel Plant in favour of the petitioner in accordance with the conditions of the Notice Inviting Tender and instructions as received. He submits that there was no arbitrariness in the fixation of the Start Bid Price, or the Reverse Auction Process as alleged and infact, there has not been any violation of the guidelines or directives, or the petitioner being prejudiced in any way. Learned counsel has also referred to Section 3 of the Indian Contract Act, 1872 to canvas his point with regard to acceptance and revocation of proposals and submits that the transaction which the petitioner contends is an unconcluded contract, is misplaced. Learned counsel has also placed reliance on the following two judgments to buttress his contentions:

- (i) ***Sanjana M. Wig (Ms) Vs. Hindustan Petroleum Corpn. Ltd. (2005) 8 SCC 242 (para 18).***
- (ii) ***E. Venkatakrishna Vs. Indian Oil Corpn. Ltd...Bombay AIR 1989 Karnataka 35 (para 5, 6 and 7).***

Learned counsel submits that the Hon'ble Supreme Court in the above noted judgments has held that a writ petition is maintainable when it involves a public law character and that a writ petition would not be entertained if it involves a serious disputed question of fact arising out of a contract. He further submits that the judgment of Karnataka High Court has held that in a contract between a statutory corporation and a private citizen containing an arbitration clause, writ petition will not be maintainable.

10. Mr. S.Jindal, learned counsel on the ground as raised by the petitioner that the contract was not concluded has drawn attention of the Court to the



additional affidavit filed by the petitioner wherein he submits the petitioner though contesting the PO had infact at para 2 of the affidavit itself, stated that the petitioner company had decided to supply the material against the impugned PO. As such, he submits the question of a non-existent contract does not arise, and the dispute being purely a contractual dispute, exercise of writ jurisdiction by this Court is not warranted.

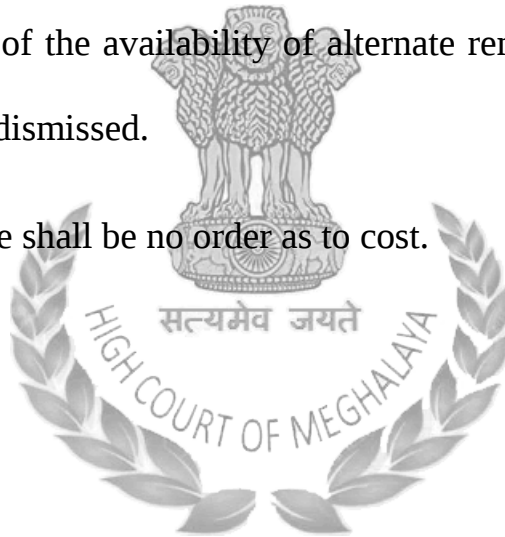
11. I have heard learned counsel for the parties, considered their submissions and examined the materials on record. The question to the mind of the Court that is most relevant is the maintainability of the instant writ petition. It is undisputed that the parties to the *lis* are commercial entities, and the relationship does not involve any public law element. The dispute as portrayed by the petitioner to invite adjudication under Article 226 has been to establish the point that the issue has arisen not from a contractual dispute, but due to the arbitrary action of the respondents in deviating from the terms and conditions of the tender process after its initiation, as also the issuance of the Risk Purchase Notice dated 01-05-2021 and further that there is no existing contract. On the other hand, the contentions raised by the respondents as enumerated in the earlier paragraphs, especially the availability of alternate remedy in view of the existence of an arbitration clause, cannot be wished away. Further as held by Hon'ble Supreme Court in various judgments, Courts are to be slow in invoking Article 226 in contractual disputes unless the facts of a particular case warrant the same and permissible only if public law element is involved. Resort to Article 226 would be misconceived if the petitioner is not seeking to enforce any statutory right or obligation which has been cast upon the respondents.



12. In the facts of the instant case, firstly, there is no element of public law nor is the petitioner seeking to enforce any statutory right. Furthermore, the issues in question such as the question of jurisdiction and the presence of an arbitration clause which has been prescribed in the General Conditions of Contract for Purchase (SAIL P1) apart from the presence of disputed facts will surely prevent this Court from entertaining the writ petition. The contention that there is no existing contract is rejected in view of the nature of the PO and the fact that the petitioner company had acted upon the same.

13. Without dwelling any further on the other facts and materials as placed, for the reasons aforementioned, this writ petition is held to be not maintainable on the basic ground of the availability of alternate remedy, and as such the same is accordingly dismissed.

14. However, there shall be no order as to cost.



Judge

Meghalaya
05.04.2022
"Samantha PS"