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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **W.P.(C) 5704/2008**

Reserved on : 01.05.2009

Date of decision : 12.08.2009

IN THE MATTER OF :

M/S KAVERI INFRASTRUCTURE PVT.LTD.

..... Petitioner

Through: Mr. Rajiv Nayyar, Senior Advocate with
Mr. Siddhartha Dave and
Ms.Jemtiben Ao, Advocates.

versus

DELHI JAL BOARD & ORS.

..... Respondents

Through: Mr. Pinaki Misra, Senior Advocate with
Mr.Suresh Tripathy, Advocate

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

1. Whether Reporters of Local papers may be allowed to see the Judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

HIMA KOHLI, J.

The present writ petition is the tenth round of litigation between the parties on the same subject, over a short span of two years. The petitioner company has sought quashing of the order dated 28.3.2008 passed by the respondent, Delhi Jal Board (DJB) debarring and blacklisting the petitioner from participating and/or being considered for any fresh

tender to be issued by the DJB till such time, the outcome of the investigations being carried out by the Central Bureau of Investigation(CBI) is made known to the DJB whereafter, the said decision would be reviewed. The second prayer in the writ petition is for directions to the DJB to consider the petitioner company for applying for tenders that may be floated by it, subject to fulfillment of eligibility criteria.

2. As the case has a chequered history, before proceeding to deal with the issues raised, it is necessary to encapsulate the relevant facts and revisit the earlier series of litigation. The petitioner company carries on the work of laying of water pipes, sewer pipes, water and waste water management, in collaboration with a United Kingdom based company, for the civic agencies, like the respondents. On 9.11.2004, a Notice Inviting Tender (NIT) was issued by the respondents inviting expression of interest for pre-qualifying the firms for renovation of old pipeline. The petitioner company applied for the said tender and was ultimately awarded the said work. Part of the work under the contract was completed. In the meantime, the CBI registered FIR on 23.4.2007 against Mr.Vijay Kumar Kataria, Managing Director of the petitioner company, Mr.Rakesh Mohan, CEO of the respondent authority and the son-in-law of Mr.Rakesh Mohan on the ground that the contract was awarded to Mr.Vijay Kumar Kataria when Mr. Rakesh Mohan was the CEO of the respondent, for extraneous considerations and

that he was instrumental in purchase of immovable property for the son-in-law of Mr.Rakesh Mohan in USA, which formed the consideration for awarding the contract in favour of the petitioner company.

3. On 1.6.2007, the Board of the DJB passed a resolution prohibiting the petitioner company from being awarded any tender of the DJB and from participating in the tender process. This was followed by issuance of a Circular dated 25.6.2007 by the DJB, giving effect to the aforesaid resolution of the Board. The relevant extract of the aforesaid Circular is reproduced hereinbelow for ready reference:

“ ...After detailed deliberation it was decided that in all fairness the firm may not be allowed to participate in any fresh tender or may not be considered for award of any new work, which is yet to be awarded, till the said CBI case is finally decided.”

4. Aggrieved by the aforementioned Circular dated 25.6.2007, the petitioner company filed a writ petition, registered as WP(C) No.5398/2007 for quashing the aforesaid Circular. Vide judgment dated 14.9.2007, the learned Single Judge quashed the Circular dated 25.6.2007. The operative paras of the aforesaid judgment are reproduced hereinbelow:

“Para 22: ...In these circumstances, the DJB ought to have issued some form of notice, and afforded reasonable opportunity of hearing to the petitioner,

before issuing the impugned order; by not doing so, the said order is unsustainable, as being tainted by arbitrariness.

Para 23: In the light of the above circumstances, the impugned order is quashed. However, the respondent is at liberty to issue notice, outlining allegations against the petitioner and afford it reasonable opportunity to refute them. Thereafter, it shall apply its mind to all relevant considerations; in case of its deciding to blacklist or not business with the petitioner, a time frame for operation of such order shall be communicated. The entire process shall be completed within six weeks from today.

Para 24: The petition is allowed in the above terms; on costs."

5. In compliance with the order of the learned Single Judge, the DJB issued a show cause notice dated 10.10.2007 to the petitioner company calling upon it to explain its position with regard to the allegations, as contained in the FIR dated 23.4.2007 lodged by the CBI. The petitioner company replied to the aforesaid show cause notice vide letter dated 18.10.2007 seeking withdrawal thereof.

6. At the same time, the order of the learned Single Judge was assailed by the DJB by directly filing a Special Leave Petition in the Supreme Court. The Special Leave Petition was dismissed by the Supreme Court vide order dated 12.11.2007 on the ground that the DJB ought to have exhausted the remedy of *intra-court* appeal in the High Court. As a result,

the DJB filed an *intra-court* appeal before a Division Bench of this Court, registered as LPA No.1351/2007.

7. Contemporaneously, the DJB filed an application before the learned Single Judge in the decided petition [WP(C) No.5398/2007], seeking extension of time to complete the process of taking a decision on the show cause notice issued to the petitioner company. The said application was however withdrawn by the DJB on 14.12.2007.

8. In the meantime, the DJB issued a fresh NIT inviting expression of interest for the work of Rehabilitation of Trunk Sewer from Jhilmil Colony to Jagriti SPS Shahdara. In response thereto, the petitioner company addressed a letter dated 21.1.2008 to the DJB requesting it to issue the tender documents, which request was declined by the respondent/DJB. As a result, the petitioner company filed a Contempt Petition, registered as Contempt Case(Civil) No.39/2008 in this Court. The petitioner company also filed a writ petition, registered as WP(C) No.1128/2008 challenging the action of the DJB in failing to issue the tender documents of the aforesaid NIT.

9. Vide order dated 18.2.2008 passed in the aforesaid writ petition filed by the petitioner company, the Division Bench allowed the petitioner company to participate in the process of tender and also observed that in

view of its order, the pending contempt proceedings were rendered infructuous. The appeal preferred by the DJB against the judgment dated 14.9.2007 passed by the learned Single Judge in WP(C) NBo.5398/2007 was adjourned. In view of the order of the Division Bench, the Single Judge passed an order dated 25.2.2008 in the contempt proceedings, dismissing the same as not pressed.

10. Aggrieved by the order dated 18.2.2008 passed by the Division Bench in WP(C) No.1128/2008, the DJB preferred two Special Leave Petitions before the Supreme Court, registered as SLP Nos.5447/2008 and 5449/2008. The aforesaid petitions were disposed of by the Supreme Court vide order dated 14.3.2008, refusing to interfere in the order of the Division Bench dated 18.2.2008, but permitting the DJB to grant a personal hearing to the petitioner company in the matter of blacklisting and dispose of the same, within two weeks. The Division Bench was also directed to expedite the hearing in the pending appeal(LPA No. 1351/2007).

11. In view of the order dated 14.3.2008 passed by the Supreme Court, the respondent/DJB issued a show cause notice dated 26.3.2008 to the petitioner company, directing it to appear before the Committee constituted by the DJB, on 28.3.2008. The petitioner appeared before the Committee on the date fixed and also filed its written representation. The Competent Authority of the DJB disposed of the show cause notice and

passed the impugned order dated 28.3.2008. The operative para of the aforesaid order is reproduced hereinbelow:

"...And now after carefully considering the circumstances leading to the issuance to the issue of show cause notice and reply and submission made by M/s Kaveri Infrastructure Pvt.Ltd., the Competent Authority has taken a decision that M/s Kaveri Infrastructure Pvt.Ltd., shall not be allowed to participate in the tendering process till such time the outcome of the investigations being carried out by the Central Bureau of Investigation(CBI) is made known to the Delhi Jal Board. It has also been decided by the Competent Authority that Delhi Jal Board would review the aforesaid decision immediately after the report of CBI investigations is made available.

The above orders of the Competent Authority are hereby conveyed to M/s Kaveri Infrastructure Pvt.Ltd., for their information."

12. On 12.5.2008, the Division Bench disposed of as infructuous WP(C) No.1128/2008 and LPA No.1351/2007 filed by the petitioner company and the DJB respectively, in view of the statement made on behalf of the parties that a fresh show cause had been issued to the petitioner company and nothing survived in either of the matters.

13. Aggrieved by the impugned Circular dated 28.3.2008, issued by the DJB, the petitioner company filed the present writ petition. Accompanying the writ petition was an application for interim relief, seeking

directions to the DJB to permit the petitioner company to participate in the fresh tenders that may be issued by it. The aforesaid application was considered and vide order dated 20.8.2008, the impugned order dated 28.3.2008 was stayed. The operative para of the aforesaid order is as under:

"..... It prima facie appears that once again the same lacuna persists in the impugned order. The impugned order which states that the decision of the competent authority not to permit the petitioner to participate in tendering process will be reviewed after the report of the CBI investigations again appears to be an open ended order of blacklisting since neither the petitioner nor the respondent has any control over the pace and progress of investigation and consequently there is no definiteness with regard to the time period for which the blacklisting would operate.

In view of the aforesaid, till the next date of hearing, the operation of the impugned order shall remain stayed. ..."

14. Aggrieved by the aforesaid interim order, the DJB preferred an *intra-court* appeal, registered as LPA No.524/2008, which was allowed vide judgment dated 5.9.2008, and the interim order dated 20.8.2008 was set aside. The petitioner company took the aforesaid order in appeal to the Supreme Court by filing a Special Leave Petition, which was disposed of vide order dated 15.10.2008, with the following directions:

"..... Keeping, therefore, in view the peculiar facts and circumstances of this case and having regard to the statements made before us by Mr. Pinaki Misra, learned

senior counsel appearing for respondent- Board that no tender document shall be supplied to any person against whom C.B.I. inquiry is pending by his client, we are of the opinion that the interest of justice would be subserved if the special leave petition is disposed of with the following directions:

- (1) Finalization of any of the aforementioned three tenders would be subject to the result of writ petition filed by the petitioner.
- (2) The Delhi Jal Board shall file its affidavit in opposition within a week from date in the writ petition and rejoinder, if any, must be filed within two weeks thereafter.
- (3) The High Court is requested to take up the hearing of the writ petition as expeditiously as possible and preferably within a period of six weeks from date.

We have no doubt in our mind that the writ petition would be disposed of on its own merits irrespective of the observations made by the Division Bench in the impugned judgment as the Division Bench was only considering an appeal from the interim order.

Although, the C.B.I. is not a party before us, we direct that a copy of this order may be sent to the Director of C.B.I. for consideration that the investigation in the matter be completed at an early date.

With the aforementioned directions and observations, the special leave petition is disposed of. "

15. Thus, in the light of the aforesaid order, the parties completed their pleadings in the present writ petition and made their submissions. I have heard the counsels for the parties and considered their respective arguments. I have also perused the judgments relied on by the parties.

16. The *leitmotif* of the arguments urged on behalf of the petitioner company was that even after the judgment dated 14.9.2007 came to be passed in favour of the petitioner company, in the earlier writ petition filed by it, wherein the impugned Circular dated 25.6.2007 was quashed, the DJB has passed the impugned blacklisting order, without providing a time frame for operation of the order. It was thus contended that the impugned order dated 28.3.2008 is identical to the earlier Circular dated 28.6.2007 issued by the DJB and liable to be set aside.

17. The contours of administrative law as etched out from a number of judicial pronouncements over the years, highlights the fact that the Court while exercising its powers of judicial review of administrative action, seeks to prevent arbitrariness, irrationality, unreasonableness and *mala fides*. As observed by the Supreme Court in the case of Jagdish Mandal Vs. State of Orissa and Ors. reported as **(2007) 14 SCC 517**, the purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. At the end of the day, sight cannot be lost of the fact that the award of contract is purely a commercial transaction, guided by commercial considerations which will swing one way or the other. While taking such a decision, the State, its instrumentalities and agencies are expected to adhere to the norms, standards and procedures laid down by them so as to discharge their public duty to be fair

to all concerned. It has been equally emphasized that the Courts must exercise its discretionary power under Article 226 of the Constitution of India with great caution and restraint, only in furtherance of public interest, and not to protect private interest at the cost of public interest or to decide contractual disputes[Refer: Sterling Computers Ltd. Vs. M & N Publications Ltd. (1993) 1 SCC 445, Tata Cellular Vs. Union of India (1994) 6 SCC 651, Raunaq International Ltd. Vs. I.V.R.Construction Ltd. (1999) 1 SCC 492], Air India Ltd. Vs.Cochin International Airport Ltd. (2000) 2 SCC 617, Association of Registration Plates Vs. Union of India, (2004) 5 SCC 364, B.S.N. Joshi Vs. Nair Coal Services Ltd. (2006) 11 SCC 548.

18. Proceeding to examine the case in hand in the light of the aforesaid parameters, it may be noted at the outset that at the time of passing the first order of blacklisting and even the second impugned order dated 28.3.2008, the material before the DJB remained the same, i.e., the FIR lodged by the CBI. The difference is that before passing the earlier order of blacklisting, the DJB did not afford an opportunity of hearing to the petitioner company, and consequently, the said order was quashed on the ground of it being tainted with arbitrariness. However, before passing the second order of blacklisting, the DJB issued a show cause notice dated 10.10.2007 to the petitioner company and afforded it an opportunity of hearing. Thus the principles of *audi alteram partem* as enunciated in the

case of Erusian Equipments & Chemicals Ltd. Vs. State of West Bengal and Anr. reported as **(1975) 1 SCC 70** and Raghunath Thakur Vs. State of Bihar & Ors. reported as **(1989) 1 SCC 229** were duly observed. The procedure adopted by the DJB while blacklisting the petitioner company was in conformity with the principles of natural justice.

19. The core issue hinges on the impact of the impugned blacklisting order dated 28.3.2008, with focus on the time frame for running its course. To examine the contention of the counsel for the petitioner company that there is no difference between the earlier Circular dated 28.6.2007 and the present order dated 28.3.2008 and that by taking the subsequent decision, the DJB has ignored the fact that the order of the learned Single Judge had become final and binding, it is necessary to carefully peruse the wording of both the orders. While the earlier Circular dated 28.6.2007 had stipulated that the petitioner company would not be allowed to participate in any fresh tender and it may not be considered for award of any new work which is yet to be awarded, "till the said CBI investigation is finally decided", in the impugned order dated 28.3.2008, the DJB has decided that the petitioner company shall not be allowed to participate in the tendering process "till such time the outcome of investigation being carried out by CBI is made known to DJB" and that "the

DJB would review the decision immediately after the report of CBI investigations is made available”.

20. It is nobody's case that the decision on the FIR lodged by the CBI lies in the hand of the DJB. It is neither conducting the investigation, nor monitoring the proceedings. In fact, looking at its predicament, the Supreme Court while deciding the Special Leave petition filed by the petitioner company against the order dated 5.9.2008 passed by the Division Bench in LPA No.524/2008, took note of the fact that the CBI was not a party before it, and directed that a copy of the order be forwarded to the Director of CBI for consideration that the investigation in the matter be completed at an early date.

21. A perusal of the impugned order reflects a distinct difference between the earlier Circular dated 25.6.2007 and the present order dated 28.3.2008. The dangerous nebulousness observed by the learned Single Judge in the judgment dated 14.9.2007, has been adequately addressed by the DJB while passing the impugned order. Unlike the earlier decision taken to await the final decision in the CBI case, now, the DJB has decided to await the outcome of the investigations being carried out by the CBI and that too, with the clear intention of reviewing its decision immediately after a report of the CBI investigation is made available to it. The lack of certainty of time frame which engaged the Court while passing

the judgment dated 14.9.2007 has been taken care of by removing the obscurity and reducing the time frame for operation of the impugned blacklisting order, by deciding to await the result of the CBI investigations and not to await a final decision in the CBI case. The obscurity in specifying the time span questioned by the petitioner company in the first round of litigation has been considerably cut short in the impugned order. The impugned order can therefore not be called either so amorphous or so vague as to invite interference by this Court. With its observations made in the order dated 15.10.2008, the Supreme Court has also prodded the CBI to complete the investigation expeditiously. Thus the contention of the counsel for the petitioner company that the DJB has failed to meet the grievance of the petitioner company as to lack of time frame for the running of the black listing order is liable to be turned down.

22. The other ground urged on behalf of the petitioner company that the DJB having failed to decide the second set of proceedings after issuing a fresh show cause notice, within a time bound manner, as stipulated in the judgment dated 14.9.2007, the entire proceedings are void and liable to be set aside, the first show cause notice having deemed to have lapsed and no fresh show cause notice could have been issued thereafter, is taken note of only to be rejected. By urging the said argument, the petitioner company appears to have missed the wood for the trees. It may be

emphasized that the thrust of the judgment dated 14.9.2007, was to direct the DJB to afford an opportunity of hearing to the petitioner company and thus observe the principles of natural justice as a blacklisting order has serious civil consequences for future business prospects of a person. The petitioner company is seeking to give an entirely different interpretation to the judgment dated 14.9.2007, to mean that as the time schedule prescribed by the learned Single Judge was not adhered to by DJB and as no extension of time was granted by the Court, the entire proceedings held by DJB pursuant to the second show cause notice, would be invalid and void, which is untenable.

23. The chronology of relevant dates in the case shows that the DJB issued a notice to show cause to the petitioner company on 10.10.2007, to which a reply was submitted by the petitioner company on 18.10.2007. Thereafter, legal wranglings erupted between the parties, who filed *intra-court* appeals and Special Leave Petitions, apart from offshoots by way of contempt proceedings and fresh petitions initiated by both, the petitioner company and the DJB. It is not disputed by the petitioner company that it was afforded an opportunity to show cause and was granted a hearing before the impugned order dated 28.3.2008 came to be passed. Thus the procedure adopted by the DJB for blacklisting the petitioner company after passing of the judgment dated 14.09.2007, cannot be faulted. Non-

adherence to the time schedule fixed in the judgment dated 14.9.2007, cannot be held to be so fatal, as to strike down the impugned order dated 28.3.2008.

24. Lastly, counsel for the petitioner company submitted that despite there being pending investigations and enquiries against other companies and firms, they are being allowed to participate in the tender process, whereas the petitioner company is being discriminated against by being debarred. It may be noted that the DJB has already extended an assurance that no tender documents shall be supplied to similarly placed companies/firms as the petitioner, against whom the CBI enquiry is pending. In this regard, reference made to the minutes of the Enlistment/Debarment Committee in its meeting held on 21.10.2008 and 6.11.2008, is relevant. The DJB has decided to suspend business with the said firms and they have also not been allowed to participate in the tender, in terms of the assurance given by DJB to the Supreme Court, as recorded in the order dated 15.10.2008. Hence the grievance of discrimination has already been redressed by the DJB.

25. In the aforesaid facts and circumstances, it has to be held that as the impugned order deals with a situation which is not capable of being made absolutely certain, in the absence of any role attributable to the DJB therein, the argument that the same is so indefinite and uncertain as to set

it aside, is found to be unsustainable. The sunset point in the blacklisting order is visible and has been defined by DJB, as best as it possibly could in the given facts and circumstances. The writ petition is, therefore, dismissed while leaving the parties to bear their own costs.

(HIMA KOHLI)
JUDGE

AUGUST 12, 2009
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