

GAHC010174732023



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

Case No. : WRIT PETITION (C) No. 4529/2023

Dipu Das, S/o - Late Dukhu Das, R/o- Uzanbazar Jahajghat,
P.O.- Uzanbazar, P.S.- Latashil, Guwahati-01, Kamrup [M],
Assam.

.....Petitioner

-Versus-

1. Guwahati Municipal Corporation, Represented by its
Commissioner, Bhangagarh, Guwahati-05, District - Kamrup
[M], Assam.

2. The Joint Commissioner, Guwahati Municipal
Corporation, Bhangagarh, Guwahati-05, District - Kamrup
[M], Assam.

.....Respondents

Advocates :

Petitioner : Mr. S. Kataki, Advocate.

Respondents : Mr. P. Nayak, Standing Counsel,
Guwahati Municipal Corporation

Date of Hearing, Judgment & Order : 24.08.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER [ORAL]

By the instant writ petition, preferred under Article 226 of the Constitution of India, the petitioner has assailed an Order bearing no. GEF/51/2023-24/284 dated 24.07.2023 and an Order bearing no. GEF/43/2023-24/328 dated 04.08.2023, both issued under the hand of the Joint Commissioner, Guwahati Municipal Corporation [GMC]. By the Order dated 24.07.2023, the respondent GMC has forfeited the Earnest Money Deposit [EMD] given by the petitioner for the purpose of participating in a bidding process initiated for settlement of a parking slot by the respondent GMC. By the said Order, the petitioner has also been blacklisted, thereby, debarring him from participating in any kind of tender/auction under the GMC from the date of issuance of the said Order. The Order dated 04.08.2023 is in continuance of the Order dated 24.07.2023 and by the Order dated 04.08.2023, the lease of another parking place viz. Parking Slot no. 43, H.B. Road, from Khubchand point to Sikh Temple point, left side parallel parking, Fancy Bazar, earlier granted to the petitioner, has been terminated with immediate effect.

2. Having regard to the nature of the issue involved and considering that necessary pleadings have been exchanged, the writ petition is taken up for final consideration at the motion stage itself, as agreed to by the learned counsel for the parties.

3. A brief narration of the previous events which had led to the passing of the afore-mentioned two Orders can be expounded at this stage.

4. By a Tender Notice under Memo no. GEF/84/2004/Pt-X/371 dated 14.03.2023 issued under the hand of the Joint Commissioner, GMC, sealed tenders in prescribed format were invited for settlement of 53 [fifty three] parking places located within the GMC areas for the year : 2023 – 2024, that is, for a period of 12 [twelve] months w.e.f. 01.04.2023 to 31.03.2024. The last date of submission of bid was up to 02-00 p.m., 05.04.2023 and the tender box was to be opened at 11-00 a.m., 06.04.2023. In response to the Tender Notice dated 14.03.2023, the petitioner submitted his bids in respect of two parking places, [i] Parking Slot no. 43, H.B. Road, from Khubchand point to Sikh Temple point, left side parallel parking, Fancy Bazar [‘the Parking Place no. 1’, for short]; and [ii] Parking Slot at Basement Parking at Fancy Bazar Market Complex [‘the Parking Place no. 2’, for short].

5. Upon evaluation of the tenders for the parking slots, the respondent GMC authorities had found that the petitioner had emerged as the successful bidder [H-1] in respect of afore-mentioned two parking places.

5.1. A Letter of Intent [LoI] bearing no. GEF/43/2023-24/48 dated 03.05.2023 was issued to the petitioner informing him that his offer for Parking Place no. 2 had been accepted. By the LoI dated 03.05.2023, the petitioner was requested to submit the following documents as per due date/schedule mentioned therein with the condition that in the event of his failure, the LoI would stand cancelled :

Sl No.	Documents	Due date/schedule
1.	Agreement	Within 5 working days from issue date of this

		letter
2.	50% Security Deposit i.e. Rs. 3,38,393.00 [Bid Rs. 2,86,774.00 + GST Rs. 51,619.00]	Within 2 working days after submission of the agreement

5.2.As the petitioner had also emerged as the successful bidder [H-1] for the Parking Place no. 1, another Letter of Intent [LoI] bearing no. GEF/51/2023-24/45 was issued to the petitioner in respect of the Parking Place no. 1 containing similar terms and conditions as in the LoI bearing no. GEF/43/2023-24/45 dated 03.05.2023 issued in respect of the Parking Place no. 1. In response to the LoI bearing no. GEF/43/2023-24/45 dated 03.05.2023, the petitioner completed the requisite formalities including deposit of the amount, asked for by the LoI, and accordingly, the respondent GMC authorities had issued an Order granting lease of Parking Place no. 1 vide letter no. GEF/43/2023-24/69 dated 09.05.2023.

6. Subsequent to the Order granting lease of Parking Place no. 1 on 09.05.2023, the petitioner intimated the Commissioner, GMC by a letter dated 10.05.2023 that due to his financial problem, he would not be able to accept the lease in respect of the Parking Place no. 2.

7. It was in the above fact situation, the Order no. GEF/51/2023-24/284 dated 24.07.2023 came to be issued whereby, *firstly*, the Earnest Money Deposit [EMD] given by the petitioner along with his bid submitted for Place no. 2 had been forfeited; and *secondly*, the petitioner had been blacklisted, thereby, debarring him from participating in any kind of tender/auction process under the GMC from the date of issuance of the said Order. The Order bearing no.

GEF/51/2023-24/284 dated 24.07.2023 was followed by the Order bearing no. GEF/43/2023-24/328 dated 04.08.2023, whereby, the grant of lease in respect of Parking Place no. 1 had been terminated with immediate effect.

8. I have heard Mr. S. Kataki, learned counsel for the petitioner and Mr. P. Nayak, learned Standing Counsel, GMC for both the respondents.

9. Mr. Kataki, learned counsel for the petitioner has referred to Clause 8 of the terms and conditions of lease issued by the GMC, to contend that in the event the selected bidder does not adhere to the terms and conditions given in the LoI then such default would have only incurred disqualification of the selected bidder in respect of the tender in which he has participated and the same would also entail forfeiture of the selected bidder's Earnest Money Deposit [EMD]. Clause 8 has clearly stipulated that in the event the selected bidder does not accept the offer, the next highest bidder would be given the offer for settlement. Assailing that part of the impugned Order dated 24.07.2023, whereby, the petitioner has been blacklisted, Mr. Kataki has submitted that the Order of blacklisting has suffered on two counts, *firstly*, no prior opportunity of hearing was afforded to the petitioner prior to passing such Order of blacklisting; and *secondly*, the Order of blacklisting is for an indefinite period. As the basis of passing the impugned Order dated 04.08.2023 is the impugned Order of blacklisting only, the same is not sustainable as the impugned Order of blacklisting itself is not sustainable.

10. Mr. Nayak, learned Standing Counsel, GMC has contended that the Orders, dated 24.07.2023 & dated 04.08.2023, were passed as it was demonstrated

from the conduct of the petitioner that he had withdrawn from the tender process after issuance of the LoI for the Parking Place no. 2 as an act of collusive practice and such act of withdrawal from the tender process was found to be in breach of the Code of Integrity for procuring entity and bidders, as contained in Section 11 of the Assam Public Procurement Act, 2017. He has referred to the provisions contained in Section 11 of the Assam Public Procurement Act, 2017 to buttress his point that it is open for the procuring entity/tendering authority to take appropriate measure against an erring bidder including his exclusion from the procurement process and his debarment from participation in future procurement processes to the undertaken by the procuring entity. He has also referred to the provisions contained in Section 46 of the Assam Public Procurement Act, 2017 in support of his contentions. He has contended that such kind of practice as had been demonstrated by the petitioner, are frequently found in the tender processes undertaken by the respondent GMC authorities. As a result of withdrawal of the bid by the petitioner, the respondent GMC authorities had to suffer financial loss to the tune of Rs. 1,58,500/- [= Rs. 2,59,000/- (the difference between the bid values of H-1 bidder and H-2 bidder) less Rs. 1,00,500/- (EMD deposited by the petitioner)] as the bid value offered by the H-2 bidder was only Rs. 29,55,000/-.

11. I have given due consideration to the submissions of the learned counsel for the parties and have also perused the materials brought on record. I have gone through the decisions cited at the Bar.

12. It is not in dispute that after participating in the bidding process initiated by the Tender Notice dated 14.03.2023, the petitioner had emerged as the successful bidder [H-1] in respect of both the parking places, that is, Parking

Place no. 1 and Parking Place no. 2 and the LoIs were by the respondent GMC authorities in his favour for both the parking places on 03.05.2023.

13. The terms and conditions for leasing, as contained in the Tender Document for the period : 2023 – 2024 *inter alia* contain the following conditions :-

8. Selection Process :

- a. After scrutiny of the documents submitted by the bidders, the successful bidder will be intimated by giving a LoI [Letter of Intent] to him/her.
- b. After getting the LoI the selected bidder has to submit an Agreement & shall deposit 50% of the settled value as advance deposit as per stipulated time mentioned below :

Sl No.	Documents	Due date
1.	Agreement	Within 5 working days
2.	50% Security Deposit	Within 2 working days after submission of the agreement

- c. After receiving the above mentioned documents the bidder will be given a final order granting the lease of the parking. The balance 50% amount of settled value will have to be deposited by the bidder in 2 [two] equal installments, the 1st installment needs to be paid within 3 [three] months and 2nd installment needs to be paid within 6 [six] months from the issue date of the final order.
- d. On default, the bidder will be disqualified and his earnest money so deposited in the prescribed form shall be forfeited. In such a situation, the next highest bidder shall stand qualified for the next offer.
- e. If the lessee/bidder fails to pay any of the installments within the stipulated time as mentioned in the order granting lease of parking, 10% penal interest shall be charged against any such delayed payments. Further, if the lessee fails to pay installment within 3 [three] months, the lease would be terminated forthwith and the parking place will be taken over by GMC and earnest money and the advance payment so deposited shall be forfeited declaring the lessee as defaulter. Defaulting lessee shall be liable to be blacklisted and shall be prohibited from participating in

any tender process of the Corporation in future. Any arrear due to the Corporation by the lessee, shall be recovered either under the provisions of the Chapter XX of the Guwahati Municipal Corporation Act, 1971 or under the Bengali Public Demand Recovery Act, 1913, or as the Commissioner may decide in this behalf.

14. From a reading of Clause 8 of the Tender Document, it is discernible that after issuance of the LoI, the selected bidder has to submit an agreement and to deposit 50% of the settled value as advance deposit within the stipulated time period to be mentioned in the LoI. It is after compliance of the conditions set forth in the LoI, the selected bidder is to be given the final order granting the lease of the parking place. In case the selected bidder/LoI holder commits any default, the same would incur disqualification and would entail forfeiture of the Earnest Money Deposit [EMD] given by the successful bidder/LoI holder at the time of submitting his bid. The said Clause had further mentioned that in the event of default by the successful bidder/LoI holder, the next higher bidder would qualify with his offer. Clause 13 of the Tender Notice has further mentioned that any bidder who withdraws his tender after submission of the tender but before opening of the same then it would be open for the GMC without prejudice to any other right or remedy to forfeit the Earnest Money Deposit [EMD].

15. It is trite that the power to blacklist a contractor irrespective of the nature of the contract is inherent in the employer/tendering authority allotting the contract and there is no need for any such power being specifically conferred by statute or reserved by contractor. It has been observed in *Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others*, reported in [2014] 14 SCC 731, that 'blacklisting' simply signifies a business decision by which the party affected by the breach

decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. The same implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. Whether the Order is reasonable, fair and proportionate to the gravity of the offence can be examined by a writ court.

16. The law as regards blacklisting is well settled. Before any order of blacklisting, the person sought to be blacklisted must be afforded reasonable opportunity by serving him a show cause notice by making him aware about the precise case set up against him and the proposed action sought to be taken against him. It is also clear that one cannot be blacklisted for life and the period of blacklisting is to be proportionate with the nature of offence or nature of breach committed by the persons sought to be blacklisted. The order of blacklisting to the extent that it has not specified the period cannot be sustained. It has been held by the Hon'ble Supreme of India in *M/s Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and another*, reported in [1975] 1 SCC 70, that an order of blacklisting does not pertain to any particular contract. The blacklisting order involves civil consequences and it casts a slur. It creates a barrier between the persons blacklisted and the Government in the

matter of transactions. The blacklists are 'instruments of coercion' and it tarnishes one's reputation. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government or its instrumentalities/agencies for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require a person to represent his case before he is put on the blacklist.

17. In *Raghunath Thakur vs. State of Bihar and others*, reported in [1989] 1 SCC 229, the appellant did not deposit the requisite amount after emerging as the successful bidder in an auction process. The name of the appellant was thereafter, placed in the blacklist. No notice was given to the appellant therein on the proposal of blacklisting him. It was contended on behalf of the State respondents therein that there was no requirement in the rule for giving any prior notice before blacklisting any person. It has been held therein that in so far as the contention that there was no requirement specifically of giving any notice was concerned, the State respondents were found to be right. After observing so, it has been held that it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has been observed that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order in so far as it had directed blacklisting of the appellant therein in respect of future contracts, has

been held to be unsustainable in law. In that premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts was set aside. It has been held that so far as the cancellation of the bid of the appellant was concerned, the same should not be affected. It has been further held that setting aside of the order of blacklisting in view of violation of the principles of natural justice would not prevent the State Government or the appropriate authorities, as the case may be, from taking any future steps for blacklisting the appellant if the Government was so entitled to do so in accordance with law, that is, giving the appellant due notice and an opportunity of making representation. It has been further held that it is after hearing the appellant, the State Government would be at liberty to pass any order in accordance with law indicating the reasons therefore.

18. In *Gorkha Security Services vs. Government [NCT of Delhi] and others*, reported in [2014] 9 SCC 105, the Hon'ble Supreme Court of India has discussed about serving a prior show-cause notice and has observed that it is incumbent on the part of the party seeking to blacklist to state in the show-cause notice that the competent authority has intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. In *UMC Technologies Private Limited vs. Food Corporation of India and another*, reported in [2021] 2 SCC 551, the Hon'ble Supreme Court of India has observed in the following manner :

13. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The basic principle of natural justice is that

before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. This Court in *Nasir Ahmad v. Assistant Custodian General, Evacuee Property*, has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.

19. It is apposite, at this stage, to refer to Section 11 & Section 46 of the Assam Public Procurement Act, 2017 and Rule 20[5] & Rule 31[4] of the Assam Public Procurement Rules, 2020 which have been referred to from the respondents' side to support its actions.

The Assam Public Procurement Act, 2017

11. Code of integrity for procuring entity and bidders.-

- [1] No officer or employee of a procuring entity or a person participating in a procurement process shall act in contravention of the code of integrity prescribed by the State Government.
- [2] The code of integrity referred to sub-section [1] shall include provisions for,- [a] prohibiting, -
 - [i] any offer, solicitation or acceptance of any bribe, reward or gift or any material benefit, either directly or indirectly, in exchange for an unfair advantage in the procurement process or to otherwise influence the procurement process;
 - [ii] any omission, including a misrepresentation that misleads or attempts to mislead so as to obtain a financial or other benefit or avoid an obligation;
 - [iii] any collusion, bid rigging or anti-competitive behavior to impair the transparency,

- fairness and progress of the procurement process;
- [iv] improper use of information shared between the procuring entity and the bidders with an intent to gain unfair advantage in the procurement process or for personal gain;
 - [v] any financial or business transactions between the bidder and any officer or employee of the procuring entity, who are directly or indirectly related to tender or execution process of contract;
 - [vi] any coercion including impairing or harming or threatening to do the same, directly or indirectly, to any party or to its property to influence the procurement process;
 - [vii] any obstruction of any investigation or audit of a procurement process;
 - [viii] making false declaration or providing false information for participation in,-
 - [a] tender process or to secure a contract;
 - [b] disclosure of conflict of interest;
 - [c] disclosure by the bidder of any previous transgressions with any entity in India or any other country during the last three years or of any debarment by any other procuring entity.
- [3] Without prejudice to the provisions of Chapter IV, in case of any breach of the code of integrity by a bidder or prospective bidder, as the case may be, the procuring entity after giving a reasonable opportunity of being heard, may take appropriate measures including, -
- [a] exclusion of the bidder from the procurement process;
 - [b] calling off of pre-contract negotiations and forfeiture or encashment of bid security;
 - [c] forfeiture or encashment of any other security or bond relating to the procurement;
 - [d] recovery of payments made by the procuring entity along with interest thereon at bank rate;
 - [e] cancellation of the relevant contract and recovery of compensation for loss incurred by the procuring entity;
 - [f] debarment of the bidder from participation in future procurements of the

procuring entity for a period not exceeding three years under section 46.

* * * * *

46. Debarment from bidding.

- [1] A bidder shall be debarred by the State Government if he has been convicted of an offence -
 - [a] under the Prevention of Corruption Act, 1988 ; or
 - [b] under the Indian Penal Code, 1860 or any other law for the time being in force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract
- [2] A bidder debarred under sub-section [1] shall not be eligible to participate in a procurement process of any procuring entity for a period not exceeding three years commencing from the date on which he was debarred.
- [3] If a procuring entity finds that a bidder has breached the code of integrity prescribed in terms of section 11, it may debar the bidder for a period not exceeding three years.
- [4] Where the entire bid security or the entire performance security or any substitute thereof, as the case may be, of a bidder has been forfeited by a procuring entity in respect of any procurement process or procurement contract, the bidder may be debarred from participating in any procurement process undertaken by the procuring entity for a period not exceeding three years.
- [5] The State Government or a procuring entity, as the case may be, shall not debar a bidder under this section unless such bidder has been given a reasonable opportunity of being heard.

* * * * *

The Assam Public Procurement Rules, 2020

Rule 20[5] - Notwithstanding anything contained in sub-rule [1] above, a registered bidder, who already holds a previous contract or award for works or supply of goods which is in progress, is found to have adopted fraudulent means or has otherwise violated the provision of the Act while submitting bids for or undertaking a different work or supply shall be debarred from participating in that bid and in all bids for future

works for a period up to three years after being given a reasonable opportunity of being heard but may, if the procuring entity so decides in the public interest, not be deregistered till the completion or cancellation of such previous contracts or awards for works or supply already held.

Rule 31[4] - If the bidder, whose bid has been accepted, fails to sign a written procurement contract or fails to furnish the required performance security within the specified period, the procuring entity shall take action against the successful bidder as per the provisions of the Act and these rules. The procuring entity may, in such cases, cancel the procurement process or, if it deems fit, offer the rates of lowest or most advantageous bidder to the next lowest or most advantageous bidder, in accordance with the criteria and procedures set out in the bidding documents. The bidder shall execute the written procurement contract on non-judicial stamp of specified value, the cost of which shall be borne by the bidder.

20. On examination of the aforesaid provisions contained in the Assam Public Procurement Act, 2017 [‘the Act’, for short] and the Assam Public Procurement Rules, 2020 [‘the Rules’, for short], framed under the said Act, it is clearly discernible that before any order of debarment, it is incumbent on the part of procuring authority which is the GMC in the case in hand, to give a reasonable opportunity of being heard to the person sought to be debarred by it. It is also clear that any order of debarment to be passed under the Act and the Rules cannot extend beyond a period of three years commencing from the date on which the persons has been debarred.

21. Reverting back to the facts of the case, the Order of blacklisting passed by the respondent GMC authorities vide Order no. GEF/51/2023-24/284 dated 24.07.2023 was admittedly not preceded by service of any kind of notice upon the petitioner affording him any prior and reasonable opportunity of being heard to adhere to the principles of natural justice. It is, thus, clearly established that

the petitioner was not afforded the prior and reasonable opportunity of hearing prior to passing of the impugned Order bearing no. GEF/51/2023-24/284 Dated 24.07.2023 making it unsustainable in law in so far as the part containing blacklisting/debarment is concerned. Moreover, the Order of blacklisting has not specified any period of blacklisting. With the settled law that one cannot be blacklisted for life, the impugned Order of blacklisting is found unsustainable on that count also. The authority passing the impugned Order of blacklisting is also found to have violated the provisions of the Assam Public Procurement Act, 2017 and the Assam Public Procurement Rules, 2020, which such authority is under obligation to follow. In such view of the matter, that part of the impugned Order bearing no. GEF/51/2023-24/284 dated 24.07.2023 as regards blacklisting the petitioner, thereby, debarring him from participating in any kind of tender/auction process under the GMC from the date of issuance of the said order is found unsustainable in law and the same is liable to set aside. It is accordingly set aside.

22. As the only basis for passing the impugned Order bearing no. GEF/43/2023-24/328 dated 04.08.2023 is the Order of blacklisting bearing no. GEF/51/2023-24/284 dated 24.07.2023, the Order bearing no. GEF/43/2023-24/328 dated 04.08.2023 is also not sustainable in law and the same is accordingly set aside. With the setting aside of the Order bearing no. GEF/43/2023-24/328 dated 04.08.2023, the order of termination passed by the respondent GMC authorities in respect of Parking Place no. 1 stands set aside. As a natural corollary, the lease in respect of Parking Place no. 1 stands restored. Thus, the respondent GMC authorities are directed to allow the petitioner to operate the Parking Place no. 1 in terms of the contract agreement executed to that effect.

23. The writ petition is allowed to the extent indicated above. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant