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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 23rd January, 2023

+ W.P.(C) 222/2022 & CM APPL. 614/2022

M/S RATAN KUMAR SINGH

..... Petitioner

Through: Mr. Neeraj Malhotra, Sr. Advocate
with Mr. Parmatma Singh, Mr.
Mayank Jain, Mr. Madhur Jain and
Mr. Nimish Kumar, Advocates. (M:
8826719057).

versus

CENTRAL RAILSIDE WAREHOUSE COMPANY
LIMITED

..... Respondent

Through: Mr. Ashish Tiwari and Mr. Sahib
Patel, Advocate for CRWC.

CORAM:**JUSTICE PRATHIBA M. SINGH****Prathiba M. Singh, J. (Oral)**

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by M/s Ratan Kumar Singh, which is a sole proprietary concern, challenging the blacklisting order dated 30th November, 2021 passed by the Respondent- Central Railside Warehouse Company Ltd. which has now been transferred to Central Warehousing Corporation. The said order reads as:

“Whereas, you have participated in the tender and furnished all requisite documents as per eligibility criteria along with the declaration that you agree to abide by all terms and conditions of Contract.

Whereas as you were selected as L1 bidder and accordingly the said contract was awarded to you vide letter no.- CRWC-II/RWC-Badnera/H&T-Tender/2021-22/1429 dated 12.11.2021.

Whereas, vide award letter dated 12.11.2021 you were asked to take over the work at RWC Badnera w.e.f. 16.11.2021 and submit the security deposit within 15 days of the date of award letter as per tender terms & conditions.

Whereas, vide letter dated 15.11.2021, you had shown your inability to take over work and asked for cancellation of the award letter.

Whereas, vide this office letter dated 25.11.2021 you were again requested to take over the work at RWC Badnera and submit the security deposit within 15 days of the date of award letter i.e., by 27.11.2021 failing which necessary action will be initiated against you as per the tender clause, terms & conditions mentioned below:

- *BLACKLISTING/ DEBAR (Clause 19, page 29/75):*

The non-performing/defaulting service provider may be Suspended / banned for trade relation/black listed/debarred for participation in future Tender enquiry for the period upto 5 years based on the gravity of non-performance/breach of any terms of the Contract/default of the service provider by the Managing Director of the CRWC whose decision in the matter shall be final and binding.

- *BID SECURITY DECLARATION (Appendix-XV-page 75/75):*

As per Bid Security Declaration duly stamped, signed and submitted by you wherein you have accepted that in case of withdrawal of bid during the validity period you would be suspended for a period of 05 years from the date of NIT by CRWC.

- *SECURITY DEPOSIT (Clause iv, page 12-13/75):*

The successful Bidder shall furnish, within a fortnight from the date of award of work by CRWC, Security Deposit of Rs. 18, 00, 000/- (Rs. Eighteen Lakhs Only) failing which the work order shall be liable to be cancelled at his/their risk and cost and also subject to such other remedies as may be available to the Company under the terms of the contract. Besides the CRWC may suspend/ban the trade relations with him/them or debar to participate in all future Tender enquiries with CRWC based on the merit of each case upto a period of five years without prejudice to any other rights and remedies of the CRWC under the contract and law.

Whereas, vide letter dated 26.11.2021, you have conveyed your inability to take over the work for handling rail/road borne cargo at Railside Warehouse Complex Badnera, Maharashtra.

Whereas, you have failed to take over the work awarded, failed to execute the agreement with CRWC and failed to submit the security deposit within fortnight from the dated of award of contract, as per terms and condition agreed by you.

Whereas, you have breached the terms and conditions of the tender.

Therefore, you have been backlisted and debarred by CRWC for participation in future tender enquiries of CRWC for a period of 05 (five) years from date of issue of this letter and same shall be applicable to Central Warehousing Corporation (CWC) after merger of CRWC with CWC."

Background

3. The Respondent had floated a tender dated 14th September, 2021 for 'Appointment of service provider for handling rail/road borne cargo' at Railside Warehouse Complex Badnera, Maharashtra.
4. The said location had a specific condition in respect of employment of

labour. The labour was to be provided in that area by the Amravati Mathadi & Unprotected Labour Board (*hereinafter 'the Board'*) and no outside or external labour could be engaged in the said area. This issue was within the knowledge of both the Petitioner and the Respondent when the tender was floated.

5. Vide letter dated 7th August, 2021, a letter was issued by the Respondent to the Board informing them about the forthcoming tender and requesting them to provide reasonable handling rates that would be charged by the labour. In response to the said letter, the Board, vide letter dated 13th August, 2021 confirmed that the rates for loading and unloading at the Railside Warehouse Complex (RWC) Badnera, would be Rs.2.90 per bag, till November 2021. The Board did also mention that for future contracts there could be a possibility of increase of rates in the range of 10-15% considering the dearness index on prevailing rate.

6. The Petitioner participated in the tender for '*Appointment of service provider for handling rail/road borne cargo*' at Railside Warehouse Complex Badnera, Maharashtra and vide letter dated 12th November, 2021, it was awarded the said contract. The said contract was awarded on the rates as submitted by the Petitioner and as per the terms and conditions stipulated in the subject e-tender document. The performance of the contract was supposed to start with effect from 16th November, 2021 for a period of 2 years. Vide the award letter, the Petitioner was also directed to deposit the security amount of Rs. 18,00,000/- (Rupees Eighteen Lakhs only) as per terms of the e-tender, within 14 days, and execute the agreement along with the Custody & Indemnity Bond.

7. However, on 15th November, 2021, after being awarded the tender,

the Petitioner wrote to the Respondent and said that it would be unable to execute the tender and take over operations in the RWC, Badnera, Maharashtra and accordingly, it would not be depositing the security deposit in terms of the letter of award dated 12th November, 2021. Accordingly, the Petitioner requested for cancellation of the award on account of *Force Majeure*.

8. The correspondence between the parties continued and the Respondent did not accede to the request for cancellation of the said award and called upon the Petitioner to deposit the security amount and execute the contract with the Respondent. Thereafter, vide letter dated 25th November, 2021 citing clause 19 of Section V of the tender and other relevant clauses of the contract, the Respondent called upon the Petitioner once again to deposit the security amount and takeover the work at the RWC by 27th November 2021. The said letter also stated that if the Petitioner fails to do so, action will be initiated against the Petitioner as per the relevant clauses of the tender, without further notice. The said letter is extracted below:

“Please refer to your letter dated 23.11.2021 on above cited subject, please also refer to this officer letter no, 1461 dated 17.11.2021 with reference to your earlier letter dated 15.11.2021.

Vide referred letter, we had advised you to takeover the work of service provider at Railside Warehouse Complex-Badnera, Maharashtra immediately falling necessary action will be taken against you in the bonfide interest of the Organisation as per tender terms & Conditions as mentioned below:-

- *Clause 19 of Section-V on page 29/75 of Tender Blacklisting/Debar:*

The non-performing/defaulting service provider may be suspended/banned for trade relation/black

listed/debarred for participation in future Tender enquiry for the period of upto 5 years based on the gravity of non-performance/breach of any terms of the Contract/default of the service provider by the Managing Director of the CRWC whose decision in the matter shall be final and binding.

- *Bid security declaration (Appendix - XV) duly stamped, signed and submitted by you wherein you have clearly accepted that in case of withdrawal of bid during the validity period you would be suspended for a period of 05 years from the date of NIT by CRWC (Copy enclosed).*

Vide referred letter, you were also requested to deposit security amount of Rs. 18,00,000/- (Rupees Eighteen Lakhs only) as per Tender terms & condition as mentioned below and execute the Agreement and Custody & Indemnity Bond within a fortnight from the date of award letter i.e, on or before 27.11.2021 falling which necessary action will be taken against you:

- *Security Deposit:*
"The successful Bidder shall furnish, within a fortnight from the date of award of work by CRWC, Security Deposit of Rs. 18,00,000/- (Rs. Eighteen Lakhs only) falling which the work order shall be liable to be cancelled at his/their risk and costs and also subject to such other remedies as may be available to the company under the terms of the contract. Besides the CRWC may suspended/ban, the trade relations with him/them or debar to participate in all future Tender enquiries with CRWC based on the merit of each case upto a period of five years without prejudice to any other rights and remedies of the CRWC under the contract and law".

You are once again requested to kindly deposit amount of Rs. 18,00,000/- (Rupees Eighteen Lakhs only) and takeover the work of service provider at raiiside warehouse complex: Badnera, Maharashtra

on or before 27.11.2021 failing which necessary action will be initiated against you as per the aforesaid tender cause and Bid Security Declaration submitted by you, without further notice.”

9. When the Petitioner did not accede to the directions in letter dated 25th November, 2021, the impugned blacklisting notice has been issued by the Respondent.

Submissions

10. Mr. Neeraj Malhotra, Id. Senior Counsel appearing for the Petitioner submitted that no show cause notice was issued prior to the blacklisting order issued by the Respondent and no hearing was conducted. He further submits that the period of blacklisting for five years is the highest period prescribed under the Clause for non-performance/breach of contract in the tender and the same is disproportionate considering the fact that the Petitioner has been conscious and has kept the Respondent in the loop in respect of the stand of the Board.

11. It is his submission that once the Petitioner has submitted the bid on the basis of the rates which were agreed to in the correspondence in August, 2021, and the increase of the said amount would completely make the contract unviable to the Petitioner. Accordingly, he submits that the fundamental condition of the contract had itself been altered, thus, the cancellation ought to have been agreed to by the Respondent.

12. He relies upon the judgment of the Supreme Court in ***Kulja Industries Limited v. Chief Gen. Manager W.T. Proj. BSNL and Ors, AIR 2014 SC 9*** to argue that the period of blacklisting is disproportionate. Moreover, he submits the Petitioner, apart from being blacklisted by the Respondent, is also suffering difficulty in its operations since, the blacklisting has to be

cited by the Petitioner in various other contracts where it submits its bids.

13. Thus, it is the submission of the Id. Senior Counsel that the Petitioner is suffering from irreparable damage.

14. On behalf of the Respondent, it is submitted Mr. Ashish Tiwari, Id. Counsel that the Board had quoted a price of Rs.2.90 plus 30% surcharge, in August 2021, which was to be valid till November 2021. The Board had also mentioned about the increase in rate per bag of around 10-15%, going by the figures given by the Board, the rate per bag would come to about Rs. 3.19 – Rs.3.34. Thus, what was demanded by the Board i.e., Rs. 3.50 per bag plus 30% surcharge was not totally off the mark compared to the rates which were agreed.

15. He also submits that the Petitioner was well aware of the ground situation and had submitted its bid being conscious of the position with the Board. Thus, it cannot renege on the bid it had submitted. Moreover, despite repeated notices being served upon the Petitioner to deposit the security amount of Rs.18 lakhs, the Petitioner chose not deposit the amount it was bound to, as per the tender.

16. As per the Id. Counsel, under Clause 19 of Section V of the tender, the Respondent is fully entitled to blacklist the Petitioner for a period of five years. The consequences under Clause 19 were well within the knowledge of the Petitioner. Moreover, the Respondent has also suffered four to five months of delay in view of the stand of the Petitioner and the Respondent had to float a fresh tender in respect thereof.

17. Finally, it is submitted by Id. counsel that the Petitioner had given a bid security declaration that if the Petitioner withdraws or modifies the bid during the period of validity, it could be suspended for a period of five years

by the CRWC, without any deviation or exception. This was duly signed by the Petitioner and today the Petitioner cannot complain in respect of the same agreement.

Analysis & Findings

18. A perusal of the record in this case would show that the withdrawal by the Petitioner was done only on 15th November, 2021, one day before the Petitioner was supposed to take over the work at Railside Warehouse Complex (RWC) Badnera. The Petitioner had already submitted a bid by that time, which was also accepted and it is under these circumstances that the forfeiture of Performance Bond has been directed by the Respondent.

19. In the scheme of awarding such contracts, once a bidder submits a bid and becomes successful, if parties are allowed to resile from the said bid in the manner as sought to be done in the present case, the whole credibility of the tender process itself becomes questionable. Once bids are submitted, the same ought to have some sanctity. Moreover, in the present case the argument that is being raised, is that the amount that is sought to be charged by the Amravati Mathadi & Unprotected Labour Board is much higher, is also not correct inasmuch as the initial quote by the Board in August 2021 was for a sum of Rs.2.90/- per bag, plus 10-15% increase which is not far off from the current rate of Rs. 3.50.

20. Even otherwise, these are commercial contracts in which bidders are aware of the risks that are involved in the tender process. Thus, the Respondent cannot be blamed for the change of stand by the Labour Board.

21. The decision of the Supreme Court in *Kulja Industries (Supra)* considered the effect and consequences of blacklisting, particularly in the

context of allocation of government contracts. In the said judgement, the Supreme Court examined black listing or debarment in the context of both domestic and international law. It was held that blacklisting must be proportionate to the offence for which the entity is punished and while the period might vary, it could not be forever. The relevant extract of the judgement in this regard is extracted as under:

“24. Suffice it to say that ‘debarment’ is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the ‘debarment’ is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.”

22. Further, it was also held that granting a fair hearing to the party being blacklisted is an essential pre-condition for a proper exercise of the power to blacklist an entity. The relevant extract of the with this finding is extracted as under:

“17. That apart the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because ‘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. This 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. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with *Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Anr.* (1975) 1 SCC 70 where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed:*

“20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government 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 that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.”

23. In the present case, it is observed that no specific show cause notice was given prior to the blacklisting of the Petitioner. As per the tender, it is the maximum period for which the blacklisting can be undertaken.

24. Vide letter dated 25th November, 2021, the Respondent had mentioned that the non-adherence to the order for taking over the operation at the RWC would lead to actions being initiated against the Petitioner in terms of the tender clauses including the clause relating to blacklisting. However, undeniably, no opportunity to be heard was given.

25. However, on merits, this Court is of the opinion that the charges payable to the Board are not such as to give the Petitioner a legal basis for resiling from the bid it had submitted. In fact, the Petitioner would have been conscious of the occurrence of such events especially when labour boards of this nature are involved. The Petitioner has clearly resiled from the bid without a justifiable cause. While, the five years blacklisting is on the higher side, the Petitioner also cannot go completely scot-free. A perusal of the letter dated 25th November 2021, shows that the Petitioner was called upon to deposit a sum of Rs. 18,00,000/- and take over the work. The relevant extract of the letter reads:

"You are once again requested to kindly deposit amount of Rs. 18,00,000/- (Rupees Eighteen Lakhs only) and takeover the work of service provider at railyard warehouse complex: Badnera, Maharashtra on or before 27.11.2021 failing which necessary action will be initiated against you as per the aforesaid tender cause and Bid Security Declaration submitted by you, without further notice."

This letter was followed by the impugned blacklisting letter dated 30th November 2021.

Directions

26. Applying the principles in *Kulja Industries (supra)* and in the overall facts and circumstances of this case, it is deemed appropriate to direct the Petitioner to deposit a sum of Rs. 18,00,000/-, with the Respondent for having resiled from the bid.

27. Accordingly, the Petitioner is directed to deposit a sum of Rs.18,00,000/- in accordance with the conditions laid down in the tender, with the Respondent within four weeks. Upon the said deposit being made, the impugned black listing order shall stand lifted and the Petitioner will no longer be treated as having been a blacklisted entity vide the said order.

28. The communications issued by the Respondent dated 25th November, 2021 and the grounds stated in the black listing order dated 30th November, 2021 shall be treated as a show cause notice to the Petitioner as to why black listing should not be done and why the amount of Rs.18,00,000/- ought not to be forfeited.

29. The Petitioner shall file its reply to the said communications within a period of four weeks. A hearing shall be given to the Petitioner and a reasoned decision shall be passed by the Respondent. The deposit of Rs. 18,00,000/- shall abide by the final order to be passed.

30. With these observations, the present petition and all pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

JANUARY 23, 2023/MR/Am