

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2015

Date of Reserving the Order	Date of Pronouncing the Order
09.02.2015	12.02.2015

Coram

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P. Nos. 23181 & 5649 of 2014

M/s.Sri Sai Caterers
Rep., by its proprietor,
S.Satish Kumar
Shop No.1 and 2 Bhavini Township,
Anupuram 603 127,
Kancheepuram District. ... Petitioner in both W.Ps.,

Vs

- 1.The The Station Director,
Nuclear Power Corporation of India Ltd.,
Madras Atomic Power Station,
Kalpakkam 603 102,
Kancheepuram District.
- 2.The Manager (HR-ER & Engineer in charge
Nuclear Power Corporation of India Ltd.,
Madras Atomic Power Station,
Kalpakkam 603 102,
Kancheepuram District. ... Respondents in W.P.No.23181/2014

The Engineer-in-charge, (Contract)
Nuclear Power Corporation of India Ltd.,
Madras Atomic Power Station,
Kalpakkam 603 102.
Kancheepuram District,
Tamil Nadu. ... Respondent in W.P.No.5649 of 2014

Prayer in W.P.No.23181 of 2014 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari to call for thee records on the file of the first respondent in his proceedings NPCIL/MAPS/SD/2014/S, dated 16.08.2014 in confirming the order of the second respondent in his proceedings NPCIL/MAPS/HR-HS/Canteen/2014, dated 11th April, 2014 and quash the same as illegal, arbitrary, violative of principles of natural justice.

Prayer in W.P.No.5649 of 2014 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari to call for the records of the proceedings dated 21.02.2014 in No.NPCIL/MAPS/HR-HS/Canteen/Blacklisting/1 on the file of the respondent and to quash the same as arbitrary, illegal and ultra vires.

For petitioner .. Mr.V.Lakshmi Narayanan

For Respondents .. Mr.V.VijayaShankar

C O M M O N O R D E R

The petitioner, a Catering Contractor has filed this Writ Petition challenging the order passed by the first respondent dated 16.08.2014, confirming the order passed by the second respondent, dated 11.04.2014, by which the petitioner has been banned from doing any business with the respondent organisation for a period of two years.

2.In W.P.No.5649 of 2014, the petitioner has challenged the order dated 21.02.2014, which is infact a show cause notice calling upon the petitioner to submit his explanation as to why penalty should not be imposed on the petitioner from doing business with the respondent organisation for a period of two years. Since already an order has been passed on 11.04.2014, imposing the penalty, which has been confirmed in appeal by order dated 16.08.2014, W.P.No.5649 of 2014 has become infructuous and accordingly, the same is dismissed as infructuous.

3. The respondent organisation called for tenders by notification, dated 09.01.2013 for 'Running of Industrial Canteen in the Madras Atomic Power Station at Kalpakkam, on round the clock shift basis' on all the days and estimated cost of the work was Rs.2,31,57,547/-. The petitioner submitted his tender and the petitioner being the lowest tenderer, work order was issued by the respondents. According to the petitioner, he has been carrying on the work in accordance with the work order for the past one year and four months. It is submitted that there is no complaint regarding the quality, quantity and manner of service rendered by the petitioner. During February 2014, a notice was issued by the second respondent stating that the petitioner has concealed information while submitting his tender application, calling upon the petitioner to explain as to why the petitioner should not be blacklisted. The notice was based on an order passed by the sister organisation of the respondent called "BHAVANI". According to the petitioner the said organisation "Bhavani" passed an order blacklisting the petitioner

without opportunity to the petitioner and it was an exparte order. The petitioner had challenged the show cause notice by filing Writ Petition in W.P.No.5649 of 2014, stating that the respondents have pre-decided the matter. In the mean time, the second respondent passed an order dated 11.04.2014, banning the petitioner from doing any business with the respondent organisation for a period of two years. In the meanwhile, since fresh tenders were sought to be called for, the petitioner filed a stay petition before the Appellate Authority and filed a Writ Petition before this Court in W.P.No.19717 of 2014 and the said Writ Petition was disposed of, by order dated 24.07.2014, to dispose of the stay petition within a time frame and maintain status-quo till then and thereafter to dispose of main appeal within four weeks. The petitioner would state that he was not afforded a fair and reasonable opportunity to putforth his contentions. The Appellate Authority has not only rejected the stay petition, but also dismissed the appeal dated 16.08.2014. These orders dated 11.04.2014 and 16.08.2014 are impugned in these Writ Petitions.

4. The learned counsel appearing for the petitioner submitted that the impugned orders have been passed in utter violation of principles of natural justice and without taking into consideration that the petitioner did not conceal any information in the tender application. The learned counsel by referring to clause 3 in annexure I, which deals with 'Contract Eligibility Criteria' referred to clause 3.7, which states that information regarding projects in hand, current litigation, orders regarding exclusion/expulsion or blacklisting, if any. By referring to clause 1.10, which is the information regarding qualification of the bidders, it is submitted that the information has to be furnished in a tabulated form, in which the applicant has to disclose the client and address, cause of dispute, amount and remarks and the present status. The learned counsel appearing for the petitioner argued that there is no provision made in the tabulated statement to furnish the details regarding blacklisting. That apart there is no litigation pending against the petitioner and therefore, the petitioner stated 'NIL' in column No.1.10. Further, it is submitted that in Section II of the tender form, the intending bidder has to give a declaration in which the petitioner has stated that he has been debarred. Therefore, there is no suppression in not furnishing the information and the basis of the impugned order itself is illegal. Further, it is submitted that the Appellate Authority while considering the stay petition pursuant to the orders passed by this Court on 24.07.2014, did not consider any of the contentions raised by the petitioner, disposed of the main appeal itself and the impugned order is devoid of reasons. The learned counsel appearing for the petitioner placed reliance on the decisions of the Hon'ble Supreme Court in the cases of M/s.Erusian Equipment & Chemicals Ltd., vs. State of West Bengal & Anr., reported in (1975) 1 SCC 70, and Southern Painters vs.

Fertilizers & Chemicals Travancore Ltd., & Anr., reported in 1994 Supp 2 SCC 699, in support of his contentions that the blacklisting of the petitioner without due opportunity and without adhering to principles of natural justice is not tenable. The learned counsel referred to the decision in the case of Daya Shankar Yadav vs. Union of India, in Civil Appeal No.9913 of 2010, dated 20.11.2010, in support of his contention that if the queries raised in the format is not adequate or proper, then the petitioner should not have been penalised for the same.

5. The learned counsel appearing for the respondent by referring to the counter affidavit submitted that the petitioner has intentionally suppressed the information that he was blacklisted by "BHAVANI" on 15.12.2012 and when the order of blacklisting was invoked, he had applied for tender on 09.01.2013. Further, it is submitted that the information furnished by the petitioner is not relevant to clause 3.7 of the tender condition, which is the pre-qualification criteria. Even otherwise, the petitioner has neither submitted details nor supporting documents indicating that he has been blacklisted, contrary he has stated that the relevant information is 'NIL'. It is submitted that the second respondent had no pre-determination to terminate the existing contract awarded to the petitioner, however, keeping in mind the principles of natural justice, show cause notice was issued and explanation was called for. It is submitted that the show cause notice was issued based on the investigation was done by the competent authority. However, the petitioner instead of replying to the show cause notice, filed a Writ Petition to quash the notice, as there was no stay order granted by this Court, the matter was proceeded further and the impugned order was passed banning the petitioner for a period of two years from doing any business with the respondents. The petitioner also preferred an appeal and filed a Writ Petition to dispose of the appeal and the respondents has complied with the order. It is submitted that the petitioner was afforded an opportunity of personal hearing on 11.08.2014 at 14 hours at the Administrative Building Conference Room, but the petitioner was accompanied by his lawyer, which was without intimation to the Appellate Authority and for security reasons, no other persons can be allowed inside the plant premises without prior intimation and the petitioner being well aware all these restrictions, he is intentionally misleading this Court and giving false information about the respondent. The petitioner was heard and thereafter a decision was taken. It is further submitted that in clause Nos. 1.10 and 3.7 of pre-qualification criteria, the petitioner has mentioned 'NIL'. The tender condition provided for a pre-bid meeting to clarify any doubts and the petitioner purposely did not attend the pre-bid meeting and he was fully aware of the tender conditions and the concealment of the information was deliberate. Clause 29.1 of part 2 of the bid document deals with 'price bid' and not about part 1 'technical bid' and the petitioner

has misinterpreted the condition with regard to pre-qualification. The petitioner has admitted that he has been blacklisted by "BHAVANI" and he has not challenged the same. Further, in the document where declaration has to be furnished, the petitioner has simply struck off the irrelevant portion, but no supporting documents were enclosed. Therefore, the suppression of the information was deliberate. Therefore, it is submitted that the petitioner having concealed the information and gained a prestigious contract by using a unfair methods is not entitled for any indulgence.

6. Heard the learned counsels appearing on either side and perused the materials placed on record.

7. The impugned orders have been challenged primarily on two grounds, firstly that the impugned order has been passed in violation of principles of natural justice and secondly the petitioner has not suppressed the information, but furnished the requisite details and the queries sought for in clause No.1.10 does not provide for furnishing information regarding blacklisting, however, the petitioner has stated that he has been blacklisted, while submitting the declaration in terms of Section II of the tender documents at page 40.

8. I first propose to deal with the contention as to the nature of information which the tenderer is required to furnish in terms of the conditions in the tender. Before proceeding further, it has to be pointed out that the conditions of tender are binding on the petitioner and he is not entitled to deviate from the same. Annexure I of the tender schedule deals with pre-qualification criteria. Under annexure I clause 3 deals with contract eligibility criteria. In clause 3, there are eight sub-conditions and sub-condition No.3.7 is relevant for this case, which is reads as follows:-

Contract Eligibility Criteria

3...

3.7. Information regarding projects in hand, current litigation, orders regarding exclusion/expulsion or black listing, if any.

9. In terms of clause 3.7 contract eligibility includes information regarding projects in hand, litigation, orders regarding exclusion/expulsion or black listing, if any. The contention of the petitioner is that the information sought for under clause 3.7 is required to be furnished in clause 1.10, at page 21 of the tender document, which deals with information to be filled in by the bidder regarding qualification. The tabulated column is as follows:-

Information regarding qualification of bidders
Information on litigation history in which the Bidder
is involved (format for clause 3.7 of Annexure 1 - Pre-

qualification criteria)

Client & Address	Cause of Dispute	Amount	Remarks and the present status

10. Another clause, which would be relevant is the declaration in which the tenderer is required to furnish contained in page 39 and 40 of the tender document, which falls in Section II of the tender schedule. That portion of the declaration, which is relevant for the instant case is as follows:-

I/We hereby declare that I/We have been debarred/not been debarred and /or delisted/not delisted any Government of Quasi-Government agencies or PSUs.

Dated the 25th day of February 2013 Witness + _____

*Signature of Tenderer _____

Address: _____

Occupation _____

The above tender is hereby accepted by me on behalf of the Nuclear Power Corporation of India Limited.

Dated the _____ day of _____ 20

=+ _____

Tenderer is advised to read carefully and strike out whichever is not applicable and furnish details wherever applicable.

* Signature of Contractor before submission of tender.

+ Signature of witness of contractors signature.

=+Signature of the officer by whom accepted.

11. It is not in dispute that the petitioner participated in a tender called for by the sister organisation of the respondent Corporation called "BHAVANI". It is not in dispute that the petitioner was blacklisted by the said organisation on the alleged ground that he is said to have formed a cartel and prevented other bidders. The petitioner did not question the order blacklisting him and the said order was passed on 15.12.2012. The tender notification published by the respondent organisation was during January 2013. On the date, when the tender was invited by the respondent, the blacklisting order passed against the petitioner by the sister organisation was in vogue, as the petitioner had not challenged the order of blacklisting.

12. In such circumstances, it has to be seen as to whether the petitioner disclosed this information in the tender form submitted to the respondent organisation and as to whether the format contains the proper and adequate queries. The petitioner's case is that he has not suppressed the information and clause 1.10 does not provide for furnishing information regarding blacklisting. Clause 3.7 has been referred to supra, which requires furnishing of information regarding

projects in hand, litigation, orders, exclusion/expulsion or black listing, if any. The format is a common format for all these particulars to be furnished.

13. Assuming there was a project in hand and there are certain litigation or arbitration proceedings pending, the petitioner was bound to furnish the information. The tabulated statement containing the headings of the particulars to be furnished, may not be relevant for all types of information. Nevertheless a duty cast is upon a tenderer/petitioner to disclose the information. The information regarding litigation history in which the bidder is involved, is a very important detail for the respondent organisation to take note of while considering and assessing the pre-bid qualification. It may be true that the petitioner has not initiated any Court proceedings against the order of blacklisting passed on 15.12.2012. However, there was an order passed blacklisting the petitioner and the order was in force. Therefore, the petitioner ought to have furnished such information in the column provided in clause 1.10, though the headings of the tabulation may not be relevant for the informations furnished by the petitioner. As long as there is a condition in clause No.3.7 to furnish information regarding blacklisting and such information is required under the heading contract eligibility criteria, being a mandatory requirement and essential requirement to be complied with by the petitioner in letter and spirit. The interpretation given by the petitioner for clause No.1.10 is devoid of substance and the petitioner having furnished information as 'NIL' is now attempting to wriggle out of the obligation by raising a vexatious plea.

14. In addition to the above, the conduct of the petitioner could be very well assessed by the manner in which he has furnished the declaration at page 40 of the tender document. The declaration requires the applicant to state that whether he has been de-barred or he has not been debarred. It is no doubt true that the petitioner has struck off that portion of the declaration which is not applicable to him, thereby stating that he has been de-barred. However, his obligation under the tender does not stop with this, because the declaration states that the tenderer is required to furnish details wherever applicable. Therefore, if the petitioner has stated that he has been de-barred by "BHAVANI" on 15.12.2012, he ought to have furnished details. Thus on a cumulative consideration of all these facts, it is evidently clear that the petitioner suppressed vital information, which is mandatory and essential information to the respondent organisation while submitting his tender. In the light of the above, this Court is of the firm view that the tender schedule contains proper and adequate queries, which the applicant has to furnish and there is no ambiguity or vagueness in the information sought for which is to be mandatorily furnished by the tenderer and therefore, the decision in the case of Daya Shankar

Yadav vs. Union of India, in Civil Appeal No.9913 of 2010, dated 20.11.2010, does not render any assistance to the case of the petitioner.

15. Having held so, it has to be seen as to whether there has been any violation of principles of natural justice. The petitioner relied on the decision in the cases of M/s.Erusian Equipment & Chemicals Ltd., and Southern Painters (referred supra) and the law deducible from those decisions as well as in the subsequent decision is that an order blacklisting a contractor, has the effect of preventing a person from entering into a lawful relationship with the Government and the fact that a disability is created by an order of blacklisting indicates that the relevant authority is to have an objective satisfaction and 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 and that he has right to be heard and make a representation against the order, as it is an elementary principles of natural justice.

16. In the instant case, it is not in dispute that the petitioner was issued a show cause notice by the second respondent. The petitioner did not file his reply, but rushed to this Court by filing a Writ Petition in W.P.No.5749 of 2014. This Court did not admit the Writ Petition nor granted any interim order, but by order dated 26.02.2014 only directed the petitioner to serve the notice on the respondent. The Writ Petition is still pending and is being disposed of by this order as having become infructuous.

17. The petitioner submitted his explanation on 07.03.2014, however, copy of the same has not been filed in the typed set of papers. After considering the explanation, the order imposing the ban was passed on 11.04.2014. Against the said order, the petitioner filed an appeal before the first respondent raising several grounds. In the mean time, the respondent organisation issued a notification calling for fresh tenders for running the industrial Canteen, by notification dated 02.07.2014. The petitioner filed a Writ Petition before this Court in W.P.No.19717 of 2014, for a direction to dispose of the petitioner's appeal dated 21.04.2014. This Court by order dated 24.07.2014 taking into consideration of the limited scope of the prayer sought for directed the first respondent to entertain the appeal, if the papers are in order and dispose of the stay petition first in accordance with law, within a period of two weeks from the date of receipt of copy of the order and till such time, the respondents were directed to maintain status-quo existing on the date of the order. Thereafter, the petitioner was afforded an opportunity of personal hearing and record of the personal hearing has also been filed in the typed set of papers and the petitioner is also a signatory. During the course of personal hearing, the petitioner reiterated that he had intimated that he was de-barred in page 40 of

the tender notification and there is no litigation pending to be mentioned in page 21 of the tender documents. In the preceding paragraphs, this Court has dealt with these issues and held that the plea raised by the petitioner is wholly unsustainable. The fact that the petitioner was afforded an opportunity of personal hearing clearly reveals that there has been full compliance of the principles of natural justice. The respondents are not judicial or quasi judicial authorities and are not trained to write judgments or orders, what is required to be seen in these matters is as to whether fundamentals of fair play were followed whether there was an opportunity for the petitioner to represent his case. Facts disclose that effective and adequate opportunity has been granted to the petitioner. In such circumstances, it is not a case where there has been a violation of principles of natural justice for this Court to interfere with the matter.

18. In the light of the above, the petitioner has not made out any case for interference with the impugned order. Accordingly, the Writ Petition in W.P.No.23181 of 2014 is dismissed for the reason arising above, W.P.No.5649 of 2014 is dismissed as infructuous. Taking note of the fact that the period of contract is for two years and the period is going to come to an end in April 2015, the respondents may consider permitting the petitioner to complete the contract on the petitioner's submitting a representation as expeditiously as possible. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

pbn
To

1.The Station Director,
Nuclear Power Corporation of India Ltd.,
Madras Atomic Power Station,
Kalpakkam 603 102,
Kancheepuram District.

2.The Manager (HR-ER & Engineer in charge
Nuclear Power Corporation of India Ltd.,
Madras Atomic Power Station,
Kalpakkam 603 102,
Kancheepuram District.

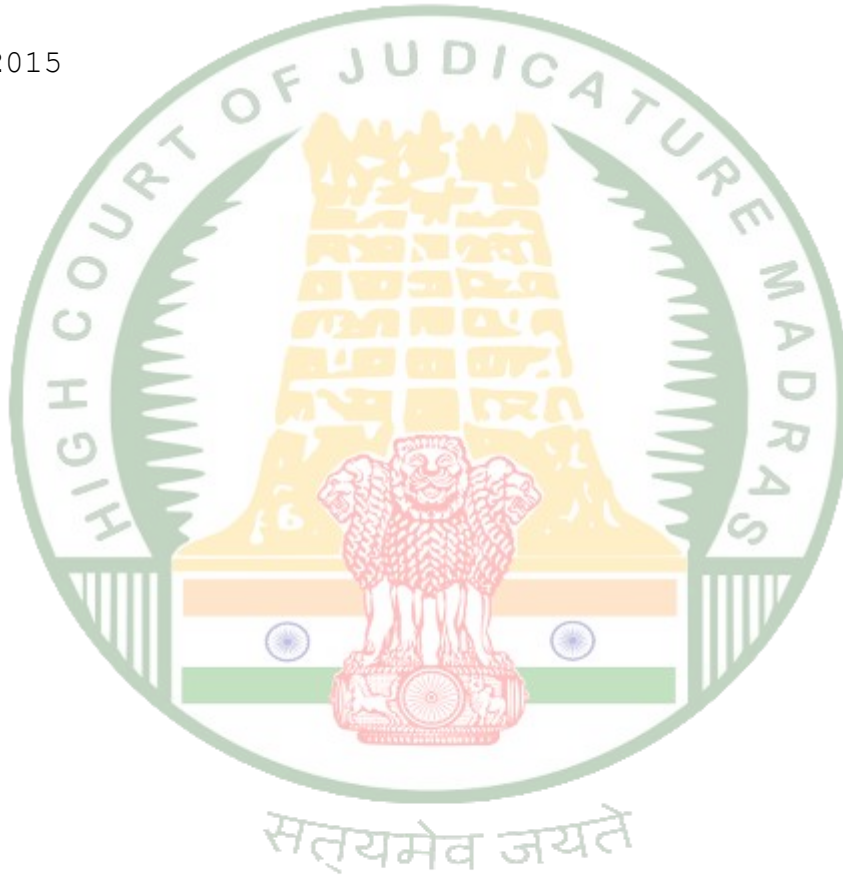
3.The Engineer-in-charge, (Contract)
Nuclear Power Corporation of India Ltd.,
Madras Atomic Power Station,
Kalpakkam 603 102.
Kancheepuram District,
Tamil Nadu.

1 cc to Mr.V.Vijay Shankar ,Advocate, SR.No.8028

2 cc to Mr. V.Raghavachari,Advocate, SR.No.7788 & 7789

W.P. No. 23181 & 5649 of 2014

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