IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CIVIL WRIT PETITION NO.13298 of 2015

DATE OF DECISION: OCTOBER 16, 2015

M/s Venus Transport Company ....Petitioner

Versus

Food Corporation of India and others ....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR.JUSTICE TEJINDER SINGH DHINDSA

Present: Mr.HPS Bhinder, Advocate for the petitioner.

Mr.JS Puri, Advocate for the respondents.

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TEJINDER SINGH DHINDSA, J.

The petitioner-firm has assailed the action of the respondent-Food Corporation of India in having forfeited its earnest money deposit. Challenge has also been laid to Clause 4 (iii) of the Model Tender Form in terms of which a tenderer stands blacklisted/debarred for a period of five years in every case of forfeiture of earnest money. Writ of mandamus is sought directing the respondent-Corporation to refund the forfeited earnest money amounting to ₹4,49,500/- and also for removal of the name of the petitioner-firm from the list of blacklisted/debarred contractors maintained by the Corporation on its official website.

2. Petitioner-firm engaged in the business of transport, is a partnership concern comprising of only two partners, namely, Rakesh Kumar and Sanjeev Kumar. Such partnership concern stands duly registered with the office of Registrar of Firms, Punjab.

3. Tender notice dated 21.12.2012 was issued by Food Corporation of India inviting tenders under the two bid system for appointment of Transport Contractors, Handling & Transport Contractors and Road Transport Contractors for a period of two years in respect of a number of Centres in different Districts of the State of Punjab. Petitioner-firm submitted its tender online for appointment of Transport Contractor at Badni Kalan Centre, Moga District.

4. Clause 4 laying down the dis-qualification conditions, Clause 5 i.e. instructions for submitting tender and Clause 6 governing earnest money of the Model Tender Form would be relevant for the controversy at hand and the same are re-produced hereunder:

> *"4. **Disqualification Conditions.***
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> *(I) Tenderers who have been blacklisted or otherwise debarred by FCI or any department of Central or State Government or any other Public Sector Undertaking will be ineligible during the period of such blacklisting or for a period of 5 years from the date of **blacklisting/ debarment**, whichever is earlier.*
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> *(II) Any Tenderer whose contract with the Food*

Corporation of India, or any department of Central or State Government or any other Public Sector Undertaking has been terminated before the expiry of the contract period at any point of time during last five years, will be ineligible.

(III) Tenderer whose Earnest Money Deposit and/or Security Deposit has been forfeited by Food Corporation of India or any department of Central or State Government or any other Public Sector Undertaking, during the last five years, will be ineligible.

(IV) If the proprietor/any of the partners of the Tenderer firm/any of the Director of the Tenderer company have been, at any time, convicted by a court of an offence and sentenced to imprisonment three years or more, such Tenderer will be ineligible.

(V) While considering ineligibility arising out of any of the above clauses, incurring of any such disqualification in any capacity whatsoever (even as a proprietor, partner in another firm, or as director of a company etc.) will render the Tenderer disqualified.

(VI) A Hindu Undivided Family (either as a proprietor or partner of a firm) shall not be entitled to apply for tender. Any tender submitted in the capacity of Hindu Undivided Family (either as a proprietor or partner of a firm) shall be summarily rejected.

5. Instructions for submitting Tender

The instructions to be followed for submitting the tender are set out below:

(a) The Tenderer must fill up and sign the forwarding letter in the format given in Appendix-I *and also furnish full, precise and accurate details in respect of information asked for in* Appendix-II *attached to the form of tender.*

(b) Signing of Tender

(i) Person(s) signing the tender shall state in what capacity he is, or they are, signing the tender, e.g., as sole proprietor of the firm, or as a Secretary/ Manager/ Director etc., of a Limited Company. In case of Partnership firm, the names of all partners should be disclosed and the tender shall be signed by all the partners or by their duly constituted attorney, having authority to bind all the partners in all matters pertaining to the contract. The original or an attested copy, of the registered partnership deed should be furnished along with the tender. In case of limited company, the names of all the Directors shall be mentioned, and a copy of the Resolution passed by the Company authorizing the person signing the tender to do so on behalf of the company shall be attached to the tender along with a copy of the Memorandum and Articles of Association of the Company.

(ii) The person signing the tender, or any documents forming part of the tender, on behalf of another, or on

behalf of a firm shall be responsible to produce a proper power of attorney duly executed in his favour, stating that he has authority to bind such other person, or the firm, as the case may be, in all matters, pertaining to the Contract. If the person so signing the tender fails to produce the said Power of Attorney, his tender shall be summarily rejected without prejudice to any other rights of the Corporation under the law and the Earnest Money Deposit paid by him/her shall be forfeited.

(iii) The Power of Attorney should be signed by all the partners in the case of a partnership concern, by the proprietor in the case of proprietary concern, and by the person who by his signature can bind the company in the case of a limited company. The entire tender document must also be signed on each page by the authorized person.

6. Earnest Money

(i) Each tender must be accompanied by an Earnest Money @ 2% value of contract amounting ₹............ (Rupees............) in the form of a D.D./Pay Order issued by a Scheduled Bank or through Electronic Clearing System (ECS)/other electronic means in favour of the GM (Region), FCI. The tenderer shall be permitted to bid on the express condition that in case he resiles, or modifies his offer, or terms & conditions thereof, after submitting his tender, for any reason

whatsoever during the tender process, or any of the information furnished by him/her is found to be incorrect or false, the Earnest Money Deposited by him shall stand forfeited, without prejudice to any other rights and remedies of the Corporation under the Contract and Law, and the Tenderer will be liable for any loss suffered by the Corporation on account of its withdrawal/modification etc. besides forfeiture of EMD. He will also be debarred from participating in any other Tender Enquiry with FCI for a period of five years.

(ii) The Earnest Money will be returned to all unsuccessful tenderers within a period of 15 days from the date of disqualification in the case of all Tenderers whose Technical Bids are disqualified, and within a period of 30 days from the date of issue of the acceptance letter in the case of all other Tenderers and to a successful Tenderer, after he has furnished the Security deposit, if he does not desire the same to be adjusted towards the Security Deposit. No interest shall be payable on Earnest Money, in any case."

5. Petitioner-firm has been dis-qualified from participating in the tender process at the technical evaluation stage. Vide impugned order dated 2.3.2013, Annexure P7, the tender has been summarily rejected and the earnest money deposit stands forfeited under Clause 5(b)(ii) of the Model Tender Form. Consequentially, by operation of Clause 4(iii), the petitioner-firm

stands debarred for a period of five years on account of forfeiture of earnest money deposit.

6. It would be pertinent to take note that the scope of the instant petition has been confined only as regards forfeiture of earnest money and automatic blacklisting as a consequence thereof and no challenge has been raised to the rejection of the tender.

7. Having heard counsel for the parties at considerable length, we are of the considered view that the action of the respondent-Food Corporation of India forfeiting the earnest money deposit of the petitioner-firm and consequential blacklisting is not only arbitrary but is irrational as well. Reasons for holding such view are detailed hereunder:

i) A conjoint reading of Clauses 4, 5 and 6 of the Model Tender Form would show that a person signing the tender or any other document forming part of the tender, on behalf of another or on behalf of a firm is obligated to produce a power of attorney duly executed in his favour stating that he has authority to bind such other person or the firm, as the case may be, in all matters pertaining to the contract. The tender is to be summarily rejected upon failure to produce the said power of attorney. Even the earnest money deposit in such eventuality is to be forfeited. Under Clause 4(iii) forfeiture of earnest money renders the tenderer ineligible to participate in the tender process for a period of five years. Still further, if any information furnished by the tenderer is found to be incorrect or false during the tender process, the earnest money deposit is to be forfeited and blacklisting for a period of five years is to follow.

Reading of the impugned order dated 2.3.2013, Annexure P7, would show that forfeiture of earnest money has been directed on the basis that the power of attorney furnished is "improper" on two counts, viz. it has not been authenticated by any Court/Magistrate or Notary Public and has not been executed on the stamp paper of proper denomination.

Counsel appearing for the respondent-Corporation has not brought to our notice any provision in law or for that matter any condition contained in the Model Tender Form which would require authentication of a power of attorney by any Court/ Magistrate or Notary Public. Insofar as the power of attorney having not been executed on stamp paper of proper denomination, it would be necessary to advert to certain relevant provisions of the Indian Stamp Act, 1899 (for short '1899 Act'). Under Section 2(14) of the 1899 Act, an "instrument" has been defined to include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. Under Section 3 of the 1899 Act, instruments shall be chargeable with duty of the amount as contained in Schedule I of the Act. Entry 48 of Schedule I deals with Power of Attorney and stipulates the duty chargeable varying as per purpose for which it is intended to be used. Section 35 of the Act stipulates that no instrument chargeable with duty shall be admitted in evidence for any purpose unless such instrument is duly stamped. Proviso to Section 35 clarifies that any such instrument shall be admitted in evidence on payment of duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty as prescribed. As such, it would be clearly discernible from the provisions referred to hereinabove that non-execution on the stamp paper of proper denomination would not be fatal to the instrument. Be that as it may, the grounds furnished in the impugned order dated 2.3.2013 may be taken as sufficient for a summary rejection of the tender. Forfeiture of earnest money deposit on such count and coupled with automatic blacklisting for a period of five years would be construed as extremely harsh and is so held.

ii) The purpose of insertion of Clause 5(ii) and to produce a Power of Attorney duly executed is to bind a person who has filled up a tender form as a partner, along with other partners as also the firm. It would ensure elimination of a possibility of escaping from liability in case of a default occurring in the future and would also prevent fraud and deceit on the part of the other partners. Admittedly, the respondent-Corporation is a large public sector and Government undertaking and deals with the storage and movement of food grains across the country and heavy responsibility is cast to ensure that Government money is protected from any kind of fraudulent act. The purpose, as such, of insertion of a clause for submitting a Power of Attorney is laudable.

In the present case, the document furnished on behalf of the petitioner-firm and which has been construed by the respondent-Corporation to be an “improper” power of attorney is dated

20.12.2012 and placed on record at Annexure P6. In terms thereof, Sanjeev Kumar, partner of the firm has duly authorized the second and only other partner, namely, Rakesh Kumar to sign the tender form and other related documents on behalf of the firm. The authorization was in the following terms:

> *"He is fully authorized to do all the acts on our behalf, to communicate regarding the tender with the FCI authorities. We shall be fully responsible for the act done by him on our behalf with the FCI authorities."*

Also placed on record at Annexure P1 is copy of form 'A' maintained by the Registrar of Firms, Punjab under Section 59 of the Indian Partnership Act, 1932 which would duly substantiate that the petitioner-firm comprised only of two partners, namely, Sanjeev Kumar and Rakesh Kumar. Had the respondent-authorities viewed the document dated 20.12.2012 at Annexure P6 against the backdrop that the partnership firm comprised only of two partners, it is possible that a view may have been taken that such document fulfilled the purpose and purport of Clause 5 (ii) of the Model Tender Form. However, such aspect has been completely overlooked while directing forfeiture of earnest money. It was expected of the respondent-Corporation to have dealt with such issue with a certain degree of circumspection as it was not just forfeiture of earnest money, but the same also entailed automatic blacklisting, or so it thought, for a period of five years.

iii) Mr.JS Puri, learned counsel appearing for the respondent-Corporation would place heavy reliance on Clause 6 of the Model Tender Form to submit that the information furnished by the tenderer was incorrect. To substantiate such assertion, learned counsel would advert to the document, Annexure R1, filed along with reply i.e. Appendix I along with the tender form that had been submitted on behalf of the petitioner-firm and in which in the list of documents attached, the authorized person had indicated that the Power of Attorney had been duly attached. This, as per learned counsel, even though did not constitute false information, but certainly amounted to furnishing incorrect information and on account of which the earnest money deposit had rightfully been forfeited. It has been contended that blacklisting for a period of five years was a direct fall out thereof.

We are unable to accept and appreciate such line of argument. In the first instance, in the impugned order dated 2.3.2013, Annexure P7, while directing forfeiture of earnest money deposit, it has nowhere been stated that the tenderer had furnished incorrect or false information. The only basis disclosed therein was that the Power of Attorney furnished was not "proper". An order which visits a tenderer with drastic civil consequences in the nature of forfeiture of earnest money deposit as also blacklisting has to speak for itself. It would not be open for the respondent-Corporation to support such order and to add reasons to the same by filing an affidavit/reply in proceedings wherein a challenge to the same has been laid. That apart, it is not the case made out on behalf of the respondent-Corporation that the information furnished was false. In our considered view, neither was the information furnished incorrect. At best, the declaration contained in Appendix I appended as Annexure R1 along with reply would fall within the expression “inaccurate”. Even assuming the information to be incorrect, still it was imperative upon the Corporation to have examined the aspect as to whether such information had been furnished with an ulterior design so as to constitute a deliberate default. The petitioner-firm already stood adequately dealt with for having supplied the alleged incorrect information inasmuch as the tender had been rejected summarily. Such rejection has been accepted by the petitioner. Blacklisting is a punitive measure and has to be commensurate to the acts of omission and commission including mis-representations and other breach of the tender conditions under which contracts are allotted. The default, if any, committed by the petitioner-firm was not such, so as to warrant and justify the unduly harsh step of forfeiture and blacklisting.

iv) It would be apposite to take notice of an order dated 16.4.2014, Annexure P15, passed by the Food Corporation of India itself in respect of the Patti Majha Truck Operator Society, wherein while reviewing an earlier decision of forfeiture of earnest money deposit and while reversing such decision, a view had been taken that the failure of the bidder to upload scanned copy (in PDF format) of Power of Attorney would be a mere technical violation of the terms and conditions and should not visit the party with consequences in the nature of forfeiture of earnest money. Even though such order had been passed in respect of a Society, yet the same principle was liable to be imported and applied even to the case of the petitioner-firm.

v) The impugned order dated 2.3.2013, Annexure P7, also cannot sustain as there has been an infraction of the principles of natural justice. Under Clauses 4 and 6 of the Model Tender Form, every case of forfeiture of earnest money deposit results in automatic blacklisting for a period of five years. In other words, the impugned order, dated 2.3.2013, has to be viewed not only as an order of forfeiture simpliciter, but also as an order of blacklisting. Concededly, the petitioner had not been put to notice prior to passing of the order. It is by now well settled that blacklisting has to be preceded by a show cause notice. In a recent decision of the Hon'ble Supreme Court in *Gorkha Security Service v. Government of N.C.T. Delhi and others, (2014) 9 SCC 105,* the question pertaining to the form and content of a show cause notice that is required to be served prior to action of blacklisting came to be considered. It was held that in order to fulfil the requirement of principles of natural justice, not only is it essential to serve a show cause notice, but even the particular penalty/action i.e. blacklisting which is proposed to be taken should also be mentioned. Such safeguard having not been adopted, the impugned order cannot sustain.

8. The above clauses merely entitle the respondent to blacklist the party for a specified period. It does not compel the respondent to do so. It would be open to the respondent to blacklist a party for less than the period specified or even not at all. A decision in this regard must be an informed one keeping in mind all the facts and circumstances of the case. It can hardly be suggested that a deliberate breach of the terms and conditions

would invite the same consequences as an inadvertent error.

9. For the reasons recorded above, the order dated 2.3.2013, Annexure P7, directing forfeiture of earnest money deposit is set aside. Consequentially, even the action of blacklisting/debarring the petitioner-firm for a period of five years shall not operate. The forfeited earnest money amounting to ₹4,49,500/- be refunded to the petitioner within a period of four weeks from the date of receipt of a copy of this order.

10. In view of the relief granted to the petitioner, the issue with regard to validity of Clause 4(iii) of Model Tender Form is kept open.

11. Petition disposed of in the aforesaid terms.

(S. J. VAZIFDAR)
ACTING CHIEF JUSTICE

(TEJINDER SINGH DHINDSA)
JUDGE

OCTOBER 16, 2015
SRM

Note: Whether referred to Reporter? (Yes/No)