IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP No. 8121 of 2015 (O&M)
Date of Decision: 14.10.2015

M/s Divya Bhaskar --Petitioner

Versus

State of Haryana & another --Respondents

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

Present:- Mr. Rajesh Arora, Advocate for the petitioner.

Mr. Rahul Dev Singh, D.A.G., Haryana.

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TEJINDER SINGH DHINDSA J.

The instant petition is directed against the order dated 4.2.2010 (Annexure P-7), passed by the Controller, Printing & Stationery Department, Haryana, respondent no.2, whereby the petitioner-firm has been permanently blacklisted. A Writ of Certiorari is also sought for quashing the order dated 31.3.2015 (Annexure P-14) of the Principal Secretary, Govt. of Haryana, Printing & Stationery Department affirming the action of blacklisting.

2. Respondent no.2 issued tender notice for printing and supply of text books for classes 6^{th} to 12^{th} as also for primary classes 1^{st} to 5^{th} pertaining to academic session year 2010-2011. Section 3 of the notice inviting tenders dealt with instructions to bidders and clause F thereof governed Award of Contract. Section 3F sub clause 29 would be relevant for the controversy at hand and is reproduced hereunder:-

*"3F. **Award of Contract***

25. xxx xxx xxx

26. xxx xxx xxx

27. xxx xxx xxx

28. xxx xxx xxx

29. ***Signing of contract and depositing of performance security.***

i) At the same time as the Department notifies the successful bidder that the firm's bid has been accepted, the Department will send the bidder the Contract Form provided in Section 8 of the bidding documents.

ii) Within four (4) days of issue of the contract form, the successful bidder shall sign and date the contract and positively return it personally to the Department and also deposit the performance security for an amount of 10% of the contract value failing which a penalty @ Rs.5000/- per day for the next three days will be imposed, otherwise action as deemed fit by the Controller including forfeiture of the earnest money or also black listing the firm and to assign the job to the next eligible and willing firm or also to enhance the amount of penalty can be taken and such order of the Controller will be final and binding upon the firm.

iii) Failure of the successful bidder to comply with the requirement of Clause 29 and 30 of Section 3 shall constitute sufficient grounds for annulment of the award and forfeiture of the earnest money, in which event, the Department may assign the award to one of the next lowest Evaluated Bidders willing to execute the job or call for new Bids."

3. Petitioner-firm participated in the tender process by submitting the technical as well as financial bid within the stipulated time frame. Earnest money of Rs.2 lacs was also duly deposited. In pursuance to negotiations having taken place before a Special High Powered Purchase Committee, the petitioner-firm was declared the successful tenderer on 8.12.2009. In pursuance thereto the supply order dated 21.12.2009 was issued in favour of the petitioner-firm. As per Section 3 F clause 29 (ii), 10% performance security was to be deposited within a period of seven

days. The performance security having not been deposited, communication dated 7.1.2010 was sent under registered cover to the petitioner-firm bringing to its notice as to why the supply order be not cancelled and earnest money be not forfeited. It so transpires that vide communications dated 12.1.2010 and 14.1.2010 addressed to respondent no.2, petitioner-firm expressed its inability to execute and undertake the supply order. The plea taken in such communications was that the specialized machinery that the petitioner-firm had ordered to undertake the supply order had been delayed and as such on account of circumstances beyond its control, there was no option but to express inability and to invite upon itself the penalty of forfeiture of earnest money. Vide order dated 13.1.2010 (Annexure P-5) respondent no.2 directed forfeiture of the earnest money amounting to Rs.2 lacs. A show cause notice carrying even date i.e. 13.1.2010 (Annexure P-6) was also served upon the petitioner-firm contemplating the penalty of blacklisting for not having undertaken the printing work that had been duly allotted. Reply to the show cause notice was furnished.

4. Respondent no.2 issued the impugned order dated 4.2.2010 (Annexure P-7) blacklisting the petitioner-firm by invoking the clause 29 (ii) of Section 3 of the notice inviting tenders and as such debarred it from doing any printing business with the Haryana Government. The appeal preferred before the State Government has been dismissed vide order dated 31.3.2015 (Annexure P-14), passed by respondent no.1 and the order of blacklisting dated 4.2.2010 has been affirmed.

5. Learned counsel for the parties have been heard at length.

6. The impugned order does not mention any period and thus the petitioner-firm stands blacklisted for an unlimited period of time. Such an

order of permanent blacklisting is unsustainable in view of the judgement of the Hon'ble Supreme Court in ***M/s Kulja Industries Ltd. Vs. Chief General Manager, W.T. Project B.S.N.L, AIR 2014 (S.C), 9.***

7. The question that now arises is as to whether this Court ought to examine the issue as to whether the penalty of blacklisting was required to be resorted to as also the period of blacklisting, if at all, keeping in view the attendant facts and circumstances. Ordinarily we would have opted to remand the matter back to the competent authority since such matters and decisions would lie within the domain of such authority. However, the facts of the present case are peculiar and we are of the considered view that there would be no warrant for grant of liberty to the respondent authorities to pass any fresh order with regard to blacklisting. We take this view for the following reasons:

8. It is by now well settled that the power to blacklist a person is a necessary concomitant to the executive power of the State to carry on trade or business and making of contracts for any purpose. There need not be any statutory grant for the exercise of such power. A blacklisting order entails adverse civil consequences. Blacklisting is also seen as an “instrument of coercion.” The object of blacklisting may be construed as an effective method to discipline deviant suppliers/contractors. The legal limitation, however, upon the exercise of such a power is that the State must act fairly and rationally without in any way being arbitrary. In the present case tender was awarded in favour of the petitioner-firm for providing and supply of text books for the benefit of school students. In the show cause notice date 13.1.2010 (Annexure P-6) contemplating the penalty of blacklisting it had been mentioned that on account of the supply order not being executed it

would not be possible to provide books to lacs of students and which in turn would tarnish the image of the concerned department as also of the State Government. It stands conceded in the reply placed on record that after the petitioner-firm had expressed its inability to execute the supply order, the respondent department had negotiated with L-2 and L-3 tenderers to perform the same work and at the same rate as had been quoted by the petitioner-firm and it was agreed to by the other tenderers and the work was completed within the stipulated time of 180 days without any loss to the respondent department and without prejudice to the interests of the students. It is also not in dispute that the supply order was executed without publication of fresh tenders for the same work. Such aspect has been completely overlooked by the Appellate Authority while passing the impugned order dated 31.3.2015 (Annexure P-14). The conduct of the petitioner-firm would also have a material bearing on the aspect of blacklisting. After the award of the supply order, the petitioner-firm at the very threshold had expressed its inability to execute the same and had itself invited the penalty of forfeiture of earnest money deposit. It is not even the case of the respondent department that the petitioner-firm had engaged in any corrupt or fraudulent practice. Rather on account of the appeal against the order of blacklisting dated 4.2.2010 having been kept pending and decided only on 31.3.2015, the petitioner-firm has already served out a period of debarment in excess of five years. Under such circumstances, there would be no justification to permit the respondent authorities to revisit the issue with regard to imposition of penalty of blacklisting.

9. In view of the above, writ petition is allowed. Impugned order dated 4.2.2010 (Annexure P-7), passed by respondent no.2 and order dated

31.3.2015 (Annexure P-14), passed by respondent no.1 are set aside. Liberty to pass any fresh order as regards blacklisting upon the petitioner-firm is specifically declined.

10. Petition is allowed in the aforesaid terms.

(S.J. Vazifdar)
Acting Chief Justice

(Tejinder Singh Dhindsa)
Judge

14.10.2015
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Whether to be referred to Reporter? Yes.