IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.18446 of 2015

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M/s Sarvesh Security Service Pvt. Ltd. a company registered under the Indian Companies Act, having its registrered office at 413, Pocket -E, Mayur Vihar, Phase-II, Delhi -110091 through its Authorised Representative Ajit Kumar Singh son of late Chandrama Prasad Singh Resident of Fair Field Colony, P.s Digha, District Patna.

.... Petitioner

Versus

1. Life Insurance Corporation of India through the Divisional Manager, O.S. Department, LIC Muzaffarpur Division, Umashankar Pd. Marg, Muzaffarpur-842002.
2. Manager , O.S. Department, LIC Muzaffarpur Division, Umashankar Pd. Marg, Muzaffarpur-842002.

.... Respondents

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Appearance :

For the Petitioner : Mr. Rajeev Verma, Senior Advocate
Mr. Saket Tiwary

For the Respondents : Mr. Rajeev Ranjan Prasad
Mr. Sudhanshu Trivedi

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

ORAL JUDGMENT

Date: 25-07-2016

Heard learned counsel for the petitioner and learned counsel for the Life Insurance Corporation of India.

The petitioner seeks quashing of the order dated 08.01.2015, by which the respondent Corporation has cancelled the work order with immediate effect and forfeited the earnest money deposit of the petitioner and also to quash the order dated 17.02.2015, by which the respondents have blacklisted the petitioner.

The respondent-Life Insurance Corporation came out with a notice inviting tender dated 08.10.2014 for outsourcing of sweeping services at Muzaffarpur Divisional Office. The petitioner was declared successful tenderer after the technical bid and financial bid were taken into consideration, which was informed to the petitioner by letter dated 05.11.2014 intimating that it had to start the job within ten days of receiving the acceptance letter and stamped agreement was required to be signed before taking over the assignment. However on receiving such letter, there was no response from the side of the petitioner to the said letter nor to the other letter issued on 08.01.2015. Reference is made to the last E-mail dated 22.12.2014 stating that till date there was no written communication from the side of the petitioner and no one had reported to the respondent, except it was intimated that the proprietor was seriously ill and under treatment at that moment and the company was not in a position to take any decision and as soon as he joins the respondents would be contacted.

The petitioner had, in the meantime, only sent E-mail dated 29.11.2014 stating that it was very much interested to commence the work provided that the award letter was issued in its favour.

In view of the said conduct of the petitioner, it was intimated that the work order was being cancelled with immediate effect and EMD was being forfeited for such casual approach. By the said letter, the petitioner was further directed to submit its observation within 15 days as to why the company should not be blacklisted for irresponsible and non-professional approach.

The petitioner by its E-mail dated 11.01.2015 referring to the last E-mail dated 22.12.2014 informed stating that it was not in a position to intimate the exact date of commencement of work as its Director was suffering from malignancy of prostate gland and was under heavy medication pending investigation and operation and was not in a fit condition and would commence work at any time as per the instructions issued by the Corporation. However, by the impugned letter dated 17.02.2015, the petitioner was informed that the clarification was not satisfactory in view of its organization being an ISO 9001:2000 certified company and its attitude also showed that it was not interested in undertaking the job and considering the issue in its totality it was decided to blacklist the petitioner-firm in the register of LIC.

Learned counsel for the petitioner submits that it was not open to the respondents to have cancelled the contract and forfeited the E.M.D. as also blacklisted the petitioner in the facts and circumstances of the case. It is further submitted that the petitioner has been unable to proceed with the contract within the time given in the letter dated 05.11.2015 of the respondent because of the serious illness of the Director of the company and as soon as the Director recovered, a letter dated 11.01.2015 had been issued expressing its readiness of take up the contract but without considering the said facts and circumstances the contract has been cancelled on 08.01.2015 and the E.M.D. was forfeited and further by the letter dated 17.02.2015, the petitioner has been blacklisted.

It is urged that the respondent, being State under Article12 of the Constitution, ought not to have acted in such an arbitrary and discriminatory manner considering the circumstances under which there was delay on the part of the petitioner in proceeding with the contract in the matter. It is further submitted that since no agreement had been signed pursuant to the letter of allotment dated 05.11.2014, there was no contractual relation between the parties and it was not open to the respondents to have blacklisted the petitioner which imposes serious civil consequences upon the petitioner apart from the huge financial loss caused for no fault of the petitioner.

Learned counsel for the petitioner further submits that blacklisting cannot be for an indefinite period but has to be proportionate to the conduct of the person concerned.

Learned counsel for the petitioner in support of his aforesaid stand relies upon a decision of this Court rendered on 11.02.2014 in the case of Ajay Kumar Singh v. The State of Bihar and others: C.W.J.C. No.15240 of 2006, in which it has been held as follows:-

"I have considered the rival submissions of learned counsels for the parties. It is evident from the sequence of events stated above that the petitioner appears to be more a victim of circumstances that had arisen on account of certain action taken by the State respondents, namely, closure of Karwandia Mines. The issue is not that the same had been done rightly or wrongly but the fact that for the roads which were to be constructed the stones were to be obtained from the nearby Karwandia Mines within Rohtas district, which was part of the terms of the agreement and the rates were also accordingly fixed for the relevant period. It is not disputed that the mines got closed on account of the direction of the State Government making it practically impossible for the petitioner to complete the work in time. It is also not disputed that the petitioner had begun the work and had done some amount of work of repairing of roads and the entire earth work had been completed. Thus it could not be said to be a case where the petitioner could be held to be liable for the non-completion of the work or delay in its completion at least to go to the extent of even blacklisting the petitioner. As repeatedly emphasized by the Apex Court and this Court in various cases on the issue, some of which have been cited above that the order of blacklisting involves civil consequenes and should not be passed at the drop of a hat whereas the respondent authorities are habitual in doing so. Even cancellation of contract has serious consequences

> upon the contractor but blacklisting goes much beyond and prevents a contractor from not only taking up work for the State but of Government of India and their undertakings which have made provisions in the clauses of Standard Bid Documents in that regard. Hence any order of blacklisting must be passed taking into account its effect upon the fundamental rights of a citizen to carry on his business and occupation under Article 19 (1)(g) of the Constitution, and only in case of gross misconduct or other gross conduct on the part of the contractor such power should be invoked. In the present matter, the respondents have clearly failed in supporting the blacklisting of the petitioner on the facts that have been placed on the record.
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> This Court and the Apex Court have also held that an order of blacklisting cannot be passed for an indefinite period of time and the respondents even if they proceed to blacklist any contractor must ensure that the period of blacklisting is commensurate with the misconduct involved and/or the loss caused to the Government."

Learned counsel for the Life Insurance Corporation of India, on the other hand, submits that there was a clear cut case of not commencing the work under the contract by the petitioner, which has caused serious problem for the respondents. It is submitted that immediately after looking into the tenders floated on 08.01.2014, the respondents had taken steps and by letter dated 05.11.2014 informed the petitioner that its tender for cleaning and sweeping service has been accepted. The petitioner was further informed that it has to start work within ten days of receiving the acceptance letter and also to sign a stamped agreement before taking over the assignment but the petitioner failed to take any action in that regard and for the first time the petitioner made a vague response by E-mail letter dated 29.11.2014. Despite several reminders, the petitioner did not come forward and only after letter dated 08.01.2015 was issued, cancelling the contract and forfeiting the E.M.D., the petitioner by its E-mail letter dated 11.01.2015 intimated that its representative would visit on 13.01.2015. It is submitted that the respondents were fully justified in cancelling the work order and forfeiting the E.M.D. on account of the casual approach of the petitioner. It is further submitted that the explanation of the petitioner was unsatisfactory in view of its organization being an ISO 9001:2000 certified company and action was taken, pursuant to the work order issued by the respondents, after a period of two months even though the petitioner had to start the work within ten days after the receipt of the same.

It is further submitted that blacklisting of a person flows from the right of the tender issuing authority not to do any business with the person concerned because of his bad conduct and the L.I.C.

was fully justified in taking decision not to have any business dealing with the petitioner while blacklisting the company.

In support of his stand, learned counsel for the L.I.C. relies upon a decision of the Supreme Court in the case of M/s. Kulja Industries Limited v. Chief Gen. Manager, W.T. Proj., BSNL and others: 2013 AIR SCW 5637 equivalent to AIR 2014 SC 9 in paragraph No.17 of which, it has been held as follows:-

> "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 untrammeled 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: (AIR 1975 SC 266) 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."

It is submitted by learned counsel for the L.I.C. that the respondents had given a show cause notice to the petitioner and only after considering the same the blacklisting order has been passed.

I have considered the submissions of learned counsels for the parties and perused the materials on the record.

So far as the question of cancellation of the work order and forfeiting E.M.D. is concerned, there does not appear to be any illegality in the action of the respondents as the same flows from the provisions of the tender notice which have been enclosed in the counter affidavit and read as follows:-

> "In case the lowest (L1) vendor/bidder refuses to sign the agreement within the prescribed time, a notice shall be served to him by giving seven days time to fulfil the conditions and sign in the agreement failing which his EMD amount lying/retained with us shall be forfeited without any further correspondence and he will be deemed to have abandoned the work"

There cannot be any doubt that failure of the petitioner to sign the agreement and commence the work, being covered by the said clause contained in the instructions, it would bind the petitioner and failure of the petitioner to have commenced the work despite the proper intimation made to him by letter dated 05.11.2014 followed by several reminders, the respondents could have acted in the matter and cancelled the work order as also forfeited the EMD in view of the conduct of the petitioner.

The further issue of blacklisting, however, could not be supported by learned counsel for the respondents on any justifiable legal grounds. The attempt to rely upon the decision of the Supreme Court in M/s. Kulja Industries' case (supra) does not help them as the same clearly holds that the right to blacklist is inherent in the party allotting the contract. Although the freedom to contract or not to contract is unqualified for the private parties but in the case of State or any of its instrumentalities the decision is subject to judicial review so that the order itself must reasonable, fair and proportionate to the gravity of the offence and it should not be arbitrary or discriminatory. Any such decision of blacklisting is subject to the judicial review on the ground of violation of principles of natural justice, equality and doctrine of proportionality. The said decision was rendered in the case of a concluded contract. The same is not the position here. There is no agreement between the respondents and the petitioner, rather it is a case of the petitioner failing or refusing to enter into the written agreement as was required in terms of the tender and by the letter of allotment issued on 05.11.2014. Thus no such right arose in the LIC to blacklist the petitioner.

Learned counsel for the petitioner has rightly relied upon the decision of this Court in the case of Ajay Kumar Singh (supra) where this Court has referred to the fact that blacklisting goes much beyond a mere cancellation of contract and prevents the contractor from not only taking up the work for the State but of the Government of India and their undertakings. Hence any order of blacklisting must be passed taking into account its effect upon the fundamental right of a citizen to carry on his business and occupation under Article 19 (1) (g) of the Constitution, and only in a case of gross misconduct or other gross conduct on the part of the contractor such power should be invoked. It may however be noted that the decision in Ajay Kumar Singh's case (supra) related to a person, who had entered into an agreement with the party, whereas the present matter is a case of not entering into an agreement before taking over the assignment. Accordingly, this Court holds that the respondent- LIC did not have any right to blacklist the petitioner in the facts and circumstances of this case.

Thus, in the light of the aforesaid discussions, the writ application is partly allowed and the impugned order dated 17.02.2015, by which the petitioner has been blacklisted, is quashed.

(Ramesh Kumar Datta, J)

V.P.Sinha/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	22.12.2014
Transmission Date	