

**HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO**

**W.P.No.4150 of 2016**

**ORDER:**

Heard the learned counsel for the petitioner and the learned Government Pleader for Medical, Health and Family Welfare, appearing for respondents.

2. This Writ Petition is filed by the petitioners challenging the order dt.24-06-2015 of 2<sup>nd</sup> respondent blacklisting the petitioner for a period of three years from participating in tenders floated by it.

3. Brief facts which led to filing of this Writ Petition are that bids were invited by Tender Notice dt.06-01-2015 by 2<sup>nd</sup> respondent for procurement of ultrasound scanners for Public Health Centres and Child Health Centres in the State of Andhra Pradesh. The petitioner responded to the said tender notice and uploaded its bid along with two Certificates which indicated that they were valid up to 27-02-2015. Thereafter a provisional list of qualified tenderers was published by 2<sup>nd</sup> respondent on its website calling for objections, if any, in the qualification process. One of the qualified bidders complained online that the certificates uploaded by the petitioner were fake and requested further verification. The 2<sup>nd</sup> respondent then addressed the firm M/s.ITC, Czech Republic (who issued

those certificates to the petitioner) to confirm their genuineness by an e mail dt.07-04-2015. The said Company replied by their e mail dt.09-04-2015 that the two certificates issued by it to the petitioner were valid only until 31-12-2014 which period had already expired by then and so the two certificates uploaded by petitioner were fake since they disclose different dates.

4. In view of this, a show cause notice was issued to the petitioner on 12-06-2015 calling for petitioner's explanation within five days.

5. Petitioner replied to the same by e mail dt.17-06-2015 stating that it had never come across any such case, that they are looking into it and requested to allow sometime to scrutinize the matter internally, and authenticate the facts.

6. In view of this reply, 2<sup>nd</sup> respondent construed that the petitioner has no explanation to offer to the show cause notice and was trying to prolong the issue. It invoked Clause 8.d of Section 1 and 36.2 (c) of Section II in Bid Document which provide for penal action for furnishing fake certificates by tenderer and passed the impugned order on 24-06-2015 holding the petitioner to be ineligible for a period of three years from the date of issue of the said order from participating in tenders floated by the respondents. The EMD submitted by the petitioner

was also forfeited.

7. This is questioned by the petitioner in this Writ Petition.

8. Learned counsel for the petitioner contended that the time granted to reply to the show cause notice was inadequate and 2<sup>nd</sup> respondent ought to have granted more time to the petitioner to offer a more detailed explanation to the show cause notice. He contended that petitioner had no intention to drag on the matter. He also contended that certain persons, without the knowledge of the petitioner, uploaded the two certificates in question along with the tender; that it was not intentional or wanton act on the part of the petitioner; and once this fact came to the notice of the petitioner by the notice issued by 2<sup>nd</sup> respondent, the said certificates were got renewed. It is also stated that a criminal case has been filed against the employee who uploaded the above Certificates which resulted damage to the operations of the petitioner. It is contended that the certificates have since been renewed and if more time had been given, the petitioner would have persuaded 2<sup>nd</sup> respondent to reconsider the issue. He also stated that the petitioner is an international business concern and this action on the part of 2<sup>nd</sup> respondent has also damaged the petitioner's credibility in the hands of the others organizations making it difficult to

the petitioner to run its business. Learned counsel for the petitioner also placed reliance on the judgment of the Supreme Court in **M/s.Kulija Industries Limited Vs. Chief General Manager W.T. Proj. BSNL & Others**<sup>[1]</sup>.

9. Counter affidavit is filed by 2<sup>nd</sup> respondent supporting its action. It is stated that the tenders are to be uploaded through e procurement platform by using digital keys issued by APTS with the assistance of e-procurement service provider, that the digital keys are highly confidential and are to be used under proper authentication only, and so the contention of the petitioner that one of its employees uploaded the documents in question without its knowledge clandestinely cannot be accepted and the petitioner is liable for all the acts of its employees. It is specifically stated that the complaint of the bidder against the petitioner was got verified with the persons who issued certificates to the petitioner, that the petitioner was also given an opportunity to respond to the allegation that they uploaded fake certificate and therefore the decision of 2<sup>nd</sup> respondent cannot be said to be arbitrary. It is also contended that merely because the petitioner had got certificates renewed subsequent to the uploading of the fake certificates for the tender, the petitioner cannot escape from the consequences of blacklisting. It is also stated that any criminal action taken by it against its employee does not exonerate the

petitioner from the act of uploading the fake certificates and that blacklisting is necessary in the facts and circumstances of the case and is permitted by clause 36.2 (c) of the bid document.

10. The said clause states:

*“The purchaser will sanction a firm or individual, including declaring ineligible, either indefinitely or for a stated period of time, to be awarded a contract, if it at any time determines that the firm has, engaged in corrupt, fraudulent, collusive, coercive, obstructive practices in competing for a contract.”*

11. In the judgment **M/s.Kulija Industries Limited**

(1 supra), the Supreme Court had referred to the judgment in **Erusian Equipment & Chemicals Ltd. Vs. State of**

**West Bengal and Another**<sup>[2]</sup> to the effect that before blacklisting any person which affects the person from entering into lawful relation with the Government or Government entities for the purpose of gains, a fair hearing should be given and an opportunity should be given to the party before he is put on a blacklist. In the case of the said judgment, the Court observed:

*“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."*

12. In the present case, it is not as if no opportunity was given to the petitioner before putting the petitioner on a blacklist. Petitioner had five days time to look into the matter. In this era of communications by e mail and fax, it cannot be said that the period of five days granted to the petitioner to submit explanation to the show cause notice is unreasonable. Even otherwise it is not the case of the petitioner that the conclusion to which 2<sup>nd</sup> respondent had arrived at (that the certificates uploaded by the petitioner are fake) was untrue. Even according to the petitioner, it was its employee, who had uploaded two certificates by changing the validity period mentioned therein and that they had initiated criminal action against him.

13. Since on the admitted facts, no other conclusion other than the one arrived at by 2<sup>nd</sup> respondent that the certificates arrived at are fake is possible, I am of the opinion that the petitioner cannot complain of any prejudice caused to it by being allowed only five days time to respond to the show cause notice. It cannot be said that 2<sup>nd</sup> respondent had acted arbitrarily since 2<sup>nd</sup> respondent had verified about the genuineness of the certificate uploaded by the petitioner from the company M/s.ITC, Czech Republic which had issued them to it and even mentioned about said fact in the show cause notice itself.

14. In my opinion, power to blacklist a contractor is inherent in the party allotting the contract as held by the Supreme Court in the above decision and the act of blacklisting is only a business decision of 2<sup>nd</sup> respondent by which it decided not to enter into any contractual relationship with the petitioner, that too for a limited period.

15. Therefore, I am of the considered opinion that there is no merit in the Writ Petition and the same is accordingly dismissed. No costs.

16. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

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**JUSTICE M.S.RAMACHANDRA RAO**

Date: 15-03-2016

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[\[1\]](#) Civil Appeal No.8944 of 2013 dt.04-10-2013

[\[2\]](#) (1975) 1 S.C.C. 70