

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 8th March, 2016

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W.P.(C) 2641/2015 & CM No.4733/2015 (for stay).

M/S GUPTA BROTHERS

.... Petitioner

Through: Mr. S.N. Pandey, Adv.

Versus

**EAST DELHI MUNICIPAL
CORPORATION & ANR**

..... Respondents

Through: None.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the order dated 30th September, 2014 of the respondents no.1&2 East Delhi Municipal Corporation (EDMC) de-barring the petitioner from the panel of respondents EDMC for a period of five years from the date of issue of the order (less the period of four months and 21 days i.e. from 7th November, 2013 to 28th March, 2014 for which the petitioner had remained de-barred earlier).
2. The petition challenging the de-barring order was filed and re-filed on 13th February, 2015 and 13th March, 2015 respectively and came up first before this Court on 18th March, 2015 when none appeared on behalf of the petitioner and the petition was adjourned to 21st July, 2015. On 21st July, 2015, being *prima facie* of the view that the matter was purely contractual

and entailed disputed questions of fact and that the remedy by way of a writ petition under Article 226 of the Constitution of India is not available to the petitioner, the counsel for the petitioner was heard at length and judgment reserved. None appeared for the respondents EDMC on advance notice. Though the judgment went on the back burner for long but it may be recorded that the petitioner, its counsel at no time in the interregnum mentioned the matter.

3. The petition is filed pleading (i) that the petitioner was engaged in the work of civil construction and enlisted with the respondents EDMC/its predecessor Municipal Corporation of Delhi (MCD) vide Certificate dated 11th December, 2008 has never in the past been de-barred or blacklisted; rather the work executed by the petitioner was adjudged as very good/good; (ii) the bid of the petitioner for the work of improvement of six Mother & Child Healthcare (MCH) Centres was accepted and the Work Order No.195 dated 15th February, 2013 issued by the respondents EDMC in favour of the petitioner; (iii) that of the six sites, only three sites were handed over to the petitioner; all the MCH Centres were fully functional between 9.00 a.m. to 3.00 p.m. six days of the week and the work thus could not be carried out in full swing as the work involved renovation of rooms and halls in which the

MCH Dispensary was operating and the bath rooms attached thereto; the staff and doctors of the MCH Centres did not allow the work of chiseling and removal of plaster etc. to be carried out while the Dispensary was functional; (iv) that the petitioner vide letters dated 13th March, 2013, 11th April, 2013, 26th April, 2013, 7th May, 2013 and 27th May, 2013 informed the respondents EDMC of the hindrance in execution and the slow progress of the work; (v) after much persuasion, fourth site was handed over but the progress of the work still remained slow; (vi) the respondents EDMC however issued a notice dated 11th March, 2013 asking the petitioner to show cause why action under Clause-2 of the Agreement be not taken against the petitioner on account of breach of contract on the part of the petitioner in having not even started the work by then though the time for completion thereof was of nine months only; (vii) the said show cause notice was *mala fide* and a counterblast to the letter dated 13th March, 2013 of the petitioner complaining of the delays on the part of the respondents EDMC and as is also evident from the fact that the same was issued much prior to the stipulated date of 23rd November, 2013 of completion of the work; (viii) the petitioner vide its letter dated 1st July, 2013 replied to the show cause notice and also met the Chief Engineer on the same day and was made to

sign on a blank paper on which subsequently false minutes of the meeting were fabricated; (ix) that out of the total contractual value of Rs.92,88,171/- towards civil work, work of the value of Rs.65,45,336/- could not be executed for want of finalization of specifications of tiles and shades by the respondents EDMC; (x) that the respondents EDMC without paying any heed to the reply by the petitioner to the show cause notice aforesaid, vide letter dated 29th July, 2013 directed the petitioner to deposit Rs.10,20,583/- by way of compensation “as stipulated in Clause-2 of the Agreement” failing which it was threatened that the amount shall be recovered from any other contract of the petitioner; (xi) vide subsequent letter dated 6th August, 2013 penalty also was levied on the petitioner; (xii) the petitioner filed CS(OS) No.1592/2013 impugning the claim of compensation and levy of penalty on the petitioner and which suit was stated to be pending before this Court; (xiii) that in further harassment of the petitioner, the respondents EDMC issued a notice dated 27th August, 2013 asking the petitioner to show cause as to why disciplinary action should not be taken against the petitioner under the Enlistment Rules for not doing work under the Work Order No.195 dated 15th February, 2013; (xiv) the petitioner submitted a reply dated 2nd September, 2013 to the said show cause notice but the respondents

EDMC without even considering the same, vide order dated 6th September, 2013 de-barred the petitioner for a period of five years for non-completion of the work awarded vide work order aforesaid; (xv) the petitioner filed W.P.(C) No.7277/2013 in this Court impugning the same; though notice thereof was issued but no interim relief claimed granted; aggrieved from non-grant of interim relief, the petitioner preferred LPA No.912/2013 and which LPA as well as the W.P.(C) No.7277/2013 were disposed of vide order dated 2nd December, 2013 of the Division Bench by setting aside the order dated 6th September, 2013 of debarment/black listing of the petitioner by directing the respondents EDMC to pass a fresh order on the show cause notice dated 27th August, 2013 after considering the reply dated 2nd September, 2013 of the petitioner; and, (xvi) that a personal hearing was granted to the petitioner on 16th July, 2014 but it was merely an eyewash and the respondents EDMC vide impugned order dated 30th September, 2014 have again debarred the petitioner for the same period of five years less the period of debarment/blacklisting earlier undergone by the petitioner.

4. It is the contention of the petitioner (a) that its debarment is “against the provisions of Clause-23 of the contract” particularly Clause 23.3 titled “removal from the approved list”; (b) the order of blacklisting has been

passed mechanically inasmuch as the explanation/response of the petitioner has not been considered and dealt with; (c) that the empanelment of the petitioner as a Class-II contractor is a valuable right and cannot be taken away in the manner done; (d) that none of the Clauses of Class 23.3 of the contract on which alone blacklisting/debarment can be done are applicable to the petitioner; (e) that no instructions of the respondents EDMC have been disobeyed by the petitioner; (f) that the petitioner has never in the past been proceeded against for the reason of any of its works being unsatisfactory; (g) that the work order, of renovation of MCH Centres, was issued notwithstanding the said Centres being functional and during which time the work was/is not possible; and, (h) that the order of blacklisting for five years is too harsh and unreasonable.

5. The counsel for the petitioner during the hearing informed that the civil suit aforesaid filed by the petitioner had been withdrawn upon non-grant of interim order therein.

6. I had, as aforesaid, *prima facie* felt the writ remedy to be not available owing to the recent pronouncement of the Supreme Court in ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728, applying the tests laid down wherein it was felt that the *lis* between the

parties is purely of a personal nature without any public law character. The counsel for the petitioner during the hearing also argued that the stand of the respondents EDMC of the default being on the part of the petitioner was fallacious in view of the letters written by the petitioner from time to time. The same fortified my view of the dispute entailing factual controversy, whether the default was on the part of the petitioner or not, being capable of determination only by examination and cross examination of witness and which strictly speaking is outside the domain of the writ petition. Else it is not in dispute, after the direction in the earlier writ petition, that the petitioner has been given due hearing prior to being blacklisted. The proportionality of the period of blacklisting is largely in the domain of the authority having power to blacklist and scope of interference by Court is limited. (see *State of Karnataka Vs. H. Nagaraj* (1998) 9 SCC 671, *Union of India Vs. R.K. Sharma* (2001) 9 SCC 592 and *Om Kumar Vs. Union of India* (2001) 2 SCC 386)). However while dictating the judgment and while going through the paper book it is felt that one of the legal questions which can arise is, whether the blacklisting/debarment is contrary to the terms of blacklisting/debarment laid down by the respondents EDMC itself, as pleaded by the petitioner with reference to “Clause 23 of the Agreement”. It

was felt that if the contract/agreement lists the circumstances or conditions or events on the happening of which power to blacklist can be exercised, there can be no blacklisting in contravention thereto. I have thus examined the matter from the said perspective to see whether a case for calling upon the respondents EDMC to respond is made out.

7. Though the petitioner has referred to a “contract” or to an “Agreement” but has not filed any Agreement/contract. The only thing which has been filed is the Work Order dated 15th February, 2013 and which work order refers to the terms and conditions of tender but which have not been filed. The said work order further calls upon the petitioner to attend the office of the respondents EDMC “to complete the formal Agreement” but no formal Agreement as aforesaid has been filed.

8. A perusal of the show cause notice dated 27th August, 2013 shows that the petitioner was asked to show cause as to why “disciplinary action should not be taken against your firm under Enlistment Rule for not doing the above mentioned work”. The work above mentioned was the Work Order dated 15th February, 2013 supra.

9. The respondents EDMC in the impugned order dated 30th September, 2014 records (i) that the work under the Work Order dated 15th February,

2013 was to be started latest by 24th February, 2013 and to be completed by 24th November, 2013; (ii) the work was to be taken up at six different sites of existing MCH Centres for their renovation and improvement; (iii) the petitioner neither brought any material at site nor started any work at any of the six sites till 11th March, 2013; (iv) show cause notice dated 11th March, 2013 was issued to the petitioner and the reply of the petitioner thereto was not found satisfactory; (v) the petitioner also failed to depute a Graduate Engineer at site to supervise the work; (vi) subsequent letters were written to the petitioner and the excuses given by the petitioner were not found acceptable; (vii) the petitioner was well aware about the site conditions and it was supposed to take up the work in an organized manner so that the same could be completed in stipulated time period without creating any hindrance in day-to-day work of health Centres; (viii) the petitioner however took up the work only at four sites and that too in a haphazard manner by dismantling of doors, windows and tiles etc. without proper planning and which created problems in MCH Centres; (ix) the petitioner did not start any work at the other two sites; (x) that though the petitioner had alleged that Third Party Quality Assurance Agency had not been engaged but “NCCBM” was engaged by the department as Third Party Quality Assurance Agency

for this work and which had also inspected the work on 12th April, 2013; (xi) since the progress of the work was not proportionate with respect to stipulated time, a show cause notice “under Clause 3 was also issued” vide letter dated 1st July, 2014 and personal hearing was also fixed simultaneously on 1st July, 2014; (xii) during the course of hearing the petitioner had assured to gear up the progress and to complete the work within stipulated time; accordingly a joint inspection was fixed up after a fortnight; (xiii) during the visit on 16th July, 2013 no progress was found and only two or three workers were found at the two sites; (xiv) the petitioner on 29th July, 2013 completely stopped the work and removed all building material and T&O from the site; (xv) NCCBM also inspected the site on 29th July, 2013 and reported that only 10% of the total work had been completed; (xvi) another hearing was given to the petitioner on 12th August, 2013 but the petitioner failed to attend the same; (xvii) since inspite of giving sufficient opportunity the petitioner had failed to give substantial and proportionate progress of the work it was felt that the petitioner is willfully and deliberately not taking up the work with the *mala fide* intention and found liable for action under Enlistment Rules; (xviii) since work was of an urgent nature and was to be completed in a time bound manner, show cause

notice dated 27th August, 2013 for taking disciplinary action under Enlistment Rule was issued; (xix) the reply of the petitioner was not found satisfactory; (xx) accordingly the petitioner was debarred for five years vide order dated 7th November, 2013; (xxi) after the orders in the writ petition/LPA aforesaid filed by the petitioner personal hearing was granted to the petitioner and the matter considered afresh; (xxii) it was evident that the petitioner did not start the work within the stipulated period of ten days from the work order and even after 50% of the stipulated time had expired was found to have done only 10% of the work; (xxiii) the petitioner had not engaged Graduate Engineer at site which was mandatory as per the terms and conditions of the contract; (xxiv) the petitioner did not even start work of two sites; (xxv) the demand of the petitioner to hand over the vacant possession of running health centres was neither feasible nor justified; (xxvi) the petitioner had failed to improve progress of work inspite of sufficient opportunity; (xxvii) the petitioner had not abided by the assurances given by him; and, (xxviii) accordingly the order of debarment from the panel of EDMC for a period of five years was being issued.

10. The petitioner along with the petition has filed a copy of the “Instructions for enlistment of contractors in MCD” and which appears to

have been issued in the year 2008. I, at this stage must state that the petitioner has not placed all the documents before this Court. The conduct by the petitioner of this petition is found to be as lackadaisical as the conduct of the petitioner in carrying out the works aforesaid as per the respondent EDMC. The petitioner, inspite of being barred/blacklisted has not shown any urgency. As aforesaid the contract has not been placed; the typed copies only of annexures filed are with a large number of blanks making the same difficult to comprehend; the orders passed in the suit admittedly filed by the petitioner have not been filed. Moreover as aforesaid, the counsel for the petitioner during the hearing did not even refer to the Instructions for enlistment and only on going through the petition and finding the same to have been pleaded are the same being considered. On the website of the Municipal Corporation of Delhi I find a Circular dated 2nd March, 2012 circulating “Revised instructions for enlistment/revalidation of contractors in MCD” and “Instructions for enlistment of contractors in MCD, 2012” to be available and which repeal all the previous instructions. It thus appears that the instructions as in force are of the year 2012 and not of 2008 as have been filed by the petitioner. All this shows the lackadaisical attitude of the petitioner in pursuing this petition. Be that as it may the 2012 instructions

are for enlistment of contractors who intend to work with the MCD and Clause 23 thereof is titled “Disciplinary Actions”. Thereunder Clause 23.1 is titled “Demotion to a lower class”, Clause 23.2 is titled “Suspension of business”. Clause 23.3 is titled “Removal from the approved list” and provides that “the contractor shall have to abide by all the instructions of enlistment and also by the terms and conditions of the contract and the notice inviting tenders” and empowers the Enlisting Authority to *inter alia* debar the contractor or remove his name from the approved list of contractors indefinitely or for a period as decided by the Enlisting Authority after issue of show cause notice and makes the decision of the Enlisting Authority final and binding on the contractor. Clause 23.3 provides for removal of the name of the contractor from the approved list of contractors, if the contractor:-

- “A) *has , on more than one occasion, failed to execute contract or has executed it unsatisfactorily; or*
- B) *is proved to be responsible for constructional defects in two or more works; or*
- C) *persistently violates any important conditions of the contract; or*
- D) *fails to abide the conditions of enlistment; or*
- E) *is found to have given false particulars at the time of enlistment; or*
- F) *has indulged in any type of forgery or falsification of records; or*

- G) *changes constitution of the firm or Individual, change the name of the firm without prior approval of the enlistment authority; or*
- H) *changes permanent address/ business address without intimation to the enlistment authority; or*
- I) *is declared or is in the process of being declared bankrupt; insolvent, wound up, dissolved on partitioned; or*
- J) *persistently violates the labour regulations & rules, or*
- K) *is involved in complaints of serious nature received from other department which prima facie appear to be true.*
- L) *Default in settlement of tax dues like income tax, contract tax, sales tax, octroi, duties etc.*
- M) *has already been demoted for other reason(s), or*
- N) *Ceases to fulfill eligibility criteria based on which enlistment / revalidation was done, or*
- O) *is considered not required to be in list of MCD for any other reason considered fit by enlistment authority.*
- P) *Does not start the work after the same is awarded to him on three occasions.”*

11. As I have noticed above, the impugned order of 30th September, 2014 of blacklisting mentions of the default of the petitioner qua the subject work order only. The grounds of blacklisting mentioned in Clauses (A) and (B) or (P) which pertain to defaults in two or more works are therefore not attracted. Similarly, the grounds mentioned in the impugned order dated 30th September, 2014 do not fall in Causes (D) to (O). That leaves only Clause (C) i.e. of “persistently violating important conditions of contract”.

Unlike Clauses (A), (B) and (P), Clause (C) does not use the words “on more than one occasion” or “two or more works” or “on three occasions”. I have wondered whether to qualify as ‘persistent’, the violation of important conditions of contract within the meaning of Clause (C) has to be qua more than one work order / contract or can be qua one contract only. From the use of the words “any important conditions of the contract” instead of “important conditions of contracts” it appears that the reference is to one contract only. The word ‘persistent’ otherwise means “continuing firmly or obstinately in an opinion or course of action inspite of difficulty or opposition”. There is nothing in it which requires from use thereof in Clause (C) that the violation of important conditions of contract to qualify as ‘persistent’ have to be qua more than one contract. I am therefore of the opinion that persistent violation of important conditions of one contract / work order can invite debarment / blacklisting under Clause 23.3 of Instructions for enlistment.

12. The language of the impugned order dated 30th September, 2014 does make out a case of ‘persistent violations of important conditions’ of subject work order by the petitioner – in the opinion of the respondents EDMC, even though exactly these words have not been used. From the material on

record it is evident that the respondents EDMC was giving immense importance to the work under the subject work order and rightly so, the same being of renovation of MCH Centers of vital importance to the most sensitive section of our society.

13. Clause 23.3 supra makes the opinion of the Enlisting Authority final and binding on the contractor i.e. the petitioner. Of course, it will remain subject to judicial review but again, a) it is a disputed question of fact whether the violation was persistent or not, b) the lis is contractual and c) without any public law character.

14. Not only so, as aforesaid, the Enlistment Instructions/Conditions are besides the conditions of the notice inviting tender and the contract and which the petitioner has failed to file. It thus cannot be said whether thereunder debarment is possible on some other grounds as well. In this regard I may also notice that the Supreme Court as far back as in ***Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal*** (1975) 1 SCC 70 held that an ordinary individual can choose not to deal with any person but the Government/Governmental Agencies, as the respondents EDMC are, cannot choose to exclude persons by discrimination. It was further held that no person has a fundamental right to insist that the Government must enter

into a contract with him and that in passing an order of blacklisting the Government must act under a standardised Code. Again in ***Patel Engineering Ltd. Vs. Union of India*** (2012) 11 SCC 257 it was held that a State can decline to enter into a contractual relationship with a person with legitimate purpose and that the authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. and that there need not be any statutory grant of such power. It was further held that only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary. It was yet further held that the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the from blacklisting a delinquent bidder, if it is otherwise justified. The power to blacklist was held to be inherent in every person legally capable of entering into contract.

15. I have following the aforesaid and other judgments, in ***Prabhatam Advertisement Pvt. Ltd. Vs. Municipal Corporation of Delhi (South Zone) New Delhi*** MANU/DE/2674/2015, concluded that the exercise of the power

to blacklist is independent of any provision therefor in any law or in the contract.

16. Here, not only has the petitioner not placed the contract and the tender before the Court but even as per the Enlistment Instructions a ground for blacklisting had accrued. However the petitioner persistently failed and it thus cannot be said that the blacklisting of the petitioner is contrary to the Enlistment Instructions also.

17. Else, as I have already observed, the dispute is factual and there is no grievance of non-compliance of prescribed procedure and principles of natural justice. This Court has already once in the past directed reconsideration.

18. Thus no case for entertaining the petition is made out. The petition is dismissed with liberty to the petitioner to invoke the arbitration clause if any in the contract or to file a suit on the same cause of action.

No costs.

MARCH 08, 2016
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RAJIV SAHAI ENDLAW, J.