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

\+ **W.P.(C) 9159/2016 & C.M.Nos.37083-37084/2014**

M/S OTIK HOTELS AND RESORTS PRIVATE LIMITED

..... Petitioner

Through Mr.Manjit Singh Ahluwalia, Advocate.

versus

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LTD. ..... Respondent

Through Mr.Nikhil Majithia, Advocate.

\+ **W.P.(C) 9158/2016 & C.M.Nos.37081-37082/2016**

M/S OTIK HOTELS AND RESORTS PRIVATE LIMITED

..... Petitioner

Through Mr.Manjit Singh Ahluwalia, Advocate.

versus

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LTD. ..... Respondent

Through Mr.Nikhil Majithia, Advocate

% Date of Decision: 05th October, 2016

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

JUDGMENT

MANMOHAN, J: (Oral)

1. Present writ petitions have been filed challenging the termination letters dated 28th September, 2016 passed by the respondent-IRCTC

terminating the temporary licences awarded to the petitioner of on-board catering services in train nos.12832-24 and 12365-66 on the ground that the petitioner failed to start the catering service w.e.f. 21st September, 2016 and did not pay the security deposit and licence fee on or before 19th September, 2016. The respondent-IRCTC further in terms of Clause 4.8 of the tender document has debarred the petitioner from participating in future projects of respondent-IRCTC for a period of one year.

2. Mr.Manjit Singh Ahluwalia, learned counsel for the petitioner states that vide three letters dated 16th September, 2016, the respondent-IRCTC awarded temporary licences to the petitioner for three trains and the petitioner was required to deposit the security deposit and licence fee on or before 19th September, 2016. He, however, states that the letters dated 16th September, 2016 were received by the petitioner on 21st September, 2016 and consequently it was impossible for the petitioner to pay the licence fee on or before 19th September, 2016.

3. Learned counsel for the petitioner also submits that without any show cause notice, the petitioner has been debarred for a period of one year. In support of his submission, learned counsel for the petitioner relies upon the judgment of the Supreme Court in ***Gorkha Security Services Vs. Government (NCT of Delhi) and Others, (2014) 9 SCC 105*** wherein it has been held that before imposition of penalty of blacklisting/debarment, the petitioner has to be given a specific notice stating that in the event the authority is not satisfied with the reply it gives, it can be blacklisted/debarred.

4. Mr.Ahluwalia also contends that the tender document itself postulates late payment on behalf of the tenderer. In support of his contention, he relies upon Clause 6.2 of the tender document which reads as under:-

6.2	*Failure to deposit License fee – post commissioning of licence*	*Licensee is required to deposit License Fee, in advance, as advised by IRCTC, for the period of temporary license, extended of IRCTC. In case Licensee fails to deposit the License fee within the stipulated time frame, IRCTC shall charge interest @ 18% per annum calculated for the number of days of default and in case of inordinate delay IRCTC may initiate the termination proceeding to terminate the contract at the risk and cost of licensee.*

5. Mr.Ahluwalia lastly states that the punishment of debarment for one year is very harsh in the facts of the present cases. He points out that the petitioner has been an empanelled caterer for the Railways since 2005 and as of today is running five Base Kitchens and is employing two hundred and fifty employees.

6. Per contra, learned counsel for the respondent-IRCTC states that as the petitioner is an empanelled caterer, it has furnished its email address to the respondent-IRCTC for the purpose of correspondence. He states that in the present case temporary licence of catering for three trains, namely, Amritsar Haridwar Jan Shatabdi, Patna Ranchi Jan Shadabdi and Durg Nizammudin Sampark Kranti Express were issued for short duration.

7. Learned counsel for the respondent-IRCTC also states that the letters of intent dated 16th September, 2016 were sent to the petitioner by email and were received by the petitioner on the same date. He contends that though

the last date for making payment for all three trains was 19th September, 2016, yet the petitioner paid the entire licence fee only for Amritsar Haridwar Jan Shatabdi on 20th September, 2016 and for Patna Ranchi Jan Shadabdi in two installments on 20th and 21st September, 2016. He points out that for Durg Nizamuddin Sampark Kranti Express, the petitioner sought extension of time to pay till 8th October, 2016.

8. He emphasised that even though the petitioner had paid only Rs.25,35,445/- as against a total of Rs.60,47,844 (excluding security deposit of Rs.9,57,600/-) for three trains, petitioner has been issued licence for Amritsar Haridwar Jan Shatabdi after condoning the delay of one day.

9. Having heard learned counsel for parties and having perused the paper book, this Court finds that since the petitioner had furnished its email address and the letters of Award dated 16th September, 2016 were communicated to the petitioner by way of email, which were admittedly received, the petitioner cannot complain of lack of communication of the three letters of Award. Consequently, it was possible for the petitioner to pay the licence fee on or before 19th September, 2016.

10. This Court also finds that the tender documents in the present instance itself clearly stipulated that in the event the licence fee was not paid in whole or part, the applicant would be debarred from participating in any bidding process for future projects of the respondent-IRCTC for a period of one year. Clauses 4.8 and 1.1 of the General Conditions of License are reproduced hereinbelow:-

4.8	*Non acceptance of award*	*In case the successful bidder fails to accept the offer of award of licence along with security deposit and <u>licence fee, within the stipulated time as advised</u>*

		by IRCTC, the licence shall be terminated along with forfeiture of security deposit and licence fee, whole or part thereof, as the case may be. Further, he will be debarred from participating in the bidding process of future projects of IRCTC for a period of one year.

Section two

1.1	*Payment of License fee*	*Bidders are required to quote License Fee excluding service tax as applicable, for a period of 06 months. Successful bidder will be required to deposit quoted license fee for a period 06 months along with applicable Service Tax thereon, in advance, before start of work and as advised by IRCTC.*

11. In fact, even while submitting its bids, the petitioner had specifically agreed that on account of non-acceptance of Award or on account of non-fulfillment of the tender conditions within the prescribed time, it shall stand debarred by the respondent-IRCTC from participation in its future tenders for a period of one year. Consequently, in the opinion of this Court, no specific notice stating that the petitioner would be debarred on account of non-payment of licence fee was required.

12. This Court is also of the opinion that Clause 6.2 has no application to the facts of the present case as it only confers discretion upon IRCTC to condone delay in depositing the licence fee, post commissioning of the licence and that too, upon payment of interest @18% p.a. Consequently, the

initial licence fee has to be paid within the time prescribed and the same cannot be extended upon payment of interest.

13. The judgment of ***Gorkha Security Services*** (supra) also does not help the petitioner as in the said case the tender document did not provide specifically for blacklisting/debarment of the contractor. In the present case, Clause 4.8 of the tender document as well as the petitioner's own bid documents specifically state that the petitioner can be debarred for a period of one year on account of non-fulfillment of tender conditions within the prescribed time.

14. Recently, the Supreme Court in ***Bakshi Security & Personnel Services (P) Ltd. Vs. Devkishan Computed (P) Ltd., (2016) 8 SCC 446*** has held as under:-

> *"16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties.*
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> *xxx xxx xxx xxx*
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> *xxx xxx xxx xxx*
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> *19. It is also well to remember the admonition given by this Court in Michigan Rubber (India) Ltd. v. State of Karnataka [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216] in cases like the present, as under: (SCC p. 228, para 21)*
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> *"21. In Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , the following conclusion is relevant: (SCC p. 531, para 22)*
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> *'22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is*

a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

15. In a recent study on *'Ease of Doing Business, 2016'* by World Bank, India has been ranked 178th out of 179th countries on the enforcing contracts indicator.

16. Keeping in view the aforesaid facts and the mandate of law, the plea for extension of time cannot be entertained as in the opinion of this Court, present proceedings cannot be used for renegotiation of contract and for fixing new dates for deposit of licence fee. In any event, if the respondent-IRCTC has wrongly debarred the petitioner, as claimed by the petitioner, then in the opinion of this Court, the petitioner would only be entitled for damages.

17. However, this Court is in agreement with the contention of learned counsel for the petitioner that the punishment of debarment for a period of one year is not proportionate to the facts of the present case, especially keeping in view the fact that the petitioner has been an empanelled contractor/caterer with the Railways for more than ten years and is at the moment running five base kitchens.

18. The concept of proportionality of punishment is not unknown to law. The Supreme Court in ***Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited & Ors., (2014) 14 SCC 731*** has held as under:-

> *"26. In the case at hand according to the respondent BSNL, the appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the respondent Corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when (a) the appellant is supplying bulk of its manufactured products to the respondent*

BSNL, and (b) the excess amount received by it has already been paid back.”

19. A Coordinate Bench of this Court in ***M/s. Sai Consulting Engineers Pvt. Ltd. Vs. Rail Vikas Nigam Ltd. & Ors., 198 (2013) DLT 507*** has held as under:-

> *"32. As far as ban of 5 years on the basis of second show-cause notice is concerned, this court is of the view that the same is imposed for larger period in view of peculiar facts of the present case and particularly earlier ban on the basis of first show-cause for only one year and the same was already spent by the petitioner. Considering the overall facts and circumstances of the present case, I reduce the period of ban from five years to two years with effect from 30th June, 2011."*

20. Consequently, the punishment of debarment of the petitioner in the peculiar facts of the present case is reduced to one month w.e.f. 28th September, 2016. The amount of Rs.15,55,799/- deposited by the petitioner with regard to Patna Ranchi Jan Shadabdi shall be refunded to the petitioner within a period of one week.

21. With the aforesaid directions and conclusions, present writ petitions and applications stand disposed of.

Order *dasti*.

MANMOHAN, J

OCTOBER 05, 2016
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