

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.07.2017

+ **W.P.(C) 713/2017 & CM APPL. 3283/2017, 5193/2017**

RAMAN KALRA

.....Petitioner

Versus

GOVT OF NCT OF DELHI AND ORS

.....Respondents

Advocates who appeared in this case:

For the Petitioner : Ms. Seema Bengani

For the Respondents : Mr. Gautam Narayan, ASC, for Respondent no.1.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition impugning an order dated 11.01.2017 passed by respondent no.3 (hereafter 'DTIDC'), *inter alia*, forfeiting the petitioner's Earnest Money Deposit (EMD) and further debarring the petitioner from participating in any tender / RFP of DTIDC for the current financial year and the next four financial years. The petitioner has also challenged the addendum to the notice inviting tender (tender was issued in December 2016), issued by DTIDC on 11.01.2017 inviting bids for the shops that were allotted to the petitioner.

2. DTIDC had issued a notice inviting tender (hereafter 'NIT') in September 2016 from interested and eligible parties for licensing of shops/sites/spaces at various interstate bus terminals (ISBTs) including the

shops located at ISBT Kashmere Gate. In terms of the NIT, the last date and time for submission of bids was 14:00 hours on 27.10.2016 and tenders were to be opened at 14:30 hours on the same day. The bids were to remain valid for a period of 120 days from the date of submission.

3. The petitioner submitted bids for two shops - shop nos.41 and 47 - at the departure block of ISBT Kashmere Gate and also furnished the EMD of ₹3 lacs in respect of each bid (₹6 lacs in aggregate).

4. The bids submitted by the petitioner were accepted and DTIDC issued a Letter of Acceptance (LOA) dated 15.12.2016 in respect of shop no.41 and called upon the petitioner to furnish interest free security deposit equivalent to six months' licence fee and also other maintenance charges at the rate of ₹30 per square feet per month along with applicable service tax, water charges, etc. The petitioner was called upon to furnish the aforesaid amounts within a period of 7 days from the issue of LOA to avoid forfeiture of EMD. A similar LOA dated 19.12.2016 was issued in respect of shop no.47 as well.

5. On receipt of the aforesaid LOAs, the petitioner sent a letter dated 21.12.2016 acknowledging the receipt of the LOAs and requesting that he be granted further time of 20 days to complete the formalities as required; the petitioner claimed that he was unwell and, therefore, unable to do so within the time specified. The petitioner sent another letter dated 02.01.2017 requesting for further time to complete the formalities on the ground of his continuing illness.

6. Since the petitioner had failed to deposit the funds as required in terms of the LOAs dated 15.12.2016 and 19.12.2016, DTIDC proceeded to

forfeit the petitioner's EMD and also debarred him from participating in any further tenders for the specified period.

7. DTIDC also issued an addendum including the shops in question (shop no.41 and shop no.47 at the departure block ISBT Kashmere Gate, New Delhi) as a part of the NIT issued in December 2016 which was open at the relevant time. In other words, fresh tenders for licencing the shops in question were invited by DTIDC consequent to cancellation of allotment of the shops in favor of the petitioner.

8. The petitioner has also challenged issuance of such notice principally on the ground that the petitioner's bid was valid for a period of 120 days and the said notice had been issued during the said period.

9. During the course of arguments, Mr Gautam Narayan, learned counsel appearing for DTIDC had stated that DTIDC was willing to recall the order dated 11.01.2017 and allot the shops in question to the petitioner in terms of his offer. At a hearing held on 30.01.2017, the learned counsel for the petitioner sought time to take instructions as to whether the petitioner was ready with the requisite funds. However, it transpires that the petitioner was no longer interested in accepting the allotment of the shops in question.

10. Ms Seema Bengani, learned counsel appearing for the petitioner stated that there was a material change in end of February 2017 as concerned authorities had decided to divert 36% bus traffic from ISBT Kashmere Gate to other ISBTs in order to address the issue of congestion in this city. She stated that in view of the proposed reduction in traffic, the petitioner was no longer willing to stand by his bids.

11. In view of the above, it is clear that the petitioner's challenge to the action of DTIDC in inviting fresh bids for the shops in question, no longer survives. Ms Bengani has limited her arguments in the present petition to impugning the forfeiture of the EMD and debarring the petitioner from further participating in tender / RFPs for the specified period.

Submissions

12. Ms Bengani advanced arguments essentially on three fronts. First, she had submitted that the action of DTIDC in forfeiting the EMD is wholly arbitrary and unreasonable. She contended that the petitioner had merely sought additional time to complete with the formalities as he was indisposed and in the circumstances, denial of further time was wholly unreasonable and unfair.

13. Second, she contended that the NIT inasmuch as it provides for forfeiture of the EMD and for blacklisting of a bidder who is unable to accept the LOA, without further hearing, was arbitrary and unreasonable and thus the order dated 11.01.2017 was liable to be set aside. Third, she submitted that debarring the petitioner from participating in further tenders floated in the financial year (FY 2016-17) and four succeeding financial years, without offering any opportunity to the petitioner of being heard was arbitrary and unreasonable and contrary to the principles of natural justice. She relied on the decisions of the Supreme Court in ***Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Anr.*: (1975) 1 SCC 70**; ***Raghunath Thakur v. State of Bihar & Ors.*: (1989) 1 SCC 229** and ***Gorkha Security Services v. Govt. (NCT of Delhi) and Others*: (2014) 9 SCC 105** in support of her contention that a party proposed to be

blacklisted was entitled to sufficient notice and an opportunity of being heard.

14. She also relied on the decision of a Division Bench of this Court in ***Naresh Khetrpal v. Union of India: (2008) 154 DLT 183*** in support of her contention that even though the petitioner had participated in the tender, he could challenge the clauses of the NIT as being arbitrary and unreasonable.

15. Mr Gautam Narayan, learned counsel appearing for the respondents countered the aforesaid submissions. He submitted that the petitioner had asked for an extension of 20 days for completing the formalities on account of his illness; however, the petitioner failed to pay the amounts as required in terms of the LOA even after the lapse of the said period and, therefore, DTIDC had no option but to cancel the allotment and once again invite offers for the shops in question. He further stated that the petitioner could not be heard to object to the forfeiture of EMD that was expressly stipulated in the NIT and the petitioner cannot be permitted to challenge the same after having participated in the tender.

16. Mr Gautam Narayan also opposed the contention that the petitioner was entitled to any hearing before being blacklisted. He submitted that the event of blacklisting was expressly provided for under the NIT and, therefore, no further notice was required to be issued to the petitioner. He relied on the decision of a Coordinate Bench of this Court in ***M/s Otik Hotels and Resorts Pvt. Ltd. v. Indian Railway Catering and Tourism Corporation Ltd.: 2016 SCC OnLine Del 5508*** in support of his contention.

Reasoning and Conclusion

17. At the outset, it is necessary to refer to certain terms and conditions of the NIT. The Schedule of the tendering process, in a tabular form, was indicated in clauses (iii) and (iv) of paragraph 2.4 of the NIT. The tabular statement as set out in clause (iv) of paragraph 2.4 of the NIT is reproduced below:-

“iv Schedule of Various Stages: The Selected tenderer shall follow the following time lines:

Stage of Activity	Time Period
Payment of Advance License Fee for three months, maintenance charges, taxes and Interest Free Security Deposit/ Performance Security to DTIDC by Licensee	Within 07 days of issue of Letter of Acceptance (LOA)
Vacant Shops to be handed over to Selected Bidder/Tenderer	Within 07 days of making the due payments in accordance with LOA.
Signing of License Agreement	Within 07 days from date of payment of due as per LOA

18. The NIT expressly provided that the bidder would be required to pay advance licence fee for three months, maintenance charges, tax and interest free security deposit / performance security within a period of seven days of the issuance of LOA. Paragraph 4.7 of the NIT also expressly provided that failure on the part of the bidder to deposit the aforesaid amounts within the specified period (seven days of issue of LOA) would result in forfeiture of the EMD and the bidder would also be

debarred from participating in tenders of DTIDC for the financial year and next four financial years. Paragraph 4.7 of the NIT is set out below:-

“4.7. License Fees (and other applicable charges & taxes) shall be payable in advance by the Licensee to DTIDC on monthly basis. There will be an annual increase @10% in the License fee for the licensed period on compounding basis (applicable in case the licence tenure is more than one year). All the payments shall be accepted through Demand Draft/banker cheques/RTGS only. No payment through cheques or cash will be accepted. The license fee, maintenance charges along with applicable service tax thereupon for the first three months shall be paid by the selected tenderer, within 07 days of the issue of LOA (Letter of acceptance) alongwith interest free security deposit, mentioned hereinafter. Failure to deposit the same shall attract forfeiture of EMD and the bidder shall be debarred from participating of tender/RFP of DTIDC for this financial year and next four financial years.”

19. Clause 5.6 of the NIT is also relevant and expressly provides that in the event the tenderer withdraws his bid during the period of validity (120 days of submission of the bid), the bid security/EMD submitted by the bidder would be forfeited. Clause 5.6 of the NIT is set out below:-

“5.6. No tender/bid shall be modified or withdrawn by the tenderer/bidder after submission of tender on due date of submission of tender. Withdrawal of a tender/bid during the interval between the due date of submission of tender and date of expiry of the tender validity period would result in automatic forfeiture of Bid Security/EMD. Apart from that the tenderer will also debar from participating in the Tenders/RFP of DTIDC for this financial year and next four financial years.”

20. The petitioner had participated in the aforesaid tender and, thus, is bound by the tender conditions. There is no doubt as to the liability to pay the advance licence fee, other applicable charges and the security deposit and the consequences of default in making the aforesaid payment; the terms of NIT in this regard are clear and unambiguous.

21. Concededly, the petitioner had failed to deposit the advance licence fee, other applicable charges as well as the security deposit when called upon to do so in terms of the LOA. The NIT expressly provided for forfeiture of the EMD in the event the bidder did not accept the allotment. In the present case, the petitioner's bids were accepted and the LOAs were issued to the petitioner. Thus, in terms of the NIT, the petitioner was required to make the necessary payments and take possession of the shops in question. Concededly, the petitioner did not do so and sought further time of 20 days to fulfil the formalities on account of his ill health. It is clear from the record that DTIDC did not take any steps for cancellation of the allotment till 11.01.2017. This was more than 20 days after 21.12.2016 (the date of the petitioner's letter requesting for such further time). It is also relevant to note that even during the course of the present proceedings, DTIDC had offered to allot the shops to the petitioner on the terms of the bid submitted by him. Even at the time of final hearing, Mr Gautam Narayan had unequivocally stated that DTIDC was still ready and willing to licence the shops in question to the petitioner. However, it is apparent that the petitioner is not willing to stand by his bids. It is plainly evident that the petitioner either had second thoughts regarding his bids or otherwise did not have the necessary funds to make the payments; in either event, the petitioner cannot escape the liability as expressly indicated in the NIT.

22. In the circumstances, DTIDC was well within its right to forfeit the EMD in terms of the NIT. It is also well settled that the bidder cannot challenge the tender conditions after it has participated in the tender.(See: ***Surinder Singh v. Union of India & Ors: 2015 SCC OnLine Del 11807*** and ***M/s Opaque Infrastructure Pvt. Ltd. v. Union of India & Anr.: 2015 SCC OnLine Del 8396***). This Court is not persuaded to accept that the action of DTIDC in forfeiting the EMD was unlawful or illegal.

23. The next question to examine is whether DTIDC was required to give any notice before debarring the petitioner from further contracts or blacklisting the petitioner. On this question, the law is well settled. In ***M/s Erusian Equipment (supra)***, the Supreme Court had authoritatively held that fundamentals of fair play require that a person should be given an opportunity to represent his case before he is blacklisted. The relevant passage of the said judgment is set out below:-

“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.”

23. The requirement of giving prior notice before blacklisting a person was reiterated by the Supreme Court in ***Raghunath Thakur (supra)***. However, the said cases were rendered in a context where there was no specific provision incorporated in the tender conditions, which indicated that blacklisting would follow in case of a given event. In the present case, the NIT specifically provides that in the event the bids are withdrawn

within the validity period, the bidder would be debarred. Thus, the principal question to be addressed is, whether specifically mentioning in the tender conditions that blacklisting would follow in certain eventualities, entitles DTIDC to impose such measure on a bidder without notice to him and without considering his explanation in defence.

24. Indisputably, blacklisting a bidder or debarring him from participating in further tenders has serious civil consequences for his business. As noticed in *Gorkha Securities Services (supra)*, such an order is also stigmatic in nature. A person who is excluded from participating in tenders floated by DTIDC may also on the basis of being debarred by DTIDC, be disqualified from participating in tenders floated by other authorities or government bodies/agencies. It is, thus, necessary that such a punitive measure be not taken mechanically.

25. In the present case, the NIT provides for a bidder, who either withdraw his bid within the validity period or defaults in paying the amounts in terms of the LOA, to be visited with the consequences of forfeiture of EMD / bid security and also be debarred from participating in tenders/RFPs issued by DTIDC for a period exceeding four years (the current financial year and four succeeding financial years). *Ex facie* such provision of debarring a bidder is harsh and may in certain circumstances be wholly inequitable. The period of blacklisting is also significantly long. In the circumstances, it would be necessary for DTIDC to examine the proportionality of such measure in the context of the facts of each case. In a given case, a bidder may have been prevented by reasons completely beyond his control and may be in a position to establish the same. In such cases, it may not be apposite for DTIDC to ignore the mitigating

circumstances and impose such a harsh punishment of debarring the bidder for more than a period of four financial years. It is difficult to accept that such an imposition of a harsh and severe punitive action should follow mechanically.

26. This Court is thus of the view that it is necessary for DTIDC to permit the bidder against whom such action of blacklisting is proposed, to explain and show cause why such action for debarring him not be taken and / or that the period of blacklisting be reduced. In *Otik Hotels (supra)*, a Coordinate Bench of this Court observed that no show cause notice was required because the tender documents itself stipulated that the applicant who failed to pay the licence fee as required would be debarred from participating in bidding for future projects of the respondent therein for a period of one year. However, the Court also found that in the facts of that case, punishment of debarment for a period of one year was not proportionate and consequently, reduced the punishment of debarment imposed on the petitioner therein to a period of one month. Thus, the said decision also underscores the importance of evaluating whether the harsh measure of debarring a defaulting bidder for a period ought to be taken mechanically, without considering the question if such measure is proportionate in the given circumstances. This Court is of the view that such question cannot be considered without affording the bidder a chance to furnish an explanation.

27. In the case of *Naresh Khetrapal (supra)*, a Division Bench of this Court considered a challenge to the clause of the tender document whereby the Ministry of Tourism had reserved its right to not to accept bids from agencies resorting to unethical practices or against whom

investigation/enquiry proceedings had been initiated by investigating agencies. The Court held that such a clause could not be read in a manner so as to exclude from its ambit, the principles of fair play and natural justice.

28. Indisputably, DTIDC would have the discretion to not to deal with a bidder who has been found to be untrustworthy as he has defaulted. In ***Patel Engineering Ltd. v. Union of India and Anr.:* (2012) 11 SCC 257**, the Supreme Court had reiterated the principle that the “*authority of the 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*”.

29. However, the exercise of such powers cannot be arbitrary or unreasonable and must take into account the doctrine of proportionality and fair play. Thus, although paragraph 4.7 of the NIT expressly provides that the failure on the part of the bidder to pay advance licence fee and security deposit within seven days of the receipt of LOA would result in the bidder being debarred for the specified period; this Court is not persuaded to accept that the said punitive measure would follow automatically and without affording the bidder a chance to represent against the same. The provisions to debar the bidders on account of any default must be read as only enabling DTIDC to take such action. Such provision also serves as a notice to the bidders that their default could invite such measures. However, the bidders ought to be given a right to represent against the imposition of such punitive measures and it is necessary for DTIDC to consider the same before imposing such punitive measures.

30. In the circumstances, the decision of DTIDC to debar the petitioner for the financial year 2016-17 and four further financial years is set aside. DTIDC is at liberty to blacklist and debar the petitioner from participating in future tenders; however, it would be necessary for DTIDC to issue a notice indicating its intention to impose such punishment and take a final decision to do so after considering the petitioner's response, if any, and following the principles of natural justice.

31. The petition and the pending applications are disposed of in the aforesaid terms.

JULY 24, 2017
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VIBHU BAKHRU, J

