

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

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Judgment reserved on: 19th January, 2017

Judgment delivered on: 16th March, 2017

+ W.P.(C) 1438/2015 & CM No. 2527/2015

KHALSA GYMNASTICS WORKS

..... Petitioner

versus

UNION OF INDIA & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. Pradeep Kumar Mathur, Adv.

For the Respondents : Mr. Vivek Goyal, CGSC with Ms. Vanya Khanna, Adv. for UOI
Mr. Anil Grover with Ms. Noopur Singhal, Advs. for R-2 & 3

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The petitioner impugns the directions of the respondent in banning the petitioner for a period of three years from entering into any business dealings with the respondent-Sports Authority of India and all its Regional Centres / Sub-Centres /Academic Institutions / SAG / SYC Centres etc. under the administrative control of Sports Authority of India.

2. The petitioner is aggrieved by the banning order as well as the period of three years for which the petitioner has been banned.

3. It would be necessary at this stage to examine certain facts of the case. The respondent-Sports Authority of India issued Notice Inviting Tender on 24.01.2014 for supply of sports goods inter-alia 20 Billiard & Snooker tables and accessories. The condition of the tender was with regard to the domestic goods or goods of foreign origin located in India, the required delivery period was immediate i.e. within four days from the date of issuance of contract.

4. On 12.02.2014, Notification of award was issued wherein the petitioner was informed that the bid of the petitioner had been accepted, inter-alia, for supply of 20 Billiard & Snooker Tables. The delivery period in the notification of award was stated as under:-

“(i). Stores to be delivered to the respective consignees within 04 days from the date of receipt of this Notification of Award i.e. latest by 17.02.2014 positively.”

5. The contract agreement dated 12.02.2014 was issued to the petitioner in continuation of the Notification of award dated 12.02.2014. The delivery schedule mentioned in the contract agreement was *“within 04 days from date of receipt of Notification of Award”*.

6. On 13.02.2014, the petitioner requested for alteration in the delivery schedule from 04 days to 40 to 60 days. On 17.02.2014 the respondent-Sports Authority of India issued a letter to the petitioner requiring the petitioner to return a copy of the contract agreement and

Notification of Award duly signed and stamped in token of their acceptance of the same and also to furnish the performance security for Rs. 2,42,000/-. The respondent while informing the petitioner that stores had to be delivered latest by 17.02.2014 positively required the petitioner to immediately intimate the progress of supply made till date. Admittedly, no supplies were made till 17.02.2014.

7. On 21.02.2014, the petitioner offered to supply five Billiard tables. The respondent did not accept the offer. On 22.04.2014, the petitioner informed the respondent that due to bad weather/heavy rains in Meerut, Delhi and nearby places, the polishing work could not be done due to cold weather and moisture in the temperature. Accordingly, it was informed that first installment of 5 Billiard tables was ready for delivery. The offer of delivery was not accepted by the respondents.

8. By letter dated 03.04.2014, the respondent informed the petitioner that the contracts stood terminated on account of breaches by the petitioner and further the petitioner was restrained from entering into any business dealings with Sports Authority of India and all its Regional Centres / Sub-Centres / Academic Institutions / SAG / SYC Centres etc. under the administrative control of Sports Authority of India for three years from the date of issue of the letter.

9. The petitioner impugned the letter dated 03.04.2014 by filing a writ petition being W.P.(C) No. 3180/2014. On 23.05.2014, the Division Bench was informed that a decision had been taken by the

respondent on 22.05.2014 thereby withdrawing the contents of paragraph 5 of impugned letter dated 03.04.2014 whereby the petitioner had been restrained from entering into any business dealings with the Sports Authority of India for three years. The decision taken by the Respondents on 22.05.2014 was without prejudice to the rights of the respondents to take appropriate action after giving a show cause notice.

10. On 16.06.2014, show cause notice was issued to the petitioner, requiring the petitioner to show cause as to why the petitioner be not banned for any business dealing for three years from the date of issuance of the letter. A detailed reply was given to the show cause notice reiterating that it was humanly impossible to make delivery of 20 Billiard tables within four days.

11. By the order dated 26.08.2014, the respondents once again banned the petitioner for a period of three years. The letter dated 26.08.2014 reads as under:-

“2. In terms of Clause-4 of the Notification of Award, you were required to return a copy of the Contract Agreement and Notification of Award duly signed and stamped by you in token of your acceptance of the same. Further, in terms of Clause-2(h) of the said Notification of Award, you were required to furnish Performance Security for Rs.2,42,000/- by 14.02.2014. Also, in terms of Clause-2(i) "Delivery Period" of the Notification of Award and as already confirmed by you vide page-19 & 25 of Bid Document, the ordered goods were required to be delivered to the respective consignees within 04 days from the date of receipt of Notification of Award i.e.

latest by 17.02.2014. Despite this office reminder of even no. dated 17.02.2014, neither the signed copy of Contract Agreement & Notification of Award and also Performance Security was furnished nor the supplies were made by you. Since you have failed to honour the contractual obligations thereby the currency of the contract could not be affected. Hence the subject contract stands terminated.

3. The aforesaid contract is a commercial contract wherein time was the essence of contract and the stipulation of the period in which the goods to be delivered was duly proclaimed and agreed upon i.e. delivery within 04 (four) days. It is apparent that you were well aware of the fact that you would not be able to supply the goods within the requisite time i.e. stipulated period of 04 (four) days and through your bid you have deliberately tried to give an impression that you have the goods ready with you in a deliverable state/condition and it was an endeavour to hoodwink the Sports Authority of India.

4. That you were duly aware of the fact of the quantum of goods to be delivered, the time period in which it had to be delivered and there was no event which has occurred after the notification of the award; the goods were required on urgent basis and therefore, the tender was floated on urgent basis and even you were aware of the urgency of the matter.

5. As you have failed to fulfil the obligations of the Bidding Document and the resultant Notification of Award as stated above, there is a breach of Contract & breach of trust on your part. As a result of your default, SAI has been put into embarrassing position while launching the Community Connect scheme of Govt., as various schemes could not be launched on the target date

thereby resulting into recurring financial/revenue loss by way of membership fees to the SAI.

6. Since time allowed for delivery as per contract being commercial contract, was an essence of the Contract, which you have failed to adhere to, you are hereby banned from entering into any business dealings with Sports Authority of India, New Delhi (including all SAI stadia at Delhi) and its all Regional Centres/Sub-centres/Academic Institutions/SAG/STC Centres etc. under the administrative control of SAI for three (03) years from the date of issue of this letter.”

12. The petitioner thereafter filed writ petition being W.P.(C) No. 628/2014 impugning the letter dated 26.08.2014. By order dated 24.09.2014, a coordinate bench of this court, held as under:-

“The petitioner impugns letters dated 07.04.2014 and 26.08.2014 (03.04.2014) whereby respondent no. 2 has debarred the petitioner from participating in any further tenders for the next three years. Apparently, the petitioner has been black listed on account of his failure to perform the contract awarded to him. Prima facie, it appears that the punishment inflicted on the petitioner is disproportionate. The learned counsel for the petitioner states that he shall make a representation to respondent no. 2 for reduction in the period for which the petitioner is black listed. Respondent no. 2 shall consider the present writ petition as a representation on behalf of the petitioner and pass a speaking order within a period of four weeks in accordance with law after considering the request of the petitioner for reduction in the period for which he is black listed.

The writ petition and all the pending applications are disposed of with the aforesaid directions.”

13. Consequent to the representation made by the petitioner, the respondents have passed the impugned order dated 05.11.2014 which reads as under:

“With reference to the above mentioned Writ Petition converted into your representation by the Hon'ble High Court of Delhi vide its Order dated 24.09.2014, you are hereby informed that your representation/matter has been considered afresh with due care & diligence by the Competent Authority and the observations are as under:-

(i) That you have rightly debarred from participating in any further tenders which has been upheld by the Hon'ble Court of Delhi in its Order dated 24.09.2014 in the writ petition No.6128/2014.

(ii) In so far as the period of debarment is concerned, it is being pointed out that you have not been debarred permanently and its only for a limited duration.

(iii) Taking into consideration, all the circumstances involved, including your earlier representations as well as the present Writ Petition, it is noted that no cogent ground have been submitted and therefore, the period of debarment of three (03) years considered appropriate in view of the act of deliberate misconduct and omission and commission committed by you. It is further specified that the debarment is not permanent, but is only for a limited period of three years.

(iv) Therefore, in the considered wisdom of SAI, the letter dated 26.08.2014, debarring your firm for 03 years is considered appropriate.

2. In view of the foregoing, there is no further scope for any reduction in period of debarment and your representation stands disposed off by this office.”

14. Admittedly, the condition of the tender invited by the respondent was that supplies had to be made within four days. The said condition was reiterated in the Notification of Award as well as the Contract Agreement. The petitioner who had submitted a bid consequent to the tender conditions was aware that if the tender were awarded to the petitioner, the supplies would have to be made within a period of four days.

15. Admittedly, the petitioner did not make the supplies within the period of four days. On the contrary, the petitioner immediately on award of the contract requested for alteration in the delivery schedule for extending the period from four days to 40 to 60 days.

16. A bidder who, submits a bid being fully aware of the tender conditions, cannot after the award of tender, seek a modification therein. The respondent had invited tender on 24.01.2014 and petitioner had submitted the bid on 31.01.2014. The Notification of award and the Contract Agreement were issued on 12.02.2014.

17. The petitioner who had submitted the bid on 31.01.2014, being fully aware that the supplies had to be made within four days of the award, cannot be permitted to contend that it is humanly impossible to make the supplies within the stipulated period of four days. If the petitioner was not in a position to make the supplies within the stipulated period of four days, the petitioner should not have submitted the bid.

18. The fact that the petitioner sought a variation in the delivery schedule from four days to 40-60 days, immediately on award, shows that the petitioner was not having sufficient capacity and ability to make the supplies within the stipulated period of four days. It clearly shows that the petitioner had submitted the bid being fully aware that the petitioner would not be in a position to make the delivery of the tendered quantity.

19. The respondents have clearly stated that time was of essence of the contract. Even the wording of the Notice Inviting Tender and the Notification of Award as well as the Contract Agreement show that period of delivery was of essence. It is further stated that the tender was floated on an urgent basis, as the goods were required urgently.

20. It is contended by the respondents that as the petitioner failed to fulfill the obligations of the bidding documents and the Notification of award, the Sports Authority of India has been put in an embarrassing position while launching Community Connect Schemes of the Government. The schemes could not be launched on the target date thereby resulting in recurring financial/revenue loss by way of membership fees to the Sports Authority of India.

21. In view of the very wording of the bidding document as well as the Notification of Award, it is clear that the petitioner was aware of the urgency and the fact that time was of essence of the contract. The petitioner fully knowing well that the supplies had to be made within the stipulated period of four days clearly defaulted in not making the

supplies within the stipulated period thereby causing embarrassment and loss to the respondents.

22. It is not even a case, where on account of changed circumstance, the performance of contract has become impossible or difficult. The fact that the petitioner sought for change in the delivery schedule from four days to 40 to 60 days, clearly establishes that the petitioner was aware even at the time of submission of the bid that he would not be able to deliver. This is nothing short of paying a fraud on the Respondents. In view of the default/breaches on the part of the petitioner, the action of the respondent in terminating the contact and banning the petitioner, cannot be faulted.

23. The issue, which then arises, is with regard to proportionality of the period of debarment. The issue whether the Court ought to itself determine the time period for which the petitioner should be blacklisted or remit the matter back to the authority to do so having regard to the attendant facts and circumstances was considered by the Supreme Court in **Kulja Industries Ltd. v. Western Telecom Project BSNL**, (2014) 14 SCC 731. The Supreme Court held as under:

“28. A remand back to the competent authority has appealed to us to be a more appropriate option than an order by which we may ourselves determine the period for which the appellant would remain blacklisted. We say so for two precise reasons:

28.1. Firstly, because blacklisting is in the nature of penalty the quantum whereof is a matter that rests

primarily with the authority competent to impose the same. In the realm of service jurisprudence this Court has no doubt cut short the agony of a delinquent employee in exceptional circumstances to prevent delay and further litigation by modifying the quantum of punishment but such considerations do not apply to a company engaged in a lucrative business like supply of optical fibre/HDPE pipes to BSNL.

28.2. Secondly, because while determining the period for which the blacklisting should be effective the respondent Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor.”

(underlining supplied)

24. In the facts of the present case, the option of remand on the question of quantum was exercised by this court in favour of the petitioner by order dated 24.09.2014 in W.P.(C) 6128/2014. The impugned order dated 05.11.2014 has been passed after the remand. The Respondents have maintained the order of banning for a period of three years.

25. I have examined the reasons for imposition of the order banning the petitioner for a period of three years and found no reason or ground to interfere with the same. This is a commercial matter, where as noticed hereinabove, the petitioner is not a victim of circumstances but was aware, at the time of submitting the bid, that he does not have the wherewithal to even perform the contract. Despite knowing that he did not have the capacity or capability to perform the contract, he submitted his bid and on award of contract, immediately requested for change in the delivery schedule. In my view, no indulgence can be shown to such a petitioner.

26. In view of the above, I find no merit in the petition. The Writ Petition is dismissed, leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

March 16th, 2017
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