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

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Judgment delivered on: 22.02.2017

+ W.P.(C) 6441/2016 & CM No. 26397/2016

M/S SUNDHO MAL RAM SWARUP Petitioner

versus

UNION OF INDIA & ANR Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Vishal Saxena, Adv.

For the Respondents : Mr. Dev P. Bhardwaj, CGSC for UOI with Mr. Arvind Chamoli, AC/GD/ITBP

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. The petitioner impugns the order dated 18.05.2016 whereby the petitioner firm has been debarred from participating in all kinds of business/tenders in Indo Tibetan Border Police (ITBP) for a period of two years with effect from the date of the order.
2. It is contended that the petitioner had participated in a tender invited by the respondent vide letter dated 01.12.2015. The petitioner was successful and awarded the contract.
3. In terms of para-8(c) of Annexure-'A' to the tender documents,

the petitioner firm was required to submit a performance security deposit. The petitioner firm failed to deposit the performance security. Accordingly, the tender which was awarded to the petitioner was rescinded and a show cause notice dated 26.04.2016 was issued.

4. Consequent to the show cause notice dated 26.04.2016, impugned order dated 18.05.2016 was passed whereby the petitioner has been debarred from participating in all kinds of business/tenders in ITBP for a period of two years.

5. Learned counsel for the petitioner submits that the show cause notice issued to the petitioner only contemplated taking action in terms of para-8(c) of Annexure-‘A’ and did not put the petitioner to notice that any action of debarment would be taken. Reliance is placed on the decision of the Coordinate Bench of this Court in **Thermo Blow Engineers (M/s) Vs. DDA** 2013 VI AD (Delhi) 740.

6. Learned counsel for the respondents submits that drawing attention to clause 8(c) was sufficient indication to the petitioner that action of blacklisting was proposed to be taken. It is further contended that if a party has defaulted in performance of a contract, the respondent authorities would have the inherent right to blacklist an entity that has failed to perform its contract so as to prevent any further loss to the State.

7. Paragraph 4 of the show cause notice dated 26.04.2016 reads as

under:-

“4. Your kind attention is invited to para-8 of Annexure-‘A’ to the documents, which relates to submission of Security Deposit. Since your firm has not deposited the performance security, it is presumed that your firm is not in position to operate the contract in question. Hence, you are directed to show cause as to why the action should not be taken against your firm as per para-8(c) of Annexure-‘A’ of tender documents.”

(Underlining supplied)

8. Para 4 of the show cause notice required the petitioner to show cause as to why the action should not be taken against the petitioner as per para-8(c) of Annexure-‘A’ of the tender documents.

9. Para-8 of Annexure-‘A’ of the tender documents reads as under:

“8. SECURITY DEPOSIT

(a) Successful tenderers (including Central/State Govt. Deptt/Agencies or NSIC registered firm) will be required to deposit performance Security equivalent to an amount of 10% of the total value of the contract within 15 days after the placement of the contract. Performance Security can be deposited in any one of the manners prescribed above for depositing Earnest money. The performance Security should remain valid for a period of 60 days beyond the date of completion of all contractual obligations of the suppliers including warranty

obligations. No interest will be paid by the purchaser on Performance Security.

(b) Such categories of firms who may be exempted from submitting earnest money, as mentioned before, may also be considered for exemption from depositing security amount.

(c) In case of extension in period of depositing of Security amount applied for by the successful tenderers on any ground, the same will be considered on merit and decision of the Purchaser/Indenter in determining the days/period of such extension as per para 6.15 (a) of DGS&D manual or rejecting the request of firm for extension would be final and binding. In case, it is not agreed to, the Purchaser/Indenter shall have the right to take action against the said firm as per terms & conditions of T.E. such as cancel the contract and forfeiture of EMD in addition to other measures to prevent loss to the State.

(Underlining Supplied)

10. Reading of clause 8(c) of Annexure-‘A’ shows that if extension for deposit of security amount is not agreed to, then the Respondents had the right to take action as per the terms and conditions of the Tender Enquiry such as cancelling the contract and forfeit the EMD, in addition to taking other measures to prevent loss to the State.

11. The show cause notice issued to the petitioner on 26.04.2016 put the petitioner to notice of a contemplated action in terms of clause

8(c), which stipulates an action as per terms and conditions of the tender enquiry in addition to taking other measures to prevent loss to the State. Clause 8(c) does not specifically talk of an order of debarment/blacklisting. Since the terms of the conditions of the tender enquiry do not contemplate any action of debarment, the show cause notice, in my view, does not put the petitioner to such a notice.

12. The petitioner thus has not been put to any notice that any action of debarment/blacklisting is contemplated against the petitioner.

13. In **Thermo Blow Engineers** (Supra), a coordinate bench of this court has held as under:

*4. It is an undisputed proposition of law that since an order debarring a person from doing business with the Govt. or its agencies carries serious civil consequences, no such order can be passed without giving notice to him, requiring him to show cause against the proposed debarring/blacklisting. Reliance in this regard may be placed upon the decision of the Supreme Court in **Raghunath Thakur vs. State of Bihar and Ors.** (1989) 1 SCC 229, where Supreme Court, inter alia, held as under:-*

“4. ... It has to be realized that black-listing any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that

parties affected by any order should have right of being heard and making representations against the order.”

5. The communication dated 23.6.2012 which is stated to be the show cause notice given to the petitioner reads as under:-

“.....An assurance was given by your rep. that the defective parts installed by them will be replaced within 4 days. Since the defective parts have not been replaced after the assured period, you are therefore informed that why not actions should be initiated as deemed fit.”

It would, thus, be seen that there was no reference to the proposed debarring/blacklisting in the above-referred communication. In case the notice inviting quotations did not contain a term for debarring the tenderer in case the goods supplied by him were found to be defective, as the case of the petitioner is, the aforesaid communication cannot be interpreted to be a show-cause notice against the proposed debarring/blacklisting. In any case, the petitioner could not have taken this communication as an opportunity to explain his position qua the proposed blacklisting/debarring. The notice issued to the petitioner does not specify the action DDA proposes to take against it. The show cause notice could have met the requirement of the principles of natural justice, only if it specifically indicated that the respondents were proposing to debar the petitioner from tendering in future. Therefore, the aforesaid communication, in my view, does not meet the requirement of a show cause notice which

is required to be given to a vendor before blacklisting/debarring him from tendering in future. The impugned Order/Circular dated 7.8.2012 therefore, is liable to be quashed on this ground alone.”

(Underlining supplied)

14. An order of debarment has serious civil consequences. Principles of natural justice require issuance of a show cause notice. If a show cause notice does not specifically communicate the proposed action of debarment/blacklisting, it would not amount to giving an opportunity to a party to explain its position qua the proposed blacklisting/debarring.

15. Since the petitioner has not been put to notice of the proposed action of blacklisting/debarment, in my view, the petitioner has not been provided an opportunity to explain its position qua the proposed blacklisting/debarment. On this ground alone, the impugned order dated 18.05.2016 cannot be sustained. Accordingly, the impugned order dated 18.05.2016 is quashed.

16. The contention of the respondent, that there is inherent right of respondents to blacklist or refuse to deal with a party which has defaulted, in my view, does not arise for consideration in the present petition as the petitioner has been found entitled to the relief on the technical ground of lack of issuance of a show cause notice. I am not called upon to examine the said issue and I leave it open.

17. It is clarified that the respondents would be at liberty to take appropriate action, inter-alia, of debarment after putting the petitioner to notice of the proposed action and after giving it an opportunity to respond.

18. It may also be noticed that during the pendency of the present petition, the respondents have floated a fresh tender in which under order of this court, the petitioner had been permitted to submit its bid. The tender is not in issue in this petition. It is clarified that the respondents would be at liberty to either proceed with the tender or take such decision vis-à-vis the tender as they may so desire. In case the respondents proceed with the tender, they would be obliged to take into account the bid submitted by the petitioner.

19. The writ petition is allowed in terms of above. No order as to cost.

20. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

FEBRUARY 22, 2017
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