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

+ **W.P.(C) 9402/2016**

M/S NEW GROW SOFTWARE SOLUTIONS
(P) LTD

..... Petitioner

Through Mr Amit Anand Tiwari, Ms Vishakha,
Advocates.

versus

UNION OF INDIA

..... Respondent

Through Mr Nawal Kishore Jha, Advocate for
UOI with Mr Rajendra Prasad, (S.O.) MOR.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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04.08.2017

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning an order dated 23.09.2016 (hereafter 'the impugned order') whereby the petitioner has been debarred from participating in the tender process or entering into any contract/sub contract for a period of three years by the Ministry of Finance (respondent).
2. The petitioner had submitted its bid pursuant to a notice inviting tender dated 09.09.2010 issued by the respondent for providing data entry operators and peons. The petitioner's bid was accepted and it was awarded the contract for providing 50 data entry operators and 14 peons by the respondent on 22.11.2010. The said contract was extended from time to time and finally concluded on 29.02.2012.

3. In terms of the contract, the petitioner was responsible for complying with all statutory requirements and payment of all statutory dues including the payment of dues of EPF, ESI and service tax.
4. It is stated that the petitioner deposited the service tax dues, however, was not regular in depositing the EPF dues of the employees. Counsel for the petitioner states that this was so because the respondent had withheld its payments.
5. Nonetheless, the petitioner had deposited all the EPF dues and provided the details thereof to the respondent on 05.11.2013. It is also stated that information to this effect was furnished by the Employees' Provident Fund Organization to the respondent on 08.11.2013.
6. Prior to the aforesaid date, the respondent issued letter dated 30.04.2013, calling upon the petitioner to submit employee wise details of contributions deposited by it for EPF and ESI purposes and the payment of service tax immediately without any delay. The respondent also warned that any lapse on the part of the petitioner would be viewed as gross violation of Labour Laws/Service Tax Rules.
7. Since it is an admitted case that the petitioner had not deposited the complete dues of EPF till that date (and had deposited it on 05.11.2013), the respondent proceeded to pass the impugned order.
8. Learned counsel appearing for the petitioner has assailed the impugned order principally on two fronts. Firstly, he submitted that the impugned order has been passed without issuing any show cause notice and thus it is liable to be set aside. Secondly, he submitted that although there has been some delay in depositing the EPF dues, however, there has been no default in the same and prior to the passing of the impugned order, the EPF

Organization had confirmed to the respondent that all dues had been discharged.

9. Learned counsel for the respondent has countered the aforesaid submissions. At the outset, he has stated that the petitioner had committed default and such default would invite orders as passed by the respondent. He also submitted that this was an open and shut case where an incorrect undertaking had been submitted by the petitioner. He also disputed the contention that no show cause notice had been issued to the petitioner. He referred to the letter dated 30.04.2013 and submitted that the allegations on the basis of which the impugned order was passed were stated in the said letter.

10. Insofar as the merits of the case are concerned, the first and foremost question to be examined is whether the respondent had issued a show cause notice as required. A bare perusal of the letter dated 30.04.2013 indicates that there is no mention of blacklisting in the said letter. Thus, clearly the petitioner was not informed of any action such as blacklisting being contemplated against it. It is now trite law that an order of blacklisting has serious consequences on the party being blacklisted. In the case of ***Gorkha Security Services v. Govt. (NCT of Delhi) and Others: (2014) 9 SCC 105***, the Supreme Court has termed this as "civil death". A Co-ordinate Bench of this Court in the case of ***R.K. Associates v. The Managing Director, IRCTC & Anr.: ILR (2009) Supp.(7) Delhi 1*** has also referred to blacklisting in similar terms. It is also trite law that no action for blacklisting can be initiated without a show cause notice. This was authoritatively stated by the Supreme Court in ***Erusian Equipment & Chemicals Ltd v. State of West Bengal & Anr: (1975) 1 SCC 70***; the relevant extract of which is set out

below:-

“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.”

11. The decision to blacklist a party cannot also be taken lightly and whether such action is warranted has to be considered on the anvil of several factors. In *Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL & Ors: (2014) 14 SCC 731*, the Supreme Court summarised the parameters required to be borne in mind by an authority while considering the question of blacklisting a party, which are as follows:-

“The guidelines also stipulate the factors that may influence the debarring official’s decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether the contractor has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on the basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(h) Whether the contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.”

12. In view of the above, the Supreme Court had also mentioned that the question of proportionality is also required to be considered while considering the question of blacklisting. This aspect has also been considered by this Court in *M/s Avinash EM Projects Private Ltd. v. M/s GAIL (India) Ltd.*: 2015 SCC OnLine Del 7135.

13. In *Gorkha Security Services (supra)*, the Supreme Court has summarily stated that mere issuance of show cause notice would not be

sufficient and it would be necessary that the party against whom the order of blacklisting is contemplated, be specifically put to notice regarding the proposed action to blacklist the said party. The relevant extract of the decision is as under:-

"19. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

20) The High Court has simply stated that the purpose of show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

- i) The material/ grounds to be stated on which according to the Department necessitates an action;
- ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High

Court has failed to omit."

14. In the present case, the letter dated 30.04.2013 did not indicate that any punitive measure was contemplated; the petitioner was called upon to provide certain details and was cautioned that *"any lapse on submission of details will be viewed as gross violation of Labour Laws/Service tax rules"*. Thus it is apparent in the facts of the present case that no show cause notice as required was issued by the respondent and, consequently, the impugned order is not sustainable.

15. It is not considered apposite at this stage to examine the petitioner's contention that the action of blacklisting is unwarranted. Those contentions would be considered by the respondent as and when it would be required to be considered by the respondent in the first instance. It is also expected that the petitioner would have full opportunity to raise the aforesaid contentions before the respondent in response to the show cause notice as when the same is issued.

16. In view of the above, the impugned order is set aside. The petition and the pending applications are, accordingly, disposed of with the aforesaid observations.

17. The parties are left to bear their own costs.

VIBHU BAKHRU, J

AUGUST 04, 2017/pkv