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

+ **W.P.(C) 5438/2017**

M/S HIMALAYA COMMUNICATIONS LTD Petitioner

Through: Mr Sakal Bhushan, Advocate.
versus

BHARAT SANCHAR NIGAM LTD Respondent

Through: Mr Sameer Agrawal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **03.07.2017**

VIBHU BAKHRU, J

CM No.22895/2017

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

W.P.(C) 5438/2017 & CM No.22894/2017

3. Issue notice. The learned counsel for the respondent accepts notice.
4. With the consent of the parties, the petition is taken up for final hearing.
5. The petitioner has filed the present petition, *inter alia*, impugning the communication/order dated 02.03.2017 (hereafter 'the impugned order') issued by the respondent as being arbitrary and against the principles of natural justice.
6. The controversy in the present case concerns the question whether the

respondent could ban the petitioner from participating in tenders and from entering into any transactions with the respondent for a period of three years on account of the petitioner having failed to accept the Advance Purchase Orders (APOs) placed on the petitioner. The APOs in question were issued pursuant to a tender submitted by the petitioner in response to a notice inviting tender dated 24.06.2016 (hereafter 'the NIT').

7. The respondent had issued the NIT for inviting bids from eligible bidders for supply of Optical Fibre Cables (OFCs). The petitioner had participated in the aforesaid tender and was declared as the lowest bidder (L-1). In terms of the NIT, APOs were placed on the petitioner on 28.10.2016 and the petitioner was called upon to furnish the performance bank guarantees as required in terms of the NIT. Admittedly, the petitioner failed to accept the said APOs and furnish the bank guarantees.

8. The petitioner claims that it was not in a position to accept the APOs since the respondent had not granted approval for its product. It is further claimed that the petitioner was entitled to participate in the tender while its product was pending such approval. The approval having been denied, the petitioner was, obviously, not in a position to supply the products (OFCs) to the respondent.

9. The learned counsel for the petitioner has assailed the impugned order essentially on three grounds. First, he submits that in terms of Clause 24.1 of the NIT, the respondent could not have placed the APOs on the petitioner since the petitioner's products had not been approved. Second, he submits that the impugned order is contrary to the terms of the NIT. And third, he

submits that the impugned order amounts to blacklisting the petitioner and is in violation of the principles of natural justice, since no hearing was afforded to the petitioner before the passing of the impugned order.

10. The NIT clearly lists out the circumstances in which a punitive measure of banning participation of the bidders in future tenders can be taken. Clauses 1(a), 2, 6, 7, 10 & 12 of the Instructions to Bidders are relevant and are reproduced below:-

S.No.	Defaults of the bidder/vendor	Action to be taken
A	B	C
1(a)	Submitting fake/forged	i) Rejection of tender bid of respective Vendor.
	a) Bank instruments with the bid to meet terms & conditions of tender in respect of tender fee and/or EMD;	ii) Banning of business for 3 years which implies barring further dealing with the vendor for procurement of Goods & Services including participation in future tenders invited by BSNL for 3 years from date of issue of banning order.
	b) Certificate for claiming exemption in respect of tender fee and/or EMD;	iii) Termination / Short Closure of PO/WO, if issued. This implies non-acceptance of further supplies/work & services except to make the already received material work/complete work in hand.
	and detection of default at any stage from receipt of bids till award of APO/issue of PO/WO.	
Note 1:- However, in this case the performance guarantee if alright will not be forfeited.		
Note 2:- Payment for already received supplies/completed work shall be made as per terms & conditions of PO/WO.		

XXXX	XXXX	XXXX	XXXX
2.	If vendor or his representative uses violent/coercive means viz. Physical/Verbal means to threatens BSNL Executive/employees and/or obstruct him from functioning in discharge of his duties & responsibilities for the following: a) Obstructing functioning of tender opening executives of BSNL in receipt/opening of tender bids from prospective Bidders, suppliers/Contractors. b) Obstructing/Threatening other prospective bidders i.e. suppliers/Contractors from entering the tender venue and/or submitting their tender bid freely.	Banning of business for 3 years which implies Barring further dealing with the vendor for procurement of Goods & Services including participation in future tenders invited by BSNL for 3 years from date of issue of banning order.	
XXXX	XXXX	XXXX	XXXX
6.	Submission of claims to BSNL against a contract a) for amount already paid by BSNL. b) for Quantity in excess of that supplied by Vendor to BSNL c) for unit rate and/or amount higher than that approved by BSNL for that purchase. Note 5:- The claims may be submitted with or without collusion of BSNL Executive/employees. Note 6:- This penalty will be imposed irrespective of the fact that payment is disbursed by BSNL or not.	i) Recovery of over payment from the outstanding dues of Vendor including EMD/PG & SD etc. and by invoking 'Set off' clause 21 of Section 5 Part A or by any other legal tenable manner. ii) Banning of Business for 3 years from date of issue of banning order or till the date of recovery of over payment in full, whichever is later.	

7.	Network Security/Safety/ Privacy: - If the vendor tampers with the hardware, software/firmware or in any other way that	i) Termination of PO/WO. ii) Banning of business for 3 years which implies barring further dealing with the vendor for procurement of Goods & Services including participation in future tenders invited by BSNL for 3 years from date of issue of banning order. iii) Recovery of any loss incurred on this account from the Vendor from its PG/SD/O/s bills etc. iv) Legal action will be initiated by BSNL against the Vendor if required.
	a) Adversely affects the normal working of BSNL equipment(s) and/or any other TSP through BSNL.	
	b) Disrupts/Sabotages functioning of the BSNL network equipments such as exchanges, BTS, BSC/MSR, Control equipment including IN etc., transmission equipments but not limited to these elements and/or any other TSP through BSNL.	
	c) tampers with the billing related data/invoicing/account of the Customer/User(s) of BSNL and/or any other TSP(s).	
	d) hacks the account of BSNL Customer for unauthorized use i.e. to threaten others/spread improper news etc.	
	e) undertakes any action that affects/endangers the security of India.	
XXXX XXXX		XXXX XXXX
10.	If the vendor does not return/refuses to return BSNL's dues:	i) Take action to appoint Arbitrator to adjudicate the dispute.
	a) inspite of order of Arbitrator.	i) Termination of contract, if any. ii) Banning of business for 3 years which implies barring further dealing with the vendor for procurement of Goods & Services including participation in future tenders invited by BSNL from date of issue of

		banning order or till the date by which vendor clears the BSNL's dues, whichever is later. iii) Take legal recourse i.e. filing recovery suite (sic) in appropriate court.
	b) inspite of Court Orders.	i) Termination of contract, if any. ii) Banning of business for 3 years which implies barring further dealing with the vendor for procurement of Goods & Services including participation in future tenders invited by BSNL from date of issue of banning order or till the date by which vendor clears the BSNL's dues, whichever is later.
	XXXX XXXX	XXXX XXXX
12.	The following cases may also be considered for Banning of business:	
	a) If there is strong justification for believing that the proprietor, manager, MD, Director, partner, employee or representative of the vendor/supplier has been guilty of malpractices such as bribery, corruption, fraud, substitution of tenders, interpolation, misrepresentation with respect to the contract in question.	i) Banning of business for 3 years which implies Barring further dealing with the vendor for procurement of Goods & Services including participation in future tenders invited by BSNL
	b) if the vendor/supplier fails to execute a contract or fails to execute it satisfactorily beyond the provisions of para 4.1 & 4.2.	for 3 years from date of issue of banning order.

	c) If the vendor/supplier fails to submit required documents /information, where required.	
	d) Any other ground which in the opinion of BSNL is just and proper to order for banning of business dealing with a vendor/supplier.	
Note 7:- The above penalties will be imposed provided it does not clash with the provision of the respective tender.		
Note 8:- In case of clash between these guidelines & provision of invited tender, the provision in the respective tender shall prevail over these guidelines.		
Note 9:- Banning of Business order shall not have any effect on the existing/ongoing works/AMC/CAMC which will continue along with settlement of Bills.		

11. It is apparent that none of the aforesaid clauses are applicable in the facts of the present case. There is also much merit in the petitioner's contention that having specified the particular grounds on which an order banning the bidder from participation in future tenders can be passed, the respondent had impliedly excluded cases not specifically covered under the said clauses.

12. The petitioner's contention that the impugned order amounts to blacklisting is also merited. It is well settled that such orders, which adversely affects a party, cannot be passed without affording a fair hearing to the party so affected.

13. In *Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Anr.*: (1975) 1 SCC 70, the Supreme Court had held as under:-

“Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should

apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

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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.”

(Also see: ***Grosos Pharmaceuticals (P) Ltd. and Anr v. The State of Uttar Pradesh and Ors.*** (2001) 8 SCC 604 and ***Gorkha Security Services v. Government (NCT of Delhi) and Ors*** : (2014) 9 SCC 105).

14. In view of the position that the petitioner has not been afforded sufficient opportunity of being heard prior to the passing of the impugned order, this Court is of the opinion that the impugned order is liable to be set aside on this ground alone.

15. Accordingly, the present petition is disposed of by setting aside the

impugned order and directing that in the event the respondent desires to impose a ban on the petitioner from participating in future tenders or future dealings with the respondent, the respondent shall afford the petitioner sufficient opportunity of being heard and pass such speaking orders, as it considers fit.

16. It is clarified that this Court has not examined whether the APOs could not be placed on the petitioner in terms of the NIT. The said question is left open.

17. The petition and the pending application are disposed of.

JULY 03, 2017
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VIBHU BAKHRU, J

