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

+ **W.P.(C) 7603/2017**

**M/S CYCLOPES SECURITY & ALLIED SERVICES
PRIVATE LIMITED**

..... Petitioner

Through: Mr R. K. Raizada, Sr. Advocate with
Mr Vinay Kumar Bhasin and Mr
Sarthak Raizada, Advocates.

versus

**CHACHA NEHRU BAL CHIKITSALAYA
& ANR**

..... Respondents

Through: Mr Sanjoy Ghose, ASC and Mr
Rhishabh Jetley, Advocate for
GNCTD.
Mr Rajesh Kumar and Mr Gaurav Kr.
Singh, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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30.08.2017

CM No.31376/2017

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

W.P.(C) 7603/2017 & CM No. 31375/2017

3. Issue notice. The learned counsel for the respondents accepts notice.
4. The petitioner has filed the present petition, *inter alia*, impugning a letter/order dated 25.07.2017, whereby the respondents had forfeited the performance security submitted by the petitioner and also blacklisted the petitioner, debarring it from participating in future tenders for a period of

three years.

5. At the outset, the learned counsel for the petitioner states that he is restricting his grievance in the present petition to the order of black listing and does not press his grievance with regard to forfeiture of bid security, reserving its rights to agitate the same in arbitration.

6. Mr Sanjoy Ghose, learned counsel for the respondents submits that the process for appointment of an arbitral tribunal is underway and the arbitral tribunal is likely to be constituted shortly. He also submits that the action taken by the respondents for black listing and for forfeiture of bid security is in terms of the tender conditions/contract between the parties and, therefore, would be an arbitrable dispute.

7. The petitioner had participated in the tender for providing security services by submitting its bid online. The petitioner's bid was accepted and on 15.04.2017, the petitioner was awarded a contract for providing such services for a period of 24 months.

8. Since there were certain allegations and complaints against the petitioner, the respondents issued a show cause notice dated 17.06.2017 making several allegations. It was alleged that the petitioner had failed to disburse the salary of the security personnel and submit the bills by the stipulated time. The relevant extract of the show cause notice indicating the other allegations made against the petitioner is set out below:-

"A) You are disbursing the salary in cash and not according to the revised rates of minimum wages.

B) Complaints have been received from security personnel that new accounts have been opened by your firm on their behalf have not been communicated to the employees and you have retained the related documents (like Passbook & ATM) by you initially.

C) Further, you are forcing your employees posted at CNBC to return the varying cash amounts from the salary.

D) You are also not paying the salary in lieu of weekly off mandated by the Labour Laws despite claiming the same from hospital administration.

E) It has been also brought to our notice that you are removing the employees, who are not complying with your direction to return the salary amount.

F) You have replaced the guards posted initially without any intimation to the hospital administration, which is the breach of tender clause no. 1 & 5 of the Section 3. As per the said clauses of the tender, the contractor have to submit the details of personnel to be deployed and also give basic familiarization under the contract for 2-3 days about the duties to be performed by the security guards and their desirable behaviour, but your firm failed in complying the above terms & conditions and your firm had also attempted to post unauthorized personnel for duty at CNBC without fulfilling the contract condition & prior information to the hospital administration and also without prior duty familiarization.

G) Your firm has installed the biometric machine very late on dated 03.05.2017 and your firm has failed in providing the biometric attendance of the security personnel for the month of May 2017 posted at CNBC for verification.

H) Further, a memorandum was issued to your firm vide no. F.889(1)/CNBC/PUR/16-17/Tender for security services/5905-08 dt. 29.05.2017 regarding discrepancy in the deployment of security personnel by your firm with a direction to immediately enrol all the security personnel in the biometric machine and

submit the compliance report within three days along with your explanation why penalty should not be imposed on your firm but till date no reply/explanation has been received in this hospital.

I) Complaint regarding overtime/double duty (157 nos. in the month of May 2017) of the security guards have been also received, whereas as per clause no. 5 of section 4, one guard will perform single shift duty in a day and overtime is not allowed. So your firm has breached the terms & condition of the agreement.

J) Further, it has been also reported that on surprise checks made on 20th & 21st May'2017, many guards on physical duty were different from those who have marked attendance, which is not acceptable in any circumstances."

9. The petitioner responded to the said Show Cause Notice, vide letter dated 23.06.2017. And, thereafter, the respondents issued the impugned order rejecting the petitioner's reply to the Show Cause Notice as unsatisfactory and, *inter alia*, blacklisting the petitioner. The relevant extract of the said order indicating the reasons why the petitioner's response to the Show Cause Notice was found unsatisfactory, is set out below:-

- "a) The family reason cited for 157 overtime of guards in May'17 does not seem justified.
- b) It has been established that initially bank passbook & ATM cards were not given to the security guards.
- c) The firm has changed 21 guards citing various reasons.
- d) Your firm is using various tactics to harass (sic) the guards, as your firm is taking the signature of guards on resignation and account closure letter in lieu of handing over the passbook & ATM to them.
- e) Still there are gross discrepancies in the biometric attendance of June'2017 reflecting the improper

functioning of the firm.

- f) ESI cards to currently working guards are still not provided."

10. The learned counsel appearing for the petitioner contended that the findings returned in the impugned order were never put to the petitioner and the allegations made in the Show Cause Notice were substantially different from the adverse findings of the concerned authority. It is apparent from the impugned order that although some of the findings returned against the petitioner are grounded in the Show Cause Notice, it is also apparent that some of the findings have no foundation in the Show Cause Notice.

11. Blacklisting or debarring a party from entering into any contract with the State has serious consequences for the party who is visited with such punitive measures.

12. In *Erusian Equipment & Chemicals Ltd v. State of West Bengal & Anr*: AIR 1975 SC 266, the Supreme Court observed that:-

"The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

...

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."

13. In *Gorkha Security Services v. Govt. (NCT of Delhi) and Others*: (2014) 9 SCC 105, the Supreme Court had observed as under:-

“With blacklisting, many civil and/or evil consequences follow. It is described as “civil death” of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.”

14. It is necessary that a party against whom such action is contemplated is issued a Show Cause Notice and afforded a proper hearing before such punitive measure is imposed. The purpose of Show Cause Notice is to enable the noticee to meet the case set up against him and render all explanations. Seen from this standpoint, it does appear that the petitioner did not get an opportunity to render any explanation in regard to some of the findings returned by the concerned authority.

15. Mr Ghose, learned counsel appearing for the respondents submitted that even if one of the allegations made in the Show Cause Notice has been sustained, the respondents’ action of blacklisting the petitioner cannot be faulted.

16. This Court is not persuaded to accept the aforesaid contention given the serious adverse effect that a blacklisting order would have on the petitioner. Thus, in the circumstances, this Court is of the view that the petitioner ought to be given one more opportunity to render his explanation with regard to the comments made in the impugned order. In the circumstances, the impugned order to the extent that it blacklists the petitioner, is set aside. The petitioner is at liberty to file a reply in respect of the findings returned in the impugned order. The said reply shall be filed

within a period of one week from today. The respondents shall consider the same and pass a speaking order. It is clarified that the impugned order to the extent it forfeits the bid security, is not disturbed and the aforesaid directions are only in the context of the order blacklisting the petitioner and debarring it from participating in future tenders for a period of three years.

17. It is also clarified that this Court has not expressed any opinion on the merits of the allegations made against the petitioner and the concerned authority would be at liberty to take an informed view with regard to the same. In the event, the petitioner is aggrieved by such decision, it would be open for the petitioner to raise a dispute before the arbitral tribunal.

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

VIBHU BAKHRU, J

AUGUST 30, 2017

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