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

\+ W.P.(C) 9332/2017 & CM Nos. 38122-23/2017

M/S SUNSHINE ENTERPRISES ..... Petitioner

Through: Mr Amit Kumar, Mr Amit Anand Tiwari, Mr Shashwat Singh and Ms Vishakha, Advocates.

versus

UNION OF INDIA ..... Respondent

Through: Mr Akshay Makhija, CGSC with Mr Shivi Sanyam, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% 25.10.2017

1. Issue notice. The learned counsel for the respondents accepts notice. With the consent of the parties, the petition is taken up for hearing.

2. The petitioner has filed the present petition, *inter alia*, impugning an order dated 16.08.2016 (hereafter 'the impugned order') passed by the respondent debarring the petitioner from participating in any tender process/entering into any contract or sub-contract for a period of three years from the said date.

3. Mr Amit Kumar, the learned counsel for petitioner assails the impugned order on two grounds: first, he submits that the impugned order has been issued without a prior show cause notice and without giving the petitioner an opportunity to be heard; second, he submits that the punishment imposed on the petitioner is highly disproportionate.

4. The petitioner was awarded the contract by providing services of Peons/Multi Tasking Staff (MTS) at the Department of Revenue (the respondent). The said contract for services continued from 03.07.2012 to

30.03.2014. There were serious allegations against the petitioner with regard to non deposit of PF and ESI contributions of the MTS provided by the petitioner. The petitioner has produced correspondence between the parties, which indicates that the respondent had repeatedly asked the petitioner to provide month wise/employee wise details of PF and ESI contributions, deposited with the concerned authorities.

5. Whilst, it is the case of the petitioner that it had provided the necessary information, the respondent claims to the contrary. Mr Makhija, learned counsel for the respondent also drew the attention of this Court to a letter dated 04.04.2014, whereby the petitioner was put to notice that if it failed to make the payments of salary to MTS without any delay, the respondent would be compelled to take legal action as well as blacklisting the petitioner. He contends that in view of the aforesaid letter, the petitioner had adequate notice that it will be blacklisted if it did not comply with the requirement of paying salary to MTS.

6. It is seen from the impugned order that services of 22 MTS (Multi Tasking Staff) were provided by the petitioner for the period March, 2012 to April, 2014. The principal allegation on the basis of which the impugned order is passed is that the petitioner was required to comply with the statutory requirements, such as making payments of the salary fixed by the Government, providing benefits under the Employees' Provident Fund Act, ESI, etc. but the petitioner had failed to do so. It is specifically stated in the impugned order that the petitioner did not deposit ESI contribution with the concerned ESI authorities even though the petitioner had deducted the employees' contribution. It is further alleged that the petitioner had submitted false claim for reimbursement on this account and also provided

false undertakings.

7. Although, these allegations had been put to the petitioner earlier, it appears that no specific show cause notice was issued informing the petitioner that it had fallen foul of the said provisions and, therefore, is liable to be debarred from participating in future contracts.

8. Given the serious adverse consequences of a blacklisting order, the Supreme Court in its various decisions has emphasised the requirement of issuing a specific show cause notice so as to enable the concerned person to meet the allegations made against him and further for the concerned authority to take an informed decision. (***See***: ***Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr.: AIR 1975 SC 266*** and ***Gorkha Security Services v. Govt. (NCT of Delhi) & Ors.: (2014) 9 SCC 105***).

9. In this view, this Court considers it apposite to set aside the impugned order dated 16.08.2016 and direct that the same be treated as a show cause notice issued by the respondent. It is noticed that although the respondent had requested for specific information, there is no material on record to indicate that such specific information – month wise/employee wise statement of contributions and deposits – had been provided to the respondent. The petitioner shall respond to the said notice (impugned order dated 16.08.2016) by, *inter alia*, providing the names of the employees engaged by the petitioner; the dates on which salaries were paid; the amount and the dates on which the contributions to PF and ESI were deposited by the petitioner; the dates on which undertakings were provided in respect of compliances; and all relevant details to establish that the petitioner is not guilty of the allegations made in the impugned order.

10. As noticed above, it is also alleged that the petitioner has been furnishing incorrect undertakings. The petitioner shall specifically respond to the said allegation as well.

11. Apart from the above, there is yet another important aspect which is required to be considered by the respondent and that is with regard to proportionality of the punitive measure imposed on the petitioner. In ***Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL & Ors: AIR 2014 SC 9***, the Supreme Court had set out the factors that were required to be considered for determining the period for which a person/entity should be blacklisted.

12. In the event, it is established that there has been a default as alleged, the petitioner would also be at liberty to make a representation as to any mitigating circumstances that may be taken into account by the respondent while taking its decision.

13. The petitioner shall respond to the above allegations and make its representation within a period of four weeks from today. The respondents may consider the same and pass an appropriate order within a period of four weeks, thereafter.

14. It is clarified that in the meanwhile, the petitioner will not participate in any other tender process.

15. The petition and pending applications are disposed of.

16. Order *dasti*.

VIBHU BAKHRU, J

OCTOBER 25, 2017
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