

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 608 OF 2018

Cyfuture India Private Limited,
A company registered under Companies Act,
1956 having its Regional Office at 105,
IJMIMA, Mindspace, Off Link Road,
Malad West, Mumbai 400 064

....Petitioner

Versus

1.Hindustan Petroleum Corporation Limited,
A company registered under Companies Act,
1913 Represented through Director,
Central Procurement Organization,
Marketing HPCL, 9th Floor, A-Wing,
Marathon Futurex Building, C.S. No. 166,
Mafatlal Mills Compound, N.M. Joshi Marg,
Lower Parel (East), Mumbai 400 013.

2. Caratel Infotech Ltd.
A company registered under Companies
Act 1956 having their Office at Golden
Tobacco Compound, 2nd Floor,
S.V. Road, Vile Parle (W),
Mumbai 400 056

3. Elite Certifications Pvt.Ltd.
A company registered under Companies
Act, 1956, Having its Registered office at
U-60, 3rd Floor, School Block 2nd,
Shakarpur, Delhi 110 092
and its Head Office at
D-54, 1st Floor, Sec-2, Noida 201 301

...Respondents

Mr. Girish S. Godbole a/w. Mr. Dipen Furia, Mr. Harsh Keshria,
Mr. Ashwin Hawelkar i/b. M/s. Shah and Furia Associates for
Petitioners

Mr. Sandeep Aole a/w. Ms. Koshiki Bhugra i/b. Vidhi Partners
for R-1.

Mr. Sanjeev Sagar a/w. Mr. Navin Arora i/b. Vrushali Maindad
for R-2.

Mr. Abhijeet A. Desai i/by Desai Legal for R-3

**CORAM : B.P. DHARMADHIKAKRI &
SARANG V. KOTWAL, JJ.
CLOSED FOR ORDERS ON :DECEMBER 13, 2018
PRONOUNCED ON : DECEMBER 21, 2018**

ORAL JUDGMENT (Per Dharmadhikari,J.):

By this petition filed under Article 226 of the Constitution of India, petitioner company seeks writ of mandamus to direct respondent no.1 to reconsider the bid submitted by respondent no. 2 and to declare the said bid technically disqualified. By amending prayer clause (b)(i), writ is sought to set aside and quash the decision dated 16/01/2018 declaring respondent no.2 to be lowest bidder and further quashing the award of contract and all other subsequent acts. By prayer (b)(ii), direction is sought to respondent no. 1 to award that contract to petitioner for remaining period of tender or for any period thereafter.

2. We have accordingly heard Advocate Godbole, for the petitioner, Mr. Aole for respondent no. 1, Mr. Sanjay Sagar for respondent no.2 and Mr. Abhijit Desai for respondent no. 3.

Considering the nature of controversy, we have heard the matter finally by consent by issuing rule and making it returnable forthwith.

3. Mr. Godbole submits that respondent no. 2 has procured the work from respondent no. 1 by playing fraud and by suppressing the material facts. He submits that as per tender terms and conditions, even initiation of process for black listing is sufficient and though such process was initiated against the respondent no. 2, by agricultural department of Union of India on 05/12/2017, respondent no. 2 suppressed it. He points out that as per clause 20(i) of the instructions to bidders, the due date of tender was 26/12/2017. Respondent no. 2 replied to the show cause notice of agricultural department on 09/12/2017. Its bid is found to be lowest by respondent no. 1 on 16/01/2018 and it has been given work order on 21/02/2018. The order of black listing is passed on 22/02/2018. He therefore contends that in this situation, the award of work order and tender by respondent no.1 to respondent no. 2 is unsustainable.

4. He further points out that respondent no.2 has also to provide valid ISO certification of 27001 for security and ISO 22301 for business continuity as per clause 10(g). Inviting attention to clause

8, he points out the importance and impact of later certificate. He submits that the respondent no.2 has supplied to respondent no.1 said certificate which is issued on 22/12/2017. Respondent no. 2 has given an undertaking on 19/12/2017 thereby asserting that the entire information furnished by it to respondent no. 1 was true. It also accepts the right of respondent no. 1 to summarily cancel the tender and procure balance quantity from any alternative source, if information is found incorrect.

5. He submits that when on 15/2/2018, client list of respondent no. 3 was accessed by the petitioner, it did not reveal the name of respondent no.2 and therefore, the fact of respondent no.3 issuing above ISO 22301 certificate to respondent no.2 is false. He also draws support from communication dated 16/2/2018 sent on behalf of respondent No.3 by one Ritu Chavan conforming that the said ISO certification can be done on same day basis for the consideration of Rs.30,000/-. This communication also shows that the certificate was similarly issued by respondent no.3 to respondent no.2 for Rs.35,000/-. Thus, he claims that the said certificate is bogus. He also submits that the respondent no. 3 has offered its services by charging Rs.30,000 + GST to Aptech IT Solutions on 14/02/2018 and accepted that within a day,

certificate dated 22/12/2018 was issued by it in favour of respondent no. 2.

6. In the backdrop of these documents, he has also invited our attention to reply of respondent no. 3, particularly paragraphs 9, 12, 16 and 18 to demonstrate that the explanation furnished by respondent nos. 2 and 3, runs contrary to the documents on record. He points out the claim that email record produced by the petitioner before this court is (alleged to be) tampered with by respondent no. 3 but then the relationship between respondent no.3 and Ritu Chavan is not denied. He states that thus on the basis of the bogus ISO 22301 certificate, respondent no.2 has established his business continuity, capacity and respondent no.1 has acted upon it. He also invites attention to documents filed on record by respondent no.2 to show that the offer made to it by respondent no. 3 is on 18/12/2017 and number of sites to be verified was 5. Advocate Godbole submits that the ante dated document prepared by way of afterthought are seen to be signed by the very same lady namely Ritu Chavan.

7. He further submits that even this document offers services in future while according to respondent no. 3 the first survey was already done on 09/10/2017. In this backdrop, he also relies upon

clause 23 of the NIT to show how respondent no. 2 and respondent no.1 are expected to guarantee transparency in the entire deal. This undertaking is furnished by respondent no. 2 and hence, respondent nos. 1 and 2 cannot be permitted to defeat it.

8. He placed reliance upon the order dated 22/02/2018 passed by the Government of India, Ministry of Agricultural to show that there contention of respondent no. 2 that it had call centers at 11 locations including Hyderabad, Jaipur, Jabalpur and Ahmedabad was found to be incorrect and four centers namely at Jaipur, Hyderabad, Jabalpur and Ahmedabad were found not in existence. Hence, on 05/12/2017 letter was served upon respondent no. 2 asking as to why suitable action should not be initiated against it for its attempt to procure the tender by furnishing false, misleading and wrong information and why action should not be initiated for blacklisting.

9. He concludes by submitting that the petitioner has been doing that work for respondent no.1 earlier and in present process is found "L-2". Petitioner is ready and willing to work at the rate offered by respondent no. 2.

10. Advocate Desai appearing for respondent no. 3 has submitted that the audit of establishment lasts for short duration depending

upon the effective number of personnel therein. He relies upon the document at Exh. 1 tendered with affidavit in reply to add that there can not be any standard period for issuing above mentioned ISO certificate. He has also pointed out the documents dated 20/12/2017 to show audit of establishment of respondent no. 2 at Noida on 19/12/2017, report dated 28/11/2017 to show audit at Vile Parle office on 16/11/2017 and 21/11/2017. He also relies upon audit report dated 03/11/2017 showing audit of office of respondent no. 2 at Narayana Industrial area, New Delhi and at Salt Lake City, Calcutta on 09/10/2017 and 23/10/2017. He therefore, submits that this work has not been completed in a day. After proper verification, the certificate has been issued and it is valid up to 21/12/2020.

11. He further states that the petitioner may not have succeeded in accessing the website because of the technical difficulties like not entering right code or right numbers and hence the document at Exh. D with the petition cannot be accepted as decisive one.

12. Learned counsel for respondent no.2 submitted that on 16/01/2018, respondent no.2 was found lowest and work order is given to it on 12/02/2018. The purchase order thereafter has been put up on it on 21/02/2018. The order of blacklisting has come on

22/02/2018. Hence, there was no blacklisting on any of the relevant dates in the present matter.

13. Inviting our attention to notice dated 05/12/2017 sent by the Government of India, he points out that said show cause notice is not for black listing but for showing cause as to why suitable action for black listing should not be initiated. According to him, this notice therefore, does not initiate action for black listing but only asks explanation as to why action for that purpose should not be initiated.

14. In this backdrop he has invited our attention to the order of black listing dated 22/02/2018 particularly paragraph 7 and submits that it also supports his contention.

15. He relies upon clause 20(ii) of (NIT) instructions to bidder to submit that respondent no.1 has mandated only a declaration from respondent no.2 that it is not black listed as on the due date of tender. Accordingly respondent no.2 has furnished that affidavit and undertaking.

16. Coming to prayer clause in the petition, he attempts to demonstrate that there is no prayer to set aside the award of tender to respondent no. 2 or then to set aside the work order issued to it. He further contends that as this court is not taking

cognizance in the public interest litigation, petitioner must first establish its locus to maintain the petition.

17. He also relies upon the declaration submitted by respondent no. 2 on 19/12/2017 that it is not black listed and its acceptance by respondent no. 1.

18. Our attention is drawn to General Financial Rules, 2017 of the Government of India particularly Rule 151 to show that it points out the situation in which the bidder can be debarred. He submits that the respondent no.2 cannot be debarred unless and until it is given reasonable opportunity and hence, before 22/02/2018, there could not be and was no order debarring or black listing respondent no.2.

19. The guidelines at annexure 21 issued by respondent no. 1 are also relied upon to show that as per clause 2.5 banning or black listing has prospective effect. Clause 9.4 of these guidelines is also relied upon to show that the latter disqualification or black listing does not affect the contract which is already concluded and unilateral action in this respect is not possible. Additional affidavit filed by respondent no.1 is also relied upon to show that respondent no. 1 has expressly pointed out that the order of black listing therefore was not in existence prior to 22/02/2018. He also points

out that the said respondent has claimed ignorance when bidding process was going on. The averments in that reply are also relied upon to show that the respondent no.1 has rightly accepted the ISO certificate issued by respondent no. 3 and has also relied upon the affidavit placed on record by that respondent.

20. He has relied upon the order dated 09/03/2018 passed by Delhi High Court in W.P. No. 2178 of 2018 to show that the black listing is already assailed by respondent no.2 before Delhi High Court. He further points out that the print out placed on record by respondent no. 2 obtained from the website of respondent no.3 clearly shows that the stand based on print out allegedly taken out by the petitioner is incorrect.

21. He further contends that sub clauses 20 of NIT must be read jointly and it shows that only a bidder is black listed as on due date of tender, is not qualified to participate.

22. To drive home the contentions raised by him he has relied upon 1975 (1) SCC page 17 in the case of M/s. Erusian Equipment and Chemicals Ltd. Vs. Sate of West Bengal and another, 2000 SCC Online 2686 in the case of Sanjay Kumar Jha Vs. Prakash Chandra Chaudhary, 2018 SCC Online 8269 in the case of Atlanta Limited Vs. Union of India and anr, 2014 SCC Online P.& H. 11393 in the

case of KCC Buildcon Private Limited Vs. State of Haryana and Ors., 2014 Vol. 14, SCC 731 in the case of Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Ors., and 2006 Vol.12 SCC 28 in the case of Union of India and another Vs. Kunisetty Satyanarayana.

23. Counsel for the respondent no.1 submits that the original documents have been verified and no error was found in ISO 22301 certificate submitted by respondent no. 2. According to him, as per its records, certificate issued by respondent no.3 is after following proper procedure. He further points out that the respondent No. 1 was not aware of the proceedings for blacklisting initiated against respondent no. 2 and denies the allegations of collusion between respondent nos. 1 and 2. He however, submits that the order of black listing has come after purchase order was issued to respondent no. 2. He relies upon clause 23 in NIT to show how transparency needed to be guaranteed and submits that respondent no. 1 has acted bona fide in the matter.

24. He submits that for providing online booking arrangement to customers all over India, call center services are essential and respondent no.1 has therefore floated the tender on 04/12/2017. Any intervention of this court will result in inconvenience to large

number of public all over the country and disruption in service.

25. In brief reply, advocate Godbole submits that prayer clause (b) (i) added by amendment is exhaustive. He further submits that respondent no.1 has accepted the petitioner to be eligible bidder and hence objection to its locus is unwarranted.

26. He further adds that the respondent nos. 1 and 2 were served with the notice of present challenge (writ petition) on 24/02/2018 by email. The print out taken by the petitioner is on 15/02/2018, while respondent no. 2 is producing print out of which updation or uploading was done on 26/02/2018 i.e. after the service of above notice. Therefore, that print out is not genuine and must be discarded. He further contends that the show cause notice in the present matter served upon respondent no.2 on 05/12/2017 was for blacklisting and respondent no.2 was aware of it on 09/12/2017 when it replied to it. He invites attention to dictionary meaning of word “initiated” and submits that clause 20(i) of the NIT expressly provides for even initiation of action for black listing. Respondent no. 2 was therefore, duty bound to maintain transparency and disclose this notice served upon it to respondent no. 1. He submits that in the present matter, transparency is a pre-condition and it has been breached by respondent no. 2.

27. He points out that in terms of the undertaking furnished by respondent no. 2 and powers available to it, respondent no. 1 can appoint any other person for its work and petitioner who has already done it prior to introduction of respondent no. 2 in the field, is ready and willing to work at the rate offered by respondent no. 2.

28. Counsel for respondent no. 2 adds that about 10 months of contract period is already over and in this situation, considering the disputed facts and other issues, this Court should refrain from intervening in the writ jurisdiction.

29. We would first like to deal with the requirement of valid ISO certification. ISO 22301 is for business continuity. This requirement appears in NIT in clause 10 which prescribes “other mandatory requirements”. None for the respondents have urged that it is not a mandatory but a collateral requirement. The business continuity is about shifting of the current arrangement for inbound calls with the service provider based in different regions and its transition to migrate to new platform and facility with zero disruption of service in the areas like toll free services, IVRS based call handling, diversion of call traffic which are successful bidder's premises and trained operators at the time of Go-Live date. The importance of this certificate is therefore, not in dispute. The certificate of respondent

no.2 dated 22/12/2017 is issued by respondent no. 3. Respondent no. 2 has also given undertaking dated 19/12/2017 which in turn asserts truth in the information furnished by him and agreed that if after accepting of their bid/placement of purchase orders, any incorrectness is found, respondent no. 1 HPCL has a right to summarily cancel the tender and procure balance quantity from any alternative service. It also indemnifies the HPCL for the loss if rate of such latter service is higher. In addition to this HPCL is given opportunity to take appropriate action as deemed fit.

30. Petitioner points out that when it attempted to check the veracity of the said ISO certificate, it could not get details of any such certificate issued in favour of respondent no. 2 by respondent no. 3. Respondent no. 3 has contended that petitioner could not have accessed the site correctly.

31. From the arguments of learned counsel appearing for respondent no. 3, it can be seen that they have not given any definite period during which the audit can be completed. The duration specified is minimum 1.1/2 day and maximum duration is of 22 days depending upon the effective number of personnel. The documents purported to be audit report of the establishments of respondent no. 2 are also produced by respondent no. 3 on record.

The dates noted supra show that the offer by respondent no. 3 to respondent no. 2 is of the later date while exercise of audit commenced earlier. The report at page 342 on record mentions two addresses of respondent no. 2 one is at Mumbai and other is at Pune. It is mentioned that the audit has been conducted at Mumbai and Pune. The duration of audit given is 16/11/2017 and 21/11/2017. The contents of the report do not show separate consideration for either Mumbai office or Pune Office. The column at the end dealing with the representative interviewed, only mentions names of the different persons. The rest of the information in all the audit reports more or less appears to be identical. The audit of respondent no.2's office at Delhi and at Calcutta is carried on 09/10/2017 and 23/10/2017. Again our observations made supra hold good even in relation to this audit.

32. Where minimum audit duration is of 1.1/2 days, it is not clear how on two different dates, audit of both the offices can be conducted simultaneously and how there can be a common audit report.

33. The offer by respondent no.3 to respondent no. 2 placed on record by respondent no. 2 is dated 18/12/2017. Respondent no. 2 has annexed it as a copy of the quotation. The quotation has to

precede the audit reports. This material therefore, casts a doubt on genuineness of the ISO certification.

34. To add to this doubt is the email produced by the petitioner where Ritu Chavan on behalf of respondent no.3 assures issuance of that certificate on the same day basis and endorse that certificate has been similarly issued to Caretel Infotech Ltd. Respondent no. 3 has not denied the relationship with the said Ritu Chavan though it is claimed that this email is fabricated.

35. Clause 20 of NIT reads as under :

“20. Black List/Ban/Holiday List :

i) Bids received from parties who have been baned/blacklisted/put on holiday list or parties in respect of whom the action for blacklisting and holiday listing has been initiated by HPCL/any Government/Quasi Government Agencies or PSUs, shall not be considered for either evaluation or for award of work. Offer of Vendor who has not submitted declaration on black listed or holiday listed shall be considered as non-responsive and offer shall be rejected.

ii) The bidder shall give a written declaration indicating that they are not on holiday list/banned/blacklisted as on due date of this tender.”

36. It is true that Clause (ii) expects bidder to give written declaration undertaking that they are not blacklisted as on the due date of tender. It therefore, considers blacklisting continuing on that date. Clause (i) speaks of bidders who have been blacklisted earlier and further points out that the bidders against whom action for blacklisting has been initiated also was not to be considered. Respondent no.2 has not challenged these clauses. The tense employed in clause (i) demonstrates that even pending action for blacklisting need to be disclosed. Again the mandatory nature of this clause is not in dispute. In view of the clear arrangement and language of both the clauses, as we found no absurdity resulting from its literal understanding, the contention that clause (ii) must control the reach of clause (i) cannot be accepted.

37. Before us, respondent no.2 has not denied that it has received show cause notice on 05/12/2017 and that it replied to it on 09/12/2017. Thus the action for blacklisting was very much initiated and continuing against respondent no.2 when it was submitting its bid in the present tender. Parties have accepted that 26/12/2017 is "due date of this tender". The order of blacklisting has been passed on 22/02/2018 and tender of respondent no. 2 was accepted on 16/01/2018. Purchase order was put up by

respondent no. 2 on 21/2/2018. The respondent no.1 HPCL floated the present tender on 04/12/2017 and respondent no. 2 got show cause notice from agricultural department of Union of India on 05/12/2017. These dates therefore reveal that the action of blacklisting had been initiated against respondent no.2 by Government on 05/12/2017 and respondent no. 2 did not disclose it to respondent no. 1.

38. Respondent no. 2 has submitted that show cause notice served upon it on 05/12/2017 does not show that action for blacklisting was initiated by it. Copy of that show cause notice has been made available by respondent no. 2. That show cause notice issued by the Deputy Secretary (Extension) of Ministry of Agricultural, Government of India shows that when the department deputed 4 officers to verify the establishment of respondent no. 2, at the locations mentioned therein, they found that respondent no.2 was not operating at those locations viz. Jaipur, Hyderabad, Jabalpur and Ahmedabad. Respondent no.2 was called upon to furnish the documents to prove its operation at those locations, documents like purchase orders, details of call center agents, agreements, internet bill payment receipts, electricity bills, totaling to 11 were called for and respondent no.2 did not furnish that information. The show

cause notice, therefore, states that respondent no. 2 endeavoured to procure the tender by providing false, misleading and wrong information. Its material part reads :-

“therefore, the Department hereby issue notice to M/s. Caretel Infotech Pvt. Ltd. to show cause as to why suitable action for blacklisting the firm (M/s. Cartel Infotech Pvt. Ltd.) should not be initiated.”

39. The show cause notice therefore, in clear terms shows initiation of action for black listing. If the contention of learned counsel for respondent no.2 is to be accepted, respondent no.2 should have pointed out that after its reply dated 09/12/2017, Ministry of Agriculture issued to it another notice before actual blacklisting. There is no such effort. The order of blacklisting passed against respondent no.2 on 22/2/2018 also does not mention any other show cause notice.

40. Material on record therefore, shows that respondent no.2 did not bring correct facts to the notice of respondent no. 1 and also did not produce the genuine ISO 22301 certificate. It violates clause 23 dealing with integrity pact in NIT.

41. This brings us to consideration of case laws.

The first judgment in the case of M/s. Erusian Equipment and

Chemicals Ltd. Vs. State of West Bengal and another relied upon by respondent no.2 shows that the only order of blacklisting could have stopped the petitioner from participating. Para 20 is on the same lines and states that the disability is created by the order of blacklisting. Obviously clause like 20(i) which we have reproduced (supra), did not fall for consideration in that matter. Here we have already noted that respondent no. 2 did not challenge the said clause.

42. Judgment in the case of Sanjay Kumar Jha Vs. Prakash Chandra Chaudhary in paragraph 13 shows that the High Court cannot adjudicate upon affidavit the disputed question of facts. In the matter before us, in so far as the angle of blacklisting is concerned, the facts are not in dispute. The documents produced in support of ISO certificate 22301 by respondent no. 2 and 3 militate with their story. It makes the deal between Respondent no. 2 and 3 opaque.

43. Judgment in the case of Atlanta Limited Vs. Union of India and anr is the judgment of Delhi High Court, where in paragraph 21 right of contractor to hearing before blacklisting has been pointed out and it is therefore, found that it has to be always prospective. Automatic debarring without opportunity is therefore, found

arbitrary and unreasonable. It matter before us, there is no such debarring and respondent no. 2 has accepted the tender conditions without any protest and objection.

44. The judgment in the case of KCC Buildcon Private Limited Vs. State of Haryana and Ors shows that the bidder has to give information only after action against him has attained finality. Incomplete action cannot be an impediment in the award of contract. The arrangement in clause 20 in the present matter does not enable the respondent no. 2 to draw any advantage out of this judgment.

45. The judgment in the case of Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Ors relied upon by respondent no.2 shows that the power of blacklisting is inherent in the employer like respondent no. 1 and it is a method to discipline the deviant contractors. The judgment also shows that the punishment imposed upon the deviant contractor must be proportionate. In the present matter, we are not concerned with the quantum of punishment of blacklisting suffered by respondent no.2. Respondent no. 2 has already filed writ petition in Delhi High Court which has on 09/03/2018 issued notice in the matter. However, it has not granted any interim relief.

46. Respondent no. 2 has relied upon case of Union of India and another Vs. Kunisetty Satyanarayana wherein in paragraph 14 again the Hon'ble Apex Court points out that the initiation of proceedings does not furnish cause of action. Learned counsel for respondent no.2 is right in submitting that initiation of proceedings for blacklisting may not always end in blacklisting. However, when the parties have, with open eyes, agreed to certain terms and conditions in NIT, we find that it was obligatory for respondent no. 2 to point out initiation of proceedings against it by Ministry of Agriculture on 05/12/2017. Respondent no.1 HPCL has accepted that respondent no. 2 has suppressed the same.

47. This brings us to the question of relief or order which can be allowed in the present matter. We have already noted the integrity pact and undertaking of respondent no.2 (supra). In the light of the discussion (supra), it becomes clear that respondent no.2 has not placed correct facts and in any case has relied upon incorrect facts to procure the contract. This is in violation of the undertaking dated 19/12/2017 furnished by respondent no.2 to respondent no. 1 to maintain the transparency. Respondent no.1 has accepted this position. The agreement under integrity pact mandates transparency and its violation enables the employer (respondent no.

1) to take suitable decision in its wisdom. The language of the undertaking furnished by respondent no.2 to respondent no. 1 gives right to respondent no.1 to take suitable decision including the decision to put an end to the contract and to get remaining work/services from other service provider. It also permits the employer to demand the loss sustained by it in the matter and to recover it from respondent no. 2. As this power is reserved by respondent no. 1 to itself, in this situation, we find it appropriate to direct the said respondent no. 1 to exercise it and take appropriate decision as per law in this respect within four weeks from today.

48. With these directions, we partly allow the writ petition and dispose of the same. Rule is made absolute accordingly. There shall be no orders as to costs.

(SARANG V. KOTWAL, J.)

(B.P. DHARMADHIKARI, J.)