

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No: 2030 of 2018

DATE OF DECISION: 08.03.2018

Ram Phal

...Petitioner

versus

State of Haryana and others

...Respondents

**CORAM:- HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE AVNEESH JHINGAN, JUDGE**

Present: Mr. Inder Pal Goyat, Advocate for the petitioner.

Mr. Deepak Balyan, Addl. Advocate General, Haryana,
for respondent Nos.1 to 6.

Mr. Gopal Sharma, Advocate, for respondent No.7.

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S.J. VAZIFDAR, CHIEF JUSTICE:

Respondent Nos.2 to 6 are the officers of respondent No.1. Respondent No.1 is impleaded through the Department of Irrigation and Water Resources.

2. The petitioner has challenged the award of the work in favour of respondent No.7 M/s Laxmi Construction Company pursuant to the tenders invited by respondent No.1. The petitioner contends that respondent No.7 ought to have been held ineligible to participate in the tender process initiated by a Notice Inviting Tender (NIT) dated 17.11.2017 on the ground that it ought to have been black listed from a date prior thereto.

3. The first respondent had originally invited tenders by a notice dated 10.10.2017. The petitioner and respondent No.7 submitted their bids. The technical bids were opened on 17.11.2017. In an internal communication of the official respondents, it was stated that respondent No.7 had failed to submit the physical documents and that the petitioner's tender ought to be accepted. Since the petitioner was the only eligible tenderer it was decided to call for fresh tenders keeping alive the petitioner's tender. This decision cannot be faulted in view of the fact that the petitioner was the only eligible tenderer. It was reasonable, therefore, for the first respondent to invite fresh tenders. Action was also decided to be taken against respondent No. 7 under clause 29 of the NIT which reads as under:-

29. Debarring	If the agency submits Financial Bid through e-tendering but fails to submit either bid security or the Technical bid or both, then the agency will be debarred from participating in any bid in Haryana Irrigation and Water Resources Department for one year.
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4. As noted earlier, fresh tenders were invited by the Notice Inviting Tenders dated 17.11.2017. The petitioner contends that on account of respondent No.7 having failed to submit the documents in physical form, respondent No.7 ought to be visited with the consequences provided in clause-29. We will for the purpose of this judgment presume this contention to be well founded.

5. Correspondence ensued thereafter between various officers/departments of respondent No.1 in which it was inter-

alia stated that the case of respondent No.7 ought to be considered before opening the technical bid pursuant to the fresh tender process to avoid litigation and that the petitioner's bid ought to be opened and taken into consideration. Guidance was also sought as to whether respondent No.7 be considered or not in the fresh tender process. Ultimately, the bid of respondent No.7 was considered and respondent No.7 was granted the work order in view of his bid being the most competitive namely 10% less than the bid of the petitioner.

6. The petitioner has challenged the award of contract in favour of respondent No.7 on the ground that the official respondents have failed to take any action against respondent No.7 under clause 29.

7. During the pendency of this writ petition, the official respondents served a notice dated 21.02.2018 calling upon respondent No.7 to show cause why action against him ought not to be taken under clause 29. Our order dated 28.02.2018 recorded the statement on behalf of the official respondents that respondent No.7 would be afforded a personal hearing and a decision regarding black listing of respondent No.7 would be taken before the next date of hearing.

8. Mr. Balyan, the learned Additional Advocate General, Haryana states that a decision has now been taken and vide order dated 07.03.2018 respondent No.7 has been debarred from participating in the tenders for a period of six months from

07.03.2018 to 06.09.2018. The order dated 07.03.2018 has the effect of barring respondent No.7 from participating in tenders but only in respect of the said period namely 07.03.2018 to 06.09.2018. The order does not affect the award of work to respondent No.7 in the past.

9. It was contended that the official respondents *mala fide* did not commence the proceedings to black list the petitioner immediately only with a view to accommodating respondent No.7. Reliance is placed upon a letter dated 13.12.2017 addressed by the petitioner to the official respondents calling upon them to take action against respondent No.7.

10. Even assuming that the black listing proceedings were pending which they were not, it would make no difference, for the mere pendency of black listing proceedings does not prevent the official respondents from inviting bids from parties including a party against whom a show cause notice has been issued. The mere issuance of a show cause notice does not result in black listing a party. The issue of black listing would have to be adjudicated upon pursuant to the show cause notice.

11. Clause 29 does not result in an automatic black listing. The word 'will' in clause 29 must be read as 'may'. An order of black listing has serious consequences not only qua the party inviting bids in the given case but also in other cases qua other parties inviting bids. For instance, certain

NIT's stipulate that a party who has been black listed by another government agency would not be entitled to participate in the tender process. An order blacklisting implies that it is not in the interest of the party that passes the order to deal with the party blacklisted. The order would for instance be based on the view that the party is incapable of performing the contract. It could also be on the basis that it is not in the interest of the party inviting tenders to deal with the party as it is guilty of *mala-fides*. A black-listing order is a stigma. Being stigmatic it cannot arise out of a self operative term in a contract. The cause of a breach of contract is not always *mala-fide*. It can be *bona-fide*. While a contract may be terminated on account of an innocent or *bona-fide* breach the party in default cannot be black listed without anything more. If the breach is innocent or *bona-fide*, it does not follow that it is undesirable to engage with it future contracts.

The authority would have to consider the facts and circumstances in which the bidder failed to submit the bid security and/or the technical bid. If for instance it is found that the lapse was totally unintentional, inadvertent or due to any valid reason, an order of black listing does not necessarily follow. It is to determine these issues that it is necessary that a party is given an opportunity of explaining its stand/case before being black listed.

12. In the circumstances, the petition is dismissed. It is clarified that we have expressed no views on the validity of the order black listing respondent No.7 and have proceeded on the basis that it is valid only for the purpose of this judgment. Respondent No.7 is always at liberty to challenge the order.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(AVNEESH JHINGAN)
JUDGE

08.03.2018
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Whether speaking/reasoned	√ Yes/No
Whether Reportable:	√ Yes/No