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

Date of Decision: 04.05.2018

+ W.P.(C) 3009/2018, CM APPL.12056-12057/2018 & CM APPL.
12630-12631/2018

**CHAUDHARY CONSTRUCTION COMPANY PRIVATE
LIMITED**

..... Petitioner

Through Mr.Amit Agarwal and Mr. Ali Waris
Rao, Advocates.

versus

PUBLIC WORKS DEPARTMENT, GOVT OF DELHI

..... Respondent

Through Mr.Sanjoy Ghose, ASC with Ms.Urvi
Mohan and Mr.Shwetank Singh,
Advocates for GNCTD.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

1. The grievance in this petition, under Article 226 of the Constitution of India, is with respect to cancellation of a bid and consequential forfeiture of the earnest money deposit (EMD) and subsequent black listing of the petitioner, from participating in further tender process. The petitioner had successfully bid for the tender (hereafter 'NIT') for the works of strengthening of road surface of outer ring road from Modi Mill to Chirag Delhi (Masjid Moth).

2. The facts are that the petitioner had succeeded in the tender floated by the Government of NCT on 12.01.2018, which was for strengthening of road surface of outer ring road from Modi Mill to Chirag Delhi (Masjid Moth). Bids and related documents were to be submitted by 22.01.2018. In terms of the tender conditions the bid was open for acceptance for a period of 60 Days from the date of opening of tenders/financial bid. The petitioner furnished its bid on 20.01.2018, together with earnest money of ₹19,33,900/-.

3. It is undisputed that the petitioner's bid was deemed lowest as it was lower by 38% of the estimated cost (of the work). The controversy arises thereafter; the petitioner contends that it never received the acceptance letter or any communication; the respondent NCT, on the other hand states that the competent authority accepted the tender on 01.02.2018 and consequently an offer letter was issued to the petitioner on 02.02.2018. The terms of the contract granted 60 days time to public agency (GNCTD) to communicate its formal acceptance from the bid opening date. It *inter alia* provided as follows:

“13. The tender for the work shall remain open for acceptance for a period of 60 Days from the date of opening of tenders/financial Bid. If any tenderer withdraws his tender before the said period or issue of letter of acceptance whichever is earlier, or makes any modifications in the terms and conditions of the tender which are not acceptable to the department, then the Government shall, without prejudice to any other right or remedy, be at liberty to forfeit 50% of the earnest money as aforesaid. Further, the tenderer shall not be allowed to participate in the re-tendering process of the work.”

4. The petitioner approached this Court complaining against the order of 17.02.2018, by which, its bid was cancelled on the ground that the condition

requiring it to furnish the performance bank guarantee was not complied with within the time stipulated. The impugned order/letter reads as follows:

“Strengthening of road surface of Outer Ring Road from Modi Mill to Chirag Delhi (Masjid Moth)-Tender regarding

Ref: This office letter no 54(142)AB/EE/SER-II/PWD/2017-18/253 dated 02.02.2018

Vide above referred letter you were intimated that your tender for the subject work” has been accepted on behalf of President of India at your tendered amount of Rs. 5,99,48,171/-. You were also requested to furnish the performance guarantee of Rs.29,97,409/- within 7 days of issue of the above referred letter but you have failed to furnish the prescribed performance guarantee within the prescribed period as mentioned in Schedule F of NIT. In view of above, you are liable for forfeiture of your earnest money amounting to Rs. 19,33,812/-.

Therefore I, Rajinder Kumar Sharma, EE, SER-2, PWD in accordance to NIT conditions forfeit to the President of India, your earnest money amounting to Rs. 19,33,812/-. You shall not be allowed to participate in the re-tendering process of the work.”

5. The petitioner contends that the allegations regarding the communication of acceptance by a letter of 02.02.2018 are factually unfounded and in fact appears to be false. Learned counsel relied upon the material on record in the form of inter se correspondence between the postal authorities and the PWD to say that the tracking report which reflects delivery of the postal package, nowhere reflected that in fact the letter dated 02.02.2018 was ever delivered to the petitioner. It is submitted that the respondent i.e. PWD in fact asked the postal department to correct the tracking report to state that the article, sent by speed post was lost. Reliance

is placed on the documents and files produced by the respondents in the course of these proceedings. The petitioner relies on its correspondence with the respondents as well as the documents they have placed on the record to say that the offer letter was never dispatched on 3 February, 2018 as is contended nor received and therefore, the respondents acted unfairly in forfeiting its EMD and debarring it from tendering in other works.

6. As observed earlier, the respondents had produced the original file; they also filed a counter affidavit, refuting the petitioner's allegation about not having dispatched the letter in fact on 03.02.2018. They argue that this court should not enter the thicket of disputed facts in writ proceedings. More importantly, they argue that the offer letter, dispatched to the petitioner, was through Speed Post; they rely on the tracking report (a copy of which has been produced) and say that according to the official website of Speed Post, the packet containing the letter was delivered on 05.02.2018. It is also submitted that since the petitioner represented to the respondent, alleging that it never received the offer letter and had complained to the police authorities, upon inquiry, since there was no confirmation of its delivery on the Speed Post website, a letter was again addressed on 13.02.2018 to the said postal agency, requesting it to correct its website entry. It is submitted that there was nothing unusual in regard to the mode of dispatch of the offer letter, through Speed Post, as that is the official postal agency and is normally resorted to by the respondent, in all its communications. It is submitted that the respondents have since re-tendered the work and are yet to finalize the bid; consequently it would not be appropriate to interfere with their decision.

7. The court heard counsel for the parties; they reiterated the submissions made in the pleadings. The relevant condition of the NIT (relied upon by the respondent public agency) which stipulated the time given to the successful tenderer, to accept the offer, which led to issuance of the impugned order, forfeiting the bid security is as follows:

“Time allowed for submission of Performance Guarantee, Programme Chart (Time and Progress) and applicable labour licenses, registration with EPFO, ESIC and BOCW welfare board or proof of applying thereof from the date of issue of letter of acceptance – 7 days.

(ii) Maximum allowable extension with late fee @ 0.1% per day performance guarantee amount beyond period provided in above in days-3.”

8. The petitioner has produced letters and a copy of the bank guarantee which it secured from its banker and appears to have attempted to tender with the respondent. However, those documents were not officially refused, but not taken on record either. Instead, on 17.02.2018, the petitioner was issued with the impugned order. Interestingly, after the controversy arose and the petitioner alleged that the Speed Post tracking report (relied on by the respondent) wrongly reflected delivery of the article- at the same pointing out that the report was silent as to who received it, a letter was written to that postal agency, by the respondent, on 21.02.2018. That letter, to the postal agency, interestingly stated as follows:

“After tracking the details of the consignment online, it shows that the item was delivered on 05.02.2018. (Copy enclosed), but the consignee informed that he has not received the letter/consignment. Consignee further intimated that he has enquired for the same and he has been informed by the

concerned postman Sh. Anand /Arya that the letter has been lost somewhere and he has lodged an FIR bearing FIR No. 622406/2018 for the same, (The copy of the FIR is enclosed for ready reference please) In this regard, it is requested that it may please be clarified whether the letter has actually lost or not and if the same is lost then, the status showing delivered may please be changed and a copy of the same may please be sent to this office. It is also requested to verify following:-

(i) Whether the letter/consignment having ID ED675049318IN has been lost and not delivered to consignee.

(ii) If (i) above is true then please change the status of article to "not delivered",

(iii) Whether the postman has actually filed an FIR bearing LR No. 622406/2018 regarding misplacing of consignment (ED 675049318IN) and the postal department acknowledge the same."

9. The most important letter in this context is the communication by the Office of the Senior Post Master, who on 13 March 2018 replied to the respondent PWD's earlier queries. The postmaster stated in his letter, in connection with whether the letter was actually delivered on 5 February, 2018 to the petitioner that:

"In continuation of letter of even no. dated 27-02-2018 in this connection whole matter was enquired and enquiry report reveals that:

1. The article was lost by the Postman but erroneously it was uploaded on India post website as "Delivered item". Now, it is not possible to change the status on internet.

2. Postman Sh. Anand Arya actually lodged the Fir no. 622406/2018 without any intimation to Competent Authority and he himself responsible for FIR and lost of article.

Conclusively, the article has been lost."

10. In the opinion of this court, the *inter se* correspondence between the postal authorities and the respondent establishes that the latter entertained doubts about whether the offer letter was in fact delivered to the petitioner, on 5 February 2018. The tracking report relied on by them, states that the packet was delivered; however it does not say to whom, it was delivered. The petitioner lodged its protest soon after becoming aware; before that it had attempted to furnish the bank guarantee, which was not accepted. A curious fact is that the whole process of bidding is through e-tenders, where the parties submit on-line tenders and supporting documents. In this background, it passes one's comprehension as to why the respondents did not resort to email, to communicate with the petitioner and enclose a copy of their offer. No doubt, they have to resort to postal communication, as that is the official mode of writing to parties. But the net result today is that the official mode did not result in the communication of the offer to the petitioner, for it to comply with NIT conditions and furnish the guarantee within the time stipulated. In these circumstances, the resort to the condition at Para 13 (quoted earlier) is palpably unfair.

11. In the context of failure to furnish performance guarantee within the time stipulated, where the further stipulation is automatic debarring of a contractor, the Punjab and Haryana High Court had recently, in its decision *M/s R.S. Labour and Transport Contractor v. Food Corporation of India and others*, 2017 SCC Online P&H 166, held as follows:

“25. If the respondents are permitted to disqualify a party from submitting a tender in respect of a contract merely on account of the EMD of such a party having been forfeited in another contract, it would have the disastrous consequences of

blacklisting the party without affording it an opportunity of being heard or dealing with the order of blacklisting in any manner whatsoever. This cannot be permitted. A term in a notice inviting tenders which disqualifies absolutely a party from submitting its bids merely on account of its EMD having been forfeited in another contract, is illegal being unreasonable, arbitrary and violative of the principles of natural justice. If the term merely confers a right upon the party inviting tenders or gives it the discretion to disqualify a party whose EMD had been forfeited in another contract, it would be valid. However, in such a case, the party inviting tenders would have to grant the party sought to be disqualified an opportunity of showing cause against the proposed disqualification. Call it by any name, such a term, in effect, debars a party from participating in the tender process and must, therefore, have read into it the principles of natural justice as applicable to cases of blacklisting.

26. The clause in this case reads: “The parties whose EMD is forfeited by FCI will not be qualified”. The clause is absolute in its terms which is clear from the words “will not”. The clause entails an automatic blacklisting merely on the ground that the EMD has been forfeited. The clause does not stipulate the circumstances in and the reasons for which the EMD is forfeited. The notice inviting tenders does not restrict the grounds on which the first respondent may forfeit the EMD. In other words, the clause disqualifies a party from the tender process even when the EMD has been forfeited for an innocuous reason.

27. Having said that, however, it must be remembered that it is not necessary for a notice inviting tenders to include a clause for blacklisting in order to entitle the party inviting tenders to

blacklist a person. A party inviting tenders has an inherent right to do so. It was so held by a Division Bench of this Court, to which one of us (S.J. Vazifdar, C.J.) was a party, in a case between the petitioners and the first respondent-2016 AIR (Punjab) 98 (paragraph-12). A party inviting tenders would be entitled to consider the forfeiture of EMD under one contract as a ground for disqualifying a party in respect of tenders invited for other contracts but only after following the procedure necessary for blacklisting/debarring a party. The forfeiture of the EMD under one contract cannot by itself be a ground for blacklisting a party in respect of other contracts. Terminating a contract is one thing. Blacklisting a party is another thing altogether. There may be a genuine difference in perception that leads to the termination of a contract and forfeiture of the EMD. Not every case of forfeiture of EMD, however, would justify the drastic consequences of blacklisting. Each case would have to be considered on its own merits. If the forfeiture is on account of a reason which justifies an inference that it is not desirable to enter into a contract with a party, a decision not to do so may well be justified. Thus, for instance, if the conduct of a party in respect of another contract has been such that the party inviting tenders would be justified in not wanting to deal with it for a certain period of time, it would be entitled not to do so. That, however, can be done after following the procedure relating to blacklisting which would include affording the party sought to be blacklisted an opportunity of meeting the same including by a personal hearing.

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29. The view that we have taken does not prejudice the respondents in any manner. As we mentioned earlier, a party inviting tenders has an inherent right to blacklist a party from participating in the tenders invited by it. It is not necessary for

a notice inviting tenders to include a term entitling the party to blacklist any category of person otherwise eligible from participating in the tender process. Thus, if a party's EMD has been forfeited for reasons which justify the party inviting tenders refusing to enter into a contract with such a party, it can always do so. In the present case also, it would be open to the official respondents to blacklist the petitioners provided the EMD was forfeited for such a reason. The mere forfeiture of the EMD, however, does not entitle the official respondents to debar the petitioners from participating in the tender process. The mere termination of a contract and/or the forfeiture of the EMD does not, absent anything else, compel the party to afford the other party an opportunity of being heard. The dispute in that regard must be settled as in the case of any other contract. When, however, such termination or forfeiture of EMD is followed by or is the basis of blacklisting the party, different considerations arise. It would be necessary for the party blacklisting to follow the rules of natural justice applicable in such cases.”

The above decision was cited and followed in *Atlanta Ltd v. Union of India* (W.P.(C) 10854/2017 on 09.04.2018) by a Bench of this court.

12. In the present case, the facts are stark; the petitioner never received the communication or offer; it clearly could not send its acceptance within the stipulated 7 days, and furnish the requisite guarantee. The respondents tacitly acknowledge this, as is evident from their communication with the postal agency. Yet, they are unbending in their determination not to re-visit the issue. Their obduracy has resulted not only in forfeiture of the petitioner's bid, but also a default debarring order, which is unfair and untenable in the light of the decision in *Atlanta (supra)*. The petitioner, by rights ought to have been restituted, which in this case, means that its

acceptance should have been taken on record, subject to verification of the guarantee and other documents. It is not as if the respondents cannot make amends; there is no law, rule or practice, akin to the Law of the Medes etched in stone, immutable and unchanging. In these circumstances, this court is of the opinion that the impugned order, forfeiting the EMD and debarring the petitioner from participation in future tenders, has to be quashed.

13. Now the issue of relief. The Supreme Court, in *Tata Cellular v. Union of India*, (1994) 6 SCC 651, having reviewed the law on award of public contracts, laid down the following guiding principles:

“1) The modern trend points to judicial restraint in administrative action.

2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of

reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.

6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

Again in *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, the Supreme Court stated that there must be two questions that the Court must ask itself while exercising judicial review in tender matters involving a public authority:

“Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.”

14. *Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.*, AIR 2005 SC 2299, too noted that courts’ role is not to review or oversee the award of contract, on the merits of the decision, but rather consider whether the decision making was regular, legal, procedurally fair and untainted by mala fides.

15. This court has already held that the respondent's action is palpably unfair, since it recognized that the petitioner – fact reasonably deducible from the Senior Postmaster's letter, did not receive the offer letter. Its position of helplessness because it re-tendered the work, is no answer; it compounds the unfairness. In this case, the quashing of the respondent's impugned decision would mean that the petitioner has the option of accepting the offer, and furnishing the bank guarantee. Concededly, the offer made by it was more than a third lower in value than the respondent's estimate. Furthermore, no equities have since arisen, because the subsequent tender has not been evaluated and finalized. In these given circumstances, the public interest is in no manner adversely affected if the relief claimed in these proceedings are granted.

16. Accordingly, the impugned letter of 17 February 2018 is hereby quashed. The petitioner shall now be served with the offer letter not later than 20 May, 2018. The respondents shall also send an email to the petitioner for this purpose; upon its receipt the petitioner may proceed to fulfil the stipulations and furnish the guarantee in the acceptable form, within the time stipulated for the purpose, subject to other tender conditions. The writ petition is allowed in these terms. Order *dasti* under signatures of Court Master.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MAY 04, 2018