IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.15892 of 2018

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M/s Youth Arena Pvt. Ltd. Through Its Director Sanjeev Kumar Pathak S/o Thakur Pathak Chandrika Rai Market, 1st Floor, New Bigrahpur, Mithapur, P.S.- Jakkanpur, District- Patna.

... ... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Patna.
2. The Principal Secretary-Cum-Chief Executive Officer, Bihar Skilled Development Mission, Department of Labour Resources, Government of Bihar, Patna.
3. The Mission Manager, Programme and Implementation, Bihar Skilled Development Mission, Department of Labour Resources, Government of Bihar, Patna.

... ... Respondents

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Appearance :
For the Petitioner/s : Mr. Sandeep Jha, Advocate
For the Respondent/s : Mr.Ravi Ranjan, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date : 28-03-2019

Petitioner in the present case is a Private Limited Company who is aggrieved by the order dated 25.09.2017 issued by respondent no. 2 as contained in Annexure-5 to the writ application by which the respondent no. 2 has debarred the petitioner for a period of five years from participation in any of the tenders of the Bihar Skill Development Mission (Bihar Kaushal Vikas Mission). By the impugned order the petitioner has also been debarred from participation in any of the skill development programme in the State of Bihar.

The brief facts of the case are not much in dispute. The Bihar Skilled Development Mission (hereinafter referred to as the 'Mission') has undertaken upon itself one of the programmes of the State Government under '*Saat Nischay Yojana'*. Under this programme the 'Mission' is engaged in implementing the major programme to skill the youths in the State of Bihar in a Mission Mode Manner on a State-wide scale through various departments under the auspices of the 'Mission'. This is a programme aimed at helping the youths in the State in enhancing their employability and self-employability by developing various competencies within them. The programme has got special emphasis on those who have passed either standard 10^{th} examination or 12^{th} examination and it shall focus on helping the youths attain higher levels of productivity, efficiency, quality and an entrepreneurial mindset at their work places in diverse domains.

Under the scheme it is provided that to attain the above objectives, the 'Mission' shall create with appropriate partnerships, State-wide network of Skill Development

Centres (hereinafter referred to as the ‘Centres’) for implementation of skilled development programmes. Two types of skill development programmes have been identified. The first programme is Kaushal Yuva Programme (“KYP”) and the second programme is known as Sector Skills Development Programme. A candidate will get itself enrolled at the ‘Mission’ for the ‘KYP’ course after due approval by ‘Mission’ for payment of his/her stipulated share of course fee and stipulated share of examination fee to the Block Skill Development Centre (hereinafter referred to as ‘BSDC’). An individual may be enrolled at the ‘BSDC’ for the KYP course directly by payment of his/her own full course fee and examination fee and receipt of stipulated share by the ‘Mission’ within the specified period after issuance of various login ID and password by the ‘Mission’.

The ‘Mission’ floated a request for proposal through a notice inviting the interested individuals or organizations for allotment of it’s ‘BSDCs’, wherein the individuals or the organisation, as the case may be, were required to install suitable infrastructure and equipment to setup centres for running KYP courses as an opportunity to participate in empowering youth of Bihar. The individual or the organization making application for allotment of 'BSDCs' who were required to develop centres were also required to deposit earnest money.

Eligibility criteria for the individual/organization for making applications to get allotment of centres are also laid down in the request for proposal. It requires besides others that the applicant must have a positive net worth as on 31.03.2015, he must have trained at least 600 candidates on a consolidated basis during the last three financial years and the applicant must have a track record of operating/running a minimum of two centres in the last three financial years. The applicant has to submit an affidavit in terms of Annexure-1 to the Request For Proposal (in short 'RFP') giving certain declarations on oath. The performance of the applicant has to be reviewed on nine months from the date of registration of that centre. The allotment is for a period of one year from the date of approval of the registration of the centre, however the period of allotment may be extended for subsequent years based on performance subject to a maximum of five years, in the first instance. After five years, it may be further extended on the basis of the agreed terms and conditions and performance of the applicant.

It appears that pursuant to the notice inviting Request for Proposal as contained in Annexure-1 to the writ application, one Zephyr Limited an organization registered under the Companies Act got allotment of certain Centres in the district of Kishanganj, Rohtas, Saran and Sitamarhi. An agreement dated 2nd day of November, 2016 was signed between the 'Mission' through it's Chief Executive Officer and Zephyr Limited through it's representative Mrs. Renu Sangwan. In the agreement a clause was inserted, according to which the Zephyr Limited had to run the allotted centres by itself and any kind of subletting or subcontracting or franchisee arrangement of the centres or conduct of training was strictly prohibited and was made impermissible under any circumstances. No joint venture or consortium or association is permissible. (*emphasis supplied*)

As per allegation against the petitioner, contrary to the prohibition imposed on the Zephyr Limited an agreement was executed between said Zephyr Limited and the present petitioner. The agreement has been named as "Infrastructure Services Lease Agreement" whereunder this petitioner had taken upon itself certain responsibilities as Infrastructure Associate. The petitioner agreed to provide all the services listed out in Annexure-'A' to the agreement. Annexure-'A' to the agreement provides the scope of services to be performed by the Infrastructure Associates. It is this agreement which has been taken as violative of the prohibition clause of the original agreement dated 2nd November, 2016 signed between the 'Mission' and Zephyr Limited.

According to the respondent nos. 2 & 3, the Prohibition Clause of the original agreement has been contravened by both, the Zephyr Limited and this petitioner. The respondents have come out with a case that the Labour Resources Department was in receipt of number of emails in which the complainants mentioned themselves as Centre owner and in these emails it was clearly mentioned that they had closed the Centres as they had not been paid their remuneration for a long time and hence they were not in a position to run the programme in the Centres due to paucity of funds. This, according to the respondents, compelled them to issue a show cause notice to both the organizations. This petitioner, on receipt of the show cause notice had submitted a reply but then the reply was not found satisfactory and the impugned order was passed which is under challenge.

Submission of the petitioner

Learned counsel for the petitioner submits that in no case the official respondent could have assumed a power upon themselves to pass an order of debarment/blacklisting against this petitioner. It is submitted that there was no agreement between the 'Mission' and this petitioner for which any violation may be alleged or which may confer a power upon the official respondents to take the extreme view of debarment of the petitioner from participation in the tenders which may be floated by the 'Mission' during next five years. It is further contended that by no stretch of imagination the official respondents could have take a decision to debar the petitioner from participation in any of the skill development programme in the State of Bihar.

It is one of the contentions of the petitioner that the RFP which was floated by the respondents nowhere contained any condition saying that the persons who will be allotted the centres will not employ the services of any associates for infrastructure purposes. It is further submitted that so far as the prohibition clause under the original agreement dated 2nd November, 2016 between the 'Mission' and the Zephyr Limited is concerned, there is no material on the record to show that the said agreement was ever brought to the notice of this petitioner while signing the service agreement.

It is submitted that in absence of there being knowledge on the part of the petitioner as regards the agreement dated 2nd November, 2016, it cannot be inferred that the petitioner had knowingly entered into the service agreement with Zephyr Limited. It is submitted that in the service agreement executed by this petitioner there is no indication at all that the Zephyr Limited had at any point of time represented to the petitioner with regard to the original agreement dated 2nd November, 2016.

It is submitted that the 'Mission' has imposed a debarment of five years without there being any basis for imposition of the said quantum of punishment. It is submitted that no resolution of the 'Mission' which is a society has been placed before this court to show that at any point of time any guideline has been framed or a resolution passed by the society with regard to the quantum of punishment to be imposed in different nature of cases calling for a debarment. It is submitted that in absence of there being any guiding document and the resolution of the society, the authority of the 'Mission' (R-2) has acted arbitrarily and exercised his power in an unbridled manner to impose a punishment of five years of debarment. It is submitted that the punishment has got a civil consequence as it would close the door of the petitioner which has in face come in existence only recently set-up by some young entrepreneurs who are in the very beginning days of their career.

Submission of the respondents

Learned counsel representing the official respondents has though initially attempted to defend the action of the respondents but was unable to demonstrate from the records before the court that the petitioner has any knowledge of the prohibition clause as contained in the original agreement dated 2nd day of November, 2016 between the 'Mission' and the Zephyr Limited. Learned counsel has however submitted that a show cause notice was issued to this petitioner prior to passing the order of blacklisting and when a reply was received it was found that this petitioner was not eligible to participate in the RFP, therefore, it established that the petitioner adopted a different mode to obtain the right to run the centres.

Consideration

In course of hearing, this court called for a copy of the original agreement dated 2nd November, 2016 which was made available by learned counsel for the 'Mission'. The relevant clause III of the original agreement which is quoted hereunder for a ready reference:-

> **"III. PROHIBITION ON SUB LETTING/SUB CONTRACTING/FRANCHISEE AGREEMENT:**
> *The organization has to run the allotted BSDC by itself and any kind of sub-letting or sub-contracting or franchisee arrangement of the BSDC/s or conduct of training is strictly prohibited and impermissible under any circumstances. No joint*

venture or consortium or association is permissible."

The service agreement between the Zephyr Limited and this petitioner provides the scope of work in Annexure-A to the agreement which is quoted hereunder for a ready reference: -

"Annexure 'A'
SCOPE OF SERVICES TO BE PERFORMED BY THE INFRASTRUCTURE ASSOCIATES.

a) Mobilizing Participants for the Training Program as per the Category targets given by the Client.

b) Infrastructure set up for the Training Program, including Training Labs as per standard norms defined by Department time to time.

c) All operational Expenses pertaining to running the center (Rent/Electricity/ Water/Internet/Consumables/Power Back up, etc.)

d) Providing Delivery Details on the MIS software (along with all relevant documents)

e) Coordinating with District officers for approval of center/assessments/collections, etc.

f) Provide District level Placement support to the company if possible.

g) If there is any changes in guideline of the client, it will be delivered by Infrastructure Associate.

SCOPE OF SERVICES TO BEPERFORMED BY THE COMPANY "Zephyr Limited".

a) The Quality team for the project will regularly inspect the facilities provided by the infrastructure Associate, and will point out deficiencies if any. The Deficiencies will have to be corrected in a minimum time as defined by the company.

b) The Trainers will conduct program as per the curriculum defined by the company.

PAYMENT TERMS:

a. The invoice will be raised by Infrastructure Associate for each centre on successful completion of delivery milestones. The amount of invoice will be based on delivery at each centre.

b. Payment will be released within 15-30 days on back-to-back basis after approval from concerned authorities."

A perusal of the RFP floated by the 'Mission' shows that it does not contain any prohibition clause restraining the organization from entering into an agreement for arrangement of infrastructure. The eligibility condition as mentioned in the RFP talks of the annual turnover and the experience of the applicant in training at least 600 candidates on a consolidated basis during the last three years. It further says that the applicant must have a track record of operating/running of minimum up to two centres. In the whole RFP, there is no clause providing that the organization who will get the allotment shall not even arrange the infrastructure under an agreement with a third party. The scope of work under the service agreement executed between the Zephyr Limited and this petitioner shows that what the petitioner had agreed for is for mobilizing the participants for the training programme, infrastructure setup for the training programme including training Labs as per standard norms defined by the department to provide all operational expenses appertaining to running the centre (Rent/Electricity/Water/Internet /Consumables/Power Back-up) and providing delivery details on the MIS software. So far as the trainers are concerned, the scope of services to be performed by Zephyr Limited contains a clear stipulation that the trainers will conduct programme as per the curriculum defined by the company. (*emphasis supplied*)

Thus, to this court, it appears at the first instance that the RFP did not contain any prohibition clause with regard to entering into an agreement for infrastructure setup for the training programme and so far as the conduct of training programme is concerned, the service agreement at least shows that it has not been specifically transferred to this petitioner under the scope of work. Thus from the records it cannot be concluded as a clear case of sub-letting or sub-contracting or entering into a franchisee agreement for conduct of training.

Apart from the aforesaid facts appearing from the records, this court finds that the Infrastructure Service Lease Agreement (Annexure-2) nowhere refers to the original agreement dated 2nd November, 2016 entered into between the petitioner and the Zephyr Limited. There is no material on record to demonstrate even *prima facie* that this petitioner had been aware of the original agreement dated 2nd November, 2016 and the prohibition contained thereunder.

In its reply to the show cause notice the petitioner has taken a stand that it was established on 15th Day of June, 2016 and had not moved towards the government projects because they were aware that it was of no use before completion of three years. The petitioner has also taken a stand that they were not aware of the guidelines of the 'Mission'. The petitioner further took a stand that it was approached and engaged into an agreement by Zephyr

Limited and as a new setup the petitioner took it as its first assignment of work.

It is stated that the petitioner had not deliberately ignored the clause as mentioned in the show cause notice. The impugned order has been passed by taking a view that the petitioner had adopted a franchisee mode to conduct the training centre. In the opinion of this court, the finding recorded by the competent authority is not based on any clinching material. The impugned order itself says that in view of the statement made in the reply of the petitioner that the petitioner was not eligible to participate in the RFP and that certain emails were being received in which complainant was claiming itself owner of the Centre, the competent authority came to a conclusion that petitioner had deliberately adopted the different mode. The complaint written by a complainant claiming itself the owner of the Centre in fact goes a long way to show that the complainant was not aware of the prohibition clause contained in the agreement between the 'Mission' and Zephyr Limited. In any view, these are all mere inferences drawn by respondent no. 2. In want of any clinching material to support the impugned order, this court is of the view that the conclusion reached by the competent authority cannot be sustained.

This court also agrees with the submission of learned counsel for the petitioner that nothing has been brought to the notice of this court to show that the 'Mission' has framed any guideline in the matter of debarment/blacklisting providing for a period of debarment in a particular kind of misdeed committed by a party to the contract. No resolution of the 'Mission' has been brought on record in this regard.

It is true that no party has a fundamental right to do business with the government and/or its instrumentality but the order of debarment has certainly got a civil consequence. It is a drastic power vested with any employer but such power cannot be exercised in a unbridled and un-canalized manner. Why a punishment of five years debarment is to be imposed, why not two years or ten years? It is for this reason that a clear guideline is to be framed with due approval of the competent body of the society.

In the facts of the present case, I find that the competent authority could not have debarred this petitioner for the reason that there was no agreement between the 'Mission' and this petitioner which could have established a jural relationship between the parties. There was no jural relationship in this case between the petitioner and the 'Mission'. This court has also found that there is no material on the record to show that the petitioner was aware of the original agreement and more particularly the prohibition clause contained in the agreement between the 'Mission' and the Zephyr Limited.

This court is, thus, of the considered opinion that the drastic power of debarment/blacklisting for a period of five years, in the case of this petitioner, which is, in fact at its initial stage of setting up of it's business, would amount to causing a civil death of the petitioner.

The impugned order is, thus, liable to be quashed. It is accordingly quashed and the writ application is allowed.

(Rajeev Ranjan Prasad, J)

Rajeev/-

AFR/NAFR	
CAV DATE	
Uploading Date	05.04.2019
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