

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

1088 WRIT PETITION NO.13703 OF 2018

M/S JALGAON GOLDEN TRANSPOT PVT LTD JALGAON THROUGH
DIRECTOR RADHESHYAM SURAJMAL ..PETITIONER

VERSUS

THE UNION OF INDIA AND OTHERS ..RESPONDENTS

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Ms. P. S. Talekar h/f M/s. S. B. Talekar and
Talekar and Associates, Advocate for the
Petitioner.

Mr. Sanjeev B. Deshpande, Advocate for Respondent
No.1.

Mr. Rameshwar F. Totala and Mr. M. S. Bodhanwalla,
Advocate for Respondent Nos.2 and 3.

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**CORAM : S. V. GANGAPURWALA &
A. M. DHAVALA, JJ.**

DATED : 18th JANUARY, 2019.

PER COURT:-

1. The petitioner assails the order dated 03.12.2018 blacklisting the petitioner, so also assails the award of tender to respondent no.4 in pursuance of the E-Reverse auction process conducted on 28.11.2018.

2. Ms. Talekar, learned counsel for the petitioner strenuously contends that the order blacklisting the petitioner is patently erroneous. The same is an unreasoned one. The order nowhere considers reply given by the petitioner to show cause notice. According to the learned counsel, there is no evidence to suggest that the petitioner

has formed a cartel. Only because one M/s. Super Transport had also filled in tender from the same service provider as has been filled in by the petitioner would not ipso facto mean that the petitioner has formed a cartel with Super Transport. The learned counsel further submits that the service provider has also filed an affidavit explaining the negligence on his part. After the tender of the petitioner was uploaded by the service provider, he did not delete the documents of the petitioner and due to his inadvertence, the documents were attached with the tender of the Super Transport. The petitioner cannot be blamed for the same. The learned counsel submits that the price offered has no relevance in as much as the E-Reverse auction process was to be adhered to. The tenderers whose price bids have been opened were required to participate in E-Reverse auction event conducted by the respondent no.1. As such no question of carteling would arise in such cases. The learned counsel submits that it is only on account of the petitioner being blacklisted, the petitioner is disqualified from the instant tender process and decided to allot the tender to respondent no.4.

3. According to learned counsel, the order of blacklisting is bad in law, same deserves to be set aside. The tender process conducted pursuant to the tender notice published on 06.07.2018 be either

set aside or the petitioner also be allowed to participate in the E-Reverse auction proceedings.

4. Mr. Totala, learned counsel of respondent nos.2 contends that 20.07.2018 was the last date for submission of bids. Total nine bids were received. The technical bids of these parties were opened on 25.07.2018. Out of nine parties, only six parties including the petitioner and one M/s. Super Transport submitted all required documents in compliance with the pre-qualification criteria as specified in the NIT. The price bids of these six parties were opened on 11.10.2018. While scrutinizing the price bids, it was observed by respondent no.2 that the petitioner and one M/s. Super Transport had uploaded the same price bids with the same rates and in the same name that is in the petitioner's name. On conducting a detailed inquiry, it was observed that parties had uploaded the same price bids with the same rates from different computers. The same is evident from the different IP addresses of the computers. The same was a sufficient evidence to conclude that the petitioner and one M/s. Super Transport had formed a cartel for the purposes of bidding in the said tender. The show cause notices were issued to the petitioner and M/s. Super Transport. After receiving the reply to the show cause notices, the respondent has taken a conscious decision. The reply is found to be unsatisfactory. Under the

terms of the NIT, more particularly clause 3.0(a) of Annexure XI, any party may be blacklisted by the company if there is a sufficient reason to believe that the party has been guilty of unethical or malpractice of forming cartel. In view of that, as the petitioner had formed cartel with M/s. Super Transport, the decision was taken to blacklist the petitioner by respondent no.2. The approval of the competent authority to blacklist the petitioner, so also M/s. Super Transport was passed on 23.11.2018 and the final order blacklisting the petitioner was thus passed on 23.11.2018 that is five days prior to the E-Reverse auction. According to learned counsel, subsequently the E-Reverse auction proceeding is conducted and further process has been undertaken. The respondent no.4 is found to be lowest one.

5. The learned counsel for respondent no.4 submits that he is lowest one. His price is also the lowest than the petitioner. The petition be dismissed.

6. We have considered the submissions canvassed by the learned counsel for respective parties.

7. Section 2 (c) of Competition Act, 2002 defines "cartel". It specifies that "cartel" includes an association of producers, sellers,

distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

(Cartel:- By the word cartel in H&T tenders it is meant that creation of a situation where two or more parties come together to form a group or nexus amongst themselves with personal motives which are detrimental to the interest of the company. For e.g. quoting the near similar rates in the same fashion or influencing the other tenderer for rate quotes).

8. It appears that the petitioner and M/s. Super Transport had filled in the bids by the same service provider. As per respondents, the IP addresses of both petitioner and M/s. Super Transport by which the tenders were filled in were different. As per the contention of the respondent, the petitioner and M/s. Super Transport uploaded the Bill of Quantities (BOQ) in the same name and according to the petitioner, it was due to inadvertence on the part of service provider. Be that as it may, the show cause notice was issued to the petitioner as to why the petitioner should not be blacklisted on the ground of formation of cartel. The petitioner replied the show cause notice on 15.10.2018 and under order dated 03.12.2018, the petitioner is blacklisted.

9. Perusal of the order dated 03.12.2018 blacklisting the petitioner, it is manifest that the said order is bereft of any reasons. The order nowhere depicts the explanation given by the petitioner to the show cause notice issued to the petitioner is considered. The reasons now are considered to be the pillar of principles of natural justice. The reasons also are must in any administrative orders. Distinction between an Administrative Act and Quasi Judicial order has almost obliterated. Even, administrative actions are to be supported by reasons. The reasons depict the application of mind of the authorities passing the order. The order blacklisting the petitioner is bereft of any reasons. The order nowhere suggest that the authority has considered the explanation given by the petitioner threadbare. In fact, authority was required to consider the explanation given by the petitioner, deal with the said explanation and ought to reason out as to why he is either accepting or not accepting the explanation given by the petitioner. The order being without reasons cannot be sustained. More over, when the particular order leads to civil consequences, the explanation offered has to be considered threadbare by the authority and thereafter arrive at a conscious conclusion.

10. In light of the above, it will be appropriate to direct the authority to consider the

explanation put forth by the petitioner and decides it on own merits.

11. In view of the above, the order dated 03.12.2018 is set aside. The authority shall consider the explanation given by the petitioner and after dealing with the explanation given by the petitioner shall arrive at independent conclusion. The learned counsel for the petitioner says that the petitioner would file additional reply to the same. The petitioner is permitted to file additional reply within a period of fifteen days from today. The additional reply shall also be considered by the authority before taking any decision pursuant to the show cause notice dated 12.10.2018 issued to the petitioner for blacklisting.

12. This takes us to the second grievance to allow the petitioner to participate in the E-Reverse auction.

13. The process is already completed. Still there would be cloud over the right of the petitioner. It would not be appropriate to stall the public work. The authority has to reconsider and decide afresh pursuant to show cause notice issued to the petitioner as to why petitioner should not be blacklisted. In case, the petitioner's explanation is accepted, there would

be no further question. However, if the petitioner's explanation is not accepted, then again there would be further delay in the conduct of the work. The E-Reverse auction having already been concluded, we are not inclined to stall the same. The prayer to that extent is negatived.

14. Writ Petition accordingly is disposed of with aforesaid observation.

15. The learned counsel for the petitioner submits that there was a stay to the issuance of the work order till date, the same be continued for the period of two weeks. In fact, E-Reverse auction has already taken place. It is because of the pendency of the writ petition, no further steps of issuance of work order could be taken. There is still a cloud over the right of the petitioner. In view of that the said request is refused.

(A. M. DHAVALÉ)
JUDGE

(S. V. GANGAPURWALA)
JUDGE