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

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Judgment Reserved on: 28.02.2019

Judgment Pronounced on: 25 .03.2019

+ **FAO 68/2019 & CM NO 8294/19 (for stay)**

ALLIED MEDICAL LTD. Appellant

Through: Mr. Rajat Wadhwa and Mr. Karanprret
Singh, Advocates.

Versus

UTTAR PRADESH HEALTH SYSTEMS
STRENGTHENING PROJECT Respondent

Through: Ms. Shanta Pandey, Mr. Hiren Dasan,
Mr. Rajive Ranjan, Mr. Harish Dasan
and Mr. Chand Qureshi, Advocates

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. The impugned order dated 12.02.2019 passed by the court of learned Additional District Judge-03, Patiala House Courts, New Delhi ('ADJ') dismissing the application of the appellant

under Section 9 of the Arbitration and Conciliation Act, 1996 (in short 'AACA') being ARB 437/2019 is the subject matter of challenge in this appeal.

2. The brief facts of the case are that the Government of India had received credit from the International Development Association (IDA) towards the Uttar Pradesh Health Systems Strengthening Projects (UPHSSP). Thereafter, its Project Director floated an e-tender, *inter alia*, inviting bids for the purchase of medical equipments consisting of (i) Infusion Pumps, (ii) Cardiac Monitors, and (iii) Binocular Microscope with light source.
3. The appellant was one of the five participants in submitting the bids to the respondent for supply of the Cardiac Monitors. The bids were opened on 05.02.2018. The contract to supply 23 Cardiac Monitors for Rs. 27,56,320/- was assigned by the respondent to the appellant. The contract was signed on 06.07.2018 by the parties and the respondent placed an order with the appellant. The appellant informed the respondent by e-mail dated 16.08.2018 for pre-dispatch inspection on or after 22.08.2018. The respondent got the Cardiac Monitors imported by the appellant inspected through a third party inspection agency i.e. Central Scientific Instrument Organization, New Delhi ('CSIR') on 24.08.2018 at Gurugram. The 'CSIR' in its pre-dispatch inspection report (i.e. prior to the supply of the cardiac monitors) informed the respondent the

following deficiencies in the Cardiac Monitors (Model No. M747) as per the e-tender format:-

	COMPLIANCE DETAILS	OBSERVATION	YES/NO
5.	Should have the facility of monitoring ECG, RR, Dual sp02, NIBP and Temperature for Adult, Paediatric & Neonatal applications	Facility of monitoring ECG, RR, sp02, NIBP and Temperature for Adult, Paediatric & Neonatal applications available	1. YES for ECG, RR, NIBP and Temperature. 2. NO for Dual sp02**
8.	Should have detection facility for advanced arrhythmias along with ST analysis, St mapping, QT analysis, HRV analysis & NIBP analysis	Detection facility for advanced arrhythmias along with ST analysis, ST mapping & NIBP analysis available.	1. YES for advanced arrhythmias along with ST analysis, ST mapping & NIBP analysis 2. NO for QT analysis & HRV analysis

4. Having received the report from the 'CSIR', the respondent issued a show-cause notice dated 13.09.2018 to the appellant about the above deficiencies, and stating that *"It is also to bring to your notice that at the time of technical bid evaluation, our Procurement Agent M/s. HLL Infra Tech Services Limited has*

asked for clarification regarding compliance of technical specification for which you had agreed upon compliance of all the technical specification mentioned in the e-bid document.

Seeing the above facts, it is clear that there is certainly a breach of conditions of the contract, which highly unacceptable and you have committed a grievous offense by misleading/hiding facts with the Project.

You are hereby directed to submit your explanation with all the required evidences within 7 days, failure to which we shall be forced to forfeit your performance security as well as blacklist your firm.”

5. The appellant sent a reply dated 21.09.2018 to the respondent *“Please note that the inspection was carried out on 24th August, 2018. The material was duly imported and received from customs few minutes before the inspection and as a result our technical team did not get enough time to property prepare for the inspection.*

Kindly note that we have offered our quoted model of monitor with Dual SP02 facility however there is no technical specification given for dual SP02 which is not a standardised requirement. Accordingly, we have offered our monitor with choice of 2 different SP02 facilities i.e. Masslmo SP02 and our own SP02 and details of the same have been submitted at the time of technical evaluation as well. (copy enclosed)

Kindly note that at the time of technical evaluation we have submitted details of all analysis available in our monitors for which product brochure was submitted earlier and also relevant details from technical user manual were also submitted at the time of technical evaluation (copy enclosed). We have offered our monitors accordingly with the same features.”

6. However, by an office order dated 09.10.2018, the respondent conveyed to the appellant that they have terminated the agreement dated 06.07.2018 and forfeited their Bank Guarantee of Rs. 2,76,000/- and also decided to blacklist them.
7. The appellant preferred a petition being case No. MISE. BENCH No.-31476 of 2018 before the Allahabad High Court and by an order dated 29.10.2018, the Division Bench quashed the impugned office order dated 09.10.2018 and remanded the matter back to the respondent to adjudicate afresh.
8. The appellant submitted a fresh representation dated 26.11.2018 to the respondent. After providing the appellant personal hearing, the respondent by an office order dated 21.12.2018, terminated the said contract dated 06.07.2018 and forfeited the performance guarantee and blacklisted the appellant for a year.
9. The appellant filed an application under Section 9 of the ‘AACA’ that the contract between the parties contains an arbitration clause and sought, *inter-alia*, injunction against the operation of the said order dated 21.12.2018 passed by the respondent to the extent of blacklisting them on the ground that

(i) the respondent has not granted any opportunity to remove the defects or shortcomings in the equipments as per the terms of the contract and (ii) the blacklisting order has severe civil consequences upon the appellant and do not flow from the contract entered between the parties since the written contract did not provide for termination of the contract without following the remedial procedure provided for.

10. In its reply, the respondent, *inter-alia*, has denied the allegations of the appellant.
11. After hearing the learned counsel for the parties, the trial court dismissed the application in terms as under:-

“7. The interim relief sought herein has nothing to do with the contract between the parties. It is the case of petitioner that order of black listing him affects his rights to apply for Government contracts in general as he would be barred by Government with respect to all other contracts as well. However, what will be the impact of black listing petitioner vide order dated 21.12.2018 with respect to his rights in general qua other contracts, cannot be adjudicated by way of Section 9 application. By way of this application, petitioner is not seeking interim protection qua this contract only. Rather, he is seeking enforcement of his civil rights which are curtailed by the said order. However, the said is beyond the purview of Section 9 of Arbitration Act.

8. Further, it is the own case of plaintiff that black listing is beyond the purview of the arbitration.

9. Further, the order regarding black listing is part of the order wherein the contract is terminated. Black listing is a consequence of the order of termination. The entire order can be held to be illegal or legal after deciding the case on merits. At this stage, on the basis of Section 9 application the said order cannot be stayed.

10. Application is dismissed.”

12. The learned counsel for the appellant vehemently argued that the appellant should have been given an opportunity to remove the defects in the Cardiac Monitors by the respondent in terms of the clause 4(c), 10.1, 10.2, 26.7, 28.4 to 28.6 instead of terminating the contract. He contended that there is no provision in the contract to blacklist the appellant even if there were some defects in the equipments. He further argued that they were not given an opportunity for hearing before blacklisting the company since the blacklisting would have serious civil consequences on them and they would not be able to participate in the tenders in future. He also relied upon the judgment of the single bench of this court in ***Jyoti Structure Ltd. Vs. Dakshinanchal Vidyut Vitran Nigam Ltd. 2016 SCC Online Del 5035: (2016) 233 DLT 207*** wherein it was held that *“Before concluding it would also be necessary to consider the contention that by virtue of the letter of termination, JSL has been effectively blacklisted. Although Mr. Misra contended that debarring JSL from participating in future tenders for a period of one year did not amount to blacklisting, I am unable to*

accept the same. Clearly the direction to debar JSL from participating in future tenders is a punitive measure and would amount to blacklisting. It is well settled that such punitive measures cannot be taken without issuing a show cause notice and without affording the concerned party an opportunity to be heard (See Erusian Equipment & Chemicals Ltd. v. State of West Bengal.: (1975) 2 SCR 674 and Grosons Pharmaceuticals (P) Ltd. and v. The State of Uttar Pradesh: (2001) 8 SCC 604). ”

13. He submitted that so far as the illegal termination of the contract and forfeiture of the EMD is concerned, he will seek the appropriate relief before the arbitral proceedings, however, he prayed that the order dated 21.12.2018 to blacklist them may be stayed till the arbitral proceedings are over.
14. *Per contra*, the learned counsel for the respondent has argued that there is no infirmity or illegality in the impugned order which has been passed by the trial court in accordance with law, and appeal is liable to be dismissed.
15. I have heard the learned counsel for the parties.
16. This court finds that the appellant has concealed material facts from the court. It is a well settled principle of law that while seeking discretionary relief of injunction the parties must approach the court with clean hands by disclosing each and every material fact.
17. This Court in “*M/S. Cycle Equipment (P) Ltd. v. Municipal Corporation of Delhi & Ors. ILR (1981) 2 Del 639*” held that

“17. ... Both parties appearing before the Court have an unfailing duty to disclose correct facts on which the decision is sought. Court has no means of ascertaining the facts independently nor is it advisable. In an adversory system both parties get an opportunity to point out the shortcomings in the adversary's case. But, in order to prevent a mischief, it becomes necessary to pass ex parte orders in some cases. A party seeking an ex parte order has an implied duty that no prejudicial order is secured against the adverse party by misrepresentation or trick. This is the principle of UBERIMA FIDES. Applying this principle the Division Bench of this Court in Civil Writ Petition No. 633 of 1980 in Nehru Place Hotels Ltd. v. MCD (2) held that the “door will be closed to a discretionary remedy” because of misleading statements of material facts.”

18. The Hon'ble Supreme Court in the case of ***S.P. Chengalvaraya Naidu v. Jagannath*, (1994) 1 SCC 1** held that:

“5. ...The principle of “finality of litigation” cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on

falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. ... A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

19. This Court in the case of *“Holy Health and Educational Society (Regd.) v. Delhi Development Authority (1999) 80 DLT 207* held that *“20. ... Thus, an attempt has been made by the plaintiff to over-reach the Court and the plaintiff has played fraud upon the Court as well as upon the opposite party and thus, the suit filed by the plaintiff itself is liable to be dismissed, in view of suppression and concealment of material facts by the plaintiff and his failure to come to the Court with clean hands.”*
20. The Hon’ble Supreme Court in *Badami v. Bhali, (2012) 11 SCC 574* has held that *“31. A person whose case is based on falsehood has no right to approach the court. A litigant who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If a vital document is withheld in order to gain advantage on the other side he would be guilty of playing fraud on court as well as on the opposite party.”*
21. In its order dated 21.12.2018, it is noticed by the respondent that the bids were opened on 25.01.2018 and the appellant had

quoted the lowest rates. Before assigning the contract to the appellant, the respondent's procurement agency M/s HLL, Hites sought a clarification from the appellant by e-mail dated 19.02.2018 about availability of Dual SP02 and QT analysis and HRV analysis to which on 23.02.2018 by e-mail the appellant assured that they shall ensure availability of Dual SP02 and QT analysis and HRV analysis in the Cardiac Monitors. Only then, the decision was taken on 05.06.2018 by the respondent to award the contract to the appellant. Accordingly the sanction was given on 13.06.2018 by the President, Project Steering Committee. The contract was signed between the parties on 06.07.2018. However, when the Cardiac Monitors were placed at Gurugram for pre-dispatch inspection by the 'CSIR', it was found that the machines did not fulfill pre-requisite mandatory features "Dual SP02" and "QT Analysis and HR Analysis" in terms of specification of the tender.

22. This is to be noted that these e-mails dated 19.02.2018 and 23.02.2018 have been concealed by the appellant from the court. These have neither been pleaded in the application under Section 9 of the 'AACCA' before the Ld. 'ADJ' nor mentioned in the appeal. Even during the course of arguments these were not brought to the notice of this Court. This Court finds that office order dated 21.12.2018 was issued by the respondent after considering all aspects including e-mails dated 19.02.2018 and 23.02.2018.

23. The appellant was given due opportunity of hearing by the respondent before issuing the order dated 21.12.2018. A contradictory stand was taken by the appellant before the respondent. On one hand it was pleaded that there were no deficiency in the monitors. On the other hand, it was pleaded that they should have been given an opportunity to make up the deficiencies in the monitors. It is also to be noticed that while responding to the show cause notice dated 13.09.2018, the respondent in its reply dated 21.09.2018 did not come forward to make up the deficiencies or arrange/import new Cardiac Monitors having features which were found deficient. In the reply dated 21.09.2018, they have given insufficient explanation even for deficiency of the feature of “Dual SP02”. Surprisingly the appellant did not explain in its reply dated 21.09.2018 qua the other vital deficient features i.e. “OT Analysis and HR Analysis”.
24. During the course of the arguments, the learned counsel for the respondent clarified that “Dual SP02” indicates oxygen saturation in the blood and “QT Analysis and HR Analysis” indicates time of ventricular activity of the heart and the heart rate variability.
25. By the office order dated 21.12.2018, the respondent found that the appellant by giving the lowest rate obtained the status of L1 thereby causing exit of other four firms out of the race. The respondent further noticed that the appellant in order to obtain

the contract of tender for sensitive Cardiac Monitors has adopted the procedure which is completely against the public interest and opposite to the specified standards of the tender and such firm cannot be allowed to play with the health of the general public.

26. There is no force in the argument of the Ld. Counsel for the appellant that the appellant cannot be blacklisted in the absence of any term to the effect in the contract as it is inherent in the discretion of the party allotting the contract and there is no need of any clause in the contract. In ***Kulja Industries Ltd. v. Western Telecom Project BSNL, (2014) 14 SCC 731*** it was held by the Hon'ble Supreme Court *"17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to*

judicial review when the same is taken by the State or any of its instrumentalities.”

27. There was no occasion for the respondent to invoke the clause in the agreement asking the appellant to make up the deficiency found in the Cardiac Monitors since they have already played fraud by participating in the tender with mala fide intention knowing fully well that the Cardiac Monitors, which they would supply, shall not meet the criteria as per the specifications of the tender. Even by e-mail dated 23.02.2018 in response to the e-mail dated 19.02.2018 the appellant falsely assured that the Cardiac Monitors would have the essential features of “Dual SP02” and “QT Analysis” and HRV analysis”. It appears to the Court that the Director and officers at the helm of affairs of the appellant might have thought to get through the defective monitors by bribing or winning over the public servants of the respondent. The officers of the respondents deserve appreciation in taking the bold decision to blacklist such company for one year. The decision of the respondent in blacklisting the appellant is completely justified in view of the false assurances extended by the appellant through e-mail dated 23.02.2018.
28. In view of this discussion, there is no prima-facie case made out in the favour of the appellant to grant them any injunction against the respondent from being blacklisted.

29. I do not find any merit in this appeal and the same is dismissed with the cost of Rs. 50,000/- to be deposited with Prime Minister's Relief Fund for concealing and suppressing the material documents and facts within 15 days. The receipt of cost shall be placed on record by the appellant within one week thereafter. In case of non-compliance, the Registry shall place the matter before this court for directions.

MARCH 25, 2019

**(VINOD GOEL)
JUDGE**

