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

Date of Decision : 09.01.2020

+ **W.P.(C) 36/2020 & CMs 92/2020, 464/2020**

JAYANTA KUMAR GHOSH OUTDOOR CATERING PVT
LTD Petitioner

Through: Mr.Neeraj Malhotra, Sr. Adv. with
Mr.Jitender Mehta, Mr.Lakshya Sachdeva,
Advs.

versus

INDIAN RAILWAYS CATERING AND TOURISM
CORPORATION LIMITED (IRCTC) THROUGH: ITS
GROUP GENERAL MANAGER/SERVICE Respondent

Through: Mr.Nikhil Majithia, SC with
Mr.Manish Bishnoi, Mr.V.Raj, Ms.Simran
Kaur, Mr.Ritesh Kumar, Mr.Anurag Sarda,
Advs. for IRCTC.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. With the consent of the learned counsels for the parties, the petition has been taken up for final hearing at the notice stage itself.

2. This petition has been filed by the petitioner challenging the order dated 20.12.2019 passed by the respondent,

terminating the Agreement/Letter of Award dated 20.09.2019 along with forfeiture of security deposit and licence fee deposited by the petitioner, as also debarring the petitioner for a period of three years from participating in future projects of the respondent.

3. The respondent had floated a tender dated 30.08.2019 *inter alia* for providing catering services on board of Ahmedabad – Mumbai Tejas Express Train. The bids were to be submitted by 14.09.2019, which the petitioner claims, was later extended till 16.09.2019. Clause 4 of the tender document prescribed the ‘Qualifying Criteria’ as under:

4.0	<i>Technical Criteria</i>	<i>Documents required to be scanned and uploaded</i>
	<i>Net Worth: Firm/Company have minimum of Rs.5 Crores on 31.03.2019</i>	<i>Certificate for net worth issued by Chartered Accountant.</i>

4. Clause 2 of the Note to the Qualifying Criteria of the tender document, further reads as under:

“2. The data submitted by the successful bidder, In compliance of the above eligibility conditions shall be subject to verifications by IRCTC itself or through an agency (Expert In Forensic Audit) appointed by IRCTC, for which all necessary documents shall have to be essentially provided by the bidder, if so required. If the successful bidder

is found to be Ineligible on such verification, the letter or award will be terminated along with forfeiture of licence fee and Security deposit. In such eventuality the successful bidder will also be debarred for 3 years from participating in the future projects of IRCTC.”

5. The petitioner along with its offer, submitted a certificate dated 13.09.2019 issued by its Chartered Accountant certifying the total Net Worth of the petitioner to be Rs.5,05,68,394/-.

6. In terms of Clause 2 of the Note of the tender document, the respondent got a Forensic Audit conducted of the documents submitted by the petitioner and after pursuing the said documents filed by the petitioner in support of its claim before such Auditor, it has been reported that the Net Worth of the petitioner as on 31.03.2019 was Rs.505.68 lacs.

7. Based on the report of the Forensic Auditor, the respondent issued a Letter of Award dated 20.09.2019 in favour of the petitioner. The same was challenged by one M/s Brandavan Food Products Pvt. Ltd. by way of WP(C) No.10661/2019 *inter alia* on the ground that the petitioner was not eligible for the Award of the said tender inasmuch as its Net Worth was not more than Rs.5 crores as on 31.03.2019.

8. In the counter affidavit filed by the respondent in the said Writ Petition, the respondent defended its decision to award the Contract in favour of the petitioner herein, *inter alia* placing reliance on the Forensic Audit Report.

9. While the said Writ Petition was pending adjudication, the respondent issued a Show Cause Notice dated 11.12.2019 to the petitioner and after pursuing the reply filed by the petitioner, has passed the Impugned Order.

10. The Impugned Order rejects the submissions of the petitioner observing as under:

“I have examined the reply dated 16.12.2019 as well as documents furnished therein to evaluate its status vis a vis tender conditions. JK Ghose Outdoor Catering Pvt. Ltd. has filed a notice dated 15.03.2019 for holding an extra ordinary general meeting of the company on 30.03.2019 to consider increase in authorised share capital of the company from Rs.1,00,00,000/- to Rs.5,25,00,000/- by creating additional 4250000 equity share of Rs.10. Board of Directors of the JK Ghose Outdoor Catering Pvt. Ltd. vide proceedings dated 15.03.2019, resolved to increase authorised share capital of the company from Rs.1 Crore to Rs.5.25 Crore. A similar resolution was allegedly adopted by shareholders in extra ordinary meeting dated 30.03.2019. However, JK Ghose Outdoor Catering Pvt. Ltd. has annexed form SH7 submitted to ROC for alteration of authorised share capital and attached two documents with the said form, One is certified copy of another resolution adopted by shareholders in the extra ordinary general meeting held on 30.03.2019 increasing the authorised share capital from Rs.1 Cr to Rs.1.5 Cr. Thus, there appears to be two conflicting board/shareholder resolutions dated 30.03.2019, one for increase of share capital to Rs.1.5 Cr. and another for increase of share capital to Rs.5.25 Cr. On an independent

verification from ROC website it was found that Form SH7 for alteration of share capital was for Rs.5.25 Cr. but the documents produced in support thereof did not tally with Form SH7. The ROC website showed the Board Resolution dated 30.03.2019 increasing authorised share capital from Rs.1 Cr. to Rs.1.5 Cr. and not Rs.5.25 Cr. as is being claimed by JK Ghose Outdoor Catering Pvt. Ltd. The said resolution has been signed by two directors of the company. Similarly, MOA of the company which was amended and uploaded to ROC website depicted increase of authorised share capital of the company to Rs.1.5 Cr. only and not Rs.5.25 Cr.

PAS3 shows allotment of 3328017 equity shares of Rs.10 as on 30.03.2019, increasing the share capital to 42953160. It is an admitted fact that the cut off date for submission of tender was 16.09.2019 and filing of document to any authority after the said date, especially when the letter of award dated 20.09.2019 was issued, cannot be taken into account while reviewing the net worth of the company. The certificate and affidavit filed on behalf of Gadly Shaw and Associate, Chartered Accountant cannot be accepted at this stage. The said chartered accountant has admitted that wrong resolution and MOA prepared at the instructions of the Directors was uploaded inadvertently. The fact remains that the said resolution has been passed by shareholders and certified copies duly authenticated by the Directors are in the official records (i.e. ROC records). In these circumstances it cannot be said that the documents i.e. Shareholders Resolution dated 30.03.2019 and MOA showing increasing capital to Rs.1.5 Crores were not adopted in the meeting. In case, these documents have not been passed, the certified copies could not have been issued. In fact, the

existence of two signed Board Resolutions, both dated 30.03.2019, points to either antedating of documents or falsification of company records. Accordingly, I am constrained to take cognizance of shareholder resolution increasing the capital only to Rs.1.5 Crores and there was no official compliance/approval to increase the authorised share capital to Rs.5.25 Crores. As such, JK Ghose Outdoor Catering Pvt. Ltd. does not fulfil the mandatory eligibility criteria in respect of net worth of the company and the documents submitted by him along with its bid to claim net worth to the extent of Rs.5.25 Cr. are not supported by necessary documents as is revealed by its reply dated 16.12.2019.”

11. At the outset, it may be noted that the petitioner has not insisted upon its challenge to the Impugned Order insofar as it terminates the Letter of Award dated 20.09.2019 issued by the respondent in favour of the petitioner. This has also been recorded by the Division Bench of this Court in its order dated 08.01.2020 in W.P. (C) 36/2020. The only challenge of the petitioner therefore, left in the present petition is that on the decision of the respondent to forfeit the security deposit and the licence fee deposited by the petitioner as also banning the petitioner for three years from participating in the future projects of the respondent.

12. The learned senior counsel for the petitioner submits that the respondent has failed to appreciate that the Net Worth of the petitioner was in fact more than Rs.5 crores as on 31.03.2019,

as it had increased its Authorized Share Capital from Rs.1 crore to Rs.5.25 crores by a Board Resolution dated 30.03.2019. He submits that in this regard, the petitioner had filed Form SH-7 with the Ministry of Corporate Affairs after depositing a fee which is calculated as per the increase in the Authorized Share Capital. The said form was duly accepted by the Ministry of Corporate Affairs, as is evidenced from its e-mail dated 12.09.2019. However, along with the Form SH-7, the petitioner had, due to a bona fide mistake, uploaded an incorrect copy of the Board Resolution as also the Memorandum of Association, which reflected the increase in Share Capital to be of only Rs.1.50 crores. This was clearly a bona fide error as is evident from not only a reading of the Form, but also from the fee that was deposited alongwith the Form. The Ministry of Corporate Affairs also did not notice this discrepancy and, in fact, accepted the Form. Later on 18.09.2019, the petitioner also filed Form PAS-3, which also clearly showed the Paid up Capital of the petitioner company to be Rs.429.53 lacs. He submits that therefore, for a bona fide error in uploading of certain documents along with Form SH-7, the petitioner could not have been visited with such grave penalty.

13. The learned senior counsel for the petitioner, placing reliance on the Clause-2 of the Note to the Qualifying Criteria in the tender document, further submits that in any case, the forfeiture of the security deposit and the licence fee as also the

order of banning could have been passed by the respondent only if the Forensic Audit data submitted by the petitioner was found to be incorrect and the petitioner was found to be ineligible. In the present case, even the Forensic Auditor found the petitioner to be eligible and as having achieved the eligibility criteria with respect to the Net Worth requirement, he submits that therefore, Clause-2 of the Note of the Qualifying Criteria could not have been put in service for passing the Impugned Order.

14. The learned senior counsel for the petitioner further submits that the petitioner has, on realizing the mistake, also filed the Form No.MGT-14 with the Ministry of Corporate Affairs for rectifying the error.

15. On the other hand, the learned counsel for the respondent submits that clearly the copy of the Board Resolution uploaded along with Form SH-7 restricted the increase in Authorized Share Capital to only Rs.1.50 crores. As the same had been certified by the Directors of the petitioner company, there was no reason to disbelieve the same. If the said document is taken into consideration, the Net Worth of the petitioner was below the required Net Worth and therefore, the petitioner was ineligible and the licence fee along with security deposit was liable to be forfeited. The petitioner was also liable to be banned from further dealings in terms of Clause-2 of the Note of the Qualifying Criteria.

16. I have considered the submissions made by the learned counsels for the parties.

17. Form SH-7 that had been uploaded by the petitioner prior to the last date of submission of the tender, clearly reflects increase in Authorized Capital of the petitioner company to Rs.5.25 crores, thereby meeting eligibility criteria stipulated by the respondent in the tender document. It is also not denied that at the time of uploading the said Form, the petitioner had paid the fee, which is determined on the basis of the increase in share capital to Rs.5.25 crores. The said Form had been duly accepted by the Ministry of Corporate Affairs without pointing out the discrepancy in the attached documents which showed the increase in the Authorized Capital to be only Rs.1.50 crores. It is evident that the petitioner had made a bona fide error at the time of uploading of the supporting documents along with Form SH-7. For such bona fide error, the petitioner cannot be visited with such grave penalty.

18. It is noted that even in the Forensic Audit, the petitioner was called upon to submit documents in support of its claim for the Net Worth and the Forensic Auditor, which is an independent authority, came to a conclusion that the Net Worth of the petitioner as on 31.03.2019 was more than Rs.5 crores, which was the requirement under the tender document.

19. While this Court cannot, in exercise of its powers of judicial review, determine the validity of the decision taken by

the respondent as if sitting as a Court of Appeal against the same, however, at the same time, the decision taken by the respondent has to meet the test of fairness and proportionality. For a bona fide error committed by the petitioner, the petitioner cannot be visited with such harsh penalty, which would in fact, amount to a civil death of the petitioner company.

20. In ***Kulja Industries Ltd. vs. Western Telecom Project BSNL***, (2014) 14 SCC 731, the Supreme Court has held as under:-

“20. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality…….”

21. As far as the order of blacklisting is concerned, the Supreme Court further gave the factors that may influence the debarring official’s decision, as under:-

22. The guidelines also stipulate the factors that may influence the debarring official’s decision which include the following:

a) The actual or potential harm or impact that results or may result from the wrongdoing.

b) The frequency of incidents and/or duration of the wrongdoing.

c) Whether there is a pattern or prior history of wrongdoing.

d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official."

22. In *Coimbatore District Central Coop. Bank vs. Employees Association and Anr.*, (2007) 4 SCC 669, the Supreme Court held that:-

“Doctrine of proportionality

17. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the “doctrine of proportionality”.

18. “Proportionality” is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.

19. de Smith states that “proportionality” involves “balancing test” and “necessity test”. Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative.

[Judicial Review of Administrative Action (1995), pp. 601-05, para 13.085; see also Wade & Forsyth: Administrative Law (2005), p. 366.]

20. *In Halsbury's Laws of England (4th Edn.), Reissue, Vol. 1(1), pp. 144-45, para 78, it is stated:*

“The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness.”

21. *The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no “pick and choose”, selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a “sledgehammer to crack a nut”. As has been said many a time; “where paring knife suffices, battle axe is precluded”.*

23. Applying the above tests to the facts of the present case, the punishment imposed on the petitioner for its bona fide mistake, is shockingly disproportionate and cannot be sustained, especially where the petitioner has also lost out of the Contract due to such mistake.

24. In view of the above, one of the option available to this Court was to remand the matter back to the respondent for a fresh consideration. This option was exercised by the Division Bench of this Court in its order dated 08.01.2020, wherein the respondent was called upon to consider whether any concession can be granted to the petitioner for its bona fide error. The respondent has, however, reiterated its decision.

25. In view of the above, this Court has been left with no other option but to set aside the Impugned Order dated 20.12.2019 in so far as it directs the forfeiture of the licence fee and the security deposit of the petitioner with the respondent and further debars the petitioner for a period of three years from participating in future projects of the respondent. The respondent is directed to release the said amounts within a period of two weeks to the petitioner from the date of the communication of the present order, as also, remove the name of the petitioner from the Banning List.

26. The respondent shall, however, be entitled to forfeit the Earnest Money of Rs. 10,00,000/- deposited by the petitioner at the time of submission of its offer under the tender.

27. The petition is allowed in the above terms and directions.
28. There shall be no order as to costs.

NAVIN CHAWLA, J

JANUARY 09, 2020
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