

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

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Date of decision: 05.03.2020

+ **LPA 87/2020 & C.M.Appln.6238/2020**

INDIAN RAILWAY CATERING & TOURISM CORPORATION
LTD Appellant

Through: Mr. Nikhil Majithia, Advocate

versus

M/S JAYANTA KUMAR GHOSH OUTDOOR CATERING PVT
LTD Respondent

Through: Mr. Neeraj Malhotra, Senior
Advocate with Mr. Jitender Mehta, Mr. Akshya
Sachdeva and Mr. Ujjawal Kumar, Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ASHA MENON, J.

1. This appeal has been preferred by the appellant/Indian Railway Catering & Tourism Corporation Limited (for short, 'IRCTC') against the judgment dated 09.01.2020, passed by the learned Single Judge in W.P.(C) 36/2020 filed by the respondent/M/s.Jayanta Kumar Ghosh Outdoor Catering Pvt. Ltd. allowing the petition and setting aside the order dated 20.12.2019 whereby, the respondent/company was debarred from participating in the future projects of the appellant/IRCTC for a period of three years while upholding forfeiture of the Earnest Money Deposit (for short, 'EMD') for a sum of Rs.10 lakhs.

2. The brief facts as are relevant for the disposal of the present appeal

are that under a new arrangement, the appellant/IRCTC was to operate certain trains, namely, Tejas Trains while paying haulage charges as also the custody charges to the Indian Railways. Catering and allied services on the Tejas Trains were also to be managed by the appellant/IRCTC, but in order to do so, it published a Notice Inviting Tender (for short, 'NIT') on 30.08.2019, inviting bids for Catering and Allied On-Board Services for the said Tejas Trains. The Open E-Tender No.-2019/IRCTC/CATERING/TEJAS TRAINS dated 30.08.2019, provided for a pre-bid meeting on 09.09.2019 at 11:30 hrs.. The last date and time of submission of bids was 14.09.2019 upto 15:00 hrs. and the date and time of opening of the technical bids was 14.09.2019 at 15:15 hrs. An EMD of Rs.10 lakhs was required to be deposited by the bidders. The period of Licence Fee was two years plus one year on the Lucknow-New Delhi Tejas Express and Ahmedabad-Mumbai Tejas Express. The Instructions to Tenderers in Clause 4.0 provided as follows:-

“ **QUALIFYING CRITERIA** ”

	<i>Mandatory Criteria</i>	
	<i>Technical Criteria</i>	<i>Documents Required to be scanned and uploaded</i>
1.0	xxx	Xxx
2.0	Xxx	Xxx
3.0	Xxx	Xxx
4.0	<i>Net Worth: Firm/Company have minimum of Rs.5 crore on 31.03.2019</i>	<i>Certificate for net worth issued by Chartered Accountant.</i>

NOTE

1. xxx xxx
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 of award will be terminated along with forfeiture of license 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.”

3. Vide letter dated 20.09.2019, issued by the appellant/IRCTC, the respondent/company was awarded the licence for provision of “On-Board Catering and Allied Services in the Ahmedabad-Mumbai Tejas Express @ Annual Concession Fee of Rs.2,51,55,555/-”, for a period of two years, extendable further by one more year subject to the terms and conditions of the bid document. The said Licence Fee with GST @18%, thus totalling to Rs.2,96,83,555/-, was deposited by the respondent/company alongwith a Security Deposit of Rs.2 crores. However, vide letter dated 20.12.2019, the appellant/IRCTC conveyed to the respondent/company its decision to terminate the licence so granted on 20.09.2019 on the ground that it did not fulfil the mandatory eligibility criteria in respect of the net worth of the company and the disclosure made alongwith its bid to claim net worth to the extent of Rs.5.25 crores, was not supported by necessary documents, as was revealed from the reply dated 16.12.2019, submitted by the respondent/company in response to the Show-Cause Notice dated 11.12.2019, issued by the appellant/IRCTC. While so terminating the Agreement/Letter of Award dated 20.09.2019, forfeiture of the Security Deposit and the Licence Fee was also directed and the respondent/company

was debarred from participating in the future projects of the appellant/IRCTC for a period of three years.

4. Aggrieved by this termination, the respondent/company filed W.P.(C) 36/2020, with the following prayers: -

- 1. Issue an appropriate Writ, Direction or Order quashing the impugned letter of termination dated 20.12.2019 issued by Respondent at the objection of M/s Brandavan Food Products.*
- 2. Issue an appropriate Writ, Direction or Order directing Respondent that upon quashing of termination letter dated 20.12.2019, Petitioner may be permitted to execute work in accordance with Letter of Award dated 20.9.2019.*
- 3. Without prejudice to the aforesaid prayer, Issue an appropriate Writ, Direction or Order inter alia directing Respondent to refund security and lease amount totalling to Rs. 4.96 crores in case this Hon'ble Court upholds the termination letter dated 20.12.2019.*
- 4. Issue an appropriate Writ, Direction or Order inter alia directing Respondent to pay an amount to the extent of additional expense incurred, being the amount of loss suffered by the Petitioner herein upon issuance of termination letter dated 20.12.2019.*
- 5. Issue an appropriate Writ, Direction or Order inter alia directing Respondent to give personal hearing to Petitioner for explaining the stand of Petitioner.*
- 6. Pass any order or further orders as this Hon'ble Court may deem fit and proper.*

5. Before the learned Single Judge, however, the respondent/company did not press its challenge to the impugned order terminating the Letter of Award and limited the challenge to the decision of the appellant/IRCTC of

forfeiting the Security Deposit and the Licence Fee and banning it for a period of three years from participating in the future projects of the appellant/IRCTC.

6. After hearing both sides, the learned Single Judge concluded that the punishment imposed on the respondent/company for a *bona fide* mistake, was shockingly disproportionate and could not be sustained and thus set aside the impugned order dated 20.12.2019, save and except for the forfeiture of the EMD of Rs.10 lakhs deposited by the respondent/company at the time of submission of the bid. Aggrieved thereby, the appellant/IRCTC has preferred the present appeal.

7. Mr. Nikhil Majithia, learned counsel for the appellant/IRCTC contended that the learned Single Judge has erroneously concluded that while submitting its bid, the mis-information provided by the respondent/company in respect of its net worth, was a *bona fide* mistake as the documents on record clearly established otherwise. He pointed out that there were in fact, two Resolutions of the respondent/company of the same day and the date and time of the alleged meetings held pursuant to the two Meeting Notices of the same date, reflecting two different figures, was also the same, which goes to show that the documents in question were fabricated. He submitted that the initial share capital of the respondent/company was only Rs.1 crore. The certified copy uploaded by the respondent/company alongwith Form No.SH-7 on the website of the Registrar of Companies was of a resolution adopted by the shareholders in the EGM held on 30.03.2019, where the following was resolved: -

“RESOLVED that the Authorized Share Capital of the Company be increased from Rs.100,00,000/- to Rs.150,00,000/-

by the creation of additional 5,00,000 Equity Shares of Rs.10/- each.”

8. The Notice dated 15.03.2019 for this meeting, copy whereof is placed at page No.191 of the appeal paper-book, records the following Agenda: -

“1. To consider and if thought fit to pass with or without Notification, the following Resolutions as an ordinary Resolution:

RESOLVED that the Authorized Share Capital of the Company be increased from Rs.100,00,000/- to Rs.150,00,000/- by the creation of additional 5,00,000 Equity Shares of Rs.10/- each.”

9. It is submitted that there was no scope of erroneously certifying these copies as the originals would have been available with the respondent/company even at the time of filling Form No. SH-7 and they were correctly uploaded. This clearly showed that the attempt made on the part of the respondent/company was to appear to have fulfilled the requirements on paper before the last date for submission of the bids, i.e. 14.09.2019, which was extended to 15.09.2019. That was why Form No.SH-7 was uploaded on 12.09.2019, declaring the authorized share capital of the respondent/company to be Rs.5,25,00,000/- while the Memorandum of Articles reflected the authorized share capital as Rs.1.5 crores only. It was submitted that an attempt was made by the respondent/company to misrepresent that the net worth of the company was what was claimed as on 30.03.2019, by fabricating the Resolution and the EGM Notice for enhancement of the authorised share capital of the company from Rs.1 crore to Rs.5.25 crores, which unfortunately bore the same date as the earlier Resolution and EGM Notice whereby the authorized share capital of the

company was to be increased only to Rs.1.25 crores.

10. Learned counsel for the appellant/IRCTC further contended that though ordinarily, blacklisting is done only for a period of one year, this project being the first of its kind for the appellant/IRCTC and being very prestigious, in an effort to ensure transparency and honest disclosure, such an onerous condition was placed of not only forfeiting the Security Deposit and Licence Fee, but also of blacklisting the defaulter for three years. Therefore, the learned Single Judge erred in limiting the penalty to a mere forfeiture of the EMD of Rs.10 lakhs deposited by the respondent/company.

11. On the other hand, Mr. Neeraj Malhotra, learned Senior Advocate appearing for the respondent/company contended that there is no reason why this mix-up should be described as *mala fide*. It was submitted that when the respondent/company had submitted Form PAS-3 on 18.09.2019, the paid-up share capital of the respondent/company was disclosed as Rs.429.53 lakhs. Since the Ministry of Corporate Affairs had accepted the details uploaded on its website on increase of the authorized share capital vide the Form No.SH-7, on 12.09.2019, the respondent/company had no clue about the *bona fide* mistake committed while uploading the details of the Resolution passed for enhancement of the authorized share capital, which was in fact enhanced to Rs.5,25,00,000/-. It was only after the complaint of M/s. Brandavan Food Products was forwarded by the appellant/IRCTC to the respondent/company for seeking an explanation, that this discrepancy was noted. It was in reply to the Show-Cause Notice dated 11.12.2019, issued on the basis of the discovery made during the Forensic Audit, that the respondent/company sought to explain that an error had taken place in uploading the correct Resolution and that the Meeting Notice dated 15.03.2019 had called for a

meeting to resolve that the authorized share capital was to be increased to Rs.5.25 crores and not Rs.1.5 crores and the said Resolution was also passed on 30.03.2019. It was further submitted that the wrong uploading was a *bona fide* mistake and the learned Single Judge had rightly observed so and had further tested the decision of the appellant/IRCTC on the anvil of fairness and proportionality to limit the penalty imposed to Rs.10 lakhs. In the said circumstances, it was contended that the judgment did not deserve interference.

12. We have heard the arguments advanced by learned counsel for the parties and have perused the record. We find force in the contention of the learned counsel for the appellant/IRCTC that existence of two sets of Notices and two sets of Resolutions, both dated 15.03.2019 and 30.03.2019, respectively raises serious doubts as to the *bona fides* of the respondent/company in uploading the details on the website of the Registrar of Companies, as it did on 12.09.2019, after the pre-bid meeting had taken place on 09.09.2019, but before closure of the bids on 14/16.09.2019. An erroneous uploading of the Resolutions may by itself be a *bona fide* error, provided that there was only one Resolution reflecting the correct value of the enhanced authorized share capital. In the instant case, the respondent/company has not been able to satisfactorily explain as to why were there two sets of Notices, both dated 15.03.2019, one for calling the EGM to resolve that the authorized share capital be enhanced from Rs.1 crore to Rs.1.5 crores and the other for resolving that the authorized share capital of the company be enhanced from Rs.1 crore to Rs.5.25 crore. There is also no explanation coming forth as to why were there two sets of Resolutions of the same date i.e. 30.03.2019, one resolving that the

authorized share capital be enhanced from Rs.1 crore to Rs.1.5 crores and the other resolving that the authorized share capital of the company be enhanced from Rs.1 crore to Rs.5.25 crores.

13. *Ex facie*, it does appear that since Clause 4 of the bid document, as extracted hereinabove, required that as per the Technical Criteria, the net worth of the Firm or Company had to be a minimum of Rs.5 crores, as on 31.03.2019, an effort was made to antedate the documents so as to reflect an enhanced net worth, for being eligible for bidding. Thus, there is no ground to hold that the termination order, which in any case has not been challenged by the respondent/company, is bad in law.

14. Holding that the respondent/company had furnished incorrect information *bona fide*, the learned Single Judge elected to limit the penalty imposed to forfeiture of the EMD of Rs.10 lakhs. We are however unable to subscribe to the said view, particularly in the light of the observations made hereinabove that there did not appear any surrounding circumstances for this court to believe that a *bona fide* mistake was committed by the respondent/company. However, the question of proportionality of the penalty has to be considered so as to determine as to whether forfeiture of the Security Deposit of Rs.2 crores, Licence Fee of Rs.2.96 crores and blacklisting for a period of three years from participating in the future projects of the appellant/IRCTC, was the appropriate penalty to be imposed on the respondent/company.

15. The Supreme Court in Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL & Ors., (2014) 14 SCC 731 has observed as below:-

“25. Suffice it to say that “debarment” is recognised

and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the “debarment” is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.”

16. We are in agreement with the submission made by learned Senior Counsel for the respondent/company that blacklisting would have serious consequences as it amounts to civil death. At the same time, the appellant/IRCTC is well entitled to insist on transparency, as commercial transactions require stringent standards of disclosure and the said approach cannot be faulted. It is also within the right of the appellant/IRCTC to impose onerous conditions on bidders to discourage suppression of material facts or fraudulent disclosures. In that light, the penalty of forfeiture of the EMD of Rs.10 lakhs, as imposed by the learned Single Judge, does not appear to be proportionate.

17. Debarment, for any period, would have to be assessed on its proportionality that ought to be commensurate with the nature of the offence committed by the erring contractor. Though the Supreme Court in Kulja Industries Ltd. (supra) has observed that the court ought not to determine the period of blacklisting, in the present case, on a query posed to the appellant/IRCTC, learned counsel had informed the learned Single Judge that the appellant/IRCTC was not inclined to modify the period of blacklisting and therefore, it was held that there would be no useful purpose in remanding the matter back to the appellant/IRCTC for reconsideration.

18. Be that as it may, since the quantum of punishment is subject to judicial review for the court to examine its fairness and proportionality, on the facts of this case, we find that mere forfeiture of the EMD of Rs.10 lakhs would not suffice. In our opinion, a reasonable amount, enough for the respondent/company to feel the pinch ought to be recovered for the improper disclosure of material facts and the same need not be limited to forfeiture of the EMD of Rs.10 lakh. In our opinion, to balance the equities, discourage the respondent/company from future infractions and send a message to other bidders that they must make honest disclosures, recovery of four times of the EMD of Rs.10 lakhs would be just and fair.

19. The appeal is thus partly allowed. The impugned judgment is modified and the appellant/IRCTC is held entitled to recover a sum of Rs.40 lakhs that shall include the EMD of Rs.10 lakhs, already deposited by the respondent/company. The said amount shall be deposited by the respondent/company with the appellant/IRCTC within four weeks from today.

20. The appeal alongwith the pending application is disposed of on the above terms while leaving the parties to bear their own expenses.

(ASHA MENON)
JUDGE

(HIMA KOHLI)
JUDGE

MARCH 05, 2020/s