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

Reserved on: 17th August, 2020

Date of decision: 2nd September, 2020

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W.P.(C) No. 3301/2020

DIWAN CHAND GOYAL

.... Petitioner

Through: Ms. Anusuya Salwan, Ms. Nikita Salwan, Mr. Abhishek Pundir, Mr. Bankim Garg and Mr. Chaitanya Bansal, Advocates. (M: 9811225368).

versus

**NATIONAL CAPITAL REGION TRANSPORT
CORPORATION & ANR.**

... Respondents

Through: Mr. Siddarth Dave, Sr. Advocate, Mr. Rajesh Katyal, Standing Counsel with Mr. Devendra Kumar Singh, Ms. Parina Katyal, Advocates for NCRTC (M: 9810643553).
Mr. Jitender Kumar and Mr. Varun Sikka, Advocates for DIMTS (M: 9871880147).

CORAM:

**JUSTICE PRATHIBA M. SINGH
JUDGMENT**

Prathiba M. Singh, J.

1. This judgment is pronounced through video-conferencing.

CM APPL. 11573/2020 (exemption from filing court fee and attested affidavits)

2. This is an application seeking exemption from filing court fee and duly attested affidavits. Binding the deponent of the affidavit to the contents of the application, the exemption is granted. Insofar as the court fee is concerned, the same be deposited within one week. Application is disposed

of. Registry to submit a report in case the court fees is not filed after a month.

W.P.(C) No. 3301/2020 and CM APPLs. 11572/2020, 11574/2020

3. The present petition has been filed by Mr. Diwan Chand Goyal who is the Sole Proprietor of S.D Construction Company, Delhi (*hereinafter, "Petitioner"*) against the National Capital Region Transport Corporation (*hereinafter, "NCRTC"*) which is a joint venture company of the Government of India and four states i.e., Haryana, Rajasthan, Uttar Pradesh and Government of National Capital Territory of Delhi (*hereinafter "GNCTD"*).

4. The challenge is to the letter dated 29th April, 2020 by which the NCRTC banned the Petitioner from participating in all future bids for a period of five years. The bid security amount which was submitted was also forfeited and the Petitioner's offer was directed to be rejected in all bids which were still under evaluation with the NCRTC. Only the on-going work was permitted to be carried out. The said letter has been challenged on several grounds. The prayer in the writ is that the debarment for five years ought to be removed and the security deposit released to the Petitioner. The reliefs sought are set out below:

"i. Issue a writ, order or directions in the nature of Certiorari for quashing the impugned letter dated 29.04.2020 debarring the petitioner for a period of five years.

ii. Issue a Writ of Mandamus directing the Respondent to remove the ban on Petitioner from participating in any future bid with it.

iii. Issue a Writ of Mandamus directing the Respondent to release the bid security to the tune of Rs 26,62,642/- furnished by the Petitioner along with interest @ 18%."

5. The petition was first listed on 1st June, 2020 on which date the DIMTS, an organisation which had issued the experience certificate to the Petitioner, for satisfying the eligibility condition was directed to be impleaded in the matter. One of the letters relied upon by the Petitioner was a letter dated 20th September, 2019 which according to the DIMTS appeared forged – leading to the blacklisting and other punitive action. Since the stand of DIMTS was crucial, an affidavit was also called for from the DIMTS on 15th June, 2020.

6. The pleadings in the matter are complete and final arguments were heard.

Submissions of The Parties

7. Ms. Anusuya Salwan, Id. counsel appearing for the Petitioner took the Court through the Notice For Invitation of Bids (hereinafter “NIB”) dated 26th August, 2019. She relied upon Clause 2.4.2 to submit that as per the said clause all bidders were supposed to show their capability to execute the contract in terms of the said clause. The bidders were to submit Form EXP-2(b) setting out the particulars of a similar work executed by the Petitioner.

8. Ms. Salwan submitted that the Petitioner’s track record is extremely good and the Petitioner is a Contractor who has successfully executed several projects for the Delhi Metro Rail Corporation (*hereinafter “DMRC”*) and other organisations. The Petitioner wished to rely upon one similar work executed for the DMRC in Delhi to show how it satisfied the eligibility criteria. Thus, along with the bid documents, certificate dated 3rd May, 2018 issued by DIMTS for Construction of Cluster Bus Depot at Dwarka Sector-22, New Delhi which was valued for a sum of approximately

Rs.22 crores was relied upon by the Petitioner. A second letter dated 20th September, 2019 giving the break-up was also attached. Ld. counsel for the Petitioner submitted that the form which was filled up by the Petitioner did not mislead or give any incorrect facts. Ms. Salwan submitted that the NIB in fact defined 'corrupt practices' and 'fraudulent practices' in Clause 3 of the Instructions to Bidders. The same required that in order for a practice to be termed as a fraudulent practice the Contractor ought to have made a material misrepresentation or omission of facts. The two letters to satisfy experience for executing a similar project were dated 3rd May, 2018 and 20th September, 2019 merely certified that the project which was executed by the Petitioner was more than Rs.22 crores and this was also submitted in annexure Form EXP 2(b) dealing with the specific work experience. The two letters did not either misrepresent or omit any relevant/material facts and thus did not constitute corrupt or fraudulent practice. Ms. Salwan submitted that there was not even a need for the Petitioner to submit the second certificate dated 20th September, 2019.

9. The satisfactory completion of the said project was quite clear from the certificate issued by the DIMTS and, therefore, there was no need whatsoever for the Petitioner to submit any forged or non-genuine certificates. In any case, it was argued, that the said letter according to the NCRTC did not satisfy the condition, hence, the Petitioner did not derive any advantage from the said certificate. Ld. Counsel further argued that in reply to the show cause notice all these facts were clearly informed to the NCRTC which facts, however, were not considered and the impugned order blacklisting the Petitioner for a period of five years was passed.

10. Ld. Counsel thereafter pointed out that after submission of the bid, the NCRTC sought a clarification on 11th December, 2019 as to the break up cost of the similar work. In response thereto, the Petitioner on 16th December, 2019 stated that it approached the client for issuance of additional certificate mentioning cost of similar work i.e. Building work, and that the client denied the issue of the additional certificate as they had already issued the Performance Certificate and the NCRTC was requested to send clarification directly to DIMTS.

11. According to Ms. Salwan, the Petitioner was completely surprised when it came to its knowledge that on 10th January, 2020, the Petitioner's technical bid was shown as rejected, on the website of the NCRTC. Upon rejection of the technical bid of the Petitioner, refund of the security deposit was sought by the Petitioner from the NCRTC. However, surprisingly, on 4th February, 2020 instead of refunding the security deposit the NCRTC chose to issue a show cause notice alleging that the second certificate issued by the engineer dated 20th September, 2019 was forged and the Petitioner was asked to show cause as to why the Petitioner ought not to be barred for a period of five years and the bid security deposit forfeited. She submitted that detailed replies were given to the show cause notice, however, unfortunately, on 29th April, 2020 the impugned letter was issued by the competent authority taking extreme punitive action against the Petitioner.

12. Thus, according to Ms. Salwan, the challenge in this writ petition is that the Petitioner denies the fact that there was any forgery. She submitted that no advantage has been derived by the Petitioner by submitting the said letter. The original letter of the DIMTS, which is a certificate of completion, was to the same effect as was the certificate by the engineer dated 20th

September, 2019. She submitted that the track record of the Petitioner has been completely unblemished and accordingly, the kind of punishment that has been imposed by the NCRTC is completely disproportionate to the allegation that has been raised against the Petitioner. Ld. counsel further submitted that no hearing was given to the Petitioner despite the fact that detailed replies were submitted to the show cause notice. The second certificate which is alleged to be forged cannot in any manner put the Petitioner to such a disadvantageous position insofar as the Petitioner has over 100 employees and there are several others who depend upon the Petitioner's business. She submitted that the impugned decision of the NCRTC would result in civil death of the Petitioner who has an excellent track record. She submitted that not a single litigation is pending between her client and the DMRC or the NCRTC. She submitted that organizations similar to the DMRC provide for an appeal, however, the NCRTC has not made any such remedy available to the Petitioner.

13. Vehement reliance is placed upon the settled law in this regard including the judgment of the Supreme Court in *M/s Kulja Industries Ltd. v. Chief General Manager W.T. Proj. BSNL & Ors., 2014 (14) SCC 731*. Ld. Counsel submitted that various guidelines have been laid down by the Supreme Court in respect of banning and blacklisting. The said decision of the Supreme Court has also been followed by the Delhi High Court in the following cases:

- a) NHAI v. L.N. Malviya Infra Projects Pvt. Ltd. & Anr.**
[LPA 660/2017, decided on 9th July, 2018]
- b) M/s Avinash EM Projects Private Ltd. v. M/s Gail (India)**
Ltd., [W.P.(C) 2041/2014, decided on 6th February, 2015]

14. She also relied upon the following judgments:

- ***Gorkha Securities Services v. Govt. of NCT of Delhi 2014 AIR SC 3371***
- ***M/s S& P Infrastructure Developers P Ltd v. NHIDCL 2019(263) DLT 603***

15. It is submitted that the impugned letter is liable to be set aside and the forfeited security deposit refunded to the Petitioner. Ld. counsel also relied upon the affidavit of the DIMTS which does not state that the certificate of the engineer is forged or non-genuine. She submitted that in view of the circumstances, the writ petition may be allowed and the five years' blacklisting may also be set aside.

16. On the irreparable injury that is caused to the Petitioner, she submitted that the explanation of the Petitioner was that a site engineer had obtained a certificate dated 20th September, 2019 and the same was submitted with the bid documents itself. It was not a document which was specifically created or fabricated in any manner by the Petitioner to satisfy the conditions of the bid. She urged that the Petitioner has more than 100 employees and 200 to 300 labourers working with it. The impugned blacklisting order, according to her, is having a cascading effect inasmuch as various other Government Departments have also started raising queries in respect of the said blacklisting. This has also resulted in the Petitioner not being able to participate in any Government tenders of the NCRTC and may even have an effect on other Government tenders where the Petitioner wishes to participate. She thus, submitted that the impugned order did not satisfy ***M/s Kulja Industries (supra)*** and is liable to be set aside.

17. Mr. Siddarth Dave, Id. Senior counsel appearing on behalf of the NCRTC commenced his submissions by relying upon the definitions of corrupt practice and fraudulent practice. He submitted that while the said two practices are separately categorised and any practice which is indulged in by the bidder to influence the procurement process or execution of the contract would constitute a fraudulent practice. As per clause 3.1 (b) and 3.1 (d) the consequence of a fraudulent practice would be forfeiture to the security deposit and debarment for a period of five years. He also relied upon the affidavit filed by the bidder/ Petitioner at page 196 and 198 wherein the bidder/ Petitioner clearly swore to this clause and had deposed that if he indulged in any corrupt or fraudulent practice the consequences would have to be suffered.

18. Insofar as Clause 2.4.2 of the NIB is concerned, the interpretation given by Mr. Siddarth Dave, is that the expression 'similar work' has been specifically defined under this clause and is not a general experience clause as in other tenders. 'Similar work' has been specifically defined as "Construction of buildings with facilities of HVAC, Fire Fighting and Electrical works" where HVAC stands for Heat, Ventilation and Air Conditioning". The certificate dated 3rd May, 2018 was a general certificate giving the completion cost whereas the second certificate dated 20th September, 2019 was purportedly to give the breakup to satisfy the conditions under Clause 2.4.2. He submitted that the second certificate was, therefore, a deliberate submission by the Petitioner to satisfy the conditions under Clause 2.4.2 and the contents of the same were not identical to the first certificate dated 3rd May, 2018. The bidder/ Petitioner sought to gain an advantage by submitting the second certificate. When the NCRTC was not

satisfied with the bidder's/ Petitioner's experience certificate, a clarification was sought by the NCRTC on 27th November, 2019 on the portal. In its reply on 3rd December, 2019, the bidder/ Petitioner took the stand that various other experience certificates would not even be required for the bidder inasmuch as the Dwarka completion certificate by itself satisfied the bid conditions. The bidder's/ Petitioner's stand, therefore, was clearly that it was relying upon the two certificates issued by the DIMTS to satisfy the conditions of the bid.

19. However, the NCRTC was not satisfied and on 11th December, 2019 specific reference was given to clause 2.4.2 and a clarification was sought. In response thereto, the bidder/ Petitioner asked the NCRTC to seek a clarification directly from DIMTS as the employer in the Dwarka project had refused to give any further certificate. When the NCRTC sought a clarification from the DIMTS, that is when it was informed of the forgery which the bidder/ Petitioner had committed. He thus, submitted that when DIMTS has clearly certified that the second letter dated 20th September, 2019 was a forgery, there was nothing remaining for the NCRTC to decide inasmuch as submission of a forged document would constitute a fraudulent practice.

20. The bidder/ Petitioner was also conscious of this fact and therefore, on 20th January, 2020 it did not even challenge the technical evaluation and merely sought release of the earnest money. It was at that stage that the NCRTC decided to take action in terms of the corrupt practice clause in NIB and the show cause notice dated 4th February, 2020 was issued. The bidder/ Petitioner submitted its reply to the said show cause notice on 13th February, 2020.

21. Mr. Dave, Id. Senior Counsel, thereafter, relied upon the reply to the show cause notice dated 13th February, 2020 to submit that the Petitioner did not take a fair stand even in this reply. He submitted that a perusal of the reply would show that the Petitioner merely tried to justify the reliance on certificate no. DIMTS/ENGG/DGM-P/BUS DEPOT/DS-22/58/475 dated 20th September, 2019 on the ground that the said certificate did not show any deviation in the facts and figures as contained in the completion certificate dated 3rd May, 2018. He relied upon the fact that in this reply, there was no prayer made requesting for any oral/personal hearing. Highlighting the fact that the stand of the Petitioner is that the forgery appeared meaningless, it was submitted that the attempt by the Petitioner was to completely downplay the whole issue.

22. It is submitted that when the NCRTC came to know that the letter was forged, it proceeded to thereafter impose the five-year ban as per clause 3.1 of the tender documents. Reference was made to the judgment relied upon by Ms. Salwan in *M/s Kulja Industries Limited (supra)*. It was submitted that the said judgment supported the case of the NCRTC. Reference was made to paragraph 20 of this judgment to argue that in paragraphs 20 to 23, the international position on blacklisting which is also known as debarment was considered by the Court and after considering the same, the Supreme Court came to the conclusion that the question as to whether once there is any fraudulent practice which is adopted by the bidder, what should be the period of debarment ought to be left to the authority concerned. It was also submitted that the rule of giving oral hearing is not inviolable and hence in every matter there is no compulsion to grant an oral hearing. He submitted that the ratio of this case is that the period of black listing ought to be as per

the seriousness of the case and the nature of the offence. Once the Court comes to the conclusion that there has been any fraudulent practice, the Court ought not to interfere with the period of black listing. He argued that the reason why in the said case the matter was remanded back to the authority was because the black listing by BSNL of the contractor was for “all times to come” and was in fact perpetual in nature.

23. Reliance was also placed upon **Grosons Pharmaceuticals (P) Ltd v. State Of Uttar Pradesh AIR 2001 SC 3707** to argue that the show cause notice which was given was sufficient compliance of the requirement of natural justice. Once the show cause notice was issued and the reply was considered, the Petitioner could not insist on a hearing. Finally, it was submitted that the forgery/fabrication was not even being justified by the Petitioner. In **M/s Patel Engineering Limited v. UOI & Anr 2012 (11) SCC 257** it was observed at para 26 :

“Coming to the submission that R-2 ought to have given an oral hearing before the impugned order was taken, we agree with the conclusion of the High Court that there is no inviolable rule that a personal hearing of the affected party must precede every decision of the State .This Court in Union of India and another v. Jesus Sales Corporation, (1996) 4 SCC 69, held so even in the context of a quasi-judicial decision. We cannot, therefore, take a different opinion in the context of a commercial decision of State. The petitioner was given a reasonable opportunity to explain its case before the impugned decision was taken.”

24. Reliance was placed on **Patel Engineering (supra)** to argue that in a case where the bidder was declared successful and he walked out from a contract, the Court came to the conclusion that the bidder had committed a

legal wrong. The contractor was guilty of dereliction and huge financial loss was caused to the Petitioner. The decision to black list the contractor was held to be neither irrational nor perverse.

25. Ld. Counsel for the NCRTC submitted that the decision to black list was completely justified. This was in view of the provisions of the NIB which was duly affirmed to and was in the knowledge of the Petitioner who had submitted an affidavit of undertaking to comply with the same. At the time when the show cause notice was issued, even in the reply, no hearing was sought. However, after the black listing issue a representation was made on 4th May, 2020 and at that stage a hearing was sought. By the said period, since the black listing order had already been passed, no occasion arose for giving any further hearing to the Petitioner.

26. Ms. Salwan, addressing her rejoinder submitted that in order for clause 3, NIB to be invoked, there has to be misrepresentation or omission of facts leading to the five-year ban. She submitted that the letter dated 20th September, 2019 did not have any facts which were misrepresented in nature for the purpose of procuring of the bid. Her submission was that the completion certificate in fact was merely reiterated in the certificate dated 20th September, 2019. She again reiterated her submission about the Petitioners' experience, which according to her could not have been doubted, inasmuch as the completion certificate itself was sufficient to show the requisite experience possessed by the Petitioner.

Analysis and Findings

27. Heard counsels for the parties. The allegation in this case is that the Petitioner submitted two certificates to prove that it had the experience as per the eligibility conditions. Reliance was placed on two letters of DIMTS

dated 3rd May, 2018 and 20th September, 2019. The submission of these documents is not in dispute. They were submitted along with the bid itself. The first document dated 3rd May 2018 of DIMTS was an experience certificate mentioning the project executed by the Petitioner along with the total value of the project. The second document i.e. the performance certificate dated 20th September, 2019 was to support the Petitioner's claim of experience in a similar project, with the cost break-up of various components in the project. DIMTS vide its letter dated 24th December, 2019 had informed NCRTC that the second certificate had never been issued by it and '*seemed to be forged*'. The question, therefore, is whether the submission of this Performance certificate constitutes a corrupt practice or a fraudulent practice. At the outset some relevant clauses of the Bid documents need to be noticed.

“3. Corrupt Practices

3.1 The Employer requires that bidders, suppliers, and contractors observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy, the Employer:

(a) defines, for the purposes of this provision, the terms set forth below as follows:

(I) “corrupt practice” means offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the action of any bidder in the procurement process or the execution of a contract;

(ii) “fraudulent practice” means a misrepresentation or omission of facts in order to influence a procurement process or the execution of a contract;

(iii) “collusive practice” means a scheme or arrangement between two or more bidders, with or without the knowledge of the Employer, designed to influence the action of any bidder in a procurement process or the execution of a contract;

(iv) “coercive practice” means harming or threatening to harm, directly or indirectly, persons, or their property to influence their participation in a procurement process, or affect the execution of a contract;

(b) has the right to reject the bid for award if it determines that the bidder recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive, or coercive practices in competing for the Contract; and

(c) will sanction a bidder or its successor, including declaring ineligible, either indefinitely or for a stated period of time, to participate in Employer’s activities, if it at any time determines that the bidder has, directly or through an agent, engaged in corrupt, fraudulent, collusive, or coercive practices in competing for, on in executing a contract of the employer.

(d) In case it is found during the evaluation or at any time before signing of the Agreement or after its execution and during the period of subsistence thereof, that the bidder has made material misrepresentation or has given any materially incorrect or false information, the bidder may be

(i) disqualified and banned for further business dealings for a period of 05 years with the Employer forthwith if not yet appointed as the bidder either by issue of Letter of Acceptance or entering into the Agreement. In such an event, Employer shall forfeit and appropriate the Bid Security (to be treated as mutually agreed pre-

estimated compensation and damages payable to the Employer for, inter alia, time cost and efforts of the Employer), without prejudice to any other right or remedy that may be available to the Employer.

(ii) And if the bidder has already been issued the Letter of Acceptance or has entered into the Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this bid document, be banned for further business dealings with the Employer for a period of five years, by a communication in writing by the Employer to the bidder, without the Employer being liable in any manner whatsoever to the bidder or the bidder, as the case may be. Further the Contract of the bidder may be terminated and the decision of Employer in this regard shall be final and binding on the bidder. In case the contract is terminated, Employer shall forfeit and appropriate the Performance Security (to be created as mutually agreed pre-estimated compensation and damages) payable to the Employer for, inter alia, time cost and efforts of the Employer), without prejudice to any other right or remedy that may be available to the Employer.

In the above clauses of the NIB, corrupt and fraudulent practices are specifically defined and the consequences in case of the bidder indulging in corrupt/fraudulent practice are also provided for.

28. The chronology of events leading to the filing of this petition are relevant. The bid required, under clause 2.4.2, experience to be established by the bidder for 'similar work'. The clause prescribing the experience required reads as under:

“2.4 Work Experience

2.4.2 Specific Work Experience.

The bidder must have completed/substantially completed work(s) during last 07 (seven) years ending last day of the month previous to the month of bid submission as given below:

i. At least one “Similar Work” of value not less than INR 10.65 crore

OR

ii. Two “Similar Works” each of value not less than INR 6.66 crore

OR

iii. Three “Similar Works” each of value not less than INR 5.33 Crore

iv. The work is considered to be substantially completed if 90% or more of the work is physically completed which is to be substantiated by a certificate from the employer who has awarded the work to the bidder. Or

If 90% of payment of the awarded contract value or revised contract value whichever is lower has been received by the bidder. This is to be substantiated by a certificate from the employer who has awarded the work to the bidder.

Definition of Similar Work:

“Construction of buildings with facilities of HVAC, Fire Fighting and Electrical works”

29. As per the above clauses, bidders were required to submit documents for at least one similar work which was of a value of not less than Rs. 10.65 crore or two similar works, each of a value of not less than Rs.6.66 crores or three similar works of not less than Rs.5.33 crores each. The bid documents were submitted by the Petitioner on 7th November, 2019. In order to qualify as per the experience criteria, the Petitioner submitted a certificate of

DIMTS dated 3rd May, 2018 which certified that the Petitioner had completed work of construction of Cluster Bus Depot at Dwarka, Sector-22, New Delhi for contract value of Rs.18,67,09,367/- and the total completion cost was Rs.22,09,98,187/-. Along with the said certificate, another alleged performance certificate dated 20th September, 2019 was also submitted. This is purportedly signed by the Project Manager of DIMTS and gives a breakup of the works which have been executed as part of the said project. As per the NCRTC, the bidder had to show experience in respect of “*similar work*” as defined in clause 2.4.2.

30. NCRTC sought a clarification on 27th November, 2019 to which the Petitioner, vide letter dated 3rd December, 2019 replied and took a stand that the construction of Dwarka Sector-22 depot is enough for it to qualify for the tender in terms of the qualifying criteria. NCRTC was not satisfied and it again sought further clarification from the Petitioner to satisfy the cost of the similar work vide letter dated 11th December, 2019. The Petitioner, vide letter dated 16th December, 2019 informed the NCRTC that it had approached DIMTS for issuance of an additional certificate mentioning the cost of similar works. In this letter it relied upon the performance certificate dated 20th September, 2020. The letter dated 16th December, 2019 reads as under:

Letter from DIMTS to NCRTC dated 24/12/19

“Respected Sir,

In reference to the above referred letter & as per your clarification regarding "Cost of Similar work" of contract “Construction of Cluster bus depot at Dwarka Sector-22 New Delhi”, it is to inform you that we have approached the client for

issuance of additional certificate mentioning Cost of Similar work i.e. Building work.

In this regard the client has denied to issue the additional certificate as they have already issued the Performance Certificate as per format prescribed by the CPWD.

Therefore you are requested to send your clarification directly to the client (PMC) as mentioned below:-

*The Dy. General Manager (Projects),
DIMTS Limited, 5th Floor, Maharana Pratap, .
ISBT Building Kashmere Gate, Delhi-.110006
Email:-devendra.gautam@dimts.in*

*Thanking You
FOR S.D. Construction Co.”*

31. Thus, the Petitioner's stand was that the performance certificate was issued by DIMTS as per the format of the CPWD and it requested the NCRTC to seek any further clarification directly from DIMTS. The Petitioner's bid was, however, rejected during technical evaluation. The Petitioner then sought refund of EMD (Earnest Money Deposit) of a sum of Rs.26,62,642/- by its letter dated 20th January, 2020. On 4th February, 2020 a show cause notice was served upon the Petitioner. In the said show cause notice, the NCRTC relied upon the letter issued by the DIMTS dated 24th December 2019, which informed the NCRTC that the performance certificate appeared to be a forged document. The relevant extract of the letter of DIMTS dated 24th December 2019 reads:

“..... Sir, with reference to your aforementioned letter under ref-1 for Clarification on Certificate pertaining to the tender under ref-2, it is to confirm that certificate no. 1897 dated 03.05.2019

under ref-3 has been issued by this office for the “construction of Cluster Bus Depot at Dwarka Sector-22, New Delhi.

Regarding the Certificate No. 475 dated 20.09.2019 [under ref-4, enclosed with you letter], has never been issued by this office and seems forge.

In view of the above conduct of the contractor [submission of forge Performance Certificate], we refrain our self to provide any further detail as sought vide your letter under ref-1.

We also request you to take stern action against M/s. S.D. construction Co. Delhi for this act of forgery.

Thanking you.....”

Thus, the above letter of DIMTS clearly informed NCRTC that the first letter was genuine but the second letter was forged. DIMTS further called upon NCRTC to take stringent action. The Petitioner filed a reply to the show cause notice on 13th February, 2020. After considering the reply NCRTC passed the impugned order on 29th April, 2020 banning the Petitioner for all its future bids for five years, rejecting the offer submitted in all its bids and finally forfeiting the bid security. The said letter specifically stated that the Project Manager himself confirmed that he had not issued the said performance certificate. The operative portion of this decision is set out herein below.

“..... It was confirmed by the same officer Mr. Devendra Kumar Gautam of DIMTS that it was never issued by DIMTS and seems forged. Thus, the official whose signature was said to be available on the certificate submitted by the firm, himself mentioned that the certificate is forged.

XXX

In view of the details mentioned above, the Competent Authority in NCRTC has found that the Firm i.e. M/s S.D Construction as a Bidder in the Bid No.DM/CN/COR-OF/066 of NCRTC, in spite of getting a chance for showing cause, failed to defend the genuineness of the certificates submitted by them. Accordingly, it has been decided by the Competent Authority in NCRTC in terms of ITB 3.1 (d) of the Bid Document of the said Bid that the Firm i.e M/s S.D. Construction Co. should be:

- (a) Banned for participation in all future Bids of NCRTC for a period of five years.*
- (b) The offer submitted by the Firm should be rejected in all the Bids which are still under evaluation with NCRTC.*
- (c) The Bid Security submitted by the firm in the subject Bid should be forfeited.*
- (d) The Firm M/s S.D. Construction Co should be permitted to complete the ongoing works with NCRTC.”*

32. Upon receipt of this decision of the NCRTC, the Petitioner made a representation on 4th May, 2020. The explanation given in the said representation was that the site engineer, who was involved in the project, obtained this alleged performance certificate dated 20th September, 2019 and the same was submitted to the Petitioner. The Petitioner then had not suspected the genuinity of the certificate and had, therefore, submitted it with the bid. In this representation for the first time, an opportunity of hearing was sought.

33. In the above narration of events, none of the facts are in dispute except the circumstances surrounding the issuance of the performance certificate dated 20th September, 2019. In writ jurisdiction, the Court is not

conducting a fact finding enquiry as to the circumstances surrounding the issuance of the said certificate. The Petitioner is neither contending that the said certificate is genuine nor seeking to justify the reliance on the said certificate. Ld. counsel for the Petitioner also did not seek to suggest that the certificate ought to be relied upon for the purpose of awarding punishment. The argument is that the site engineer had obtained it and the Petitioner was not aware as to how the same was obtained. Moreover, the name of the site engineer is also not put forth either in pleadings or in oral arguments.

34. The Petitioner is also not aggrieved by the rejection of its bid but is aggrieved by the action taken against it in terms of forfeiture of the security deposit, blacklisting for a period of five years etc. The vehement contention of the Id. counsel for the Petitioner is that the Petitioner is a company with an impeccable track record which has not been in dispute with the NCRTC or any other public organization with whom it has been dealing. It has successfully executed a large number of projects and hence, it should not be made to suffer in this manner. On merits, it is also submitted that the said certificate does not add to the experience of the Petitioner in any manner, inasmuch as the total value of the project itself was specified in the first certificate dated 3rd May, 2018. The second performance certificate merely gave a breakup and nothing more.

35. There is no doubt that the clauses in the bid document as to what constitutes 'corrupt practice' and 'fraudulent practice'. A specific affidavit was submitted by the bidder/Petitioner primarily confirming the complete adherence to the bid conditions. A declaration has also been given that no misleading or false statement has been made in any of the documents

submitted to prove the qualification requirements. It was also categorically declared by the deponent of the bidder/ Petitioner that all the documents submitted are correct. Thus, apart from the specific clauses in the bid, a specific affidavit in respect of the documents submitted was also furnished by the bidder/ Petitioner.

36. The DIMTS in its affidavit, has stated that upon receiving a query from NCRTC, it was found that the Completion Certificate dated 3rd May, 2018 was issued by the office of answering performa Respondent (DIMTS) in favour of the Petitioner. However, the Performance Certificate dated 20th September, 2019 was neither drawn nor issued by the office of the DIMTS in favour of Petitioner. Thus, the second certificate is clearly a manufactured and fabricated document. There is no clarity in these proceedings as to the specific individual who was responsible for the manipulation or fabrication but the Petitioner having relied upon the said document has to shoulder the burden. The Petitioner has also not sought to explain the circumstances of the issuance of this certificate. The Court has to, under such circumstances, only to go by the record which shows the fact that this certificate was submitted with the bid and the same turned out to be forged. Whether the Petitioner gained an advantage by submission of this certificate is irrelevant. In any bidding process, every bidder is expected to submit genuine and correct documents. There can be no justification whatsoever for the submission of any misrepresentative facts or fabricated/manipulated documents. To that extent there can be no doubt that the Petitioner has indulged in wrong doing. The definition of fraudulent practice in the would clearly cover submission of a forged certificate as such submission would be a misrepresentation to influence bid/procurement process.

37. The question is what should be the consequence? While assessing any wrong doing and deciding upon the effect thereof, the issue of proportionality would have to be examined. NCRTC has taken the highest level punitive action as permitted under the bid under clause 3.1(d). The NCRTC has the power to impose the disqualification of banning for a period of five years, if there is any material misrepresentation. NCRTC can also forfeit and appropriate the bid security which is the amount mutually agreed to be pre-estimated damages and compensation. Thus, the NCRTC's stand is that it has taken action in terms of the bid document. The highest level of punitive action which could be taken under the bid document has been taken and the same has also been vehemently defended before this Court.

38. The Petitioner has placed reliance upon the judgment of *M/s. Kulja Industries Ltd. (supra)*. In this case the Petitioner had submitted its bids in response to the tender notice by BSNL. It was a successful tenderer. Excess payment was made by the BSNL to the tenderer. BSNL's case was that the Petitioner had colluded with some of its officials to generate the forged vouchers and a sum of Rs.7.98 crores was paid in excess. Upon receiving the knowledge of the excess payments made, an FIR was filed. Parallely, BSNL blacklisted the company. The Supreme Court observed that the power of blacklisting need not to be specifically conferred by the statute or reserved by the Contractor. The power is one, which is inherent in the party allotting the contract. The observations of the Supreme Court are as under:

“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. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court.

"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purpose of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

39. The Court, thereafter, reviewed the legal position in respect of the blacklisting in other jurisdictions such as USA and UK and finally observed

as under:

“24. 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.”

40. In ***Erusian Equipment and Chemicals Limitedv. State of West Bengal & Anr., 1975 (1) SCC 70***, the Supreme Court held that the party being blacklisted ought to be given an opportunity to represent its case before its blacklisting. In ***National Highways Authority of India (supra)*** passed by the Id. Division Bench of this Court, the National Highways Authority of India blacklisted the company for a period of three years. The Id. Division Bench observed that a forgery was not made out. However, the Court held that higher standard of objective fairness is required. The relevant portion of the said judgment is extracted herein below:

“22. In similar situations and cases, petitions have been allowed by the courts on the grounds that adequate notice was not provided before the tendering of a particular decision which leads to unfairness and arbitrariness in terms of procedure. In the aforementioned case, the situation is similar to the one being dealt with presently. Blacklisting also entails serious consequences in terms of its implications, which is why it should be kept in mind that apart from objectivity in terms of

decision-making there must also be a clear understanding that cases of this nature would also require the satisfaction of beyond just minimum requirements. It would not suffice to contend the fact that an authority has complied with the minimum requirements of objective fairness as it is clear that in the cases where punitive action to the tune of blacklisting has been ordered, it would be required that the authority observes a higher standard of objective fairness and must attempt to ensure that justice is rendered in their maximum capacity. Moreover, the issue surrounding blacklisting criterion or the general grounds one may look for have been clearly summarized by the learned Single Judge. The order passed deals with multiple general reasons on a broad spectrum of reasons or qualifying factors which may invite a decision akin to blacklisting...

Thus, under the facts of this case the Court had come to the conclusion that there was no forgery or corrupt practice and the order of the Id. Single Judge setting aside the blacklisting was upheld.

41. In *M/s. S & P Infrastructure Developers Pvt. Ltd. (supra)*, the Petitioner was the successful bidder for construction of a highway. After submission of the bid document, National Highways and Infrastructure Development Corporation Ltd (NHIDCL) had received a complaint that a forged certificate was submitted by the bidder. The matter was investigated. Though the Petitioner had been declared as successful bidder, the signing of the contract was kept on hold. The Petitioner then argued that even if the said certificate is kept aside, it still qualifies the eligibility criteria. NHIDCL, however, invoked the bank guarantee submitted as security on the ground that the bidder had indulged in the fraudulent practice. The bidder was,

thereafter, debarred for two years. The Court found that the bidder had submitted documents which had inaccurate descriptions. However, the question raised was whether it constituted as corrupt, fraudulent, coercive, undesirable or restricted practice. Clause 4 in RFP document specified whether it constituted a fraudulent practice. The Court held that the Petitioner therein was not absolved of its liability in respect of the document, which was furnished along with the bid which it had certified to be true and correct. However, after analyzing the contents of bid document, the Court came to the conclusion that the submissions made in the said document about certain projects could not influence the bidding process as they were not eligible projects. The Court noted that blacklisting has a serious and adverse consequence. On the ground that the document did not influence the bidding process, the Court set aside the blacklisting.

42. In **Grosos Pharmaceuticals (P) Ltd. (supra)** elaborating on the principles of natural justice, prior to blacklisting, the Supreme Court held as under:

“2..... It is true that an order blacklisting an approved contractor results in civil consequences and in such a situation in the absence of statutory rules, the only requirement of law while passing such an order was to observe the principle of audi alteram partem which is one of the facets of the principles of natural justice. The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant were based was not the requirement of principle of audi alteram partem. It was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted. It is not

disputed that in the present case, the appellant was given an opportunity to show cause and he did reply to the show cause which was duly considered by the State Government. We are, therefore, of the view that that the procedure adopted by the respondent while blacklisting the appellant was in conformity with the principles of natural justice."

Thus, as per the above judgment, a hearing is not mandatory but what is necessary is issuance of a show cause and an opportunity of reply, prior to any order being passed.

43. In *M/s. Patel Engineering (supra)*, defining blacklisting, the Supreme Court observed as under:

"11. The concept of Blacklisting is explained by this Court in M/s. Erusian Equipment & Chemicals Limited v. Union of India and others, (1975) 1 SCC 70, as under:

"Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains."

The nature of the authority of State to blacklist persons was considered by this Court in the abovementioned case and took note of the constitutional provision (Article 298)**, which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of*

*Article 14. Though nobody has any right to compel State to enter into a contract, everybody has a right to be treated equally when State seeks to establish contractual relationships*** The effect of excluding a person from entering into a contractual relationship with State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.*

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18. The next question that is required to be considered is whether the 2nd respondent is justified in blacklisting the petitioner in the facts and circumstances of the case. The necessary facts are already mentioned and they are not in dispute. Failure of the petitioner to conclude the contract by executing the necessary documents, admittedly, resulted in a legal wrong. Whether the 2nd respondent should have been satisfied with the forfeiture of the bid security amount or should have gone further to also blacklist the petitioner after forfeiting the bid security, is a matter requiring examination. In other words, the issue is one of the proportionality of the action taken by the 2nd respondent.

Thus, in matters of blacklisting, the doctrine of proportionality is to be considered.

44. *In Mekaster Trading Corporation Vs. UOI and Ors 2003 (71) DRJ 376*, a ld. Single Judge of this Court set aside a five year blacklisting order on the ground that the same was passed in a slipshod manner. In *M/S Svogl Oil Gas & Energy Ltd. v. Indian Oil Corporation Ltd., 2016(232) DLT 180* relied upon by the NCRTC, it was held that reasons for blacklisting have to be contained in the order, which blacklists the party.

45. Upon a reading of the aforesaid judgments cited on behalf of both the

parties, the general principles, which emerge, with respect to blacklisting are;

- (a) Principles of natural justice have to be complied with before the order of blacklisting is passed;
- (b) Natural justice or *audi alteram partem* does not always require a hearing to be granted. Serving of show cause notice and affording an opportunity to reply to the same, is considered as being adequate opportunity and is sufficient adherence to the principles of natural justice;
- (c) Blacklisting constitutes civil death and has extremely grave consequences. Thus, the same is amenable to the judicial review if the same is by governmental authorities;
- (d) Any order of blacklisting ought to contain proper reasons. The reasons need not be detailed or elaborate. It is sufficient to be brief, pithy and concise;
- (e) Reasons should be supplied to the affected party;
- (f) Decision taken ought not to be arbitrary or discriminatory.
- (g) Blacklisting orders being amenable to judicial review can be judged on the standard of proportionality. Thus, the period of blacklisting as also terms and conditions thereof have to be proportionate to the irregularities or conduct of the bidder.

46. Every party has a freedom to contract. In exercise of this freedom, the giver of work or a project is free to award or allot the work to any person as it deems appropriate. However, in order to attract the most advantageous terms from the best qualified entities as also to maintain transparency and level playing field to all, the process of tendering is adopted. The tender

document contains all the requisite eligibility conditions and the documents that are required to be submitted by the prospective bidder. The prospective bidder is expected to only submit genuine and correct documents and make correct claims in a bid. In order to fully ensure that no bidder is able to submit incorrect or false documents or make any misrepresentations in the bids submitted, bidders are cautioned with specific consequences being provided in the bid in case it is found that they have indulged in any incorrect practice. If, after going through a bid and agreeing to not indulge in any fraudulent or corrupt practice, any party is found to have indulged in the same, such conduct ought not to be condoned. If the bidder has adopted an incorrect, immoral, fraudulent or corrupt practice, action ought to be taken. However, the action taken can be judged on the benchmark of proportionality.

47. In the present case, the bidder / Petitioner was to establish that it had experience in executing the similar works. Despite clarifications being asked, the bidder/ Petitioner submitted experience documents relating to one project. In the bidder's/ Petitioner's view point, the said one project was sufficient for it to qualify or satisfy the eligibility criteria. Along with its bid, the two certificates of DIMTS, which the bidder/ Petitioner submitted dated 3rd May, 2018 and 20th September, 2019 were meant to act as evidence of fulfilment of the eligibility criteria. Thus, if only the first certificate was sufficient i.e. dated 3rd May, 2018, the second certificate dated 20th September, 2019 need not have been submitted. The fact that the bidder/ Petitioner submitted certificate dated 20th September, 2019 shows that it was conscious of the need for such a certificate to certify its performance as also the breakup of the various components of the projects,

which it had allegedly executed. Thus, the submission of certificate dated 20th September, 2019 was neither superfluous nor an innocent act. It was a conscious and deliberate act on behalf of the bidder. The said certificate has later turned out to be forged. Submission of such certificate would clearly, in the opinion of this Court, constitute a fraudulent practice, which was meant to affect the bidding/procurement process. Thus, the facts of this case are completely distinguishable from *M/s. S & P Infrastructure Developers Pvt. Ltd. (supra)* judgment.

48. The NCRTC felt that the bidder did not satisfy the eligibility and sought clarifications. The chronology of events after submission of the bid and after NCRTC informed that the second certificate was forged, shows the bid was rejected and the Petitioner sought refund of the EMD amount. A show cause notice was issued informing the Petitioner that its second certificate was forged and an opportunity was given to file the reply. The Petitioner submitted its reply and it is relevant to highlight that in the said reply, the Petitioner did not seek a personal hearing. The impugned order dated 29th April, 2020 came to be passed and it was only thereafter that the Petitioner sought a personal hearing. The reply of the Petitioner was considered. In the facts of this case, the principles of natural justice have been adequately complied with as –

- NCRTC duly verified the facts from DIMTS;
- After receiving the letter of DIMTS and the clarification, the bid of the Petitioner was rejected;
- It issued a show cause notice setting out the case against the Petitioner;

- Reply was sought which was duly submitted. No personal hearing was sought in the reply;
- Blacklisting order was passed giving sufficient and adequate reasons;
- A representation was then made seeking a hearing. The hearing was neither sought prior to the blacklisting nor is it compulsory to grant a hearing in every case.

49. However, the events that transpired when NCRTC sought clarification, shows that the Petitioner did take some mitigative steps i.e. it referred NCRTC to seek clarification from DIMTS directly, if needed and it did not challenge the rejection of its bid but merely sought refund of EMD amount. Thus, there may have been no malafide intention on behalf of the bidder/ Petitioner and it is nigh possible that the forgery was not in the knowledge of the Petitioner's management. It could have been an act of an employee, which is an issue not being gone into in the present writ petition. This fact ought to be taken into consideration while dealing with the question as to whether the punitive action as per impugned order is proportionate or not.

50. As per the impugned order, four measures have been taken by the NCRTC. The Competent Authority in NCRTC in terms of ITB 3.1 (d) of the Bid Document of the said Bid decided that the Petitioner should be:

- (a) Banned for participation in all future Bids of NCRTC for a period of five years.
- (b) The offer submitted by the firm should be rejected in all the Bids which are still under evaluation with NCRTC.

(c) The Bid Security submitted by the firm in the subject Bid should be forfeited.

(d) The Firm M/s S.D. Construction Co (Petitioner) should be permitted to complete the ongoing works with NCRTC.

51. A perusal of clause 3 shows that there are several kinds of impermissible practices that have been listed in the said clause including corrupt practice, fraudulent practice, collusive practice and coercive practices. All these practices, though falling under clause 3, are not identical to each other. The level of irregularity, fraud, collusion, corrupt practice ought to be taken into consideration in each and every case though for all these practices, disqualifying and banning is permitted for five years. Thus, the period of five years ought to be reckoned as the maximum period for which any bidder can be disqualified or banned by the NCRTC. Since the doctrine of proportionality applies while reviewing a blacklisting order, the nature of the practice indulged in, on behalf of the bidder would have to be considered along with any mitigative circumstances. The Petitioner has been subjected to the maximum possible punitive action for submitting incorrect/fabricated certificate.

52. The circumstances surrounding the issuance and submission of the same are not gone into. The submission of such a certificate in support of the certificate dated 3rd May, 2018 constituting misrepresentation would, in the opinion of this Court, attract punitive action but not to the maximum extent. The bidder/ Petitioner has already been subjected to a forfeiture of the bid security. In addition, the bidder/ Petitioner has been blacklisted for a period of five years and even in the bids, which are currently under consideration, the bids have been directed to be rejected.

53. The averments in the writ petition show that the Petitioner has been in the construction business since 25 years. Its employees are a large number of workers and labourers and as per the counsel for the Petitioner, its business would come to complete stand still, as blacklisting of this nature by one government organization also has a cascading effect.

54. The submission of Id. counsel for the NCRTC has been, following ***M/s Kulja Industries*** judgment (*supra*), that once the Court comes to the conclusion that the blacklisting is excessive, in order to determine the period of blacklisting, the case ought to be remitted back to the authority. A perusal of ***Kulja Industries*** judgment(*supra*) shows that the observations of the Supreme Court on this question is as under:

“26. The next question then is whether this Court ought to itself determine the time period for which the appellant should be blacklisted or remit the matter back to the authority to do so having regard to the attendant facts and circumstances. A remand back to the competent authority has appealed to us to be a more appropriate option than an order by which we may ourselves determine the period for which the appellant would remain blacklisted. We say so for two precise reasons. Firstly, because blacklisting is in the nature of penalty the quantum whereof is a matter that rests primarily with the authority competent to impose the same....”

55. A perusal of the above shows that remitting back to the authority is only one of the options, as per the Supreme Court. The Court decided the issue on the facts and circumstances which arose therein. Currently during the pandemic, construction work has either fully stopped or it has reached a bare minimum. The Petitioner has already been blacklisted since 29th April, 2020. Even some of its earlier bids, which it had earlier submitted, may

have been rejected. Remitting back the case for reconsideration would lead to further delay, inasmuch as during the lockdown most of the offices are functioning at the very bare minimum. The Petitioner has employed various labourers, other staff and according to the Petitioner, his employees are more than 200 in number. Keeping all these contended facts and circumstances, this Court modifies the impugned order in the following terms:

- (i) The forfeiture of the bid security of a sum of Rs. Rs 26,62,642/- of the Petitioner is upheld;
- (ii) The period of blacklisting is modified to six months instead of five years;
- (iii) Insofar as the bids which have already been submitted are concerned, the bids which may have been rejected already shall stand rejected. There shall be no reconsideration of such bids. However, if any bids are still left to be considered, the same shall not be rejected merely on the basis of the impugned order dated 29th April, 2020. The bids of the Petitioner already submitted, if opened henceforth, shall be considered on their own merits without being affected by the impugned order dated 29th April, 2020. If the Petitioner is found successful, the bid shall not be awarded prior to the expiry of the six months' period.
- (iv) In respect of ongoing works NCRTC has already permitted completion of ongoing works. Hence, no modification is called for.

56. Since the Petitioner is sufficiently sanctioned, the impugned order or the present order would not have any bearing on the Petitioner's ability to apply or bid in any future tenders or bids of the NCRTC or any other entity

including government and autonomous bodies.

57. The present writ petition along with all pending applications is disposed of in these terms.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 2, 2020

dk/dj/R

