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HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on 10.02.2021****Order Delivered on 16.02.2021****Writ Petition (C) No. 2577 of 2020**

- M/s Jai Ambey Roadlines, through its proprietor Mr. Jogendra Singh, having its place of business at 1-37, Lalita Kunj, Anupam Nagar, Shankar Nagar, Raipur, Chhattisgarh - 492007

---- Petitioner**Versus**

1. South Eastern Coalfields Limited through its Charmian cum Managing Director, having its registered office at Seepat Road, P.B. No. 60, Bilaspur, Chhattisgarh – 495001.
2. South Eastern Coalfields Limited through its General Manager, Sohagpur Area, P.O. Dhanpuri, District Shahdol, Madhya Pradesh – 484114.

---- Respondents

For Petitioner	:	Shri Prafull N. Bharat and Shri Rajat Agrawal, Advocates.
For Respondents	:	Shri Goutam Khetrapal, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Justice Parth Prateem Sahu, Judge****CAV Order****Per P. R. Ramachandra Menon, Chief Justice**

1. Cancellation of the contract, recovery of the penalty and debarment under Clause 6.1 and 9.2 of the 'General Terms & Conditions' of the tender notification, as per Annexure P/1 order dated 29.09.2020, are put to challenge in this petition.
2. The Petitioner is a proprietorship firm engaged in the business of transportation. Pursuant to Annexure P/3 E-Tender Notice dated 22.07.2020 issued by the 2nd Respondent, inviting bids from prospective bidders for hiring of tippers for transportation of surface minor cut coal to various destinations, the Petitioner participated in the same and came to be placed at 'L-2' level.

3. M/s Akhlak Ahmad, another prospective bidder was got placed at 'L-1'. After declaring the status as above, the 'Letter of Intent' (for short, 'LOI') was awarded to the 'L-1' bidder the bid evaluation was conducted in terms of Clause 11 of Annexure P/2 'NIT'. On evaluating the bid, it was noted that the 'L-1' bidder could not clear Clause 11(v), under which circumstance their bid was rejected.
4. On cancellation of the 'LOI' given to the 'L-1' bidder, invoking the power under Clause 11(vii), 'LOI' was issued to the Petitioner who was placed at 'L-2' on the same date, vide Annexure P/3 dated 05.12.2019. As per Annexure P/6, the Petitioner was directed to furnish 'Performance Security' of Rs.1,77,46,612/- and 'Additional Performance Security' of Rs.35,54,211/- (since the quote was more than 50% less than the scheduled of rates). As per the term, the work was to be started within the time, as specified. Since there was no positive action on the part of the Petitioner, Annexure P/6 reminder was issued on 31.12.2019, requiring the Petitioner to mobilize the equipments and to furnish the 'Performance Security' as well as 'Additional Performance Security'. This was followed by Annexure P/7 dated 24.01.2020 reminding to meet the requirements as per the 'LOI' and the Annexure P/6.
5. In the meanwhile, the 'L-1' bidder whose bid was cancelled by the Respondents on 05.12.2019 challenged the proceedings of the Respondents by filing Writ Petition No. 27919 of 2019 before the High Court of Madhya Pradesh, seeking to set aside the impugned order and to award the work to the said bidder. The Petitioner herein was arrayed as 4th Respondent in the said writ petition, to whom notice was ordered by the Madhya Pradesh High Court on 09.01.2020.
6. Case of the Petitioner is that, it is without revealing the pendency of the said proceedings before the Madhya Pradesh High Court, that the Respondents were pressing the Petitioner to furnish the 'Performance Security', 'Additional

Performance Security', Execute the Agreement and to commence the work (inspite of the fact that they had already received the notice and entered appearance). It is the case of the Petitioner that the Annexure P/3 'LOI' was issued to the Petitioner on 05.12.2019, without any consultation and the Petitioner was virtually made to accept the same under pressure.

7. Since no action was pursued by the Petitioner to fulfill the requirements and to commence the work, Annexure P/8 show-cause notice was issued by the 2nd Respondent on 14.02.2020, granting '15 days' time to explain why proceedings under Clause 6.1 of the 'NIT' for cancelling the work shall not be pursued; alongwith forfeiture of the EMD and Debarring / Blacklisting of the bidder. On the very next day *i.e.* on 15.02.2020, the Petitioner submitted Annexure P/10 reply, clearly conveying that the Petitioner was interested in the commencement of the work awarded by the 2nd Respondent and that they were ready to deposit the 'Performance Security' and to sign the agreement. It was assured that the Petitioner would start the work on or before 25th to 28th February, 2020 and that all their machinery and equipments were ready for deploying in the site. It is further stated that the Petitioner was waiting for the loading tender on Sohagpur site, which was the reason for the delay in commencement of the work. It was categorically stated therein that the Petitioner was accepting the 'LOI' issued by the 2nd Respondent.
8. It is seen that there were further correspondence between the Respondents and the Petitioner and the Petitioner was required to attend the meeting scheduled on 17.03.2020 vide Annexure P/13. As per Annexure P/14 dated 17.03.2020, the Petitioner requested to reschedule the meeting; based on which the meeting was rescheduled by the 2nd Respondent to be held on 20.03.2020 and the position was conveyed as per E-mail dated 18.03.2020. However, a mail was sent on 20.03.2020 by the Petitioner, expressing the inability to attend the meeting because of 'Covid-19' pandemic and the declaration of Section 144 of

Cr.P.C. proceedings in the Raipur area. It is pointed out that a detailed representation was sent already on 14.05.2020 vide Annexure P/16 (where it has been conceded that the notice issued from the Madhya Pradesh High Court in Writ Petition No. 27919 of 2019 filed by the 'L-1' bidder was obtained in February, 2020) requesting to keep all the tender proceedings in abeyance till the matter was finalized by the Madhya Pradesh High Court and further to return the EMD. It is contented that the request made by the Petitioner was not properly considered and a drastic order was passed as Annexure P/1 dated 29.09.2020, whereby the 'LOI' was cancelled, EMD was forfeited, Blacklisting was ordered for a period of '24 months' (enhancing the same from '12 months' as contained in Annexure P/8 show-cause notice dated 14.02.2020 issued by the 2nd Respondent) and also imposing penalty of 20% of the value of the left over work in terms of the relevant clauses of the agreement; correctness of which is put to challenge in this writ petition.

9. A detailed reply / statement has been filed from the part of the 2nd Respondent, producing copies of various documents as Annexures R/1 to R/12. The averments and allegations raised by the Petitioner in the writ petition have been rebutted therein. Reference is made to the various correspondences between the Petitioner and the Respondents and as to the glaring lapses including the non-furnishing of the 'Performance Security' and 'Additional Performance Security', non-execution of the agreement and non-commencement of the work till date. Various enabling provisions in the Tender Notifications / 'General Terms & Conditions' of the tender / Instructions of the bidders have also been referred to. The circumstance under which Annexure P/3 'LOI' came to be issued to the Petitioner has also been explained, contending that the challenge raised against the Annexure P/1 is totally baseless in all respects. The Petitioner has filed a rejoinder as well.

10. Shri Prafull N. Bharat, the learned counsel appearing for the Petitioner submits that Annexure P/1 order passed by the 2nd Respondent is not maintainable either on facts or in law. The learned counsel addressed the Court in terms of the pleadings raised in the petition, mainly contending that the Annexure P/3 'LOI' was issued to the Petitioner without any intimation; that the pendency of the writ petition filed by the 'L-1' bidder before the Madhya Pradesh High Court challenging the tender proceedings was never informed by the Respondents to the Petitioner (while they were insisting to satisfy the 'Performance Security' / 'Additional Performance Security' and to execute the agreement); that the Petitioner was virtually pressurised to accept the Annexure P/3 'LOI'; that there is no rhyme or reason for imposing the huge penalty to an extent of 20% of the value of the left over work and further that the Blacklisting of the Petitioner, that too for '24 months', virtually enhancing the period of '12 months' mentioned in Annexure P/8 show-cause notice, is unconscionable. It has been ordered without affording any opportunity of hearing, which is pointed out as contrary to the law declared by the Supreme Court and hence requires interference.
11. Shri Goutam Khetrapal, the learned counsel representing the Respondents submits in terms of the pleadings raised in the reply / statement, that there is absolutely no merit or bonafide in the writ petition. Specific reference is made to the relevant clauses, particularly, Clause 11 of Annexure P/2 as to the bid valuation and that Annexure P/3 'LOI' was issued to the Petitioner on the same day, when the 'LOI' issued to the 'L-1' bidder was cancelled, in conformity with Clause 11(vii) of the general conditions. While submitting the bid in response to the tender notification, the Petitioner had agreed to all the 'Terms & Conditions' and as such, the Petitioner cannot plead ignorance on any such grounds. Specific provisions are incorporated in the tender as to the requirement to satisfy the 'Performance Security', 'Additional Performance Security', the

necessity to execute an Agreement, Commencement of work within '10 days' from the date of issue of 'LOI' and on such other aspects. It is also pointed out that the Petitioner had received the notice from the Madhya Pradesh High Court well on time, as conceded in Annexure P/16 representation. However, no intimation was ever been issued to the Respondents when the Annexure P/3 'LOI' was issued to the Petitioner or even thereafter, pointing that the Petitioner was not interested to proceed with the tender. This submission is made also in response to the submission made by Shri Prafull N. Bharat, the learned counsel for the Petitioner that by the time the 'LOI' was issued to the Petitioner, 3 months had already elapsed after the 'LOI' issued to the 'L-1' bidder and that the Petitioner had already diverted funds for such other works. If that be the position, it was very much open for the Petitioner to have informed the position then and there, which undisputedly has not been done. The 'L-2' bidder simply steps into the shoes of the 'L-1' bidder once the 'LOI' given to the 'L-1' bidder is cancelled for non-satisfaction of the requirements (under various sub-clauses of Clause 11) as clearly stipulated in Clause 11(vii). Reference is also made to Annexure P/10 reply dated 15.02.2020 to Annexure P/8 show-cause notice dated 14.02.2020, categorically stating that the Petitioner was ready to furnish the 'Performance Security' / 'Additional Performance Security' and to execute the Agreement and also to commence the work on or before 25th to 28th February, 2020. It has also been made clear there, that the Petitioner was accepting Annexure P/3 'LOI' issued to him; submits the learned counsel. We find considerable force in the said submission.

12. As borne by the contents of Annexure P/8 show-cause notice dated 14.02.2020, as many as 8 letters issued by the Respondents from 08.12.2019 to 30.01.2020 have been referred to, specifically adverting to the failure on the part of the Petitioner. After referring to the relevant clauses in the Agreement regarding the power to forfeit the EMD and to pursue further steps as per the 'General Terms

& Conditions' of the contract, it was informed that, before proceeding further, the said notice was being served to the Petitioner to commence the work awarded, deposit the 'Performance Security' and sign the Agreement immediately. Simultaneously, the Petitioner was also required to submit the reasons explaining the delay in commencement of the work and the failure under different heads, alerting to the following consequences:

"Unquote:-

XXX XXX XXX

XXX XXX XXX

You are also advised to submit your justification in delay of commencement of work awarded to you, non deposition of PSD and non signing of agreement in writing or in person within the stipulated time period in the office of General Manager Sohagpur Area, failing which it shall be presumed that neither you are interested in execution of work nor have anything to state in your defence and the management will have no options other than to initiate actions as below:-

1 – Cancellation of LOI.

2 – Forfeiture of EMD Rs.12,96,000/- (Twelve Lakh Ninety Six Thousand)

3 – Debarring you from participating in future Bids for at least 12 months under clauses quoted above."

This was replied by the Petitioner as per Annexure P/10 dated 15.02.2020 in the following lines:

"With reference to your previous letter, this is to inform you that we are interested in commence of work awarded by you. And we are ready to deposit of PSD and signing of agreement. We will start our work on or before 25 to 28 February 2020. All our machine and equipment are ready for deploying in site. We had waiting for the loading tender on sohagpur site that's why we have not commencement of work. We are accepting your letter of intent."

13. In response of the specific query raised by this Court, the learned counsel for the Petitioner conceded that, though copy of the proceedings filed by the 'L-1' bidder before the Madhya Pradesh High Court was served about 1 years ago,

no return has so far been filed by the Petitioner in the said proceedings. Since the specific prayer of the Petitioner in the said case was to cancel the proceedings pursued by the Respondents and to award the work to the 'L-1' bidder, if the Petitioner herein was not interested in any manner, it could have been brought to the notice of the Court then and there; which admittedly has not been done. On the other hand, the Petitioner made the Respondents to believe that the Petitioner was interested to get the work done, specifically accepting Annexure P/3 'LOI' issued to him; but trying to purchase time to furnish the 'Performance Security', 'Additional Performance Security' and to sign the Agreement, expressing their willingness in this regard. This being the position, the contentions that the Petitioner was prejudiced because of the proceedings pending before the Madhya Pradesh High Court filed by the 'L-1' bidder; that this was the reason for delay / failure / lapses of the Petitioner in furnishing the 'Performance Security', 'Additional Performance Security'; execution of the Agreement and commencement of the work or that the Petitioner was forced to accept the Annexure P/3 'LOI' issued by the Respondents, are not liable to be sustained and it stands repelled.

14. Clause 6 of the 'General Terms & Conditions' of the contract deals with the time for completion of the contract; extension thereof, defaults and compensation for delay. Clause 6.1 sought to be relied on by the Respondents in Annexure P/1 to forfeit the EMD reads as follows:

“Clause 6.1. If the contractor, without reasonable cause of valid reason, commits default in commencing the execution of the work within the aforesaid date, the company shall, without prejudice to any other right or remedy, be at liberty, by giving 15 days notice in writing to the contractor to commence the work, failing which to forfeit the Earnest Money deposited by him.”

15. It will be worthwhile to make a reference to Clause 9.2 of the very same document as to the powers conferred upon the Respondents / Authorities

concerned on cancellation of the contract or termination of the contract, which provides for the 'Blacklisting' for a minimum period of '12 months' and also for imposing penalty to an extent of 20% of the value of the incomplete work. The relevant provision of the above clause is extracted below:

“9.2. On cancellation of the contract or on termination of the contract, the Engineer-in-Charge shall have powers:

a. To take possession of the site and carry out balance work through any other agency.

b. after giving notice to the contractor to measure up the work of the contractor and to take such whole or the balance or part thereof, as shall be unexecuted out of his hands and to give it to another contractor or take up departmentally, to complete the work. The contractor whose contract is terminated shall not be allowed to participate in future bidding for period of minimum twelve months.

In such an event, the contractor shall be liable for loss/damage suffered by the employer because of action under this clause and to compensate for this loss or damage, the employer shall be entitled to recover higher of the following:

i) Forfeiture of security deposit comprising of performance guarantee and retention money and additional performance security, if any, at disposal of the employer.

Or

ii) 20% of value of incomplete work. The value of the incomplete work shall be calculated for the items and quantities remaining incomplete (as per provision of agreement) at the agreement rates including price variation as applicable on the date, when notice in writing for termination of work was issued to the contractor.

It is being clarified that the above liability is over and above the penalties payable by the contractor on account of shortfall in quantities as per provision of clause 6.”

16. On evaluating the course and conduct of the Petitioner and the steps taken by the Respondents by issuing various correspondence at different points of time, alerting the Petitioner to satisfy the requirements in terms of the tender, it is seen that the Petitioner has miserably failed in this regard. This being the

position, the forfeiture of the EMD, ordered as per Annexure P/1, is not liable to be interdicted by this Court. Since the Petitioner does not have a case or prayer to set aside the cancellation of the 'LOI' or to award the work to him (but for confining the relief against the forfeiture of the EMD, Blacklisting for '24 months' and imposing the penalty to an extent of 20% of the value of the incomplete work), there cannot be further challenge with regard to the forfeiture of the EMD.

17. With regard to the Blacklisting of a bidder, it is settled law as per the ruling rendered by the Apex Court in ***Gorkha Security Services vs. Government (NCT of Delhi) & Others reported in (2014) 9 SCC 105*** that there cannot be any Blacklisting without issuing any proper notice. The notice issued to the bidder concerned shall reveal the intention of the awarder to proceed in the lines as suggested therein, thus, affording an opportunity of hearing. This virtually has been satisfied by issuing Annexure P/8 show-cause notice where the different consequences that would follow on the failure of the Petitioner, have been given in a crystal-clear terms. Though an explanation was called for, the only version of the Petitioner, as given in Annexure P/10 reply dated 15.02.2020, is that, the Petitioner was ready to furnish the 'Performance Security' and to sign the Agreement, assuring that the work would be commenced on or before 25th to 28th February, 2020 adding that the 'LOI' issued by the Respondents stands accepted. Virtually, no explanation is forthcoming from the part of the Petitioner as to the delay or as to why the 'Blacklisting' shall not be ordered. There is no explanation with regard to the proposed steps for imposing penalty as well, in terms of Clause 9.2.
18. **Clause 9.2(b)** of the notice inviting tender however stipulates that on termination of the contract, the contractor shall not be allowed to participate in the future bids for a minimum period of '12 months'; whereas the Blacklisting ordered as per the impugned order is for '24 months'. The explanation offered

by the learned counsel for the Respondents is that the provision only mentions the “minimum period” and hence the Competent Authority is justified in imposing Blacklisting for '24 months'. But after having mentioned in the proposal (if it be so) to Blacklist for a period of '12 months' (in Annexure P/8), no reason is stated or discernible from Annexure P/1 as to why it was sought to be enhanced from the minimum period of 12 months to 24 months. Non-mentioning of reason for such a drastic course of action in Annexure P/1 (and even in the reply filed from the part of the Respondents) makes the said proceedings not legally acceptable. It is settled law, as per the rulings rendered by the Apex Court on many an occasion, that the act of Blacklisting is having serious consequences and as such, it cannot be ordered without calling for explanation as to the proposed step for Blacklisting. The period for which Blacklisting is ordered also depends upon the facts and circumstances of each case, which can be decided only after considering the explanation to be offered by the party in this regard. [See: ***Gorkha Security Services vs. Government (NCT of Delhi) and Others*** reported in (2014) 9 SCC 105, ***Vetindia Pharmaceuticals Limited vs. State of Uttar Pradesh & Another***, {Civil Appeal No. 3647 of 2020 vide judgment dated 06.11.2020}, ***UMC Technologies Private Limited vs. Food Corporation of India & Another***, {Civil Appeal No. 3687 of 2020 vide judgment dated 16.11.2020}, ***Medipol Pharmaceuticals India Pvt. Ltd. vs. Post Graduate Institute of Medical Education and Research and Another***; {Civil Appeal No. 2903 of 2020 vide judgment dated 05.08.2020}].

19. Similarly, the Quantum of Penalty, if to be awarded in terms of Clause 9.2, also depends on various facts and circumstances, as Penalty cannot be imposed as a matter of course; but to be ordered with proper application of mind, depending upon the culpability involved. Further, the 'Penalty' to be imposed as per Clause 9.2 of the 'General Terms & Conditions' of the tender is with reference to the

“loss caused to the Company”. This shows that there has to be proper application of mind with regard to all the relevant facts and figures in computing the 'loss' as well and to have it realised in the form of Penalty to be mulcted on the parties concerned. Here again, the Respondents have gone wrong in pursuing the 'decision making process' and hence it requires reconsideration.

20. In the light of the above discussion and findings arrived at, the challenge raised by the Petitioner against the 'forfeiture of the EMD' ordered in Annexure P/1 stands repelled. The cancellation of the Annexure P/3 'LOI' and the forfeiture of the EMD stands affirmed. However, the 'Blacklisting' of the Petitioner ordered for a period of '24 months', as against the proposal to Blacklist the Petitioner for '12 months' as contained in Annexure P/8 show-cause notice and the fixation of the quantum of the 'Penalty', mechanically ordering to recover 20% of the value of the incomplete work with reference of Clause 9.2 (b) (ii) of the 'NIT' without any loss assessment, stands set aside, as the 'decision making process' is bad. This is without prejudice to the rights and liberties of the Respondents to proceed with further steps in this regard by issuing a proper notice and affording an opportunity of hearing before passing a speaking order as to the extent of Blacklisting and the quantum of Penalty to be ordered, if any.

The writ petition stands disposed off as above.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge