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

Date of decision: 28th January, 2021

+ **W.P.(C) 1014/2021 & CM APPLs. 2818-19/2021**

M/S ELECON POWER INFRA LTD.

..... Petitioner

Through: Ms. Nandini Sen and Mr. Basab
Sengupta, Advs. (M: 9810099579 &
9990686255)

versus

BSES RAJDHANI POWER LTD.

..... Respondent

Through: Mr. Narender Hooda, Senior
Advocate with Mr. Rishab Raj Jain,
Advocate. (M: 9811079695)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done by video conferencing.
2. The Petitioner has filed the present petition challenging the impugned notice dated 31st October, 2020, by which the Petitioner has been blacklisted by the BSES Rajdhani Power Ltd. (*hereinafter as 'BSES'*), and debarred from performing/participating/associating with the BSES for a period of three years, w.e.f 1st November, 2020, citing gross breach of the Vendor Code of Conduct of BSES.
3. The submission of Ms. Nandini Sen, Id. counsel for the Petitioner, is that the said act of blacklisting has been done without proper notice being given to the Petitioner. Mr. Narender Hooda, Id. Senior counsel for the Respondent, on the other hand, submits that the Rate Contracts between the Petitioner and the Respondent contain a clause laying down a dispute resolution mechanism, which provides for disputes to be resolved by arbitration and therefore, the Petitioner ought to invoke the same.

4. A perusal of the show cause notice dated 4th March, 2020, shows that after setting out the allegations against the Petitioner, the BSES has basically stated that there maybe termination and blacklisting of the Petitioner. The notice however gives an opportunity to the Petitioner to submit a report on the action taken on the said allegations, which shall contain the precautionary measures and practices adopted to avoid the occurrence of such issues. The relevant portion of the show cause notice dated 4th March 2020, after mentioning the various violations by the Petitioner, concludes as extracted below:

“You may refer to the clause no.30 TERMINATION of the said Rate Contract & their sub Clause No. 30.7, 30.9.

You are aware that as per contract clause no.30 these repeated cases of vigilances are not acceptable and may lead to termination of the contract and blacklisting from BRPL.

You are requested to submit a action taken report on these issues which shall contain the precautionary measures and practices adapted by your firm to void such occurrence in future and also submit your detailed reply why action not to be initiated against your firm as per the contract clause no. 30.

The ATR with your reply should reach us, not later than 15.03.2020.”

A perusal of the above shows that a threat was given that the Petitioner may be blacklisted, but the Petitioner was asked to explain the measures taken by it. It was not a clear notice for blacklisting.

5. The Petitioner replied to the Respondent on 14th March 2020. In the reply the Petitioner gave a detailed explanation as to the action taken by it in respect of each of the complaints raised against it. In the reply, the Petitioner

also assured that it will be vigilant in the future to ensure that its employees follow proper working procedure. The reply concludes as under:

“d) We've replaced supervisor from time to time, & shall improve screening & monitoring of supervisors further.

Lastly, improvement of working procedure & keeping vigil are two constants. Issues will come in the future, but we can guarantee you this, that our loyalty towards your esteemed organization & the work bestowed on us will never fail, as it has not failed in last 19 years.

We have never been blacklisted till now & have no intention to be so.”

6. No further communication was exchanged between the parties. After almost seven months, the Respondent straightaway issued the impugned order dated 31st October 2020, thus, blacklisting/debarring the Petitioner for a period of three years, and simultaneously terminating the Rate Contract, w.e.f. 30th November 2020. The said communications are under challenge in the present writ petition.

7. The Petitioner submitted a letter dated 3rd December, 2020, through its counsel, explaining its position and also highlighting the fact that no hearing was given prior to passing the blacklisting order. In the said letter, the Petitioner also gave the background and history of the relationship between the parties. The Respondent was called upon to withdraw the blacklisting order. The Respondent however refused to withdraw the same leading to the filing of the present writ petition.

8. The law relating to blacklisting/debarring and the importance of serving of proper notice prior to blacklisting is quite well settled. In ***Civil Appeals Nos. 7167-68/2014*** titled ***Gorkha Security Services v. Government (NCT of Delhi) and Ors.***, dated 4th August, 2014, the Supreme Court

observed as under:

“21. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.”

9. Recently in **Civil Appeal No. 3687 of 2020** titled **UMC Technologies Private Limited v. Food Corporation of India & Anr.**, dated 16th November, 2020, the Supreme Court, while discussing the criteria to be fulfilled for a show cause notice to constitute a valid blacklisting order, has observed as under:

“21. Thus, from the above discussion, a clear legal position emerges that for a show cause notice to constitute the valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the noticee. Such a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting.”

10. In the opinion of this Court, the show cause notice dated 4th March, 2020, does not satisfy the ingredients to constitute a valid order of blacklisting. From a reading of the notice as a whole, the clear impression one gets is that the Petitioner was called upon to take remedial actions with respect to the allegations raised against the Petitioner in the said show cause notice, and if the Respondent is not satisfied with the action taken, then the Respondent *may* resort to blacklisting. Considering the fact that the Petitioner has been a company which has been dealing with the Respondents for more than 19 years, and has more than 150 employees along with enormous investment, it deserved a proper opportunity to explain and take remedial measures before being debarred or blacklisted. The Petitioner was not even given a hearing prior to blacklisting.

11. Ld. Senior counsel Mr. Hooda, appearing for the Respondent, submits that the BSES is willing to withdraw the blacklisting order and serve a fresh show cause notice to the Petitioner.

12. Accordingly, the blacklisting order dated 31st October, 2020 is set aside. Insofar as the termination of the contract is concerned, the Petitioner is permitted to avail of its remedies, in accordance with law.

13. With these observations the present petition, along with all pending applications, is disposed of.

PRATHIBA M. SINGH
JUDGE

JANUARY 28, 2021

Dj/Ap

(corrected & released on 2nd February, 2021)