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

Date of decision: 10th November, 2021

\+ **W.P.(C) 3441/2021 & CM APPL. 27841/2021& 37124/2021**

GEETA JEENA ..... Petitioner

Through: Ms. Seema Bengani, Advocate (M-9891821220)

versus

GOVT OF NCT OF DELHI AND ORS ..... Respondents

Through: Mr. Gautam Narayan, ASC with Ms. Asmita Singh, Advocate for R-3 (M-9643520339).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

2. The present petition has been filed by the Petitioner challenging the forfeiture of the Earnest Money Deposit (hereinafter, "EMD") and the debarment for the current and four financial years, in terms of Clause 4.7 of the Notice Inviting Tender (*hereinafter "NIT"*).

3. The Respondent No.3/DTIDC had invited bids for licensing of shops/sites/spaces at Maharana Pratap ISBT, Kashmere Gate, Delhi in March, 2020. The last date for submission of bids was 18th June, 2020. However, due to the Covid-19 pandemic and the consequent lockdown, the date was extended from time to time. The Petitioner had submitted her bid for Shop No.41, ISBT, Kashmere Gate, Delhi in December, 2020. She was declared a successful bidder and a letter of acceptance dated 2nd February, 2021 was issued by the department to her. The Petitioner could not make the payments in terms of the bid which was submitted by her. The ground for

the said non-payment as has been stated in the writ petition, was the ill health of the Petitioner, in view of which she sought time for 24 days to complete the formalities. In view of the fact that the extension of time that was requested was not granted to the Petitioner, the letter dated 16th February, 2021 was issued against her, forfeiting the EMD, and debarring her from bidding for the present financial year and the next four financial years, in terms of Clause 4.7 of the NIT. The relevant extract of the said letter reads:

" ***LIST OF DEBARRED BIDDER/PERSON***

Name of Tender:- Licensing of Shops/ Sites/ Spaces at Maharana Pratap ISBT Kashere Gate, Delhi, March, 2020 for commercial utilization.
NIT NO. DTIDC/ MARCH/2019-20/1216

The successful bidders have failed to complete the formalities for the respective licence premises as stipulated in the LOA letter dated 02.02.2021:-

S.No.	***Name & Address of the successful Bidder***	***EMD amount***	***Shop No./ Licence premises***
1.	*Ms. Geeta Jeena W/o Sh. Tara Singh Jeena, R/o H. NO. L-50-B, Gali No. 35/38, Sadatpur Extn., Karawal Nagar, North East Delhi, Delhi-1100094*	*Rs.3,00,000/-*	*Shop No.41, Departure Block, ISBT, Kashmere Gate, Delhi*

The EMD of above successful bidders is hereby forfeited and the concerned successful bidders are debarred from taking participation in Tender/RFP of DTIDC for this financial year and next four financial year in terms of NIT condition No.4.7. This issues with prior approval of MD, DTIDC."

4. This matter was first listed before this Court on 17th March, 2021. On the said date, ld. Counsel for the Respondents/GNCTD had submitted that the Respondents are willing to give an extension of time for making the payment, so that the Petitioner can honour the bid. However, at that stage, the Petitioner opted not to honour the bid, relying upon the prevalent circumstances including the *kisaan andolan*. In view of the said position on 17th March, 2021, no interim order was granted and the following observation was made by this Court:

> *"8. <u>In view of the above, since there is an admitted default on the part of the Petitioner by not honouring the bid submitted by her and despite extension for payment being offered today, which was sought by the Petitioner herself, the Petitioner does not wish to avail of the same, no interim order is being granted at this stage. The Petitioner cannot firstly seek extension on medical grounds and now cite other reasons such as kisan andalon for not honouring her bid. The application for stay being CM APPL. 10459/2021 is accordingly rejected at this stage</u>. However, the period of blacklisting and whether both forfeiture of EMD and blacklisting can be simultaneously imposed, deserves consideration. If there is any future tender called by the Respondent, the Petitioner is given liberty to approach the Court."*

5. The pleadings have been completed in the matter. Ld. Counsels for the parties have made their submissions. Ms. Bengani, ld. Counsel appearing for the Petitioner vehemently submits that the forfeiture of Rs.3 lakhs which was deposited as EMD, coupled with the next four financial years of blacklisting, is an extremely high penalty that has been imposed upon the Petitioner by the Respondents. She submits that the Petitioner was initially ill and had sought extension of 24 days which was not granted. By the time

the matter was heard by the Court in March, 2021, the *kisaan andolan* had expanded, which had resulted in reduced footfall in the ISBTs, and it was no longer viable for the Petitioner to continue to stick by the earlier bid which was submitted prior to the effect of the *kisaan andolan* being felt in the ISBTs.

6. On the other hand, Mr. Gautam Narayan, ld. ASC appearing for GNCTD, submits that the Petitioner is a habitual defaulter. The reasons for not honouring the bid have been changed by the Petitioner from time to time. Initially, medical illness of the Petitioner was cited, and thereafter, the *kisaan andolan* was cited as a reason. The conditions in the NIT are clear that the dishonour of the bid would lead to debarment from bidding as per Clause 4.7 of the NIT.

7. The facts in the present case are admitted. The factum of floating of the tender, the submission of the bid by the Petitioner, and the extension of time for making the payment which was sought are also not in dispute. Thus, the only question is whether the letter dated 16th February, 2021, by which the EMD was forfeited and the debarment from participation in the tender floated by the DTIDC for this financial year and next four financial years was imposed, is valid in the eyes of law or not.

8. A perusal of Clause 4.7 of the NIT shows that the advance license fee and security deposit was liable to be paid by the bidder. The said Clause reads as under:

> *"**4.7. License Fees (and other applicable charges & taxes)** shall be payable in advance by the Licensee to DTIDC on monthly basis. There will be an annual increase @ 10% in the License fee for the licensed period on compounding basis (applicable in case the*

license tenure is more than one year). All the payments shall be accepted through Demand Draft/banker cheques/RTGS/instructions issued by the DTIDC time to time. No payment through cheques or cash will be accepted. The license fee, maintenance charges along with applicable GST thereupon for the first six months shall be paid by the selected tenderer, for the shops at ISBT, Kashmere Gate, Delhi and ***three months*** *license fees, maintenance charges along with applicable GST thereupon to DTIDC in respect of spaces for shops at Mori Gate on temporary land within 07 days of the issue of LOA (Letter of acceptance) alongwith* ***six months*** *interest free security deposit, for the shops at ISBT, Kashmere Gate, Delhi and* ***three months*** *interest free security deposit to DTIDC in respect of spaces for shops at Mori Gate on temporary land mentioned hereinafter.* ***<u>Failure to deposit the same shall attract forfeiture of EMD and the bidder shall be debarred from participating of tender/RFP of DTIDC for this financial year and next four financial years</u>****.”*

Thus, after submission of a bid along with the security deposit was to attract forfeiture and debarment for four plus years.

9. The Petitioner admittedly did not deposit the bid amount apart from the amount of Rs.3 lakhs which was deposited as EMD. Clause 4.7 provides for forfeiture of EMD as also for debarment for this financial year and for the next four financial years. In effect, therefore, the debarment is for a period beyond four years.

10. The Petitioner in the present case had initially sought an extension of 24 days which was rejected by the Respondent for whatever reasons. By the time the matter was listed before this Court, the Respondent was willing to give an extension in respect of the earlier bid and if the Petitioner wished to honour the said bid, she could be permitted to participate in the new tender.

However, the Petitioner was not interested in retaining the said shop, which was allotted to her in December, 2020 owing to reduced traffic in the ISBT in view of the *kisaan andolan*. Thus, another opportunity which was given to the Petitioner to honour her bid was also not accepted by her. Thus, insofar as the forfeiture of the EMD is concerned, there can be no doubt that the EMD would be liable to be forfeited inasmuch as the bid which was submitted in December, 2020 was not honoured by the Petitioner.

11. A perusal of the NIT shows that the same relates to shops which are run at ISBT, which are small commercial spaces where eatables and beverages, are sold for the purpose of catering to the needs of travellers. These are shops which attract daily footfall. However, in the pandemic as also during the *kisaan andolan,* there can be no doubt that the traffic in the ISBTs has been affected. The question would be whether, considering the reasons given by the Petitioner, debarment for more than four years would be disproportionate to the non-deposit of the bid amount. The first reason cited by the Petitioner was medical illness, and thereafter, the reason cited was the *kisaan andolan.*

12. In the facts and circumstances of the present case, the Petitioner is a person who was running five shops in the various ISBT terminals. She was well-aware of the ground reality in the ISBT, especially during the pandemic. The bid was submitted by her in a completely conscious manner and being fully aware of the factual situation on the ground. Thus, the Petitioner cannot claim that she was not aware of the effect of the pandemic, or the *kisaan andolan* which had already commenced in September, 2020. The bid was a conscious bid which the Petitioner chose to resile from. The Petitioner has already suffered due to the forfeiture of the EMD. Even the

non-grant of interim order staying the debarment on 17th March, 2021 has also, in effect, ensured that the Petitioner has not participated in any further bids for any commercial spaces in the ISBTs.

13. This Court is of the opinion that the legal position in respect of debarment or blacklisting is clear. Debarment or blacklisting is, in effect, a civil death for any bidder or tenderer. It is also the settled position of law that the debarment or black listing has to be proportionate to the default which is committed by the bidder. The above principle of law was reiterated by this Court in ***Diwan Chand Goyal v. National Capital Region Transport Corporation & Ors. [W.P. (C) 3301/2020 decided on 2nd September, 2020].*** The relevant extract from the said judgment reads as under:

> *"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 Limited v. State of West Bengal & Anr., MANU/SC/0061/1974: 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 ld. Division Bench of this Court, the National Highways Authority of India blacklisted the company for a period of three years. The ld. Division Bench observed that a

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 ld. 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 Grosons 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, MANU/SC/0061/1974 : (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. XXX 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."*

<u>Thus, in matters of blacklisting, the doctrine of proportionality is to be considered</u>.

44. In Mekaster Trading Corporation Vs. UOI and Ors MANU/DE/0701/2003 : 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., MANU/DE/1266/2016 : 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;

<u>(c) Blacklisting constitutes civil death and has extremely grave consequences. Thus, the same is amenable the judicial review if the same is by governmental authorities;</u>

(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."

14. In the present case, the non-deposit of the bid amount or dishonour of the bid has already been adequately penalised with by forfeiture of the EMD and the Petitioner has already suffered the debarment for almost a year. Considering the overall facts and circumstances of this case and keeping in mind that the debarment has to be proportionate to the default, this Court is of the opinion that the debarment for a period of more than four years is highly disproportionate, especially in the factual circumstances that existed during the period of the pandemic and the *kisaan andolan*. Accordingly, the debarment of the Petitioner from participation in the tender floated by the DTIDC is restricted to a period up to 31st May, 2022.

15. The present order shall not be treated as an observation in respect of the validity of Clause 4.7 of the NIT or the period of debarment prescribed thereunder, and is passed in the peculiar facts and circumstances of the present case, wherein the pandemic and the *kisaan andolan* have been supervening circumstances.

16. The present petition, along with all pending applications, is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 10, 2021
Rahul/AD