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

Date of Decision: 11.02.2021

\+ W.P.(C) 6922/2020 & CM No. 23745/2020 (Stay), CM No. 32214/2020 & CM APPL. 3320/2021 (for vacation of order dt.20.10.2020)

M/S APTECH LIMITED .... Petitioner

Through Mr.Arun Bhardwaj, Sr. Advocate with Mr.S.K. Sahijpal, Advocate

versus

UNION OF INDIA & ANR. ..... Respondents

Through Mr.Chetan Sharma, ASG with Mr.Vikram Jetley, CGSC, Mr.Amit Gupta, Mr.Vinay Yadav, Akshay Gadeock & Mr.Sahaj Garg, Advocates for Respondent/UOI. Mr.Sandeep Sethi, Sr. Advocate ith Mr.Ajit Warrier, Mr.Angad Kochhar & Ms.Malvika Yadav, Advocates for Respondent No.3.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J (ORAL)

1. This writ petition, as originally filed, claimed reliefs (a) to (f). However, on the very first date of hearing i.e. 24.09.2020, the learned senior counsel for the petitioner on instructions made a statement that the reliefs in the present petition be confined to reliefs (a), (b), (e) & (f). The said surviving reliefs read as under:-

> *"a) direct Respondent no. 2 to cancel its disqualifications of the Petitioner dated 28.08.2020;*

b) direct Respondent no.2 to allow Petitioner to submit its financial bid in tender no.MSDE 18011/06/CBTTENDER/2020-TTC;
e) pass such other order orders as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.
f) pass an order for the cost of the petition in favour of the Petitioner"

2. On 15.06.2020, the respondent no.2 *i.e.* Directorate of General of Training (DGT) issued a tender bearing no. MSDE-18011/06/CBTTENDER/2020- TTC for selection of service providers to conduct end-to-end computer based tests under its various schemes. Prior to the issuance of this tender, the respondent no.2 had earlier issued a similar tender on 12.02.2019 which was, however, subsequently withdrawn. Thus, the nature and scope of work envisaged under the tender dated 15.06.2020 was the same as that envisaged under the earlier tender dated 12.02.2019. However, the pre qualification criteria and the Quality & Cost Based Selection (QCBS) ratio was changed in the tender dated 15.06.2020. This NIT–issued on 15.06.2020, required the bidders to, *inter alia*, submit a declaration with regard to their non-blacklisting in Form 'B' annexed with the NIT. The contents of the said declaration as contained in Form 'B' reads as under:-

"Form B
SELF-DECLARATION
NON-BLACKLISTING

To,
Director (TTC),
Directorate General of Training,
Ministry of Skill Development & Entrepreneurship,
1st Floor, Employment Exchange Building, Pusa,
New Delhi -110 012

Sir,

In response to the ***"REQUEST FOR PROPOSAL (RFP)*** *Selection of Service Provider to conduct of End-to-End Computer Based Test under various schemes (CTS, ATS, CITS etc) of Directorate General of Training MSDE ", I/We hereby declare that presently our Company/Service provider is having unblemished record related to examination business in India is neither blacklisted nor debarred by any PSU or Any Regulatory Body or Government of India or State Government or any of its agencies for any reasons whatsoever for indulging in corrupt or fraudulent practices or for indulging in unfair trade practices.*

lf this declaration is found to be incorrect then without prejudice to any other action that may be taken, our EMD may be forfeited in full and the tender if any, to the extent accepted may be cancelled.

Thanking you,

Yours faithfully,

Name of the Bidder Authorized Signatory Seal of the Organization" (underlining supplied)

3. The petitioner, along with the other bidders, submitted its bids in response to the aforesaid NIT. The petitioner also submitted the aforesaid declaration in Form 'B'. The case of the petitioner is that separate financial and technical bids were required to be submitted and the petitioner accordingly submitted both its technical and financial bids. The petitioner claims that in the process of evaluation of technical bids, it was found qualified. Thereafter, without any prior notice or opportunity of hearing to it, the respondents proceeded to disqualify the petitioner and proceeded to award the tender to M/s NSEIT Ltd., who was impleaded as a party respondent in the present petition pursuant to directions passed by this Court on 20.10.2020.

4. On 20.10.2020, this Court while issuing notice, restrained the respondent nos.1 & 2 from executing the contract in favour of newly added respondent, i.e. respondent no.3/ M/s NSEIT Ltd. which had been declared as the successful bidder. The stay continues to operate as on date. Consequently, the respondent nos.1 & 2 have preferred CM No. No.3320/2021 & CM No. 32214/2020 to seek vacation of stay as the conduct of public examination is held up.

5. On the last date while issuing notice in the application being CM No. No.3320/2021 we had, while granting opportunity to the petitioner to file a reply, made it clear that the matter shall be heard even if no reply/rejoinder are filed. Though the petitioner claims to have filed reply to this application, the same has not come on record. We have, therefore, proceeded to hear the submissions of the parties–not only in the application, but in the writ petition itself.

6. The submission of Mr.Bhardwaj, learned senior counsel for the petitioner (as noticed by this Court in its initial order dated 24.09.2020) is that the petitioner has been disqualified without issuance of any show cause notice or any opportunity to explain its position. It is further contended that no reasons for the petitioner's disqualification have been communicated to it, despite the fact that its technical bid was initially found to be in order by the respondents themselves. Thus, the submission of Mr.Bhardwaj is primarily founded upon the claimed breach of Principles of Natural Justice.

7. We may now notice the factual background in which the respondents have disqualified the petitioner for the NIT in question. Vide order dated 23.05.2019 issued by the U.P. Power Corporation Ltd.(UPPCL), the petitioner was blacklisted from award of contract for a period of three years

after it was found that the petitioner had resorted to and facilitated hacking and cheating by the candidates in a public examination where it had been appointed as an agency by the UPPCL for conducting the exams. The petitioner had then preferred a writ petition before the Allahabad High Court to assail the said order passed by UPPCL dated 23.05.2019, with a prayer not to treat it as disqualified on account of the said order, and to allow it to participate in future tenders floated for award of contracts. The application moved by respondent nos.1 & 2 seeking vacation of stay, places on record the judgment dated 07.08.2019 passed by a Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No.19639/2019 titled M/s APTECH Ltd. Vs. UP Power Corporation & Anr. In paragraph 14 of the decision of the Allahabad High Court, the submission of the UPPCL/ respondents therein was recorded in the following terms:-

> *"14. He further submits that from a perusal of the F.I.R., it is evident that it contained the averment in regard to Aptech Limited being the examination conducting agency its failure to ensure that the computer systems which were installed at the examination centres, namely, J.K. Public School, Lucknow and Mahabir Prasad Degree College did not contain any virus/hacking software.* ***Thus, from the F.I.R. it is clear that the Aptech Limited had not only failed to ensure that the computer systems were properly sanitized and free from hacking etc. but also facilitated the accused persons to install AMMY ADMIN software which gave access to such systems to the hackers to hack the examination papers and to benefit certain of the candidates illegally. The report of the S.T.F. U.P. police spells out the technical shortcoming/anomalies at the end of the petitioner."*** *(emphasis supplied)*

8. The findings returned by the Division Bench of the Allahabad High Court as contained in para 30 read as under:-

> *"30. Applying the above test to the facts of the present case, we find that the basic task performance with which the petitioner was entrusted to under the agreement reached between the petitioner and the respondent authorities, it was only on account of the absolute trust reposed with the petitioner not only the online software developed by the petitioner was permitted to be applied to but even the selection process, centres and systems were also left to the discretion of the petitioner to maintain absolute secrecy of the online examination and absolute discretion was to be exercised by the petitioner to ensure free and fair examination for selection but the manner in which, it appears, the things were so much taken for granted by the petitioner as far as the computer systems and centres are concerned that software became vulnerable to unhealthy design of unscrupulous hackers. The company of hackers succeeded but for want of proper sanitization. If the exercise of online examination process or the examination conducting exercise that had been virtually out sourced to the petitioner resulted in cancellation of the examination because of the paper leakage like unhealthy practice. It eroded faith of the people as well in the system and charged the State owned corporation for failing to provide a full proof system for conducting free and fair selection and, resultantly warranted for an appropriate action, and so, we do not find any arbitrariness in the State action in the present case."*

9. In the light of its aforesaid findings, the writ petition was dismissed by the Allahabad High Court as having no merit.

10. The submission of Mr.Chetan Sharma, learned Additional Solicitor General appearing for respondent nos.1 & 2, is that the petitioner

deliberately suppressed the decision of the Allahabad High Court from this Court. He further submits that the petitioner also knowingly made a false declaration in Form 'B', which required the bidders to state that they were having an unblemished record relating to examination business in India and were neither blacklisted, nor debarred by any PSU or Any Regulatory Body or Government of India or State Government, or any of its agencies for any reasons whatsoever for indulging in corrupt or fraudulent practices or for indulging in unfair trade practices.

11. Learned ASG further submits that since the blacklisting order was issued in 2019, and the decision of the Allahabad High Court was rendered in the same year; the declaration in 'Form B', as given by the petitioner in 2020, was knowingly false and misleading. Thus, the petitioner's claim that it was cleared during the technical evaluation is neither here, nor there, since the said clearance of the petitioner's technical bid was premised on a false declaration made by it. Mr.Sharma further submits that the conduct of a public examination by Government, or any of its instrumentality, is a matter of trust and utmost faith; the blameworthy conduct of the petitioner, as noticed by the Allahabad High Court, did not relate to any single individual or a few employees of the petitioner, but the petitioner/company itself was found guilty of allowing malpractices as an institution, and the same renders the petitioner unworthy of award of the tender in question.

12. Mr.Sandeep Sethi, learned senior counsel who appears for the newly added respondent no.3, submits that the fundamental premise of the petitioner's grievance about not being show caused and heard before declaring it disqualified is without any basis inasmuch, as, the petitioner was not entitled to issuance of a show cause notice before being disqualified

under the terms of the tender. The NIT specifically reserves the right of the respondent to reject any or all bids. His contention, thus, is that the respondent authorities were not obliged to issue a show cause notice to any bidder before rejecting its bid. In this regard, Mr.Sethi has placed reliance on ***(2007) 14 SCC 517 Jagdish Mandal Vs. State of Orissa & Ors.*** and (***2016) 8 SCC 622 Central Coalfields Limited & Anr. Vs. SLL-SML (Joint Venture Consortium) & Anr.***

13. In response, Mr.Bhardwaj, learned senior counsel for the petitioner submits that the petitioner has truthfully disclosed before this Court the factum of it having been blacklisted by the UPPCL and, in fact, the blacklisting order dated 23.05.2019 has also been placed on record before this Court as Annexure 'J' to the petition.

14. On a query by this Court, as to whether the said blacklisting order was submitted along with the petitioner's bid, Mr.Bhardwaj submits that at the pre-bid stage, the petitioner had, during its meeting with the respondent No.2's officers, clearly disclosed the said blacklisting order. In this regard, he has drawn our attention to an e-mail sent to the Deputy Director General and Chairman of Tender Evaluation Committee, DGT on 21.08.2020. Mr.Bhardwaj submits that the language of Form 'B' annexed to the NIT was not clear and was quite vague and, therefore, the petitioner had submitted the said self declaration about it having an unblemished record relating to examination business in India, and that it was not blacklisted or debarred from any PSU or any regulatory body or Government of India or State Government or any of its agencies for any reason. The petitioner had also obtained a legal opinion in this regard and only based on the said legal

opinion, the petitioner proceeded in the manner it did, by not disclosing the blacklisting order in Form 'B'.

15. Mr.Bhardwaj further submits that the other 2 bidders, i.e. namely NSEIT Ltd–who has been found to be the lowest bidder, and TCS Ltd. were also found to be blameworthy, yet they were considered by the respondents. He further submits that despite the blacklisting by the UPPCL, the petitioner has been awarded further contracts for conduct of such like examinations by various government bodies and, therefore, there is no reason as to why the petitioner should not be awarded the tender in question.

16. Having heard the submissions of learned counsel, we are of the view that the present petition is a gross abuse of the process of the Court. The petitioner has not come to this Court–while invoking its discretionary writ jurisdiction, with clean hands. The petitioner has not only suppressed from this Court the judgment of the Allahabad High Court, which has returned categorical findings about the petitioner's blameworthy conduct as an institution–and not merely of some of its employees, but has also given a patently false declaration in Form 'B'–while submitting its bid, on a completely specious premise that the language of Form 'B' was vague and not clear. The language of the said Form, in our view, is plain and simple and as clear as day light. The petitioner cannot, and does not deny the fact that it has been blacklisted by UPPCL–a government body/Regulatory Body. The petitioner was, therefore, bound to disclose in its declaration that it had been blacklisted by UPPCL on 23.05.2019 for a period of three years. The blacklisting itself was premised on the petitioner's blameworthy conduct, which has been noticed in the blacklisting order, as well as in the decision of the Allahabad High Court. We have already extracted the

findings returned by the Allahabad High Court in the earlier part of this judgment. The petitioner was found guilty of having installed a software, which made it possible for candidates to hack the system and to resort to cheating.

17. The submission of Mr.Bhardwaj that the other bidders, including the respondent no.3, have also been found to be blameworthy, does not arise of consideration, since the reliefs sought in this petition relate only to the petitioner's ouster and there is, admittedly, no challenge to the award of the contract to either of the other two bidders.

18. There is also no merit in the primary submission of Mr.Bhardwaj that ouster of the petitioner was vitiated, having been done without issuance of a show cause notice or opportunity of hearing to it. In this regard, we may refer to Para 24 of ***Jagdish Mandal case (supra)***, wherein the Supreme Court held as under:-

> *" 24.The tender conditions give an option to the tenderer, to furnish earnest money deposit, by pledging NSC/postal time deposit/postal saving passbook/deposit receipts issued by any nationalized Bank. The first respondent pledged a postal TD Account passbook relating to a Deposit of Rs.1,70,000 in fulfilment of the condition regarding EMD. The Department is entitled to verify the genuineness of the TD passbook to ensure that the required EMD is furnished. In this case, even before the Committee could consider the tenders, a complaint was also received alleging that the TD passbook produced by fifth respondent was tampered and manipulated. It was therefore but natural for the Department to seek confirmation from the Postal Department as to whether the TD Passbook was genuine and valid. Its query elicited a reply from the Superintendent of Post Offices that the Term Deposit passbook for*

Rs.1,70,000 produced by the fifth respondent was not to be acted upon. Therefore, the Committee concluded that the tender of fifth respondent was defective as not being accompanied by a valid EMD. ***It cannot be said that the Committee acted unreasonably and arbitrarily, in arriving at the said decision. The Committee did not send show cause notice to the fifth respondent before rejecting the TD passbook and consequently the tender, as Clause 3.5.18 of the Code makes it clear that acceptance of any tender is entirely at the discretion of the accepting authority and no tenderer can require the authority to show cause for rejection of the tender.****"(emphasis supplied)*

19. Reference may also be made to paras 43 & 47 of ***Central Coalfields Limited & Anr. (Supra),*** wherein the Supreme Court, held as under:-

"43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and re-introducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-judge decision in Tata Cellular v. Union of India (1994) 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. <u>Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation</u>. This was quite clearly stated by this Court (following Tata Cellular) in Jagdish Mandal v. State of Orissa (2007) 14 SCC 517 in the following words:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

This Court then laid down the questions that ought to be asked in such a situation. It was said:

"Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

xxx xxx xxx

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber."

20. In the present case, the petitioner was very well aware of its own blameworthy conduct throughout, which was noticed by the Allahabad High Court while dismissing its writ petition. The petitioner was aware of its

having being blacklisted by UPPCL on 23.05.2019 for a period of three years. The petitioner was also conscious of this position and, therefore, sought to cover its blameworthy conduct and falsity in the declaration given in Form 'B' by relying upon a self-serving legal opinion obtained by it which, according to us, is neither here nor there. There was no element of shock or surprise which the petitioner can claim to have suffered when it learnt of the rejection of its technical bid. The claimed initial clearance of its technical bid is neither here, nor there. It did not vest any right in the petitioner since that so called clearance was itself premised on a false declaration. The email communication referred to by Mr.Bharadwaj is also of no avail. Undisputedly, the petitioner did not furnish the truthful declaration with its tender–which was mandatory and the petitioner's failure in this regard was itself sufficient to knock it out. Even before us, the petitioner has not been able to point out what prejudice it has suffered by the so-called denial of the Principles of Natural Justice. The petitioner has not disclosed what is it that it could have produced–by way of an explanation or any document, which could have swayed the decision in its favour. For this reason as well, we find no merit in the grievance of the petitioner.

21. In our view, organisations resorting to, or permitting malpractice at an institutional level should be kept at bay, by bodies conducting public examination and such conduct ought not to be condoned. It would be a different matter if there are stray incidents where an employee, or some employees, may show weakness of character and indulge in isolated acts of malpractice. However, if such malpractices are adopted by an organization itself, or are facilitated by the organisation itself, it is very different matter, and is indeed a serious matter since it reflects adversely on the intent of the

management of the organization itself.

22. For the aforesaid reasons, we find absolutely no merit in the petition which is dismissed with costs quantified at Rs.10,00,000/-, payable within 4 weeks. A sum of Rs.5,00,000/- be paid to the respondent nos.1 & 2, while the remaining costs of Rs. 5,00,000/- shall be paid in equal proportion to the Delhi State Legal Services Authority and the High Court of Delhi (Middle Income Group) Legal Aid Society.

23. In case the costs are not deposited by the petitioner within four weeks, the matter be listed before Court for directions.

VIPIN SANGHI, J

REKHA PALLI, J

FEBRUARY 11, 2021/aa