IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16313 of 2021

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REC- Power Development and Consultancy Limited (REC- PDCL) (formerly REC Power Distribution Company Limited), (a subsidiary of REC Ltd.), D Block, REC World Headquarter, Plot No. I-4, Sector 29, Gurugram 122001, through its General Manager, Mr. Alok Singh aged about 45 years, (Male) Son of Shri Jagdhari Singh, Resident of T7-902, Parsvnath Green Ville, Sector- 48, P.S. and District - Gurugram (Haryana).

... ... Petitioner/s

Versus

1. North Bihar Power Distribution Co. Ltd. Patna, through the Managing Director, having its registered office at Vidyut Bhawan, Bailey Road, Patna - 800014.
2. The Chief Engineer (Project-I/Rural), North Bihar Power Distribution Co. Ltd., Patna, having his registered office at Vidyut Bhawan, Bailey Road, Patna - 800014.

... ... Respondent/s

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Appearance :	
For the Petitioner/s	: Mr. P.K. Shahi, Sr. Adv.
	: Mr. Mukesh Kumar, Adv.
For the Respondent/s	: Mr. Vinay Kirti Singh, Sr. Adv.
For NBPDCL	: Mr. Anand Kumar Ojha, Adv.
	: Mr. A.K. Karn, Adv.

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

C.A.V. JUDGMENT

Date : 30-09-2022

The present writ petition has been filed for quashing the order of disqualification of the petitioner dated 02.9.2021, issued by the Chief Engineer (Project-I/ Rural), North Bihar Power Distribution Co. Ltd., Patna, i.e the Respondent no. 2, vide an email, on the ground that the petitioner company has been blacklisted by Namami Gange and Grameen Jalapurti Vibhag, Uttar Pradesh vide letter dated 11.12.2020 and the interim order of the Court against a blacklisting order does not create eligibility for the firm as also in absence of final adjudication upon the blacklisting of the firm, the bid cannot be considered. Thus, the bid of the petitioner company has been found to be non-responsive as per Clause 1.1.3 (e) of Section 1 of the Request For Proposal document (hereinafter to be referred to as the “RFP”). The petitioner has further prayed for directing the respondents to consider the bid submitted by the petitioner vide RFP NIT No. 01/ PR/ NBPDCL/ 2021 for appointment as Project Management Agency.

2. The brief facts of the case, according to the petitioner, are that the petitioner company, i.e REC-Power Development & Consultancy Limited (hereinafter referred to as the "REC-PDCL"), a subsidiary of REC Ltd., is a Government of India controlled ‘Navratna’ PSU, which is engaged in the business of developing power sector infrastructure and carries out the works related to power

distribution as also is engaged in consultancy work for other agencies and Government Departments. At the moment, the petitioner is stated to be rendering value added consultancy services & project execution to 41 power distribution companies across India in 28 States, involving project cost of more than Rs. 85,000/- Crores. The petitioner company is also engaged in undertaking various types of electrical infrastructure projects of power utilities, across the country.

3. The Respondent No. 1 had issued RFP NIT No. 01/PR/NBPDCL/2021, inviting online tender/ bid for appointment of Project Management Agency ("PMA") to provide services for implementation of construction of 11 KV dedicated feeders and extension of 11 KV line from existing/ upcoming dedicated feeders, installation of Distribution Transformer, erection of LT line with AB cable with new agriculture connection and R & M of LT line in all nine circles of North Bihar Power Distribution Co. Ltd. (hereinafter referred to as the "NBPDCL"), under the 'Mukhyamantri Krishi Vidyut Sambhad

Yojana'. The bids were to be submitted in two parts i.e. Technical Bid, and Financial Bid. As per the provisions of RFP, the Financial Bids of only those bidders were to be opened who stand qualified upon opening of the Technical Bids. The petitioner had submitted its e-Bid/online bid, in the prescribed format and as per the procedure provided for in the RFP, on 06.04.2021. The technical bid was subsequently opened by the Respondent no. 1 on 08.04.2021.

4. The Ld. Sr. Counsel for the petitioner has submitted by referring to sub-clause (e) of Clause 1.1.3, under Section-1 of the RFP, which provides for submission of an affidavit by the bidder regarding it having not been blacklisted/ debarred as on the date of bid opening, that the petitioner had complied with the aforesaid pre-requisite by submitting an affidavit dated 01.04.2021, along with the bid certifying that the petitioner has not been blacklisted/ debarred by any Government department/ organization or any public limited company or any bilateral/ multilateral funding

agency as on date of bid opening. However, the Respondent No. 2, vide letter dated 24.08.2021, while intimating the petitioner that it had received an email regarding the petitioner being blacklisted by Namami Gange and Rural Water supply Department, Government of Uttar Pradesh by an order dated 11.12.2020, had sought further clarification from the petitioner regarding the same. The petitioner had then vide letter dated 25.08.2021, submitted a detailed response to the clarification sought by Respondent No. 2, explaining therein that the petitioner had participated in a tender issued by Namami Gange & Grameen Jalapurti Vibhag, Government of UP for the work of baseline survey in all GPs of Uttar Pradesh to implement Jal Jeevan Mission and by an order dated 11.12.2020, it was blacklisted by Namami Gange without affording proper opportunity of hearing to the petitioner which was subsequently challenged by the petitioner before the Hon’ble High Court of Judicature at Allahabad, Lucknow Bench and the Hon’ble High Court vide order dated 17.12.2020 held that prima facie case for interim relief was made out, hence had directed that the blacklisting order dated 11.12.2020 shall remain stayed, thus the blacklisting order ceases to be effective and cannot be considered to be in force as on the date of the bid submission i.e. 06.04.2021 as well as on the date of bid opening i.e. 08.04.2021.

5. It is thus submitted by the Ld. Sr. Counsel for the petitioner that the blacklisting order dated 11.12.2020 was neither in force on the date of submission of the bid on 06.04.2021 nor on the date of opening of the bid on 08.04.2021 and the said blacklisting order is still not in force, by virtue of the stay order dated 17.12.2020, passed by the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench in WRIC No. 25431/2020, hence the petitioner is fully eligible to participate in the bidding process as per the terms of the tender documents. Nonetheless, the Respondent No.1 has, vide email dated 02.09.2021, rejected the

petitioner's bid on the following ground:-

> "M/s REC power Distribution Company Limited (RECPDCL) has been blacklisted by Namami Gange & Grameen Jalapurti Vibhag, U.P. vide Letter No. 1157/WQ-314(BLS)/2020-21 dated 11.12.2020 and the interim order of the Court against blacklisting does not create eligibility for the firm and in absence of final adjudication upon the blacklisting of the firm, the bid cannot be considered. Hence, bid of M/S RECPDCL is found non-responsive as per Clause 1.1.3 (e) of Sec-1 of RFP".

6. The petitioner, in response to the impugned disqualification order dated 02.09.2021, had sent another email dated 02.09.2021, to the Respondents, seeking reconsideration of its disqualification from the tender, inter alia stating therein that since, the Hon'ble High Court has stayed the operation of the blacklisting order in question, the blacklisting order was neither in force at the time of bid submission nor is effective even today, hence the petitioner is eligible, as per Tender Document, to participate in the bidding process, thus an in-operative order of blacklisting

cannot be a ground for disqualification, thus the decision to disqualify the petitioner be reconsidered.

7. The learned senior counsel for the petitioner, Shri P.K. Shahi has thus submitted that the impugned order disqualifying the petitioner contained in email dated 02.09.2021 is ex-facie arbitrary and discriminatory for the following reasons:-

(a) Firstly, the respondents are mistaken to rely upon the inoperative blacklisting order issued by Namami Gange & Rural Water Supply Department, Government of Uttar Pradesh, inasmuch as the Hon'ble High Court has granted a stay dated 17.12.2020 on the blacklisting order, after prima facie considering the merits of the petitioner's case.

(b) Secondly, the stay order granted in favour of the petitioner is an 'order in rem' and therefore extends to the petitioner's benefit as a bidder in the tender issued by the Respondents as well.

(c) The impugned disqualification order is a cryptic, one line rejection, which has been passed without considering the facts and circumstances of the case. The impugned disqualification order is thus not a speaking order and has been passed in violation of the principles of natural justice.

(d) The Respondents have only vaguely and perfunctorily rejected the eligibility of the petitioner in blatant disregard to the eligibility criteria provided in the RFP.

(e) The impugned disqualification order disregards the other conditions of the RFP to properly consider the petitioner's eligibility. Reference has been made to Clause 1.2.28 of the RFP, which govern the eligibility of the prospective bidder and reads as follows:-

> "1.2.28..... The bidder is not eligible to participate in the bidding in case the blacklisting/ debarment is in force and effective on the date of submission of the bid....."

(f) By not considering Clause 1.2.28, the Respondents have arbitrarily overlooked the most relevant provision applicable to the present case. A bare reading of the said provision makes it clear that the tender document envisages the ineligibility of the bidder only in a situation wherein the blacklisting/ debarment order is in force and effective on the date of submission of the bid. However, in the present case, since the blacklisting order issued against the petitioner was stayed and ceased to be in force, by the interim order dated 17.12.2020, passed by the Hon'ble High Court, the petitioner was/is very much an eligible bidder.

8. The Ld. Sr. counsel for the petitioner has further submitted that the order dated 17.12.2020 passed in WRIC No. 25431 of 2020, by the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, is very clear in as much as the impugned order of blacklisting dated 11.12.2020 has been stayed. In this regard it would be apt to reproduce the relevant portion of the said order dt. 17.12.2020 herein below:-

"It is submitted that effective date was to begin from the successful handling of the SWSM mobile application by the respondent to the petitioner. It is alleged that mobile application purportedly handed over by respondent on 21.09.2020 was defective and not working therefore, on many occasions the petitioner informed the respondents about the defective SWSM mobile application and web portal. The details of various communications are given in the chart contained in para 16 of the writ petition. When the petitioner received no communication from the respondents, he visited the office of the App developer & it is only on 12.10.2020 the issue in SWSM were rectified & App developer conveyed this to the petitioner vide email dt. 12.10.2020. The email is on record as Annexure-5".

Subsequently, the respondents issued show cause notice dated 25.11.2020 to the petitioner as to why they may not be blacklisted.

Learned counsel for the petitioner submits that while issuing the show cause notice the decision of blacklisting the petitioner had already been taken. However, in reply to the show cause notice the petitioner has submitted the detailed reply and consequently the impugned order dated 11.12.2020 has been passed.

It is further submitted that the impugned order is factually incorrect; has been passed unilaterally without considering the fact that delay was caused due to non-functioning of SWSM mobile application; and is in total disregard to the provisions contained in Article

14 of the Constitution of India. In support of his contention he has relied on the judgment of Hon'ble Supreme Court reported in (2010) 13 SCC 427. Ld. counsel for the petitioner has emphasized on paras 23 and 27.

It is lastly submitted that the petitioner company is highly reputable State owned 'Navratna Corporation' and has spotless record. The impugned order has far reaching repercussions and are blemishing the reputation of the petitioner and as a consequence of blacklisting the petitioner shall disqualify from participating in various tenders and bids all across the country.

Considering the arguments of learned counsel for the parties and on due consideration, we are of the view that prima facie case for interim relief is made out. Accordingly, till further orders of the court, the impugned blacklisting order dated 11.12.2020, contained in Annexure-1 to the writ petition shall remain stayed.

9. In this regard the learned senior counsel for the petitioner has relied upon a judgment in the case of **Consolidated Coffee Ltd. vs. Agricultural Income Tax Officer Madikeri & Ors**., reported in (2001) 1 SCC 278, paragraph no.

8 whereof is reproduced herein below:-

> "As has been pointed out by this court in kanoria Chemicals and Industries Ltd. Vs. U.P. State Electricity Board (1997) 5 SCC 772, an order of stay may be made in different ways but the effect thereof is the same, namely, that for the period during which an order of stay operates, the order that is stayed does not exist in the eye of the law. Once the stay is vacated, the order is resuscitated and may then be executed. For the period of stay, therefore, the assessee cannot be said to be in default of the orders stayed and, therefore, no penalty in that behalf can be imposed."

10. The Ld. Sr. counsel for the petitioner has further submitted that as per Clause 1.1.3 of the RFP, the participating firm should not have been blacklisted by any Govt. department/ Organization or any public limited company or any bilateral/ multilateral funding agency as on date of bid opening. However, there is no specific requirement of disclosing any other facts such as a stayed blacklisting order or details of pending litigation and in case the respondent company was of the view that the same was required to be disclosed, it

should have been provided for in the RFP. In this regard the Ld. Senior counsel for the petitioner has referred to a judgment rendered by the Hon'ble Apex Court in the case of **Reliance Energy Ltd. v. Maharashtra State Road Development Corporation**, reported in *(2007) 8 SCC 1*, para no. 24 whereof is reproduced herein below:-

> "24. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

Thus, it is submitted that since the RFP did not explicitly state the requirement of disclosing any such facts, the issue of non-disclosure and suppression of a blacklisting order, against REC-PDCL, does not arise.

11. The Ld. Senior counsel for the petitioner has also submitted that the respondents are not party to the writ petition before the Hon'ble High

Court of Judicature at Allahabad, Lucknow Bench, nonetheless the order of stay granted in favour of the petitioner is liable to be followed by them. In this regard a Full Bench Judgment of the Hon'ble Madras High Court in the case of **Vidya Charan Shukla vs. Tamil Nadu Olympic Association and Ors.**, reported in *AIR 1991 Madras 323* has been relied upon, Paragraph No. 52 whereof is reproduced herein below:-

> "52. One important aspect of the case since there has been some arguments before us about it is, can it be said that for a breach of the injunction by a party or a stranger for aiding or abetting the breach alone, the Court's inherent power can be exercised and not in a case of a third party, who had the knowledge of the order, but decided to violate it, who may be guilty of obstructing the administration of justice still, will not be subject to any restitution order? <u>This we feel needs no detailed discussion. No person can obstruct the path of justice. No one can escape by committing a gross and violent obstruction to the implementation of the order/direction of the Court….."</u>

{emphasis supplied}

12. Lastly it has been submitted by the Ld. senior counsel for the petitioner that an arbitrary exclusion, such as in the case of the petitioner herein, has been conclusively held to be judicially reviewable, by the Hon'ble Apex Court in a catena of judgments including the one rendered in the case of **Tata Cellular vs. Union of India**, reported in (1994) 6 SCC 651, wherein it has been held that the principle of judicial review would be applied to the exercise of contractual power by the Governing body in order to prevent arbitrariness.

13. Per contra, the Ld. counsel for the Respondent company i.e. NDPDCL has submitted that NIT No. 01/PR/NBPDCL/2021 was issued by the Respondents for appointment of Project Management Agency and the awarded cost of project is Rs. 614.64 crore. It is stated that except for an authoritative legal exposition on impact of an interim order of stay of blacklisting, the present writ petition has become infructuous on account of Award of contract, upon conclusion of the bidding

process, to the successful bidder, leading to creation of 3rd party rights. The learned counsel for the respondents has further submitted that the only issue involved in the present case is as to whether an interim order in the peculiar facts and circumstances of competitive bidding can be acted upon at par with the final verdict for awarding a Public Contract involving public money, by a Government Company. It is also submitted that another question which may arise would be the ambit of “freedom of play in joints” of the tendering authority within the Tender Terms and Public Interest and the last issue may be the extent of right to take a decision on the eligibility of a bidder without prejudice to one or the other bidder and in the Public Interest. An allied concern would also be whether an interim order, only creating an eclipse upon Blacklisting, can be pre-judged by a beneficiary even before a final verdict and whether grant of interim order posits a blacklisted bidder at par with other bidders having never suffered any Blacklisting. It is also submitted that the interim order dated 17.12.2020, staying the Blacklisting order dated 11.12.2020, cannot be taken as an intention of the Court to grant of a final relief or to supersede Tender Terms, Public Interest and conduct of the Bidder. Another condign issue may be the extent to which an interim order can be pressed for a relief and the extent to which a litigant can retain benefit of interim order and avoid final adjudication. It is thus submitted that an interim order is granted in aid of and as an ancillary to the main relief available for final adjudication. No effect in the nature of finality can be awarded, based thereon. A different impact of an interim order is to be seen in cases where grant of public contract is involved, inasmuch as no roll back and no restitution is possible in the event of an adverse final order, upon adjudication of the matter. The interim order is to be read along with the tender conditions and basic eligibility. Even otherwise no litigant can derive any benefit from mere pendency of a case in a court of law. The interim order always merges in the final order and if the case is ultimately dismissed, the interim order stands nullified automatically. The Award of contract is final and absolute, which pertains to providing management consultancy Services in execution of a public project connected with construction of dedicated feeder including works like extension of 11KV line from the dedicated feeders, installation of distribution transformer, erection of LT Line etc. & the cost of project as per the NIT is astronomic.

14. It is contended by the Ld. Counsel for the respondents that the process of work execution and financial dealing and the high financial stakes involved in the proper execution of the project coupled with timeline are aspects attached to the Award of Contract, hence this Hon'ble Court will not countenance any Award of Public Contract subject to the result of finality of adjudication. It is also contended that an order of Blacklisting dated 11.12.2020 has been passed against the petitioner, by an authority under the Government department of the State of Uttar Pradesh, which is

detailed and self-speaking and spells out poor performance of the petitioner.

15. The Ld. Counsel for the respondents has pointed out yet another discrepancy to the effect that admittedly the petitioner has not submitted an affidavit with a declaration that it has suffered Blacklisting and instead the affidavit dated 01.04.2021, submitted by the petitioner, states that the petitioner has not been blacklisted/ debarred by any Government department/ organization or any public limited company or any bilateral/ multilateral funding agency as on the date of bid opening, which clearly amounts to suppression of material facts and is a case of suppression vari and Suggesio Falsi, inasmuch as the petitioner has not only concealed the Blacklisting order but has also cloaked the details about the pending judicial proceeding and the interim order passed therein. In this regard, the Ld. Counsel for the respondent has referred to Clause 1.1.3 (e) of the RFP, which stipulates that the participating firm should not be blacklisted by any

Govt. department/ Organization or any public limited company or any bilateral/ multilateral funding agency as on the date of bid opening and an affidavit, to the said effect, has to be submitted by the bidder. Clause 1.2.20 of the RFP has also been referred to, which confers right to reject any bid upon misrepresentation by the bidder.

16. It has been further submitted by the Ld. Counsel for the respondents that the respondents have applied the RFP terms without causing any prejudice to any bidder inasmuch as there has neither been any arbitrariness nor any favoritism nor any intention to disobey or flout the order of the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench. It is stated that the theory of Restitution is inherent in all orders of interim injunction or stay and the affected party is always protected by full restitution, actual or realistic cost and mesne profit as the case may be. As a Rule the Courts should grant stay order only after hearing the Respondents and in exceptional cases of ex-parte injunction the court has to record condition

of full restitution in case of eventual dismissal of the suit. It is further submitted that the Hon’ble Apex Court has declared automatic expiry of stay granted by any court after six months, unless an extension is granted but in the case of the petitioner there is no extension of the stay order dated 17.12.2020. In this regard reference has been made to a Judgment rendered by the Hon'ble Apex Court in the case of ***Asian Resurfacing of Road Agency (P) Ltd. Vs. CBI*****, reported in (2018) 16 SCC 299**, paragraph No. 36 whereof is quoted herein below:-

> "36. In view of the above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this situation, we consider it appropriate to direct that in all pending cases where stay against proceedings

of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalised. The trial court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced."

17. Thus, the learned counsel for the respondents has submitted that the aforesaid interim order dated 17.12.2020 has to be read in tandem with the Tender conditions, conduct of non-disclosure of material facts, nature of Public Contract etc. It is also contended that neither, the petitioner nor the Respondents can pre-judge the final verdict hence the interim order of stay cannot be accepted for awarding a contract in the nature

of finality. Moreover, rejection of the bid of the petitioner and its disqualification is justified also for non-disclosure of material fact regarding its Blacklisting. It is the non-disclosure of Blacklisting Order which is more important than non disclosure of the order of stay in as much as disclosure about the status of the bidder regarding it being Blacklisted is essential for eligibility of the bidder. In this regard, the learned counsel for the respondents has relied upon a judgment rendered by the Hon'ble Apex Court in the case of **Devendra Kumar vs. State of Utranchal** reported in *(2013) 9 SCC 363* as also the one rendered in the case of ***State of AP vs. Chinam Naidu*** reported in *(2005) 2 SCC 746* to submit that even a subsequent beneficial order does not absolve the candidate from correct and full disclosure of disqualification. However, in the instant case the plea of petitioner is that an affidavit in negative on Blacklisting was filed because of the stay granted by the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench.

The learned counsel for the Respondents has also relied upon a judgment rendered by the Hon'ble Apex Court in the case of **Empire Jute Company Limited vs. Jute Corporation of India**, reported in *(2007) 14 SCC 680*, to submit that an interim order is to be taken in the nature of not rendering passing of final order as inappropriate. It is also submitted that interim order cannot be sought to be implemented as if it is a final verdict, for this approach would not only amount to pre-judging the final verdict but would also entail prejudice.

18. The Ld. counsel for the respondents has next submitted that the Court would not sit as a court of appeal qua the administrative decision and the modern trend points to judicial restraint in administrative action. In this regard reliance has been placed on a judgment rendered by the Hon'ble Apex Court in the case of **Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd**., reported in *(2005) 6 SCC 138*. It is also submitted that it is a trite law that an interim order should not be used to obtain a gain on mere

pendency of the main application and litigation should not be allowed to turn into a fruitful company. In this regard reliance has been placed on judgments rendered by the Hon'ble Apex Court in the case of **Kalabharati Advertising v. Hemant Vimalnath Narichania**, reported in *(2010) 9 SCC 4*37 as also in the case of **Abhimanyoo Ram vs. State of Uttar Pradesh & An**r., reported in *(2008) 17 SCC 73,* paragraphs No. 6 & 8 whereof are reproduced herein below:-

> "6. Any attempt by a litigant to retain the benefit of the interim order by avoiding final adjudication, requires to be deprecated. In fact, it requires to be dealt with sternly. Courts should bestow caution while dismissing cases where interim relief had been granted, as not pressed or as withdrawn. The courts cannot proceed on the assumption that all concerned would know about the legal consequences of dismissal and therefore, it is not necessary to make any order in regard to the interim relief already granted. Even though the legal effect of dismissal on withdrawal, is vacation of the interim order, the concerned respondents not being aware of the legal consequences, will not take consequential action but continue the

benefit extended to the petitioner by the interim order, unless there is a specific direction spelling out the consequences. Sometimes, the concerned departmental officials, on account of collusion with the petitioners who had obtained the interim relief, will not withdraw or reverse the benefit granted to the petitioner in pursuance of the interim order, when the petition is withdrawn or dismissed as not pressed. Therefore, appropriate consequential directions cancelling or vacating the interim order should be passed so as to restore status quo ante. In cases where the prayer for dismissal (as not pressed or withdrawn) is made even before the respondent is served, then the order vacating the interim order should be communicated to the authority against whom the interim order was issued, so that any benefit extended as a consequence of the interim order, can be withdrawn or reversed. The only exception is where the respondents agree for the continuance of the interim order as a final relief, or agree that the benefit of the interim order already granted need not be disturbed, in which event, the court should record such submission and pass appropriate consequential orders.

8. In this case, the appellant was not put on

notice about the consequential direction to be issued on acceptance of the request for withdrawal, nor given the option of continuing with the case, if he did not want dismissal of his petition with any added directions. To that extent it can be said that there has been violation of a facet of principles of natural justice."

19. The learned counsel for the Respondents has also contended, by referring to the judgment rendered by the Hon'ble Apex Court in the case of **Asian Resurfacing of Road Agency Pvt. Ltd. & Anr.** (Supra) that the Hon'ble Supreme Court has already directed for automatic vacation of stay Orders after six months. Thus, the aforesaid stay Order dated 17.12.2020, passed by the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, in the case of the petitioner, staying the Blacklisting Order dated 11.12.2020, beyond a certain point, cannot bestow any benefit upon the petitioner. The Ld. counsel for the Respondents has also referred to a judgment rendered by the Hon'ble Apex Court in the case of **United India Insurance Co. Ltd. v. Harchand Rai Chandan**

Lal, reported in (2004) 8 SCC 644, to submit that the terms of the contract have to be strictly read and natural meaning has to be given to it. Thus, it is submitted that the Respondents have acted strictly as per the provisions contained in the RFP and since the petitioner was lacking basic eligibility criteria, hence, without making out any issue of a clear case of misrepresentation, it chose to simply disqualify the bid of the petitioner. Therefore, it is submitted that there is no merit in the present writ petition and the same is fit to be dismissed.

20. The learned Senior counsel for the petitioner in reply has submitted that none of the judgments cited by the learned counsel for the Respondents are applicable in the facts and circumstances of the present case and moreover, none of the said judgments lay down any law to the effect that the interim orders of the constitutional courts should not be honored. Therefore, it is submitted that in view of the order of stay dated 17.12.2020, granted by the Hon'ble High Court of Judicature at Allahabad, Lucknow

Bench, it would be deemed that as on the date of opening of the bid, no order of blacklisting/ debarment was either in force or effective, thus, the bid of the petitioner company could not have been disqualified for the reasons mentioned in the impugned email dated 02.09.2021.

21. I have heard the learned counsel for the parties and perused the materials on records as also the various judgments/ authorities cited and relied upon by the learned counsel for the parties. The issue involved in the present case is as to whether the decision of the respondents to disqualify and hold the bid of the petitioner to be non-responsive as per clause 1.1.3(e) of section 1 of the RFP, as communicated to the petitioner vide email dated 02.09.2021, is legally sustainable in the eyes of law. In this context it may be stated that the respondents had issued the aforesaid NIT in question bearing NIT No. 01/PR/NBPDCL/2021 for appointment of Project Management Agency, in pursuance to which, the petitioner, along with others had submitted e.bid/online bid in the

prescribed format as per the procedure provided for in the RFP on 06.04.2021, whereafter the technical bid was opened on 08.04.2021 by the Respondents, however, the petitioner was informed vide email dated 02.09.2021 that its bid has been rejected on the following grounds:-

> "M/s REC power Distribution Company Limited (RECPDCL) has been blacklisted by Namami Gange & Grameen Jalapurti Vibhag, U.P. vide Letter No. 1157/WQ-314(BLS)/2020-21 dated 11.12.2020 and the interim order of the Court against blacklisting does not create eligibility for the firm and in absence of final adjudication upon the blacklisting of the firm, the bid cannot be considered. Hence, bid of M/S RECPDCL is found non-responsive as per Clause 1.1.3 (e) of Sec-1 of RFP".

22. At this juncture itself, it would be relevant to quote Clause- 1.1.3 (e), 1.2.20 and 1.2.28 herein below:-

> "1.1.3 (e). The participating firm should not be blacklisted by any Government department/ Organization or any public limited company or any bilateral/ multilateral funding agency as on the date of bid opening. An affidavit has to

be submitted by the bidder to that effect that the firm is not blacklisted/ debarred as on date of the bid opening".

1.1.20. The Owner reserves the right to reject any bid, if at any point of time, it becomes known or is discovered that a material misrepresentation has been made by a bidder in the bid. In the event of any bidder not responding to further clarifications as required for the finalization of the bid, the Owner reserves the right to forfeit the bid earnest money furnished by such bidder and reject the bid.

1.2.28. The participating firm should not be blacklisted by any Government department/ Organization or any public limited company as on date of bid opening. An affidavit has to be submitted by the bidder to that effect that the firm is not blacklisted/ debarred as on date of the bid opening. The participating firm should also not be debarred by BSPHCL and its subsidiary companies as on date of bid opening. An affidavit has to be submitted by the bidder to that effect that the firm is not debarred as on date of the bid opening. The Bidder is not eligible to participate in the bidding in case the blacklisting/ debarment is in force & effective on the date of submission

> of the bid. In case the bidder has been blacklisted/ debarred after the bid submission date and if the blacklisting/ debarment is in force and effective on the date of award of the contract, the bidder shall be deemed to be disqualified for award of the contract."

23. While it is the case of the petitioner that the respondents have illegally disqualified the petitioner and have illegally held its bid to be non-responsive on the ground that it has been blacklisted by *Namami Gange and Grameen Jalapurti Vibhag*, Uttar Pradesh vide letter dated 11.12.2020 inasmuch as the said blacklisting order dated 11.12.2020 was stayed by the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench vide order dated 17.12.2020 passed in WRIC No. 25431 of 2020, hence as on the date of submission of bid as also on the date of the opening of the technical bid, the blacklisting order was not in force/ operation, whereas on the contrary, the respondents have submitted that not only the present writ petition has been rendered infructuous on account of award of contract, upon conclusion

of the bidding process, to the successful bidder, resulting in creation of 3rd party rights but the fact remains that the petitioner has been blacklisted by *Namami Gange and Grameen Jalapurti Vibhag*, Government of the State of Uttar Pradesh, vide order dated 11.12.2020, which is a detailed and a self speaking order and spells out poor performance of the petitioner and moreover, stay of the blacklisting order dated 11.12.2020, by the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, cannot confer any benefit to the petitioner inasmuch as the same cannot be taken to be an intention of the Court to grant final relief to the petitioner or to supersede Tender Terms, Public Interest and conduct of the bidder since neither roll back nor restitution is possible in the event of an adverse final order upon adjudication of the pending case of the petitioner before the Hon'ble High Court inasmuch as an interim order is granted in aid of and as an ancillary to the main relief available for the final adjudication, therefore, the same will not have an effect in the nature of finality, thus a blacklisted bidder, though armed with an interim order of stay of its blacklisting cannot be considered at par with other bidders who have never suffered any blacklisting.

24. This Court finds that by virtue of an interim order dated 17.12.2020, passed by the Hon'ble High Court of Judicature at Allahabad, Lucknow Bench, in the case of the petitioner, though the order of blacklisting dated 11.12.2020 has been stayed but the same still exits till it is set aside by the Hon'ble High Court and the challenge raised by the petitioner before the Hon'ble High Court with regard to the same may or may not come to be answered in favour of the petitioner, hence, in a case of grant of public contract, the impact of an interim order is required to be seen differently and the same has to be read along with the tender conditions and basic eligibility criteria. This Court also finds that the process of work execution and financial dealing and the high financial stakes involved in proper execution of the project coupled with timeline are aspects attached

to the Award of Contract, hence, this Hon'ble Court is handicapped to countenance any Award of Public Contract, subject to the result of finality of adjudication of the aforesaid case filed by the petitioner before the High Court.

It is a well settled law that an interim order cannot be sought to be implemented as if it is a final verdict inasmuch as the same would not only amount to per-judging the final verdict but would also entail prejudice to the other bidders as also the principal employer. In this regard reference be had to the judgment rendered by the Hon'ble Apex Court in the case of Empire Jute Co. Ltd. (supra).

25. It may be relevant to refer to the well established legal proposition to the effect that the power of judicial review in contractual matter concerning the State is very limited. The concern of the Court in exercising such powers would be to prevent any arbitrariness, discrimination, malafides in the tender process, so as to ensure adherence of fairness in the State action. The

power of judicial review is thus exercised to rein in unbridled executive functioning. In exercising such powers, the superior Courts are concerned with reviewing not the merits of the decision but the decision making process itself. It is not the function of the Court to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administration. The duty of the court is to confine itself to the question of legality of the tender process on the touchstone of Article 14 of the Constitution. Its concern should be whether a decision-making authority has exceeded its powers in arriving at an arbitrary decision or had committed a serious error of law or has acted in breach of the rules of natural justice or has reached a decision which no reasonable body of persons could have reached or has acted in complete abuse of its powers. It is thus not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which such decisions have been taken. The grounds upon which an administrative action is subject to control by judicial review is classified on three counts firstly Illegality, secondly Irrationality and thirdly Procedural impropriety. The Court does not sit as an appellate authority over the tendering authority, but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct an administrative decision and if a review of the administrative decision is permitted it would be substituting its own decision, without the necessary expertise with the Court, which itself may be fallible. It is also well settled that the terms of the NIT cannot be open to judicial scrutiny, as the same is in the realm of contract. The decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. The Government must have freedom of contract, in other words, a fair play in the joints is a necessary concomitant for an administrative body, functioning in an administrative sphere or quasiadministrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness, not affected by bias or actuated by malafides. In fact quashing of decisions may impose heavy administrative burden on the administration and would lead to increased and unbudgeted expenditure. (These principles have been enunciated in a decision rendered by the Hon'ble Apex Court in the case of ***Tata Cellular* v. *Union of India***, (1994) 6 SCC 651).

26. It is equally a well settled law, as has been held in the case of **Afcon Infrastructures Ltd. vs. Nagpur Metro Rail Corporation Ltd. & Anr**., reported in *(2016) 16 SCC 818*, that administrative decisions ought not to be interfered with merely on account of disagreement with the decision making process or decision of the authorities and since the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents, a writ

court should rely on the understanding of the owner / employer of a project and appreciate the terms and conditions of the tender documents, but unless there is malafide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions, the decision-making process or the decision itself should not be interfered with.

27. It is equally a trite law that one of the test laid down for judicial review in tender matters, in so far as arbitrariness is concerned, is that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached. Hence, it is to be seen, as to whether the decision arrived at by the authorities is such that no responsible authority acting reasonably would have arrived at. In fact, the decision of the Technical Tender Committee does not involve either a penal, civil or stigmatic consequence, hence principles of natural justice will not be attracted.

28. This Court further finds, from the facts and circumstances of the present case, that the present case is not a case where the action of the Respondents is not fair or is arbitrary or is not judicially sound, hence, the decision making process of the Respondents does not require any interference. This Court also finds that the decision making process of the Respondents is neither mala fide nor is intended to favor anyone and the normal rules of the game, as provided for in the RFP have been strictly followed by the Respondents, thus, the decision of the Respondents, disqualifying the petitioner and holding its bid to be non-responsive, does not require any interference, especially in view of the well-settled law to the effect that the principles of judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself and further in light of the inherent limitations laid down by the Hon’ble Apex Court in exercise of the power of judicial

review by the Constitutional Courts to the effect that judicial restraint should be maintained in administrative action, the Court should not sit as a Court of appeal but should merely review the manner in which the decision was made since the Court does not have the expertise to correct the administrative decision and permitting the review of the administrative decision would be permitting, substituting its own decision, without the necessary expertise, which itself may be fallible and moreover, if the decision relating to award of contract is bona fide and is in public interest, Courts should not exercise power of judicial review and should not interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Reference in this connection be had to the judgment rendered by the Hon'ble Apex Court in the case of **Consortium of Titagarh Firema Adler S.P.A.-Titagarh Wagons Ltd.**, reported in (2017) 7 SCC 486 and the one rendered in the case of **Tata Cellular** (supra). Reference be also had to the judgments rendered by the Hon'ble Apex Court in the case of **Silppi Constructions Contractors**, reported in (2020) 16 SCC 489, **Bharat Coking Coal Ltd.** , reported in (2020) 16 SCC 759, **Vidarbha Irrigation Development Corporation**, reported in 2019 SCC Online SC 89 and the one rendered in the case of **Siemens Public Communication Networks (P) Ltd.** , reported in (2008) 16 SCC 215 (supra).

29. At this juncture, this Court would also refer to a recent judgment rendered by the Hon'ble Supreme Court in the case of **N.G. Projects Limited vs. Vinod Kumar Jain & Ors**., reported in *2022 SCC Online SC 336*, wherein the Hon'ble Apex Court has held that the Courts should be reluctant in interfering with the contracts involving technical issues and the approach of the Courts should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions and the contract of public service

should not be interfered with lightly.

30. Yet another aspect of the matter is that the petitioner was required to submit an affidavit along with its bid to the effect that it has not been blacklisted/ debarred as on the date of the opening of the bid in terms of clause- 1.1.3(e) of the RFP, however, though the petitioner had filed an affidavit dated 01.04.2021 but in the same it had made a declaration that the petitioner has not been blacklisted/ debarred by any Government department/ Organization or any public limited company or any bilateral/ multilateral funding agency or by the respondents and its subsidiary companies as on the date of bid opening, which is apparently false and not only amounts to the petitioner having made material misrepresentation but also amounts to non-disclosure of material facts regarding its blacklisting, which was/is a mandatory and essential information, required to be furnished to the respondents for the purposes of proper evaluation of the bid of the petitioner as also essential for eligibility of the petitioner as a

bidder. A duty is obviously casted upon the petitioner to disclose the aforesaid information regarding its previous blacklisting, which is a very important detail for the respondents to take note of while considering and assessing the pre-bid qualification. The interpretation given by the petitioner to clause 1.1.3 (e) and 1.2.28 of the RFP to wriggle out the situation by stating that on account of the stay order granted by the Hon'ble High Court, the blacklisting order was not in force, hence, it was not obliged to furnish details regarding the said blacklisting order in the affidavit to be filed in terms of clause 1.1.3 (e) of the RFP, is not only devoid of any substance but has also resulted in non-disclosure and suppression of material facts regarding its blacklisting, thus the bid of the petitioner was/is liable to be rejected on this ground alone, in terms of Clause 1.2.20 and 1.2.28 of the RFP. At this juncture, it would be apt to refer to the well settled law to the effect that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceeding stands vitiated if they are actuated by fraud, thus fraud is an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. Reference in this regard be had to a decision rendered by the Hon'ble Apex Court in the case of **K.D. Sharma vs. Steel Authority of India Ltd. and others**, reported in (2008) 12 SCC 481.

31. Thus on a cumulative consideration of the facts, as aforesaid, it is evidently clear that the petitioner has suppressed vital information, which is mandatory and essential information as per the RFP and was required to be submitted along with its bid, hence, this Court finds no reason to interfere with the email communication dated 02.09.2021, informing the petitioner that its bid has been found to be non-responsive.

In view of the discussions made herein above, this Court finds that the Judgments referred to hereinabove by the Ld. Sr. Counsel for the petitioner, rendered by the Hon'ble Apex Court in the cases of **Consolidated Coffee Ltd. vs. Agricultural Income Tax Officer Madikeri & Ors**. (Supra), **Reliance Energy Ltd.** (Supra) and **Vidya Charan Shukla** (Supra), do not have any applicability in the present case and are clearly distinguishable in the facts and circumstances of the present case.

32. Having regard to the facts and circumstances of the present case and for the reasons mentioned herein above, this Court does not find any merit in the present writ petition, hence the same stands dismissed, however without any order as to cost.

(Mohit Kumar Shah, J)

Tiwary/-

AFR/NAFR	AFR
CAV DATE	05.10.2021
Uploading Date	
Transmission Date	N/A