

ORISSA HIGH COURT: CUTTACK

W.P.(C) No. 17239 of 2021

In the matter of an application under Article 226 of the
Constitution of India.

AFR

M/s. Durga Electricals and
Electronics

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Petitioner

-Versus-

Mahanadi Coalfields Limited
and others

.....

Opp. Parties

For Petitioner : Mr. Manmaya Kumar Dash,
Advocate.

For Opp. Parties : M/s D. Mohanty, A. Mishra,
B.P. Panda and D. Behera,
Advocates

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND**

THE HON'BLE MR. JUSTICE V. NARASINGH

Date of hearing and judgment :: 15.02.2022

DR. B.R. SARANGI, J.

The petitioner, by means of this writ

petition, seeks to quash the order dated 26.05.2021 in

Annexure-5, by which the bid of the petitioner has been

rejected and the petitioner has been banned for 2 (two)

years from being eligible to submit bids in CIL and its subsidiaries from the date of its issuance, taking recourse to Clause-14(E) of the NIT; as also the consequential work order dated 26.05.2021 issued in favour of opposite party no.5 (inadvertently numbered as '4') vide Annexure-6; and to issue direction to the opposite parties to consider the representation of the petitioner dated 30.05.2021 under Annexure-7, within a stipulated period.

2. The factual matrix of the case, in brief, is that the petitioner is a proprietorship firm and participated in the process of tender, pursuant to the online bid invited by opposite party no.3, having digital signature certificate authorized by the Controller of Certifying Authority (CCA), Government of India, in respect of the work "*Conversion of 3.3 kV overhead line (Pump feeder) to 33 kV overhead line to feed power to proposed temporary field substation near stock No-6 of Ananta OCP of Jagannath Area*". Following due procedure of selection, the petitioner was declared as L-1 bidder. When the petitioner was waiting for the work order, on 26.05.2021, it was issued with a letter

intimating that with reference to the NIT, the petitioner has participated in the tender and became L-1 bidder, but it failed in submitting the requisite document online as per NIT. Therefore, as per Clause-14(E) of the NIT, the bid of the petitioner was rejected and it was banned for 2 (two) years from being eligible to submit bids in CIL and its subsidiaries from the date of issue of the said letter. The very fact, that the petitioner was declared as L-1, establishes that it had produced all the relevant documents. Therefore, it was urged that subsequent rejection of its bid and banning the petitioner from participating for two years in the bids of CIL and its subsidiaries, vide Annexure-5 dated 26.05.2021, which amounts to blacklisting, is illegal, arbitrary and contrary to the settled position of law, and so also the consequential issuance of work order vide Annexure-6 in favour of opposite party no.5. Hence this writ petition.

3. Mr. M.K. Dash, learned counsel for the petitioner contended that the impugned communication/ order, vide Annexure-5 dated 26.05.2021, banning the

petitioner for two years from being eligible to submit bids in CIL and its subsidiaries, cannot be sustained in the eye of law, having been passed without giving opportunity of hearing to the petitioner, which amounts to gross violation of principles of natural justice. To substantiate his contention, he has placed reliance on **TELSA Transformers Limited v. Odisha Power Transmission Corporation Limited**, 2016 (II) ILR CTC-237 and **UMC Technologies Private Limited v Food Corporation of India** (Civil Appeal No. 3687 of 2020 disposed of on 16.11.2020).

4. Mr. Debraj Mohanty, learned counsel appearing for the opposite parties, vehemently contended that since the petitioner had not submitted the requisite documents through online as per NIT, taking recourse to Clause-14(E) of the NIT, the bid of the petitioner has been rejected. As the petitioner has not adhered to the terms and conditions of the bid, it is not entitled to participate in the future bids. Therefore, the order impugned dated

26.05.2021 has been passed, for which no fault can be found with the authorities.

5. This Court heard Mr. M.K. Dash, learned counsel for the petitioner and Mr. D. Mohanty, learned counsel appearing for the opposite parties by hybrid mode, and perused the record. Pleadings having been exchanged between the parties, with their consent this writ petition is being disposed of finally at the stage of admission.

6. Though multiple reliefs have been sought before this Court, in course of hearing, Mr. M.K. Dash, learned counsel for the petitioner contended that the petitioner is aggrieved by that part of the order dated 26.05.2021, whereby it has been banned for two years from being eligible to submit bids in CIL and its subsidiaries, and he confined the writ petition to such relief only, as in the meantime, the work in question has already been allotted in favour of opposite party no.5 vide Annexure-6 and he has no knowledge whether he has progressed with the work or not.

7. On the basis of the factual matrix as delineated above, there is no dispute that the petitioner was selected by the opposite parties for award of the work “*Conversion of 3.3 kV overhead line (Pump feeder) to 33 kV overhead line to feed power to proposed temporary field substation near stock No-6 of Ananta OCP of Jagannath Area*”, pursuant to the Tender ID No. 2021_MCL_204099_1. The petitioner, having participated in the tender and declared as L-1, the work would have been allotted in his favour, but taking recourse to Clause-14(E) of the NIT, the bid of the petitioner has been rejected, vide Annexure-5 dated 26.05.2021, on the ground that the petitioner has failed to submit the required documents through online as per NIT, and simultaneously the petitioner has been banned for two years from being eligible to submit bids in CIL and its subsidiaries.

8. Clause- 14(E) of the NIT, being relevant for the purpose of effective adjudication of this case, is extracted hereunder:-

“In case the L-1 bidder fails to submit requisite documents online as per NIT or if any of the information/declaration furnished by L-1 bidder online is found to be wrong by Tender Committee during evaluation of scanned documents uploaded by bidder, which changes the eligibility status of the bidder, then his bid shall be rejected and the bidder will be banned for two years from being eligible to submit bids in CIL and its subsidiaries.”

On perusal of the aforementioned clause, it is made clear that if the L-1 bidder fails to submit requisite documents online as per NIT, then his bid shall be rejected and the bidder will be banned for two years from being eligible to submit bids in CIL and its subsidiaries. But nothing has been placed on record to show as to which document the petitioner was required to submit online as per NIT. Merely referring to Clause-14(E) of the NIT, the bid of the petitioner could not have been rejected and, as such, the petitioner could not have been banned for two years from being eligible to submit bids in CIL and its subsidiaries from the date of issuance of the letter dated 26.05.2021 in Annexure-5. By issuing such letter, the petitioner has been blacklisted by the opposite parties. As a matter of course, while blacklisting the petitioner, the minimum requirement of compliance of natural justice had to be

followed. As such the petitioner has been condemned without being given an opportunity of hearing.

9. In ***Nova Steel (India) Ltd vs M.C.D. And Ors***, AIR 1995 SC 1057 the apex Court held that the question of blacklisting of the contracts have been considered by the Courts time and again and it has categorically been held that such order cannot be passed without giving opportunity of hearing to the party.

10. In ***Urussian Equipment & Chemicals Ltd. v. State of West Bengal***, AIR 1975 SC 266, the apex Court held that 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 offence is similarly examinable by a writ Court. The apex Court also declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and the authority

passing any such order is required to give a fair hearing before passing an order of blacklisting in certain entity.

11. In **Mr. B.S.N. Joshi & Sons Ltd v. Nair Coal Services Ltd. & Ors**, (2006) II SCC 548 : AIR 2007 SC 437 and a long line of decisions have followed the ratio of that decision and applied principle of *audi alteram partem* to the process that may eventually culminate in the blacklisting of a contractor.

12. In **TELSA Transformers Limited** (supra), this Court also taking into consideration the ratio of **Gorkha Security Services v. Government (NCT of Delhi)**, AIR 2014 SC 3371 held that merely because clause in notice inviting tender empowers the department to impose such penalty that does not mean that such penalty can be imposed without putting defaulting contractor to notice to this effect.

13. In **Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others**, (2014) 14 SCC 731, the

apex Court held, if State or its instrumentality takes decision on blacklisting then such decision is subject to judicial review on grounds of principles of natural justice, doctrine of proportionality, arbitrariness and discrimination under Article 14 of the Constitution of India.

14. In **UMC Technologies** (supra), the apex Court has also taken note of the decision of the apex Court in **Erusian Equipment & Gorkha Security** (supra) and has come to a conclusion that a prior show cause notice granting a reasonable opportunity of being heard is an essential element of all administrative decision-making and particularly so in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted. Therefore, furnishing of a valid show cause notice is critical and a failure to do so would be fatal to any order of blacklisting pursuant thereto.

15. Taking into consideration the factual matrix and the propositions of law, as discussed above, this Court is of the considered view that, since the order

impugned dated 26.05.2021 in Annexure-5 has been passed banning the petitioner for two years from being eligible to submit bids in CIL and its subsidiaries from the date of issue of the letter, without complying the principle of natural justice, the same cannot be sustained in the eye of law and, as such, the same is liable to be quashed and hereby quashed.

16. The writ petition is allowed to the extent indicated above. No order as to costs.

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DR. B.R. SARANGI,
JUDGE

V. NARASINGH, J. I agree

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V. NARASINGH,
JUDGE

Orissa High Court, Cuttack
The 15th February, 2022, Arun/GDS