

PMB

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2783 OF 2021

AGS Transact Technologies Limited

and anr.

.. Petitioners

vs.

The Bank of India

.. Respondent

Mr. Ravi Kadam, Senior Advocate a/w Mr. Malhar Zatakia,
Ms. Cheryl Fernandes, Ms. Tanya Chib and Ashutosh Kothari
i/b. AZB and Partners for the petitioners.

Mr. B. Gopalkrishnan a/w Mr. Nilesh Sunil Ghadge and Ms.
Mamta Kadam for the respondent.

**CORAM : DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

DATE : JULY 18 & 19, 2022

P.C. :

1. While hearing Writ Petition (L) No. 17941 of 2022 (AGS Transact Technologies Limited & Anr. vs. Union Bank of India) at the admission stage, we considered it appropriate to hear this writ petition first since the order of debarment, under challenge herein, created an impediment for the first petitioner to bid in response to a tender floated by Union Bank of India.

2. The petitioners in this writ petition have taken exception to a communication of the General Manager of the Bank of India (hereafter "the bank", for short) dated

December 8, 2020. By such communication, it was conveyed to the petitioners that the bank had decided as under: -

- (i) The purchase order issued by the Bank in favour of the petitioners stands cancelled.
- (ii) The bid security of Rs.1 crore deposited by the petitioners stands forfeited.
- (iii) The petitioners (including group companies) are debarred permanently to participate in the bank's future processes for selection of service provider for various services.

3. Mr. Kadam, learned senior advocate appearing for the petitioners has not questioned the decision of the bank to cancel the purchase order or forfeit the bid security. However, he takes serious exception to the bank's decision to debar the first petitioner permanently from participating in future processes of the bank on the ground that neither was the petitioners put on notice before such drastic decision was taken nor was the petitioners offered any opportunity of hearing.

4. In course of hearing, Mr. Kadam has drawn our attention to notices dated November 17, 2020, November 21, 2020, November 27, 2020 and December 2, 2020 (pages 426, 428, 430 and 432 of the writ petition, respectively) to contend that in all such notices the petitioners had been threatened with cancellation of the purchase order and forfeiture of the security bid, should the petitioners fail to submit the performance guarantee of Rs.49.85 crore and the contract form as per the Request For

Proposal (hereafter "RFP", for short) format. He contends that there was sufficient reason for the petitioners not to comply with the purchase order but, notwithstanding the fact that there was a failure, if only the bank had given an opportunity to the petitioners to explain their position, the bank could have been persuaded not to issue the permanent debarment order.

5. In support of his contention that a debarment order like the one under challenge, which is in the nature of an order of blacklisting prejudicially affecting the petitioners for all times to come, could not have been issued without at least a notice to show cause being given to them, reliance has been placed by Mr. Kadam on the decisions of the Supreme Court in **Gorkha Security Services vs. Government (NCT of Delhi) and others¹**, **Vetindia Pharmaceuticals Limited vs. State of Uttar Pradesh and another²** and **UMC Technologies Private Limited vs. Food Corporation of India and another³**. In all these cases, the Supreme Court had interfered and quashed the orders putting the concerned bidders on the blacklist on the sole ground that they were not put on notice for which they did not have any opportunity to place their versions and, thus, were condemned unheard.

6. Mr. Kadam further contends that because of the order of permanent debarment, under challenge herein, the

1 (2014) 9 SCC 105

2 (2021) 1 SCC 804

3 (2021) 2 SCC 551

petitioners could not participate in 8 (eight) tenders floated by various public sector banks between January 8, 2021 and March 9, 2021, with the result that the petitioners have suffered enough and that this is not a case where the matter should be remitted to the bank for deciding the matter of debarment afresh.

7. In his usual fairness, Mr. Kadam has placed before us the decision of the Supreme Court in **Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others**⁴, where the Court had considered it appropriate to remit the matter to the competent authority for a fresh decision in accordance with law. He, however, hastens to add that the facts and circumstances of the present case are completely different.

8. Mr. Kadam, thus, submits that the decision of the bank to debar the first petitioner permanently without granting opportunity to represent is arbitrary, illegal and unreasonable; hence, it is prayed that the debarment order contained in the impugned communication dated December 8, 2020 be quashed and set aside.

9. Answering Mr. Kadam's contentions, Mr. B. Gopalkrishnan, learned advocate appearing for the bank contends that the first petitioner was granted sufficient opportunity to submit the performance guarantee and the contract form, yet, it did not. In fact, he contends, there

⁴ (2014) 14 SCC 731

was no genuine reason for the petitioners not to act in terms of the purchase order and no genuine intention either to close the breach committed by them despite repeated opportunities that were given. It is further contended that the bank issued several notices in this behalf whereby the first petitioner was duly put on notice that any failure on its part to close the breach would result in cancellation of the purchase order as well as forfeiture of the security bid. The petitioners having failed to comply with the terms of the purchase order, the bank was left with no other alternative but to take the impugned decision. According to him, principles of natural justice have been duly followed and the allegation that no chance was afforded to the petitioners to put its case before the bank in the proper perspective is false, baseless and made with ulterior motives.

10. Mr. Gopalkrishnan further contends that the decision taken by the bank does not amount to blacklisting since the bank has not reported the breach to the Indian Banks Association for blacklisting the first petitioner from participating in any tender which may be or has been floated by other public institutions or banks. It is only that the first petitioner has been debarred from participating in tenders floated by the bank and in view thereof, the decisions cited by Mr. Kadam have no application in the facts and circumstances of the present case.

11. While referring to Mr. Kadam's contention that the petitioners have suffered enough because of the impugned

debarment and that the matter does not deserve to be remitted to the bank for a fresh decision, our attention has been drawn by Mr. Gopalkrishnan to paragraph 19 of Writ Petition (L) No. 17941 of 2022 filed by the same petitioners against Union Bank of India, where it has been admitted that after the debarment order under challenge was stayed by this Court on May 6, 2021, the first petitioner has participated in 21 (twenty-one) tenders and been successful in 8 (eight) of them. It is, therefore, the contention that the impugned debarment order has not operated adversely to the interest of the petitioners.

12. In course of hearing, Mr. Gopalkrishnan referred to and relied on the decisions of the Supreme Court in **Life Insurance Corporation of India vs. Escorts Limited and others**⁵, **Union of India and another vs. S. B. Vohra and others**.⁶, **Zee Telefilms Ltd. and another vs. Union of India and others**⁷, **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mohotsav Smarak Trust and others vs. V. R. Rudani and others**⁸ and **Joshi Technologies International Inc vs. Union of India and others**⁹ in support of the contention that the Court ought to stay at a distance and not examine the action of the State in regard to contractual matters and that the power of the judicial review is not available in a given

5 (1986) 1 SCC 264

6 (2004) 2 SCC 150

7 (2005) 4 SCC 649

8 (1989) 2 SCC 691

9 (2015) 7 SCC 728

case which has no public law element.

13. Based on the aforesaid contentions, Mr. Gopalkrishnan has prayed that the writ petition be dismissed.

14. We have heard learned advocates for the parties, perused the materials on record as well as considered the decisions cited at the bar.

15. Certain basic facts giving rise to the present dispute need to be noticed.

16. The bank floated the RFP dated July 1, 2020 'For Outsourcing of Installation and Managed Services for 4000 Cash Dispensers'. According to the bank, it is a very prestigious project which was required to be completed in a time bound manner without any delay. The terms of the RFP clearly indicated that any failure and/or breach on the part of the selected bidder would result in cancellation of the contract as well as forfeiture of the security deposit. Clause 4.41.1 provides for termination of contract in the event of occurrence of one or more of the conditions mentioned therein. Clause 5.10.11 is titled "Cancellation of Contract and Compensation". The seven bullet points forming part thereof indicate the circumstances when the bank could invoke its power to cancel the contract of the selected bidder and recover expenditure incurred by it.

17. It is not in dispute that the purchase order dated October 31, 2020 issued to the first petitioner required submission of performance guarantee by November 13,

2020 and the contract form by November 20, 2020. It is also not in dispute that the first petitioner, within the time stipulated by the bank in the purchase order, did not submit the requisites, not to speak of installing the requisite number of cash dispensers. However, Mr. Kadam has sought to impress upon us that the time granted to the petitioners to install such cash dispensers was too short having regard to the delay in decision making. We are not required to examine this aspect of the matter on this writ petition, particularly when the petitioners have unconditionally chosen to accept the cancellation of the purchase order and forfeiture of the security bid. What we are tasked to decide first is, whether the bank could have debarred the first petitioner permanently from participating in its future processes without issuance of a notice and extending an opportunity to show cause. Obviously, the decisions referred to us by Mr. Kadam in **Gorkha Security Services** (supra), **Vetindia Pharmaceuticals Limited** (supra) and **UMC Technologies Private Limited** (supra), which all followed the parent decision of the Supreme Court on the subject, i.e., **Erusian Equipment and Chemicals Ltd. vs. State of West Bengal and anr.**¹⁰, are authorities for the proposition that no order of debarment/blacklisting, by whatever name called, could be issued without extending to the defaulting bidder an opportunity to show cause against the proposed action. What follows from such decisions is

¹⁰ (1975) 1 SCC 70

that before an order of debarment/blacklisting is issued, a notice to show cause proposing the action to be taken is a *sine qua non*. The materials on record do not suggest that any such notice was given to the petitioners, calling upon them to show cause why the proposed action of debarment shall not be resorted to. We also called upon Mr. Gopalkrishnan to show us from the terms of the RFP as to whether the bank reserved the right to permanently debar the selected bidder upon the occurrence of any breach of the terms and conditions of the purchase order/contract, apart from the clauses that reserved the right of the bank to cancel/terminate the contract and recover the expenditure incurred by it. He was unable to draw our attention to any such term. In view of the undisputed factual position that the petitioners were never put on notice before the bank decided to permanently debar the first petitioner from participating in future processes, the decision of the bank, to the extent impugned before us in this writ petition, appears to be indefensible. The decisions cited by Mr. Gopalkrishnan are not on the subject of debarment/blacklisting and hence, distinguishable on facts. On the contrary, having regard to the clear enunciation of law in the decisions of the Supreme Court in **Gorkha Security Services** (supra), **Vetindia Pharmaceuticals Limited** (supra) and **UMC Technologies Private Limited** (supra), the question is no longer *res integra* and we have no hesitation to hold that the first petitioner could not have

been permanently debarred from participating in future processes of the bank without being put on notice. The first question is, thus, answered in the negative.

18. Clause (iii) paragraph 13 of the impugned communication dated December 8, 2020 consequently stands set aside.

19. We are now tasked to decide the other question as to whether the bank ought to be given an opportunity to decide afresh whether the first petitioner should at all be debarred, either permanently or for any specified period, for its failure which has led to cancellation of the purchase order and forfeiture of the security bid.

20. Although Mr. Kadam has persisted that this is not such a case where the matter ought to be remitted to the bank on the ground that the petitioners have suffered enough by reason of the disability flowing from clause (iii) of paragraph 13 of the impugned communication dated December 8, 2020 on and from that date till May 6, 2021, we are not at all impressed for twin reasons.

21. First, the petitioners delayed their approach to the Court. Although the impugned communication was received by the petitioners on or about December 8, 2020, this writ petition was instituted as late as on April 28, 2021. Within a week of its institution, the petitioners obtained an order of stay whereafter, it is their admitted case [in Writ Petition (L) No. 17941 of 2022] that it has been successful in 8 (eight) tenders out of 21 (twenty-one). It would, therefore, be

reasonable to infer that had the petitioners instituted this writ petition earlier, it could have had a fair chance to participate in tenders floated by other banks and public institutions between December 8, 2020 and April 28, 2021. The petitioners, therefore, have none else but themselves to blame for their present position. Nonetheless, since May 6, 2021, the petitioners have been participating in tenders and have not suffered any irreparable loss, injury or prejudice which could impel us to agree with Mr. Kadam.

22. Even if we ignore the ground of delay in approaching the Court, the decisions cited by Mr. Kadam provide suitable guidance for deciding the relevant question.

23. In **Gorkha Security Services** (supra), the Supreme Court after setting aside the order of blacklisting left it open to the respondents to take any action after complying with the necessary procedural formalities delineated in the decision. This decision, therefore, does more harm than good to the cause of the petitioners.

24. Mr. Kadam has, however, placed strong reliance on paragraph 17 of the decision in **Vetindia Pharmaceuticals Limited** (supra) where the Supreme Court set aside the order of blacklisting which was passed more than a decade prior to its decision. There, the order of blacklisting dated September 8, 2009 was challenged by the petitioner in a writ petition instituted on July 24, 2019 and the High Court had dismissed the same on the ground of unexplained delay; however, the Supreme Court found that the delay

had been appropriately explained and the High Court was in error in dismissing the writ petition on the ground of delay. That apart, the Court held that the illegality and the disproportionate nature of the order dated September 8, 2009 with no third-party rights being affected, unfortunately, did not engage the attention of the High Court in the judicious exercise of the discretionary equitable jurisdiction, which was sufficient for the Court to set aside the impugned order of blacklisting as well as the order dismissing the writ petition. We would most humbly read paragraph 17 of the decision as an exercise of the power under Article 142 of the Constitution of India by the Supreme Court in view of the fact that the Government, in that case, was found to be remiss.

25. This, we say, because decisions of the Supreme Court are legion where law has been laid down that repeated representations before the authority seeking reconsideration of the decision, which is ultimately challenged, does not amount to satisfactory explanation of the delay in approaching Court. If any authority is required, we may usefully refer to the decision in **State of Orissa and ors. vs. Pyarimohan Samantray**¹¹. The said decision and other decisions that lay down the law that repeated representations do not extend the period within which the Court has to be approached were not considered in **Vetindia Pharmaceuticals Limited** (supra). The decision

¹¹ (1977) 3 SCC 396

is, therefore, of no help to the petitioners.

26. The decision in **UMC Technologies Private Limited** (supra) though interfered with the order of blacklisting dated January 9, 2019 on the grounds assigned in the judgment but the Court did not deem it appropriate to remit the matter to the respondents for fresh consideration having regard to the peculiar facts and circumstances of the case. This decision, therefore, turns on its special facts and does not aid the petitioners.

27. It has been noted above that Mr. Kadam volunteered to place before us the decision in **Kulja Industries Limited** (supra). For the reasons indicated in paragraph 28 of the decision, the Supreme Court thought it fit and proper that a remand to the competent authority would be a more appropriate option than an order by which the Court may determine the period for which the appellant would remain blacklisted.

28. We are of the clear opinion that natural justice having been denied to the petitioners prior to the decision to debar the first petitioner permanently and since the order of debarment is being interfered with by us on such ground only, it would not automatically follow that the bank is divested of its right to reconsider whether an order of debarment ought to be issued once again upon granting sufficient opportunity of defence. It is not for the Court to substitute itself for the bank and decide the matter. In this connection, we may profitably refer to the decision in **State**

of W.B. and others vs. Nuruddin Mallick and others¹²,
 where the Supreme Court had the occasion to observe as follows: -

"28. *** The courts can either direct the statutory authorities, where it is not exercising its discretion, by mandamus to exercise its discretion, or when exercised, to see whether it has been validly exercised. It would be inappropriate for the Court to substitute itself for the statutory authorities to decide the matter."

29. Here, only Rs.1 crore has been forfeited, which was the security bid. The tender was worth Rs.997 crore. The petitioners went ahead and accepted the purchase order with their eyes open that it had a relatively short time to install the cash dispensers. This could be an aspect which may be considered by the bank once it decides to proceed against the petitioners for debarment. It is needless to observe that the omission/failure/breach on the part of the petitioners to submit the requisites in terms of the purchase order within the time stipulated has to be considered based on what other defence they set up pursuant to the show cause notice, which might be issued by the bank. We do not intend to restrict the bank's power to exercise its discretion and leave it to the bank to proceed against the petitioners in accordance with law. However, it is needless to observe that since the order of debarment stands set aside and till such time any further order of debarment, if any, is issued by the bank, the petitioners are free to participate in

12 (1998) 8 SCC 143

tenders that are issued by the public institutions and other banks henceforth. The question as to whether the petitioners are entitled to participate in the tender which forms the subject matter of challenge in Writ Petition (L) No. 17941 of 2022 obviously does not call for examination in this writ petition and is left to be decided in accordance with law.

30. The writ petition stands allowed to the extent mentioned above. There shall be no order as to costs.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)