

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
NAGPUR BENCH, NAGPUR.

**WRIT PETITION NO. 4855 OF 2021**

PETITIONER :- M/s. Hindustan Trade Overseas Pvt. Ltd.,  
13 Lake Range, Dynamic Mansion,  
Southern Avenue, Kolkata-700026,  
Through its Managing Director  
Mr.Hamesh Kumar S/o Govindram  
Agrawal, Aged about 53 years.

...VERSUS...

RESPONDENTS :-

1. General Manager (C.M.C.) Western Coal  
Field Limited, Headquarters, Registered  
Office, Coal Estate, Civil Lines, Nagpur  
(M.S.)-440001.
2. Area General Manager, (Ballarpur Area)  
Western Coal Field Limited,  
Headquarters, Registers Office, Coal  
Estate, Civil Lines, Nagpur(M.S.)440001.

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Mr. M.K. Kulkarni, counsel for the petitioner.  
Mr.Atul Pande, counsel for the respondents.  
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**CORAM : SUNIL B.SHUKRE &  
SMT. M.S.JAWALKAR JJ.**

**DATE : 28.04.2022.**

O R A L J U D G M E N T (Per : Sunil B.Shukre, J.)

Heard.

2. **Rule.** Rule made returnable forthwith. Heard finally by consent of the learned counsel appearing for the parties.

3. The petitioner had taken part in the tender process initiated vide tender Notice No.54/2020-21. By this notice, tenders were invited from the qualified bidders for awarding the work of processing of over burden [OB] to segregate sand and clay from overburden including storage of finished product sand and disposal of clay in the designated site at specified places of Ballarpur Colliery.

4. The petitioner was found to be a qualified bidder and was ultimately evaluated to be the lowest bidder and accordingly, a letter of acceptance was issued to him on 18.06.2021. The letter of acceptance [LOA] was issued subject to certain conditions and the relevant condition thereof was of submission of the Performance Security of Rs.56,43,893/- within a period of 21 days of issue of LOA. For the sake of convenience, this condition is reproduced as follows:

*“(B) The performance security (first part of security deposit) should be 5% of annualized value of contract amount i.e. Rs.56,43,893/- (Rupees Fifty Six Lakh, Forty Three Thousand, Eight Hundred Ninety Three Only) as the period of contract is 2135 days {07 (Seven Years)} and it should be submitted within 21 days of issue of LOA by you in any of the form given below. ”*

5. The petitioner, however, could not submit Performance Security within a period of 21 days and, therefore, he sought extension of time for submission of the same. The respondents granted the request and extended the time by 14 more days. Even within the extended period of time, the petitioner could not submit the Performance Security and therefore, a show cause notice was issued to the petitioner as to why action be not taken against him as per clause No.4 of the tender document. The clause-4 spoke of cancellation of the award of work and imposition of ban from participation in future tender processes of Coal India Limited and its subsidiaries for a period of two years. The show cause notice also made it clear that if the petitioner failed to submit his written explanation or to appear for personal hearing on the scheduled date, it would be construed

that the petitioner had nothing to submit in his defence and the WCL Management would initiate action against the petitioner as per terms and conditions of the tender document referred to in the show cause notice.

6. The petitioner did not submit any written explanation in response to the show cause notice, though learned counsel for the petitioner contends that the petitioner did submit his explanation and in support, he relies upon the communication dated 01.09.2021, sent by the petitioner to the respondents.

7. The petitioner also submitted that because he has taken a leave due to getting infected with COVID-19 and there was COVID-19 Pandemic going on, he could not attend the hearing personally and therefore, by his communication dated 01.09.2021, he prayed for giving of another chance to him to appear before the Authority.

8. These requests were not accepted by the respondents primarily for the reason that no medical certificate was annexed to

the communication dated 26.08.2021, sent by the petitioner.

9. Ultimately, by the order passed on 19.10.2021, the respondents cancelled the work awarded to the petitioner and by another communication dated 04.11.2021, banned the petitioner from participating jointly or individually in the future bids of WCL for two years from the date of issue of the letter. The respondents thereafter, floated yet another tender for the same work by its notice dated 24.12.2021.

10. Being aggrieved by the communications dated 19.10.2021, 04.11.2021 and fresh tender notice dated 24.12.2021, the petitioner has approached this Court seeking quashing and setting aside these communications and the fresh tender notice.

11. Learned counsel for the petitioner submits that no proper opportunity of hearing has been granted to the petitioner to explain his stand and without granting any opportunity of hearing to the petitioner, the LOA has been cancelled and that the

petitioner has been blacklisted for two years. According to him, such an action on the part of the respondents is against the principles of natural justice and, therefore, it is liable to be quashed and set aside. He also submits that the cancellation of the LOA issued to the petitioner being illegal, no fresh tender notice could have been issued by the respondents, and therefore, the action of the respondents in inviting fresh tender for the same work would also have to be quashed and set aside.

12. Learned counsel for the respondents submits that, sufficient opportunity of hearing has been given to the petitioner, but the petitioner did not avail of the same and not only that, the petitioner even did not submit any explanation to a detailed show cause notice issued to him on 12.08.2021, and that the petitioner pleaded before the respondents for giving of more chances to him to appear personally before the respondents, without actually submitting any written explanation to the allegations made against him in the show cause notice dated 12.08.2021. He also submits that the action taken by the petitioner in cancelling the work awarded to the petitioner and blacklisting him for two years

and issuing a fresh tender for the same work is absolutely in accordance with Clause-4 of the tender notice and since, the petitioner, in his notice has admitted that he is not challenging this clause anywhere, the petitioner as well as the respondents would be bound by this clause and if that is accepted, the legality and correctness of the action initiated by the respondents against the petitioner, would be confirmed.

13. On going through the relevant clause of the tender notice in question, the show cause notice dated 12.08.2021, the communications dated 26.08.2021 and 01.09.2021, both sent by the petitioner to the respondents and also the other documents available on record, including the impugned orders and impugned tender notice, we find that there is no substance in the argument of the learned counsel for the petitioner and we find merit in the submissions of the learned counsel for the respondents.

14. It is not in dispute that after the LOA was issued to the petitioner, the petitioner was required to submit Performance Security within a period of 21 days, but the petitioner could not

submit the same within that period of time. It is also not in dispute that at the request of the petitioner, further 14 days time was granted to the petitioner for submission of the Performance Security. It is also not in dispute that even within the extended time, the petitioner could not submit the Performance Security. Keeping in mind, these admitted facts appearing on record that we have to consider the relevant clause of the tender document relating to the tender notice No.54/2020-21. This clause is 4.2 and the relevant portion thereof is extracted as below:-

*4.2. "In case the successful bidder fails to submit the Performance Security within the stipulated time then the award of work shall be cancelled and they will be banned for two years from being eligible to submit Bids in CIL and its subsidiaries".*

15. A bare perusal of the aforesaid clause would be sufficient to indicate that upon the happening of the contingency stated therein, the contingency of failure to submit the Performance Security within the stipulated time, the inevitable event automatically happens. This inevitable event is of cancellation of the award of work and banning of the bidder for

two years from being eligible to submit bids in tender notices of Coal India Limited and its subsidiaries.

16. When, a consequence of certain failure on the part of the bidder is stated in a very specific manner in the tender document, it cannot be said that the bidder is taken by surprise and that he is not aware of the consequence flowing from the failure to do a particular act on his part. In such a case, even if, show cause notice is not issued, still the bidder cannot be heard to say that he was taken by surprise and therefore, prior notice for enabling him to explain his stand may not be necessary.

17. In the present case, in spite of the aforestated effect of the said penal Clause, the respondents did issue a show cause notice to the petitioner just to make doubly sure that no injustice was caused to the petitioner. If the action stated in the said penal Clause had been taken by the respondents even without issuing show cause notice and giving any opportunity of hearing to the petitioner, still, the action so taken could not have been faulted with. But, the respondents out of abundant precaution did issue a

show cause notice to the petitioner. By this show cause notice, the petitioner was made aware of the said penal Clause and the petitioner was called upon to submit his written explanation or to appear for personal hearing on the scheduled date before the respondents. But, the response of the petitioner, which is to be seen in the communication dated 26.08.2021, was quite disappointing. He only stated that due to his illness because of inclement weather, that he was not able to appear before the Authorities on the planned date. In this communication, the petitioner also informed the respondents, that he had taken a decision to appear before the respondents in person on 27.08.2021, but due to his illness, he was unable to appear before them. He sought from the respondents another convenient date after 10.09.2021 for hearing him. In this communication the petitioner also stated that doctor's prescription of the online consultation he had taken in the matter was attached, but the respondents, found that the online prescription of the concerned doctor was not attached to the communication and accordingly, the respondents informed the petitioner of absence of the medical prescription. The respondents also informed the petitioner that

the Competent Authority had not agreed to grant his request for further opportunities as in the opinion of the Authority, already ample opportunities were granted to the petitioner and therefore, the petitioner was warned that the Authority would proceed with the proposed action. This reply was sent by the respondents on 30.08.2021.

18. Then, the petitioner sent another letter to the respondents on dated 01.09.2021, which letter, according to learned counsel for the petitioner, is the explanation given by the petitioner to the show cause notice. By this letter, the petitioner only informed the respondents that due to on going COVID-19 Pandemic and on doctor's advice, he took a decision to not travel and therefore, he requested to postpone the matter. In this communication, the petitioner also admitted that due to some clerical mistake, he failed to attach the medical prescription to his earlier request letter. Nowhere in this letter, the petitioner has given his explanation as to why he could not submit Performance Security within a stipulated time. Of course, the learned counsel for the petitioner insists that the letter dated 01.09.2021, contains

some explanation given by the petitioner, but the submission cannot be accepted by us as a close perusal of this letter nowhere discloses that even a single reason has been cited by the petitioner for his inability to submit Performance Security within a stipulated time.

19. The discussion thus far held would show that in spite of giving of sufficient opportunities to the petitioner, the petitioner not only failed to appear before the respondents, but the petitioner also did not submit any explanation to the Authorities as to why the petitioner failed to submit Performance Security within stipulated period of time including extended time. This being the factual scenario, we are of the view that the petitioner was given sufficient opportunities of hearing in the matter, which opportunities were not availed of by the petitioner. If that is so, the petitioner now cannot be heard to say that rules of natural justice have not been followed in the present case.

20. As stated by us earlier, it was not necessary for the respondents to have issued any show cause notice to the petitioner

and still the respondents, out of abundant precaution, issued show cause notice to the petitioner, but the opportunity so generated for the benefit of the petitioner was not availed of by him. The well settled law says that a blacklisting order cannot be interfered with when it is passed after giving of sufficient opportunity of hearing to a contractor (see **M/s Daffodils Pharmaceuticals Ltd. and ors. Vs. The State of Uttar Pradesh**, reported in 2019 (17) Scale, 758 and **M/s Patel Engineering Ltd. Vs. Union of India and ors.** reported in (2012) 11 SCC 257), if violation of principle of natural justice is the only ground taken to assail the order, which is the case here.

21. In fact, the law is that even though there is no statutory rule which requires that a contractor must be given an opportunity to show cause before he is being blacklisted, the principle of natural justice, in general, would require that at least some opportunity of being heard is granted to such a contractor. (See **Gronsons Pharmaceuticals (P) Ltd. and anr. V. State of U.P and ors.** reported in AIR 2001 SC 3707), and this opportunity of hearing has already been granted to the petitioner.

22. Thus, we find that there is no merit in the submission of the learned counsel for the petitioner that the petitioner has been unjustly and illegally subjected to cancellation of the contract awarded to him and also ban on his participation in tenders of WCL for a period of two years. If this is so, we did not find anything wrong in issuance of fresh tender notice. Of course, the petitioner may have been allowed to take part in the fresh tender process by the order of this Court, but his such participation was made subject to the final out come of this petition. Now the final result of the petition has gone against the petitioner and therefore, his participation in the first tender process is also liable to be cancelled, in view of the ban imposed upon the petitioner.

23. The Writ Petition, thus stands dismissed. No costs.

(SMT. M.S.JAWALKAR, J)

(SUNIL B.SHUKRE, J)