



NEUTRAL CITATION NO: 2022/DHC/002443

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

% Reserved on: 3rd June, 2022

Pronounced on: 4th July, 2022

+ **W.P.(C) 6937/2022**

CM APPL.21156/2022 (stay)

**CM APPL.27993/2022 (placing on record short counter affidavit-
by respondent No.3)**

**TEXMACO RAIL AND ENGINEERING
LTD. & ANR.**

..... Petitioners

Represented by: Mr.Kapil Sibal (through video
conferencing link) and
Mr.Dayan Krishnan, Sr.
Advocates with Mr.Abhishek
Pandey, Ms.Kanika Singh and
Mr.Ankur Chawla, Advocates.

versus

UNION OF INDIA & ORS.

..... Respondents

Represented by: Mr.Arnav Kumar, CGSC and
Mr.Suprateek Neogi,
Mr.Priyank Mohan,
Mr.Gurudas Khurana and
Mr.Harshil Manchanda,
Advocates for respondent Nos.1
and 2.

Mr.Chandan Kumar, Advocate
for respondent No.3.

**CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE ANISH DAYAL**

**ANISH DAYAL, J.**

1. This writ petition has been preferred seeking quashing/recalling of the letter dated 12th April, 2022 ('impugned show cause notice') issued by respondent No.2 (Northern Railways, through General Manager, HQ, New Delhi) to show cause as to why action may not be initiated against petitioner No.1 for submitting a false declaration as part of the bid for a tender floated by respondent No.2 dated 23rd September, 2021 ('First Tender'). The alleged false declaration was that the petitioner No.1 had not been blacklisted or debarred by the Railways or any other Ministry/ Department of Government of India from participating in any tender whereas, as per information received by respondent No.2 from respondent No.3 (IRCON International, a Government of India Undertaking), the petitioners had been debarred by respondent No.3 for a period of two years by a decision communicated through letter dated 15th October, 2020 with effect from that date. Prior to issuing the impugned show cause notice, respondent Nos.1 and 2 had purportedly discharged the First Tender on 8th April, 2022 having received the information of debarment from respondent No.3 (vide letters dated 9th March, 2022 and 4th April, 2022) and floated a new fresh tender ('Second Tender') on 20th April, 2022 for the same scope of work. The petitioners, therefore, in addition to the quashing of the impugned show cause notice sought directions to restrain respondent No.2 from taking any further steps regarding the Second Tender pending adjudication of the petition. The petitioners also alleged that the First Tender was open and active for which they were declared as L1, were amidst negotiations for



executing the contract and therefore a decision regarding the First Tender be also taken.

2. Respondent No.1 (Union of India, through Ministry of Railways) and respondent No.2 (Northern Railways) filed a common counter affidavit to which the petitioner filed a rejoinder in response. Respondent No.3 on the other hand, despite an opportunity given by the court decided not to file a counter saying it was not a necessary party, the petition was not maintainable *qua* them and no reply was required. However, before the last date of hearing, respondent No.3 filed a short counter affidavit placing some facts on record. Pursuant to hearing final arguments by this Court, written submissions were filed by all parties including respondent No.3.

Chronology of Events

3. At the outset, it may be apposite to provide a brief narration of the chronology of events gleaned from pleadings filed by the parties.

3.1 In August 2018, respondent No.3 (IRCON International) issued a tender for “*Design, Supply, Installation, Testing & Commissioning of Electronic Interlocking based Signalling System at 2 stations of Pipradhi- Bijalpura (Nepal) section and Provision of 6-Quad plus OFC Communication system between Kurtha (Nepal) and Bijalpura (Nepal)*”. Petitioner No.1’s bid was successful and it was awarded the tender and proceeded to commence work. However, in 2020 certain disputes arose between petitioner No.1 and respondent No.3 resulting in issuance of the letter dated 15th October, 2020 from respondent No.3 to petitioner No.1, rescinding the contract and balance work to be carried out independently without participation of



petitioner No.1. The said letter further declared that - “Your participation as well as participation of every member/partner in any manner as an individual or a partnership firm/JV is hereby debarred from participation in the tender for executing the balance work and your security deposit shall be forfeited and Performance Guarantee shall also be encashed.” The facts leading up to the issuance of this letter may not be relevant for the purpose of this adjudication since this has neither been challenged by the petitioner in this writ petition nor has the petitioner stated that it was or is under challenge in any other proceeding.

3.2 About a year later on 23rd September, 2021 respondent No.2 issued a tender for “*Indoor And Outdoor signalling works for Design, Supply, Installation, Wiring, Testing & Commissioning of the Distributed Type Electronic Interlocking for Lucknow yard along with Yard remodelling for 4-Line Entry/Exit including required alterations to adjoining Block Section LC gates & Stations for Aspect control & Block working on Lucknow Division of Northern Railways*” for an approximate cost of Rs. 44.09 crores (First Tender).

3.3 Petitioner No.1 submitted its bid on 20th October, 2021 including providing an undertaking (as part of the bid requirements) declaring that Texmaco Rail & Engineering Limited or any of its constituents have not been blacklisted or debarred by Railways or any other Ministry/Department of Government of India from participation in tender on the date of opening of bids, either in individual capacity or as a member of



the partnership firm or JV in which the Company was/is a partner/member. Petitioner No.1 also submitted a certificate in standard format (Annexure 'M' of First Tender) declaring that no misleading or false representations had been made in the bid document and that if the certificate was found as false/forged/incorrect during evaluation of tender it would lead to a forfeiture of the tender, EMD besides banning of business for a period of upto five years.

3.4 Petitioner No.1 was declared as the successful L1 bidder on 21st October, 2021 pursuant to which negotiations ensued which would have led to execution of a binding contract.

3.5 However, as per information supplied by respondent Nos.1 and 2 in their counter affidavit, while negotiations were underway, they discovered that respondent No.3 had debarred petitioner No.1 from participating in any tender floated by respondent No.3 for a period of two years with effect from 15th October, 2020. Accordingly, in order to verify the same, respondent No.2 issued a communication on 9th March, 2022 to respondent No.3 and respondent No.3 by letter of the same date confirmed the same and that such a list was indeed available on their website <https://intranet.ircon.org/agency/SB.pdf>.

3.6 The Tender Evaluation Committee of respondent No.2 met on 14th March, 2022 and evaluated this response received from respondent No.3 and its impact on the veracity and authenticity of the undertaking and certificate submitted by petitioner No.1. The Committee recommended that action should be undertaken as per para 7 of Annexure M of the tender



document for banning the tenderer i.e. petitioner No.1 for upto 5 years. The Committee further recommended that due to submission of false declaration the offer of petitioner No.1 stood disqualified and the tender may therefore be discharged.

3.7 Respondent No.2 issued yet another communication on 4th April, 2022 seeking another confirmation from respondent No.3 regarding the debarment of petitioner No.1 and respondent No.3 by a communication of the same date stated that the petitioner is debarred from participating in the tenders invited by respondent No.3 for a period of two years w.e.f. 15th October, 2020.

3.8 The First Tender, therefore, stood discharged on 8th April, 2022 and this information was, as per respondent Nos.1 and 2, contemporaneously updated on Indian Railway E-procurement System [IREPS] portal which was accessible by the petitioner No.1 through its login account.

3.9 Having discharged the First Tender, respondent No.2 published a fresh tender on 20th April, 2022 for the same scope of work ('Second Tender').

3.10 Thereafter, respondent No.2 issued the impugned show cause notice on 12th April, 2022 stating that in light of the false declaration by petitioner No.1 and suppression of information relating to debarment by respondent No.3 why action should not be initiated which would result in banning of business for a period upto five years. This impugned show cause was served on petitioner No.1 on 18th April, 2022 to which a response was issued by petitioner No.1 on 19th April, 2022, followed up by



subsequent communications on 22nd April, 2022 and 25th April, 2022. The counsel for the respondents confirmed that no decision had been taken as of yet on the impugned show cause notice.

4. The instant writ petition came up for hearing on 2nd May, 2022 before this Court wherein notice was issued to the respondents and the following direction was passed:

“In view of the issue raised in the present petition, the respondents are restrained from taking any coercive action against the petitioners in terms of the show-cause notice dated 12th April, 2022 and the Second Tender bearing No. Sig/P/EI/LKOY/LKO/05-2022 dated 20th April, 2022 will not be given final effect till the next date of hearing.”

Submissions by Petitioners

5. The petitioners' submissions *inter alia* in brief are:
- i. The letter dated 15th October, 2020 sent by respondent No.3 which forms the basis of the impugned show cause notice does not amount to a debarment or banning of the petitioner but only limited to debarment from participation in a tender for executing the balance work of the rescinded contract.
 - ii. Till date no communication or order completely debarring petitioner for a period of 2 years with effect from 15th October, 2020 has been placed on record.
 - iii. The impugned show cause notice dated 12th April, 2022 makes no mention of letters dated 9th March, 2022 and 4th April, 2022



that the respondent Nos.1 and 2 produced as part of their counter affidavit.

- iv. The veracity of the aforementioned alleged correspondences exchanged between the respondent No.2 and the respondent No.3 is under serious doubt, and in no case such private correspondence could be relied upon to prematurely disqualify the petitioner No.1 and discharge the First Tender even prior to issuance of a show cause notice.
- v. The petitioner No.1 cannot be visited with severe civil consequences on the basis of an alleged false declaration relating to events which were not even communicated to the petitioner.
- vi. It has been repeatedly held by Hon'ble Supreme Court that public orders/communications, publicly made cannot be construed in the light of explanations subsequently given and must be interpreted strictly with reference to the language of the order/communication itself.
- vii. This Court has jurisdiction to set aside a show cause notice that is vitiated by procedural mala fides, and also one which is non-speaking, and is on the basis of a predetermined mindset.
- viii. It is settled law that a blacklisting order leads to civil death of a company and therefore, the blacklisting order should be a reasoned order and should be issued after giving an opportunity of hearing upon issuance of a show cause notice which clearly sets out blacklisting as a consequence.



- ix. As per the website of respondent No.2, as late as 22nd May, 2022, the First Tender was still shown as open and thus the alleged discharge is only an internal decision which has never been communicated.
- x. The impugned show cause notice and the fresh tendering process are against the principles of natural justice and have been issued and initiated without any opportunity to the petitioner to explain its case or objectively demonstrate the true state of affairs.
- xi. The action of the respondent No.2 in publishing the Invitation for the Second Tender on 11th April, 2022, i.e. even before issuance of the show cause notice to the petitioner No.1 on 12th April, 2022 smacks of *malafide* and evinces gross violation of the principles of natural justice.
- xii. The allegation that the discharge of the First Tender on 8th April, 2022 was immediately uploaded on the IREPS portal seems to be totally and wholly incorrect.
- xiii. In order to blacklist/debar the petitioner under the 2018 tender, respondent No.3 was required to proceed in terms of the “Procedure for suspension/ banning of business dealings” and follow the principles of natural justice.
- xiv. Impugned show cause notice states that the contract is liable for determination under clause 62 of the General Condition of Contract, it is vital to consider that the General Conditions of Contract accompanying the First Tender are in effect post a contract being actually executed between the parties i.e.,



between the petitioner No.1 and the respondent No.2. However, no such contract was ever executed, and the petitioner No.1 was merely the L1 bidder and in a pre-contractual stage.

In support of the above submissions the petitioners have cited *Tata Cellular v. Union of India*, (1994) 6 SCC 651, *Gorkha Security Services v. Government (NCT of Delhi) & Ors.*, (2014) 9 SCC 105, *UMC Technologies Private Limited v. Food Corporation of India & Anr.*, (2021) 2 SCC 551, and *Kulja Industries Limited v. Chief General Manager, Western Telecom Project BSNL & Ors.*, (2014) 14 SCC 731, *Commissioner of Police, Bombay v. Gordhandas Bhanji* 1952 SCR 135, *Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.*, (1978) 1 SCC 405 and *East Coast Railway & Anr. v. Mahadev Appa Rao & Ors.*, Civil Appeal No. 4964 OF 2010 dated 07/07.2010).

Submissions by Respondent Nos.1 and 2

6. The respondent Nos.1 and 2's submissions *inter alia* in brief are:
 - i. In absence of a challenge to discharge of First Tender on 8th April, 2022, the challenge to issuance of Second Tender is not maintainable.
 - ii. Respondent Nos.1 and 2 rightly discharged the First Tender in view of the letters dated 9th March, 2022 and 4th April, 2022 received from respondent No.3. In view of these letters and the stand taken by respondent No.3 in its short counter affidavit, it cannot be said that the decision of respondent No.2 to discharge



the tender suffers from any arbitrariness, irrationality or unreasonableness.

- iii. Whether the petitioners had been aware of the debarment by respondent No.3 are disputed questions of facts and cannot be gone into in these proceedings. The petitioners can challenge the same in separate proceedings.
- iv. The petitioners' contention that debarment by respondent No.3 was never communicated to the petitioner is beyond the scope of the present writ petition.
- v. The petitioner was disqualified by respondent No.3 from participating in another tender floated by respondent No.3 on 30th June, 2021 on account of petitioner being "*banned from business dealing with respondent No.3*".
- vi. The petitioner has till date neither challenged the above termination notice dated 15th October, 2020 nor has it challenged respondent No.3's rejection of petitioner's bid for the 2021 tender.
- vii. Even otherwise, assuming that petitioner was debarred by respondent No.3 not for a period of 2 years but only for only executing the balance portion of work, Clause 2.4.1 of the First Tender is wide enough to include within its scope such "limited debarment" also. Clause 2.4.1 uses the expression "tender" and not "tenders".
- viii. The words "blacklisting" "banning of firm", "suspension" and "debarment" are synonymous. Any omission or inaction on part



of respondent No.3 in debarring the Petitioner cannot be held against respondent No.2.

- ix. Clause 7 of Standard General Conditions of Contract give an unfettered/unqualified right to respondent Nos.1 and 2 to reject any tender without assigning reasons for such action. It is settled law that while rejecting the tender the person or authority inviting the tender is not required to give reasons.
- x. The scope of judicial review in tender matters is extremely limited and narrow. It is settled law that while exercising judicial review in tender matters, the court does not sit as a court of appeal but merely reviews the manner in which the decision was made. It is submitted that the challenge to the impugned show cause notice is not maintainable as being premature. The respondent No.2 has not taken a final decision pursuant to the impugned show cause notice. There is no reason to pre-empt the decision of the respondents.
- xi. Guidelines issued by Department of Expenditure, Ministry of Finance vide Office Memorandum dated 2nd November, 2021. A bare perusal of the said Office Memorandum would indicate that the term "Ministry/ Department of Government of India" includes their CPSUs, Attached Offices/Autonomous Bodies etc.

Submissions by Respondent No.3

7. Respondent No.3's submissions *inter alia* in brief are:

- (i) None of the decisions taken by respondent No.3 are the subject matter of the petition.



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- (ii) Both the decisions of respondent No.3 dated 15th October, 2020 and 18th November, 2021 stand accepted by the Petitioner till date. Petitioner may not be allowed to challenge or impugn the same indirectly in a collateral proceeding.
- (iii) Clause 26 of the Instructions to Tenderers of the 2018 Tender provided for declaration of non-performance on account of a previous termination due to contractor's default during previous two years.
- (iv) Petitioner No.1 had participated in another tender of respondent No.3 in 2021 and was disqualified and did not represent against that as well.

In support of the above submissions the respondents have cited *Jagdish Mandal v. State of Orissa & Ors.*, (2007) 14 SCC 517, *Kulja Industries Limited v. Chief General Manager, Western Telecom Project BSNL & Ors.*, (2014) 14 SCC 731, *Silppi Constructions Contractors v. Union of India and Anr.*, (2020) 16 SCC 489, *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.*, (2016) 16 SCC 818, *N.G. Projects Limited v. Vinod Kumar Jain & Ors.*, 2022 SCC OnLine SC 336, *JBM Ecolife Mobility Private Limited v. Union of India & Anr.*, 2022 SCC OnLine Del 1397, *Central Coalfields Limited & Anr. v. SLL-SML (Joint Venture Consortium) & Ors.*, (2016) 8 SCC 622; *State of Orissa & Ors. v. MESCO Steels Limited & Anr.*, (2013) 4 SCC 340 and *State of Uttar Pradesh v. Brahm Dutt Sharma & Anr.*, (1987) 2 SCC 179.

8. We have heard learned Counsel Mr. Kapil Sibal and Mr. Dayan Krishnan, Senior Advocates assisted by Miss Kanika Singh, Advocate for the petitioners, Mr. Arnav Kumar, CGSC with Mr



Suprateek Negi, Advocates for respondent Nos.1 and 2 and
Chandan Kumar, Advocate for respondent No.3.

Letter dated 15th October 2020

9. For unravelling the issues involved in this petition, it may be appropriate to first deliberate upon the genesis of the matter, viz. the scope and impact of letter dated 15th October, 2020 from respondent No.3 to petitioner No.1 relating to the respondent No.3 tender. It is this letter and its interpretation which has finally resulted in discharge of the First Tender floated by respondent No.2 as also the impugned show cause notice dated 12th April 2022.

10. It is an admitted position between respondent No.3, the issuer of this letter and the petitioner No.1 who was impacted by the said letter that there has been no challenge by the petitioners of this communication nor any relief *qua* this letter is sought for in this petition. Therefore, it will not be appropriate for this Court to delve into the facts and circumstances leading up to the issuance of this letter and of the interpretation of this letter, save and except to the extent it impacts the relief sought by the petitioner regarding the First Tender, Second Tender and impugned show cause notice.

11. However, this Court considers some *prima facie* observations necessary in the context of this adjudication. A bare perusal of this letter dated 15th October, 2020 makes it incontrovertibly clear that *firstly*, the contract being executed by the petitioner for respondent No.3 stood rescinded; and *secondly* visited a debarment on the petitioner which is specific and particular in its phraseology. It is the scope of the latter which is in contention. For convenience, the exact



phraseology used in the said letter dated 15th October, 2020 regarding the debarment is reproduced again as under:

“Your participation as well as participation of every member/partner in any manner as an individual or a partnership firm/JV is hereby debarred from participation in the tender for executing the balance work....”

(emphasis supplied)

12. It seems, at least, from the phraseology used by respondent No.3 in this letter dated 15th October, 2020, that debarment was only for participation in the tender for executing the balance work and not for all other tenders of respondent No.3. This has to be necessarily read in consonance with earlier part of this letter which rescinds the contract and directs the balance work to be carried out independently without the petitioner’s participation. The emphasis was on “balance work”. Despite what may seem to be *ex facie* clear, respondent No.3 in its communication dated 9th March, 2022 and 4th April, 2022 (sent to respondent No.2) informed, clarified and verified that this letter dated 15th October, 2020 issued by respondent No.3 debarred petitioner No.1 from participating in all tenders invited by respondent No.3 for a period of two years w.e.f. 15th October, 2020. The petitioner No.1 has objections to this interpretation by respondent No.3 and for having not been put to notice or having had the chance to clarify (since these letters of 9th March, 2022 and 4th April, 2022 have not been shared with the petitioner No.1 prior to these proceedings).

13. However, since this letter has not been challenged before this Court it may not be appropriate for the court to give any conclusive determination on its scope and interpretation. It would be open to the petitioner to assail the communication dated 15th October, 2020 and



the recent communication of 9th March, 2022 and 4th April, 2022 in appropriate proceedings and seek appropriate relief as the petitioner may be advised. In other words, notwithstanding how respondent No.3 interprets its own letter, it would be open for the petitioner to assert in appropriate proceedings as to the interpretation, scope, consequence and impact of this letter.

14. There is another aspect to be considered. Respondent No.3 filed a short counter affidavit before the last date of hearing stating *inter alia* that post the termination of the 2018/2019 contract by letter dated 15th October, 2020 the petitioner had participated in another tender bearing No. IRCON/1014/J&K.KQ/S&T/tunnel Com/Tender dated 30th June, 2021 for which the bid was not considered applying clause 26 in the Instructions to Tenderers which declared tenderers as ineligible if any previous contract awarded to them has been terminated by IRCON on account of Contractors default during the last two years prior to date of bid submission. The disqualification of this 2021 tender was uploaded by the respondent No.3 on the e-tender website on 18th November, 2021. Respondent No.3 had filed a copy of the said display, however the petitioner in response filed a copy of another communication in respect of the same also dated 18th November, 2021 received from the e-tender portal informing about the rejection of the bid for reasons stated as 'NIL'. Notwithstanding this factual dispute it is *prima facie* evident that the bid for 2021 tender was rejected for certain reasons. The petitioners for reasons known to them neither ascertained detailed reasons of why they were rejected nor ever challenged the rejection of their bid of the 2021 tender. In any event, as mentioned earlier, it is not a subject matter of challenge in this petition. Needless to state, the petitioners are always at liberty to



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take steps in accordance with law, if they wish to, not only against the debarment by respondent No.3's letter of 15th October, 2021 but also the rejection of 2021 bid by communication dated 18th November, 2021.

First Tender

15. We now assess whether this Court can judicially review and/or interfere in a commercial tender and the decision of the tendering authority and whether the decision-making process adopted by respondent No.1 and respondent No.2 regarding the First Tender stands the test of law. Various decisions of the Hon'ble Supreme Court as well as this Court in various decisions have been relied upon, *inter alia Tata Cellular v. Union of India*, (1994) 6 SCC 651, *Central Coalfields Limited & Anr. v. SLL-SML (Joint Venture Consortium) & Ors.*, (2016) 8 SCC 622, *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.*, (2016) 16 SCC 818, *Silppi Constructions Contractors v. Union of India & Anr.*, (2020) 16 SCC 489, *N.G. Projects Limited v. Vinod Kumar Jain & Ors.*, 2022 SCC OnLine SC 336, *JBM Ecolife Mobility Private Limited v. Union of India & Anr.*, 2022 SCC OnLine Del 1397. For the benefit of appreciation, extracts from some of these decisions cited are adverted to as under.

16. In *Central Coalfields Limited & Anr. v. SLL-SML (Joint Venture Consortium) & Ors.*, (2016) 8 SCC 622 the Hon'ble Supreme Court has held as under:

"47. ...As pointed out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken



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by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with relevant law could have reached” as held in Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] followed in Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216].”

17. In **Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.**, (2016) 16 SCC 818, the Hon’ble Supreme Court held that:

“15. We may add that 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. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.”



18. The power of the issuing authority to reject a tender was further underscored in ***Silppi Constructions Contractors v. Union of India & Anr.***, (2020) 16 SCC 489:

“ 25. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a State within the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard...”

19. More recently in ***N.G. Projects Limited v. Vinod Kumar Jain & Ors.***, 2022 SCC OnLine SC 336, the Hon’ble Supreme Court has expounded that High Courts should refrain from imposing its decisions over the decision by the employer as to whether or not to accept the bid of a tenderer. The Apex Court opines:

“23. ...The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court 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. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer



twice, firstly paying ~~escalation costs and secondly~~, by being deprived of the infrastructure for which the present – day Governments are expected to work.”

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20. This Court in ***JBM Ecolife Mobility Private Limited v. Union of India & Anr.***, 2022 SCC OnLine Del 1397 while relying on ***N.G. Projects Limited*** (*supra*) held that:

“63. While it is true that the earlier line of decisions rendered by our Supreme Court did hold that an administrative decision rendered in violation of the principles of natural justice was liable to be viewed as void ab initio, over a period of time the jurisprudence as expounded by the Supreme Court in this regard has seen an evident and perceivable shift. As the role of administrative authorities became ever more pervasive and their right to adjudicate and rule upon the asserted rights and claims of people more expansive, the Supreme Court though not even remotely suggesting a dilution of the primordial obligation to abide by the principles of natural justice, of an opportunity to show cause and explain, a right of hearing, has indubitably carved out certain well recognised exceptions. These exceptions govern situations where while an infraction of a facet of the natural justice principles may be evident, the facts of a case may not justify interference with the ultimate decision taken by an authority. It is in these spaces that the precepts of useless formality and prejudice have come to be enunciated and ordained to apply. This shift in the line of reasoning is based upon the well settled precept of the principles of natural justice being flexible and not, as they have been repeatedly described, cast in a straightjacket....

(emphasis supplied)

66. ...As has been observed in the preceding paragraphs of this decision, the provisions engrafted in the Guidelines



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envisage a “self-activating” debarment the moment an allied firm/sister concern comes to be blacklisted. The disqualification of the petitioner was thus, an inevitable fallout, an inescapable consequence. Regard must also be had to the fact that no fruitful purpose could have been possibly served by the second respondent placing the petitioner on notice. This since it would have been clearly beyond its province to examine or consider any challenge that the petitioner may have taken or urged with respect to the order of 29 April 2022. The Court, in the facts of the present case, thus finds that while the petitioner may not have been afforded an opportunity of hearing, no prejudice stood caused to it. A notice to the petitioner prior to the issuance of the impugned communication would have thus clearly been an empty formality.”

(emphasis supplied)

21. The court therefore has a limited role to assess whether the decision making process of respondent No.1 and 2, owners of the project, is vitiated by *mala fides*, procedural irregularity, arbitrariness or disproportionality. It is evident from the chronology of events (*supra*) that while negotiations to execute the contract were underway post petitioner No.1 being declared as the L1 successful bidder, respondent No.1 and respondent No.2 sought information from respondent No.3 relating to the possibility of petitioner No.1 having been debarred from business with respondent No.3. The position was confirmed by respondent No.3 in its letter of 9th March, 2022 which was further deliberated *in extenso* by the Tender Evaluation Committee on 14th March, 2022. This was followed by further exchange of communications dated 4th April, 2022 reiterating the factum of the debarment. Once respondent Nos.1 and 2 had received



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this official communication from respondent No.3 there was no reason for them to disbelieve or sit in judgement over the decision and scope of the debarment. It was not respondent Nos.1 and 2's job or within their power to set aside or reinterpret or ignore respondent No.3's confirmation about debarment of petitioner No.1, save and except to the extent to decide whether such a debarment amounted to a disqualification for the First Tender. Having received such a confirmation from respondent No.3 and after deliberating, the Tender Evaluation Committee decided that the undertaking given under Special Tender Conditions and Instructions were falsified resulting in petitioner No.1 being disqualified. It is not necessary to deliberate upon whether respondent Nos.1 and 2 were obliged to issue a show cause notice to the petitioner at this stage. As mentioned earlier respondent No.3's confirmation could not be questioned or adjudicated upon by respondent Nos.1 and 2 and therefore even if a show cause notice was issued it would not have changed the conclusion of respondent Nos.1 and 2 as regards the First Tender and petitioner No.1's disqualification, since that was based on a plain reading on letters dated 9th March, 2022 and 4th April, 2022 from respondent No.3. Moreover and most importantly, respondent Nos.1 and 2 decided to discharge the First Tender thereby extinguishing the tender itself and with it any right of the petitioner in the tender. It is well accepted that bidders participating in the tender process cannot insist that the tender be accepted and contracts be executed once they have been successful in the bid. The tendering authority has full discretion to cancel a tender process which does not violate any fundamental right of the tenderer. It cannot be termed as unreasonable as no party gets the benefit of the tender upon its discharge. This



position has been affirmed by the Hon'ble Supreme Court in *Binda Express Carrier & Anr. v. North-East Frontier Railway & Ors.*, (2014) 3 SCC 760:

“12. As pointed out in the earlier part of this order, the decision to cancel the tender process was in no way discriminatory or mala fide. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. Inasmuch as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court....”

(emphasis supplied)

22. The respondent Nos.1 and 2 are therefore correct in their submission that once the First Tender stood discharged, there was no real cause of action that subsisted in favour of the petitioner No.1. The petitioner No.1 has raised a factual dispute in its rejoinder as to whether the First Tender was still open or has been discharged as claimed by respondent Nos.1 and 2. We don't have any reason to disbelieve documents filed on affidavit by respondent Nos.1 and 2 and therefore hold that the relief sought for by the petitioners regarding the First Tender does not survive.

Show Cause Notice dated 12th April 2022

23. As regards the Second Tender, final decision of which was stayed in the interim by this Court by order dated 2nd May, 2022, the petitioner No.1 is unable to participate since it has been issued a show cause notice on 12th April, 2022 which has been impugned herein for debarment of the petitioner No.1 *qua* respondent Nos.1 and 2 for five



years because of the falsified undertaking. This Court notes that the information provided as background in the impugned show cause notice provided by respondent No.2 was highly inadequate, in particular it did not mention or annex the communications exchanged between respondent Nos.1 and 2 and respondent No.3 on 9th March, 2022 and 4th April, 2022 in relation to debarment of the petitioner by respondent No.3. There are other contentions (including reliance on provisions of the tender, clauses of the contract and other facts and circumstances) which have been made by respondent Nos.1 and 2 in the counter affidavits and short affidavit relating to the scope of debarment visited upon the petitioner by respondent No.3. It is only fair and just that the show cause notice issued to the petitioner by respondent Nos.1 and 2 is duly supplemented seeking petitioners' response to particularised issues and reasons in support that may result in debarment by respondent Nos.1 and 2. Any such action by respondent Nos.1 and 2 should not be arbitrary, unreasonable and should be in compliance with the principles of natural justice. Since no decision has been taken on the show cause notice as has been admitted by all parties, respondent Nos.1 and 2 ought to put their full case before the petitioners *inter alia* by supplementing the show cause notice with all supplemental facts, documents and imputations. Such a step, if undertaken, should be within 10 days of this order, seeking petitioners' response within a reasonable time (preferably not more than 15 days, the period already specified in the impugned show cause notice) including personal hearing if necessary (and if sought by the petitioner) and a reasoned decision be passed within a period of 10 days thereafter. Any decision resulting from this process will impact the business of the petitioner and its livelihood and reputation in the



industry and the rights of the petitioner, and therefore proper process must be followed.

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24. ***In Gorkha Security Services v. Government (NCT of Delhi) & Ors.***, (2014) 9 SCC 105, the Hon'ble Supreme Court had to decide whether the action of blacklisting could have been taken without specifically proposing/contemplating such an action in the show-cause notice. For this purpose, the Court laid down guidelines as to the contents of a show-cause notice pursuant to which adverse action such as blacklisting may be adopted:

“21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is



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proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.”

(emphasis supplied)

25. Subsequently, in ***UMC Technologies Private Limited v. Food Corporation of India & Anr.***, (2021) 2 SCC 551, the Hon’ble Supreme Court had reiterated the essentials of a show cause notice as under:

“21. Thus, from the above discussion, a clear legal position emerges that for a show-cause notice to constitute the valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the noticee. Such a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting.”



26. While respondent No.2 ^{NEUTRAL CITATION NO: 2022/DHC/002443} has supplemented the reasons behind issuance of the Show Cause Notice to petitioner No.2 in their counter affidavit and extensive reliance has been placed on the confirmation of debarment received from respondent No.3 vide letters dated 9th March, 2022 and 4th April, 2022 the same was never communicated to the petitioners. It has been repeatedly held by Hon'ble Supreme Court that public orders/communications, publicly made cannot be construed in the light of explanations subsequently given and must be interpreted strictly with reference to the language of the order/communication itself. In ***Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.***, (1978) 1 SCC 405 the Court has observed that:

*“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16]* :*

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.



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Orders are not like old wine becoming better as they grow older.”

(emphasis supplied)

27. In support of their contention that the petitioners’ challenge to the impugned show cause notice is not maintainable for being premature, respondent Nos.1 and 2 have placed reliance on ***State of Orissa & Ors. v. MESCO Steels Limited & Anr.***, (2013) 4 SCC 340:

“20. On the contrary, the issue of the show-cause notice setting out the reasons that impelled the Government to claim resumption of a part of the proposed lease area from the respondent Company clearly suggested that the entire process leading up to the issue of the show-cause notice was tentative and no final decision on the subject had been taken at any level. It is only after the Government provisionally decided to resume the area in part or full that a show-cause notice could have been issued. To put the matter beyond any pale of controversy, Mr Lalit made an unequivocal statement at the Bar on behalf of the State Government that no final decision regarding resumption of any part of the lease area has been taken by the State Government so far and all that had transpired till date must necessarily be taken as provisional. Such being the case the High Court was in error in proceeding on an assumption that a final decision had been taken and in quashing what was no more than an inter-departmental communication constituting at best a step in the process of taking a final decision by the Government. The writ petition in that view was premature and ought to have been disposed of as such. Our answer to Question 1 is accordingly in the affirmative.”



28. Therefore, it is only appropriate that the show cause notice be comprehensive and complete and that full opportunity be given to the petitioners to revert and respond. Thereafter, only upon a decision being reached by respondent Nos.1 and 2 can a right accrue in favour of the petitioners.

Second Tender

29. As regards the issuance of the Second Tender, this Court, in light of the discussions above, does not consider it appropriate to stall the process. It is for the tendering authority i.e. respondent Nos.1 and 2 to consider the urgency and expediency of the work tendered for. The court ought not to pre-empt or substitute its decision on technical issues. However, in the event, the process of the Second Tender is not complete or it is reissued, for any reason, and in the meantime any favourable decision for the petitioners is arrived at either on the impugned show cause notice and/or pursuant to an appropriate challenge by the petitioners of the respondent No.3's decisions (*inter alia* letter dated 15th October, 2020), this Court expects respondent Nos.1 and 2 to allow participation of petitioner No.1 depending on result of either or both of these developments.

Conclusion

30. In light of the above, conclusions (in brief) as arrived by this Court *qua* relief sought by the petitioners, are as under:

- i. As regards the First Tender floated by the respondent No.2 (dated 23rd September, 2021), no real cause of action subsists in favour of the petitioner No.1, the tender having been



discharged. The relief sought for by the petitioners regarding the first tender does not survive.

- ii. As regards the show cause notice dated 12th April, 2022, since no decision has been taken, respondent Nos.1 and 2 ought to put their full case before the petitioners as elaborated in paragraph 23 of this judgment and order. Supplementary show cause notice, if any, be given by respondent Nos.1 and 2 within ten days of this order. Petitioners shall be at liberty to reply within fifteen days thereafter (even in the absence of a supplementary show cause notice). Reasoned decision be passed by respondent Nos.1 and 2 within a period of ten days thereafter.
- iii. As regards the Second Tender floated by respondent no.2 (dated 20th April, 2022), the respondent Nos.1 and 2 are at liberty to proceed with the process of tender and interim order dated 2nd May, 2022 is hereby vacated. Needless to note that in case a decision in favour of the petitioners ensues pursuant to the show cause notice and the process of second tender is not concluded in the meantime, the petitioner No.1 will be permitted to participate therein.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 04, 2022
ac/ns/sm