



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

Date of decision: 31st AUGUST, 2023

IN THE MATTER OF:

+ **W.P.(C) 9777/2023 & CM APPL. 37513/2023**

M/S EVEREST ENTERPRISES

..... Petitioner

Through: Mr. L. Ojha and Mr. Manish Ojha,
Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Ms. Aakansha Kaul and Mr. Aman
Sahani, Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Writ Petition has been filed under Article 226 of the Constitution seeking the issue of a writ of mandamus or any appropriate writ for quashing the impugned order dated 24.11.2022 issued by respondent no. 2, terminating the Contract with the petitioner for supply of manpower to the Department for Promotion of Industry and Internal Trade under Ministry of Commerce and Industry, forfeiting the Performance Security Amount deposited by the petitioner and debarring it from participating in any future bid of the department. The facts leading up to the passage of the impugned order and the petitioner's objections to it thereof are as follows:

- a. The petitioner, M/s Everest Enterprises is a proprietorship Company with registered office at 152-D, Pocket-6 MIG Flats, Mayur Vihar, Delhi 110096, operating since 2008 in the business of Man Power supply to Government Ministries and Private Sector.



- b. The Respondent No. 1 is the Union of India and Respondent No. 2 (henceforth, the respondent department) is the Department for Promotion of Industry and Internal Trade under Ministry Of Commerce at Vanijya Bhawan, New Delhi 110011.
- c. It is stated that a contract dated 05.04.2022, bearing Contract No. GEMC-511687750268070, was entered into through a bidding process, Bid/RAP/PR No: GEM/2022/8/1987068 via Government E-Marketplace platform through electronic mode, to supply 47 data entry operators and 18 stenographers starting from 06.04.2022 to the respondent department.
- d. It is stated that the Establishment Section of the respondent department received a complaint in the month of July 2022 that the petitioner being a service provider to the department was demanding Rs. 25000 from each person in order to be engaged as data entry operators and stenographer. On 12.05.22, a vigilance enquiry was ordered by the respondent department on the said complaint. It is stated that on 27.07.2022, a preliminary enquiry report was released by the vigilance section which stated that there was no solid proof to conclusively state that the contractor had demanded Rs. 25,000 from each of the complainant for their deployment in the respondent department.
- e. It is stated that subsequently a second complaint was received by the establishment sector of the respondent department that the petitioner M/s Everest Enterprises had received payments of Rs. 15000 / Rs. 25000 / Rs. 28000 from the Data Entry Operators for their engagement in the respondent department. On 06.10.22, a second enquiry by the Vigilance team was



ordered and that on 09.11.22, the second enquiry report by the vigilance team was published which concluded that the contractor being the petitioner had demanded and accepted money as alleged by the complainants, based on the evidence produced before the committee.

- f. Based on the second vigilance report dated 09.11.22, the respondent department under the Ministry of Commerce issued a Show Cause Notice vide F.N. A-54011/7/2022-Estt.NG dated 11.11.22 to the petitioner, asking for a reply for violation of Clause 4.1 of the Contract No. GEMC-511687750268070 dated 05.04.2022 which states that if the Service Provider is found to be charging money/charges/fees/penalties from the manpower resources engaged for deployment to the Buyer, the buyer has a right to terminate the contract and forfeit the Performance Security amount deposited by the Service Provider.
- g. It is stated that a reply to the said Show Cause Notice vide F.N. A-54011/7/2022-Estt.NG dated 11.11.22 was sent by the petitioner vide email dated 15.11.2022 denying the allegations. Subsequently, the respondent department based on the second vigilance report dated 09.11.22 passed an order dated 24.11.2022, being the impugned order, terminating the GeM contract No. GEMC-511687750268070 dated 05.04.2022 awarded to the petitioner and forfeiting the Performance Security Amount deposited being Rs. 7,57,000 and referring the matter to GeM for blacklisting the petitioner and barring them from participating in any future bids of the respondent department for a period of one year. Based on the



abovementioned facts, the petitioner thereby prays that a writ of mandamus to set aside the impugned order of debarment dated 24.11.22 pass by the respondent department.

- h. It is stated by the petitioner that there existed no consideration in the contract No. GEMC-511687750268070 dated 05.04.2022 between the petitioner and the respondent department and therefore it is contended that the said contract itself is not valid in the eyes of law and that the forfeiture of earnest money and blacklisting the petitioner for one year from participating in any contract to supply manpower to Government Department or State Government Department is illegal. It is further stated that in addition to debarring the petitioner from bidding and forfeiture of earnest money deposited by the Petitioner, a further recommendation to the GeM to debar the petitioner from the portal amounts to double jeopardy and is violative of Article 20 of the constitution
- i. It is also stated by the petitioner that during the course of the vigilance enquiry, the petitioner was neither given a copy of the complaint on the basis of which the Vigilance Enquiry was proceeded with, nor were they accorded any opportunity to cross examine the complainants, thereby depriving the petitioner of their right to defend their case.
- j. It is further stated by the petitioner that the allegation mentioned in the Show Cause Notice vide F.N. A-54011/7/2022-Estt.NG dated 11.11.2022 issued to the petitioner by the respondent department that the petitioner has accepted the allegation of having received money from one A2Z



Consultancy is out of context. It is stated that the petitioner hires most of its manpower from M/s A2Z Consultancy Services, which charges a nominal registration / training fee from its manpower, a part of which accrues to the petitioner by M/s A2Z Consultancy Services. It is also submitted that fees charged from its own manpower as done here is not in conflict with any conditions given in the contract.

2. Arguments heard and the materials placed on record have been perused

3. The Government e-Marketplace (GeM) was created for setting-up a dedicated e-market place for goods and services procured by Government Organizations, departments and Public Sector Undertakings and provides tools for electronic bidding, reverse e-auction and demand aggregation to facilitate government users. It has been authorized under Rule No. 149 of the General Financial Rules, 2017 that Government purchases ought to happen via the GeM portal only, by the Ministry of Finance.

4. The contract No. GEMC-511687750268070 dated 05.04.2022 between the petitioner and the respondent department for Manpower Outsourcing Services was awarded via electronic mode based on Bid/RAP/PR No: GEM/2022/8/1987068 through listing on the Government E-Marketplace platform. As per the terms, the awarded contract represents a 'Service Level Agreement' between the Buyer being the respondent department and the Manpower Hiring Service Provider. The agreement is to remain valid till the completion of the contractual duration of 12 months



being 06.04.2022 to 05.04.2023 with the total contract value including all Duties and Taxes amounting to Rs. 2,52,63,421.56 to be awarded on a monthly billing cycle. Contentions on the validity of the contract as raised by the petitioner on the premise of lack of up front consideration cannot be appreciated by this Court as the nature of Agreement born out of a bidding process and the award of the said contract thereof is legally valid and not void ab initio.

5. The stated contentions of the petitioner, therefore, ought to be tested on the allegations that the second Vigilance Enquiry Report dated 09.11.22 on the basis of which the Show Cause Notice vide F.N. A-54011/7/2022-Estt.NG dated 11.11.22 was issued and subsequently the impugned order dated 24.11.22 was passed, was firstly, based on premises, presumption and assumptions and secondly, possessed procedural fallacies as due opportunity for cross examination did not take place and the complaints on the basis of which the Enquiry was order was not provided to the petitioner.

6. As per the Service Details and Standards provided for under Clause 4.1 of the contractual terms, the charging of money by contractual service providers in any form from the manpower resources engaged by them will give rise to a right to terminate the contract including forfeiture of the performance security amount by the buyer and may also lead to blacklisting or debarring the said service provider. The relevant portion of the Clause is extracted as below:

" 4.1 Service Details and Standards

1. Service Provider; while providing the services shall be compliant with all the applicable laws with respect to Buyer's organization, region or premises. List of central labour laws under Ministry of Labour and



Employment is given as Annexure 1, Service Provider shall follow all the laws applicable for Buyer.

2. Buyer will be required to select the manpower as per available type of manpower category, in case the category is not available; Buyer will select other category and provide manual inputs.

- *It is the responsibility of the Service Provider to provide manpower as per Buyer's requirement. The person deployed should not below the age of 18 years old.*

- 1. The persons deployed should be efficient while handling the assigned work and complete the assigned work in given timelines. The Service Provider shall be responsible for any act of indiscipline on the part of the persons deployed.*

- 2. The Service Provider should have a legal status, it can be a registered Proprietorship Firm/ Partnership Firm/Company under Companies Act having legal entity with all statutory licenses/ registration for carrying out such activities like registration with labour department, PF Act, 1952, ESI Act, 1948, Income Tax Act etc.*

- 3. The Service Provider shall ensure that all the relevant licenses/ registrations/ permissions which may be required for providing the services are valid during the entire period of contract; failing to which shall attract the appropriate penalties. The documents relevant in this regard shall be provided by the Service Provider to the Buyer on demand.*

- *Working shifts (includes day and night shift) if any, and daily working hours shall be mutually agreed upon between Buyer and Service Provider and should be in compliance with the labour laws. In case of continuous work (24 hours), Service Provider shall be responsible to change the shifts and manpower in compliance with the labour law, maximum working hours, minimum wages, overtime and/ or any other conditions mentioned in the contract.*

- *In case of services hired on annual basis and 5 working days, the manpower will be entitled to 08 days*



of casual leaves per year on pro-rata basis and in case of 6 working days the manpower will be entitled to 15 days casual leave per year on pro-rata basis. Beyond specified leaves as applicable, leave will be treated as leave without pay (LWP) for which necessary deduction will be made by the Buyer in the billed amount if no replacement is provided.

1. Employers share of EPF, ESI, ELDI, insurance and other relevant/ mandatory compliances shall be deposited to the respective authorities with proof of deposit of both employee employer share by within first 7 working days of the succeeding month. Employee share of EPF and ESI contribution shall be recovered from the gross remuneration and balance amount is to be released to the persons employed.

2. The Service Provider shall be required to keep the Buyer updated about the change of address, change of the Management etc. from time to time.

3. The Service Provider shall be solely responsible for the redressal of grievances/ resolution of disputes relating to persons deployed. The Buyer shall, in no way be responsible for settlement of such issues whatsoever.

• After award of the contract, if the Service Provider is found to be charging any money/charges/fees/penalties in whatever form, manner, or name, from the manpower resource engaged by it for deployment to the Buyer/ Client's site, the Buyer will have the right to terminate the contract forthwith along with forfeiture of Performance Security amount deposited by the Service Provider. The Buyer may also blacklist/debar the Service Provider, as deemed fit by the Buyer. Any such amount received from its manpower by the Service Provider may be recovered by the Buyer from the pending bills of the Service Provider and paid directly to the concerned person/manpower.

• Any violation of contractual obligations by the Service Provider/ manpower shall attract penalties, before imposing a penalty, the Buyer will provide 3 days prior notice to the Service Provider to make its



representation. The Service Provider confirms and agrees that penalty whenever becomes payable, shall be deducted by the Buyer from the payments due to the Service Provider.

• In case the submission of monthly bills is delayed by the Service Provider beyond 15 days from the last day of the month in which the services have been provided, the entire liability towards payment of interest/penalty to the tax authorities shall be borne by the Service Provider."
(emphasis supplied)

7. It is well within settled principles of law that Courts shall stray clear from a substitution of their wisdom to the opinions of the administrative authorities who take decisions in quasi-judicial capacities, unless there is an innate need for interference due to the administrative orders being marred by malafide, perversity or illegality. It is also to be noted that while checking for such malafide, perversity or illegality, the court under its writ jurisdiction of Article 227, ought not to delve into the adequacy of evidences used by the administrative authority to reach its decisions.

8. The Apex Court in Uflex Ltd v The Government of Tamil Nadu, (2022) 1 SCC 165, noted as under:

"2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and



irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. "

The Supreme Court in State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaya (2011) 4 SCC 584, held as under:

"7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic enquiry, nor interfere on the ground that another view is possible on the material on record. If the enquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record.

The Supreme Court in Bank Of India And Anr vs Degala Suryanarayana (1999) 5 SCC 762 has also held that

"11. The Court exercising the jurisdiction of judicial review would not interfere with the findings of fact arrived at in the departmental enquiry proceedings excepting in a case of malafides or perversity i.e., where there is no evidence to support a finding or where a finding is such that no man acting reasonably and with objectivity could have arrived at that findings. The Court cannot embark upon reappreciating the evidence or weighing the same like an appellate authority. So long as there is some evidence to support



the conclusion arrived at by the departmental authority, the same has to be sustained."

9. In the present case, the Second Vigilance Enquiry report dated 09.11.2022 on the basis of which Show Cause Notice vide F.N. A-54011/7/2022-Estt.NG dated 11.11.22 was issued, categorically outlines the complaint received by the Establishment Branch of the Respondent Commission from Data Entry Operators against the petitioner alleging payment of Rs. 15,000/Rs.25,000/Rs.28,000 to the petitioner contractor on outsource basis for their engagement in the manpower services. It further outlines the proceeds of collection and evaluation of evidences produced before the Vigilance Enquiry committee in the course of its Enquiry, which are duly recorded as reasonings in the final report of the Enquiry Committee. On the appreciation of the abovementioned reasons, the Vigilance Enquiry Report dated 09.11.22, concludes in the affirmative on the pointed question of money to the account of Rs. 15,000/Rs.25,000/Rs.28,000 having been demanded by the Contractor petitioner from the manpower being engaged in the respondent department under the Contract No. GEMC-511687750268070 dated 05.04.2022. The relevant portions of the Enquiry report dated 09.11.22 are extracted below:

" Conclusion

(i) The Committee is of the view that the evidences placed before the Committee as evaluated above and the representation of the Contractor dated 25.10.2022 make it crystal clear that the, Contractor has demanded and accepted the money as alleged by the complainants and the allegations are proved based on the evidences produced before the Committee. The contention of the Contractor that he paid Rs.25,000/- each to the two complainants and Rs.28,000/- to Shri Pramod Kumar Yadav as advance is actually the



money charged by him from the three complainants, namely, Shri Rajpal, Shri Deepak and Shri Pramod Kumar Yadav which is supported by evidences produced before the Committee as well as the representation dated 25.10.2022 submitted by the Contractor.

(ii) It is a fact that three complainants viz Shri Rajpal, Shri Deepak and Shri Pramod Kumar Yadav have not been paid salary for the months of June and July, 2022. It is also a fact that no re-imbursement towards salary for the months of June and July, 2022 In respect of the above 3 complainants have been made by Establishment.

(iii) The Committee is also of the view that not only from complainants, the Contractor has taken Rs.25,000/- or so from other DEOS and Rs.35,000/- from Stenographers also. The Contractor is trying to hide the truth by involving M/s A2Z Consultancy.

(iv) The Committee IS also of the view that the DEOs/Stenographers who appeared before the Committee denied having paid any amount under the apprehension of losing their job as has happened after the previous inquiry. These apprehensions were raised before the , current Committee as well.

(v) By demanding and accepting the amount of Rs.15,000/- /25,000/-/35,000/- from the DEOs/Stenographers deployed in the Department, the contractor has violated one of the conditions stipulated in the contract which does not allow charging of any money/charges/fees/penalties in whatever form, manner or name from the manpower resources engaged by it for deployment to the buyer.

(vi) The Committee is further of the view that not only this Contractor even the Contractors engaged earlier by the Department have also taken money from the



DEOS/Stenographers outsourced through them as was Informed by some of the DEOS, therefore, the Committee recommends that route cause of such irregularities by the Contractors need to be examined and remedial measures taken to avoid recurrence of such Incidents."

10. It is therefore clear that the impugned order of the 24.11.2022 which was passed with reference to the Second Vigilance Enquiry report dated 09.11.22 for violation of Clause 4.1 of the Contract No. GEMC-511687750268070 dated 05.04.2022 between the petitioner and the respondent department shall not be set aside by this court for want of reasonability.

11. It is further contended by the petitioner that the lack of an opportunity to cross examine the complainants amounts to a violation of procedural justice and therefore ought to render the departmental enquiry conclusion a violative of Article 21. The Apex Court in K.L. Tripathi v. State Bank of India and Ors., (1984) 1 SCC 43, has held as under:

"32. The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified, is, in dispute, right of cross examination must inevitably form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the



decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version or the credibility of the statement.

*33. The party who does not want to controvert the veracity of the evidence from record or testimony gathered behind his back cannot expect to succeed in any subsequent demand that there was no opportunity of cross-examination specially when it was not asked for and there was no dispute about the veracity of the statements. **Where there is in dispute as to the facts, or the weight to be attached on disputed facts but only an explanation of the acts, absence of opportunity to cross examination does not create any prejudice in such cases.*** (emphasis supplied)

It was also stated by the Apex Court in Viveka Nand Sethi v. Chairman, J&K Bank Ltd., (2005) 5 SCC 337, in paragraph 22 that

“22. The principle of natural justice, it is trite, is no unruly horse. When facts are admitted, an enquiry would be an empty formality. Even the principle of estoppel will apply. [See Gurjeewan Garewal (Dr.) v. Dr. Sumitra Dash [(2004) 5 SCC 263].] The principles of natural justice are required to be complied with having regard to the fact situation obtaining therein. It cannot be put in a straitjacket formula. It cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case.

12. The case of the Petitioner is that it was not provided with a copy of complaint on the basis of which a Vigilance Enquiry was ordered by the respondent department and an opportunity to cross examine the complainant was not accorded during the course of the Vigilance Enquiry which



culminated into the vigilance Enquiry report dated 09.11.22 for violation of Clause 4.1 of the Contract No. GEMC-511687750268070 dated 05.04.2022 between the petitioner and the respondent department. It is therefore contended that the whole vigilance proceeding ought to be set aside on grounds of procedural fallacy, which cannot be accepted by this Court. It is to be noted that the content of the Vigilance Enquiry Report dated 09.11.22 categorically mentions that an opportunity was given to the Contractor, being the petitioner to appear before the Committee on 21.10.22 so that cross examination of the complainants with reference to their allegations may be carried out. It is also pertinent to note that as recorded in the Enquiry report dated 09.11.22 there was no appearance before the committee on behalf of the contractor, who sent emails and a representation dated 25.10.2022 seeking copies of the written and recorded statements of the complainants which was a part of the inquiry proceedings which were yet to reach its conclusion. The Enquiry report also notes that the petitioner already had prior notice of the complaints made by the complainant before the petitioner was asked to first appear before the Committee on 14.10.22 to make submissions on the complaints, as there was indication from the petitioner's side as to having already known the complainants and the contents of the said complaints, including the advance given to the three complainants on behalf of the petitioner prior to the first hearing. The relevant part of the Vigilance report dated 09.11.22 is extracted as below:

"(vii) Another opportunity was given to the Contractor to appear before the Committee on 21.10.2022 after hearing both the parties so that he may cross- examine the complainants with reference to their . allegations. However, no one appeared before the Committee, rather Contractor sent another mail seeking copies of the written statements and recorded statements of the DEOS/Stenographers and also sought 3 days time to



appear before the Committee. Since the written statements were part of the inquiry proceedings, the Contractor was refused to provide the same as the inquiry was yet to conclude. As requested by the contractor, he was given 3 days time to appear before the Committee on 28.10.2022. However, the Contractor refused to appear before the Committee. Copies of the emails received from the contractor in this regard are attached with the Inquiry Report. He also submitted a representation dated 25.10.2022 for consideration of the Committee.

(viii) Shri Vipin, the DEO has provided a copy of the cheque of ISIS Dadies with Fjn which he was asked to pay the amount by Shri Parmeshwar. This account was in the name of M/s A2Z Consultancy. Therefore, details of the owner of this account were obtained from ICICI Bank. On contacting at the mobile No. of Shri Sidharth Dua, the person owning the above account no., provided by the bank, no proper response was given by him. Subsequently, a letter dated 24.10.2022 was also sent to M/s A2Z Consultancy to appear before the Committee. However, M/s A2Z Consultancy refused to appear before the Committee on the ground that they have no role in the inquiry and as per their Firm's policy, they do not share information of vendors/clients to the third party. The proceedings were closed after giving full opportunity to both the parties to make their submissions. The whole inquiry proceedings were also got recorded and are available in the Pen Drive being sent alongwith the Inquiry Report.

Evaluation of evidences produced before the Committee

(i) The statements made by the Contractor during the inquiry on 14.10.2022 do indicate that he knew as to who have made complaints against him and contents thereof. This is evident from the fact that none of the Members of the Committee had mentioned name of any of the complainants during the Inquiry and despite that



he claimed before the Committee that he had given advance to three complainants and thus tried to cover up his misdeed. to cover up his misdeed"

13. The material on record shows that the opportunity to cross examine was not denied to the petitioner in the course of the departmental enquiry. Moreover, it is also to note that the fact of having extracted money from the members engaged for Manpower Resources is not denied by the petitioner, who has stated that an arrangement existed between itself and M/s A2Z Consultancy in the case at hand. This makes it clear that it is not disputed that money has been taken from the manpower engaged under the contract No. GEMC-511687750268070 dated 05.04.2022 between the petitioner and the respondent department. It is also to be noted that a Show Cause Notice vide F.N. A-54011/7/2022-Estt.NG dated 11.11.22 was issued, categorically outlining the complaint received by the Establishment Branch of the Respondent Commission and a time duration of three days was given to the petitioner to file a reply to the same. The impugned order dated 24.11.22 was passed only after taking into consideration the reply filed by the petitioner in the form of a representation on 15.11.22.

14. This court is not inclined to re-evaluate the adequacy of the evidence presented before the Inquiry Committee which has upheld the allegations against the petitioner for its violation of Clause 4.1 of the Contract Agreement No. GEMC-511687750268070 dated 05.04.2022. When no perversity is made out in both the decision and the procedure followed in making the same via Departmental proceedings this Court is not inclined to exercise its jurisdiction under Article 226 of the Constitution of India. The contention of the petitioner that in addition to the cancellation of the Contract No. GEMC-511687750268070 dated 05.04.2022 and debarring it

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from participating in any future bids in the respondent department for a period of one year, forfeiture of Performance Deposit and further reference to GeM for blacklisting the petitioner amounts to double jeopardy is also not accepted by this Court.

15. In the view of the above, this court is not inclined to entertain the present Writ petitioner. The petition is dismissed and pending applications, if any, also stands dismissed.

SUBRAMONIUM PRASAD, J

AUGUST 31, 2023

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