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

Date of decision: 06th DECEMBER, 2023

IN THE MATTER OF:

\+ **W.P.(C) 15495/2023 & CM APPL. 62081/2023**

INBOX MEDIA PVT LTD. ..... Petitioner

Through: Mr. Sanjay Poddar, Sr. Advocate with Ms. Jyotika Kalra, Mr. Govind Kumar, Mr. Basant Sawaria, Mr. Manish Manchoa, Ms. Priya, Mr. Shakti and Mr. Aditya Jha, Advocates.

versus

BHARAT SANCHAR NIGAM LIMITED ..... Respondent

Through: Mr. Suryakant Singla and Ms. Mayanka Dhawan, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The Petitioner has approached this Court seeking setting aside of the Order dated 24.11.2023, passed by the Respondent debarring the Petitioner from participating in any bid in BSNL for a period of two years.

2. The facts, as stated by the Petitioner in the present Writ Petition are that on 27.07.2021 the Respondent herein issued a Policy for empanelment of System Integrators for Bulk Push SMS and called for proposals from interested and eligible companies for empanelment as Application Service Providers on non-exclusive basis. It is stated that an agreement was entered

into between the Petitioner and the Respondent on 04.08.2022 for empanelment as Application Service Providers on non exclusive basis. It is stated that a Request for Proposal bearing RFP No.CNNCO-12/18/31/2023-EB II dated 22.05.2023 for selection of partner amongst the empanelled Bulk SMS System Integrator of the Respondent. It is stated that the Petitioner was selected and a Service Agreement was entered into between the Petitioner and the Respondent on 15.06.2023. It is stated that on 07.10.2023 the Respondent herein terminated the contract with the Petitioner herein due to failure of delivery of service within stipulated time. In the termination letter it is stated that the Respondent floated the RFP for selection of Bulk SMS (A2P) System Integrator so as to participate in the RFP floated by the Department of Agriculture and Farmer Welfare. The Petitioner was selected as a partner and the Respondent submitted its bid with the Department of Agriculture and Farmer Welfare on the basis of the quote given by the Petitioner herein. It is stated that the contract was awarded to the Respondent herein and it was to be implemented within four weeks from the date of the Order. It is stated in the termination letter that there was a failure on the part of the Petitioner in the implementation of the project because of which the Respondent has been debarred by the Department of Agriculture and Farmer Welfare and consequently, the Respondent terminated the contract with the Petitioner. The Order dated 24.11.2023 was passed debarring the Petitioner herein from participating in any tender of the Respondent herein for a period of two years. It is this Order which has been challenged in the present Writ Petition.

3. The short point raised by the learned Counsel for the Petitioner is that the Order of debarment has been passed without giving any Show-Cause

Notice to the Petitioner herein. It is stated that even the contract entered into between the Petitioner and the Respondent herein does not provide for a penalty of debarment. Learned Counsel for the Petitioner places reliance on the Judgment of the Apex Court in Gorkha Security Services v. Govt. (NCT of Delhi), **(2014) 9 SCC 105**, which mandates that a notice must be given to the offending party before an order of debarment is passed against it.

4. Heard the counsels and perused the material on record.

5. A perusal of the Order dated 24.11.2023, passed by the Respondent debarring the Petitioner from participating in any bid in BSNL for a period of two years shows that the said Order has been passed without giving any Show Cause Notice to the Petitioner which is completely contrary to the law laid down by the Apex Court in Gorkha Security Services (supra) which states that blacklisting has to be preceded by a Show Cause Notice and any order of blacklisting without a Show Cause Notice cannot be sustained. The Apex Court in the Gorkha Security Services (supra) has observed as under:

> "*16. It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.*
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> *17. Way back in the year 1975, this Court in Erusian*

Equipment & Chemicals Ltd. v. State of W.B. [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] , highlighted the necessity of giving an opportunity to such a person by serving a show-cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. This is clear from the reading of paras 12 and 20 of the said judgment. Necessitating this requirement, the Court observed thus: (SCC pp. 74-75)

> *"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.*

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> *20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."*

18. Again, in Raghunath Thakur v. State of Bihar [(1989) 1 SCC 229] the aforesaid principle was reiterated in the following manner: (SCC p. 230, para 4)

> *"4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last*

> *portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do in accordance with law i.e. after giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is thus disposed of."*

19. Recently, in Patel Engg. Ltd. v. Union of India [Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] speaking through one of us (Jasti Chelameswar, J.) this Court emphatically reiterated the principle by explaining the same in the following manner: (SCC pp. 262-63, paras 13-15)

> *"13. The concept of 'blacklisting' is explained by this Court in Erusian Equipment & Chemicals Ltd. v. State of W.B. [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] as under: (SCC p. 75, para 20)*
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> > *'20. Blacklisting has the effect of preventing a person from the privilege and advantage of*

entering into lawful relationship with the Government for purposes of gains.'

14. The nature of the authority of the State to blacklist the persons was considered by this Court in the abovementioned case ["12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation."(Erusian Equipment case [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] , [(1975) 1 SCC 70], SCC p. 74, para 12)] and took note of the constitutional provision (Article 298) ["298.Power to carry on trade, etc.—The executive power of the Union and of each State shall extend to the carrying on of *any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:Provided that—(a) the said executive power of the Union shall, insofar as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and(b) the said executive power of each State shall, insofar as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament."] , which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel the State to enter into a contract, everybody has a right to be treated equally when the State seeks to establish contractual relationships. ["17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. The privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as* *a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore,there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation."(Erusian Equipment case [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] , [(1975) 1 SCC 70], SCC p. 75, para 17)]] The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.*

15. It follows from the above judgment in Erusian Equipment case [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary—thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a

> *given case can vary depending upon various factors."*

> *20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg. [Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445]"*

6. In view of the law laid down by the Apex Court, the Order dated 24.11.2023, passed by the Respondent debarring the Petitioner from participating in any bid in BSNL for a period of two years is set aside.

7. Accordingly, the Writ Petition is allowed. Pending applications, if any stand disposed of.

8. Needless to state that it is always open for the Respondent to issue a Show Cause Notice to the Petitioner to show cause as to why the Petitioner should not be debarred and then pass appropriate Orders in accordance with law.

SUBRAMONIUM PRASAD, J

DECEMBER 6, 2023
Rahul