Ct. No.10
10.12.2024
Item No.1
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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.A. No. 10361 of 2024

M/s. M & S Co. & Anr.
Vs.
Indian Institute of Technology, Kharagpur

Mr. Pankaj Mehta
Ms. Aditya Mondal
Ms. Shweta Sonai
...for the petitioner

Mr. Suddhasatva Banerjee
Ms. Akanksha Mukherjee
...for the respondent

The petitioners assail a notice of blacklisting dated 27 February 2024 issued by the respondent, Indian Institute of Technology, Kharagpur whereby the petitioners have been blacklisted from participating in any future tendering process of the respondent including any work which is uploaded on the e-procurement system, Government of India, Portal.

Briefly, the petitioner no. 1 is a partnership firm formed on 31 May 2003 and *inter-alia* engaged in the construction business. In or about 2020, the petitioner no. 2 was incorporated with the sole object of taking over the business of the petitioner no. 1. Pursuant to the above, the petitioner nos. 1 & 2 entered into a Settlement Agreement dated 21 April 2022 whereby the petitioner no. 1 agreed to transfer all its assets and liabilities including the benefits of subsisting contracts entered into by the petitioner no. 1 in favour of the petitioner no. 2. In terms of the above arrangement, the petitioner no. 2 also passed a Board Resolution dated 28 March 2022 and complied with all necessary formalities including filing of all compliances with the Registrar of Companies (ROC) and with all other statutory authorities.

On 4 July 2023, the respondent issued a Notice Inviting Tender for repairing and resurfacing of bituminous roads and revamping of the campus storm-water drainage (Phase -II) at IIT Kharagpur. Pursuant to the above invitation, the petitioner no. 1 submitted its bid on 23 July 2023 which was duly accepted by the respondent on 5 December 2023. Accordingly, the respondent issued a letter of acceptance dated 15 December 2023 in favour of the petitioner no. 1. The above arrangement has also been duly acknowledged and approved by The Road Construction Department, Government of Jharkhand.

As such, the petitioner no. 2 company duly notified the respondent regarding takeover of petitioner no. 1 and requested the respondent to substitute the petitioner no. 2 in place and stead of the petitioner no. 1. Despite correspondence between the petitioner no. 2 and the respondent, the respondent chose not to substitute the petitioner no. 2 in place and stead of the petitioner no. 1 and refused to acknowledge the existence of the petitioner no. 2.

Subsequently, the respondent issued a show-cause notice dated 2 January 2024 seeking reasons as to why the petitioners should not be debarred and blacklisted in terms of the General Conditions of the Contract. By its reply dated 12 January 2024, the petitioner no. 2 duly replied to the said notice. In response, the respondent by the impugned notice dated 27 February 2024 cancelled the LOA issued in favour of the petitioner no. 1 and blacklisted both the petitioner no.1 and petitioner no. 2 on account of suppression of material information with the aim of gaining an unfair advantage.

It is contended by the petitioners that although the process of conversion of the petitioner no. 1 to the petitioner no. 2 had begun prior to the issuance of the tender, nevertheless at the time of submitting the bid, the petitioner no. 1 still existed as a partnership firm and retained its legal status permitting participation in the tender process and carrying on other activities. Moreover, the petitioner no.1 had complied with the eligibility criteria under clause 1.3.1 of the conditions since the transfer of assets and liabilities had not been completed. Clause 11 of the deed of settlement executed between the petitioner no.1 and 2, specifically stated that a formal dissolution deed would be prepared once all transfers were finalized and all the creditors had consented to having the partnership firm dissolved. Hence, the ongoing transfer of assets and liabilities did not imply dissolution of petitioner no. 1.

It is also alleged by the petitioners that the respondent failed to provide the petitioners with a reasonable opportunity of hearing. The show cause notice did not indicate the proposed action to be taken by the respondent or the basis of the impugned action. The impugned actions of the respondent are arbitrary, disproportionate and in violation of the principles of natural justice. There were no grounds to blacklist the petitioner no. 2. The impugned action is drastic insofar as the petitioners are concerned and impinges on their right to carry on business under Article 19(1)(g) of the Constitution. It is also alleged that the failure of the respondent to recognize and give effect to the change from a partnership firm to a private limited company when the assets of the petitioner no. 1 had already been transferred to petitioner no. 2, made it impossible for the petitioner no. 1 to furnish a bank guarantee in terms of the tender. In support of such contentions, reliance is placed on *Gorkha Security vs. Government (NCT of Delhi) & Ors. (2014) 9 SCC 105* and *Grosons Pharmaceuticals Pvt. Ltd v State of U.P.,(2001) 8 SCC 604*.

On behalf of the respondent it is contended that, the petitioner no. 1 failed to submit the bank guarantee within the stipulated time period and made deliberate misrepresentations with the *mala fide* intention of ultimately trying to secure the tender in favour of the petitioner no. 2 on the ground of non-existence of the partnership firm. In such circumstances, the respondent was compelled to issue the impugned show cause notice. In the absence of any satisfactory reply, the respondent was forced to cancel the letter of acceptance in favour of the petitioner no. 1 and debar both the petitioner no.1 and petitioner no. 2 *inter-alia* on the ground of suppression of material facts. There is also a clear violation of the Integrity Pact which was binding between the parties to the contract. It is also contended that the petitioners were in violation of the undertaking signed by the petitioner no. 1 pertaining to black-listing/non debarment. In any event, the respondent was justified in debarring the successors of a prospective bidder in case of breach of the Code of Integrity. In support of such contentions, the respondent relies on the decision in *Bhagwan*

Dass Chopra vs United Bank of India and Ors (1987) Supp SCC 538.

Clause 8 and 11 of the Settlement Agreement by and between the petitioners provides as follows:

"8. The parties now agree to transfer the business of their said partnership together with all assets and liabilities and the benefit of subsisting contracts entered into by the partnership by executing a Deed of Assignment of the business as a going concern."

"11. After the business of the said partnership is assigned to the company as aforesaid, the said partnership will be treated as dissolved when the parties in such erstwhile partnership decide to do so. Formal Dissolution deed would be prepared at that stage when the erstwhile partners decide and be filed with registrar and advertised as required by law..."

It is evident from the above that in terms of the settlement agreement although the assets and liabilities of the petitioner no. 1 were transferred from the date of execution of the agreement, nevertheless the partnership firm existed as a legal entity until the formal dissolution deed had been executed by and between the parties. As such, the petitioner no. 1 firm was in existence on the day of submission of the bid and was only takenover by the petitioner no. 2 after the completion of all necessary legal and statutory compliances.

In any event, any action impugned or otherwise, could only have been taken against the petitioner no.1 and not the petitioner no.2. The petitioner no. 2 was neither a bidder nor had the petitioner no. 2 been accepted as having any legal relationship with the respondent. There was no privity of contract between the petitioner no.2 and the respondent. The respondent also refused to recognize the petitioner no. 2 notwithstanding the settlement agreement by which the petitioner no. 2 had taken over the petitioner no. 1. The failure to submit the bank guarantee within the stipulated period of time could have been a ground for cancellation of the tender as far as the petitioner no.1 is concerned. However, debarring the petitioner no.2 indefinitely is draconian. Debarment or blacklisting must be based on a fair assessment of the factual situation [*Kulja Industries Ltd v Chief General Manager, W.T. Proj., BSNL & Ors (2014) 14 SCC 731 Erusion Equipment & Chemicals Ltd vs State of West Bengal (1975) 1 SCC 70*].

Upon violation of the Integrity Pact and the terms of the tender, the respondent may have been justified to initiate the impugned action insofar as the petitioner no.1 is concerned. However, no action could have been initiated against the petitioner no. 2. The respondent having refused to accept the bank guarantee sought to be furnished by the petitioner no.2 on the ground that there was no legal relationship nor privity of contract between the parties and that the petitioner no.2 was a third party could not have initiated any proceeding against the petitioner no. 2. Significantly, the respondent had also refused to accept letters written by the petitioner no.2. In view of the above, there was no basis to treat the petitioner no.2 as a successor in interest.

The selective treatment of the petitioner no.2 by the respondent is arbitrary, irrational and whimsical.

The blacklisting of the petitioner no. 2 or debarring the petitioner no. 2 from participating in future tenders for an indefinite period especially when the petitioner no. 2 was a distinct, separate and independent legal entity is a serious infraction of their right to carry trade and conduct business.

In Erusion Equipment & Chemicals Ltd vs State of West Bengal (1975) 1 SCC 70 it has been held as follows:

"18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest

price from participating at a public auction would also have the same aspect of arbitrariness.
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."

In *Assam Air Products Private Limited & Ors. v Oil India Limited & Ors., (2023) 3 GLT 97*, emphasizing on the severe consequences of being blacklisted, it has been held as follows:

" 63.5 ... The purported inherent power cannot be said to be so unfettered and unguided so as to sustain an action of banning the petitioner company for a period of 3 [three] years which would have the effect of the petitioner company descending towards civil death virtually for the said period, with the ripple effect that would follow even thereafter, on the principles of reasonableness and proportionately. "

In *M/S S & P Infrastructure vs National Highways & Infrastructure Development Corporation Limited AIRONLINE 2019 DEL 918* it has been observed as follows:

44. It is well settled that blacklisting a contractor has serious adverse consequences. It is common for the Government and Public Sector Undertakings to stipulate that a contractor who is blacklisted by another entity would also be ineligible to participate in the tenders invited by such entities. Blacklisting a contractor adversely affects his reputation. The Supreme Court in the case of Gorkha Security Services v. Government (NCT of Delhi) & Ors.: (2014) 9 SCC 105 has described the blacklisting a contractor as "Civil Death". It is, thus, necessary to *ensure that such punitive measures are taken only where the conduct of the contractor warrants such punition. Plainly, the conduct should be such that ought to render such contractor unworthy of being accepted as a contracting party.*

In view of the above, the punishment of blacklisting insofar as the petitioner no. 2 is concerned, is draconian to the extent that there is a deprivation of both personal and professional reputation which is followed by civil consequences.

Insofar as the petitioner no.1 is concerned, an undertaking had been signed by the petitioner no. 1. There was also a clear violation of the Integrity Pact by the petitioner no. 1. There was also a breach of the conditions insofar as the petitioner no. 1 had failed to furnish a bank guarantee. A show cause notice had also been issued to the petitioner no. 1. In such circumstances, there are no grounds to assail the impugned notice insofar as the petitioner no. 1 is concerned. However, the blacklisting of the petitioner no. 2 is disproportionate, excessive, unreasonable and in violation of Article 19 (1)(g) of the Constitution.

In view of the above, the blacklisting and the impugned action against the petitioner no. 2 is unsustainable. The impugned letter dated 27 February 2024 is set aside insofar as the petitioner no. 2 is concerned. The interim order directing the respondent authorities to take down the name of the petitioner no. 2 from the debarment list uploaded in the Central Public Procurement Portal stands confirmed. To the above extent, WPA No 10361 of 2024 stands allowed.

(Ravi Krishan Kapur, J.)