Item No.10
23.07.2024
Court. No. 9
GB/S. Biswas

W.P.A. 17529 of 2024

Kalimata Ispat Industries Private Limited & Anr.
Vs.
Union of India & Ors.

Mr. Tanoy Chakraborty,
Mr. Shounak Mukhopadhyay,
Mr. Kallol Saha,
Mr. Sourath Dutta,
Mr. Akash Ghosh,
Ms. Monika Roy
... for the Petitioners.
Mr. Indrajeet Dasgupta,
Mr. Kaustav Chandra Das
... for the UOI.
Mr. D.N. Ray,
Mr. Rajesh Kumar Shah
... for the Respondent Nos.2 to 7.

1. Affidavits-of-service filed in Court today, are taken on record.
2. The petitioners have challenged an order of debarment from claiming exemption from depositing security money and earnest money while participating in any tendering process of the railways. It is alleged that the order is in the nature of a penalty which was imposed upon the petitioners, after cancellation of their bid. The consequence was that the exemption which the petitioners were enjoying in not requiring to deposit the earnest money and the security deposit in any tender process with the railways, had been cancelled/withdrawn for six months. The debarment applied to claim for exemption in respect of all units of Indian Railways.

3. It is contended by the petitioners that the order has penal consequences and the principles of natural justice had not been followed. Neither any show cause, nor any hearing was given to the petitioners. The petitioners rely on a document which talks about debarment. The provision is contained in the instructions to the tenderers. The same deals with the procedure for debarment and provides that approval of debarment must be considered by an additional member or in the absence of an additional member, by a nominated Principal Executive Director or Executive Director. Further reliance is placed on a format which is Annexure-7 to the instructions and deals with a debarment proposal. Serial 7.1 of the said procedure/proposal, mentions about issuance of a show cause notice to the firm. Format of the show cause is at Page 185 of the writ petition, Annexure-8 of the general instructions. Annexure-9 is the format for the debarment order. An office memorandum dated November 2, 2021 has been relied upon which talks about the guidelines on debarment.

4. It is, thus, contended by the petitioners that the clauses and the formats which have been annexed as general instructions to bidders are the only clauses which talk about debarment of a proposed tenderer or a tenderer from participating in any tender process floated by the railways. The said process is something akin to blacklisting. The tender committee does not have

authority either under the general conditions or under the tender documents to debar the petitioners from availing of the exemptions and that too without following the due process. On the merits, it has been submitted that the tender documents required the bidder to enter all information with regard to the pending works and the status of such works upto the date of publication of the tender notice, that is, January 10, 2024.

5. In the case in hand, the alleged reason for debarment was that the petitioners had failed to disclose the status with regard to the work order received on January 12, 2024. The fact that such was the only ground for the debarment, is available not only from the order passed by the tender committee, but also from the communication to the petitioners. The order of debarment has been imposed on the basis of an undertaking given by the petitioners.

6. According to the petitioners, the said declaration is not applicable in the case in hand. The undertaking deals with misinformation with regard to the claim for exemption from depositing security money and earnest money, and not with regard to the ongoing projects which the petitioners/bidders had undertaken after the publication of the tender notice.

7. The learned advocate for the Union of India has raised a question of jurisdiction, inter alia, stating that the tender was floated by Northern Railways.

8. The learned advocate for the Northern Railways submits that the order impugned has to be read in consonance with the other tender conditions and also with the decision making process of the tender committee. Reliance has been placed on the order of the tender committee and especially Clause 2.7 thereof. It is stated that the authority was empowered to summarily reject the bid on the ground of suppression of material facts and non-disclosure of certain information. Moreover, the power of debarment could also be read into the declaration at Annexure H, which the petitioners had signed. Not only was the petitioners' bid found to be techno-commercially unresponsive, but was also found to be in violation of the Bid Security Declaration. Accordingly, the order was imposed thereby debarring the petitioners from claiming the exemptions.
9. Mr. Ray, learned senior advocate further submits that the authority was empowered to either reject or accept the bid and also impose penalties if the bidder was found to have misled the authority or to have suppressed crucial information.
10. Having heard the learned advocates for the respective parties, this Court finds that the order impugned and several communications were received by the petitioners at the petitioners' unit at Kolkata. The issue is with regard to the propriety of the order impugned.

11. The authorities have specifically stated in the order that the same was in consonance with para 2.7 of accepted TC's minutes dated April 18, 2024. The offer of the firm was summarily rejected for noncompliance of Annexure H, by not providing correct statement. Accordingly, action was taken as per the undertaking/declaration in Annexure H for giving incorrect information. Penalty as per Bid Security Declaration was also recommended to be imposed. The additional instruction talks about approval of recommendation of debarment. The general instructions talk about debarment and the procedure to be followed. The format of the show cause notice and the format of the order have been provided.

12. In the reading of the Court, the debarment clauses are akin to blacklisting. However, even if the authority retains the power to debar the petitioners from claiming exemptions in terms of Annexure H, such order has civil consequences. It is in the nature of penalty. The order cannot be imposed without allowing the petitioners an opportunity of hearing. The debarment applies to all units of Indian Railways. Secondly, the tender document does not talk about debarment from claiming the exemptions on the ground of furnishing either incorrect or insufficient information. The declaration which was relied upon by the authority to justify information of the debarment clauses reads as follows:-

> *"I/We certify that my/our offer is eligible for exemption from submission of bid*

security/Earnest Money Deposit, in terms of the tender conditions.

In case my/our claim to exemption from submission of bid security/Earnest Money Deposit is not found valid as per terms of the tender, I/We understand and accept that Railways has unquestionable right to summarily reject my bid and my offer shall not be considered for ordering. Further, I/we hereby understand and accept that if I/we withdraw or modify my/our bids during the period of validity, or if I/we are awarded the contract and on being called upon to submit the performance security/Security Deposit, fail to submit the performance security/Security Deposit before the deadline defined in the request for bid document/Notice Inviting Tender, I/we shall be debarred from exemption of submitting Bid Security/Earnest Money Deposit and performance security/Security Deposit for a period of 6 (six) months, from the date I/we are declared disqualified from exemption of EMD/SD, for all tenders for procurement of goods issued by any unit of Indian Railways published during this period."

13. The said declaration deals with an undertaking by the bidder that the bidder was eligible for exemption from submission of the bid security and the earnest money deposit in terms of the tender conditions. If the exemption was found to be either unacceptable or not valid, the authority had a right to cancel the tender/bid and also debar the bidder from claiming exemption for six months. The authority has relied on non-compliance of Annexure H. Annexure H is at page 31 of the writ petition. Annexure H is quoted below for convenience:

"Statement of existing commitments with Bidders for supply of all the items included in RDSO item ID (applicable to this tender indicated in Eligibility criteria) up to the date of invitation of tender.

SN	*Item Description*	*Order received from*	*PO NO. & date*	*PO Qty. with Unit*

1	*2*	*3*	*4*	*5*

Qty. Supplied	*Balance Qty.*	*Qty. required to be supplied during the delivery period of this tender*
7	*8*	*9*

Note: 1. Additional rows may be added as required.

In case of no pending order, NIL statements is to be furnished.

Declaration by the Bidder:

"I/We confirm that information furnished above are correct and I am/We are aware that in case, these are found to be incorrect at any stage, our offer may be summarily rejected with forfeiture of EMD/penalty as per Bid Securing Declaration or the Contract may be cancelled with forfeiture of SD."

14. It talks about the statements with regard to commitment of the bidder for supply of items including RDSO item ID up to the date of invitation of tender. The date of invitation of tender/application was January 10, 2024. In this case, the authority allegedly debarred the petitioner from claiming exemption on the ground that information with regard to tender of January 12, 2024 had not been provided. The same is available from the para 2.7 of the T.C's minutes dated April 18, 2024.

15. Moreover, the undertaking talks of a forfeiture clause. The debarment is not a part of the declaration. The debarment provided for in the Bid Security Declaration and that under the forfeiture clause in the declaration part of Annexure H,

do not appear to operate in the same field. In any event, the order impugned has not provided the reasons in detail. The order impugned read as follows:-

> "Kindly debar the firm M/s KALIMATA ISPAT INDUSTRIES PVT LTD-KOLKATA (IREPS VENDOR ID- 7082) for preventing exemption from submitting Bid Security/Earnest Money Deposit and performance security/Security Deposit for six months from the date of issuance of the letter and spans all tenders for goods procurement issued by any unit of Indian Railways during this period.
> This has to be done as per Para no 2.7 of accepted TC minutes by CMM/HQ on 18.04.2024.
> (Copy of TCM enclosed)."

16. Clause 2.7 of the TC meeting dated April 18, 2024 reads as follows:-

> *"KALIMATA ISPAT INDUSTRIES PVT LTD-KOLKATA (14/2, OLD CHINA BAZAR STREET), <u>As per annexure H submitted by the firm (SN/131), firm have provided order status of ERC J with mention NR PO dtd 12.01.2024, BUT as per NR vendor performance record over IMMS(SN/175-176) the firm is showing pending order status for ERC MKV(PO No.77235870200320 dtd 12.01.2024) whose huge quantities are pending over firm. Hence, TC observes firm is considered as providing false statement or concealing some records.</u>*
> *Therefore, the offer of the firm is hereby summarily rejected as per Annexure H terms for providing incorrect statement and action will be taken as per Annexure H terms given in case of incorrect information by bidder (Penalty as per Bid security declaration)*
> *TC states, This is RGC tender for qty 9.07 lakh of ERC J with pre-spliting clause hence need not further discussion.*
> *IN view of above discussion, Offer of the firm M/s KALIMATA ISPAT INDUSTRIES PVT LTD-KOLKATA is considered techno-commercially unresponsive offer for the Bulk and developmental order by the TC and penalty is recommended to be imposed as per bid security declaration over the firm."*

17. Thus, there are a number of issues which goes unanswered. The lack of reasons in the decision goes to the very root of

the decision as also the decision making process. The questions to be answered are as follows:-

a) Whether the Bid Security Declaration or the declaration in Annexure H would authorize debarment of the petitioners from claiming exemptions from the requirement to deposit earnest money and the security deposit in all units of the railways on the ground of non-furnishing of adequate information;

b) Whether the information beyond the date of publication of the tender notice i.e. January 10, 2024 was required to be provided in terms of Annexure H;

c) Whether the order was in consonance with the general instructions and the procedure to be followed before imposing an order of debarment;

d) Whether the said debarment could be sustained, as the same was passed in violation of the principles of natural justice.

e) As the order of debarment was in the nature of a recommendation for debarment, whether any process was followed for approval of such recommendation.

18. The railways have not been able to satisfy the court with regard to the questions which have been framed hereinabove. They are required to be answered.

19. Under such circumstances, the order impugned is set aside. The issue will be revisited by the competent authority

and a decision shall be taken upon hearing the petitioners in accordance with the law and guidelines relating to an order of debarment of this kind. The rejection of the bid of the petitioners is not interfered with. As the matter is being remanded to the authority concerned, the question of jurisdiction is not gone into. The authority will take a decision upon hearing the petitioner no.2 and communicate a reasoned order to the petitioners. The decision shall be taken as early as possible, preferably within a period of eight weeks from the date of communication of the order. Till such decision is taken, the petitioner shall be permitted to participate in any other tender process. The order impugned shall not have any effect. The exemptions as permissible may be claimed, in accordance with the law and as per terms and conditions of the tenders.

20. Accordingly, the writ petition stands disposed of.

21. All the parties are directed to act on the basis of the server copy of the order.

(Shampa Sarkar, J.)