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

Date of decision: 01st February, 2024

IN THE MATTER OF:

+ **W.P.(C) 5580/2022**

M/S STATE ENGINEERS

..... Petitioner

Through: Mr. Abhishek Kumar, Advocate.

versus

PRAGATI POWER CORPORATION LTD.

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. Petitioner has approached this Court challenging the communication dated 17.06.2020, issued by the Respondent herein debarring the Petitioner for a period of three years from participating in any tenders floated either by the Indraprastha Power Generation Co. Ltd. (IPGCL) or Pragati Power Corporation Ltd. (PPCL).
2. The facts, in brief, leading to the present Writ Petition are that in pursuance to a tender floated by the Respondent for awarding annual maintenance contract for Control and Instrumentation (C&I) maintenance at the Pragati Power Station – I for a period of one year, the Petitioner made a bid for the said tender. The Petitioner was the successful bidder. A letter of intent was issued by the Respondent to the Petitioner. A contract, being contract No.7200000620 was entered into between the Petitioner and the



Respondent on 04.01.2019 and the tender was awarded to the Petitioner. A work order was issued to the Petitioner. It is stated that a show cause notice dated 07.12.2019 was issued to the Petitioner by the Respondent. A perusal of the show cause notice shows that several e-mails and letters have been given to the Petitioner regarding failure on their part to pay wages, over-time, bonus, etc. to the contractual employees hired by the Petitioner. The show cause notice indicates that vide e-mail dated 28.11.2019 the Petitioner was advised to clear all pending dues by 07.12.2019 and compliance of the same was to be submitted by the Petitioner by 10.12.2019. The Petitioner did not submit any documents to show that steps have been taken to rectify complaints regarding non-payment of wages to its employees. The show cause Notice also indicates that the Petitioner was made aware that stringent action will be taken against the Petitioner and the contract with the Respondent would be terminated if Petitioner is not able to rectify the complaints. The show cause notice dated 07.12.2019 reads as under:

“Subject: Show Cause Notice against Contract 7200000620 dt 04.01.19 (PO: 4020004083 dt. 08.02.19)

1. Annual Maintenance Contract of Control & Instrumentation maintenance at Pragati Power Station - 1 work contract no 7200000620 with PO No: 4020004083 awarded to your firm ie. M/s State Engineers for a period of one year valid upto 07.01.20.

2. With referring to e-mail from user/indenting department dated 02.02.19, 12.02.19, 13.02.19, 14.02.19, 16.02.19, 20.02.19, 02.04.19, 10.04.19, 24.05.19, 10.06.19, 02.07.19, 10.07.19, 11.07.19,



19.07.19, 03.10.19, 19.10.19. 04.11.19, 05.11.19. 08.11.19, 10.11.19 and e-mail by C&M Deptt. darad 16.11.19, 22.11.19 & unattended meeting scheduled for dated 28.11.19. you have failed to credit the payment of wages, overtime, bonus etc. to your contract employees since last four months up to November, 2019. Vide e-mail dated 28.11.19 you were advised to clear all pending dues by 7 December. 2019 and compliance of the same may be submitted to PPCL immediately by 10 December, 2019.

3. You also failed to submit any document that proves to redemptive of complaint received from PUMS Cell, Delhi Govt., vide complaint I.d. No. 2019131821 [w.r.t e-mail dated 05.11.19]

As per the recent meeting held with the Minister of Labour, GNCTD and Commissioner of Labour, it is mandatory for IPGCL-PPCL to submit compliance of payment of minimum wages notified by GNCTD on 22.10.2019, status before 13.12.2019. Accordingly, you are given the last opportunity to present, in writing, to submit the compliance of payment of wages to contractual worker deputed by your firm at site and all other compliances (deliberated in e-mail dated 16.11.19), latest by 12.12.19.

Your attention is invited to the respective rights of the Government to take stringent action as deemed fit, as per rule, which may be invoked to terminate for default and circulated in other Govt. departments and companies whose credentials have been submitted by you to participate in this tender

Any communication about the above subject should be directed to the undersigned."



3. Pursuant to the show cause notice, replies have been given by the Petitioner and the impugned communication dated 17.06.2020 has been issued by the Respondent debaring the Petitioner for a period of three years from participating in any tenders floated either by the IPGCL or PPCL.
4. The short argument raised by the Petitioner is that no notice has been given by the Respondent to the Petitioner regarding debarment and that the Order of debarment without any notice is violative of the law laid down by the Apex Court in Gorkha Security Services vs. Govt. of NCT of Delhi, (2014) 9 SCC 105, and UMC Technologies (P) Ltd. v. Food Corpn. of India, (2021) 2 SCC 551.
5. Counter affidavits and rejoinder have been filed.
6. Learned Counsel for the Petitioner has raised a short contention that the order of debarment is wrong inasmuch as no notice has been given to the Petitioner stating that the Petitioner would be debarred from participating in future tenders. He states that the contract entered into between the Petitioner and the Respondent does not mention debarment as a penalty, however, clause 14(3) of the contract mentions that all other terms and conditions of contract shall remain same as mentioned in the tender document. Clause 37 & 38 of the tender document which deals with banning/blacklisting/debarment and termination of the contract reads as under:

“37. Banning/Blacklisting/Debar

*IPGCL/PPCL may, as its sole discretion,
blacklist/debar any supplier/contractor for*



participating in any tendering process with IPGCL, who indulges or is suspected to have indulged in unethical practices while dealing with IPGCL.

Banning

Banning of vendors for future dealing will be done:

- i. In case unethical business practice is established against a vendor.*
- ii. Vendor furnishes wrong information or manipulated documents.*
- iii. Vendor is charged with CBI investigation for an offence against Govt. regulation and subsequently in court of Law.*

38. Termination Of Contract

The IPGCL/PPCL Engineer in charge may, without prejudice to his right against the contractor in any respect of any delay or inferior workmanship or otherwise or to any claim of damages in respect of any breaches on the part of the contractor and without prejudice to any rights or remedies under any of the provisions of this NIT or otherwise and when the date for completion has or has not elapsed, by notice in writing, absolutely terminate the contract

- i. If the contractor, having been given by the Engineer-in- Charge a notice in writing to rectify or replace any defective work or that the work is being performed in an inefficient or otherwise improper or unprofessional manner, shall delay or suspend the execution of work so that in the judgment of the Engineer-in-Charge(which shall be final and binding) he shall be unable to secure completion of the work by the date for completion or he has already failed to complete the work by that date:*



ii. If the contractor, being the company pass a resolution or the court makes an order that the Co. shall be wound up or if a receiver or Manager on behalf of a creditor, shall be appointed or if circumstances so arise which entitle the court to make a winding up order, if the contractor commits breaches of any of the terms and conditions of this contract.

iii When the contractor is found to have made any false or fraudulent declaration or statement to get the contract or he is found to be indulging in unethical or unfair trade practices.

iv When both parties mutually agree to terminate the contract

v Any special circumstances, which must be recorded to justify the cancellation or termination of a contract. When the contractor has made himself liable for action under terms of NIT, the Engineer-in-charge PPCL may without prejudice to the right of PPCL terminate or rescind the contract and security deposit of contractor shall stand forfeited and shall be absolutely at the disposal of IPGCL. PCCL reserves the right to take any action to recover the loss, if any suffered by the PCCL due to non-performance of the contract or due to non-compliance of any of the terms and conditions of the contract.”

7. A perusal of the above mentioned clauses shows that the Respondent at its own discretion can blacklist and debar any supplier/contractor from participating in any tender floated by the IPGCL in case unethical business practice is established against a supplier/contractor or if the supplier/contractor furnishes wrong information or manipulates documents



or if the supplier/contractor is charged with CBI investigation for any offence against Government. Section 38 deals with circumstances where the contract can be terminated.

8. A perusal of the material on record shows that the Petitioner has only been given a show cause notice regarding termination of contract and there is no notice for debarment of the Petitioner.

9. Learned Counsel for the Respondent made a frivolous attempt to show that some of the letters given to the Petitioner indicated that the Petitioner can be debarred.

10. Letters which have been relied on by the learned Counsel for the Respondent are not show cause notices. The order of debarment has been passed consequent to the show cause notice dated 17.12.2019 where there is no indication that the consequence of non-compliance of the said notice would be debarment. The show cause notice is limited to termination of the contract.

11. It is not the case of the Respondent that violation of a term of contract would automatically result in debarment. It is now well settled by the Apex Court in a number of judgments that before debarring any entity, a notice must be given to that entity informing that the entity would be debarred. Debarment without show cause notice cannot be sustained.

12. The Apex Court in UMC Technologies (supra) has observed as under:

“13. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The



basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. This Court in Nasir Ahmad v. Custodian General, Evacuee Property [Nasir Ahmad v. Custodian General, Evacuee Property, (1980) 3 SCC 1] has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.

14. Specifically, in the context of blacklisting of a person or an entity by the State or a State Corporation, the requirement of a valid, particularised and unambiguous show-cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatisation that accrues to the person/entity being blacklisted. Here, it may be gainful to describe the concept of blacklisting and the graveness of the consequences occasioned by it. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting take away this privilege, it also tarnishes the blacklisted person's reputation and brings the



person's character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person.

15. In the present case as well, the appellant has submitted that serious prejudice has been caused to it due to the Corporation's order of blacklisting as several other government corporations have now terminated their contracts with the appellant and/or prevented the appellant from participating in future tenders even though the impugned blacklisting order was, in fact, limited to the Corporation's Madhya Pradesh regional office. This domino effect, which can effectively lead to the civil death of a person, shows that the consequences of blacklisting travel far beyond the dealings of the blacklisted person with one particular government corporation and in view thereof, this Court has consistently prescribed strict adherence to principles of natural justice whenever an entity is sought to be blacklisted.

16. The severity of the effects of blacklisting and the resultant need for strict observance of the principles of natural justice before passing an order of blacklisting were highlighted 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] in the following terms: (SCC pp. 74-75, paras 12, 15 & 20)

“12. ... 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.

15. ... The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are “instruments of coercion”.

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.”

17. Similarly, this Court in Raghunath Thakur v. State of Bihar [Raghunath Thakur v. State of Bihar, (1989) 1 SCC 229] struck down an order of blacklisting for future contracts on the ground of non-observance of the principles of natural justice. The relevant extract of the judgment in that case is as follows: (SCC p. 230, para 4)

“4. ... [I]t is an implied principle of the rule of law that any order having civil consequences 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.”

18. *This Court in Gorkha Security Services v. State (NCT of Delhi) [Gorkha Security Services v. State (NCT of Delhi), (2014) 9 SCC 105] has described blacklisting as being equivalent to the civil death of a person because blacklisting is stigmatic in nature and debars a person from participating in government tenders thereby precluding him from the award of government contracts. It has been held thus: (SCC p. 115, para 16)*

“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.”

19. *In light of the above decisions, it is clear that a*



prior show-cause notice granting a reasonable opportunity of being heard is an essential element of all administrative decision-making and particularly so in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted. In these cases, furnishing of a valid show-cause notice is critical and a failure to do so would be fatal to any order of blacklisting pursuant thereto.

25. The mere existence of a clause in the bid document, which mentions blacklisting as a bar against eligibility, cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show-cause notice. The Corporation's notice is completely silent about blacklisting and as such, it could not have led the appellant to infer that such an action could be taken by the Corporation in pursuance of this notice. Had the Corporation expressed its mind in the show-cause notice to blacklist, the appellant could have filed a suitable reply for the same. Therefore, we are of the opinion that the show-cause notice dated 10-4-2018 does not fulfil the requirements of a valid show-cause notice for blacklisting. In our view, the order of blacklisting the appellant clearly traversed beyond the bounds of the show-cause notice which is impermissible in law. As a result, the consequent blacklisting order dated 9-1-2019 cannot be sustained."

13. The fact that one of the e-mails indicated that the Petitioner can be debarred is not sufficient because the order of debarment is based on the show cause notice dated 17.12.2019 which has been extracted above and it does not state that the Petitioner is likely to be debarred. Termination of



contract does not automatically leads to debarment. The Petitioner has to be put to notice that the Petitioner is likely to be debarred and without such notice the Order of debarment is bad. Hence, the communication dated 17.06.2020, issued by the Respondent is set aside.

14. It is always open for the Respondent to issue a fresh show cause notice to the Petitioner for debarment on the ground of non-payment of wages etc. to its employees and pass necessary orders.

15. The Writ Petition is disposed of along with the Pending applications, if any.

SUBRAMONIUM PRASAD, J

FEBRUARY 01, 2024

Rahul