



2024:DHC:6032



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

Date of decision: 06th AUGUST, 2024

IN THE MATTER OF:

+ **W.P.(C) 6928/2024 & CM APPLs. 28790/2024, 31980/2024, 31981/2024 & 31982/2024**

RIDDHI SIDDHI ASSOCIATES

..... Petitioner

Through: Mr. Gagan Gupta, Sr. Advocate with
Mr. Arjun Sharma, Mr. Pratyush
Miglani, Mr. Nikhil Varma and Ms.
Hiba Shah, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ORS.

..... Respondents

Through: Mr. Santosh Kumar, Standing
Counsel with Mr. Adithya Ramni,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. Petitioner has approached this Court challenging the communication dated 10.05.2024, issued by the Respondents herein, debarring the Petitioner herein for a period of three months from the list of pre-qualified bidders in any tender floated by the Respondents.
2. The facts, in brief, leading to the present Writ Petition are as under:
 - a. It is stated that the Petitioner is engaged in the business of toll collection, highway management, and other ancillary services and is a regular participant of the bids issued by the State Governments and the NHAI for this purpose.



2024:DHC:6032



- b. It is stated that Respondents herein invited a tender for the “Engagement of user fee collection agency on the basis of e-tender for the work of Collection of User fee at FP-9 at Panchu at Km 484+167 to FP-19 at Sangana at Km 752+034 for the section from Amritsar to Jamnagar Section from Km 206+867 to Km 968+865 in the State of Rajasthan” (*hereinafter referred to as 'the Toll Plaza'*). It is stated that the Petitioner emerged as the highest bidder and a Contract Agreement dated 29.01.2024 was entered into between the Petitioner and the NHAI.
- c. It is stated that on 05.05.2024 a dispute among the highway users and the employees of the Petitioner deployed at the Toll Plaza took place where iron rods were used by the employees of the Petitioner and police had to be called.
- d. Respondent No.4 herein, i.e. the Project Director, Project Implementation Unit - Jodhpur, issued a letter on 06.05.2024 to the Petitioner directing the Petitioner to terminate the individuals engaged in the fight. The said letter also stated that if the Petitioner fails to take appropriate action against the individuals engaged in the scuffle then appropriate action in accordance with the Contract Agreement shall be taken against the Petitioner.
- e. Vide Letter dated 07.05.2024 another letter was issued by the Respondent No.4 to the Petitioner informing about imposition of penalty of Rs.1,00,000/- on the Petitioner under Clause 20 of the Contract Agreement for the incident that took place on



2024:DHC:6032



05.05.2024 on the ground that the Petitioner has failed to adhere to Clause 13(e) and 23(i) of the Contract Agreement entered into between the Petitioner and the NHAI. Clause 13 of the Contract Agreement postulates that Contractor and/or its employees shall not misbehave/misconduct with the members of the public.

- f. It is stated that on the very same day, i.e. 07.05.2024, a Show Cause Notice was issued by the Respondents to the Petitioner asking the Petitioner to show cause as to why action for debarment should not be taken against the Petitioner for failing to adhere to Clause 13(e) and 23(i) of the Contract Agreement. Vide the said letter, the Petitioner was directed to submit its reply before 02:00 PM on 08.05.2024.
- g. It is stated that the Petitioner gave its reply on 09.05.2024 stating that the persons engaged in the conflict between the Employees of the Petitioner and the Highway users belong to the same area and were known to each other and the issue for which the scuffle took place pertained to a financial transaction amongst them and the Petitioner has nothing to do with the dispute. It was further stated in the reply that the matter has been amicably settled between the parties.
- h. On 10.05.2024 the impugned Order has been passed by the Respondents debarring the Petitioner for a period of three months from the list of pre-qualified bidders and has also imposed a penalty of Rs.1,00,000/- on the Petitioner for not



2024:DHC:6032



adhering to the mandate of Clause 13(e) and 23(i) of the Contract Agreement.

i. It is this letter which is under challenge in the present Writ Petition.

3. It is contended by the learned Counsel for the Petitioner that the Order of debarment has been passed in violation of principle of natural justice inasmuch as the Petitioner has not been given adequate time to respond to the Show Cause Notice. He states that the Petitioner has already terminated the services of the personnel who were involved in the scuffle, as directed by the Respondents, and the issue has been resolved. Learned Counsel for the Petitioner further contends that after imposing a penalty of Rs.1,00,000/- on the Petitioner, it was not open for the Respondents to debar the Petitioner. He further states that the persons involved in the scuffle have compromised the matter and they have withdrawn the complaint case as well. He states that the scuffle did not take place because of misbehaviour or mis-conduct of the employees of the Petitioner rather it was a personal matter between the parties as the accused and the complainant knew each other and the scuffle took place because of a financial transaction between them. He further states that a Letter of Award has been issued to the Petitioner after 08.05.2024 for running the Toll Plaza and the Petitioner has been permitted to run the Toll Plaza till the end of the term. Learned Counsel for the Petitioner, therefore, contends that on the one hand the Petitioner has been debarred from participating in any future tender floated by the NHAI for three months and on the other hand the Petitioner has also been issued a Letter of Award to run the Toll Plaza in question till the end of its term. Learned Counsel for the



2024:DHC:6032



Petitioner, therefore, states that the actions of the Respondents is contradictory and the decision to debar the Petitioner has been arrived at without application of mind. He further states that if the Petitioner was to be debarred, it cannot be asked to complete the term of the contract for running the toll plaza.

4. Per contra, learned Counsel for the Respondents contend that for a short duration of time the NHAI does not have the wherewithal to run the Toll Plaza in question and there was no option for the NHAI but to permit the Petitioner to keep running the Toll Plaza for the balance period of the contract. He states that the Petitioner has violated clauses 13(e) and 23(i) of the Contract Agreement and, therefore, the action taken by the Respondent cannot be said to be arbitrary. He further states that the principles of natural justice have not been violated by the Respondents and adequate time has been given to the Petitioner to give its reply to the Show Cause Notice. He states that the incident in question is of serious nature and an FIR for the same has been registered under Sections 143, 341, 323, 384, 385, 354, 307 and 509 IPC. He states that the offences are serious in nature and, therefore, action has been taken against the Petitioner. Learned Counsel for the Respondents places reliance on Clause 20 of the Contract Agreement which permits the Respondent to levy a penalty on the Contractor for default on their part. He states that the fact that penalty has been levied on the Petitioner under Section 20 of the Contract Agreement does not take away the right of the Respondents to debar the Petitioner.

5. Heard the Counsels for the Parties and perused the material on record.

6. Clause 12, 13(e), 20 and 23(g) of the Contract Agreement entered into



2024:DHC:6032



between the Petitioner and the NHAI reads as under:

"12. REQUIREMENT OF PERSONNEL FOR USER FEE COLLECTION: *For the purpose of discharging its obligations under this Contract, the Contractor shall deploy adequate number of personnel of prescribed qualification & experience and having undergone such training as may be relevant and considered necessary from time to time by the Authority to ensure efficient management of entire operations, including free flow of traffic, in or around the plaza including in the User Fee collection booths. In additions Contractor will deploy sufficient manpower for continual up keeping on daily basis of Toilet block for 24 Hrs. in a day. The number, qualification & experience of personnel to be deployed should be in accordance with the details given in schedule- ill of this contract. However, the Authority reserves the right to serve directions for any interchange in the category of personnel (total deployment will remain according to Schedule- III) to be deployed by the Contractor, for the purpose of User Fee Collection for ensuring free flow of traffic.*

13(e). *The personnel deployed by the Contractor shall not misconduct/misbehave with the members of public and shall observe strict discipline and decency in their behavior.*

20. PENALTY FOR FAILURE TO COMPLY ANY OF THE OBLIGATIONS SPECIFIED IN CLAUSE 23 OF THE CONTRACT:

In case of non-compliance of any of the obligations specified in Clause 23(a) to (i), the Authority shall



2024:DHC:6032



levy penalty@ Rs.1 lakh per default per month except for Clause-23(e) for which the penalty shall be @ Rs.10,000/-per default per month, without prejudice to any other rights of the Authority under this Contract. However, in case of non-compliance of obligations specified in Clause 23 (h), the Authority shall levy a penalty @ Rs.10,00,000/- per instance or termination of Contract Agreement or both, without prejudice to any other rights of the Authority under this Contract. The date of default will be the date of reporting to the contractor by the Authority concerned or his authorized representative. In addition to levy of penalty as above, more than three defaults in a month under this clause may attract termination under clause 35 (2) of this contract. Before levy of penalty under this clause the contractor shall be given a reasonable opportunity to rectify the default. The decision of the Authority concerned or his authorized representative to levy the penalty under this clause shall be final and binding. The penalty so levied shall be recovered from the performance guarantee which shall be replenished by the contractor within 10 days from the date of such recovery failing which the contract is liable to be terminated.

23. (g) *The contractor also agree to abide by the requirement of clause 12 & clause 13 specifically on deployment of the personnel for the purpose of this Contract. "* (emphasis supplied)

A perusal of the abovementioned clauses indicate that the Respondents have the right to levy penalty on the Petitioner if the Petitioner does not perform its duties stipulated under the Clause.

7. It is well settled that the power to blacklist a Contractor is inherent in



2024:DHC:6032



the employer even if such power is not specifically conferred by the statute or is not mentioned in the Contract. Undoubtedly, the correctness or otherwise of the action of blacklisting the Petitioner can be decided by the Writ Courts to satisfy itself as to whether the principles of natural justice have not been violated and the Order of blacklisting is not completely disproportionate to the alleged mis-conduct.

8. The Apex Court in State of Kulja Industries Ltd. v. Western Telecom Project BSNL, (2014) 14 SCC 731 has held as under:

"16. A literal construction of the provisions of Paras 31 and 32 extracted above would mean that the power to disqualify or blacklist a supplier is available to the purchaser only in the three situations enumerated in Paras 31 and 32 and no other. Any such interpretation would, however, give rise to anomalous results. We say so because in cases where a supplier is found guilty of much graver offences, failures or violations, resulting in much heavier losses and greater detriment to the purchasers in terms of money, reputation or prejudice to public interest may go unpunished simply because all such acts of fraud, misrepresentation or the like have not been specifically enumerated as grounds for blacklisting of the supplier in Paras 31 and 32 of the tender document. That could in our opinion never be the true intention of the purchaser when it stipulated Paras 31 and 32 as conditions of the tender document by which the purchaser has reserved to itself the right to disqualify or blacklist bidders for breach or violation committed by them. If the bidders who commit a breach of a lesser degree could be punished by an order of blacklisting there is no reason why a breach of a more serious nature should go unpunished, be ignored or rendered inconsequential by reason only of an omission of such breach or violation in the text of



2024:DHC:6032



Paras 31 and 32 of the tender document. Paras 31 and 32 cannot, in that view, be said to be exhaustive; nor is the power to blacklist limited to situations mentioned therein.

17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because “blacklisting” simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court.

18. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with Erusian Equipment & Chemicals Ltd. v. State of W.B. [(1975) 1 SCC 70] where this Court declared that blacklisting has the effect of preventing a person from



2024:DHC:6032



entering into lawful relationship with the Government for purposes of gains and that the authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed: (SCC p. 75, para 20)

“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.”

Subsequent decisions of this Court in Southern Painters v. Fertilizers & Chemicals Travancore Ltd. [1994 Supp (2) SCC 699 : AIR 1994 SC 1277] ; Patel Engg. Ltd. v. Union of India [(2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] ; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548] ; Joseph Vilangandan v. Executive Engineer (PWD) [(1978) 3 SCC 36] among others have followed the ratio of that decision and applied the principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.

19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer res integra. The decisions of this Court in Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] ; E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] ; Maneka Gandhi v. Union of India [(1978) 1 SCC 248] ; Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258]



2024:DHC:6032



; *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489] and *Dwarkadas Marfatia and Sons v. Port of Bombay* [(1989) 3 SCC 293] have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a writ court exercising powers under Article 226 or Article 32 of the Constitution.

20. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in *Mahabir Auto Stores v. Indian Oil Corpn.* [(1990) 3 SCC 752] should, in our view, suffice: (SCC pp. 760-61, para 12)

“12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Radhakrishna Agarwal v. State of Bihar* [(1977) 3 SCC 457 : (1977) 3 SCR 249] In case any right conferred on the citizens which is sought to



2024:DHC:6032



be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. ... It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.” "

9. The Apex Court in State of Odisha v. Panda Infraproject Ltd., (2022) 4 SCC 393 has held as under:

“26. In Kulja Industries [Kulja Industries Ltd. v. Western Telecom Project BSNL, (2014) 14 SCC 731] ,



2024:DHC:6032



this Court has observed that “debarment” is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor. In the said decision this Court emphasised on prescribing guidelines by determining the period for which the blacklisting should be effective. It is observed and held by this Court that while determining the period for which the blacklisting should be effective, for the sake of objectivity and transparency it is required to formulate broad guidelines to be followed. It is further observed that different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines.

28. Duration of blacklisting cannot be solely per offence. Seriousness of the lapse and the incident and/or gravity of commission and omission on the part of the contractor which led to the incident should be the relevant considerations. In a given case, it may happen that the commission and omission is very grave and because of the serious lapse and/or negligence, a major incident would have taken place. In such a case, it may be the contractor's first offence, in such a case, the period/duration of the blacklisting/banning can be more than three years. However, as the said guidelines are not under challenge, we rest the matter there and leave it to the State Government to suitably amend and/or modify the said office memorandum. However, what we have observed above can be a guide while determining the period of debarment/blacklisting.”

10. Material on record discloses that the employees of the Petitioner have indulged in violence. The FIR discloses that iron rods and dandas have been used by the employees of the Petitioner while committing the offence. The



2024:DHC:6032



Respondent/State cannot be expected to be a mere silent spectator if the Contractor supports violence. Such an action cannot be tolerated. The observation made by the Apex Court in Panda Infraproject Ltd (supra) that the seriousness of the lapse and the gravity of the incident and the omission on the part of the contractor which led to the incident are relevant considerations while passing an order of Blacklisting. Breach of a serious nature cannot be ignored as inconsequential. The Respondents were, therefore, well within their rights to impose penalty as stipulated in Clause 20 of the Contract Agreement and invocation of Clause 20 does not take away the right of the Respondents to initiate action for blacklisting the Petitioner, which, as stated in Kulja Industries (supra), is an inherent right of the Respondents and the same need not be specified either in a Statute or in the Contract.

11. As laid down by a Co-ordinate Bench of this Court in M/s Sabharwal Medicos Pvt. Ltd. vs. Union of India and Ors., **2013 SCC OnLine Del 3839** that it is for the competent authority which is issuing an order of blacklisting/debarring to decide, whether the facts and circumstances of the case justify blacklisting/debarring or not and the Court should not substitute its own views to the views taken by the competent authority, unless it is shown that the decision taken was not taken by a competent authority or is otherwise wholly arbitrary or perverse in nature. Paragraph No.12 of the said Judgment reads as under:

“12. Primarily it is for the authority competent to order blacklisting/debarring to decide, whether the facts & circumstances of the case justify blacklisting/debarring or not. The Court cannot



2024:DHC:6032



substitute its own views for the view of the competent authority in this regard and cannot interfere with the decision taken by it, unless it is shown that the decision is taken by an authority which was not competent in this regard was taken without following the principles of natural justice or is otherwise wholly arbitrary or perverse in nature. Even otherwise, it would be difficult to dispute that the forged bids could be submitted only by in conspiracy with the person, who ultimately got the order, in connection to which the said forged bids were submitted. A perusal of the charge-sheet would show that it is the petitioners before this Court who got the orders in question. The State, in my view, is entitled to take decision, not to enter into any contract with a person, who resorts to forgeries for the purpose of securing orders from it, thereby polluting the tendering process itself. Once the investigation by a State Agency is carried out and it culminates in filing of a charge-sheet, the State cannot be expected to wait for the outcome of the prosecution and in the meanwhile, continue to deal with persons whose conduct has come under a serious cloud. To take a different view will place unreasonable fetters on the right of the State not to enter into contracts with persons, whom it finds to be undesirable.”

12. Material on record shows that proper procedure has been followed by the Respondents before debarring the Petitioner. A Show Cause Notice has been issued to the Petitioner specifically stating that the Petitioner can be blacklisted. Reply to the said Show Cause Notice has been given by the Petitioner and after considering the said reply, the order of blacklisting has been passed by the Respondents. It, therefore, cannot be said that there is any infirmity in the procedure followed by the Respondents. The decision



2024:DHC:6032



making is fair and this Court does not want to substitute its conclusion to the one arrived at by the Respondents.

13. Accordingly, the Writ Petition is dismissed along with the pending applications, if any.

SUBRAMONIUM PRASAD, J

AUGUST 06, 2024

Rahul