



2024:DHC:5547-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **WP (C) 15671/2023 & CM APPL. 62810/2023****SHIVA BUILD TECH PRIVATE LIMITED**PetitionerThrough: Mr. Ramesh Kumar and Mr.
Ashutosh Prakash, Advocates

versus

NORTHERN RAILWAY & ANR RespondentsThrough: Mr. Bhagvan Swarup Shukla CGSC
with Mr. Sarvan Kumar, Ms. Reeva
and Mr. Bhanu Pratap Singh,
Advocates for UOI.

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Date of Decision: 25th July, 2024.**CORAM:****HON'BLE THE ACTING CHIEF JUSTICE****HON'BLE MR. JUSTICE TUSHAR RAO GEDELA****JUDGMENT****MANMOHAN, ACJ:(ORAL)**

1. Present petition is filed under Article 226 of the Constitution of India, 1950 assailing the decision of respondent no.1 communicated *vide* email dated 9th October, 2023 to the petitioner whereby respondent no.1 had rejected the bid submitted by the petitioner, indicating in the said email initiation of action for-(a) forfeiture of earnest money deposited by the petitioner with its bid in the form of Bank Guarantee, and (b) banning of business of the petitioner, on the premise that Annexure-H to the Bid submitted by the petitioner was incorrect, without any reason and without



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specifying under which provision of the tender document, initiation of forfeiture of Bid Security and banning of business of the petitioner was sought.

2. The petitioner-Shiva Build Tech Private Limited is a private limited company domiciled in India and incorporated under the provisions of the Companies Act, 1956 having its registered office at 226A, D-288-89/10, Laxmi Nagar, Wadhwa Complex, Vikas Marg, New Delhi-110092.

3. It is the case of the petitioner that respondent no.1 had invited tender for the construction work of Super Structure 2nd Line on Via Duct and other miscellaneous works from km. 0.800 to km. 5.640 in Rohtak City on Rohtak-Gohana-Panipat Section on 9th June, 2023. The bids were to be submitted online from 27th June, 2023 uptill 11th June, 2023. The petitioner states that it had obtained the Bank Guarantee on 3rd July, 2023 for a sum of Rs.43,30,500/- and submitted the same as Earnest Money Deposit (hereinafter referred to as “EMD”) alongwith its bid. The petitioner claims to have submitted its bid on 11th July, 2023 alongwith the requisite documents as stipulated in the tender documents. It is stated that respondent no.1 opened the Technical Bid on 11th July, 2023. The respondent was to open the Financial Bid at a later date.

4. The petitioner claims that on 9th October, 2023, respondent no.1 *vide* an e-mail communicated to the petitioner that it was found technically unsuitable on account of Annexure-H to the bid submitted by the petitioner being incorrect. Simultaneously, the said rejection *vide* the said e-mail also indicated that the respondent would proceed to forfeit the EMD as also



initiate proceedings for banning the business of the petitioner. Upon receiving the said e-mail, *vide* the communication dated 11th October, 2023, the petitioner submitted a representation to the Chief Engineer of respondent no.1. It is claimed that the said Chief Engineer had orally assured the petitioner that respondent no.1 would issue a show cause notice in writing before any such action is initiated. It is claimed by the petitioner that respondent no.2 bank had telephonically communicated on 29th November, 2023 that respondent no.1 had initiated action for invocation and encashment of the Bank Guarantee. The petitioner also claims that despite contacting the Chief Engineer of respondent no.1, the said Bank Guarantee was encashed by respondent no.1 on 29th November, 2023.

5. Aggrieved by the aforesaid action, the petitioner has filed the present writ petition assailing the communication dated 9th October, 2023.

6. Mr. Rakesh Kumar, learned counsel for the petitioner at the outset, submits that the impugned order/communication is bereft of any reasons and as such, untenable to withstand the scrutiny of law. He submits that while the impugned order purports to reject/cancel the bid documents of the petitioner on the basis of Annexure-H thereto being incorrect, yet in the counter affidavit, the said respondent refers to the violation of the undertaking contained in Annexure-M. He submits that there is a clear contradiction in the impugned order on the one hand and the explanation tendered in the counter affidavit, the impugned ought to be set-aside.

7. Learned counsel further submits that even otherwise, Annexure-M to the bid documents was in respect of an undertaking regarding the contents



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of the certificate which if found false, would enable the respondent to forfeit the EMD besides banning business for a period upto two years. He states that since the impugned order refers only to Annexure-H and not Annexure-M, the action undertaken by respondent no.1 is contrary to the facts. He submits that on this score too, the impugned order needs to be set aside. He submits that Annexure-M and the documents annexed thereto regarding the Substantial Completion Certificate would actually indicate that the petitioner had to its credit a proper certificate issued by the previous organisation namely Haryana State Road Development Corporation. On that basis, learned counsel submits that even this submission on the part of the respondent is contrary to the records of the case.

8. Learned counsel lastly submits that the action of banning business of the petitioner is a serious and drastic civil consequence entailing wide and detrimental ramifications upon the petitioner. He states that no such action can be undertaken without the issuance of a show cause notice prior thereto. He states that there being no such show cause notice emanating from respondent no.1, the banning of business would be nonest in law. He prays that the impugned communication/order dated 9th October, 2023 be quashed and set aside. He also prays that as a consequence, the EMD which has been encashed be refunded to the petitioner with applicable interest.

9. *Per Contra*, Mr. Bhagvan Swarup Shukla, learned CGSC appears for respondent no.1 and submits that the impugned communication/order fully



satisfies the requirements of law and as such, need not be interdicted. He states that the reasons on the basis whereof the impugned communication cancelled the bid documents of the petitioner and simultaneously initiated action for forfeiture of EMD and banning of business of the petitioner, has been succinctly stated in the counter affidavit. He draws our attention to the counter affidavit filed on behalf of the respondent and states that the petitioner is guilty of concealment regarding previous works executed by it and appended with the bid documents. He states that this issue was considered by respondent no.1 and upon finding that the petitioner had concealed material facts, invoked the undertaking tendered by the petitioner *vide* Annexure-M dated 6th July, 2023, in particular Clause No.8. He submits that as per Clause No.8, the petitioner undertook that in case the contents of the certificate submitted by it are found to be false or incorrect, it shall lead to forfeiture of bid security besides banning of business for a period upto two years. He states that as a consequence of such concealment, respondent no.1 rightly invoked the undertaking contained in Annexure-M leading to the issuance of impugned communication/order. As per learned CGSC, the respondent had taken appropriate action in terms of the stipulations contained in the tender documents. As such, he submits that no fault can be attributed to respondent no.1 for the issuance of the impugned communication/order which need not be interfered with.

10. Learned CGSC invites the attention of this Court to page 87 of the paper book, particularly to Clause 2.3.2 in respect of bid capacity which is



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applicable for tender of value more than Rs.20 Crores. In particular, he refers to sub clause (B) and the note appended thereto. He refers to sub para (ii) of para (a) of the Note to submit that the said Clause required the bidders to furnish details of existing commitments and balance amount of ongoing works as per the prescribed Proforma in Annexure-H. He states that the petitioner had violated this condition stipulated in the tender documents. He submits that having violated this condition as narrated above, respondent no.1 was well within its right and jurisdiction to cancel the bid documents of the petitioner, *vide* the impugned communication. He thus prays that the present petition be dismissed.

11. We have heard learned counsel for the parties and perused the documents on record.

12. It would be relevant at the outset to examine the impugned communication/order dated 9th October, 2023 sent *vide* an e-mail. The same is reproduced hereunder:

“
ashishsaini
to me
Fri, 17 Nov, 13:42 (13 days ago)

..... .. Forwarded message.....
From: <sysadmin.eps@cris.org.in>
Date: Mon, 9 Oct, 2023, 10:43 am
Subject: Your Bid Status for Tender No: 74-W-6-200-WA-TKJ
To: <ashishsaini792@gmail.com>

M/s SHIVA BUILDTECH PRIVATE LIMITED-DELHI,

Your Techno-Commercial Bid against tender No. 74-W-6-200-WA-TKJ, which was due on 11-JUL-2023 11:30:00 Hrs has been found technically unsuitable due to following reasons:



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Comments: Reject Annexure-H incorrect, Initiate action for forfeiture of EMD & banning of business.

*Thanks & Regards,
CAO/C/NR
CAO-C-NR-ENGG/NORTHERN RLY.*

This is a system generated mail. Please do not reply to the mail.”

13. *Ex facie*, the said communication/order is bereft of any reason, much less a cogent reason. Apart from stating that the Techno-Commercial Bid of the petitioner was found technically unsuitable due to Annexure-H being incorrect and therefore, as a consequence entitling the respondent to initiate action for forfeiture of EMD and banning of business of the petitioner, there is no reference to as to what are the actual reasons for rejection. It is trite that any order of rejection must contain atleast a brief reference to the reasons for such rejection so as to enable the party, who is likely to be affected by such a decision, to challenge the same in a Court of Law. The said principle has been crystallized by the Supreme Court in ***Patel Engineering limited vs. Union of India And Another***, (2012) 11 SCC 257.

The relevant paragraphs are extracted hereunder:

10.Lastly, the learned counsel submitted that the punishment of blacklisting (for a period of one year) is disproportionate to the wrong committed by the petitioner as it would have the effect of not only debarring the petitioner to deal with the second respondent for a period of one year (which is almost over as on today) but the stigma would remain and have a very adverse effect on the business prospects of the petitioner.

11.On the other hand, the learned counsel for the respondent argued that the respondent is entirely justified in blacklisting the petitioner in view of the huge loss caused by the petitioner, which is estimated at Rs 3077 crores over a period of 25 years to the second respondent, an



instrumentality of the State. The learned counsel heavily relied upon the conclusion of the High Court that the petitioner has "no one else to blame, but itself".

12. The second respondent though a statutory body, the authority of the second respondent to blacklist the petitioner is not based on any express statutory provision.

13. The concept of "blacklisting" is explained by this Court in Erusian Equipment & Chemicals Ltd. v. State of W.B. as under: (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. "

14. The nature of the authority of the State to blacklist the persons was considered by this Court in the abovementioned case. and took note of the constitutional provision (Article 298), which authorises both the Union of India and the States to make contracts for any purpose and to carry on any business. The 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. 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' 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-whereby 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.”

14. To say the least, the impugned communication/order is perfunctory, whimsical, unjust and non-speaking. The reference to the explanations and reasons cited in the counter affidavit would also not endure to the benefit of respondent no.1. We draw strength in our view from a judgment of the Supreme Court in **Commissioner of Police, Bombay vs. Gordhandas Bhanji**, AIR 1952 SC 16, which was also followed in **Mohinder Singh Gill vs. Chief Election Commissioner**, (1978) 1 SCC 405. The relevant paragraph of **Mohinder Singh Gill**(supra) is extracted hereunder:-

*“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in **Commr. of Police, Bombay v. Gordhandas Bhanji**:*

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

Orders are not like old wine becoming better as they grow older.”

15. This principle has consistently been followed by the Supreme Court in various judgements uptill **United Air Travel Services vs. Union of**



India, (2018) 8 SCC 141. It is thus a well settled principle of law and forms the doctrine of *Stare Decisis*.

16. It is manifest from the aforesaid ratio that an Authority is under an obligation to at least give brief reasons, if not a detailed explanation in the order which drastically impacts the parties and has detrimental civil consequences. In the present case, we find that the respondent no.1 has given no reason at all. Applying the ratio of ***Mohinder Singh Gill*** (supra) to the facts of the present case, if we are to eschew the contents of the counter affidavit giving reasons for issuance of the impugned communication/order dated 9th October, 2023, the impugned communication cannot withstand the scrutiny of law. Undoubtedly, the impugned communication/order dated 9th October, 2023 must and is quashed and set aside.

17. Another compelling reason to reach the aforesaid conclusion would also be an apparent error on the face of the record. In that, though the impugned communication/order refers to the reason of rejection, on the basis of an incorrect Annexure-H being appended to the bid document, the explanation tendered in the counter affidavit refers to Annexure-M. Annexure-M appears to be an undertaking which is distinct from the contents of Annexure-H. Whether the reference to Annexure-H in the impugned communication/order is an error or a deliberate conscious reference, has not been clarified by the respondent no.1. In these compelling circumstances too, we have no choice other than to conclude that the impugned communication/order dated 9th October, 2023 is not only



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bereft of reasons but is also materially defective, rendering the same incongruous with the stand taken in the counter affidavit. Thus, the impugned communication dated 9th October, 2023 is quashed and set aside.

18. As a consequence of quashing the impugned communication/order dated 9th October, 2023, the action initiated for forfeiture of EMD and the banning of business of the petitioner is also liable to be and are set aside. However, we make it clear that the respondent shall issue a show cause notice within one week from the date of receipt of this order, in accordance with the law in respect of the action it seeks to undertake for the forfeiture of EMD as also for banning of the business of the petitioner. We are informed that the tender has already been awarded and the successful party has already commenced the works and is midway in the implementation of the same. Thus, we are not inclined to interfere with the contract which has been awarded to the successful party.

19. In view of the aforesaid directions, the writ petition is allowed and disposed of alongwith pending application.

ACTING CHIEF JUSTICE

TUSHAR RAO GEDELA, J

25th July, 2024/rl

Signature Not Verified

Digitally Signed
By: MADHU KARDANA
Signing Date: 29.07.2024
17:52:55

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