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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2964/2021

M/S SATYA BUILDERS
A PARTNERSHIP REGISTERED UNDER THE PARTNERSHIP ACT, 1932
HAVING ITS REGISTERED OFFICE AT 20A, NOBLE ENCLAVE, OLD DELHI-GURGAON ROAD, HARYANA-122015 AND IN THE PRESENT PROCEEDINGS REPRESENTED BY MR RAJAT SHARMA ONE OF THE PARTNERS OF THE PETITIONER FIRM.

VERSUS

NORTHEAST FRONTIER RAILWAY
REP BY THE CHIEF ENGINEER/CONSTRUCTION -IV FOR AND ON BEHALF OF THE PRESIDENT OF INDIA, NORTHEAST FRONTIER RAILWAY, MALIGAON, GUWAHATI, ASSAM-781011

2:NORTHEAST FRONTIER RAILWAY
REPRESENTED BY THE GENERAL MANAGER FOR AND ON BEHALF OF THE PRESIDENT OF INDIA
NF RAILWAY
MALIGAON
GUWAHATI 78101

Advocate for the Petitioner : MS. N UPADHYAY,

Advocate for the Respondent : SC, NF RLY, MR A DASGUPTA,MR G GOSWAMI

BEFORE

HONOURABLE MR. JUSTICE KARDAK ETE

JUDGMENT

Date : 01-04-2025

Heard Mr. P. Mehta, learned counsel for the petitioner. Also heard Mr. A. Dasgupta, learned senior counsel assisted by Mr. G. Goswami, learned counsel for the respondent NF Railway.

2. Challenge made in this writ petition is to the termination notice dated 17.12.2020 issued by the Chief Engineer/Con-4, NF Railway, Maligaon, by which, the contract (LOA) is terminated and forfeited the Earnest Money Deposit, Bank Guarantee and Performance Guarantee to the tune of Rs.3,08,93,889.65 (Rupees three crores eight lakhs nine-three thousand eight hundred and eighty nine rupees sixty-five paise) and debarring the petitioner from participation in any and all tenders and doing business for 5 (five) years.

3. The petitioner is a registered partnership firm and claims to be involved in the execution of government infrastructure projects for the last forty years and is an active participants of various tenders issued by different authorities, particularly, in the Northeastern States and also successfully executed several government projects.

4. The case of the petitioner, in brief, is that Northeast Frontier railway issued a tender notice on 14.11.2019 for the work of earthwork in formation for making railway embankments, construction of minor bridges including blanketing work, construction of RCC drain and other connected ancillary works between the km277/0 to 298/0 between, Patiladaha (PTLD) (including)- Barpeta Road (BPRD) (including) DL Section of New Bongaigaon (NBQ) – Agthori (AGT)

BG doubling projects. The petitioner participated in the said Tender process.

5. On having found responsive, the petitioner was awarded the tender vide Letter of Acceptance (LOA) dated 02.06.2020, thereby directed the petitioner to deposit Performance Guarantee before signing of the contract agreement which the petitioner had complied with by submission of Performance Guarantee vide letter dated 29.07.2020 along with Bank Guarantee dated 28.07.2020 issued by the Bank of Maharashtra in favour of the Chief Engineer/Con, Financial Advisor & Chief Accounts Officer/Con, NF Railway, Maligaon, Guwahati to the tune of Rs.2,76,70,989.65/- (Rupees two crore seventy six lakh seventy thousand nine hundred and eighty nine and sixty five paisa) only. The petitioner mobilized resources at the project site by investing an amount, which is close to Rs.1 crore, to ensure timely execution of the work awarded to him even before signing of the contract agreement, which was inexplicably delayed by the respondent, which now stands to be vain, because of the impugned termination and penalty imposed upon the petitioner.

6. It is the contention of the petitioner that after months of inactivity on the part of the respondent authorities to sign the contract and get the execution of the work, the respondent vide show cause notice dated 01.12.2020 apprise the petitioner that the document of credentials submitted by the petitioner has been, upon verification, returned as not found in the office record from the Delhi Development Authority and sought reason as to why the respondent should not forfeit the Earnest Money Deposit, Bank Guarantee and Performance Guarantee and debarred the petitioner for a period of five years from participating in any tender process and carrying out any business.

7. The petitioner responded to the said show cause notice by stating that the document was old and placed with the tender document by the petitioner’s staff

which went unverified due to paucity of time in submission of their bid and thus an outdated document of credentials have been placed before the respondent. The petitioner has also offered another document of credential in the form of Certificate of Completion issued by the National Highway Infrastructure Development Corporation Limited (in short NHIDCL).

8. The respondent authorities vide termination notice dated 17.12.2020, terminated the contract on the basis of the tender document and General Condition of Contract (GCC in short) stating that the petitioner has admitted the previous documents of credential to be false, thereby, terminating the contract vide LOA and forfeited the earnest Earnest Money Deposit, Performance Guarantee and Bank Guarantee cumulatively amounting to Rs.3,08,93,889.65/- and debarring the petitioner for five years from participating in any tender process and carrying out business.

9. It is the contention of the petitioner that the respondent authorities without considering the completion certificate issued by NHIDCL and on the basis of wrong interpretation of the tender document and provision of the GCC, thereby illegally stating that the petitioner has admitted the previous document of credential to be false has resorted to above actions by terminating the contract with a consequential forfeiture of Earnest Money Deposit, Performance Guarantee and Bank Guarantee cumulatively and also debarred the petitioner for five years from participating in any tender process and carrying out business. The petitioner contends that a representation dated 29.01.2021 has been submitted before the respondent authorities seeking release of the Earnest Money Deposit, Performance Guarantee and Bank Guarantee cumulatively amounting to Rs.3,08,93,889.65/- which has been duly received by the respondent authorities. However, they chose to feign ignorance and to not

respond to the same.

10. Mr. P. Mehta, learned counsel for the petitioner, submits that the respondent authorities have failed to verify the authenticity of the tender documents submitted by the petitioner at the stage of document review and issued the Letter of Acceptance dated 02.06.2020 in favor of the petitioner. The undue delay by the respondent authority in verifying the completion certificate is evidently arbitrary and prejudicial to the petitioner's interest. Timely verification would have allowed the petitioner to promptly rectify any errors made. The petitioner has been deprived of this opportunity due to the lack of timely validation of the documents. The respondent authorities have issued the Letter of Acceptance to the petitioner dated 02.06.2020. But they have failed to sign the Contract with the petitioner for many days. The said practice highlights the arbitrary action of the respondents, which warrants proper judicial review by this Hon'ble Court. It is evident that that the respondents harbored an intention to deliberately harass the petitioner from the outset. Despite the absence of a signed Contract between the parties, the Respondent, in adherence to the Letter of Acceptance (LOA), initiated the works at the site and issued the Performance guarantee as per the terms outlined in the LOA itself. Such action by the respondents stand as clear violation of natural justice and are deemed arbitrary in their nature.

11. He submits that the respondents have cited Clause 62 (1) (xiv) (B) (f) of the General Conditions of Contract as grounds for terminating the contract. As per the mentioned clause, if a tenderer submits a false document or certificate regarding their credentials, the tenderer should rectify the error promptly if it is amendable. In the instant case, the petitioner submitted a bid accompanied by a contested completion certificate. The respondents verified the document only

after issuing the Letter of Acceptance to the petitioner. Upon verification, it was discovered that the ompletion certificate was not genuine, as the issuing authority had no record. Subsequently, the respondent issued a show cause notice to the petitioner. The petitioner acknowledged the mistake made during the bid submission and provided an alternate completion certificate issued by NHIDCL. He submits that the respondent authorities did not incur any losses due to the discrepancy caused by the petitioner. Hence, the forfeiture of the Earnest Money Deposit, Performance Guarantee, and Security Deposit is arbitrary, irrational, unfair, unjust, unreasonable and not in consonance with the principles of natural justice.

12. Mr. P. Mehta, learned counsel submits that the respondent authorities ought not to have blacklisted the petitioner merely on the ground of a mere clerical error. The mistake committed by the workers of the petitioner is a mere clerical error and a bona fide attempt has been made by the petitioner by providing the respondent with another work completion certificate as issued by the NHIDCL. The said Completion Certificate was submitted by the petitioner before the respondent authorities along with the Reply to the Show Cause Notice. The Respondents have failed to take into consideration the justification provided by the Petitioner in the Reply to the Show Cause Notice. Even though the Petitioner accepted the clerical mistake committed at the time of submission of bid and rectified the same by providing another competition certificate of similar nature, still the Authority issued the Termination Notice in a mechanical nature. The respondents failed to consider the response provided by the Petitioner to the show cause notice. Consequently, it appears that the show cause notice was merely a procedural formality, and the termination notice was issued in a mechanistic fashion without due consideration of the petitioner's response. Hence, the forfeiture of the Earnest Money Deposit, Performance Guarantee, and Security Deposit is inconsistent with the principles of natural justice.

13. In support of his submissions, Mr.P. Mehta, learned counsel, has placed reliance on the following judgments:-

i. **M/S S & P Infrastructure v. National Highways & Infrastructure Development Corporation Limited** reported in **2019 DHC 3097,**

ii. **Isolators and Isolators v. Madhya Pradesh Madhya Kshetra Vidyut Vitran Company Limited & Anr.** reported in **(2023) 8 SCC 607,**

iii.**M/s Avinash EM Projects Private Limited v. M/S Gail India Limited** reported in **2015 DHC 1205,**

iv.**Arvind Kumar Singh v. The State of Bihar & Ors. [MANU/BH/0342/2023],**

v. **Assam Air Products Private Limited & Ors. V. Oil India Limited & Ors.** reported in **2023 (3) GLT 97,**

vi.**Sushil Kumar Thard v. National Jute Manufacturers Corporation Limited**, reported in **2023 SCC Online Cal 3157,**

vii.**Atibir Industries Company Limited v. Central Coalfields Limited & Ors.** reported in **2023 (3) J.L.J.R. 698.**

14. On the other hand, Mr A. Dasgupta, learned senior counsel for the respondents, submits that the petitioner has secured the contract by fraud. Fraud has been defined under section 17 of the Indian contract act 1872. It means and includes any of the acts as contained in clause 1 to 5. Clause 1 states that the suggestion, as a fact, of that which not true, by one who does not believe it to be true. Clause 2 says that the active concealment of a fact by one having knowledge or believe of that fact.

15. In the instant case, the petitioner while submitting the document of his credentials stated that they had executed some contract of Delhi Development Authority(DDA). A document in this regard was furnished. If they had not executed any such work, how such document come into their possession so it is evident beyond any doubt that the document submitted by them to prove their due credential is a manufactured document which has been used by the petitioner. It is stated by the petitioner that submission of these documents was an inadvertent mistake committed by their employee. Even if we assume that

this is a mistake done by their employee but the fact remains the same that they had annexed a document for performance of contract which was not performed by them. So, by any stretch of imagination it cannot be said that the contract was not procured by fraud.

16. He referred to the case of **Avijantrik Infratech Pvt. Ltd. Vs. The Union of India and Ors.** reported in **2024 (1) GLT 275**, wherein the writ petitioner/contractor submitted wrong credential which they do not possess and on consequent detection of the same the Railway Authority Blacklisted the petitioner.

17. Learned senior counsel, Mr. Dasgupta submits that pursuant to the above tender process initiated by the respondent railway dated 14.11.2019 the petitioner participated for the work for Earthwork in formation for making Railway embankment, construction of minor bridges, blanketing work, construction of RCC drain and all other connected ancillary works, construction of RCC drain and all other connected ancillary works between Km 298.00 to 317.73 between Barpeta Road(BPRD) (excluding) Pathsala(PBL) (including) DL section of New Bongaigaon (NBQ) Agthori(AGT) BG doubling project. The petitioner found to be L1 in the said tender process and accordingly Letter of Acceptance (L.O.A) vide letter dated 02.06.2020 was issued to the petitioner.

However, before entering into a contract agreement with petitioner the Railway authority found that petitioner in order to fulfill the eligibility criteria for participating in the instant tender process initiated by the Railways has submitted work order certificate in the pad of Delhi Development Authority(DDA), which was found to be false on re-verification. The petitioner in order to fulfill the technical eligibility criteria as per the tender document/ NIT at Appendix-1, Clause -2, has submitted an experience Certificate issued by Delhi

Development Authority(DDA) dated 20.04.2015 for certain work done for the said authority. The Delhi Development Authority(DDA) in response to a query made by the Railway authority for the purpose of verification of genuineness of the credential certificate submitted by the petitioner has vide its letter No. letter dated 27.11.2020 has confirmed that no such letter was issued by Delhi Development Authority(DDA).

18. He submits that thereafter the Railway authority wrote a letter dated 01.12.2020 to the petitioner asking them to show cause as to why appropriate action shall not be taken against the petitioner a per relevant provision and in accordance with provisions laid down in the Tender Document.

19. He submits that submission of a fake document has a bearing on the contract as indicated in para 62(1)(xiv), (B) (f) of GCC. Accordingly, a note of caution was indicated in the show cause notice itself to the effect that the conduct of the contractor may led to termination of contract. However, when the show cause notice was issued no contract was signed so the question of taking action on the basis of the para 62(1)(xiv), (B) (f) of GCC does not arise and it is only a note of caution. No action under this para was taken. It could not have been taken also because no contract came in force. Further action of blacklisting was taken in terms of tender clause. Forfeiture of Earnest Money Deposit (EMD), Performance Guarantee (PG) and Security Deposit (SD) were also taken in terms of tender clause and as is evident before taking any action against the petitioner show cause notice also been issued for violation of the tender condition. In the show cause notice it was also indicated that contractors action may entail him termination of contract as indicated in para 62(1)(xiv), (B)(f) of GCC. The Railway authority has not invoked this clause. The Railway authority only invoked the tender clause mentioned in the show cause notice dated

01.12.2020. As the clause 62(1)(xiv), (B) (f) of General Condition of Contract(GCC) is not invoked question of compliance of it does not arise.

20. Mr. Dasgupta, learned Senior counsel submits that the gravity of the offence committed by the petitioner in order to fulfill the eligibility criteria for participating in the instant tender process initiated by the Railways by submission of work order certificate in the pad of Delhi Development Authority (DDA), which was found to be false on re-verification is a grave misconduct and the action taken by the Railway Authority is proportionate to the gravity of the misconduct. Therefore, the writ petition is liable to be dismissed with cost.

21. Mr. Dasgupta, learned Senior counsel, has relied upon the judgment of this Court in the case of **Avijantrik Infratech Pvt. Ltd.** (Supra) wherein this court has observed which are reproduced herein under:-

> "*26. What transpires from the above is that the allegation of use of forged documents as such, has not been denied. What is required to be seen at this stage is the nature of the documents which were forged. The documents pertain to a third party, namely, M/s Singhania Associates which were utilized for submitting the bid by the petitioner. In such a situation, the explanation given that the petitioner was unaware that the documents were forged and fake becomes absolutely difficult to be accepted.*
>
> *28. From a reading of the various case laws placed on record and relied upon by the parties, it emerges that since blacklisting is an action which has adverse civil consequences, the same cannot be issued unilaterally and has to be preceded by an opportunity to be given to the affected party. The only requirement is that the opportunity should be an effective one wherein the party in question does not suffer any legal prejudice. The requirement of affording a personal hearing after issuing a show-cause notice, would entirely depend on the facts and circumstances of the case. As laid down by the Hon'ble Supreme Court in the landmark case of Erusian Equipment & Chemicals Ltd. (supra) what is sine qua non before imposing the penalty of blacklisting is a reasonable opportunity.*

> *29. In the instant case, however, it appears that a proper opportunity was given by issuing the show-cause notice dated 11.08.2021 where a specific allegation was leveled. The said allegation was not denied in its entirety and rather use of forged/fake documents was admitted. In that view of the matter, this Court is of the view that demanding for a further personal hearing would be an useless formality, an expression which was used by the Hon'ble Supreme Court in the case of Aligarh Muslim University Vs. Mansoor Ali Khan reported in MANU/SC/0533/2000: 2000: INSC:416: (2000); SCC 529".*

22. Due consideration has been extended to submissions advanced by the learned counsel for the parties and also perused the materials available on record.

23. Pursuant to the Tender process initiated by the respondent railway dated 14.11.2019 the petitioner participated for the execution work for Earthwork in formation for making Railway embankment, construction of minor bridges, blanketing work, construction of RCC drain and all other connected ancillary works, construction of RCC drain and all other connected ancillary works between Km 298.00 to 317.73 between Barpeta Road(BPRD) (excluding) Pathsala(PBL) (including) DL section of New Bongaigaon (NBQ) Agthori(AGT) BG doubling project. The petitioner found to be L1 in the said tender process and accordingly Letter of Acceptance (L.O.A) vide letter dated 02.06.2020 was issued to the petitioner.

24. Before signing the contract agreement the respondent authorities have found that petitioner in order to fulfill the eligibility criteria for participating in the tender process, has submitted work order certificate issued by the Delhi Development Authority, which has been found to be false on re-verification. Thereafter, the respondent authorities issued show cause vide dated

01.12.2020 to the petitioner asking as to why appropriate action shall not be taken against the petitioner as per relevant provision. The petitioner submitted the reply by stating that the document was old and placed with the tender document by the petitioner's staff which went unverified due to paucity of time in submission of their bid and thus an outdated document of credentials have been placed before the respondent. Thereafter, the petitioner has offered another document of credential in the form of Certificate of Completion issued by the NHIDCL.

25. Admittedly, the petitioner has not denied the submission of false documents of credential in the tender process pursuant to the tender dated 14.111.2019 based on which the petitioner was found to be responsive and issued letter of acceptance. The only justification provided by the petitioner is to the effect that the said document was old which was placed with the tender documents by the petitioner's staff, which went unverified due to paucity of time in submission of bid and thus an outdated document of credentials have been placed before the respondent authorities and thereafter the petitioner had offered document of credentials in the form of certificate of completion issued by NHIDCL.

26. Having considered the admission of submission of false credential documents submitted by the petitioner, the issues required to be determined in this present proceedings are as to whether the action of the respondent authorities in resorting to forfeiture of Earnest Money Deposit, Bank Guarantee and Performance Guarantee to the tune of Rs.3,08,93,889.65 (Rupees three crores eight lakhs ninety-three thousand eight hundred and eighty nine rupees sixty-five paise) and debarring the petitioner for a period of five years is in accordance with the terms of the tender or GCC. And/or as to whether the

action of the respondent in forfeiture of Earnest Money Deposit, Bank Guarantee and Performance Guarantee to the tune of Rs.3,08,93,889.65 (Rupees three crores eight lakhs ninety-three thousand eight hundred and eighty nine rupees sixty-five paise) and debarring the petitioner for a period of five years from any and all tenders is proportionate or not.

27. To appreciate the issues, I would refer to the relevant terms and conditions of the tender, which has been provided by way of additional special condition of contract and the GCC.

28. Appendix III to the instruction to the tender provides as follows:-

> "*A.(v) If any one or more of the detailed information furnished in the tenderer's documents is proved to be false at any stage, the contractor/firm will be debarred then and there, from all the commitments connected with the tender and his/their tender/contract will be rejected/terminated and further action will be taken as per extant rules.*
>
> *(vii) The tenderers shall submit a notarized affidavit on a non-judicial stamp paper stating that they are not liable to be disqualified and all their statements/documents submitted along with bid are true, and factual. Standard format of the affidavit to be submitted by the bidder is enclosed as Annexure-V. Non submission of an affidavit by the bidder shall result in summary rejection of his/their bid. And it shall be mandatorily incumbent upon the tenderer to identify, state and submit the supporting documents duly self-attested by which they/he is qualifying the Qualifying Criteria mentioned in the Tender Document. It will not be obligatory on the part of Tender Committee to scrutinize beyond the submitted document of tenderer as far as his qualification for the tender is concerned.*
>
> *B. (a) The Railway reserves the right to verify all statements, information and documents submitted by the bidder in his tender offer, and the bidder shall, when so required by the Railway, make available all such information, evidence and documents as may be necessary for such verification. Any such verification or lack of such verification, by the railway shall not relieve the bidder of its obligations or liabilities hereunder nor will it affect any rights of the railway thereunder.*
>
> *(b) In case of any wrong information submitted by tenderer, the contract shall be terminated, Earnest Money Deposit (EMD), Performance Guarantee (PG) and*

Security Deposit (SD) of contract forfeited and agency barred for doing business for a period of upto 5 (five) years."

29. Clause 62(1)(A) of GCC provides as follows:-

"*62(1) (A) At any time after the tender relating to the contract, has been signed and submitted by the Contractor, being a partnership firm admit as one of its partners or employee under it or being an Incorporated company elect or nominate or allow to act as one of its directors or employee under it in any capacity whatsoever any retired Engineer of the Gazetted rank or any other retired Gazetted Officer working before his retirement, whether in the executive or administrative capacity, or whether holding any pensionable post or not, in the Railways for the time being owned and administered by the President of India before the expiry of one year from the date of retirement from the said service of such Engineer or Officer unless such Engineer or Officer has obtained permission from the President of India or any officer duly authorized by him in this behalf to become a partner or a director or to take employment under the contract as the case may be, or*

(B) Fail to give at the time of submitting the said tender:
(a) The correct information as to the date of retirement of such retired Engineer or retired officer from the said service, or as to whether any such retired Engineer or retired officer was under the employment of the Contractor at the time of submitting the said tender, or
(b) The correct information as to such Engineers or officers obtaining permission to take employment under the Contractor, or
(c) Being a partnership firm, the correct information as to, whether any of its partners was such a retired Engineer or a retired officer, or
(d) Being in incorporated company, correct information as to whether any of its directors was such a retired Engineer or a retired officer, or
(e) Being such a retired Engineer or retired officer suppress and not disclose at the time of submitting the said tender the fact of his being such a retired Engineer or a retired officer or make at the time of submitting the said tender a wrong statement in relation to his obtaining permission to take the contract or if the contractor be a partnership firm or an incorporated company to be a partner or director of such firm or company as the case may be or to seek employment under the Contractor.
(f) Submits copy of fake documents/certificates in support of credentials, submitted by the tenderer
Then and in any of the said Clause, the Engineer on behalf of the Railway may serve the Contractor with a notice in writing to that effect and if the Contractor does not within seven days after the delivery to him of such notice proceed to make good his default in so far as the same is capable of being made good and carry on the work or comply with such directions as aforesaid of the entire satisfaction of the Engineer, the Railway shall be entitled after giving 48 hours' notice in writing under the hand of the Engineer to rescind the contract as a whole or in part or parts and after expiry of 48 hours' notice, a final termination notice should be issued."

30. Bare perusal of the above clauses of terms and conditions shows that if any one or more of the detailed information furnished in the tenderer's documents is proved to be false at any stage, the contractor/firm will be debarred then and there, from all the commitments connected with the tender and his/ their tender/ contract will be rejected/terminated and further action will be taken as per extant rules. It will not be obligatory on the part of Tender Committee to scrutinize beyond the submitted document of tenderer as far as his qualification for the tender is concerned. It provides the Railway reserves the right to verify all statements, information and documents submitted by the

bidder in his tender offer, and the bidder shall, when so required by the Railway, make available all such information, evidence and documents as may be necessary for such verification. Any such verification or lack of such verification, by the railway shall not relieve the bidder of its obligations or liabilities hereunder nor will it affect any rights of the railway thereunder. It further provides that in case of any wrong information submitted by tenderer, the contract shall be terminated, Earnest Money Deposit (EMD), Performance Guarantee (PG) and Security Deposit (SD) of contract forfeited and agency barred for doing business for a period of 5 (five) years.

31. Clause 62(1)(A) of GCC, would be applicable after the contract is completed i.e. by signing of the contract agreement. In the present case, undisputedly no contract agreement has been signed, only the Letter of Acceptance (LOA) was issued and therefore, the contract was yet to be concluded. Thus, in my view, above clause of GCC would not be applicable and as such the reliance on the said clause by the learned counsel for the petitioner is misconceived.

32. The terms and conditions of the tender clearly provides that in case of any wrong information submitted by tenderer, the contract shall be terminated, Earnest Money Deposit (EMD), Performance Guarantee (PG) and Security Deposit (SD) of contract forfeited and agency barred for doing business for a period of upto 5 (five) years. Admittedly, the petitioner appears to have submitted false documents of credential and thereby had offered to submit another document from NHIDCL having been found that the credential documents submitted in support of the bid of the petitioner was false. Therefore, the action of the respondent authorities in terminating the contract and imposing the penalty forfeited the Earnest Money Deposit, Bank Guarantee

and Performance Guarantee to the tune of Rs.3,08,93,889.65/- (Rupees three crores eight lakhs ninety-three thousand eight hundred and eighty nine rupees sixty-five paise) and debarring the petitioner for a period of five years from any and all tenders cannot be termed arbitrary and illegal, rather in my view appears to be in accordance with the conditions of tender.

33. Now, this court would refer to the case laws relied on by the learned counsel for the petitioner.

34. In the case **M/S S & P Infrastructure** (Supra), Honb'le Supreme court has held that 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. reported in (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. Thus, the respondent would have the right not to enter into contracts with the petitioner (that is blacklist it) provided that such decision is for cogent reasons and is not capricious, mala fide or unreasonable.

35. The High Court of Delhi in **M/s Avinash EM Projects Private Limited** (Supra), has held which is reproduced herein under:-

> *"38. It is well settled that the High Court while exercising powers of judicial review would be reluctant to substitute its own opinion on the quantum of penalty or punishment imposed. However where the punishment imposed is shockingly disproportionate, interference with the same would be warranted."*

36. In the case of **Assam Air Products Private Limited** (Supra), it has held which is reproduced herein under:-

> *"26. An order of blacklisting has a ripple effect in that once a person is blacklisted by an instrumentality/agency of the State, he can be debarred from participation in respect of other similar processes initiated by the State or other instrumentalities/agencies and as a result, the blacklisted person might be precluded from entering into any business relationship with the State or any of its instrumentalities/agencies in the times to come, thus, virtually resulting into his civil death. It is no longer res integra that with blacklisting many civil and/or evil consequences follow. Blacklisting is described as 'civil death' of a person who is served with an order of blacklisting. An order of blacklisting is indubitably stigmatic in nature and debars the blacklisted person from participating in Government tenders which prevents him from getting Government contracts. The blacklisted person would not be treated in similar manner with others in the field of competition, who are otherwise ought to have treated in similar manner.*
>
> *60. Thus, from the above authoritative pronouncements, it is clear that the consequence of the impugned Order dated 31.08.2018 of banning the petitioner company for a period of 3 [three] years has public law elements in that the impugned decision of banning would have the effect of not only barring the petitioner company from entering into any business relationship with the respondent company for the said period but embedded into it also the ripple effect of precluding the petitioner company from entering into business relationship with the State or any other of its instrumentalities/agencies in the times to come, thus, resulting virtually into its civil death, atleast for a period of 3 [three] years. Even after elapse of 3 [three] years it would take a long period of time for a blacklisted entity to make a revival and thereafter, restore itself to its original business position in terms of reputation, volume of business, etc. it had achieved prior to being blacklisted. On many an occasion, it might not even be possible to make a revival. The impugned action has adverse bearings on the freedoms enshrined in Article 19 of the Constitution of India, that is, freedom to carry on trade or business, subject to reasonable restrictions. A decision which impairs the fundamental right without appropriate justification can be disproportionate. It is settled that the principle of proportionality ordains that the administrative measures should not be harsher than what is necessary and the principle of proportionality is traceable to the principle of reasonableness. If an action taken by an authority is found to be grossly disproportionate in the backdrop of obtaining facts and circumstances of the case, then such a decision is not immune from Judicial scrutiny. If an action taken by the authority is arbitrary. irrational, unfair, unjust or unreasonable, a court of law can interfere with such action by exercising the power of judicial review. The principle of proportionality as a part of judicial review ensures that a decision which is otherwise within the ambit of the administrative authority*

must not be arbitrary, irrational, unfair, unjust or unreasonable. Though in exercising the power of judicial review, the Court is not concerned with the correctness of the decision but while examining the decision making process, it can very well examine whether all the relevant factors touching upon the matter have been taken into consideration and whether the irrelevant factors have been eschewed out of the consideration in arriving at the decision and it is in the process of such consideration, the principle of proportionality enters in the arena. It has been It has been observed in Kulja Industries Limited [supra] that though the power to blacklist a contractor is inherent in the party allotting the contract with no need for any such power being conferred by statute or reserved by contract, but such decision of blacklisting taken by the State or any of its instrumentalities/agencies is subject to judicial review not only on the touchstone of the principles of natural justice but also on the principle of proportionality."

37. The Hon'ble High Court of Calcutta in **Sushil Kumar Thard (Supra),** has held which is reproduced herein under:-

"13. Further, the right to forfeiture of earnest money cannot survive in the absence of proof of actual loss. Forfeiture of earnest money comes within the purview of section 73 as opposed to section 74 of the Indian Contract Act, 1872 where the factum of loss is a sine qua non; that is a seller can only forfeit a nominal amount on the seller proving that the seller has suffered loss caused to it on account of breach of contract by the buyer (Rajesh Gupta v. Ram Avtar, 2022 SCC OnLine Del 1482). Therefore the right to forfeit earnest money cannot be sustained in absence of any actual proof of loss.

14. It is also important to note that where the public entity has discretion whether to forfeit any part of the earnest money, the discretion must be coupled with a duty to prevent exercise of absolute power by the repository of such power. Power must necessarily be with limits and where the concerned authority exercises power, the discretion must be exercised with a view to promoting fairness and aiding equity; Maya Devi (Dead) Throuogh LRS. V. Raj Kumari Batra (Dead) Through LRS., (2010) 9 SCC 486 and Jagmohan Singh v. State of Punjab. (2008) 7 SCC 38.

21. The entire earnest deposit cannot be forfeited since damages, under section 73 of the Contract Act, 1872, is assessed on the date of the complained breach of the contractual terms.

31. The decisions cited on behalf of the respondent distinguishable. Meerut Development Authority v. Association of Management Studies, (2009) 6 SCC 171 cited by the petitioner, relies upon ABL International Ltd. and recognizes that the Court can interfere in contractual matters in case of arbitrariness. State

of Maharashtra v. A.P. Paper Mills Ltd., (2006) 4 SCC 209: AIR 2006 SC 1788 and State of Haryana v. Malik Traders, (2011) 13 SCC 200: AIR 2011 SC 3574 are factually not applicable since in the present case the petitioner was not under any financial constraints at the relevant point of time. National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410 and National Thermal Power Corporation Limited v. Ashok Kumar Singh, (2015) 4 SCC 252 did not deal with deposit of earnest money but with bid security where the bid security was to be forfeited if the bidder withdraws from the bid during the period of validity. Ashok Kumar Singh was also concerned with revocation of tender. Infotech 2000 India Limited v. State of Punjab, AIR 2007 P&H 58 did not discuss the question of remoteness or sufficiency of damages under section 73 of the Contract Act. The unreported judgment of the Madras High Court in Rubina v. The Authorized Officer, Axis Bank Limited held that existence of a forfeiture clause does not imply that the entire amount deposited has to be forfeited and that the right to forfeit must be balanced against the rule of unjust enrichment."

38. The Hon'ble High Court of Jharkhand in **Atibir Industries Company Limited (Supra)** has held which is reproduced herein under:-

"18. However, forfeiture is not automatic in all cases and it has to answer the test of reasonableness and cannot be made arbitrarily. Existence of such a Clause in notice inviting tender does not give an unqualified right to forfeit the earnest money. It is for this reason that Courts in appropriate cases have insisted upon actual loss caused due to the breach. In Fateh Chand v. Balkishan Dass, MANU/SC/0258/1963 :(1964) 1 SCR 515 forfeiture of earnest money was struck down as there was no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property."

39. Perusal of the above case laws relied upon by the learned counsel for the petitioner, shows that same are decided on the contextual facts of each case and are clearly distinguishable with the present case. There would not be any quarrel to the proposition of law as enunciated. Thus, I am of the considered view that the above case laws does not come to the aid of the petitioner.

40. Coming back to the present case, having been considered the facts in its entirety, this court finds that admittedly the petitioner has submitted false credential documents and thereby had offered to submit another document from NHIDCL, realizing that the credential documents submitted in support of the bid of the petitioner was false, therefore, the action of the respondent in terminating the LOA of the contract and forfeiture of the Earnest Money Deposit, Bank Guarantee and Performance Guarantee to the tune of Rs.3,08,93,889.65/-(Rupees three crores eight lakhs ninety-three thousand eight hundred and eighty nine rupees sixty-five paise) does not deserve any interference. However, the penalty of debarring/blacklisting the petitioner from participation in any and all tenders and doing business for 5 (five) years, in my considered view, appears to be little harsh a penalty and therefore, is required to be appropriately interfered with.

41. In view of the discussion and conclusion arrived at herein above, I am of the view that no case is made out for interference with the action of the respondent authorities in forfeiture of the Earnest Money Deposit, Bank Guarantee and Performance Guarantee to the tune of Rs.3,08,93,889.65/-(Rupees three crores eight lakhs ninety-three thousand eight hundred and eighty nine rupees sixty-five paise) only. However, the penalty of debarring/blacklisting the petitioner for five years from participating in any tender and doing business is interfered with. Accordingly, the debarring/blacklisting of the petitioner is set aside and quashed.

42. Writ petition partly allowed stands disposed of, accordingly. No order as to costs.

JUDGE

Comparing Assistant