

(2016) 01 DEL CK 0018

In the Delhi High Court

Case No : W.P. (C) 5667/2015 & CM Appl. 10197/2015

Kalsi Brothers

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Citation : (2016) 01 DEL CK 0018

Hon'ble Judges : Manmohan, J.

Bench : Single Bench

Advocate : Anil Sapra, Senior Advocate, Manish Makhija and Siddharth Handa, Advocates, for the Appellant; Vikas Mahajan, CGSC and Rohan Gupta, Advocate, for the Respondent

Final Decision : Disposed off

Judgement

Manmohan, J.—1. Present writ petition has been filed challenging the Circular dated 20th April, 2015 issued by the respondent No. 2 debarring the petitioner from taking up any work for Director General Married Accommodation Project for a period of five years.

2. Learned senior counsel for the petitioner states that the show cause notice did not indicate or spell out the penalty sought to be imposed, i.e., as to why the petitioner be not debarred. It only stated why "disciplinary/legal action be not taken". This, according to him, deprived the petitioner of a valuable right to oppose the imposition of severe penalty of blacklisting. In support of his submission, he relies upon the judgment of the Supreme Court in Gorkha Securities Services Vs. Government (NCT of Delhi) and Others, , (2014) 9 SCC 105.

3. Learned senior counsel for petitioner further states that the order dated 20th April, 2015 is totally devoid of reasons inasmuch as respondents have not dealt with the explanation/response given by the petitioner.

4. He also states that the order dated 20th April, 2015 is based on the letter

dated 19th February, 2015 written by Executive Engineer, PWD, Mohali, which was received by the respondents after issuance of show cause notice and reply. He states that neither any copy of the same was supplied to the petitioner nor any response/explanation was sought with regard to the same. This, according to him, constitutes a complete violation of the principles of natural justice.

5. He lastly submits that no personal hearing was granted to the petitioner which is a mandatory requirement whenever any action of blacklisting is taken.

6. On the other hand, learned counsel for respondents contends that the petitioner had not been taken by surprise by imposition of a ban for five years, inasmuch as the Press Notice and the document for pre-qualification of contractors provide for only one penalty, i.e. debarment from tender.

7. He submits that the reliance upon the judgment of the Supreme Court in Gorkha Securities Services (supra) is misplaced, inasmuch as the penalty clause (i.e. Clause 27 of NIT) in the said case provided for various penalties which could be imposed by the department and it was in that backdrop, the Supreme Court observed that in such a situation, the department needed to specify in the show cause notice what action it proposed to take.

8. He states that the contention that Clause 2.4 provides for another penalty of "disqualification" in the event the petitioner made false representation is incorrect. He states that the expression "disqualification" occurring in the clause bearing the heading "evaluation criteria for pre-qualification" has to be understood as "not fulfilling the eligibility for issuance of tender" and the same is not to be construed as a penalty. According to learned counsel for respondents, since petitioner had pre-qualified (or declared eligible for issuance of tender), the only penalty that could have been imposed was that of debarring it under Clause 7.

9. He submits that in the entire reply dated 28th January, 2015, there was only one ground which dealt with the allegations made in the show cause notice i.e., the information furnished by the petitioner was based on the certificate issued by IISER, Mohali. Consequently, according to him, there is no violation of principles of natural justice in the present case.

10. In rejoinder, learned senior counsel for the petitioner states that there are no two qualification stages.

11. Having heard learned counsel for parties, this Court is of the view that it is first essential to outline the relevant facts.

12. On 20th May, 2014, a tender was floated by the respondents for "Completion of Balance work for construction of Dwelling Units including Allied Services for officers, JCOS/Or at Kirkee". One of the pre-qualification requirement for participation in the tender was that the contractor should have satisfactorily completed similar works of the following value:-

"Value of satisfactorily completed similar works of value:

One work for Rs. 86.40 Crores

Or

Two Works for 57.60 Crores

Or

Three works for 43.20 Crores."

13. The petitioner was declared as the lowest bidder on 17th December, 2014, based on the Certificate dated 22nd October, 2014 to the effect that the petitioner had satisfactorily completed the construction of hostels etc. for IISER, Mohali Campus amounting to Rs. 88 crores (approx.). The relevant para of the Certificate dated 22nd October, 2014 is reproduced hereinbelow:-

" Date: 22/10/2014

IISER/14/EE-EO/533

TO WHOM IT MAY CONCERN

It is certified that M/s. Kalsi Brothers, Plot No. B-37, Industrial area Phase-III, Mohali have completed the work of C/o Hostel (5,6,7 & 8), Guest House Building Shopping Complex, Underground RCC water tanks, Substations, Auxiliary Staff Quarters, Gate Complex for IISER, Mohali Campus amounting to Rs. 88 crores (appx.). The work have been completed satisfactorily. The work has been executed and completed over the period of four years, i.e. from 02.01.2011 to 30.04.2014. The quality of construction work and their technical proficiency have been found to be very good. We wish them all success in future.

-sd- Executive Engineer"

14. On verification, the information furnished by the petitioner by way of the above certificate was found to be incorrect and misleading. The said verification was done by CPWD, and vide their letter dated 19th February, 2015 and it was confirmed that the work executed by the petitioner in IISER Mohali Campus had been executed under different agreements during the period July 2009 to April 2014 and the amount of largest work executed by petitioner was Rs. 34,13,52,068/-. The relevant portion of letter dated 19th February, 2015 is reproduced hereinbelow:-

"Subject:- Regarding Verification of works executed by M/s. Kalsi Brothers.

Ref. No. Your office letter No. 507786/SK/MON/Pers dated 16.02.2015.

Sir,

With reference to above subject, as per the telephonic discussion on 16.02.2015, it is to mention that the works executed by M/s. Kalsi Brothers in IISER Mohali

Campus have been executed under the different agreement during the period of July 2009 to April 2014. The amount of the largest work executed by M/s. Kalsi Brothers is C/o 2 Nos. Hostel 6 & 8 amounting to Rs. 34,13,52,068.

It is submitted for your further necessary action please."

15. Accordingly, a Show Cause Notice dated 14th January, 2015 was issued to the petitioner proposing disciplinary/legal action. The relevant portion of Show Cause Notice dated 14th January, 2015 is reproduced hereinbelow:-

"4. The performance and the other details pertaining to subject work were asked from IISER Mohali and Executive Engineer, IISER Mohali, Project Division, CPWD, Chandigarh through various letter and by detailment of our representative. Based on their feedback on the subject, it has now been transpired that the work at para 03 above indicated in your prequalification documents was not a single work but were number of works which were executed by your firm from July 2009 to Apr 2014.

5. In view of the above, it is seen that you have given incorrect information and fake/wrong details which is against the spirit of letter transmittal submitted by your firm on an affidavit. Please SHOW CAUSE as to why disciplinary/legal action should not be taken against your firm for the above lapse."

16. On 28th January, 2015, petitioner sent a reply to the show cause notice contending that it had executed "various jobs of a single work" in the same complex for the same employer and the certificate issued by the employer was also to the said effect. On 20th April, 2015, an order was passed by the respondents debarring the petitioner from tendering with respondents for five years.

17. Keeping in view the aforesaid, this Court is of the view that the Press Notice and the document for pre-qualification of contractors provides for only one penalty of debarring/blacklisting. The relevant part of Clause 7 of the Press Notice and the document and pre-qualification of contractors is reproduced hereinbelow:-

"7. Joint Ventures concluded prior to 31st March 2014 are permitted to apply. Foreign firms are not permitted to participate. If any information furnished by the applicant is found incorrect and/or misleading and/or false representation and/or deliberately suppressed information, at a later stage, he shall be liable to be debarred from tendering/taking up of any work for DGMAP project. The department reserves the right to verify the particulars furnished by the applicant independently."

(emphasis supplied)

18. It is pertinent to mention that Clause 1.7 of Information and Instructions for Applicants also reads as under:-

"1.7 Any information furnished by the applicant found to be misleading or false

representation or a deliberately/suppressed information either immediately or at a later date, would render him liable to be debarred from tendering/taking up of work of DG MAP project."

19. Consequently, as only one action could be taken against the petitioner under the Press Notice as well as the document for pre-qualification of contractors, it cannot be said that petitioner has been taken by surprise or that his reply would have been any different had the penalty of debarment been specifically stated in the show cause notice. Therefore, the judgment of the Supreme Court in Gorka Securities Services (supra) is inapplicable to the facts of the present case.

20. Non-furnishing of PWD's letter dated 19th February, 2015 is also immaterial as Clause 7 of the Press Notice specifically provided that the department reserved the right to independently verify the particulars furnished by the tenderer. Moreover, contents of the letter dated 19th February, 2015 had been virtually incorporated in para 4 of the Show Cause Notice dated 14th January, 2015, which has been reproduced hereinabove.

21. This Court is also of the opinion that it is not mandatory in every case of blacklisting to give a personal hearing. Since in the present case a Show Cause Notice had been given and the petitioner's reply had been taken into consideration before passing the blacklisting order, this Court is of the view that the principles of natural justice have been fully complied with. In fact, the Supreme Court in Gorkha Securities Services (Supra) has itself stated, ".....once the show-cause notice is given and opportunity of reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing."

22. However, this Court is of the view that the ban of five years is a bit excessive and disproportionate to the alleged misdemeanour committed by the petitioner. A Coordinate Bench of this Court in M/s. Sai Consulting Engineers Pvt. Ltd. Vs. Rail Vikas Nigam Ltd. & Ors., , 198 (2013) DLT 507 has held as under:-

"32. As far as ban of 5 years on the basis of second show- cause notice is concerned, this court is of the view that the same is imposed for larger period in view of peculiar facts of the present case and particularly earlier ban on the basis of first show-cause for only one year and the same was already spent by the petitioner. Considering the overall facts and circumstances of the present case, I reduce the period of ban from five years to two years with effect from 30th June, 2011."

23. Keeping in view the facts of the present case, this Court reduces the penalty of blacklisting/debarment to a period of one year instead of five years.

24. With the aforesaid modification of the period of penalty, present writ petition and application stand disposed of, but with no order as to costs.