(2024) 04 OHC CK 0139

In the Orissa High Court

Case No : Writ Petition (C) No. 14413 Of 2021

M/s. Gayatri Agency APPELLANT

Vs

Paradip Port Trust And Another RESPONDENT

Date of Decision : 15-04-2024

Acts Referred:
Constitution of India, 1950 — Article 14, 19(1), 21, 226, 227

Citation : (2024) 04 OHC CK 0139

Hon'ble Judges : Dr. B.R.Sarangi, J;G. Satapathy, J

Bench : Division Bench

Advocate : S.K. Dash, S.P. Sarangi, V. Mahapatra, S.K. Sahu, Pradeep Kumar Rout

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J

1. M/s Gayatri Agency, a proprietorship concern, represented though its Senior General Manager, has approached this Court by filing the present writ petition seeking to quash the decision of the Executive Engineer, Port Electrical Division-II-opposite party no.2 taken, vide order dated 12.03.2021 bearing reference no. EM/PED/TECH-13/2019/195 under Annexure-26, terminating the agreement and work order dated 10.08.2019 issued, pursuant to e-tender notice dated 30.10.2019 for "Revamping of 11 KV HT Electrical Distribution Systems at different locations at Paradip", and forfeiting the security deposit of the petitioner and debarring the petitioner from participating in the future tenders of Paradip Port Trust for a period of 7 years with effect from 12.03.2021, by invoking Clause 39 of Instructions to Bidder (ITB) read with Clause 12.4 of General Conditions of Contract (GCC).

2. The facts of the case, in brief, are that the petitioner is a proprietorship concern having registration under the Micro, Small, and Medium Scale Enterprises Act, 2006 & National Small Industries Corporation. It is operating as

an electrical construction agency having its registered office at 427/428, 1st Floor, PO/PS: Pahala, Bhubaneswar, Khordha. The Paradip Port Trust-opposite party No. 1, which is a Public Sector Undertaking under the aegis of the Government of India, issued the e-tender notice on 30.10.2019 for "Revamping of 11 KV HT Electrical Distribution Systems at different locations at Paradip". The petitioner, being found to be the successful bidder, was awarded with the work, vide work order dated 10.08.2020. As per the terms and conditions of tender, the bidders had to procure the RMU-GIS unit, an electrical component for revamping of the electrical distribution system from one of the four vendors approved under the tender documents and, thereafter, carry out revamping work at the work site. The petitioner had submitted its bid by including specifications of the RMU-GIS unit as supplied by M/s Schneider Electric, one of the four such approved vendors. After scrutiny of the same, the opposite parties found the petitioner to be techno-qualified along with four other bidders. Thereafter, the financial bid of the petitioner was also accepted and it was awarded with the work order on 10.08.2020. Immediately thereafter, on 11.08.2020, the petitioner submitted the drawings and Guaranteed Technical Particulars (GTP) for approval of the opposite parties so that it could proceed with material procurement and execution of the work order within the project timelines. The petitioner issued repeated reminders for early approval, but the opposite parties failed to approve the drawings and GTP and, on the other hand, vide impugned order dated 12.03.2021, terminated the work order, forfeited the securities deposited by the petitioner and debarred the petitioner from participating in future tenders of the opposite parties for a period of seven years. Hence, this writ petition.

3. Mr. S.K. Dash, learned counsel appearing for the petitioner vehemently contended that the action taken by the opposite parties is extremely harsh and not proportionate to the default alleged to be committed by the petitioner. As such, the order so passed does not mention about the reasons for the impugned action. Without affording any opportunity of hearing to the petitioner, the cancellation of work order is in violation of Clause 39 read with Clause 6 of the ITB. The delay in approval of the drawings and GTP is attributable to the opposite parties only. The debarment Clause-12 of the General Conditions of Contract provides that the opposite parties may debar the contractor/ petitioner, in the event of termination, due to default. As such, there is no provision for debarment of seven years under the tender conditions, as has been done by the opposite parties. The penalty of debarment is also a discretionary penalty which also indicates that the imposition of such penalty should be accompanied by reasons showing judicious application of mind and not ordinarily.

3.1 It is further contended that as none of the vendors manufacture or supply RMU-GIS for the specifications under the tender documents, the petitioner cannot be said to have defaulted the tender condition, when the condition itself was unworkable, and no fault can be attributed to the petitioner in that regard, when it had been pointed out by the petitioner to the opposite parties time and again. The petitioner had submitted the specifications thereof as supplied by M/s

Schneider Electric, one of the vendors approved by the opposite parties. After scrutiny thereof, the opposite parties declared the petitioner as techno-commercially qualified. Therefore, when the opposite parties were themselves aware and had accepted the specifications of the RMU-GIS unit by the petitioner as a bidder, the actions of the opposite parties in terminating the contract, forfeiting the security of the petitioner and thereafter debarring for a period of 7 years on the grounds of alleged non-compliance with RMU-GIS specifications under the tender documents subsequently, are arbitrary, unreasonable and contrary to the provisions of law. Debarment of the petitioner for a period of seven years amounts to blacklisting. It does not pertain to any particular contract, as the blacklisting order involves civil and evil consequences. It casts a slur. It creates a barrier between the person blacklisted and the Government in the matter of transaction. Therefore, the blacklists are instruments of coercion. More so, such order, having been passed without complying with the principles of natural justice, cannot be sustained in the eye of law. Therefore, he seeks for quashing of the order dated 12.03.2021 under Annexure-26. To fortify his argument, reliance has been placed to the decision of the apex Court in Daffodills Pharmaceuticals Ltd. and another v. State of Uttar Pradesh and another, (2020) 18 SCC 550 and of this Court in the case of Ram Kumar Agrawal Engineers Pvt. Ltd v. State of Odisa, 2022 SCC OnLine Ori 804, in which one of us (Dr. Justice B.R. Sarangi) was a member.

4. Mr. P.K. Rout, learned counsel appearing for the opposite parties-Paradip Port Trust, vehemently contended that before blacklisting the petitioner, due opportunity of hearing was given to the petitioner and, as such, despite giving adequate opportunities on 24.11.2020, 05.01.2021, 21.01.2021 and 29.01.2021 under Annexure-E/2, since the petitioner did not adhere to the terms of the contract, action was taken for termination of contract and also imposition of penalty of debarment for a period of seven years. Thereby, the order impugned is well justified and does not warrant interference of this Court at this stage.

5. This Court heard Mr. S.K. Dash, learned counsel appearing for the petitioner and Mr. P.K. Rout, learned counsel appearing for opposite parties in hybrid mode and perused the records. Pleadings have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being disposed of finally at the stage of admission.

6. Before delving into the issue involved, the relevant provisions are quoted hereunder:-

GENERAL CONDITIONS OF CONTRACT

“6.0 LIQUIDATED DAMAGE: (L. D.) Unless otherwise specified, in case of delay in completing the work, liquidated damage shall be charged to the Contractor at the rate 0.25% of the contract price for a delay of one week or part thereof subject to a maximum of 5% of the contract price if the original execution period is 90 days or more. Where the original execution period is less than 90 days, liquidated damage shall be charged to the Contractor at the rate of 0.1% of the contract price for a delay of one day or part thereof subject to a maximum of 5% of the contract value. Where the Liquidated Damage amount exceeds the maximum limit, Paradip Port Trust reserves the right to: - i) Terminate the contract and / or ii) Forfeit the Initial Security Deposit (ISD)."

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"12. TERMINATION FOR DEFAULT:

12.1 The Board may, without any prejudice to any other remedy for breach of contract, by written notice of default sent to the Contractor. terminate 1he Contract in whole or in part:

i) if the Contractor fails to execute the work within the period as specified in the Contract, or any extension granted by the Board:

ii) if the Contractor fails to perform any other obligation under the contract and if the Contractor does not cure, after receipt of a notice of default, its failure within the time specified in the notice. The notice of default shall specify the nature of default as well as the time within which the default has to be cured by the Contractor.

12.2. In the event of Board's termination of the contract in whole or in part the Board may execute the remaining work or procure goods similar to those undelivered by the Contractor, and the Contractor shall remain liable to the Board for any excess cost for such works or goods and risk, if any.

12.3 No payment shall be released in favour of the Contractor till all the balance works are completed in all respects. After the balance works arc completed the Board may consider payment for the items / goods that have been completed / supplied by the Contractor and accepted by Paradip Port Trust after adjustment of any additional cost that have been incurred for completing the balance works.

12.4 In case of termination of contract for default by the Contractor, the Board may forfeit the initial security deposit and may not permit the Contractor to participate in any of the future tender of Paradip Port Trust.

12.5 The contract may be terminated by either party by giving written notice to the other, at least 90 days in advance and neither party shall have any right of any claim on the other on account of such termination."

"13.0 RESOLUTION OF DISPUTE:

a. The Executing office and the Consultant shall make every effort to resolve ay disagreement or dispute arising between them in connection with the contract amicably. as per terms conditions of contract by direct informal negotiations. Incase of non-resolve, the dispute shall be referred to CME, PPT for amicable settlement. However, in case of failure of negotiation bethveen the CME and the Contractor, the parties shall refer their present and future disputes relating to the contract itself or arising out of or concerning or in connection with or in consequence of the contract to the chairman PPT whose decision shall be final and binding on both the parties. The contract shall be governed by The Indian Contract Act, 1872.

b. JURISDICTION OF COURTS: All disputes which could not be resolved at the intervention of Chairman, PPT shall be subjected to exclusive jurisdiction of courts at Kujang only."

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"20. SUPPLY OF MATERIALS AND EQUIPMENT:

On request of the Contractor, Port Trust may supply materials and/or provide equipment to the Contractor for the work subject to availability and Contractor's acceptance of the prevailing Port Trust conditions.

On request of Paradip Port Trust (PPT), to avoid delay, the Contractor shall supply materials / spares which are not available with PPT and not included in the scope of the Contractor and payment for such supply shall be made by PPT as per actual on the basis of documentary evidences like purchase vouchers etc."

INSTRUCTION TO BIDDERS

"7.0 CLARIFICATION ON BIDDING DOCUMENTS:

A prospective Bidder requiring any clarification (pre-bid queries) on the Bidding Documents may request Paradip Port Trust online in the e-procurement portal using his DSC; provided the questions are raised during the period as mentioned in the TCN / Contract data/home page of portal. The identity of the bidder will not be disclosed by the system. Reply to clarifications shall be sent by PPT only if the clarifications requested for, are considered appropriate by PPT. The clarifications given by PPT will be visible to all the bidders intending to participate in the tender.

After evaluation of techno-commercial bids, the information on qualification / disqualification of the participant bids along with the reason for disqualification will be published in the e-procurement portal upon which the disqualified bidders will receive system-generated communication along with reason for disqualification of respective bid(s). The unsuccessful bidder may choose to represent in writing over rejection of its bid to the officer inviting tender, prior to the date of opening of price bid as notified in the e-procurement portal. No such representation shall be entertained after opening of price bids, over rejection of its bid.

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"39.0 TIME IS THE ESSENCE OF THE CONTRACT: Time is the essence of the contract and the Contractor shall ensure that all the obligations under the Contract re completed within the agreed lime schedule. The Contractor shall be solely responsible for all the delays

including the delays caused by its vendor's. In case of delay in progress of the works, Paradip Port Trust reserves the right to withhold payment, cancel the contract unilaterally or complete the work departmentally or by engaging another agency at the cost and risk of the contractor.

SPECIFIC CONDITIONS OF CONTRACT

25. Reference Standards Standard Description

Standard

Description

IS 3427

AC metal enclosed switchgear and control gear for rated voltages above I kV and up to

and including 52 kV

IS 12063

Classification of degrees of protection provided by enclosures of electrical equipment

IS 9920 (Parts

1 to 4)

High Voltage Switches

IS 9921

(Parts 1 to 5)

Specification for AC disconnectors and earthing switches for voltages above 1000 V

IS 13118

HV AC Circuit Breakers.

IS 10601

Dimensions of terminals of HV Switchgear and Control gear

IS 12729

General requirements of

switchgear and control gear for voltages exceeding 1000 V

IEC 1330

High voltage/ low voltage

prefabricated substations

IEC 60694

Common clauses for MV

switchgear standards

IEC 6081

Common clauses for MV switchgear standards

IS 2705

Monitoring and control

IS 3156

Current Transformations

IS 8686

Voltage transformations

IEC 61171-

200

Standards for high voltage metal clad switchgear up to 52 KV.

IEC 60480

Guidelines for the checking

and treatment of sulphr hexafluoride (SF6) taken from electrical equipment and

specification for its re-use

IEC60529

Degrees of protection provided by enclosures (IP Code)

IEC60616-DB

General symbols of diagram

IEC60688

Electrical measuring Transducers for coverting a.c. electrical quantity to analogue or digital signals.

IEC60694

Combined specifications for high voltage switchgear and control gear standard

IEC 61000

Electromagnetic compatibility (EMC)

IEC 61634

High voltage switchgear and control gear-Use and handling of sulphur hexafluoride (SF6) in High voltage Switchgear and Control gear

IEC 62261

Part High voltage switchgear and control gear (Part 100 High voltage alternating- current circuit breakers. Part 200: High voltage Switchgear and control gear Part 200 AC meter enclosed switchgear and for rated voltages above -KV and up to and including 52kV)

IEC 61243-5

Voltage Detection System

IEC 61850

Communication standard for

protection relays.

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27. The Bidder shall supply GIS RMU from the following vender:

Sl. No.

Equipments/

Materials

Approved Vendors

1.

11 KV Secondary GIS RMU Switch Board Panel

ABB/ Schneider Electric / Siemens/ Jyoti Ltd

7. The work order, which has been issued on 10.08.2020 under Annexure-10, states that the agreed schedule date of commencement of the work is 10.08.2020 and schedule date of completion of the work is 06.05.2021.

8. In view of the terms and conditions, as mentioned above, it is made clear that the successful bidder is required to purchase the "GIS-RMU" unit from any of the four approved vendors or OEM (Original Equipment Manufacturers) of the Paradip Port Trust only. They are:

i. ABB

ii. Schneider Electric

iii. Siemens

iv. Jyoti Ltd.

The execution of the work order comprised of procurement of RMU-GIS unit from one of the four approved vendors under the tender documents and, secondly, execution of work at the work site by the bidder. In terms of Clause 7 of the Instructions issued to Bidders, various bidders raised pre-bid queries in relation to the tender conditions and specifications. The petitioner and the approved vendors (OEM’s Original Equipment Manufacturer) also raised different queries in relation to the scope of the work, including the specific query made under Clause 4.11, which is quoted hereunder:

“Clause 4.11 i.e.- Similar parts and Components shall he interchangeable wherever practical. An interlock system shall he provided to prevent the interchange of modules with higher current rating with modules of lower current rating. Replacement of circuit breaker module shall be without interfering busbar operation and without gas work."

9. The petitioner participated in the said e-tender and submitted its bid, as per the procedure mentioned in the e-tender notice, on 27.12.2019, i.e., within the extended deadline for bid submissions. It had submitted the specifications of the RMU-GIS unit, as supplied by M/s Schneider Electric, one of the vendors approved under the tender documents. During evaluation of tender, the opposite parties informed the petitioner, vide letter dated 26.02.2020, to submit “Type test report of offered Gas insulated RMU” within 7 days. In response to the same, petitioner, vide its letter dated 02.03.2020, submitted the “Type test report of offered Gas Insulated RMU”, along with other documents like the brochure of the GIS RMU from M/s Schneider Electric, again. The opposite parties, after scrutiny of the GIS-RMU model unit offered to be supplied by the petitioner, accepted the petitioner as a technically qualified bidder. Therefore, the opposite parties were aware and accepted the specification of GIS RMU to be supplied by the petitioner from M/s Schneider Electric, for which replacement was not possible without busbar interference and without gas work. After a period of almost 6 months from the submission of the bid, the opposite party no. 2 intimated the petitioner, vide letter dated 10.07.2020, that its financial bid has been accepted by the competent authority for an amount of Rs.4,03,00,000/- and requested it to complete necessary formalities as per the tender documents by submitting the security deposit and executing the agreement.

10. The petitioner conducted site visit along with Executive Engineer, Port Electrical Division-II, Assistant Engineer, Port Electrical Division-II and Line Staff of Port Electrical Division-II on 14.07.2020, and once again reiterated the concerns raised earlier during the pre-bid queries regarding supply and specification of “RMU GIS” as the RMU GIS units as per specifications mentioned in the tender documents were not being supplied by any of the approved vendors. The petitioner communicated the same concerns again, vide its letter dated 15.07.2020, informing the opposite party no. 2 that during the site visit, verbal clearance was given by officials of the opposite parties to submit GTP and

drawings for approval, as per the standard RMU GIS design, which the petitioner had submitted along with the tender documents based on specifications supplied by M/s Schneider.

11. Thereafter, the opposite parties in their letter dated 10.07.2020 called upon the petitioner to submit the security deposit being 1% of contract value in the shape of bank guarantee, which was deposited by the petitioner on 17.07.2020 as per the terms of the tender. After a period of almost one month, the opposite party no. 2 issued the work order on 10.08.2020, according to which, the schedule date for commencement of work was 10.08.2020 and the schedule date of completion of work was 06.05.2021. The petitioner has also executed the agreement in the format specified in the tender documents. However, the signed counterpart of the said agreement has not been shared with the petitioner by the opposite parties.

12. When the work order was issued in favour of the petitioner on 10.08.2020, the petitioner submitted its time chart for the work order wherein it provided the schedule for completion of work including approval of drawings, procurement of RMU-GIS units and handing over. On the very next date, i.e., 11.08.2020, the petitioner submitted its GTP and Drawing for approval of opposite party no. 2 in accordance with tender conditions so that it could proceed immediately with purchase of the RMU-GIS units and mobilize resources for execution of the work order. After three weeks of submission of drawing, when no communication was made, the petitioner issued a reminder on 02.09.2020 to expedite the process of approval so that the procurement of materials could commence on priority.

13. Thereafter, meetings were held at the office of the opposite parties in Paradip between the petitioner, the opposite party and approved vendor M/s Schneider Electric regarding the specification of RMU GIS on 07.09.2020 and 25.09.2020 for the work order. In the said meeting, the opposite parties had assured the petitioner that they would submit their final observations of technical specifications of RMU GIS and the drawings by 28.09.2020. However, the opposite parties failed to submit their approval by the said date. Nearly 7 weeks had passed since submission of the drawings and GTP for approval. When no approval was made, the petitioner issued second reminder on 01.10.2020 emphasizing that delay in approval of drawings was holding up procurement of material manufacturing and would affect project timelines and requested for early action at the end of the opposite parties. Even after the reminder, the opposite parties failed to approve the drawings and GTP even after a lapse of nearly 64 days from the date of submission of such drawings.

14. The petitioner issued a third reminder on 15.10.2020 requesting for prompt approval by the opposite parties in this regard. Finally, on 24.11.2020, after a period of 106 days, the opposite parties submitted their views on the drawings and GTP, which were submitted by the petitioner on 11.08.2020. Therefore, the delay in execution of the work can only be attributable to the opposite parties and not to the petitioner. On 24.11.2020, the opposite party no. 2 directed the

petitioner to submit a fresh drawing and GTP for approval after incorporating the views of the opposite parties. In response to the same, the petitioner submitted the revised drawings and GTP promptly on 09.12.2020. It also requested the opposite parties to convey their approval to the revised drawings and GTP on or before 15.12.2020, as the approved vendor M/s Schneider had notified about price escalation setting in thereafter. In this process, delay has been caused at the level of the opposite parties in approving the drawings and GTP. The petitioner submitted another revised drawings and GTP, on 21.01.2021, wherein the petitioner confirmed all the observations recommended by the opposite parties on 09.01.2021, except for specifications for GIS RMU Unit and Isolators. In this regard, the petitioner noted as follows:-

Details as per PPT Tender Technical

specification

Petitioner Response

4.11

Replacement of circuit breaker module shall be without interfering

Busbar operation and

without gas work.

Any replacement activity of Live part in GIS RMU shall be carried out through OEM only in OFF condition, considering

Involvement of special tools, workmanship,

controlled condition, other equipment's to handle SF6 gas etc. So, it's not

recommended by any GIS RMU OEM. which may please be confirmed at your end. Hence this may please be accepted.

7.1

Isolators (Switches open, closed earthed)

shall be motor operated. In case

of emergency,

manual operation must

be possible.

All the offered RMUs are with motorised CB

(Breaker Function), Isolator is not applicable in GIS

RMU. In line with our global design to prevent any harmful operation and safety point of view motorised earth switch should not be used. Hence this may please be accepted

15. All the above indicate that the petitioner emphasized that the GIS RMU, being manufactured and supplied by the approved vendors of' the opposite parties, did not permit replacement of circuit breaker module without interfering with the busbar operation and without gas work. The same was also in line with the applicable global standards. Therefore, the tender specifications with respect to GIS RMU were unworkable and impossible. Accordingly, it requested the opposite parties to accept the GIS specification as supplied by its approved vendors, which was in the line with the international standards. Instead of doing so, a show cause notice was issued to the petitioner on 21.01.2021 directing it to explain the delay in approval of drawings and GTP. The notice stated that approval of drawings and GTP ought to have been completed in September, but, as because the petitioner had not been incorporating the suggestions recommended by the opposite parties, the project has been delayed. The notice directed the petitioner to show-cause why action should not be initiated against it under Clause No. 39 of ITB for delay by treating the same as default.

16. On 29.01.2021, the opposite parties communicated to the petitioner that the GIS RMU unit is to be, as per the specifications in the tender documents only, and supply of the same is the responsibility of the petitioner. The tender conditions specify that GIS RMU unit has to be procured from one of the approved vendors only and not a single approved vendor supplies or manufactures the GIS RMU unit as per the specifications of the tenders to allow replacement of circuit breakers without interfering with busbar operation and without gas work.

17. In response to the show cause notice issued on 21.01.2021, the petitioner submitted its reply on 30.01.2021 making an alternative suggestion to supply the same from alternative vendor, who could supply RMU GIS unit as per the specifications made in the tender documents, and requested for early action.

18. Again, a fresh show-clause notice was issued by the opposite parties on 19.02.2021 directing the petitioner to explain as to why action should not be initiated against it for forfeiture of its security deposit, termination of the contract, completion of work at the cost and risk of the petitioner and debar the petitioner for a period of 7 years under Clause 12 and Clause 39 of the ITB of the tender documents, to which the petitioner responded on 25.02.2021 highlighting the grounds of delay in submission of the comments/observations by the opposite parties with respect to the drawings and GTP. The petitioner also clarified that the drawings were submitted for approval as early as 11.08.2020, on the very next day of issuance of work order. But the delay has been caused at the level of the opposite parties.

19. The petitioner, being a MSME (Micro, Small and Medium Scale Enterprise) & NSIC (National Small Industries Corporation) registered unit, which has successfully completed earlier projects for the opposite parties, even during the

current pandemic situation. It also undertook to complete the work order, subject to extension of time. But, without listening to the same, the order impugned was passed on 12.03.2021 terminating the contract, forfeiting the initial security deposit and debarring the petitioner from participating in future tenders of the opposite parties for a period of seven years.

20. As it appears from the sequence of events, as discussed above, the delay has been caused at the level of the opposite parties in approving the drawing and GTP. More so, since the conditions, which have been stipulated in respect of the purchase of RMU GIS unit from approved dealers, could not be satisfied, because of unworkable condition, therefore, without appreciating such fact in its proper perspective, the order impugned cannot be sustained in the eye of law.

21. In Ram Kumar Agrawal (supra), this Court at paragraphs 20, 21, 22, 24, 25 and 26 observed as follows:-

"20. It is true that blacklisting affects the reputation of a person put on the blacklist, it is not limited to his dealings with the Government but also in dealings with private firms and amounts to affecting his business prospects. A blacklist order leads to civil consequences. Such an order must not be passed by any authority without affording due opportunity of being heard to the person likely to be affected by such an order.

21. In other jurisdictions like in USA and UK, the legal position governing blacklisting of suppliers is no different. In USA, instead of using the expression 'Blacklisting', the term "debarring" is used by the Statutes and the Courts. The Federal Government considers 'suspension and debarment' as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions. W.P.(C) No.14053 of 2020 Page 15 of 20 Comprehensive guidelines are, therefore, issued by the Government for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise unable to perform satisfactorily.

22. It is an undenying fact that the authority must act in fairness while putting a person in the blacklist. The principles of natural justice are attracted in case a person is to be deprived of entering into business relationship, particularly so when such a person has reasonable expectation of making a gainful contract with the Government. The Government or instrumentalities of State are under a constitutional obligation not to discriminate. They owe a duty towards citizens to act fairly, without fear or favour. If the State unfairly puts a party on blacklist, it will amount to denial of an equal opportunity of being able to compete with his adversaries. Blacklisting any person would mean deprivation of an equal opportunity of competing with others. Thus, where valuable rights are sought to be taken away by the Government in depriving of a person dealing with it, the writ Courts cannot act as mere spectator and shall intervene to do justice to the aggrieved party. Another aspect of putting a party on blacklist is the stigma

attached with it, besides depriving him of rightful gains which he would have made from the contract had he not been put on blacklist. A situation may arise when the party put on blacklist from executing the contracts in hand. In such a case, it not only puts a stigma on the contractor but also affects his civil rights. Further, plethora of judgments of the apex Court and High Courts have unequivocally resonated and reminded the employers that blacklisting the contractor cannot be for an indefinite period. The order by which a contractor is blacklisted must mention the period for which he is put on the blacklist because blacklisting cannot debar a party forever as a registered contractor.

24. Although the "Doctrine of Proportionality" has been dealt with as a part of the Wednesbury's principle, the Courts have adopted a different position when it comes to the judicial intervention in terms of judicial review. It has been held that the principle entails the reasonableness test with a heightened scrutiny.

In other words, to apply this doctrine, not only the decisions have to be within the limits of reasonableness, but only, there has to be a balance between the advantage and disadvantage in the outcome that has been achieved through the administrative action. Therefore, the extent of judicial review is more intense and greater on account of "proportionality" test than the 'reasonableness' test. Further, the apex Court, while applying the rule of proportionality, will think about the public and individual interest in the matter which is not done while applying the Wednesbury's principle of unreasonableness. In Gohil Vishvaraj Hanubhai and Ors. v. State of Gujarat and Ors11 it is held in paragraphs 24 to 27 thus:

“24. The next question is whether the impugned decision could be sustained judged in the light of the principles of ‘Wednesbury unreasonableness’. In the language of Lord Diplock, the principle is that “a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”. Having regard to the nature of the allegations and the prima facie proof indicating the possibility of occurrence of large scale tampering with the examination process which led to the impugned action, it cannot be said that the impugned action of the respondent is “so outrageous in its defiance of logic” or “moral standards”. Therefore, the 2nd submission of the appellant is also required to be rejected.

25. We are left with the 3rd question – whether the magnitude of the impugned action is so disproportionate to the mischief sought to be addressed by the respondents that the cancellation of the entire examination process affecting lakhs of candidates cannot be justified on the basis of doctrine of proportionality.

26. The doctrine of proportionality, its origin and its application both in the context of legislative and administrative action was considered in some detail by this Court in Om Kumar & Others v. Union of India, (2001) 2 SCC 386.

This Court drew a distinction between administrative action which affects fundamental freedoms[10] under Articles 19(1) and 21 and administrative action which is violative of Article 14 of the Constitution of India. This Court held that in the context of the violation of fundamental freedoms;

"54. ….. the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the courts did not call this proportionality but it really was.

This Court, thereafter took note of the fact that the Supreme Court of Israel recognised proportionality as a separate ground in administrative law to be different from unreasonableness.

27. It is nobody's case before us that the impugned action is violative of any of the fundamental freedoms of the appellants. We are called upon to examine the proportionality of the administrative action only on the ground of violation of Article 14. It is therefore necessary to examine the principles laid down by this Court in this regard.

xxx xxx xxx."

25. 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 the Supreme Court and this Court which are of seminal importance in a system that is committed to the rule of law. A fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting. In addition, the State has to examine the principle of proportionality while examining the instant case since the blacklisting period is not specified.

26. Thus, having regard to the aforesaid discussion, we have reached to the conclusion that the decision of the State to blacklist the petitioner has been done in a hush hush manner without giving a proper hearing. Further, the application of the doctrine of proportionality has not been kept in mind in proper perspective while awarding a punitive measure like blacklisting without a period specified in the impugned order. In addition, there seems to be violation of codal procedures, in so far as procedural formalities are concerned. In the result, this writ petition succeeds to the extent that the impugned order of blacklisting the petitioner deserves a revisiting by the State authority."

22. In Daffodills (supra), the apex Court held that the 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. Referring to the judgments of the apex Court in Erusian Equipments and Chemicals Ltd. v. State of West Bengal, (1975) 1 SCC 70 and Raghunath Thakur v. State of Bihar & Ors, (1989) 1 SCC 229, in paragraph-14 it has been stated as follows:-

"14. The decisions in Erusian Equipments and Chemicals Ltd. v. State of West Bengal and Raghunath Thakur v. State of Bihar & Ors as well as later decisions have now clarified that before any executive decision maker proposes a drastic adverse action, such as a debarring or blacklisting order, it is necessary that opportunity of hearing and representation against the proposed action is given to the party likely to be affected. This has been stated in unequivocal terms in Raghunath Thakur (supra) as follows:

"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."

In Southern Painters v. Fertilizers & Chemicals Travancore Ltd., 1994 Supp (2) SCC 699, the grievance was with respect to unilateral deletion of the petitioners' name from the list of approved contractors, maintained by the public sector agency. This court held that such an action was arbitrary:

"11. The deletion of the appellant's name from the list of approved contractors on the ground that there were some vigilance report against it, could only be done consistent with and after due compliance with the principles of natural justice. That not having been done, it requires to be held that withholding of the tender form from the appellant was not justified. In our opinion, the High Court was not justified in dismissing the writ petition."

23. In B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others, (2006) 11 SCC 548, the apex Court held that declaration of a bidder as defaulter must be preceded by decision. A declared defaulter should be an actual defaulter not an alleged defaulter.

24. In Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others, (2014) 14 SCC 731, the apex Court reiterated the principle for blacklisting/debarment of contractor.

25. In Vetindia Pharmaceuticals Ltd. v State of Uttar Pradesh and another, (2021) 1 SCC 804, the apex Court held that before blacklisting/debarment of a contract, a show cause notice should be issued and the form and content of the show cause notice mandatorily requires to mention that action of blacklisting is proposed, or it should be possible to draw clear inference to this effect from the

notice.

26. But the content of the show cause notice, in the present case, did not mention that action of blacklisting was to be taken or was under contemplation. In absence of the same, it can be safely construed that in this case, when the authority took action of blacklisting/ debarment of the petitioner for a period of seven years, the show cause notice had not fulfilled the mandatory requirement, as mentioned above.

27. In course of hearing, this Court called upon Mr. P.K. Rout, learned counsel for the opposite parties to indicate as to which clause of the tender documents indicates debarment for a period of seven years. No plausible or satisfactory reply was given nor was any clause shown from the conditions of the tender for imposition of penalty of debarment for seven years.

28. In State of Odisha v. M/s. Panda Infra project Limited, (2022) 4 SCC 393, the question formulated by the apex Court was, whether in the facts and circumstances of the case the contractor was required to be debarred/blacklisted permanently? While answering the same, the apex Court took note of the principles enumerated in Kulja Industries Ltd (supra) and referring to the office memorandum dated 26.11.2021, which provides that the blacklisting period per offence shall be limited to 03 (Three) years subject to an overall maximum cumulative period of 10 (Ten) years for multiple offences", did not approve the guidelines issued by the State Government by O.M. dated 26.11.2021 and held that 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. The apex Court, by so holding, finally dismissed the Civil Appeal preferred by the State.

29. In the considered opinion of this Court, such a huge length of blacklisting or debarment would cause great hardship to the petitioner and, more particularly, it may so happen that with the lapse of seven years many works may come up in which the petitioner cannot participate and lose its experience and expertise. As a result, in the world of competition, the petitioner may lag behind and in the process it may be deprived of earning its livelihood. Therefore, proper proportionality of imposition of penalty should be taken into consideration while debarring/blacklisting a contractor to perform his work. In the present case, the sequence of events clearly indicates that the lapses were on the part of the opposite parties in performing their part of responsibility and obligation as per the terms of the contract. Therefore, the debarment of the petitioner for a period of seven years cannot have any justification.

30. In view of the facts and law, as discussed above, this Court is of the considered view that the order dated 12.03.2021 under Annexure-26, in terminating the work order dated 10.08.2020 issued to the petitioner, pursuant to the e-tender notice dated 30.10.2019 for "Revamping of 11 KV HT Electrical

Distribution System at different locations at Paradip", forfeiting the security deposit of the petitioner and debarring the petitioner from participating in any future tender of Paradip Port Trust for a period of 7 years, cannot be sustained in the eye of law and the same is liable to be quashed and is hereby quashed.

31. Resultantly, the writ petition is allowed. But, however, in the facts and circumstances of the case, there shall be no order as to costs.

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