

(2012) 03 DEL CK 0652

In the Delhi High Court

Case No : Writ Petition (C) No. 799 of 2012, CMs 1783/12 (Stay) and 1784/12 (Direction)

M/s SPS International Ltd.

APPELLANT

Vs

Directorate of Education and Another

RESPONDENT

Date of Decision : 01-03-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)
Contract Act, 1872 — Section 74

Citation : (2012) 2 BC 363 : (2012) 188 DLT 234

Hon'ble Judges : A.K. Sikri, Acting C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Nishant Datta with Ms. Ruchika Datta, for the Appellant; Zubeda Begum, for the Respondent

Judgement

A.K. Sikri, Acting Chief Justice

1. The petitioner herein is aggrieved by the orders dated 17.1.2012 of the respondent No.2 whereby the work awarded to the petitioner earlier for printing, supply and scanning of OMR sheets for CCEP-II Examination, 2011-2012 has been cancelled. The effect of the cancellation is that though petitioner was given the aforesaid order, in view of the cancellation thereof, the petitioner is not to execute that contract. In addition to the challenge laid to the withdrawal orders dated 17.1.2012, the petitioner has also questioned the validity of eligibility criteria No. 2(vi) prescribed by respondent No.1 in Notice Inviting Tender (NIT) dated 15.12.2011 in respect of which NIT, the petitioner was awarded the work. The brief factual matrix leading to the filing of this petition by the petitioner runs as under:

Respondents No.1 and 2 issued NIT dated 15.12.2011 through e-procurement for printing, scanning and supplying of OMR sheets for CCEP-II Examination, 2011-2012. In this NIT, in para 2 thereof, eligibility criteria was also stipulated lying down certain conditions which every bidder was to fulfill to become eligible

to respond to the said tender. Though as many as 8 conditions are stipulated, in the present petition, we are concerned only with condition No. 2(vi) which reads as under:

vi. The printer blacklisted/penalised by any Govt. department or by any other agency shall not be eligible for bidding. Every printer would be required to submit an affidavit that the bidder has never been blacklisted/penalised by any Govt. department/Govt. undertaking/any other agency.

2. As per the aforesaid condition, any printer who has been blacklisted/penalised by any Government Department or any other agency was not eligible for bidding. For this purpose, the bidders were required to submit an affidavit that they had never been blacklisted/penalised.

3. The petitioner submitted its bid in the requisite form along with documents. It also gave an affidavit that it was never blacklisted/penalised by any Government department/public sector undertaking, etc. The precise language in which the aforesaid declaration in the affidavit was made is as under:

3. That our company has never been blacklisted or penalized by any Govt. organization, Education Board, Public Service Commission till date.

4. Bid of the petitioner along with others was considered and petitioner was chosen for award of work. Accordingly, award letter dated 6.1.2012 was issued to the petitioner. The petitioner submitted fixed deposit of Rs. 1,06,000/- towards performance guarantee vide letter dated 9.1.2012. It also furnished duly signed agreement on non judicial stamp papers to the respondents No.1 and 2 vide letter dated 12.1.2012.

5. Another firm M/s Star Forms was also a bidder in respect of the same NIT. Its bid was rejected on the ground that it had been blacklisted. It filed W.P. No.238/2012 questioning the validity of the clause making blacklisted candidates ineligible to submit the bids (same challenge which is laid by the petitioner as well in the present case). It also impleaded present petitioner as respondent No.3 therein and submitted that even when the petitioner herein was similarly blacklisted by Kurukshetra University, in its case the aforesaid eligibility condition was not applied and contract was awarded.

6. After the notice in WP(C) No.238/2012 was issued, respondents No.1 and 2 herein sprung into action and issued letter dated 13.1.2012 to the petitioner herein calling upon the petitioner to clarify its position as to whether the petitioner was blacklisted by Kurukshetra University. The petitioner gave its response vide reply letter dated 14.1.2012, inter alia, stating as under:

(i) that the petitioner had neither received any notice from the Hon"ble Court in respect of W.P.(C) NO.238/2012 nor had the petitioner received any intimation of the said case or prior legal notice regarding filing of the same from Mr. Arunesh Bansal.

(ii) the petitioner requested Respondent No.2 to furnish a copy of the aforesaid writ petition along with order dated 11.01.2012 and also requested for some more time to peruse the writ petition before submitting a detailed reply/clarification.

(iii) the petitioner informed Respondent No.2 that it was, at one point of time, blacklisted by Kurukshetra University. However, the said blacklisting order was passed without affording the petitioner an opportunity of hearing.

(iv) The petitioner was constrained to approach the Hon''ble High Court of Punjab and Haryana at Chandigarh by means of Civil Writ Petition No.11072/2011, which was disposed of vide Order dated 10.06.2011 with a direction to the Kurukshetra University to consider petitioner's appeal wherein it had sought opportunity of being heard in addition to other reliefs.

(v) That pursuant to passing of Order dated 10.06.2011 by the Hon''ble Punjab and Haryana High Court, the Kurukshetra University granted petitioner herein an opportunity of hearing against the blacklisting order and eventually vide its order dated 28.06.2011 took a lenient view and removed petitioner from the blacklist.

(vi) The petitioner also provided the background in which the above mentioned blacklisting order came to be passed, which was a result of malafide and illegal actions of petitioner company's erstwhile whole time director namely Mr. Sudhir Jain, who had secretly incorporated his own company by the name of M/s S.C.J. Scan form Solution Pvt. Ltd. during his employment as whole time Director with the petitioner herein and had colluded with an official of the said University to cause the blacklisting Order to be passed.

Respondents No.1 and 2, however, did not accept the aforesaid explanation of the petitioner and passed impugned orders dated 17.1.2012.

7. Two-fold submission is made before us. In the first instance, it was submitted that on the facts of the petitioner's case, it cannot be stated that the petitioner was either blacklisted or penalised. Submission in this behalf was that as far as blacklisting order is concerned, this had been revoked by the Kurukshetra University itself. It was further argued that though while revoking the blacklisting order earnest money was forfeited but that would not amount to "penalty". Order dated 28.6.2011 passed by Kurukshetra University vide which name of the petitioner was removed from the list of blacklisted persons reads as under:

With reference to your representation dated 28-02-2011 to Hon''ble Vice Chancellor, Kurukshetra University, Kurukshetra regarding withdrawal from the blacklist and refund of Earnest Money is considered after taking lenient view, name of your Firm M/s SPS International Ltd., Delhi is removed from the blacklist of the University for participation in the tender process and your earnest money is forfeited.

8. It was argued that the forfeiture of earnest money which the petitioner had given in the contract awarded by the Kurukshetra University, was in the nature of

recovery of damages which would be in the nature of liquidated damages u/s 74 of the Indian Contract Act, 1872. According to the learned counsel, the expression "penalty" will have totally different connotation. He referred to the judgment of the Apex Court in *Maula Bux v. Union of India*, AIR 1970 SC 1955, wherein the Supreme Court held that forfeiture of earnest money did not amount to imposition of penalty. Following discussion from the said judgment was pressed into service:

Forfeiture of earnest money under a contract for sale of property-movable or immovable-if the amount is reasonable, does not fall within Section 74. That has been decided in several cases : *Kunwar Chiranjit Singh v. Har Swarup* A.I.R.1926 P.C. 1 *Roshan Lal v. The Delhi Cloth and General Mills Company Ltd.*, Delhi ILR All.166 *Muhammad Habibullah v. Muhammad Shafi* ILR All. 324 *Bishan Chand v. Radha Kishan Das* I.D. 19 All. 490. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

9. Learned counsel also tried to contrast penalty from forfeiture of earnest money by referring to certain orders passed by the respondents imposing the penalty. One such order was dated 1.7.2008, operative portion whereof is as under:

Competent Authority was held on 01.7.08 in the Chamber of Addl. DE (Exam) to discuss the report. After detailed discussion, the committee recommended to release all payments in respect of CPSE-07 and CASE-07 after deducting 10% of the amount of the work in which printing mistakes/errors were found in CASE 07. Copy of the minutes of the meeting is placed on page 107/c to 109/c.

Hence it is proposed:

1. The balance 20% amount of the bill of CPSE-07 may be paid to the printer. The details are as below:

Total amount of the bill - Rs. 10,15,564/- 20% of the amount - Rs. 2,03,112/-
------(A)

2. The balance 20% amount of the bill of CASE-07 may be paid to the printer after deducting 10% penalty. The details are as under:

Total amount of the bill - Rs. 41,45,736/- 20% of the amount - Rs. 8,29,147/-

He also referred to another order passed by the Examination Committee in its meeting held on 13.9.2010 and as per the minutes of that meeting, penalty was imposed on the concerned contractor in the following manner:

All the members of the committee went through all the complaints again to

assess quantum of penalty. The reply submitted by the printer for Show Cause Notice served to him has also been considered. He mentioned in the reply that he was very ill and got treatment from the hospital and was advised complete bed rest during examination period. As a result of which the whole supervision got disturbed and some errors in packing has been observed. He further requested to the department to forgive for any act which had caused the problem due to his illness. It was also brought to the notice of the committee that the firm has been engaged in the confidential work of Directorate of Education since the session 2006-07.

Keeping in view, the nature of complaints and reply of the printer, the committee is of the opinion that a lenient view may be taken and penalty may be reduced from 50%. However, the printer may be advised to be more careful in future so that such type of mistakes would not be repeated.

Considering all the facts, the committee in its opinion, taking a lenient view recommended to impose penalty of 40% of the total amount of the bill (Rs. 41,56,015/-) upon the printer i.e. M/s Star Forms which will be Rs. 16,62,406/- and the balance of Rs. 24,93,609/- (Rs. 41,56,015/- - Rs. 16,62,406/-) may be paid to the printer after deducting Rs. 16,62,406/- .

10. Second contention of learned counsel for the petitioner was that such an eligibility condition contained in para 2(vi) was violative of Article 14 and 19(1) (g) of the Constitution of India, if forfeiture of earnest money was to be read as "penalty" inasmuch as it was excessively harsh, unreasonable and arbitrary. It was also argued that even when a person is blacklisted in the past, that has to be for a certain period/specified time and cannot be for indefinite period. Barring a person from participating in future tendering process on the basis of past blacklisting/penalty amount to offending Article 14 and 19(1)(g) of the Constitution.

11. Learned counsel for the respondent refuted the aforesaid contentions. Her submission was that this clause was perfectly valid and justified having regard to the nature of sensitive job which was awarded to these contractors. It was argued that the work involved printing, scanning and supply of OMR sheets required for the Continuous Comprehensive Evaluation Programme Examination. For such examinations, it was absolutely necessary that the OMR sheets supplied by the printer are flawless, otherwise it may lead to various complications in the conduct of examination. For this reason, strict eligibility conditions were required and, therefore, they were rightly imposed. She referred to the judgment of the Supreme Court in the case of Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, to bolster her submission that it was the prerogative of the State to chose its own method to arrive at a decision.

12. She also submitted that once this legal position is to be accepted that the State can fix its own terms and conditions of invitation to tender, it is not open to judicial scrutiny as held in M/s. Monarch Infrastructure (P) Ltd. Vs.

Commissioner, Ulhasnagar Municipal Corporation and Others, . She, thus, submitted that the challenge to the constitutional validity of the aforesaid eligibility condition was totally misconceived. Refuting the argument that the forfeiture of earnest money was not "penalty", her contention was that in the context in which the said money was forfeited was to be seen. In this behalf, she argued that for breach of contract, the petitioner was blacklisted by Kurukshetra University.

On appeal filed by it, the authorities had taken a lenient view in the matter withdrawing the order of blacklisting but maintained that the order of forfeiture of earnest money shall remain. Such an order had to be treated as penalty, was the submission.

13. We have also considered the respective submissions of both the parties. In so far as challenge to the validity of the eligibility clause is concerned, we are not impressed by the same. It is always open to the Government to lay down terms and conditions in the tender bearing in mind the nature of contract and in such matters, the employer calling for the tender is the best judge to prescribe the terms and conditions. In *Educomp Datamatics Ltd. (supra)*, the Supreme Court had made specific observations in this behalf as can be seen from the discussion contained in para 9 of the said judgment which is as under:

9. It is well settled now that the courts can scrutinise the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in *Tata Cellular Vs. Union of India*, . After examining the entire case law the following principles have been deduced.

94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play

in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

[Emphasis supplied]

To the same effect is the dicta laid down in M/s Monarch Infrastructure (P) Ltd. (supra) as can be seen from a reading of the following paragraph:

10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest;

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate;

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

14. The very effect of blacklisting a person is to deprive him from submitting such tenders in future. That records that procedural requirements are to be fulfilled before a person/contractor is blacklisted by the Government [Refer Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another,]. However, once a person is blacklisted, civil and/or evil consequences have to follow which include depriving such a person from participating in other contracts of the Government. Otherwise, the very purpose of blacklisting gets defeated. The same would be the position when "penalty" is imposed on a contractor. Learned counsel for the respondent is right in her submission that making a contractor ineligible to bid for such a contract on the ground that he is visited with the order of penalty earlier, is relevant keeping in view the nature of work required to be undertaken by such printers. It is rightly emphasized that the examination work is a time bound activity and it involves a lot of secrecy,

accuracy and punctuality. Even a marginal error can disrupt the whole of the system. The restriction imposed by clause (vi) and clause (v) of NIT-1 and NIT-2 respectively have a close nexus with the object sought by the respondent department. The respondents have also highlighted the fact that the Directorate of Education annually conducts seven exams, namely:

- (i) Summative Assessment-I
- (ii) Summative Assessment-II
- (iii) Continuous Comprehensive Evaluation Programme-I
- (iv) Continuous Comprehensive Evaluation Programme-II
- (v) Mock Test
- (vi) Pre Board
- (vii) Common Compartment School Examination.

It is further submitted that approximately 15 lakh students studying in about 1000 Government and Government aided schools of Delhi take these examinations. All the examinations are time bound and are held on dates fixed much before starting of the academic session. Due to lack of resources, the question papers of all the aforesaid examinations and answer scripts of Continuous Comprehensive Evaluation Programme-I and Continuous Comprehensive Evaluation Programme-II which are in the form of OMR sheets are got printed by private firms. It cannot be denied that the respondents were justified in keeping the aforesaid parameters in mind while laying down the eligibility conditions including the one specified in para 2(vi). Challenge to the validity of this clause, therefore, fails.

15. We now revert to the meaning which has to be assigned to the expression "penalty" contained in this clause. It is to be borne in mind that this word is used along with blacklisting with-in between. That is of some significance. According to us, not every action of the department pertaining to a particular contract withholding certain payments or forfeiting certain other accounts of payment would amount to "penalty". In so far as the present respondents are concerned, the issue may not even pose much problem. The two decisions of the respondents themselves taken on 1.7.2008 and 23.8.2011 removed the mist and exemplified as to how respondents have understood the concept of "penalty". It is obvious that the respondents would have adopted the same concept of penalty in mind while prescribing the conditions in para 2(vi) of the NIT. Respondents are imposing the penalty only when mistakes, errors and deficiencies in the work performed by the contractors in the printing of OMR sheets are found. For this purpose, even the modus of imposing the penalty that is followed is that Examination Committee not only goes through the complaints which are received from examination centres, on these complaints even show cause notice is issued to the printer and his reply is considered. Thereafter, the penalty is imposed

which is in the nature of deduction from the total amount of the bill submitted by the printer. Thus, in so far as respondent is concerned, whenever it has to debar a contractor from the tender process in respect of any penalty imposed by respondents themselves earlier, it has to be in the nature of penalty of the aforesaid account.

16. Difficulty may arise when action is taken by some other authorities, for example, Kurukshetra University in the present case. Whether forfeiture of earnest money was treated as "penalty" by the Kurukshetra University, it would be difficult to find out the same. It is for this reason we are observing that when such a penalty is imposed by any other employer, namely, some other Government or Public Sector Undertaking etc., it should have the shadow of blacklisting, namely, for some breach of contract etc., the printer was penalized.

17. When we examine the facts of the present case in the aforesaid context, we are constrained to hold that Kurukshetra University could not have contemplated forfeiture of earnest money as penalty. Interestingly, the said University has lifted the order of blacklisting. The effect thereof is that the petitioner is in a position to participate in the tenders floated by Kurukshetra University, even when there is a forfeiture of earnest money. Can such a person who is eligible to bid in so far as Kurukshetra University is concerned, be debarred from participating in the tenders floated by the respondents herein on the professed ground that Kurukshetra University has allegedly imposed the penalty? It would be difficult to accept such a situation. We, thus, hold that the forfeiture of earnest money by the Kurukshetra University was not in the nature of "penalty" when the purport of the order passed by Kurukshetra University was to remove the ban making petitioner eligible in that University for the award of contracts. We may clarify that in such a case, some kind of damages etc. are imposed by other agencies/State etc. That may be one of the factors which can be taken into account by the Tender Committee while evaluating the tenders and adjudging the comparative merits. However, that cannot be a consideration to throw that printer at the threshold on the ground of ineligibility.

18. Having said so, we are of the opinion that in the present case, it is difficult to give relief to the petitioner. It is because of the reason that after the cancellation of the contract, the respondents have floated fresh tenders having regard to the urgent requirement of the job. The exams for which the job is to be executed are round the corner. We are informed that work has been awarded. If we restore the contract of the petitioner, it would lead to delay in the execution of the work which is needed in a time bound manner and we cannot brook any delay. Therefore, while we hold that the petitioner cannot be treated as ineligible in terms of para 2(vi) and, therefore, would be entitled to participate in the tenders floated by the respondents in future, in so far as the present case is concerned, we cannot grant the prayers asked for. At the same time, since the cancellation is found to be unjustified, it would be open to the petitioner to file suit for damages.

19. The writ petition is disposed of in the aforesaid terms. There shall be no

order as to costs.