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WP-16956-2024

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA

ON THE 3rd OF SEPTEMBER, 2024WRIT PETITION No. 16956 of 2024

*ARCHON POWERINFRA INDIA PVT. LTD. THROUGH ITS
AUTHORISED SIGNATORY AND CIVIL ENGINEER SHRI AMIT
SHAR*

*Versus**THE STATE OF MADHYA PRADESH AND OTHERS*

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Appearance:

*Shri Naman Nagrath, learned senior counsel with Shri Arihant Kumar
Nahar and Shri Sarthak Nema, learned counsel for the petitioner.*

*Shri Prashant Singh, learned Advocate General alongwith Shri
Bhuwan Gautam, learned Govt. Advocate for respondents/State.*

Shri Rohit Sharma, learned counsel for the respondent No.5 & 6.

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ORDER

Per. Justice Vijay Kumar Shukla

The petitioner has filed the instant petition under Article 226 of the Constitution of India challenging the order dated 07.06.2024 (Annexure P/16) passed by respondent No.4 in Case No.731/Tak/Lo.NI.Vi./2024 and order dated 24.06.2024 (Annexure P/22) passed by respondent No.3 whereby the contract awarded to the petitioner for construction of building of New District Court at Piplyahana, Indore was terminated and the petitioner was blacklisted for an indefinite period and the registration of the



petitioner/company was cancelled. Further the petitioner is also challenging the NIT dated 26.07.2024 issued by the respondents for construction of balance work of new District Court building at Piplyahana, Indore.

2. The facts succinctly are that the Department of Law and Legislative Affairs granted sanction for construction of new District Court building in Indore Pipliyahana on 29.09.2018. Initially, the tender was awarded to one Harsh Construction (P) Ltd. being lowest bidder pursuant thereto an agreement was also executed on 03.01.2019. The said contract was terminated on 01.05.2023. Pursuant thereto, a PIL was filed before this Hon'ble Court on 07.07.2023 which was registered as W.P. no. 10060/2023 wherein, a concern was raised regarding termination of contract for construction of District Court building at Indore as the same has halted the construction due to which the project is delayed. After the intervention of this Hon'ble Court, the NIT was issued on 10.05.2023. Since, no bids were received in first two calls, therefore, third call was issued on 16.08.2023.

3. In pursuant to the said NIT, the petitioner submitted his bid on 08.09.2023. A letter of acceptance was issued in favour of the petitioner on 22.09.2023. According to the petitioner, the petitioner engaged services of a consultant namely 'Alpeshbhai Solanki' who is an expert for filing tender so that the requirements of tender are duly fulfilled. For this reason, a power of attorney was also executed in favour of Alpeshbhai Solanki to perform such work as necessary or required in connection with or incidental to submission of the Bid for the tender in question. It is submitted that the said person is a professional who works for many other companies also and provides consultancy apart from undertaking the entire exercise of filling up and submission of tender forms. In the present case also, the said person had single handedly gone through the tender conditions and had uploaded the documents for this tender. The Petitioner's company was not involved in identifying and evaluating each document that was to be uploaded and physically submitted as a part of supporting documents for fulfilling the required criteria.

4. After submission of the bid and prior to issuance of LOA, the



petitioner had returned to the respondent/Department on 18.09.2023 that a wrong document in regard to experience certificate has been filed along with the tender document. On 07.10.2023, the committee after scrutinising the tender documents issued letter of acceptance and a contract agreement was executed between the petitioner and the department on 07.10.2023. A Public Interest Litigation WP No.25696/2023 was filed challenging the issuance of second tender notice and allotment of work order in favour of the petitioner. In the said PIL, the respondents have specifically and categorically stated that pursuant to the appointment of petitioner agency, the work in question was proceeding with milestone prescribed. All of sudden like a bolt from blue, the impugned order dated 07.06.2024 (Annexure P/16) was issued and without issuing any show notice or opportunity of hearing to the petitioner, the contract of the petitioner was cancelled on the ground that he had furnished a forged experience certificate along with the tender documents and the contract was rescinded and it was further held that on such rescission performance security deposited by the petitioners stand absolutely forfeited to the government. It was further directed that the expenses incurred for executing the remaining work shall be liable to be borne and paid by the petitioner or may be deducted from any money due to him or from security in deposit or process of sales thereof or sufficient part thereof as the case may be.

5. Counsel for the petitioner vehemently argued that the contract of the petitioner was not awarded on the basis of the aforesaid wrong document which was already sought to be ignored by the petitioner before the issuance of letter of acceptance. He referred the part-A of Annexure-C which enumerates financial eligibility. The same is reproduced as under:-

i. Experience of having successfully executed:

a) Three similar works each costing not less than the amount equal to 20% of the probable amount of contract during the a last 5 financial years; or

b) Two similar works each costing not less than the amount equal to 30% of the probable amount of contract during the last 5 financial years; or



- c) One similar works each costing not less than the amount equal to 50% of the probable amount of contract during the the last 5 financial years;*
- ii. Average annual construction turnover on the construction works not less than 50% of the probable amount of contract during the last 5 financial years.*
- iii. Executed similar items of work in any one financial year during the last 5 financial years, which should not be less than the minimum physical requirement, if any, fixed for the work.*
- iv. Bid capacity — Bidder shall be allotted work up to his available bid capacity which shall be worked out as given in format I-2 of Annexure-I.*

6 . He submits that Annexure (i) of the bid documents provides for requirement of annual turnover and bid capacity. The Clause for annual turnover states that the average annual turnover on the construction of civil engineering works during preceding 5 financial shall not be less than 50% of the probable amount of the contract. Thus, according to him, ignoring the said wrong documents, he was fulfilling the minimum qualifying criteria in the evaluation as stated in the annual turnover sheet for bid capacity. It is further acerbated that the probable cost of construction work for District Court was provided in the tender at Rs. 25333.95 lakhs fifty percent of which amounts to Rs. 12666.98 lakhs. Since, as per duly certified certificate issued by the Chartered Accountant, the Average Annual Turnover on the construction of civil engineering works during preceding 5 financial years was Rs. 13053.14 lakhs which is more than Rs. 12666.98 lakhs (50% of the total cost of tender), the petitioner company duly fulfilled the requisite eligibility to participate in the tender. The petitioner fulfilled the twin conditions required for participating in the tender, i.e., annual turnover as well as bid capacity. However, it is submitted that there is no dispute either with regard to this criteria against the petitioner and is not the basis for passing of the impugned orders. Dispute however only relates to pre-



qualification criteria as enumerated in Part A of Annexure-C appended to the bid document regarding Financial eligibility as quoted above.

7. Thus, it is argued that the registration of contract on the ground of submission of forged document is illegal and arbitrary. It is further urged that as per the tender evaluation committee Report dt.18/9/2023, the authorities, i.e, Executive Engineer(Building), Chief Engineer (CE) and Superintending Engineer duly analyzed documents of all three participating bidder companies and found the turnover document of one bidder, 'SPG infra' as fake and found the documents of the petitioner to be proper. It is pertinent to mention here that no action as per clause 14.2 of the tender document was taken against the said company, namely "SPG Infra" which is mandated by Clause 24(ii)(b), which defines fraudulent practice on account of submitting fake documents and portraying incorrect turnover. Neither the EMD of Rs.50 lakhs submitted by the SPG Infra and till date the registration of SPG Infra is active which can be easily seen on the MPPWD website. The action of the tender evaluation committee also contemplates that all the documents which were submitted by the bidders alongwith their bid were duly verified and it is only upon verification, suggestive action was taken against the bidders, like documents submitted by SPG Infra was found to be fake but no action as per conditions of the NIT was taken against it. On the other hand, the representation of the petitioner was considered and it is only upon ignoring said documents, petitioner was awarded tender.

8. Counsel for the respondents No.1-4 supported the impugned orders. The work experience certificate submitted by the petitioner along with the tender was found to be forged and, therefore, invoking Clause-27.2g of the contract. The same was terminated on the ground of fraud committed by the petitioner and an FIR has also been lodged at Police Station - Palasia, Indore bearing Crime No.225/2024 on 22.06.2024. It is also argued that as a result of the termination of contract, the respondents forfeited the bank guarantee furnished by the petitioner by order dated 27.06.2024, however, the dismay of the amount of the bank guarantee, the said amount had already been withdrawn by the petitioner in the month of March, 2024 itself unilaterally without informing the same to the respondents. For the said reason also, the



petitioner has been blacklisted and before passing the order of blacklisting and cancellation of registration, the petitioner was given a show cause notice and the petitioner had sent his reply on mail and after considering the said reply, the impugned order of blacklisting and cancellation of registration has been passed.

9. The respondents also raised preliminary objection that regarding maintainability of the petition in respect of challenge to the order of termination of contract on the ground that as per the Clause 12.5 of the Conditions of Contract, complete grievance of redressal mechanism is provided and thereafter the petitioner has remedy to approach Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983.

10. Counsel for the respondents No.5 & 6 submitted that they are not necessary party in the present case. No relief is claimed against them. They were not member of the committee which had awarded the contract to the petitioner and they had not taken decision for cancellation of of contract and blacklisting of the petitioner. The impugned orders are passed by the Competent Authority.

11. After hearing learned counsel for the parties it is apt to reproduce Clause-12 of the Contract as under:-

12. Dispute Resolution System

12.1 No dispute can be raised except before the Competent Authority as defined in Contract Data in writing giving full description and grounds of dispute. It is clarified that merely recording protest while accepting measurement and/or payment shall not be taken as raising a dispute.

12.2 No dispute can be raised after 45 days of its first occurrence. Any dispute raised after expiry of 45 days of its first occurrence shall not be entertained and the Employer shall not be liable for claims arising out of such dispute.

12.3 The Competent Authority shall decide the matter within 45 days.



12.4 Appeal against the order of the Competent Authority can be preferred within 30 days to the Appellate Authority as defined in the Contract Data. The Appellate Authority shall decide the dispute within 45 days.

12.5 Appeal against the order of the Appellate Authority can be preferred before the Madhya Pradesh Arbitration Tribunal constituted under Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983.

12.6 The Contractor shall have to continue execution in the Works with due diligence notwithstanding pendency of a dispute before any authority or forum.

12. Considering the rival contentions raised by counsel for the parties and the facts of the present case involving disputed question of facts as well, we are of the considered view that the petitioner has alternative and efficacious remedy under Clause-12 of the Contract. In view of the aforesaid, we are not inclined to entertain the present petition so far it relates to challenge to the order of termination of contract and forfeiture of bank guarantee.

13. So far challenge to the fresh NIT dated 26.07.2024 (Annexure P/25) is concerned, we are of the considered view that since the contract of the petitioner has already been terminated and this Court has declined to interfere with the order of termination of contract in the writ petition, therefore, the petitioner has no locus to challenge the fresh NIT dated 26.07.2024. Thus, the petition is also dismissed so far challenge to the said NIT dated 26.07.2024 is concerned.

14. In regard to the challenge to the order of blacklisting, we have considered submissions and the record from which it is evident that a show cause notice dated 12.06.2024 for blacklisting was issued to the petitioner and he was granted 15 days time to file reply. The said period was to expire on 27.06.2024. The petitioner sent a mail to the respondents in respect of



notice to the termination of contract and not in pursuant to the show-cause for blacklisting, however, the same has been treated to be reply to the show cause notice for blacklisting and the impugned order has been passed. In the show-cause notice dated 12.06.2024 for blacklisting 15 days time was granted to the petitioner to file reply. The said period was to expire on 27.06.2024. However, even prior to the expiry of the said period, the impugned order of blacklisting and suspension of registration was passed on 24.06.2024. Considering the show cause notice dated 12.06.2024 and the mail sent by the petitioner, it is crystal clear that the mail sent by the petitioner was not in respect of the show cause notice dated 12.06.2024 for blacklisting and prior to expiration of 15 days of the show cause notice, the impugned order has been passed. Thus, the impugned order has been passed without affording adequate opportunity of hearing and in violation of principles of natural justice.

15. The law relating to blacklisting is no longer *res integra*. Blacklisting has always been viewed by this Court as a drastic remedy and the orders passed have been subjected to rigorous scrutiny. In *Erusian Equipment & Chemicals Ltd. vs State of West Bengal & Anr. (1975) 1 SCC 70*, this Court observed that :-

"22. 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...."

16. In *Mr. B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. & Ors. (2006) 11 SCC 548*, this Court held that :-

"41. ... When a contractor is blacklisted by a department he is debarred from obtaining a contract, but in terms of the notice inviting tender when a tenderer is declared to be a defaulter, he may not get any contract at all. It may have to wind up its business. The same would, thus, have a disastrous effect on him. Whether a person defaults in making payment or not would depend



upon the context in which the allegations are made as also the relevant statute operating in the field. When a demand is made, if the person concerned raises a bona fide dispute in regard to the claim, so long as the dispute is not resolved, he may not be declared to be defaulter.”

17. This Court in *Kulja Industries Ltd. vs. Chief General Manager Western Telecom Project BSNL & Ors. (2014) 14 SCC 731* after setting out the legal position governing blacklisting/debarment in USA and UK held that :-

“25. Suffice it to say that “debarment” is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the “debarment” is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.

26. In the case at hand according to the respondent BSNL, the appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the respondent Corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when (a) the appellant is supplying bulk of its manufactured products to the respondent BSNL, and (b) the excess amount received by it has already been paid back.

18. The Apex Court in the case of *Canara Bank v. V.K. Awasthy, (2005) 6 SCC 321*, has held that the natural justice is another name of common sense justice. The Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. The expressions



‘natural justice’ and ‘legal justice’ do not present a watertight classification.

It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. The relevant extracts of the said decision read as under:

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“8. Natural justice is another name for common-sense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common-sense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

9. The expressions “natural justice” and “legal justice” do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants' defence.

10. The adherence to principles of natural justice as recognized by all civilised States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so



as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate interrogate and adjudicate". In the celebrated case of Cooper v. Wandsworth Board of Works, (1863) 143 ER 414 the principle was thus stated:

"[E]ven God himself did not pass sentence upon Adam, before he was called upon to make his defence, 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?'"

Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

11. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice."

19. In the case of *Raghunath Thakur v. State of Bihar, (1989) 1 SCC 229*, it is held that an order of blacklisting has the civil consequences and could not be passed without notice. The same view has been reiterated by the Apex Court in a recent judgment delivered on 7/8/2024 in the case of the Blue Dreamz Advertising Pvt. Ltd. and Anr. Vs. Kolkata Municipal



Corporation in SLP (Civil) NO.11682/2018.

20. In view of the aforesaid, the impugned order of blacklisting dated 24.06.2024 (Annexure P/22) is quashed. The petitioner is granted 15 days time to submit reply to the show cause notice dated 12.06.2024 and the Competent Authority shall pass fresh order after considering the reply and affording opportunity of hearing to the petitioner in accordance with the law.

21. In view of the aforesaid, the petition is **partly allowed and disposed off.**

(VIVEK RUSIA)
JUDGE

(VIJAY KUMAR SHUKLA)
JUDGE

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