

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR**

**BEFORE**

**HON'BLE SHRI JUSTICE RAVI MALIMATH,  
CHIEF JUSTICE**

**&**

**HON'BLE SHRI JUSTICE VISHAL MISHRA**

**ON THE 15<sup>th</sup> OF SEPTEMBER, 2022**

**WRIT PETITION No. 10989 of 2022**

**BETWEEN:-**

**LINKWELL TELESYSTEMS PVT. LTD. COMPANY INCORPORATED UNDER THE PROVISION OF THE COMPANIES ACT 1956 AND IS A COMPANY WITHIN THE MEANING OF THE COMPANIES ACT (2013), HAVING ITS REGISTERED OFFICE AT 252/1B BEHIND SHOPPERS STOP BEGUMPET HYDERABAD 500016, TELANGANA, THROUGH AUTHORIZED SIGNATORY MR. DEVAL KHARE, S/O SHRI NIRMAL KHARE, AGED ABOUT 39 YEARS, OCCUPATION PROJECT MANAGER, LINKWELL TELESYSTEMS PVT. LTD., R/O HX 106, E7 EXTENSION, ARERA COLONY BHOPAL (MADHYA PRADESH) 462016**

**.....PETITIONER**

***(BY SHRI CHALLA KONANDA RAMA - SENIOR ADVOCATE WITH SHRI SIDDHARTH SHARMA & SHRI PRANAY SHUKLA - ADVOCATES)***

**AND**

- 1. THE STATE OF MADHYA PRADESH, THROUGH PRINCIPAL SECRETARY MINISTRY OF FOOD AND CIVIL SUPPLIES, DEPARTMENT OF CONSUMER PROTECTIONS, VALLABH BHAWAN, BHOPAL (MADHYA PRADESH)**
- 2. THE PRINCIPAL SECRETARY, FOOD, CIVIL SUPPLIES AND CONSUMER PROTECTION DEPARTMENT, VALLABH BHAWAN, BHOPAL (MADHYA PRADESH)**
- 3. THE DIRECTOR, DIRECTORATE OF FOOD, CIVIL SUPPLIES AND CONSUMER**

PROTECTION DEPARTMENT, D-WING 1ST FLOOR 1ST FLOOR, VINDHYACHAL BHAWAN, ARERA HILLS, BHOPAL (MADHYA PRADESH)

4. OASYS CYBERNETICS PVT. LTD., A COMPANY INCORPORATED UNDER THE PROVISIONS OF COMPANIES ACT, HAVING ITS OFFICE AT 3/4, STRINGERS ROAD, OAS TOWERS, VEPEY, PERIAMET, CHENNAI (TAMIL NADU)

.....RESPONDENTS

*(SHRI HARPREET S. RUPRAH - ADDITIONAL ADVOCATE GENERAL WITH SHRI SUYASH THAKUR - GOVERNMENT ADVOCATE FOR RESPONDENTS NO.1 TO 3 AND SHRI ANSHUMAN SINGH - ADVOCATE FOR RESPONDENT NO.4)*

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*This petition coming on for admission this day, Hon'ble Shri Justice Ravi Malimath, Chief Justice passed the following:*

**ORDER**

The case of the petitioner is that it is a Company engaged in the business of creating, designing, developing, manufacturing and launching of various new electronic products etc.

2. That the respondent no.3 floated a Notice Inviting Tender (NIT) on 04.06.2021 for appointment of System Integrator for Fair Price Shop (FPS) Automation under PDS (Supply, Install and Maintain) PoS devices along-with System Integration with Government portals. The petitioner and others bid for the same. The bid of the petitioner was accepted as he being L1. Letter of Intent was issued on 17.12.2021. Questioning the same the respondent no.4 herein filed Writ Petition No.2026 of 2022. It was contended therein that the writ petitioner herein had suppressed a material information of his contract being terminated by the State of Sikkim and therefore, the award of tender to him goes against the conditions mentioned in the bid. However, by the order dated 04.02.2022 the submission of the learned Deputy Advocate General was placed on record that the tender document dated 04.06.2021 has been cancelled on 03.02.2022 and all

further proceedings have also been cancelled. That the State proposes to go in for a fresh tender. In view of the submissions made, the writ petition was dismissed as being infructuous. Thereafter, in view of the termination of the tender in favour of the writ petitioner herein the instant writ petition has been filed seeking to question the order of termination.

3. Notices were issued to the respondents. The State have filed their reply. The intervention application having been allowed, the applicant therein namely L4 has been impleaded as respondent no.4.

4. Shri Challa Konanda Rama, learned senior counsel appearing for the petitioner's counsel submits that the termination order dated 01.02.2022 is erroneous and liable to be set aside. That the respondents have no authority to terminate the contract for breach of any of the terms of contract. That the State relies upon Clause 4.2.1 of the tender document by stating that there has been a violation of the same in particular with reference to Serial No.5 thereon. The same would indicate that an affidavit of declaration has to be filed to the effect that the bidder has not been terminated by the Central Government/any State Government/any Government Organization or Department in India for breach of the terms of contract/non-compliance of terms of contract etc. It is submitted that none of this has happened. That his bid has not been terminated for breach of terms of contract. In fact, the material on record would indicate that in respect of the contract, which was entered into with the State of Sikkim, the payments were not being made to the writ petitioner. That huge amounts were overdue in spite of the specific clauses in the agreement. That even though the payments were not being made regularly to the writ petitioner, he continued in the service of the State of Sikkim. Therefore, this is not the case of the contract being terminated on the grounds of non-performance. Hence, he pleads that the finding by the State is erroneous. He has also relied on certain communications of the State wherein these facts were brought to the notice

of the State before the LOI was issued. He further pleads that the Writ Petition No.2026 of 2022 was listed before the Court for the first time on 28.01.2022. On 04.02.2021, on the submission made by the State the petition was dismissed as being infructuous on the ground that the tender has been withdrawn. In the interregnum period, there was no notice at all issued to him. That, if at all the State had any doubt with regard to the contents in the tender document, an appropriate notice should have been issued to him before termination. Even that has not been done by the State. Hence, on this ground also the impugned order of termination is liable to be set aside.

5. The State had filed the return. They have, by and large, reiterated the reasons for termination. They have also stated therein that the termination of contract with the State of Sikkim was not brought to the notice of the State. That in the self-declaration filed in terms of Annexure R-3, the petitioner has stated that its contract has never been terminated. Therefore, this is a false declaration. Hence, the termination was ordered.

6. The respondent No.4 have also supported the case of the State. They have further stated various grounds on which the order of termination cannot be interfered.

7. Heard learned counsels and examined the material on record.

8. The primary ground on which the contract has been terminated is Clause 4.2.1 with reference to Serial No.5 which reads as follows:

*“4.2.1. Eligibility Criteria*

5	<p><u>Performance:</u></p> <p><i>The Bidder should not have been terminated by Central Govt. / any State Govt. / any Govt. Organization or Department in India for breaching the terms of contract / non-compliance of terms of agreement at the time of Bid submission. If this is later found to be false, the application fees and any performance guarantees would be forfeited.</i></p>	<i>Affidavit of declaration</i>
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Therefore, the same would have to be accompanied by an affidavit of declaration.

**9.(a)** We asked the learned counsel for the petitioner as well as the State as to whether the affidavit of declaration has been filed. We do not find any material to indicate that such an affidavit of declaration has been filed. Therefore, there does not appear to be any such affidavit in terms of the Serial No.5 of Clause 4.2.1 wherein, the petitioner bidder would have to indicate that his contract has not been terminated earlier. However, what is being contended by the learned counsel for the petitioner is that there is no format for such a declaration. That the format for declaration as could be seen is in terms of Serial No.4 of Clause 4.2.1, which reads as follows:

4	<p><u><i>Blacklisting:</i></u></p> <p><i>The Bidder shall not have been blacklisted by Central Govt. / any State Govt. / any Govt. Organization or Department in India at the time of Bid submission.</i></p>	<p><i>Court affidavit by the designated official as per the format of the responding firm or as per Annexure of Section 9.2.4.</i></p>
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**9.(b)** Therein what is sought for is a Court affidavit by the designated official as per the format of the responding Firm or as per Annexure of Section 9.2.4. Therefore, the format as provided in Clause 9.2.4 has been furnished by the petitioner as could be seen from Annexure P-5, which is a self declaration dated 30<sup>th</sup> July, 2021. Therefore, the format as provided by the State has been complied with. There is no such format so far as the Clause-B for termination is concerned. Hence, it cannot be said that there is any non-submission or suppression of material facts.

**10.** We have considered the contentions.

**11.** Serial No.5 of Clause 4.2.1 does not indicate any fixed format which the bidders would have to follow. The format has been narrated so far Serial No.4 of Clause 4.2.1 is concerned and probably other formats. Therefore, the contention of the petitioner that no format is prescribed requires to be accepted. But that does not mean that an affidavit should not

be filed. A standardized format having not been provided, does not mean that an affidavit should not be filed. The requirement clearly indicates the information that has to be provided in the form of an affidavit. Therefore, if a format is not prescribed then the affidavit could be in such a manner as the bidder may deem fit. We do not find any such affidavit on record.

**12.** Furthermore, the affidavit has been filed in terms of Clause 9.2.4. We have considered the same. The same is with regard to a declaration for not being blacklisted by any Government entity. It reads as follows:

*“9.2.4 Self-declaration for not being blacklisted by any Government Entity  
(Letter on the bidder's Letterhead)*

*To*

*Director,*

*Directorate of Food, Civil Supplies and Consumer Protection,*

*D-Wing, 1<sup>st</sup> Floor, Vindhyachal Bhavan,*

*Arera Hills, Bhopal-462004. Madhya Pradesh*

*Sub: Declaration for not being blacklisted by any Government Entity*

*Ref: RFP for Selection of System Integrator for Supply, Installation and Maintenance of Pos Devices (Tender*

*No: \_\_\_\_\_ Dated: \_\_/\_\_/\_\_)*

*Dear Sir,*

*In response to the above mentioned RFP I/We \_\_\_\_\_, as \_\_\_\_\_ <Designation> \_\_\_\_\_ of M/s \_\_\_\_\_, hereby declare that our Company / Firm \_\_\_\_\_ is having unblemished past record and is not declared blacklisted or had our contract terminated or ineligible to participate for bidding by any State / Central Govt., Semi-government or PSU due to unsatisfactory performance, breach of general or specific instructions, corrupt / fraudulent or any other unethical business practices.*

*Your Faithfully*

*[Authorized Signatory]*

*[Designation]*

*[Place]*

*[Date and Time]*

*[Seal & sign]*

*[Business Address]”*

**13.** Therefore, there are two aspects in this affidavit. Firstly is the factum of being blacklisted. It is clearly stated that the petitioner has not been blacklisted. However, the second portion of the affidavit would indicate that any time in the past the contract has not been terminated or has been ineligible to participate for bidding etc. Therefore, this is a statement made on affidavit by the bidder. He has clearly stated that his contract has not been terminated. Undisputedly, the contract of the petitioner in the State of Sikkim has been terminated. There is no contest with regard to the same. But what is being submitted by the petitioner's counsel is the reason for termination. It is the specific case of the petitioner that in terms of Clause 4.2.1(5), in the affidavit it would have to be indicated only if the termination is by breaching the terms of contract or otherwise. In the contract with the State of Sikkim, there is no breach of contract. He has performed his part of the contract without any failure. In fact, the failure was because of the State of Sikkim. Since the State of Sikkim did not make any payment to him he was compelled to stop the work. These are all matters of record which cannot be disputed by either the parties. Therefore, the termination is not because of his non-performance.

**14.** However, on considering the contentions, we do not think that such a submission could be accepted. Firstly is the fact of a non-filing of an appropriate affidavit in terms of Clause 4.2.1(5). However, even assuming that the same is covered in terms of the affidavit as filed in Clause 9.2.4 is concerned, there is a clear averment that the contract has not been terminated. The affidavit does not indicate that no contract has been terminated in terms of what is stated in Clause 4.2.1(5). The specific statement is that no contract is terminated. Secondly, with regard to the grounds for termination whether the petitioner was liable or the State of Sikkim is not necessary for this Court to go into. Whether the termination

is because of the fault of the petitioner or fault of the State of Sikkim is not for us to consider. The factum of termination exists. Therefore, such factum of termination should necessarily have been brought to the notice of the authorities when the affidavit was filed. Nothing prevented the petitioner from stating the true facts before the respondents. However, to contend as a matter of law and trying to make a distinction with regard to the quality of the termination, in our considered view, is not open for us to consider. We are only considering the fact as to whether the affidavit sought for by the respondents is a true reflection of the state of facts. The factum of termination having not been brought to the notice of the State, in our considered view, is a sufficient ground for termination of the contract.

**15.** The further plea that there are various communications between the petitioner and the State with regard to the very issue of termination also requires to be considered. There are communications by the Government asking the petitioner to show cause on this issue. He has replied to the same. It is the case of the petitioner that having accepted the position, thereafter the LOI has been issued. Be that as it may, the requirement of the petitioner in furnishing the requirements to the State, in our considered view, cannot be overlooked by the subsequent events. If such a material was placed for consideration before the State and the same was qualified, only then the State could have proceeded to consider whether the termination was bad or not or otherwise. Therefore, so far as the termination is concerned, we are of the view that since there has been non-furnishing of the required information to the State, the termination of the contract by the State, in our considered view, cannot be disturbed.

**16.** After the order of termination was passed by the State of Sikkim, the writ petitioner had filed Writ Petition (C) No.23 of 2021 before the High Court of Sikkim at Gangtok, which was dismissed on 09.06.2021. Writ Appeal No.03 of 2021 was filed. The writ appeal was also dismissed vide



order dated 10.12.2021 while coming to the conclusion that the writ petitioner therein is always entitled to invoke the arbitration clause. It was at that juncture the Additional Advocate General therein had also stated that the appellant/writ petitioner has already invoked the arbitration clause in the State of Sikkim.

**17.** Yet another document vide Annexure R-2 has been placed by the respondent No.4 which is a copy of the E-Portal of the Government of India. The same would indicate that the bid submitted by writ petitioner herein in the State of Rajasthan was found to be disqualified. That the reason assigned therein is that the writ petitioner has accepted that they have used fake signatures on the stamp papers. That this amounts to submitting forged document in the bid. However, on considering the same, we do not find that such a document is relevant for the determination of this case.

**18.** So far as the contention that adequate notice was not given before termination is concerned, we do not think that it is necessary to do so. The condition in the bid document itself indicates that if any false declaration is made the tender is liable to be rejected. When such a clause exists the question of giving any notice would not arise for consideration.

**19.** Clause 7.7 of the bid documents deals with the termination of the successful bidder. It contains various clauses. Clause 7.7i. reads as follows:-

*“7.7i. The engagement of the Successful Bidder shall be suspended, and the Bidder may be blacklisted forthwith by the DFCSCP under following circumstances/reasons:*

- i. Violation of any condition of the tender/ contract or part of any condition of the tender contract of engagement, or*
- ii. Deviation found in quality and quantity of the product supplied, or*
- iii. On finding software supplied with hardware is pirated, or*

- iv. *If it is found that during the process of award of contract, fraudulence was made by the Successful Bidder or the Successful Bidder if found to resort to the fraudulent practice in getting supply order like offering incentive in terms of free product or money.”*

Therefore, it is a case of the respondents that fraud has been made by the successful bidder and hence, the contract has been terminated. That the fraudulent practice has been committed.

**20.** Clause 7.11 of the bid documents deals with Corrupt/Fraudulent Practices. Fraudulent practice is defined in Clause 7.11d, which reads as follows:-

*“7.11d. "Fraudulent practice" means a misrepresentation of facts in order to influence award of contract or a procurement process or a execution of a contract to the detriment of DFCSCP, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive DFCSCP of the benefits of the free and open competition.”*

The same would indicate that a fraudulent practice means misrepresentation of facts in order to influence award of a contract etc. That is exactly what the writ petitioner has done. He has given a false information with regard to termination of the contract. Therefore, in terms of the clauses in the bid documents the respondents were justified in terminating the contract.

**21.** Hence, for all these reasons we do not find any ground to interfere in the matter. Consequently, the writ petition being devoid of merit is dismissed.

**(RAVI MALIMATH)**  
**CHIEF JUSTICE**

**(VISHAL MISHRA)**  
**JUDGE**