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 1st OF JULY, 2022

WRIT PETITION No. 12087 of 2022

Between:-

INTERCONTINENTAL CONSULTANTS AND TECHNOCRATS PVT. LTD. COMPANY REGISTERED UNDER THE COMPANIES ACT, HAVING REGISTERED OFFICES AT:- A-8, GREEN PARK, NEW DELHI THROUGH THEIR AUTHORISED SIGNATORY SAURABH KHANNA, NEW DELHI - 110016

.....PETITONER

(BY SHRI KISHORE SHRIVASTAVA – SENIOR ADVOCATE WITH SHRI KUNAL THAKRE, SHRI RAJAS POHANKAR AND MS. SURBHI GUPTA – ADVOCATES)

AND

1. **MINISTRY OF ROAD TRANSPORT AND HIGHWAYS, GOVERNMENT OF INDIA (REGIONAL OFFICE) SUPERINTENDING ENGINEER ON BEHALF OF CHIEF ENGINEER, BHOPAL AT 2ND FLOOR NIRMAN BHAWAN ARERA HILLS, BHOPAL (MADHYA PRADESH)**

2. **MANAGING DIRECTOR, MP ROAD DEVELOPMENT CORPORATION LIMITED (GOVERNMENT OF M P UNDERTAKING) 45-A, ARERA HILLS, BHOPAL-462011, MADHYA PRADESH**

3. MINISTRY OF ROAD TRANSPORT AND HIGHWAYS GOVERNMENT OF INDIA, HEAD OFFICE AT – TRANSPORT BHAWAN,1 PARLIAMENT STREET, NEW DELHI-110001 (DELHI) THROUGH SECRETARY (RT & H)

.....RESPONDENTS

(SHRI VIKAS GUPTA – ADVOCATE FOR RESPONDENT NO.1 AND SHRI ANVESH SHRIVASTAVA – ADVOCATE FOR RESPONDENT NO.2)

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

ORDER

1. The case of the petitioner is that respondent No.3 floated the bid for consultancy services for rehabilitation and up-gradation of Jabalpur Bhopal Section of NH-12 from KM 10.400 to KM 130.00 to four lane with paved shoulder with provision of rigid pavement on EPC mode under NHDP-III in the State of Madhya Pradesh in February, 2016. The petitioner and others bid for the same. The financial proposal of the petitioner was accepted by the letter dated 11.07.2016. An agreement was executed on 28.07.2016. The respondent No.2 entered into the contract dated 19.12.2017 for execution of the project with the contractor M/s Wagad Infra Projects Pvt. Ltd- M/s Sorathia Velji Ratna Co. (JV) for the purposes of this contract dated 19.12.2017.

2. The role of the petitioner in the said project was that of a consultant. It was their duty under the contract to advise and supervise the other contractor. Thereafter, a communication/show cause notice dated 22.07.2021 in terms of Annexure P/16 was addressed by Superintending Engineer of respondent No.1 to the petitioner seeking for an explanation as to why Rs.0.35 Crore COS for 50 meters long additional retaining wall/Toe wall in approaches of Hiran River Bridge is proposed when it is not required and other material. A reply was furnished by the petitioner

explaining the said position in terms of Annexure P/17 dated 30th July 2021. Ten months thereafter the impugned communication was addressed to the petitioner dated 27.04.2022 vide Annexure-P/1 declaring the petitioner as an "Non-performer" for any tender or RFP issued by the Authority/MoRTH/NHIDCL/State Government. That he is also debarred for one year from working in any capacity in National Highways works from the date of the order. Questioning the same, the instant petition has been filed.

3. Shri Kishore Shrivastava, learned Senior Counsel appearing for the learned counsel for the petitioner submits that the impugned communication/order is bad in law and liable to be set aside. That the role of the petitioner was only that of a Consultant. Similar kind of notices were issued to the other contractors. That the role of the petitioner was circumscribed by the terms of the contract. He contends that a notice was issued to him calling for an explanation with regard to such certain factual aspects on construction. The same was replied. Whether the reply was just and appropriate is a secondary question. Based on the communication vide Annexure-P/16, an order of debarment or blacklisting could not have been passed by the respondents. In support whereof, he relies on the judgments of the Hon'ble Supreme Court in the case of Vet India Pharmaceuticals vs. State of Uttar Pradesh and another reported in (2021) 1 SCC 804, UMC Technologies Private Limited Vs. Food Corporation of India and another reported in (2021) 2 SCC 551 and Gorkha Security Services Vs. Government (NCT of Delhi) and others reported in (2014) 9 SCC 105 with reference to paras 21 to 28.

4. The contesting respondents are respondent No.1 & 3. The matter was listed on the previous dates. The matter was adjourned specifically at request of the learned counsel for respondent No.1 to enable her to file

objections. Even as on date, objections have not been filed. There is no reply by any of the respondents. The petitioner's counsel pleads that even though an interim order staying the order of blacklisting has been granted, the drastic effect of the same continues against him. That he has not been able to bid for any of the contracts and therefore, he pleads that the matter be taken up for consideration. In spite of granting sufficient time, objections have still not been filed. Therefore, we are constrained to take up this matter for final disposal.

5. We are rather surprised that the respondent No.1 has taken this matter so very casually. Similar petitions were disposed off on 15.06.2022 pertaining to the very same question of law. This matter was also clubbed along with the same. However, the learned counsel Smt Gunjan Sinha Jain pleaded that she wants to distinguish this case with the other petitions that were disposed off on that day. Even though there was a serious objection by the petitioner to the same, in order to enable the respondents to have their say, the matter was again adjourned. It is rather unfortunate that the liberty given to the learned counsel for respondents has not been availed of. There appears to be a very casual approach in dealing with a matter which has serious civil consequences to the parties.

6. The question of law as raised by the learned counsel for the petitioner is that until and unless there is a specific show cause notice seeking to blacklist on contingency, such an order could not have been passed. In support whereof, he relies on the judgments of the Hon'ble Supreme Court in the case of Vet India Pharmaceuticals vs. State of Uttar Pradesh and another reported in (2021) 1 SCC 804 vide para 11, which reads as under:-

> *"11. If the respondents had expressed their mind in the show cause notice to blacklist, the appellant could have filed an appropriate response to the same. The*

> *insistence of the respondents to support the impugned order by reference to the terms of the tender cannot cure the illegality in absence of the appellant being a successful tenderer and supplier. We therefore hold that the order of blacklisting dated 08.09.2009 stands vitiated from the very inception on more than one ground and merits interference."*

In the case of UMC Technologies Private Limited Vs. Food Corporation of India and another reported in (2021) 2 SCC 551, the Hon'ble Supreme Court in para 24 and 25 has held as under:-

> *"24. A plain reading of the notice makes it clear that the action of blacklisting was neither expressly proposed nor could it have been inferred from the language employed by the Corporation in its show cause notice. After listing 12 clauses of the "Instruction to Bidders", which were part of the Corporation's Bid Document dated 25.11.2016, the notice merely contains a vague statement that in light of the alleged leakage of question papers by the appellant, an appropriate decision will be taken by the Corporation. In fact, Clause 10 of the same Instruction to Bidders section of the Bid Document, which the Corporation has argued to be the source of its power to blacklist the appellant, is not even mentioned in the show cause notice. While the notice clarified that the 12 clauses specified in the notice were only indicative and not exhaustive, there was nothing in the notice which could have given the appellant the impression that the action of blacklisting was being proposed. This is especially true since the appellant was under the belief that the Corporation was not even empowered to take such an action against it and since the only clause which mentioned blacklisting was not referred to by the Corporation in its show cause notice. While the following paragraphs deal with whether or not the appellants said belief was well-founded, there can be no question that it was incumbent on the part of the Corporation to clarify in the show cause notice that it intended to blacklist the appellant,*

so as to provide adequate and meaningful opportunity to the appellant to show cause against the same.

25. The mere existence of a clause in the Bid Document, which mentions blacklisting as a bar against eligibility, cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show cause notice. The Corporation's notice is completely silent about blacklisting and as such, it could not have led the appellant to infer that such an action could be taken by the Corporation in pursuance of this notice. Had the Corporation expressed its mind in the show cause notice to black list, the appellant could have filed a suitable reply for the same. Therefore, we are of the opinion that the show cause notice dated 10.04.2018 does not fulfil the requirements of a valid show cause notice for blacklisting. In our view, the order of blacklisting the appellant clearly traversed beyond the bounds of the show cause notice which is impermissible in law. As a result, the consequent blacklisting order dated 09.01.2019 cannot be sustained."

In the case of Gorkha Security Services Vs. Government (NCT of Delhi) and others reported in (2014) 9 SCC 105, the Hon'ble Supreme Court held in paras 21 to 28 as under:-

"21. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily

explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet the following two requirements viz:

i) The material/ grounds to be stated on which according to the Department necessitates an action;

ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

we may hasten to add that even if it is not specifically mentioned in the show cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.

Discussion with reference to the instant case:

23. With the aforesaid statement of law, now let us proceed with the present case scenario.

24. It would be necessary to take note of the relevant portion of clause 27 of the NIT under which umbrage is taken by the respondents to justify their action, and even appealed to the High Court. Clause 27 (a) (c) (a) reads as under:

"a (sic) In case the contractor fails to commence/ execute the work as stipulated in the agreement or unsatisfactory performance or does not meet the statutory requirements of the contract, Department reserves the right to impose the penalty as detailed below:-

(i) 20% of cost of order/ agreement per week, upto two weeks' delays.

(ii) After two weeks' delay Principal Employer reserves the right to cancel the contract and withhold the agreement and get this job carried out preferably from other contractor(s) registered with DGR and then from open market or with other agencies if DGR registered agencies are not in a position to provide such Contractor(s). The difference if any will be recovered from the defaulter contractor and also shall be blacklisted for a period of 4 years from participating in such type of tender and his earnest money/ security deposit may also be forfeited, if so warranted."

(emphasis supplied)

25. It is clear from the reading of the aforesaid clause that when there is a failure on the part of the contractor to comply with the express terms of the contract and/ or to commit breach of the said terms resulting into failure to commence/ execute the work as stipulated in the agreement or giving the performance that does not meet the statutory requirements of the contract, the Department has a right to impose various kinds of penalties as provided in the aforesaid clause. These penalties are of the following nature:-

(i) Penalty in the form of 20% of cost of orders/ agreement per week, upto delay of 2 weeks.

(ii) If the delay is beyond 2 weeks then:

a) To cancel the contract and withhold the agreement. In that event, Department has right to get the job carried out from other contractor at the cost of the defaulter contractor;

b) To black list the defaulter contractor for a period of 4 years;

c) To forfeit his earnest money/ deposits, if so warranted. (emphasis supplied)

26. In the present case, it is obvious that action is taken as provided in sub clause 2(ii). Under this clause,

as is clear from the reading thereof, the Department had a right to cancel the contract and withhold the agreement. That has been done. The Department has also a right to get the job which was to be carried out by the defaulting contractor, to be carried out from other contractor(s). In such an event, the Department also has a right to recover the difference from the defaulting contractor. This clause, no doubt, gives further right to the Department to blacklist the contractor for a period of 4 years and also forfeit his earnest money/ security deposit, if so required. It is thus apparent that this sub-clause provides for various actions which can be taken and penalties which can be imposed by the Department. In such a situation which action the Department proposes to take, need to be specifically stated in the show cause notice. It becomes all the more important when the action of black listing and/ or forfeiture of earnest money/ security deposit is to be taken, as the clause stipulates that such an action can be taken, if so warranted. The words "if so warranted", thus, assume great significance. It would show that it is not necessary for the Department to resort to penalty of black listing or forfeiture of earnest money/ security deposit in all cases, even if there is such a power. It is left to the Department to inflict any such penalty or not depending upon as to whether circumstances in a particular case warrant such a penalty. There has to be due application of mind by the authority competent to impose the penalty, on these aspects. Therefore, merely because of the reason that clause 27 empowers the Department to impose such a penalty, would not mean that this specific penalty can be imposed, without putting the defaulting contractor to notice to this effect.

27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically

but from the reading of the show cause notice, it can be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.

28. In the instant case, no doubt show cause notice dated 6.2.2013 was served upon the appellant. Relevant portion thereof has already been extracted above (see para 5). This show cause notice is conspicuously silent about the blacklisting action. On the contrary, after stating in detail the nature of alleged defaults and breaches of the agreement committed by the appellant the notice specifically mentions that because of the said defaults the appellant was "as such liable to be levied the cost accordingly". It further says "why the action as mentioned above may not be taken against the firm, besides other action as deemed fit by the competent authority". It follows from the above that main action which the respondents wanted to take was to levy the cost. No doubt, notice further mentions that competent authority could take other actions as deemed fit. However, that may not fulfil the requirement of putting the defaulter to the notice that action of blacklisting was also in the mind of the competent authority. Mere existence of Clause 27 in the agreement entered into between the parties, would not suffice the aforesaid mandatory requirement by vaguely mentioning other "actions as deemed fit". As already pointed out above in so far as penalty of black listing and forfeiture of earnest money/ security deposit is concerned it can be imposed only, "if so warranted". Therefore, without any specific stipulation in this behalf, respondent could not have imposed the penalty of black listing."

7. We are of the view that the answer to the ground urged by the learned counsel for the petitioner is since covered by the aforesaid

judgments of the Hon'ble Supreme Court wherein, the Hon'ble Supreme Court has held that in order to pass any order against the concerned person, a show cause notice to the said effect has to be necessarily issued, which would mean that in case the respondents intend to blacklist the petitioner, then a show cause notice to that effect would have to be issued. If the show cause notice is otherwise, then the respondents are not entitled to resort to blacklisting the petitioner. In the instant case, the notice dated 22.07.2021 (Annexure P/16) issued to the petitioner is with regard to certain issues, which are as follows:-

> *" 6.1 It may be explained as to why Rs.0.35 Cr. COS for 50 m long additional Retaining Wall/Toe wall in approaches of Hiran River Bridge is proposed, when it is not required.*
>
> *7. It is also observed that AE has not duly verified the site & recommended extra cost for COS, while there is saving in the contract in total due to these two attributes (culverts & retaining wall) of COS. In view of the above, it may be explained as to why not action against AE be initiated as per the Contract Provision."*

8. Therefore, any action to be taken should have been relatable to what was stated in the said notice. There is not even a whisper that the respondents intend to debar the petitioner or to pass a similar order. However, in terms of the impugned communication dated 27.04.2022 (Annexure P/1), the respondents have stated in para 6 as follows:-

> *"6. Therefore M/s Intercontinental Consultants and Technocrats Pvt. Ltd, New Delhi is hereby declared as Non-Performer for any tender or RFP issued by the Authority/MoRTH/NHAI/NHIDCL/State Government for NH works upto 1 year or till rectification of deficiencies whichever is earlier and taking adequate measures not to repeat such instances in future and concerned TL of the AE shall be removed from the*

project and is debarred upto 1 year for working in any capacity in NHs works from the date of issue of this letter as per Cl 1.9 of RFP and Ministry's Circular dated 07.10.2021."

9. Therefore what is stated in para 6 in the impugned communication dated 27.04.2022 has no nexus with the show cause notice issued to the petitioner dated 22.07.2021. The very issue is since answered by the aforesaid judgments by the Hon'ble Supreme Court. Hence, for all these reasons, we are of the view that the impugned communication becomes unsustainable.

10. Consequently, the writ petition is allowed. The impugned communication dated 27.04.2022 issued by the respondent No.1 vide Annexure-P/1 is quashed.

No order as to cost.

(RAVI MALIMATH)
CHIEF JUSTICE

(VISHAL MISHRA)
JUDGE

Prar.