

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

WP(C) No. 1196/2021
CM No. 5773/2021
CM No. 5774/2021
CM No. 4917/2021

Pronounced on: 29.07.2022

Rakesh Kumar Choudhary

.... Petitioner(s)

Through:- Mr. Vikram Sharma, Sr.
Advocate with Mr. Manjeet
Singh, Advocate

V/s

Union of India and others

.....Respondent(s)

Through:- Mr. U. K. Jalali, Sr. Advocate
with Mr. Vipin Gandotra,
Advocate

CORAM: HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE
JUDGMENT

01. The National Highway Authority of India invited bids through e-tender from experienced firms/organizations for short term improvement and routine maintenance of NHAI/Lakhanpur-Jammu section including Jammu Bye-pass from Km 16.350 to Km 97.20 and Km 0.00 to Km 15.00 of Jammu Bye-pass of NH-44 (old NH-1A) in the State of Jammu and Kashmir. The petitioner alongwith other eligible contractors, participated in the bidding process and being the lowest bidder, his bid for contract price of Rs. 9,34,34,136/- was accepted. The petitioner, thus, furnished performance security plus additional security for an amount of Rs. 93,43,414/- in terms of the bid document. The NHAI, accordingly, entered into a contract with the petitioner on

05.03.2018 and the petitioner successfully completed the execution of the contract. The respondent No. 4 i.e. Regional Officer, J&K, NHAI issued a show-cause notice dated 04.02.2021 to the petitioner, stating that since the experience certificates submitted by the petitioner were not genuine and have not been issued by the concerned authorities, as such, are false and fabricated, therefore, confirmation towards correctness of these documents is also false.

02. The petitioner was, thus, called upon to show cause as to why action under Clause 35 of the Instructions to Bidder (ITB) of RFP document declaring the firm ineligible either indefinitely or for a stated period of time be not initiated against him, as the petitioner has engaged in corrupt & fraudulent practices.

03. In reply dated 17.02.2021, to the show-cause notice, the petitioner submitted that the respondents could not invoke Clause 35 of the Instructions to Bidder (ITB) of RFP documents as the contract was awarded and executed within stipulated period of time to the satisfaction of the respondents-NHAI. It was certified by the Project Director, NHAI on 03.02.2020 that the petitioner had performed the same satisfactorily. It was also submitted that the case of the petitioner was not covered under Clause 35 of Instructions to Bidder (ITB) of RFP, as such, proceedings initiated in terms of notice be dropped, as the same are unwarranted and unfounded. The respondents, after considering the reply issued an office circular dated 26.03.2021 declaring the petitioner ineligible to bid for any work of NHAI and also debarred him from participating in bidding for any work to be

undertaken by NHAI thereafter for a period of 02 years from the date of issuance of that office circular.

04. The petitioner is aggrieved of the office circular dated 26.03.2021, declaring him ineligible from participating in the bidding process in any work undertaken by NHAI i.e., blacklisting him. The impugned circular dated 26.03.2021 is, thus, challenged by the petitioner on the ground that; (i) the impugned office circular dated 26.03.2021 is arbitrary, illegal and is against the terms of the contract agreement dated 25.03.2018, as such, is liable to be quashed or set aside; (ii) the office circular is misconceived as the contract agreement does not include Instructions to Bidders (ITB) of RFP in the request for proposal to be part of the contract agreement covering the petitioner and respondent-NHAI; (iv) further the Instructions to Bidder (ITB) of RFP is only to inform the intending bidder requirements while making bid and does not cover the dispute of post completion of the execution of work in the contract; (v) the Instructions to Bidder (ITB) is not an agreement between the bidders and the NHAI, as such, invoking Clause 35 of RFP is illegal and misconceived in law; (vi) the petitioner has successfully executed the work within stipulated time to the satisfaction of NHAI, therefore, the alleged act of the petitioner does not fall within the purview of “fraudulent practice” under Sub-Section (h) of Clause 53.2 of the ‘Conditions of Contract’; (vii) the Contract does not contemplate action of blacklisting or banning the contractor for, allegedly indulging in fraudulent practice from participating in any work of NHAI; (viii) The Instructions to Bidder (ITB) of RFP do not over-

ride the terms of contract, as such, action against the petitioner after invoking Clause of ITB is arbitrary and illegal. Lastly, it was submitted that since the proposal of the petitioner, at the time of bidding, was neither rejected nor there was any termination of contract by the respondents-NHAI, therefore, respondents cannot invoke any of these clauses for proceedings against the petitioner and office circular dated 26.03.2021 is, thus, void *ab initio* and is required to be quashed. The act of the respondents in blacklisting/debarring the petitioner for bidding for the tenders of NHAI is arbitrary, illegal and is required to be set aside.

05. It is also contended by the petitioner that the office circular dated 26.03.2021, was issued only after investigation of C.B.I A.C.B, Jammu against the allotment of contract by the respondents. The respondents instead of waiting for the culmination of the investigation process, passed the impugned order without any application of mind, as such, the same is required to be set aside.

06. The respondents in their objections submit that the petitioner was declared L-1 after evaluation of all the bids by the Technical and Official Evaluation Committee and was allotted the contract. One of the contractors, who had participated in the same NIT, and had failed to succeed in the bidding process, had filed a writ petition, questioning the eligibility of the petitioner before the High Court of Delhi titled '*Mohandas V. Rajani v/s National Highways Authority of India and others*', (WP(C) No. 2266/2018). This writ petition was disposed of vide order dated 12.03.2018, by issuing directions to the NHAI to conduct a suitable enquiry about the

genuineness of the documents and the claim with respect to the eligibility and experience certificate of the petitioner and pass appropriate speaking order within a period of three weeks but no response from Executive Engineer PW(R&B) GurdanBala, Rajouri and Mendhar was received.

07. The respondents submit that though, as per there policy, NHAI does not resort to verification of documents/experience certificates submitted by the bidder since as per the provisions of the bid, the responsibility of correctness of all such documents rests with the bidders and, in case, the documents are found to be incorrect, forged or fake, RFP stipulates penal action against the bidders/contractors indulging into such practices. Undertaking to this effect was also taken from the bidder. The relevant clause 4.4 B (a) of RFP is as under:

“4.4 B (a) Each bidder must produce:

- (i) An affidavit on a Stamp Paper, duly attested from the Notary Public, that the information furnished with the bid documents is correct in all respects; and
- (ii) Such other certificates as defined in Section-III.
- (iii) Failure to submit the certificates/documents as specified above at (i) and (ii) may make the bid non-responsive.”

08. The respondents further submit that the petitioner, in connection with the experience certificates, had produced as many as six certificates from the Executive Engineer, PMGSY, Doda, Executive Engineer, PW(R&B), Division of GurdanBala, Rajouri,

Executive Engineer, PW(R&B), Division Kishtwar, Executive Engineer, PW(R&B), Division Mendhar, Executive Engineer, PMGSY, Doda and Executive Engineer, PW(R&B), Division Kishtwar, referred in the letters from RO Jammu in Para 'O' of the objections, that are; (i) NHA/RO-JAMMU/2010/11012/NS-33/332 (ii) NHA/RO-JAMMU/2010/11012/NS-33/333 (iii) NHA/RO-JAMMU/2010/11012/NS-33/334 (iv) NHA/RO-JAMMU/2010/11012/NS-33/335 (v) NHA/RO-JAMMU/2010/11012/NS-33/336 (vi) NHA/RO-JAMMU/2010/11012/NS-33/337. In response to the above letters, confirmation from the Executive Engineer, PW(R&B) Kishtwar and Executive Engineer, PMGSY, Doda about the correctness of the experience certificates were received through speed post, however, no response was received from Executive Engineer, PW(R&B) GurdanBala and Mendhar within the stipulated period. Since the confirmation, received from two Executive Engineers was enough for satisfaction of the correctness of experience as the T.E.C had relied upon the certificates. After receipt of the order passed in WP(C) No. 2266/2018 from the Hon'ble High Court of Delhi, the respondents directed the petitioner to submit his comments/confirmation regarding genuineness of the said documents within a week's time. The petitioner in compliance to this said order submitted his reply and, accordingly, a speaking order in terms of the order of Hon'ble High Court at Delhi was passed on 21.05.2018. Mohandas V. Rajani stated that they were satisfied with the position brought out in the speaking order and, therefore, their complaint vide letter dated 25.02.2018 regarding Technical Evaluation might be treated as closed.

09. The respondents further submit that the C.B.I A.C.B vide their letter dated 25.06.2019, requested for certain details in connection with the verification of complaint pertaining to allotment of contract to the petitioner. These details were furnished to them vide R.O Jammu letter dated 05.07.2019. Subsequently, C.B.I A.C.B, Jammu initiated preliminary enquiry against the petitioner and some unknown officers and officials of NHAI, Jammu. During the course of the enquiry, it was transpired that the experience certificates submitted by the petitioner against work of similar nature as per RFP Clause 4.3(A) (B) of ITB were fabricated as the same were not issued by the concerned authorities. Pursuant to the above enquiry, the show-cause notice dated 04.02.2021 was issued to the petitioner for submission of fabricated documents along with other bid documents to compete for allotment of the contract from the authority and the petitioner was called upon to show cause as to why action for debarring him as per Clause 35 of ITB of RFP document/Contract Agreement should not be initiated.

10. The respondents after considering the reply of the petitioner held that the undertaking and affidavit of the petitioner were not true and since the work was allotted to the petitioner on the basis of forged and fabricated experience certificates submitted by the petitioner, thus, the petitioner had indulged in fraudulent practices for competing for the contract, therefore, the respondents declared him ineligible and barred him from participating in any contract for a period of two years.

11. The respondents submit that the NHAI is well within its rights to debar the petitioner vide office circular dated 26.03.2021, as the petitioner had obtained the allotment of contract by submitting fabricated experience certificates and, thus, had resorted to fraudulent practice. The action taken by the NHAI is in consonance with the terms of the contract as the Instructions to Bidder (ITB) besides other documents also form part of contract agreement. Reliance is placed on Clause 35 of the Instructions to Bidder (ITB) of RFP documents, this Clause reads as under:

“Clause 35- Corrupt or Fraudulent Practices.

The Employer will reject a proposal for award if it determines that the Bidder recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question and will declare the firm ineligible, either indefinitely or for a stated period of time, to bid for any work with National Highways Authority of India, if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for the contract, or in its execution.

For the pursue of this clause, the following terms shall have the meaning hereinafter respectively assigned to them

- (a) “Corrupt practice” means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Bidding Process (For avoidance of doubt, offering of employment, or employing, or engaging in any manner whatsoever, directly or indirectly, any official of the Authority who is or has been associated in any manner, directly or indirectly, with Bidding Process, at any time prior to the expiry of one year from the date such official

resigns or retires from or otherwise ceases to be in the service of the Authority, shall be deemed to constitute influencing the actions of a person connected with the Bidding Process);

(b) “Fraudulent practice” means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;

The Employer requires the bidders/Contractors to strictly observe the laws against fraud and corruption enforced in India, namely, Prevention of Corruption Act, 1988.”

12. The contention of the petitioner is that the action cannot be initiated against him only on the basis of Clause 35 of the Instructions to Bidder (ITB) document, as the same does not form part of contract.

13. The Instructions to Bidder (ITB) document forms part of the contract agreement and, thus, Clause 35 of ITB document is to be read as part of the contract agreement. It cannot be said that agreement came into existence between the parties is not valid. The intention of the parties is to be gathered from expressions of correspondence and meaning of it conveys and in case it shows that there is a meeting of minds between the parties and they are actually in needful agreement upon the terms, then there can said to be a binding contract. Thus, it is clear that Instruction to Bidder is to be read as part of the contract documents keeping in view the intention of the parties as per Clause 35 of this Instructions to Bidder document.

14. As per Clause 35, in case of misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in

order to influence the Bidding Process, would constitute a fraudulent practice. The two certificates relied upon by the petitioner for participating and obtaining the contract were denied to have been issued by the concerned authority. The contract was, thus, secured by fraudulent practice. Though, the contention of the petitioner is that the contract awarded to him stood executed and he has completed the same successfully but this does not absolve the petitioner of his liability, as the very work executed by the petitioner was obtained by him through fraudulent means, therefore, the authority had rightly issued show-cause notice to the petitioner and petitioner had denied the same. The fact of the matter is that the petitioner had resorted to fraudulent means to secure the contract and subsequent completion of the contract successfully and allotment of award of the completion certificate does not absolve the petitioner of his action, which are as a result of fraudulent practices. The respondents had issued show-cause notice to the petitioner dated 04.02.2021 and, petitioner was given 15 days' time to reply to the same in defense. The petitioner, vide his communication dated 17.02.2021, had replied to the show-cause notice. Para 2 of which is relevant and is quoted below:

“2. That the bid documents as well as the required experience certificates are submitted by my office in various offices where tenders are to be submitted for obtaining various works floated through these tenders. At this stage I do not remember whether the said documents are genuine and true or not as the files are made and completed for submission by my office staff. As already stated above I deal with number of businessmen spread in various states of the country and the documents

pertaining to various tenders of different departments are prepared by my office executives which are mostly submitted by them but at times these are also signed by me.”

15. The issue regarding power to blacklist the contractor for execution of contract was considered by Hon’ble Apex Court in ‘**M/s Kulja Industries Ltd. V. Chief General Manager and others**’, (2014) 14 SCC 731:

“**16.** A literal construction of the provisions of paras 31 and 32 extracted above would mean that the power to disqualify or blacklist a supplier is available to the purchaser only in the three situations enumerated in paras 31 and 32 and no other. Any such interpretation would, however, give rise to anomalous results. We say so because in cases where a supplier is found guilty of much graver offences, failures or violations, resulting in much heavier losses and greater detriment to the purchasers in terms of money, reputation or prejudice to public interest may go unpunished simply because all such acts of fraud, misrepresentation or the like have not been specifically enumerated as grounds for blacklisting of the supplier in paras 31 and 32 of the tender document. That could in our opinion never be the true intention of the purchaser when it stipulated paras 31 and 32 as conditions of the tender document by which the purchaser has reserved to itself the right to disqualify or blacklist bidders for breach or violation committed by them. If bidders who commit a breach of a lesser degree could be punished by an order of blacklisting there is no reason why a breach of a more serious nature should go unpunished, be ignored, or rendered inconsequential by reason only of an omission of such breach or violation in the text of paras 31 and 32

of the tender document. Paras 31 and 32 cannot, in that view, be said to be exhaustive; nor is the power to blacklist limited to situations mentioned therein.

17. That apart the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because 'blacklisting' simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. 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 made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court.

25. Suffice it to say that 'debarment' is recognized 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.”

16. In ‘**M/s Patel Engineering Ltd. V. Union of India and another**’, (2012) 11 SCC 257, it was held that the express condition in tender document for blacklisting a tenderer/contractor for some action or inaction on its part is not necessary since power not to enter into contract with a particular person is inherent in every person legally capable of entering into contracts. It further held failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the respondent from blacklisting a delinquent bidder, if it is otherwise justified.

“**23.** The authority of the second respondent to enter into contracts, consequently, the concomitant power not to enter into a contract with a particular person, does not flow from Article 298, as Article 298 deals with only the authority of the Union of India and the States. The authority of the second respondent to enter into a contract with all the incidental and concomitant powers flow from Section 3(1) and (2)6 of the National Highways Authority Act. The nature of the said power is similar to the nature of the power flowing from Article 298 of the Constitution, though it is not identical.

24. The second respondent, being a statutory Corporation, is equally subject to all constitutional limitations, which bind the State in its dealings with the subjects. At the same time, the very authority to enter into contracts conferred under Section 3 of the NHA Act, by necessary implication, confers the authority not to

enter into a contract in appropriate cases (blacklist). The 'bid document' can neither confer powers, which are not conferred by law on the second respondent, nor can it subtract the powers, which are conferred by law either by express provision or by necessary implication.

25. The bid document is not a statutory instrument. Therefore, the rules of interpretation, which are applicable to the interpretation of statutes and statutory instruments, are not applicable to the bid document. Therefore, in our opinion, the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the second respondent from blacklisting a delinquent bidder, if it is otherwise justified. Such power is inherent in every person legally capable of entering into contracts."

17. The petitioner has not denied the fact that the experience certificates submitted by him have not been issued by the concerned authority. The petitioner by producing experience certificates acted with deliberate deception with a design of securing unfair advantage and managed to secure the contract. That he completed the contract to the satisfaction of the respondents is of no consequence when the very basis for securing a contract is a result of fraudulent practices. It is a well settled law that fraud vitiates every solemn proceeding and, therefore, a person indulging in the same cannot claim any right on the basis of technicalities. The respondents were, therefore, well within their rights to debar the petitioner from participating in any contract for a period of two years.

18. In view of the aforesaid discussion, there is no merit in this petition and the same is, accordingly, **dismissed** along with connected applications.

(Sindhu Sharma)
Judge

JAMMU
29.07.2022
Michal Sharma

<i>Whether the Judgment is speaking</i>	:	<i>Yes</i>
<i>Whether the Judgment is reportable</i>	:	<i>Yes</i>

