

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.3212/2019

Musawar Kamal

Versus

The Secretary, Ministry of Petroleum and Natural Resources and
others

Dates of Hearing: 01.10.2020 and 02.10.2020
Appellants by: Ch. Abdur Rahman Nasir, Advocate
Respondents by: Mr. Sultan Mazhar Sher, Advocate
Mr. Muhammad Nadeem Khakwani,
learned Assistant Attorney-General

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Musawar Kamal, impugns the letter dated 24.11.2016 issued by the Pakistan State Oil Company Limited (“P.S.O.”), whereby the petitioner was permanently blacklisted and the bid security for an amount of Rs.121,196/- submitted by him was forfeited.

2. The facts essential for the disposal of this petition are that vide advertisement dated 13.03.2016, P.S.O. invited bids from eligible contractors for the award of Annual Contract for the Operation and Maintenance of Steaming Network at Lalpir Depot (“the Contract”). In response to the said advertisement, M/s New Tech Engineering Services (“New Tech”) submitted its bid on 29.03.2016. Along with its bid, New Tech submitted its licence No.09990 for category C5 purportedly issued by the Pakistan Engineering Council (“P.E.C.”). The said licence had mentioned 31.12.2015 as well as 31.12.2014 as the date until which the said licence was valid. This discrepancy caused P.S.O. to address letter dated 12.08.2016 to New Tech informing the latter that the licence “*appears to be doubtful.*” P.S.O. advised New Tech to explain its position in writing within a period of seven days, failing which the licence would be considered as fake, the bid security would be forfeited and the firm would be blacklisted from participation in future tenders of P.S.O.

3. Vide letter dated 18.08.2016, New Tech informed P.S.O. that the said licence was not doubtful and that the staff at the P.E.C. had committed “*some clerical mistakes.*” Additionally, the position taken

by New Tech in the said letter was that the matter had been taken up with the P.E.C. Vide letter dated 09.09.2016, P.S.O. sent the licence submitted by New Tech along with its bid to the P.E.C. and requested the latter to confirm its authenticity. Vide letter dated 28.09.2016, the P.E.C. informed P.S.O. that licence No.09990 was forged.

4. Vide letter dated 07.10.2016, P.S.O. informed New Tech about the position taken by the P.E.C. in its letter dated 28.09.2016 regarding the licence submitted along with its bid. Furthermore, New Tech was also informed that the management of P.S.O. had decided to afford an opportunity of a hearing so that New Tech could explain as to why it should not be blacklisted for committing a corrupt and fraudulent practice.

5. Vide letter dated 14.10.2016, New Tech informed P.S.O. that since the petitioner's father, Arshad Naveed, had died in May 2013 and since the matter regarding the renewal of New Tech's licence was being handled by his manager, if any discrepant document or forged paper had been submitted between 2014 and 2015, the same may be ignored as the petitioner was ignorant about it. The petitioner also claims to have been a victim of fraud committed by an agent.

6. On 14.10.2016, an opportunity of a hearing was afforded to the petitioner in his capacity as the representative of New Tech. The minutes of this hearing show that New Tech's manager had submitted fake documentation in collusion with an agent. Vide letter dated 24.11.2016, P.S.O. decided to permanently blacklist New Tech for submitting a forged licence along with its bid. Furthermore, the petitioner's bid security was also forfeited. The said letter dated 24.11.2016 has been assailed by the petitioner in the instant writ petition.

7. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that P.S.O. had not complied with the requirement set out in Rule 19 of the Public Procurement Rules, 2004 to specify a mechanism and manner to permanently or temporarily bar a contractor from participating in any procurement proceedings; that although an opportunity of a hearing had been afforded to the representative of New Tech, the penalty of permanently blacklisting imposed by the P.S.O. was disproportionate

to the act of submitting a fake licence along with New Tech's bid; that the sole proprietor of New Tech was not in any manner responsible for submitting a fake licence to P.S.O.; and that New Tech had deposited the fees required for the issuance of a licence by the P.E.C. in accordance with the law.

8. Learned counsel for the petitioner further submitted that New Tech had been deceived by an agent, who had provided the fake licence to New Tech; that on 15.10.2016, a legal notice had been issued on behalf of New Tech's sole proprietor to M/s Nasrullah and Co. who had provided a fake licence to New Tech; that on 25.10.2016 and 27.05.2019, a criminal complaint had been lodged before Station House Officer, Police Station City, Muzaffargarh and the Senior Superintendent of Police Muzaffargarh, respectively, against Muhammad Nasrullah for preparing a fake licence for New Tech; that on 14.06.2019, the petitioner filed a petition under Sections 22-A and 22-B of the Criminal Procedure Code, 1898 ("Cr.P.C.") praying for the registration of an F.I.R. against Muhammad Nasrullah; that vide order dated 10.07.2019, the said petition was disposed of by the *ex-officio* Justice of Peace with the direction to the petitioner to approach the proper forum along with necessary documents for the redressal of his grievance; and that the petitioner has learnt that in order to avoid the process of the law, Muhammad Nasrullah has escaped to India. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

9. On the other hand, learned counsel for P.S.O. submitted that the instant petition was liable to be dismissed on account of *laches* since the letter whereby New Tech was permanently blacklisted was issued on 24.11.2016 whereas the instant petition was filed on 23.09.2019 i.e. with a delay of two years and ten months; that the petitioner does not deny submitting a fake licence along with its bid to P.S.O. but asserts that the act of forgery was done by its agent, Muhammad Nasrullah; that this is an afterthought inasmuch as New Tech in its letter dated 18.08.2016 had taken the position that a clerical mistake had been committed by the concerned staff; that it was only after New Tech was informed by P.S.O. vide letter dated 07.10.2016 that the P.E.C. had confirmed that the licence in question

was fake that New Tech came-up with the story that the licence had been provided by its agent; that New Tech and the petitioner cannot avoid liability for an act committed by their agent; that the bid documents along with the fake licence had been submitted to P.S.O. by New Tech and not its agent; and that the act of submitting a fake licence with the bid is a fraudulent practice which does not call for any leniency.

10. Learned counsel for P.S.O. further submitted that prior to the making of the Public Procurement Rules, 2004, a mechanism had been put in place by P.S.O. to blacklist contractors who indulged in malpractices; that on 01.08.2019, P.S.O. updated its mechanism for blacklisting a contractor; that even though the blacklisting of New Tech pre-dates the updating of the said mechanism, the requirements prescribed in the said updated mechanism had been substantially complied with by P.S.O. in conducting proceedings against New Tech; and that the proceedings culminating in the decision to permanently blacklist New Tech do not suffer from any legal infirmity or procedural irregularity. Learned counsel for P.S.O. prayed for the writ petition to be dismissed.

11. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 6 above and need not be recapitulated.

12. The act of submitting licence No.09990 purportedly issued by the P.E.C. to New Tech along with New Tech's bid for the award of the Contract has not been denied by the petitioner. The petitioner's case is that it had engaged the services of an agent, namely Muhammad Nasrullah, to submit the necessary documents required by the P.E.C. for the renewal of a category C5 licence.

13. Whether there was an agent who had fabricated the said licence and whether New Tech or its sole proprietor, the petitioner, had no knowledge of this fraud is a controversial question of fact which cannot be resolved without the recording of evidence. Such an exercise cannot be undertaken by this Court while exercising jurisdiction under Article 199 of the Constitution.

14. Learned counsel for the petitioner did not come up with any plausible explanation for filing this petition with a **delay of two years and ten months** after the issuance of the impugned letter dated 24.11.2016. This prolonged silence on the petitioner's part is not in consonance with his assertion that New Tech had been defrauded by an agent or that the penalty of permanent blacklisting had unlawfully been imposed on New Tech. After filing a criminal complaint against Muhammad Nasrullah, on 25.10.2016, the petitioner waited for over two and a half years before filing a petition under Sections 22-A and 22-B Cr.P.C. seeking the registration of an F.I.R. against him. After the said petition was disposed of vide order dated 10.07.2019 passed by the *ex-officio* Justice of Peace, Muzaffargarh, the petitioner did not agitate the matter against Muhammad Nasrullah any further.

15. The competitive process initiated by P.S.O. through advertisement dated 13.03.2016 culminated in the award of the contract to New Tech. The documents brought on record by P.S.O. show that service orders had been issued by P.S.O. to New Tech on 29.06.2017. It is not disputed that New Tech had also been awarded contracts by P.S.O. in the past. New Tech's blacklisting has serious consequences for it. P.S.O. recognized its responsibility of affording an adequate and effective opportunity to New Tech to put forth its defence, and in furtherance of this responsibility P.S.O., in its letter dated 07.10.2016, required New Tech to attend a personal hearing on 14.10.2016.

16. Since an order of blacklisting involves civil consequences, such an order can only be passed after due notice and an adequate opportunity of a hearing to the person against whom such order is proposed to be passed. The importance of the requirement of the issuance of a show cause notice and the opportunity of a personal hearing to the party against whom an order for blacklisting is proposed to be passed has been stressed by the Superior Courts in the following judgments:-

- (i) In the case of Messrs Kulja Industries Limited Vs. Chief General Manager, W.T. Project, BSNL (2014 SCMR 1748), the Indian Supreme Court held as follows:-

“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.”

- (ii) In the case of New Jubilee Insurance Company Ltd. Vs. National Bank of Pakistan (PLD 1999 SC 1126), it was held as follows:-

“16. It may be pointed out thus the fall-out of the blacklisting of the appellant is to prevent it from the privilege and advantage of entering into lawful relationship with the respondent for the purpose of gains which is violative of Article 18 of the Constitution, which lays down that subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business. The blacklisting of a company/firm/person, also tarnishes the reputation of it/has, as to its/his credibility to honour its/his commitments which may dissuade other parties from entering into contracts with, the former. Thus the consequences of blacklisting a company/firm/person are of great magnitude, which warrant that before taking such an action, there should be material on record prima facie to indicate that the delinquent Insurance Company's refusal to pay claim was not warranted in the circumstances of the case.”

- (iii) In the case of M.A. Aleem Khan Vs. Province of Punjab (PLD 2006 Lahore 84), it was held that the action of blacklisting taken without hearing the petitioner was not sustainable in law. In the said case, it was also held that the consequences of blacklisting a party were drastic since it results in the deprivation of its business activity and amounts to its commercial killing, having multiple implications including the

infringement of the fundamental right enshrined in Article 18 of the Constitution.

- (iv) In the case of Nizami Construction Company Vs. Chief Executive Officer, Gujranwala Electric Supply Company (2005 CLC 366), a writ petition against the blacklisting of a contractor by Gujranwala Electric Supply Company was allowed by the Hon'ble Lahore High Court primarily on the ground that neither was any show cause notice nor was an opportunity of a hearing afforded to the petitioner before its blacklisting through a non-speaking order.
- (v) In the case of Rehim Khan Vs. Divisional Superintendent, Pakistan Railways, Rawalpindi (2003 YLR 63), a writ petition to challenge the blacklisting of the petitioner was allowed by the Hon'ble Lahore High Court on the ground that prior to the said decision, no opportunity of a hearing was afforded to the petitioner. Reliance had been placed on the judgment in the case of Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal (AIR 1975 S.C. 266), wherein it was held that an order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of a public contract. It was also held that blacklisting casts a slur and creates a barrier between the person blacklisted and the government in the matter of transactions.
- (vi) In the case of Zulfiqar Ali Vs. Divisional Superintendent (Workshops), Pakistan Railways, Moghalpura, Lahore (PLD 2001 Lahore 13), due to an alleged breach of a contractual obligation, the petitioner was blacklisted by the respondent without affording an opportunity of a hearing. It was held by the Hon'ble Lahore High Court that the person likely to be adversely affected by the decision of blacklisting is entitled to a notice and a hearing in the matter. The order to blacklist the petitioner without affording it an opportunity of a hearing was declared to be illegal and of no legal effect.
- (vii) In the case Dawood Corporation (Private) Limited Vs. The Director General, Department of Supplies, Government of Pakistan, Ministry of Industries (1988 CLC 788), the Division

Bench of the Hon'ble High Court of Sindh allowed a writ petition against the order to blacklist the petitioner due to a contractual dispute. The order to blacklist the petitioner was declared to be without lawful authority and no legal effect primarily on the ground that before passing the order to blacklist the petitioner neither was any show cause notice issued nor was the petitioner afforded an opportunity of a hearing.

17. The minutes of the personal hearing dated 14.10.2016 show that by the time the said hearing took place, New Tech had not filed any criminal complaint against the agent for preparing a fabricated licence. During the personal hearing, it was not asserted on behalf of New Tech that a criminal complaint had been filed against Muhammad Nasrullah prior to the personal hearing. The said minutes also show that the petitioner had accepted the fact that the licence submitted along with his bid was forged.

18. The submission of a fake licence along with a bid submitted in a procurement process is not just a civil wrong but also has consequences in criminal law. In this case, licence No.09990 (which turned out to be a fake document) had been submitted by New Tech in order to be awarded a contract by a procuring agency. New Tech was successful in its designs since the Contract was awarded to it. Had P.S.O. not detected the discrepancy as to the validity dates in the licence submitted by New Tech along with its bid and had the P.E.C. not confirmed that licence No.09990 was fake, New Tech would have continued to derive benefits under the Contract. It is my view that P.S.O. showed leniency to New Tech and its sole proprietor by not filing a criminal case against them for submitting a fake licence along with the bid.

19. Public sector organizations have dismissed from service scores of employees who obtained employment or service benefits on the basis of fake educational certificates. Reference in this regard may be made to the judgments in the cases of Anwar Ali Vs. Chief Executive, HESCO (WAPDA) (2009 SCMR 1492), and Kaloo Khan Vs. O.G.D.C.L. (2019 PLC (C.S.) 519). In the case of Anwar Ali Vs. Chief Executive HESCO (WAPDA) (supra), the department had imposed the penalty of dismissal from service on a civil servant for submitting a

bogus academic certificate. On appeal, the Service Tribunal converted the penalty of dismissal from service into compulsory retirement. The Hon'ble Supreme Court set aside the conversion of the penalty into compulsory retirement, and observed that the department was free to examine the possibility of getting a criminal case registered against the civil servant.

20. This Court, in exercise of writ jurisdiction, cannot direct P.S.O. to do business with New Tech and ignore the fact that it had submitted a fake licence along with its bid to procure a contract. Since the factum as to the submission of a fake licence along with the bid had not been denied by the petitioner and / or New Tech, P.S.O.'s decision not to do any business with the petitioner and / or New Tech in the future can neither be termed as illegal, irrational or disproportionate.

21. The Public Procurement Rules, 2004 were made by the Federal Government in exercise of the powers conferred by Section 26 of the Public Procurement Regulatory Ordinance, 2002. Rule 19 of the said Rules is reproduced herein below:-

“19. Blacklisting of suppliers and contractors.-The procuring agencies shall specify a mechanism and manner to permanently or temporarily bar, from participating in their respective procurement proceedings, suppliers and contractors who either consistently fail to provide satisfactory performances or are found to be indulging in corrupt or fraudulent practices. Such barring action shall be duly publicized and communication to the Authority:

Provided that any supplier or contractor who is to be blacklisted shall be accorded adequate opportunity of being heard.”

22. P.S.O. had a mechanism in place for blacklisting its registered contractors prior to the making of the Public Procurement Rules, 2004. On 25.06.2002, P.S.O. revised its Purchase Manual which had been in use since 1979. Clause 1.4 titled ***“Blacklisting/cancellation of registration”*** provided that in case of a complaint against any vendor, the purchase manager is to hold an inquiry against the conduct of the vendor. Furthermore, it is provided that when the vendor is found guilty of any of the following, the general manager may blacklist and cancel its registration:-

- “a) General conduct of the vendor found unsatisfactory.***
- b) Indulged in mal-practices.***
- c) Willfully tries to deceive the Company.***
- d) Supplies the material which is off-specification to the sample.***

- e) *Refuses to replace defective material.*
- f) *Does not meet delivery schedule and causing loss or affecting the operations of Company adversely without giving any satisfactory justification.*
- g) *Violates the terms and conditions of the Purchase Order without seeking prior approval from the Company".*
(Emphasis added)

23. The said Purchase Manual also provides that when vendor is to be blacklisted his name is to be removed from all the categories of goods/services for which he was enrolled. Now, the mechanism which was put in place by P.S.O. for the blacklisting of a contractor neither provided for the issuance of a show cause notice nor an opportunity of a hearing to the contractor. Be that as it may, it is not disputed that vide letter dated 07.10.2016, P.S.O. called upon New Tech to explain as to why it should not be blacklisted for the fraudulent practice of submitting a fake licence along with its bid documents. New Tech had also been informed that the P.E.C. had confirmed that the licence submitted by New Tech along with its bid was fake. The decision of P.S.O. to afford an opportunity of a hearing to New Tech was also conveyed through the said letter. In the said letter, the date, time and venue for personal hearing was also conveyed. It is also not disputed that on 14.10.2016, the representative of New Tech had been afforded an opportunity of a personal hearing. Therefore, it cannot be asserted by the petitioner that the principles of natural justice had not been complied with by P.S.O. in the proceedings culminating in the decision to permanently blacklist the petitioner for submitting a fake licence along with its bid documents.

24. As regards the “*mechanism for blacklisting of bidder/supplier/contractor,*” framed by P.S.O. on 01.08.2019, it requires the issuance of a show cause notice and an opportunity of a hearing to the contractor before a speaking order is passed for the blacklisting of such contractor. In the case of New Jubilee Insurance Company Ltd. Vs. National Bank of Pakistan (*supra*), the appellant/insurance company was delisted by the respondent/bank from its approved list of insurance companies without getting the dispute, which was the cause of delisting, adjudicated by a competent forum. In the said case, even though no formal show

cause notice had been issued to the appellant, but it had been issued with a notice whereby it was called upon to review its decision with regard to the repudiation of the claim within seven days and to settle the claim amicably failing which the respondent was to have no option but to delist the appellant from its approved list of insurance companies. This, according to the Hon'ble Supreme Court, was *“sufficient compliance of the principle of natural justice.”*

25. Even though P.S.O.'s letter dated 07.10.2016 was not a formal *“show cause notice,”* it had all the essential ingredients of such a notice. It sets out the cause (i.e. confirmation by the P.E.C. that the licence submitted by New Tech along with its bid was fake) for the initiation of proceedings for blacklisting. The contents of the said letter show that an adequate opportunity to defend itself in a personal hearing was provided to New Tech. New Tech had also been asked to explain as to why it should not be blacklisted for committing the fraudulent practice of submitting a fake licence along with its bid. The impugned letter dated 24.11.2016 sets out the reasons for taking the measure of permanent blacklisting against New Tech. The said letter is not devoid of reasons and is in compliance with the requirements of Section 24-A of the General Clauses Act, 1897. Since the norms of natural justice had been satisfied in the proceedings culminating in the decision to blacklist the petitioner, I have been given no reason to interfere with the said decision. Consequently, this petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE)

Qamar Khan*

APPROVED FOR REPORTING