

Modern Stage Service (Projects) vs India Tourism Development Corporation ... on 7 April, 2025

Author: Manoj Kumar Ohri

Bench: Manoj Kumar Ohri

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision

+ W.P.(C) 693/2020 and CM APPL. 1945/2020
MODERN STAGE SERVICE (PROJECTS)Petitioner
Through: Mr. Vibhor Garg, Mr. Keshav Ti
and Ms. Diksha Kakker, Advocates

versus

INDIA TOURISM DEVELOPMENT
CORPORATION LTD.Respondent
Through: Mr. Ravi Sikri, Senior Advocate with
Ms. Sumitra Chaudhary, Mr. Deepak
Yadav, Ms. Kanak Grover, Mr.
Nishant Goyal, Mr. M.K. Raghav
Raman, Ms. Nitya Sharma, Ms.
Jasmine Sheikh and Ms. Muskan,
Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. The present proceedings have been instituted on being aggrieved with the letter dated 30.10.2019 (hereafter, the impugned letter), vide which the Respondent has not only forfeited the Earnest Money Deposit (hereafter, the EMD) and disqualified the Petitioner but also debarred it from participating in future tenders issued by Respondent and/or its units and divisions for a period of three years.

2. During pendency of proceedings, as noted in order dated 22.11.2023, the Petitioner has confined its challenge to the last aspect, i.e., debarment for period of three years, terming it unjust and disproportionate.

3. To appreciate the contentions, facts in brief are that on 07.03.2019, the Respondent had floated a Tender for Implementing Sound & Light/Multimedia show at Udaigiri-Khandagiri Caves, Bhubaneswar, Odisha being Tender No. ITDC/SEL/Udaigiri/Odisha/2019 dated (hereinafter, 'subject tender'). One of the requirements stipulated in the bid document was that the bidder participating in the said tender process was supposed to submit proof of having successfully

completed similar works during the last five years immediately preceding the month in which the tender was invited. Vide the impugned letter, the Petitioner's bid came to be rejected for non-compliance of technical specifications with aforementioned consequences.

4. Petitioner contends that as per the specifications laid down in the Bid Document, the Petitioner was required to provide proof of either two similar completed works costing not less than amount equal to 20% of the estimated cost, i.e., Rs.77,10,162/- or proof of one similar completed work costing not less than the amount equal to 25% of the estimated cost i.e. Rs.96,37,702/-. By abundant caution, the Petitioner submitted documents claiming successful completion of 4 similar works to exhibit its competence, even though it met the requirement with the submission of proof for one of the completed work where cost was not less than Rs.96,37,702/-.

5. The controversy arose when, during verification process, one of the entities denied issuing the certificate that was furnished by the Petitioner alongwith the bid. On being show caused, Petitioner reiterated its claim of successfully completing that project. It also stated that the disputed certificate was, in fact, of the lowest value among the four submitted works by the Petitioner.

6. Petitioner contends that penalty of debarring the Petitioner for three years is highly disproportionate and arbitrary, and resultantly, not only harmed the reputation of the Petitioner in the market but also caused financial losses to it as it was unable to submit further tenders. Thus, it is contended that the impugned letter is violative of the rights of the Petitioner under Articles 19(1)(g) and 14 of the Constitution of India. Reliance is placed on decisions of the Supreme Court in *Erusian Equipment & Chemicals Ltd. v. State of W.B.*,¹ and *Techno Prints v. Chhattisgarh Textbook Corpn.*² It is also submitted that although the Petitioner was given an opportunity of personal hearing before the Independent External Monitors (IEM) of the respondent, the same was biased in its approach. Furthermore, the impugned letter/order of penalty is without any authority insofar as the authority issuing the impugned letter was different from the authority before which hearing took place and that the report of the IEM was never made available to the Petitioner. In support of his submissions, learned counsel places reliance on *Hyundai Rotem Company v. Delhi Metro Rail Corporation*.³

7. Lastly, it is submitted that irrespective of the Petitioner's contentions on merits, the punishment of debarment is disproportionate insofar as no financial loss was caused to the Respondent due to the disqualification of the petitioner from the tender process on account of the alleged discrepancy in the Completion Certificate, since the tender anyway was awarded to the lowest bidder/third party, a condition the Petitioner was anyways not (1975) 1 SCC 70.

2025 SCC OnLine SC 343.

2015 SCC OnLine Del 13531.

meeting.

8. Per contra, learned Senior Counsel for the Respondent defends the impugned letter by stating that the Petitioner's entire argument is premised on erroneous grounds inasmuch as the Petitioner

had submitted a fake Completion Certificate of previously undertaken similar work for procuring the tender. It is stated that the respondent followed the due process, issued two show cause notices and gave ample opportunity to the Petitioner to make its case, before passing the order of debarment, which in itself is reasoned. It is contended that furnishing of such documents amounted to breach of the Pre-Contract Integrity Pact, particularly, Section 7, Clauses 3 and 5(ii),(vi) and (vii) of the Notice inviting Tender (NIT).

9. Pertinently, the respondent, after disqualifying the Petitioner's tender proposal, passed the impugned order, vide which, it not only forfeited the Earnest Money Deposit (EMD) of the Petitioner but also debarred the Petitioner from consideration for any tender issued by the respondent/its units and divisions for a period of 3 years from the date of issuance of the said letter. This two-fold penalty imposed on the Petitioner is averred to be highly disproportionate to the alleged violation of the NIT, as it is the Petitioner's case that an irregularity in a document submitted at the pre-qualification stage did not warrant such harsh measures.

10. It is a settled position in law that a sanction in the nature of blacklisting/debarment in cases of tender should only be resorted to when the bidder materially breaches the terms of the tender/NIT, such that the punitive measure is commensurate with its actions. The deviation on part of the bidder shall be such as is fatal to the entire bidding process. This is because the consequence of an action in the nature of blacklisting/debarment carries with it heavy consequences for the bidder. What constitutes as a material breach shall differ as per the facts and circumstances of the relevant case.

11. At this stage, gainful reference is made to the decision of the Supreme Court in *Techno Prints* (Supra); relevant paragraphs of which are extracted hereunder:

"15. The second point that falls for our consideration is whether the respondents in the facts of this case more particularly having regard to the nature of violation were justified in calling upon the appellant to show cause as to why they should not be blacklisted for a period of three years.

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33. As observed by this Court in *Erusian Equipment & Chemicals Ltd. v. State of W.B.*, (1975) 1 SCC 70, an order of blacklisting casts a slur on the party being blacklisted and is stigmatic. Given the nature of such an order and the import thereof, it would be unreasonable and arbitrary to visit every contractor who is in breach of his contractual obligations with such consequences. There have to be strong, independent and overwhelming materials to resort to this power given the drastic consequences that an order of blacklisting has on a contractor. The power to blacklist cannot be resorted to when the grounds for the same are only breach or violation of a term or condition of a particular contract and when legal redress is available to both parties. Else, for every breach or violation, though there are legal modes of redress and which compensate the party like the Corporation before us, it would resort to blacklisting and at times by abandoning or scuttling the pending legal proceedings.

34. Plainly, if a contractor is to be visited with the punitive measure of blacklisting on account of an allegation that he has committed a breach of a contract, the nature of his conduct must be so deviant or aberrant so as to warrant such a punitive measure. A mere allegation of breach of contractual obligations without anything more, per se, does not invite any such punitive action.

35. Usually, while participating in a tender, the bidder is required to furnish a statement undertaking that it has not been blacklisted by any institution so far and, if that is not the case, provide information of such blacklisting. This serves as a record of the bidder's previous experience which gives the purchaser a fair picture of the bidder and the conduct expected from it. Therefore, while the debarment itself may not be permanent and may only remain effective for a limited, pre-determined period, its negative effect continues to plague the business of the debarred entity for a long period of time. As a result, it is viewed as a punishment so grave, that it must follow in the wake of an action that is equally grave.

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37. We clarify that it shall be open for the Respondent Corporation to forfeit the EMD of Rs. 5,00,000/-. However, the show cause notice calling upon the appellant as to why it should not be blacklisted is quashed and set aside."

(Emphasis supplied)

12. The Petitioner has assailed the respondent's impugned action by referring to documents which according to it rather show that it had completed the work and the dispute pertained the payment of dues. In fact, it is the respondent's own case that the employer accepted awarding the work to the Petitioner, as well as the Performance Certificate issued by the appointed consultant in the said project. In fact, a report of the Chartered Accountant was also relied upon by the Petitioner as valid proof of previously completed work. Moreover, the veracity of the other three completed works and their proving documents thereof has not been challenged.

13. In these facts, the Petitioner's debarment, even though for a limited period of 3 years, nonetheless has the potential to cause irreparable harm to its reputation in the market as well as attaches stigma in terms of its prior conduct, when considered in future tender bids. Proportionality has to be seen between the alleged act and the harm caused by it to the Respondent and the tender process. It is also indisputable that no financial harm is caused to the Respondent as the tender was anyway allotted to a third party with the lowest bid, and the damage caused to the petitioner's reputation may far exceed the period of debarment itself.

14. In view of the above, and considering the facts and legal position, the impugned order is set aside to the extent of the debarment of the Petitioner.

MANOJ KUMAR OHRI (JUDGE) APRIL 7, 2025/ik