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**Jay Autocomponents Limited vs.energy Efficiency Services Limited & Anr.**

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**SooperKanoon Citation :** [sooperkanoon.com/1221381](http://sooperkanoon.com/1221381)

**Court :** Delhi

**Decided On :** Feb-13-2019

**Appellant :** Jay Autocomponents Limited

**Respondent :** Energy Efficiency Services Limited & Anr.

**Judgement :**

\$~28 \* + IN THE HIGH COURT OF DELHI AT NEW DELHI O.M.P.(I) (COMM.)  
12/2019 & I.A.No.1957/2019 Date of Decision :

13. h February, 2019 JAY AUTOCOMPONENTS LIMITED .....

... Petitioner

Through: Mr.Rajiv Nayyar, Sr. Adv. with Mr.Ratan K. Singh, Mr.Suran Prakash and Ms.Mrinal Litoria, Advs. versus ENERGY EFFICIENCY SERVICES LIMITED & ANR. Through: Mr.Sandarshi Sanjay, Adv. ....

... RESPONDENTS

CORAM: HON'BLE MR. JUSTICE NAVIN CHAWLA NAVIN CHAWLA, J.

(Oral) 1. The present petition has been filed by the petitioner inter-alia praying for the following reliefs: the respondent no.1 (a) restrain its agents, representatives, assignees, affiliates, any acquired company until the conclusion of the trial of this action or further order meanwhile from accepting any payment from the respondent No.2 under the Performance Bank Guarantee bearing number 003GT02181290028; and restrain the Respondent No.2, its agents, (b)

representatives, assignees, affiliates, any acquired company until the conclusion of the trial of this action or further order meanwhile from releasing the monies OMP(I)(Comm.) No.12/2019 Page 1 2. claimed under bearing number 003GT02181290028; and the Performance Bank Guarantee (c) stay the letter from respondent No.1 dated 16 January 2019, terminating the contract and banning the applicant from future tenders. This court by a detailed order dated 18.01.2019 rejected the prayer of the petitioner seeking restrain on the encashment of the bank guarantee, at the same time issued notice to the respondent on the prayer sought by the petitioner for stay of the operation of Letter of Termination dated 16.01.2019.

3. The petitioner has thereafter filed an Interim Application, being I.A. No.1957/2019, praying for the following reliefs: (a) Direct the Respondent to allow the Applicant to perform its part of obligations under the Letter of Award dated 12 October 2018; and/or; (b) Direct the Respondent to allow the Applicant to participate in the bidding for Tender bearing reference "NIT/Bid Document No: EESL/06/ICB-smart meters- Pan India/Phase 3/181901035" and dated 21 January 2019. 4. The application is premised on the fact that during the pendency of the present petition the respondent no.1 has on 21.01.2019 issued a fresh tender inviting bid for procurement of 5 million smart meters for Pan India. Under Condition 16 of the Special Conditions of Contract of the above tender notification, it has been provided that bidders should not have been blacklisted by the Central/State Government or OMP(I)(Comm.) No.12/2019 Page 2 Public Sector undertakings. As the Impugned Termination Letter dated 16.01.2019, of which stay had been prayed for in the present petition, also bars the petitioner for a period of one year, it is asserted that the petitioner would be unable to participate in the said tender, thereby necessitating the filing of the application.

5. By the order dated 08.02.2019 on the above application, with the consent of the learned counsels for the parties, the hearing of the petition itself was preponed and has been taken up for final hearing.

6. Learned senior counsel for the petitioner has placed reliance on the judgment of the Supreme Court in Gorkha Security Services v. Government (NCT of Delhi) and

Ors., (2014) 9 SCC105 to contend that even if a Clause in the Agreement permits blacklisting of the tenderer, it has to necessarily be proceeded by a show cause notice to the tenderer. In absence of such show cause notice, the order of blacklisting is liable to be set aside. He further places reliance on the judgment of this Court in Prakash Atlanta JV & Ors. v. National Highways Authority of India & Ors., 2010 SCC OnLine Del 471 to contend that in any case, an order of blacklisting/debarring has to contain reasons for arriving at the said conclusion. In the present case the Impugned Letter of Termination dated 16.01.2019 does not contain any reason for blacklisting the petitioner for a period of one year and therefore, cannot be sustained. Further, placing reliance on the judgment of the Supreme Court in R.B.Shreeram Durga Prasad and Fatehchand Nursing Das v. Settlement Commission (IT & WT) and Anr., (1989) 1 SCC628 he submits that any order passed in OMP(I)(Comm.) No.12/2019 Page 3 violation of principles of natural justice would be null and void and cannot be given effect to.

7. On the other hand, learned counsel for the respondent has placed reliance on the Clause 5.11 of the Tender Documents to contend that the tender itself had warned the tenderer, that in case of non compliance of the conditions thereof, including submission of the Contract Performance Guarantee and the Contract Agreement within a period of 28 days, the Letter of Award would stand recalled and the tenderer would be banned from future tenders. Further, placing reliance on the judgment dated 29.07.2002 passed by the Supreme Court in Civil Appeal No.4359-4361/2002, Kanhaiya Lal Agarwal v. Union of India & Ors., he submits that where non-compliance with the conditions of tender results in rejection of the tender, the Court cannot interfere with the same. He also places reliance on the judgment of the Supreme Court in Shristi Infrastructure Development Corporation Ltd. v. Sunway Construction SDN BHD, MANU/SC/7349/2008 to contend that in a similar case, the Supreme Court, taking into account the non-compliance of the terms and conditions of the Contract/Work Order dated 19.11.2005 therein and the urgency of the project, refused to interfere with the termination of the contract and award of work to a third party.

8. I have considered the submissions made by the learned counsels for the parties. I have also enumerated the factual position leading to the filing of the

present petition in my order dated 18.01.2019 and therefore, do not propose to revisit the same. It suffices to show that OMP(I)(Comm.) No.12/2019 Page 4 at least, prima facie, it is apparent that the petitioner has failed to comply with the terms of the Letter of Award inasmuch as it has not submitted the Contract Performance Guarantee nor it seems to be in a position to make the supply of smart meters in accordance with the schedule set forth in the Letter of Award. Therefore, at this stage, as far as the termination of the Letter of Award is concerned, the petitioner has been unable to make out any prima facie case in its favour.

9. However, the same cannot apply to the order of blacklisting/debarring the petitioner from further business dealings for a period of one year.

10. Clause 5.11 of the Tender Document reads as under: 5.11 Ineligibility for Future Tenders Notwithstanding the provisions specified in ITB sub clause 2.4 and ITB sub clause 5.7 and 5.8, if a bidder after having been issued and letter of award, either does not sign the contract agreement pursuant to ITB clause 5.7 or does not submit a acceptable performance security pursuant to ITB clause 5.9, such bidder may be considered ineligible for participating in future tenders of EESL for a period as may be decided by the EESL. (Emphasis Supplied) 11. A reading of the above Clause would clearly show that upon failure of the successful tenderer/bidder to submit an acceptable performance security and execute the contract document, said bidder OMP(I)(Comm.) No.12/2019 Page 5 may be considered as ineligible by the respondent for participating in future tenders of the respondent for a period as may be decided by the EESL. Therefore, in terms of Clause 5.11 not only does the discretion vest with the respondent to ban or not to ban the petitioner from future dealings, but also with respect to the period for which the said ban is to operate.

12. In my opinion, this would necessarily require a notice to be issued to the petitioner and the petitioner being heard before taking a decision on the same.

13. Though the learned counsel for the respondent has relied upon the letters dated 12.11.2018, 29.11.2018 and 26.12.2018 addressed by the respondent to the petitioner calling upon the petitioner to submit the Contract Performance

Guarantee and signed copy of the Agreement, I do not find the said notices to be in the nature of show cause or as seeking an explanation from the petitioner on whether the petitioner should suffer a ban from future dealings with the respondent and if so for what period. As noted by the Supreme Court in Gorkha Security Services (supra), mere existence of Clause 5.11 in the tender document need not suffice the mandatory requirement of the issuance of show cause notice to the petitioner before taking this drastic measure, which amounts to civil death of the contractor. The Supreme Court held as under: 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 OMP(I)(Comm.) No.12/2019 Page 6 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 fulfil 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. In the instant case, no doubt the show-cause 28. notice dated 6-2-2013 was served upon the appellant. Relevant portion thereof has already been extracted above. This show-cause notice is conspicuously silent about the blacklisting action. On the contrary, after starting 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, the notice further mentions that the competent authority could take other actions as deemed fit. However, that may not fulfil the requirements 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 insofar as penalty of

OMP(I)(Comm.) No.12/2019 Page 7 and of forfeiture blacklisting earnest money/security deposit is concerned it can be imposed only, if so warranted. Therefore, without any specific stipulation in this behalf, the respondent could not have imposed the penalty of blacklisting.

29. No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, in exercise of power prejudicially affecting another must be in conformity with the rules of natural justice. xxxxx 31. When it comes to the action of blacklisting which is termed as civil death it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premises that this is one of the actions so stated in the provisions of NIT. 14. A reading of the Letter of Termination dated 16.01.2019 would show that the same also does not give any reasons for the decision taken by the respondent to ban the petitioner and also for the period of such ban. Being a Public Sector Undertaking it is expected from the respondent to act in conformity with Article 14 of the Constitution of India and therefore, be informed by reason and not act unreasonably or OMP(I)(Comm.) No.12/2019 Page 8 arbitrarily. The said condition would also entail the condition of giving reasons for its decision.

15. As far as the judgments cited by the learned counsel for the respondent, I may only note that this Court is not interfering with the fresh tender that has been floated by the respondent and therefore, these judgments are not applicable to the facts of the present case. In fact, I have already held that the petitioner has been unable to make a prima facie case for seeking stay on the Letter of Termination dated 16.01.2019.

16. In view of above, there shall be a stay on the enforcement of the Letter of Termination dated 16.01.2019 only to the limited extent of Clauses 3, 4 and 7 which are reproduced hereinbelow: Based on the above, this notification shall

have the following effects:

1. 2.

3.

4. .... .... Further business dealings with your firm are banned with immediate effect. The order of Banning would operate for a period of one (01) year. During the period of Banning, no Business Dealing shall be held with your firm. No Enquiry/Bid/Tender shall be issued to your firm nor will the bids submitted by your firm be entertained. xxxxx OMP(I)(Comm.) No.12/2019 Page 9 7. firm shall not be allowed as Your participate Contractor/Joint Venture/Consortium future tenders of EESL. to Sub-Vendor/Sub- in 17. However, the above order shall not in any manner prejudice the rights of the respondent to take any action in this behalf after complying with necessary procedural formalities and in accordance with the law.

18. I further make it clear that this order shall not prejudice the determination of the disputes in accordance with the contractual terms/mechanism.

19. The petition and the pending application are disposed of in the above terms, with no order as to cost. NAVIN CHAWLA, J FEBRUARY13 2019/Arya OMP(I)(Comm.) No.12/2019 Page 10

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