



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 5900/2023

M/s H.D. Enterprises, A registered partnership firm,
through its Partner Harilal S/o Devji Patel, aged
about 63 yrs, Occ.Business, Off at : 501-503, Siddharth
Complex, R.C. Dutt Road, Vadodara, Gujarat.

PETITIONER

....VERSUS....

Western Coalfields Limited (WCL), Through its
General Manager (CMC), Office at: Coal Estate,
Civil Lines, Nagpur.

RESPONDENT

**WITH
WRIT PETITION NO. 6197/2023**

M/s Gaurav Contracts Co., 122, Pooja Complex,
Station Road, Bhuj Kutch, Gujarat – 370 001.

PETITIONER

....VERSUS....

Western Coalfields Limited (WCL), Through its
General Manager (CMC), Office at: Coal Estate,
Civil Lines, Nagpur.

RESPONDENT

Shri Sunil Manohar, Senior Advocate with Shri Rohan Deo, counsel for the
petitioner in Writ Petition No. 5900/2023.

Yashowardhan Sambre, counsel for the petitioner in Writ Petition No.6197/2023.

Shri Chaitanya Samudra, counsel for the respondent in both the writ petitions.

CORAM : A. S. CHANDURKAR AND MRS VRUSHALI V. JOSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : SEPTEMBER 26, 2023

DATE ON WHICH JUDGMENT IS PRONOUNCED : NOVEMBER 30, 2023

JUDGMENT (PER : A.S. CHANDURKAR, J.)

RULE. Rule made returnable forthwith and heard the learned
counsel for the parties.

2. Since the challenge raised in both the writ petitions is to the
order of blacklisting, they are being decided together by this common
judgment.

3. Petitioner-M/s H.D. Enterprises (for short, 'HDE') in Writ Petition No. 5900 of 2023, a registered partnership firm entered into a joint venture/consortium agreement with the petitioner-M/s Gaurav Contracts Company (for short, 'GCC') in Writ Petition No. 6197 of 2023 on 23.05.2018. The said joint venture agreed to submit a bid for the work advertised by the respondent no.1-Western Coalfields Limited (for short, 'the WCL'). It was stated in the said agreement that the joint venture would continue till the project in question was completed including the defects liability period. On the basis of this joint venture, a work order dated 03.01.2019 came to be issued and the joint venture undertook such work. Thereafter on 06.04.2023 the WCL issued E-Tender notice No.3/24 inviting bids for undertaking expansion of its mines at Chandrapur area. The bids were to be submitted by 24.04.2023 at 11.00 a.m. HDE responded to the said bid on 24.04.2023 and uploaded its bid at 10.37 a.m. By publishing a corrigendum the last date for submission of bids was extended to 04.05.2023. Alongwith the tender documents HDE submitted an undertaking as prescribed by Annexure-P in the tender notice. As per said undertaking, it was stated the if HDE had relationship with another bidder either directly or through common third parties that would put HDE in a position to have access to information about or influence on the bid of another bidder it would be disqualified in the tender. The undertaking submitted by HDE was dated 15.04.2023.

4. Prior to the last date of submission of bids, GCC submitted its bid at 18.50 p.m. on 03.05.2023. The technical bids were thereafter examined and on evaluation, the bids of HDE as well as GCC were held to be disqualified. On 21.06.2023, the WCL issued a show cause notice to HDE as well as GCC stating therein that in terms of Clause 4.2(d)(e) both the bidders had failed to disclose the entering into of a joint venture agreement on the basis of which the work order dated 03/05.01.2019 had been issued to it and that work was in progress. It was stated that the entities did not make a correct disclosure in Annexure-P and had thus furnished a false undertaking. They were called upon to show cause as to why action in the form of forfeiture of Earnest Money Deposit (for short, 'EMD') as well as debarment for a period of twelve months from participating in future tenders of the WCL be taken. HDE submitted its reply to the show cause notice on 03.07.2023 and denied the grounds raised in the show cause notice. It was stated that the joint venture had been entered into only for the earlier tender notice that resulted in issuance of a work order dated 03/05.01.2019. It stated that there was no functional integrity between two entities that were independent partnership firms. It was further stated that HDE be granted an opportunity of personal hearing. GCC submitted its reply to the show cause notice on 05.07.2023 and denied the statements made in the show cause notice. Since there was no bar for a member of the joint venture to participate in the subsequent tender process in its individual capacity there was no breach of Clause 4.2 of the tender notice. An additional reply was also submitted by GCC on 11.06.2023.

5. The WCL thereafter granted personal hearing to both the entities and by the order dated 26.08.2023 it proceeded to forfeit the EMD that was furnished by both the entities. Similarly they were also de-barred from participating in any future tenders of the WCL for a period of twelve months. The said orders dated 26.08.2023 are the subject matter of challenge in these writ petitions.

6. Shri Sunil Manohar, learned Senior Advocate for HDE submitted that the impugned communication dated 26.08.2023 inflicting the penalty of forfeiture of the EMD as well as debarment was without assigning any reason. In reply to the show cause notice HDE had submitted a detailed reply and had relied upon various documents to urge that the penalty proposed could not be inflicted on it. Though an opportunity of personal hearing was granted to HDE, the impugned communication did not reflect due consideration of the stand taken by HDE nor were any reasons indicated in the said communication as to why its stand was not accepted. Since the order of debarment had been passed without considering the reply to the show cause notice and was thus a non-speaking order it was liable to be set aside. In this regard reliance was placed on the decision in *Oryx Fisheries Private Limited Versus Union of India & Others* [(2010) 13 SCC 427]. It was further submitted that HDE had not furnished any false undertaking in the form of Annexure-P inasmuch as the said undertaking was signed on 15.04.2023 and submitted alongwith with the technical bid. HDE had

submitted its bid on 24.04.2023 and at that point of time it was correctly stated that the firm did not have any relationship with another bidder either directly or through a common third party so as to attract disqualification. Since GCC submitted its bid much later on 03.05.2023 it could not be expected of HDE to state in the undertaking at Annexure-P that it had entered into a joint venture with GCC at an earlier point of time. It therefore could not be said that the undertaking at Annexure-P was false in any manner whatsoever. This was one of the considerations in issuing the impugned communication as there was no foundation for holding Annexure-P to be false undertaking, the impugned communication was vitiated.

As regards the action of debarment is concerned it was submitted that the WCL proceeded to assume that HDE and GCC did not appear to be “at arms length” with regard to the tender in question. All business relationships of a bidder with another entity were not required to be disclosed inasmuch as Clause 4.2(d) required disclosure of only such business relationship that would put a bidder in a position to have access to information about or influence the bid of another bidder. Despite a specific stand taken by HDE in that regard, this aspect was not considered at all by the WCL. There were various categorical assertions in the reply filed by HDE which were not taken into consideration. Reference in that regard was made to paragraph 4(e) to (h) of the reply to the show cause notice dated 03.07.2023 and it was urged that the order of blacklisting on this premise was vitiated. It was also not the stand of the WCL that HDE was aware of

the fact that GCC would subsequently participate in the tender process in which it had already submitted its undertaking. On this premise it was submitted that the action of blacklisting taken by the WCL was unwarranted in the facts of the case. The same was therefore liable to be set aside.

7. Shri Yashowardhan Sambre, learned counsel for GCC adopted the submissions as urged on behalf of the learned Senior Advocate for HDE. He referred to the reply submitted to the show cause notice on 05.07.2023 and 11.08.2023 to urge that the impugned action forfeiting the EMD as well as debarment was uncalled for in the facts of the present case. He too prayed that the impugned communication dated 26.08.2023 be set aside.

8. Shri Chaitanya Samudra, learned counsel for the WCL opposed the aforesaid submissions. According to him, all contentions raised by both the petitioners had been duly considered and after granting them sufficient opportunity of hearing, the impugned action had been taken. The conclusion recorded in the communication dated 26.08.2023 was arrived at after due consideration of the stand taken by the petitioners and merely because the same did not refer to all the deliberations in detail it could not be said that the impugned communication was a non-speaking one. He invited attention to the proceedings as recorded while considering the reply of both the petitioners and submitted that the decision making process was fair and transparent. Since the principles of natural justice had been duly

complied with and all material on the basis of which the impugned action was taken was brought to the notice of the petitioners it could not be said that the said action was liable to be interfered with on the ground that reasons were not indicated in the communication dated 26.08.2023. The deliberations undertaken indicated the decision making process and the said action was not liable to be interfered with on that count. Reference in that regard was made to the decisions in *Punya Coal Roadlines & Others Versus Western Coalfields Limited, Nagpur & Another* [2015 SCC OnLine Bom 2941] and *Hindustan Trade Overseas Pvt. Ltd. Versus General Manager (C.M.C.), Western Coalfields Limited & Another* [2022 SCC OnLine Bom 1062]. The learned counsel invited attention to the undertakings submitted by both the bidders as per Annexure-P and Annexure-C. Referring to Clauses 4.1 and 4.2 of the tender notice, it was submitted that each bidder could submit only one bid either in the individual capacity or as a partner of the partnership firm or as a member of the joint venture. Similarly the likelihood of having a conflict of interest amongst bidders was sought to be treated as a disqualification under Clause 4.2. The joint venture between both the bidders continued to operate since the work under earlier work order dated 03/05.01.2019 was ongoing. The parties therefore had business relationship with each other and they were not 'at arms length' in their course of business. There was no arbitrariness in the decision taken by the WCL in forfeiting the earnest money and debarring both the petitioners. The WCL as the principal was empowered to decide the manner in which it

could undertake its business dealings and the scope for interference in such decision was limited. The learned counsel referred to the decisions in *Jagdish Mandal Versus State of Orissa & Others* [(2007) 14 SCC 517], *Central Coalfields Limited & Another Versus SLL-SML (Joint Venture Consortium) & Others* [(2016) 8 SCC 622], *Afcons Infrastructure Limited Versus Nagpur Metro Rail Corporation Limited & Another* [(2016) 16 SCC 818] and *Silppi Constructions Contractors Versus Union of India & Another* [(2020) 16 SCC 489] in that regard. It was thus submitted that since the impugned action had been taken by following the due procedure of law and in compliance with the principles of natural justice no interference with the same was called for.

9. We have heard the learned counsel for the parties at length and with their assistance we have perused the relevant material on record. At the outset, we may consider the challenge raised by the petitioners to the impugned communication dated 26.08.2023 debarring the petitioners from participating in future tenders and forfeiting the EMD on the premise that this has been done by a non-speaking order. Perusal of the impugned communication indicates that it refers to the show cause notice in detail and thereafter states that after observing the principles of natural justice and granting an opportunity of hearing it was found that the explanation furnished by the noticees was not satisfactory. By stating so, the impugned action of debarment has been taken.

It is true that the impugned communication merely states that the matter was deliberated and it was thereafter found that the explanation offered was not satisfactory. If the impugned communication is considered in isolation it could be easily stated that the same does not contain any reason whatsoever and it merely states that the explanation furnished by the noticees was not satisfactory. It is however to be noted that the WCL alongwith its reply has placed on record the minutes of the proceedings held on 17.07.2023 as well as the deliberations that took place thereafter preceding issuance of the impugned communication. The said material indicates the manner in which the decision of visiting the petitioners with penalty was arrived at. In this regard it may be stated that this material in the form of a note-sheet containing deliberations undertaken by the principal prior to taking any action would be significant while considering the challenge as raised. If it is seen from the record that is produced before the Court that the impugned action has been taken after due consideration of the reply to the show cause notice by granting due opportunity of hearing to the parties, then the impugned communication would not be liable to be set aside only on the ground that it did not contain reasons. In other words, if the reasons in support of the ultimate conclusion are placed on record that are in the form of deliberations that have preceded the decision making process, then it would not be possible to hold that merely on the ground that the impugned communication does not refer to all the deliberations that took place earlier, a non-speaking order has been passed.

10. In this regard, we may refer to the observations in paragraph 2 of the decision in *Grosos Pharmaceuticals (P) Ltd. & Another Versus State of U.P. & Others* [(2001) 8 SCC 604]. A somewhat similar contention was also raised in the aforesaid case and the Hon'ble Supreme Court observed that since elaborate reasons were found to have been recorded while passing the order of blacklisting the same could not be questioned on the count that the ultimate order was unreasoned. The Hon'ble Supreme Court held as under :-

“2. It is true that an order blacklisting an approved contractor results in civil consequences and in such a situation in the absence of statutory rules, the only requirement of law while passing such an order was to observe the principle of *audi alteram partem* which is one of the facets of the principles of natural justice. The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant were based, was not the requirement of the principle of *audi alteram partem*. It was sufficient requirement of law that an opportunity of show-cause was given to the appellant before it was blacklisted. It is not disputed that in the present case, the appellant was given an opportunity to show cause and it did reply to the show-cause which was duly considered by the State Government. We are, therefore, of the view that the procedure adopted by the respondent while blacklisting the appellant was in conformity with the principles of natural justice.”

The aforesaid decision has been thereafter followed in **Civil Appeal No.1083 of 2022** [*State of Odisha & Others Versus M/s Panda Infraproject Limited*] decided on 24.02.2022 by the Hon'ble Supreme Court. In these facts therefore, the ratio of the decision in *Oryx Fisheries Private Limited* (supra)

cannot be applied to the case in hand. We thus find that merely for the reason that the impugned communication dated 26.08.2023 does not contain reasons it is not liable to be set aside. As the conclusion recorded is sought to be supported by the material placed on record, the same would be sufficient to turn down the contention raised on behalf of the petitioners that the impugned communication was liable to be set aside as it did not contain any reasons.

11. Having found that the impugned communication dated 26.08.2023 can be sustained in view of the fact that the reasons in support of the conclusion recorded in the said communication are available on record, it would be necessary to consider the challenge to the action taken by the WCL against the petitioners. In the show cause notice issued to HDE as well as GCC reference has been made to Clause 4 of the Instructions to Bidder of the tender notice and especially Clauses 4.2(d) and (e). The said clauses read as under:

“4.2 Conflict of Interest.

A Bidder may be considered to have a conflict of interest with one or more parties in this bidding process, if:

(d) They have business relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the bid of another Bidder; or

(e) A Bidder or any of its affiliate participated as a consultant in the preparation of the design or technical specification of the contract that is the subject of the Bid; or”

It has been stated that in view of the Joint Venture between HDE and GCC under which the work order dated 03/05.01.2019 was being undertaken, the said parties had business relationships with each other which could not be construed 'at arms length' in the usual course of business. By stating that the parties had not made correct disclosure in Annexure-P and had furnished a false undertaking it was proposed to forfeit the EMD and also to de-bar both the entities and its partners for a period of twelve months. Annexure-P reads as under :-

“Name of Work :
Tender No:
Tender Id:
I/We, proprietor/partner/Legal Attorney/
Directed/Accredited Representative of M/s, solemnly
undertake that:
1. I/We am/are submitting Bid for the work against Bid Notice no. dated and I/We offer to execute the work in accordance with all the terms, conditions and provisions of the bid.
2. I/We undertake that if I/We have relationship with each other, directly or through common third parties, that puts I/We in a position to have access to information about or influence on the bid of another Bidder;
or
I/We or any of our affiliate participated as a consultant in the preparation of the design or technical specification of the contract that is the subject of the Bid; shall be disqualified in the tender.

Signature of the Bidder
(Signature of all partners in case of Partnership firm/Joint Venture)
Dated”

12. Since the WCL has sought to justify the action of de-barment by relying upon Clause 16 of the Conditions of Contract which contain guidelines for banning of business it would be necessary to refer to the said Clause which reads as under :-

*“16. **Guidelines for Banning of Business***

CIL and its Subsidiary Companies shall follow the following guidelines for effecting ‘Banning of Business’ with a contracting entity in respect of Works and Services Contracts.

2. The contracting entity may be banned in the following circumstances:-

b. On termination of contract.

vi) Wilful suppression of facts or furnishing of wrong information or manipulated or forged documents by the Agency or using any other illegal means. (In this case the bannings/unfair shall be for a minimum period of 05(Five) years.”

The same indicates that in case of wilful suppression of facts or furnishing of wrong information, banning of business consequent upon termination of the contract could follow. The show cause notice states that both the entities had not made a correct disclosure in Annexure-P and had furnished a false undertaking.

The reply to the aforesaid show cause notice was given by HDE on 06.07.2023 and by GCC on 05.07.2023. It was denied that the said entities were liable to be de-barred for the reasons stated in the show cause notice. Reference was made to the fact that both the entities had distinct legal existence and that there was no functional integrity between the said entities.

13. In this regard it would be necessary to refer to certain undisputed facts on record. In response to the tender notice, HDE had submitted its bid on 24.04.2023. Alongwith all requisite documents, it also submitted its undertaking dated 15.04.2023 as per Annexure-P. This would indicate that as on the date of the undertaking HDE submitted that if it had any relationship with another bidder directly or through common their parties that would put it in a position to have access to information about or influence the bid of another bidder or if any of its affiliates participated as a consultant in the preparation of the relevant documents which is the subject of the bid, it would be disqualified. The undertaking submitted by GCC as per Annexure-P is dated 18.04.2023. The same reiterates the statements referred to in the printed format. GCC submitted its bid documents on 03.05.2023. The aforesaid would indicate that though the undertaking as required in Annexure-P was submitted by HDE on 15.04.2023 and that by GCC on 18.04.2023 till that date neither HDE nor GCC had submitted their bid documents. Their bids were submitted on 24.04.2023 and 03.05.2023 respectively. These facts would therefore be required to be considered in the context of the conclusion recorded by the WCL that the information furnished in Annexure-P was incorrect and that a false undertaking had been submitted. Another relevant fact insofar as HDE is concerned is that on the date when it submitted its bid document which was 24.04.2023, GCC had not entered the fray. HDE was therefore not expected to have knowledge of the fact that GCC, a distinct entity would be participating in

the tender process. Similarly on the date when GCC executed its undertaking which was 18.04.2023, HDE had still not uploaded its bid documents which exercise was undertaken thereafter on 24.04.2023.

In our view these aspects would have material bearing on the action taken against the said entities especially since the action of banning has been resorted to in view of Clause 16(2)(b)(vi) which refers to wilful suppression of facts or furnishing of wrong information. The position as prevailing on the date of submitting the undertaking as per Annexure-P would be relevant before concluding as to whether the disclosure made therein was incorrect and that a false undertaking had been submitted.

14. Coming to the aspect of forfeiting of EMD, such action is permissible if conflict of interest as per clause 4.2(d) and (e) is found. The stipulation prescribed is that a bidder must have business relationship with another, directly or through common third parties, due to which access to information as regards the other's bid is possible. The fact that the Joint Venture between the HDE and GCC that was undertaken on 24.05.2018 with regard to an earlier tender notice issued by the WCL is not in dispute. The work thereunder is ongoing. In the show cause notice, the aspect of both bidders not being "at arms length" has been emphasised. The reply given by HDE and GCC to the show-cause notice specifically disputes this aspect by indicating their separate legal status and distinct identity. We find on a perusal of the notings made during the course of hearing the bidders that this specific aspect has not been considered in detail. Merely on the

basis of the fact that the work under the earlier joint venture was continuing, it has been concluded in Note 58 that HDE and GCC did not appear to be “at arms length” insofar as the present work was concerned. Since the reason for blacklisting both the bidders emanates from non-disclosure of business relationship between HDE and GCC in Annexure-P, we are of the considered opinion that even the matter leading to forfeiture of EMD requires re-consideration at the hands of the WCL. This is for the reason that civil consequences would follow on adjudication of the show-cause notice against the petitioners and hence due consideration of all material aspects is warranted.

15. For aforesaid reasons, we are of the view that the WCL should re-consider the reply submitted by HDE and GCC to the show-cause notice issued to them in the light of observations made hereinabove and take a decision afresh. Accordingly, the following order is passed :-

- (I) The communication dated 26.08.2023 issued by the WCL is quashed to enable re-consideration of the show-cause notice dated 21.06.2023 issued to HDE and GCC afresh. It is clarified that the communication dated 26.08.2023 was issued after complying with the principles of natural justice and the same is being set aside only to enable re-consideration of the entire matter afresh in the light of observations made hereinabove.
- (II) The action with regard to forfeiture of EMD and de-barring of HDE and GCC would remain in abeyance until fresh adjudication is undertaken by the WCL.

- (III) The WCL shall re-consider the show-cause notice dated 21.06.2023 in accordance with law within a period of six weeks from today.
- (IV) All points on merits of the challenge raised by both the sides are kept expressly open.
16. Rule is disposed of in aforesaid terms with no order as to costs.

(MRS. VRUSHALI V. JOSHI, J.)

(A.S. CHANDURKAR, J.)