* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 25.10.2013

\+ WP(C) No.6718 of 2013

M/S GORKHA SECURITY SERVICES ....PETITIONER

Through: Mr. K.K. Rai, Sr. Adv. With Mr. Rarkeshwar Nath and Mr. Saurabh Kumar Tuteja, Advs.

Versus

GOVT. OF NCT OF DELHI & ORS. ....RESPONDENTS

Through: Ms. Zubeda Begum, Standing Counsel for Govt. of NCT of Delhi with Ms. Sana Ansari., Adv.

CORAM:
HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J. (Oral)

The petitioner before this Court was awarded a contract to provide security services in Shri Dada Dev Matri Avum Shishu Chiktsalaya, Dabri, New Delhi – 110045, for a period of one year with effect from 2.9.2011 to 1.9.2012. The petitioner, however, continued to provide services even thereafter. The case of the petitioner is that it has not been paid for the security services provided by it in terms of the aforesaid contract.

2. Vide notice dated 4.8.2012, the respondents, referring to their earlier letter dated 17.10.2011, directed the petitioner to submit the valid EPF/ESIC certificate, list of persons deployed, along with copies of their educational certificates, police verification report and medical examination report, etc and to make the payment of prescribed

minimum wages to the workers through ECS or by cheque and deposit the ESI/PF and service tax etc. In the aforesaid notice, the respondents, *inter alia*, observed as under:

(i) in spite of the lapse of a long period, the petitioner had failed to submit the requisite document/ information;

(ii) neither the firm is making full payment or minimum prescribed wages nor providing the statutory benefits like EPF and ESI etc to the workmen/ security guards;

(iii) the petitioner has failed to provide the complete list of workers deployed in the hospital and also appointing/ suspending/ transferring the personnel/ security guards without any intimation to the hospital administration thereby placing the security of the hospital at a higher risk in the absence of the non-availability of credentials of the deployed security guards;

(iv) the security guards were absent from their place of duty, particularly during the nigh hours, though their presence was shown on the attendance register and sometimes the points fixed for the security check were left unattended;

(v) a number of complaints were received against the security guards alleging demanding illegal gratification in the garb of the tip/*baksheesh* from the relatives of the patients, who were then allowed to avail un-scheduled entry in the hospital;

(vi) the petitioner has not complied with the Circular dated 21.4.2012 and notice dated 26.6.2012 directing it to make payment through ECS from April-2012 and submit the

proof thereof and submit a list of workers deployed in the hospital along with a copy of the registration of each worker;

The petitioner, was, therefore, directed to explain within seven (7) days as to why the action against it be not taken for failure to abide by the terms and conditions and also for violating the labour laws etc.

3. Vide communication dated 7.8.2012, the petitioner informed the respondents (a) that they had obtained EPF& ESIC numbers in respect of deployed security personnel and deposited their contributions towards EPF & ESIC with the concerned authorities and submitted photocopies of consolidated challans with the bills and (b) they had made payment to the workers as per the Minimum Wages Act and had also deposited the contribution of EPF & ESIC;

4. The notice dated 04.08.2012 was replied by the petitioner on 17.8.2012 and along with its reply, the petitioner submitted; (a) photocopies of bio-data in respect of deployed thirty two (32) security personnel along with police verification report, (b) list of security personnel along with their date of birth, educational qualification, addresses and EPF & ESIC numbers. The petitioner also assured that in case of any change/ transfer in future, the same would be informed and that it had instructed all the security personnel not to accept any illegal gratification and not to allow any un-scheduled entry in the hospital. As regards payment through ESC/ Cheque, it was stated that they had directed the personnel to open saving accounts and until such accounts are opened, they had to disburse wages to the workers in cash.

5. Vide show-cause notice dated 6.2.2013, the respondents, inter alia, noted as under:

(i) as per the terms and conditions of the agreement, it was binding upon the petitioner to make the payment of minimum wages through ECS as also to extend the other benefits to the workers and to make timely payment to the respective departments and submit proof in this regard;

(ii) the petitioner was required to maintain the day-to-day deployment register of the security guards and get the same countersigned as also to get the antecedents of the security staff verified and submit the copies of the same along with list of security personnel, which the petitioner had failed to submit;

(iii) the petitioner had failed to properly manage and provide satisfactory service;

(iv) the petitioner had failed to submit requisite documents in terms of the letter dated 17.10.2011;

(v) the petitioner had failed to submit the documents such as list of workers along with the proof of payment made to the workers through ECS/ cheque, duly authenticated by the concern bank, in respect of each worker along with labour licence;

(vi) the petitioner had made the payment to the workers in cash up to May-2012;

(vii) scrutiny of documents furnished by the petitioner revealed that the list submitted by it including the names of some employees who were actually not working in the hospital

and some employees were working in double duty, as against the shift of eight (8) hours which was not allowed;

(viii) the petitioner failed to submit the list of workers along with the requisite information in the prescribed performa pertaining to deposit pertaining to the deposit of the ESI contributions;

The petitioner was directed to show cause within seven(7) days as to why action be not taken against it as deem fit by the Competent Authority.

6. The show-cause notice was replied by the petitioner vide reply dated 25.4.2013 stating therein that it was following the provisions of the agreement as signed between the parties and it was maintaining the register of the security guards which was duly counter-signed by the representative of the hospital. It was further submitted in the said reply that labour licence had already been provided to the hospital and the petitioner had not engaged any workmen on double duty.

7. Vide impugned order dated 11.9.2013, the respondent imposed the following penalties upon the petitioner:

(1) A penalty of Rs.3000/- (rupees three thousand only) under clause 27© of the T&C, on account of public complaints.

(2) A penalty of Rs.41,826/- (Rupees Forty One Thousand Eight Hundred Twenty Six Only) under Clause 27(C) a.(i) on account of unsatisfactory performance and not abiding by the statutory requirements.

(3) A penalty of forfeiture of performance guarantees amounting to Rs.3,70,000/- (rupees three lac seventy thousand only).

(4) A penalty of blacklisting the firm M/s Gorkha Security for a period of four (4) years from the date of this order, from participating the tenders in any of the department of Delhi Government/ Central Government/ Autonomous Body under the Government.

8. The impugned order is assailed by the learned senior counsel for the petitioner on the following grounds:

(i) the show-cause notice dated 6.2.2013 made no reference to the proposed black-listing of the petitioner and, therefore the petitioner had no opportunity to make a representation in this regard;

(ii) no opportunity of personal hearing was given to the petitioner before passing the impugned order; and

(iii) there was no ground for black-listing the petitioner since no term of the agreement was breached by it.

9. As regards, the power of the State to blacklist a person, the following view was taken by this Court in W.P(C) No.7369/2011 *M/s Sabharwal Medicos Pvt. Ltd. Through its Director* versus *Union of India & Ors.* [decided on 25.9.2013]:

> "8. It is an undisputed legal proposition that the State has an inherent right either to enter or not to enter in a contract with any person though even in such matters, it is required to act fairly, reasonably and without actuated by any mala fide. A reference in this regard may be made to the following view taken in Patel Engineering Limited Vs. Union of India and Anr. (2012) 11 SCC 257:

"The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary - thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors.

As regards oral hearing the, the following was the view taken by the Apex Court:

"Coming to the submission that R-2 ought to have given an oral hearing before the impugned order was taken, we agree with the conclusion of the High Court that there is no inviolable rule that a personal hearing of the affected party must precede every decision of the State. This Court in Union of India and Anr. v. Jesus Sales Corporation, (1996) 4 SCC 69, held so even in the context of a quasi-judicial decision. We cannot, therefore, take a different opinion in the context of a commercial decision of State."

The following view taken by the Apex Court in Grosons Pharmaceuticals (P) Ltd. & Anr. Vs. State of U.P. & Ors. (2001) 8 SCC 604 is also relevant to the issue involved in these writ petitions.

"2. Learned counsel appearing for the appellant, urged that seeing the nature the seriousness of the order passed against the appellant, the respondent ought to have supplied all the materials on the basis of which the charges contained in the show cause notice were based along with show cause notice and in the absence of supply of materials, the order impugned is against the principles of natural justice. We do not find any merit in this contention. Admittedly, the appellant has only contractual relationship with the State government and the said

relationship is not governed by any statutory Rules. There is no statutory rule which requires that an approved contractor cannot be blacklisted without giving an opportunity of show cause. 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 fact 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 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."

As regards, scope of interference by the court in such administrative decisions, the following view was taken by this Court in the aforesaid case:

15. In DDA & Anr. Vs. UEE Electricals Engg. (P) Ltd. & Anr. (2004) 11 SCC 213, a three Judges Bench of the Apex Court held that while considering the challenge to administrative decision, the Courts will not interfere as if they are sitting in appeal over the decision. The following view taken by the Apex Court with respect to the relations between a Company and its Directors are pertinent for the purpose of the cases before this Court:

"17. Though in a legalistic sense an incorporated body like a company and its Directors are separate entities for certain purposes, in many companies they act as alter ego. For the acts of the Director, the concept of vicarious and constructive liabilities operates so far as the company is concerned. The acts of the company are done primarily through the Directors or the employees. In a case like the one at hand, the stand of respondent No. 1 - Company that even if one of its Directors has assaulted an employee of the appellant-Authority, yet it is of no consequence when deciding the tender application. The strained relationship between a contractor and the contractee can have its implications in working out the contract.

> 18. This is not a case where the appellant-Authority can be said to have acted in a mala fide manner or with oblique motives. If the Authority felt that in view of the background fats, it would be undesirable to accept the tender, the same is not open to judicial review in the absence of any proved mala fide or irrationality. The impugned judgment of the High Court is indefensible and is set aside. The appeal is allowed. Costs made easy."

10. The following *inter alia* were the terms and conditions of the contract, as contained in the NIT, which, in terms of clause (ii) of the formal agreement dated 08.09.2011, formed part of the agreement between the parties:-

"Terms and Conditions of the Contract:

1. The security personnel provided shall be the employees of the contractor and all statutory liabilities will be paid by the contractor such as ESI, PF, Workmen's Compensation Act, etc. The list of staff going to be deployed shall be made available to the Department and if any change is required on part of the Department fresh list of staff shall be made available by the agency after each and every change.

2. The contractor shall abide by and comply with all the relevant laws and statutory requirements covered under Labour Act, Minimum Wages and (Contract Labour (Regulation & Abolition Act 1970), EPF etc with regard to the Security personnel engaged by him for works. It will be the responsibility of the contractor to provide details of manpower deployed by him. In the Department and to the Labour Department.

4. The antecedents of security staff deployed shall be got verified by the contractor from local police authority and an undertaking in this regard to be submitted to the department and department shall ensure that the contractor complies with the provisions.

10. The security staff shall not accept any gratitude or reward in any shape.

12. Under the terms of their employment agreement with the contractor the Security staff shall not do any professional or other work for reward or otherwise, either directly or indirectly, except for and on behalf of the contractor.

23. The contractor shall abide by and comply with all the relevant laws and statutory requirements covered under various laws such as Labour Act, Minimum Wages Act, Contract Labour (Regulation and Abolition) Act, EPF, ESI and various other Acts as applicable from time to time with regards to the personnel engaged by the contractor for the Department.

a. In case the contractor fails to commence/ execute the work as stipulated in the agreement or unsatisfactorily performance or does not meet the statutory requirements of the contract, Department reserves the right to impose the penalty as detailed below:-

(ii) After two weeks delay principal employer reserves the right to cancel the contract and withhold the agreement and get this job be carried out preferable from other contractor(s) registered with DGR and then from open market or with other agencies if DGR registered agencies are not in a position to provide such contractor(s). The difference if any will be recovered from the defaulter contractor and also shall be blacklisted for a period of four (4) years from participating in such type of tender and his earnest money/ security deposit may also be forfeited, if so warranted.

54. The contractor will have to deposit the proof of depositing employee's contribution towards PF/ ESI etc of each employee in every 3 months.

55. The contractor shall disburse the wages to its staff deployed in the Department every month through Electronic Fund Transfer to the Bank Account of the concerned employees. The proof of such

EFT shall be maintained and made available for the inspection whenever required."

11. It would thus be seen that the contract between the parties specifically empowered the respondents to blacklist the petitioner firm. Therefore, when the show-cause notice received by the petitioner expressly mentioned of such action as may be deemed appropriate by the Competent Authority, the petitioner could easily visualize that the action proposed by the Competent Authority could include blacklisting of the petitioner – firm. Considering the express terms of the contract between the parties, it was not necessary for the respondent to specifically refer to the proposed blacklisting in the show-cause notice issued to the petitioner. The purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which an action is proposed against it and such grounds were fully detailed in the show-cause notice issued to the petitioner. In fact, even prior to issue of the show-cause notice, the petitioner was aware of the issues between the parties through the notice dated 04.08.2012. It would, therefore, be difficult to say that the petitioner did not know what case it had to meet while responding to the show-cause notice. In any case, the petitioner did respond to the show-cause notice without claiming the ambiguity in the said notice and, therefore, it is not open to it to assail the impugned order on the ground that there was no specific reference to the proposed blacklisting of in the said notice.

12. The learned senior counsel for the petitioner relies upon the decision of this Court in *W.P.(C) No. 669/2013,* titled ***Thermo Blow Engineers vs. Delhi Development Authority***, decided on 31.05.2013. A perusal of the above-referred decision would show that in that case,

there was no provision for debarring in the notice, whereby the quotations were invited by the respondent-DDA, but despite that, the petitioner was debarred from furthering tendering in DDA. The communication issued to the petitioner in that case made no reference to the proposed debarring/black-listing. It was in these circumstances that this Court held that the communication sent by the DDA to the petitioner cannot be interpreted to be a show-cause notice against the proposed debarring/black-listing.

13. As regards personal hearing, as noted earlier, the Hon'ble Supreme Court in Patel Engineering Limited (supra) has clearly held that there is no inviolable rule that a personal hearing of the affected party must precede every decision of the State. As stated in the Grosons Pharmaceuticals (P) Ltd. & Anr.(supra), the State before passing the order of black-listing/debarring, is required to observe the principle of *audi alteram partem* and that requirement was duly complied with by the respondents by issuing a detailed show-cause notice to the petitioner. In any case, a perusal of the reply submitted by the petitioner to the show cause notice would show that no personal hearing was sought by the petitioner while responding to the said notice. In these circumstances, it was not obligatory for the respondent to afford an opportunity of oral hearing to the petitioner, of their own.

14. As regards, the last contention that there was no breach of the terms of the contract, I find that the Competent Authority after taking into consideration the reply submitted by the petitioner has come to the conclusion that there were numerous breaches of the terms and conditions of the agreement by the petitioner. On a perusal of the response to the show-cause notice, I find that some of the grievances of

the respondents, as stated in the notice, were not even denied in the reply. If the petitioner feels that the few findings recorded by the respondents in the impugned order are factually incorrect, the appropriate remedy for the petitioner would be to approach the civil court in this regard since disputed questions of facts cannot be gone into in a writ petition.

It is primarily for the competent authority to decide, after considering the reply, if any, furnished by the noticee and taking into consideration the facts and circumstances of the case as to whether there was any breach of the terms of the contract on the part of the noticee or not and whether the acts and omissions attributed to the noticee justify blacklisting or not. The writ court cannot substitute its own view for the view of the Competent Authority and cannot interfere with such a decision unless it is shown that the decision so taken by the Competent Authority was wholly arbitrary or perverse in nature. That, however, cannot be said with respect to the conclusion drawn in the impugned order.

15. For the reasons stated hereinabove, I find no merit in the petition and the same is hereby dismissed. There shall be no orders as to costs.

OCTOBER 25, 2013/*rd* V.K. JAIN, J.