

GAHC010303582019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/9153/2019

M/S. PURVANCHAL COMMUNICATION PVT. LTD.
4TH FLOOR BORDOICHILLA BHAWAN (K), ABOVE SAMSUNG PLAZA, G.S.
ROAD, BHANGAGARH, GUWAHATI-781005, REP. BY ITS AUTHORISED
REPRESENTATIVE, SRI KHAJAN CHAND JINDAL.

VERSUS

FOOD CORPORATION OF INDIA AND 3 ORS.
A STATUTORY BODY UNDER THE FOOD CORPORATION ACT, 1964,
HAVING ITS HEADQUARTERS IN NEW DELHI AND A REGIONAL OFFICE AT
GUWAHATI, G.S. ROAD PALTAN BAZAR, ABOVE FBB, MT TOWER (3RD
FLOOR TO 5TH FLOOR), GUWAHATI, KAMRUP (M) ASSAM, PIN-781008,
REP. BY CHAIRMAN AND MANAGING DIRECTOR.

2:THE CHAIRMAN CUM MANAGING DIRECTOR

FOOD CORPORATION OF INDIA
HEADQUARTERS BARAKHAMBA ROAD
NEW DELHI-110001.

3:THE GENERAL MANAGER (R)

FOOD CORPORATION OF INDIA
REGIONAL OFFICE
GUWAHATI
PALTAN BAZAR
GUWAHATI
KAMRUP (M) ASSAM PIN-781008.

4:THE ASSTT. GENERAL MANAGER (CONTRACTS)

FOOD CORPORATION OF INDIA

REGIONAL OFFICE
GUWAHATI
PALTAN BAZAR
GUWAHATI
KAMRUP (M) ASSAM
PIN-781008

Advocate for the Petitioner : MR. R DUBEY

Advocate for the Respondent : SC, F C I

Linked Case : WP(C)/7073/2019

M/S PURVANCHAL COMMUNICATION PVT. LTD. AND 2 ORS.
4TH FLOOR BORDOICHILLA BHAWAN (K)
ABOVE SAMSUNG PLAZA
G.S. ROAD
BHANGAGARH
GUWAHATI-781005
REP. BY ITS AUTHORIZED REPRESENTATIVE
SRI KHAJAN CHAND JINDAL.

2: SANJIVE NARAIN
MANAGING DIRECTOR
M/S PURVANCHAL COMMUNICATION PVT. LTD.
4TH FLOOR BORDOICHILLA BHAWAN (K)
ABOVE SAMSUNG PLAZA
G.S. ROAD
BHANGAGARH
GUWAHATI-781005.

3: AKSHATA NARAIN
DIRECTOR
M/S PURBANCHAL COMMUNICATION PVT. LTD. 4TH FLOOR
BORDOICHILLA BHAWAN (K)
ABOVE SAMSUNG PLAZA
G.S. ROAD
BHANGAGARH
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FOOD CORPORATION OF INDIA AND 3 ORS.
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GUWAHATI
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GUWAHATI
KAMRUP (M)
ASSAM
PIN-781008.

Advocate for : MR. R DUBEY
Advocate for : SC
F C I appearing for FOOD CORPORATION OF INDIA AND 3 ORS.

:: BEFORE ::

HON'BLE MR. JUSTICE KALYAN RAI SURANA

Advocates for the petitioner: Mr. S. Sarma, Mr. R. Dubey,
Ms. A.B. Kayastha, Mr. A.N.I. Hussain.
Advocates for the respondents: Mr. P.K. Roy, S.K. Chakraborty.
Date of hearing: 15.10.2020, 10.11.2020.
Date of judgment: **04.01.2021.**

JUDGMENT AND ORDER (C.A.V.)

Heard Mr. S. Sarma, learned counsel assisted by Mr. R. Dubey, learned counsel for the petitioners. Also heard Mr. P.K. Roy, learned standing counsel for the respondents.

2) By filing WP(C) 7073/2019 under Article 226 of the Constitution of India, the petitioners are seeking for quashing and setting aside of the clause nos. 4(II), 4(III) and 4(V) of the Disqualification Conditions contained in the General Information to Tenderers (hereinafter referred to as 'GIT' for brevity) appended to the Notice Inviting Tender (NIT for short) dated 30.08.2019 issued by the respondent no.1 i.e. FCI for the work of "*Handling And Transport Contract Ex-Rly Siding Salchakra to FSD Badarpurghat via Weigh Bridge including handling at FSD Badarpurghat*"; and for directing the respondents to permit the petitioner no.1 to submit its bid pursuant to the aforesaid NIT. By filing WP(C) No.9153/2019 under Article 226 of the Constitution of India, the petitioners are seeking quashing and setting aside of the decision of the respondent no.1, uploaded on 02.12.2019, thereby rejecting the technical bid of the petitioner no.1 in respect of NIT dated 04.10.2019 for the work of "*Transport Contract Ex-Rly Siding/ FSD Tinsukia to FSD Anini via Weigh Bridge (distance 324 kms)*"; and for directing the respondents to consider the bid of petitioner no.1 company as technically responsive in view of stay order passed in Misc.(Arb.) Case No.44/2019; and for further directing the respondent no.1 authorities to open the price bid of the petitioner no.1

in respect of the aforesaid NIT. Upon being submitted that both the writ petitions are interconnected, both the writ petitions have been analogously heard.

3) The undisputed backdrop of these two writ petitions are that the petitioner no.1 has an interest in a proprietorship firm in the name and style of Purvanchal Communication, which entered into a joint-venture with one Radhika Express Service and in the name and style of Purvanchal Communication Radhika Express (JV) and participated in a tender process bearing tender no. CE/COM/N-K/CRG/201709/RT-1 issued by the N.F. Railway authorities for the work of "Loading, Unloading and Transportation of Rails, PSC BG Sleepers, PSC Turnout Sleepers, other PSC Spl Sleepers, other P.Way Fittings and Materials etc. with including all Lead, Lifts and Stacking at various locations and in Station Yards from Km.88.0 to 176.0 in connection with Doubling Project of NBQ-GLPT-KYQ (two packet tender). It is projected that the petitioner no.1 was the lead partner of the joint-venture with 51% share while the other joint-venture partner had 49% share. For reasons sought to be justified by the petitioners, the said joint-venture could not deposit the performance guarantee in time, as such, by a letter dated 20.12.2018, the Chief Engineer/Con/IX, N.F. Railway terminated the contract arising out of the hereinbefore mentioned tender and by forfeited the EMD i.e. Earnest Money Deposit of Rs.17.00 lakh was forfeited and the said joint-venture was barred from participating in the re-tender of the said work. Thereafter, the petitioner no.1 had participated in another tender process of the FCI bearing NIT dated 29.05.2019 and came out as a successful bidder. However, the said tender process was challenged by filing WP(C) No. 5094/2019 and ultimately in view of the challenge, the respondent no.1 withdrew the contract which is reflected in the order dated 28.08.2019 passed by this Court in the aforesaid writ petition. The petitioners project that the adverse effect of the termination of contract by the N.F. Railway became known to the petitioner for the first time after filing of WP(C) No. 5094/2019. Thereafter, on the ground that the N.F. Railway authorities had not followed clause 36 of the Tender Conditions before terminating the contract and forfeiting EMD, after service of notice, the petitioner no.1 took recourse to law by filing an application under section 9 of the Arbitration and Conciliation Act, 1996 and the Additional District Judge (FTC) No.3 Kamrup (Metropolitan), Guwahati by order dated 13.09.2019 stayed the termination of contract and forfeiture of EMD issued vide letter dated 20.12.2018. In the

meanwhile, the N.F. Railway authorities by their letter dated 30.08.2019 clarified that the petitioner no.1 would not be barred from participating in other tenders of the railways and in other departments. Under the aforesaid facts, the petitioners filed WP(C) 7668/2019 to challenge the rejection of the technical bid of the petitioner in connection with NIT dated 13.09.2019 for the work of "*Handling and Transport Contract Ex-FCI Siding Changsari (CFCC) to FSD Changsari (CFCC) via Weigh Bridge (Inter-shed movement)(distance 0.86 Kms) including handling at FCI Siding Changsari (CFSS)*" and this Court by order dated 16.10.2019 provided that if any letter of acceptance is issued to any successful bidder, the same will be subject to the outcome of the writ petition. Thereafter, as regards tender notice dated 04.10.2019, the technical bid of the petitioner was rejected and uploaded in the website on 02.12.2019 wherein it was indicated that the bid was rejected as per clause no.4(II) and (III) of the Disqualification Conditions contained in the General Information to Tenderers.

4) The learned counsel for the petitioner contends that the joint-venture of the petitioner no.1 had good grounds and reasons for not being able to deposit performance guarantee within the time allowed and for such default, the N.F. Railway authorities merely barred the petitioner no.1 to submit bid in the re-tender process, which did not act as a disqualification for participating in any other tender issued by the Railways. Hence, the decision of the respondents to perpetually debar the petitioners from participating in their tender process amounts to illegal and colourful exercise of power for permanently blacklisting the petitioner, which could otherwise not be done without taking recourse to the procedure prescribed for blacklisting any tenderer. It is further submitted that termination of contract and forfeiture of earnest money are separate and independent cause of action compared to the blacklisting of the petitioner in disguise and accordingly, it is submitted that the blacklisting in disguise without taking recourse to the procedure prescribed for blacklisting is not sustainable on facts and in law.

5) It is submitted that WP(C) 5094/2019, having been withdrawn, there was no adjudication of the *lis* on merit and, as such, the interim orders passed in the said writ petition would not amount to a binding precedent so as to disqualify the petitioner to participate in any subsequent tender issued by the respondents. It is also submitted that the

operation of the letter of termination and forfeiture of EMD vide letter dated 20.12.2018 was stayed by order dated 13.09.2019 passed by the learned Additional District Judge (FTC) No.3, Kamrup (Metropolitan), Guwahati. Hence, it was not open to the respondents to rely upon the termination order dated 20.12.2018.

6) In support of his submissions, the learned counsel for the petitioner has relied on the following cases, viz., (1) *UMC Technologies Private Limited Vs. Food Corporation of India & Anr.*, (2020) 0 Supreme(SC) 660; (2) *Shree Shyamji Transport Company Vs. Food Corporation of India & Ors.*, (2015) 1 SCC 440; (3) *Gorkha Security Services Vs. Govt. of NCT of Delhi*, (2014) 9 SCC 105; (4) *Suresh Dhanuka Vs. Sunita Mohapatra*, (2012) 1 SCC 578; (5) *Arvind Construction Co. (P) Ltd. Vs. Kalinga Mining Corporation & Ors.*, (2007) 6 SCC 798; (6) *Raghunath Thakur Vs. State of Bihar*, (1989) 1 SCC 229; (7) *Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal*, (1975) 1 SCC 70; (8) *Imran Hussain Laskar Vs. State of Assam*, 2017 (4) GLJ 289; (2018) 2 GLR 286; (9) *UMC Technologies Pvt. Ltd. Vs. Food Corporation of India*, (2019) 0 Supreme (MP) 472; (10) *R.S. Labour and Transport Contractor Vs. Food Corporation of India*, (2017) 0 Supreme(P&H) 296; (11) *Shree Shyamji Transport Company Vs. Food Corporation of India & Ors.*, CWP No. 21694 of 2001 (O&M), decided by High Court of Punjab & Haryana on 06.04.2012.

7) Per contra, the learned standing counsel for the respondents has made his submissions to justify the rejection of technical bid of petitioners and it is submitted that as on date, the Disqualification Conditions contained in the General Information to Tenderers ('GIT for brevity'), as contained in the NIT floated by the respondents have not been interfered with and, as such, the said conditions cannot be said to be invalid or bad in law. Moreover, it is submitted that the said disqualification conditions have general application and the said conditions are not mala fide and are not designed to debar the petitioners, but the said clauses have been incorporated to ensure that food distribution chain is not disrupted merely because the respondents have engaged a tenderer whose transportation contract work had been terminated with forfeiture of EMD. It is submitted that the letter dated 12.09.2019 by which the respondents had terminated the contract of the petitioner as well as the re-tendering of the work vide NIT dated 13.09.2019 as well as the letter of acceptance

dated 15.10.2019 issued after re-tendering had remain unchallenged, the present challenge would not be maintainable. In support of his submissions, the learned counsel for the respondents has referred to the following cases, viz. (1) *Bharat Coking Coal Ltd. Vs. AMR Dev Prabha*, (2020) 0 Supreme(SC) 274; (2) *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818; (3) *Michigan Rubber (India) Ltd. Vs. State of Karnataka*, (2012) 8 SCC 216 (4) *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association*, AIR 1992 SC 1439; (5) *Poddar Steel Corpn. Ltd. Vs. Ganesh Engineering Works & Ors.*, AIR 1991 SC 1579; (6) *G.Z. Fernandez Vs. State of Karnataka & Ors.*, AIR 1990 SC 958; (7) *Narayani Trading Co. Vs. State of Assam & Ors.*, W.P.(C) 976/2017, decided on 09.08.2017: (2017) 0 Supreme(Gau) 948.

8) Perused the pleadings and documents available in the writ petition, affidavit-in- opposition, affidavit- in reply and written notes of argument submitted by both sides in connection with the two writ petitions.

9) The basic pillars upon which the edifice of these two writ petitions is case is built up are (i) the petitioners had valid reasons for not being able to provide performance guarantee to the NF Railway in connection with their tender awarded to the joint venture where the petitioner no.1 is one of the constituent; (ii) by order dated 13.03.2019 passed by the learned Addl. District Judge (F.T.C.) No.3, Kamrup (Metropolitan) in Misc. Arb. Case No. 44/2019, the communication dated 20.12.2018 by which not only the NF Railway had terminated their contract awarded to the joint venture of the petitioner no.1 was terminated but the EMD was also forfeited was also stayed; (iii)

Effect of order dated 13.09.2019 passed in Misc. Arb. Case No. 44/2019 in these two writ petitions:-

10) The order of stay dated 13.09.2019 passed in Misc. Arb. Case No. 44/2019 does not specifically indicate that the said would operate retrospectively w.e.f. 20.12.2018, i.e. the date of letter of termination, as such, the petitioners could not produce any document by which the NF Railway authorities had either restored the terminated contract work in favour of the joint venture of the petitioner no.1 and the petitioners have also not produced any document by which the forfeiture of the EMD was restored by NF Railway authorities in

favour of the joint venture of the petitioner no.1. Moreover, the said order dated 13.09.2019 was passed in an application purportedly made under section 9 of the Arbitration & Conciliation Act, 1993 and there is no document on record that the said NF Railway's letter of termination dated 20.12.2018 was set aside by or quashed by Arbitral Tribunal. In this regard, reference may be made to the case of *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association, Madras (1992) 3 SCC 1*, wherein it was well settled that quashing of an order results in the restoration of the position as it stood on the date of passing of the order which has been quashed and that the stay of operation of an order does not, however, lead to such a result, but it only means that the order which has been stayed would not be operative from the date of passing of the say order and does not mean that the said order has been wiped out from existence. Therefore, the order dated 13.09.2019, does not appear to help the petitioners in any manner whatsoever.

11) There is another way to appreciate the herein before referred order dated 13.09.2019. On a perusal of the said order dated 13.09.2019 [Annexure-16 to WP(C) 9153/2019], it appears that one of the petitioners before the Court below was "*Purbanchal Communication Radhika Express (JV)*". However, the said joint venture is not arrayed as a party in these two writ petitions. Moreover, the said order does not indicate that the respondents herein were arrayed as parties in the said Misc. Arb. Case No. 44/2019 and from the cause title of these two writ petitions, it is apparent that the NF Railways are not parties in these two writ petitions. Under such backdrop, when no attempt to demonstrate before the Court that how the respondents herein would be bound by the said order dated 13.09.2019, the Court is constrained to hold that the respondents herein would not be bound by the order dated 13.09.2019. Hence, the said order dated 13.09.2019 does not appear to help the petitioner in any manner. It may be mentioned that in this regard, the learned counsel for the petitioner had placed reliance on the case of *Arvind Constructions (supra)*, wherein Arbitral Tribunal was in seisin of the dispute, but as indicated herein before, in the present case in hand the respondent was not a party to the interlocutory application filed under section 9 of Arbitration & Conciliation Act, 1993 and there is no document on record to show that any dispute between the NF Railway and the petitioner was finally decided by an Arbitral Tribunal. Thus, the status of the petitioner vis-à-vis the terminate contract and forfeiture of earnest

money was never decided by a competent Court of forum. For the same reason the present case is distinguishable from the facts of the cited case of *Suresh Dhanuka (supra)*, where in an intra-parte dispute, the order of injunction which had restrained the manufacture of products under deed of assignment was set aside despite termination of joint venture agreement.

12) In the aforesaid context, it would be of profit to refer to the provisions of section 42 of the Evidence Act, 1872 and illustration appended thereto, which is as follows:-

“42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.- *Judgments, order or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry, but such judgments, orders or decrees are not conclusive proof of that which they state.*

Illustration

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.”

13) Therefore, in the present case in hand, when it is not in dispute that the respondents were not a party in the proceedings of Misc. Arb. Case No. 44/2019, by virtue of section 42, the order dated 13.09.2020 cannot be said to be relevant as the said order does not relate to matters of public nature. Moreover, the order dated 13.09.2020 was in connection with an application under Section 9 of the Arbitration and Conciliation Act, 1993, which is an order of injunction. In this context, this Court is of the considered opinion that the power to grant injunction under Section 9 of the 1993 Act is nothing but a supplemental proceeding similar to such proceeding as envisaged under section 94 CPC under Part-VI of the Civil Procedure Code. Just like it is not necessary that an order passed in a supplemental proceeding would influence the final decision in the suit, similarly, an ad interim temporary injunction granted by a Court of competent jurisdiction in exercise of power under section 9 of the 1996 Act would have no persuasive value before the arbitral tribunal while granting final relief. Therefore, the case of *Arvind Constructions (supra)* and *Suresh Dhanuka (supra)* does not help the petitioner in any manner. Accordingly, in light of the discussions above, the Court is inclined to hold that the order dated 13.09.2019 passed in Misc. Arb. Case No.

44/2019 would not come to the aid of the petitioners in these two writ petitions. Thus, the point is answered by holding that the order dated 13.09.2019 passed by the learned civil Court in Misc. Arb. Case No. 44/2019 would have no effect on these two writ petitions.

Whether clause nos. 4(II), 4(III) and 4(V) of the Disqualification Conditions contained in the GIT appended to the NIT dated 30.08.2019 are liable to be set aside and quashed?

14) A portion of the herein before referred order dated 13.09.2019, which appears to the Court to be relevant for this point of determination is quoted below:-

“... None of the constituents of the petitioner J.V. were aware of the consequences of the letter dtd. 20-12-18 by which their contract was terminated and the EMD was forfeited. Although they were contemplating to take appropriate legal steps in the matter but could not take the same for one reason or the other. Recently, Purbanchal Communications Pvt. Ltd. participated in a tender process floated by Food Corporation of India and came out as a successful bidder. When a challenge was made to its technical qualification before the Hon'ble High Court by another bidder in WP (C) No. 5094 of 2019, the petitioner and its constituents came to know about the serious ramification of the termination and forfeiture of the earlier contract.”

15) It may be pertinent to mention herein that the learned counsel for the petitioners had made an emphatic submission to the effect that the termination of contract and forfeiture of EMD by the NF Railway merely prevented the joint venture of the petitioners to participate in the re-tender process and did not operate as a disqualification to participate in other tenders of the NF Railway, as such, the disqualification clause contained in the NIT of the respondents was harsh as it amounted to colourable blacklisting of the petitioners. Thus, notwithstanding the projection made by the petitioners that the constituents of the joint venture of petitioner no.1 might not be aware of the consequences of clause nos. 4(II), 4(III) and 4(V) of GIT appended to NIT, but the petitioners had participated in the NIT of the respondents with the said clause contained in the NIT. The petitioners had admitted that they were awarded with a contract work by the respondents, which was challenged by another contractor by filing W.P.(C) 5094/2019, which resulted in revocation of LoI (letter of intent) dated 09.07.2019 by the respondents herein, upon which the said writ petition was disposed of. Thus, there is nothing on record that the said action of the respondents to revoke LoA

dated 09.07.2019 was assailed by the petitioners. There is also nothing on record that the re-tendering owing to revocation of LoI was assailed by the petitioners, rather, the petitioners had again participated in the re-tendering process, wherein their bids were held to be non responsive and the successful bidder was awarded the contract, and the Letter of Acceptance dated 05.10.2019 was not assailed by the petitioners. Nonetheless, the aforesaid clause nos. 4(II), 4(III) and 4(V) of GIT appended to NIT has been assailed in WP(C) 7073/2019. Therefore, when the petitioners had accepted their debarment in respect of previous tender, and had participated in the present tender process without challenging the said clause nos. 4(II), 4(III) and 4(V) of GIT, it would be too late to assail the said clauses after the respondents have invoked the said clauses and held the bid submitted by the petitioners to be non responsive.

16) The learned counsel for the petitioner has placed reliance on the case of *UMC Technologies (supra)*. In the said case, reference has been made to the following cases cited by the learned counsel for the petitioner, viz., *Erusian Equipment & Chemicals Ltd. (supra)*, *Raghunath Thakur (supra)*, *Gorkha Security Services (supra)*. However, on the unique facts of this case, the cited case can be distinguished because the petitioner was not black-listed in the present case in hand, but in the present case in hand, the contract work of NIT dated 29.05.2019, awarded to the petitioner had been withdrawn and that the petitioner was held to be technically non-responsive in NIT dated 13.09.2019, followed by absence of challenge to the letter of acceptance dated 15.10.2019 after re-tendering. It appears from the facts of the cited case of *UMC Technologies (supra)* that in that case the FCI had issued an order dated 09.01.2019 by which the contract of the petitioner was terminated, its security deposit was forfeited and it was debarred from participating in any future tenders of the Corporation for a period of 5 (five) years, which is not so in this case in hand, rather, in this case, the respondents are debarring the petitioner from participating in their tender on the strength of clauses contained in clause nos. 4(II) and 4(III) of the disqualification conditions contained in the General Information to Tenderers. Thus, in the present case in hand, the cause of debarment of the petitioner as contained in the terms and conditions of the tender had been acted upon. The case of *M/s. R.S. Labour and Transport Contractor (supra)* and *Gorkha Security Services (supra)*, also relates to blacklisting, as such, on facts the said case is

distinguishable. Moreover, it may be mentioned herein that in the case of *M/s. R.S. Labour and Transport Contractor (supra)*, the High Court of Punjab and Haryana had not approved of condition incorporated as tender condition by the respondent- FCI that forfeiture of EMD in one contract could be the basis of disqualification from participating in tenders floated by FCI. However, by producing an uncertified copy of the order dated 08.01.2020, passed by the Supreme Court of India in SLP (C) No. 17191- 17193 of 2017 (*FCI Vs. M/s. R.S. Labour and Transport Contractor*), it was submitted by the learned standing counsel for the respondents that notwithstanding that the SLP filed by the FCI was dismissed as infructuous, but the question of law was kept open. Therefore, in the considered opinion of this Court, the ratio laid down in the case of *M/s. R.S. Labour and Transport Contractor (supra)*, with all respect, cannot be said to have any persuasive value in the present case in hand.

17) It appears that although the consequences of clause nos. 4(II) and 4(III) of the disqualification conditions contained in the General Information to Tenderers, but the Court is not convinced that such condition amounts to black-listing. Black's Law Dictionary, Seventh Edition defines "blacklist" as "to put the name of (a person) on a list of those who are to be boycotted or punished." As per The Law Lexicon by P. Ramanatha Aiyer (Reprint 2002), "Black List" is a list of persons or firms against whom its compiler would warn the public, or some section of the public; a list of persons unworthy of credit, or with whom it is not advisable to make contracts. Thus the official list of defaulters on the Stock Exchange is a black list. To put a man's name on such a black list without lawful cause is actionable; and the further publication of such a list will be restrained by injunction (*Ency. of the Laws of England*)." Thus, it appears that the 'blacklisting' has different purport and connotations, for its publication warns others not to deal with the persons whose name appear in such a list, for which there are judicial pronouncements requiring adherence to natural justice before the blacklisting. Thus, the Court is unable to accept the argument advanced by the learned counsel for the petitioner that the effect of clause nos. 4(II) and 4(III) of the disqualification conditions contained in the General Information to Tenderers amounts to colourable use of power to blacklist and that the said clause amounts to blacklisting the petitioner in disguise.

18) In the case of *Imran Hussain Laskar (supra)*, the petitioner therein had

participated in the tender, which could not be brought to its logical end. On re-tender, the petitioner was the highest bidder. The highest bidder in previous tender had assailed the re-tender, which was disposed of by directing the authorities to settle the tender with the highest bidder. As nothing was done, the petitioner therein preferred another writ petition, which was disposed of by directing the authorities to dispose of the representation for return of earnest money. The authorities forfeited the earnest money on the ground that the petitioner was a defaulter in another tender awarded to him. Thus, the case cited by the petitioner came to be filed, and that the petitioner had been able to satisfy this Court that he was not a defaulter in previous tender, as such, by interfering with the order of forfeiture, direction was issued to show cause and decide whether the petitioner was a defaulter or not and on satisfaction that the petitioner is not a defaulter, the earnest money be refunded to him. Thus, on facts, the cited case is totally dissimilar to the facts of the present case in hand.

19) The present case relates to transport handling of food grains meant for public distribution system. Hence, the Court perceives the present contract to be an essential service in greater public interest. There is nothing on record from which the Court can draw a presumption that the said tender condition was to favour someone or mala fide. There is no material on record from which it can be held that the tender clauses were arbitrary or unreasonable. Therefore, as constituent of the joint venture, when the NF Railway, which is a Govt. of India enterprise had revoked and/or rescinded the tender work awarded to the joint venture of the petitioner no.1 on the ground that performance guarantee could not be provided and that the EMD was forfeited, the Court does not find any fault in the clause nos. 4(II), 4(III) and 4(V) of GIT appended to the NIT, by virtue of which a bidder can be disqualified. In the considered opinion of the Court, in commercial considerations, it is within the domain of the respondents to decide that they do not want to award work to a bidder who has defaulted in any previous contract work given by other Government department of agencies. In this connection, reference may be made to the case of *Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517*, wherein the Supreme Court of India has, inter-alia, laid down that a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions, viz., (i) Whether the process adopted or

decision made by the authority is mala fide or intended to favour someone; or (ii) Whether the process adopted or decision made is so arbitrary and irrational that the court can say "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (iii) whether public interest is affected? It was held that if the answers are in the negative, there should be no interference under Article 226 of the Constitution of India. In the present case in hand, the aforesaid three questions can all be answered in the negative. Therefore, no case is made out for interfering with the said clause nos. 4(II), 4(III) and 4(V) of GIT appended to the NIT.

20) The learned counsel for the petitioner had referred to the case of *Shree Shyamji Transport Company Vs. Food Corporation of India, (2015) 1 SCC 440* and it was alternatively contended that clause nos. 4(II), 4(III) and 4(V) of GIT appended to the NIT be declared as not mandatory. In the said case, the Supreme Court of India had referred to the finding of the High Court FCI did not have any intention to invoke clause 7 of MTF indicating that the FCI preferred not to debar the contractor for the contract period. However, similar fact situation does not exist in the present case in hand because the respondents had previously also debarred the petitioner from subsequent contract as elaborately discussed above, as such, the cited case of *Shree Shyamji Transport Company (supra)* would not come to the aid of the petitioner because by conduct the respondents have demonstrated that they intent to adhere to clause nos. 4(II), 4(III) and 4(V) relating to essential conditions of eligibility and in this regard, with profit, one may refer to the case of *G.J. Fernandez (supra)*, where the Supreme Court of India had observed that where the party did not deviate or want to deviate from this established procedure in regard to contracts of this nature, but decided to adhere to the said procedure, the High Court was right in declining to interfere and it was further observed that the party issuing the tender has a right to punctiliously and rigidly enforce them. Therefore, in light of the ratio laid down in the case of *G.J. Fernandez (supra)*, the case of *Shree Shyamji Transport Company (supra)* would not come to the aid of the petitioner.

21) In view of the discussions above, the Court is of the considered opinion that in any view of the matter, clause nos. 4(II), 4(III) and 4(V) of the Disqualification Conditions

contained in the GIT appended to the NIT dated 30.08.2019 are not liable to be set aside and quashed under the unique facts of this case.

22) These two writ petitions, therefore fail and both the writ petitions stand dismissed. The parties are left to bear their own cost.

JUDGE

Comparing Assistant