M/S Patel Enginnering Ltd vs Union Of India & Anr on 11 May, 2012

Equivalent citations: AIR 2012 SUPREME COURT 2342, 2012 (11) SCC 257, 2012 AIR SCW 3260, 2012 (4) AIR JHAR R 285, 2012 CLC 743 (SC), (2012) 2 CLR 24.2 (SC), (2012) 3 JCR 210 (SC), 2012 (2) CLR 24.2, 2012 (5) SCALE 374, (2012) 115 ALLINDCAS 4 (SC), AIR 2012 SC (CIVIL) 1879, 2012 (115) ALLINDCAS 4 SOC, (2012) 114 CUT LT 670, (2012) 3 CIVILCOURTC 352, (2012) 5 ANDHLD 131, (2012) 5 SCALE 374, (2012) 5 ALL WC 4481, 2012 (4) KCCR SN 229 (SC)

Bench: J. Chelameswar, Altamas Kabir

Non Reportable

IN THE SUPREME COUR OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO.23059 OF 2011

M/s. Patel Engineering Limited
….Petitioner

Versus

Union of India & Anr.
….Respondents

J U D G M E N T

Chelameswar, J.

The National Highways Authority of India (R-2) had decided to undertake development and operation / maintenance of “six laning of Dhankuni – Kharagpur Section of NH-6” in the States of West Bengal and Orissa under NHDP Phase-V “on design, build, finance, operate and transfer” (DBFOT) “toll basis project through public private partnership”. For the said purpose, R-2 decided to invite offers for selecting a private entity to which the project could be entrusted on the basis of a long term “Concession Agreement”.

2. An elaborate bidding process was devised by R-2, the full details of which are not necessary for the present purpose. Bids were invited on the basis of the “lowest financial grant required by a

bidder for implementation of the project", or in the alternative "a bidder may, instead of seeking a grant, offer to pay a premium in the form of revenue share and / or upfront payment, as the case may be," to R-2 for award of the concession.

3. The petitioner, a company, was one of the 14 persons, who submitted bids. Petitioner quoted a premium of Rs.190.53 crores per year and was declared the highest bidder. By a letter dated 17-01-2011, R-2 informed the petitioner that its bid had been accepted and the petitioner was called upon to confirm its acceptance within 7 days [as required under Clause 3.3.5 of the Request for Proposal (RPF), volume 1]. By a letter dated 24-01-2011 the petitioner company expressed its inability to confirm its acceptance on the ground that its bid was found not commercially viable on a second look. The petitioner stated in the said letter that minutes of the pre-bid meeting, which included several amendment / queries, were published on website of NHAI on 07-01-2011 and the bid had to be submitted within three days thereafter, i.e., on 10-01-2011, thereby leaving insufficient time to consider and assess impact of the clarifications published by R-2 on its website on 07-01-2011.

4. R-2 issued a show-cause notice on 24-02-2011 calling upon the petitioner to explain as to why action debarring (blacklisting) the company for a period of 5 years from participating or bidding for future projects to be undertaken by R-2 should not be taken. On 01-03-2011, the petitioner replied to the show cause notice. Two months later, R-2 through its letter dated 20-05-2011 communicated the order that barred the petitioner from prequalification, participating or bidding for future projects to be undertaken by R-2 for a period of one year from the date of issue of the letter.

5. It appears that R-2, eventually, awarded the contract to M/s. Ashok Buildcon Limited, which quoted a premium of Rs.120.06 crores, which, obviously, was significantly lower than what was offered by the petitioner. On 28-05-2011, the petitioner made a representation to the Ministry for Road, Transport and Highways seeking, in substance, the intervention of the Ministry and annulment of the decision of R-2 to debar the petitioner. As there was no response from the Ministry, the petitioner approached the High Court of Delhi through a writ petition under Article 226 of the Constitution with a prayer to quash the abovementioned order of R-2 dated 20-05-2011. A Division Bench of the High Court upheld the order passed by R-2 and dismissed the petition and held as follows:

> "the respondent No.2 was well within its rights to take appropriate action against the petitioner, and taking into consideration the enormity of the loss, we are of the considered view that respondent No.2 has dealt with the petitioner rather lightly." Hence, the S.L.P.

6. The learned counsel for the petitioner Mr. Mukul Rohatgi, argued that the decision of the 2nd respondent to blacklist the petitioner from participating, for a period of one year, in the future projects of the 2nd respondent is without any authority of law. The learned counsel argued that, no doubt, according to (Clause 2.20.6 of) the bid document, the 2nd respondent is entitled to forfeit and appropriate the bid security as damages in the various contingencies specified under Clause 2.20.7, but the power to blacklist a bidder and prohibit from participating in any future tender

process is available only in those cases where the bidder is guilty of "Fraud and Corrupt Practices". Refusal to enter into a contract can never be classified as an act of fraud or a corrupt practice warranting the blacklisting of such defaulting bidder. The learned counsel conceded that such a refusal by the bidder would render him liable for payment of damages in terms of Clause 2 of the bid document. He further submitted that, as a matter of fact, bid security amount deposited by the petitioner to the tune of Rs.13.97 crores has, in fact, been forfeited by the 2nd respondent and the petitioner did not raise any dispute regarding the legality of such forfeiture.

7. The learned counsel also submitted that assuming for the sake of arguments that it is legally permissible to blacklist the petitioner on the ground that it declined to enter into a valid contract after it had been declared as the successful bidder by the 2nd respondent, such a decision is required to be taken only after complete compliance with the requirements of the principles of audi alteram partem and the petitioner should have been given an oral hearing before the impugned decision was taken.

8. Lastly, the learned counsel submitted that the punishment of blacklisting (for a period of one year) is disproportionate to the wrong committed by the petitioner as it would have the effect of not only debarring the petitioner to deal with the 2nd respondent for a period of one year, (which is almost over as on today) but the stigma would remain and have a very adverse effect on the business prospects of the petitioner.

9. On the other hand, the learned counsel for the respondent argued that the respondent is entirely justified in blacklisting the petitioner in view of the huge loss caused by the petitioner, which is estimated at Rs. 3077 crores over a period of 25 years to the 2nd respondent, an instrumentality of the State. The learned counsel heavily relied upon the conclusion of the High Court that the petitioner has "no one else to blame, but itself".

10. The 2nd respondent though a statutory body, the authority of the 2nd respondent to blacklist the petitioner is not based on any express statutory provision.

11. The concept of Blacklisting is explained by this Court in M/s. Erusian Equipment & Chemicals Limited v. Union of India and others, (1975) 1 SCC 70, as under:

> "Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains." The nature of the authority of State to blacklist persons was considered by this Court in the abovementioned case[1] and took note of the constitutional provision (Article 298)[2], which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14.

> Though nobody has any right to compel State to enter into a contract, everybody has a right to be treated equally when State seeks to establish contractual relationships[3]. The effect of excluding a person from entering into a contractual relationship with State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

12. It follows from the above Judgment that the decision of State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into contractual relationship with such persons is called blacklisting. 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.

13. In the case on hand, the bid document stipulated various conditions, which seek to regulate the relationship between the 2nd respondent and the bidders, such as the petitioner herein. Relevant in the context are Clauses 2 and 4 of the bid document. Clause 2.2 and the various sub-clauses thereunder deal with the bid security; the method and the manner of providing such bid security; and, by whom it should ultimately be appropriated. It stipulates that a bidder would require to deposit a bid security of Rs.14-00 crores either by way of demand draft or in the form of bank guarantee acceptable to the 2nd respondent in a format contained at Appendix-II of the bid document. It is further stipulated that a bidder, by submitting a bid, "shall be deemed to have acknowledged and confirmed" that the 2nd respondent will "suffer loss and damage on account of withdrawal" of the bid or "for any other default by the bidder during the period of bid validity". It also stipulates that under the various contingencies specified thereunder the 2nd respondent would be entitled to forfeit and appropriate the bid security amount "as mutually agreed genuine pre-estimated compensation and damages payable to the 2nd respondent". Such a right to forfeit and appropriate is sought to be "without prejudice to any other right or remedy that may be available to the authority hereunder or otherwise". There are five contingencies specified under Clause 2 in which a bid security would be forfeited and appropriated by the 2nd respondent. Relevant for our present purpose are only two:

> "b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of this RPF;"
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> d) In the case of Selected Bidder, if it fails within the specified time limit-
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> (i) to sign and return the duplicate copy of LOA;
>
> (ii) to sign the Concession Agreement; or

(iii) to furnish the Performance Security within the period prescribed therefor in the Concession Agreement;"

14. The other stipulation under the bid document, which is relevant for our present purpose, is Clause 4, which deals with "Fraud and Corrupt Practices", which requires the bidders, its employees, agents, etc., to observe the highest standard of ethics during the bidding process and during the subsistence of Concession Agreement, etc. The Clause purports to declare the right of the 2nd respondent either to decline to enter into a contractual relationship with a bidder or terminate the agreement entered into with a successful bidder, if the 2nd respondent comes to the conclusion that either the bidder or his agent, etc., committed any; (i) corrupt; (ii) fraudulent; (iii) undesirable; or (iv) restrictive practice (collectively we call them 'unacceptable practices'). It also enables the 2nd respondent to forfeit and appropriate the Bid Security or Performance Security, as the case may be, towards damages. It is further stipulated in Clause 4.2 that whenever it is found that bidder or his agent, etc., indulged in any one of the abovementioned unacceptable practice;

"such Bidder or Concessionaire shall not be eligible to participate in any tender or RFP issued by the Authority during a period of 2(two) years from the date such Bidder or Concessionaire, as the case may be, is found by the Authority to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practices, as the case may be." (Emphasis supplied)

15. The various expressions "corrupt practice", "fraudulent practice", etc., mentioned above are specifically defined under Clause 4.3.

16. These two Clauses become relevant in the context of the second submission made by the learned counsel for the petitioner that as per the bid document, the power to blacklist is available only in the cases of the commission of any or some of unacceptable practices by the bidder or his agents, etc., but not in the case, where the successful bidder declines to enter into a contract on being declared as a successful bidder. No doubt, the bid document expressly declares that in the case of the commission of a corrupt practice, etc., the bidder shall not be eligible to participate in any tender issued by the 2nd respondent for a period of two years from the date on which it is found that a corrupt practice has been committed. Such an express stipulation is not to be found in the bid document, in the context of the failure of the successful bidder to execute the necessary documents to conclude the contract. In our opinion, that is not determinative of the authority of the 2nd respondent to blacklist a bidder, such as, the petitioner herein, who declines to execute the necessary documents for creating a concluded contract after the offer made by the bidder, is accepted by the 2nd respondent.

17. The authority of the 2nd respondent to enter into contracts, consequently, the concomitant power not to enter into a contract with a particular person, does not flow from Article 298, as Article 298 deals with only the authority of the Union of India and the States. The authority of the 2nd respondent to enter into a contract with all the incidental and concomitant powers flow from Section 3 (1) and (2)[4] of the National Highways Authority Act. The nature of the said power is similar to the nature of the power flowing from Article 298 of the Constitution, though it is not

identical. The 2nd respondent, being a statutory Corporation, is equally subject to all constitutional limitations, which bind the State in its dealings with the subjects. At the same time, the very authority to enter into contracts conferred under Section 3 of the NHA Act, by necessary implication, confers the authority not to enter into a contract in appropriate cases (blacklist). The 'bid document' can neither confer powers, which are not conferred by law on the 2nd respondent, nor can it substract the powers, which are conferred by law either by express provision or by necessary implication. The bid document is not a statutory instrument. Therefore, the rules of interpretation, which are applicable to the interpretation of statutes and statutory instruments, are not applicable to the bid document. Therefore, in our opinion, the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the 2nd respondent from blacklisting a delinquent bidder, if it is otherwise justified. Such power is inherent in every person legally capable of entering into contracts.

18. The next question that is required to be considered is whether the 2nd respondent is justified in blacklisting the petitioner in the facts and circumstances of the case. The necessary facts are already mentioned and they are not in dispute. Failure of the petitioner to conclude the contract by executing the necessary documents, admittedly, resulted in a legal wrong. Whether the 2nd respondent should have been satisfied with the forfeiture of the bid security amount or should have gone further to also blacklist the petitioner after forfeiting the bid security, is a matter requiring examination. In other words, the issue is one of the proportionality of the action taken by the 2nd respondent.

19. The reason given by the 2nd respondent in its show-cause notice dated 24-02-2011 for proposing to blacklist the petitioner is as follows:

> "It needs to be appreciated that the projects being undertaking by NHAI are of huge magnitude and both in terms of manpower and finance besides being of utmost National importance, striking at the root of economic development and prosperity and general public and a nation as a whole, the NHAI cannot afford to deal with entities who fail to perform their obligations as in your case." And in the impugned order dated 24-02-2011, the 2nd respondent gave the following reasons:
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> "It is to be noted that your act of non-acceptance of LOA has resulted in huge financial loss to the tune of Rs.3077 crores, as assessed over the life of the concession period, in terms of lower premium, apart from cost of the time and effort, to NHAI. It is further noted that this is the first case where a bidder has not accepted the LOA, and warrants exemplary action, to curb any practice of 'pooling', and 'malafide' in future.
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> After considering all material facts, and your reply in response to the Show Cause Notice, NHAI is of the considered view that no justifiable grounds have been made out in support of your action of non-acceptance of LOA. Keeping in view the conduct of the addressees, NHAI find that they are not reliable and trustworthy and have caused huge financial loss to NHAI."

20. The learned counsel for the petitioner argued that Clause 4 of the bid document stipulates blacklisting to be one of the actions that can be taken against a bidder or contractor, if the 2nd respondent comes to the conclusion that such a person is guilty of any one of the unacceptable practices, referred to earlier. Imposing the same penalty on a person, who is not guilty of any one of the unacceptable practices, though such a person is guilty of dereliction of some legal obligation, would amount to imposition of a punishment, which is disproportionate to the dereliction. In support of the submission, the learned counsel relied upon the Judgment of this Court in Teri Oat Estates (P) Ltd. v. U.T.Chandigarh and others, (2004) 2 SCC 130.

21. It was a case, where allotment of a piece of land, made under the Capital of Punjab (Development and Regulation) Act, 1952 and the Rules made thereunder, was cancelled on the ground that the allottee did not make the payment of the requisite instalments agreed upon. One of the submissions made by the allottee (appellant before this Court) was that the action of the Chandigarh administration, seeking to evict the appellant and resume the land, lacked proportionality in the background of the specific facts of that case. This Court explained the doctrine of proportionality at paras 45 and 46, as follows:

> "45. The said doctrine originated as far back as in the 19th century in Russia and was later adopted by Germany, France and other European countries as has been noticed by this Court in Om Kumar v. Union of India.
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> 46. By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve".

22. Tested in the light of the abovementioned principle, we are required to examine; (1) the purpose sought to be achieved by the impugned decision of the 2nd respondent to blacklist the petitioner; and (2) the adverse effects, the impugned action may have on the rights of the petitioner.

23. From the impugned order it appears that the 2nd respondent came to the conclusion that; (1) the petitioner is not reliable and trustworthy in the context of a commercial transaction; (2) by virtue of the dereliction of the petitioner, the 2nd respondent suffered a huge financial loss; and (3) the dereliction on the part of the petitioner warrants exemplary action to "curb any practice of 'pooling' and 'mala fide' in future".

24. We do not find any illegality or irrationality in the conclusion reached by the 2nd respondent that the petitioner is not (commercially) reliable and trustworthy in the light of its conduct in the context of the transaction in question. We cannot find fault with the 2nd respondent's conclusion because the petitioner chose to go back on its offer of paying a premium of Rs.190.53 crores per

annum, after realising that the next bidder quoted a much lower amount. Whether the decision of the petitioner is bona fide or mala fide, requires a further probe into the matter, but, the explanation offered by the petitioner does not appear to be a rational explanation. The 2nd respondent in the impugned order, while rejecting the explanation offered by the petitioner, recorded as follows:

> "Further the fact remains that clarification / amendments communicated by NHAI were 'minor' and cannot be attributed as a cause for occurrence of an 'error' of 'major' nature and magnitude. With project facilities clearly spelt out in the RFP document, the project cost gets frozen well in advance and similarly traffic assessment & projections, which largely impact the financial assessment, are also not expected to be left for last few days of bid submission. Therefore stating that an 'error' of this nature and magnitude occurred is neither correct nor justified..... " (Emphasis supplied)

25. We cannot say the reasoning adopted by the 2nd respondent either irrational or perverse. The dereliction, such as the one indulged in by the petitioner, if not handled firmly, is likely to result in recurrence of such activity not only on the part of the petitioner, but others also, who deal with public bodies, such as the 2nd respondent giving scope for unwholesome practices. No doubt, the fact that the petitioner is blacklisted (for some period) by the 2nd respondent is likely to have some adverse effect on its business prospects, but, as pointed out by this Court in Jagdish Mandal v. State of Orissa and others, (2007) 14 SCC 517:

> "Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes." The prejudice to the commercial interests of the petitioner, as pointed out by the High Court, is brought about by his own making. Therefore, it cannot be said that the impugned decision of R-2 lacks proportionality.

26. 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 Indian and another 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 petitioner was given a reasonable opportunity to explain its case before the impugned decision was taken.

27. We do not see any reason to interfere with the Judgment under Appeal. The S.L.P. is, therefore, dismissed.

.....J. (ALTAMAS KABIR) .....J. (J. CHELAMESWAR) New Delhi;

May 11th , 2012.

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[1] 12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation."
[2] Article 298. Power to carry on trade, etc.- The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:

> Provided that -
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> (a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and
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> (b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.

[3] 17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

[4] (3) Constitution of the Authority.

(1) With effect from such date2 as the Central Government may, by notification in the Official Gazette, appoint in this behalf, there shall be constituted for the purposes of this Act an Authority to be called the National Highways Authority of India.

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall by the said name sue and be sued.
