

Kamlesh Engineering Works vs Delhi Jal Board, Govt. Of N.C.T. Of Delhi on 16 August, 2022

Author: Yashwant Varma

Bench: Yashwant Varma

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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 10052/2021

KAMLESH ENGINEERING WORKS

..... Petition

Through: Ms.Geeta Mehrotra, Adv.

versus

DELHI JAL BOARD, GOVT. OF N.C.T. OF DELHI Respond

Through: Ms.Malvi Balyan, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% 16.08.2022

1. This writ petition has been preferred seeking the following reliefs:-

"a) To quash and set aside the alleged order dated 4.10.2019 (copy of which has not been supplied to the petitioner) and circular dated 14.10.2019, whereby the petitioner has been debarred from participation in any of the tenders to be issued by the Divisions/offices of Delhi Jal Board and to have any business dealing with DJB by any means for the period of 3 years and

b) direct the respondent to allow the petitioner to participate in the tenders to be issued by the Divisions/offices of Delhi Jal Board and to have business dealing with respondent/DJB,

c) Cost of the petition be also awarded."

2. The challenge as was raised in the writ petition was essentially to an "alleged" order of 04 October 2019. The petitioner firm asserted that it had not been supplied with any such order and that it came to know about its debarment only upon the issuance of a circular of 14 October 2019. The proceedings emanate from a notice of 02 April 2019 wherein the respondent Board alleged that upon inspection and checking of various works executed by the petitioner, various shortcomings came to the fore. It was further asserted by the respondents that bills had been raised and got approved in respect of fictitious works in collusion with concerned officials of the respondent Board. The petitioner was accordingly called upon to explain why it not be blacklisted, removed or temporarily suspended by the Delhi Jal Board.

3. In response to the aforesaid notice, the petitioner in terms of its communication of 26 April 2019 asserted that the work order which had been placed upon it had required it to deliver a system of pump sets for improvement of the delivery system. It was asserted that out of the entire 14 items that were supplied, an allegation of wrongdoing was leveled only in respect of two. It was further urged by the petitioner that in the Joint Inspection Report dated 03 October 2018, the nozzles and other fixtures were found dully fitted in the system. It had further asserted that it had duly executed the work and the purchase invoices in respect of the Sluice-Valves and all other items had been supplied.

4. The record further reflects that the performance of the petitioner and its proposed debarment was then taken up for consideration by a Debarment Committee whose minutes of 04 October 2019 have been placed along with the counter affidavit. The Debarment Committee, on the basis of recommendations made by the Vigilance Department, ultimately came to form the opinion that the petitioner along with eleven other firms whose names stand mentioned in that file noting, are liable to be debarred for periods as set forth in that order.

5. Insofar as the petitioner is concerned, the Debarment Committee recorded that it was liable to be blacklisted for the period of three years. It is this recommendation which ultimately appears to have been duly approved by the Managing Director and Chief Executive Officer of the respondent Board.

6. The procedure as adopted by the respondent cannot possibly be countenanced bearing in mind the following well settled principles with respect to blacklisting as were enunciated by the Supreme Court in *Gorkha Security Services v. Government (NCT of Delhi) & Ors.* [(2014) 9 SCC 105]:-

"16. It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.

17. Way back in the year 1975, this Court in *Erusian Equipment & Chemicals Ltd. v. State of W.B.* [*Erusian Equipment & Chemicals Ltd. v. State of W.B.*, (1975) 1 SCC 70], highlighted the necessity of giving an opportunity to such a person by serving a show-cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. This is clear from the reading of paras 12 and 20 of the said judgment. Necessitating this requirement, the Court observed thus: (SCC pp. 74-75) "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. When the State acts to the prejudice of a person it has to be supported by legality.

20. 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 fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

18. Again, in *Raghunath Thakur v. State of Bihar* [(1989) 1 SCC 229] the aforesaid principle was reiterated in the following manner: (SCC p. 230, para 4) "4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do in accordance with law i.e. after giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is

thus disposed of."

19. Recently, in *Patel Engg. Ltd. v. Union of India* [*Patel Engg. Ltd. v. Union of India*, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] speaking through one of us (Jasti Chelameswar, J.) this Court emphatically reiterated the principle by explaining the same in the following manner: (SCC pp. 262-63, paras 13-15) "13. The concept of „blacklisting“ is explained by this Court in *Erusian Equipment & Chemicals Ltd. v. State of W.B.* [*Erusian Equipment & Chemicals Ltd. v. State of W.B.*, (1975) 1 SCC 70] as under: (SCC p. 75, para 20) „20. 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.

14. The nature of the authority of the State to blacklist the persons was considered by this Court in the abovementioned case ["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."(*Erusian Equipment case* [*Erusian Equipment & Chemicals Ltd. v. State of W.B.*, (1975) 1 SCC 70] , [(1975) 1 SCC 70], SCC p. 74, para 12)] and took note of the constitutional provision (Article 298) ["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--(a) the said executive power of the Union shall, insofar 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(b) the said executive power of each State shall, insofar 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."], 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 the State to enter into a contract, everybody has a right to be treated equally when the State seeks to establish contractual relationships. ["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. The 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."(Erusian Equipment case [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] , [(1975) 1 SCC 70], SCC p. 75, para 17)] The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the above judgment in Erusian Equipment case [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. 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 the 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 the 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."

20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg. [Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445]"

7. More recently and on the same lines, the Apex Court in UMC Technologies Private Limited v. Food Corporation of India & Anr. [(2021) 2 SCC 551] held as follows :-

"14. Specifically, in the context of blacklisting of a person or an entity by the State or a State Corporation, the requirement of a valid, particularised and unambiguous show-cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatisation that accrues to the person/entity being blacklisted. Here, it may be gainful to describe the concept of blacklisting and the graveness of the consequences occasioned by it. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting take away this privilege, it also tarnishes

the blacklisted person's reputation and brings the person's character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person.

16. The severity of the effects of blacklisting and the resultant need for strict observance of the principles of natural justice before passing an order of blacklisting were highlighted by this Court in *Erusian Equipment & Chemicals Ltd. v. State of W.B.* [*Erusian Equipment & Chemicals Ltd. v. State of W.B.*, (1975) 1 SCC 70] in the following terms: (SCC pp. 74-75, paras 12, 15 & 20) "12. ... 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. When the State acts to the prejudice of a person it has to be supported by legality.

15. ... The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

20. 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 fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

25. The mere existence of a clause in the bid document, which mentions blacklisting as a bar against eligibility, cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show-cause notice. The Corporation's notice is completely silent about blacklisting and as such, it could not have led the appellant to infer that such an action could be taken by the Corporation in pursuance of this notice. Had the Corporation expressed its mind in the show-cause notice to blacklist, the appellant could have filed a suitable reply for the same. Therefore, we are of the opinion that the show-cause notice dated 10-4-2018 does not fulfil the requirements of a valid show-cause notice for blacklisting. In our view, the order of blacklisting the appellant clearly traversed beyond the bounds of the show-cause notice which is impermissible in law. As a result, the consequent blacklisting order dated 9-1-2019 cannot be sustained..."

8. As would be manifest from the recordal of the facts as set out hereinabove, the petitioner apart from having been placed initially on notice to show cause was neither provided an opportunity of hearing by the Debarment Committee nor do the minutes of that Committee evidence any

consideration of the reply that had been submitted.

9. While the respondents have alluded to notices dated 2 April and 18 April 2019 issued by the Executive Engineer as well as of 23 May 2019 by the Superintendent Engineer and an opportunity of personal hearing having been provided by the latter to the petitioner, those cannot sustain the impugned action since the decision to debar was taken by the Debarment Committee and not by the authorities mentioned hereinabove. The note sheet would further indicate that the recommendations of the Debarment Committee were thereafter approved by the Managing Director and CEO of the Board. Even that authority had neither heard the petitioner nor provided it an opportunity to represent against the recommendations of the Executive Engineer, the Superintendent Engineer or the Debarment Committee. The manner in which proceedings were drawn by the respondents would thus clearly appear to fall foul of the well settled principle that "he who hears must decide".

10. The Court further notes that apart from the office noting and minutes which have been placed on the record by the respondent, no formal order of blacklisting has been placed on the record. It is well settled that file notings neither constitute an order nor a decision which can be countenanced in law. Accordingly, and for all the aforesaid reasons, this Court finds itself unable to sustain the decision taken by the respondent.

11. The writ petition is accordingly allowed. The decision of 04 October 2019 as well as the circular of 14 October 2019 insofar as it relates to the petitioner are hereby quashed and set aside. This order, however, shall not preclude the respondent from drawing proceedings afresh and in accordance with law.

12. The Court while parting deems it appropriate to observe that it has interfered with the impugned order of blacklisting only on account of the evident infraction of the principles of natural justice. The present order is thus not liable to be construed as being an adjudication on the merits of the allegations that were levelled against the petitioner. All contentions of respective parties in that respect are kept open.

YASHWANT VARMA, J.

AUGUST 16, 2022 bh