

Umc Technologies Private Ltd. vs Food Corporation Of India on 16 November, 2020

Equivalent citations: AIR 2021 SUPREME COURT 166, AIRONLINE 2020 SC 884

Author: S. Abdul Nazeer

Bench: B. R. Gavai, S. Abdul Nazeer

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3687 OF 2020
(Arising out of S.L.P. (C) No. 14228 of 2019)

UMC TECHNOLOGIES PRIVATE LIMITED

...APPELLANT(S)

VERSUS

FOOD CORPORATION OF INDIA AND ANR. ...RESPONDENT(S)

JUDGMENT

S. ABDUL NAZEER, J.

1. Leave granted.

2. This appeal is directed against the order dated 13.02.2019 passed by the High Court of Madhya Pradesh at Jabalpur in Writ Petition No. 2778 of 2019. By the impugned order, the High Court has dismissed the writ petition and has upheld the validity of the order dated 09.01.2019 passed by respondent no.1, namely Food Corporation of India (for short 'the Corporation') through its Deputy General Manager (Personnel), who is respondent no. 2 herein, to terminate a contract of service with the appellant and to blacklist the appellant from participating in any future tenders of the Corporation for a period of 5 years.

3. The Corporation had issued a Bid Document on 25.11.2016 inviting bids for appointment of a recruitment agency to conduct the process of recruitment for hiring watchmen for the Corporation's office. The appellant submitted its bid on 21.12.2016 and was eventually declared as the successful bidder vide the Corporation's letter dated 28.03.2017. After completion of the formalities, the

appellant was appointed for a period of 2 years w.e.f. 14.02.2017 for undertaking the tendered work of conducting recruitment of watchmen for the Corporation.

4. As part of its work, on 01.04.2018, the appellant conducted a written exam for eligible aspirants for the post of watchman with the Corporation at various centres in Madhya Pradesh. On the same day, a Special Task Force of Bhopal Police arrested 50 persons in Gwalior, who were in possession of certain handwritten documents which prima facie appeared to be the question papers related to the examination conducted by the appellant. The police filed a charge sheet on 03.08.2018 against certain persons including an employee of the appellant. Upon receipt of the above information, the Corporation issued a show cause notice dated 10.04.2018 to the appellant informing the appellant about the said arrest and seizure of documents which appeared to contain question papers related to the examination conducted by the appellant. This notice alleged that the appellant had breached various clauses of the Bid Document dated 25.11.2016 on the ground that it was the sole responsibility of the appellant to prepare and distribute the question papers as well as conduct the examination in a highly confidential manner. Several clauses of the Bid Document were listed in the said notice dated 10.04.2018 and the Corporation alleged that the appellant had violated the same due to its abject failure and clear negligence in ensuring smooth conduct of the examination. The said notice directed the appellant to furnish an explanation within 15 days, failing which an appropriate ex-parte decision would be taken by the Corporation.

5. The appellant replied to the aforesaid notice vide its letter dated 12.04.2018 denying any negligence or leak of question papers from its end. In its communication, the appellant furnished several factual justifications in support of its position and also requested the Corporation to make the documents seized by the police available to the appellant for forensic analysis. These documents were provided to the appellant vide the Corporation's letter dated 18.10.2018. The Corporation addressed another letter dated 22.10.2018 calling upon the appellant to submit its final reply/explanation. Thereafter, on 27.10.2018, the appellant submitted an Observation Report-cum-Reply/Explanation which compared the seized documents with the original question papers and contended that there were many dissimilarities between the two and thus there had been no leakage or dissemination of the original question papers.

6. By its aforesaid order dated 09.01.2019, the Corporation concluded that the shortcomings/negligence on part of the appellant stood established beyond any reasonable doubt and proceeded to terminate its contract with the appellant and also blacklisted the appellant from participating in any future tenders of the corporation for a period of 5 years. Further, the appellant's security deposit with the Corporation was forfeited and the appellant was directed to execute the unexpired portion of the contract at its own cost and risk.

7. Aggrieved by the above order of the Corporation, the appellant, after issuing a legal notice, filed Writ Petition No. 2778 of 2019 before the High Court. This petition came to be dismissed by the High Court's aforesaid order dated 13.02.2019 which is under challenge before us.

8. At the outset, it may be noted that Shri Gourab Banerji, learned senior counsel for the appellant, has submitted that the appellant only seeks to contest the issue of blacklisting and not the

termination of the contract between the appellant and the Corporation. Thus, the sole issue that falls for determination before us is whether the Corporation was entitled to and justified in blacklisting the appellant for 5 years from participating in its future tenders.

9. Before delving into the contentions of the parties, it would be useful to extract some of the provisions of the Corporation's Bid Document dated 25.11.2016 which would be material to determining the validity of the blacklisting order dated 09.01.2019:

"INSTRUCTIONS TO BIDDERS XXX XXX XXX

10. DISQUALIFICATION CONDITIONS: Bidder who have been blacklisted or otherwise debarred by FCI or central/state Govt. or any central/ State PSU / Statutory Corporations, will be ineligible during the period of such blacklisting.

10.1 Any Bidder whose contract with FCI or central/state Govt. or any central/State PSU/Statutory Corporations has been terminated before the expiry of the contract period for breach of any terms and conditions at any point of time during the last five years, shall be ineligible.

10.2 Bidder whose Earnest Money Deposit and/or Security Deposit have been forfeited by the FCI or central/state Govt. or any central/State PSU/Statutory Corporations, during the last five years, for breach of any terms and conditions, shall be ineligible.

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25. CORRUPT PRACTICES:

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25.4 Any corrupt practice indulged by the agency or any of its employee at any of the stages of the recruitment including preparation of the question paper, distribution of question paper, conducting of the exams, valuation of the answer sheets, declaration of results etc. shall lead to immediate cancellation of the contract and the agency shall be liable for appropriate legal action without prejudice to any other clause in the contract.

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42. TERMINATION OF CONTRACT:

42.1 By Corporation

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(ii) The FCI shall also have, without prejudice to other rights and remedies, the right in the event of breach by the Bidder of any of the terms and conditions of the contract, or failing to observe any of the provisions, obligations governing the contract, to terminate the contract forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the Agency and to forfeit the Security Deposit or any part thereof for recovery of all losses, damages, costs and expenses which may be incurred by FCI consequent to such termination and / or in completing the assignment. FCI may also effect recovery from other sums then due to the Agency or which at any

time thereafter may become due under this or any other contract with FCI. In case the sum is not sufficient to cover the full amounts recoverable, the Agency shall pay FCI on demand the entire remaining balance due.

(iii) FCI may at any time without assigning any reason terminate the contract without any liability by giving 7 working days' notice to the bidder.”

10. On behalf of the appellant, it was submitted by Shri Banerji that the Corporation had no power under the above quoted or any other provisions of the Bid Document dated 25.11.2016 to blacklist the appellant. It was argued that above quoted Clause 10 titled “Disqualifications Conditions”, which has been relied upon by the Corporation, merely lays down eligibility criteria and does not grant any power of future blacklisting. It was further alleged that the said clause was also not mentioned in the show cause notice dated 10.04.2018 issued by the Corporation. The said show cause notice was also impinged upon by the appellant by submitting that it failed to meet the requirements of natural justice as it neither mentioned the grounds necessitating action nor specified what actions were proposed to be taken. Thus, Shri Banerji submitted that in the absence of a valid show cause notice, the consequent blacklisting order cannot be sustained. He further highlighted the outsized impact of the Corporation's impugned order on the appellant in as much as the Corporation's branches in other States as well as other government corporations have now issued as many as 5 notices to the appellant to cancel contracts or prevent the appellant from participating in their tender process and have also forfeited or withheld outstanding payments and security deposits. He argued that due to the domino effect of the Corporation's blacklisting of the appellant, the appellant has unreasonably suffered 5 punishments at the hands of the Corporation which is disproportionate and tantamounts to the civil death of the appellant.

11. On the other hand, Shri Ajit Pudussery, the learned counsel appearing on behalf of the Corporation argued that due to the negligence of the appellant, the entire recruitment process had to be scrapped and the same has deprived several applicants of employment and undermined the confidence of the public in the recruitment process of the Corporation. In relation to the issue of blacklisting, he submitted that since the appellant had breached the terms of the contract by leaking the question papers for the examination, it was not in public interest to permit it to participate in future tenders. He further submitted that the appellant must have been aware of the possibility of the punishment of blacklisting as the same was provided for in the Bid Document. Thus, it was argued that since the blacklisting order was made as per the Bid Document and after issuance of a show cause notice, to which the appellant was granted ample time to reply to, the Corporation's impugned blacklisting order dated 09.01.2019 cannot be challenged.

12. We have given our anxious consideration to the submissions made by the learned counsel at the Bar on behalf of the parties. In our opinion, the validity of the impugned order of the Corporation dated 09.01.2019, so far as the blacklisting of the appellant thereunder is concerned, would in turn be determined by the validity of the underlying show cause notice dated 10.04.2018 issued by the Corporation to the appellant.

13. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. This Court in *Nasir Ahmad v. Assistant Custodian General, Evacuee Property, Lucknow and Anr.*,¹ has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.

1 (1980) 3 SCC 1.

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, particularized and unambiguous show cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatization 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 takes 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.

15. In the present case as well, the appellant has submitted that serious prejudice has been caused to it due to the Corporation's order of blacklisting as several other government corporations have now terminated their contracts with the appellant and/or prevented the appellant from participating in future tenders even though the impugned blacklisting order was, in fact, limited to the Corporation's Madhya Pradesh regional office. This domino effect, which can effectively lead to the civil death of a person, shows that the consequences of blacklisting travel far beyond the dealings of the blacklisted person with one particular government corporation and in view thereof, this Court has consistently prescribed strict adherence to principles of natural justice whenever an entity is sought to be blacklisted.

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 West Bengal*² in the following terms:

“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.

2 (1975) 1 SCC 70.

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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 black lists are instruments of coercion.

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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.”

17. Similarly, this Court in *Raghunath Thakur v. State of Bihar*,³ struck down an order of blacklisting for future contracts on the ground of non-observance of the principles of natural justice. The relevant extract of the judgement in that case is as follows:

“4. ... [I]t is an implied principle of the rule of law that any order having civil consequences 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.”

18. This Court in *Gorkha Security Services v. Government (NCT of Delhi) and Ors.*⁴ has described blacklisting as being 3 (1989) 1 SCC 229.

4 (2014) 9 SCC 105.

equivalent to the civil death of a person because blacklisting is stigmatic in nature and debars a person from participating in government tenders thereby precluding him from the award of government contracts. It has been held thus:

“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.”

19. In light of the above decisions, it is clear that a prior show cause notice granting a reasonable opportunity of being heard is an essential element of all administrative decision-making and particularly so in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted. In these cases, furnishing of a valid show cause notice is critical and a failure to do so would be fatal to any order of blacklisting pursuant thereto.

20. In the present case, the factum of service of the show cause notice dated 10.04.2018 by the Corporation upon the appellant is not in dispute. Rather, what Shri Banerji has argued on behalf of the appellant is that the contents of the said show cause notice were not such that the appellant could have anticipated that an order of blacklisting was being contemplated by the Corporation.

Gorkha Security Services (supra) is a case where this Court had to decide whether the action of blacklisting could have been taken without specifically proposing/contemplating such an action in the show-cause notice. For this purpose, this Court laid down the below guidelines as to the contents of a show cause notice pursuant to which adverse action such as blacklisting may be adopted:

“Contents of the show-cause notice

21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet.

This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent, However, it is equally important to mention as to what would be the

consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

- (i) The material/grounds to be stated which according to the department necessitates an action;
- (ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.”

21. Thus, from the above discussion, a clear legal position emerges that for a show cause notice to constitute the valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the noticee. Such a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting.

22. To test whether the above stipulations as to the contents of the show cause have been satisfied in the present case, it may be useful to extract the relevant portion of the said show cause notice dated 10.04.2018 wherein the Corporation specified the actions that it might adopt against the appellant:

“Whereas, the above cited clauses are only indicative & not exhaustive.

Whereas, it is quite evident from the sequence of events that M/s U.MC Technologies Pvt. Ltd, Kolkata has violated the condition/clauses governing the contract due to its abject failure & clear negligence in ensuring smooth conduct of examination. As it was the sole responsibility of the agency to keep the process of preparation & distribution of question paper and conducting of exam in highly confidential manner, the apparent leak point towards, acts of omission & commission on the part of M/S UMC Technologies Ltd. Kolkata.

Whereas, M/S UMC Technologies Pvt. Ltd. Kolkata is hereby provided an opportunity to explain its Position in the matter before suitable decision is taken as per T&C of MTF. The explanation if any should reach this office within a period of 15 days of receipt of this notice falling which appropriate decision shall be taken. ex-parte as per terms and conditions mentioned in MTF without prejudice to any other legal rights & remedies available with the corporation.”

23. It is also necessary to highlight the order dated 09.01.2019 passed by the Corporation in pursuant to the aforesaid notice, the operative portion of which reads as under:

“After having examined the entire matter in detail, the shortcomings/negligence on the part of M/s UMC Technologies Pvt. Ltd. stands established beyond any reasonable doubt. Now, therefore in accordance with clause 42.1(II) of the governing MTF, the competent authority hereby terminates the contract at the risk and cost of the Agency. As per Clause No. 10.1 & 10.2 the said M/s UMC Technologies Pvt. Ltd. is hereby debarred from participating in any future tenders of the corporation for a period of Five years. Further, the Security Deposit too stands forfeited as per clause 15.6 of MTF. This order is issued without prejudice to any other legal remedy available with FCI to safeguard its interest.”

24. A plain reading of the notice makes it clear that the action of blacklisting was neither expressly proposed nor could it have been inferred from the language employed by the Corporation in its show cause notice. After listing 12 clauses of the “Instruction to Bidders”, which were part of the Corporation’s Bid Document dated 25.11.2016, the notice merely contains a vague statement that in light of the alleged leakage of question papers by the appellant, an appropriate decision will be taken by the Corporation. In fact, Clause 10 of the same Instruction to Bidders section of the Bid Document, which the Corporation has argued to be the source of its power to blacklist the appellant, is not even mentioned in the show cause notice. While the notice clarified that the 12 clauses specified in the notice were only indicative and not exhaustive, there was nothing in the notice which could have given the appellant the impression that the action of blacklisting was being proposed. This is especially true since the appellant was under the belief that the Corporation was not even empowered to take such an action against it and since the only clause which mentioned blacklisting was not referred to by the Corporation in its show cause notice. While the following paragraphs deal with whether or not the appellant’s said belief was well-founded, there can be no question that it was incumbent on the part of the Corporation to clarify in the show cause notice that it intended to blacklist the appellant, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same.

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 black list, the appellant could have filed a suitable reply for the same. Therefore, we are of the opinion that the show cause notice dated 10.04.2018 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 09.01.2019 cannot be sustained.

26. In view of our conclusion that the blacklisting order dated 09.01.2019 passed by the Corporation is contrary to the principles of natural justice, it is unnecessary for us to consider the other contentions of the learned counsel for the appellant. Having regard to the peculiar facts and circumstances of the present case, we deem it appropriate not to remit the matter to the Corporation for fresh consideration.

27. For the foregoing reasons, the appeal succeeds and it is accordingly allowed. The order dated 13.02.2019 passed by the High Court is set aside. The Corporation's order dated 09.01.2019 is hereby quashed only so far as it blacklists the appellant from participating in future tenders. The parties will bear their own costs.

28. Pending application(s), if any, shall stand disposed of.

.....J. (S. ABDUL NAZEER)J. (B. R. GAVAI) New Delhi;

November 16, 2020