

# **M/S, Vindhyawasini T. Transport vs State Of U.P. And 2 Ors. on 20 February, 2018**

**Author: Sudhir Agarwal**

**Bench: Sudhir Agarwal, Ajit Kumar**

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Reserved on 23.10.2017

Delivered on 20.02.2018

Court No. - 34

Case :- WRIT - C No. - 14505 of 2015

Petitioner :- M/S Vindhyawasini T. Transport

Respondent :- State of U.P. and others

Counsel for Petitioner :- Shri Kant Shukla

Counsel for Respondent :- C.S.C.

Hon'ble Sudhir Agarwal, J.

Hon'ble Ajit Kumar, J.

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. Heard Sri Shashi Nandan, learned Senior Advocate, assisted by Mr. Shri Kant Shukla, Advocate, for petitioner and learned Standing Counsel for respondents.

2. Though contract of petitioner has been cancelled and he has been blacklisted, but learned Senior Advocate is confining his relief in the present writ petition only to the extent petitioner has been permanently blacklisted and contention is that blacklisting cannot be permanent without providing a specific period therefor.

3. We find substance in the aforesaid submission. Before giving our reasons in detail, it would be appropriate to have a bird eye view of the relevant facts, necessary for adjudication of present writ petition.

4. M/s Vindhyawasini T. Transport is "Handling and Transport Contractor" registered in Food and Civil Supplies Department for handling and transportation of food grains. It is registered with Regional Food Controller, Gorakhpur Region, Gorakhpur (hereinafter referred to as "RFC, GKP"). Principal function of petitioner, whenever contract is awarded, is to transport and handle food grains available for Public Distribution System (hereinafter referred to as "P.D.S.") in Gorakhpur Region, Gorakhpur. A work tender was floated in 2012 for handling and transportation of food grains for transporting the same from Warehouse Depot, Railway Go-downs and other centers to different distribution centers in Gorakhpur Division for Financial Year (hereinafter referred to as "F.Y.") 2012-13, i.e., upto 31.03.2013. Petitioner was ultimately issued work order on 28.12.2012 by RFC, GKP. Two of the conditions of work order in Clauses-6 and 7 were that, any information, if given by Contractor, is found incorrect, his security amount shall be forfeited, contract shall be cancelled and Contractor shall be blacklisted. Further, Contractor if fails to lift and transport goods or deliberately allows allocation to lapse, it will be deemed to be in violation of terms and conditions of contract and would result in cancellation of registration of Contractor and also forfeiture of security amount and blacklisting of Contractor. In compliance of work order, agreement was executed between petitioner and RFC, GKP. The above contract was extended for F.Y. 2013-14 and subsequently vide order dated 29.03.2014, it was extended for F.Y. 2014-15.

5. Alleging that Truck drivers of transport vehicles arranged by petitioner, diverted food grains meant for distribution to poor people through P.D.S. and thereby committed a serious offence. This diversion also resulted in breach of terms of contract. A Show Cause Notice was issued to petitioner after suspending contract by order dated 09.12.2014. A criminal case was also registered being Case Crime No. 441 of 2014 under Sections 419, 420, 467, 468, 471 I.P.C. and 3/7 Essential Commodities Act. Petitioner submitted reply dated 09.02.2015 and thereafter impugned order has been passed on 11.03.2015, forfeiting security and blacklisting of petitioner's Firm.

6. It is contended by Sri Shashi Nandan, learned Senior Advocate, that impugned order, blacklisting petitioner's Firm does not mention any period, and, therefore, this is nothing but a "permanent blacklisting" which is not permissible in law. Learned Senior Counsel has pressed this writ petition against impugned order dated 11.03.2015 only to the extent it has blacklisted petitioner, permanently.

7. Hence question up for consideration is, "whether blacklisting of a Firm or Contractor can be made permanently or it should be for a limited period".

8. It cannot be doubted that blacklisting of a person or Contractor or a Firm has an adverse civil consequence. No one can be blacklisted without opportunity and more so, it can not be permanent. Here it would be appropriate to have a retrospect of law on the subject of blacklisting.

9. A Full Bench by majority view in V. Punnen Thomas v. State Of Kerala, AIR, 1969 Ker. 81, held that a mere refusal to afford a man the prospect of doing profitable or unprofitable business with the Government, of entering into advantageous relationships with the Government as it has been put, entails no civil consequences however serious a blow that might be to the person concerned.

10. Differing from majority view, Justice Mathew (as he then was) observed in his dissenting judgment, as under:

"14. Government has right like any private citizen to enter into contracts with any person it chooses and no person has a right fundamental or otherwise to insist that Government must enter into a contractual relation with him. ...

15. A contractual relationship presupposes a consensus of two minds. If Government is not willing to enter into contract with a person, I do not think that Government can be forced to do so. It is one thing to say that Government, like any other private citizen can enter into contract with any person it pleases, but a totally different thing to say that Government can unreasonably put a person's name in a blacklist and debar him from entering into any contractual relationship with the Government for years to come. In the former case, it might be said that Government is exercising its right like any other private citizen, but no democratic government should with impunity pass a proceeding which will have civil consequences to a citizen without notice and an opportunity of being heard. The reason why the proceeding for blacklisting the petitioner and debarring him from taking Government work for ten years was passed, is that he committed irregularities in connection with the tender of the contract work. ... An ex parte adverse adjudication that the petitioner committed irregularities in connection with the tender for working down timber from Udumbandhola Block No. 1 by Government on the report of some petty officer without notice and an opportunity of being heard to the petitioner and putting his name in the blacklist and debarring him from 'taking any Government work for ten years' by way of punishment, appear to me, to be against all notions of fairness in a democratic country."

(emphasis added)

11. Justice Mathew further held that "Reputation can be viewed both as an interest of personality and as an interest of substance, viz., as an asset" and quoted following words of Roscoe Pound:

"On the one hand there is the claim of the individual to be secured in his dignity and honour as part of his personality in a world in which one must live in society among his fellow-men. On the other hand there is the claim to be secured in his reputation

as a part of his substance in that in a world in which credit plays so large a part the confidence and esteem of one's fellow-men may be a valuable asset." (See: Interest of Personality' 28 Harvard Law Review, pp. 445, 447).

12. Finally, Justice Mathew said:

"As the memorandum in question casts a stigma on the reputation of the petitioner, which is both an interest of personality and an interest of substance, and as it is attended with civil consequences to the petitioner, and as it operates as a punishment for an alleged irregularity, I think, the memorandum should have been proceeded by notice and an opportunity of being heard. If anybody were to say that Ext. P-1 is an administrative proceeding and so no notice or opportunity of being heard was required and that no interference under Article 226 is possible, I would answer him in the high and powerful words of Mr Belloc, 'you have mistaken the hour of the night: it is already morning'." (p. 89) (emphasis added)

13. In *Erusian Equipment and Chemicals Ltd v. State of West of Bengal*, 1975 (1) SCC 70, Court concluded:

"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, 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." (emphasis added)

14. In *Erusian Equipment & Chemicals Ltd. v. State of W.B.* (supra) Court also observed:

"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.

Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people.

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." (emphasis added)

15. Again, in *Raghunath Thakur v. State of Bihar* (1989) 1 SCC 229, Court observed:

"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."

16. In *Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd. And Another*, 1994 Supp (2) SCC 699, Court held in para 8 and 9 as under:

"8. The minority view of Justice Mathew is now the law. The majority view in *V. Punnen Thomas* case is not good law and must be considered to have been, impliedly, overruled by the *Erusian* case (1975) 1 SCC 70, 75. Indeed, in *Joseph Vilangandan v. Executive Engineer, Buildings & Roads (PWD) Division, Ernakulam* (1978) 3 SCC 36, 41 it was held:

"The majority judgment of the Kerala High Court, inasmuch as it holds that a person is not entitled to a hearing, before he is blacklisted, must be deemed to have been overruled by the decision of this Court in *Erusian Equipment ..*".

17. Relying upon aforesaid judgments, in *P. Nageshwar and others Vs. Government of Andhra Pradesh and Another* 1994 Supp (2) SCC 693 Court held that delisting of tenderer resulting in denial to participate in tender process without any opportunity is in clear violation of principles of natural justice. Court held that withholding of tender of such tenderers was not justified. Delisting of Contractor from the list would have been done only after complying with principles of natural justice. Such order even on the basis of Vigilance report without giving opportunity was held, bad in law. Similar view was taken in *Patel Engg. Ltd. v. Union of India*, (2012) 11 SCC 257. In view of the above exposition of law, it is clear that for a proposed action to be taken an impugned order of blacklisting should always be preceded by an appropriate show cause notice.

18. The question, then, arises as to what is the law regarding show cause notice; whether show cause notice seeking reply was sufficient or show cause also required to carry details of the intention of proposed action including period.

19. Court in *Gorkha Security Services Vs. Government (NCT of Delhi) and Others*, (2014) 9 SCC 105 has held that order of blacklisting is stigmatic in nature and debars such a person from participating in Government Tenders which means precluding him from the award of Government Contracts. While discussing necessity of serving of show cause as reiterating principles of natural justice showing intention of proposed action, Court has held:

"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." (emphasis added)

20. Court further said:

"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 to 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 be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement." (emphasis added)

21. The comes the question whether blacklisting can be permanent. It is now well settled law that blacklisting even if can be imposed against indisciplined deviant contractors for their acts of omission or commission, such blacklisting cannot be for all time to come.

22. In *Kulja Industries Ltd. V Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Ltd. And Others.* (2014) 14 SCC 731 Court has held:

"20. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject ... "

"25. Suffice it to say that "debarment" is recognized and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the "debarment" is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor." (emphasis added)

23. The aforesaid view has been reiterated in a recent judgment of *B.C. Biyani Projects Pvt. Ltd. v. State of M.P. and others* 2017 (3) AWC 2840 (SC).

24. In view of law discussed above, and considering the recent authorities on the subject that debarment can never be permanent and period should invariably be mentioned in the order of debar, though it would depend upon the nature of defiance, breach or offence committed by erring person/Firm/Contractor, we find no hesitation in allowing writ petition partly and declare that impugned order dated 11.03.2015 will not be treated to be permanent debarment/blacklisting of petitioner. Respondent-Competent Authority, i.e., RFC, GKP shall pass a clarificatory supplementary order mentioning period of debarment of petitioner with regard to blacklisting pursuant to order dated 11.03.2015, looking to the nature of defiance, breach or offence committed by petitioner. This shall be done within one month from the date of production of a certified copy of this order.

25. The writ petition stands partly allowed in the manner hereinabove.

Dt. 20.02.2018 PS