

GAHC010019462023



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

Case No. : WP(C)/496/2023

1. Voyants Solutions Private Limited in association with
Yashica Consultants and Educational Services Pvt. Ltd. 403, 4th Floor, Park
Centrea, Sector-30, NH-8, Gurugram-122001.
2. Voyants Solutions Private Limited,
403, 4th Floor, Park Centrea, Sector-30, NH-8,
Gurugram-122001, r
epresented by Mr. Prasanta Bhattacharya
3. Yashica Consultants and Educational Services Pvt. Ltd.
c-179, Jeewan Nagar, New Delhi-110014.

.....Petitioners.

Versus

1. Union of India, represented through Secretary,
Ministry of Road Transport and Highways,
Paryavaran Bhawan, 1, Sansad Marg,
New Delhi-110001.
2. The National Highways and Infrastructure Development Corporation
Ltd. Ministry of Road Transport and Highways,
Government of India, PTI Building, 3rd Floor,
4, Parliament Street, New Delhi-110001.
3. The Managing Director,
National Highways and Infrastructure Development Corporation Ltd.
PTI Building, 3rd Floor,

4, Parliament Street, New Delhi-110001.

4. The Executive Director,
National Highways and Infrastructure Development Corporation Ltd.
PTI Building, 3rd Floor,
4, Parliament Street, New Delhi-110001.
5. The Executive Director (Projects) Regional Office,
National Highways and Infrastructure Development Corporation Ltd.
Agni Shanti Business Park, 2nd Floor, Opposite AGP Office, GNB Road,
Ambari, Guwahati-781001 (Assam).

.....**Respondents.**

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioners : Mr. I. ChoudhurySr. Advocate.
Mr. S. Biswakarma Advocate.

For the respondents : Mr. P.J. SaikiaSr. Advocate.
Mr. S. Biswakarma Advocate.

Date of hearing & judgment : 25.04.2024.

JUDGMENT AND ORDER

1. Heard Mr. I. Choudhury, learned Senior assisted by Mr. S. Biswakarma, learned counsel for the petitioners. Also heard Mr. P.J. Saikia, learned Senior assisted by Mr. R.K. Talukdar, learned counsel for the respondents.
2. The petitioners are aggrieved by the impugned debarment notice dated 23.01.2023 issued by the National Highways and Infrastructure Development Corporation Ltd. (NHIDCL), by which the petitioners have been debarred for two years from participating in any future projects of the NHIDCL/MoRTH, either

directly or indirectly in accordance with paragraph 3 (3) (a) & (e) of the MoRTH Circular dated 07.10.2021.

3. Mr. I. Choudhury, learned Senior Counsel for the petitioners submits that the petitioners are consultants/ authority engineers, providing consultancy services for the contract work pertaining to "Four laning of Jhanjhi to Demow section from km 491.050 to km 535.250 and Demow to Bogibeel junction near Lapetkata section from km 535.250 to km 581.700 of NH-37 in the State of Assam under SARDP-NE on Engineering, Procurement and Construction (EPC) mode", which was trifurcated into 3 (three) contracts.

4. The learned Senior Counsel for the petitioners submits that the debarment notice has been issued in pursuance to the contract i.e. "End of Moran Bye-pass (km 562.525) to Bogibeel junction (km 581.700)". The petitioners challenge to the debarment/blacklisting order is basically on the ground that no notice had been issued to the petitioners, prior to the impugned debarment notice being issued. In support of his submission, he has relied upon the judgments of the Supreme Court in the case of (i) ***M/s Erusian Equipment & Chemicals Ltd. vs. State of West Bengal & Another***, reported in **(1975) 1 SCC 70**, (ii) ***Gorkha Security Services vs. Government (NCT of Delhi) & Others***, reported in **(2014) 9 SCC 105** and (iii) ***UMC Technologies Private Limited vs. Food Corporation of India & Another***, reported in **(2021) 2 SCC 551**.

5. Mr. P.J. Saikia, learned Senior Counsel for the respondents, on the other hand submits that Show-Cause Notice was issued to the petitioners, prior to the impugned debarment/blacklisting order being issued. He further submits that as

there was an admission on the part of the petitioners, with regard to the fact that excess payment had been made to the contractor for works that had not been executed, no prejudice can be said to be caused to the petitioners, even if no notice was issued to the petitioners, prior to the issuance of the Debarment Notice. He further submits that the blacklisting of the petitioners can be put to challenge by way of a review, in terms of the MoRTH Circular dated 07.10.2021 and as such, the petitioners should avail the efficacious alternative remedy available. In support of his submission, he has relied upon the judgments of the Supreme Court in the case of (i) ***M/s Dharampal Satyapal Ltd. vs. Deputy Commissioner of Central Excise, Gauhati & Others***, reported in **2015 AIR SCW 3884** (ii) ***M.C. Mehta vs. Union of India & Others***, reported in **AIR 1999 SC 2583** and (iii) ***Aligarh Muslim University & Others vs. Mansoor Ali Khan***, reported in **AIR 2000 SC 2783**.

6. I have heard the learned counsels for the parties.

7. To a specific query put to the counsel for the respondents as to whether the excess amount paid to the contractor has been adjusted/reconciled, Mr. P.J. Saikia submits that most of the excess amount has been adjusted/reconciled. However, the excess amount has not been fully adjusted/reconciled, inasmuch as, the contract with M/s Monoranjan Brahma has subsequently been terminated by the NHIDCL and final adjustment of payable dues etc., if any, would have to be made after measurement of the works is done.

8. The brief facts of the case is that pursuant to the tender notice in respect of the contract work “End of Moran Bye-pass (km 562.525) to Bogibeel junction (km 581.700)”, the contract for construction of the road was awarded to one

M/S Atlanta Limited, vide Agreement dated 11.02.2016. The said contract was however terminated in the year 2018 and a fresh tender notice was issued. In pursuance to the fresh tender notice, a contract agreement was executed between the NHIDCL and M/s Monoranjan Brahma for the said contract.

9. The contractor had raised bills beyond actually executed works. The said bills were to be scrutinized and verified by the petitioners and recommended/not recommended by the petitioners for payment. The said recommendation was thereafter to be further scrutinized by the NHIDCL. The fact remains that the contractor's bills were cleared and payments made for works, beyond actually executed works. Subsequent to the said facts, communications were made between the NHIDCL and the petitioners, on the parties coming to learn that there had been payment of bills beyond actually executed works. In this respect, the first letter with regard to the excess payment made is reflected in the communication dated 26.09.2022 issued by the NHIDCL to the petitioners. The said letter dated 26.09.2022, according to the respondents, is a Show-Cause Notice, while the stand of the petitioners is that the said letter is not a Show-Cause Notice, but just a simple communication to clarify the issue of excess payment made to the contractor. Suffice to say, subsequent to the above letter dated 26.09.2022, which was replied to by the petitioners vide letter dated 03.10.2022, a reminder was sent by the NHIDCL on 21.10.2022 on the same subject matter, as reflected in the earlier communication dated 26.09.2022. The reminder dated 21.10.2022 was also replied to by the petitioners vide letter dated 07.11.2022.

10. Without going further into the merits of the issue as to whether the petitioners were at fault in recommending payment of bills for non-executed works by the contractor, for which the impugned debarment/blacklisting order

had been issued, the first issue that would have to be decided is whether a Show-Cause Notice had been issued to the petitioners, prior to issuance of the impugned debarment/blacklisting order dated 23.01.2023 and whether prior notice was mandatory.

11. In the case of ***M/s Eurasian Equipments Ltd. (supra)***, the Supreme Court has held that blacklisting involves civil consequences and that it has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for the purpose of gain. 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.

12. In the case of ***Gorkha Security Services (Supra)***, the Supreme Court has held that law with regard to issuance of Show-Cause Notice prior to blacklisting is firmly grounded and the giving of an opportunity of hearing to the person against whom the action of blacklisting is sought to be taken has a valid and solid rationale behind it. It held that the serving of the Show-Cause Notice is not only to make the noticee understand the precise case set up against him which he has to meet , but the other requirement is that he should be made to know the nature of action which is proposed to be taken against him. That should be stated in the notice, so that the noticee is able to point out that the proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactory explained. The Supreme Court held in the above case that the giving of a prior notice was imperative. It held as follows :

“When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is the harshest possible action.”

The Supreme Court thus held in paragraph-22 that in order to fulfill 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 on 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.”

13. In the above case of ***Gorkha Security Services (Supra)***, the Supreme Court further held that even if it is not specifically mentioned that the competent authority intended to impose such a penalty of blacklisting, but it could be clearly inferred that such an action was proposed, that would fulfill the requirement of the Show-Cause Notice. However, a reading of the NHIDCL letter dated 26.09.2022 and the reminder dated 21.10.2022, does not give any indication that the respondents intended to impose a penalty of blacklisting/debarment of the petitioners from participating in future contracts with the NHIDCL/MoRTH.

14. In the above case of ***UMC Technologies Private Limited (Supra)***, the Supreme Court has held that in the context of blacklisting of a person or an

entity by the 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 stigmatisation that accrues to the person/entity being blacklisted. It further held that for a show cause notice to constitute a 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 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.

15. As can be culled out from the judgements of the Supreme Court stated above, it was imperative/mandatory on the part of the NHIDCL to have made a mention in the letter dated 26.09.2022 or reminder dated 21.10.2022, that the petitioners could be blacklisted. However, no such mention was made with regard to the possibility of the petitioners being blacklisted in the letter dated 26.09.2022 and the reminder dated 21.10.2022. Further, a reading of the above two letters show that nothing can be inferred to the effect that there was a proposal for blacklisting/debarment of the petitioners for 2 (two) years.

16. Now let us see whether the judgments relied upon by the respondents, which is basically to the effect that non-issuance of a prior notice does not vitiate an order and would be futile, if only one conclusion is possible and if it does not cause prejudice to the noticee

17. In the case of ***M/s Dharampal Satyapal Ltd. (supra)***, (ii) ***M.C. Mehta (supra)*** and (iii) ***Aligarh Muslim University (supra)***, the Supreme Court has held that the principles of natural justice cannot be applied in a straight jacket formula. When there is an infraction of principles of natural justice, the further question that has to be addressed is whether any purpose would be served in remitting the case to the authority to take a fresh decision and if such an exercise would be totally futile. The Supreme Court further held in the above three cases that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the Court need not issue a writ, merely because there is violation of principles of natural justice.

18. In the present case, though there appears to be an admission of fact that the contractors bills for works which had not been done, had been recommended for payment by the petitioners, it was also the duty of the respondents NHIDCL to re-verify the facts, in terms of the contract agreement made by the NHIDCL with the petitioners and the contractor. The explanation given by the petitioners in their letters dated 03.10.2022 and 07.11.2022 also does not appear to have been addressed by the NHIDCL. Be that as it may, while the judgments relied upon by the counsel for the respondents show that if allegations are admitted, the non-furnishing of a prior notice cannot be a reason to issue a writ, on the ground that no prejudice is being caused to the petitioners, the fact remains that the cases relied upon by the respondents pertains to doing away with the issuance of prior notice in general, if only one conclusion is possible. However, the cases relied upon by the petitioners' counsel specifically relate to blacklisting of persons/entity, wherein the Supreme Court has specifically held that the Show-Cause Notice would not only have to

give the grounds for which the Notice giver would want to take action upon the person concerned, but the Show-Cause Notice would also have to put the noticee to attention, of the fact that the authority intended to impose a penalty of blacklisting upon the said person. If the notice does not state that the penalty of blacklisting is proposed, it should be clearly discernible from the notice that a penalty of blacklisting was being proposed. As such, this Court is of the view that the cases cited by the respondents does not squarely cover the issue raised in this writ petition, while the cases relied upon by the petitioners, i.e. (i) **M/s Erusian Equipment & Chemicals Ltd. (*supra*)** (ii) **Gorkha Security Services (*supra*)** and (iii) **UMC Technologies Private Limited (*supra*)**, squarely cover the issue raised in this writ petition. As such, in the view of this Court, the respondents should have issued a prior Show-Cause Notice to the petitioners stating the precise case set up against them, besides specifically making the petitioners know that the penalty of blacklisting/debarment was being proposed to be taken against them. As the same was not done by the respondents and as the communications sent by the respondents to the petitioners, does not give any indication that there was a proposal to blacklist the petitioners, the issuance of the impugned debarment notice dated 23.01.2023 is not sustainable in law. The same is accordingly set aside. However, liberty is given to the respondents to issue a fresh Show-Cause Notice to the petitioners, if they propose to take any action of blacklisting/debarment against the petitioners, pursuant to the contract work i.e. "End of Moran Bye-pass (km 562.525) to Bogibeel junction (km 581.700)".

19. With regard to the stand of the respondents' counsel that the petitioners can avail of the alternative remedy, by filing a review against the impugned

debarment notice dated 23.01.2023, in terms of the MoRTH Circular dated 07.10.2021 issued by the Government of India, Ministry of Road Transport and Highways (S&R Zone), this Court is of the view that the issue raised in this case having already been decided by the Supreme Court, this Court is not inclined to dismiss the writ petition on the ground that there is an alternative remedy available. Further, the Supreme Court has held that the High Court under Article 226 has the discretion to entertain or not to entertain a writ petition in at least 3 contingencies, namely where the writ petition has been filed for (i) the enforcement of any of the fundamental rights or (ii) where there has been a violation of principles of natural justice or (iii) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. This has been clearly laid down by the Supreme Court in the case of ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Others***, reported in **(1998) 8 SCC 1.**

20. As the issue in this case is with regard to whether there was violation of the principles of natural justice, which in the opinion of this Court has been answered positively by this Court, this case is disposed of in terms of the judgments of the Supreme Court, which mandatorily requires prior notice to be issued, before a blacklisting/debarment order can be issued.

JUDGE

Comparing Assistant