

**(2015) 01 DEL CK 0024**

**In the Delhi High Court**

**Case No :** Writ Petition (C) 7179/2014 and CM No. 16859/2014

Abhey Kumar Jain

APPELLANT

Vs

South Delhi Municipal Corporation

RESPONDENT

---

**Date of Decision :** 16-01-2015

**Acts Referred:**

Constitution of India, 1950 — Article 14, 298

**Citation :** (2015) 2 AD 279 : (2015) 148 DRJ 335

**Hon'ble Judges :** Vibhu Bakhru, J.

**Bench :** Single Bench

**Advocate :** Anusuya Salwan and Renuka Arora, for the Appellant; Mini Pushkarna, SC and Namrata Mukim, Advocates for the Respondent

**Final Decision :** Disposed off

---

## **Judgement**

Vibhu Bakhru, J.—The petitioner impugns a circular dated 14.07.2014 (hereafter the "impugned circular") issued by the respondent blacklisting the petitioner and debarring him from participating in the tendering process for any work with SDMC, for a further period of five years.

2. The petitioner is a Class-I contractor duly registered with the North Delhi Municipal Corporation (NDMC). On 28.09.2013, the petitioner was awarded with the contract (Work Order No. EE Project South-I/SYS/2013- 2014/6) by the respondent for improvement and strengthening of various internal roads in South Zone by dense carpeting. The date of commencement of the work was 07.10.2013 and the work was required to be completed by 06.04.2014.

3. Apparently, the petitioner delayed commencing the work and the respondent, by its letter dated 20.11.2013, directed the petitioner to commence the awarded work and complete the same within the stipulated time. The petitioner, by its letter dated 24.11.2013, replied that the work had been started and would be completed soon. However, despite the petitioner's assurance, it appears that the petitioner failed to commence the work and the respondent, again by its letter

dated 06.12.2013, directed the petitioner to start the work. In response to the said letter, the petitioner by its letter dated 14.12.2013, confirmed that the work was started on 24.11.2013 and part of the work had been completed.

4. It appears that the progress in the work was slow and the petitioner had stopped the work sometime in December 2013. This led the respondent to send another communication on 31.12.2013, directing the petitioner to resume the work and further warning the petitioner that failure to do so would invite action as per the terms of the agreement. The petitioner, by his letter dated 03.01.2014, informed the respondent that the temperatures were very low at the material time, which were not suitable for carrying on the dense carpeting work. He assured that the work would be completed as soon as the weather improved.

5. The respondent, by its letter dated 09.04.2014, pointed out certain defects in the work executed by the petitioner and called upon the petitioner to rectify the same and also explain the reasons for delay in completion of the work.

6. Thereafter, the respondent issued a show cause notice dated 15.04.2014 to the petitioner to show cause as to why compensation should not be imposed under Clause 2 of the contract and why disciplinary action should not be taken under Clause 23 of the Contract Enlistment Rules/Instructions (hereafter "Enlistment Rules"). The petitioner, by its letter dated 25.04.2014, replied that the petitioner was carrying out other contracts with the respondent for a value of Rs. 3.75 crores and despite executing the work for a value of over Rs. 2 crores, payment for the same had not been made, which had financially crippled the petitioner resulting in delay in completion of the work in question. He requested that the payments due be released so that the work could continue smoothly.

7. The respondent, by its letter dated 28.04.2014, called the petitioner for a personal hearing before Superintending Engineer (Project-South Zone) on 01.05.2014, which was, on request of petitioner, re-scheduled to 06.05.2014. The petitioner appeared before the Superintending Engineer (Project - South Zone) on 06.05.2014 and again complained that the bills of over Rs. 2 crores were pending clearance and no payment had been made for the work executed by the petitioner and that had constrained the petitioner from smoothly executing the work in question. The Superintending Engineer directed the Executive Engineer to finalize the pending bills after ensuring the requisite formalities/testing are completed. The petitioner was also directed to resume and complete the work awarded.

8. The respondent states that an inspection was conducted and the work executed by the petitioner was found to be defective. It is further asserted that despite several extensions for completion of the work, the petitioner had failed to live up to his assurance to complete the work within the extended time.

9. Concededly, the work in question was not completed within the agreed time. Consequently, time for completion of the work was extended by the respondent. The petitioner challenges the impugned circular, principally, on the ground that it

is contrary to Clause 23 of the Enlistment Rules. The petitioner submits that the Enlistment Authority was the Commissioner, SDMC/Additional Commissioner (Engg.), SDMC. Thus, the show cause notice could only be issued by the said officers and the hearing as contemplated under Clause 23 of the Enlistment Rules could only be provided by the Enlistment Authority. It is further contended on behalf of the petitioner that although a hearing was granted by Superintending Engineer, the impugned circular has been issued by the Additional Deputy Commissioner (Engg.), SDMC, albeit, with the approval of the Commissioner, SDMC. This, it is contended, was contrary to the principles of natural justice.

10. The learned counsel for the respondent does not dispute that the Enlistment Authority is the Commissioner, SDMC/Additional Commissioner (Engg.), SDMC. She, however, submits that it was not necessary that a hearing be afforded by them; the said officers could take a decision on the basis of the record placed before them by other officers of SDMC.

11. Although, it has been contended on behalf of the respondent that the work executed by the petitioner was defective, the petitioner has disputed the same and contended that any defect pointed out had been rectified. In my view, it is not necessary to examine this aspect as the said allegation did not form a part of the show cause notice issued to the petitioner pursuant to which the petitioner was blacklisted. The only allegations made in the show cause notice were that the petitioner had delayed commencement of the work; suspended the work; and the progress of the work was slow.

12. In order to examine the petitioner's contention that the procedure that led to the impugned circular is contrary to Clause 23 of the Enlistment Rules, it would be necessary to refer to Clause 23 of the Enlistment Rules. The relevant extract of the said clause is quoted below:-

"23.0 Disciplinary Actions :- The contractor shall have to abide by all the instructions of enlistment and also by the terms and conditions of the contract and the Notice Inviting Tenders. He shall have to execute the works as per contract on time and with good quality. The enlisting authority shall have the right to demote a contractor to a lower class, suspend business with him for any period, debar him or remove his name from the approved list of contractors indefinitely or for a period as decided by the enlisting authority after issue of show cause notice. Decision of the enlisting authority shall be final and binding on the contractor. The following actions of the contractor shall, in general, make him liable to disciplinary actions.

xxxx xxxx xxxx xxxx

23.3 Removal from the approved list:- The name of the contractor may be removed from the approved list of contractors, by the enlisting authority, if he:

A) has, on more than one occasion, failed to execute contract or has executed it unsatisfactorily; or

- B) is proved to be responsible for constructional defects in two or more works; or
- C) persistently violates any important conditions of the contract; or
- D) fails to abide the conditions of enlistment; or
- E) is found to have given false particulars at the time of enlistment; or
- F) has indulged in any type of forgery or falsification of records; or
- G) changes constitution of the firm or Individual without prior approval of the enlistment authority; or
- H) changes permanent address/ business address without intimation to the enlistment authority; or
- I) is declared or is in the process of being declared bankrupt; insolvent, wound up, dissolved or partitioned; or
- J) persistently violates the labour regulations and rules, or
- K) is involved in complaints of serious nature received from other department which prima facie appear to be true.
- L) Default in settlement of tax dues like income tax, contract tax, sales tax, octroi, duties etc.
- M) has already been demoted for other reason(s), or
- N). Ceases to fulfill eligibility criteria based on which enlistment / revalidation was done, or
- O) is considered not required to be in list of MCD for any other reason considered fit by enlistment authority."

13. I am unable to accept the contention that Clause 23 of the Enlistment Rules mandates that the show cause notice be issued by the Enlisting Authority. Clause 23 of the Enlistment Rules postulates that the Enlisting Authority would, inter alia, have the right to debar or remove the name of the contractor from the approved list after issue of show cause notice. Therefore, the decision to debar or blacklist a contractor can only be taken by the Enlisting Authority. However, this does not imply that the show cause notice be also issued by the same authority. The purpose of the show cause notice is to apprise the contractor of the allegations against him and the action proposed to be taken in regard thereto and to enable the contractor to respond to the allegations and provide an explanation why the proposed action should not be taken against him. The nature of the notice does not necessitate that the same be issued by the person authorised to take the decision against the contractor.

14. The next issue to be considered is whether it was incumbent upon the Enlisting Authority to afford a hearing to the petitioner. Blacklisting a contractor has serious adverse consequence on the business and the reputation of the

contractor and it is now well established that a person must be afforded a hearing before any decision to put him on a blacklist is taken. The Supreme Court in the case of Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, had observed as under:-

"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.

xxxxx xxxxx xxxxx xxxxx

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."

15. The learned counsel for the respondent emphasised that in the present case a hearing was afforded to the petitioner, by the Superintending Engineer, on 06.05.2014 and thus, the principles of natural justice were complied. In my view, the said contention is untenable as it is now well established that the person who has to take the decision must hear the affected person. The purpose of affording a hearing is to enable the affected person to persuade the concerned authority not to take the action as contemplated. The purpose of affording a hearing is significantly diluted if it is afforded by a person other than one who has to decide the fate of the affected person. The Supreme Court in the case of Rasid Javed and Others Vs. State of U.P. and Another etc. etc., referred to an earlier decision of the Supreme Court in the case of Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, and observed that "51. ... a person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing is too fundamental a proposition to be doubted."

16. The Supreme Court in Union of India (UOI) and Others Vs. Shiv Raj and Others, referred to the several earlier decisions and summarised the law as under:

"the law on the issue can be summarized to the effect that the very person/officer, who accords the hearing to the objection must also submit the report/take decision on the objection and in case his successor decides the case without giving a fresh hearing, the order would stand vitiated having been passed in violation of the principles of natural justice." 17. Concededly, no hearing was afforded to the petitioner by the deciding authority (i.e. the Enlistment Authority) before taking the decision to blacklist the petitioner. Thus, the impugned circular is liable to be set aside.

18. There is yet another aspect which must be noticed. The petitioner had responded to the show cause notice dated 15.04.2014 and had explained that he was financially constrained as, according to him, more than two crores was due and payable to the petitioner by SDMC in respect of other works and same had not been released. At the hearing held before the Superintending Engineer (Project-South Zone) on 06.05.2014, the petitioner had once again reiterated this issue. After hearing the petitioner the Superintendent Engineer had directed the Executive Engineer "to look into this and finalize the pending bills after ensuring the requisite formalities/testing etc. If any compliance is required from agency it shall be done by the agency within this period. In case the agency failed to complete the requisite formalities EE(Pr)I S2 shall communicate to him in writing." The petitioner was also directed to take up the work immediately and complete the same. Further noting of the file indicates that the petitioner had immediately commenced his work on 06.05.2014 and continued the same on 09.05.2014, 12.05.2014, 13.05.2014, 14.05.2014 and 15.05.2014. Thus, it is apparent that the petitioner had followed the directions issued by the Executive Engineer and immediately resumed the work.

19. The learned counsel for the petitioner has stated that significant financial resources of the petitioner were committed to the dense carpeting work carried out on the aforesaid dates. But, the amounts due to the petitioner were not released. The learned counsel for the respondent has been unable to point out as to how the petitioner's issue for release of funds was addressed. A show cause notice is not an empty formality; the purpose of a show cause notice and a hearing is to elicit whether there is sufficient reason for a contractor to have defaulted in its commitment. If the reasons provided by the contractor are found to be without substance, the same may be rejected. In the present case, the Superintending Engineer did not reject the reason as indicated by the petitioner but instead directed the Executive Engineer to complete the formalities and release the payments. In my view, any further action against the petitioner could only be contemplated if the said directions had been complied with.

20. In view of the aforesaid, the impugned circular is set aside. It would be open for the Enlistment Authority to take a fresh decision after hearing the petitioner.

21. The writ petition and the pending application are disposed of in view of the aforesaid.