

(2013) 09 DEL CK 0455

In the Delhi High Court

Case No : Writ Petition (C) 3917 of 2011

Anjani Technoplast Ltd.

APPELLANT

Vs

UOI

RESPONDENT

Date of Decision : 09-09-2013

Acts Referred:

Citation : (2014) 1 BC 311 : (2013) 204 DLT 381

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Shiv Khorana, for the Appellant; Saqib, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, J.—The challenge in this writ petition is to the order dated 24.01.2011 passed by the respondent, forbidding all Departments/Ministries/Offices of the Government of India from having commercial/business dealings with the petitioner, for a period of 3 years, from the date of the order. The respondent-Union of India, invited tender on 3.7.2009, for purchase of 59,000 light-weight bulletproof jackets. A Technical Evaluation Committee (TEC) was constituted by the Government of India to carry out physical evaluation of the samples received from various tenderers including the petitioner. The sample submitted by the petitioner was, however, rejected by the said Committee. Complaints/representations were made to the Government alleging that the procedure adopted by the TEC for evaluation etc was faulty. The technical evaluation was then cancelled and a fresh evaluation was directed. Before conducting fresh evaluation of the samples, a meeting of the tenderers was convened by the Director General, BPR & D on 5.2.2010. In the said meeting which was attended, inter alia, by Mr. Bhuwanish Kumar, Deputy GM of the petitioner company, Chairman of TEC informed the representatives of the bidder that they should not approach any of the officer associated with technical evaluation process nor should any officer of the department contact the bidders. It was made clear in the said meeting that any violation of this direction will be viewed seriously.

2. A notice dated 27.9.2010 was issued by the Joint Secretary and Chief Vigilance Officer in Department of Commerce, Supply Division to the petitioner alleging therein that in violation of the directives dated 5.2.2010 Mr. R.K. Gupta, Director of the petitioner company, attempted to contact and converse with one member of TEC Mr. Sanjay Baniwal, Deputy Director (Development), BPR & D. It was further alleged in the said notice that Mr. Bhuwanish, another representative of the petitioner firm attempted to contact Mr. Sanjay Baniwal from his mobile telephone and invited him for a meeting. This was followed by a phone call from Mr. Bhuwanish of the petitioner company to Mr. Sanjay Baniwal. However, the invitation extended by the representative of the petitioner company was declined by Mr. Baniwal. Alleging that such an act on the part of the Director and representative of the petitioner amounted to malpractice, involving improper conduct in business dealings, the petitioner was required to show cause as to why business dealings with them should not be banned by the Government of India in the non-statutory sphere in terms of para 5.18.3 (iii) of the DGS & D Manual.

3. The petitioner responded to the said show-cause notice dated 16.10.2010, stating therein that the alleged interaction/conversation of its representative with Shri Sanjay Baniwal had, on the fact of it, nothing to do with technical evaluation. It was further stated in the reply that the allegations stated in the notice do not attract para 5.18.3 (iii) of the DGS & D Manual. It was requested that the copies of the entire material be supplied to the petitioner and a personal hearing be also given.

4. Vide communication dated 26.11.2010, the petitioner was debarred from participating in MHA and CPMFs tender, till a final decision in the matter of black-listing was taken. The said decision was challenged by the petitioner by way of W.P.(C) No. 8694 of 2010. The writ petition was disposed of with an agreed order, whereby the respondents were to take a reasoned decision on the show-cause notice and the impugned order dated 26.11.2010 was not to continue for more than 10 days.

Vide communication dated 10.01.2011, the petitioner was requested to depute a duly authorized representative for the purpose of giving personal hearing to it. After hearing the representative of the petitioner, the impugned order dated 24.01.2011 came to be passed.

5. The order challenged in the writ petition, to the extent it is relevant, reads as under:-

? During the course of first technical evaluation, there was unwarranted and irregular interaction of ATL's representative, with a scientist, TBRL, which led to cancellation of technical evaluation report and de novo evaluation.

? Accordingly, a meeting was held on 05.02.2010, under the Chairmanship of DG, BPR & D, attended by the Technical Evaluation Committee (TEC) members, co-opted experts and by the bidders' representatives, which also included ATL's

representatives, to formulate the procedures during the Technical Evaluation of the Samples" submitted by the bidders.

? The suggested formulated procedures inter alia stipulates as under:-

Grievances, if any, from the bidders at the time of ballistic trials should be made then and there to the Chairman of the Sub-committee and he will take a decision on the spot. Result of various trials will be announced to the bidders.

Subsequent to the meetings, no representative of any bidding firm should approach any of the officers associated with technical evaluation process to meet personally, neither should any officer contact them. A serious view will be taken of any violation of this direction on either side.

? Bidders" representatives agreed to the suggestions and at the end of meeting, representatives of all bidders signed a certificate that they have understood the methods described to them and that they do not have any objection to the procedure and methods to be followed in various trials of samples" technical evaluation.

3.1 On 02.03.2010, during the ballistic trial at TBRL, Chandigarh, Shri R.K. Gupta, Director (ATL), who was present as a representative of the firm, had attempted to make a contact and started conversation with Shri Baniwal, about his transfer order. Shri Baniwal avoided discussing the topic. DIG (provisioning), BSF, who was present at trial site confirmed the veracity of the discussion to the DG, BPR & D.

3.2 On the next day, on 03.03.2010, after completion of testing, Shri Bhuwanish, another representative of the firm, again made attempt to contract Shri Baniwal over mobile phone (from mobile No. 98738 00739), and invited him for a meeting either at a place or residence which Shri Baniwal refused.

3.3. On 04.03.2010, Shri Baniwal received an SMS from (mobile No. 98110 12858) stating "Thanks a lot sir. Big Boss might invite you. Need to take as per your convenience. Warm regards. R.K. " Shri Baniwal replied " I had asked for my posting so please do not intervene. Thank you." Shri Baniwal thereafter again received a message from the same number as "please Don't go...don't leave us. BPR & D needs upright and bold officers like you to bring reforms, Sir...Warm regards R.K."

3.4 Again Shri Baniwal received a phone call from Shri Bhuwanish (from mobile No. 98738 00739) for a meeting request which Shri Baniwal refused and advised Shri Bhuwanish to write to TEC's Chairman for any issue.

5. Above acts on the part of the Director and the representative of ATL were considered serious offence amounting to malpractice involving improper conduct in business dealing and sufficient to attract administrative action in terms of Para 5.18.3 (iii) of the DGS & D Manual, as reproduced below:-

If there is strong justification for believing that the proprietor or employee or

representative of the firm has been guilty of malpractice such as bribery, corruption, fraud, substitution of tenders, interpolation, misrepresentation, evasion or habitual default in payment of any tax levied by law; etc.

7. ATL did not satisfactorily justify their failure to comply with the specific directions of TEC dated 05.02.2010 that no representative of any bidding firm should approach any of the officers associated with technical evaluation process to meet personally, neither should any officer contact them otherwise a serious view will be taken of any violation of this direction on either side. As per the record, this direction of the Chairman, TEC was duly agreed by all the representatives of bidding firms including ATL and a certificate to this effect was also signed by them. ATL could not satisfactorily justify their contention that their interaction with the Deputy Director (Development), BPR & D had nothing to do with technical evaluation.

8. On the basis of facts and substances of the case as placed by MHA (Procurement Wing), written statement by Shri Sanjay Baniwal, DD (Dev.), ATL's mala fide action in not adhering to the formulated procedures laid down by Chairman TEC on 05.02.2010 stands proved. ATL's mala fide action is all the more serious in view of the fact that 1st technical evaluation report got cancelled owing to such unwarranted and irregular interactions.

9. In view of the facts in the preceding paras, there is no doubt that representatives of ATL had acted in a manner amounting to malpractice involving improper conduct in business dealings and this suffices to attract administrative action in terms of DGS & D's Manual Para 5.18.3 (iii).

6. It is an undisputed legal proposition that the State has an inherent right either to enter or not to enter in a contract with any person though even in such matters, it is required to act fairly, reasonably and without actuated by any mala fide. A reference in this regard may be made to the following view taken in Patel Engineering Limited Vs. Union of India (UOI) and Another,

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 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 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.

Therefore, in our opinion, the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the 2nd Respondent from blacklisting a delinquent bidder, if it is otherwise justified. Such power is inherent in every person legally capable of entering into contracts.

As regards oral hearing the, the following was the view taken by the Apex Court:

Coming to the submission that R-2 ought to have given an oral hearing before the impugned order was taken, we agree with the conclusion of the High Court that there is no inviolable rule that a personal hearing of the affected party must precede every decision of the State. This Court in *Union of India and another Vs. M/s. Jesus Sales Corporation*, held so even in the context of a quasi-judicial decision. We cannot, therefore, take a different opinion in the context of a commercial decision of State.

In the case before this Court, not only was the petitioner given a show-cause notice, even a personal hearing was extended to its representative though in terms of the decision of the Supreme Court in *Patel Engineering Limited (supra)*, it was not obligatory to grant an oral hearing.

7. The impugned order has been assailed by the learned counsel for the petitioner primarily on the following grounds:- (i) the petitioner was not provided the material relied upon in the show-cause notice; (ii) the show-cause notice did not refer to the alleged irregular interaction of the representative of the petitioner with a scientist during the course of the first technical evaluation, which led to cancellation of the technical evaluation report and de nove evaluation; (iii) the reply of the petitioner was not duly considered and (iv) the acts attributed to the petitioner could not have led to its black-listing.

8. As regards the contention that the alleged interaction during the course of the first testing was not referred to in the show-cause notice, I find from a perusal of the impugned order that the black-listing of the petitioner founded on the interaction of its representative with Mr. Sanjay Baniwal on 02.03.2010, 03.03.2010 and 04.03.2010 and there is only a passing reference to the irregular interaction by the representative of the petitioner with a scientist at the time of the first evaluation. I, therefore, find no merit in this contention.

9. As regards copy of the material relied upon in the show-cause notice not being supplied to the petitioner, it would be appropriate to refer to the following view taken by the Apex Court in *Grosons Pharmaceuticals (P) Ltd. and Another Vs. The State of Uttar Pradesh and Others*,

2. Learned counsel appearing for the appellant, urged that seeing the nature the seriousness of the order passed against the appellant, the respondent ought to have supplied all the materials on the basis of which the charges contained in the show cause notice were based along with show cause notice and in the absence of supply of materials, the order impugned is against the principles of natural justice. We do not find any merit in this contention. Admittedly, the appellant has only contractual relationship with the State government and the said relationship is not governed by any statutory Rules. There is no statutory rule which requires that an approved contractor cannot be blacklisted without giving an opportunity of show cause. It is true that an order blacklisting an approved contractor results in civil consequences and in such a situation in the absence of statutory rules,

the only requirement of law while passing such an order was to observe the principle of audi alteram partem which is one of the fact of the principles of natural justice. The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant were based was not the requirement of principle of audi alteram partem. It was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted.

Moreover, in its reply, the petitioner did not ask for any particular material. If the petitioner required some material to enable it to respond effectively to the show-cause notice, nothing prevented it from seeking such material from the respondents. In any case, a perusal of the reply by the petitioner would show that there was no denial of the averments that (i) on 02.03.2010, Shri R.K. Gupta, a representative of the petitioner had started conversation with Mr. Baniwal about his transfer order; (ii) on 03.03.2010, Bhuwanish Kumar, another representative of the petitioner-company, tried to contact Mr. Baniwal on his mobile No. 9873800739; (iii) on 04.03.2010, an SMS was sent on behalf of the petitioner to Shri Baniwal from 9811012858 seeking his convenience from a meeting with "big boss", which presumably referred to someone higher up in the petitioner-company, (iv) there was no denial of Mr. R.K. Gupta of the petitioner sending the SMS, asking Mr. Baniwal not to go as BPR & D needed upright and bold officers like him to bring reforms and (v) Bhuwanish Kumar made a call to Mr. Baniwal from his Mobile No. 9873800739 seeking a meeting which Mr. Baniwal refused. Since none of the material allegations made in the show-cause notice was disputed in the reply sent by the petitioner, there could be no question of supplying any material and that precisely appears to be the reason why no such material was ever sought by the petitioner.

10. It was not disputed in the reply sent by the petitioner that in the meeting held on 05.02.2010, the Chairman of Technical Evaluation Committee, with the consent of the bidders, decided that no representative of any bidder should approach any officer associated with Technical Committee to meet personally nor should they contact him. All the bidders were cautioned that a serious view would be taken if this direction is violated on either side. The representatives of all the bidders agreed to the said decision and also signed a certificate accepting the said directive. Therefore, by trying to engage into a conversation for Shri Baniwal, despite decision taken in the meeting held on 05.02.2010, the representative of the petitioner clearly violated the aforesaid directive. In view of the consent decision taken in the meeting held on 05.02.2010, representative of the petitioner had no business to engage into conversation with Mr. Sanjay Baniwal, who was an officer involved in the evaluation process even he may not be a member of the Technical Evaluation Committee. This was none of the business of the representative of the petitioner as to whether Mr. Baniwal was transferred or continued at Delhi, the same being a matter purely between Mr. Baniwal and his superiors. Similarly, Bhuwanish Kumar, another representative of the petitioner, ought not to have contacted Mr. Baniwal and invited him for a

meeting. In fact, despite Mr. Baniwal responded by saying that he himself had asked for his posting, and the representative of the petitioner should not intervene in the matter, a message was sent to Mr. Baniwal, alleging him not to leave BPR & D. The representative of the petitioner did not hesitate in outright flattery of Mr. Baniwal by describing him as an upright and bold officer who could bring reforms in BPR & D. Even after that message Mr. Bhuwanish called Mr. Baniwal seeking a meeting. The representatives of the petitioner by these overtures to Mr. Baniwal clearly acted in contravention of the decision taken in the meeting held on 05.02.2010.

11. Though there is no evidence of the representative of the petitioner offering any kind of bribery, substitution of tender, evasion or default in payment of any tax, etc. nor is there any accusation of the petitioner indulging into a fraud, persistent attempts made by the representatives of the petitioner to get close to Mr. Baniwal and indicating that they wanted him to stay in BPR & D, despite his having been ordered to be transferred from there and trying to have a one to one meeting with him, was certainly a malpractice which a tenderer was not expected to adopt, more so when a decision had been taken that no bidder would contact any officer concerned with technical evaluation of the product and the said decision was accepted by all the tenderers without any reservation or protest. The attempt of the representatives of the petitioner to have a personal meeting with Mr. Baniwal, despite the decision taken in the meeting held on 05.02.2010 and repulsion from Mr. Baniwal was nothing, but an attempt to influence the evaluation process by getting close to an officer involved in the said process. It would be pertinent to note here that this was not the case of the petitioner that in the reply to the show-cause notice that the telephone numbers referred in the said notice did not belong to its representatives. In fact, during the course of arguments, the learned counsel for the respondents placed on record a letter dated 15.03.2010, sent by Bhuwanish Kumar to the Chairman, Ballistic Evaluation Sub-Committee on the letterhead of the petitioner-company and telephone number 9873800739 has been written as the telephone number of Mr. Bhuwanish Kumar on this document.

12. The learned counsel for the petitioner has relied upon *Rajesh Gupta Vs. MCD, SPS Engineering Ltd. Vs. Indian Oil Corporation Ltd., M.J. Sivani and Others Vs. State of Karnataka and Others*, I have gone through the judgments and none of them of any help to the petitioner.

In *Rajesh Gupta (supra)*, the submissions made by the petitioner in that case in response to the show-cause notice were wholly ignored while passing the impugned order. This, however, is not the position in the case before this Court. More importantly, the incidents referred in the show-cause notice were not at all disputed in the reply submitted by the petitioner.

In *S.P.S. Engineering (supra)*, no personal hearing was given to the petitioner and its replies were not adequately dealt with. However, in the case before this Court, personal hearing was duly given to the representative of the petitioner

though in terms of the decision of the Supreme Court in Grosons Pharmaceuticals (P) Ltd. (supra), no such hearing was mandatory. I have also perused the decision in M.J. Sivani (supra), but, I find nothing in the judgment which would of any help to the petitioner.

For the reasons stated hereinabove, I find no merit in the writ petition and the same is hereby dismissed.

There shall be no order as to costs.