
(2016) 01 CAL CK 0045
In the Calcutta High Court
Case No : W.P. No. 30058 (W) of 2015

Bahn-Technology Private Limited and Others	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision : 20-01-2016

Acts Referred:

Citation : (2016) 01 CAL CK 0045

Hon'ble Judges : Dipankar Datta, J.

Bench : Single Bench

Advocate : Kishore Dutta and Vivekananda Bose, for the Appellant;

Final Decision : Disposed off

Judgement

Dipankar Datta, J.—1. The Director, Railway Stores (M), Railway Board issued Memorandum dated November 3, 2015, observing, inter alia, that the first petitioner had indulged in malpractices/irregularities (as detailed in a statement of charges/misconduct forming an enclosure thereof) and conveyed that the Government of India proposes to ban business dealings for a period of five years by the Indian Railways and Production Units etc. with the first petitioner. Consequently, the first petitioner and its allied/sister concerns were given an opportunity to show cause against the action proposed and called upon to submit its representation within 30 days failing which it would be presumed that the first petitioner and its allied/sister concerns have no representation to make against the proposed action and that final decision on merits would follow. The enclosure thereof, containing statement of charges/misconduct, reads as follows:

"1. M/s. Bahn Technology Pvt. Ltd., 3A, Mangoe Lane, 2nd Floor, Kolkata - 700 001(W.B.) participated in Northern Railway's tenders as authorized agent of M/s. Fessel Industrietechnik GmbH, Freytagstra Be 42, 40237, Dusseldorf, Germany Tel:021169066-0 for supplying various types of SMB Fessel Make Hydraulic Pumps/Motors and its spares. CMPE/DSL/Northern Railway vide letter No. 516-M/310-General/ML-3 dated 11.07.2007 had sought clarification from Railway

Advisor, Berlin as under:--

"M/s. Fessel Make Hydrostatic Fan Motors/Plumps are being used on CLW built diesel Hydraulic locomotives for the last 5-6 years. Now a doubt had been raised on the existence of this firm by SECR.

The particulars of the firm available with NR are as under:--

Name of firm: M/s. FESSEL Industrietechnik GmbH, Freytagstra Be 42, 40237, Dusseldorf, Germany Tel: 0211 69066-0, FAX: 0211 69066-66 e-mail:info@smbgmbh.com Company Registration Nr. Is HRB-36741 VAT(UST. ID. Nr.) Nr. Is DE203153756

It is requested to kindly check the details given above in Germany and confirm the existence of M/s. Fessel".

Technical Assistant to RA, Embassy of India, Railway wing, Berlin vide letter No. RA/Assessment/Fessel/07/1 dated 15.10.2007 had confirmed the following to CMPE/DSL/Northern Railway:

"With reference to the above, the telephone No. furnished in the letters under reference was contacted and the following information obtained from one Mr. Klevert at the other end who apparently answers queries on behalf of M/s. Fessel Industrietechnik GmbH:

1) The telephone No. and the premises at Freytagstrasse 42, Dusseldorf is that of a lawyer. The company is registered under this postal address and any query regarding M/s. Fessel is being received by this office and is being redirected to Mr. Rajest Agarwal in India.

2) M/s. Fessel Industrietechnik GmbH has no manufacturing activity whatsoever at the given address in Dusseldorf".

2. The purchase order No. 16.11.5128.1.63082 dated 01.03.2012 was placed on M/s. Bahn Technology Pvt. Ltd., Kolkata for supply of Journal Cross Assembly for Under Truck Cardon Shaft of SMB Fessel make to C&D No. 207/1000,GWB 36715 for ZDM3 Loco, Drawing No. 71.90.50.06.00.010.

The subject item was passed for fourteen(14) Nos. vide Inspection Certificate No. E/NR/E 12031220/PP/26.03.13.32 dated 11.04.2013 on the basis of the drawing provided by the supplier. Subsequently, the material was rejected by the consignee as it was found unsuitable with respect to Drawing No. 71.90.50.06.00.010 mentioned in Purchase order.

A joint Inspection by representatives of the firm, Consignee & Rites was held on 26.09.2013. During Joint Inspection, the following deviations were noticed:

a) Diameter of cup was found to vary from 72.60 mm to 72.64 mm as against the specified value of 65+0.75/+0.11 mm.

b) Length of shaft was found to vary from 171.2 mm to 171.4 mm as against the

specified value of 202 mm.

General Manager/Inspection RITES Ltd./Kolkata, Eastern Region/Kolkata vide letter No. RITES/ER/GMI/CON (EN/13-14/28) dated 11.02.2014 intimated that the rejection has been "UPHELD" and had intimated that the drawing provided to Inspecting Engineer by the firm at the time of inspection and the drawing used during the Joint Inspection are different although both the drawings bear the same No. 71.90.50.06.00.010 as mentioned in the P.O.

Thus, M/s. Bahn Technology P. Ltd./Kolkata had submitted the copy of drawing for inspection to inspecting engineers which is different than that provided for joint inspection and both the drawings bear same No. 3.0 Thus, M/s. Bahn Technology P. Ltd./Kolkata had participated in Northern Railway's tender and offered to supply SMB Fessel make Hydraulic Pumps/Motors and its spares manufactured by M/s. Fessel Industrietechnik GmbH even though M/s. Fessel Industrietechnik GmbH does not have manufacturing facilities.

In one of the case, M/s. Bahn Technology P. Ltd./Kolkata had submitted the copy of drawings for inspection to inspecting engineers which is different than that provided for joint inspection and both the drawings bear same No. "

The said memorandum is the subject matter of challenge in this writ petition dated December 17, 2015.

2. Appearing in support of the writ petition, Mr. Dutta, learned senior advocate contended as follows:

"a) The proposal to ban business dealings based on the statement of charges/misconduct has been issued with a closed mind and reveals the biased attitude of the Director. The opportunity that has been extended to submit representation is, in reality, intended to complete a formality in law, in that the first petitioner is now required to dispel the conclusions that have already been drawn against it. Reliance was placed on the decision of the Supreme Court in *Oryx Fisheries (P) Ltd. v. Union of India*, reported in , (2010) 13 SCC 427, to seek judicial interdiction.

b) The purported statement of charges/misconduct does not reveal any misconduct, thereby warranting interference by the Court of writ.

c) The director has no power to ban business dealings. The pleadings in paragraph 33 of the writ petition were referred to by him, to contend that no punitive action is contemplated in terms of the terms and conditions of the contract entered into by and between the parties even if it were held that there has been a breach on the part of the first petitioner in discharging its contractual obligations."

3. Despite service of copies of the writ petition on the respondents, none has appeared on their behalf.

4. However, having regard to the nature of challenge and the stage at which such

challenge has been laid, this Bench is of the considered view that further notice on the respondents is unnecessary.

5. In connection with a disciplinary proceeding which had been initiated against a teacher who had alleged that the disciplinary authority was proceeding with a pre-judged mind and the opportunity that was extended to such teacher was a sham one, this Bench upon consideration of a host of precedents had the occasion to hold in its decision in *Indrani Dutta (Chowdhury) v. Vidyasagar University*, reported , (2015) 2 CAL LT 167 (HC), as follows:

"14. *** It is settled law that the real purpose of initiating a disciplinary proceeding is to inquire as to whether the facts relating to delinquency, prima facie ascertained against a charged officer/staff, are correct or not. The purpose cannot be to cause a secret inquiry against him and to form a positive and firm view about his complicity in the alleged misconduct and thereafter to give him an opportunity to dispel the conclusion already drawn against him. Charges framed must be clear and must not suffer from any ambiguity or vagueness. If the charge is not expressed in clear and certain terms, then the officer/staff is likely to be misled and suffer prejudice for the vagueness in the charge-sheet, not knowing the case he has to meet. A charge-sheet has to be read in a common sense way to see that there is a plain statement of an act complained as wrong, so that the officer/staff complained against may raise effective defence. A technically and legalistically strict view would have to be eschewed. Whether or not a disciplinary authority has a closed and pre-judged mind at the inception of disciplinary proceeding cannot really be comprehended only by having a look at the expressions used in the charge-sheet. Expressions used, at times, may be deceptive. A disciplinary proceeding may be ruled to have been initiated with closed and pre-judged mind if from the attending circumstances such a conclusion can reasonably be drawn, even though there is a proliferation of non-injurious expression in the charge-sheet like "alleged acts", "prima facie guilty", "tentative view", etc. and the charge-sheet appears to be perfectly worded; whereas, a proceeding initiated absolutely bona fide, may not be interdicted despite definite expressions in the charge-sheet which might give an impression in the mind of the charged officer/staff that nothing remains to be decided and that the same has been initiated only to complete a formality in law, unless of course surrounding circumstances are such that the Court is convinced that there has been deflection of justice. A charge-sheet has to be construed in a reasonable manner and too much legalism cannot be expected of a domestic enquiry. If apart from the inappropriately worded charge-sheet there is no other incriminating circumstance having the effect of vitiating the proceedings culminating in an order of penalty, it would be prudent exercise of judicial discretion not to interfere."

There is no reason why the proposal to ban dealings and the enclosed statement of charges/misconduct may not be examined, bearing in mind the aforesaid views.

6. Bare perusal of the statement of charges/misconduct extracted supra would reveal sequential narration of events/facts that had occurred/were ascertained. It is obvious that the petitioner was required to react since the events/facts narrated in the statement revealed a doubt regarding existence of the firm M/s. Fessel as well as non-existence of any manufacturing activity at the given address in Dusseldorf. That the firm exists and carries on manufacturing activity are within the special knowledge of the petitioner. It is for it to produce evidence of such existence/carrying on of manufacturing activity. If indeed the petitioner could offer a plausible explanation, the director would be required to make an appropriate order closing the proceedings. However, should the petitioner fail to offer a satisfactory explanation, the director would be free to make an appropriate order as is warranted on facts and in the circumstances, which might include banning of dealings with the petitioner. The contents of paragraph 3 of the statement are really pointed accusations and not drawn conclusions, to which the petitioner has to respond. Question of the memorandum having been issued with a closed mind is, therefore, unacceptable.

Insofar as the decision of the Supreme Court in Oryx Fisheries (P) Ltd. (supra) is concerned, the same is clearly distinguishable on facts. The show cause notice, which did not find favour with the Supreme Court, had been quoted at paragraph 22 of the decision. Referring thereto, the Supreme Court in paragraph 24 of the decision had held that the notice has been issued with a closed mind. The language used in the show cause notice, in the perception of the Supreme Court, ought not to have been used; in the present case, the accusations cannot give rise to a genuine apprehension in the mind of the petitioners that conclusions have been drawn and an opportunity is being given only to dispel the same.

The first contention, thus, stands overruled.

7. Moving on to the second point, this Bench would only observe that whether or not there has been a misconduct on the part of the petitioners ought not to be the subject matter of scrutiny of the Court of writ at this stage and such question must be left open for a decision by the director.

In *Special Director v. Mohd. Ghulam Ghouse*, reported in , (2004) 3 SCC 440, it has been held by the Supreme Court as follows:

"5*. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a

jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

(emphasis added)

It is, therefore, clear that unless a point of jurisdiction is raised, the Court should be slow to interfere with a show cause notice and the noticee must be allowed to place its version before the authority for proper consideration thereof upon due application of mind. The second contention of Mr. Dutta is, therefore, not decided and the petitioner is left free to react to the show cause notice.

8. This takes the Bench to the last contention urged in support of relief claimed by the petitioners, i.e. the director has no power to ban dealings with the first petitioner under the relevant terms and conditions of the contract. As observed in *Mohd. Ghulam Ghouse (supra)*, it is only in an exceptional case where it is shown that the authority has absolutely no power or jurisdiction even to investigate facts that such show cause notice could be interdicted by a Court without even requiring the noticee to respond. The contention that is presently under consideration is not akin to a challenge of the nature which is permitted to be raised on the authority of *Mohd. Ghulam Ghouse (supra)*.

The Government has the right to enter into a contract with any person it chooses. The only caveat is that discrimination while excluding persons from entering into lawful relationships with the Government is not permissible. If there are valid grounds for which the Government may decide not to enter into any contract with any person, it may exclude such person and ban dealings with him/it. Ordinarily banning of business dealings amounts to blacklisting a party whereby it is prevented from enjoying all the privileges and advantages of entering into a lawful relationship with the Government for purposes of gains. Blacklisting could be ordered only on an objective satisfaction that such an action is indeed warranted on facts and in the circumstances. Such satisfaction has to be recorded after granting the party to be affected an opportunity to present its case against the proposed action, for, blacklisting entails civil consequences. An order of blacklisting, if unchallenged or upheld by a Court of law, would provide the Government immunity from the charge of discrimination and such person suffering an order of blacklisting has no fundamental right to insist that the Government must enter into a contract with him/it. The right to ban dealings on justifiable grounds cannot, therefore, be doubted. This is the law laid down in *M/s. Erusian Equipment and Chemicals Ltd. v State of West Bengal*, reported in , AIR 1975 SC 266.

The law laid down therein holds good here. Offering an opportunity to the first petitioner to present its views is in keeping with natural justice. Even if it were conceded that the terms and conditions of the contract do not contemplate banning of dealings, the power of the Government to ban is a concomitant power running with its power to enter into contracts with private persons/parties. There is no substance in the contention of Mr. Dutta that business dealings with the first petitioner can never be banned.

However, whether or not having regard to the terms of contract that was executed by and between the parties and/or any statute that might be applicable in respect of such dealings, the director has the power to ban is altogether a different matter. It is necessarily a question pertaining to his jurisdiction to proceed against the petitioner. These are factual issues and must be agitated first before the director himself by the petitioner and once the director rules on his own jurisdiction and the petitioner is still aggrieved thereby, it may approach the Court. The point of jurisdiction/power raised by Mr. Dutta seems to be premature.

9. In view of the above discussions, no interference is called for on this writ petition. The same stands disposed of granting opportunity to the petitioner to submit its response to the impugned memorandum within a fortnight from date, whereafter action in accordance with law shall follow.

It is made clear that the petitioners shall not be entitled to raise any point in their response for consideration by the director which has been decided by this Bench by this judgment.

Urgent photostat certified copy of this judgment, if applied for, be furnished to the applicant within 4 days from date of putting in requisites therefor.