

(1998) 12 GUJ CK 0006
In the Gujarat High Court

Case No : Letters Patent Appeal No. 179 of 1987 in Special Civil Application No. 4514 of 1986

East India Transformer and Switchgear Pvt. Ltd. APPELLANT
Vs

Gujarat Electricity Board RESPONDENT

Date of Decision : 08-12-1998

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1998) 12 GUJ CK 0006

Hon'ble Judges : C.K. Buch, J;B.C. Patel, J

Bench : Division Bench

Advocate : S.B. Vakil, for the Appellant; Pranav G. Desai, for the Respondent

Final Decision : Allowed

Judgement

1. Unsuccessful petitioner before the learned Single Judge in Special Civil Application No. 4514 of 1986, which was rejected by the learned Single Judge on 2nd April 1987 has preferred this L.P.A.

2. The appellant carries on the business of manufacture and sale of transformers since 1972 and has supplied transformers to various bulk consumers including various State Electricity Boards and Public Works Departments. In response to an advertisement published by the respondent Gujarat Electricity Board ["Board" for brevity] in November 1983 inviting tenders for supply of transformers of the description and specification set out in the advertisement and the terms and conditions contained therein, the appellant submitted its offer. It transpires that on 31.5.1984 the respondent Board placed an order with the appellant for 963 Nos. of 63 KVA. transformers, 137 Nos. of 200 KVA. transformers and 9 Nos. of 500 KVA. transformers on the terms and conditions mentioned in the letter. As per Acceptance of Tender ("AT" for brevity, hereinafter), supplies were to be subject to inspection and approval. Notice was required to be given prior to the despatch of the Stores. The appellant submitted drawings for approval for certain category of transformers, but there was dispute about bushing and clearance of

L.V. Side. The Board called upon to submit fresh drawings which were approved by letter dated 3.10.1984. As contended by the appellant, the respondent Board wrongly rejected the manufactured item which was inspected by the officers of the Board. Ultimately the Board decided to cancel the contract with regard to 200 and 500 kvs. transformers forthwith. On 4.3.1985, the appellant was called upon to arrange for inspection of 50 Nos. of 63 KVA. transformers by 15.3.1985 and pointed out that on default, the Board would invoke clause 20 (b) of the AT.

3. It appears that on 7.7.1984 the appellant addressed a letter to the Chief Engineer of the respondent Board [vide Annex. "I" at page 49] conveying that the appellant was prepared to accept an additional order for 600/700 Nos. Transformers for delivery upto February 1985 provided the Board agrees to make the prices variable as per IEMA price variation formula. It was also pointed out in the said letter that for emergency requirement of 63 KVA. transformers, the same were available from ready stock lying at their Rajpura Works. It was also clarified that these transformers were identical in design to the case quoted except for the fact that no double bushing arrangement was provided.

4. By letter dated 4.3.1985, the appellant was informed that on inspection on 22.2.1985, the Inspector was conveyed that the transformers were not ready for inspection, and false promises were given. It was pointed out that there was acute shortage of transformers and it was difficult to wait on false promises. Attention of the appellant was drawn to the fact that the ordered quantity should have been supplied long back in accordance with the delivery schedule. By the said letter, Annexure III, notice was given to invoke clause 20 (b) of the AT in case the appellant fails to offer atleast 50 pcs. of transformers for inspection by 15.3.1985. The Board pointed out its intention of risk purchase and action in terms of clause 20 (b) of the AT and further that the failure of the appellant in execution of the order will be conveyed to all Electricity Boards and other agencies. It may be noted that there was no whisper about blacklisting. It appears that thereafter there were some meetings and ultimately the respondent Board addressed a letter on 5.6.86 disclosing that the Board has decided to stop dealing with the appellant along with all the Directors for malpractices for a period of five years from 3.5.1986, vide Annexure "A" [page 16]. This letter was the subject matter before the learned Single Judge.

5. Learned Single Judge, after considering the lengthy affidavits and oral submissions held that the petition is without substance and hence rejected at the admission stage. Learned Single Judge considered the decision of a Division Bench in LPA No. 125 of 1982 in Spl. C.A. No. 661/81. Learned Single Judge pointed out that the observations of the Division Bench has been quoted only for the purpose of showing that even if the Respondent was a State, the decision not to invite tenders from the petitioner cannot be said to be arbitrary. Learned Single Judge was of the view that lengthy correspondence which ensued between the parties before any action was taken was sufficient. Learned counsel appearing for the appellant before the learned Single Judge pointed out that the

meeting cannot be considered as a hearing for the purpose of blacklisting the appellant on the ground of mal practice. Mr. Desai, learned advocate appearing for the Board read the affidavit of Mr. A.J. Buch, Executive Engineer of Electricity Board with a view to point out that there was not only failure on the part of the appellant to supply the material in time but when inspection was taken material was not lying in the godown or factory of the appellant. Certain numbers of transformers which were ready were not approved as the transformers were without required bushings. It is further pointed out in detail as to what was the defect in certain transformers. He submitted that considering the various grounds that appellant after the letter at Annexure III dated 4.3.1985 wherein the appellant was conveyed that failure of execution of the order will be conveyed to all Electricity Boards and other agencies and it was sufficient indication that if the appellant failed, his name will be blacklisted.

6. In the matter of purchase of articles by Government or a Public Sector or a Public Corporation, they are ordinarily maintaining a list of standard suppliers, which is known as list of approved suppliers. When the tenders are invited, scrutiny takes place and experience of the person/firm submitting the tender, nature of product, capacity to supply etc. are considered. List of approved suppliers are also prepared taking all these aspects into consideration. However, when a person/firm does not fulfill contractual obligations or fails in executing orders or has been included in the list of approved suppliers on the basis of furnishing false or fabricated documents, names of such persons are delisted or blacklisted. However, before delisting or blacklisting a person/firm, principles of natural justice of affording an opportunity requires to be complied with.

7. Mr. Desai, learned advocate submitted that in the instant case, there is no question of invoking Article 14 of the Constitution inasmuch as the relations between the appellant and the respondent after acceptance of the tender are governed by the Law of Contracts. He drew our attention to a reported decision in the case of the Apex Court in the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, . He emphasised on paragraph 10 of the judgment, which reads as under :-

"At this stage, no doubt, the State Act purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State, or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Art. 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In the sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

7.1 In the aforesaid case of Radhakrishna [supra], the petitions were directed against the orders of the State Government passed in 1974 revising the rate of royalty payable by the petitioners under a lease of 1970 and after that cancelling the lease by a letter dated 15th March 1975. The petitioners' case was that the revision of the rate of royalty payable by the petitioners for the lease to collect and exploit sal seeds from forest area was illegal during the subsistence of the lease, and, thereafter, cancellation of the lease itself was illegal for various reasons. Under clause 4 of the lease, the lessee had to establish a factory within the State of Bihar for processing the sal seeds and extraction of oil there from within a period of five years from the date of agreement, failing which the agreement itself was to terminate. In the writ petitions, questions were raised relating not only to action lying within the sphere regulated by the law of contract but by constitutional provisions relating to the exercise of the executive powers of the State contained in Art. 298 of the Constitution. When the contract was broken, the remedy would be in accordance with the provisions contained in the Indian Contract Act as the parties were bound by the terms of the contract. The Court pointed out that they claimed rights conferred upon them by contract and were bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract. Thus, the principle laid down by the Apex Court is that in the field of contract, parties being governed by the contract, action can be taken in accordance with law but certainly the provisions of Article 14 cannot be invoked. In the instant case the appellant has not filed the writ petition for breach of contract. If that would have been so, Mr. Desai would have been right.

8. In the instant case, the question is: whether opportunity was given to the appellant before blacklisting the appellant on the ground of mal-practice or notice was given to invoke clause 20 (b) of the AT. The relevant clause 20 (b) reads as under :-

20. Termination of Contract. In case the contractor fails to deliver the stores or any consignment thereof, within contracted period of delivery or in case the stores are found not in accordance with prescribed specification and/or the approved sample, the Board shall exercise its discretionary power either :-

(a). xxx xxxx xxxx xxxx xxxx

(b). to purchase elsewhere after giving due notice to the contractor on account and at the risk of the contractor such stores not so delivered or others of similar description without cancelling the contract in respect of the consignment not yet due delivery, or

(c). xxxx xxx xxx xxx xxx

[Neither the AT nor this clause was produced before the learned Single Judge, but before us, the learned advocate produced the same and has relied on the same].

9. The State, while dealing with individuals in transactions, has to bear in mind the principle about the fair and equal treatment. Duty to observe certain aspect of rules of natural justice is a must to comply with to act fairly. The Apex Court, in the case of *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, held in paragraph 19 of the judgment as under :-

"Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein."

9.1 Thus, when authorities exercising the powers think to pass an order without hearing has to bear in mind this caution. The Apex Court in the Aforesaid case *EE & C Ltd. (supra)* pointed in paragraph 20 as under :-

"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 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."

10. So far as Mr. Desai's contention with regard to invoking of clause 20 (b) of the AT is concerned, we would only say that in view of clause 20 (b), which we have reproduced hereinabove, it is clear that the appellant was called upon with regard to termination of contract, risk purchase and conveying to other Boards etc. Therefore, notice was given for this purpose only. Intention of the Board was not disclosed in the letter that the appellant will be blacklisted for a particular period on account of mal-practice. Mr. Vakil invited our attention to the language used in the letter and submitted that the appellant was called upon to show as to why action should not be taken under clause 20 of the AT, and no further. He invited our attention to the decision of the Apex Court in the case of *Joseph Vilangandan Vs. The Executive Engineer, (PwD), Ernakulam and Others*, wherein the Apex Court considered the question of blacklisting and its effect. In that case, notice was issued to the Contractor reading as under :-

"You are requested to show cause within 7 days from the date of this notice why the work may not be arranged otherwise at your risk and loss through other agencies after debarring you as a defaulter and making good the loss that may accrue to the department, from your subsisting contracts in this Division".

10.1 The Apex Court pointed out that the words "debarring you as a defaulter" could be understood as conveying no more than that an action with reference to the contract in question only, was under contemplation. There were no words in the notice which could give a clear intimation to the addressee that it was proposed to debar him from taking any contract, whatever, in future by the Department. The Court held that the Contractor was thus not afforded adequate opportunity to represent against the impugned action.

11. In the instant case, what was conveyed was that clause 20 (b) will be invoked and other Boards will be informed about the failure of execution of the order and no further. From this, it cannot be inferred that the appellant was conveyed information that he was to be blacklisted and that too on the ground of mal-practice. In view of the aforesaid decision of the Apex Court, we are of the view that the order passed by the learned Single Judge deserves to be quashed and set aside. Accordingly, it is quashed and set aside. The appeal stands allowed. As a consequence of this, Annexure "A" to the petition [SCA No. 4514/86] stands quashed. Rule is made absolute in the petition. We clarify that whatever is indicated herein would not be used against any parties in the litigations pending between the parties as this Court has decided only a limited question on affidavits.