

(2015) 11 DEL CK 0125

In the Delhi High Court

Case No : LPA 547/2015 and W.P.(C) 7265 and 7656/2015

Hyundai Rotem Company

APPELLANT

Vs

Delhi Metro Rail Corporation

RESPONDENT

Date of Decision : 23-11-2015

Acts Referred:

Constitution of India, 1950 — Article 136, 227

Citation : (2016) 1 BC 349 : (2015) 224 DLT 715

Hon'ble Judges : G. Rohini, C.J. and Jayant Nath, J.

Bench : Division Bench

Advocate : Parag Tripathi, Sr. Advocate, Arunav Patnaik, Bhabna Das, Yojit Singh and Kanika Singh, Advocates, for the Appellant; Tarun Johri, Advocate, Satish Chandra, GM/L and Puneet Garg, Law Officer, for the Respondent

Final Decision : Disposed Off

Judgement

Jayant Nath, J.—By the present judgment we will dispose of W.P.(C) 7265/2015, W.P. (C) 7656/2015 & LPA 547/2015. All the Petitions and appeal are filed by the appellant company and arise from common facts.

2. The controversy centres around a letter dated 10.08.2015 issued by the respondent blacklisting the appellant company. Brief facts of the case are that on 05.03.2012 the respondent issued a notice inviting bids for the "RS. 10" Project. The bids were opened and the appellant company was declared the lowest bidder. A Letter of Award dated 01.04.2013 was issued by the respondent to the appellant. This was followed by a Contract Agreement dated 24.05.2013. The execution of the contract commenced and is said to be continuing. The appellant has received a part payment of approximately Rs. 880.2 crores out of the total value of the contract of about Rs. 4500 crores.

3. On 05.11.2014 the respondent wrote a letter to the appellant company bringing to its notice about a restraint letter dated 14.12.2011 issued by Airport Authority of India (hereinafter referred to as the "AAI") by which the AAI had

decided not to issue tenders for future works in favour of the appellant company for a period of three years. The appellant was asked for the reasons for non-submission of this information in the appellant's tender bid to the respondent. It is the case of the appellant that the AAI tender pertained to and was dealt with by the Plant & Machinery Division of the company which is a distinct unit from the Rolling Stock Division of the appellant, which is handling the present contract. It is also stated that two officials of the Plant & Machinery Division who were handling the AAI bid never informed the senior management of the appellant about the developments which took place with AAI and which led to letter dated 14.12.2011 being issued by the AAI. The officials concerned did not inform their superiors in the appellant on account of apprehension of adverse consequence. It was also the case of the appellant that these two officers were guilty of breach of duty and hence an inquiry was conducted by the appellant and these two officers were terminated from the appellant company. It is also pointed out that on 14.12.2014 the period of restraint letter under the AAI letter dated 14.12.2011 came to an end after having run its course of 3 years. The appellant company wrote several communications to the respondent including letters dated 14.11.2014 and 17.12.2014 to the above effect.

4. On 16.06.2015, the respondent issued a show cause notice to the appellant company seeking an explanation as to why action as contemplated in the contract should not be taken against the appellant company on account of it having indulged in a "fraudulent practice" of not having disclosed the details of the AAI debarment. Replies were submitted by the appellant on 30.06.2015, 21.07.2015 and 28.07.2015. The appellant also requested for a personal hearing. On 29.07.2015 the respondent issued a letter blacklisting the appellant company for a period of 5 years w.e.f. 15.07.2015.

5. Accordingly, the appellant filed a Writ Petition (C) No. 7265/2015 challenging the letter dated 29.07.2015 and seeking quashing of the same. After having filed the Writ Petition it appears that the appellant received a communication dated 29.07.2015 from the respondent calling it for a "formal personal hearing" on 31.07.2015. However, the W. P. (C) No. 7265/2015 was listed in the Court on the said date, i.e. on 31.07.2015. The learned Single Judge who heard the matter directed the appellant to appear before the respondent on 03.08.2015 for a personal hearing and directed the respondent to pass an order within a week. The said Writ Petition was kept pending and is being disposed off by the present order.

6. On 10.08.2015 after having heard the appellant, the respondent reiterated its earlier order blacklisting the appellant company for a period of 5 years retrospectively from 15.07.2015.

7. The appellant filed a second Writ Petition (C) No. 7656/2015 seeking a writ of mandamus/direction for quashing the impugned letter dated 10.08.2015 issued by the respondent blacklisting the appellant company for a period of 5 years. Other connected relief are also sought. Alongwith the Writ Petition, an application

for interim injunction was also filed being CM No. 14947/2015 to stay the impugned letter dated 10.08.2015.

8. The matter came up before the learned Single Judge on 14.08.2015. Interim stay was not granted by the Court on that date and after having heard the arguments in part, the case was re-notified on 24.08.2015. The said order of the learned Single Judge dated 14.08.2015 was challenged by the appellant in a Letters Patent Appeal being LPA No. 547/2015 seeking urgent interim order to stay the operation of the letter dated 10.08.2015. Other connected reliefs were also sought.

9. In the LPA, it was submitted before this Court by the learned senior counsel for the appellant that the absence of an interim order would cause serious prejudice and harm to the appellant as the financial bids for the tender of Lucknow Metro Rail Project for the supply of metro cars were recently opened and a consortium led by the appellant was declared to be L1. The Contract is stated to be worth Rs. 1070 crores and the absence of an interim order would cause the appellant to lose the said contract. In these circumstances and keeping in view the other factual background of the matter, this Court on 17.08.2015 apart from passing interim orders protecting the appellant noted that the matter required expeditious disposal. The Writ Petition being No. 7656/2015 was directed to be listed alongwith the appeal being LPA No. 547/2015. Later on, W.P. (C) No. 7265/2015 was also directed to be listed before this Court.

10. We have heard the learned counsel for the parties and gone through the record.

11. The learned senior counsel appearing for the appellant has strenuously stressed that the blacklisting order passed by the respondent is a non-speaking order and fails to deal with the submissions made by the appellant in its various replies and in the hearing. He has relied upon the judgments of this Court in Prakash Atlanta JV and Others Vs. National Highways Authority of India and Others, and judgment of the Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, to contend that it was mandatory on the part of the respondent to have passed a speaking order while passing the order blacklisting the appellant company for a period of 5 years. He submits that the impugned letter causes grave prejudice to the appellant as the appellant is likely to be debarred by a large number of firms in India from making a bid in various tenders that may be floated for the next 5 years. As there are serious civil consequences, the respondent was obliged to apply its mind properly to the submissions made by the appellant and pass a reasoned order. He secondly submitted that pursuant to the order passed by the learned Single Judge of this Court dated 31.07.2015 in W.P.(C) 7265/2015, the hearing was given to the appellant by a committee comprising of two Directors and one General Manager of the respondent. On the other hand, the order which is impugned in the present proceeding dated 10.08.2015 was passed by the Executive Director of the respondent. Hence, the functionaries that had given a

hearing to the appellant, have not passed the order blacklisting the appellant showing complete non-application of mind by the respondent in passing the impugned letter dated 10.08.2015. To support this contention that it is not permissible to pass the order by the authority in this matter who did not give the hearing, reliance is placed on the judgment of the Supreme Court in the case of Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, .

12. Learned counsel appearing for the respondent submitted that the Board of Directors of the respondent have delegated the powers to the Managing Director and it is the Managing Director who has taken the decision which has been impugned in the present proceeding.

13. We may have a look at some of the relevant facts of the case. The respondent passed the first order blacklisting the appellant on 29.07.2015. The relevant portion of the same reads as follows:

".....2. Your reply dated 30th June 2015 (reference "1" above) has been reviewed by the competent authority and it is concluded that Hyundai Rotem Company is responsible for concealment of facts which amounts to fraudulent misrepresentation in their submission for Tender "RS 10" having influence on the procurement process against the said tender "RS 10" for the work of "DESIGN, MANUFACTURE, SUPPLY, TESTING, COMMISSIONING AND TRAINING OF 486 No. STANDARD GAUGE CARS ELECTRICAL MULTIPLE UNITS (EMUs)".

3. On review of all the facts and circumstances the competent authority has decided that Hyundai Rotem Company shall be considered ineligible for award of any contract by DMRC either as an individual firm or any other "JV" firm/"JV firm/"JV SPV in any name and style for a period of 5 (five) years starting from 15th July 2015 to 14th July 2020 in terms of provisions of the contract."

14. The above communication dated 29.07.2015 was impugned by the appellant in W.P.(C) 7265/2015. On 31.07.2015, the learned Single Judge passed an order, relevant portion of which reads as follows:

"In view of submission made by learned counsel for the respondent, it is clear that the respondent is affording an opportunity of personal hearing to the petitioner which is scheduled for today.

At this stage, learned senior counsel for the petitioner submits that it would not be possible for the petitioner to appear today. Thus, the petitioner is directed to appear before the respondent on 03.08.2015 at 3.00 p.m. and the respondent will pass an order within one week."

15. Thereafter, a hearing took place on 03.08.2015 by a committee of the respondent. This was followed by the second order of debarring/blacklisting passed by the respondent dated 10.08.2015. The order reads as follows:

"1. In accordance with the Hon"ble Delhi High Court directives, authorized rep. of

Hyundai Rotem Company (HRC) was advised to present themselves for a "formal personal hearing" on 03rd August 2015 at 1500 hrs. in the Meeting Room at Delhi Metro Rail Corporation, 7th Floor, Metro Bhawan, Fire Brigade Lane, Barakhamba Road, New Delhi-110001.

2. On review of all the submissions made by the representatives of HRC, the competent authority has reiterated its decision for making Hyundai Rotem Company (HRC) ineligible for award of any contract by DMRC either as an individual firm or any other " JV firm/" JV SPV in any name and style for a period of 5 (five) years starting from 15th July 2015 to 14th July 2020 in terms of provisions of the contract."

16. A perusal of the said order dated 10.08.2015 passed by the respondent shows that it is bereft of any reasons whatsoever. Despite a detailed hearing having taken place, none of the submissions made by the appellant have even been noted, let alone to dealt with by the respondent while passing the impugned order.

17. Reference may be had to the judgment of the Constitutional Bench of the Supreme Court in S.N. Mukherjee Vs. Union of India, . That was a judgment which was dealing with the challenge to the validity of a general Court Martial by the Army. In that factual background the Supreme Court held as follows:--

"35. The decisions of this Court referred to above indicate that with regard to the requirement to record reasons the approach of this Court is more in line with that of the American Courts. An important consideration which has weighed with the Court for holding that an administrative authority exercising quasi-judicial functions must record the reasons for its decision, is that such a decision is subject to the appellate jurisdiction of this Court under Article 136 of the Constitution as well as the supervisory jurisdiction of the High Courts under Article 227 of the Constitution and that the reasons, if recorded, would enable this Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations which have also weighed with the Court in taking this view are that the requirement of recording reasons would (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision-making. In this regard a distinction has been drawn between ordinary Courts of law and tribunals and authorities exercising judicial functions on the ground that a Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency whereas an executive officer generally looks at things from the standpoint of policy and expediency."

18. The above judgment was applied to a case of blacklisting by a learned Single Judge of this Court A.K. Sikri, J. (as he then was) in the case of Mekaster Trading Corporation Vs. Union of India (UOI) and Others, .

19. Similar view was taken by another Single Judge of this court in Prakash Atlanta JV & Ors. v. National Highways Authority of India & Ors. (supra). The

learned Single Judge relied upon the judgment of the Supreme Court in the case of S.N. Mukherjee v. Union of India (supra) and noted as follows:

"24. Thereafter in para 38, the Supreme Court observed "keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities". The decision in S.N. Mukherjee v. Union of India by the Constitution Bench of the Supreme Court, rendered in the context of court martial proceedings under the Army Act 1950, has been consistently followed by the courts in other contexts as well and in particular in the context of orders blacklisting contractors. The decision of the Supreme Court in Madhya Pradesh Industries Ltd., to which a reference is made by the learned senior counsel for NHA, was considered by the Constitution Bench of the Supreme Court in S.N. Mukherjee which then explained the law as noted hereinbefore. Therefore, the decision of the larger Bench in S.N. Mukherjee, which has been consistently followed by this Court in the decisions noted hereinafter, holds the field."

20. Reference may also be had to a judgement of the Supreme Court in Gorkha Security Services Vs. Govt. of NCT of Delhi, wherein Supreme Court has held:

"17. It is a common case of the parties that the blacklisting has to be preceded by a show cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in Government Tenders which means precluding him from the award of Government contracts...."

21. The order in the present case dated 10.08.2015 is without any reasons. Respondent was obliged to deal with the submissions of the appellant in a broad manner before passing the order debarring the appellant. If after a hearing, a non-speaking order is passed, the person affected by adverse order would be at a loss to know the reason for the adverse order. Even if the decision is right, the person against whom it was made should be told why the decision has been made. The absence of reasons leads to denial of justice. Accordingly, in our view the impugned order dated 10.08.2015 is passed in violation of the principles of natural justice. The same is liable to be quashed.

22. We may also deal with second submission of the learned senior counsel for the appellant. The impugned order dated 10.08.2015 is passed by the Executive Director of the respondent. The order, however states that the "Competent Authority" has reiterated its earlier decision of debarring the appellant company for five years. The name of the competent authority is not stated. As per the counter affidavit filed by the respondent, the competent authority, namely MD of

the respondent had nominated a committee comprising of Director/Rolling Stock (DRS), Director/Finance (DF) and General Manager (Legal) of the respondent who have heard the appellant. It is admitted that the competent authority is the Managing Director of the respondent. Hence, the impugned order dated 10.08.2015 though communicated by another officer has been passed by the Managing Director of the respondent, i.e. the "competent authority". But the hearing has been given by a committee comprising of two Directors and one General Manager. It is obvious that the authority which granted the personal hearing to the appellant is not the authority who has passed the impugned order dated 10.08.2015.

23. Reference in this context may be had to the judgment of the Supreme Court in Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another, . In para 45, the Supreme Court held as follows:

"45. The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules imposes a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure."

24. Hence, the procedure adopted by the respondent, i.e. one authority hearing and another authority passing the order, defeats the very purpose of personal hearing. The appellant lost an opportunity to try and persuade the competent authority to accept its contentions. The competent authority was also deprived of an opportunity to hear the submissions of the appellant and to understand the merits of the contentions of the appellant.

25. The procedure followed by the respondent is wholly contrary to the principle of natural justice. The impugned order dated 10.08.2015 is vitiated on this ground also and is liable to be struck down.

26. In view of the above, we quash the order dated 10.08.2015 passed by the respondent debarring the appellant company for a period of 5 years.

27. Regarding the order dated 29.07.2015 passed by the respondent which is the subject matter of the first Writ Petition being W.P.(C) No. 7265/2015, it is impliedly overruled by the subsequent order dated 10.08.2015 passed by the respondent debarring the appellant for a period of five years. However, from the records placed before us there appears to be no formal order withdrawing the order dated 29.07.2015. We accordingly also quash the order dated 29.07.2015

passed by the respondent.

28. Accordingly, the Writ Petition (C) Nos. 7265/2015 and 7656/2015 and LPA 547/2015 stand disposed of. All the pending applications also stand disposed of.