
(1900) 01 MP CK 0025
In the Madhya Pradesh High Court
Case No : 12641 of 2016

Jaikumar Meena

APPELLANT

Vs

Smt. Radha Meena

RESPONDENT

Date of Decision : 01-01-1900

Acts Referred:

Citation : (1900) 01 MP CK 0025

Hon'ble Judges : S.K. Gangele, Anurag Shrivastava

Bench : Single Bench

Advocate : Anoop Nair, Sanjay Dwivedi

Judgement

1. Petitioner has filed this petition against show- cause notice dated 14/07/2016 Annexure P/13. The petitioner also prayed a relief that the respondents be directed to make payment to the petitioner and also claimed other reliefs.

2. The petitioner is a partnership firm. It is in the business of construction. Water Resources Department, Sagar invited tenders for construction of Earthen Dam and Canal in the year of 2013 under Siraswaha Tank Scheme in Panna district. The petitioner offered its tender, it was approved and an agreement was executed in terms of the tender document. The petitioner completed the work of construction of Dam and possession of Dam was handed over by the petitioner. The payment of the petitioner was not released. Hence, the petitioner wrote a letter on 06/07/2016 requesting the authority to release the amount which was due to the petitioner in pursuance to the construction of dam.

3. There was a heavy rainfall in Panna District, hence some portion of the Dam which was constructed by the petitioner was damaged. On 08/07/2016 Sub-Divisional Officer, Runj Project Canal Sub-Division Water Resources Department Panna lodged a complaint at the police station Brijpur Satna stating that in the intervening night between 06/07/2016 and 07/07/2016 some anti-social persons of the village had broken the boundary wall of Sirsaha Dam and had caused loss to the Government property by damaging the Dam. Copy of the report has been

filed by the petitioner along with the petition as Annexure P/11. On 10/07/2016, the Executive Engineer, Water Resources Department Panna wrote a letter to the petitioner that between 06/07/2016 and 07/07/2016 due to heavy rainfall in Panna District Sirsaha Dam was damaged, hence, the petitioner has to repair the damage immediately. On 14/07/2016, the Chief Engineer Sagar issued a show-cause notice dated 14/07/2016 Annexure P/13 to the petitioner mentioning the fact that the petitioner was awarded contract of construction of Dam named as Earthen Dam and Canal under Siraswaha Tank Scheme in Panna District. Dam was damaged due to heavy rainfall in the intervening night of 06/07/2016 and 07/07/2016, because the work of the petitioner was inferior quality and it was not in accordance with the norms fixed by the contract. The petitioner was directed to file reply of show-cause through the office of Executive Engineer and if the reply of the petitioner be not found satisfactory, the petitioner be blacklisted.

4. The respondents in the return raised a preliminary objection that the petition filed by the petitioner is not maintainable because the petition has been filed against a show-cause notice. It is further pleaded in the return that there were excess rains in the area, Dam in question got damaged due to poor quality of construction in accordance with agreement executed at the time of award of contract between the petitioner and State. The petitioner is under obligation to repair the damage if it is caused during contract period or within 12 months, after issuance of completion certificate. The completion certificate has not been issued in favour of the petitioner. The construction of Dam is completed in the year 2016. The petitioner was under obligation to repair the damage. Vide letter dated 10/07/2016, the petitioner was asked by the Executive Engineer to repair the damage caused to the Dam. The petitioner in reply to the letter agreed that he would repair the dam, however, he sought assurance from the department that against the petitioner no coercive steps shall be taken by the department.

5. It is further pleaded in the return that against the Sub-Divisional Officer disciplinary inquiry was initiated and he was placed under suspension. In regard to payment due to the petitioner, the respondents pleaded in the return that they have never disputed in regard to non- payment of running bills, however, amount could not be paid because funds were not available and the payment shall be made to the petitioner as per his entitlement when funds would be made available, hence, non-payment of some amount of running bills is not in dispute.

6. The question for consideration before this Court is that whether show-cause notice issued to the petitioner is proper or not.

7. In regard to maintainability of the petition the point raised by the counsel for the State, the Apex Court in the case of Siemens Ltd. Vs. State of Maharashtra and others (2006) 12 SCC 33 has held that under certain circumstances, the writ petition against show-cause notice is maintainable. The Apex Court has held as under:-

"09 Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including *State of Uttar Pradesh v. Brahm Datt Sharma and Anr.* AIR 1987 SC 943, *Special Director and Another v. Mohd. Ghulam Ghouse and Another*, (2004) 3 SCC 440 and *Union of India and Another v. Kunisetty Satyanarayana*, 2006 (12) SCALE 262], but the question herein has to be considered from a different angle, viz, when a notice is issued with pre-meditation, a writ petition would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose [See *K.I. Shephard and Others v. Union of India and Others* (1987) 4 SCC 431 : AIR 1988 SC 686]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause.

10. The said principle has been followed by this Court in *V.C. Banaras Hindu University and Ors. v. Shrikant* [2006 (6) SCALE 66], stating:

"The Vice Chancellor appears to have made up his mind to impose the punishment of dismissal on the Respondent herein. A post decisional hearing given by the High Court was illusory in this case. In *K.I. Shephard & Ors. etc. etc. v. Union of India & Ors.* [AIR 1988 SC 686], this Court held : "It is common experience that once a decision has been taken, there is tendency to uphold it and a representation may not really yield any fruitful purpose."

The Principle of law as laid down by the Hon"ble Supreme Court in regard to maintainability of writ petition against show-cause notice is that under certain circumstances writ petition is maintainable against the show-cause notice if it is issued without any authority or with predetermined mind or it is non speaking, hence, the objection raised by the counsel for the State in regard to maintainability of the petition is hereby rejected.

8. Blacklisting of a contractor has serious consequences because the person or party is debarred from entering into contracts with the department or State agencies in future. The Apex Court in the case of *M/s. Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and another* (1975) 1 SCC 70 has held as under:-

"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."

Recently, the Apex Court in the case of *Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others* (2014) 14 SCC 731 has held as under:-

"18. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with *Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Anr.* (1975) 1 SCC 70 where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed:

"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."

Subsequent decisions of this Court in *M/s Southern Painters v. Fertilizers & Chemicals Travancore Ltd. and Anr.* AIR 1994 SC 1277; *Patel Engineering Ltd. Union of India* (2012) 11 SCC 257; *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors.* (2006) 11 SCC 548; *Joseph Vilangandan v. The Executive Engineer, (PWD) Ernakulam & Ors.* (1978) 3 SCC 36 among others have followed the ratio of that decision and applied the principle of *audi alteram partem* to the process that may eventually culminate in the blacklisting of a contractor."

In the decision the Hon"ble Apex Court has held that the principle of *audi alteram partem* in the process of blacklisting has to be applied.

9. The principle of *audi alteram partem* is that notice has to be given to a party for intimating it to the proposed act. The purpose of giving notice is that the aggrieved person or party can put its case before the authority before taking any decision. In the present case, it is mentioned in the notice Annexure P/13 dated 14/07/2016 issued to the petitioner that the petitioner was awarded a contract of construction of a Dam and Canal. The Dam was damaged due to rain on 06/07/2016 and 07/07/2016. The construction carried out by the petitioner was inferior quality and it was not in accordance with approved criteria, hence, the petitioner shall submit his explanation that why he should not be blacklisted. Except these two lines no other facts mentioned in the notice. It is also admitted in the notice that the Dam was damaged when there was heavy rainfall in Panna district. The respondents themselves admitted in the return that there was heavy rainfall in the area. In such circumstances whether the averments mentioned in the notice are sufficient and fulfill the requirements of notice in accordance with the provision of *audi alteram partem* or not.

10. The Apex Court in the case of *Commissioner of Sales Tax and others Vs. M/s. Subhash and Company* AIR 2003 SC 1628 has considered the term notice as under:-

"14. Rule 63 deals with methods of serving notice or summons or order under the Act or any rules made thereunder.

15. The term "notice" is originated from the Latin word "notifia" which means "a being known" or a knowing is wide enough in legal circle to include a plaint filed in a suit. "Notice" has been defined in various Judicial Dictionaries and Dictionaries as follows :

The Judicial Dictionary, Words and Phrases Judicially Interpreted, Second Edn. By F. Stroud, (p.1299) : "Notice is a direct and definite statement of a thing, as distinguished from supplying materials from which the existence of such thing may be inferred."

Webster's Universal College Dictionary, 1997 Edn. (p.543) :

"Information, warning or announcement of something impending; notification; to give notice of one's intentions; a written or printed statement conveying such information or warning; as for renting or employment, that the agreement will terminate on a specified date. "She gave her employer two weeks" notice."

Oxford Concise Dictionary :

"an intimation; intelligence, warning" and has the meaning in expression like "give notice", "have notice" or "formal intimation of something or instruction to do something" and has the expression like "notice to quit", "till further notice". Chamber's 20th Century Dictionary 1993 (p.1154) : "intimation; announcement; information; warning; a writing; placard, etc; conveying an intimation or warning; time allowed for preparation, etc."

Chamber's Dictionary vide Allied Chambers (India) Ltd; Reprint 1994, 1995 (p. 1154) :

"intimation; announcement; a formal announcement made by one of the parties to a contract of his or her intention to terminate that contract; information, especially about a future event; warning; a writing; placard, board, etc. conveying an intimation or warning; time allowed for preparation; cognizance; observation; heed; mention; a dramatic or artistic review; civility or respectful treatment; a notion, etc." Law Lexicon Dictionary A Legal Dictionary of Legal Terms and Phrases Judicially Defined. Fourth Edition, Vol.II, 1989(P.226):

"A person is said to have notice" of a fact, when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it." The Law Lexicon Dictionary, Second Edition, 1997 (p. 1322) : (1) Intimation; a writing; placard, board, etc. conveying an intimation or warning (section 154, IPC and Article 61(2) (a), Constitution of India); (2) Knowledge or cognizance (Section 56, Indian Evidence Act). "Notice", in its legal sense, may be defined as information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent to knowledge in its legal consequences. Dictionary further states:

Co.Lit 309 Tomlin's Law Dictionary Notice is making something known, of what a man was or might be ignorant of before. And it produces diverse effects, for, by it, the party who gives the same shall have same benefit, which otherwise he should not have had; the party to whom the notice is given is made subject to some action or charge, that otherwise he had not been liable to; and his estate in danger of prejudice.

"Notice is a direct and definite statement of a thing as distinguished from supplying materials from which the existence of such thing may be inferred." (Per Parke, B. Burgh v Lege 5 M and W 420: 8 LJ, Ex.258) The Dictionary gives some other definitions of "Notice" as:

- The legal instrumentality by which knowledge is conveyed, or by which one is charged with knowledge.
- The term "notice" in its full legal sense embraces a knowledge of circumstances that ought to induce suspicion or belief, as well as direct information of that fact.
- In its popular sense, "notice" is equivalent to information intelligence, or knowledge."

The Dictionary meaning of the notice quoted by the Hon"ble Apex Court postulates that notice apprises the parties determinative the case he has to meet out. An order of blacklisting has serious consequences to a party, hence, in our opinion, it was necessary for the authority to mention detailed facts and the grounds on which the petitioner is going to be blacklisted so, the petitioner could submit proper explanation. In the present case, the facts have not been mentioned in the notice. It is non-speaking one. The petitioner was not able to putforth his reply. Hence, the principle of audi alteram partem is violated.

11. In regard to payment of amount to the petitioner which is due to him. The respondents admitted in the return that the amount of running bills shall be paid to the petitioner. The relevant pleadings in the return are as under:-

"8. That, the petitioner has submitted the running bills for the construction work which has done, the respondents made the payment to the petitioner but some portion of the running bill is outstanding and not paid to the petitioner due to non-availability of allotment. The respondents never disputed regarding non-payment of running bill but it could not be paid to the petitioner due to non-availability of funds. It is once again assured that withheld payment would be made to the petitioner as per his entitlement as soon as the fund is made available. Therefore, non-payment of some part of running bill is not in dispute and is not a cause for issuing impugned show-cause notice to the petitioner and the petitioner is unnecessarily clubbing two distinct issues, which infact have no nexus."

12. In view of the aforesaid pleadings, in our opinion, it is not necessary for this Court to adjudicate the question of granting relief to the petitioner for payment of amount. Hence, the petition is disposed of with the following directions:-

I. The impugned order of blacklisting Annexure P/13 dated 14/07/2016 is hereby quashed. The respondents are at liberty to issue fresh notice in accordance with law as per observations made by this court in the order if it is necessary. It is classified that this court has not adjudicated the merits of the case.

II. In regard to payment to the petitioner, the respondents shall make payment as per their admission in the return which is due to the petitioner within a period of three months from the date of receipt of the copy of the order. No order as to costs.