

(2009) 08 MAD CK 0305

In the Madras High Court

Case No : Writ Petition (MD) . No. 5790 of 2009 and M.P. (MD) . No. 1 of 2009

K. Jeyakumar Thanasing

APPELLANT

Vs

The Superintending Engineer (H) NABARD and The
Superintending Engineer (Highways)

RESPONDENT

Date of Decision : 24-08-2009

Acts Referred:

Citation : (2009) 08 MAD CK 0305

Hon'ble Judges : T. Sivagnanam, J

Bench : Single Bench

Advocate : M. Vallinayagam, for the Appellant; Pala. Ramasamy, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

T. Sivagnanam, J.—The petitioner, a registered class I contractor under the Highways Department, Tirunelveli, has filed the above writ petition to quash the proceedings of the first respondent dated 19.06.2009. The impugned proceedings has been passed by the first respondent removing the name of the petitioner from the list of registered contractors at Tirunelveli (Highways NABARD and Rural Road Circle).

2. The case of the petitioner is that a show cause notice was issued on 25.08.2008 calling upon the petitioner to explain as to why action should not be taken against him to remove his name from the approved list of contractors of the registration in Tirunelveli (Highways NABARD and Rural Road Circle) as per the Government Order and as per Clause 5.1 (i) and (ii) of the Standardized Code of Contract. The petitioner was granted 30 days time to submit his explanation. The allegation in the show cause notice is that appropriate investigation authority of the Government investigated into certain allegation of irregularities against the petitioner in executing 41 works and they have identified that most of the works are substandard and poor quality and the Government examined the report of such investigating authority and decided to

take criminal action against the petitioner and accordingly, the first respondent has recommended to take action in terms of Clause 5.1(i) and (ii) of Standardized Code of Contract.

3. In response to such show cause notice, the petitioner submitted his explanation, a copy of which has been filed in the typed set of papers. In such explanation, the petitioner denied the allegations made regarding the quality of work done by him and he submitted that he has not received any notice from any of the authorities who inspected the contract or engineers who are vested with powers to manage and administer the contract in question.

4. The petitioner further submitted that proof is required to establish that the contractor has on more than one occasion failed to execute the contract or has executed it unsatisfactorily or proved to be responsible for constructional defects. The petitioner would further contend that the question of invoking Clause 5.1(i) does not arise. The petitioner further pointed out that the order itself indicates full details are yet to be received from the concerned authorities and that any decision should be passed on subjective satisfaction after applying the mind to all the related materials and not on insufficient information.

5. After the explanation was submitted by the petitioner, the first respondent by order dated 20.10.2008 temporarily suspended his registration. The petitioner filed W.P.(MD)No.10752 of 2008 challenging the order of temporary suspension dated 20.10.2008. In the affidavit filed in the said writ petition, the petitioner has specifically raised the issue that no details/documents are available with the fourth respondent to consider anything against the petitioner and the petitioner contended that it is a colourable exercise of power. This Court by order dated 22.04.2009 disposed of the writ petition issuing certain directions. The relevant portion of the order is reproduced here under;

9. The documents produced along with the writ petition shows that the third respondent has already initiated action against the petitioner to remove his name from the approved list of contractors. The said proceedings commenced as per show cause notice dated 25.08.2008. As per the said proceedings, the petitioner was directed to submit his objections within 30 days from the date of receipt of show cause notice. There were subsequent correspondence between the petitioner and the respondents with respect to the black listing proceedings. Even though initially the respondents failed to provide the copies of documents to the petitioner, ultimately, the documents relied on by them to substantiate the charges against the petitioner were provided. The enquiry is also started to be in full swing. The impugned order was issued only as a temporary measure so as to forbear the petitioner from taking part in the tender to be floated during the pendency of the black listing proceedings.

10. Since the enquiry with respect to the black listing proceedings is stated to be in the final stage, I am of the view that it is not necessary to examine the legality and correctness of the impugned order passed by the fourth respondent.

Even though the petitioner has alleged mala fides against the legislator at whose instance, proceedings were commenced, I am of the view that there is no need to examine those issues in the present writ petition, which would prejudice the case of the parties before the competent authority. In such circumstances, I am of the opinion that the third respondent has to consider and dispose of the matter as expeditiously as possible.

11. Accordingly, the third respondent is directed to pass final orders in the black listing proceedings initiated against the petitioner as per the show cause notice dated 25.08.2008, on merits and as per law, as expeditiously as possible and in any case within six weeks from the date of receipt of a copy of this order.

6. The learned Counsel for the petitioner would submit that this Court was only concerned with the order of temporary suspension in the earlier writ petition and since it was submitted already the procedures for black listing was initiated, the respondents are permitted to proceed with the matter. However, the respondents have misinterpreted the order passed by this Court as if an order directing that the petitioner should be black listed.

7. The learned Counsel for the petitioner would submit that without affording any opportunity to the petitioner and without furnishing the necessary documents and without assigning any reason, the impugned order has been passed. The impugned order being a non speaking order is liable to be set aside on the ground of violation of principles of natural justice. Based on the above grounds, the learned Counsel appearing for the petitioner prayed that the writ petition should be allowed.

8. The first respondent had filed the counter affidavit inter alia contended that the petitioner's plea that black listing proceedings is initiated by the first respondent is only imaginary and concocted for the purpose of this writ petition, since black listing has not so far been done. The black listing proceedings have to be considered by the Government alone. Though as per Code, the reason for removal from the approved list is not required to be intimated to the contractor, the contractor himself is well aware of all the facts and he has not come to the Court with clean hands.

9. The learned Special Government Pleader appearing on behalf of the respondents relied upon Clauses 5.2 and 5.3 of the Standardized Code of Contract and contended that they have got sufficient powers to recommend black listing. It was further submitted that proceedings have only been communicated recommending to the Government for black listing.

10. The learned Special Government Pleader would rely upon a decision of the Allahabad high Court reported in Chandra Prakash Jain and Others Vs. Union of India (UOI) and Others, and contended that there was no statutory obligations for the respondents to record reasons while passing the impugned order and mere absence of reasons does not always vitiate the order. Therefore, the learned Special Government Pleader prayed for dismissal of the writ petition.

11. I have carefully considered the rival submission made by the learned Counsel on either side and also perused the materials available on record.

12. The short question which arises for consideration is as to whether the order passed by the respondents, which is impugned in the writ petition, is in violation of the principles of natural justice.

13. It is an admitted fact that black listing of a contractor is a serious matter as it involved civil consequences and the contractor is shut out from being able to participate in any of the bids or auction. Therefore, the Honourable Supreme Court and this Court have consistently held that when a department or an agency decides to black list a contractor, it is incumbent that the principles of natural justice should scrupulously followed.

14. The said proposition has been emphasised by the Honourable Supreme Court in the following decision;

(i) In *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, the Honourable Supreme Court has held in paragraph 20 as follows;

Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purpose 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.

(ii) In *Joseph Vilangandan Vs. The Executive Engineer, (PwD), Ernakulam and Others*, while following the judgment in *Erusian Equipment* case (cited supra), has stated that while conceding that the State can enter into contract with any person it chooses and no person has a fundamental right to insist that the Government must enter into a contract with him, held that the fact that a disability is created by the order of black listing 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 black-list.

(iii) In *Raghunath Thakur Vs. State of Bihar and Others*, while considering a case where the person granted a right to vend liquor was placed in a black listing in respect of future contracts, the Honourable Supreme Court has observed that even if the rules do not express so, it is an elementary principle of nature justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order in so far as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law.

15. The decisions in the case of *Raghunath Thakur* and *Erusian Equipment* as referred supra have been followed by the Honourable Supreme Court in *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors.* reported in (2006) 2 SCC

548 and reiterated the principles laid down.

16. Therefore in view of the ratio laid down by the Honourable Supreme Court as stated above an order of black listing has civil consequences for future business of person concerned and the person affected by an order has a right of being heard and making a representation against any order even though the Rules do not provide specifically.

17. The learned Special Government Pleader would submit that the petitioner had been afforded with an opportunity and a show cause notice was issued, reply was received and thereafter, an order has been passed. Therefore, the learned Special Government Pleader submits that there has been substantial compliance of principles of natural justice and the impugned order is perfectly legal and valid.

18. On the other hand, the learned Counsel appearing for the petitioner would submit that the impugned order is devoid of reasons and the learned Counsel for the petitioner relied upon a Division Bench judgment of the Allahabad High Court which has relied on various judgments and held that reasons must follow when an order of black listing is passed.

19. It is relevant to note that the Honourable Supreme Court in a decision reported in *S.N. Mukherjee Vs. Union of India*, observed that in view of the expanding horizon of the principles natural justice, the requirement to record reasons can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework where under jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi judicial functions the legislator, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement.

20. The respondents being an administering authority is bound to act fairly and reasonable and all the actions of the respondents have to satisfy the touchstone of reasonableness. The requirement to record reason is incumbent and Courts have consistently held that an order devoid of reasons is in violation of principles of natural justice and liable to be set aside. Even in the case referred to by the learned Special Government Pleader, the learned Single Judge of the Allahabad High Court held that the case has to be adjudicated on a case to case basis depending on the facts.

21. I have carefully gone through the impugned order and except the averment that as per law orders are issued for removing the petitioner from the list of registered contractors in Tirunelveli, no other reasons have been given as to on what basis such an order came to be passed. The contentions raised by the petitioner has neither been considered nor dealt with. A submission was made

before this Court in the earlier writ petition stating that enquiry is going in full swing, what then is the result of such enquiry. The first respondent being a administrative authority has to state as to the contentions raised by the petitioner are not tenable, as to how he is not satisfied with the issues raised and under what basis he proposed to pass such an order.

22. Even under the provisions of the Standardized Code of Contract, the respondents are bound to record reasons. A perusal of Clause 4.4. which deals with power of suspension also states that the fact of the reasons for suspension of business shall not be communicated to the contractor concerned, but in every case, the competent authority shall record the reasons for suspension of business and also furnish the Head of Department concerned with a report, indicating the reasons for the suspension of business. Clause 5.3 states that the Head of Department concerned shall communicate a copy of orders of removal, together with the reasons thereto to the other Government Department responsible for major construction works, for information and action, if necessary a copy should also be endorsed to the Government in the Public Works and Public (S.C) Departments for information. Clause (5.2) states that the decision regarding removal from registration/suspension of business/removal from the approved list taken after the issue of a show cause Notice and consideration of representation, if any in reply thereto should be communicated to the firm concerned.

23. Appendix-I to the Standardized Code of Contract prescribes the guidelines about the contents and procedures to be adopted for action to be taken under Clause 5.2 wherein in Clause (e) it has been stated that the show cause notice must enumerate instances of bad workmanship and other specific allegations for action proposed and the authority should consider the replies and take decisions in consultation with the authorities mentioned in the code. Therefore, consideration of such replies does not mean consideration for their purpose of their files alone. Consideration should be reflected in the order passed. The order should speak for itself.

24. It is a settled legal proposition as held by the Honourable Supreme Court commencing from Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, that the Department cannot improve upon the impugned order by substituting reasons in the counter affidavit.

25. The Honourable Supreme Court in S.N. Mukherjee Vs. Union of India, has observed that Reason is the heartbeat of every conclusion, and without the same it becomes lifeless.

26. For the above reasons, the impugned order is set aside and the writ petition is allowed. However, it is left open for the respondents to afford opportunity to the petitioner by furnishing all the documents sought for and thereafter, conduct an enquiry and pass a speaking order. Consequently, the connected miscellaneous petition is closed. No costs.