
(2017) 09 BOM CK 0151
In the Bombay High Court
Case No : 6283 of 2017

Mahimtura Consultants Pvt. Ltd.

APPELLANT

Vs

Pimpri-Chinchwad New Town Development Authority, & Ors.

RESPONDENT

Date of Decision : 08-09-2017

Acts Referred:

Constitution of India, Article 12 -
Application of Acts of Parliament and of the Legislature of the State of Assam to
autonomous districts and autonomous regions in the State of Assam

Citation : (2017) 09 BOM CK 0151

Hon'ble Judges : B. R. Gavai, M.S. Karnik

Bench : DIVISON BENCH

Advocate : Ravi Kadam, Birendra Saraf, Brian A. D"lema, Aseem Naphade, Nitin P. Deshpande

Judgement

1. Rule. Rule is made returnable forthwith. Respondents waive service. Heard by consent of parties.

2. The present Petition arises out of unusual facts. Petitioner - Company is engaged in the business of Consultant Engineers and Project Management Consultants. Respondent Nos. 1 to 3 had invited tenders for appointing Project Management Consultant ("PMC") for the project of constructing a building for the proposed Wakad Police Station at Sector - 40 Wakad ("the said project"). In pursuance to the said tender, the Petitioner had submitted bid and finally its bid came to be accepted and the Petitioner was awarded work of PMC. On completion of the said work, the Petitioner raised its memo of bill for an amount of Rs 5,57,456/. However, it appears that, in the meantime, the Petitioner had terminated one of its employees viz. Mr. Uttam Chavan and he has addressed various complaints to various authorities, including Respondent No.1. A communication was addressed by Respondent No.1 on 27/05/2016 seeking certain explanation from the Petitioner on the basis of the complaint made by Mr. Uttam Chavan. The Petitioner, on 05/07/2016, responded to the said communication informing therein that the Petitioner was blacklisted on account

of the misconduct of the said Mr. Uttam Chavan, who was at the relevant time, an employee of the Petitioner. The Petitioner further informed that the MSRDC had subsequently revoked the blacklisting by its order dated 29/06/2016. An information with regard to the same being sought by Respondent No.1, MSRDC also informed Respondent No.1 regarding the said fact vide communication dated 13/07/2016. On 05/12/2016, the Petitioner had addressed a letter to Respondent No.2, requesting release of 85% of the payment as per the memo of bill raised and also requesting to retain the balance 15% until the issue was resolved.

3. It appears that on 09/12/2016, Respondent No.1 addressed a letter to one Professor B.G. Birajdar of College of Engineering, Pune ("COEP"), stating therein that the cost of project which was initially estimated at Rs 2,14,70,990/was subsequently revised to Rs 2,70,65,622/and, as such, an opinion of the said Mr. Birajdar was sought with regard to increase in the cost of project.

4. Vide communication dated 27/01/2017, the Petitioner was informed that the investigation was directed against him and pending investigation, the Petitioner was debarred from participating in any of the tenders issued by Respondent No.1. The Petitioner addressed a communication on 30/01/2017 informing Respondent No.1 that the complaint was made by one disgruntle employee and therefore the communication dated 27/01/2017, which amounted to blacklisting, should be forthwith withdrawn. The Petitioner addressed another communication dated 09/02/2017 by which the Petitioner informed Respondent No.1 that the material on the basis of which the action was taken against the Petitioner was not supplied to the Petitioner. It appears that, in the meantime, COEP has submitted its Report to Respondent No.1 on 23/02/2017. On 28/02/2017, Respondent No.1 addressed a communication to the Petitioner, stating therein that the Petitioner had not disclosed the fact regarding it being blacklisted by MSRDC. Vide said letter dated 28/02/2017, the Petitioner was debarred for a period of three years.

5. The Petitioner, thereafter, vide communication dated 01/03/2017, gave reasons as to why cost of the project was increased. The Petitioner, vide another communication dated 03/03/2017, requested Respondent No.1 for personal hearing. On 09/03/2017, personal hearing was given to the Petitioner, on which date, for the first time, Report of COEP dated 23/02/2017 was brought to the notice of the Petitioner. On 18/03/2017, the Petitioner gave a detailed reply to counter the Report submitted by COEP. Vide another communication dated 18/04/2017, the Petitioner was again blacklisted.

6. Vide subsequent communication dated 24/04/2017, Respondent No.1 issued show cause notice to the Petitioner, calling upon the Petitioner to show cause as to why a sum of Rs. 11,61,159/should not be recovered from the Petitioner. The Petitioner, therefore, approached this Court by way of present Petition on 03/05/2017. On 17/05/2017, this Court passed an order, restraining Respondents from taking any coercive steps against the Petitioner in pursuance of the show cause notice dated 24/04/2017. The Petitioner also replied on

01/06/2017 to the show cause notice dated 24/4/2017 issued by Respondent No.1.

7. In the meantime, the Petitioner had also approached Veermata Jijabai Technological Institute ("VJTI"), requesting them to provide a peer review of the work done by the Petitioner as Structural Consultant and Contractor in respect of the said project. VJTI submitted its Report on 05/06/2017, a copy of which is supplied to Respondent No.1 on 07/06/2017.

8. Thereafter, the matter was adjourned from time to time. Since no reply was filed on behalf of Respondents, this Court, vide Order dated 07/08/2017 had issued a show cause notice to Respondent No.2, calling upon him to remain present in this Court and show cause as to why action should not be taken against him for not filing the reply though notice was accepted as early as on 17/05/2017. Yesterday, when the matter was called out, Respondent No.2 was personally present in Court and an affidavit was filed and also an unconditional apology was tendered. We accepted the apology and kept the matter for hearing on merits today inasmuch as Mr. Deshpande, learned Counsel for Respondent Nos. 1 and 2 was not ready to further proceed with the matter yesterday.

9. Mr. Kadam, learned Senior Counsel appearing on behalf of the Petitioner, submits that the procedure adopted by the Respondents is totally arbitrary. He submits that principles of natural justice and fairplay have been totally given a go-by. He submits that the Petitioner is a reputed Structural Consultant and one of the best, if not the best one in the country. He submitted that it is totally improbable that, for a small amount, the Petitioner, who employs around 300 engineers, would indulge into any illegal activity. He submits that even perusal of the allegations would reveal that the action of blacklisting was totally unwarranted. He submits that even if the Report of COEP is accepted, it will not make out a case for blacklisting. He submits that, in any case, the Report of VJTI, which is one of the best Institutes in the country, would show that no error was committed by the Petitioner.

10. Mr. Deshpande, learned Counsel for Respondent Nos, 1 and 2, however, submits that the issue is still pending consideration before the authorities. He submits that the Report of VJTI has been sent to COEP for getting its comments. He submits that since the matter is still under consideration, an interference by this Court, at this stage, would not be warranted.

11. As already discussed hereinabove, the present case not only arises out of peculiar facts but also the acts, which, in our view, are not permissible in law. In the present case, there is not one but three orders/letters, first one dated 27/01/2017, second one dated 28/02/2017 and third one dated 18/04/2017, which were issued purportedly after following the principles of natural justice inasmuch as hearing was given on 09/03/2017. The matter does not rest there. The Petitioner also faces fourth show cause notice, calling upon it to show cause as to why the amount of Rs 11,61,159/should not be recovered from it.

12. By now, it is a settled principle of law that an order of blacklisting has drastic consequences. It has a potentiality to throw the businessman out of business. It has therefore been held that an order of blacklisting should not be lightly passed. It has been held by Their Lordships of the Apex Court that while taking recourse to blacklisting, principles of natural justice and fairplay should be adhered to. In any case, every action of the State or instrumentality of the State within the meaning of Article 12 of the Constitution, is required to be in consonance with the principles of natural justice, fairplay, good conscience and equity.

13. Normally, this Court would not be going into a question as to whether, on facts, the order passed by the authority was warranted or not. As has been held by Their Lordships of the Apex Court in *Tata Cellular vs. Union of India*, (1994) 6 SCC 651, while examining the correctness of the administrative action, this Court is not concerned with ultimate decision but decision making process. However, in the present case, we find that reference to the factual background would also be necessary.

14. Undisputedly, the project, initially, was that of construction of a four storied building for Police Station. However, during pendency of the Project itself, Respondent No.1 decided that in order to enable the entire FSI to be exhausted in future, RCC design should be designed in such a manner that the building would be in a position to bear load of ground plus six floors. The communication of Respondent No.1 addressed to COEP dated 09/12/2016 would itself reveal that, on the site in question, there was a brick furnace as well as an artificial filling. It would also further reveal that from the said land, initially, pipe line of 600 milimetre diameter was going through, for supplying water to PimpriChinchwad Municipal Corporation. Apart from that, since there was a level difference on the land, it was necessary to construct a retaining wall. It further reveals that in the original estimate, the RCC design was estimated on the basis of traditional methods and not on the basis of detailed analysis and, as such, there has been increase in the cost of steel and concreting. However, it will have to be noted that the Report was called from COEP by Respondent No.1 on 09/12/2016. Even prior to the Report of COEP coming into the hands of Respondent No.1, they have issued first blacklisting order dated 27/01/2017. The only reason given in the said order is that one Mr. Uttam Chavan had made a complaint before the authority. It further states that there is a direction by the State Government to inquire into the matter and till the inquiry is complete, Respondent No.1 has taken decision to debar the Petitioner from participating in any tender process.

15. Though the Petitioner had made representation immediately by addressing letters dated 30/01/2017 and 09/02/2017, the second blacklisting order/letter is issued on 28/2/2017. In the order, Petitioner is informed that revised estimate of the work undertaken of the said project was examined from COEP and COEP had found three irregularities viz (i) while considering measurement of excavation, instead of taking individual footing size for excavation, the whole box type

excavation was taken into consideration, (ii) additional work was undertaken without prior permission and (iii) RCC design provided for additional steel. By the said order dated 28/2/2017, Petitioner has been blacklisted for three years. It will be relevant to note that the reasoning given by Respondent No.1 in the order/letter dated 28/2/2017 is contrary to its own communication dated 09/12/2016. Perusal of the communication dated 09/12/2016 would reveal that all this was done at the instance of Respondent No.1 itself and for the same, Petitioner could not have been blamed.

16. Thereafter, on the basis of various representations made by the Petitioner, Petitioner was given hearing on 09/03/2017 on which date, for the first, time, Report of COEP dated 23/02/2017 was given to the Petitioner. Petitioner has also given technical details as to how the Report of COEP was not correct. However, without taking all that into consideration, the third order/letter of blacklisting the Petitioner was issued on 18/4/2017. In the said order/letter, for the first time, Petitioner has been informed that when it had submitted tender, it was already blacklisted and since the said information was not given by the Petitioner, Petitioner is blacklisted for three years. It is to be noted that before the said three orders/letters of blacklisting the Petitioner were issued by Respondent No.1, letter of MSRDC dated 13/7/2016 was very much available with Respondent No.1 informing Respondent No.1 that blacklisting order passed in the case of the Petitioner by MSRDC was withdrawn. Learned Counsel for Respondent Nos. 1 and 2 has not been in a position to point out any requirement in the tender notice which requires the Petitioner to give information with regard to blacklisting order being passed by any other authorities. In any case, when all the aforesaid three orders/letters were issued by Respondent No.1, the order of blacklisting of the Petitioner by MSRDC was no more in existence.

17. Even from the Report of COEP, which is countered by the Report of VJTI, it would not reveal that the Petitioner has indulged into any gross or severe malpractices which would invite drastic order like blacklisting. Assuming for a moment that some error has been committed by the Petitioner, the same would, at the most, could be termed as an error of judgment in technical matters but not a malafide act to enrich itself at the cost of public exchequer. The act, at the most, that could be attributed to the Petitioner, is of providing more steel in RCC, taking into consideration that the design of building has changed from ground plus four floors to provide for further expansion of ground plus six floors. Undisputedly, with the rise in number of floors, the requirement of steel is increased. Perusal of document dated 09/12/2016 i.e. letter addressed by Respondent No.1 itself, would reveal that on account of situation at site like brickfurnacing, artificial filling and passing of pipeline, certain additional measures were required to be taken and retaining wall was to be constructed. In this background, it cannot be said that the Petitioner has indulged into any such activities which could be said to be amounting to malpractices to deprive the Corporation of public money and enrich itself.

18. Their Lordships of the Apex Court in *Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Others*, (2014) 14 SCC 731 had an occasion to consider the case of blacklisting. It will be relevant to refer to para 20 of the said judgment, which reads as under:

" 20. It is also well settled that even though the right of the writ Petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, nondiscrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in *Mahabir Auto Stores and Ors. v. Indian Oil Corporation Ltd.* [(1990) 3 SCC 752] should, in our view, suffice: (SCC pp.760-61, para 12)

"12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Miss Radha Krishna Agarwal and Ors. v. State of Bihar* [(1977) 3 SCC 457]. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable..... It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and nondiscrimination in the type of the transactions and nature of the dealing as in the present case." "

In the said case, Their Lordships have also considered the issue of proportionality. Though, in the said case, the Contractor therein was blacklisted

on the ground that he had fraudulently withdrawn huge amount of money which was not due to it, in collusion and conspiracy with the Officer of the Respondent - Corporation and was permanently blacklisted, Their Lordships of the Apex Court found that the order of permanent blacklisting was disproportionate and, as such, remanded the matter to employer for considering reduction of period of blacklisting. In the present case, as already discussed hereinabove, we find that, at the most, what the Petitioner can be attributed, even accepting the Report of COEP, is an error of judgment. In a matter which requires highly technical expertise, one technical expert may have one opinion, whereas another technical expert may have another opinion. As already discussed above, we have two conflicting reports in the present case; one of COEP and the another one from VJTI. It, thus, cannot be said that the Petitioner had indulged in any such act which can be said to be of criminal nature, so as to defraud the employer or public exchequer. We are therefore of the considered view that apart from the impugned orders/letters being in contravention of principles of natural justice, fairplay and equity, they are totally disproportionate to the act alleged against the Petitioner.

19. In the result, Petition deserves to be allowed. Rule is made absolute in terms of prayer clauses (a) and (b).