

(2023) 05 DEL CK 0007

In the Delhi High Court

Case No : Civil Writ Petition No. 3703 Of 2018, Civil Miscellaneous Application No. 14691 Of 2018, 38981 Of 2019, 27773 Of 2022

Mica Cargo Movers

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 02-05-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Arbitration And Conciliation Act, 1996 — Section 34(3)

Citation : (2023) 05 DEL CK 0007

Hon'ble Judges : Manoj Kumar Ohri, J

Bench : Single Bench

Advocate : Sagarika Tanwar, Ashish Mohan, Samarth Chowdhary, Arunima Dwivedi, Pinky Pawar, Aakash Pathak, Digvijay Malik

Final Decision : Allowed

Judgement

Manoj Kumar Ohri, J

1. By way of present petition filed under Article 226 of the Constitution of India, the petitioner seeks setting aside of order dated 05.07.2017 passed by respondent No.2/Northern Railway (hereafter referred to as 'respondent') whereby petitioner's registration as a contractor with Indian Railways, was cancelled alongwith cancellation of lease contracts, forfeiture of security deposit and blacklisting for a period of 5 years.

2. Petitioner claims to be proprietorship firm registered with respondent vide Registration Certificate No. 00DLIA00044 dated 23.10.2015 that was valid for a period of five years under the Comprehensive Parcel Leasing Policy (CPLP)-2014. Mr. Sanoj Kumar Modi, the petitioner's proprietor was independently registered with respondent as a Contractor vide registration dated 10.12.2013 that was valid for a period of 5 years under the provisions of CPLP-2006.

3. It is further claimed that respondent awarded a contract to Mr.Modi to operate

the parcel leasing space in Train No. 12622 RSLR from NDLS to CEN with effect from 30.04.2014 to 29.04.2017 vide Agreement dated 29.04.2014. On 30.12.2016 officials of respondent apprehended consignment of wine/alcoholic liquor being carried in the compartment that was leased to Mr. Modi at Nagpur Railway Station. A Show Cause Notice dated 31.12.2016 was issued to Mr. Modi thereby alleging that he committed violation of clause nos. 23.11, 34.4 & other clauses of the CPLP 2014, and in view of the same he is liable to pay penalty of Rs. 55,000/-. The Show Cause notice further stated that till further orders, his contract will remain suspended as a precautionary measure.

In reply, Mr. Modi refuted the allegations and annexed excise documents to contend that the consignment was illegal. However, vide letter dated 07.01.2017 respondent communicated imposition of penalty in the form of cancellation of registration, cancellation of lease contracts, forfeiture of security deposit and blacklisting him for a period of 5 years. The said order was challenged by Mr. Modi through W.P.(C) 512/2017 wherein this Court vide order dated 19.01.2017 granted him the liberty to file an appeal before the appellate authority. In compliance, a detailed representation was submitted which came to be rejected by respondent No. 3 on 23.03.2017. The rejection was challenged before this Court by way of W.P.(C) 5831/2017 and was disposed of with liberty to invoke arbitration.

4. Reportedly, arbitration proceedings culminated in passing of an award on 05.02.2022 whereby the impugned orders dated 07.01.2017 and 23.03.2017 were set aside. Even, belated objections filed by the respondent under Section 34(3) of the Arbitration & Conciliation Act, have been dismissed on 24.03.2023.

5. In between, the respondent in consequence of the orders passed against Mr. Modi, also passed the impugned order dated 05.07.2017 against the petitioner's firm.

6. Ms. Sagarika Tanwar, learned counsel for the petitioner assailed the impugned order by submitting that the same has been passed against the petitioner solely on the basis of punitive action taken against Mr. Modi. She contended that the punitive action against Mr. Modi itself was without following the principles of natural justice as no prior show cause notice was issued to him on the proposed action, which has now been set aside. In this factual background, Ms. Tanwar submitted that the subsequent impugned order dated 05.07.2017 passed by respondent also needs to be set aside as the same is premised on the earlier two orders.

Additionally, it was stated that even the consignment was also released by the respondent on 13.01.2017.

7. Ms. Arunima Dwivedi, learned counsel for the respondents, on the other hand, without disputing the aspect of dismissal of petition under Section 34(3) of the Arbitration & Conciliation Act, refutes the submissions made on behalf of the petitioner.

8. After carefully going through the records, this Court finds strength in the submissions of learned counsel for the petitioner. The impugned order besides mentioning the earlier two orders dated 07.01.2017 and 23.03.2017 and that too against Mr. Modi, mentions no other separate and independent cause of action against the petitioner firm. Concededly, the said orders having already been set aside and challenge made by the respondent to the award rejected, even that feeble link, if any, is gone. Even during the course of hearing, a specific query was put to the counsel for the respondents asking if there existed any other ground for passing of the impugned order, to which the answer is in negative. The impugned order thus suffers not only from the vice of being passed illegally but also without following the principles of natural justice. Admittedly, no personal hearing was afforded. No prior show cause notice was issued to the petitioner asking for explanation for the proposed actions including blacklisting.

9. It has been observed time and again that before taking extreme the action of blacklisting, the entity has to be put to notice for the same so that it can answer. An order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality [Ref: Erusian Equipment & Chemicals Ltd. v. State of W.B. reported as (1975) 1 SCC 70].

10. In Raghunath Thakur v. State of Bihar reported as (1989) 1 SCC 229, while emphasising on the need to follow principles of natural justice, it has been held as under :-

"10. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order."

11. Later, the Supreme Court in Daffodils Pharmaceuticals Ltd. & Anr. v. State of UP & Anr. reported as 2019 SCC Online SC 1607 expostulated the law in following terms:-

"13. Although, State of U.P. has argued that the impugned order requiring that

no procurement ought to be made from Daffodills, is neither a blacklisting nor a debarring order, in our opinion, in fact and in reality, that order is nothing but an order or a directive, debarring and preventing the State of U.P. from local purchase of medicines from Daffodills for an indefinite duration. Unlike a "normal" blacklisting order which has a finite life span (of three or maximum five years), the indefinite directive (which appears to be co-terminus with the lifetime of the criminal case) is facially far more disproportionate than a blacklisting order. Even as on date, it is not clear whether formal charges have been framed against the accused i.e. Surrender Chaudhary.

14. The decisions in *Erusian Equipments and Chemicals Ltd. v. State of West Bengal*¹ and *Raghunath Thakur v. State of Bihar & Ors*² as well as later decisions have now clarified that before any executive decision maker proposes a drastic adverse action, such as a debarring or blacklisting order, it is necessary that opportunity of hearing and representation against the proposed action is given to the party likely to be affected...

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15. In the present case, even if one assumes that Surrender Chaudhary, the accused in the pending criminal case was involved and had sought to indulge in objectionable activities, that ipso facto could not have resulted in unilateral action of the kind which the State resorted to- against Daffodils, which was never granted any opportunity of hearing or a chance to represent against the impugned order. If there is one constant lodestar that lights the judicial horizon in this country, it is this: that no one can be inflicted with an adverse order, without being afforded a minimum opportunity of hearing, and prior intimation of such a move. This principle is too well entrenched in the legal ethos of this country to be ignored, as the state did, in this case.

16. The High Court, in the opinion of this court, fell into error in holding that in matters of award of public contracts, the scope of inquiry in judicial review is limited. Granted, such jurisdiction is extremely circumscribed; no doubt the court had refused to grant relief to Daffodils against its plea of wrongful rejection of its tender. However, what the impugned judgment clearly overlooks is that the action of the state, not to procure indefinitely, on an assumption of complicity by Daffodils, was in flagrant violation of principles of natural justice."

12. The aspect was re-emphasized by the Supreme Court in *UMC Technologies Private Limited v. Food Corporation of India & Another* reported as (2021) 2 SCC 551, while reiterating settled principles, the Supreme Court has highlighted the severe consequences of blacklisting orders and the stigmatization that accrues to the person/entity being blacklisted. Relevant excerpt from the said decision reads as follows:

"14. Specifically, in the context of blacklisting of a person or an entity by the State or a State Corporation, the requirement of a valid, particularised and unambiguous show-cause notice is particularly crucial due to the severe

consequences of blacklisting and the stigmatisation that accrues to the person/entity being blacklisted. Here, it may be gainful to describe the concept of blacklisting and the graveness of the consequences occasioned by it. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting take away this privilege, it also tarnishes the blacklisted person's reputation and brings the person's character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person..."

13. More recently in *Isolators and Isolators through its Proprietor Mrs. Sandhya Mishra v. Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd.* Anr. reported as 2023 SCC OnLine SC 444, the Supreme Court once again underscored the requirement of specific show cause notice before imposing penalty.

14. Even this court in *M/s Nathu Ram Gupta and Co. v North Delhi Municipal Corporation*, W.P.(C) 8054/2020 wherein the firm was deleted from the list of approved contractors without issuance of any prior show cause notice, upheld the challenge.

15. Coming back to the facts of the present case, as noted above, the impugned actions against the petitioner firm have been taken without issuance of any independent show cause notice or affording a hearing. Even otherwise, the ostensible reason for taking the impugned action also does not survive. In view of the above, this Court finds merit in submissions of learned counsel for the petitioner and directs setting aside of the impugned order. The petition is allowed and the pending applications are disposed of.