
(2023) 07 KL CK 0128

In the High Court Of Kerala

Case No : Writ Petition (C) No. 38301 Of 2022

M/S Abcon Engineering

APPELLANT

Vs

Superintend Of Engineer

RESPONDENT

Date of Decision : 04-07-2023

Acts Referred:

Citation : (2023) 07 KL CK 0128

Hon'ble Judges : Viju Abraham, J

Bench : Single Bench

Advocate : Abdul Raoof Pallipath, K.R.Avinash, E.Mohammed Shafi, Gracy Poulouse, Bimal K.Nath

Final Decision : Disposed Of

Judgement

Viju Abraham, J.

1. The above writ petition is filed seeking to quash Ext.P12 order whereby the petitioner firm was blacklisted and the licence granted to the firm has been cancelled.

2. Brief facts of the case are as follows:- The petitioner is a contractor. As per agreement No.SE(K)/186/2017-18 dated 09.10.2017, the petitioner executed the road works of improvements to Padiyotchal- Kodamuttu Road KM0/000 to 7/400 in Kannur district. The work commenced on 13.10.2017 and the same was duly completed on 30.03.2019, within the extended period granted by the department. Ext.P1 is the copy of the certificate of completion of work with a covering letter dated 19.10.2019 and Ext.P2 is the copy of the experience certificate. As per Ext.P3 Government Order, the defect liability period (DLP) for the type of work of the kind the petitioner executed is 18 months. Reckoning the period of completion from 30.03.2019, the defect liability period of 18 months is over on 30.09.2020. The petitioner has also made available necessary credentials like quality control test from the PWD-approved quality laboratory centre. Having satisfied that the work is perfectly executed and no

defects whatsoever occurred, respondents 1 to 4 duly approved the release of Treasury security deposits of Rs.9,43,550/-and bank guarantee of Rs.9,43,550/- lying with South Indian Bank, Panaji Branch. In Ext.P4 order issued by the 2nd respondent it has been specifically certified that the work was completed in all respect on 30.03.2019 and no rectification work was necessitated within the guarantee period and no liability occurred during the liability period and hence the security deposit may be released. Thereupon, the 1st respondent issued an order for the release of security deposit of Rs.18,87,100/- and thereupon as is evident from Ext.P6 release notice, the security deposit has been released to the petitioner. Petitioner submits that had there been any defects in the work in 2019 as alleged, they would not have issued a completion certificate, or experience certificate and released the security deposit to the petitioner in the year 2021. While so, the PWD roads wing initiated a surprise inspection of works throughout Kerala as per order dated 24.09.2019 of the 5th respondent named as "Operation Saral Rasta". As part of the said inspection, the work executed by the petitioner was also allegedly subjected to inspection by the special departmental inspection wing on 24.09.2019 at about 09.30 am. It is also learnt that the Vigilance and Anti Corruption Bureau (VACB) Kannur Unit has forwarded a report to the 7th respondent which contains inter alia that the work executed by the petitioner is suffering from a shortfall of quality for which the petitioner as well as Assistant Executive Engineer Sri. Deveshan and Assistant Engineer Sri.Jayadeep. K are also vicariously liable and recommended appropriate disciplinary action to be taken against them. The said report which is produced as Ext.P8 also recommended blacklisting and other penal actions against the petitioner as well. Based on Ext.P8 report, Ext.P9 show cause notice was issued by the 1st respondent to the petitioner. To the said notice, the petitioner submitted Ext.P10 reply mainly contending that he completed the work three years ago and that the work was good in quality till when devastating flood contributed some minor defects of scratch over the surface. Later, the petitioner was heard on 07.06.2022 and in the hearing also petitioner appeared and explained the true and relevant facts. Besides Ext.P11, written submission was also submitted by the petitioner. Without considering the petitioner's version and conducting a correct probe in the matter and without appraising such other reasons that contributed to the damage of completed work on account of natural calamities, etc, the 1st respondent issued Ext.P12 order whereby the petitioner was removed from the approved list of contractors and has inflicted a punishment of blacklisting. It is aggrieved by the same, the petitioner has approached this Court.

3. Petitioner submits that none of the parameters in Clauses 1916 and 1917 of the Kerala PWD Manual for removing a contractor from the approved list and also for blacklisting is available in the facts and circumstances of the present case inasmuch as the petitioner has perfectly carried out the work to the satisfaction of the PWD and the same was ultimately approved as per Exts.P2 to P4 and later when the defect liability period was over, the security deposit as well as the bank

guarantee was released to the petitioner. Petitioner relying on Ext.P10 reply would submit that no documents or reasons have been assigned for issuance of Ext.P9 show cause notice and it is the specific contention of the petitioner that none of the contents of Ext.P8 were made known to the petitioner before issuance of Ext.P12 order. Therefore, it is contended that without making the petitioner know about the reasons for the issuance of Ext.P9 order, he could not give an effective reply to Ext.P9 show cause notice inasmuch as it does not contain any reason for taking action against the petitioner except the directions issued by the Director of Vigilance and Anti Corruption Bureau, 7th respondent herein. Petitioner further submits that the devastating flood calamities which occurred in Kerala in 2018 and 2019 might have caused some tropical effects underneath the soil and surrounding areas where improvement of surface removal work was executed. To substantiate the said contention, the petitioner relies on Ext.R1(a) document produced by the Government along with their counter affidavit wherein it is specifically stated that due to the floods a portion of the road has been damaged and the petitioner was directed to cure the said defect since the same was within the defect liability period.

4. The 1st respondent has filed a detailed counter affidavit. Though in the counter affidavit, it is admitted that necessary quality control tests were carried out during the work and the results were satisfactory. After completion, certain damages had occurred on the road during the defect liability period and direction was given to the contractor for doing the rectification work as per Ext.R1(a). It is also stated that the recommendation for release of the security deposit was made on 27.10.2021, ie. after 13 months from the expiry of defect liability period which ended on 29.09.2020 as there were no noticeable defects on the road surface at that time. It is also stated that normally the completion and experience certificates were issued by the department based on the request of the contractor immediately after the satisfactory completion of the work. In the present case, damage had happened on the road work during the defect liability period and instructions were given to the petitioner to rectify the same. The Vigilance and Anti-Corruption Bureau conducted a surprise inspection on 24.09.2019 and found some damages on the road and considering the condition of the damage, the Vigilance and Anti-Corruption Bureau recommended the black listing of the contractor. It is admitted in the said counter affidavit that since the damages noticed had happened during the defect period, the rectification work was carried out by the petitioner as directed by the Assistant Engineer. It is also admitted that the security deposit was released after the term of the defect liability period as there were no noticeable defects on the road surface.

5. Heard both sides.

6. Black listing of a contractor is a serious action which entails civil consequences and is punitive in nature. Ext.P9 show cause notice only states that the Vigilance and Anti Corruption Bureau has after an inspection recommended to blacklist the petitioner and therefore the petitioner has to submit his objection to the same.

In Ext.P9, there is no mention as to whether a copy of the report submitted by the Director of Vigilance and Anti-Corruption Bureau has been served on the petitioner nor any of the defects pointed out by the Vigilance and Anti-Corruption Bureau has been mentioned therein. To a show cause notice in the nature of Ext.P9, the petitioner cannot possibly give a proper reply to the same inasmuch as the petitioner is not made aware of the finding of the Vigilance and Anti Corruption Bureau either by giving a copy of the report or by mentioning the findings of the Vigilance wing in Ext.P9 show cause notice so that the petitioner could give a proper reply to the show cause notice.

7. It is a settled position of law that since blacklisting has the effect of preventing a person from privilege and advantage of entering into a lawful relationship with the Government for purposes of gains and that a disability is created by the order of blacklisting, the relevant authority is to have an objective satisfaction and therefore fundamental of fair play requires that the person concerned should be given an opportunity to represent his case before he is put on the blacklist. It is also a settled position of law that a fair hearing to the party being blacklisted is an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made thereto (see the judgments in *M/s.Erusian Equipment and Chemicals Ltd v. State of W.B.* and another (AIR 1975 SC 266), *Kulja Industries Ltd v. Western Telecom Project BSNL* (2014) 14 SCC 731) and *Yakoob v. Kerala State Civil Supplies Corporation* (2003 (3) KLT 535)).

8. The contention taken by the respondents is that the petitioner was issued with a show cause notice and was heard before the decision of blacklisting was taken as per Ext.P12 order and therefore the petitioner cannot contend that they have not been granted sufficient opportunity to defend their case.

9. The question to be considered is as to whether Ext.P9 show cause notice is a valid one. A perusal of Ext.P9 show cause notice would reveal that the blacklisting of the petitioner is proposed to be taken based on the recommendation of the Director of Vigilance and Anti Corruption Bureau (VACB). Ext.P9 show cause notice does not contain copy of the report of the VACB or the details of the allegations found out against the petitioner in an inspection conducted by the VACB. The Apex Court had occasion to consider a similar issue in *UMC Technologies Private Limited v. Food Corporation of India* and another ((2021) 2 SCC 551). Paragraphs 13 to 15 of the said judgment read as follows:

" 13. At the outset, it must be noted that it is the first principle of civilised Jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction

to that extent. This Court in *Nasir Ahmad v. Custodian General, Evacuee Property* (1980) 3 SCC 1 has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.

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.

15. In the present case as well, the appellant has submitted that serious prejudice has been caused to it due to the Corporation's order of blacklisting as several other government corporations have now terminated their contracts with the appellant and/or prevented the appellant from participating in future tenders even though the impugned blacklisting order was, in fact, limited to the Corporation's Madhya Pradesh regional office. This domino effect, which can effectively lead to the civil death of a person, shows that the consequences of blacklisting travel far beyond the dealings of the blacklisted person with one particular government corporation and in view thereof, this Court has consistently prescribed strict adherence to principles of natural justice whenever an entity is sought to be blacklisted."

(underline supplied)

The Apex Court in *Nasir Ahmad v. Assistant Custodian General, Evacuee Property, Uttar Pradesh, Lucknow and others* ((1980) 3 SCC 1) had also on occasion to consider a similar circumstance and held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him and if these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard. The relevant portion of the judgment reads as follows:

"4. Under Rule 6 the notice Under Section 7 must be issued in the prescribed form contain the grounds on which the property is sought to be declared evacuee property. As stated earlier, the notice that was issued in this case merely

reproduced the form without mentioning the particulars on which the case against the appellant was based. It was essential to state the particulars to enable the appellant to answer the case against him. Clearly therefore the notice did not comply with Rule 6 and could not provide a foundation for the proceedings that, followed.”

(underline supplied)

10. In view of the above, the blacklisting of the petitioner, which entails civil consequences, can be done only after affording a reasonable opportunity to the petitioner to submit a proper reply to the defects/reasons that are pointed out by the department to blacklist the petitioner. Since Ext P1 show cause notice does not contain the allegations against the petitioner based on which they proposed to blacklist the petitioner, same cannot be treated as a valid show cause notice in the eye of the law.

11. Therefore, Ext.P12 order is set aside with a consequential direction to the 1st respondent to reconsider the matter after issuing a proper show cause notice to the petitioner containing all the details of the allegations raised against them and after serving a copy of the report submitted by the Vigilance and Anti Corruption Bureau (VACB), so as to enable the petitioner to give a proper reply in answer to the allegations raised therein. The petitioner shall also be afforded an opportunity of being heard in the said proceedings. A decision in this regard shall be taken within a period of three months from the date of receipt of a copy of the judgment.

With the abovesaid direction, the writ petition is disposed of.