

(2016) 05 RAJ CK 0085

In the Rajasthan High Court

Case No : Civil Special Appeal (W) No. 823 of 2014

M/s. Nayak Construction

APPELLANT

Vs

State of Rajasthan & Others

RESPONDENT

Date of Decision : 06-05-2016

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2017) AIR(Raj) 12 : (2016) 3 WLN 1

Hon'ble Judges : Mr. Sangeet Lodha and Mr. Kailash Chandra Sharma, JJ.

Bench : Division Bench

Advocate : Mr. C.S. Kotwani, Advocate, for the Appellant; Mr. Mukesh Dave, Advocate, for the Respondent

Final Decision : Allowed

Judgement

1. This intra court appeal is directed against order dated 21.5.14 of the learned Single Judge of this court, whereby the writ petition preferred by the appellant questioning the legality of order dated 27.11.12 passed by the Chief Engineer, Public Works Department (PWD), Government of Rajasthan, Jaipur, the second respondent herein, blacklisting the appellant in terms of Para VIII.4 of Section VIII-Standard Code of Appendix XVI Part II of Public Works Financial and Account Rules ("Rules"), stands dismissed.

2. The relevant facts in nutshell are that the appellant, a proprietorship concern, was conferred the status of "AA" Class Contractor by the PWD vide order dated 31.7.09. According to the appellant, fourth respondent while working as Executive Engineer, PWD, Dungarpur, withheld the bills of the appellant concern and called its proprietor to his residence with ulterior motive to extract illegal gratification. The proprietor of the appellant concern visited residence of the fourth respondent but refused to accede to the undue demand and thereupon an FIR was lodged by the fourth respondent against the proprietor of the appellant concern and two others at Police Station, Kotwali, Dungarpur, alleging commission of offences under Sections 452, 427/34 of Indian Penal Code, 1898

read with Section 3(1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "SC/ST Act") and Section 3/25 of Arms Act.

The proprietor of the appellant concern, challenging the FIR, filed a Criminal Miscellaneous Petition No. 2763/12 before this court, wherein in the first instance, while issuing the notices to the respondents, interim protection was granted to the proprietor of the appellant concern, however, later, the petition was dismissed vide order dated 18.2.13 and thereafter, the police has already filed a charge sheet against the proprietor of the appellant concern for offences under Sections 452, 427/34 IPC read with Section 3(1)(x) of the SC/ST Act and 3/25 of Arms Act.

3. At the same time, when the matter was reported by the fourth respondent to the higher authorities, a notice dated 1.11.12, was issued by the Chief Engineer, PWD, Jaipur, the second respondent herein, to the appellant to show cause as to why it may not be blacklisted. According to the appellant, the notice was responded to by it by way of a detailed reply but the second respondent proceeded to pass an order dated 27.11.12 blacklisting the appellant concern, without considering the reply filed, the legality whereof was challenged by the appellant by way of writ petition before this court.

4. The petition was contested by the respondents, taking the stand that the appellant failed to perform the maintenance work in defect liability period, attempted to raise the bill for the work never done and threatened the fourth respondent to clear the bills and also fired on him. According to the respondents the appellant concern has consistently misbehaved with the officers of the Department. In this regard, the respondents placed on record the recommendations made by the District Collector, Dungarpur, to blacklist the appellant as also the complaint made by an LDC of PWD Sub Division, Sagwara, wherein he has averred threat perception from the appellant concern to him and his family. Precisely, the stand of the respondents was that the appellant was guilty of misbehavior with the fourth respondent and causing damage to the public property and despite notice being issued, did not respond to the allegations levelled within stipulated period and therefore, the order passed by the competent authority cannot be faulted with.

5. The fourth respondent by way of an affidavit averred that the proprietor of the appellant concern is in habit of threatening the Government officials. In support of the allegations, the complaints made by the Government officials regarding the undue pressure and threatening given and the correspondence made pursuant thereto were also placed on record. While referring to the reply alleged to have been submitted by the appellant in response to the notice issued by the second respondent, it is averred by the fourth respondent that the proprietor of the appellant concern has indulged in falsehood while stating that the FIR lodged has been quashed by this court vide an order passed in Criminal Misc. Petition No. 2763/12 whereas, the Criminal Misc. Petition has been rejected by this court. That apart, it is averred that in the Criminal Misc. Petition, the proprietor of the

appellant concern filed a false affidavit claiming himself to be member of the Scheduled Caste whereas, he has contested the election claiming himself to be member of OBC. The allegations levelled by the appellant regarding illegal gratification were specifically denied by the fourth respondent.

6. By way of rejoinder, the appellant emphasised that its work efficiency was never under cloud and it performed all its contractual works with efficiency without any defects. The appellant reiterated that a reply to the show cause notice was submitted by it within the stipulated period, yet the same has not been considered by the second respondent and the order blacklisting was passed in high handed manner.

7. After due consideration of the material on record and rival submissions, the learned Single Judge arrived at the finding that from the courier receipt placed on record and the averments made in the writ petition even if it is presumed that the reply was sent through courier services, it is not possible to draw an inference that reply in fact reached to the competent authority before passing of the impugned order. The learned Single Judge found it strange that why the appellant concern resorted to sending reply by courier services, when the notice was sent by registered post. The learned Single Judge observed that it is not possible to find fault with the recital contained in the order impugned wherein the competent authority mentioned that it has not received the reply to show cause notice on behalf of the appellant herein. Accordingly, the learned Single Judge concluded that if the contractor has not chosen to file reply, the competent authority was well within its jurisdiction to conclude that contractor has no plausible explanation to tender against the allegations contained in the show cause notice. Thus, the plea of the appellant regarding the order being passed in violation of the principle of natural justice was rejected by the learned Single Judge. While taking note of the observations made by this court in its order dated 18.2.13, dismissing the Criminal Misc. Petition preferred by the proprietor of the appellant concern, the learned Single Judge concluded that in totality the conduct of the appellant herein disentitles it to claim any relief from this court in exercise of extra ordinary equitable jurisdiction. The learned Single Judge opined that the allegations of mala fide against the private respondent are not substantiated by placing any material on record. Consequently, the writ petition preferred by the appellant has been dismissed. Hence, this appeal.

8. During the pendency of this appeal, the appellant preferred an application for taking a document (Annexure-A) i.e. copy of reply to the show cause notice sent by the appellant to the second respondent, received under the Right to Information Act, on record, showing that the reply to the show cause notice filed was duly received by the second respondent before passing the order blacklisting the appellant. A counter to the application was filed on behalf of the respondents taking the stand that the reply to show cause notice was received by the Inward Section of the Office of Chief Engineer, Jaipur on 21.11.12, however, since the notice was issued to the appellant on 1.11.12 and 15 days time granted to file

the reply thereto expired on 16.11.12, even if the appellant firm furnished the reply to the show cause notice, same was filed belatedly and did not reach the office of the competent authority within the stipulated time.

9. The application preferred by the appellant as aforesaid was allowed by this court vide order dated 27.10.14.

10. Learned counsel appearing for the appellant contended that a bare perusal of Annexure-A placed on record on behalf of the appellant manifestly shows that the appellant had filed reply to the show cause notice which was duly received by the second respondent on 21.11.12 yet, while passing the order impugned in the writ petition on 27.11.12, the same was not even taken note of. Learned counsel submitted that in absence of any material on record showing that a reply to the show cause notice was filed by the appellant, the learned Single Judge has arrived at the conclusion that since the appellant did not file reply to the show cause notice, the order impugned passed by the competent authority cannot be faulted with. Learned counsel submitted that as a matter of fact, the respondents are guilty of suppression and concealment of material facts from this court inasmuch as, the factum of receipt of the reply to the show cause notice may be belatedly, but, in any case, before the passing of the order impugned, was deliberately concealed by the respondent and it was projected that no reply to the show cause notice was received within the stipulated period. Learned counsel would submit that had the factum of reply to the show cause notice being received by the second respondent before the passing the order impugned, brought to the notice of the court, obviously, the learned Single Judge would not have concluded the issue in favour of the respondents as aforesaid. Learned counsel urged that in terms of Para VIII.4 of Section VIII Standard Code of Appendix XVI Part-II of the Rules, the second respondent was under an obligation to record the findings after due consideration of the reply filed on behalf of the appellant.

Learned counsel submitted that now the factum of the reply to the show cause notice filed on behalf of the appellant being received by the second respondent before the passing of the order blacklisting the appellant, having come on record the non consideration thereof while passing the order is sufficient to establish that the order blacklisting the appellant has been passed in gross violation of the principles of natural justice and therefore, the same deserves to be quashed. Learned counsel submitted that the dispute with regard to the caste of the appellant which is subject matter of the investigation and trial has nothing to do with the matter of blacklisting of the appellant on the allegations levelled which were controverted by filing a reply thereto and thus, the learned Single Judge has erred in making observation in this regard while passing the order impugned.

11. On the other hand, the counsel appearing for the respondents contended that the appellant having failed to file the reply to the show cause notice within the stipulated period, the second respondent was not under an obligation to consider the reply filed. Learned counsel submitted that while filing the reply to

the petition before the learned Single Judge, the respondents have nowhere stated that no reply to the show cause notice has been received rather, it is stated that no reply to the show cause notice was received within the stipulated period and thus, the allegation of suppression and concealment of material fact levelled, is absolutely baseless. Learned counsel submitted that in terms of Para VIII.4 of Section VIII-Standard Code of Appendix XVI Part-II of the Rules, show cause notice of 15 days was required to be given and since the appellant failed to file reply within 15 days i.e. by 16.11.14, the second respondent was absolutely justified in passing the order without considering the reply, filed on behalf of the appellant. Learned counsel submitted that the order impugned passed by the learned Single Judge after taking into consideration all the relevant aspects, does not warrant any interference by this court in intra court appeal jurisdiction.

12. We have considered the rival submissions and perused the material on record.

13. Indisputably, the matter with regard to blacklisting of the enlisted contractor by the enlisting authority with the approval of the next higher authority of PWD is required to be dealt with as provided for under Para VIII.4 of Section VIII-Standard Code of Appendix XVI Part-II of the Rules, which reads as under:

"VIII.4 BLACK-LISTING: After giving Show Cause Notice of 15 days and recording findings, the Enlisting Authority with the approval of the next higher authority may blacklist a contractor due to any of the following reasons:

(i) There are sufficient and strong reasons to believe that the contractor or his employee has been guilty of malpractices such as bribery, corruption, fraud, vitiating fair tendering process including substitution of or interpolation in tenders, pilfering or unauthorized use or disposal of Govt. materials issued for specific works etc.

(ii) The Contractor continuously refuses to pay Govt. dues without showing adequate reasons and where the registering authority is satisfied that no reasonable dispute attracting reference to Settlement Committee or Court of Law exists for the Contractor's action.

(iii) Where a contractor or his partner or his representative has been convicted by a Court of Law for offences involving moral turpitude in relation to the business dealings or where security considerations including suspected disloyalty to the State so warrant.

(iv) If the contractor or his partner or his employee is found guilty of misbehaviour with any of the official of the State Government connected with the execution of work directly or indirectly.

(v) If a registered contractor, being non-tenderer for work, submits applications giving his offer after receipt/opening of tenders received after due process .

Note-1. If a contractor after having tendered for a work or after negotiations gives applications voluntarily vitiating the fair tendering process, it shall also

tantamount to malpractice.

Note-2. A register containing the reasons for blacklisting the contractor as also the names of all the partners of the contractor and the allied concerns coming within the effective influence of the blacklisted contractor will be maintained.

Note-3. A register of black listed contractors will be maintained in RPWA111 which will not only include contractors enlisted with the Enlisting Authority but also black listed contractors of all Engineering Departments, Zones, Circles, Divisions, Other State Governments, M.E.S., Railways, Posts & Telecommunication, CPWD etc.

Note-4. A Black listed contractors (i) shall not be entitled for enlistment in any engineering department, (ii) shall not be awarded any work in future, (iii) his enlistment shall stand cancelled immediately and his enlistment security shall stand forfeited."

14. Undoubtedly, as per provision of Para VIII.4 (iv) quoted herein above, if the contractor or his partner or his employee is found guilty of misbehavior with any of the official of the State Government connected with the execution of the work directly or indirectly, may be blacklisted by the Enlisting Authority with the approval of the next higher authority after giving a show cause notice to the contractor and recording the finding of guilt after due consideration of the stand of the contractor. It goes without saying that the requirement of issuing show cause notice and obligation cast upon the authority to record the findings is not an empty formality. Obviously, the provision incorporated as aforesaid regarding an opportunity of hearing to be extended to the contractor, has been incorporated inasmuch as, the action of blacklisting a contractor which has civil and civil consequences cannot be taken without following the principles of natural justice.

15. In "M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr", (1975) 1 SCC, 70, the Hon"ble Supreme 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."

(emphasis supplied)

16. Similarly, in "Raghunath Thakur v. State of Bihar & Ors.", (1989) 1 SCC 229, the Hon"ble Supreme Court observed that blacklisting any person in respect of business ventures has civil consequences for future business of the person concerned and therefore, 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 representation against the order.

17. In "Gorkha Security Services v. Government of NCT of Delhi & Ors.", (2014) 9 SCC, 105, the Hon'ble Supreme Court while relying upon the decisions in M/s. Erusian Equipment & Chemicals Ltd's case and Raghunath Thakur's case (supra), observed that the action of the blacklisting must be preceded by show cause notice setting up the precise case which noticee is required to meet. The court observed that this would require the statement of imputations detailing out the alleged breaches and defaults committed so that he gets an opportunity to rebut the same. Another requirement as pointed out by the Court is the nature of action which is proposed to be taken for such breach inasmuch as, it is incumbent upon the authority concerned to provide adequate and meaningful opportunity to the person concerned. The court further observed that when it comes to the action of blacklisting which is termed as "civil death", a harshest possible action, it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in the provisions of NIT.

18. Thus, in the backdrop of the settled position of law noticed as above, it needs to be examined as to whether while passing the order impugned blacklisting the appellant, the respondents have followed the principles of natural justice and extended fair opportunity of hearing to the appellant.

19. Adverting to the facts of present case, it is to be noticed that it was the specific stand of the appellant herein before the learned Single Judge that a reply to the show cause notice was sent to the second respondent and all concerned by way of courier service but the order blacklisting was passed without considering the reply filed on behalf of the appellant. A perusal of the reply to the writ petition filed on behalf of the respondents reveals that the specific averments made by the appellant regarding the reply being sent by courier service were not specifically answered and it was not disclosed as to whether the reply sent by the appellant was received by the second respondent or not, rather, an evasive reply was given in terms that no reply was received by the second respondent within the stipulated time.

20. At this stage, reference to the findings arrived at by the learned Single Judge would be appropriate. The learned Single Judge has observed :

"..... For initiating action against the petitioner firm, the competent authority has issued show cause notice dated 01.11.2012 (Annex.4) and in response to the same although the petitioner has pleaded that it has submitted reply vide Annex.5 by sending it through courier services but in the impugned order competent authority has recorded a categorical finding that no reply to show cause notice was submitted by the petitioner firm. From the courier receipt placed on record and the averments contained in the writ petition even if it is presumed that the reply was sent through courier services, it is obviously not possible to draw an inference that reply in fact reached to the competent

authority below before passing of the impugned order. There is no material placed on record to show that the counter services through which reply was sent by the petitioner firm was an approved courier services by the Public Works Department. Therefore, in these circumstances, it is not possible to find fault with the recitals contained in Annex.6, wherein the competent authority has mentioned that it has not received reply to show cause notice on behalf of the petitioner firm. The requirement under the Rules is only to serve fifteen days show cause notice to the erring contractor and if the contractor has not chosen to file reply, the competent authority is well within its right to conclude that the contractor has no plausible explanation to tender against the allegations contained in the show cause notice. Thus, in my considered opinion, the competent authority before passing the impugned order has made endeavour to comply with the relevant provisions of law and it is not possible to draw an inference that the order has been passed in violation of principles of natural justice."

(emphasis supplied)

Suffice it to say that in absence of any material on record showing that reply to show cause notice was filed by the appellant, the learned Single Judge has arrived at the finding that if the contractor has not chosen to file the reply, the competent authority was well within its right to conclude that contractor has no plausible explanation to tender and accordingly, the contention of the appellant that order has been passed in violation of principles of natural justice, was rejected.

21. But now, the fact that the reply to the show cause notice sent by the appellant was duly received by the second respondent on 21.11.12, much before the passing of the order impugned on 27.11.12, yet, the same was not taken into consideration is not in dispute. Obviously, had the factum of receipt of the reply to the show cause notice by the second respondent before the passing of the order impugned, brought to the notice of the court, probably, the conclusion of the learned Single Judge regarding non observance of the principles of natural justice, would have been different. We are firmly of the view that the respondents in not disclosing the fact regarding the receipt of the reply to the show cause notice sent by the appellant before passing of the order of blacklisting, have indulged in suppression and concealment of material fact, which deserves to be deprecated.

22. Coming to the stand of the respondents that the reply to the show cause notice though received before passing of the order by the second respondent, the same was not required to be considered while passing the order of blacklisting inasmuch as it was not received within the stipulated period, it is true that the provisions of Para VIII.4 contemplates that notice to show cause of 15 days shall be given to the contractor before taking the action for blacklisting but the same does not lead to the inference that in case, the contractor fails to file the reply within two weeks, no further time can be granted to him by the Enlisting

Authority for filing the reply. Moreover, in the instant case, the notice dated 1.1.12, was dispatched by the second respondent on 2.11.12, which according to the appellant it was received on 5.11.12 and a reply thereto was dispatched on 13.11.12. Again the respondents in reply to the application filed by the respondent have disclosed that the reply sent was received in Inward Section of the office of Chief Engineer, Jaipur on 21.11.12 but have not disclosed as to when the reply sent by the appellant was actually delivered by the courier to the office of the Chief Engineer, Jaipur. Be that as it may, the fact remains that the reply was duly received by the second respondent before passing the order impugned, then, there was absolutely no reason as to why the second respondent has not considered the stand of the appellant before passing the order blacklisting the petitioner. Obviously, under Rule VIII.4, which provides for giving 15 days show cause notice to the contractor, the number of days within which the reply is to be filed is not that sacrosanct that on failure to file reply within the stipulated period, the same cannot be taken into consideration rather, the principle underlying the Rule VIII.4 mandating grant of fair opportunity to the contractor to defend the allegations against him is sacrosanct, which is required to be strictly adhered to.

23. In view of the discussion above, we are firmly of the opinion that the second respondent could not have passed the order, ignoring the reply filed by the appellant solely on the ground that it was not received within the stipulated period. To say the least, the action of the second respondent in passing the order impugned without considering the reply filed on behalf of the appellant amounts to denying the fair opportunity of hearing to the contractor as envisaged under Rule VIII.4 of the Rules and is ex facie violative of elementary principle of natural justice and therefore, not sustainable in the eyes of law.

24. In the result, the special appeal succeeds, it is hereby allowed. The order impugned dated 21.5.14 passed by the learned Single Judge is set aside. The writ petition preferred by the appellant is allowed. The order impugned in the writ petition dated 27.11.12 passed by the Chief Engineer, Public Works Department, Government of Rajasthan, Jaipur, is quashed. It will be open for the respondents to pass the order afresh in accordance with law after due consideration of the reply to the show cause notice submitted on behalf of the appellant. No order as to costs.