

(2018) 04 MP CK 0130
In the Madhya Pradesh High Court
Case No : WRIT PETITION NO.21058 OF 2017

M/S Nirved Namdeo

APPELLANT

Vs

Madhya Pradesh Poorva Kshetra Vidhyut Vitaran Company
Limited And Others

RESPONDENT

Date of Decision : 20-04-2018

Acts Referred:

Constitution of India — Article 14, 19(1)(g)

Citation : (2018) 04 MP CK 0130

Hon'ble Judges : SUBODH ABHYANKAR, J

Bench : Single Bench

Advocate : Atul Kumar Jain, Mukesh Agrawal, Utkarsh Agrawal

Final Decision : Allowed

Judgement

This petition has been filed against the order dated 14.02.2017 passed by the respondent No.3/Superintending Engineer (O&M) Circle, M.P. Poorva

Kshetra Vidhyut Vitaran Company Limited, Narsinghpur where by the respondent No.3 has decided not to issue any work order till further orders to

the petitioner. The petitioner has also challenged the order dated 15.6.2017 again passed by the respondent No.3 whereby the order dated

14.02.2017 was modified and in place it is mentioned that the petitioner shall not be given any work for a further period of two years.

2. The grievance of the petitioner is that before passing the aforesaid order, he was not given any opportunity of hearing and no show cause notice

was issued to him before passing the aforesaid order.

3. In brief the facts of the case are that the petitioner is a proprietorship concern engaged in the business of providing services relating to electricity. A

Notice Inviting Tender (N.I.T.) was issued by the respondents for service Contract

of Operation and Minor Maintenance work of 26 Nos 33/11 K.V.

Substation for the Narsinghpur District under (O&M) Circle Narsinghpur in which the petitioner being the successful bidder, was awarded the

contract and the agreement in this behalf was entered into on 28.12.2005.

4. The petitioner's contention is that the work was to be done within a period of six months which the petitioner completed successfully.

However, clause 7 of the Contract also provided that the work can be extended for a further period of 18 months i.e. (6+12) months on the same

rates, terms & conditions on mutual basis. The contract was extended by the mutual consent of the parties, which expired on 31.01.2017. On

19.01.2017 the petitioner informed the respondents that the work has to be completed on 31.01.2017 and since the petitioner is not willing to extend

the contract period for any further period, hence the same be closed but instead the respondent issued the impugned order dated 14.02.2017

arising that the work of the petitioner was not found in accordance with the terms of the contract, hence it is decided that he shall not be issued

any further work order till the further order. The aforesaid order dated 14.2.2017 was again modified by the respondent on 15.6.2017 and now it was

mentioned that the petitioner is debarred for a period of two years from working with the respondent.

5. The petitioner's main plank of argument is that before passing the aforesaid order no opportunity of hearing was given to the petitioner despite

the fact that the order was essentially an order blacklisting the petitioner-firm. It is further submitted that the work allotted to the petitioner has

already been completed and the inspection which is made the basis to pass the impugned order was carried out behind the back of the petitioner and

beyond the contract period. The counsel has further submitted that the impugned order clearly violates the mandates as enshrined under Article

19(1)(g) of the Constitution of India and has been passed arbitrarily and with mala fide intention.

Counsel for the petitioner has further submitted that although inhouse mechanism for settlement of dispute is also provided under clause 18 of the

contract but the issue of blacklisting cannot be decided by the arbitrator and is beyond the agreement, hence it cannot be said that this dispute can be

resolved through clause 18 of the Agreement and it is further submitted that as

per the Apex Court, the arbitrator has no power to restore the position of the contractor, hence the adjudication as regard to black listing cannot be done by the arbitrator.

6. Counsel for the petitioner has relied upon following judgments of this Court as well as the Apex Court to submit that the petition is maintainable and also that due opportunity of hearing ought to have been provided to the petitioner:

(i) Order dated 20-02-2017 passed by this Court in W.P. No.3518 /2016 (Mohd. Arif vs. M.P. Housing and Infrastructure Development Board).

(ii) M/s Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and another, (1975) 1 SCC 70 (Para 12, 13, 14, 15)

(iii) Amit Mishra vs General Manager (Transport), M.P. State Civil Supplies Corporation Ltd., 2008(4) MPLJ 542 (para 4, 9 & 10)

(iv) Gorkha Security Services vs. Government (NCT of Delhi) and others, (2014) 9 SCC 105 (Para 21, 22, 27, 28, 29 & 34)

(v) Joseph Vilangandan vs The Executive Engineer, (PWD), Ernakulam and others (1978) 3 SCC 36 (para 17)

(vi) Southern Painters vs Fertilizers & Chemicals Travancore Ltd. and another , 1994 Supp (2) SCC 699 (para 5 & 10)

(vii) Order dated 29.6.2017 passed by this Court in W.P. No.10070/2016 (Kamtheen Security Services Indore vs State of Madhya Pradesh and others) (para 4, 6, 7, 8, 9, 10, 11, 12)

(viii) Indian Oil Corporation Ltd. Vs Amritsar Gas Service and others (1991) 1 SCC 533

7. A reply has also been filed by the respondents wherein it is submitted that the petition is not maintainable as the petitioner has not availed the

efficacious alternative remedy available under the contract itself, clause 18 of which specifically provides for settlement of dispute and for the same

three stages have been provided but without availing the aforesaid remedy the petitioner has directly filed this petition which is liable to be dismissed

on this count only. It is further submitted that prior to issuance of the impugned order, the petitioner was afforded appropriate opportunity of hearing

and a show cause notice to improve the work was also issued to him but despite such notices the petitioner did not rectify the work assigned to him,

hence the respondents had no option but to pass the impugned order.

8. Counsel for the respondents has submitted that the petitioner was served notices on 06/06/2016, 09/06/2016, 17/09/2016, 24/09/2016, 01/10/2016 and 26/12/2016 and only after serving these notices that the impugned order dated 14.02.2017 was passed, hence it cannot be said that the petitioner was not given appropriate time to give response to the aforesaid notices before passing of the impugned order. The respondents have also placed on record all the aforesaid notices.

9. A rejoinder has been filed by the petitioner in which it is contended that firstly, the notices as referred to by the respondent in their reply were not received by the petitioner and secondly, it is further submitted that a perusal of the aforesaid notices filed by the respondents reveals that they are not in the form of a show cause notice and in none of these notices any warning has been issued to the petitioner that non-compliance of the same would entail blacklisting/debarring of the petitioner for future. Hence it is submitted that the letters Annexure R/1 are only for correction of the work and termination of the contract on failure only, however there was no provision to debar or blacklist the petitioner on account of the noncompliance. Hence it is submitted that even taking into account the aforesaid show cause notices, it cannot be said that the petitioner was given due opportunity of hearing regarding blacklisting.

10. An additional return has also been filed by the respondent and while reiterating the preliminary objections regarding maintainability of the petition, it is further submitted that adjudication regarding blacklisting of the petitioner is also covered by the dispute clause and the petitioner cannot contend that in-house dispute redressal mechanism is not equipped to deal with the blacklisting of the petitioner. It is further submitted that in clause 19 of the contract the provision of blacklisting of the agencies was also provided hence the petitioner was also aware of the consequences of non-performance of the contract in accordance with the terms of the same. It is specifically denied that the show cause notices had not been received by the petitioner.

11. The undisputed fact of this case is that the agreement was entered between the parties on 28.12.2015. It is also not disputed that the same was extended for a period of 18 months vide letter dated 2.9.2016, and on 19.1.2017 the petitioner wrote to the respondents that they are not interested to

extend the contract. It is also not disputed that in the agreement dated 28.12.2015, the following clauses regarding the settlement of dispute and blacklisting of agency are there. The relevant extract of the same read as under:

18. SETTLEMENT OF DISPUTE:-

(i) If any dispute or difference of any kind whatsoever will arise between the agency and the Company in connection with or arising out of the Contract, the parties will make every effort to resolve amicably such dispute or difference by mutual consultation.

(ii) In the event of any dispute arising between the parties.

(a) xxx

(b) xxx

(c) xxx

(iii) If after thirty (30) days the parties have failed to resolve their dispute or difference by such mutual consultation, then either party may give notice

to the other, of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of the matter

may be commenced unless such notice is given.

19. BLACKLISTING OF AGENCY:-

Once the Contract between the Company and the agency has been signed, no further changes in the terms and conditions thereof are permissible.

Any request received by the Company in this regard shall be summarily rejected making it clear to provide the services strictly in accordance with the

terms and conditions of the contract. Any attempt by the agency to back out of the commitment shall be considered as serious and his earnest money

deposit be forfeited forthwith, without prejudice to any further legal remedies open to the Company under the relevant laws. Where necessary, action

for black-listing of the agency and recovery of damages, if any, shall be taken up.

12. The issue as raised by the petitioner is that before passing of the order of blacklisting dated 14.12.2017 as also the amended order dated 15.6.2017

the petitioner was not issued any notice regarding the same, however the aforesaid contention has been rebutted by the respondents by filing various

notices issued to the petitioner.

13. Now the only question falls for consideration by this Court is that whether

those notices were sufficient indication of the fact that non-compliance of the same would entail blacklisting of the petitioner. Since all the notices from 6.6.2016 to 26.12.2016 are couched in the same language/identical

language, one such notice dated 1.10.2016 is produced as under:

Â Â Â Â Â Â Â Â Â??izfr]

Jh fuosZ| dqekj ukenso Ukjk;.k xat] rglhy fuokl e.MykA

fo""k;%&d`f""k QhMjksa ij 'ksM~;wy ls vf/kd fo|qr iznk; fd, tksu ckor~A lanHkZ%&v/kh{k.k vfHk;ark Â¼la-la-Â½ o`r ujflagiqj dk i= dzekad 5360

fnukad 24-09-16 A

mijksDr fo""k;karxZr tSlk fd vki dks ckj ckj funsZâ??k fn, x, gS fd d`f""k QhMjksa ij 'ksM~;wy ls vf/kd fo|qr iznk; u fd;k tk;sa fdUrq vkids }kjk

funsZ'kksa dh vogsyuk dh tk jgh gSA ftlesa buiqV esa vizR;kf'kr o`f) gks jgh gSA vkidh bl rjg dh ykijokgh iw.kZ dk;Ziz.kkyyh ls fu/kkZfjr lIykbZ Iyku

dk mYya?ku vkSj mPpkf/kdkfj;ksa ds funsZ'kksa dh vogsyuk fd;k tkuk ifjyf{kr gks jgk gSA vr% vkidks funsZf'kr fd;k tkrk gS fd Hkfo""; esa vkids

}kjk Bsds ij fy;s x;s fdlh Hkh midsUnz esa bl rjg dh ykijokgh feyrh gS rks vkidk BsdK rRdky izHkko ls fujLr fd;k tkosxA ftlds fy;s vki

Lo;a iw.kZ #i ls ftEesnkj jgsxsA

/;ku jgs fd funsZ'kksa dk ikyu lqfuf'pr fd;k tkosA

Â dk;Zikyu vfHk;arkÂ¼lhlhÂ½Â Â Â Â Â Â¼lapk-la/kk-Â½ laHkkx e-iz-iw-{ks-fo-fo-da-fy-] ujflagiqj

dzekad@dkvu@la0la0@laHkkx@LVsuks@16@7729Â
01&10&16â??

ujfLkagiqj@fnukad

This Court has carefully gone through the contents of all the notices and in none of the notice the word â??blacklistingâ?? is mentioned.

14. Although the learned counsel for the petitioner has placed many judgments, but presently the judgment delivered by the Honâ??ble Apex Court in

the case of Gorkha Security Services Vs. Government (NCT of Delhi) & others, reported in (2014) 9 SCC 105 has been taken into consideration,

which is more appropriate in the facts and circumstances of the case. The relevant paras of the said judgment are reproduced as under:-

â??21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind

the serving of show-cause notice is to make the noticee understand the precise

case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained.

When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action

is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the

consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in

order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.

23. xxx 24. xxx 25. xxx

26. xxx

27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent

authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against

the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly

inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not

suggest that noticee could find out that such an action could also be taken. We

say so for the reasons that are recorded hereinafter.

28. In the instant case, no doubt the show-cause notice dated 6-2-2013 was served upon the appellant. Relevant portion thereof has already been

extracted above (see para 5). This show-cause notice is conspicuously silent about the blacklisting action. On the contrary, after stating in detail the

nature of alleged defaults and breaches of the agreement committed by the appellant the notice specifically mentions that because of the said defaults

the appellant was "as such liable to be levied the cost accordingly". It further says "why the action as mentioned above may not be taken

against the firm, besides other action as deemed fit by the competent authority". It follows from the above that main action which the respondents

wanted to take was to levy the cost. No doubt, the notice further mentions that the competent authority could take other actions as deemed fit.

However, that may not fulfill the requirement of putting the defaulter to the notice that action of blacklisting was also in the mind of the competent

authority. Mere existence of Clause 27 in the agreement entered into between the parties, would not suffice the aforesaid mandatory requirement by

vaguely mentioning other "actions as deemed fit". As already pointed out above insofar as penalty of blacklisting and forfeiture of earnest

money/security deposit is concerned it can be imposed only, "if so warranted". Therefore, without any specific stipulation in this behalf, the

respondent could not have imposed the penalty of blacklisting.

29. No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to

secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or

by necessary implication excludes the application of any rules of natural justice, in exercise of power prejudicially affecting another must be in

conformity with the rules of natural justice.

30. xxx 31. xxx

32. xxx

33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned

Additional Solicitor General. In the first instance, we may point out that no such case was set up by the respondents that by omitting to state the

proposed action of blacklisting the appellant in the show-cause notice, has not caused any prejudice to the appellant. Moreover, had the action of blacklisting being specifically proposed in the show-cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to blacklist the appellant. Therefore, it is not at all acceptable that non-mentioning of proposed blacklisting in the show-cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant.

34. For the aforesaid reasons, we are of the view that the impugned judgment of the High Court does not decide the issue in the correct perspective.

The impugned Order dated 11-9-2013 passed by the respondents blacklisting the appellant without giving the appellant notice thereto, is contrary to the principles of natural justice as it was not specifically proposed and, therefore, there was no show-cause notice given to this effect before taking action of blacklisting against the appellant. We, therefore, set aside and quash the impugned action of blacklisting the appellant. The appeals are allowed to this extent. However, we make it clear that it would be open to the respondents to take any action in this behalf after complying with the necessary procedural formalities delineated above. No costs.â??

(emphasis supplied)

Thus applying the aforesaid dictum of the Honâ??ble Apex Court, it is apparent that the petitioner has not been issued a specific notice regarding blacklisting, which has led to violation of principles of natural justice and in gross violation of Article 14 of the Constitution of India, and as such the availability of the alternative remedy would not be a bar for entertainment of the present petition and in such circumstances the present petition is maintainable.

15. In the result, the present petition is allowed and the impugned order dated 14.2.2017 (Annexure P-1) as well as the order dated 15.06.2017

(Annexure P-2) are hereby set aside with liberty to the respondents to issue an

appropriate show cause notice to the petitioner and pass an order in accordance with law after affording due opportunity of hearing to the petitioner.