

(2022) 01 CHH CK 0106

In the Chhattisgarh High Court

Case No : Writ Petition (Civil) No. 4758 Of 2021

M/S. S.K.Patodia & Associates

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 25-01-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

Aligarh University Revised Leave Rules, 1969 — Rule 5(8)(i)

Citation : (2022) 01 CHH CK 0106

Hon'ble Judges : Arup Kumar Goswami, CJ;N.K. Chandravanshi, J

Bench : Division Bench

Advocate : Prafull N Bharat, Mayank Chandrakar, Gagan Tiwari, Vikram Sharma

Final Decision : Allowed

Judgement

Arup Kumar Goswami, CJ

1. Heard Prafull N Bharat, learned senior counsel for the petitioner. Also heard Mr. Gagan Tiwari, learned Deputy Government Advocate for the

respondent No. 1 and Mr. Vikram Sharma, learned counsel for the respondent No. 2.

2. The respondent No. 2 invited a request for proposal (for short, RFP) dated 25.03.2021 for "Engagement and Consultant for Implementation of

Accounting Assignments in Chhattisgarh". Four tenderers including the petitioner participated in the aforesaid tender process. The petitioner had

submitted its bid on 21.06.2021.

3. By this application under Article 226 of the Constitution of India, the petitioner challenges the legality and validity of the order dated 03.11.2021

passed by the respondent No. 2, whereby the security deposit made in terms of clause 3.5(f)(f) of the RFP has been forfeited and further, in terms of

clause 3.35.2 of the RFP, the petitioner has been debarred from participating in the future tender process of the respondent No. 2 for a period of two years.

4. The order dated 03.11.2021 is, primarily, assailed on the ground that no opportunity of hearing was granted and that the petitioner had not suppressed any material information in the tender submitted.

5. The respondent No. 1 filed its reply stating that the respondent No. 2 had communicated the minutes of the meeting of the Tender Committee held

on 22.09.2021, whereby recommendation was made to reject the proposal of the petitioner and to forfeit the security deposit in terms of clause 3.5(f)

(f) of the RFP and for re-tendering. On such proposal being received, permission was given to re-tender the work with forfeiture of the bid security

and barring the petitioner from participating in any of the tender process for a period of two years.

6. There is no denial in the reply-affidavit that notice was not issued to the petitioner before the impugned order was passed.

7. The respondent No. 2 has filed its reply-affidavit wherein also, there is no denial to the allegation that no notice was issued to the petitioner before

passing the order debarring the petitioner from participating in the tender process for a period of two years. The stand taken in the affidavit is that no

prejudice was caused to the petitioner by not giving any opportunity of hearing as even if opportunity was provided, the same would not alter the

position as the suppression resorted to by the petitioner goes to the root of the matter.

8. Pleadings of the parties would demonstrate that it is an admitted position that no opportunity of hearing was granted to the petitioner before the

order debarring the petitioner was passed.

9. During the course of hearing also, Mr. Vikram Sharma, learned counsel for the respondent No. 2, abiding by the stand taken in the reply, submitted

that grant of an opportunity of hearing, in the facts and circumstances of the case would be an empty formality and as such, no notice was issued to

the petitioner.

10. Mr. Prafull N Bharat, learned senior counsel for the petitioner submitted that though, by the impugned order dated 03.11.2021, the security deposit

of the petitioner was forfeited apart from debarring the petitioner from

participating in the future tender of the respondent No. 2 for a period of two years, the petitioner is limiting the challenge made in this writ petition only to that part of the order by which the petitioner has been blacklisted for a period of two years. Mr. Bharat submits that it is no longer res integra that before an order of blacklisting is passed, a show cause notice is required to be issued and when admittedly show cause notice has not been issued, the order of blacklisting cannot be sustained in the eye of law. In this connection, he has placed reliance in the decisions of the Honâ??ble Court in M/s. Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Another, reported in (1975) 1 SCC 70, Gorkha Security Services v. Government (NCT of Delhi) & Others, reported in (2014) 9 SCC 105, and UMC Technologies Private Limited v. Food Corporation of India & Another, reported in (2021) 2 SCC 551.

11. Mr. Bharat further submits that though it is alleged in the order dated 03.11.2021 that the petitioner had suppressed material information while responding to serial No. 11 of the RFP Form 1: Letter of Proposal, there was no such suppression or a false declaration. Similarly, there was no concealment while responding to serial No. 6(ii) and (iii) of the RFP Form No. 2: Summary of Information. It is submitted that the foundation of the order dated 03.11.2021 is that the respondent No. 2 had received an anonymous complaint on 23.08.2021 and on the basis of the said complaint, enquiries were made which revealed that the MP Power Management Co. Ltd. Jabalpur (for short, MPPMCL) had terminated the contract entered into between the petitioner and the MPPMCL on 03.12.2018 and had further debarred the petitioner from participating in the tender process for the period from 03.12.2018 to 02.12.2021. It is submitted that the order issued by the MPPMCL against the petitioner was set aside by the High Court of Madhya Pradesh vide order dated 25.10.2021. It is also submitted that the respondent No. 2 had taken a decision in the meeting held on 22.09.2021 only to forfeit the security deposit and to reject the bid submitted by the petitioner and it is only because of the direction given by the respondent No. 1 on 18.10.2021 that the impugned order dated 03.11.2021 was passed debarring the petitioner from participating in the future tender of the respondent No. 2 for a period of two years.

12. It is also submitted by Mr. Bharat that the petitioner neither failed to

complete any work awarded to it by any public authority/entity in the last five years nor has it been debarred by any agency of Government of India or Government of Chhattisgarh from participating in any projects, as alleged.

13. Mr. Vikram Sharma, learned counsel for the respondent No. 2 has drawn the attention of the Court to clauses 3.5, 3.12, 3.28, 3.28.3, 3.34, 3.35.1,

3.35.2, 3.35.3(b) of the RFP and based on the same, submits that it is evident that the petitioner had suppressed and had given false declaration.

Admittedly, on the date of submission of the bid, the order of blacklisting issued by the MPPMCL was in force, and even if any opportunity of hearing

was granted to the petitioner, the same would have made no difference and therefore, in the attending facts and circumstances, failure to give notice

would not vitiate the order blacklisting the petitioner for a period of two years. In support of his contention, Mr. Sharma has placed reliance on the

decisions of the Honâ??ble Supreme Court in the cases of M/s. Radhakrishna Agrawal & Others v. State of Bihar & Others, reported in AIR 1977

SC 1496, Aligarh Muslim University & Others v. Mansoor Ali Khan, reported in AIR 2000 SC 2783, M/s. Dharampal Satyapal Ltd. v. Deputy

Commissioner of Central Excise, Gauhati & Others, reported in (2015) 8 SCC 519, and State of U.P. v. Sudhir Kumar Singh & Others, reported in

2020 SCC Online SC 847.

14. We have considered the submissions of the learned counsel for the parties and have perused the materials on record.

15. A perusal of the order dated 03.11.2021 would go to show that by the said letter, the petitioner was informed that through a letter No.

GM(IAD)/Tender-2-PP/2017-18/TS-175/F-128/22, dated 11.01.2019 of MPPMCL, it was communicated to respondent No. 2 that MPPMCL had

imposed a ban upon the petitioner in participating in tender for a period of 3 years (from 03.12.2018 to 02.12.2021) as its performance was

unsatisfactory. It was further informed that this information was not given in the proposal submitted by the petitioner for the subject work and as such

on account of concealing of the above fact and because of providing erroneous information in RFP Form 1: Letter of Proposal: Sr. No. 11, page No.

76, RFP Form 2: Summary of Information: Sr. No. 6(ii & iii) page No. 80 and RFP Form 9: Format for Affidavit: Sr. No. 2, page 89, in terms of the

letter dated 18.10.2021 of Government of Chhattisgarh, Urban Administration

and Development Department and under the provision mentioned

(Disclaimer : Para No. 07, Page No. 06), the proposal presented by the petitioner is rejected and as per clause 3.5(f)(f) of the RFP, the security

amount deposited by it is forfeited and as per clause 3.35.2 of the RFP, it is banned from participating in the future tender process issued by the

Department for a period of two years.

16. Sl. No. 11 of the RFP Form No. 1 reads as under:

11. We certify that in the last 3 (three) years, we or our Associates have neither failed to perform on any contract, as evidenced by imposition of

a penalty or a judicial pronouncement or arbitration award, nor been expelled from any project or contract nor have had any contract terminated for

breach on our part;

17. Sl. No. 6(ii) and (iii) of the RFP Form No. 2 reads as follows:

xxx xxx xxx

(ii) Has the Bidder been penalized by any organization for poor quality of work or breach of contract in the last five years?

Yes/No

(iii) Has the Bidder/Member ever failed to complete any work awarded to it by any public authority/entity in last five years?

Yes/No

18. In response to both the aforesaid clauses, the petitioner had indicated No.

19. Clause 6(iv) of the RFP Form 2 reads as follows:

(iv) Has the Bidder been blacklisted by any Government department/Public Sector Undertaking in the last five years?

Yes/No

20. Though the petitioner had responded by saying No, the same is not taken as one of the grounds while issuing the order dated 03.11.2021.

21. Sl. No. 2 of the RFP Form 9: format for affidavit, reads as follows:

2) The undersigned also hereby certifies that neither our firm M/s. nor any of its directors/constituent partners have abandoned any

work in India and/abroad nor any contract awarded to us for such works have been terminated for reasons attributed to us, during last five years prior

to the date of this application nor have been barred by any agency of Government of India (GOI) or Government of Chhattisgarh (GOCG) from

participating in any projects.â??

22. Clause 3.12 of the RFP provides for certain conditions with regard to the pre-qualification and eligibility of applicants and that condition No. 6 itself

stated that the bidder should not have been blacklisted by any State/Central Government/ULB/Semi-Government Organisation/PSU in India.

23. Clause 3.35 of the RFP is on the subject of â??fraud and corrupt practicesâ??. Clause 3.35.1 provides that the authority can reject a proposal if it

determines that the bidder has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice,

undesirable practice or restrictive practice, etc. in the selection process. Clause 3.35.2 provides that if a bidder or the consultant is found to be directly

or indirectly or through his agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrict

practice during the selection process or after the issue of the Letter of Authority or the execution of the agreement, such bidder or consultant shall not

be eligible to participate in any tender or RFP issued by the authority during a period of two years from the date such consultant is found by the

authority to have directly or indirectly or through agent engaged or indulged in prohibited practices.

24. At this juncture, it will be appropriate to consider the decisions cited at the bar.

25. In M/s. Radhakrishna Agrawal & Others (supra), grievance was expressed against the order of the State Government passed in 1974 revising the

rate of royalty payable by the petitioners under a lease of 1970, and, after that, cancelling the lease by a letter dated 15.03.1975. The case of the

petitioners was that the revision of the rate of royalty payable by the petitioners for the lease to collect and exploit sal-seeds from the forest area was

illegal during the subsistence of the lease, and thereafter, cancellation of the lease itself was illegal for a number of reasons including on the ground of

not affording an opportunity to show cause against cancellation of the lease. It was observed that the limitations imposed by rules of natural justice

cannot operate upon powers which are governed by the terms of an agreement exclusively.

26. In *M/s. Erusian Equipment & Chemicals Ltd. (supra)*, the Honâ??ble Supreme Court observed as follows:

â??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.â??

27. In *Gorkha Security Services (supra)*, the Honâ??ble Supreme Court observed that serving of show cause notice is a requirement before recourse can be taken for blacklisting. It was observed that the fundamental purpose behind serving of the show cause notice is to make the noticee understand the precise case set up against him which he has to meet and for this purpose, a statement of imputations detailing out the alleged breaches and defaults he has committed, is required so that he gets an opportunity to rebut the same and also indicating the nature of action which is proposed to be taken for such a breach.

28. In the aforesaid case, although a show cause notice was issued, the show cause notice was conspicuously silent about blacklisting and it was on that ground, it was held by the Honâ??ble Supreme Court that without any specific stipulation in that behalf, respondent could not have imposed the penalty of blacklisting. The Honâ??ble Supreme Court also repelled the contention advanced by the respondents that no prejudice was caused to the appellant in not issuing the show cause notice. The Honâ??ble Supreme Court held that that no case was set up by the respondents that by omitting to state the proposed action of blacklisting, no prejudice is caused to the appellant. It was also observed that 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 respondents were not satisfied with the explanation qua the defaults. The Honâ??ble Supreme Court further observed that the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant.

29. In UMC Technologies Private Limited (supra), it was held by the Honâ??ble Supreme Court that for a show cause notice to constitute the valid

basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on

the part of the issuer of the notice to blacklist the noticee. Such a clear notice is essential for ensuring that the person against whom the penalty of

blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting. As the

notice in the said case was silent about the proposed action of blacklisting, the Honâ??ble Supreme Court held that the show cause notice issued in

the said case did not fulfill the requirement of valid show cause notice for blacklisting and accordingly, the order of blacklisting was set aside and

having regard to the peculiar facts and circumstances of the case, the matter was remanded to the Corporation for a fresh consideration.

30. In Aligarh Muslim University & Others (supra), having regard to the fact that leave was sanctioned to the respondent-Mr. Mansoor Ali Khan only

for two years and before expiry of the said period, he applied for extension of leave by 3 years. The University responded to him on 12/23.09.1981

granting extension only for one year categorically mentioning that he was required to resume duties by 18.4.1982 and that no further extension in the

period of his leave would be possible and was advised to resume his duty positively by 18.04.1982. It was on the background of the aforesaid facts,

the Honâ??ble Supreme Court held that absence of a notice to show cause as to why it would not be deemed that he had vacated the office under

Rule 5(8)(i) of the Aligarh University Revised Leave Rules, 1969 does not make any difference as he was already told that if his further overstay is

for continuing in the job in Libya, it was bound to be refused, and therefore, even if any response was given to the show cause notice, that would not

have made any difference and would not have been treated as satisfactory explanation under Rule 5(8)(i) of the Rules. Thus, on the admitted or

undisputed facts, only one view was possible. The Honâ??ble Supreme Court, in paragraphs 24 and 25 observed as under:

â??24. The 'useless formality' theory, it must be noted, is an exception. Apart from the class of cases of ""admitted or indisputable facts leading only to

one conclusion"" referred to above,- there has been considerable debate of the application of that theory in other cases. The divergent views expressed

in regard to this theory have been elaborately considered by this Court in M.C. Mehta, 1999 AIR SCW 2754: AIR 1999 SC 2583, referred to above.

This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J.

and Staughton L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, De. Smith, Wade, D.H. Clark etc.

Some of them have said that orders passed in violation must always be quashed for otherwise the Court will be prejudging the issue. Some others have

said, that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via-media rules. We do not think it necessary, in

this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case.

25. It will be sufficient, for the purpose of the case of Mr. Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa

Reddy, J. in S.C. Kapoor v. Jagmohan, AIR 1981 SC 136, namely, that on the admitted or indisputable facts - only one view is possible. In that event

no prejudice can be said to have been caused to Mr. Mansoor Ali Khan though notice has not been issued.â??

31. In Sudhir Kumar Singh & Others (supra), the only question that was posed by the Honâ??ble Supreme Court was whether an administrative

authority can dispense with the requirement of issuing notice by itself deciding that no prejudice will be caused to the person against whom the action

is contemplated? The Honâ??ble Supreme Court categorically held that it is not permissible for the authority to jump over the compliance of the

principles of natural justice on the ground that even if hearing had been provided, it would have served no useful purpose. The opportunity of hearing

will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. The Honâ??ble Supreme

Court at paragraph 39 stated as follows:

â??39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem

rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles

of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it.

This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the

Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of

setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case,

and not by the authority who denies natural justice to a person.

(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of

fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

32. In *M/s. Dharampal Satyapal Ltd. (supra)*, the Hon'ble Supreme Court observed as follows:

"38. But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at

the same time, the Courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in

any straight-jacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this

reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the Courts have held that it would

be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon

the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as necessary concomitant of the principles

of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged

opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no

such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional

hearing is held to be permissible. Further, the Courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasizing that

the principles of natural justice cannot be applied in straight-jacket formula, the aforesaid instances are given. We have highlighted the jurisprudential

basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general

social goals, etc. Nevertheless, there may be situations wherein for some reason "perhaps because the evidence against the individual is thought to

be utterly compelling" it is felt that a fair hearing 'would make no difference' meaning that a hearing would not change the ultimate conclusion

reached by the decision-maker" then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in *Malloch v.*

Aberdeen Corporation, (1971) 1 WLR 1578, who said that: (WLR p. 1595 : All ER p. 1294)

"A 'breach of procedure...cannot give (rise to) a remedy in the courts, unless behind it there is something of substance which has been lost by

the failure. The court does not act in vain".

Relying on these comments, Brandon LJ opined in *Cinamond v. British Airports Authority*, (1980) 1 WLR 582 : (1980) 2 All ER 368 (CA), that:

(WLR p. 593 : All ER p. 377)

"no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing'. In such

situations, fair procedures appear to serve no purpose since 'right' result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the Courts. Even if it is found by the

Court that there is a violation of principles of natural justice, the Courts have held that it may not be necessary to strike down the action and refer the

matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has

not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the

conclusion that order passed is always null and void. The validity of the order has to be decided on the touchstone of 'prejudice'. The ultimate test is

always the same, viz., the test of prejudice or the test of fair hearing.â??

33. A consideration of the judgments cited by Mr. Sharma would go to show that principles of natural justice are very flexible principles and they

cannot be applied in any straight-jacket formula. The principles of natural justice are grounded on the doctrine of procedural fairness. There are

divergent views with regard to â??useless formalityâ? theory which is pressed into service in cases where facts can be stated to be admitted or

indisputable and as only one view is possible, it is considered that a fair hearing would make no difference to the ultimate conclusion reached by the

decision maker. The theory is based on the principle that the Court need not pass futile orders of setting aside or remand when there is, in fact, no

prejudice caused. However, there is no doubt that it is not permissible for the authority to ignore compliance of the principles of natural justice

presuming that it would be a â??useless formalityâ?. It would be for the Court to determine on the facts of the case as to whether grant of

opportunity will serve any useful purpose or not. Thus, in a given situation, the Court may not consider it necessary to strike down an action because

of violation of principles of natural justice and refer the matter back to the authorities to take a fresh decision after complying with the procedural

requirements when failure to comply with principles of natural justice did not cause any prejudice to the person against whom the action is taken.

34. On the other hand, decisions cited by Mr. Bharat is in respect of the issue of blacklisting that has arisen in the instant case and thus, to the point. In

clear, unambiguous and unequivocal terms, the Honâ??ble Supreme Court has emphatically laid down that serving of a show-cause notice proposing

to blacklist is a sine qua non and condition precedent before an order of blacklisting can be passed.

35. In view of such authoritative pronouncements of Honâ??ble Supreme Court in the matter of blacklisting, we do not propose to go into the

question on the touchstone of “useless formality” theory, canvassed by Mr. Sharma.

36. In view of the above discussion, the impugned order dated 03.11.2021 debarring the petitioner from participating in the future tender of the

respondent No. 2 for a period of two years cannot be sustained in law. Accordingly, the order dated 03.11.2021, so far as it relates to debarring the

petitioner from participating in the future tender of the respondent No.2 is set aside. The respondents are, however, at liberty to issue appropriate

show cause notice to the petitioner on the issue of blacklisting.

37. Writ petition is allowed in terms of the above observations and directions.