
(2014) 05 RAJ CK 0272

In the Rajasthan High Court

Case No : Civil Writ Petition No. 12921/2012

Nayak Construction

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 21-05-2014

Acts Referred:

Arms Act, 1959 — Section 25, 3
Penal Code, 1860 (IPC) — Section 307, 34, 427, 452
Prevention of Damage to Public Property Act, 1984 — Section 3
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(x)

Citation : (2014) 4 WLN 203

Hon'ble Judges : Pratap Krishna Lohra, J

Bench : Single Bench

Advocate : C.S. Kotwani and S.P. Joshi, Advocate for the Appellant; Mukesh Dave, Dy. Govt. Counsel and Sachin Acharya, Advocate for the Respondent

Judgement

Pratap Krishna Lohra, J.—Petitioner, a proprietorship firm, having status of "AA" Class Contractor with the Public Works Department (for short, "PWD") has launched this legal battle against the order dt. 27th of November 2012 (Annex.6) passed by the second respondent, whereby it was blacklisted in terms of Appendix XVI Part II Section VIII of the Standard Code Para VIII.4 of the Public Works Financial and Accounts Rules. The facts, in brief, giving rise to this writ petition are that petitioner firm a "AA" Class contractor of PWD is involved in various construction works at District Dungarpur. The said status of "AA" Class contractor was conferred on the petitioner firm by the Chief Engineer, Public Works Department, Jaipur vide order dt. 31st of July 2009 (Annex.3). According to the version of the petitioner, fourth respondent while working as Executive Engineer, PWD, Dungarpur, with ulterior motive withheld some of the bills of the petitioner firm to extract illegal gratification for their clearance. With a view to struck a deal for clearance of bills, the fourth respondent invited the proprietor of the firm at his residence on 25th of October 2012. When the proprietor of the petitioner firm visited residence of fourth respondent, he refused to accede to the

undue desire of the fourth respondent and thereupon a first information report was lodged by him against the petitioner for offences under Sec. 452, 307, 427/34 of the Indian Penal Code read with Section 3(1)(x) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act 1989 and Section 3/ 25 of the Arms Act. According to the petitioner firm, the entire edifice of the FIR was falsehood and in fact no offence was committed by the proprietor of the firm. An endeavor was made at its behest through proprietor to challenge the said FIR before this Court by way of S.B. Criminal Misc. Petition No. 2763/12. In the criminal misc. petition, at the threshold, notices were issued and interim protection was granted. It so happened that the FIR lodged against the petitioner firm in the interregnum was taken cognizance, and when the matter was reported to the higher authorities, a show cause notice was issued to the petitioner firm on 01.11.2012 (Annex.4) by the Chief Engineer and Addl. Secretary, PWD, Jaipur. Responding to the said notice, according to the petitioner firm, a detailed reply was submitted but without considering the reply the order Annex.6 was passed, which is impugned in the present petition. Assailing the action of the respondent, the petitioner has categorized the same as high-handed action in gross violation of principles of natural justice.

2. On behalf of the official respondents, reply to the writ petition is submitted defending the impugned action. While questioning the work efficiency of the petitioner firm in execution of the contract works, the respondents have very specifically pleaded in the reply that petitioner firm has consistently, misbehaved with the officers of the department and for that purpose earlier also notices were issued to it. Adverting to the incident for which the impugned action was taken, the respondents have specifically pleaded in the reply that the bills of the petitioner were rightly withheld by the fourth respondent because of certain defects in maintenance work and when the petitioner firm was asked to get the work done, its proprietor instead of carrying the same, threatened fourth respondent and exerted undue pressure on him to clear bills. Highlighting his conduct of committing serious cognizable offence at the residence of fourth respondent, the respondents have submitted in the reply that the proprietor of the firm used fire arms. Insisting on the persistent misbehavior of the petitioner firm, the respondents have also placed on record complaint laid by a Lower Division Clerk of PWD Sub-Division, Sagwara, wherein he has averred threat perception from the petitioner firm to him and his family. Thus, in totality, the respondents have defended their action and have submitted in the reply that as the petitioner was guilty of misbehavior and despite giving show cause notice it has not submitted reply to the same, the competent authority had no option but to pass the impugned order.

3. The fourth respondent, who was arrayed in his personal capacity, has also filed a counter affidavit denying the insinuations hurled against him. In this counter affidavit, the fourth respondent has categorically denied all the allegations made in the counter affidavit. It is also submitted by the fourth respondent that the criminal misc. petition preferred on behalf of the petitioner firm has been

dismissed by this Court by order dt. 18th of February 2013. In his affidavit, the fourth respondent has also highlighted the dubious conduct of the proprietor of the petitioner firm inasmuch as it is averred that he has submitted a false caste certificate claiming himself to be a member of Scheduled Caste whereas in fact he belongs to Other Backward Class and with the said status he has contested the election for Municipal Council, Dungarpur.

4. The petitioner firm has thereafter filed its rejoinder reiterating the stand which was emphasized in the main petition. Joining the issued with the respondents, the petitioner firm has averred that reply to show cause notice was submitted by it within stipulated time but the same was not considered while passing the impugned order. The petitioner firm has also alleged in the rejoinder that at no point of time its work efficiency was under cloud and it has performed all its contractual works with efficiency without any defects. Once again emphasizing that order impugned is highhanded action and in gross violation of principles of natural justice, the petitioner firm has craved for its annulment.

5. Learned counsel for the petitioner Mr. C.S. Kotwani has vehemently argued that impugned order Annex.6 has visited the petitioner firm with evil and civil consequences and the same has been passed in gross violation of principles of natural justice. With this plea, learned counsel would contend that the order impugned is not sustainable. Mr. Kotwani has also questioned the impugned order on the ground of malafide by urging that the same has been passed at the behest of the fourth respondent who was inimical with the petitioner firm. The learned counsel has also submitted that the order impugned has been passed mechanically inasmuch as the competent authority while passing the said order has not taken into account reply/explanation submitted by the petitioner firm in response to show cause notice. Learned counsel in support of his contentions has placed reliance on the following legal precedents:

(i) M/s. Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd. and another,

In this verdict, while examining the role of natural justice in the matter of deletion of name of an approved contractor on the basis of vigilance report without affording of opportunity by public sector undertaking, Hon''ble Apex Court held as under:

11. The deletion of the appellant's name from the list of approved contractors on the ground that there were some vigilance report against it, could only be done consistent with and after due compliance with the principles of natural justice. That not having been done, it requires to be held that withholding of the tender form from the appellant was not justified. In our opinion, the High Court was not justified in dismissing the writ petition.

12. However, on the question as to what is the effective relief grantable to the appellant, the case presents its own difficulties. The work order was issued to the other tenderer on 6.1.1993. According to the respondent--and that is not

disputed--the work has reached almost the stage of completion and would be completed in a couple of months. It is not possible to retrace the steps, nullify the contract awarded to the successful tenderer and efface the work already done. It is unfortunate that the appellant has been denied this opportunity to compete: but all that can now be done is to direct the continuance of the appellant's name in the list of qualified contractors. If the respondents want to have the appellant's name deleted, that could be done only consistent with the principles of natural justice. Till that is done, the appellant shall continue to be entitled to be issued the tender forms to compete with other qualified contractors. The appeal is disposed of accordingly. There will be no order as to costs.

(ii) Grosons Pharmaceuticals (P) Ltd. and Another Vs. The State of Uttar Pradesh and Others, .

In this verdict Hon"ble Apex Court held that blacklisting of a contractor involves civil consequences and before passing such an order the principles of natural justice cannot be dispensed with. Hon"ble Court held in Para 2 as under:

2. Learned counsel appearing for the appellant urged that seeing the nature and seriousness of the order passed against the appellant, the respondent ought to have supplied all the materials on the basis of which the charges contained in the show-cause notice were based along with the show-cause notice and in the absence of supply of materials, the order impugned is against the principles of natural justice. We do not find any merit in this contention. Admittedly, the appellant has only contractual relationship with the State Government and the said relationship is not governed by any statutory rules. There is no statutory rule which requires that an approved contractor cannot be blacklisted without giving an opportunity of show-cause. It is true that an order blacklisting an approved contractor results in civil consequences and in such a situation in the absence of statutory rules, the only requirement of law while passing such an order was to observe the principle of audi alteram partem which is one of the facets of the principles of natural justice. The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant were based, was not the requirement of the principle of audi alteram partem. It was sufficient requirement of law that an opportunity of show-cause was given to the appellant before it was blacklisted. It is not disputed that in the present case, the appellant was given an opportunity to show cause and it did reply to the show-cause which was duly considered by the State Government. We are, therefore, of the view that the procedure adopted by the respondent while blacklisting the appellant was in conformity with the principles of natural justice.

6. On the other hand, learned counsel, Mr. Mukesh Dave, submits that the impugned order has been passed strictly in adherence with the relevant provision contained under the Public Works Financial and Accounts Rules while considering the misbehavior of the petitioner with the official of the State Government

directly connected with the execution of works. Mr. Dave has urged that after issuance of show cause notice, reply/explanation was not tendered by the petitioner firm within the stipulated time period; it became imperative for the competent authority to pass the impugned order which cannot be categorized as violative of principles of natural justice in the given circumstances. Refuting the allegations of malafide, learned counsel submits that the competent authority while passing the impugned order has acted objectively, and therefore, plea of the petitioner firm to categorize the impugned action malafide is not sustainable.

7. Dr. Sachin Acharya, learned counsel for the fourth respondent submits that the allegations of malafide are absolutely vague, cryptic and mellow, and therefore, such allegations are not at all tenable. Learned counsel for the private respondent would contend that proprietor of the petitioner firm misbehaved with the fourth respondent and committed a criminal offence for which FIR was lodged, has sufficiently met the requirement envisaged under the Public Works Financial and Accounts Rules for blacklisting the firm and as such no interference with the impugned order is called for. Emphasizing the dubious conduct of the petitioner firm, learned counsel submits that the proprietor of the petitioner firm had made misrepresentation before this Court in Criminal Misc. Petition No. No. 2763/2012 by asserting that he belongs to scheduled caste and subsequently it was revealed that in fact he belongs to Other Backward Class, is sufficient to non-suit the petitioner firm in its pursuit for the relief. Mr. Acharya submits that an incumbent invoking extraordinary equitable jurisdiction of this Court must come with clean hands, clean mind and clean object and conduct of an individual is of great significance for grant of relief in exercise of equitable jurisdiction. In support of his contentions, learned counsel Mr. Acharya has placed reliance on following verdicts:

(i) Karnataka State Road Transport Corporation and Another Vs. S.G. Kotturappa and Another,

(ii) Mohd. Sartaj and Another Vs. State of U.P. and Others, .

8. I have heard the learned counsel for the parties and perused the materials available on record.

9. The core issue, which is subject matter of judicial scrutiny in the instant case, is blacklisting of the petitioner firm for its misbehavior with the government official. The relevant provision in this behalf as envisaged under Appendix XVI Part II Section VIII of the Standard Code Para VIII.4 of the Public Works Financial and Accounts Rules 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 under 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 misbehavior with any of the official of 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.

10. Upon perusal of the aforesaid provision quoted supra, it is crystal clear that by virtue of clause (iv), a contractor, or his partner, or his employee, if found guilty of misbehavior with the government official connected with the execution of work directly or indirectly, the contractor can be blacklisted. The misbehavior of the proprietor of the petitioner firm is prima facie established on account of registration of criminal case against him under Sec. 452, 307, 427/ 34 of the Indian Penal Code read with Section 3(1)(x) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act 1989 and Section 3/ 25 of the Arms Act. For initiating action against the petitioner firm, the competent

authority has issued show cause notice dt. 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. The petitioner has not placed on record any proof showing that reply in fact was received by the competent authority within the stipulated period. It is really strange that when the show cause notice was received by the petitioner firm through Registered AD why it has resorted to sending reply by courier services and not by Registered AD. There is no material placed on record to show that the courier 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 endeavor 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. Even otherwise, the conduct of the petitioner is a gross act of misbehavior within four corners of clause (iv) of Para VIII.4 of Appendix XVI Part II Section VIII of the Standard Code of the Public Works Financial and Accounts Rules inasmuch as proprietor of the petitioner firm has committed serious offences of IPC, Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act 1989 and the Arms Act. The objectionable conduct of the proprietor of the petitioner firm is also discernible from the fact that while filing Criminal Misc. Petition No. 2763/12 for quashment of FIR, he has shown himself to be a member of Scheduled Caste whereas in fact he was not a member of Scheduled Caste and is belonging to OBC. This Court, while dismissing the criminal misc. petition, by its order dt. 18th of February 2013 had taken cognizance of this false averment of the proprietor of the petitioner firm and made following observations:

"The Investigating Officer present in the Court has submitted his factual report. It has been mentioned in the factual report that the certificate, which the petitioner has placed on record claiming to be a member of the Scheduled Caste is a concocted certificate. It has been mentioned in the factual report that the petitioner Poonam Chand had contested the elections of Municipality, Doongarpur

from the Ward No. 8, which is reserved for the persons belonging to the Orientally Backward Classes. It has also been mentioned that the petitioners belong to the OBC and not to the Scheduled Caste. The Investigating Officer has also placed on record the copy of the charge-sheet filed in the Court concerned in pursuance of the FIR No. 51/2006 registered at the Police Station Bichhiwada, wherein the petitioner Poonam Chand has been charge-sheeted for conniving to issue a forged certificate of Scheduled Caste while being the Sarpanch of the village concerned. The copy of the nomination form of the petitioner and the caste certificate filed by him alongwith the election nomination form, wherein the petitioner has shown himself to be belonging to the Orientally Backward Classes has also been filed on record. The Investigating Officer has reported that prima-facie, the offences under Sections 452, 427/ 34 IPC, Section 3/ 25 of the Arms Act, Section 3(1)(x) of the SC/ST Act and Section 3 of the PDPP Act are found to be made out against the petitioners.

Thus, in totality, the conduct of the petitioner, in my opinion has disintitiled him to claim any relief from this Court in exercise of extraordinary equitable jurisdiction.

11. Now, adverting to the argument of the learned counsel for the petitioner about violation of principles of natural justice, suffice it to state that the factum of serving show cause notice to the petitioner firm is not in dispute. As regards the reply/explanation tendered by the petitioner firm in response to the same in want of sufficient proof being tendered by the petitioner firm that the reply in fact was received by the competent authority, it is not possible to dislodge the positive assertion of the competent authority, as recorded in the impugned order, that it has not received reply to show cause notice. Well it is true that principles of natural justice are great humanizing principles and its adherence is necessary when the impugned action visits an individual with evil and civil consequences. However, there are certain restraints and extent of its applicability for observance considering the circumstances of an individual case.

12. Hon"ble Apex Court in case of The Chairman, Board of Mining Examination and Chief Inspector of Mines and Another Vs. Ramjee, , while examining the true purport of principles of natural justice, has laid down certain parameters for circumscribing its application. The Court made following observations in Para 13 of the verdict:

13. The last violation regarded as a lethal objection is that the Board did not enquire of the respondent, independently of the one done by the Regional Inspector. Assuming it to be necessary, here the respondent has, in the form of an appeal against the report of the Regional Inspector, sent his explanation to the Chairman of the Board. He has thus been heard and compliance with Reg. 26, in the circumstances, is complete. Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and

circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be financial nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt - that is the conscience of the matter.

13. In *S.L. Kapoor Vs. Jagmohan and Others*, , the Court has held that where the facts are admitted and only one conclusion is possible, it is not necessary to observe principles of natural justice. The Court held in Para 24 of the verdict as under:

24. The matter has also been treated as an application of the general principle that justice should not only be done but should be seen to be done. Jackson's *Natural Justice* (1980 Edn.) contains a very interesting discussion of the subject. He says:

"The distinction between justice being done and being seen to be done has been emphasised in many cases.

xx xx xx

The requirement that justice should be seen to be done may be regarded as a general principle which in some cases can be satisfied only by the observance of the rules of natural justice or as itself forming one of those rules. Both explanations of the significance of the maxim are found in Lord Widgery C.J.'s judgment in *R. v. Home Secretary, Ex. P. Hosenball*, (1977) 1 WLR 766, 772, where after saying that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done" he went on to describe the maxim as "one of the rules generally accepted in the bundle of the rules making up natural justice."

It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the Court is concerned not with a case of actual injustice but with the appearance of injustice, or possible injustice. In *Altco Ltd. vs. Sutherland*, (1971) 2 Lloyd's Rep 515 Donaldson J. said that the Court, in deciding whether to interfere where an arbitrator had not given a party a full hearing was not concerned with whether a further hearing would produce a different or the same result, It was important that the parties should not only be given justice, but, as reasonable men, know that they had had justice or "to use the time hallowed phrase" that justice should not only be done but be seen to be done. In *R. v. Thames Magistrates' Court, ex. p. Polemis*, (1974) 1 WLR 1371, the applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defence. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defence to the

charge.

"It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: "Well, even if the case had been properly conducted, the result would have been the same". That is mixing up doing justice with seeing that justice is done (per Lord Widgery C.J. at P. 1375)."

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The nonobservance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied Justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal.

14. In Ahmedabad Municipal Corporation Vs. Nawab Khan Gulab Khan and others, , while examining the observance of principles of natural justice vis-?-vis removal of encroachments of the public places, the Court held as under:

10. The Constitution does not put an absolute embargo on the deprivation of life or personal liberty but such a deprivation must be according to the procedure, in the given circumstances, fair and reasonable. To become fair, just and reasonable, it would not be enough that the procedure prescribed in law is a formality. It must be pragmatic and realistic to meet the given fact-situation. No inflexible rule of hearing and due application of mind can be insisted upon in every or all cases. Each case depends upon its own backdrop. The removal of encroachment needs urgent action. But in this behalf what requires to be done by the competent authority is to ensure constant vigil on encroachment of the public places. Sooner the encroachment is removed when sighted, better would be the facilities or convenience for passing or repassing of the pedestrians on the pavements or footpaths facilitating free flow of regulated traffic on the road or use of public places. On the contrary, the longer the delay, the greater will be the danger of permitting the encroachers claiming semblance of right to obstruct removal of the encroachment. If the encroachment is of a recent origin the need to follow the procedure of principle of natural justice could be obviated in that no one has a right to encroach upon the public property and claim the procedure of opportunity of hearing which would be a tedious and time-consuming process leading to putting a premium for high-handed and unauthorised acts of encroachment and unlawful squatting.

15. Although the petitioner firm has made allegations of malafide against the

private respondent but there is no material placed on record to substantiate the same. In common parlance, it is easy to allege malafide but for establishing strict material proof is required and such allegations cannot be accepted unless properly substantiated by the aggrieved party. Accordingly, the contention of the petitioner in this behalf is rejected.

16. Thus, viewed from any angle, I am not inclined to grant any indulgence to the petitioner firm considering the conduct of the petitioner and substantial compliance of observance of principles of natural justice by the respondents. Resultantly, the petition fails and the same is accordingly dismissed.