

(2018) 07 DEL CK 0158

In the Delhi High Court

Case No : W.P.(C) 7846 OF 2016 and CM No. 32464 OF 2016

**Prachar Communication Limited @APPELLANT@Hash Bharat Sanchar
Nigam Limited**

Date of Decision : 04-07-2018

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2018) 07 DEL CK 0158

Hon'ble Judges : VIBHU BAKHRU, J

Bench : Single Bench

Final Decision : Allowed

Judgement

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Article 226 of the Constitution of India impugning the Show Cause Notice dated 14.06.2016

(hereafter "the SCN") issued by the respondent (hereafter "BSNL") and the order dated 18.07.2016 (hereafter "the impugned order")

passed by the BSNL blacklisting the petitioner for a period of five years from the date of the said order.

2. The petitioner has assailed the impugned order principally on the ground that it has been passed in violation of principles of natural justice. The

petitioner alleges that it was not afforded any meaningful opportunity to respond to the allegations on the basis of which the petitioner has been

blacklisted. The petitioner claims that the SCN falls short of the requisite standards, as it neither provides any particulars of the allegations nor puts the

petitioner to notice of the proposed action to blacklist it. Â

3. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

3.1 On 11.07.2008, BSNL issued an "Expression of Interest for Empanelment of Advertising Agencies for BSNL Corporate Office" (hereafter "EOI"). In terms of the EOI, BSNL had invited bids from eligible bidders for rendering services relating to creative designing; media planning; and PR activities. The petitioner submitted its bid pursuant to the EOI. The said bid was accepted, and on 26.12.2008, BSNL issued a Letter of Intent (LOI) to the petitioner. Â

3.2 Thereafter, on 05.06.2009, the parties entered into an Agreement (hereafter "Empanelment Agreement") in terms of which the petitioner was required to provide the specified service "that is, media planning; media buying and public relation services" on the terms as agreed between the parties. The Empanelment Agreement was valid for a term of two years with an option of further extension for a period of one year. It was specifically agreed between the parties that the petitioner's performance would be reviewed in every three months and in the event its performance was found to be unsatisfactory, BSNL would have the right to terminate the Empanelment Agreement. Admittedly, there were no complaints against the petitioner during the term of the Empanelment Agreement and the petitioner's performance was not found dissatisfactory. Â

3.3 It is stated that almost five years after the term of the Empanelment Agreement had expired, BSNL issued the SCN, inter alia, alleging that the petitioner had "committed irregularities in the matter of empanelment of advertising agency" during the years 2008-10 and the petitioner was called upon to show cause why action should not be taken against the petitioner.

3.4 The petitioner responded to the SCN by a letter dated 17.06.2016, inter alia, stating that the petitioner was a reputed agency and was empanelled with several public sector undertakings. The petitioner asserted that it had filed an application for being empanelled as an Advertising Agency along with the necessary documents and had been empanelled at the discretion of BSNL. It also claimed that its financial bid was below the rate card of various media channels and publications and BSNL had benefited from the competitive rates offered by the petitioner.

3.5 On 18.07.2016, BSNL passed the impugned order debarring the petitioner from any business dealing with BSNL for a period of five years from the date of the impugned order. Â

4. The learned counsel appearing for BSNL submitted that the SCN was issued to the petitioner pursuant to the advice received from the Central Bureau of Investigation (CBI). He stated that the petitioner was not eligible for being empanelled as an Advertising Agency as it did not qualify the eligibility criteria as set out in Clause 2 of the EOI. The EOI specifically required the bidder to have experience of serving a minimum of three Government Departments and/or PSU's and/or listed companies with a minimum annual turnover of more than ₹ 500 crores during each of the previous three years. He submitted that in terms of Clause 2.2 of the EOI, only Advertising Agencies that had an annual turnover of ₹ 100 crores in advertisement and/or media planning and PR functions for the last three years (FY 2005-06, 2006-07 and 2007-08) were eligible for tendering their application. He submitted that even though the petitioner was not eligible, the Selection Committee had empanelled the petitioner. This was despite the internal auditor of BSNL opining that the petitioner was not eligible for empanelment in terms of EOI. Â

Reasons an Conclusion

5. At the outset, it is relevant to note that the SCN does not contain any reference to the allegations that are now sought to be canvased on behalf of BSNL. The SCN merely stated that a preliminary enquiry had been conducted by CBI on the basis of a reference received from CVC against certain officers of BSNL and it appeared that the petitioner had committed irregularities in the matter of empanelment as an Advertising Agency. The SCN is reproduced below:-

â??To

M/s Prachar Communication Limited,

Regd. Office: B-wing, 105, Samkeet Apartment

Sant Janabai Marg off Hanuman Road,

Ville Parle (E), Mumbai- 400 057

Sub: Show Cause Notice regarding irregularities in the matter of empanelment of advertising agency in BSNL Corporate Office during 2008-10.

Dear Sir(s),

WHEREAS a preliminary enquiry was conducted by CBI on the basis of reference received from CVC vide no. PE 7 (A)/2012/AC-III dated

23.03.2012 against some BSNL officers / ex-officers and M/s Percept Communications through its Directors & Promoters for committing irregularities in the matter of empanelment of advertising agency in BSNL Corporate Office, New Delhi during 2008-10.

WHEREAS it appears to the undersigned that M/s Prachar Communications Limited committed irregularities in the matter of empanelment of advertising agency in BSNL Corporate Office, New Delhi during 2008-10.

THEREFORE, I, V.K. Sharma, General Manager (Corporate Marketing), in exercise of powers conferred upon me by the BSNL, for and on behalf

of the CMD BSNL, hereby give you this notice to show cause within 15 days to my satisfaction why action should not be taken against you

(i.e. M/s Prachar Communications Ltd.) for indulging in unhealthy business practices. Please note that in case no cause is shown by you within the

stipulated period or the cause shown is not to my satisfaction, I shall take such actions against you as deemed fit, without further notice.

6. It is apparent from the above that the SCN is bereft of any particulars and there is much merit in the contention that the SCN did not disclose any

particular allegation, which could be responded to by the petitioner. The allegations that the petitioner had committed irregularities is a vague

allegation and this Court is at a loss to understand as to how anybody could effectively respond to such allegation. The SCN also refers to

unhealthy business practices. However, in absence of any particulars, it is difficult to understand the allegations being levelled against the

petitioner. Â

7. Blacklisting a person has serious adverse consequence on that person. It is also common knowledge that once any person has been blacklisted by

any Government Department or agency, other Government agencies and PSUs also refrain from dealing with the said person. Thus, the person who

has been blacklisted not only loses the opportunity to do business with the organisation that has blacklisted him but also with other concerns.

Blacklisting casts a stigma on the person who is blacklisted and has severe adverse affect on his goodwill and reputation. Â

8. In Erusian Equipment & Chemicals Ltd v. State of West Bengal & Anr: AIR 1975 SC 266, the Supreme Court had observed that:-

The blacklisting order involves civil consequences. It casts a slur. It creates a

barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are “instruments of coercion”.

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.

9. In *Gorkha Security Services v. Govt. (NCT of Delhi) and Others*: (2014) 9 SCC 105, the Supreme Court had observed as under:-

“With blacklisting, many civil and/or evil consequences follow. It is described as “civil death” of a person who is foisted with the order of

blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from

the award of government contracts.”

10. Given the serious adverse consequences of a blacklisting order, it is necessary that the person against whom such order is proposed, is given full

opportunity to submit his explanation and meet the allegations made against him. In *Erusian Equipment & Chemicals Ltd. (supra)*, the Supreme Court

had authoritatively held that it was necessary to issue a show cause notice and give full opportunity to a person to meet the allegations levelled against

him. This principle was reiterated by the Supreme Court in a later decision in *Raghunath Thakur v. State of Bihar & Ors.* : (1989) 1 SCC 229.

11. It is also settled law that a show cause notice is not an empty formality and must contain the specific particulars of the allegations that the noticee

is required to meet. In *Gorkha Security Services (supra)*, the Supreme Court had explained the above principles in the following words:-

“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 black listing, 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 on 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 be clearly and safely be discerned from the

reading thereof, that would be sufficient to meet this requirement.â??

12. In the present case, it is apparent that the SCN falls short of the standards necessary for it to be a meaningful notice. As stated earlier, the SCN

does not contain any specific allegation that would offer the petitioner a meaningful opportunity to submit its response. The allegation that the petitioner

has committed irregularities and the allusion that it has indulged in unhealthy business practices, without providing any further particulars, are vague

allegations and incapable of eliciting a meaningful response other than a plain denial. Â

13. It is further relevant to note that the SCN also did not indicate the nature of the action proposed to be initiated against the petitioner. Thus, the

petitioner was not put to the notice that it was proposed to blacklist the petitioner or debar the petitioner from any business dealing with BSNL.

14. The impugned order is also bereft of any particulars. The impugned order mentions that a preliminary enquiry had been conducted against some

officers of BSNL for committing irregularities in the matter of empanelment of advertising agency during 2008-10 and the SCN has been issued on the

recommendation of CBI at the advice of CVC. The impugned order further states

that the response submitted by the petitioner was unsatisfactory

and, therefore, a competent authority had decided to debar the petitioner from business dealings with BSNL for a period of five years. Â

15. It is apparent from the plain reading of the impugned order that it also does not disclose particulars of any offensive conduct for which the petitioner has been penalised.

16. As mentioned above, blacklisting or debarring a person from business dealings has serious adverse consequences. It is also necessary to ensure

that such punitive measure is commensurate with the gravity of the misconduct of the person who has been visited with such punishment. In *Kulja*

Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL & Ors.: AIR 2014 SC 9, the Supreme Court had indicated the factors that

were required to be considered by the concerned authorities while determining the question whether to blacklist a person. The relevant extract of the

said decision is set out below:-

â??The guidelines also stipulate the factors that may influence the debarring officialâ??s decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether the contractor has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State

or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative

or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(h) Whether the contractor has cooperated fully with the government agencies during the investigation and any court or administrative action. Â (i)

Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

17. It is also apparent that BSNL has not considered the aforesaid factors while determining the duration for which the petitioner has been debarred from business dealings with BSNL.

18. In view of the above, the SCN and the impugned order cannot be sustained. The same are, accordingly, set aside. However, it is clarified that

BSNL is not precluded from issuing a fresh show cause notice indicating the specific allegations against the petitioner and further indicating the action

proposed to be taken against the petitioner. In the event BSNL decides to proceed against the petitioner, it is also necessary that the concerned

authority bear in mind the principles as set out by the Supreme Court in *Kulja Industries* (supra).

The petition is allowed in the aforesaid terms. The application also stands disposed of.