

(2011) 03 DEL CK 0061

In the Delhi High Court

Case No : LPA No. 778 of 2010 and WP (C) No. 7860 of 2010

Roshan Lal Vohra and Sons and Others

APPELLANT

Vs

MCD and Others

RESPONDENT

Date of Decision : 14-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 03 DEL CK 0061

Hon'ble Judges : Dipak Misra, C.J.; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Shyam Moorjhani and Siddharth Joshi, for the Appellant; H.S. Phoolka Jitender Kumar and Kanwar Faisal for MCD, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, C.J.—The controversy involved in the Letters Patent Appeal and the writ petition preferred under Article 226 of the Constitution of India being relatable to the same parties and regard being had to the inescapable impact they will have on each other, the matters were heard analogously and are disposed of by a singular order.

2. Be it noted, when WP(C) No. 7860/2010 was listed before the learned Single Judge on 25.11.2010 keeping in view the assail made in the earlier order, which had relevance, in LPA 778/2010, the learned Single Judge thought it appropriate to refer the matter to the Division Bench to be linked with the Letters Patent Appeal.

3. To appreciate the list in question, it is imperative to sit in a time machine to appreciate the number of litigations that have been filed before this Court and the consequences and the effect of the same. The Appellant and others had entered into a contract with the Municipal Corporation of Delhi (MCD) and due to certain reasons an order was passed blacklisting the firm and the said order was challenged in WP(C) No. 8130/2009. Though contentions were raised with regard

to the various facets relating to the promptitude in which the contractor had carried on the work, the non-justification of issuance of any kind of order like black listing, the high handed attitude exhibited by the owner, the non-supply of revised drawings and designs and obstructions at the site and the non-fixation of the revised rate and certain other ancillary factors, the learned Single Judge thought it appropriate not to enter into the said arena by expressing the view that it involved factual dispute and refrained himself from deciding the same. However, as far as the black listing is concerned, in paragraph 39 of the order, the learned Judge opined that as the order of black listing has been passed without following the principles of natural justice, and hence, the same deserved to be lanced in view of the decisions rendered in *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, and *National Building Construction Corporation Limited v. New Delhi Municipal Council* 2007 (2) R.A.J. 162 (Del). Eventually, the learned Single Judge opined thus:

In the facts and circumstances of this case as observed earlier, it is not possible for this Court in the proceedings under Article 226 of the Constitution of India to decide dispute questions of fact and the dispute arises out of a contract entered into between the parties. Thus, no relief can be granted to the Petitioners with respect to two orders passed on 16.3.2009. It will be open to the Petitioners to seek such remedies, as may be available to them in accordance with law. It is clarified that any observations made by this Court shall not come in the way of the Petitioners in seeking appropriate remedy.

4. After the aforesaid order came to be passed, the Appellant preferred WP(C) No. 5785/2010 for issue of a writ of mandamus to have the access to e-tenders as he has been deprived of the said benefit. On that juncture, the learned Single Judge while dealing with the writ petition came to hold that as no notice to show cause was given after the order of blacklisting was axed, a contention was advanced by the MCD that pending action it has the jurisdiction/authority to suspend awaiting decision on the show cause notice. The learned Single Judge took note of the fact that no show cause notice had been issued and no order of suspension had been passed. It is worth noting, a contention was advanced by the Appellant that neither the show cause notice could be issued nor can an order of suspension be passed as such a power did not rest with the authority. Under these circumstances, the learned Single Judge disposed of the writ petition with the following directions:

In view of the aforesaid circumstances, this petition is disposed of with direction that unless there is an order of suspension i.e. of interim blacklisting of the Petitioner on or before 15th September, 2010, the Respondent No. 1 MCD to give access to the Petitioner to the tenders and allow him to participate in the same with effect from 16th September, 2010. Needless to state that the Petitioner shall have remedies against the order, if any, of suspension and/ or if the show cause notice now given results in fresh blacklisting.

5. As the factual chronology would reveal, thereafter the MCD issued a notice on

13th September, 2010 requiring the Appellant to show cause why the Appellant firm be not debarred from tendering in MCD for an appropriate period for not following the terms and conditions of the NIT/Work Order/Contract.

6. After the issuance of the notice to the Appellant, vide order dated 15.9.2010 an order was passed suspending the Appellant for a period of six months pending appeal. At this juncture, the Appellant moved this Court in Contempt Case No. 653/2010. It was put forth before the learned Single Judge that after quashment of the order of black listing, the issuance of notice to show cause did amount to contempt of this Court. The learned Single Judge declined to initiate the proceedings for contempt by ascribing following reasons:

... By filing W.P.(C) No. 8130/2009 the Petitioners had challenged various orders passed by the MCD including the order of blacklisting. While disposing of the writ petition the order of blacklisting was quashed only on the ground that the Respondent MCD had failed to comply with the principles of natural justice and no show cause notice, as to why the Petitioners should not be blacklisted, was issued to the Petitioners. Issuance of show cause notice to the Petitioners does not amount to willful disobedience of any order or direction issued by this Court in the judgment dated 1.7.2010. Accordingly, no grounds are made out for initiating contempt proceedings in the present contempt petition.

7. It is apposite to mention that liberty was granted to the Petitioner to assail the show cause notice and the order of suspension in accordance with law. After the proceeding for contempt was dropped, WP(C) No. 6718/2010 was filed. It has been urged in the writ petition and propounded in the course of arguments that when the order of blacklisting had been dropped by order dated 1st July, 2010, in the earlier petition, the Respondents had no authority in law to proceed for blacklisting and suspend the business of the Appellant, and secondly the show cause notice dated 13th September, 2010 had not been issued by the appropriate authority.

8. The learned Single Judge referred to the earlier order and opined that when the order of blacklisting was passed solely on the ground that principles of natural justice was not complied with, it is open to the MCD to proceed with the blacklisting proceedings and the permission or leave from this Court was not necessary. As far as the second contention is concerned, the learned Single Judge opined that the Appellant-Petitioner can raise all the contentions in the show cause before the competent authority including the ground that it had not been given by the competent authority.

9. The said order is impugned in this Letters Patent Appeal. When the Letters Patent Appeal was pending, a second show cause notice was issued by the Enlistment Committee of the MCD on 2.11.2010. It was mentioned therein that the Enlistment Committee has concurred with the orders of the Commissioner MCD dated 14.9.2010 issued vide circular dated 15.9.2010 suspending the business of the Petitioner with the MCD for a period of six months. The said show

cause notice was challenged in WP(C) No. 7860/2010 which the learned Single Judge thought it appropriate to be heard by a Division Bench along with the appeal.

10. Questioning the correctness and legal propriety of the order passed in WP(C) No. 6718/2010, holding the issuance of the notice to show cause and the order of suspension passed by the Respondent to be correct and further the order passed in WP(C) No. 8130/2009, Mr. Shyam Moorjhani, learned Counsel for the Appellant, has raised the following contentions:

(a) When the learned Single Judge had quashed the order of blacklisting and no liberty was granted, the MCD and its functionaries could not have issued the show cause notice.

(b) The language employed in the show cause notice would clearly reflect the pre-determined mind of the Respondent to blacklist the Appellant and, therefore, the principle of audi alteram partem is fundamentally an exercise in futility.

(c) The first show cause notice and order was passed in the name of the Commissioner and, therefore, no second show cause notice could have been issued by the Committee in question.

(d) The show cause notice issued by the Respondent is in the realm of jurisdictional fact and, therefore, the same deserves to be quashed and more so when there is a pre-disposition of mind.

Mr. Moorjhani to bolster his submissions has commended us to the decision in Siemens Ltd. Vs. State of Maharashtra and Others,

11. Mr. H.S. Phoolka, learned senior counsel for the MCD, resisting the aforesaid contentions has proposed thus:

(i) When any order which is likely to visit adverse consequences is quashed on the ground of non-compliance of principles of natural justice, the Court issues a writ of certiorari for quashing the said order and the parties get relegated to their original position and, therefore, the question of obtaining any liberty or grant of liberty does not arise.

(ii) The initial show cause notice was issued by the Commissioner though it is the Committee which has the power of issuance of show cause notice as well as the suspension order under the relevant instructions and, therefore, the defects were rectified and it is within the domain of the authority to rectify the defects and hence, the action taken cannot be faulted.

(iii) The contention that once the show cause notice is issued the hands of the Respondent are tied is unacceptable since it relates to realm of contract and specially the participation of the Contractor in the tendering process and, therefore, the MCD is not debarred in law to issue/correct/rectify the another show cause notice.

(iv) The decision in Siemens Ltd. (Supra) is distinguishable inasmuch as the Apex Court was dealing with the jurisdictional fact and that an absolute prior premeditation and hence opined, the doctrine of audi alteram partem herein is unwarranted but the said principle is not applicable to the case at hand inasmuch as the factual bed rock which constitutes the jurisdictional fact pertains to violation of terms and conditions of the contract/agreement and adequate opportunity would be afforded to the Petitioner to explain the same and, therefore, it cannot be held that the Respondents have made up their mind. In any case, whether there has been violation of contractual terms and conditions or not should not to be decided in a writ petition or an appeal arising out of a writ petition since the said determination first lies within the domain of the authority and more so when the disputed questions of facts are involved.

12. To buttress his submissions, the learned senior counsel has drawn inspiration from the decisions rendered in Canara Bank and Others Vs. Shri Debasis Das and Others, Union of India (UOI) and Others Vs. B.N. Jha, ; Uma Nath Pandey and Others Vs. State of U.P. and Another, and Gurmej Singh Vs. State of Punjab and Another,

13. First we shall advert to the contention whether the liberty was required to be granted. On a perusal of the order passed by the learned Single Judge on the first occasion, it is quite clear that the learned Single Judge had quashed the order primarily on the ground that there has been non-compliance of principles of natural justice. While quashing the order, the learned Single Judge has referred to the factual scenario and declined to adjudicate the controversy relating to the contract and in paragraph 45 of the order has clearly observed that if any observations have been made they will not affect the case with regard to the contractual dispute. Thus, it is clear as crystal that the whole thing rests on the violation of the audi alteram partem.

14. In the case of Debasis Dass and Ors. (Supra), the Apex Court held that whenever an order is struck down as invalid, being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left open. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated. While dealing with the concept of useless formality, their Lordships have held thus:

23. As was observed by this Court we need not go into "useless formality theory" in detail; in view of the fact that no prejudice has been shown. As is rightly pointed out by learned Counsel for the Appellants unless failure of justice is occasioned or that it would not be in public interest to dismiss a petition on the fact situation of a case this Court may refuse to exercise said jurisdiction (Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, . It is to be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing Charan Lal Sahu Vs. Union of

India,

15. In the case of Uma Nath Pandey and Ors.(Supra), the principles laid down in the case of Debasis and Ors.(Supra) were reiterated. In Gurmej Singh (Supra), the Apex Court reiterated the aforesaid principle and the applicability of natural justice in this context and the action to be taken when such an order is passed.

16. At this juncture, we may refer to the decision in Siemens Ltd. (supra) on which Mr. Moorjhani has placed a heavy reliance. The learned Counsel has drawn our attention to paragraphs 8 to 11. In the said case, their lordships expressed the view that when a demand is made forming the same as a show cause notice and there is absence of jurisdictional fact for issuance of the said notice, a writ petition would be maintainable. In that context in paragraphs 9 and 11 it has been held thus:

9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of Uttar Pradesh Vs. Brahm Datt Sharma and Another, , The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another, , and Union of India (UOI) and Another Vs. Kunisetty Satyanarayana, but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose K.I. Shephard and Others Vs. Union of India (UOI) and Others, . It is evident in the instant case that the Respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice....

11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter-affidavit filed by the Respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the Appellant. If in passing the order the Respondent has already determined the liability of the Appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable.

17. After so stating, the Apex Court remitted the matter to the High Court for consideration on its own merits. Thus, it means that the show cause notice shall be treated as a demand and the matter was remitted to the High Court to adjudicate whether the demand was adequately raised. In the peculiar facts, their Lordships did not think it appropriate to quash the show cause notice and directed the matter to be reconsidered by the competent authority as the liability had already been fulfilled. But in the case at hand, the factum of the matter is whether the Appellant deserves to be blacklisted. The learned Single Judge, on the first occasion, had referred to the terms of the contract determining the

contract and eventually the communication made between the parties and eventually refrained from deciding the disputed question of fact as the dispute arises out of a contract entered into between the parties. The Court had not quashed the order of blacklisting on merits.

18. At this juncture, this Court should not assume that an order would be passed and how they shall be dealt with at the stage of initiation and more so when on the earlier occasion, the Court had quashed the order of blacklisting on merits and the said order had been challenged from both the sides.

19. In view of our aforesaid analysis, the contention requiring the Respondent to afford an opportunity of hearing to the Petitioner before proceeding to the blacklisting is in the realm of useless theory of formality where it does not arise. Hence, we do not dwell upon the said issue. The next aspect that is highlighted by Mr. Moorjhani, learned Counsel for the Appellant, that once a notice to show cause had been issued, the same could not have been substituted by the second show cause notice. It has been also urged by him that the second show cause notice issued by the Committee is an eye-wash as the Committee could not have differed from the decision taken by the Commissioner. On this, Mr. Phoolka has drawn our attention to the instructions.

20. Be it noted, the show cause notice is relatable to black listing as well as suspension of business. Instruction 23.2 on which reliance has been placed upon, reads as follows:

23.2 Suspension of business: The enlistment authority may suspend business with a contractor for indefinite period or for a period as decided by enlisting authority, pending full enquiry into the allegation, if the enlistment authority is prima facie of the view that the contractor is guilty of an offence in relation to business dealings which, when established would result in his removal/banning business and it is not considered desirable to entrust new works or continue business with the contractor.

21. It is not in dispute that the first show cause notice was issued under the authority of the Commissioner/Corporation. To rectify the same, the Committee issued the second show cause notice to which an objection was raised by the Petitioner to regularise the same or to bring it in consonance with the instructions. On the second show cause notice so issued, it is submitted by Mr. Phoolka, relying on the decision in Maharashtra State Seeds Corpn. Ltd Vs. Haridas and Another, that in an administrative proceeding if there is a defective notice then it can be rectified. Learned senior counsel would submit that it is not such a mistake which cannot be rectified and, on the contrary, the mistake deserved to be rectified to take appropriate action as required under law.

22. In our considered opinion, the MCD had the authority to rectify the mistake by issuing the show cause notice through the Committee in terms of the instructions of which the parties were aware at the time of entering into agreement. It will be extremely harsh to say that once a show cause notice had

been issued by the Commissioner or any authority on behalf of the Commissioner, the Corporation as a body corporate will become functus officio. In the absence of lack of inherent jurisdiction we are unable to accede to such a submission and, accordingly, we fail to repeal the same. As far as the disagreement of the Committee with the Commissioner is concerned, in the scheme of things the Committee has taken a decision and there cannot be a presumption that it will be guided, influenced, persuaded or commended by the Commissioner. That apart, thus, the said submission also does not gain any acceptance.

23. In view of the aforesaid, we are not inclined to interfere with the LPA 778/2000 as well as the WP(C) No. 7860/2010. However, we extend the period to file reply to the second show cause notice dated 2nd November, 2010 within a period of four weeks and the Committee shall afford an adequate opportunity of personal hearing to the Petitioner as he has to protect himself from vesting of adverse consequences.

24. We further hasten to clarify that none of our observations would be taken up as an aid at any juncture for the simon pure reason that we have not referred to the contractual implications as the same has to be adjudicated, if necessity so warrants, by a different forum.

25. In the result, the appeal and the writ petition are dismissed with no order as to costs.