
(2017) 03 MAD CK 0044
In the Madras High Court
Case No : 17336 of 2016

S.P.Agencies

APPELLANT

Vs

Tamil Nadu Ware Housing Corporation & Anr

RESPONDENT

Date of Decision : 28-03-2017

Acts Referred:

[Partnership Act, 1932](#), [Section 25](#), [Section 32](#), [Section 38](#) - Liability of a par

Citation : (2017) 03 MAD CK 0044

Hon'ble Judges : S.Vimala

Bench : SINGLE BENCH

Advocate : S.Vimala

Judgement

1. Whether absolute power to blacklist a Contractor is vested with the party, allotting the contract or whether it can be done only by following the

principles of natural justice, especially, when such blacklisting has civil consequences, i.e. it not only affects the reputation, but also erodes his

credibility in such contractor's dealings with other private persons?

1.1. When State or any other instrumentality of the State is a party, whether the decision to blacklist is open to the judicial review on the

touchstone of proportionality and natural justice principles?

2. ""You are directed to show cause why action should not be taken against you for gross violation of the terms and conditions of the Tender

Document, as per clause X (a) & (b) r/w clause IV(d) of the Tender Document and why action should not be initiated to terminate the contract

extended to you for the period 2013-2015 and the existing contract awarded to you for the period of 2015-2017, without prejudice to the other

proceedings of debarring and blacklisting you"" - this is the show cause notice issued by the Tamil Nadu Warehousing Corporation to the petitioner.

3. Thereafter, the first respondent, by the impugned order dated 31.08.2016, terminated the contract awarded in favour of the petitioner dated

08.02.2016, for the period from 2015 to 2017, on the ground that the petitioner was guilty of wanton and wilful suppression of material fact of the

re-constitution of the partnership, during the currency period of the contract. The respondent also blacklisted the petitioner, by invoking the

provisions of clause X(a)(b)&(d) of the Handling and Transport Tender Document for 2013-2015 (which was extended from 2015 to 2017). This

order is under challenge in this writ petition.

4. Facts:

(i) The petitioner is a Partnership Firm, functioning as Transport Contractor. The respondent floated a tender for appointment of Handling and

Transport Contractors (hereinafter referred to H&T Contractor), for all regions in Tamil Nadu. The petitioner obtained a contract in respect of

Tirunelveli Region for the period 2013 to 2015, the contract period ending by 17.10.2015.

(ii) Subsequently, the petitioner Firm re-constituted their Partnership.

(iii) Thereafter, the respondent Corporation floated a tender for 2015-2017 for several regions. The petitioner submitted its tender for eight

regions. The petitioner was awarded a contract to Vellore Region for the period 2015-2017. But, the contract in respect of Tirunelveli Region for

2015-2017 was awarded in favour of an erring contractor, against whom, the petitioner has submitted a representation.

(iv) The petitioner obtained an order of stay in W.P.No.2344 of 2016 in respect of Tirunelveli Region and got an order of extension of the contract

period from the respondents.

(v) When the respondents did not permit the petitioner to carry out the work, the petitioner, on enquiry, was informed that the first respondent has

issued an order, terminating the contract and blacklisting the petitioner. Challenging the same, this writ petition has been filed.

5. The following dates and events would be helpful to better appreciate the facts.
Sl. No. Dates Events 1. 18.10.2013 Award of Contract to the

petitioner for Tirunelveli Warehouse for 2013-2015 2. 18.02.2016 Extension of

the contract for another six months under the same rates, dates and conditions (for Tirunelveli Region) 3. 13.11.2015 Reconstitution of the Partnership 4. February 2016 Reconstitution of the Partnership came to the notice of the Corporation 5. 17.03.2016 Show Cause Notice 6. 23.03.2016 Dismissal of W.P.(MD)No.2344 of 3983 of 2016 filed by the petitioner 7. 31.03.2016 Reply to the show cause notice (by the petitioner) 8. 31.08.2016 Impugned order of blacklisting 9. 10.09.2016 Receipt of the impugned order by the petitioner

6. In the Technical Bid for appointment of H&T Contractors for the period of 2013-2015, clause IV (d) states as follows:

The Contractor(s) shall not, during the currency of the contract make, without the prior approval of the Corporation, any change in the Partnership

of the Firm or reconstitute the Firm. The contractor(s) shall notify the Corporation the death/resignation of the Partners/Directors, immediately on

the occurrence of such event. On receipt of such notice, the Corporation shall have the right to terminate the Contract, if it deems so fit.

Clause XI, stipulating the period of contract, provides for extension of the period of contract for a further period upto six months on the same rates,

terms and conditions and it provides for claiming of any resultant loss sustained or cost incurred from the contractor, if the contractor is unwilling

for extension.

7. In the Partnership Deed dated 08.10.2010, there are Partners, by name, Mrs.S.Poovammal, Mr.G.Subbiah, Mr.S.Livingston, K.Ramesh,

Mrs.R.Nirmala, Mr.V.P.S.Kannan. In the partnership Deed dated 13.11.2015, the partners are Mrs.S.Poovammal, Mr.G.Subbiah,

Mr.S.Livingston, Mr.K.Ramesh, Mrs.R.Nirmala, Mr.K.Pandian, Mr.N.Prabu, Mr.P.Mahadevan and Mr.T.Venkatachalapathy. Thus, apparently,

there had been a re-constitution in the Partnership Firm.

8. It is an admitted fact that even though the original contract was for the period of two years, starting from 18.10.2013 to 17.10.2015, it was

extended for three months from 18.10.2015 to 17.01.2016. During the currency of three months (extended period), the Firm has been re-

constituted.

9. It is also relevant to point out that the extension of the contract was under the same terms and conditions of the original contract. It is not the

case of the petitioner that before the re-constitution of the Firm, the petitioner obtained the prior written consent of the Corporation.

10. From the details of the re-constituted Partnership Firm, it is evident that one partner has been removed and four partners have been inducted.

11. The tender condition postulates and contemplates a stellar responsibility on the part of the respondent to have fair and objective consideration of the pros and cons of the change in the partnership, so as to arrive at a conclusion of fitness of the decision, it would make upon such consideration.

12. Under Section 25 of the Indian Partnership Act 1932, the liability of each partner is joint and several.

12.1. It is worth to extract the provisions of Sections 25, 32 and 38 of the Indian Partnership Act, 1932, in order to understand the consequences

of the change in the Partnership and the impact upon the liability of the Partner.

Section 25: Liability of a partner for acts of the firm -

Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

Section 32 : Retirement of a partner -

(1) A partner may retire -

(a) with the consent of all the other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) A retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by an agreement made

by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such

third party and the reconstituted firm after he had knowledge of the retirement.

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by

any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement: Provided that a

retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.

Section 38: Revocation of continuing guarantee by change in firm-

A continuing guarantee given to a firm, or to a third party in respect of the transactions of a firm, is, in the absence of agreement to the contrary,

revoked as to future transactions from the date of any change in the constitution of the firm.

Therefore, even though the legal consequences appear to be less, still as there is suppression, regarding reconstitution of the Firm, i.e.

Reconstitution of the Partnership Firm, that too without the prior consent of respondent Corporation. The Corporation is within its power to

terminate the contract.

13. The next issue to be considered is whether the respondent is justified in ordering blacklisting of the petitioner, apart from terminating the

Contract?

14. It is the contention of the learned counsel for the respondents that a) the power to order blacklisting is inherent in the contract itself and

therefore, the order is justified; b) even assuming that the principles of natural justice has to be followed, show cause notice has already been

issued to the petitioner and as the principles of natural justice has been followed, the order for blacklisting cannot be questioned.

15. In order to appreciate those contentions, it is necessary to know the meaning and implication of blacklisting.

In Black's Law Dictionary, the meaning of the term "blacklist" is given as follows:

Blacklist: A list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among

whom it is intended to circulate;

Blacklist is a list of people, who are considered by a particular authority or group to be unacceptable and who should be avoided and not trusted.

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.

Opportunity of hearing:

16. The Hon"ble Supreme Court in the case of Joseph Vilangandan v. The Executive Engineer, (PWD), Ernakulam and Ors. (AIR 1978 SC 930)

after taking into consideration the law as laid down by Hon"ble the Apex Court in the case of Erusian Equipment & Chemicals Ltd. (Supra) held

that before blacklisting a person, opportunity should be given to him by the competent authority and if the same is not done, the order passed

thereby blacklisting a person is contrary to fair play as well as principles of natural justice.

Implied principle of rule of law:

17. In the case of Raghunath Thakur v. State of Bihar and ors. (AIR 1989 SC 620), the Hon"ble the Apex Court held as under:-

Indisputably, no notice had been given to the appellant of the proposal of black-listing the appellant. It was contended on behalf of the State

Government that there was no requirement in the rule of giving any prior notice before black-listing any person. In so far as the contention that

there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any

order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that black-listing any

person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not

express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making

representations against the order. In that view of the matter, the last portion of the order in so far as it directs black-listing of the appellant in

respect of future contracts, cannot be sustained in law.

18. The scope of interference in the case of judicial review has been explained in the decision of the Hon"ble Apex Court reads as follows:

The Hon"ble the Apex Court in the case of Heinz India Private Ltd. And another v. State of U.P. and Ors., reported in (2012) 5 Supreme Court

Cases 443, after placing the reliance on the judgment of Reid v. Secy. of State for Scotland (1999) 1 ALL ER 481 (HL) held that ""Judicial review

involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence.

Adequate and meaningful opportunity of hearing:

19. In the case of *Erusian Equipment & Chemicals (supra)*, a three Judges' Bench of the Hon^{ble} Supreme Court has been pleased to observe

and hold, *inter alia*, as under:-

17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a

contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises

because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of

arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the

Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one

but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and

personality. Blacklisting tarnishes one's reputation.

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a

lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection

and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who

offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.

20. An adequate and meaningful opportunity to the person concerned to show cause and to present his case before the authorities in a proposed

action of blacklisting/debarring is a well established norm; and is not a matter of empty formality.

21. At this juncture, it is essential to consider the tenor and tone of the show cause notice.

22. "You are directed to show cause why action should not be taken against you for gross violation of the terms and conditions of the Tender

Document, as per clause X (a) & (b) r/w. Clause IV(d) of the Tender Document and why action should not be initiated to terminate the contract

extended to you for the period 2013-2015 and the existing contract awarded to you for the period of 2015-2017, without prejudice to the other

proceedings of debarring and blacklisting you" - this is the show cause notice issued by the Tamil Nadu Warehousing Corporation to the petitioner.

23. From the reading of the show cause notice, it is evident that the ambiguity and obscurity mask the real intention of the show cause notice in as

much as it grossly understate the impending proceeding of the debarring and blacklisting.

23.1. If the above statement is to be understood in an appropriate perspective, it is necessary to understand the twin requirements of show cause notice.

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

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

These twin requirements are conspicuous by their absence, in the instant case.

24. The Allahabad High Court has highlighted the purpose of serving the show cause notice as reported in the case of K.P. College of

Management Vs. State of U.P. and Ors., which reads as under:

The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he

has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an

opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That

should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches

complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to

the fact that it is harshest possible action.

These opportunities, as highlighted in the decision cited supra, have been denied to the petitioner herein.

25. Apart from issuing show cause notice, the facts and circumstances of the case may impose a duty on the part of the respondents to give an

opportunity of oral hearing, which is spoken to by the Apex Court, in the case of Gorkha Security Services, where, the Hon''ble Apex Court held

that it would depend on the nature of interest to be affected and the circumstances in which a power was exercised and the nature of sanctions

involved; and therein, the authorities were directed to hear the petitioners on the question as to whether their names should be put on the blacklist

or not.

26. The learned counsel for the respondents would contend that as per clause X(a) of the Tender Document, the Managing Director of the

Corporation is empowered to terminate the contract, without prejudice to any other rights and remedies. The learned counsel for the respondents

also relied upon the following decisions:

(i) M/s.Patel Engineering Limited vs. Union of India and another, dated 11.05.2012, in which, the decision of Jagadish Mandal vs. State of Orissa

and others ((2007) 14 SCC 517) is relied upon:

Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.'" The

prejudice to the commercial interests of the petitioner, as pointed out by the High Court, is brought about by his own making. Therefore, it cannot

be said that the impugned decision of R-2 lacks proportionality.

Contending that reasonable opportunity has been furnished and that it is sufficient, the same judgment has been relied upon:

26. Coming to the submission that R-2 ought to have given an oral hearing before the impugned order was taken, we agree with the conclusion of

the High Court that there is no inviolable rule that a personal hearing of the affected party must precede every decision of the State. This Court in

Union of Indian and another v. Jesus Sales Corporation, (1996) 4 SCC 69, held so even in the context of a quasi-judicial decision. We cannot,

therefore, take a different opinion in the context of a commercial decision of State. The petitioner was given a reasonable opportunity to explain its

case before the impugned decision was taken.

(ii) Expressing the necessity of reasonableness, fair play, natural justice, equality and non-discrimination, the decision of the Supreme Court, in the

case of M/s.Kulja Industries Ltd. vs. Chief General Manager, W.T.Proj, BSNL and others (AIR 2014 SC page 9) needs to be looked into. The

relevant observation reads as under:

11. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason.

In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the

Constitution. Reliance in this connection may be placed on the observations of this Court in Miss Radha Krishna Agarwal and Ors. v. State of

Bihar and Ors., [1977] 3 SCR 249 ?... In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article

14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is

arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action

down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of

the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental

action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable??. It

appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law

applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the

citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are

subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of

the transactions and nature of the dealing as in the present case.

27. There may be circumstances in which one of the contracting party may be justified in backing out the other. There may be unforeseen

circumstances/supervening circumstances/several other situations, which the contracting parties could not comprehend, and the ground realities

may be found otherwise than what was meant and understood by the contracting parties. There may be mutual mistake or mistake on the side of

one party on the basis of wrong understanding of the ground realities.

27.1. No such circumstances exist in this case to the extent of blacklisting the petitioner.

28. A unilateral decision by one of the contracting parties, who is in a dominating position, to blacklist a contractor on the mere ground that he

backed out, unmindful of the consequences without reference to the circumstances, under which, he is backed out, is wrong and illegal.

29. If the decision to blacklist is taken without affording meaningful opportunity of being heard (to the affected party), it adds to the illegality and

the order blacklisting the contractor is liable to be struck down.

30. In the result, the order dated 31.08.2016 relating to termination of contract is upheld and the same order relating to blacklisting of the

petitioner is quashed.

31. Accordingly, the writ petition is disposed of. No costs. Consequently, connected miscellaneous petitions are closed.