
(2015) 03 MP CK 0045
In the Madhya Pradesh High Court
Case No : Writ Petition No. 8546/2014

T.R. Trehan Construction Pvt. Ltd.

APPELLANT

Vs

M.P. Audyogik Kendra Vikas Nigam (Indore) Limited and
Others

RESPONDENT

Date of Decision : 26-03-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 298

Citation : AIR 2015 MP 80 : (2015) 3 BC 561

Hon'ble Judges : Alok Verma, J.;P.K. Jaiswal, J.

Bench : Division Bench

Advocate : Aniket Naik, Learned Counsel, for the Appellant; Lucky Jain, Learned Counsel, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Alok Verma, J.—Aggrieved by the order dated 07.09.2014 passed by the Chief Engineer and the appellate authority - respondent No. 1 rejecting the appeal filed by the petitioner against the order dated 12.03.2014 (Annexure P/10) passed by Managing Director of respondent No. 1 (Annexure P/7) whereby the Managing Director forfeited the security deposit submitted by the petitioner and also claimed damages and compensation for the breach of contract by the petitioner, and also the petitioner was prohibited to participate in tender process of works of respondent No. 1 for a period of 5 years.

2. According to the counsel for the petitioner, the petitioner is a reputed and experienced Civil Engineer Contractor and doing the construction and maintenance works of civil engineering since last 25 years. He has been undertaking construction and maintenance works on contract with the State Government and other undertakings and is registered as "A-5" Class Contractor with Public Works Department, Government of Madhya Pradesh.

3. Respondent No. 1 invited tenders for B.T. Renewal Work in Pithampur and

Kheda, District Dhar. The present petitioner submitted his tender. He was found eligible and his tender was accepted and work order was issued on 05.10.2007 in favour of the petitioner for a probable amount of contract of Rs. 392 lacs. The period of completion of work of B.T. Renewal was six months excluding rainy season. The work order is (Annexure P/1) and the work contract is (Annexure P/2).

4. As per the provisions of the contract, the petitioner was required to furnish bank guarantee for a period of maintenance of road that is 5 years after completion of work. The work was completed on 29.05.2009 and the maintenance period began from 30.05.2009 and was to be completed on 29.05.2014. The petitioner submitted bank guarantee issued by Oriental Bank of Commerce for Rs. 23 lacs which were valid upto 11.04.2013. After 11.04.2013, the Oriental Bank of Commerce wrote a letter to the respondent No. 1 and requested him to return the original bank guarantee as the same was expired on 11.04.2013. This letter is Annexure P/3.

5. On receiving such letter from the bank, the office of respondent No. 1 remained silence for five months and thereafter, wrote a letter on 26.09.2013 (Annexure P/4) asking the petitioner to renew the guarantee for further one year. Thereafter, on 28.12.2013, the executive engineer of respondent No. 4 issued another letter to petitioner asking him to renew the guarantee, failing which the security deposit shall be forfeited and the petitioner would be blacklisted. The last para of the letter is as under:--

"You are hereby again instructed to submit the renewed Bank Guarantee with in three days. Otherwise, the security deposit deposited in this Nigam under this agreement will be forfeited and it will be proposed to get your firm black listed. You will only be responsible for such an action." 6. In response to this letter, the petitioner submitted the detailed reply (Annexure P/6) in which he raised various objections against the allegations that he failed to maintain the road and in respect of bank guarantee. In para 17 of the letter he replied as under:--

"17. Now, as for other issue, namely for renewal of the BG, we have to respectfully submit that till date you have had no occasion to carry out any maintenance at out cost. Now, out of the 5 years period of maintenance, more than four and a half years is over. We are continuing with the repairs and maintenance. Moreover, you are still having Rs. 22,39,737 as security, hence there is hardly any need to renew the BG. There is no provision in the contract stipulating any powers to you to forfeit the security deposit during the maintenance period. We presume that you will find this stance in order, particularly, because of what has been stated here in before in previous paragraphs particularly paragraph Nos. 14 and 15. We hope you will not act arbitrarily and indulge again in any sort of abuse of authority. Should you do so you will be doing so at your risk and responsibility? We may also state that in case you do not think it wise to agree with our response, in part or full, then we shall invoke Arbitration clause of the contract and we expect you to wait for the

result of arbitration." 7. Taking action on this reply, the respondent No. 3 issued a letter on 12.03.2014 by which the security deposit of the present petitioner was forfeited and he was prohibited to participate in tender process of works of respondent No. 1 for a period of 5 years from the date of this order. The last paragraph of this letter is stated as under:--

"In view of the above facts, you have committed gross breach of the terms and conditions of the said Agreement and thus the Nigam is forfeiting the security deposit submitted by you and also entitled to claim damages and compensation for the said breach. You are also further prohibited to participate in the tender process of works of MPAKVN (I) Ltd., Indore for a period of 5 years from the date of this order." 8. Receiving the letter, the petitioner filed a W.P. No. 3378/2014 before this Court on 28.04.2014 which was disposed of by order dated 22.07.2014 by the co-ordinate Bench of this Court with following directions:--

"Having regard to the aforesaid submissions made by the learned counsel for the parties, we dispose of this writ petition with liberty to the petitioner to challenge the impugned order passed by the Managing Director before the Chairman, MP Audyogik Kendra Vikas Nigam Limited by way of appeal. In case, such an appeal is filed by the petitioner within two weeks, the same shall be considered and decided by the Chairman on merits as expeditiously as possible, but not later than one month from the date of receipt of such an appeal after giving opportunity of hearing to the petitioner.

With the aforesaid, the writ petition stands disposed of."

9. As directed by the Court, the petitioner filed an appeal before the Chairman of respondent No. 1. The appeal was disposed of by order dated 07.09.2014 (Annexure P/10). The appellate authority make following observation in the operative portion of the order:--

"Managing Director MPAKVN Ltd. Indore vide his letter No. 3812 dated 12.03.2014 has not blacklisted the Appellant but only prohibited the Appellant to participate in the tender process of works of MPAKVN Indore for a period of 5 years from the date of aforestated letter.

Order:--

In view of the above, the Appellant have committed gross breach of contractual obligations, hence the order passed by MD AKVN Indore vide his order No. 3812 dated 12.03.2014 does not need interference and stands as it is.

With the aforesaid directive, the Appellant appeal stands disposed of."

10. Meanwhile, the petitioner also filed a Reference Petition before Madhya Pradesh Arbitration Tribunal, Bhopal which is pending as Reference Petition No. 76/2014.

11. In this second round of litigation, this writ petition is filed seeking quashment of impugned order (Annexure P/10) passed by appellate authority of respondent

No. 1 also for invoking arbitration clause for non submission of renewed fresh guarantee etc.

12. In reply, the respondent submits that proper show-cause notice was issued to the petitioner on 28.12.2013 and placed reliance on Patel Engineering Limited Vs. Union of India (UOI) and Another, . It is argued on behalf of the respondent that even if, blacklisting is not mentioned as one of the action that would be taken against the delinquent contractor, such a failure itself would not disable the respondent from blacklisting the contractor. Such power was inherent in the respondent when they entered into a works contract with the petitioner. It is further averted in the reply that the petitioner was under obligation to renew the road and maintenance for five years. Thereafter, however, the petitioner failed to maintain the road in good condition, he was warned by the respondent about substandard and poor quality of work and also about failure to maintain road, however, the petitioner did not maintain the roads as per the road standards and himself he breached the condition of contract. The petitioner submitted bank guarantee for Rs. 23 lacs as performance security for maintenance of road for a period of five years and bank guarantees were expired on 11.04.2013 before the completion of maintenance work on 29.05.2014. The petitioner failed to renew the bank guarantee as contemplated upto the expiry of maintenance period of five years, that is upto 29.05.2014. Even after, expiry of the bank guarantee a request for made which was not accepted by the petitioner. The petitioner instead of renewing the bank guarantee proposed to invoke arbitration clause of the contract and also requested the respondents to wait for the result of arbitration which was not required as per the terms of contract. Thus, the impugned order (Annexure P/7) was passed after giving proper show-cause notice to the petitioner and requires no interference by this Court and accordingly, this writ petition should be dismissed.

13. It is also averted on behalf of the State that there is an arbitration clause in the contract. Petitioner has already invoked the said clause and filed a Reference Petition before the Arbitration Tribunal. The co-ordinate Bench of this Court in W.P. No. 7679/2012 by order dated 30.10.2012 held that in case of arbitration argument between the parties, writ petition is not pending.

14. In response to the reply filed by the respondents, the petitioner is filed rejoinder in which it is stated that notice of blacklisting the present petitioner was not proper in the ratio of Patel Engineering (supra) is not applicable in this case. It is further averted that the Hon'ble Apex Court in many cases held that action of blacklisting is open to judicial review under article 14 and 16 of the Constitution of India. It is further averted that though the matter is pending before the Madhya Pradesh Arbitration Tribunal, Bhopal, however, the Tribunal is not competent to adjudicate in respect of action of blacklisting of respondents for which the only remedy a writ petition. It is further averted by the petitioner that the respondent diverted heavy traffic on the road in question, as flyover was under construction. The respondent avoided construction of bypass and diverted

the traffic on the road which was subject matter of the works contract between the petitioner and the respondent and, therefore, the road was subjected to heavy traffic which was not otherwise expected on the road and damage was caused by such a heavy traffic to the road. It is further averted that when the bank guarantee were expired on 11.04.2013, the respondents had sufficient amount of security deposit with them to cover the remaining period of maintenance upto 29.05.2014. There was no need of bank guarantees for remaining period of maintenance.

15. On aforementioned submissions made by both the parties, the following question for construction emerged in this writ petition:--

"(i) Whether the show-cause notice issued to the petitioner was sufficient and proper for taking action of blacklisting the petitioner for a period of five years.

(ii) Whether the Arbitration Tribunal has power to look into the validity of action of blacklisting the present petitioner by the respondents.

(iii) Whether in view of the fact that the reference petition is pending before the M.P. Arbitration Tribunal, this writ petition is not maintainable."

16. Learned counsel for the petitioner placed reliance on judgment of the Hon"ble Supreme Court in Joseph Vilangandan Vs. The Executive Engineer, (PwD), Ernakulam and Others, . The Hon"ble Court held that when there were no words in the notice which could give a clear intimation to the addressee that it was proposed to debar him from taking any contract, whatever, in future under the department, the contractor was not thus, afforded adequate opportunity to represent against the impugned action. He further placed reliance on the latest judgment of the Hon"ble Supreme Court in Gorkha Security Services Vs. Govt. of NCT of Delhi, . In this case, the Hon"ble Supreme Court dealt with question of necessity of serving show-cause notice as a requisite of (i) principles of natural justice, (ii) contents of show-cause notice and (iii) when it may be inferred that prejudice is caused when the notice do not contend the proposed action of blacklisting.

17. Before proceedings to consider rival contentions of the parties it may be mentioned here that clause 3 of conditions of contract which relates to action when the work is incomplete, abundant or delayed beyond the permitted limit allowed by the Managing Director. This clause provides three courses which could be taken recourse to by the Managing Director. In such an eventuality as aforesaid, however, it does not contain any provision regarding imposition of a penalty of blacklisting of a contractor if his contract is resigned or work is completed at his risk and costs.

18. Coming back to the questions involved in this case, so far as, the necessity of serving show-cause notice is concerned, the Hon"ble Apex Court held that way back in the year 1975 it was held in the case of Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, that necessity of giving

an opportunity to such a person by serving a show-cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such person is necessary. Therefore, it is now a trite law that before taking such an action which prevents a person from the privilege and advantage of entering into lawful relationship with the government for the purposes of gains is necessary. The ratio of Patel Engineering Ltd. (supra) was also considered by the Hon''ble Court in para 19 of the judgment and it was held that under article 298 of Constitution of India, the State and the Union Governments have executive power to impose such penalty on any person and prevent him from taking back in the tender process of the government, however, the Hon''ble Court also observed in para 11 that in Patel Engineering Ltd. (supra) a view was taken that there is no inviolable rule that a personal hearing has to be given to the affected party before taking a decision. Thus, it is imply clear that show-cause notice has to be given before taking such an action.

19. The question of content of the show-cause notice should meet the following two requirements:- (i) the material grounds to be stated which according to the department necessitates an action and (ii) particular penalty of action which is proposed to be taken.

20. In the instant case, however, the second requirement is fulfilled as it is specifically mentioned in the letter dated 28.12.2013 (Annexure P/5) that it will be proposed to get their firm blacklisted and thereafter, after taking the reply of the present petitioner into consideration the impugned order (Annexure P/7) dated 12.03.2014 was passed in which the firm was prohibited for five years from participating in the tender process of works of respondent No. 1. As such, the requirement of contents of notice as held by the Hon''ble Supreme Court in the case of Gorkha Security Services (supra) is fulfilled in the present case.

21. So far as, the questions regarding maintainability of this writ in view of the fact that arbitration clause in the contract has already been invoked by the petitioner and whether the Arbitration Tribunal can decide propriety of imposition of penalty of blacklisting on the present petitioner is concerned the same loses its relevance once it is held that requirement of natural justice in this case has already been fulfilled and on the ground of non-compliance of principles of natural justice, no interference is caller for. As such, these questions need not be answered in this writ petition.

22. Accordingly, we find that this writ petition has no force and liable to be dismissed. As a result, this writ petition is dismissed. However, with liberty to the petitioner to raise before the M.P. Arbitration Tribunal, the questions for feature of security deposit and propriety of blacklisting the petitioner for five years.

23. With these observations, this writ petition stands disposed of.