

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

[1] WP(C)No.9669/2007

Judgments delivered on April 13th, 2009

SH. BALI RAM Petitioner
Through : Ms. Anusuya Salwan, Adv.

Versus

\$ MUNICIPAL CORPORATION OF DELHI Respondent
^ Through : Mr. Amit K. Paul, Adv.

[2] WP(C)No.9287/2007

SH. BALI RAM Petitioner
Through : Ms. Anusuya Salwan, Adv.

Versus

\$ MUNICIPAL CORPORATION OF DELHI Respondent
^ Through : Mr. Amit K. Paul, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

1. Whether reporters of local papers may be allowed to see the judgment? **Yes**
2. To be referred to the Reporter or not? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

G.S. SISTANI, J:

- 1.
2. Learned counsel for the parties submit that both the writ petitions are identical in nature, the parties in both the petitions are same and the pleadings and annexures are also identical, except the work order is different. Hence both the WP(C)No.9669/2007 & WP(C)No.9287/2007

abovesaid petitions are being disposed of by a common judgment.

3. In the writ petition [WP(C)No.9669/2007] the petitioner was awarded work of Development of U/R Colony SH: Construction of drain and providing RMC from Arya Samaj Mandir to out fall drain and from Rza 34/233 to RZJ-43 in West Sagarpur in W No.52/NGZ. The estimated cost of work was Rs.49.75 lakhs and the time for completion of work was eight months.
4. In the writ petition [WP(C)No.9287/2007] petitioner was awarded a work of Development of U/R Colony SH: Construction of drain and providing RMC from WZ 404 Gali No.4A, near Ram Chowk to Pradhan Chowk and from Tanwar House Gali No.16 to Sanchan Medical Store in Sadh Nagar in Work Order No.387/NGZ. The estimated cost of work was Rs.49,42,700/- and the time for completion of work was eight months.
5. It is contended by counsel for the petitioner that immediately after awarding of work, the petitioner mobilized his resources to execute the work but it was found that though the work was awarded with respect to construction of a drain but actually the work which was sought to be executed pertained to work of sewerage system. Hence, the work was not within the scope of work awarded and the petitioner immediately brought it to the notice of the respondent vide letter dated 30.05.2007. The petitioner kept on representing to the respondent and after persistent efforts the Superintending Engineer, Nazafgarh Zone, agreed to have a meeting in the office wherein the

representative of the petitioner was present and it was agreed by the respondent that since the scope of the work was totally different, extra items would be sanctioned and the same would be got approved by the executive engineer and also his running bills would be passed. Learned counsel contends that despite having given an assurance that extra items would be sanctioned, nothing was done and this fact was brought to the notice of the respondent vide letter dated 29.10.2007. It is also contended that no work could be carried out at the site on account of various reasons which were brought to the notice of the respondents. Vide letter dated 30.05.2007 petitioner brought it to the notice of the respondent that the site was also not available as the width of the road was from 12 feet to 18 feet and even lesser in places and in the said site two sewer lines and two water lines were in running position because of which there was no scope for excavation and hence RCC pipes could not be laid unless the running sewer or water pipes were removed. It was also brought to the notice of the respondent that this was not within the scope of the work and further that the width of the road was so narrow that the material could not be stacked. These facts were brought to the notice of the respondents vide letter dated 29.10.2007 and 13.11.2007. While no action was taken pursuant to the letters of the petitioner, the petitioner received a letter dated 06.11.2007 informing the petitioner that the above mentioned contract work have been closed and his earnest money have been forfeited and action would be taken against him for not

following instructions for enlistment of contracts in the MCD. Petitioner claims to have replied to the aforesaid letter vide letter dated 14.11.2007 bringing it to the notice of the respondent that there has been no delay on his part and it is the respondent who had committed breach of contract. Various other reasons were also brought to the notice of the respondent including non-availability of approval of designs and drawings. The petitioner thereafter received the impugned circular dated 26.11.2007 blacklisting the petitioner, which led to the filing of the present petitions.

6. Learned counsel for the petitioner submits that the circular dated 26.11.2007 is bad in law and is liable to be set aside as the petitioner was not given any show cause notice before passing the impugned circular blacklisting the petitioner. It is contended that the petitioner was informed by the Executive Engineer that action would be taken against him under the Enlistment Rules, but no show cause notice has been given. Moreover, the Additional Commissioner (Engineering) passed the impugned order without giving any opportunity to the petitioner to show cause and give a personal hearing. The respondents, as per the petitioner, have failed to comply with the principles of natural justice and the petitioner has been debarred and thus his right of livelihood has been taken away by a cryptic and an unreasoned order. Learned counsel for the petitioner also contends that the only action that could have been taken was under Rule 22 of the Enlistment Rules. Rule 22 reads as under:-

“22 Disciplinary Actions

The contractor shall have to abide by all the rules of enlistment and also by the terms and conditions of the contract and the Notice inviting tenders. He shall have to execute the works satisfactorily, on time and with good quality. The enlisting authority shall have the right to a lower class, suspend business with him for any period, debar him or remove his name from the approved list of contractors after issue of show cause notice. Decision of the department shall be final and binding on the contractor. The following actions of the contractor shall, in general, make him liable to disciplinary actions.”

[Emphasis supplied]

7. Mr.Amit K. Paul, learned counsel for the respondent - MCD has opposed these petitions on two grounds: firstly the petitioner has not approached this court with clean hands and has suppressed and withheld material facts and communications and thus the petitioner is not entitled to invoke the extraordinary jurisdiction of this Court and secondly respondents have complied with the principles of natural justice and have issued show cause notice to the petitioner, granted personal hearing and thereafter passed the impugned order. Learned counsel further submits that even on merits the petitioner did not comply with the terms of the work order and thus the impugned orders were passed. Counsel for the MCD relies on paras 3 to 6 of the counter affidavit, which are reproduced below:

“3. It is respectfully submitted that the instant petition is not maintainable as it is devoid of any justiciable cause of action or legally enforceable rights in favour of the petitioner. Neither is the

instant case one where the respondent has failed to discharge a statutory obligation or acted contrary to the statute or procedure prescribed therein. The petitioner has in fact misrepresented and concealed vital facts from this Hon'ble Court and is attempting to abuse the process of this Court to secure his vested interests.

4. The main grievance of the petitioner is that he has been debarred from further tendering with the MCD for a period of 5 years vide circular dated 26.11.07 without following the principles of natural justice in as much as neither was any show cause opportunity given to him and nor was any personal hearing granted to him before passing the said order. On the contrary it is submitted that a show cause notice as well as personal hearing was given to the petitioner and only thereafter the impugned order was passed in accordance with the rules of enlistment of the contractors.

5. The petitioner was awarded the work of Development of unauthorized regularized colony, Sub-Head construction of drain and providing Ready Mix Concrete from WZ 404 Gali No.4A, Near Ram Chowk to Pradhan Chowk and from Tanwar House, Gali No.16 to Sanchan Medical Store in Sadh Nagar, in ward no.52 in Najafgarh Zone vide work order no.EE/VI/Plan /TC/06-07/387 dated 15.03.2007. It is respectfully submitted that the petitioner has failed to perform any work whatsoever awarded to him under the subject contract. It is submitted that work order on the petitioner had been placed on 15.3.2007 and the contract agreement was entered into on 20.3.2007. Needless to say, at the time of tendering and even at the time of accepting the work order and signing the work contract, the applicant was deemed to have inspected the work site and/or satisfied himself as to the nature of the work to be performed and therefore all grievances /disputes raised by the petitioner in this regard subsequently are devoid of merit.

6. That even though the work order had been placed on the petitioner on 15.03.2007 the petitioner did not commence any work pursuant to the same citing one reason or the other. Since the awarded work was to be completed within a period of eight months i.e. by 23.11.2007, the respondents vide letter dated 03.10.2007 requested the petitioner to commence the work immediately. Subsequently, vide letter dated 09.10.2007 the petitioner was given notice to

show cause as to why action under clause of the agreement be not taken against him as he was liable to pay compensation on account of not starting the work. The petitioner was further directed to show cause within a week's time as to why action for suspension of business from debarring from tendering in the M.C.D./Black listing of the firm for not executing the work as per the rules of enlistment be not taken. It was again brought to the notice of the petitioner vide letter dated 10.10.2007 that the work awarded was of urgent nature for providing drainage system and improvement of roads and since it had not yet been started, the residents in the area were facing great difficulty. However, before taking any action in the interest of natural justice, the petitioner was granted an opportunity to explain his position with regard to the non-commencement/non-completion of the awarded work.

7. That before taking any further disciplinary action against the petitioner a personal hearing was given to him by the Superintending Engineer, Najafgarh Zone on 15.10.2007 during the course of which the petitioner acknowledged that he was yet to start the contracted work and further promised to commence and complete the same at the earliest. However, despite this commitment, the petitioner failed to commence the contracted work because of which the respondent were constrained to send him another letter dated 06.11.2007 informing him that his work order "had been closed" and earnest money of Rs.72,500/- deposited at the time of tendering had been forfeited and that his case was being processed for further disciplinary action. Only thereafter as per the enlistment rules circular dated 26.11.2007 was issued by the Administrative Officer, Engineering Department (HQ)."

8. I have heard learned counsel for the parties, who have taken me through the petitions as well as annexures filed along with the writ petition and reply thereto. No rejoinder has been filed. Petition [WP(C)No.9287/2007] was filed earlier in time. On the first date of hearing, when the matter came up for hearing, the following order was passed on 17.12.2007:

“WP(C)9287/2007

Issue notice to show cause to the respondent as to why rule nisi be not issued.

Mr.Amit S.Paul, Adv. accepts notice and prays for time to file counter affidavit. Let the same be filed within four weeks. Rejoinder thereto, if any, may be filed before the next date of hearing.

List on 14th May, 2008.

CM.17518/2007

Notice.

Mr.Amit S.Paul, Adv. accepts notice and prays for time to file reply. Let the same be filed within four weeks. Rejoinder thereto, if any, may be filed before the next date of hearing.

List on 14th May, 2008.

Having regard to the grievance of the petitioner that he has been debarred from contracting with the MCD without issuing of notice to show cause, there shall be a stay of the order dated 26th November, 2007, till the next date of hearing.”

9. Subsequently petition [WP(C)No.9669/2007] was filed.

Relying upon the earlier order, show cause notice was issued and the following order was passed on 2.1.2008:

“WP(C)9669/2007 & CM.18235/2007

Learned counsel for the parties state that in an another writ petition WP(C)No.9287/2007, notice has been issued and operation of the circular dated 26th November, 2007 relating to the work order No.EE-VI/Plan/TC/06-07/387 has been stayed.

In these circumstances, issue notice to the respondent /MCD to show cause as to why rule nisi be not issued.

Mr.Amit K. Paul, Adv. accepts notice on behalf of the Municipal Corporation of Delhi. Counter affidavit shall be filed within three weeks. Rejoinder, if any, will be filed within two weeks thereafter.

In the meantime, operation of the impugned Circular dated 26th November, 2007 is stayed. However, it is clarified that it will be open to the respondent/ MCD to issue show cause notice and pass appropriate orders in terms of instructions for enlistment of Contractors in MCD including Clause 22.”

10. This court while issuing notice to show cause had considered the submissions of counsel for the petitioner that MCD without issuing show cause notice had debarred the petitioner. On this submission, stay of the order dated 26.11.2007 was passed. Even in the body of the writ petition it has been stated that after the award of the work, the petitioner mobilized his resources, but found that the work awarded was with respect to the construction of drain however, the work which was sought to be executed pertained to sewerage system which was brought to the notice of the respondent vide letter dated 30.5.2007 (identical in both the matters). Thereafter, petitioner is stated to have met the Superintendent Engineer, Najafgarh Zone on 15.10.2007. Perusal of the counter affidavit of respondent would show that this meeting of 15.10.2007 was held in fact pursuant to a communication dated 10.10.2007. As per the respondent, after the work having been awarded to the petitioner, the latter did not commence the work, forcing the respondent to issue a communication dated 3.10.2007 which is reproduced below:

“No. D/ 499/EEVI/2007 Dated 3.10.2007
M/s.Dagar & Co.
Mpl. Contractor,

Sub: Dev. of U/R. Cly. S/H: C/o. drain & [pdg. RMC
from Arya Samaj Mandir to outfall drain and from
RZA 34/233 to RZ-343 in West Sagarpur NGZ

The above cited work has been awarded to you vide Work Order No.EEVI/Plan /TC/06-07/388 dated 15.3.07 with a completion period of 8 months. The work has not been started by you so far even after verbal persuasions. The non-taking up of the work may

result in inordinate delay in completion of the project and inconvenience to the residents. You are, therefore, directed to start the work without further loss of time failing which action under the relevant clauses of the agreement will be started against you & explain the reasons for non starting the work so far within three days of the receipt of this letter.

Yours faithfully,

Sd/-
Asstt. Engineer-II

Copy to: 1. SE (NGZ) for information pls.
2. EE VI for information pls."

11. After issuing of this letter dated 3.10.2007, another letter dated 9.10.2007 was issued wherein it was pointed out that the stipulated date of completion was 23.11.2007. Despite six months having already been elapsed, the work has not commenced till date. Petitioner was also directed to show cause within one week as to why action for suspension of business with his firm and further tendering the firm in the black list, be not taken by the MCD. Petitioner was also cautioned that if no reply is received within the specified period, it would be presumed that you have nothing to say. Communication dated 9.10.2007 is reproduced below:

"No. D/ 525/EEVI/2007 Dated 9.10.2007

M/s.Dagar & Co.
Mpl. Constractor,
Village & Post Office Issapur,
New Delhi -110 073

Sub: Development of unauthorized colony S.H.: C/o. drain & pdg. RMC from WZ 404 Gali No.4A, near Ram Chowk to Pradhan Chowk and from Tanwar House Gali No.16 to Sanchan Medical Store in Sadh Nagar

Dear Sirs,

The above said work was awarded to you vide W.O. NO.EEVI/Plan/ TC/06-07/387 dated 15.3.2007 with a completion period of 8 months. The stipulated date of completion of this as per agreement is 23.11.2007. Time of more than 6 months have already been elapsed, but you have not started the work even after personal persuasions as well as in writing vide letter No.D/498/EEVI dated 3.10.2007. This work is of urgent nature for providing drainage system and improvement of road by providing ready mix concrete, but you have not started the work due to which area residents are facing great difficulties. It is, therefore, directed to start the work immediately and complete with full swing. Your non-taking up of work so far rendered yourself liable to pay compensation under clause 2 of the aforesaid agreement.

In exercise of powers conferred on me under clause 2 of the agreement I, Ravinder Singh, Executive Engineer (VI) hereby give you notice to show cause within a week's time to my satisfaction as to why action under clause 2 of the agreement be not taken against you as are liable to pay compensation on account of not starting the work. You are also directed to show cause within a week's time as to why action for suspension of business with your firm/ debarring your firm from further tendering in the MCD/ black list of your firm, for not taking up the work as per the rules of enlistment be not taken. If no reply is received from you to the satisfaction of the undersigned within above specified period, it will be presumed that you have nothing to say in this regard and the matter will be referred to the higher authority for initiating disciplinary action against you under the relevant clauses of the agreement.

Yours faithfully,

Sd/-
(Ravinder Singh)
Executive Engineer (VI)

Copy to:

1. C.E.-I for information pl.
2. DC (NGZ) for information pl.
3. SE(NGZ) for information pl.
4. AE-II to pursue & report.

Executive Engineer (VI)''

12. It is further observed that vide letter dated 10.10.2007 another opportunity was granted to the petitioner to explain in person on 15.10.2007 at 11:00 a.m. Thus, the letters dated 3.10.2007, 9.10.2007 and 10.10.2007 would show that hearing which took place on 15.10.2007 was pursuant to communication dated 10.10.2007 and not due to persistent requests by the petitioner, as stated in para 5 of the writ petition. As per the writ petition, meeting of 15.10.2007 was held on account of persistent efforts of the petitioner. Para 5 of the writ petition reads as under:

“5. The petitioner kept representing to the respondent bringing out the aforementioned facts to the Respondents that the work awarded is in fact contrary to the work to be executed and therefore extra items should be prepared. Accordingly after persistent efforts the Superintending Engineer, Nagafgarh Zone agreed to have a meeting in his office wherein the representative of the petitioner was present and that it was agreed by the Respondent that since the scope of work was totally different extra time would be sanctioned and the same would be got approved by the Executive Engineer and also his running bills would be passed. That despite having given assurance that extra items would be sanctioned nothing was done, as a result of which the petitioner was constrained to bring this to the notice of the respondent by letter dated 29.10.2007”

13. During the course of hearing no reasonable explanation has been rendered as to why the petitioner has suppressed the aforesaid communication. In the case of **Arunima Baruah Vs. Union of India, (2007) 6 SCC 120**, the Apex Court has held that a petitioner would be disentitled to seek discretionary relief in case of suppression of material facts. Para 12 of the same reads as under:

"12. It is trite law that so as to enable the court to refuse to exercise its discretionary jurisdiction suppression must be of material fact. What would be a material fact, suppression whereof would disentitle the appellant to obtain a discretionary relief, would depend upon the facts and circumstances of each case. Material fact would mean material for the purpose of determination of the lis, the logical corollary whereof would be that whether the same was material for grant or denial of the relief. If the fact suppressed is not material for determination of the lis between the parties, the court may not refuse to exercise its discretionary jurisdiction. It is also trite that a person invoking the discretionary jurisdiction of the court cannot be allowed to approach it with a pair of dirty hands. But even if the said dirt is removed and the hands become clean, whether the relief would still be denied is the question.

13. xxxxxxxx

14. In *Halsbury's Laws of England*, 4th Edn., Vol. 16, pp. 874-76, the law is stated in the following terms:

*"1303. He who seeks equity must do equity.—*In granting relief peculiar to its own jurisdiction a court of equity acts upon the rule that he who seeks equity must do equity. By this it is not meant that the court can impose arbitrary conditions upon a plaintiff simply because he stands in that position on the record. The rule means that a man who comes to seek the aid of a court of equity to enforce a claim must be prepared to submit in such proceedings to any directions which the known principles of a court of equity may make it proper to give; he must do justice as to the matters in respect of which the assistance of equity is asked. In a court of law it is otherwise: when the plaintiff is found to be entitled to judgment, the law must take its course; no terms can be imposed.

* * *

*1305. He who comes into equity must come with clean hands.—*A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. This was formerly expressed by the maxim 'he who has committed iniquity shall not have equity', and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust

which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design.”

14. As far as the merits of the matter is concerned, a bare reading of the writ petition would show that not only has the petitioner concealed three important letters from this Court i.e. letters dated 3.10.2007, 9.10.2007 and 10.10.2007, but has intentionally tried to hoodwink this court, in para 5 of the petition, it has been averred that a meeting of 15.10.2007 was fixed on account of persistent efforts on the part of the petitioner for the meeting. It may be noticed that work was awarded to the petitioner vide work order dated 15.3.2007 for completion of the same within eight months i.e. by 23.11.2007. On 3.10.2007, the petitioner was warned that despite verbal requests the petitioner has not started the work and due to delay in completion of the project there would be inconvenience to the residents. Petitioner was directed to start the work without loss of time failing which action under the relevant clause of the agreement will be initiated and petitioner was asked to explain the reasons for not starting the work within three months. Vide communication dated 9.10.2007, while the contents of earlier letter were reiterated and petitioner was informed that his not taking up the work till date had rendered himself liable to pay compensation under

clause 2 of the aforesaid agreement and petitioner was asked to show cause as to why action under clause 2 of the agreement be not taken and also show cause why his firm should not be blacklisted. Vide communication dated 10.10.2007, the petitioner was informed that in the interest of justice he had been granted an opportunity to explain his position in person on 15.10.2007 at 11:00 a.m. Petitioner did not file any reply to letters dated 3.10.2007, 9.10.2007 and 10.10.2007. In addition to the aforesaid letters, a personal hearing was granted wherein the petitioner had assured that the work would commence. However, the petitioner did not commence the work and he was informed by letter dated 6.11.2007 that as per circular dated 2.6.2003, the cases where the work order /contract has been awarded for more than six months and work has not yet started, the same is deemed as closed and accordingly the contract /work order was closed and earnest money of Rs.75,000/- was forfeited. Petitioner is stated to have sent reply to this communication which was found unsatisfactory.

15. Perusal of these communications would show that despite a work order having been issued to the petitioner to comply with the work within eight months, for over a period of six months, the petitioner did not even start the work and in addition of being asked verbally, the petitioner was issued several communications dated 3.10.2007, 9.10.2007, 10.10.2007 and 6.7.2007; and a personal hearing was also granted to the petitioner and it was only thereafter that the

petitioner was black listed. Not only the petitioner was issued show cause notice, but he was also granted a personal hearing. Learned counsel for the petitioner has relied upon in the case of **Gullapalli Nageswara Rao Vs. APSRTC**, reported at AIR 1959 SC 308, **Saraswati Dynamics (P) Ltd. Vs. U.O.I.**, reported at 2003 (IV) AD (Delhi) 225, and **Mekaster Trading Corporation Vs. U.O.I.**, reported at 106 (2003) DLT 573 in support of his submission that observance of principles of natural justice was mandatory before passing an order 'blacklisting the petitioner'. There is no quarrel to this proposition of law argued by the counsel for the petitioner. However, the judgments relied upon by the petitioner cannot come to his rescue, in view of the facts of this case wherein a proper show cause notice as well as a personal hearing was given and even otherwise, the fact that despite work having been awarded, the petitioner did not even commence the work, I find there to be no infirmity in the impugned order. Learned counsel for the petitioner has also referred to clause 22 of the Enlistment Rules, in support of her plea that the show cause notice was mandatory. I find that the said rule has been complied with in this case as a show cause notice was given. In the case of **Nova Steel (India) Ltd. Vs. MCD & Ors.**, reported at (1995) 3 SCC 334, notice was issued to the petitioner as to why should he not be black listed or debarred for having not replied despite receipt of notice by the petitioner, the Apex Court did not interfere with the order of

respondent, who had debarred the petitioner. Relevant portion of the judgment reads as under:

“2. It is thus clear that the petitioner having negotiated with the respondent to supply the iron and received the acceptance in that behalf, he was required to enter into the contract and to start supply immediately, had not done the same. Despite receipt of the notice of show cause, no reply thereto was given. The respondent necessarily has to take further action to get the supply of required steel. Therefore, they exercised the power and issued notice to the petitioner which would be consistent with the principles of natural justice and passed the offending order blacklisting the petitioner for a period of two years. The conduct of the petitioner constrained the respondents to pass the order of blacklisting. The exercise of the power, therefore, cannot be said to be unwarranted nor arbitrary nor irrelevant. The High Court, therefore, is right in declining to interfere with the offending order in exercise of its discretionary power under Article 226 of the Constitution. We, therefore, find no ground warranting interference under Article 136. The SLP is accordingly dismissed.”

16. For the reasons that sufficient opportunity had been granted to the petitioner to explain his case and the petitioner has not even started the work, I find no reason to interfere in the impugned circular dated 26.11.2007.
17. In addition the conduct of the petitioner is such that he is not entitled to any discretionary relief on the grounds that he had mala fide intention and with a view to gain unfair advantage, the petitioner on the first date of hearing misled this Court, stating that no show cause notice was issued prior to the order of blacklisting, and obtained a stay order. The petitioner has suppressed documents which are material, integral, essential and necessary for deciding the lis between the parties. A

person who seeks equity must do equity. The petitioner has not approached this Court with clean hands and has suppressed material communications dated 3.10.2007, 9.10.2007 and 10.10.2007. The sharp practices adopted by the litigants are fast gaining pace and should be discouraged.

18. Petitions are accordingly dismissed with costs of Rs.25,000/- each to be paid to the Delhi High Court Legal Aid Society.

G.S. SISTANI, J.

April 13th, 2009
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