

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

**Date of decision: 15<sup>th</sup> July, 2011**

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**W.P.(C) 4946/2011**

**R.K. MACHINE TOOLS LTD. & ANR. .... Petitioners**

Through: Mr. V.N. Koura with Mr. Rakesh &  
Mr. Sumit S. Benipal, Adv.

Versus

**UNION OF INDIA .... Respondent**

Through: Mr. Sachin Datta & Mr. Abhimanyu  
Kumar, Adv.

**CORAM :-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. Whether reporters of Local papers may  
be allowed to see the judgment? Not necessary.
2. To be referred to the reporter or not? Not necessary.
3. Whether the judgment should be reported  
in the Digest? Not necessary.

**RAJIV SAHAI ENDLAW, J.**

1. The petitioner no.1 Company of which petitioner no.2 is the  
Chairman-cum-Managing Director claims to be engaged since the year  
1962 in the business predominantly of manufacture of defence equipment;

it also claims to have researched and developed capability to manufacture critical parts for the Indian Defence Industry, so that dependence on foreign supplies could be reduced; it claims to be supplying Mortar Bomb Bodies used in Ordnance Factories for manufacture of ammunition for the Armed Forces, critical parts for the tanks and other heavy vehicles of the respondent. It is claimed that as on 3<sup>rd</sup> June, 2009 the petitioner Company had outstanding contracts of value of ₹64,36,40,099/- from various units/factories of the respondent, out of which supplies of ₹61,34,33,838/- were outstanding. It is further pleaded that all the said contracts were on the same Terms & Conditions and incorporated by reference the General Conditions of the Contract of the DGS&D in Form 68; that neither the General Terms & Conditions of DGS&D incorporated in Form 68 nor the Terms & Conditions of any relevant contract contain any provision for putting on “suspension” or “hold” any contract or the performance of any obligation of the parties.

2. It is the case of the petitioner Company that notwithstanding the aforesaid, the Ordnance Factory, Chanda of the respondent, vide letter

dated 3<sup>rd</sup> June, 2009 with reference to two Purchase Orders placed on the petitioner, intimated the petitioner of the said Purchase Orders having been “put on hold till further orders”. Similar letters are stated to have been received from the Heavy Vehicles Factory and other Ordnance Factories. It is pleaded that in pursuance thereto neither any supplies are being received from the petitioner Company nor any payments are being released, neither of pending nor of completed contracts. It is yet further pleaded that even the Bank Guarantees of the closed contracts are not being released.

3. It is yet further the plea of the petitioner Company that it is not being considered for the award of any further contracts inspite of being the lowest bidder.

4. The petitioner earlier filed W.P.(C) 13457/2009 in this Court challenging the aforesaid action of the respondent. The petitioner claims that during the pendency of the said petition it was furnished copy of FIR and proceedings initiated by the CBI before the Court at Kolkata and in which two of the employees of the petitioner are accused.

5. The writ petition aforesaid preferred by the petitioner was disposed of vide judgment dated 11<sup>th</sup> February, 2010. The contention of the petitioner Company that the orders putting on hold the contracts had been passed in violation of the principles of natural justice was accepted and the order putting on hold the contracts with the petitioner set aside, however leaving it open to the respondent to proceed in a time bound manner and in accordance with law i.e. not to take any decision without complying with the principles of natural justice.

6. The petitioner no.1 Company admits that post the aforesaid judgment, a notice dated 22<sup>nd</sup> December, 2010 to show cause was received by it. It is however the case of the petitioner no.1 Company that since the said notice did not disclose the basis thereof, the petitioner no.1 Company gave only an interim reply dated 12<sup>th</sup> January, 2011 thereto *inter alia* demanding various particulars/documents from the respondent. It is further stated that the said show cause notice dated 22<sup>nd</sup> December, 2010 was replaced by another show cause notice dated 25<sup>th</sup> February, 2011 and to which again an interim reply as aforesaid was given by the petitioner no.1

Company again seeking basis/particulars of the show cause notice. Other show cause notices with respect to other contracts were also served on the petitioner no.1 Company. It is the case of the petitioner no.1 Company that all of them were without any basis and vague and interim replies thereto seeking further particulars have been given.

7. The petitioner claims that without furnishing the particulars/clarifications sought, the petitioner Company was called for a personal hearing, first on 16<sup>th</sup> May, 2011 thereafter on 16<sup>th</sup> July, 2011 but on each of which occasion the petitioner Company sought adjournment owing to the non-availability of its Advocate.

8. The petitioner Company claims to have on 30<sup>th</sup> May, 2011/2<sup>nd</sup> July, 2011/8<sup>th</sup> July, 2011 also invoked the arbitration clause in each of the contracts and now contends that arbitration having been invoked, the occasion for the respondent issuing show cause notice or passing any order in pursuance thereto does not arise since the grounds on which show cause notices have been issued are disputed and as per the agreement are to be

adjudicated by arbitration. This writ petition has been filed to restrain the respondent from proceeding with the show cause notices issued aforesaid without (i) furnishing the clarification/documents sought by the petitioner Company; (ii) giving fair and reasonable opportunity of representation to the petitioner Company; (iii) the decision of the arbitration proceedings initiated by the petitioner Company; (iv) decision of the criminal proceedings pending before the Court at Kolkata. The petitioner Company has also claimed the relief of mandamus to the respondents to not withhold or suspend deliveries or payments under the pending contract (s) and to consider the petitioner Company in accordance with law and without discrimination for the award of future contracts.

9. The counsel for the petitioner Company has vehemently argued that the respondent in the manner aforesaid has put the petitioner Company out of business resulting in immense loss to the petitioner Company, its employees, its plant & machinery and equipment etc. It is urged that all this has been done at the behest of the foreign suppliers of defence equipment. It is contended that the petitioner Company has been supplying

defence equipment at a fraction of the cost demanded by the foreign suppliers.

10. The counsel for the respondent appearing on advance notice states that the decision pursuant to the show cause notices issued would have already been taken had the petitioner Company availed of the hearing granted by the respondent and the petitioner Company itself has been seeking time and cannot blame the respondent therefor.

11. The counsel for the petitioner Company has argued under three heads. Firstly, it is contended that non-supply of documents amounts to violation of fair and reasonable opportunity to show cause against the proposed action. Reliance in this regard is placed on *State of Punjab v. Bhagat Ram* AIR 1974 SC 2335, *Kashinath Dikshita v. Union of India* AIR 1986 SC 2118, *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant* (2001) 1 SCC 182 and *State of U.P. v. Saroj Kumar Sinha* MANU/SC/0082/2010.

12. Secondly, it is contended that the departmental proceedings as in pursuance to the show cause notices issued cannot proceed simultaneously with criminal proceedings. Reliance in this regard is placed on *Delhi Cloth & General Mills Ltd. v. Kushal Bhan* AIR 1960 SC 806, *Tata Oil Mills Co. Ltd. v. The Workmen* AIR 1965 SC 155, *Kusheshwar Dubey v. M/s Bharat Coking Coal Ltd.* AIR 1988 SC 2118, *G.M. Tank v. State of Gujarat* (2006) 5 SCC 446 and on *Hoshiar Singh v. The State of Haryana* MANU/PH/0052/1970.

13. It is lastly contended that no order of black listing can be made while arbitration regarding the same subject matter is pending. Reliance in this regard is placed on *Indian Oil Corporation Ltd. v. SPS Engineering Ltd.* 128 (2006) DLT 417 (DB), *National Building Construction Corporation Ltd. v. NDMC* 138(2007) DLT 414 and on *Prakash Atlanta JV v. National Highways Authority of India* 169 (2010) DLT 664.

14. I may notice that the counsel for the petitioners has confined the arguments to the show cause notice in so far as for blacklisting only and

the thrust of the argument is that till the decision of the criminal prosecution and till the conclusion of the arbitration proceedings, no order of blacklisting can be made. It is urged that as per the arbitration agreement, the arbitrator is to be of the respondent only and the respondent can appoint the arbitrator and conclude the arbitration proceedings expeditiously and before that cannot blacklist the petitioner Company. It is contended that the respondent should not jump the gun to blacklist the petitioner Company even before the dispute resolution mechanism agreed to between the parties has found the petitioner Company guilty of any breach or violation of the agreement.

15. The petitioner Company was blacklisted as aforesaid in the year 2009, of course without any show cause notice, as found in the order in the earlier writ petition. The said order of blacklisting was set aside vide order in the earlier writ petition with liberty to the respondent to black list the petitioner Company after following the procedure in law. The said procedure is admittedly underway and is held up for reasons attributable to the petitioners. No order of blacklisting has been made as yet. The question

which arises is, whether this Court should interfere at this stage or allow the procedure directed by this Court in the judgment in the earlier writ petition to be followed and completed.

16. Of the three grounds urged, the grounds of deficiency in the show cause notice and of arbitration were not available to the petitioner Company at the time of earlier writ petition. However the prosecution, till the decision of which it is now argued that no black listing can be done, had admittedly commenced during the pendency of the earlier writ petition. The petitioner Company does not appear to have contended in the first writ petition as is being contended now, that there can be no black listing till the decision in the prosecution. The order in the first writ petition has attained finality. In my opinion, it is now not permissible to the petitioner Company to urge at least the said ground. Moreover, the Courts have always shown reluctance to interfere at the intermediary stage of a proceeding. If such interference is entertained, the same would result not only into proceedings impugned being indefinitely delayed but would also result in multiplicity of litigation with challenge being first made to the

procedure and thereafter to the final order passed. If at all there are any deficiencies and vagueness in the show cause notices and if the respondent inspite of demand by the petitioner Company fails to make up the said deficiencies and proceeds to pass the order, it will be always open to the petitioner Company to challenge the final order if made against the petitioner Company on such grounds. In fact today it is not even known whether the petitioner Company will be black listed or not. The respondent is still to take a decision in this regard. It is well nigh possible (though the counsel for the petitioner Company contends that the order of black listing the petitioner is a foregone conclusion) that the respondent may be satisfied with the response/defence of the petitioner Company as to the vagueness/deficiencies in the show cause notice and/or as to no case for black listing having been made out. In fact it is the petitioner Company who is found to be jumping the gun and not otherwise as contended.

17. The Supreme Court in *State of Punjab v. V.K. Khanna* (2001) 2 SCC 330 has held that challenge at the intermediary stage can be entertained only on the ground of bias. No bias of the decision making

authority of the respondent against the petitioner Company is pleaded in accordance with law.

18. As far as the contention of the petitioner Company of black listing being not permissible till the decision on the prosecution and till the decision in the arbitration invoked by the petitioner Company is concerned, I have enquired from the counsel for the petitioner Company as to whether, if the said arguments were to be accepted, black listing would not become illusory. This Court cannot gloss over the hard reality of the long time taken in prosecution and arbitration; if it were to be held that till then no black listing could be done, it would tantamount to a person/contractor against whom there may be serious charges/allegations being required to be considered for all future contracts also simply because he had invoked arbitration proceedings or was being prosecuted or for that matter had filed a Civil Suit. The Government as a purchaser of goods/equipments/services cannot be put in such a situation. It is possible that if the Court is of the view that the grounds for black listing are such which require adjudication, the Court may in a given case observe that the order of black listing should

be deferred till the adjudication of disputes or finding of guilt. However the general proposition as made cannot be accepted.

19. If that be the position, then without the order of black listing which in terms of the directions in the earlier writ petition is to contain the reasons/grounds, being before this Court, the Court is unable to apply its mind whether the grounds of black listing are such which allow black listing even during the pendency of adjudication before other Fora or otherwise. Thus this petition is found to be pre-mature.

20. It cannot also be lost sight of that the petitioner Company in the present case has invoked the arbitration at the last minute. As aforesaid, the disputes are pending since 2009. No arbitration was then invoked. No such plea which was available was taken in the first round of litigation. No such plea was taken in response to the show cause notice also or while seeking adjournments for hearing in pursuance thereto. The impression created is that arbitration was invoked merely to avoid participating in the hearing before the respondent pursuant to show cause notice. Such conduct of the petitioner Company cannot be appreciated and lends me to believe that the

present petition has been filed to avoid consideration of its case by the respondent as directed in the earlier writ petition and which is even otherwise a right of the respondent. I may add that though it is pleaded as aforesaid that the terms & conditions of contract do not provide for putting on hold contracts with the petitioner but the counsel for the petitioner Company in response to a specific query admitted the right of the respondent to black list.

21. At this stage the contents of the show cause notices issued to the petitioner Company may be noticed. The petitioner Company is alleged to have paid illegal gratification to Sh. Sudipta Ghosh, former Director General (Ordnance Factory). Clause 22 of the Terms & Conditions of DGS&D - 68 Manual reserves a right in the respondent to cancel the contract and all other contracts upon finding the seller/supplier to have paid any consideration or commission to any person in the service of the respondent. The clause provides for the decision of the respondent or his nominee to the effect that conditions of such clause had been satisfied to be final and binding on the petitioner Company.

22. I am of the opinion that the breach of contract on account of which the show cause notices have been issued, besides being a breach of contract, even otherwise is a malady which has afflicted the fabric of the society. The country at this stage is involved in fighting the disease of corruption and in exploring ways to combat the same. If at all the respondents in the order to be made by them establish the guilt of the petitioner, the petitioner cannot be allowed to continue with its business. It is therefore deemed appropriate to await the order in pursuance to the show cause notice aforesaid of the decision making authority of the respondents and to only thereafter judicially review the same.

23. As far as the judgments on the aforesaid aspect cited by the counsel for the petitioner Company are concerned, the Division Bench of this Court in ***SPS Engineering Ltd.*** (supra) was concerned with black listing for the reason of delay in execution of the contract; the arbitration proceedings had been pending for considerable time when black listing was effected for the same reason of delay in execution of the contract. It was in this context that the order of black listing was set aside awaiting the

decision of the arbitrator.

24. The facts before the Division Bench cannot be compared with the facts of the present case. The delay in execution of the contract affects only the parties to the contract and not the general public and society, as corruption does. Moreover in that case the arbitration was already underway. In the present case arbitration appears to have been invoked only to ward off the hearing in terms of order in the earlier writ petition. Had the petitioner Company desired any arbitration, it would have invoked the arbitration clause then only.

25. The position in *National Building Construction Corporation* (supra) was same; in fact in that case an interim award had also been announced and it was in this context that the order of black listing at that stage was held to be *malafide*.

26. The same was the position in *Prakash Atlanta JV* (supra). Thus, neither of the three judgments vehemently relied upon by the counsel for the petitioner Company persuade me to hold otherwise.

27. Similarly, none of the judgments cited to urge that black listing cannot be effected till the decision of the prosecution, deal with a case of black listing and relate to disciplinary proceedings against employee and prosecution simultaneously. The same thus have no application. I may however add that the Apex Court in ***Southern Railways Officers Association Vs. UOI*** (2009) 9 SCC 24 has held that acquittal in prosecution can be no ground for setting aside the disciplinary proceedings on the same ground.

28. The counsel for the petitioner Company agrees that none of the other judgments cited, deal with a case of interference at the stage of show cause notice and were concerned with challenge to the order on the ground of proper opportunity to show cause having not been given. The same are in consonance with whatever is observed hereinabove about reluctance of the Courts to interfere at intermediary stage.

29. There is thus no merit in the petition; the same is dismissed. Since the petition has been dismissed on the very first day though after full hearing, I refrain from imposing any costs.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

**JULY 15, 2011**

Pp (Corrected & released on 29<sup>th</sup> July, 2011).