

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

Date of decision: 9th MAY, 2011

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W.P.(C) 9051/2008

% M/s GOLDY CONSTRUCTION COMPANY Petitioner

Through: Mr. Moni Cinmoy, Adv.

Versus

MUNICIPAL CORPORATION OF DELHI Respondent

**Through: Mr. Ajay Arora & Mr. Sarfraz
Ahmed, Advocates**

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported
in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The writ petition impugns the Circular dated 27th November, 2008 of the respondent MCD intimating to the petitioner and others concerned of the petitioner having failed to honour its contractual obligations under the Work Order dated 8th December, 2006 (for

construction of twelve (12) Class Rooms at M.C. Primary School, Baljeet Nagar in Karol Bagh Zone), and of the competent authority, vide order dated 7th November, 2008 having debarred the petitioner from the approved panel of MCD for a period of three years.

2. Notice of the writ petition and of the application for interim relief was issued and counter affidavit filed by the respondent MCD. It was *inter alia* the contention of the petitioner that the notice to show cause leading to the order debarring the petitioner and the order debarring the petitioner had not been issued by the authority empowered to issue such a notice and order and the order debarring it was liable to be set aside on this ground alone. The respondent MCD filed an additional affidavit on the said aspect along with documents, to show that the show cause notice as well as the order had been made by the authorities empowered in that regard. Though opportunity for filing response thereto was granted to the petitioner on 1st December, 2009 but no response to said additional affidavit was filed by the petitioner. This Court vide order dated 19th January, 2010 dismissed

the application of the petitioner for interim relief. The counsels for the parties have been heard.

3. The order dated 7th November, 2008 debarring the petitioner and of which intimation was given vide Circular dated 27th November, 2008, has not been filed by either of the parties. It is the contention of the petitioner that the respondent MCD has failed to provide copy of the said order to the petitioner. The respondent MCD in its counter affidavit neither specifically dealt with the said plea, nor as aforesaid, filed copy of the order debarring the petitioner. The respondent MCD however along with its additional affidavit (though filed on the aspect of the authority empowered to take action for debarring) has filed as Annexure-B thereto the photocopy of its noting file which shows that the authority empowered to so debar has not passed any speaking order but merely appended its signatures on 7th November, 2008 to the proposal submitted before it for (i) forfeiting the earnest money, (ii) rescinding and recalling the tender at the risk and cost of the petitioner, (iii) debarring the petitioner for three years and

(iv)imposition of penalty of 10% of the tender amount on the petitioner for delaying / not executing the work.

4. The counsel for the petitioner has referred to:

- (i) ***Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal*** AIR 1975 SC 266 laying down that blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gain; 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.
- (ii) ***M/s. Southern Painters Vs. Fertilizers & Chemicals Travancore Ltd.*** AIR 1994 SC 1277 also laying down that compliance of principles of natural justice i.e. of prior

notice and opportunity of hearing is a must before blacklisting.

(iii) ***M/s. V.K. Dewan and Co. Vs. Municipal Corporation of Delhi*** 1994 (29) DRJ 522 laying down that in the absence of a provision to the said effect in the contract, no blacklisting can be ordered.

(iv) ***Mekaster Trading Corporation Vs. Union of India*** 106(2003) DLT 573 laying down that where the order of blacklisting is passed in a slipshod manner and does not indicate as to what are the elements which persuaded the competent authority to reject the contentions of the blacklisted contractor and where the competent authority gave no reasons for conclusion that submissions of the blacklisted contractor were unconvincing; such order cannot stand judicial scrutiny. It was further held that though this Court in exercise of power of judicial review does not sit as an appellate authority over the decision of

the competent authority and is thus not to test the merits of the decision but the decision making process is to be examined by the Court. In that case, the order of blacklisting, after making recital of the events which transpired after the show cause notice issued, i.e. filing of replies by the petitioner therein, giving of hearings to both the parties who explained their respective cases, in the penultimate para merely recorded that the case had been examined and heard and the sum and substance of the allegations made against the petitioner in that case was that the petitioner could not fulfill its contractual obligations and the reasons given by the petitioner could not be found to be convincing; the pleas taken by the petitioner therein were not dealt with. This Court held the order of blacklisting to be without reasons and further held that the requirement that the reasons must meet the substance of the principal arguments was found to be lacking.

(v) ***Vinay Construction Co. Vs. MCD*** 116 (2005) DLT 14 where also it was held that the requirement of giving show cause notice and hearing is not an empty formality and there has to be detailed finding and the authority which had to decide the question of delisting has to itself give the hearing and reasons for delisting.

5. In my opinion in the facts of the present case, the principles laid down in ***Mekaster Trading Corporation*** and in ***Vinay Construction Co.*** (supra) apply on all fours. In ***Mekaster Trading Corporation*** there was atleast an order, which was held to be without reasons. In the present case, there is no order dated 7th November, 2008 of debarring the petitioner. All that has been produced in the name of the order dated 7th November, 2008 is the signature of the authority empowered to debar, approving the action proposed by its subordinate officer. In fact the subordinate officer also while putting up the proposal for approval of the competent authority has not given any reason and

merely stated that the proprietor of the petitioner in the personal hearing had agreed to start work on or before 18th September, 2008 but did not start the work “till date”. The said proposal is dated 17th October, 2008. Only for the reason of the proprietor of the petitioner in the hearing held having agreed to commence the work on or before 18th September, 2008 and having not so commenced the work till 17th October, 2008, the action aforesaid was proposed. There is no writing of the petitioner having so agreed to commence the work. Rather it is the case of the petitioner that it was to so commence the work subject to certain conditions which remained uncomplied by the MCD. The petitioner relies on contemporaneous correspondence in this regard, all of which was not considered, neither by subordinate officer proposing action of debarring the petitioner, nor by the authority competent to debar. In the absence of any order by such authority, it is not known as to what prevailed with it to approve the action of debarring the petitioner.

6. The respondent MCD in the present case had given a notice dated 3rd October, 2007 to the petitioner to show cause as to why actions contemplated under Clause 3 of the Contract/Work Order i.e. of rescission of contract, getting work done at the risk and prejudice of the petitioner and of imposition of penalty (proposal to debar was not mentioned therein though mentioned in subsequent letter dated 5th March, 2008) should not be taken against the petitioner for the reason of having not even started the work which under the Work Order dated 8th December, 2006 was to be completed within 10 months. Thereafter vide letter dated 2nd January, 2008 provisional extension of time for completion of the work without prejudice to the right of the MCD to claim liquidated damages was granted till 31st March, 2008. It was the case of the petitioner that the work could not be commenced since the site was not clear, there was no vacant space for stacking the material; a School was already functioning just adjacent to the site and the construction work posed danger to the School children; there was hard rock beneath the surface and due to uneven surface the foundation could not be laid down properly and the design given was not

applicable / suitable to the site. It was further the contention of the petitioner that none of the said obstructions / impediments to the work were removed even while granting extension of time. It was further the case of the petitioner that all the aforesaid facts had been brought to the notice of the MCD immediately after the award of the work and a letter recording the same was also issued on 12th January, 2007.

7. The respondent MCD granted further provisional extension of time for completion of the work upto 30th June, 2008 but the petitioner continued to complain of the obstructions / impediments aforesaid. The respondent MCD once again vide notice dated 22nd May, 2008 asked the petitioner to show cause as to why administrative action should not be initiated against the petitioner.

8. The petitioner again vide its letter dated 5th June, 2008 pointed out that the obstructions / impediments aforesaid continued to exist.

9. The respondent MCD vide letter dated 22nd September, 2008 provisionally extended the time for completion of the work to 31st

December, 2008 without prejudice to its rights to recover liquidated damages. The petitioner was thereafter called for personal hearing and thereafter as aforesaid approval of the competent authority for debarring the petitioner was obtained.

10. Neither the proposal put up for approval nor the competent authority while approving the same has discussed or dealt with the reasons aforesaid given by the petitioner for being not able to commence the work. The same would show that the action of debarring suffers from the same malaise as in the case of *Mekaster Trading Corporation* and *Vinay Construction Co.* and cannot stand for the same reason.

11. Though the petitioner has in the petition also pleaded that the action has not been taken by the competent authority but on perusal of the documents produced, I am satisfied that the approval of the action was obtained from the competent authority, though the competent authority does not appear to have applied its mind before approving the same.

12. I may also notice that though the petitioner has also filed a civil suit with respect to the other actions approved of but during the hearing it was informed that the proceedings in that suit are kept pending awaiting the decision in this petition, since the same questions are involved. The counsel for MCD has contended that the petitioner having first filed the suit, is not entitled to maintain this writ petition. However the petitioner has admittedly not challenged the order debarring it in the suit. The present petition was filed within a month of the order of debarring. The suit though entailing the same question as to application of mind by the Competent Authority, relates to fiscal penalties imposed. I have not found any factual controversy requiring adjudication, as far as the question of whether any “decision” was taking or not. The pendency of the said suit is thus not an impediment to the maintainability or entertainability of this writ petition.

13. The petitioner has also contended that that in the agreement, there was no provision for debarring and thus the action impugned is bad for this reason also, as held in *V.K. Dewan & Co.* (supra).

However in view of the above, need is not felt to deal with the said argument.

14. The counsel for MCD has contended that the decision of debarring, being an administrative reason, the only enquiry in judicial review permissible is to see that the same is not vindictive, harsh or disproportionate; that in the present case the petitioner has persistently defaulted / violated the contract; the petitioner having admittedly not even started the work, is not entitled to any relief.

15. However in the present case, as aforesaid, there is no “decision” also of the authorities empowered to debar. The obligation to give show cause notice and hearing entails corresponding duty to give reasons for not agreeing with the reply to the show cause notice. In the present case, the respondent MCD has failed to discharge such duty. So in law, there is no “decision”, of which information was given vide Circular dated 27th November, 2008.

16. The purported order of the respondent MCD debarring the petitioner thus cannot be sustained and is set aside / quashed. The writ petition is allowed with costs of ₹20,000/- payable by the respondent MCD to the petitioner within four weeks of today.

**RAJIV SAHAI ENDLAW
(JUDGE)**

MAY 09, 2011
'gsr'