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

+ W.P.(C) 93/2014 & CM APPL. 162/2014

M/S DECCAN MECHANICAL AND
CHEMICAL INDUSTRIES PVT. LTD. & ANR Petitioners
Through: Mr. Arvind K. Nigam, Senior
Advocate with Mr. Arunabh
Chowdhury and Mr. Vaibhav Tomar,
Advocates.

versus

NTPC LTD. & ANR Respondents
Through: Mr. Parag P. Tripathi, Senior
Advocate with Mr. Bharat Singhal,
Ms. Kanika Tandon and Ms. Saumya
Aggarwal, Advocates.

% Reserved on : 8th January, 2014
Date of Decision : 15th January, 2014

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J:

1. Present writ petition has been filed under Article 226 of the Constitution of India challenging the legality and validity of the debarring order dated 27th November, 2013 issued by the respondents banning all

business dealings with the petitioner-company for all projects of respondent-Corporation for a period of three years w.e.f. 27th November, 2013.

2. The relevant facts of the present case are that petitioner no. 1 claims to be one of the leading multiproduct companies manufacturing wear and abrasion resistant products, material handling equipments and engineering machinery for power plant. Since its incorporation in 1969, petitioner no. 1 claims to have been supplying wear and abrasion resistant products and material handling equipments to respondent-Corporation.

3. A Notice Inviting Tender for supply of "Ceramic Lined Bends and Pipes for 200/500 MW mills" was issued by the respondent-Corporation for its plant at Korba, Chhatisgarh. Since the petitioner-company emerged as the lowest bidder, a purchase order dated 24th December, 2011 was issued to it.

4. From 20th March, 2012 to 28th March, 2012 petitioner-company supplied the ceramic pipes against Material Dispatched Clearance Certificate at Korba, Chhatisgarh to the respondents.

5. On 29th May, 2013, respondents addressed a mail to the petitioners requesting the petitioners to ensure the presence of their representative to identify the material supplied.

6. On 3rd September, 2013, petitioners received a show cause notice from the respondent-Corporation alleging that samples collected from the material supplied had been sent to CSIR for checking the alumina content and the test report showed that the samples had failed with respect to the purchase order specifications as the alumina content was found to be 75.68% against purchase order specification of 86%. On the basis of the aforesaid allegation, petitioners were informed that it was proposed to ban

business dealings with the petitioner-company for three years and accordingly, petitioners were asked to show cause.

7. On 10th September, 2013, petitioner-company submitted its reply to the show cause notice stating that the goods supplied were as per required specifications. The petitioners stated that test reports differ from lab to lab and they be given a personal hearing to explain their stand on the effect of alumina content on wear and abrasion properties as well as cost of the alumina and the laboratory methods of testing.

8. On 27th November, 2013, respondents issued the impugned letter conveying the decision to ban all dealings with the petitioners for all products of respondent-Corporation for a period of three years. The relevant portion of the impugned letter is reproduced hereinbelow:-

" xxx xxx xxx

Sub: Banning of business dealings with M/s. Deccan Mechanical & Chemical Industries Pvt. Ltd. for all projects of NTPC for a period of three years from 27/11/2013 to 26/11/2016

Dear Sir,

1.0 This has reference to the Show Cause Notice ref. no.KS/MM/P-4000079539 dated 03.09.2013 issued to you by NTPC regarding supply of sub-standard material to Korba STPP of NTPC Limited and your subsequent reply vide letter ref. no.A1-482 dated 10/09/2013

2.0 The reply furnished by you has been analyzed at our end and based on the analysis, it has been established that the reply submitted by you is devoid of any merit.

3.0 In view of the above, it has been decided to ban all business dealings with M/s Deccan Mechanical &

Chemical Industries Pvt. Ltd. for all projects of NTPC for a period of three years from 27/11/2013 to 26/11/2016. Accordingly, no bidding/tender documents shall be issued and/or award shall be made to M/s Deccan Mechanical & Chemical Industries Pvt. Ltd. for any of the contract packages tendered from Corporate Centre/Project Sites/Regional Offices. Further, for all the packages where the bidding documents may have been issued to you from any of the NTPC Projects but the price bids are yet to be opened, any bids submitted by you will not be considered."

9. According to the petitioners, they addressed various communications to the respondents between 9th December, 2013 and 18th December, 2013 asking for a personal hearing so that they could explain their stand. As they received no reply, petitioners filed the present writ petition.

10. On 8th January, 2014, when the matter was taken up for hearing, this Court passed the following order:-

"Issue notice. Mr. Bharat Singal, Advocate accepts notice for the respondents.

With the consent of parties, the matter is taken up for final hearing.

Arguments heard. Judgment reserved.

Both parties are directed to file written synopsis not exceeding two pages by tomorrow i.e. 09th January, 2014."

11. Mr. Arvind K. Nigam, learned senior counsel for the petitioners submitted that the impugned order had been passed in gross violation of the principles of natural justice without affording an opportunity of personal hearing. He stated that petitioners' numerous requests for a personal hearing to explain their case had been denied due to high handed exercise of power. According to Mr. Nigam, the impugned order of blacklisting was a

unilateral order and the denial of personal hearing tantamounted to denial of fair opportunity. In support of his submissions, Mr. Nigam relied upon the judgment of the Supreme Court in ***Raghunath Thakur v. State of Bihar, (1989) 1 SCC 229*** wherein it has been held that *"....blacklisting 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."*

12. Mr. Nigam further submitted that the impugned order of blacklisting was non-speaking and unreasoned. He pointed out that the Supreme Court in ***Kranti Associates (P) Ltd. v. Masood Ahmed Khan, (2010) 9 SCC 496*** has held that even an order passed by an administrative authority *"must not be like the inscrutable face of a sphinx"*.

13. Mr. Nigam stated that goods supplied by the petitioners had been fully utilised and had not been rejected by the respondent-Corporation in exercise of power under Clauses 6 and 8 of the General Purchase Condition. Mr. Nigam pointed out that as per Clause 29 of the General Purchase Condition, the goods had been guaranteed for eighteen months from the date of dispatch and as of today, seventeen months had already lapsed. Mr. Nigam contended that the respondent-Corporation had done thorough checking and inspection of the goods at the petitioners' factory before issuing a dispatch certificate.

14. Mr. Nigam further contended that CSIR test report which formed the basis of the impugned order had not been supplied to the petitioners despite their requests. In support of his contention, Mr. Nigam relied upon

petitioners' email and letter dated 16th December, 2013.

15. Mr. Nigam stated that the petitioners would not gain anything from supply of substandard alumina as reduction of 10% of alumina would reduce the product price marginally by about 2%. Mr. Nigam emphasised that petitioners had been supplying material to the respondent-Corporation since last twenty-five years and there had been no report of any loss, project delay or rejection by the respondents. He lastly stated that the petitioners manufacture six other products apart from alumina ceramic which in any event could not come under the purview of the impugned action.

16. On the other hand, Mr. Parag P. Tripathi, learned senior counsel for respondents submitted that the argument of breach of principles of natural justice was purely theoretical as petitioners had all along admitted that they did not meet eligibility criteria of minimum 86% alumina content. In this connection, Mr. Tripathi referred to the reply to show cause notice dated 10th September, 2012 which stated that "*there can be some error in the chemical analysis report of the secondary raw material of the supplier, which may reflect on the alumina content of the final product.*" Mr. Tripathi also referred to petitioners' representation dated 10th December, 2013 which stated that "*there may be some shortage of alumina content in a particular mineral of that specific lot which might have been reflected in the final product.*"

17. Mr. Tripathi stated that the whole focus of the petitioner's reply to the show cause notice was that there could be lower percentage of alumina but the same was unintentional and in any event was no guarantee for getting better results.

18. Mr. Tripathi contended that petitioners never asked for documents or personal hearing to avail the CSIR report. He stated that at no point did the petitioners demand a copy of the CSIR report and such an argument was raised for the first time in the present proceedings.

19. Mr. Tripathi submitted that principles of natural justice did not require either furnishing of documents or opportunity of hearing. According to him, simple issuance of show cause notice was enough. In support of his submissions, Mr. Tripathi relied upon following judgments of the Supreme Court and High Court :-

a) ***Grosons Pharmaceuticals (P) Ltd. and Another Vs. State of U.P. and Others, (2001) 8 SCC 604*** wherein Supreme Court has held as under:-

"2.....It is true that an order blacklisting an approved contractor results in civil consequences and in such a situation in the absence of statutory rules, the only requirement of law while passing such an order was to observe the principle of audi alteram partem which is one of the facets of the principles of natural justice. The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant were based, was not the requirement of the principle of audi alteram partem. It was sufficient requirement of law that an opportunity of show-cause was given to the appellant before it was blacklisted. It is not disputed that in the present case, the appellant was given an opportunity to show cause and it did reply to the show-cause which was duly considered by the State Government. We are, therefore, of the view that the procedure adopted by the respondent while blacklisting the appellant was in conformity with the principles of natural justice."

b) ***Patel Engineering Limited Vs. Union of India and Another, (2012) 11 SCC 257*** wherein Supreme Court has held as under:-

"15.....The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary—thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

c) ***M/s. Sabharwal Medicos Pvt. Ltd. Vs. Union of India and Others, W.P.(C) 7369/2011*** decided on ***25th September, 2013*** wherein the High Court has held as under:-

"8. In the cases before this court, show cause notice was given by the respondents to Sabharwal Medicos as well as Janak Medicos. Both of them responded to the show cause notice. While responding to the show cause notice received by them neither Sabharwal Medicos nor Janak Medicos sought any opportunity of personal hearing nor did either of them seek any document or other material from the respondents. By giving show cause notice to them, the respondents duly complied with the requirement of the principles of natural justice. Therefore, it cannot be said that the order of blacklisting was passed in violation of the principles of natural justice."

20. Having heard learned counsel for the parties, this Court is of the view that respondent-Corporation's arguments that petitioner had accepted the CSIR report and had all along admitted that it did not meet the eligibility criteria of alumina content (86% minimum), is not correct. The petitioner in its reply to the show cause notice had stated, *"Problems in Chemical Analysis: We have seen at times that the results of chemical composition test conducted in various laboratories, including defence laboratory, differs*

from lab to lab for the sample chosen from the same lot. Hence we do not entirely depend on the results of laboratories.....We will be glad if you allow us to explain in person our stand on the effect of Alumina content on wear & abrasion properties and cost of the alumina tiles." Consequently, this Court is of the view that the petitioner had denied the allegations made in the show cause notice and had asked for a personal hearing to explain its case.

21. Further, the petitioner's argument that there was an unintended error or there could be some error in the report of supplier of the raw material are alternative pleas and not admission of alleged breach.

22. This Court is also of the opinion that blacklisting of any entity has civil consequences for its future business. It is an elementary principle of natural justice, even if rules do not expressly provide, that parties affected by such an order should be given the right to make representation and the right to be heard. In ***Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517*** the Supreme Court has held that cases involving blacklisting stand on different footing "*as they may require a higher degree of fairness in action.*"

23. The *locus classicus* on the concept of blacklisting is ***M/s. Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and Another, (1975) 1 SCC 70*** wherein Supreme Court has held 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 anyone 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.

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20. 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.

21. With regard to the case of the petitioners, it is made clear that the authorities will give an opportunity to the petitioners to represent their case and the authorities will hear the petitioners as to whether their name should be put on the blacklist or not....."

(emphasis supplied)

24. The Supreme Court in **Grosons Pharmaceuticals (P) Ltd.** (supra) did not interfere with the blacklisting order as the same had been reiterated after re-hearing the petitioner and after remand of the matter by the Supreme Court in the first round of litigation. It is pertinent to mention that in the

said case, the petitioner had supplied drugs to the Government of U.P. wherein certain irregularities were noticed for which vigilance inquiry along with criminal prosecution had been launched against the petitioners therein.

25. Similarly, in *M/s. Sabharwal Medicos Pvt. Ltd.* (supra), forged bids had been submitted by the petitioner for supply of medicines and the petitioner therein had already been charge-sheeted by the CBI after investigation.

26. Keeping in view the aforesaid case law, this Court is of the opinion that the degree of compliance with principles of natural justice that is required would vary from case to case depending upon various factors. After all, principles of natural justice are flexible and cannot be fitted into rigid moulds. To say that principles of natural justice can never require either furnishing of documents or opportunity of hearing, is not correct.

27. In the present case, keeping in view the fact that petitioner has been supplying wear and abrasion resistant products to the respondent-Corporation for the past twenty-five years without any complaint and alumina ceramic forms 3% of the total supply as well as the fact that the goods supplied under the purchase order have been utilized and no part of the supply has been rejected till date, this Court is of the view that not only a detailed hearing, but a copy of the CSIR report should have been supplied to the petitioner before passing of the impugned order/letter.

28. This Court is also of the opinion that the impugned order of blacklisting is an unreasoned order. Reasons form indispensable component of the decision making process and are the link between the order and the mind of its maker. In *Messrs. Mahabir Prasad Santosh Kumar vs. State of U.P. and Others, 1970 (1) SCC 764*, it has been held that the conclusion of a

quasi-judicial authority must be fair and just and for ensuring this, the authority must record reasons as that would show the ultimate mental process leading from dispute to its solution.

29. Consequently, the impugned order is set aside and the matter is remanded back for re-hearing after giving a copy of the CSIR report to the petitioner. However, to balance the equities, in the meantime, the petitioner shall not be eligible to participate in any tender floated by the respondent-Corporation with regard to alumina ceramic products. It is clarified that in the meantime petitioner's tenders/quotations for six other products apart from alumina ceramic shall be opened and considered on merit as they are in no way connected with the present controversy.

30. With the aforesaid observations, present writ petition stands disposed of.

Order dasti under the signature of Court Master.

MANMOHAN, J

JANUARY 15, 2014

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