

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 25.11.2014

+ **W.P.(C) 2094/2014 & CM No. 4362/2014**

CWICK (IMPORT CONSOLIDATIONS) PVT. LTD. Petitioner

versus

INDIAN AGRICULTURE RESEARCH INSTITUTE Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Jagjit Singh.

For the Respondent : Mr Piyush Sharma.

CORAM:-

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition seeking quashing of the order dated 03.03.2014 passed by the respondent (hereinafter referred to as the 'impugned order') *inter alia* directing recovery of a sum of ₹5,74,249/- from the petitioner and blacklisting the petitioner from any future dealings with the respondent.

2. The limited controversy to be addressed is whether, in the given facts and circumstances of the case, the order of blacklisting the petitioner is unreasonable.

3. Briefly stated, the relevant facts necessary for the purpose of considering the dispute are as under:

4. The petitioner, who is engaged in business of clearing agent for import and export consignments, submitted its bid for rendering services to the respondent. The respondent accepted the bid of the petitioner by its letter dated 16.09.2006 and awarded an Annual Rate Contract to the petitioner initially for a period of one year, which was extended from time to time and was last extended till 31.03.2011. The letter dated 16.09.2006 also stipulated terms and conditions and the rates to be charged by the petitioner.

5. The respondent, by its letter dated 01.02.2007, offered to the petitioner the additional work of other custom clearing agent - M/s K.K. Sharma & Company *“at the rate of which were minimum for M/s K.K. Sharma & Company”*. The petitioner, by its letter dated 02.02.2007, accepted the offer of the additional work on the rates given in the award letter pertaining to M/s K.K Sharma (hereafter ‘KKS’) and agreed to do *“the customs clearance and delivery “Free of Charge” for the work on which K.K. Sharma was nominated in the supply orders, as per his minimum rates.”* Thereafter, the respondent, by its letter dated 12.02.2007, awarded the additional work of KKS to the petitioner.

6. Subsequently, the respondent issued a letter dated 26.03.2012 to petitioner stating that *“During the period of ARC, you have submitted the bills of clearance of import consignments of IARI from the Customs in divisions /units. In some bills, you have over charged the amount than that of approved under ARC. As such, payment of your all pending bills have been withheld due to overcharging of rates and the business dealing with the firm has been suspended for the time being until further order.”*

7. The petitioner, thereafter, filed a writ petition (W.P. (C) No.663/2013) before this Court impugning the said letter dated 26.03.2012. This court, by an order dated 11.11.2013, disposed of the said writ petition by setting aside the said letter/order dated 26.03.2012 to the extent of suspension of business dealings with the petitioner. This Court, however, granted liberty to the respondent to pass a fresh suspension order within a period of two weeks after giving the petitioner a show cause notice within one week and an opportunity of hearing to respond to the show cause notice within a period of one week thereafter.

8. Thereafter, the respondent issued a show cause notice dated 22.11.2013 to the petitioner on the following aspects:-

“1. Why you have overcharged the amount which is in clear violation of Rate Agreement with the IARI?

2. Why the excess amount should not be recovered from your pending bills (As per list attached)?

3. Why you should not be black listed from tendering in any other tender floated by IARI and further the business dealing with your Firm shall be permanently suspended?

4. Why the contract should not be terminated alongwith recovery of the amount?”

9. The petitioner submitted its response to the said show cause notice, by a letter dated 05.12.2013, denying all the allegations leveled against the petitioner.

10. A committee was constituted by the respondent to consider the reply of the petitioner and to conduct an inquiry into the matter. The respondent also filed an application (CM No.730/2014) before this Court seeking extension of time granted by this court on 11.11.2013. This Court, by an order dated 20.01.2014, granted further period of six weeks time to comply with the directions passed on 11.11.2013. The committee fixed the dates 23.01.2014 and 12.02.2014 for personal hearing of the petitioner and duly notified it to the petitioner, however, the petitioner did not appear before the committee. The committee, thereafter, proceeded with the matter and rejected the reply of the petitioner after considering it on merits. The respondent, thereafter, passed the impugned order dated 03.03.2014. The relevant extract of the impugned order dated 03.03.2014 reads as under:-

“Whereas I being the Director, IARI and Competent Authority
ORDER that,

1. The excess amount of Rs,5,74,249/- (Rs. Five lakh seventy four thousand two hundred forty nine only) charged by M/s Cwick (Import Consolidations) Pvt. Ltd., New Delhi should be recovered from pending bills.
2. The contract should be terminated alongwith recovery of the amount overcharged by the M/s Cwick (Import Consolidations) Pvt. Ltd., New Delhi.
3. The firm should be BLACK LISTED from tendering in any other tender floated by IARI and further any business dealing with M/s Cwick (Import Consolidations) Pvt. Ltd., New Delhi should be permanently stopped.”

11. Before proceeding further, it is relevant to note that this court, on 02.04.2014, issued notice limited to the issue of blacklisting for an indefinite period and directed the respondent to seek instructions with regard to the proportionality of the punishment. Aggrieved by the said order, the petitioner filed an appeal (LPA No.356/2014) before a Division Bench of this Court contending that since the notice issued in petition was a limited one and the other contentions were rejected, an appeal after final disposal of the writ petition may be barred by time. The Division Bench, by an order dated 12.05.2014, disposed of the appeal by giving liberty to the petitioner to urge all grounds if the petitioner was aggrieved by the final order.

12. Thereafter, the respondent filed a short affidavit dated 22.05.2014 stating that by an order dated 21.05.2014, the period of blacklisting was reduced to three years with effect from 26.03.2012 i.e. from the date of suspension of business dealings with the petitioner.

13. It was contended by the petitioner that impugned order is without jurisdiction as the time frame specified by this court on 11.11.2013 for issuing show cause notice, conducting hearing and concluding hearing was not adhered to by the respondent and his civil rights have been adversely affected. It was further contended that the period of six weeks as granted by this court on 20.01.2014 would be reckoned from date of original order (i.e. 11.11.2013) which expired on 27.01.2014 and therefore, the order dated 03.03.2014 was without jurisdiction.

14. It was further contended that all administrative actions and decisions must be supported by reasons and the impugned order was without any reasons or justification and therefore, is liable to be quashed. In support of this contention, reliance was placed on S.N. Mukherjee v. Union of India: AIR 1990 SC 1984, Indian Oil Corporation Ltd. V. SPS Engineering Ltd.: 128 (2006) DLT 417, Bhimsen v. Union of India and Anr.: AIR 1981 Del 260 and Pt. Sumbra Mitra Jaya v. The National Highways Authority of India: AIR 2003 Mad 221.

15. It was contended by the petitioner that awarding additional work of KKS to the petitioner did not mean that the rates offered by the petitioner were novated. It was contended that the petitioner had specifically agreed to charge at rates which were 20% less than IATA applicable rates for sensitive consignments. It was submitted that the bills were raised as per the agreed rate of contract and there was no overcharging.

16. The learned counsel for the respondent contended that, in terms of rate contract dated 16.09.2006, KKS offered to charge 70% less than IATA applicable rates on sensitive consignments. The said terms were also applicable for the services provided by the petitioner as the petitioner accepted the same by its letter dated 02.02.2007. Since the petitioner had raised its invoices at higher rates, i.e. 20% less than IATA applicable rates, the petitioner had overcharged and was liable to refund the amount and its blacklisting was warranted.

17. The principal controversy to be considered is whether, in the given facts and circumstances of the case, the petitioner could be blacklisted on

account of alleged overcharging. It is not disputed that the petitioner had charged at rates, which were 20% less than IATA applicable rates in respect of sensitive consignments; according to the respondent, the petitioner ought to have charged at rates that were 70% less than IATA applicable rates. Offers for rate contract for clearance of import consignments were invited by the respondent for a period of one year from 16.09.2006 to 15.09.2007. The petitioner as well as one KKS had submitted their offers which inter alia included the quantum of discount on IATA applicable rates that would be provided by the said tenderers. The charges offered by the petitioner and KKS for various consignments were as under:-

		M/S Krishan Kumar Sharma	M/S Cwick (Import Consolidations) Pvt. Ltd.
b	Dimensional/Voluminous Cargo/ Pre Paid Consignment	55% less on IATA Applicable Rates including Sensitive Consignments**	70% less on IATA Applicable Rates
c	Odd Dimensional Shipment	70% less on IATA Applicable Rates including Sensitive Consignments**	65% less on IATA Applicable Rates
d	Discount for High Density i. – 45 Kg to + 45 Kgs ii. + 100 Kgs		90% less on IATA Applicable Rates
			80% less on IATA Applicable Rates
e	Sensitive Equipment bearing Arrow Label/ Moisture Watch Label/ Fragile Goods Label		20% less on IATA Applicable Rates

18. A bare perusal of the aforesaid offers clearly indicates that whereas in respect of certain consignments the charges offered by the petitioner were lower in other cases and the charges offered by KKS were lower. Accordingly, respondent decided to award sensitive consignments to KKS while with respect to most of the other categories, the respondent decided to avail the services of the petitioner. Admittedly, the respondent was not satisfied with the services of KKS and, accordingly, the respondent decided to award annual rate contract for custom clearing work in addition to the work already awarded to the petitioner by the letter dated 16.09.2006. However, the respondent specified that the said work would be at the rate “*which were minimum for M/s K.K. Sharma and company*”. The relevant extract of the letter dated 01.02.2007 reads as under:-

“It has been decided by the competent authority to award the Annual Rate Contract for Custom Clearing work of IARI in addition to the work already awarded to you in Annual Rate Contract vide letter No: 5-3/2006-07/Stores/ dated 16.9.2006 at the rate of which were minimum for M/s K.K. Sharma & Company.”

19. The petitioner accepted the above offer by a letter dated 02.02.07 in the following words:

“We thankfully accept the additional award of work on the rates given in the award letter pertaining to K.K. Sharma.

We would do the customs clearance and delivery “Free of charge” for the work on which K.K. Sharma was nominated in the supply orders, as per his minimum rates.

You are requested to kindly allow the amendment in the supply orders, in which the forwarder of K.K. Sharma has

been nominated, for which goods have not yet arrived to avoid any further delay.”

20. Thereafter, the respondent by its letter dated 12.02.2007 awarded the additional work also to the petitioner. It is relevant to refer to the said letter which reads as under:-

“With reference to above and in continuation of our letter No:5.3.2006-07/Stores(Pt.) dated 1.2.2007 and your reply dated 2.2.2007 number nil the Director, IARI is pleased to award the entire Annual Rate Contract for the clearance of import (consignment) in respect of items already awarded to you and in addition the items awarded to M/s K.K. Sharma, vide above mentioned award of Rate Contract letter on the terms & condition accepted by you to do the custom clearance and delivery ‘free of charge’ as per the minimum rates of M/s K.K. Sharma.

These orders will be effective till further orders or 15.9.2007 whichever is earlier. All other terms and conditions remain same.”

21. The petitioner contended that it had only agreed to additional work of custom clearance for which KKS was nominated in the supply orders at minimum rates for KKS and not for the entire work. According to the petitioner, the air freight charges were to be charged at the rates offered by the petitioner except for work where KKS was nominated in the supply orders. Undoubtedly, the intention of the respondent was to avail services of the petitioner at the rates offered by KKS with respect to items for which KKS was selected. However, the language of the letter dated 02.02.2007 suggests that the petitioner had accepted to work at the rates offered by KKS only in respect of those consignments where KKS had already been nominated in the supply orders. This according to the petitioner did not

mean all sensitive consignments for which KKS had quoted lower rate of 70% less than IATA applicable rates but only specific instances where KKS had been nominated in the supply orders. It is also relevant to note that not only had the petitioner raised the bills as per its offer but the same were also cleared by the respondent.

22. It is apparent from the above that the disputes are, essentially, contractual disputes arising out of the interpretation of the contract between the parties. Clearly, the stand of the respondent that additional items of services (i.e. clearance of sensitive consignments) which as per the rate contract were allotted to KKS, were after 12.02.2007 to be done by the petitioner at the rates offered by KKS, is well-founded. However, the disputes as to amount to be charged by the petitioner would have to be decided in an appropriate forum. The only question to be considered is whether the decision of respondent to blacklist the petitioner ought to follow in these circumstances.

23. Indisputably, certain stigma is attached to blacklisting and it does tend to sully the image and the goodwill of a contractor. Apart from these, it also has the effect of preventing a contractor from entering into a lawful relationship with the Government authorities. The Supreme Court in the case of **M/s Erusian Equipment & Chemicals Ltd v. State of West Bengal and another**: (1975) 1 SCC 70 observed as under:-

“The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The black lists are “instruments of coercion”.”

24. As has been pointed out in the present case, the petitioner has not only been deprived of the contract with the respondent but also with another organization (i.e. Government Medical College and Hospital Chandigarh) has also taken note of the same. It is possible that other entities may also take note of the petitioner's blacklisting by the respondent.

25. Every contractual dispute does not warrant that the contractor be blacklisted; it would be necessary to ascribe a negative overtone to a persons conduct before such person is blacklisted. Essentially, blacklisting has a punitive effect and, thus, even in cases where a person's conduct has been found to be contrary to the terms of the contract, the punishment of blacklisting need not follow in all cases. And, in cases where it is warranted, the same has to be inflicted with a sense of proportionality. The Supreme Court in the case of *M/s. Kulja Industries Limited v. Chief Gen. Manager W.T Proj. BSNL & Ors.*: Civil Appeal No. 8944 of 2013, decided on 04.10.2013 held as under:-

“17. That apart the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because ‘blacklisting’ simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private

parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with *Erusian Equipment & Chemicals Ltd. v. State of West Bengal* (1975) 1 SCC 70 where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed:

“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.”

18. Subsequent decisions of this Court in *Southern Painters v. Fertilizers & Chemicals Travancore Ltd.* AIR 1994 SC 1277; *Patel Engineering Ltd. Union of India* (2012) 11 SCC 257; *B.S.N Joshi & Sons Ltd. v. Nair Coal Services Ltd.* (2006) 11 SCC 548; *Joseph Vilangandan v. The Executive Engineer,*

(PWD) Ernakulam (1978) 3 SCC 36 among others have followed the ratio of that decision and applied the principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.

19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer res integra. The decisions of this Court in Radha krishna Agarwal v. State of Bihar (1977) 3 SCC 457; E.P Royappa v. State of Tamil Nadu (1974) 4 SCC 3; Maneka Gandhi v. Union of India (1978) 1 SCC 248; Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722; R.D Shetty v. International Airport Authority of India, (1979) 3 SCC 489 and Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 293 have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a Writ Court exercising powers under Article 226 or Article 32 of the Constitution. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality.”

26. Applying the aforesaid principles in the given circumstances, it is clear that the decision of the respondent is not vitiated for want of adhering to the principles of natural justice. The petitioner was afforded full opportunity to meet the allegations made against the petitioner. The contention that the impugned order is liable to be set aside because the respondent had not adhered to the time frame specified by this court also cannot be accepted. The thought behind specifying a time schedule was only to ensure an expeditious disposal of the matter and failure to do so

does not vitiate the impugned order. I am also unable to accept the contention of the petitioner that the impugned order is an unreasoned one as it is apparent that the petitioner has been blacklisted on the allegation of overcharging. This conclusion has been arrived at on the basis of the rated offered by KKS and those charged by the petitioner.

27. In so far as the question of reasonableness of the respondent's decision is concerned, the same has to be viewed in the context of the dispute. Plainly, the dispute is with regard to an interpretation of a contract and there is no allegation of corruption or any disreputable conduct. In the circumstances, the action of blacklisting the petitioner for a period of three years is highly disproportionate. A prospect of blacklisting cannot be held *in terrorem* over a contractor to dissuade him from asserting what he feels is rightfully due to him.

28. It is also noteworthy that the period of blacklisting is almost over and the petitioner has already suffered the punishment for almost two years eight months. Thus, in my view it would be appropriate if the impugned order in so far as it blacklists the petitioner is set aside, leaving the parties to agitate their other contractual disputes in an appropriate forum.

29. The application also stands disposed of.

VIBHU BAKHRU, J

NOVEMBER 25, 2014
RK/pkv