

GAHC010218652021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/7057/2021

M/S AVIJANTRIK INFRATECH PVT LTD
H/NO. 239, W/ NO-4, PO AND PS- CHAPAR, DIST-DHUBRI, ASSAM,
REPRESENTED BY ITS AUTHORIZED SIGNATORY, SRI SUBHAMAY
KARMAKAR, AGED ABOUT 32 YEARS, S/O- LATE SANKAR KARMAKAR,
R/O- CHAPAGURI ROAD, NORTH BONGAIGAON, PO AND DIST-
BONGAIGAON, ASSAM

VERSUS

THE UNION OF INDIA AND 6 ORS
REPRESENTED BY THE GENERAL MANAGER (CON), NF RAILWAY,
MALIGAON, GHY-11

2:THE CHAIRMAN
RAILWAY BOARD
GOVT. OF INDIA
MINISTRY OF RAILWAYS
RAIL BHAVAN
NEW DELHI-110075

3:THE EXECUTIVE DIRECTOR
CIVIL ENGINEERING (G)
RAILWAY BOARD
RAIL
BHAVAN
NEW DELHI-110075

4:THE GENERAL MANAGER
NORTHEAST FRONTIER RAILWAYS
MALIGAON
GUWAHATI

5:THE CHIEF ENGINEER/CON-V

NORTH EAST FRONTIER RAILWAYS
CONSTRUCTION ORGANISATION
MALIGAON
GUWAHATI

6:THE DEPUTY CHIEF ENGINEER (CON).NMX-JPZ RAILWAY PROJECT
NORTHEAST FRONTIER RAILWAYS
JOGIGHOPA
ASSA

Advocate for the Petitioner : MR. R ALI
Advocate for the Respondent : SC, RAILWAY

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Date : 11-04-2023

JUDGMENT & ORDER (CAV)

The extraordinary powers conferred by Article 226 of the Constitution of India is sought to be invoked by means of this petition wherein the petitioner has put to challenge an order dated 29.10.2021 by which a decision of the Railway Board has been conveyed. The said decision pertains to banning the business dealings with a Joint Venture of which the petitioner is a constituent for a period of 5 years. The petitioner alleges that the aforesaid action is bad in law as the same has been issued without following the due process of law. The petitioner has specifically pleaded that there has been violation of the principles of natural justice.

2. Before going to the issue to be decided, it would be beneficial to record the facts of the case in brief.

3. As per the projected case of the petitioner, a Notice Inviting Tender (NIT) was issued on 27.06.2019 by the Chief Engineer/Con-V. In response to the same, the petitioner with another entity as Joint Venture (JV) had submitted the bid along with

all requisite documents. After completion of the tender process, the work was however, allotted to a third party. Thereafter, two further tender notices were issued on 15.03.2021 and 01.07.2021 for different works. In the meantime, a show-cause notice dated 11.08.2021 was served upon the petitioner leveling certain charges with regard to the tender notice dated 27.06.2019.

4. It is the case of the petitioner that reply to the aforesaid notice was submitted on 10.09.2021. However, so far as the bids submitted by the petitioner in respect of the tender notices dated 15.03.2021 and 01.07.2021 are concerned, the same were rejected which according to the petitioner was done without assigning any reasons. The petitioner had challenged the aforesaid action of rejection of its bid by filing two numbers of writ petitions, being WP(C) No. 5289/2021 and 5648/2021 before this Court in which notices have been issued and the matters are said to be pending.

5. It is the case of the petitioner that vide the impugned order dated 29.10.2021, the Railway Board had communicated the decision to ban the business dealings with the petitioner which has been stated above. It is the projected case of the petitioner that the aforesaid action has been taken without providing any opportunity of hearing and accordingly, there has been gross violation of the principles of natural justice.

6. The projected case of the petitioner has, however, been refuted by the respondent Railways by submitting that due opportunity was granted to the affected party and its response was duly considered and only thereafter, the decision was taken to ban its business dealings for a period of 5 years. It is also stated that the charges/allegations were very serious involving forgery and recourse to fraudulent documents while submitting a bid.

7. I have heard Shri A. Dasgupta, learned Senior Counsel assisted by Shri R. Ali learned counsel for the petitioner whereas the Railways have been represented by Shri B. Sharma, learned Standing Counsel. The materials placed before this Court, have

been duly considered.

8. Shri Dasgupta, learned Senior Counsel for the petitioner has submitted that the impugned order dated 29.10.2021 is unsustainable in law on the ground that the same has been passed without giving proper opportunity to the petitioner. He submits that though a notice was issued to the petitioner raising certain allegations which was duly replied to on 10.09.2021, no further opportunity was given to the petitioner as to why the reply given should not have been accepted and unilaterally, a decision has been taken to penalize the JV and ban its business dealings for a period of 5 years. The learned Senior Counsel submits that mere serving of a show-cause notice will not amount to adhering to the due process of law which includes strict compliance with the principles of natural justice. It is further submitted that the impugned order has adverse civil consequences and therefore, it was imperative upon the respondent authorities to give a proper opportunity to defend its case which according to the petitioner has not been done.

9. In support of his submission, Shri Dasgupta, the learned Senior Counsel for the petitioner has relied upon the following case laws:

(i) (1964) AC 40 [Ridge Vs Baldwin

(ii) (1975) 1 SCC 70 (M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal & Anr.)

(iii) (2021) 2 SCC 551 (UMC Technologies Pvt. Ltd. Vs Food Corporation of India & Anr.)

10. The case of **Erusian Equipment & Chemicals Ltd.** (supra) is one of the landmark cases on the issue concerning blacklisting. The Hon'ble Supreme Court has laid down that the action of blacklisting is required to be tested *vis-a-vis* the rights under Articles 14 and 19(1)(g) of the Constitution of India. It has been laid down that the action of blacklisting entails adverse civil consequences and therefore, it is

imperative that the party against whom such action is contemplated is given a proper opportunity to defend its case.

11. In the case of ***UMC Technologies Pvt. Ltd. Vs Food Corporation of India & Anr.*** reported in ***(2021) 2 SCC 551***, it has been reiterated that the action of blacklisting is required to be preceded with a proper opportunity to the party to defend its case and such action has to be taken by following the principles of natural justice.

12. The learned Senior Counsel for the petitioner has also made a passing reference to the celebrated case of ***Ridge Vs Baldwin***.

13. *Per Contra*, Shri B. Sharma, the learned Standing Counsel, Railways has submitted that the impugned order does not suffer from any legal infirmity. He submits that due opportunity was offered to the petitioner to show-cause as to why the impugned action of blacklisting should not be taken against the petitioner. The learned Standing Counsel submits that once an opportunity to show-cause is given and the response is examined, the requirement of adherence to the principles of natural justice is fulfilled. He submits that there is no further requirement of giving any personal hearing before passing an order of blacklisting.

14. The learned Standing Counsel submits that the conduct of the petitioner is also very relevant in this case and is required to be taken into consideration before taking a decision to the issue at hand. He submits that the allegation is of forging documents of another company so as to enable itself to submit its bid. It is interesting to note that the use of forged documents as such has not been denied by the petitioner and the only explanation is that they were not aware of such forgery. The learned Standing Counsel submits that once the allegation is admitted, the requirement of giving opportunity was a mere formality. In spite of that, by adhering to the principles of natural justice, an opportunity was given to the petitioner to show-cause. It is submitted on behalf of the Department that the reply was considered in which there

was a clear admission and therefore, there was no further requirement or need to afford personal hearing to the representatives of the petitioner's company.

15. The learned Standing Counsel for the Railways has relied upon the following case laws.

1. *Patel Engineering Limited Vs. Union of India & Anr.* reported in (2012) 11 SCC 257

2. *Gorkha Security Services Vs. Government (NCT of Delhi) and Ors.* reported in (2014) 9 SCC 105.

3. Judgment dated 24.02.2022 in Civil Appeal No. 1083 of 2022, *State of Odisha & Ors. Vs. M/s Panda Infraproject Ltd.*

16. In the case of ***Patel Engineering Ltd.***(supra) the Hon'ble Supreme Court was dealing with the issue of blacklisting. It has been held that the only requirement for exercise of such power is that the same should be done fairly and rationally without, in any way being arbitrary and the same would depend on the facts and circumstances of each case.

17. In the case of ***Gorkha Security Services*** (supra) reliance was made on the case of ***Patel Engineering Ltd.*** (supra) as well as the case of ***Erusian Equipment & Chemicals Ltd.*** and it has been held that oral hearing is not a necessity while giving an opportunity to show-cause as to why an entity should not be blacklisted.

18. The learned Counsel for the Railways submits that even in the latest case of ***State of Odisha & Ors.,*** no requirement of personal hearing has been laid down as a condition precedent for blacklisting.

19. Rejoining his submissions, the learned Senior Counsel for the petitioner submits that the requirement to follow the principles of natural justice is an admitted feature and the same cannot be an empty formality. He submits that the opportunity to

substantiate the defence must be an adequate one and the said burden can be discharged only if a personal hearing is afforded. The Learned Senior Counsel for the petitioner has also, at this stage referred to a notification of the Railway Board dated 09.11.2022 whereby a procedure has been laid down for carrying out exercise of debarment.

20. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined.

21. At the outset, the learned Standing Counsel of the Railways has submitted that the notification which has been placed on record is dated 09.11.2022 and would have prospective effect and therefore the same may not be relevant.

22. To examine the issue at hand, it would be prudent in this case to have a look at the nature of allegation leveled by the Railways.

23. For ready reference, the allegation which was leveled against the petitioner for which the impugned action has been taken is extracted herein below.

“Article of charge

1. *A tender i.e. No.CE/CON/N-J/TL/2019/05 was invited through IREPS for execution of the work i.e. "Linking of new BG track with 52 kg SH/60 kg (new) single/long welded panels (10 rails/20rails) with 1660 nos PSC sleeper per Km in main line and 52 kg single/three rails/10 rails/20 rails welded panels with 1540 nos PSC sleeper per km in loop lines including linking of 1 in 12, 1 in 805 and derailing switches on PSC sleepers (Fan shaped layout), laying of SEJs etc. including insertion of preassembled turnout, carriage of sleepers & rails, spreading of ballast etc., and all other connected ancillary works as per requirement in between Chapar to Abhayapuri from Km 222/000 to Km 246/960 in connection with NMX-JPZ New BG line work of NF Railway" with a value of Rs.19,20,46,568.70/-.*

2. *M/s Sumcon-Avijantrik (JV), Chapaguri Roadm North Bongaigaon, PO & Distt. Bongaigaon, Assam-783380 participated in the above tender and uploaded the documents i.e. Affidavit of Sole Proprietorship, Certified Copy Resolution passed in the meeting of the Board of Directors, Agreement of Taken*

over of Business of Singhania Associates by Avijantrik Infratech Pvt. Ltd., Money Receipt, No Claim of M/s Singhania Associates for using credentials by Avijantrik Pvt. Ltd., as a supporting document towards eligibility criteria.

3. *Later, on verification, it was found that the above documents submitted by the contractor were fake.*

4. *In the light of above, it has clearly established that M/s Sumcon-Avijantrik (JV), Chapaguri Road, North Bongaigaon, PO & Distt. Bongaigaon, Assam-783380 committed the grievous offence with mala fide intention and tried to cheat Indian Railways for getting work through forged documents."*

24. The aforesaid show-cause notice was replied on 10.09.2021. A perusal of the said reply would show that there was no denial of the use of the fraudulent documents and the only explanation was that it was not aware that the documents were fake/forged.

25. For ready reference, the relevant part of the reply dated 10.09.2021 is extracted herein below:-

"7. That sir, we used the documents of M/s Singhania Associates on bonafide and in good faith, we had no intention to cheat the Railway in any manner. While we get the smell of fraud committed with us, we refrain our self from submitting the prayer for extension of tender and requested the authority to cancel our tender offer and we wish to came out for the tender process for the above para-3 mentioned tender. Therefore, we have not committed any misconduct/forgery with the Railways intentionally as alleged. We have not taken any undue benefits by using any false documents. We have not submitted any fake documents intentionally as alleged by the Board. We assure and undertake to be more careful in future before making any deals with any company and also in taking part in tender process.

8. That sir, we have not committed any fraud/misconduct with the Railway in any manner as alleged by the Board. On the other hand, banning of business of any company carries heavy social, economical and civil impacts and consequence and as such we request your honour not to impose any such harsh penalty of imposing ban for no intentional fault on our part"

26. What transpires from the above is that the allegation of use of forged documents as such, has not been denied. What is required to be seen at this stage is the nature of the documents which were forged. The documents pertain to a third

party, namely, M/s Singhania Associates which were utilized for submitting the bid by the petitioner. In such a situation, the explanation given that the petitioner was unaware that the documents were forged and fake becomes absolutely difficult to be accepted.

27. Under such circumstances, this Court is of the view that a further opportunity of personal hearing would have been an useless formality.

28. From a reading of the various case laws placed on record and relied upon by the parties, it emerges that since blacklisting is an action which has adverse civil consequences, the same cannot be issued unilaterally and has to be preceded by an opportunity to be given to the affected party. The only requirement is that the opportunity should be an effective one wherein the party in question does not suffer any legal prejudice. The requirement of affording a personal hearing after issuing a show-cause notice, would entirely depend on the facts and circumstances of the case. As laid down by the Hon'ble Supreme Court in the landmark case of ***Erusian Equipment & Chemicals Ltd.*** (supra) what is *sine qua non* before imposing the penalty of blacklisting is a reasonable opportunity.

29. In the instant case, however, it appears that a proper opportunity was given by issuing the show-cause notice dated 11.08.2021 where a specific allegation was leveled. The said allegation was not denied in its entirety and rather use of forged/fake documents was admitted. In that view of the matter, this Court is of the view that demanding for a further personal hearing would be an useless formality, an expression which was used by the Hon'ble Supreme Court in the case of ***Aligarh Muslim University Vs. Mansoor Ali Khan*** reported in **(2000) 7 SCC 529**.

30. In the aforesaid case of ***Aligarh Muslim University*** (supra) it has been held as follows.

“ **21.** As pointed recently in *M.C. Mehta v. Union of India*¹ there can be certain

*situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in *Gadde Venkateswara Rao v. Govt. of A.P.*² it is not necessary to quash the order merely because of violation of principles of natural justice.*

22. *In M.C. Mehta it was pointed out that at one time, it was held in *Ridge v. Baldwin* that breach of principles of natural justice was in itself treated as prejudice and that no other "de facto" prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In *S.L. Kapoor v. Jagmohan Chinnappa Reddy, J.* followed *Ridge v. Baldwin* and set aside the order of supersession of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of natural justice. But even in that case certain exceptions were laid down to which we shall presently refer.*

23. *Chinnappa Reddy, J. in *S.L. Kapoor* case laid down two exceptions (at SCC p. 395) namely, if upon admitted or indisputable facts only one conclusion was possible, then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it is not necessary to quash the order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.*

24. *The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In *K.L. Tripathi v. State Bank of India Sabyasachi Mukharji, J.* (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting *Wade's Administrative Law* (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)*

"[It is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. ... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.]"

*Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in *State Bank of Patiala v. S.K. Sharma*. In that case, the principle of "prejudice" has been further elaborated. The same principle has been reiterated again in *Rajendra Singh v. State of M.P.**

25. *The "useless formality" theory, it must be noted, is an exception. Apart*

from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in M.C. Mehta¹ referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Staughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis, it may depend on the facts of a particular case."

31. There is another factor, which has intrigued this Court. The impugned order clearly states that the action has been taken against M/s Sumcon-Avijantrik (JV). Even the show-cause notice was issued to the said entity. The reply to the Show-Cause Notice dated 10.09.2021 has also been given by the said entity. However, it is not the JV which is the petitioner in this case. The petitioner is M/s Avijantrik Infratech Pvt. Ltd. which is an independent entity. Though certain explanation has been given in paragraph-1, the same cannot do away with the legal requirement that the challenge has to be instituted by the affected party.

32. In view of the aforesaid facts and circumstances, this Court is of the considered opinion that the petitioners has failed to make out any case for interference by this Court and accordingly the writ petition stands dismissed.

33. Towards the end of his argument, the learned Senior Counsel for the petitioner, however has submitted that taking into consideration that the petitioner has a working relationship with the Railways for a long period of time, the period of blacklisting can be reconsidered.

34. The aforesaid submission has been duly considered.

35. It is on record that the present petitioner has a history of having a working relationship with the Railways for a long period of time which is demonstrated by annexing a number of work orders.

36. In that view of the matter, even presuming that the impugned order affects the petitioner being a part of the JV, the petitioner is given liberty to file an application before the appropriate authority of the Railways to reconsider the period of blacklisting and reduce the same from 5 years. It is further directed that in the event such liberty is availed and an application is submitted in terms of this order within a period of 10 (ten) days from today, the appropriate authority of the Railways would consider the same and pass a speaking order which may be communicated to the petitioner. Such consideration may be made within a period of 1 (one) month from the date of receipt of the representation.

37. In view of the above, without interfering with the impugned order, with the above observations, the writ petition accordingly stands disposed of.

JUDGE

Comparing Assistant