

GAHC010112822024



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

Case No. : WP(C)/2934/2024

M/S FEEDBACK INFRA PVT LTD
THROUGH RESOLUTION PROFESSIONAL MR. RAJNEESH KUMAR
AGGARWAL HAVING ITS REGISTERED OFFICE AT 311, VARDHMAN
PLAZA, POCKET 7, PLOT NO.6, SECTOR 12, DWARKA, NEW DELHI 110078
THROUGH ITS AUTHORIZED REPRESENTATIVE SHRI. VISHWAJEET
MALIK, AGED 52 YEARS, S/O- LATE SHRI. M.N.MALLIK, R/O- RAJ AVENUE,
APARTMENT DLF, SHAHIDABAD, GHAZIABAD- 201005

VERSUS

THE UNION OF INDIA AND 2 ORS
THROUGH THE SECRETARY, MINISTRY OF ROAD TRANSPORT AND
HIGHWAYS, TRANSPORT BHAWAN, 1, PARLIAMENT STREET, NEW DELHI-
110001

2:NATIONAL HIGHWAYS INFRASTRUCTURE DEVELOPMENT
CORPORATION (NHIDCL)
MINISTRY OF ROAD TRANSPORT AND HIGHWAYS
GOVERNMENT OF INDIA
1ST AND 2ND FLOOR
TOWER-A
WORLD TRADE CENTRE
NAROJI NAGAR
NEW DELHI- 110029 ALSO AT- REGIONAL OFFICE- GUWAHATI
2ND FLOOR
AGNISHANTI BUSINESS PARK
OPPOSITE AGP OFFICE
GNB ROAD
AMBARI
GUWAHATI- 781001

3:EXECUTIVE DIRECTOR (T)

NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT
CORPORATION (NHIDCL)
MINISTRY OF ROAD TRANSPORT AND HIGHWAYS
GOVERNMENT OF INDIA
1ST AND 2ND FLOOR
TOWER-A
WORLD TRADE CENTRE
NAROJI NAGAR
NEW DELHI- 11002

Advocate for the Petitioner : N GAUTAM

Advocate for the Respondent : SC, NHIDC

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

05.06.2024

1. Heard Mr. Rajib Ranjan Raj, learned counsel for the petitioner, who submits that the petitioner has been debarred from participating in any future tenders of the National Highways and Infrastructure Development Corporation Limited (NHIDCL) for a period of 2 years, vide debarment notice dated 13.05.2024, without issuing any prior notice.

2. The petitioner's counsel submits that pursuant to a Notice Inviting Tender (NIT) dated 19.04.2021 issued by the respondent no.2, the petitioner along with M/s Armenga Engg. & Management Consultant Private Limited were awarded the contract for providing "Consultancy Services for Authority's Engineer for Supervision of Widening/Improvement of 4 (four) Lane with Paved Shoulder from Km 95+400 to Km 113+330 of near Ganpat Gaur Gaon to Kwaram Taro Village Section (Package 5) of NH 29 in the State of Assam under Bharatmala

Pariyojana on EPC Mode". However, due to certain disputes between the parties, the contract work awarded to the joint venture company involving the petitioner and M/s Armenga Engg. & Management Consultant Private Limited, the petitioner's contract work was terminated, vide letter dated 24.04.2024 issued by the NHIDCL. Thereafter, the debarment notice dated 13.05.2023 was issued to the petitioner by the NHIDCL, debarring the petitioner from participating in any future project of the NHIDCL for a period of 2 years, in terms of Clause 2.9.7 of the General Conditions of Contract (GCC).

3. The petitioner's counsel submits that the debarment notice dated 13.05.2024 is a debarment order and not a Show-Cause-Notice. He submits that the respondents have used the wrong nomenclature. In support of his submission that the impugned debarment notice has to be set aside, he relies upon the judgments of the Supreme Court and the Delhi High Court in the case of (i) ***M/s Erusian Equipment & Chemicals Ltd. vs. State of West Bengal & Another***, reported in ***(1975) 1 SCC 70***, (ii) ***Gorkha Security Services vs. Government (NCT of Delhi) & Others***, reported in ***(2014) 9 SCC 105*** (iii) ***UMC Technologies Private Limited vs. Food Corporation of India & Another***, reported in ***(2021) 2 SCC 551*** and (iv) ***Ace Integrated Solutions Ltd. vs. Food Corporation of India & Another***, reported in ***2019 SCC Online Del 8422***.

4. Mr. P.J. Saikia, learned Senior Counsel appearing for all the respondents assisted by Ms. M. Nirola submits that the debarment notice has been made pursuant to the order of termination of the contract, as mandated under Clause 2.9.7 of the GCC. He submits that in terms of Clause 2.9.7 of the GCC, the

debarment of a tenderer for a period of 2 years is a natural consequence of termination of a contract. As the petitioner was well aware of the GCC, which was a part of the contract agreement executed between the petitioner and the NHIDCL prior to starting the contract work, the petitioner cannot turn around and say the said Clause 2.9.7 of the GCC of the agreement cannot be applicable to his case. He accordingly submits that in view of Clause 2.9.7 of the GCC, no notice for debarment/blacklisting of the petitioner is required. As such this Court may not interfere with the impugned debarment notice dated 13.05.2024. He however makes a further prayer that as this matter has come for the first time, he may be given an opportunity to file an affidavit.

5. I have heard the learned counsels for the parties.

6. On a perusal of the pleadings and the submissions made by the parties, the only two issues that have to be decided is whether a debarment/blacklisting order can be held to be arbitrary and void, without issuing prior notice to the contractor. The second issue is whether Clause 2.9.7 of the GCC of the agreement which provides for debarring of a contractor for a period of 2 years as a natural consequence of termination of contract, can override the principles of natural justice, keeping in view Part-III of the Constitution.

7. Clause 2.9.7 of the GCC of the Contact Agreement states as follows :

“As a natural consequence of the termination, due to the Consultant’s failure, the Consultant shall deemed to have been debarred for a period of 2 years and shall not be eligible to bid for any Contract of the Authority either singularly or in a JV or its Related parties.

(Explanation :- Such debarment shall be natural consequence of termination. No separate Show Cause/Proceeding shall be initiated for placing such contractor under debarment)."

8. In the case of ***M/s Eurasian Equipments Ltd. (supra)***, the Supreme Court has held that blacklisting involves civil consequences and that it has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for the purpose 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. The Supreme Court further held that the exercise of powers and functions in trade by the State is subject to Part-III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade and the duty to observe equality. An ordinary individual can choose not to deal with any person. However, the Government cannot choose to exclude any person by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is not on the approved list is unable to enter into an advantageous relation with the Government, because of the order of blacklisting. A person who has been dealing with the Government in business ventures has a legitimate interest or expectation keeping the above decision of the Supreme Court in view. It has to be kept in mind that a person has a right to carry on any trade and business. If the State takes a decision which affects the livelihood/business of the petitioner, which could amount to a civil death, the affected person has to be given an opportunity of hearing. The

blacklisting of a person without being heard amounts to doing away with the principles of natural justice. Further, there is a difference between notices sent prior to termination of a contract and notices sent prior to debarment/blacklisting. One affects a particular contract, while the other can affect his livelihood and the livelihood of his employees.

9. In the case of ***Gorkha Security Services (Supra)***, the Supreme Court has held that law with regard to issuance of Show-Cause Notice prior to blacklisting, is firmly grounded and the giving of an opportunity of hearing to the person against whom the action of blacklisting is sought to be taken has a valid and solid rationale behind it. It held that the serving of the Show-Cause Notice is not only to make the noticee understand the precise case set up against him which he has to meet , but the other requirement is that he should be made to know the nature of action which is proposed to be taken against him. That should be stated in the notice, so that the noticee is able to point out that the proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactory explained. The Supreme Court held in the above case that the giving of a prior notice was imperative. It held as follows :

“When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is the harshest possible action.”

The Supreme Court thus held in paragraph-22 that in order to fulfill the requirements of principles of natural justice, a Show-Cause Notice should meet the following two requirements viz :

“i) The material/ grounds to be stated on which according to the

Department necessitates an action;

ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show cause notice but it can be clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.”

10. In the above case of ***Gorkha Security Services (Supra)***, the Supreme Court further held that even if it is not specifically mentioned that the competent authority intended to impose such a penalty of blacklisting, but it could be clearly inferred that such an action was proposed, that would fulfill the requirement of the Show-Cause Notice.

11. In the above case of ***UMC Technologies Private Limited (Supra)***, the Supreme Court has held that in the context of blacklisting of a person or an entity by the State Corporation, the requirement of a valid, particularized and unambiguous Show-Cause Notice is particularly crucial, due to the severe consequences of blacklisting and the stigmatisation that accrues to the person/entity being blacklisted. It further held that for a show cause notice to constitute a valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the noticee. Such a clear notice is essential for ensuring that person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting.

12. In the case of ***Ace Integrated Solutions Ltd. (Supra)***, Clause 10.1 and 10.2 of the MTF provided debarment from participating in any future tender of the Food Corporation of India (FCI) for a period of 5 years, in the event of termination of a contract. The Delhi High Court on considering the above provision, providing for debarment of a contractor only due to termination of a contract and without issuance of notice, held that there was no application of mind by the FCI which simply dovetailed with the decision to terminate a contract. The Division Bench of the Delhi High Court held that if an authority is to be exercised fairly, rationally, non-arbitrarily and for legitimate purpose, it must be exercised with prior notice to the affected party and with due application of mind on the basis of some rational criteria. It thus held that the debarment/blacklisting of a contractor without issuing any notice, but only due to the fact that petitioner's contract has been terminated, was arbitrary.

13. In the case of ***Raghunath Thakur vs. State of Bihar***, reported in ***(1989) 1 SCC 229***, the Supreme Court has observed that even though there was no requirement of giving any notice, the implied principle of the rule of law required that any order having civil consequences, should be passed only after following the principles of natural justice. Paragraph-10 of the judgment in ***Raghunath Thakur (Supra)*** is reproduced as follows :

“Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following

the principles of natural justice. It has to be realised 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."

14. With regard to Clause 2.9.7 of the GCC not requiring any prior notice to be issued, before blacklisting of a person, so long as the contract has been terminated, this Court is of the view that the said Clause cannot be used to deprive the petitioner from being given an opportunity of being heard, because the unequal bargaining powers between the parties has resulted in a one sided Clause 2.9.7 being inserted into the GCC.

15. In the case of ***Balmer Lawrie & Co. Ltd. vs. Partha Sarathi Sen Roy***, reported in **(2013) 8 SCC 345**, the Supreme Court has held that where an unfair and untenable, or an irrational clause in a contract, is also unjust, the same is amenable to judicial review. It further held that the State itself, or a State instrumentality cannot impose unconstitutional conditions in statutory rules/regulations vis-à-vis its employees, in order to terminate the services of its permanent employees in accordance with such terms and conditions. It further held that it is necessary to strike down an unfair and unreasonable contract, or an unfair or unreasonable clause in a contract that has been entered into by parties who do not enjoy equal bargaining power, as it is unreasonable and against public policy. Where inequality of bargaining power is the result of great disparity between the economic strengths of the contracting parties, the aforesaid principle would automatically apply for the reason that, freedom of contract must be founded on the basis of equality of bargaining power between

such contracting parties, and even though ad idem is assumed, applicability of standard form of contract is the rule. Consent or consensus ad idem as regards the weaker party may therefore, be entirely absent.

16. As such, this Court is of the view that Clause 2.9.7 of the GCC, which provides for debarment of the petitioner from participating in future projects under the NHIDCL for two years without issuance of notice is arbitrary, thereby violative of Article 14 and is against the principles of natural justice.

17. Consequently, in view of the above reasons, this Court holds that Clause 2.9.7 of the GCC cannot come in the way of issuing a prior notice to a person who is to be blacklisted/debarred. The person has to be informed as to the precise case set up against him, besides specifically making the person know that the penalty of blacklisting/debarment is being proposed to be taken against him.

18. In view of the reasons stated above, the debarment notice dated 13.05.2024 being arbitrary and hit by Article 14 of the Constitution, the same not being sustainable, is set aside.

19. The writ petition is accordingly allowed.

JUDGE

Comparing Assistant