IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2382 OF 2014

Shriram EPC Limited & anr. ... Petitioners.
Versus
Municipal Corporation of Gr. Mumbai & anr. ... Respondents.

Mr. R.A. Dada, Sr. Counsel a/w. Mr. Birendra Saraf a/w. Mr. Anil D'Souza a/w. Mr. Amit Vyas a/w. Mr. Varun Mumnia i/b. Economic Laws Practice, advocate for petitioners.

Mr. A.Y. Sakhare, Sr. Counsel a/w. Mr. M.M. Malvankar and Mr. Joel Carloes, advocate for respondents.

CORAM : B.R. GAVAI & A.S. GADKARI, JJ
DATE : APRIL 30, 2015

P.C.:

1 Rule. Rule made returnable forthwith. Heard by consent.

2 The Petition impugns the communication dated 25/6/2014 vide which the contract which was alloted in favour of the Petitioners has been cancelled and by which the Petitioners have been black listed from submitting tenders in the Municipal Corporation of

Greater Bombay for a further period of 3 years from the date of approval granted by the Municipal Commissioner i.e. 20^{th} June, 2014. It can thus be seen that the Petition raises twofold challenges, firstly with regard to cancellation of contract and secondly with regard to the black-listing.

3 Shri Dada, learned Senior Counsel appearing on behalf of the Petitioners at the outset stated that the Petitioners is not pressing the challenge in so far as cancellation of the contract is concerned and reserves its right to challenge the said part of the order in appropriate proceedings before appropriate forum. The Petition therefore, stands withdrawn with liberty as stated in the aforesaid sentence, in so far as the cancellation of the contract vide the impugned communication is concerned. In that view of the matter, we are called upon to only consider the question as to whether the order of black-listing the petitioner from submitting tenders in the Municipal Corporation of Greater Bombay for a period of 3 years from

the date of approval granted by the Municipal Commissioner dated 20th June, 2014 is sustainable in law or not.

4 Shri Dada, learned Senior Counsel restricted his submission only on the legal grounds. The learned Senior Counsel submits that by now it is settled principle of law that one who hears, must decide the matter. The learned Senior Counsel submits that the impugned order would show that the order is signed by the Chief Engineer (Sewerage Operation), whereas it refers to approval of Hon'ble Municipal Commissioner dated 20/6/2014. It is submitted that it is apparent from the order itself that the order is not passed by the authority who has signed. In any case, the learned Senior Counsel submits that the Petitioners have not been given an opportunity of being heard before the order was passed. The learned Senior Counsel in this regard relies on the Judgment of the Hon'ble Apex Court in the case of **Rashid Javed & ors. v/s. State of Uttar Pradesh and anr. reported on (2010) 7 SCC 781**.

5 The learned Senior Counsel further submits that the order of black-listing has serious consequences. It is submitted that by now, it is settled principle of law that an order of black-listing must be proceeded by the principles of natural justice. It is submitted that in the present case, principles of natural justice have not been followed even for the namesake. He submits that the order is passed by one authority, communicated by another authority. He further submitted that though replies are given to the show-cause notice, they are not even considered in the impugned order and as such, the order is devoid of any reason and on this ground also violative of principles of natural justice. The learned Counsel relying upon the Judgment of the Hon'ble Apex Court in the case of **Kulja Industries Limited v/s. W.T. Proj. BSNL arising out of SLP (C) No. 20716 of 2011** submits that the Hon'ble Apex Court in the said case has also laid down the principle of proportionality. The Learned Senior Counsel submits that in the present case, there is no reason as to why the black-listing is ordered for 3 years. He therefore submits that on the ground of proportionality also, the impugned order will have to be set

aside. The learned Counsel further submits that the authority who invokes power of black-listing must have source of power prior to doing so and unless there is a power, which permits black-listing to be done, the same cannot be done.

6 Shri Sakhare, learned Senior Counsel appearing on behalf of the Corporation on the contrary submits that the Petitioners had indulged into serious violation of the terms and conditions of the contract. The learned Senior Counsel submits that though the Petitioners were required to provide safety measures to the workers engaged for doing specialised type of work, the same was not done. He submits that as per the contract, the work was to be executed only between sunrise and sunset and work was also not to be executed on holidays. He submits that in utter breach of the terms and conditions, the work was executed after sunset and that too on a holiday. He submits that all these facts were brought to the notice of the Petitioners by the show-cause notice dated 17th May, 2014. The learned Senior Counsel submits that in the reply submitted to the

show-cause notice, the Petitioners have in fact, admitted the lapses made by them and as such on account of admission of the lapses by the Petitioners, there was no requirement to give detailed reasons in the impugned order. The learned Senior Counsel further submits that in the official procedure as is followed in the Municipal Corporation, file is routed from executive engineer upto the Commissioner and the matter is examined at various stages. He submits that though an order is passed by subordinate authority, it has only become final on approval by the Municipal Commissioner and as such, the contention in that count would not be sustainable.

7 At the outset, we may state that we are not going into the question regarding sufficiency or otherwise of the material for exercising of powers for black-listing of the Petitioners. We will restrict ourselves only to the legal issues involved in the matter. Perusal of the material on record would reveal that initially show-cause is issued on 17th May, 2014 by the Chief Engineer, calling upon the Petitioners to show cause within 7 days from the receipt of the

said show-cause notice as per the condition No. 19 of the contract and as to why company should not be black-listed. The grounds given in the said show-cause notice for taking the proposed actions, are with regard to the death of 3 labourers and violation of scheduled programme. The show-cause notice is replied by the Petitioners vide communication dated 22nd May, 2014. Another communication was addressed to the Petitioners by the Executive Engineer (Sewerage Operation) on 5th June, 2014, stating therein that the reply was not satisfactory and as such an action for cancellation of contract will be initiated against the Petitioners. The Petitioners have replied thereto on 11th June, 2014, giving therein the details regarding compensation paid by them to the relatives of dead labourers. The Petitioners have also referred to the various measures proposed to be taken by them for completion of work within the specified period. Another communication was addressed by the Petitioners on 16th June, 2014, wherein the Petitioners have in detail given cause of the accident, remedial actions after the incident, details of safety procedures to be adopted during execution after monsoon, revised completion program to complete the project within time period and details of GRP liner approval and manufacturing. The said reply is duly received on 16/6/2014 in the office of the Corporation. Another detailed communication is addressed by the Petitioner on 24th June, 2014, which is received in the office of Corporation on 25/6/2014. There is dispute as to whether the said communication is received prior to the impugned order is being passed or subsequent thereto. However, admittedly, all other communications are received in the Office of the Corporation much prior to the impugned order being passed. In this background, we will consider the impugned order.

8 The impugned order dated 25/6/2015 reads thus :

> "This is notify you that the Contract under No. SO4-12-T-1 for (slice A and slice B) entrusted on M/s. Shriram EPC Ltd. have been cancelled by Hon. Municipal Commissioner of Mumbai vide MGC/F/3026 dtd. 20.06.2014 by applying G.C.C. Clause No. 90.
>
> It is further notified that M/s. Shriram EPC Ltd have been blacklisted from submitting tenders in MCGM for next three

years from the date of Hon. M.C.'s approval under No. MGC/F/3026 dtd. 20.06.2014.

It is to inform you that MCGM shall take following actions against the contracts under No. SO4-12-T-1.

1. Deduct Rs. 30 Lacs and keep the same in deposit account as the compensation liability to be paid to the families of three deceased labourer died at section 11 of Bhandup Site.

2. Pay compensation as per the manual scavengers and construction of Dry Latries (Prohibition Act) 1993 to the family of deceased labourers as directed by Hon. Supreme Court on receipt of remarks from Municipal Law Officer.

3. Forfeit the performance deposit for slice A i.e. Rs. 2,89,31,080/- (Two Crore, Eighty Nine Lac, Thirty One Thousand, Eighty only) for negligence in the work procedure at Bhandup site.

4. Take possessions of all the sites.

5. Remedy all the defects and carryout the incomplete work, if any, by means at risk & cost of the Contractor.

6. Maintain the defect liability of the works that has been carried out, till its period of defect liability.

7. Deduct Rs. 50 Lacs and keep the same in deposit account for the works that may arise due to defaults that may have been committed by the Contractor and not known to MCGM. The

balance amount in all the deposit will be returned to Contractor on final closure of Contract.

8. After deduction of above amounts, to remit balance amount of total A.SD. Amount of Rs. 3,78,97,798/- (slice A & B) on final closure of Contract.

9. Return the Security deposit in the form of bank guarantee of Rs. 2,76,28,960/- (slice B) on final closure of Contract.

You are hereby directed to give vacant possession of the site and other premises and also undertake actions as required on cancellation of contract within seven days from receipt of this notice."

9 It can thus be clearly seen that in one sentence, it is stated that the Petitioners have been black-listed from submitting tenders in MCGM for next 3 years from the date of Municipal Commissioner's approval dated 20th June, 2014. There is not even a whisper with regard the 3 communications addressed by the Petitioners to the respondent Corporation. Giving allowance to the respondent Corporation, that the communication dated 24/6/2014 was received after the impugned decision was taken, still the communication dated 16/6/2014 contains detailed reasoning, which is duly received in the

Office of the Corporation on the same day. There is not even a whisper that these 3 communications have been considered by the authorities, prior to taking impugned decision. Shri Sakhare, the learned Senior Counsel for the Corporation was kind enough to place before us the original file, which has culminated in taking the decision. Though the said file contains aforesaid replies given by the Petitioners, in that official notings, at any of the level, it is not even whispered regarding consideration of these three communications. It is further to be noted that though the impugned order is signed by the Chief Engineer (Sewerage Operation), it refers to the approval of the Hon'ble Municipal Commissioner. It is not thus clear that as to who ultimately has passed the impugned order.

10 The Apex Court in the case of **Rashid Javed & ors (cited supra)** was considering the provisions of the Motor Vehicles Act. In the said case in so far as the draft scheme is concerned, hearing was given by one Shri Zamiruddin and the final approval was granted by

the State Government. Considering the legal position, which was culled out from the earlier judgments, the Apex Court observed thus :

> "51. That a person who hears must decide and that divided responsibility is destructive of the concept of judicial hearing is too fundamental a proposition to be doubted. This settled principle has also been highlighted by this Court in *Gullapalli Nageswara Rao* but based on such principle the limited authority of hearing given to the Hearing Authority by the State Government cannot be treated as enlarged in its scope. A delegatee must confine his activity within four corners of the powers invested in him and if he has acted beyond that, his action cannot have any legal sanction unless ratified by the delegator.
>
> 52. A distinction must be maintained where the hearing authority is empowered by the State Government to hear objections and approve the proposed modification or modify the approved scheme and a case where the hearing authority is authorized to hear the objections/representations relating to the proposed modification to the approved scheme. In the latter case, the authority delegated to the Hearing Authority is limited and he is not authorized to approve the proposed modification or modify the approved scheme. The present case falls in the latter category and accordingly the order of the Hearing

> Authority dated 11-10-1999 is in excess of the authority given to him and cannot be construed as a final order of approval under Section 102 (1) of the 1988 Act. Whether such limited authority of hearing to the Hearing Authority makes any legal sense is an aspect for consideration by the State Government. Suffice, however, to say that it was not open for the Hearing Authority to approve the proposed modification or modify the proposed scheme."

Their Lordships held that the delegatee must be within four corners of the powers invested in him and if he has acted beyond that, his action cannot have any legal sanction unless ratified by the delegator.

11 In the present case, it is not even clear as to who in fact has passed the order, whether it is passed by the Municipal Commissioner or by the Chief Engineer. In any case, no hearing has been given to the Petitioner prior to the impugned order being passed.

12 The Apex Court in the case of **Kulja Industries Limited (cited supra)** had occasion to consider the matter arising out of black-listing. The Apex Court considered various earlier judgments of the said Court as well as English Courts and the Courts in USA and observed thus :

> 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 and Anr. (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 M/s Southern Painters v. Fertilizers & Chemicals Travancore Ltd. and Anr. 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. & Ors. (2006) 11 SCC 548; Joseph Vilangandan v. The Executive Engineer, (PWD) Ernakulam & Ors. (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 and Ors. v. State of Bihar & Ors. (1977) 3 SCC 457; E.P. Royappa v. State of Tamil Nadu and Anr. (1974) 4 SCC 3; Maneka Gandhi v. Union of India and Anr. (1978) 1 SCC 248; Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., (1981) 1 SCC 722; R.D. Shetty v. International Airport Authority of India and Ors., (1979) 3 SCC 489 and Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 751 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. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in M/s Mahabir Auto Stores & Ors. v. Indian Oil Corporation Ltd., (1990) 3 SCC 752 should, in our view, suffice:

> "11. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Miss Radha Krishna Agarwal and Ors. v. State of Bihar and Ors., [1977] 3 SCR 249 ...... In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not

> entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable……. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

20. The legal position governing blacklisting of suppliers in USA and UK is no different. In USA instead of using the expression 'Blacklisting' the term "debarring" is used by the

Statutes and the Courts. The Federal Government considers 'suspension and debarment' as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions. Comprehensive guidelines are, therefore, issued by the government for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise unable to perform satisfactorily. These guidelines prescribe the following among other grounds for debarment:

(a) Conviction of or civil judgment for –

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) xxxx

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

21. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official."

22. As regards the period for which the order of debarment will remain effective, the guidelines state that the same would depend upon the seriousness of the case leading to such debarment.

23. Similarly in England, Wales and Northern Ireland, there are statutory provisions that make operators ineligible on several grounds including fraud, fraudulent trading or conspiracy to defraud, bribery etc.

24. Suffice it to say that 'debarment' is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is

> that the 'debarment' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.
>
> 25. In the case at hand according to the respondent-BSNL, the appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the respondent-corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when (a) the appellant is supplying bulk of its manufactured products to the respondent-BSNL and (b) The excess amount received by it has already been paid back."

13 It can thus be seen that the Apex Court in clear terms has held that the consequences of black-listing are very serious in nature. The implication of black-listing a person is to debarr him with the authority for a period for which he is black-listed. It is thus held that action of black-listing must always be followed by fairness reasonableness and principles of natural justice. Not only that, the Apex Court has further held that the period of black-listing must also be relatable to the act for which a party is being blacklisted. It has

been held that the doctrine of proportionality has a role to play in determining the period for which a party is to be black-listed. On the facts of the said case though Their Lordship held that black-listing was justified in the said case, however, found that permanent black-listing was not justified and as such set aside the part of the order and remanded back the matter to the authority to consider afresh as to how much period of black-listing would be sufficient in the facts of the said case.

14 In the present case, principles of natural justice have been given a total go back. It is not clear as to who has passed the order of show-cause. One show-cause was issued by the Chief Engineer and another notice is issued by the Executive Engineer. The Order is passed by the Chief Engineer giving reference to the approval of the Municipal Commissioner. It is thus not clear as to who is the authority who has ultimately passed the order. In any case, the Petitioners have not been given personal hearing. By now, it is settled principle of law that the order which invites penal

consequences must be preceded by principles of natural justice. Perusal of the impugned order would reveal that the said order apart from black-listing imposes various other penalties. In the contract of this nature, which even in the submission of Shri Sakhare is of specialised nature having various complicated issues for adjudicating, as to whether black-listing was necessary or not and as to for how much period was necessary, it was necessary to give personal hearing to the petitioners, so that they could have explained niceties of the things. However, admittedly that has not been done. Apart from that there are no reason in the impugned order as to why detailed explanation given by the Petitioners is found to be unsatisfactory. By now it is a settled principle of law that an order devoid of reasons is also violative of principles of natural justice.

15 In that view of the matter, upon overall consideration of the material placed before us, we are of the considered view that the impugned order in so far as the black-listing is concerned, is in violation of the principles of natural justice. In so far as the

contractual rights and obligations between the parties arising out of the contract are concerned, at the outset Shri Dada has submitted that the Petitioners do not press the challenge in so far as that aspect is concerned and reserve their rights to take appropriate steps in accordance with law.

16 In that view of the matter, we are inclined to quash and set aside the impugned order in so far as black-listing the Petitioners for period of 3 years is concerned.

17 The Rule is made partly absolute. The impugned order dated 25/6/2014 in so far as black-listing the Petitioners for period of 3 years is concerned, is quashed and set aside. In the facts and circumstances of the case, no order as to costs.

(A.S. GADKARI, J) **(B.R.GAVAI,J)**