

NAGPUR BENCH : NAGPUR

The petitioner, a partnership firm, working as Contractor assails the order of State Government

dated 28/7/2014 blacklisting it for a period of three years with effect from the said date and consequential Circular. As per earlier order of this Court dated 3/11/2014, the matter is to be disposed of finally at the stage of admission.

2) When matter was looked into by this Court on 28/8/2015 in the light of earlier matters where similar challenge was posed and its consideration by the Bench, which was dealing with Public Interest Litigation No.28/2010, this Court passed an order and observed that this petition should also be placed before the Bench dealing with public interest litigation. Accordingly writ petition was placed before that Bench and on 3/9/2015, one of the Hon'ble Judges expressed inability to hear the matter. Therefore, matter has been listed back before us.

3) We have accordingly heard Senior Adv. Gordey with Adv. Charpe for petitioner and Smt. Dangre,

learned Government Pleader for respondents.

4) Senior Adv. Gordey submits that because of cognizance taken by this Court and orders passed by it in P.I.L. No.28/2010, on 28/4/2014 an order reducing categorization of petitioner from Grade I-A Contractor to Grade I-B Contractor was passed and that down-gradation was to operate for a period of one year. That order was a reasoned order and petitioner did not assail it. This order was looked into by this Court in P.I.L. No.28/2010 and the Court then found that punishment inflicted upon petitioner was not commensurate. Hence, on 30/4/2014 it issued notices to Hon'ble Minister, Public Works Department, Secretary and other Officers and also permitted petitioner to implead present petitioner as party respondent. Show cause notice was issued to the petitioner as to why it should not be permanently blacklisted. It is pointed out that thereafter in the wake of this show cause notice, the State Government

on its own sought to proceed further against the petitioner. Hence, on 9/7/2014, order of punishment dated 28/4/2014 was allowed to be withdrawn and Government was permitted to re-consider the matter keeping in mind public trust doctrine and the observations recorded by the Court in its order mentioned supra. On 30/7/2014 this Court noted the stand of the State Government that it has issued order dated 28/7/2014 blacklisting the petitioner for a period of three years and felt it appropriate to go through notings in original records. Thereafter on 6/8/2014 this Court passed another order and recalled its earlier order dated 30/4/2014 issuing notice to petitioner.

5) Senior Adv. Gordey appearing for petitioner submits that thus while enhancing punishment after order dated 30/4/2014 and before passing order dated 28/7/2014, petitioner was not given any opportunity of hearing by State Government. He points out that procedure for dealing with defaulting Contractors is

contained in Government Resolution dated 28/9/2006. Inviting attention to pleadings as contained in paragraph 19 onwards upto paragraph 27 of the writ petition, he argues that seriousness or severity of punishment increases stage by stage and Contractor is given an opportunity to show improvement. When after one opportunity, there is failure to improve, a more severe punishment is contemplated. Blacklisting is the last stage and it could not have been taken recourse to automatically. He points out that downgrading is second stage, which is thereafter followed by cancellation of registration. Such contractors whose registration is cancelled can apply for fresh registration and blacklisting is the last and final punishment.

6) He further contends that observations made by this Court in public interest litigation prima facie expressed a need to impose an adequate or suitable punishment. Those observations do not oblige

respondent no.1 State Government to mechanically follow the same and impose that punishment. As the earlier punishment imposed on 28/4/2014 was accepted by petitioner, that does not mean that petitioner cannot point out lacunae or error in consideration. An opportunity of fresh hearing, therefore, was essential. Enhancement of punishment behind back of petitioner is, therefore, bad. He relies upon the judgment of the Hon'ble Apex Court in **Collector of Central Excise, Patna and others vs. I.T.C. Limited and another** {(1995) 2 SCC 38).

7) Smt. Dangre, learned Government Pleader appearing for respondents, invites our attention to various orders passed by this Court. She points out how cognizance of large scale manipulations and corrupt practices in State Public Works Department was taken in that public interest litigation. She submits that in this situation, when this Court found on 30/4/2014 that though several other Contractors were

blacklisted, similar treatment was not extended to petitioner and undue leniency was shown, by speaking order, leave to implead petitioner as party respondent was granted. She contends that High Court itself proposed to blacklist petitioner and for that purpose, notice was issued. However, considering seriousness of situation and material on record, State Government made amends and impugned order came to be passed on 28/7/2014 blacklisting petitioner for three years. These developments were then pressed into service before this Court in public interest litigation on 6/8/2014 and this Court then discharged notice issued to State Government in the matter. Our attention is also invited to hearing granted to petitioner in public interest litigation on 6/8/2014 to urge that this Court then has briefly considered the grievance as made and found that in judicial review, it could only examine decision making process and not the decision. According to learned Government Pleader, all contentions being raised by petitioner before this Court

were thus brushed aside by Bench dealing with public interest litigation. She points out that because of cognizance taken in public interest litigation and various orders passed therein, State Government has proceeded departmentally against at least 31 Officers in State Public Works Department and blacklisted more than 21 Contractors. She contents that thus individual interest of petitioner must yield to public interest and grievance of such nature cannot be made again before this Court. She also points out that other Contractors, who were blacklisted, could approach this Court in independent writ petitions because they were not party to public interest litigation and were not heard by the High Court. Thus, they never had an opportunity to point out procedural violations. According to her, present petitioner had that opportunity and in fact, used it on 6/8/2014.

8) In brief reply, learned Senior Adv. Gordey submits that order dated 6/8/2014 does not consider

challenge to blacklisting of petitioner on merits and that was not the scope of hearing in public interest litigation on that date. He contends that when other Contractors could approach this Court in independent writ petitions assailing their blacklisting, the petitioner, which possesses very same right, can also approach this Court in present writ petition.

9) The history upto order dated 30/4/2014 can be briefly mentioned from order passed by this Court in P.I.L. 28/2010 on 6/8/2014, which reads as under :

“The present Public Interest Litigation has been filed by the petitioner for bringing out to the notice of the Court various irregularities in the functioning of the Public Works Department at Nagpur. Some of the grievances raised in the petition are as under :

(i) that the works which were already done earlier were shown to be the works done subsequently for which the payment was made.

(ii) that the payment was made for the works

which were in fact not done.

(iii) that the inferior quality of works were done and for that complete payment was made.

It is also the grievance of the petitioner that certain Officers of the Public Works Department were hand-in-glove with the contractors, thereby putting the public exchequer to a great loss.

After the Court took the cognizance of the matter, an affidavit was filed before this Court stating therein that the Government has appointed an Enquiry Committee and the said Committee will enquire into the matter and take remedial steps. The matter was listed before this Court time and again. Time was sought on behalf of the State on various occasions on the ground that the matter is bulky and the number of persons involved are huge. It appears that subsequently after conducting enquiry, the Government found its various Officers involved in the matter and, therefore, had made a statement before the Court that the Government proposes to

proceed against the said Officers departmentally.

When the matter was listed before this Court on 24.7.2013 the learned Senior Counsel appearing on behalf of the petitioners brought to the notice of the Court that the action was proposed only against the Officers of the Government and not the Contractors, who were found guilty.

Again when the matter was listed before this Court on 25.9.2013 the Court noted the contention raised on behalf of the learned Senior Counsel for the petitioners that though various Contractors have been named in the report, the Contractors whose works have been identified in the report and have been found to have indulged in irregularities thereby putting the State Exchequer to the loss, no action was taken against the said Contractors.

Perusal of the order dated 25.9.2013 would reveal that the learned Senior Counsel appearing on behalf of the petitioners stated

that only one Contractor was found to have been illegally paid money. The Court has noted various instances in the report of the said Committee. The matter was again adjourned from time to time.

When the matter was listed before this Court on 26.3.2014, the learned Government Pleader informed the Court that insofar as other Contractors are concerned, who were found to have indulged in the malpractices, the State Government has already taken action. It was, however, submitted that in respect of one of the Contractors, the matter was pending before the State Government since the said Contractor had asked for a hearing. We had, therefore, granted time."

10) On 30/4/2014 this Court took note of the fact that action was taken against various Contractors, who were found to have indulged in malpractices except one whose case was referred to State Government. It noted that other Contractors were blacklisted without extending them opportunity of hearing and for lapses

committed by earlier Contractors. It has then also taken note of the fact that those orders of blacklisting were required to be set aside. Insofar as Contractor whose case was referred to State Government (present petitioner), the Court found that Public Works Department noted 11 irregularities. The irregularities and observations made by this Court thereafter in its order dated 30/4/2014 are also reproduced for ready reference :

“The perusal of paragraph 3 of the said office note would reveal that one of the instances wherein M/s. Ankit Constructions has been found to be guilty, is that though a wooden flooring of 133.57 sq. meters was done, the payment as per the agreement claimed and made was for an area of 600.32 sq. meters. This resulted in entailing a loss of Rs.11,56,540/- to the State Government. The second instance is repair of wooden staircase in the main entrance of one of the bungalows and repairs of courtyard and replacement of sanitary fittings. Finding is that the payment made towards the said work is made without

there being any such work in existence, entailing a loss of Rs.1,52,762/- to the Government. There are various instances given in the said noting which show that though on various occasions the work was of an inferior quality or of a lesser quality or when there was no work, the payment has been made by the State Government to the said Contractor.

The perusal of the office note made by the State Government makes an interesting reading. In paragraph 10 of the said note, it is stated that "since the aforesaid findings to which reference has been made are on the basis of joint measurement done in the presence of the concerned contractor and the officers of the department, it is presumed that everybody accept the same". It further reads that "the aforesaid findings show the inferior quality of work done by the concerned Contractor". It further reads that "in some works the payment done is in excess. However, the same has been recovered subsequently". It further observes that "taking into consideration the Government

Resolution dated 28.9.2006 a penal action deserves to be taken against the said contractor.” It further reads “the said contractor is a Class-I Contractor in the State Government for the last so many years. The said contractor has done various works of various nature for the Public Works Department of the State Government and the other Departments”. The further part makes interesting reading which reads : “taking these facts into consideration, the inferior quality of the work of the said contractor is being noticed for the first time and, therefore, even a censure would be sufficient.” It further reads “however, taking into consideration the seriousness of the matter and that at one point of time fault has been found in 3-4 of his works, the seriousness of the matter increases”. It further reads “though a loss has been occurred to the public exchequer, to ensure that hereinafter the said contractor does not indulge into such sort of inferior works, it is appropriate that his gradation is brought down by one scale.” The next sentence says that, “however, a demotion should be for a period of one year”.

We fail to understand as to when the State Government finds a contractor to be blacklisted for the inferior work or no work done by an earlier contractor, how in case of a contractor, who in the finding of the State Government has been made payment for not doing work at all or for doing work of inferior quality and further finding that though the State Government has suffered financially on account of such inferior quality of work or no work, the punishment of degradation by one level and that too for only one year, is sufficient to meet the acts done by such a contractor. One of the contentions in support of the said act on behalf of the State, as could be found from the office noting, is to the effect that the loss caused to the public exchequer is meted out since the payment which was done to him in excess can be recovered from the payments due to him in other contracts.

If the analogy of the State Government is to be accepted, a person who is found misappropriating the funds of the State Government to the tune of crores of rupees,

can be penalized by demoting him for a period of one year to one lower level, if he is willing to make the payment to the State Government of the amount misappropriated. By that analogy, the persons found committing dacoity could also be penalized by a day's simple imprisonment or so, if such persons are willing to return the looted amount to the person whose property is looted.

We find that the conduct of the Officers of the State Government who are signatories to the office note is not only deplorable but shocks the conscience of a person. The said conduct by any person holding any public office is not tolerable. As held by the Apex Court in the case of Noida Entrepreneurs Association vs. Noida and others reported in (2011) 6 SCC 508, the public trust doctrine is a part of law of the land. The doctrine has grown from Article 21 of the Constitution of India. It has further been held that the action of the State or State instrumentality would stand vitiated if it lacks bonafides as it could only be a case of colourable exercise of power.

Every person holding a public office is required to act “in good faith” and “for legitimate reasons”. All powers vested in the public authority are to be exercised for public good and to promote public interest. The holder of public office acts as a trustee and, therefore, is required to act fairly and reasonably. We do not find as to how public good could be realized and how a public interest would be promoted by giving a minor penalty to a contractor, who has been found to be involved in serious irregularities. We prima facie find that each of the signatories of the said office note has not acted in bonafide and reasonable manner and has acted in a manner which protects a contractor who has caused a huge loss to the public exchequer and has committed serious irregularities.

We, therefore, grant leave to the petitioner to implead M/s. Ankit Constructions, Nagpur as party respondent calling upon it to show cause as to why it should not be permanently blacklisted as a contractor for the findings recorded against it by the State Government.

By way of ad interim order, we direct the State not to allot any work to it until further orders are passed by this Court.

We further direct that a notice be issued to :

- I. Shri Chhagan Bhujbal, Hon'ble Minister, Public Works,
- II. Shri S.K. Mukherjee, Secretary, Public Works,
- III. Shri R.B. Gadge, Deputy Secretary (Building),
- IV. Shri V.D. Sardeshmukh, Under Secretary (Building),
- V. Shri P.G. Wanjari, Desk Officer

at their respective addresses – Mantralaya, Mumbai, calling upon them to show cause by 7th May 2014 as to why action should not be taken against them for not acting in the interest of the public exchequer and the larger public interest and for protecting the contractor who has been found guilty by the Enquiry Committee as well as by the State Government of having indulged into serious malpractices.

The Registrar of the Small Causes Court at Mumbai shall ensure that every assistance is provided to the petitioner so that the notices are served on the respondents, who are camped at Mumbai prior to the returnable date.

The Registrar of the District Court at Nagpur shall ensure that every assistance is provided to the petitioner so that the notice is served on the added respondent.”

11) On 9/7/2014, State Government pointed out to this Court that it had decided to re-consider the matter of blacklisting of petitioner M/s. Ankit Construction and sought permission to withdraw order dated 28/4/2014 imposing punishment of downgrading categorization for a period of one year. This Court then permitted State Government to withdraw that order and granted State Government time till 30/7/2014 to re-consider the matter. On 30/7/2014 State Government informed the Court that on 28/7/2014, it had blacklisted the petitioner for a period of three years. This Court on

that day directed State Government to produce original file on record so as to enable it to examine what weighed with the State Government for imposing said penalty. Counsel for present petitioner represented petitioner on that day in public interest litigation.

12) The matter was then considered on 6/8/2014. The order dated 6/8/2014 contains reference to various notings made by the Officers of the State Government in the file. On pages 7 and 8 of the order dated 6/8/2014, it is observed as under :

“From the earlier noting and the present noting it appears that between a period of three months, a drastic change has appeared in the mindset of the Officers of the Public Works Department. In the month of July 2014, all the Officers of the State Government serving in the department including the Under Secretary, Deputy Secretary and the Secretary (Works) have woken from the deep slumber and realised that while taking action it is necessary to protect larger public interest. Perusal of the notes would reveal that the

authorities of the State, while deciding such matters, are required to take into consideration the enquiry reports conducted by the Committees appointed by it and the severity of misdeeds pointed out in such reports requires serious punishment. They have realised that in order to curb the tendency of committing irregularities in construction and contracts, it is necessary to impose severe penalty. It further reads in order to create disciplined working environment and realise its effects, it is necessary to blacklist the contractor, like respondent no.5 herein.

We are happy that at last after the orders are passed by this Court, wisdom has dawned upon the Officers of the State Government and they have realised that every action needs to be guided by larger public interest and in public trust.”

The order thereafter deals with certain other aspects, which are not relevant for the present purpose. At page 11, this Court has observed :

“We had granted leave to the petitioner vide order dated 30.4.2014 to implead M/s. Ankit Construction as party respondent and also had issued show cause notice calling upon it as to why it should not be permanently blacklisted as a contractor for the findings recorded against it by the State Government.

We are conscious of our limitations while exercising power under Article 226 of the Constitution of India. While doing so, we can examine only the correctness or otherwise of the decision making process of the State Government and not the decision. We cannot embark upon the executive functions and discharging of duties to be performed by the State Government, except where we find that the State has failed to do so or has done in such a manner which shocks public functioning. Since the State has already taken an action in the matter, we discharge the notice issued to M/s. Ankit Constructions.”

Thus, in view of action taken against petitioner, the Court discharged notice issued to the petitioner.

However, at page 8, the Court also takes note of effort made by present petitioner, who was respondent no.5 in that P.I.L, to voice its grievance. The relevant observations read as under :

“No doubt, grievance is made by the learned Senior Counsel regarding the punishment imposed on respondent no.5. However, it is well settled that this Court in exercise of its power in judicial review, can only examine the decision making process and not the decision. Reference is made to the decision in the case of Tata v. Union of India reported in (1994) 6 SCC 651.

13) Thus, a grievance in relation to punishment of blacklisting imposed upon respondent no.5 in P.I.L. No.28/2010 was very much made before this Court on 6/8/2014. This Court in the light of its earlier findings and findings in order dated 6/8/2014 has found that it was competent to look into decision making process and not decision. To support this observation,

judgment of the Hon'ble Apex Court in the case of **Tata Cellular vs. Union of India (1994) 6 SCC 651** was also pointed out. Thus, a decision of blacklisting has been upheld by observing that Court was not concerned with the decision, but was competent only to examine decision making process. It cannot, therefore, be said that the petitioner did not have an opportunity to make this grievance in P.I.L. No. 28/2010.

14) Though it has been pointed out to this Court that other Contractors, who were blacklisted because of cognizance taken in public interest litigation, have approached this Court in separate/independent writ petitions, it is obvious that those Contractors were not joined as party respondents in P.I.L. No. 28/2010. As such, they had no opportunity to make any grievance in that public interest litigation. This Court found it necessary to implead respondent no.5 in P.I.L. 28/2010 because of leniency shown to petitioner by State

Government. Thus, quantum of punishment was the factor, which weighed with this Court for issuing said notice. In the light of its observations, consideration of notes and other material on record, ultimately the Court was satisfied with the action taken. The observations on grievance of petitioner reproduced supra show that this Court did not find any fault with the decision making process.

15) The judgment of the Hon'ble Apex Court in the case of Collector of Central Excise, Patna and others (cited supra), no doubt shows that such person can approach the Court. There the duty was enhanced or revised without extending necessary opportunity to the assessee. Duty as levied initially was already paid and grounds for enhancement were not communicated to assessee and he was not given any opportunity. Here it cannot be said that petitioner was not aware of the nature of proceedings and in fact on 6/8/2014 petitioner made an attempt to assail the procedure or

punishment unsuccessfully. He did not assail first order degrading him and later order is on self same facts. Petitioner was aware that his punishment was to be enhanced.

16) During hearing, we have expressly called upon the petitioner to state whether petitioner was in any way seeking review of order dated 6/8/2014. Upon instructions, learned Senior Counsel states that there was no request to review and an independent writ petition has been rightly filed.

17) As we find that grievance made by the petitioner is already looked into by this Court on 6/8/2014 in P.I.L. No.28/2010, present writ petition, which reiterates it, is a second attempt, which is legally unsustainable. Hence, in the light of above observations, the writ petition is dismissed. No costs.

JUDGE

JUDGE

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