

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 28th August, 2015.**

+ **W.P.(C) No. 8234/2015**

PRABHATAM ADVERTISEMENT PVT. LTD. Petitioner

Through: Mr. Gaurav Mitra & Mr. Rishabh
Maheshwari, Advs.

Versus

**MUNICIPAL CORPORATION OF DELHI
(SOUTH ZONE) NEW DELHI**

.... Respondent

Through: Mr. Gaurang Kanth with Ms. Biji
Rajesh, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.17273/2015 (for exemption)

1. Allowed, subject to just exceptions.
2. The CM stands disposed of.

W.P.(C) No. 8234/2015

1. The petition impugns the order dated 6th August, 2015 of the respondent South Delhi Municipal Corporation (SDMC) blacklisting the petitioner from the panel of the respondent SDMC on the ground of non-payment by the petitioner of the outstanding dues of Rs.2,19,90,723/-.
2. The counsel for the petitioner relying on, (i) *SPS Engineering Ltd. Vs. Indian Oil Corporation Ltd.* 113 (2004) DLT 70, (ii) *Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd.* 128 (2006) DLT 417 and (iii)

National Building Construction Corporation Limited Vs. New Delhi Municipal Council 138 (2007) DLT 414 has contended that since the arbitration proceedings with respect to the same claim, on the ground whereof the respondent SDMC has blacklisted the petitioner, are pending between the petitioner and the respondent SDMC, the respondent SDMC is not entitled to blacklist the petitioner without awaiting the outcome of the arbitration proceedings.

3. I have wondered whether the mere pendency of arbitration or a suit in respect of the disputes can become a bar to the exercise of power of blacklisting. I am of the opinion that there can be no proposition of law in absolute terms that pendency of a litigation between the contractor and an authority / body / municipality / government, the dispute wherein entitles the authority / body / municipality / government to exercise the power to blacklist the contractor, cannot be a ground to deprive such authority / body / municipality / government from exercising the power of blacklisting. If it were to be so held, it would become very easy for a contractor to defeat the right of the authority / body / municipality / government to blacklist, by, as soon as the dispute has arisen, initiate the litigation.

4. The Supreme Court, as far back as in *Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal* (1975) 1 SCC 70 held, (i) that under Article 298 of the Constitution, the executive power of the Union and the State shall extend to carry on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose; (ii) that the State can carry on executive function by making a law or without making a law; (iii) that the exercise of such powers and functions in trade by the State is subject to Part III of the Constitution; (iv) that Article 14 speaks of equality before the law and equal protection of the laws; (v) that equality of opportunity should apply to matters of public contracts and thus the State while carrying on trade has a duty to observe equality; (vi) that an ordinary individual can choose not to deal with any person; (vii) that the Government cannot choose to exclude persons by discrimination; (viii) that no person has a fundamental right to insist that the Government must enter into a contract with him; (ix) that in passing an order of blacklisting, the Government department acts under what is described as a standardised Code; (x) that the grounds on which blacklisting may be ordered are, if the contractor is convicted by Court of law or security considerations so warrant or if there is strong justification for believing that the contractor has been

guilty of malpractices such as bribery, corruption, fraud or if the contractor continuously refuses to return the Government dues or if the contractor employs the Government servant, dismissed or removed on account of corruption in a position where he could corrupt Government servants.

5. The Supreme Court again in *Patel Engineering Limited Vs. Union of India* (2012) 11 SCC 257 reiterated that State can decline to enter into a contractual relationship with a person or a class of persons with legitimate purpose and that the authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. and that there need not be any statutory grant of such power. It was further held that the only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary. It was yet further held that the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable from blacklisting a delinquent bidder, if it is otherwise justified. The power to blacklist was held to be inherent in every person legally capable of entering into contracts.

6. It would thus follow that the exercise of the power to blacklist is independent of any provision therefor in any law or in the contract.
7. Mention may also be made of the recent dicta of the Supreme Court in ***Gorkha Security Services Vs. Govt. of NCT of Delhi*** (2014) 9 SCC 105 reiterating the law aforesaid.
8. I am therefore of the view that the right of the government / governmental agency to blacklist is in addition to the right to make a claim for the amount, which according to it is outstanding or any other right which it may have under the contract or law.
9. The question which next arises is, whether invocation of one right i.e. of initiating recovery proceedings, would bar the invocation of another right i.e. to blacklist.
10. In my opinion, no. Supreme Court, in ***Transcore Vs. Union of India*** (2008) 1 SCC 125 quoted Snell's Equity (31st Edition) propounding that a dual obligation could arise on the same transaction and that doctrine of election of remedies is applicable only when the two or more remedies available are repugnant and inconsistent and that when there is no repugnancy and inconsistency, the doctrine of election has no application. Applying the same, it was held that initiating of proceedings for recovery of

debt by the Banks does not bar taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002.

11. The said principle, in my view would apply to the present situation also. The pendency of recovery proceedings cannot be a bar to the government / governmental agencies exercising the power to blacklist and without exercising which power they would be compelled to enter into fresh contracts and business dealings with a contractor who according to them has wrongly withheld their dues. I may in this regard also notice that adjudication of claims and counter-claims, whether before an Arbitral Tribunal or before a Court of law are invariably found to be taking a long time generally of years. If it were to be held that till adjudication thereof and which would be final adjudication i.e. after all the remedies of appeal, petitions, special leave petitions have been exhausted, the authority / body / municipality / government is to be required to continue entering into further contracts with the contractors who have been found to have erred or defaulted, then it would work injustice not only to the authority / body / municipality / government but also to the public at large. No sanction for the same can be given.

12. Parity in this context can also be drawn from invocation of the remedies under the civil and criminal laws. Just like civil and criminal proceedings can be simultaneously processed (see *P. Swaroopa Rani Vs. M. Hari Narayana @ Hari Babu* (2008) 5 SCC 765 and *Lee Kun Hee Vs. State of Uttar Pradesh* (2012) 3 SCC 132) with it being left to be decided on case to case basis whether one is liable to be stayed on account of other. Similarly here, it has to be decided on case to case basis whether the action of blacklisting is to be stayed pending the adjudication of claims.

13. That brings me to the judgments aforesaid cited by the counsel for the petitioner. The learned Single Judge of this Court, in *SPS Engineering Ltd.* supra held the order of blacklisting in that case to be bad for the reason of having been made without complying with the principles of natural justice. In addition, finding that the grounds on which blacklisting was ordered were the same which were subject matter of a pending arbitration, it was observed that the determination by the Arbitrator would settle all the issues. It was observed that Indian Oil Corporation Limited (IOCL) ought not to have proceeded with blacklisting with undue haste, without giving an opportunity of hearing also to the contractor in that case. However in the end, it was observed that “It is for the respondents (IOCL) to choose which path they

would like to follow”. It thus appears that the learned Single Judge of this Court also did not hold that the pendency of the arbitration was an absolute bar to blacklisting. The Division Bench dismissed the appeal, without disturbing the option given to IOCL to, notwithstanding the pendency of arbitration proceedings, if so desired, proceed with the blacklisting but after giving opportunity of hearing to the contractor. As far as *National Building Construction Corporation Limited* supra is concerned, in that case also blacklisting was found to be without proper opportunity of hearing and thus not sustainable. Though, it was also observed that since the blacklisting was on the same allegations, which were pending adjudication in arbitration, it was necessary to await the outcome of the arbitration proceedings but merely relying on *SPS Engineering Ltd.* supra and without noticing that in that case IOCL had indeed been given an option to, notwithstanding the pendency of arbitration, also take steps for blacklisting after complying with the principles of natural justice.

14. The judgments cited by the counsel for the petitioner thus are also not found to be laying down that the mere pendency of litigation qua the same controversy on which the power to blacklist is invoked, would denude the said power.

15. I thus conclude that the power to blacklist, in this case on the ground of non-payment of dues, is independent of the power to recover the said dues, whether by instituting arbitration proceedings or by instituting a suit for recovery of the said amount and the mere pendency of such proceedings would per se not be a bar to the exercise of the power to blacklist.

16. A question would however still arise that if during the pendency of legal proceedings the power to blacklist has been invoked, what would be the proper fora for entertaining a challenge if any made to the exercise of such power—whether by way of an independent proceeding or by way of an application for interim relief in the pending legal proceedings.

17. In my view, if blacklisting is on the same grounds which are subject matter of pending legal proceedings, the proper mode for challenging the said action of blacklisting would be by way of an application for interim relief in the same legal proceedings.

18. The adjudication of a challenge to the order of blacklisting would necessarily entail determination, at least *prima facie*, of the grounds of blacklisting. I am of the opinion that the Court / Arbitral Tribunal before which the disputes are already pending adjudication, would be a more appropriate fora for determining the said factor and / or for balancing the

equities, being already seized of the matter. Permitting such challenge to be made by an independent proceeding, whether by way of a suit or a writ petition, would not only lead to multiplicity of proceedings but may also be capable of conflicting views and decisions and which are to be best avoided.

19. Upon the same being put to the counsel for the petitioner, he contends that this Court in the judgments cited by him having entertained the challenge to blacklisting in an independent proceedings, it has but to be necessarily held that an independent proceeding challenging the blacklisting is maintainable and this Bench would be bound by the said judgments.

20. I have considered the aforesaid contention. I find that in neither of the judgments aforesaid cited by the counsel for the petitioner, such a plea or argument was taken or considered. In *National Building Construction Corporation Limited* supra, though *Erusian Equipment & Chemicals Ltd.* supra was noticed, but on a different aspect than that on which reliance thereon has been placed hereinabove. It is settled principle of law that a judgment is a precedent on what falls for adjudication and not what can be logically deduced or inferred therefrom. A plethora of case law in this regard has been noticed in *Google Inc. Vs. Competition Commission of India* MANU/DE/1271/2015 (DB) and in *Jamia Hamdard (Deemed University)*

Vs. Union of India MANU/DE/2314/2015. The judgments cited by the counsel for the petitioner cannot be said to have held that the challenge to the blacklisting is to be by way of an independent proceeding only and not by way of an application for interim relief in the pending legal proceeding, where the controversy is at large for adjudication.

21. I am therefore of the opinion that in so far as the challenge by the petitioner to the blacklisting order on the grounds of pendency of the arbitration proceedings is concerned, this Court is not the appropriate fora for adjudicating the same and the stay of the blacklisting order ought to be sought before the Arbitral Tribunal which would be in a better position to appreciate the *prima facie* merits of the rival claims.

22. I may in this regard notice ***M/s. Sai Consulting Engineers Pvt. Ltd. Vs. Rail Vikas Nigam Ltd.*** 198 (2013) DLT 507 holding that Arbitral Tribunal has jurisdiction to decide issues with respect to the question of blacklisting and ban on future dealings.

23. Be that as it may, what is found is that the blacklisting order in the present case does not state that any show cause notice or hearing was given to the petitioner before blacklisting the petitioner. All that it says is that several demands were made of the outstanding amount and the petitioner had

failed to pay the same.

24. It is also found that the blacklisting is for an indefinite period.

25. I have recently in judgment dated 10th July, 2015 in W.P.(C) No.5485/2015 titled *Trigen Electronics Pvt. Ltd. Vs. South Delhi Municipal Corporation* and in order dated 21st July, 2015 in W.P.(C) No.6852/2015 titled *Ajay Gupta Vs. The Commissioner, South Delhi Municipal Corporation* and in order dated 10th August, 2015 in W.P.(C) No.4578/2015 titled *Minesh Chopra Vs. The Commissioner, SDMC* held that blacklisting without issuing a show cause notice notifying the reasons for blacklisting and the period for which the contractor is proposed to be blacklisted and without giving an opportunity of hearing and for an indefinite period is bad. Accordingly, in those cases directions were issued to the public authorities to issue such show cause notice and to grant an opportunity of hearing and to thereafter pass a reasoned order.

26. However in the present case, rather than adopting the aforesaid course of action it is deemed appropriate that the Arbitrator Mr. Bharat Bhushan Addl. District Judge (Retd.), before whom the proceedings are pending, be requested to dispose of the same as expeditiously as possible and before 30th November, 2015. The said time has been arrived at after understanding from

the counsels the stage at which the arbitration proceedings are pending and the time required to be taken by them for further proceedings and on their assurance that they will not seek any adjournment and fully co-operate with the Arbitral Tribunal in disposal of the arbitration proceedings by the said date.

27. Accordingly, this petition is disposed of with the request aforesaid to the Arbitral Tribunal.

28. Needless to state that in view of the above, blacklisting shall not be given effect to till the award.

29. However, in the event of the award being in favour of the respondent SDMC, the question of the period for which the petitioner is to be blacklisted would remain to be decided by the respondent SDMC. The respondent SDMC to, within 15 days of the arbitral award, if in its favour, issue a show cause notice to the petitioner specifying the period for which the petitioner is then proposed to be blacklisted and after hearing the petitioner, pass an order thereon within a period of 15 days thereafter.

30. Needless to state that if the petitioner remains aggrieved from that order, would have remedies in law.

No costs.

Copy be given *dasti* under signature of Court Master.

RAJIV SAHAI ENDLAW, J.

AUGUST 28, 2015

‘pp/bs’

(corrected and released on 15th September, 2015).