

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

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Date of decision: 16th November, 2015

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W.P.(C) 10539/2015 & CM No.26599/2015 (for stay)
M/S S. SONI & CO.

..... Petitioner

Through: Mr. Sachin Datta, Sr. Adv. with Mr.
Dinesh Sharma & Ms. Ritika Jhurani,
Advs.

Versus

**NEW INDIA ASSURANCE COMPANY LTD.
& ANR.**

....Respondents

Through: Mr. Pankaj Seth, Adv. with Ms. Nili
Niranjan & Mr. Chirag Indulia,
Administrative Officers for R-1.
Mr. Manik Dogra, Adv. for R-2.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the order dated 14th October, 2015 of the respondent No.1 New India Assurance Company (NIAC) de-paneling the petitioner, a Insurance Surveyor, as well as the report dated 25th August, 2015 of the Committee of the respondent No.1 NIAC on the basis of which the impugned order dated 14th October, 2015 was issued. Axiomatically, a direction is also sought against the respondent No.1 NIAC restraining it from stopping giving work to the petitioner.
2. The petition came up first on 6th November, 2015 when the Rules and Regulations relating to empanelment and / or the terms and conditions of the contract of empanelment and the procedure if any prescribed regarding dis-empanelment was enquired from the senior counsel for the petitioner and on his request, the matter was adjourned to today. Since the counsel for the

respondent No.1 NIAC appearing on advance notice on that date was also unable to throw light on the said aspects, the presence of the concerned officials of the respondent No.1 NIAC before the Court today was also directed. In compliance therewith, Ms. Nili Niranjana and Mr. Chirag Indulia, Administrative Officers of the respondent No.1 NIAC are present in the Court.

3. The position which emerges after hearing the parties is that while the Insurance Regulatory Development Authority (IRDA) constituted under Insurance Regulatory and Development Authority (IRDA) Act, 1999 grants a licence for practicing as an Insurance Surveyor, the individual insurance companies empanel the surveyors holding such a licence and who are members of the Indian Institute of Insurance Surveyors and Loss Assessors (IIISLA) promoted by IRDA under Section 14 of the IRDA Act, 1999. The officials of the respondent No.1 NIAC present in Court also state that it is not as if every member of the IIISLA holding a licence from the IRDA is entitled to empanelment with the respondent No.1 NIAC; it is in the discretion of the respondent No.1 NIAC whether to empanel a particular licence holder from IRDA for the work of surveying the claims preferred against the respondent No.1 NIAC. The said position is not controverted by the senior counsel for the petitioner.

4. The senior counsel for the petitioner at the outset contends that no notice was issued to the petitioner to show cause why he should not be de-panelled or why his name should not be removed from the panel of surveyors of the respondent No.1 NIAC.

5. In this regard, it may be mentioned that the petitioner had earlier filed W.P.(C) No.2921/2015 challenging the communication dated 9th March, 2015 of dis-empanelment of the petitioner and the said writ petition was disposed of by vide order dated 26th May, 2015 setting aside the said communication dated 9th March, 2015 and by directing as under:

“5. Having regard to the above, the impugned communication is set aside. Since, the representation of the petitioner is pending before the aforementioned committee, the said committee will consider the same and pass a reasoned order. A copy of the reasoned order will be supplied to the petitioner. The Committee would also seek the presence of the petitioner, and accord, an opportunity of hearing to the petitioner.

6. Consequently, the captioned petition and the pending application are disposed of in terms of the aforementioned directions.”

6. It has as such been enquired from the counsel for the petitioner that without the petitioner then pressing for issuance of a show cause notice, how the same can be pressed now.

7. The senior counsel for the petitioner replied that the grievance is that the petitioner was not informed as to for how much time the petitioner was proposed to be dis-empanelled and the petitioner was not given any opportunity to represent on the said aspect.

8. The senior counsel for the petitioner interrupts the dictation to now also state that the communication dated 9th March, 2015 which was challenged in the earlier writ petition was only concerning dis-empanelment

as a surveyor of Marine insurance claims but during the proceedings pursuant to the order in the first writ petition, material with respect to fire insurance was also brought out and the petitioner has been de-panelled also as a surveyor of fire insurance claims.

9. However neither was such an argument made before dictation was commenced nor is such a ground taken / pleaded in the petition. The same cannot be allowed as an afterthought.

10. The second contention of the senior counsel for the petitioner is that while the hearing given to the petitioner pursuant to the order in the earlier writ petition was by a Committee constituted by the respondent No.1 NIAC but the decision taken is of the General Manager (Technical) who has not heard the petitioner. A host of judgments are relied upon to contend that the decision has to be of the same authority / body / person which has given the hearing.

11. No merit is found in the aforesaid contention also. The Committee comprising of Chief Manager and General Manager of the respondent No.1 NIAC in terms of the order in the earlier writ petition, heard the petitioner and prepared a report dated 25th August, 2015 concluding as under:

“Finally in conclusion we would like to state on the main issues that:

- I) Regional Office at Ludhiana noticed that there were discrepancies in the Fire Claim Survey work and reporting by the Surveyors thereof, but did not offer a chance to them to be heard. They decided on de-panelment without giving hearing to the Surveyor Firm, to put forth their point of view and deciding on whether or not they should retain or De-panel him. There was also thus no Speaking Order on Decision to de-panel.

- II) We confirm that the Surveyors did commit lapses / irregularities in these Marine & Fire claims.
- III) The Surveyors have not discharged their duties as prescribed in the IRDA Regulations for Surveyors neither in advising on risk minimization measures to protect the goods as required under Code of Conduct Rules 13(2) vii) of Chapter IV of Surveyors Duties in respect of Marine Cargo Claims. About cause of loss and damage due to electrical wiring in Fire claim, he has not consulted any Electrical Engineer or other expert as required in Rule 13(2) (xv) of Chapter IV of Surveyors duties. Moreover he has breached the code 15(7) of Chapter V of the aforesaid regulations which states that *“Every Surveyor and Loss Assessor shall.....7) carry out his professional work with due diligence, care and skill and with proper regard to technical and professional standards expected of him.”* In both claims the photos were submitted on plain paper without specifying on the top of the sheet as “Attached to and forming part of Survey Report No.....” and also that these photos did not have the date and time printed thereon, nor were they signed for certification / authentication and numbered for complete transparency and objectivity (as confirmed by him in his hearing on 19.6.2015 as well as in the part of the hearing on 2.7.2015 related to marine Cargo surveys)Annexures ‘A’ & ‘B’. As also in Marine claim they cannot say with certainty that they are of the specific loss, and in fact from certain photos it can be said that they are not of the loss said to have been surveyed by them.
- IV) The Stoppage of work to the Surveyor Firm, considering the discrepancies and lapses, in our view as commented herein above was proper. However, in both the portfolios the de-paneling without first giving the Surveyor Firm an opportunity to be heard was not in order. Moreover, no Speaking Order was issued

regarding depanelment. These have violated the Principles of Natural Justice, hence not technically correct, even though justifiable reasons for depanelment were established.”

and recommending that the competent authority, General Manager (Technical) Head Office, may take appropriate decision and Surveyor Firm may be informed of the conclusions drawn in the report. In pursuance thereto, the General Manager (Technical), Head Office has vide impugned communication dated 14th October, 2015 communicated to the petitioner as under:

“Re: De-paneling of Surveyor Firm M/s. Soni & Co. New Delhi

The committee appointed at Head office level to look into the above subject matter has submitted its report on 19th Sept. 2015. The report has been finalized after giving a personal hearing of Surveyor Firm and taking cognizance of relevant claim documents.

As per the finding of the committee the surveyor did commit lapse / irregularities and in view of the same the stoppage of work of the Surveyor Firm is in order.

Sd/-

GENERAL MANAGER (Tech)”

12. It is clearly not a case of the authority which has taken the decision being not the authority which had heard the petitioner in terms of the order in the earlier writ petition. The representation of the petitioner, at the time of disposal of the earlier writ petition, was already pending before the Committee, was considered by the said Committee and the Committee has passed a reasoned order titled the Report dated 25th August, 2015 in which the Committee reiterated the decision earlier taken of dis-empanelment of

the petitioner and left only the communication of the said decision to the General Manager (Technical) at the Head Office and who has not taken any fresh decision but merely communicated the report of the Committee to the petitioner. Thus the argument that the General Manager (Technical) should have given a hearing to the petitioner, is misconceived and contrary to the order in the earlier writ petition.

13. Though the senior counsel for the petitioner has also sought to challenge the decision as contained in the report dated 26th August, 2015 to be bad on merits but fairly admits that the same will entail disputed questions of fact which cannot be adjudicated in this proceeding.

14. The last contention of the senior counsel for the petitioner is that the dis-empanelment of the petitioner is for an indefinite period and which is not permitted as per the law laid down by the Supreme Court in ***Kulja Industries Ltd. Vs. Chief General Manager, Western Telecom Project BSNL*** (2014) 14 SCC 731 and a host of other judgments relied upon by the senior counsel for the petitioner.

15. In response thereto, the counsel for the respondent No.1 NIAC has contended that the respondent No.1 NIAC is a client of the petitioner and it is up to the respondent No.1 NIAC whether to engage the petitioner or not and the respondent No.1 NIAC cannot be compelled to engage the services of the petitioner when the respondent No.1 NIAC has found the petitioner guilty of misconduct.

16. Though undoubtedly so but the law which has developed in the said arena is that though a power to blacklist, as an order of dis-empanelment amounts to, is inherent in the party allotting the contract and is absolute and

untrammelled by any constraints whatsoever 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 i.e. it will be open to scrutiny not only on the touchstone of principle of natural justice but also on the doctrine of proportionality. It has further been held that debarment is never permanent and the period of debarment depends on the nature of offence committed by erring contractor.

17. Though the counsel for the respondent No.1 NIAC has also contended that there are private insurance companies also, from which the petitioner can avail business as a surveyor but it cannot be lost sight of that the petitioner as a surveyor has to necessarily depend on the insurance companies only and which are limited in number.

18. The dis-empanelment by the respondent no.1 NIAC of the petitioner is not for any definite period and thus of a permanent nature. This is impermissible.

19. The law, again, is that the decision, of the period of blacklisting, has to be of the party which is black listing and not of the Court. The matter, for this limited aspect has to be remanded to the respondent no.1 NIAC.

20. Accordingly, the decision of the respondent No.1 NIAC to the extent indefinitely dis-empanelling the petitioner cannot be upheld and is set aside. The petition, as far as other grounds urged thereon, is dismissed.

21. The respondent No.1 NIAC is directed to:

- (i) On or before 30th November, 2015 issue a communication to the petitioner intimating the period for which the petitioner is

proposed to be dis-empanelled and the reasons if any for computing the said period be also given.

- (ii) The petitioner if so desires may on or before 14th December, 2015 file its response thereto.
- (iii) The petitioner be heard on the aforesaid limited aspect on 18th December, 2015 at 1100 hours and on such subsequent dates as may be deemed necessary, at Mumbai, where the competent authority of respondent no.1 NIAC is stated to be situated.
- (iv) A decision on the aforesaid aspect be taken and communicated to the petitioner on or before 30th January, 2016.

22. The petition is disposed of in terms of above.

No costs.

Dasti under signature of Court Master.

RAJIV SAHAI ENDLAW, J

NOVEMBER 16, 2015

‘gsr’..