

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Writ Petition No. 6309 of 2015 (O&M)
Date of Decision: 04.04.2016

Omax Engineering Works through its partner Ramesh Kumar ..Petitioner

versus

State of Haryana and others ..Respondents

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE.
HON'BLE MR. JUSTICE ARUN PALLI.**

Present : Mr. Aman Bansal, Advocate and
Mr. Anjali Bansal, Advocate, for the petitioner.

Mr. Rahul Dev Singh, Deputy Advocate General, Haryana,
for the respondents.

S.J.VAZIFDAR, ACTING CHIEF JUSTICE:

The petitioners have challenged orders dated 12.08.2014 and 31.03.2015 by which they have been black-listed and their earnest money has been forfeited. The petitioners have also sought an order directing the respondents to release the earnest money with interest.

2. Respondent Nos.2, 3 and 4 are the Additional Chief Secretary, Government of Haryana, Industries & Commerce Department; the Director, Supplies & Disposals, Haryana and the Central Bureau of Investigation, respectively. The reference to the respondents shall, however, be to respondent Nos.1, 2 and 3.

3. The respondents invited tenders for supply of hospital furniture. The petitioners submitted a bid. The petitioners' technical bid was, however, rejected. It is not necessary to deal with the issue whether the petitioners' technical bid was rightly rejected or not in detail as from the documents it is

clear that the petitioners' bid was not technically qualified. One of the conditions of eligibility reads as under:-

“2. The tenderer should have a minimum annual turnover in Hospital Furniture items of Rs.50 lacs per year or Rs.150 lacs in the last 3 years for which they should submit audited balance sheet alongwith Certificate from Chartered Accountant for last 3 years.”

4. The petitioners relied upon their Chartered Accountants certificate dated 19.03.2013. It shows the result of the operational and financial position of the petitioners during the relevant preceding three years. Although the quantum of gross sales is more than what is required in condition No.2 quoted above, the certificate does not stipulate that the same is in respect of hospital furniture. It is not the mere turnover that is relevant but the turnover in respect of hospital furniture that is relevant. The petitioners were, therefore, not qualified to bid for the works.

5. This brings us to the main and more serious issue of black-listing.

The respondents by a show cause notice dated 08.11.2013 addressed to the petitioners referred to the petitioners' turnover, stated that the Technical Committee had examined all the offers at several meetings and that by their letter dated 07.10.2013 the petitioners representative had submitted another certificate of their Chartered Accountant in support of the turnover. The letter also referred to an affidavit dated 25.09.2013 submitted by the petitioners *inter-alia* certifying that the documents and copies of documents submitted were genuine and that they were fully responsible for any discrepancies therein. The notice records that the Technical Committee decided to get the second certificate of the Chartered Accountants submitted by the petitioners verified from the concerned Chartered

Accountant and that the Chartered Accountant who according to the petitioners had issued it disowned the certificate stating that he had not issued it. The notice, therefore, stated that it was conclusive that the petitioners had attempted forgery/cheating by submitting fake/incorrect documents to confirm their eligibility and were therefore, liable for punitive action as per law. The petitioners were called upon to explain their position as to why penal action such as forfeiture of earnest money deposited, debarring/black-listing and lodging of criminal complaint be not initiated against them as per the terms and conditions of Schedules-A and B.

6. The petitioners by their reply dated 10.12.2013 stated that they had not sent any documents to the respondents after filling the tender. They denied having submitted the alleged second certificate of the Chartered Accountant. They stated that none of the documents had their stamp or the signature of any of their partners.

7. The show cause notice was finally dealt with by the impugned order dated 12.08.2014. It was held that the petitioners reply was not based on facts. The petitioners' case that they had not submitted the disputed documents was disbelieved. It was held that the petitioners had attempted to cheat the department by submitting a false/fabricated document. It is important to note the operative part of the order. The order merely directed forfeiture of the earnest money of ₹ 2 lacs. There was no order for blacklisting as proposed in the show cause notice. The proceedings relating to this show-cause notice stood concluded. The petitioners did not challenge the same.

8. Over a year later, the respondents served a second show-cause notice dated 02.09.2014 raising the same allegations. This show cause notice in fact refers to the earlier show cause notice as well as the petitioners reply thereto. It also refers to the findings in the order dated 12.8.2014. It makes the same allegations against the petitioners namely of submitting a false/fabricated certificate of the Chartered Accountant. There is no additional evidence referred to in the notice. Nor does it refer to a fresh ground in respect of this show cause notice. The petitioners were called upon to show cause why they ought not to be debarred for three years from doing business in the State of Haryana on account of the same allegations.

9. The petitioners submitted a detailed reply dated 15.09.2013 reiterating what they had stated in reply to the earlier show cause notice and stated that they had been in business since the year 1980.

10. Ultimately, the second impugned order dated 31.03.2015 was passed by which the petitioners were debarred from doing any business with the Government of Haryana for a period of three years. The petitioners' partners firm "was also debarred from doing any business with the Government of Haryana" for a period of three years under the guise of different entities. The same issue namely as to whether the petitioners had submitted a certificate from the Chartered Accountant was dealt with albeit in a different manner.

11. The first question is whether the petitioners had submitted the second certificate of the Chartered Accountant subsequently indicating a turn over as required by the bid document. The petitioners admit having furnished the first certificate which we referred to earlier and which did not

indicate whether the petitioners' turnover mentioned therein was with respect to hospital furniture or not and therefore, the petitioners' technical bid was held not to be eligible to be considered. The petitioners, however, denied having issued the subsequent certificate of the Chartered Accountants which has been held to be fabricated.

12. It is not possible in this petition under Article 226 to express a definite opinion as to whether the alleged certificate of the Chartered Accountant was furnished or not by the petitioners. Far too many disputed questions are involved, which cannot be resolved in this petition. It is neither possible nor desirable to hazard a guess regarding the same. Whether or not the certificate was fabricated must and can only be decided in appropriate proceedings and with the benefit of oral and documentary evidence.

13. We must in fairness to the respondents mention one thing. This matter has been adjourned time and again at the petitioners' request. The petitioners contended that they were in a position to establish from their sales tax and excise duty returns that their turnover was infact only in respect of the hospital goods/furniture. This was not with a view to rendering the bid eligible. That it would not have, for the documents tendered with the bid were not sufficient to establish the same and therefore, the petitioners' bid could not have been considered. The petitioners desired producing the evidence only on the question of black listing to establish that it was not even necessary for them to obtain a false certificate as their turn over was adequate to meet the eligibility conditions. The material, however, has not been produced till date. We do not wish to draw any adverse inference against the petitioners as it may have been difficult for them to produce the evidence from the authorities.

14. The petition, however, must succeed on another ground. As we mentioned earlier, the petitioners had been served with the first show cause notice dated 08.11.2013 which was replied to by them and was disposed of by the order dated 12.08.2014. By the first notice the petitioners were called upon to show cause also against black-listing. The order, however, did not black-list the petitioners. The second show cause notice dated 02.09.2014 was in respect of the identical allegations and called upon the petitioners once again to show cause why they ought not to be black listed. There is nothing on record that warranted a second show cause notice being served for the same alleged offence, on the same grounds and evidence and proposing to levy the same penalty, namely, blacklisting. The respondents have furnished no cogent explanation for issuing the second show cause notice. They have not indicated any change in the circumstances warranting the issuance of a second show cause notice. It is not their contention that any act on the petitioners' part prevented them from deciding the first show cause notice effectively.

It is not the respondents' case that the authority that dealt with the first show cause notice was oblivious of the fact that the petitioner had been called upon to show cause why it ought not be blacklisted. Nor is it the respondents' case that that authority did not address himself to the issue of blacklisting. Much less is it the respondents' case that for some reason or the other the issue of blacklisting could not have been or was not dealt with by that authority. The respondents did not contend that there were any *mala fides* or fraud as a result whereof the issue of blacklisting was not considered. There is, in fact, no explanation whatever as to why the respondents decided to issue the second show cause notice based on the

same facts and proposing the same penalty despite the fact that the penalty now proposed had also been proposed in the earlier show cause notice but was not imposed upon the petitioner. If that was so, there is no explanation for a second show cause notice to have been issued.

15. The question that falls for consideration, therefore, is whether it is permissible for a second show cause notice to be issued in respect of the same offences based on the identical facts and proposing the same penal/punitive action as in an earlier show cause notice.

16. Mr. Bansal's reliance upon a judgment of the Supreme Court in *Lt. Governor, Delhi and others vs. HC Narinder Singh, (2004) 13 SCC 342*, is well founded, although that was a service matter. In that case, disciplinary action was initiated against the Head Constable for dereliction of his duties. The authorities imposed a penalty of reduction of pay by one stage without cumulative effect. Thereafter the appointing authority issued a second show cause notice proposing to remove his name from the promotion list. The Central Administrative Tribunal allowed the petitioners application by quashing the show cause notice on the ground that it would amount to double punishment based on the same cause of action. The Supreme Court dismissed the appeal observing that the second penalty based on the same cause of action would amount to double jeopardy. The Supreme Court held:-

“4. Reading of the show-cause notice suggests as if it is in continuation of the departmental proceedings. Lack of devotion to duty is mentioned as the reason for the proposed action which was the subject-matter of the earlier proceedings as well. The second proposed action based on the same cause of action proposing to deny promotion or reversion is contemplated under the impugned show-cause notice. Second penalty based on the same cause of action would amount to double jeopardy. The Tribunal was, therefore,

right in law in annulling such an action. We are not expressing any opinion on the ambit or scope of any rule.”

The petitioners’ case before us is stronger for even the first show cause notice called upon the petitioners to show cause why they ought not to be black listed. The order on this show cause notice, however, did not impose the punishment of black listing. The second notice based on the same facts once again called upon the petitioners before us to show cause why they ought not to be black listed and the respondents proceeded to blacklist the petitioners.

17. The law on the subject that we will now refer to was not cited by either counsel. We, therefore, placed the same before the counsel on both sides to enable them to make further submissions in respect thereof which they did but without citing any further authorities.

18. Although the Supreme Court in *Lt. Governor, Delhi and others vs. HC Narinder Singh (supra)* did observe that the second penalty based on the same cause of action would amount to “*double jeopardy*”, we do not think that the Supreme Court referred to Article 20(2) of the Constitution of India. This observation and use of expression “*double jeopardy*” was obviously in the context of administrative law. Article 20(2) embodies the principle of *autrefois convict* or of *autrefois acquit*, a principle recognized in Section 403(1) of the Cr.P.C. and in the fifth amendment to the Constitution of the United States of America. H.M. Seervai, in his treatise Constitutional Law of India 4th Edition observed at page-1052:-

“11.139 Although the words “before a Court of Law or Judicial Tribunal” were not to be found in Art. 20(2), the wording of the whole Article showed that there must have been a prosecution and a

punishment in respect of the same offence before a court of law or a tribunal required by law to decide the matter in controversy judicially on evidence on oath, which it must be authorised by law to administer, and not before a tribunal which entertained a departmental or administrative enquiry, even though set up by statute, but not required to proceed on legal evidence given on oath. The presence in Art. 20(1) of the words “convicted”, “commission of the act charged as an offence”, “be subjected to a penalty”, “commission of the offence” and in Art. 20(2) of the words “prosecuted and punished” and in Art. 20(3) of the words “accused of any offence” indicated that the proceedings contemplated by Art. 20(2) were of the nature of criminal proceedings before a court of law, or a judicial tribunal, and prosecution in that context meant an initiation or starting of a proceeding of a criminal nature before a court of law or judicial tribunal in accordance with the procedure prescribed in the statute which created an offence and regulated the procedure.”

19. The Supreme Court in *Maqbool Hussain v. State of Bombay* 1953 SCR 730/AIR 1953 (SC) 325, held as under:-

“**12.** The words “before a court of law or judicial tribunal” are not to be found in Article 20(2). But if regard be had to the whole background indicated above it is clear that in order that the protection of Article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorized by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used

therein:— “convicted”, “commission of the act charged as an offence”, “be subjected to a penalty”, “commission of the offence”, “prosecuted, and punished, accused of any offence, would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.”

20. This judgment has been consistently followed by the Supreme Court and by various High Courts. The judgments, however, only deal with the scope and ambit of Article 20 of the Constitution of India. The issue as to whether an identical subsequent action is permissible or not within the realm of administrative law, was not considered. It appears obvious, therefore, to us that the Supreme Court in *Lt. Governor, Delhi and others v. HC Narinder Singh (supra)* did not base their order and judgment upon Article 20, although they used the expression ‘double jeopardy’. It was a judgment in the realm of administrative law. It cannot, therefore, be said that the judgment is per incuriam on account of not having noticed the judgment of the Constitution Bench of the Supreme Court in *Maqbool Hussain* case (supra).

21. In our view, in a case such as this, where the second show cause notice is identical in every respect to the first show cause notice and where the first show cause notice was taken to its logical conclusion and the decision taken therein has attained finality, a second show cause notice is impermissible on the principle embodied in the Latin maxim ‘*interest reipublicae ut sit finis litium*’ and on the principle of cause of action/

estoppel. These principles in turn are based on an important aspect of public policy.

22. The judgment of the Supreme Court of England in *R (on the application of Coke-Wallis) v. Institute of Chartered Accountants in English and Wales [2011 UK SC 1]* is instructive on this point. That appeal, as the introduction itself states, was concerned with the relevance and application of the principles of *autrefois acquit*, *res judicata* and *abuse of process* in the context of successive proceedings before a regulatory or disciplinary tribunal. The appellant was a Chartered Accountant and a member of the respondent Institute, which was responsible for the regulation of Chartered Accountants. The appellant and his wife were the Directors and share holders of a number of trust companies carrying out regulated financial services. The Financial Services Commission by its direction inter-alia prohibited the records or files in respect of the companies or any customers from being removed from the offices of the companies. The appellant and his wife on being found to have violated this direction were charged with the offence of failing to comply with the directions and were convicted for the same. Thereafter, the respondent preferred a complaint against the appellant which was heard by the Disciplinary Committee but was dismissed. The Investigating Committee preferred a second complaint. The appellant raised a preliminary issue to the effect that the second complaint was liable to be dismissed on the ground that the same complaint had already been dismissed. It was contended that the same complaint was an abuse of the process. It was held:-

“21. The question is what is the legal effect of the conclusion that the second complaint is the same as the first. It was submitted on behalf of the appellant that the consequence is that the second complaint must be

dismissed, either on the basis of *autrefois acquit* or on the basis of *res judicata*.

26. The relationship between cause of action estoppel and issue estoppel was described, in terms that have been generally accepted, by *Diplock LJ in Thoday v Thoday* [1964] P 181, 197-198:

“The particular type of estoppel relied upon by the husband is estoppel per *rem judicatam*. This is a generic term which in modern law includes two species. The first species, which I will call ‘cause of action estoppel,’ is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e. judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in *rem judicatam*. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per *rem judicatam*. This is simply an application of the rule of public policy expressed in the Latin maxim ‘*Nemo debet bis vexari pro una et eadem causa*.’ In this application of the maxim ‘*causa*’ bears its literal Latin meaning.”

Res judicata, or estoppel per *rem judicatam*, is thus a generic term of which cause of action estoppel and issue estoppel are two species. The distinction between the two species is of potential importance because the former creates an absolute bar, whereas the latter does not: see para 47 below.

27. Although the point was not conceded on behalf of the Institute, it was not submitted in the course of the argument that the principle did not apply to non-statutory disciplinary proceedings of this kind. In any event, the principle does in my opinion apply to such

proceedings. There is no doubt that it applies to what may be called ordinary civil proceedings. In *Thrasylvoulou v Secretary of State for the Environment* [1990] 2 AC 273, where an issue estoppel was held to arise out of a determination of a planning application, the principle was held to apply to public law proceedings. Lord Bridge (with whom the other members of the appellate committee agreed) stated the general principle and emphasised its fundamental importance in this way at p 289C-D:

“The doctrine of *res judicata* rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims ‘*interest reipublicae ut sit finis litium*’ and ‘*nemo debet bis vexari pro una et eadem causa.*’ These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of *res judicata* applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.”

The House of Lords thus stressed the importance of the *res judicata* principle in terms which in my opinion apply equally to cause of action estoppel and to issue estoppel.

29. In these circumstances I see no reason why the principles of cause of action estoppel should not apply to proceedings before a disciplinary tribunal set up under the bye-laws. The provisions of the Charter and Supplemental Charter are akin to statutory provisions and it seems to me that similar principles to those identified by Lord Bridge in *Thrasylvoulou* apply to them.

It was not suggested in the course of the argument that there was anything in the Charter or Supplemental Charter to lead to the conclusion that the principles of cause of action estoppel should not apply to successive sets of disciplinary proceedings

30. Indeed, even if the bye-laws created only private rights as between the Institute and its members, I see no reason why the principle of cause of action estoppel should not apply. In *Meyers v Casey* [1913] HCA 50, (1913) 17 CLR 90, where the High Court of Australia was considering a decision of the committee of the Victoria Racing Club, at p 114 Isaac J said this of objections considered by the committee:

“They are, by reason of the committee’s decision, res judicatae, as much as if instead of the committee it had been the Supreme Court unappealed from, that has so held. That rests on the well known rule that a competent court or other tribunal has jurisdiction to give a wrong judgment, and if there is no appeal in the strict sense, then its decision, whether right or wrong, must stand, and cannot be questioned in any subsequent proceedings elsewhere.”

34. In para 1.02 Spencer Bower and Handley makes it clear that there are a number of constituent elements in a case based on cause of action estoppel. They are that: “(i) the decision, whether domestic or foreign, was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was - (a) final; (b) on the merits; (v) it determined a question raised in the later litigation; and (vi) the parties are the same or their privies, or the earlier decision was in rem.” It is not in dispute that all those elements are established except (iv) and (v). Even if any of the others were in dispute, I would hold that they are plainly satisfied. As to (vi), it was not suggested that the first decision was in rem but it is plain that the parties to both sets of proceedings were the same.

We are in respectful agreement with these observations. They apply to the case before us.

23. A view to the contrary is potentially dangerous and inherently unfair to a party. It would keep the complaint against a party open in perpetuity, although it had been dealt with finally and the decision had attained finality. It would expose a party to arbitrary action in perpetuity depending upon the whims and fancies of the very incumbent as well as his successors in office. It would require a party to defend himself even after lapse of years and that too repeatedly.

24. We hasten to add that there are cases where the proposed action is kept in abeyance by the authority itself where the situation so demands. In such cases, therefore, the matter is not dealt with finally. As and when the occasion arises the proceedings relating to such action may continue.

25. For instance, there are cases where disciplinary action is initiated against an officer. Before the conclusion of the proceedings relating thereto, the officer may retire either on superannuation or for any other reason such as pursuant to the decision not to retain him in service. In such cases, the employer would be entitled to drop the proceedings reserving the right to reopen them, if necessary. The disciplinary proceedings in such cases cannot be said to have been decided. The employer would in that event be entitled to commence/recommence the disciplinary proceedings subsequently. Such a situation could arise in various circumstances including where the order of compulsory retirement or refusal to retain in service is set-aside subsequently including by judicial orders.

26. We do not rule out the possibility of certain exceptional cases warranting a relaxation in this principle. There may be cases for instance where rigid adherence to this principle may not be in public interest. Lord Clarke in *R. versus Institute of Chartered Accountants* (supra) saw force in the introduction of such a principle but observed that whether and in what circumstances it ought to be permitted as an exception is essentially a matter for Parliament and not for Courts. It is not necessary to consider whether this caveat would apply in all cases. It certainly would not apply to cases such as the one before us where the black-listing is resorted to as an inherent right of a party to a contract or a right that flows from the contract itself. This right does not flow from or under any legislation. The restriction upon it, therefore, would not necessarily flow and need not flow from legislation. It can be recognized on constitutional principles and in the field of administrative law.

27. Having said that and assuming that exceptional circumstances warrant a relaxation of the principle, the burden is on the party invoking the exception to establish the existence of such circumstances.

28. The contention that the second impugned order is nothing but an additional order in respect of the first show cause notice requires merely to be stated to be rejected. The proceedings relating to the first show cause notice did not indicate that the issue of black listing was not to be taken up or considered. Nor do the proceedings indicate any intention to deal with the issue of black listing separately and/or subsequently. The record reveals that the first show cause notice was dealt with, considered and disposed of in its entirety without reserving any part or aspect thereof for further and/or separate consideration.

29. The petition is, therefore, disposed of by quashing the impugned orders in so far as they blacklist the petitioners. There shall, however, be no order as to costs.

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

04.04.2016
'ravinder'

(ARUN PALLI)
JUDGE

To be referred to the reporter	√Yes	No.
--------------------------------	------	-----