

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

% **Date of decision: 17th May, 2016**

+ **W.P.(C) 2459/2016 & CM No.10499/2016 (for stay)**

M/S SVOGL OIL GAS & ENERGY LTD. Petitioner
Through: Ms. Purti Marwaha and Ms. Henna
George, Advs.

Versus

INDIAN OIL CORPORATION LTD. Respondent
Through: Mr. Rajat Navet and Mr. Kushagra
Pandit, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the communication dated 18th May, 2015 of the respondent Indian Oil Corporation Ltd. (IOC) blacklisting the petitioner for a period of three years therefrom.
2. Though the petition has been listed on several occasions but notice thereof has not been issued as yet. However, the counsel for the respondent IOC appears on advance notice.
3. It is not in dispute that the blacklisting is preceded by a show cause notice and a reply thereto by the petitioner and the impugned communication dated 18th May, 2015 states that after considering the reply, the proposal as contained in the show cause notice, of blacklisting the petitioner, had been confirmed.

4. The contention of the counsel for the petitioner is twofold. Firstly, it is contended that though show cause notice was given but no opportunity of hearing was given and secondly it is contended that the impugned communication is without any reasons.

5. The counsel for the petitioner has handed over a compilation of the following judgments in support of her contentions:

- i) ***M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal*** (1975)1 SCC 70;
- ii) ***Joseph Vilangandan Vs. The Executive Engineer, (PWD), Ernakulam*** (1978) 3 SCC 36;
- iii) ***Hari Om Gupta Vs. Govt. of NCT of Delhi*** (2016) SCC OnLine Del 282;
- iv) ***Mott Macdonald Pvt. Ltd. Vs. Union of India*** (2016) SCC OnLine Del. 220;
- v) ***Trigen Electronics Private Limited Vs. South Delhi Municipal Corporation*** 221 (2015) DLT 512;
- vi) ***M/s Brite Aricon (Consortium) Vs. Airports Authority of India*** 203 (2013) DLT 408.

but upon being asked to show from any of the said judgments, the need for a personal hearing or for giving reasons, is unable to point out the same though has pointed out the passages in the judgments providing that the order of blacklisting should be after giving an opportunity to represent. She has in addition also handed over a copy of the judgment in ***Kranti Associates Private Limited Vs. Masood Ahmed Khan*** (2010) 9 SCC 496 where in the context of consumer forums, the law relating to the duty to record reasons was cited and discussed.

6. Per contra, the counsel for the respondent has relied upon ***Patel Engineering Limited Vs. Union of India*** (2012) 11 SCC 257 in para 38 whereof in the context of blacklisting only, it has been held that there is no inviolable rule that a personal hearing of the affected party must precede every decision of the State and it was further held that it depends upon the context of each case. He has further contended that it is not as if the reply of the petitioner was not considered or the same was rejected whimsically. It is argued that in accordance with the policy of the respondent IOC, a three member Committee was constituted to consider the case of the petitioner for blacklisting and the Committee for detailed reasons running into as many as seven pages and copy of which is handed over in Court and taken on record,

decided to so blacklist the petitioner. It is also pointed out that the petitioner, in the reply to the show cause notice, met with only one of the eight reasons which were given in the show cause notice and had nothing to say with respect to the remaining seven reasons.

7. The counsel for the petitioner in rejoinder has contended that the respondent, since the blacklisting order, has already initiated arbitration proceedings against the petitioner and the question of blacklisting of the petitioner also ought to have been referred to arbitration. Reference is made to my judgment in ***Prabhatam Advertisement Pvt. Ltd. Vs. Municipal Corporation of Delhi (South Zone) New Delhi*** MANU/DE/2674/2015 in this context.

8. I have considered the rival contentions and have also perused the recent dicta of the Supreme Court in ***Gorkha Security Services Vs. Govt. of NCT of Delhi*** (2014) 9 SCC 105 and am for the reasons stated hereinbelow of the opinion that no case for interfering with the order of blacklisting of the petitioner is made out.

9. I have in ***Bonn Nutrients Private Limited Vs. Union of India*** MANU/DE/4418/2015, citing various judgments on the subject, held that government / governmental authorities, just like private individuals are free

to choose with whom to contract; the only difference is that while freedom of individual private persons is absolute, leaving them free to choose as per their whims and fancy, the exercise of choice by government / governmental authorities is subject to judicial review by the Court.

10. Supreme Court, in *M/s Erusian Equipment & Chemicals Ltd.* supra cited by the counsel for the petitioner also has held that no person has a fundamental right to insist that the government must enter into a contract with him and that in passing an order of blacklisting the government must act under a standardised code. Again in *Patel Engineering Limited* supra it was held that State can decline to enter into a contractual relationship with a person for a legitimate purpose and that the authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or business and making of contracts for any purpose etc. and 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 would not by itself disable blacklisting

if it is otherwise justified. The power to blacklist was held to be inherent in every person legally capable of entering into the contract.

11. I have further enquired from the counsel for the petitioner as to what purpose the reasons, even if had been communicated to the petitioner, would have served. This Court, in exercise of power of judicial review, is concerned only with the decision making process and not with the merits of the decision. The requirements aforesaid of IOC as a State to act fairly and rationally without in any way being arbitrary are found to have been sufficiently met by a) the respondent IOC having issued notice to the petitioner to show cause as to why it should not be blacklisted; b) the petitioner having submitted its reply thereto, and, c) the reasons running into seven pages handed over today given by the Committee constituted by the IOC for the said purpose for blacklisting the petitioner. On perusal of the reply submitted by the petitioner to the show cause notice and the reasoning recorded by the Committee of the respondent IOC for blacklisting the petitioner, I am satisfied that in the facts of the present case, there was no need for giving a personal hearing to the petitioner. An opportunity of being heard is an ingredient of the principles of natural justice and qua which I have in ***Kanachur Islamic Education Trust (R) Vs. The Ministry of Health***

& Family Welfare MANU/DE/2496/2015 for reasons given in detail held that no hard and fast rule can be laid down and the parameters of which depend upon the factual situation. It was held that natural justice does not exist as an absolute jural value but is humanistically read by Courts into those great rights enshrined in Part III as the quintessence of reasonableness. It was further held that what opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation and that the rule of *audi alteram partem* is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise; that not all violations of natural justice knock down the order with nullity. Reference in this context can also be made to *Skipper Bhawan Flat Buyers Association Vs. Skipper Towers Pvt. Ltd.* MANU/DE/6428/2012 (DB).

12. The requirement of recording reasons for administrative actions as of blacklisting is a corollary to the requirement that the State has to act fairly and rationally and without in any way being arbitrary and was in *S.N. Mukherjee Vs. Union of India* (1990) 4 SCC 594 was held to be one of the principles of natural justice which govern exercise of power by administrative authorities. However once it is shown that the decision to

blacklist is a reasoned one and not arbitrary or whimsical, I am unable to decipher and the counsel for the petitioner unable to substantiate the need for communication of the reasons to the party being blacklisted. Mention may be made of *Grosons Pharmaceuticals (P) Ltd. Vs. The State of Uttar Pradesh* MANU/SC/0545/2001 where it was held a) that it was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted and the reply submitted by it was duly considered and the procedure adopted while blacklisting was in conformity with the principles of natural justice; and, b) the contention that the order of blacklisting was invalid for not containing any reason was negated holding that the record summoned showed elaborate reasons to have been recorded while passing the order of blacklisting. A Division Bench of this Court also in *B.S. Construction Co. Vs. The Commissioner of MCD* (2008) 102 DRJ 455 held that “since the reasons were recorded in the records”, the contention that no speaking order was passed to debar from participating in the tender process could not be accepted. It cannot also be forgotten that the orders, as of blacklisting, are not appealable for it to be said that the communication of reasons to the aggrieved party is essential. As long as the decision taken is found to be supported by reasons recorded at the time of taking the decision,

the requirement is satisfied. A distinction has to be carved out between duty to record reasons for blacklisting and communication of such reasons to the person being blacklisted. While the former is essential, to sustain an order of blacklisting, the latter is not. There indeed are some judgments of this Court quashing the decision to blacklist but those are in the facts where no reasons existed for the decision to blacklist and reasons given subsequently, were not accepted. The petitioner here, appears to be having regular dealings with the respondent IOC and must be aware of the policy / practice of IOC of constituting a Committee to take a decision on blacklisting and if was really interested in knowing the reasons for it being blacklisted, would have sought the same from IOC. Instead, it rushed to this Court.

13. I have rather enquired from the counsel for the petitioner whether not the only purpose to ensure fairplay is that the petitioner is not being blacklisted for extraneous reasons. There is no whisper about this in the petition or in the reply to the show cause notice. It is not the case of the petitioner that it has been blacklisted to restrict competition or guided by any desire to contract with any preferred party. In the absence thereof, no challenge to the blacklisting order can be considered.

14. As far as the contention of the counsel for the petitioner, of the aspect of blacklisting itself being required to be referred to arbitration, option has been given to the counsel for the petitioner to move either the Court under Section 9 of the Arbitration and Conciliation Act, 1996 or the Arbitral Tribunal under Section 17 of the Act with respect to the blacklisting but the counsel for the petitioner, after seeking passover and after obtaining instructions from the petitioner, has informed that the petitioner wants to peg its case on this petition only and does not want to avail of the arbitration proceedings in this respect.

15. Merely because arbitration has been commenced would not mean that the dispute as to blacklisting also has to be referred and that the power to blacklist stands denuded. *Prabhatam Advertisement Pvt. Ltd.* supra referred to by the petitioner in fact is against the petitioner rather than in favour of the petitioner and what has been held therein is that if it was to be held that no decision of blacklisting can be taken till it is arbitrated upon, no blacklisting will ever come into force and the government would be compelled to continue to contract with a person who may have been found to be wholly incompetent and unreliable.

16. There is thus no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

MAY 17, 2016

bs/gsr

