

* THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

+ Writ Petition No.748 of 2017

% 20.02.2017

Balaji Rail Road Systems Private Limited,
Rep. by its Whole Time Director Mr.Manorajan Pershad

..Petitioner

Vs.

\$ Rail Vikas the Nigam Limited, rep. by its
Deputy General Manager and others

... Respondents

! Counsel for the Petitioner : Sri K. Vivek Reddy

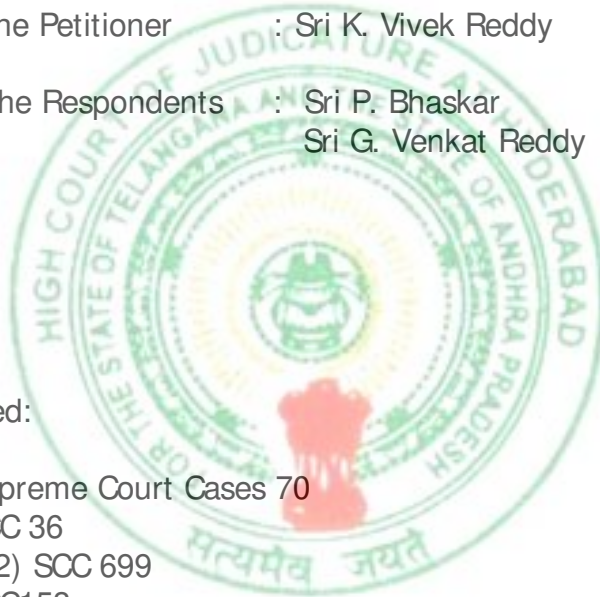
^ Counsel for the Respondents : Sri P. Bhaskar
Sri G. Venkat Reddy

< Gist :

> Head Note :

? Cases referred:

1. (1975) 1 Supreme Court Cases 70
2. (1978) 3 SCC 36
3. 1994 Supp(2) SCC 699
4. (1995) 4 SCC153
5. (2007) 11 SCC 335
6. (2012) 11 SCC 257
7. (2014) 14 SCC 731
8. AIR 1953 SC 210
9. AIR 1961 SC 532
10. (2014) 9 Supreme Court Cases 329
11. (1996) 4 SCC 69
12. 2010 (9) SCC 496
13. 1978 (1) SCC 405



IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

* * * *

Writ Petition No.748 of 2017

Between
Balaji Rail Road Systems Private Limited,
Rep. by its Whole Time Director Mr.Manoranjan Pershad
..... Petitioner
And

Rail Vikas the Nigam Limited, rep. by its
Deputy General Manager and others
... Respondents

JUDGMENT PRONOUNCED ON : 20.02.2017

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO :

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : YES
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? : YES
3. Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? : YES

HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

Writ Petition No.748 of 2017

Order:

Heard learned counsel for the petitioner and learned counsel for the respondents 1 and 2.

This Writ Petition was filed challenging the order passed by the second respondent dated 17.08.2016 confirming the order of the first respondent dated 17.05.2016 declaring the petitioner as a 'poor performer' for a period of three years.

The undisputed facts in the present case are that the petitioner is a Company offering consultancy services primarily to the Government and Public Sector Organizations running the Railways. The petitioner Company executed several projects. They also executed projects for clients located outside India. In respect of Indian Railways, they have executed over 150 projects from its inception in 1988. Based on the performance of the petitioner, the petitioner was selected to execute projects for the first respondent. On 30.09.2013 the first respondent floated seven distinct tenders (Request For Proposal) for appointment of consultant from project consultancy services for bankability studies. The successful bidder was required to evaluate the commercial viability and engineering feasibility of the new rail projects. In response to the said tender notice, the petitioner along with others submitted its bid and the petitioner became a successful bidder. A letter of award was issued on 28.01.2014, 31.01.2014, 06.02.2014 and 07.02.2014 for seven projects. The seven projects are located in various parts of India including doubling of Guntur - Tenali Railway line and its electrification in the State of Andhra Pradesh. Separate agreements were entered on various dates on

03.04.2014, 04.04.2014, 09.04.2014 and 26.04.2014 in respect of seven projects. The contracts were executed in Secunderabad. The petitioner states that all the seven projects were executed by the petitioner. However, there was delay in execution of the contract and since the delay resulted in financial loss to the first respondent, a show cause notice was issued on 14.08.2015 asking the petitioner to show cause as to why it should not be declared as a 'poor performer'. The petitioner submitted its response on 01.09.2015 explaining the reasons and attributing some of the reasons to the first respondent. After complying with the procedure relating to the declaration as poor performer, the petitioner was declared to be a 'poor performer' by the first respondent by proceedings dated 17.05.2016. Since there was a provision for appeal, the petitioner appealed to the second respondent and he confirmed the same by order dated 22.06.2016.

The petitioner addressed a letter on 22.06.2016 requesting for appointment of an arbitrator and maintaining *status quo* till the decision of the arbitrator in respect of declaration as a 'poor performer' and the first respondent, vide letter dated 11.08.2016, stated that the declaration as a poor performer is an administrative order which was issued under a separate laid down procedure and the contract agreement does not mandate arbitrators to arbitrate on the issue of poor performance, as such declaration can be made on various issues even beyond the contract/contracts. It appears that the first respondent also imposed penalty for delayed performance by making reduction from the payments due to the petitioner and the petitioner invoked the arbitration clause and challenged the same before the High Court of Delhi. The impugned orders were initially challenged before the Delhi High Court in OMP (I)

(COMM.) 445 of 2016 and the same was withdrawn on 21.12.2016 with liberty to file a Writ Petition to challenge the impugned orders.

Thereafter, the petitioner filed Arbitration Petition No.710 of 2016 before the High Court of Delhi and the High Court of Delhi disposed of the said petition by order dated 21.12.2016 appointing Mr. S.K. Sarvaria, a former Additional District Judge, Delhi, as a sole arbitrator to adjudicate the disputes between the parties including their claims and counter claim (other than the issue of placing the petitioner on the list of poor performers). However, it is stated by the learned counsel for the respondents 1 and 2 that against the said order, the first respondent preferred an appeal in the Hon'ble Supreme Court and it is likely to come up for admission on 17.02.2017. In view of the said order of the Delhi High Court excluding the declaration of poor performer from arbitration, the above Writ Petition was filed by the petitioner.

Learned counsel appearing for the petitioner submits that the procedure contemplated for declaring the consultant/contractor as a poor performer was not complied with. He submits that no opportunity of hearing as stipulated in Clause 9 was afforded to the petitioner. He also submitted that the contract does not provide for blacklisting the petitioner from future contracts. He states that the delay occurred due to the defaults committed by the first respondent only and without a finding on such default, no order can be passed declaring the petitioner as a poor performer. He further submits that the impugned orders do not contain any reasons and they are liable to be set aside on the said ground apart from the ground of violation of principles of natural justice. He relied on the decisions of the Hon'ble Supreme Court reported in M/ s. Erusian

Equipment and Chemicals Limited v. State of West Bengal¹, Joseph Vilangandan v. The Executive Engineer, (PWD), Ernakulam² and Southern Painters v. Fertilizers and Chemicals Travancore Limited³.

Learned counsel appearing for the respondents 1 and 2 submits that they have complied with the procedure for declaring the consultant/contractor as a poor performer and though the dispute might arise from the contract, the present order is not amenable to arbitration. He further submits that in view of existing clauses in the contract agreeing for jurisdiction of Courts in Delhi, the petitioner cannot maintain the present Writ Petition in this Court. He further submits that in the absence of any request for personal hearing, no such hearing need be given to the petitioner. He relied on the decisions reported in Angile Insulations v. Davy Ashmore India Limited⁴, Alchemist Limited v. State Bank of Sikkim⁵, Patel Engineering Limited v. Union of India⁶ and Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited⁷.

In view of the above facts and submissions, the following points arise for consideration in the present Writ Petition.

- 1) Whether the present Writ Petition is maintainable in this Court and whether this Court lacks territorial jurisdiction to entertain the present Writ Petition?
- 2) Whether the orders passed by the respondents 1 and 2 are valid in law?

¹ (1975) 1 Supreme Court Cases 70

² (1978) 3 SCC 36

³ 1994 Supp(2) SCC 699

⁴ (1995) 4 SCC153

⁵ (2007) 11 SCC 335

⁶ (2012) 11 SCC 257

⁷ (2014) 14 SCC 731

Point No.1 (Jurisdiction):

Learned counsel appearing for the respondents 1 and 2 raised the objection as to the territorial jurisdiction of this court to entertain the present Writ Petition and he relied on part 2 of special conditions of contract wherein it was stated that the agreement shall be interpreted, construed and governed by the laws of India and legal proceedings, if any shall be under the jurisdiction of the Court of Delhi/New Delhi. He also relied on the averments made by the petitioner in the petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, filed before the High Court of Delhi, at New Delhi, wherein it was stated as follows:

“This Hon’ble Court possesses territorial jurisdiction as the registered office of the respondent is in New Delhi. The contract agreements were executed in New Delhi. Further, under the contract agreements the exclusive jurisdiction of legal proceedings have been conferred upon the courts in Delhi. Even the seat of arbitration is New Delhi. The show cause notice and orders 1, 2 and 3 have been issued from New Delhi. Thus, the entire cause of action has arisen in New Delhi and accordingly, this Hon’ble High Court has the jurisdiction to entertain and determine the instant petition.”

In this connection, he placed reliance on the decisions of Angile Insulations’s case (supra) and Alchemist Limited’s case (supra).

Learned counsel for the petitioner submitted that a part of cause of action arose within the jurisdiction of this Court as the petitioner signed the agreements within the jurisdiction of this Court and one of the projects comes under the territorial jurisdiction of this Court.

The Hon’ble Supreme Court in Angile Insulations’s case (supra) was considering a case of objection relating to the maintainability of the suit on the ground of territorial jurisdiction in relation to a contract. The Hon’ble Supreme Court, holding that normally a Court would have jurisdiction where the cause of action, wholly or in part arises, observed

that the same would be subject to the terms of the contract between the parties and relied on a clause in the contract. In the instant case, though the parties agreed for the jurisdiction of the Delhi High Court in relation to the disputes arising out of the contract, but in view of the stand taken by the respondents that the present dispute arises out of an administrative order and does not arise out of the contract, the said clause cannot be applied to the facts of the present case.

In Alchemist Limited's case (supra) the Hon'ble Supreme Court was considering the maintainability of a Writ Petition under Article 226 of the Constitution of India with reference to a part of cause of action. The Hon'ble Supreme Court, noticed that the decision in Election Commission v. Saka Venkata Rao⁸, which was confirmed in Lt. Col. Khajoor Singh v. Union of India⁹, held that no High Court other than the High Court of Punjab (before the establishment of the High Court of Delhi) has jurisdiction to issue any direction, order or Writ to the Union of India, because the seat of the Government of India was located in New Delhi. The Hon'ble Supreme Court also noticed that this resulted in amendment of the Constitution by the Constitution (Fifteenth Amendment) Act, 1963 by inserting Clause (1-A) to Clause (1) which was renumbered as Clause(2) under the Constitution (Forty-Second Amendment) Act, 1976. The said amendments enabled the High Courts to have jurisdiction when cause of action arose within its jurisdiction. Thereafter, the Hon'ble Supreme Court considered the meaning of expression "cause of action" and the decisions which came up for consideration after the said amendments. It was ultimately held that in order to constitute a part of cause of action one has to consider whether

⁸ AIR 1953 SC 210

⁹ AIR 1961 SC 532

such fact constitutes a material, essential, or integral part of the cause of action. It was also held that even if a small fraction of the cause of action arises within the jurisdiction of the Court, the Court would have territorial jurisdiction to entertain the suit/petition.

In *Nawal Kishore Sharma v. Union of India*¹⁰, the Hon'ble Supreme Court examined the question relating to the jurisdiction under Article 226 of the Constitution of India and after examining various decisions observed as follows:

“14. In *Om Prakash Srivastava vs. Union of India* (2006) 6 SCC 207, answering a similar question this Court observed that on a plain reading of Clause (2) of Article 226 it is manifestly clear that the High Court can exercise power to issue direction, order or writs for the enforcement of any of the fundamental rights or for any other purpose if the cause of action in relation to which it exercises jurisdiction notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territory. In para 7 this Court observed:- (SCC P.210)

“7. The question whether or not cause of action wholly or in part for filing a writ petition has arisen within the territorial limits of any High Court has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. In order to maintain a writ petition, a writ petitioner has to establish that a legal right claimed by him has prima facie either been infringed or is threatened to be infringed by the respondent within the territorial limits of the Court's jurisdiction and such infringement may take place by causing him actual injury or threat thereof.”

15. In *Rajendran Chingaravelu v. CIT* (2010) 1 SCC 457, this Court while considering the scope of Article 226(2) of the Constitution, particularly the cause of action in maintaining a writ petition, held as under: (SCC P.461, paras 9 & 11)

“9. The first question that arises for consideration is whether the Andhra Pradesh High Court was justified in holding that as the seizure took place at Chennai (Tamil Nadu), the appellant

¹⁰ (2014) 9 Supreme Court Cases 329

could not maintain the writ petition before it. The High Court did not examine whether any part of cause of action arose in Andhra Pradesh. Clause (2) of Article 226 makes it clear that the High Court exercising jurisdiction in relation to the territories within which the cause of action arises wholly or in part, will have jurisdiction. This would mean that even if a small fraction of the cause of action (that bundle of facts which gives a petitioner, a right to sue) accrued within the territories of Andhra Pradesh, the High Court of that State will have jurisdiction.”

In the light of the above law laid down by the Supreme Court, the facts of the present case have to be examined. The petitioner’s registered office is situated in Secunderabad within the jurisdiction of this Court and the petitioner has to execute the work of bankability of Guntur – Tenali doubling with RE in South Central Railway under letter of acceptance dated 07.02.2014 in the territorial jurisdiction of this Court. The contracts were executed within the territorial jurisdiction of this court. Though in part 2 of the special conditions of contract, it was stated that the legal proceedings shall be under the local jurisdiction of Delhi/New Delhi, the respondents themselves took the matter out of the purview of the contract and the action of declaration of the petitioner as a ‘poor performer’ was termed as an administrative order. It is not open to the first respondent to rely on a part of the contract for one purpose and deny the application for another purpose. Faced with this situation only, learned counsel appearing for the respondents 1 and 2 submitted that though the disputes arise out of contract, the arbitration clause contained in the contract is not applicable and hence this matter was specifically excluded from reference to the arbitration by the High Court of Delhi and in spite of the same, since the matter arise out of contract, the special condition with regard to jurisdiction is applicable to the instant case. I am

not in agreement with the said contention of the learned counsel for the respondents as it is the case of the respondents from the beginning that the action was an administrative action taken on the basis of applicable rules governing the declaration of 'poor performer'. In such a situation the legality of the impugned order has to be looked into in terms of the said guidelines contained in the order for declaring the consultant/contractor as "poor performer" issued on 18.06.2010. The averments made in support of the application filed under Section 9 of the Arbitration and Conciliation Act by the petitioner before the High Court of Delhi do not stand in the way of the petitioner in the present Writ Petition, since the said application was filed under Section 9 of the Arbitration and Conciliation Act and it was later on withdrawn. Even otherwise also the maintainability of the present Writ Petition has to be looked into from the angle of the applicable law relating to the entertaining of Writ Petitions. Since a part of cause of action, more particularly relating to bankability study in respect of Guntur – Tenali was involved which falls within the jurisdiction of this Court, I have no hesitation to hold that this Court has jurisdiction to entertain the present Writ Petition.

Point No.2 (Legality of the Order):

The first respondent framed an order containing procedure for declaring a consultant/contractor as "poor performer" by its policy dated 18.06.2010. In the preamble to the said policy, it was stated as follows:

"CPM/GM/AGM Incharge of a PIU on being satisfied that there is a prima facie case for initiating action for declaring a consultant/contractor as a "poor performer" due to persistent non adherence of laid down quality standards/execution of sub standard work, wrong measurements/wrong billing and non compliance of terms of reference of contract/breach of contractual obligations, poor physical/financial progress, may submit a proposal to

Corporate office for initiation of the process of declaring the said consultant/contractor as a “poor performer”.

After the said preamble, the procedure for declaration of a consultant/contractor as a poor performer was indicated. It is stated that after issuance of show cause notice and receiving a reply from the consultant/contractor, the case should be placed before the committee of four EDs which submits its report to the competent authority. After receipt of the said report, the procedure further states as follows:

“9. The Competent Authority may give an opportunity to the firm to hear them in person.

10. The firm’s submissions in written/oral hearing will be taken into consideration by the Competent Authority and a final speaking decision may be taken.

a) For exonerating the Agency, if the charges are not established;

b) For declaring the Agency a “Poor Performer” for specific period, if the charges are proved. On expiry of the said period the orders shall be consider as withdrawn.(emphasis supplied)

11. Decision of Competent Authority will be intimated to CPM/GM/AGM Incharge of PIU, through concerned ED, to convey the same to the delinquent firm and circulate it to all officers of corporate office and all PIUs for applying these orders uniformly in RVNL.

12. The Firm may file an appeal against the order of the Competent Authority for declaring it as “Poor Performer” in RVNL. The appeal shall lie with the Appellate Authority (MD/RVNL). Such an appeal shall be preferred within one month from the date of receipt of the order of declaring the firm as “Poor Performer”. Appellate Authority may consider the appeal and pass an appropriate order. If the decision of the Competent Authority is modified by the Appellate Authority the same will be intimated to CPM/GM/AGM Incharge of PIU to take action as per Para 11 above.

It is an admitted case that no opportunity of hearing was given to the petitioner, but an order was passed on 17.05.2016 by the Competent Authority declaring the petitioner as a poor performer. The relevant portion of the order reads as follows.

“3. Accordingly, the Competent Authority has considered the show cause notice issued to you vide

reference (1) above and submission made by you vide reference (2) and passed the following Speaking Order.

“Competent Authority concludes that M/s Balaji Railroad System Limited (BARSYL) did not fulfil its contractual obligations of adhering to the agreed time schedules, and carrying out the services professionally and with due diligence, in all the seven studies probably due to absence of its key experts. Therefore, M/s. Balaji Rail Road System Limited (BARSYL) cannot be relied upon to complete studies in time and with due diligence in the future and hence declared M/s. Balaji Rail Road System Limited (BARSYL) as a poor performer for a period of 3 years with immediate effect.”

When an appeal was preferred to the second respondent, the second respondent passed the following order.

“Appellate Authority has considered your appeal and passed the following order:

“I find from Appellant’s Appeal dated 06.06.2016 that the Appellants have not brought out any new facts in their appeal to demonstrate that the Appellants have not failed to perform their contractual obligation in a timely and in qualitative manner. I also find that all the issues have been deliberated, discussed and addressed in detail by a committee of EDs and Director Operations and there is no new point/issue which has been raised in their representation or brought out on file which needs to be deliberated now by me in the capacity of an Appellate Authority. The Appellant contention that non-availability of experts cannot be considered the reasons for poor quality of the reports, defies all logics as it is on the basis of proposed deployment of specific experts satisfying requisite qualification and experience, the studies were awarded to M/s. BARSYL. The appellant’s contention that penalties have already been imposed as per contract conditions for non-availability of experts and hence it should not be the reasons for declaring M/s BARSYL as poor performer cannot be agreed to as imposition of penalties is part of contract management of the particular contract and declaration of poor performer is an administrative decision of an organization regarding the quality of working on an entity and the nature of association of that entity for future assignments.

Hence I find no grounds to withdraw the order of Director Operation to declare M/s. BARSYL a poor performer for a period of three years.”

It can be seen from the above that your request for revoking the competent authority's decision to declare BARSYL as poor performer and debarring BARSYL from participating in RVNL tenders for a period of three years has not been acceded to by the Appellate Authority."

In the light of the above facts, it is submitted by the learned counsel for the petitioner that the orders passed by the respondents 1 and 2 are bad, as no opportunity was given to the petitioner for hearing and the order does not contain any reasons. He relied on M/ s. Erusian Equipment and Chemicals Limited's case (supra), Joseph Vilangandan's case (supra) and Southern Painters's case (supra) in support of his contention. Learned counsel for the respondents 1 and 2, on the other hand, submits that the petitioner never asked for a right of hearing and in those circumstances only no opportunity of hearing was given. With respect to the reasons, learned counsel for the respondents submits that the report of the committee of EDs was taken into consideration by the competent authority and the order was passed by the competent authority applying his mind and hence it cannot be termed as void. He relied on Patel Engineering Limited's case (supra) and Kulja Industries Limited's case (supra).

A reading of the extracts of the above procedure clearly indicates that a *prima facie* case has to be made out for initiating action for declaring a consultant as a poor performer due to the reasons mentioned therein. A show cause notice has to be given indicating therein clearly the charges (based on facts as can be proved). The party against whom action is sought to be taken is entitled to submit a reply. Thereafter, after submission of recommendations by the committee, the competent authority may give an opportunity to the firm to hear them in person and

pass an order duly giving findings on the charges. The impugned order was passed after issuing a show cause notice and receiving a reply from the petitioner. But, no opportunity of hearing was given as there was no request for the same. It is also evident that no finding was recorded with regard to charges levelled against the petitioner. The decisions cited by the learned counsel for the petitioner are not applicable to the facts of the case so far as violation of principles of natural justice are concerned, as the impugned order was preceded by a show cause notice and affording an opportunity to submit explanation by the petitioner.

With regard to the lack of opportunity of hearing also I am not in agreement with the petitioner as in Patel Engineering Limited's case (supra), the Hon'ble Supreme Court clearly held that there is no inviolable rule that a personal hearing of the affected party must precede every decision of the State and the said decision was based on Union of India v. Jesus Sales Corporation¹¹, which was a case relating to a quasi judicial decision. But, the impugned orders cannot be sustained in the absence of reasons. No order involving 'civil consequences' shall be passed without reasons.

In Southern Painters's case (supra), while examining the case of a black listed contractor, the Hon'ble Supreme Court observed as follows:

"5. The Full Bench decision in V. Punnen Thomas v. State of Kerala (AIR 1969 Ker. 81) presents an interesting stage in the development of law on the matter. The facts were somewhat similar. The majority opinion in that case held:

"Surely, the term, 'civil consequences' means something more than consequences which the person concerned does not like. There must be at least the possibility of an invasion of some civil right of his before it can be said that anything done in

¹¹ (1996) 4 SCC 69

respect of him has civil consequences. A mere refusal to afford a man the prospect of doing profitable or unprofitable business with the Government, of entering into advantageous relationships with the Government as it has been put entails no civil consequences however serious a blow that might be to the person concerned.

It is said that the impugned order casts a stigma on the petitioner. Assuming that it does, does that by itself attract the principle of natural justice? We think not. The question whether an impugned act involves a stigma or not is relevant only for the purpose of determining whether the act sounds only in the region of contract or involves a punishment attracting the rules of natural justice....

To accept the contention of the petitioner would so widen the scope of the principle of audi alteram partem and therefore the scope for judicial interference as to seriously hamper the administration. It would mean, for example, that before Government refuses to deal with a person.... it would have to give the person concerned a hearing." (pp. 84-85)

6. However, in his dissenting opinion, Justice Mathew (as he then was) said:

"Government has right like any private citizen to enter into contracts with any person it chooses and no person has a right fundamental or otherwise to insist that Government must enter into a contractual relation with him. A contractual relationship presupposes a consensus of two minds. If Government is not willing to enter into contract with a person, I do not think that Government can be forced to do so. It is one thing to say that Government, like any other private citizen can enter into contract with any person it pleases, but a totally different thing to say that Government can unreasonably put a person's name in a blacklist and debar him from entering into any contractual relationship with the Government for years to come. In the former case, it might be said that Government is exercising its right like any other private citizen, but no democratic government should with impunity passing proceeding which will have civil consequences to a citizen without notice and an opportunity of being heard. The reason why the proceeding for blacklisting the petitioner and debarring him from taking Government work for ten years was passed, is that he committed irregularities in connection with the tender of the contract work.

An ex parte adverse adjudication that the petitioner committed irregularities in connection

with the tender for working down timber from Udumbandhola Block No. 1 by Government on the report of some petty officer without notice and an opportunity of being heard to the petitioner and putting his name in the blacklist and debarring him from 'taking any Government work for ten years' by way of punishment, appear to me, to be against all notions of fairness in a democratic country." (pp. 86-87)

7. Justice Mathew held that "Reputation can be viewed both as an interest of personality and as an interest of substance, viz., as an asset" and recalled these words of Roscoe Pound:

"On the one hand there is the claim of the individual to be secured in his dignity and honour as part of his personality in a world in which one must live in society among his fellow-men. On the other hand there is the claim to be secured in his reputation as a part of his substance in that in a world in which credit plays so large a part the confidence and esteem of one's fellow-men may be a valuable asset." (See: Interest of Personality' 28 Harvard Law Review, pp. 445, 447).

Concluding, Justice Mathew observed:

"As the memorandum in question casts a stigma on the reputation of the petitioner, which is both an interest of personality and an interest of substance, and as it is attended with civil consequences to the petitioner, and as it operates as a punishment for an alleged irregularity, I think, the memorandum should have been proceeded by notice and an opportunity of being heard. If anybody were to say that Ext. P-1 is an administrative proceeding and so no notice or opportunity of being heard was required and that no interference under Article 226 is possible, I would answer him in the high and powerful words of Mr Belloc, 'you have mistaken the hour of the night: it is already morning'." (p. 89)

8. The minority view of Justice Mathew is now the law. The majority view in V. Punnen Thomas case is not good law and must be considered to have been, impliedly, overruled by the Erusian case. Indeed, in Joseph Vilangandan v. Executive Engineer, Buildings & Roads (PWD) Division, Ernakulam (1978) 3 SCC 36, 41) it was held:

"The majority judgment of the Kerala High Court, inasmuch as it holds that a person is not entitled to a hearing, before he is blacklisted, must be deemed to have been overruled by the decision of this Court in Erusian Equipment....."

9. In *Erusian Equipment & Chemicals Ltd. v. State of W.B.* this Court observed: (SCC p. 75, paras 17, 18 & 20)

"The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people.

Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

10. Again, in *Raghunath Thakur v. State of Bihar* ((1989) 1 SCC 229) this Court observed: (SCC p. 230, para 4)

"Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order."

In *Kranti Associates Private Limited v. Masood Ahmed Khan*¹², the Hon'ble Supreme Court examined the principles of natural justice that have to be complied with by emphasizing the duty to give reasons. The court examined the earlier decisions and quoted with approval the following observations made in those decisions:

¹² 2010 (9) SCC 496

"28. In *Gurdial Singh Fijji vs. State of Punjab*, (1979) 2 SCC 368, this Court, dealing with a service matter, relying on the ratio in *Union of India v. Mohan Lal Capoor* ((1973) 2 SCC 836), held that "rubber-stamp reason" is not enough and virtually quoted the observation in *Capoor* (supra) to the extent that:

"28....Reasons are the links between the materials on which certain conclusions are based and the actual conclusions." (See AIR p.377 para 18).

29. In a Constitution Bench decision of this Court in *H.H. Shri Swamiji of Shri Admar Mutt etc. etc. vs. The Commissioner, Hindu Religious and Charitable Endowments Dept. and Ors.*, AIR 1980 SC 1, while giving the majority judgment Chief Justice Y.V. Chandrachud referred to (SCC p.658, para 29) *Broom's Legal Maxims* (1939 Edition, page 97) where the principle in Latin runs as follows:

"Cessante ratione legis cessat ipsa lex"

30. The English version of the said principle given by the Chief Justice is that: (*H.H. Shri Swamiji case* (supra), SCC p.658, para 29)

"29.....reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." (See AIR para 29 page 11)

31. In *Bombay Oil Industries Pvt. Ltd. vs. Union of India and Others*, AIR 1984 SC 160, this Court held that while disposing of applications under Monopolies and Restrictive Trade Practices Act the duty of the Government is to give reasons for its order. This court made it very clear that the faith of the people in administrative tribunals can be sustained only if the tribunals act fairly and dispose of the matters before them by well considered orders. In saying so, this Court relied on its previous decisions in *Capoor* (supra) and *Siemens Engineering and Manufacturing Co. of India Ltd. v. Union of India* (1976) 2 SCC 981, discussed above.

32. In *Ram Chander vs. Union of India*, AIR 1986 SC 1173, this Court was dealing with the appellate provisions under the Railway Servants (Discipline and Appeal) Rules, 1968 condemned the mechanical way of dismissal of appeal in the context of requirement of Rule 22(2) of the aforesaid Rule. This Court held that the word "consider" occurring to the Rule 22(2) must mean the Railway Board shall duly apply its mind and give reasons for its decision. The learned Judges held that the duty to give reason is an incident of the judicial process and

emphasized that in discharging quasi-judicial functions the appellate authority must act in accordance with natural justice and give reasons for its decision (SCC pp.106-07, Para 4 : AIR page 1176 para 4).

33. In *Star Enterprises vs. City and Industrial Development Corporation of Maharashtra Ltd. and others*, (1990) 3 SCC 280, a three-Judge Bench of this Court held that in the present day set up judicial review of administrative action has become expansive and is becoming wider day by day and the State has to justify its action in various field of public law. All these necessitate recording of reason for executive actions including the rejection of the highest offer. This Court held that disclosure of reasons in matters of such rejection provides an opportunity for an objective review both by superior administrative heads and for judicial process and opined that such reasons should be communicated unless there are specific justification for not doing so (see SCC Para 10, page 284-285).

34. In *Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi and others*, (1991) 2 SCC 716, this Court held that even in domestic enquiry if the facts are not in dispute non-recording of reason may not be violative of the principles of natural justice but where facts are disputed necessarily the authority or the enquiry officer, on consideration of the materials on record, should record reasons in support of the conclusion reached (see SCC para 22, pages 738-739)

35. In *M.L. Jaggi vs. Mahanagar Telephones Nigam Limited and others*, (1996) 3 SCC 119, this Court dealt with an award under Section 7 of the Telegraph Act and held that since the said award affects public interest, reasons must be recorded in the award. It was also held that such reasons are to be recorded so that it enables the High Court to exercise its power of judicial review on the validity of the award. (see SCC para 8, page 123)."

The Hon'ble Supreme Court ultimately summarized the principles as follows:

"47. Summarizing the above discussion, this Court holds:

a. In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

- b. A quasi-judicial authority must record reasons in support of its conclusions.
- c. Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
- d. Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- e. Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
- f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.
- g. Reasons facilitate the process of judicial review by superior Courts.
- h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.
- i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.
- j. Insistence on reason is a requirement for both judicial accountability and transparency.
- k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.
- l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.
- m. It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject

to broader scrutiny. (See David Shapiro in *Defence of Judicial Candor* (1987) 100 Harvard Law Review 731-737).

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See *Ruiz Tarija v. Spain* (1994) 19 EHRR 553, at 562 para 29 and *Anyia vs. University of Oxford*, 2001 EWCA Civ 405 (CA), wherein the Court referred to Article 6 of European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

o. In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

A perusal of the impugned orders show that for coming to the conclusion that the petitioner is a poor performer, no findings were recorded on the charges levelled against the petitioner. In fact, the show cause notice itself does not contain any specific charges, except narrating the events that led to the issuance of show cause notice. In legal parlance, framing of charge has a definite connotation and the charges have to be conformed to the said requirement. Learned counsel for the respondents tried to sustain the order by producing before this Court a copy of recommendation made by the committee. Even assuming that there are recommendations of the committee, in the absence of findings recorded by the competent authority, the order suffers from illegality. Even the appellate authority also did not cure the said defect. The very preamble of the procedure indicates that the issuance of show cause notice should be based on certain grounds and those grounds which take the shape of charges should be specific and should result in a finding. Though the learned counsel for the respondents relied on Kulja Industries Limited's case (supra) to show that the order can be upheld as it debars

the petitioner only for a period of three years, but the order cannot be held to be valid in the absence of reasons. As held in *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi*¹³, the action of an authority has to be judged by the reasons stated while making the order and supplementary reasons in the shape of affidavits have to be excluded.

The relevant observations of the Hon'ble Supreme Court are:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in *Commissioner of Police, Bombay v. Gordhandas Bhanji* (AIR 1952 SC 16):

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.”

In the normal circumstances, I would have remanded the case to the second respondent for giving reasons in support of the order. As stated above, I noticed that right from the stage of issuing show cause notice, the charges were not properly framed and there cannot be any finding with regard to a particular charge in the absence of properly framed charges. In the circumstances, the Writ Petition is allowed and the impugned orders are set aside. There shall be no order as to costs.

¹³ 1978 (1) SCC 405

As a sequel thereto, the miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

A. RAMALINGESWARA RAO, J

Date: 20th February, 2017
Nsr

