

HIGH COURT OF CHHATTISGARH, BILASPUR
Writ Petition (C) No.2940 of 2016

K. Seshagiri Rao & Company, A Firm Regd. Under Indian Partnership Act & Rep. By its Managing Partner – Shri K. Venkateswara Rao, aged 53 years, S/o Late K. Seshagiri Rao, R/o -H. No.23-98/3, 10B, Kakatiya Nagar, Habsiguda, Hyderabad

---- Petitioner

Versus

1. Ferroz Scarp Nigam Limited, A Company incorporated under Companies Act, Rep. By its Chairman & Managing Director, having its Regd. Office at FSNL Bhavan, Equipment Chowk, Central Avenue, P.O. Box No.37, Bhilai, District-Durg (CG)
2. The Deputy General Manager, Ferroz Scrap Nigam Limited, Regd. Office at FSNL Bhavan, Equipment Chowk, Central Avenue, P.O. Box No.37, Bhilai, District-Durg (CG)

---- Respondents

For Petitioner	:	Mr.Subramaniam Kurulla and Mr.Sharad Mishra, Advocate
For Respondents	:	Mr.N.K.Vyas, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal
Order on Board

26/03/2018

1. Ferroz Scrap Nigam Limited (hereinafter called as "FSNL")-respondents herein had invited Pre-qualification Tender (hereinafter called as "PQT") for empanelment of the contractors on its Rolls for a period of 3 years. In pursuance of the said tender, the petitioner firm has submitted its tender document, which was considered by the respondents and the petitioner was also empanelled as one of the contractors on the Roll of the respondent-FSNL in accordance with the PQT. Pursuant to the empanelment, the respondent-FSNL has also exhibited the name of the petitioner's firm in its website in the list of the Contractors

across India. After empanelment the petitioner firm got access to the works / tender that were being floated by the respondents. The advantage of above empanelment is that only empanelled contractors alone will participate in the Tenders as the respondents do not invite any open tenders in public. It is admitted case that as per clause 18 of the PQT, the petitioner firm has submitted an undertaking on affidavit on 3.11.2014, but later on, notice dated 5.9.2016 (Annexure P/7) was issued by the respondent-FSNL to the petitioner firm that he has participated in the tender floated by Visakhapatnam Steel Plant in violation of undertaking given by the petitioner firm, which was replied by the petitioner on 10.9.2016 and later on, by order dated 26.10.2016 the respondent-FSNL finding non-compliance of terms and conditions of the PQT and violation of undertaking given by the petitioner firm, depanelled the petitioner firm from the enlisted parties and debarred him from empanelment for a further period of 3 years w.e.f. 26.10.2016. Feeling aggrieved and dissatisfied with the order passed by the respondent-FSNL dated 26.10.2016, this writ petition has been filed by the petitioner herein stating inter-alia that the petitioner has not violated the undertaking given in compliance of clause 18 of the PQT and also pleaded that order depaenelling and debarring has been passed in gross violation of the principles of natural justice, therefore, it is liable to be quashed.

2. Return has been filed by the respondents stating inter-alia that the petitioner has committed breach of undertaking given in

compliance of clause 18 of the PQT and participated in the tender floated by the Visakhapatnam Steel Plant, he was served with a notice dated 5.9.2016 and after reply is filed by the petitioner firm, decision dated 26.10.2016 has been taken by the respondent-FSNL vide Annexure P/1 depanelling the petitioner from the enlisted parties and also debarring him from empanelment for a further period of 3 years w.e.f. 26.10.2016, which is strictly in accordance with law.

3. No rejoinder has been filed.
4. Mr.Subramaniam Kurella, learned counsel for the petitioner would submit that the impugned order passed by the respondent-FSNL depanelling the petitioner from the enlisted parties and also debarring him from empanelment for a further period of 3 years w.e.f. 26.10.2016 is in complete violation of principles of natural justice as well as in breach of settled principle of law declared by the Supreme Court in catena of judgments. He would further submit that notice dated 5.9.2016 is not show-cause notice for depanelling and debarring the petitioner from empanelment, therefore, the impugned order deserves to be set aside.
5. On the other hand, Mr.N.K.Vyas, learned counsel for the respondents while supporting the impugned order would submit that the petitioner was served with a notice dated 5.9.2016, reply was filed by the petitioner on 10.9.2016 and thereafter a detailed order dated 26.10.2016 has been passed, which is strictly in accordance with law and no interference is warranted under Article

226/227 of the Constitution of India.

6. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also gone through the records with utmost circumspection.
7. Before considering all the factual aspects of the matter, it would be appropriate to notice the principles of law, on which the order of depanelling/debarring can be passed by the competent authority.
8. In the matter of **M/s. Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and another**¹, Their Lordships of the Supreme Court have clearly held that before placing the name of person on blacklist, that person is entitled to be heard. Relevant paragraph of the report states as under:-

“20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. 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.”

9. The aforesaid principles of law laid down *qua* the blacklisting has been followed by the Supreme Court again in the matter of **Joseph Vilangandan v. The Executive Engineer (P.W.D.), Ernakulam and others**².
10. Thus question raised in this writ petition is no longer res-integra and stands authoritatively decided by the pronouncement

1AIR 1975 SC 266
2 AIR 1978 SC 930

of the Supreme Court in the matter of Raghunath Thakur Vs. State of Bihar and Ors.³, wherein the Supreme Court has held as under:-

“4. Indisputably, no notice had been given to the appellant of the proposal of black-listing 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 black-listing 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 black-listing 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.”

11. In Southern Painters Vs. Fertilizers & Chemicals Travancore Ltd. And another⁴, Their Lordships of the Supreme Court have held that black-listing of the petitioner contractor affects his reputation, therefore, he is entitled to opportunity of being heard. It was observed as under:-

“11. The deletion of the appellant's name from the list of approved contractors on the ground that there were some vigilance report against it, could only be done consistent with and after due compliance with the principles of natural justice. That not having been done, it requires to be held that withholding of the tender form from the appellant was not justified. In our opinion, the High Court was not justified in dismissing the writ petition.”

12. Very recently, in the matter of Gorkha Security Services

³(1989) 1 SCC 229
⁴1994 Supp (2) SCC 699

Vs. Government (NCT of Delhi) and others⁵ the Supreme Court took cognizance of **Raghunath Thakur** (supra) and held that the fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. It was observed as under:-

“21. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of Show Cause Notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/ breaches complained of are not satisfactorily explained. When it comes to black listing, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.”

26. In the present case, it is obvious that action is taken as provided in sub clause 2(ii). Under this clause, as is clear from the reading thereof, the Department had a right to cancel the contract and withhold the agreement. That has been done. The Department has also a right to get the job which was to be carried out by the defaulting contractor, to be carried out from other contractor(s). In such an event, the Department also has a right to recover the difference from the defaulting contractor. This clause, no doubt, gives further right to the Department to blacklist the contractor for a period of 4 years and also forfeit his earnest money/ security deposit, if so required. It is thus apparent that this sub-clause provides for various actions which can be taken and penalties which can be imposed by the Department. In such a situation which action the Department proposes to take, need to be specifically stated in the show

cause notice. It becomes all the more important when the action of black listing and/ or forfeiture of earnest money/ security deposit is to be taken, as the clause stipulates that such an action can be taken, if so warranted. The words "if so warranted", thus, assume great significance. It would show that it is not necessary for the Department to resort to penalty of black listing or forfeiture of earnest money/ security deposit in all cases, even if there is such a power. It is left to the Department to inflict any such penalty or not depending upon as to whether circumstances in a particular case warrant such a penalty. There has to be due application of mind by the authority competent to impose the penalty, on these aspects. Therefore, merely because of the reason that Clause 27 empowers the Department to impose such a penalty, would not mean that this specific penalty can be imposed, without putting the defaulting contractor to notice to this effect.

27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show cause notice, it can be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.

33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned Additional Solicitor General. In the first instance, we may point out that no such case was set up by the respondents that by omitting to state the proposed action of blacklisting, the appellant in the show-cause notice, has not caused any prejudice to the appellant. Moreover, had the action of black listing being specifically proposed in the show- cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the

defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to black list the appellant. Therefore, it is not at all acceptable that non mentioning of proposed blacklisting in the show cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant.”

13. Now, the question is whether the principle of opportunity of hearing has been afforded to the petitioner before depaneling the name of the petitioner from the enlisted contractors and debarring him from empanelment for a further period of 3 years ?

14. The respondents have submitted that the notice dated 5.9.2016 is the notice of show-cause served to him for taking action against the petitioner firm, which reads as under:-

“ Ferro Scrap Nigam Limited
A Govt. of India Undertaking, Mini Ratna-II, IMS Certified Company
Regd. Office: F.S.N.L. Bhawan, Equipment Chowk, Central Avenue, Post
Bon No.37, Bhilai – 490001 (C.G.) INDIA
FC/6123/2016 date 05.9.2016
E-mail:ksripl@ksrgroup.in/Post
M/s. K. Seshagiri Rao & Co.,
Koneru House, 2-98/3, 10B, Kakateeya Nagar,
Habsiguda, Hyderabad-500 007

Sub: Participation in Tender in violation of undertaking
Dear Sir,

An information has been received that M/s. K. Seshagiri Rao & Co. has participated in the Tender No.VSP/WC/SSD/76262-O/OT/2015 dated 3.08.2016 for the work of “Recovery of Steel Scarp, iron scrap, iron/steel much & fines and used /rejected refractories from central dump & processing yard (CDPY), transportation of slag & debris” at Visakhapatnam Steel Plant, which is a violation of undertaking given by you as per clause No.16 and clause No.18 of prequalification tender No.TN09/14-15 of FSNL published for empanelment with FSNL.

In view of the above it is expected that you shall take necessary steps immediately in order to maintain your empanelment in FSNL as per your undertaking dated 03.11.2014.

Thanking you,

Yours faithfully,
Ferro Scrap Nigam Limited,
(G.C.Naidu)
Dy.General Manager (MM)”

15. Now the question is whether the said notice dated 5.9.2016 issued to the petitioner is a show-cause notice for taking penal action for depanelling from enlisted contractors and debarring from empanelment for a further period of 3 years.

16. In the “Principles of Administrative Law” of M.P. Jain and S.N. Jain (5th edition), Chapter IX meaning of show cause notice has been described as under:-

“**Notice:** A basic principle of natural justice is that before a process of adjudication starts the authority concerned should give to the effected party a notice of the case against him, and the action proposed to be taken against him, and the action proposed to be taken against him so that he may adequately defend himself. Notice is the first and extremely important step in the hearing procedure. Any proceeding taken without notice would violate natural justice and would thus be invalid. Notice is regarded as minimum obligatory condition.”

17. The right to hearing becomes illusionary if the party has no knowledge of the allegations which he has to meet. The normal Rule is that notice is must to hold a fair hearing. Further the grounds given in the notice on which the action is proposed to be taken should be couched in clear, specific and unambiguous terms and not in vague or general terms. If these conditions are not satisfied the person cannot be said to have reasonable opportunity of being heard, such a notice is no notice. It amounts to violation

of natural justice and any consequential proceedings based there on would be vitiated.

18. Further, the Supreme Court in the matter of Oryx Fishery Pvt. Ltd. Vs. Union of India⁶ has held the meaning of show-cause notice. Relevant paragraphs of the report state as under:-

“27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony.

31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and especially when he has the power to take a punitive step against the person after giving him a show cause notice.”

19. Reverting to the facts of the present case after following the

principle of law laid down by the Supreme Court in the aforesaid judgments (supra), it is quite vivid that notice dated 5.9.2016 is only notice given to the petitioner to take necessary corrective steps in order to maintain his empanelment in respondent-FSNL as per undertaking given by the petitioner on 3.11.2014 and by no stretch of imagination, it can be said to be a show-cause notice for deempanelment in respondent-FSNL and further by filing reply the the petitioner has stated that he has not violated the undertaking given by him and his alleged participation does not amount to participation in violation of undertaking given as per clause 18 of the PQT. Neither it contains the grounds on which action of empenelling/debarring is proposed nor it indicates that the petitioner is to be depanelled and debarred for a further period of 3 years. Moreover, on 15.9.2016 the respndent-FSNL has issued the work order to the petitioner being E-Tender No.TN/2016/107 dtd.11.5.2016 to provide on hire module of equipment to carrying out the job of handling steel skull at FSNL, Durgapur Unit. Therefore, the said notice cannot be said to be notice to show-cause for inflicting extreme action of depaneling/debarring the petitioner from empanelment for a further period of 3 years and the petitioner has been depanelled/debarred for a further period of 3 years in full violation of principles of natural justice, which deserves to be quashed.

20. As a fallout and consequence of the above-stated discussion, the impugned order dated 26.10.2016 (Annexure P/1)

depanelling the petitioner from enlisted contractors and debarring from empanelment for a further period of 3 years is hereby quashed. However, liberty is reserved in favour of the respondents to proceed further in accordance with law.

21. The writ petition is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K. Agrawal)

Judge

B/-