

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.No.5840 of 2013

and

M.P.No.1 of 2013

Sri Ganga Transport,
Rep. by Proprietor,
D-13, CMDA Truck Terminal Complex,
Madhavaram, Ponniyamman Medu R.O.,
Chennai-600 110.

.. Petitioner

Vs.

1. The Superintending Engineer,
Tower II, 9th Floor, No.1A,
Gandhi Irwin Road,
Egmore, Chennai-600 008.

2. The Member Secretary,
Chennai Metropolitan Development Authority,
1, Gandhi Irwin Road,
Egmore, Chennai-600 008.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari to call for the entire records of the second respondent in Letter No.SE-1/CW/PAIV/1036/2007, dated 28.02.2013 and quash the same.

For Petitioner : Mr.P.J.Rishikesh

For Respondents : Mr.N.Sampath

ORDER

The petitioner-Transport Company has come forward with the above Writ Petition praying for issuance of a Writ of Certiorari to call for the entire records of the second respondent in Letter No.SE-1/CW/PAIV/1036/2002, dated 28.02.2013 and quash the same.

2. According to the petitioner, a tender was invited for collection of parking fees in heavy vehicles parking area in bus and truck terminal complex in Madhavaram at Chennai, which was notified on 21.01.2013 and was to be opened on 08.02.2013. The petitioner was the successful bidder and quoted the highest amount of Rs.49 lakhs, which was accepted, but the petitioner could not pay the amount initially and requested/prayed that the

amount may be permitted to be paid in instalments and also prayed for time. After several correspondences, the request of the petitioner was rejected by the impugned communication, dated 28.02.2013. It is submitted by the learned counsel for the petitioner that though there is no bar for the authorities to reject the request if there are no genuine grounds, the request of the petitioner being a genuine one, the said bar of the petitioner from participating in the tenders, cannot be without issuance of any show cause notice, more particularly, when there is no clause in the application itself debarring any one or the petitioner from participating in the tender process.

3. Apart from that, one of the conditions imposed in the tender application is that the CMDA will forfeit the EMD (Earnest Money Deposit) if the tenderer does not adhere to the payments within the specified period of time, as per Clause 6.4 dealing with Earnest Money Deposit and also as per Clause 21 of the tender conditions and this has already been done and that the petitioner cannot be put to any suffering by debarring him, which may go against him in the future participation of the tender process in case he participates.

4. Learned counsel for the respondents/CMDA submitted that the debarment is only for a period of three years and even though the petitioner was the successful bidder, as he has not paid the tender amount, it is for the respondents-authorities to decide the debarment of the petitioner from participating in the future tender and that it is only a decision taken internally in the administration and that the period of three years has already expired. It is submitted that no prejudice is going to be caused, if the petitioner is going to participate in future tender process.

5. Heard both sides and perused the materials available on record.

6. It is not in dispute that there was tender process for collection of parking fees in heavy vehicles parking area in bus and truck terminal complex in Madharavam at Chennai. The petitioner was successful bidder and he had not paid the required amount as agreed by him in the tender process and that the request of payment of the amount in instalments, had been turned down by the authority. Though this Court agrees that there is no clause in the tender application form that he will be debarred from participating in the future tender process for a period of three years, in the case on hand, the petitioner was not given any show cause notice with regard to his debarment from participating in the future tender process for a period of three years. If such a clause is found in tender, it may be a different issue, but however, this Court is not rendering any finding to that effect in this Writ Petition, as there is no show cause notice issued to the petitioner and that the said debarment for a period of three years, cannot be put against the petitioner and it shall not be a black-mark/black-list for the petitioner to participate in the future tender processes.

7. In the above context, learned counsel for the petitioner relied on a decision of the Supreme Court reported in 2014 (9) SCC 105 (Gorkha Security Services Vs. Govt. of NCT of Delhi), and the relevant portion of the observations of the Apex Court therein, reads as follows:

"Necessity of serving show-cause notice as a requisite of the principles of natural justice

16. It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.

17. Way back in the year 1975, this Court in *Erusian Equipment & Chemicals Ltd. Vs. State of W.B.*, [(1975) 1 SCC 70], highlighted the necessity of giving an opportunity to such a person by serving a show-cause notice thereby giving him opportunity to meet the allegations which were in the mind of the authority contemplating blacklisting of such a person. This is clear from the reading of paras 12 and 20 of the said judgment. Necessitating this requirement, the Court observed thus: (SCC pp. 74-75)

"12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of

equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

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."

18. Again, in Raghunath Thakur Vs. State of Bihar [(1989) 1 SCC 229] the aforesaid principle was reiterated in the following manner: (SCC p.230, para 4):

"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 that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do in accordance with law i.e. after giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor.

We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is thus disposed of."

19. Recently, in Patel Engg. Ltd. Vs. Union of India [(2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] speaking through one of us (Jasti Chelameswar, J.) this Court emphatically reiterated the principle by explaining the same in the following manner: (SCC pp. 262-63, paras 13-15):

"13. The concept of 'blacklisting' is explained by this Court in Erusian Equipment & Chemicals Ltd. Vs. State of W.B. [(1975) 1 SCC 70] as under: (SCC p.75, para 20)

'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.'

14. The nature of the authority of the State to blacklist the persons was considered by this Court in the abovementioned case

["12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection

of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation." (Erusian Equipment case [Erusian Equipment & Chemicals Ltd. Vs. State of W.B., (1975) 1 SCC 70], SCC p.74, para 12)] and took note of the constitutional provision (Article 298)

["298. Power to carry on trade, etc.—The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:

Provided that—(a) the said executive power of the Union shall, insofar as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in

each State to
legislation by the
State; and

(b) the said
executive power of each
State shall, insofar as
such trade or business
or such purpose is not
one with respect to
which the State
Legislature may make
laws, be subject to
legislation by
Parliament."],

which authorises both the
Union of India and the States
to make contracts for any
purpose and to carry on any
trade or business. It also
authorises the acquisition,
holding and disposal of
property. This Court also
took note of the fact that
the right to make a contract
includes the right not to
make a contract. By
definition, the said right is
inherent in every person
capable of entering into a
contract. However, such a
right either to enter or not
to enter into a contract with
any person is subject to a
constitutional obligation to
obey the command of Article
14. Though nobody has any
right to compel the State to
enter into a contract,
everybody has a right to be
treated equally when the
State seeks to establish
contractual relationships.

["17. The Government is
a Government of laws and not
of men. It is true that
neither the petitioner nor
the respondent has any right
to enter into a contract but
they are entitled to equal
treatment with others who
offer tender or quotations

for the purchase of the goods. The privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. 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." (Erusian Equipment case [Erusian Equipment & Chemicals Ltd. Vs. State of W.B., (1975) 1 SCC 70] , SCC p.75, para 17)]

The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the above judgment in Erusian Equipment case [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a

contractual relationship with a person or a class of persons for a legitimate purpose. 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 the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary—thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg. [Patel Engg. Ltd. Vs. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445].

Contents of the show-cause notice

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 blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

22. The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement."

सत्यमेव जयते

8. In the case on hand, as the period of debarment is already over, the petitioner is permitted to participate in the future auctions/tenders and that the respondents/CMDA shall not treat the debarment of the petitioner as a black-mark/black-list in the future auction/tenders, if the petitioner is otherwise eligible.

9. Further, in view of the above decision of the Apex Court, as there is no clause either in the tender application or at the time of intimating the petitioner that if the amount is not paid, the tenderer will be black-listed, this Court is of the view that the petitioner must be given an opportunity by issuance of show cause notice and more particularly, in this

case, if there is the said clause, the petitioner cannot contend that he must be heard, as the petitioner could be informed that he was aware that in case he is not able to pay the amount, he would be debarred.

10. With the above observations, the Writ Petition is disposed of. No costs. Consequently, the miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS VIII)

/true copy/

Sub Asst. Registrar

CS
To

1. The Superintending Engineer,
Tower II, 9th Floor, No.1A,
Gandhi Irwin Road,
Egmore, Chennai-600 008.
 2. The Member Secretary,
Chennai Metropolitan Development Authority,
1, Gandhi Irwin Road,
Egmore, Chennai-600 008.
- + 1 cc to Mr.N.Sampath Advocate,SR.14928
+ 1 cc to Mr.P.J.Rishikesh Advocate,SR.14814
+ 1 cc to The Govt.Pleader, SR.16317

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