GAHC010103682020

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C) 3094/2020

1:M/S. ORIENTAL ENGINEERS
2ND FLOOR, H NO. 237, R G BARUAH ROAD, OPP AMBIKA SERVICE STATION, GUWAHATI- 781024, REP. BY ITS PROP SRI KANGKAN DUTTA, S/O- LATE PARASHURAM DUTTA, H NO. 1, 1ST BYE LANE, NABAGIRI ROAD, CHANDMARI, GUWAHATI- 03

VERSUS

1:THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER AND SPECIAL SECRETARY TO THE GOVT OF ASSAM, PWD (ROADS), DISPUR, GUWAHATI- 06

2:THE DEPUTY SECRETARY
TO THE GOVT OF ASSAM
PWD (ROADS)
CONFIDENTIAL CELL
JANATA BHAWAN
DISPUR
GUWAHATI- 06

3:THE CHIEF ENGINEER
PWD (ROADS)
ASSAM
CHANDMARI
GUWAHATI- 06

4:THE EXECUTIVE ENGINEER
PWD (ROADS)
EAST GUWAHATI TERRITORIAL ROAD DIVISION
GUWAHATI- 21

5:THE ASSISTANT ENGINEER
PWD (ROADS) EAST GUWAHATI TERRITORIAL ROAD DIVISION
GUWAHATI- 2

Advocate for the Petitioner : MR. I CHOUDHURY

Advocate for the Respondent : SC, PWD

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

JUDGMENT

Date : 19-08-2020

Heard Mr. I. Choudhury, learned senior counsel for the petitioner. Also heard Mr. D. Nath, learned Additional Senior Government Advocate appearing for the authorities under the PWRD.

2. The petitioner who is a registered class-1A contractor under the PWRD, was, amongst others, allotted a work as per the letter of acceptance No. CE/CW/32/2018-19/13 dated 13.02.2019. Although the original period for completion of the work was 3 (three) months, but as because of certain intervening factors, the time for completion of the work was extended up to 31.08.2019. Ultimately, according to the petitioner, the work was completed prior to the extended period of 31.08.2019. Later on, there was a complaint from the Commissioner & Secretary to the Governor of Assam that the approach road to the Raj Bhawan was damaged and some small pot holes had developed on the road. There was some kind of enquiry on the said complaint and it is stated that the Chief Engineer, PWD had submitted a report on 30.04.2020 that some loose materials were present in the bituminous mixture which was due to inadvertence.

3. On 05.05.2020, the Executive Engineer, PWRD, East Guwahati Territorial Roads Division informed the petitioner about the inspection being conducted by the Chief Engineer and the report submitted thereon. On being so informed, the petitioner proposed before the department that necessary rectification would be done at the cost of the petitioner. The rectification work although allowed, could not be completed by the petitioner because of some difficulties due to the covid-19 pandemic situation. Accordingly, by a letter dated 19.05.2020, the petitioner prayed for some further time for completion of the repair work. Accordingly, the Executive Engineer, PWRD, East Guwahati Territorial Roads Division, vide letter no. 387 dated 05.06.2020 informed the Commissioner & Secretary to the Governor of Assam that the remaining rectification work would be carried out upon

favourable weather conditions and availability of labour.

4. On 12.06.2020, the Deputy Secretary & the Special Officer to the Governor of Assam informed the Chief Engineer, PWRD that there was a direction for completion of the work within a period of 1(one) week. On 15.06.2020, due to incessant rains, some landslide had occurred in the hill slope near Raj Bhawan which again damaged the road to some extent and landslide had weakened the layer underneath the road thereby jeopardizing its stability. The said development was also informed to the Chief Engineer, PWRD, by the Executive Engineer, PWRD, East Guwahati Territorial Roads Division on 18.06.2020.

5. In the aforesaid circumstance, the Chief Engineer, PWRD, Assam had issued the order no. CE/ADT(II)/130/2016/12-A dated 22.07.2020 by which the petitioner was debarred for a period of 3(three) months with immediate effect from performing any work.

6. Without going into any other aspect, as regards the order dated 22.07.2020 by which the petitioner was debarred for a period of 3(three) months, we examine the question as to whether the said act of debarring the petitioner was done by following the due procedure of law. Debarring a contractor to perform any work, in other words, may be for a given period of time, would tantamount to blacklisting the contractor for the said period. The law as regards the blacklisting of a contractor had been settled by the Supreme Court in M/S Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal & anr. Reported in (1975)1 SCC 70 wherein in paragraph 20, it has been provided that blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purpose of gains and therefore, the fundamentals of fair play would require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

7. The relevant proposition laid down by the Supreme Court in M/S Erusian Equipment & Chemicals Ltd. (supra) in paragraph 12, 15, 17, 19, 20 and 21 are extracted as below:

> "*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 black- listing. 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.

15. The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

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. This 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 as fairly without discrimination and without unfair procedure. Reputation is a part of person's character and personality. Blacklisting tarnishes one's reputation.

19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised the nature of sanctions involved therein.

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.

21. With regard to the case of the petitioners, it is made clear that the authorities will give an opportunity to the petitioners to represent their case, and the authorities will hear the petitioners as to whether their name should be put on the blacklist or not. This is made clear that the decision on this question will not have any effect on the proceedings pending in Calcutta High Court where the petitioner has challenged the adjudication proceedings under the Foreign Exchange Regulations Act. Any decision of the authorities on the blacklisting will have no effect on the correctness of any of the facts involved in those proceedings."

8. A reading of the proposition made by the Supreme Court would make it implicitly clear that any contractor can be blacklisted by the authorities only upon giving him an opportunity to present his case on the matter of dispute.

9. In the circumstance, we required Mr. D. Nath, learned Additional Senior Government Advocate appearing for the respondent PWRD as to whether any show-cause notice or any opportunity was given to the petitioner to present his case before the order dated 22.07.2020 was passed by the Chief Engineer, PWRD whereby he was debarred for a period of 3(three) months. Accordingly, by an earlier order dated 17.08.2020, Mr. D. Nath, learned Additional Senior Government Advocate was required to obtain the said information. Today when the matter is taken, Mr. D. Nath, learned Additional Senior Government Advocate, upon instruction makes a statement that neither any show-cause notice nor any opportunity was given to the petitioner before the order dated 22.07.2020 was issued by the Chief Engineer, PWRD.

10. In view of such categorical statement on behalf of the PWRD, by taking into consideration, the law laid down by the Supreme Court in M/S Erusian Equipment & Chemicals Ltd. (supra), we are of the view that the order dated 22.07.2020 would not be sustainable in law. Accordingly, the order dated 22.07.2020 debarring the petitioner for a period of 3(three) months is set aside. However, as the order of debarring the petitioner had been set aside on a technical reason, we grant liberty to the respondent authorities to proceed against the petitioner, if so advised, by following due procedure of law i.e. by issuing a show-cause notice or giving him an opportunity to present his case as regards the aspect of debarring him from performing any work under the department.

11. Writ petition stands allowed in the manner indicated above.

JUDGE

Comparing Assistant