

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.02.2020

DELIVERED ON : 27.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.No.22698 of 2017

&

WMP.Nos.23795 & 23796 of 2018

M/s.ASR Dredging Services Private Limited,
7C, Oriental Gardens, South Tower,
Represented by its Managing Director,
Karugapalli Jn., Desabhimani Road,
Kaloor,
Kochi - 682 026.

... Petitioner

vs.

M/s.Chennai Port Trust,
Rep. by its Chairman,
No.1, Rajaji Salai,
Chennai - 600 001.

...Respondent

Prayer: Writ petition filed under Article 226 of the Constitution of India for writ of certiorarified mandamus calling for the records on the file of the respondent relating to the impugned order bearing Ref.No.JDV/2271/2016/E dated 29.07.2017 and quash the same as arbitrary, illegal and consequently direct the respondent their men, agents, administrators, employees or assigns or anyone working under or through them, forthwith process the payments that are due to the petitioner, for the successfully completed work, in accordance with law under the contract between the parties and release payment of the same immediately.

For Petitioner :Mr.Rahul Balaji

For Respondent :Mr.G.Rajagopalan,
Additional Solicitor General for
M/s.R.Karthikeyan

ORDER

The points for consideration in this writ petition are as follows:

(a) whether the blacklisting of the petitioner's firm under the impugned order dated 29.07.2017 passed by the respondent is in accordance with law and

(b) whether principles of natural justice were adhered to by the respondent before passing of the impugned order.

2. The case revolves primarily on the completion certificate dated 27.04.2012 submitted by the petitioner as part of the tender documents for the "Deepening of eastern side of Dr. Ambedkar Dock Basin including alongside berths of Second Container Terminal Jawahar Dock Basin and Maintenance Dredging at Entrance Channel in Chennai Port". After scrutiny of tender documents, the respondent awarded the contract to the petitioner on 26.07.2012. It is the case of the petitioner that they completed the contract on 30.05.2016, but the respondent has unlawfully withheld certain payments payable under the contract. It is their case that only to avoid the payment, the impugned order has been passed blacklisting the petitioner's firm. Further it is the case of the petitioner that the respondent has not adhered to the principles of natural justice by affording fair hearing in the enquiry proceedings which culminated in the passing of the impugned order blacklisting the petitioner's firm.

3. However, as seen from the counter affidavit filed by the respondent, it is their case that the petitioner has forged the certificate dated 27.04.2012 in order to illegally get the contract in their favour. According to them, on perusal of the certificate dated 27.04.2012 produced by the petitioner at the time of opening of the tender and the office copy of the certificate dated 27.04.2012 forwarded by the Naval authority, it is evident that the petitioner has forged the document issued by the Naval Academy Project, Ezhimala by hiding the term "till date" with an intention to show the ongoing work as a completed work which would eventually qualify the petitioner under the technical bid to get the contract in their favour. It is also their case that there was enormous delay in the completion of the project by the petitioner which resulted in heavy losses to them. It is also their case that a fair hearing was afforded to the petitioner in the enquiry proceedings and principles of natural justice have not been violated.

4. Heard Mr.Rahul Balaji, learned counsel for the petitioner and Mr.G.Rajagopalan, learned Additional Solicitor General for the respondent.

5. According to the learned counsel for the petitioner, the completion certificate dated 27.04.2012 issued by the Naval Academy is a genuine one and further the basis for awarding the contract to the petitioner is the completion certificate dated 13.06.2012 and not 27.04.2012. He drew the attention of this Court to the certificate dated 27.04.2012, which the respondent claims is a forged one. In the additional typed set of documents filed by the petitioner, the certificate dated 27.04.2012 which the petitioner claims to be the one submitted at the time of submitting the bid and the certificate dated 27.04.2012 which the respondent claims to have received from the petitioner are produced. Referring to the same, the learned counsel for the petitioner would submit that the document submitted by the petitioner and the document relied upon by the respondent are completely different as the signatures found in both the documents are completely different even to the naked eye and in the certificate dated 27.04.2012 submitted by the petitioner, there is no reference to the term "till date" whereas the certificate dated 27.04.2012 relied upon by the respondent contains the term "till date". According to the learned counsel for the petitioner, the certificate relied upon by the respondent for the purpose of blacklisting the petitioner's firm is not the certificate submitted by the petitioner along with their tender application. Further it is contended by the learned counsel for the petitioner, subsequently by a certificate dated 13.06.2012 which is the basis for awarding the contract to the petitioner, the Naval Academy, Ezhimala has confirmed that the petitioner has completed the project on 12.12.2010 itself which according to him is well within the cut off date under the tender notification. Learned counsel for the petitioner further contended that despite the order passed by this Court to send the certificate dated 27.04.2012 to the forensic department for expert opinion, the same could not be obtained only due to the non-production of the original completion certificate dated 27.04.2012 by the respondent as requested by the forensic department.

6. Learned counsel for the petitioner also drew the attention of this Court to the first show cause notice issued by the respondent on 02.03.2017 and submitted that in the said show cause notice, the nature of the forged document was not given and only after repeated reminders, the respondent intimated the petitioner that the forged document is the completion

certificate dated 27.04.2012. Learned counsel for the petitioner also drew the attention of this court to the replies sent by the petitioner to the show cause notices. According to him, in all those replies, the petitioner has denied any forgery and to establish their bonafides and credentials beyond any doubt whatsoever, sufficient time was requested to produce all possible evidences and information from the Indian Navy which had issued the subject certificate dated 27.04.2012 in favour of the petitioner. According to the learned counsel for the petitioner, despite making repeated requests, the respondent did not afford sufficient opportunity to produce fool proof evidence to establish that the petitioner has not committed any forgery. Learned counsel for the petitioner also submitted that no personal hearing was afforded to the petitioner in the enquiry proceedings and arbitrarily without any basis, the impugned order has been passed blacklisting the petitioner's firm which has affected the petitioner's fundamental right to carry on their business.

7. Learned counsel for the petitioner further submitted that even a copy of the inquiry report with regard to the enquiry conducted against the officers of the respondent for their alleged irregularities committed by them in awarding the tender in favour of the petitioner was also furnished to the petitioner only on 07.01.2020, only during the hearing before this Court. Learned counsel for the petitioner also drew the attention of this court to the inquiry report and submitted that the enquiry officer has observed that the Naval academy has stated that none of the documents including the certificate dated 13.06.2012 issued by them is wrong or falsified and on the said finding, the enquiry officer has held that the charges levelled against the officials of the respondent are based on misconception and is not sustainable, partly factually incorrect and discriminatory in nature and also not proved. According to the learned counsel, when the inquiry officer himself, after detailed enquiry, has given a finding that the officials of the respondent have not committed any dereliction in their duty, without any basis the petitioner's firm has been blacklisted under the impugned order. According to the learned counsel for the petitioner, the impugned order is arbitrary, illogical and illegal and has been issued only to avoid making the legitimate payments due to the petitioner under the contract.

8. Learned counsel for the petitioner has cited the following authorities:

- (a) M/s.Erusian Equipment & Chemicals Ltd., vs. State of West Bengal and Another reported in (1975) 1 SCC 70;
- (b) Kulja Industries Limited vs. Chief General Manager,

Western Telecom Project Bharat Sanchar Nigam Limited and Others reported in (2014) 14 SCC 731;

(c) Southern Painters vs. Fertilizers & Chemicals Travancore Ltd. and Another reported in 1994 Supp (2) SCC 699

Relying upon the aforesaid decisions, the learned counsel for the petitioner submitted that blacklisting cannot be done arbitrarily without adhering to the principles of natural justice. According to him, without any justification the impugned order has been passed. According to him, in the case on hand, without any evidence, the respondent has blacklisted the petitioner's firm.

9. Per contra, the learned Additional Solicitor General for the respondent drew the attention of this Court to the impugned order dated 29.07.2017 and in particular, he referred to paragraph 2 of the impugned order wherein the eligibility criteria for participation in the tender is mentioned. According to the learned Additional Solicitor General, the petitioner had produced the completion certificate dated 27.04.2012 for the purpose of satisfying clause C of the eligibility criteria which requires the petitioner to produce a certificate from one of their employers that they have completed one dredging work not less than 8.10 lakhs cu.m. or value not less than Rs.25.60 crores. He then drew the attention of this Court to the completion certificate dated 27.04.2012 submitted by the petitioner along with the tender application which according to the respondent did not contain the term "till date", whereas the actual certificate issued by the Naval Academy which was submitted by the petitioner along with the tender application contains the term "till date". According to him, to satisfy the eligibility criteria, the petitioner ought to have completed the work with the Naval Academy on the date of tender application. However, according to him as per the certificate dated 27.04.2012 issued by the Naval Academy, the petitioner had not completed the work and hence they are not eligible to participate in the tender. According to the learned Additional Solicitor General, the petitioner has submitted a forged document which does not contain the term "till date" which deceived the respondent in awarding the contract to the petitioner, though the petitioner did not satisfy the eligibility criteria.

10. According to the learned Additional Solicitor General, being a high value project, the acceptance of the tender in favour of the petitioner was investigated by the Vigilance Department of the respondent. According to him, even though the

enquiry officer has held that the charges against the officials have not been proved, the respondent has filed an appeal before the appellate authority as against the inquiry report and challenging the same, the delinquent officials of the respondent have also filed writ petitions and obtained stay of the appellate proceedings pending before the appellate authority of the respondent.

11. Learned Additional Solicitor General for the respondent drew the attention of this Court to the various show cause notices sent by the respondent as well as the replies sent by the petitioner and submitted that the petitioner was given sufficient opportunity to place their submissions and evidence before the respondent and right of personal hearing was also afforded to them and only thereafter, the impugned order came to be passed. According to the learned Additional Solicitor General, the only remedy available to the petitioner is to file an appeal as per the terms and conditions of the tender before the appellate authority of the respondent and hence, according to him, the writ petition is not maintainable.

12. Learned Additional Solicitor General also drew the attention of this Court to the integrity pact agreement signed between the petitioner and the respondent and according to him, as per the said agreement, the respondent is empowered to exclude the petitioner from awarding future contracts, if the petitioner has committed violation of the integrity pact agreement. According to him, since the petitioner has forged the certificate dated 27.04.2012, applying section 3(a) of the integrity pact agreement, the respondent has rightly blacklisted the petitioner's firm.

Discussion:

13. Admittedly, in the case on hand, the respondent has noticed the alleged forgery of the completion certificate dated 27.04.2012 only after approximately 4 ½ years from the date of award of the contract. The contract was awarded to the petitioner on 26.07.2012 and the respondent noticed the alleged forged document only in the year 2017. Even in the first show cause notice dated 02.03.2017 issued by the respondent indicating forgery committed by the petitioner, the nature and details of the document which has been forged by the petitioner has not been disclosed. Only after repeated reminders by the petitioner, the respondent informed the petitioner that the forged document is the completion certificate dated 27.04.2012. It is the case of the petitioner that they completed the contract in the year 2012 itself and there is no delay on their

part. It is their case that outstanding payments are still due and payable by the respondent under the contract. It is also their case that only to avoid the payments, the respondent has falsely alleged that the completion certificate dated 27.04.2012 is a forged document.

14. However, it is the case of the respondent that there was inordinate delay in the completion of the project by the petitioner and due to the inordinate delay, the petitioner is put to irreparable loss and hardship. In fact, subsequent to the alleged forged document dated 27.04.2012, the petitioner has also produced another certificate dated 13.06.2012 from the Naval Academy which has been accepted by the respondent which confirms that the petitioner has completed the work with Naval Academy on 12.12.2010 itself. The respondent has also not disputed the subsequent certificate dated 13.06.2012 which confirms that the petitioner has completed the work with Naval Academy at the time of submission of their bid with the respondent. The respondent has disputed only the earlier certificate dated 27.04.2012 issued by the same Naval Academy which they claim to be a forged one.

15. The eligibility criteria for the tender is completion of work to a minimum extent of 8.10 lakhs cu.m. or value not less than 25.60 crores. As seen from the certificate dated 13.06.2012, the petitioner has completed the work and satisfied the eligibility criteria as per the notice inviting the tender issued by the respondent. Admittedly, the respondent has allegedly found out about the forgery of the document dated 27.04.2012 only in the year 2017 that is after 4 ½ years from the date of award of the contract in favour of the petitioner which happened in the month of July 2012.

16. Blacklisting affects the fundamental right of any person to carry on his business. When the fundamental right is likely to be deprived, the State or its instrumentalities will have to be more cautious and must afford sufficient opportunity to the person against whom the blacklisting order is proposed to be passed as it affects their fundamental right to carry on their business. But in the case on hand, as seen from the materials available on record, the petitioner has not been afforded a fair hearing and sufficient opportunity in the enquiry proceedings for the following reasons: (a) no personal hearing was afforded; (b) sufficient time was not given to the petitioner by the respondent to obtain supporting documents from the Naval academy to conclusively clear the forgery allegation made by the respondent; (c) the copy of the inquiry report which has cleared

the name of the officials of the respondent allegedly involved in the award of the contract has not been furnished to the petitioner in the enquiry proceedings; (d) no reasons have been given in the impugned order as to how the respondent has accepted the certificate dated 13.06.2012 which confirms that the petitioner has completed the work with the Naval Academy on 12.12.2010 itself thereby satisfying the eligibility criteria, but rejected the certificate dated 27.04.2012 issued by the same Naval Academy on the ground of forgery.

17. From the records, it is seen that only after repeated reminders, the petitioner has been informed about the document which was allegedly forged by them. The respondent has also not sent the original completion certificate dated 27.04.2012 received by them from the petitioner at the time of submission of their bid for forensic examination and without any forensic report, the respondent has passed the impugned order blacklisting the petitioner's firm. The Naval Academy which issued the certificate dated 27.04.2012 has also confirmed by the letter dated 29.06.2012 to the respondent that the completion certificate issued in petitioner's favour was infact issued by them. Even before this Court, the respondent sought for a direction to send the certificate dated 27.04.2012 for forensic examination to get a forensic report. Despite the direction issued by this Court for forensic examination, the forensic department was not in a position to submit a report, since the respondent did not produce the original of the certificate dated 27.04.2012 to them for their examination.

18. The Hon'ble Supreme Court in the case of M/s.Erusian Equipment & Chemicals Ltd., vs. State of West Bengal and Another reported in (1975) 1 SCC 70 laid down the law regarding blacklisting and held that the order of blacklisting has serious civil consequences for the affected company as such order affects the future prospects of the business by depriving it the chance to do business with the Government, earning money and also it greatly tarnishes the reputation of the company and therefore, the opportunity of being heard should be given to the company before taking any such decision. The Hon'ble Supreme Court in the same decision held that if the rules on blacklisting or the contract does not mention any requirement for hearing before blacklisting the party, it cannot be deduced that principles of natural justice need not be followed. The relevant paragraphs of the aforesaid judgment are extracted hereunder:

"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".

16. In passing an order of blacklisting the Government department acts under what is described as a standardised Code. This is a Code for internal instruction. The Government departments make regular purchases. They maintain list of approved suppliers after takings into account the financial standard of the firm, their capacity and their past performance. The removal from the list is made for various reasons. The grounds on which blacklisting may be ordered are if the proprietor of the firm is convicted by court of law or security considerations so warrant or if there is strong justification for believing that the proprietor or employee of the firm, has been guilty of malpractices such as bribery, corruption, fraud. or if the firm continuously refuses to return Government dues or if the firm employs a Government servant, dismissed or removed on account of corruption in a position where he could corrupt Government servant. The petitioner was blacklisted on the ground of justification for believing that the firm has been guilty of malpractices such as bribery, corruption, fraud. The petitioners were blacklisted on the ground that there were proceedings pending against the petitioners for alleged violation of provisions under the Foreign Exchange Regulations Act.

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

19. In the case of Southern Painters vs. Fertilisers and

Chemicals Tiruvancore limited and another reported in 1994 Supp (2) SCC 699 following the Erusian case referred to supra, the Hon'ble Supreme Court held that blacklisting affects the reputation of a contractor and therefore, blacklisting a contractor based on vigilance report without affording a fair hearing to the contractor will amount to violation of principles of natural justice. The relevant paragraph of the said judgement is extracted hereunder:

"11. The deletion of the appellant's name from the list of approved contractor 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."

20. In the case of Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Others reported in (2014) 14 SCC 731, the Hon'ble Supreme Court held that blacklisting the contractors by the State or an instrumentality of the State is subject to judicial review on grounds of principles of natural justice, doctrine of proportionality, arbitrariness and discrimination. The relevant paragraph of the said judgement is extracted hereunder:

"20. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in M/s Mahabir Auto Stores & Ors. v. Indian Oil Corporation Ltd., (1990) 3 SCC 752 should, in our view, suffice:

"12. It is well settled that every action of the State or an instrumentality of the State in

exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in *Miss Radha Krishna Agarwal and Ors. v. State of Bihar and Ors.*, [1977] 3 SCR 249 In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

21. In the case of *Raghunath Takur vs. State of Bihar* reported in AIR 1989 SC 620, the State Government had blacklisted the petitioner without giving any opportunity to be heard. It was contended by the State that there was no specific requirement in any rule that a notice had to be given to the petitioner before a blacklisting order. The Hon'ble Supreme Court held that even if the rules do not specify so, it is an implied principle of law that an order having civil consequences should be passed only after adhering to the principles of natural justice.

22. The fact that the Government has a right to enter into contract with anyone of its choice does not give the Government the power to arbitrarily blacklist a party without affording a fair hearing as blacklisting involves material damage of losing the prospect of entering into contracts with the Government in future. The effect of blacklisting are quite considerable. It prevents the person from the privilege and the advantage of entering into lawful relationship with the Government, PSUs for the purposes of gains. Apart from reducing the person's prospects of making profits, it leads to loss of credibility and goodwill, a decline in business and clients and financial hardship. It acts as a libel to the person, if unjustifiably done. This the reason why certain principles have been established by the courts of law before blacklisting a person and those principles include (a) Principles of natural justice and (b) Doctrine of proportionality which means a proper balance is maintained between the adverse effects which the administrative order may have on the rights, persons, keeping in mind the purpose for which they intend to serve.

23. Excluding a member of the public from dealing with Government, restricts a person's right of doing lawful trade which has been guaranteed under Article 19(1)(g) of the Constitution of India. If blacklisting has been done unjustifiably and without affording a fair hearing, Article 21 of the Constitution is also violated as the reputation of a person is seriously tarnished beyond repair.

24. Since the respondent has not followed the well laid down guidelines required for blacklisting, it is clear that they have violated the principles of natural justice by not affording a fair hearing and sufficient opportunity to the petitioner to produce all evidence in support of his defence before passing of the blacklisting order. Since principles of natural justice have been violated by the respondents, the question of availability of alternative appellate remedy will not arise.

25. Insofar as the claim of the petitioner that the blacklisting order is illegal is concerned, this Court with the available evidence on record, cannot come to the conclusion that the petitioner's firm is not liable to be blacklisted. In view of the same, it is for the respondent to consider the matter afresh after affording a fair hearing and sufficient opportunity to the petitioner to produce all evidence required to prove their innocence with regard to the allegation of the respondent that the petitioner has forged the completion certificate dated

27.04.2012.

26. In the result, the impugned order dated 27.09.2017 is hereby quashed and the matter is remanded back to the respondent for fresh consideration and the respondent shall pass final orders on merits and in accordance with law within a period of twelve weeks from the date of receipt of a copy of this order after affording a fair hearing and sufficient opportunity to the petitioner to place their evidence to prove their innocence and also grant them the right of personal hearing with regard to the allegations levelled against the petitioner that they have forged the certificate dated 27.04.2012. Accordingly this writ petition is disposed of. No cost. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

M/s.Chennai Port Trust,
Rep. by its Chairman,
No.1, Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.R.Parthasarathy, Advocate, Sr.No.17892
+1cc to Mr.R.Karthikeyan, Advocate, Sr.No.17241

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