



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 08th AUGUST, 2023

IN THE MATTER OF:

+ **W.P.(C) 177/2023 & CM APPL. 634/2023**

GIRIJESH KUMAR

..... Petitioner

Through: Ms. Nanda Devi Deka and Mr. K. S. Tyagi, Advocates.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LIMITED (NHIDCL) & ANR.

..... Respondents

Through: Mr. Bikash Mohanty, Mr. Umesh Agrawal and Mr. Apratim Animesh Thakur, Advocates for R-1.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present writ petition has been filed under article 226 of the Constitution of India by the petitioner seeking quashing of the impugned department order dated 11.08.2022 passed by the respondent no.1/ National Highways and Infrastructure Development Corporation Limited whereby the petitioner was blacklisted/ debarred from participating in future projects of Ministry of Road Transport and Highways (*hereinafter referred to as MoRTH*) / National Highways and Infrastructure Development Corporation Limited (*hereinafter referred to as NHIDCL*) for a period of 2 years from the date of issuance of the order.
2. Shorn of unnecessary details the facts leading up to filing of the present petition are as follows:



3. Respondent no.1/NHIDCL floated a tender / Request For Proposal (RFP) dated March, 2022 inviting proposals from eligible consultants for "Consultancy services for Authority's Engineer for supervision of improvement of existing road to 2 laning with Hard Shoulders of Maram – Peren section (Package-III, length 34.494 km) from Design Chainage km 75.000 to km 109.494 on NH- 129A in the State of Manipur on EPC mode (*hereinafter referred to as The Project*). The RFP was to be uploaded on "INFRACON" (www.infracon.nic.in). Before submitting the proposal the Consultant had to mandatorily register and enlist themselves (the firm and all key personnel), on the MoRTH portal "INFRACON" and furnish registration details along with its RFP
4. The RFP required the consultancy firm to submit proposals in two parts namely: Part 1 was to be the Technical Proposal and Part 2 was to be the Financial Proposal.
5. Respondent no.2 in association with M/s K&J Projects Pvt. Ltd. submitted bid against the said RFP. In compliance of the requirements of the RFP, the respondent no.2 uploaded the CV of the petitioner herein as a Key Personnel for the position of Resident cum Highway Engineer. Thereafter, the respondent no.2 in association with M/s K&J Projects Pvt. Ltd. was determined as H-1 on 29.06.2022 in the said RFP and the name of the petitioner was approved as the Resident cum Highway Engineer.
6. Vide email dated 30.06.2022 the respondent no.2 informed the petitioner that his CV was proposed as per the petitioner's consent for the project, which thereafter was awarded to the respondent no.2 by respondent no.1. The email requested for the petitioner's acceptance and stated that in case the petitioner is unable to join, a reason for the same shall be mentioned.



7. It is stated that the Petitioner telephonically informed the respondent no.2 that due to his health reasons and ongoing treatments he would be unable to join the project and render services.

8. Respondent no.2 vide their letter dated 15.07.2022 intimated to NHIDCL i.e. Respondent No.1 that the petitioner herein was not available to join the project due to some unavoidable circumstances. It is further mentioned in the facts that due to some medical reasons, doctors had advised him to avoid travelling to high altitude for another few months. The respondent no.2 proposed a replacement of the petitioner to the respondent no.1 for mobilization of experts at the project site.

9. On 11.08.2022, respondent no.1 issued the impugned order debarring the petitioner from participating for a period of 2 years in any tenders/ future projects with MoRTH/ NHIDCL. Vide an email dated 16.08.2022 MoRTH-INFRACON informed the petitioner that he has been blacklisted from the Infracon portal.

10. The present petition has been filed by the petitioner challenging the black listing order dated 11.08.2022.

11. Notice was issued by this Court in the present petition and pleadings stand complete.

12. It has been argued by the Ld. Counsel for the petitioner that the impugned order black listing the petitioner for a period of 2 years has been passed arbitrarily by the respondent no.1 and is bad in law as it has been passed without adhering to the principles of natural justice. It is stated that no show cause notice was served upon the petitioner, no opportunity of being heard was provided before passing the impugned black listing order. It is contended by the petitioner that he was also not served with a copy of the impugned order and it was only vide an email dated 16.08.2022 that the



petitioner was intimidated about the black listing order. Hence, the impugned order should be null and void being passed without issuing a show cause notice and adhering to the principles of natural justice.

13. It is the case of the petitioner that when the respondent no.2 was awarded a tender for the project in the State of Manipur, the respondent no.2 vide email dated 30.06.2023 requested the petitioner for accepting the job at site as a Key Personnel. The email also stated that if the petitioner was unable to join the job at site, then he should mention and convey to the respondent no.2 the reason for the same.

14. It is submitted by the Ld. Counsel for the petitioner that after receiving the email for providing confirmation, the Petitioner in July 2022 informed the HR of the respondent No.2 telephonically about his inability to join and provide his services for the said project citing his poor health condition and ongoing treatment. It is stated that the petitioner also provided a copy of his medical prescription dated 16.07.2022 issued by Government Medical College, Deoria (U.P.) to the HR of the respondent no.2 on his mobile.

15. The Ld. Counsel states that the respondent no.1 could not have passed the black listing order without serving upon him a show cause notice and giving him an opportunity of being heard. It is also submitted that the Order of blacklisting is arbitrary and could not have been passed by the respondent no.1 when the services of the petitioner were not promised to the respondent no.1 directly by the Petitioner thereby giving no right to the respondent no.1 to black list the petitioner.

16. The Ld. Counsel for the petitioner has placed reliance on a judgment titled Gorkha Security Services vs Government (NCT of Delhi) & Ors, (2014) 9 SCC 105, stating that the Hon'ble Apex Court has held that it is



mandatory to serve a show cause notice to the delinquent mentioning black listing as a penalty, so that the delinquent can appropriately address the same. The Hon'ble Apex Court further observed that the action of black listing is akin to a 'civil death' and if the show cause notice is not served then the proceedings declaring the delinquent can be declared as null and void.

17. The Ld. Counsel for the respondent submitted that as per the tender requirement, the respondent no.2 was to submit its proposal in two parts being the Technical proposal and the Financial proposal. The Technical Proposal (Part 1) required submission of various information and details. Clause 3.4 (x) specifically mandated requirement for submission of CVs of following 6 [Six] key personnel on the INFRACON portal by the respondent no.2.

18. He further submitted that in accordance with the requirement of the tender, the respondent no.2 submitted the name of the petitioner herein along with his CV and a duly signed certificate of the petitioner. It is the contention of the Petitioner that the petitioner had given his consent for the post of Resident cum Highway Engineer in the said project in writing and that he was bound by the same. The act of the Petitioner and undertaking given in the certificate resulted in issuing the black listing order by Respondent No.1. The contents of the certificate are reproduced hereunder for the sake of reference:

"I, the undersigned Mr. Girijesh Kumar, 16, Ravi Nagar, NIT Layout, Nagpur, Maharashtra 440033 undertake that this CV correctly describes myself, my qualifications and my experience and Employer would be at liberty to debar me if any information given in the CV, in particular the Summary of Qualification & Experience vis-a-vis the requirements as per TOR is found incorrect. I further



undertake that I have neither been debarred by NHIDCL or any other central/state government organization nor left any assignment with the consultants engaged by Employer I contracting firm M/s. K&J Projects Pvt. Ltd., for any continuing work of Employer without completing my assignment. I will be available for the entire duration of the current project "Consultancy services for Authority's Engineer for Supervision of Improvement of existing road to 2 Laning with Hard Shoulders of Maram-Peren section (Package-III, length 34.494 km) from Design Chainage 1<m 75+000 to km 109+494 on NH-129A in the State of Manipur on EPC Mode." If I leave this assignment in the middle of the work, Employer would be at liberty to debar me from taking any assignment in any of the Employer works for an appropriate period of time to be decided by the Employer. I have no objection if my services are extended by the Employer for this work in future.

I further undertake that my CV is being proposed for this project by M/sK&J Projects Pvt. Ltd., and I have not given consent to any other consultant(s) to propose my CV for any position for this project. I further undertake that if due to my inability to work on this project due to unavoidable circumstances, due to which consultant's firm is forced to seek replacement. In such unavoidable circumstances, I shall not undertake any employment in Employer projects during the period of assignment of this project and Employer shall consider my CV invalid till such time. I undertake that I have no objection in uploading/hosting of my credentials by Employer in public domain."
(emphasis supplied)

19. The Ld. Counsel for the respondent No.1 further argued that as per the email dated 30.06.2022 the Petitioner was given an opportunity to join the project work as Resident cum Highway Engineer and give reasons, if he was unable to join the assignment. It is, therefore, submitted that the argument of



the Petitioner that no hearing being accorded to him by the respondents before passing the impugned black listing order is incorrect. He submits that the impugned order, blacklisting the Petitioner for two years, was passed as per clause 4.5.6 of the General Clauses of the Contract of the RFP because of the failure of the Petitioner to join the project as a Key Personnel.

20. The Ld. Counsel also submitted that the petitioner was fully aware about the consequences of his failure to join the assignment as per his own certificate/ consent/ undertaking submitted by him for the said project and Petitioner, was aware of the consequences of his actions. He states that the impugned Order is in accordance with the terms and conditions of the Contract and also in accordance with the undertaking given by the Petitioner.

21. Heard the learned counsels for the parties and perused the material on record.

22. Undoubtedly, the project was accorded by the respondent no.1 to respondent no.2 and as per the terms of the RFP the respondent no.2 submitted the CV of the petitioner as one of the Key Personnel/ Resident cum Highway Engineer for the job at site in the State of Manipur, after signing the contract. in April, 2022, the petitioner had given a certificate signed by him to the respondent no.2 giving his consent and willingness to join the project. The material on record shows that the petitioner thereafter in July, 2022 had apprised the respondent no.2 about his inability to join the project at site due to his medical condition and doctor's advice. The material on record also discloses that the respondent no.2 had vide letter dated 15.07.2022 conveyed to the respondent no.1 his inability to join the project. The facts of the case reveal that respondent No.2 had offered respondent



no.1 a replacement for the petitioner to be appointed as the Resident cum Highway Engineer.

23. There is no privity contract between the Petitioner and Respondent No.1. The contract for the project under reference was signed between the respondent no.1 and the respondent no.2. The relevant extract of the terms dealing with Removal/ Replacement of Personnel under the contract signed between the respondents are reproduced hereunder for reference:

“4.5.2 In case notice to commence services is given within 120 days of signing of contract the, the Authority expects all the Key Personnel specified in the Proposal to be available during implementation of the Agreement. The Authority will not consider any substitution of Key Personnel except under compelling circumstances beyond the control of the Consultant and the concerned Key Personnel Such substitution shall be limited to not more than three Key Personnel subject to equally or better qualified and experienced personnel being provided to the satisfaction of the Authority. Replacement of the Team Leader will not normally be considered and may lead to disqualification of the Applicant or termination of the Agreement. Replacement of one Key Personnel shall be permitted subject to reduction of remuneration equal to 5% (five per cent) of the total remuneration specified for the Key Personnel who is proposed to be replaced. In case of second replacement there ductionin remuneration shall be equal to 10% (ten per cent) and for third and subsequent replacement, such reduction shall be equal to 15% (fifteen per cent) If the consultant finds that any of the personnel had made false representation regarding his qualification and experience, he may request the Employer for replacement of the personnel. There shall be no reduction in remuneration for such replacement. The replacement shall however be of equal or better score The personnel’s replaced shall be debarred from



future projects for 2 years.” (emphasis supplied)

24. The Petitioner not being a party to the contract cannot be blacklisted by the Respondent No.1. Further, it is well settled that before passing an order blacklisting a person/entity, the person/entity has to be given adequate notice and the notice must also specify the proposed punishment of blacklisting. Unless the person/entity, against whom the order of blacklisting is proposed to be passed, is made aware of the consequences of the action of blacklisting, such an order cannot be passed. An order of blacklisting has been termed as civil death and, therefore, such an order cannot be passed without giving adequate opportunity to the Noticee to establish that he does not deserve the severity of punishment that can be passed in the realm of contract.

25. In the present case, no Show Cause Notice has been given to the Petitioner informing him that an order of blacklisting will be passed against him which will disentitle him from participating in any tender floated by the MoRTH/NHIDCL. Needless to state that the order blacklisting the Petitioner will also render him ineligible to participate in several other tenders of State Governments/PSUs in future.

26. The Apex Court in Gorkha Security Services vs Government (NCT of Delhi) & Ors., (2014) 9 SCC 105, has in clear terms observed that serving a show cause notice upon a delinquent with black listing as a possible penalty is a mandatory requirement. The relevant extract is reproduced hereunder for the sake of reference:

“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.

30. *We are conscious of the following words of wisdom expressed by this Court through the pen of Krishna Iyer, J. in Board of Mining Examination v. Ramjee [(1977) 2 SCC 256 : 1977 SCC (L&S) 226] : (SCC pp. 258 & 262, paras 1, 13 & 14)*

“1. If the jurisprudence of remedies were understood and applied from the perspective of social efficaciousness, the problem raised in this appeal would not have ended the erroneous way it did in the High Court. Judges must never forget that every law has a social purpose and engineering process without appreciating which justice to the law cannot be done. Here, the socio-legal situation we are faced with is a colliery, an explosive, an accident, luckily not lethal, caused by violation of a regulation and consequential cancellation of the certificate of the delinquent shot-firer, eventually quashed by the High Court, for processual solecisms, by a writ of certiorari.

13. ... Natural justice is no unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural



expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt—that is the conscience of the matter.

14. ... we cannot look at law in the abstract or natural justice as a mere artefact. Nor can we fit into a rigid mould the concept of reasonable opportunity.”

31. When it comes to the action of blacklisting which is termed as “civil death” it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in the provisions of NIT.

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 blacklisting 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 blacklist 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.

34. For the aforesaid reasons, we are of the view that the impugned judgment [Gorakha Security Services v. Govt. (NCT of Delhi), (2013) 205 DLT 309] of the High Court does not decide the issue in the correct perspective. The impugned Order dated 11-9-2013 passed by the respondents blacklisting the appellant without giving the appellant notice thereto, is contrary to the principles of natural justice as it was not specifically proposed and, therefore, there was no show-cause notice given to this effect before taking action of blacklisting against the appellant. We, therefore, set aside and quash the impugned action of blacklisting the appellant. The appeals are allowed to this extent. However, we make it clear that it would be open to the respondents to take any action in this behalf after complying with the necessary procedural formalities delineated above. No costs.”

(emphasis supplied)

27. The certificate provided by the petitioner to the respondent no.2 giving his willingness to join the project was given in the month of April, 2022. The petitioner stated that due to his health, doctors have not permitted him to travel to high altitudes and in July, 2022 the petitioner informed the respondent no.2 about his inability to join the project on medical grounds which in turn was duly communicated to the respondent no.1 by the respondent no.2 vide a letter dated 15.07.2022. It is not in dispute that the respondent no.1 was put to notice about the non-availability of the petitioner and it has nowhere been argued that any loss or prejudice has been caused to the respondent no.1 due to the absence of the Petitioner.



28. Even assuming that Respondent No.1 could pass the Order blacklisting the Petitioner, Respondent No.1 has not given any notice to the Petitioner informing him about the proposed action of blacklisting him. No Show Cause Notice was issued to the Petitioner and the Blacklisting Order has been passed by Respondent No.1 without even giving any opportunity to the Petitioner of being heard. Further, the respondent no.1 did not follow the provisions laid down in the contract in Clause 4.5.2, which lays down a procedure to debar and black list a Key Personnel. It is trite law that the purpose behind the serving of a show cause notice is to make the noticee understand the precise case set up against him with detailed nature of accusations which are proposed to be taken, which the noticee 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.

29. The petitioner herein is a Civil Engineer having 32 years of experience in the field of road and highway construction. The Apex Court in Vetindia Pharmaceuticals Ltd. v. State of U.P., (2021) 1 SCC 804 has observed as under :

“12. In view of the aforesaid conclusion, there may have been no need to go into the question of the duration of the blacklisting, but for the arguments addressed before us. An order of blacklisting operates to the prejudice of a commercial person not only in praesenti but also puts a taint which attaches far beyond and may well spell the death knell of the organisation/institution for all times to come described as a civil death. The repercussions on the appellant were clearly spelt out by it in the representations as also in the writ petition, including the consequences under the Rajasthan tender, where it stood debarred expressly because of the present impugned order. The



possibility always remains that if a proper show-cause notice had been given and the reply furnished would have been considered in accordance with law, even if the respondents decided to blacklist the appellant, entirely different considerations may have prevailed in their minds especially with regard to the duration.”

30. In the facts of the present case, the action of the Respondents in blacklisting the Petitioner without issuing any show cause notice to him informing about the proposed action of blacklisting, is contrary to the law laid down by the Apex Court and, therefore, the order impugned herein is set aside.

31. The Writ Petition is allowed, and pending applications, if any, stand disposed of.

SUBRAMONIUM PRASAD, J

AUGUST 08, 2023

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