

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

+ W.P.(C) 8054/2020 & CM APPL. 26211/2020

Date of Decision: 09.03.2023

IN THE MATTER OF:

M/S NATHU RAM GUPTA AND CO Petitioner
Through: Mr. Aditya Chhibber, Advocate.

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent
Through: Mr. Divya Prakash Pande,
Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J. (ORAL)

1. By way of present petition filed under Article 226 of the Constitution of India, the petitioner seeks setting aside of Circular dated 07.08.2020 issued by the respondent whereby petitioner's name was deleted from the list of approved contractors.
2. Briefly, the facts in nutshell are that the petitioner claims to be a partnership firm engaged in the business of construction work and enlisted with the respondent as a class 1 Contractor since the year 1981. It also claims to have carried out more than 100 projects for the respondent. The grievance raised in the present petition relates to a tender floated by the respondent in the year 1988 for construction of the

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Zonal Building at Narela. The work was initially awarded to one 'Satish Chandra Ramesh Kumar' however, on account of certain disputes relating to non-payment of bills, the said contractor constructed only the basement structure and left without completing the entire work. Subsequently, the respondent allotted the remaining work to the petitioner vide Work Order No. EE (Pr.) TC/04-05/31 dated 25.08.2004 for a contractual amount of Rs.4,29,00,830/-. The starting date of the work was 09.09.2004 and the stipulated period for completion was 04.09.2006. During the course of work, the petitioner noticed the damage in the columns and reinforcements, and informed the respondent about the same. The respondent vide its letter dated 26.12.2004 asked the petitioner to dismantle the columns. It was agreed that the cost of dismantling, cutting of reinforcement and scrapping will be paid as extra items.

3. As borne out from the record, the petitioner vide letter dated 28.12.2004 informed the respondent about stoppage of work for non-receipt of the drawings as well as monthly payments. The disputes remain unresolved resulting in petitioner seeking recourse to Arbitration. An Award dated 01.04.2011 came to be passed in petitioner's favour. The objections filed by the respondent were disposed of by this Court vide order dated 12.12.2018. The order was subsequently partly modified to the extent of payment of interest. An appeal against the order is statedly pending before the Division Bench of this Court.

4. Learned counsel for the petitioner contended that the impugned Circular dated 07.08.2020 was passed against the principle of natural justice, inasmuch as, it violates Clause 23 of the 'Instruction for Enlistment of Contractors' issued by the respondent themselves. It is

submitted that neither any show cause notice was issued nor any personal hearing was granted before passing of the impugned order.

5. Mr. Divya Prakash Pande, learned Standing Counsel for the respondent, on the other hand, has defended the impugned order.

6. I have heard the learned counsels for the parties and perused the impugned order.

7. The impugned circular issued by the respondent reads as under :-

CIRCULAR

"NOW: *Construction of Zonal office in Narela Zone at Narela (Remaining Work)*

WO No: *EE (PR)ITC/04-05/3 1 dated 25.08 .2004.*

Addl. Comm. Engg. North OMC vide his order dated 23.07.20 on the file has approved the proposal of removal of firm M/s Nathu Ram Gupta & Co (Class-I) having address: 85fl5 1, Safdarjung Enclave, New Delhi- 110029 for the approved list of contractors. The firm shall not participate in e-tendering/ sale of tenders in all three corporation further, due to irregularity observed in the above mentioned work.

This is notified and circulated for information and necessary action by all concerned."

8. A plain reading of the aforesaid circular would show that the same is not only cryptic but also does not provide any reasons. Further the same would also show that no show cause notice was given to the petitioner before passing of the impugned order. Besides, it does not mention period of black listing. The relations between the parties are statedly governed by the 'Instructions for enlistment of contractors in MCD,2012'. Clause 23 of the same provides as under:

"23.0 Disciplinary Actions: - *The contractor shall have to abide by all the instructions of enlistment and also by the*

terms and conditions of the contract and the Notice Inviting Tenders. He shall have to execute the works as per contract on time and with good quality. The enlisting authority shall have the right to demote a contractor to a lower class, suspend business with him for any period, debar him or remove his name from the approved list of contractors indefinitely or for a period as decided by the enlisting authority after issue of show cause notice. Decision of the enlisting authority shall be final and binding on the contractor. The following actions of the contractor shall, in general, make him liable to disciplinary actions."

9. At this stage, this Court takes note of the settled law on the subject. In M/s Erusian Equipment & Chemicals Ltd. v. State of West Bengal reported as **(1975) 1 SCC 70**, the Supreme Court has held as under :-

"13. But for the order of blacklisting, the petitioner would have been entitled to participate in the purchase of cinchona. Similarly the respondent in the appeal would also have been entitled but for the order of blacklisting to tender competitive rates.

14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.

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 black lists 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 taking 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 to 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 servants. 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.

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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.”

10. In Raghunath Thakur v. State of Bihar reported as **(1989) 1 SCC 229**, while emphasising on the need to follow principles of natural justice, it has been held as under :-

“10. 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.”

11. In Southern Painters v. Fertilizers and Chemicals Travancore Ltd. & Anr. reported as **1994 Supp (2) SCC 699** it has been held 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. Later, in Kuljia Industries Ltd. v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Others reported as **(2014) 14 SCC 731** it was held as under :-

“25. Suffice it to say that ‘debarment’ is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the ‘debarment’ is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.

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27. *The next question then is whether this Court ought to itself determine the time period for which the appellant should be blacklisted or remit the matter back to the authority to do so having regard to the attendant facts and circumstances.*

28. *A remand back to the competent authority has appealed to us to be a more appropriate option than an order by which we may ourselves determine the period for which the appellant would remain blacklisted."*

13. Later, the Supreme Court in Daffodils Pharmaceuticals Ltd. & Anr. v. State of UP & Anr. reported as **2019 SCC Online SC 1607** expostulated the law in following terms:-

"13. Although, State of U.P. has argued that the impugned order requiring that no procurement ought to be made from Daffodills, is neither a blacklisting nor a debarring order, in our opinion, in fact and in reality, that order is nothing but an order or a directive, debarring and preventing the State of U.P. from local purchase of medicines from Daffodills for an indefinite duration. Unlike a "normal" blacklisting order which has a finite life span (of three or maximum five years), the indefinite directive (which appears to be co-terminus with the lifetime of the criminal case) is facially far more disproportionate than a blacklisting order. Even as on date, it is not clear whether formal charges have been framed against the accused i.e. Surrender Chaudhary.

14. The decisions in Erusian Equipments and Chemicals Ltd. v. State of West Bengal¹ and Raghunath Thakur v. State of Bihar & Ors² as well as later decisions have now clarified that before any executive decision maker proposes a drastic adverse action, such as a debarring or blacklisting order, it is necessary that opportunity of hearing and representation against the proposed action is given to the party likely to be affected...

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15. *In the present case, even if one assumes that Surender Chaudhary, the accused in the pending criminal case was involved and had sought to indulge in objectionable activities, that ipso facto could not have resulted in unilateral action of the kind which the State resorted to- against Daffodils, which was never granted any opportunity of hearing or a chance to represent against the impugned order. If there is one constant lodestar that lights the judicial horizon in this country, it is this: that no one can be inflicted with an adverse order, without being afforded a minimum opportunity of hearing, and prior intimation of such a move. This principle is too well entrenched in the legal ethos of this country to be ignored, as the state did, in this case.*

16. *The High Court, in the opinion of this court, fell into error in holding that in matters of award of public contracts, the scope of inquiry in judicial review is limited. Granted, such jurisdiction is extremely circumscribed; no doubt the court had refused to grant relief to Daffodils against its plea of wrongful rejection of its tender. However, what the impugned judgment clearly overlooks is that the action of the state, not to procure indefinitely, on an assumption of complicity by Daffodils, was in flagrant violation of principles of natural justice. “*

14. More recently in Isolators and Isolators through its Proprietor Mrs.Sandhya Mishra v. Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd. Anr. reported as **2023 SCC OnLine SC 444**, the Supreme Court once again underscored the requirement of specific show cause notice before imposing penalty.

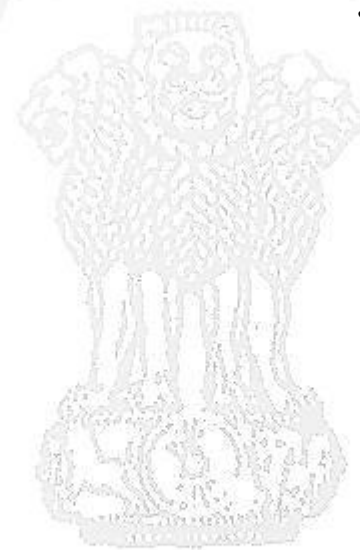
15. Coming back to the facts of the present case, what to speak of specific notice, the impugned Circular was issued without any prior show cause notice and further, also suffers from the vice of being cryptic and non-speaking.

16. In view of the above discussion, the impugned Circular blacklisting the appellant in respect of future contracts, cannot be sustained in law. The petition is allowed and the impugned order set aside. This order will, however, not prevent the respondent from taking any future steps for blacklisting the appellant in accordance with law. i.e. after giving the appellant due notice and an opportunity of making representation.

(MANOJ KUMAR OHRI)
JUDGE

MARCH 09, 2023

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