

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice Prasenjit Biswas

MAT 724 of 2024

with

CAN 1 of 2024

South Eastern Railway & Ors.

Vs.

C. Siva Prakash & Anr.

For the Appellant : **Ms. Kakali Dutta, Advocate**
Mr. Proteek Debnath, Advocate

For the Respondent: **Mr. Debrup Bhattacharjee, Advocate**
No. 1 **Mr. Deepak Kumar Singh, Advocate**
Ms. Saptamita Pramanick, Advocate
Mr. Anubhav Singh, Advocate

Heard on : July 11, 2024

Judgment on : July 11, 2024

The Court:

- 1) The writ petition filed by the respondent was disposed of by the impugned order quashing and setting aside the letter dated January 12, 2023 by which the contract was terminated, security deposit was forfeited and the writ petitioner/respondent no. 1 was debarred from participating in any tender for a period of two years.
- 2) The Single Bench in the impugned judgment held that though the Clause 8.4 of the agreement postulates that, in the event, the leaseholder failed to commence the loading operation for a continuous period of ten days, the contract shall be terminated without giving any notice and the security deposit shall be forfeited but the petitioners having written several letters to the

authorities showing concern which creates an impasse in seamless operation of loading and uploading in the said contract, yet there was no response. It was held by the Single Bench that Clause 8.4 of the said agreement operates in a field where the leaseholder did not commence the operation for a continuous period of ten days without any reason and rhymes which make the distinction so far as the operation of Clause 8.4 of the said contract is concerned. The Single Bench also noticed Clause 25.1 of the agreement which deals with the right of the leaseholder to terminate the contract upon giving sixty days notice to the Railway administration provided the contents enshrined therein are required to be fulfilled. It is categorically observed in the impugned order that not only the appellant terminated the contract, forfeited the security deposit but also blacklisted the writ petitioner/respondent no.1 without affording any opportunity of hearing nor any reasons have been assigned for termination. Ultimately, the writ court directed to refund of the security deposit with the bank interest rate to be reckoned from the date of issuance of the termination letter till its actual payment.

- 3) The Railway has filed the instant appeal raising issues on the observation made in the impugned order both on facts as well as law. According to the Counsel appearing for the appellants, the Single Bench has misinterpreted Clauses 8.4 and 25.1 of the said agreement in a manner which is not contemplated therein. According to her, Clause 8.4 of the said agreement bestowed powers upon the Railway administration to terminate the contract without giving any notice, in the event, the leaseholder failed to operate for a continuous period of ten days. It is evident and explicit from the conduct that they did not operate the site for such a long period. She further relies upon Clause 25.2 of the said agreement which confers power upon the Railway administration to terminate the contract, forfeited the security deposit and also debarred the leaseholder from participating in

the tender for a period of two years. She is very vocal in her submission that mere debarment from participating in the tender for a period of two years cannot be equated with the blacklisting of the leaseholder. According to her, a blacklisting constitutes a permanent debarment and not the temporary one and, therefore, the judgment as relied upon by the Single Bench is not applicable.

- 4) However, she refers the judgment of the Apex Court rendered in ***Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited & Ors.*** reported in ***(2014)14 SCC 731***, in support of the contention that, in the event, breach of any of the terms and conditions is evident from the conduct of the leaseholder, the blacklisting can be done provided the contract contains such provisions. As a last gasping resort, it is sought to be contended by the appellants that the respondent no. 1 denied the service of the notices as relied upon by the Railway Administration and after the judgment is delivered, the certificate was obtained from the postal department which can be treated as a conclusive proof of service of those letters upon the writ petitioner/respondent no.1.
- 5) On the conspectus of the aforesaid submission, we feel it prudent to delve upon the aforesaid points raised before us in the instant appeal by the appellants.
- 6) Clause 8.4 of the contract is required to be understood and intention of the parties to be gathered from the language used therein. The said Clause 8.4 is quoted as under:

"8.4. If the leaseholder, after commencement of loading fails to operate the contract continuously for 10 days without giving any notice, his contract will be terminated and security deposit forfeited."

- 7) It is manifestly evident from the meaningful reading of the language employed therein that, in the event, the leaseholder after the commencement of the loading fails to operate the contract continuously for ten days without giving any notice, the contract shall be terminated and the security deposit forfeited.

The appellants appear to have misinterpreted and misplaced such provisions and proceeded to understand in the manner that, in the event, there is a failure to operate for ten days, the termination of a contract and forfeiture of the security deposit is inevitable. The contract has to be read in a meaningful manner in order to gather the intention of the parties contracting therein. It operates the moment the leaseholder stops the operation without giving any notice but does not apply if the leaseholder has given a prior notice raising a grievance that what constrains it not to operate. The expression “without giving any notice” has to be understood in the perspective of the conduct of the leaseholder and cannot be construed to bestow power upon the Railway administration to terminate the contract and forfeit the security deposit without giving any notice.

- 8) The single Bench has held that several letters and correspondences were made by the respondent no. 1 with the Railway administration; even the last letter issued by the Railway administration vividly reflects the mind of the respondent no.1 that because of such obstacles, he is not in a position to operate unless some remedial measures or steps are taken.
- 9) Under Clause 25.2 of the said contract, the right is reserved upon the Railway administration to terminate the contract for any reason whatsoever upon serving one month's notice. It further provides that termination can also be made as punitive measure without any notice at any time in a case of breach of agreement or serious violation of any of the terms or the policy/railway rules but even in such situation the Railway administration was duty bound to follow the written intimation of the breach of the contract within three working days of the termination. Through the said clause empowers the Railway administration to terminate the contract upon giving one month's notice which is *sine quo non* to its applicability but the right to be heard is inhered and engrained into it before the Railway administration proceeds to terminate the contract.

- 10) Clause 25.1 though relied upon by the single Bench appears to have been misplaced because of the reason that such clause relates to a right conferred upon the leaseholder to terminate the contract upon giving a 60 days' notice. In the event, the leaseholder terminates the contract, the Railway administration can not only forfeit the security deposit but also debarred him from entering into any tender for a period of two years. The clause which is exclusively reserved and meant for a leaseholder, the Railway administration cannot take advantage of such clause until the happening of the events contemplated therein. It is only Clause 25.2 that confers power upon the Railway administration to terminate the contract which does not contain any such stipulation of debarring the leaseholder from participating in any future tender for a period of two years.
- 11) Though on factual matrix we find a clear demarcation in applicability of Clauses 25.1 and 25.2 of the said agreement, yet for clarity and the misconception which has prevailed into the Railway administration, we feel that it would be our ardent duty to explain and clarify the concept of blacklisting even if the word blacklisting has not been expressly used in contract yet its meaning and the effect is required to be recapitulated.
- 12) The single Bench has relied upon a judgment of the Apex Court rendered in ***Erusian Equipment & Chemicals Limited Vs. State of West Bengal*** reported in **1975 (1) SCC 70** where the Apex Court succinctly elaborated the concept of blacklisting having effect of preventing a person from the privilege and advantage of entering into a lawful relationship with the Government for the purpose of gains. It creates a disability into a private entity in entering into any contract in future be it for a limited period or permanently. The moment individual or concern is debarred from participating in any future tender even for a limited period of time it is blacklisting the said entity or the individual from entering into any lawful relationship with the Government

instrumentalities. It is misnomer that the blacklisting brings permanency or of perpetual in nature.

- 13) The Apex Court in ***Kulja Industries Limited*** (supra) has highlighted the rights of the individuals to enter into the contract. It is elucidatedly laid down that two individuals have a freedom to enter into a contract and have a freedom to incorporate any clauses therein debarring the other from continuing with the commercial relationship. It is further held that it is an absolute choice of an individual whether to continue the business relation with another individual and the law does not create any embargo into the two individuals in desisting from creating any contractual relationship. However, it has been highlighted that such proposition is not applicable in the event one of the party is a State or the statutory authorities in the following:

“17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because “blacklisting” simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court.”

- 14) It is thus evident from the above quoted excerpts from the said report that the freedom to contract or not to contract is inbuilt

into two individuals but the moment one of the individual is the State or its entity, it is open to judicial review on the touchstone of the principle of natural justice and on the doctrine of proportionality. As indicated above the manner in which the contract is terminated, security deposit forfeited and debarment from participating in any future contract with the Railway administration or any particular sector of the Railway administration without affording any opportunity of hearing is *per se* illegal and smack of arbitrariness.

- 15) We, thus, do not find any ground warranting interference with the impugned order.
- 16) The appeal and the application are dismissed. There will be no order as to costs.
- 17) Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Harish Tandon, J.)

(Prasenjit Biswas, J)