

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CWP-13796-2019(O&M)

Date of reservation: 19.12.2023

Date of pronouncement: 09.01.2024

M/s Gurinder Singh Contractor & Another

.....Petitioner(s)

Vs.

State of Punjab & Others

.....Respondent(s)

CORAM: HON'BLE MS. JUSTICE RITU BAHRI, ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. Puneet Bali, Senior Advocate with
Mr. Harshit Sethi, Advocate and
Mr. Gagandeep Singh, Advocate
for the petitioners.

Mr. Abhay Pal Singh Gill, DAG Punjab.

Nidhi Gupta, J.

Prayer in the present petition under Article 226/227 of the Constitution of India is for issuance of a writ, direction or order in the nature of Certiorari for quashing the impugned order dated 28.02.2018 (Annexure P6) whereby the enlistment of the petitioners in the approved list of respondent-Department, has been cancelled; and 09.03.2018 (Annexure P7), whereby the petitioners have been blacklisted for a period of two years.

2. Learned Senior Counsel for the petitioners submits that the petitioner No.1 was registered as a sole proprietorship firm in the year 1998, with the aim to carry out construction activity in the field of infrastructure in the State of Punjab. The petitioner No.2, namely Gurinder

Singh, through whom the present petition is being filed, is the sole proprietor of the firm-petitioner No.1. It is stated that petitioner No.1 has been operating since 1998 and during this long period, has earned high repute as a successful construction firm within the State of Punjab. Learned Senior Counsel submits that prior to the issuance of the impugned orders, in its existence for the past almost 21 years petitioner No.1 has undertaken large number of contracts, which it has successfully completed, resultantly having constructed about 140 projects. In fact, as a mark of appreciation for the works executed by petitioner No.1, it finds place on the official calendar published by the Government of Punjab every year; and in terms of the Instructions of Enlistment (Annexure P1) issued by the Department of Irrigation, State of Punjab, the petitioner No.1 was enrolled as a Class A1 contractor with the said Department vide Enlistment Certificate dated 05.05.2017 (Annexure P2). It is submitted that accordingly, the petitioners bear a very good reputation.

3. Learned Senior Counsel submits that however, based on undisclosed information, a vigilance inquiry was conducted against the petitioners and without proper inquiry and ascertaining correct facts, FIR No.10 dated 17.08.2017 was registered against the petitioners under various provisions of the IPC, 1860 and Prevention of Corruption Act, 1988. It is stated that thereafter, exceeding his jurisdiction and adopting an overzealous approach, the office of Assistant Inspector General of Police, Vigilance Bureau, Phase-I Unit-I, Punjab, vide its letter dated 25.10.2017 (Annexure P4) sent a recommendation to respondent No.1 that petitioner

No.1 should be blacklisted as a Contractor. The recommendation of Vigilance Bureau, Punjab was forwarded by respondent No.1 to respondent No.3 vide communication dated 10.11.2017 (Annexure P5), in pursuance to which the impugned orders have been passed.

4. Learned Senior Counsel contends that though the above actions are ipso facto illegal and liable to be struck down, however, it is pertinent that initially vide impugned order dated 28.02.2018 (Annexure P6) the “Enlisting Authority” had only removed the name of petitioner No.1-firm from the list of approved contractors. However, only about ten days thereafter, on 09.03.2018, in absence of any fresh development or change in circumstance, respondent No.3 reviewed and revised its own earlier decision dated 28.02.2018 and passed the order dated 9.3.2018 (Annexure P-7) blacklisting petitioner No.1, debarring it from participating in future contracts for a period of two years. Learned Senior Counsel contends that the impugned orders have been passed purely on the basis of vigilance report without any application of mind by respondent No.3.

5. Learned Senior Counsel further argues that as per the Departmental Instructions (Annexure P1), it is the “Enlisting Authority” alone who has the jurisdiction to proceed against the Contractors as per the prescribed mechanism; and in the present case, respondent No.3-Superintending Engineer is the “Enlisting Authority”. It is submitted that however, without issuing any show cause notice to the petitioners or granting any opportunity of hearing, respondent No.3 abdicated its jurisdiction and constituted an illegal committee under the Chairmanship of

the Executive Engineer, Water Drainage Circle, Patiala. It is stated that on the recommendations of this illegally constituted Committee, based on the Vigilance Report, present impugned orders have been passed; whereas as per the Department Instructions (Annexure P1), respondent No.3 alone is entitled to act against the Contractors and cannot delegate his powers. It is contended that a perusal of the impugned orders reveals that there has been no independent application of mind by respondent No.3 in passing the said impugned orders; and the vigilance's recommendation has been ipso facto adopted without any independent assessment and inquiry.

6. Learned Senior counsel further contends that the impugned orders are liable to be set aside also on account of the fact that the same have been passed/and the petitioners have been blacklisted by respondent No.3 without issuance of any show cause notice and even without granting any opportunity of hearing to the petitioners. It is submitted that in this regard, Respondents have no explanation whatsoever as to their admitted failure in issuing a mandatory Show Cause Notice before proceeding to blacklist the petitioner. The only argument put forth by the respondents is that since the petitioner No.2 was in under-trial judicial custody, they did not deem it necessary to issue a Show Cause Notice to the Petitioners. Such an argument is absolutely meritless and deserves to be rejected. It is argued that once there is an established failure in issuance of a mandatory Show Cause Notice, any reference or advertence to the facts/merits of the case by the Respondent is meaningless & unnecessary. If the untenable argument of the respondent is

accepted, the same would grant an open license to the State to pick up & arrest any Contractor in a false & frivolous case and then immediately blacklist them without any Show Cause Notice or opportunity of hearing thereby bypassing the mandatory procedure established by law thereby violating Article 14, 19(1)(g) & 21 of the Constitution.

7. It is further submitted that the said action is in the teeth of the judgments of the Hon'ble Supreme Court in **"UMC Technologies Private Limited Vs. Food Corporation of India & Another"**(2021) 2 SCC 551; and **Civil Appeal No.9417 of 2019 titled as M/s Daffodills Pharmaceuticals Ltd. & Anr. Vs. State of U.P. & Anr.**; and judgment of this Court in **Civil Writ Petition No.5531 of 2013 titled as "M/s STUP Consultants Pvt. Ltd. Vs. State of Punjab & Others"**. It is contended that the impugned orders are thus, rendered absolutely illegal, blatantly unconstitutional & manifestly arbitrary on this score alone.

8. It is argued that accordingly, it is very clear that in passing the impugned orders Annexure P6 and Annexure P7 whereby the enlistment of the petitioners has been cancelled, and the petitioners have been blacklisted, respondent No.3 has acted only on the recommendations of the Vigilance Bureau, Punjab without applying his independent mind without independent assessment, without independently looking into the allegations made against the petitioners, and without affording any opportunity of hearing to the petitioners.

9. Per contra, learned State Counsel vehemently opposes the submissions made on behalf of the petitioners and contends that an

inquiry was conducted in a proper way by the Punjab Vigilance Bureau against the petitioners pursuant to which FIR No.10 dated 17.08.2017 was registered against the petitioners. It is submitted that it is only thereafter, on 25.10.2017 that, the Vigilance Bureau had made a request (Annexure R1) to the Principal Secretary, Water Resources to initiate action against the petitioners for blacklisting them. It is submitted that it is only thereafter that decision was taken to blacklist petitioner No.1-firm in view of the indicting report of the Vigilance Bureau.

10. Learned State counsel contends that in the minutes of the meeting dated 30.01.2018, it has been recorded that serious discrepancies were found in the execution of various works undertaken by the petitioners. It is further recorded that it is proven that petitioner No.2 had further allotted sub-contracts at 65% below the approved rates. It is submitted that the petitioners in collusion with public functionaries entered into a criminal conspiracy by tweaking the tender process and rules, compromising the confidentiality of e-tendering, overlooking tender conditions, and distorting, and tailor-making the contracts for the benefit of the petitioners. It is stated that other contractors were illegally excluded from competition by sharing internal information of the department with the petitioners who were allotted tenders worth more than 1000 crores at arbitrary rates. It is submitted that public money has been looted, causing wrongful loss to the government while giving wrongful gain to the petitioners. Clearly therefore, the petitioners had indulged in unethical practices. It is submitted that accordingly, there is no illegality or

arbitrariness in the action adopted by the respondents. It is further stated that action has been taken by the respondents against the higher officials who were in collusion with the petitioners.

11. Learned counsel further submits that it is in these circumstances that vide order dated 07.12.2017 passed in SLP (Crl.) No.9154 of 2017, even the Hon'ble Supreme Court had rejected the anticipatory bail application of petitioner No.2.

12. Learned Senior Counsel for the petitioners immediately rebuts the above contention on part of the respondent-State, and vehemently submits that there is no law which mandates that merely because a contractor has been arrested, he should be blacklisted & that too without issuing a Show Cause Notice. It is pointed out that even otherwise, petitioner No.2 was released on bail by this Court vide Order dated 09.05.2019 (Annexure P-8).

13. Learned Senior Counsel for the petitioners further informs this Court that on 24.05.2019, this Court had issued Notice of Motion and directed "*stay of operation of the impugned orders i.e Annexures P.6 and P.7 till further orders*". Subsequently, after COVID-19, the present writ petition came up for hearing for the first time on 10.10.2023 when on account of oversight, the counsel for the petitioner could not appear & the following order was passed:-

"The petitioner has challenged orders dated 28.02.2018 (Annexure P-6) and 09.03.2018 (Annexure P-7) whereby on account of registration of FIR No. 10 dated 17.08.2017 under

Sections 406, 409, 420, 467, 468, 471, 477-A, 120-B IPC and 13(1)(d) read with Section 13(2), P.C. Act, 1988, Police Station Vigilance Bureau, Flying Squad-I, Punjab at Mohali registered against him, he has been blacklisted for a period of two years. Since the period of two years has already come to an end on 09.03.2020, no further directions are required to be given.

The instant petition stands disposed of.”

(Emphasis supplied)

14. Learned Senior Counsel submits that however, since the impugned unjustified blacklisting of petitioner required him to disclose the above status while participating in all subsequent bids, petitioners filed an application bearing CM No.18846-2023 for recalling of the above mentioned order; and vide order dated 17.11.2023 this Court was pleased to recall the order dated 10.10.2023, and the main petition was restored to its original number.

15. No other argument is raised on behalf of the parties.

16. I have heard learned counsel for the parties.

17. A perusal of the record of the case reveals that as per the Instructions regarding “Enlistment of Contractors in Punjab P.W.D. (Irrigation Branch)” issued by the Irrigation Department (Annexure P-1), in particular Clause 18 thereof, it is stipulated as follows: –

“(18) Disciplinary Actions

The contractor shall have to abide by all the rules/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 satisfactory, 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 **after issue of show cause notice.** Decision of the department shall be final and binding on the contractor. All such decisions of the department will be notified in newspaper, displayed on the website of the department and will be conveyed to all the departments of the state Govt./State Govt, undertaking in which such type of works are undertaken”.*

(Emphasis supplied)

18. Thus, a bare perusal of the above Instructions reveals that *“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 after issue of show cause notice”*. In the present case, admittedly, no such show cause notice has been issued to the petitioners before passing of the impugned orders. Undisputedly, before proceeding to take any action against an enlisted contractor, issuance of a Show Cause Notice is mandatory, not just under the above noticed Instructions (Annexure P-1), but also as per the law laid down by the Hon’ble Supreme Court, as also by this Court. Hence, the Impugned orders are liable to be set aside.

19. The law with regard to unsustainability of blacklisting order without issuance of Show Cause Notice and adhering to principles of natural justice is well settled and no more res integra as enunciated by the Hon’ble Supreme Court as well as this Court in a plethora of judgments

including **Gorkha Security Services vs. Government (NCT of Delhi) & Others (2014) 9 SCC 105.**

20. In **UMC Technologies Pvt. Ltd. Vs. Food Corporation of India & Anr. (2021) 2 SCC 551**, the Hon'ble Supreme Court summarised the law on the present subject & while setting aside blacklisting of the Contractor therein, it was held as under:-

*“13. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. This Court in **Nasir Ahmad v. Assistant Custodian General, Evacuee Property, Lucknow and Anr.**, has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard.*

14. Specifically, in the context of blacklisting of a person or an entity by the state or a state corporation, the requirement of a valid, particularized and unambiguous show cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatization that accrues to the person/entity being blacklisted. Here, it may be gainful to describe the concept of blacklisting and the

graveness of the consequences occasioned by it. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting takes away this privilege, it also tarnishes the blacklisted person's reputation and brings the person's character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person.

15. ...This domino effect, which can effectively lead to the civil death of a person, shows that the consequences of blacklisting travel far beyond the dealings of the blacklisted person with one particular government corporation and in view thereof, this Court has consistently prescribed strict adherence to principles of natural justice whenever an entity is sought to be blacklisted.

*16. The severity of the effects of blacklisting and the resultant need for strict observance of the principles of natural justice before passing an order of blacklisting were highlighted by this Court in **Erusian Equipment & Chemicals Ltd. v. State of West Bengal...***

*17. Similarly, this Court in **Raghunath Thakur v. State of Bihar**, struck down an order of blacklisting for future contracts on the ground of non-observance of the principles of natural justice...*

*18. This Court in **Gorkha Security Services v. Government (NCT of Delhi) and Ors.** has described blacklisting as being equivalent to the civil death of a person because blacklisting is stigmatic in nature and debars a person from participating in government tenders thereby precluding him from the award of government contracts...*

19. In light of the above decisions, it is clear that a prior show cause notice granting a reasonable opportunity of being heard is an essential element of all administrative decision-making and

particularly so in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted. In these cases, furnishing of a valid show cause notice is critical and a failure to do so would be fatal to any order of blacklisting pursuant thereto.

20. ...**Gorkha Security Services (supra)** is a case where this Court had to decide whether the action of blacklisting could have been taken without specifically proposing/contemplating such an action in the show-cause notice. For this purpose, this Court laid down the below guidelines as to the contents of a show cause notice pursuant to which adverse action such as blacklisting may be adopted...

21. Thus, from the above discussion, a clear legal position emerges that for a show cause notice to constitute the valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the noticee. Such a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting.

26. In view of our conclusion that the blacklisting order dated 09.01.2019 passed by the Corporation is contrary to the principles of natural justice, it is unnecessary for us to consider the other contentions of the learned counsel for the appellant. Having regard to the peculiar facts and circumstances of the present case, we deem it appropriate not to remit the matter to the Corporation for fresh consideration."

(Emphasis supplied)

21. Thus, in view of the above said unequivocal enunciation of law, prior issuance of a Show Cause Notice to a Contractor proposed to

be blacklisted is a mandatory requirement in law & any failure to do so would be fatal to any such order of blacklisting.

22. In the present case it is an admitted position on record that the petitioners have been blacklisted by respondents without issuance of show cause notice. It is settled law that no matter what the gravity of an offence be against the petitioners, however, the principle of audi alteram partem demands that an opportunity of hearing be granted to the petitioners. The same has been echoed by the Hon'ble Supreme Court in a series of judgements as mentioned above. The same is also provided in the Departmental Instructions (Annexure P-1).

23. Furthermore, the fact that the petitioners have been blacklisted without being afforded any opportunity of hearing leads to the inevitable conclusion that the respondent No.3, in dereliction of the Instructions, failed to apply its mind while issuing the impugned orders, and the same have been passed at the asking of Vigilance Bureau. It appears that Respondent No.3 acted only the recommendations of Vigilance Bureau and failed to apply his independent mind before blacklisting the Petitioner; whereas as per the Departmental Instructions (Annexure P-1), respondent No.3 alone is entitled to act against the Contractors and cannot delegate his powers.

24. In view of the above noted legal and factual position, the impugned orders dated 28.02.2018 (Annexure P6) and 09.03.2018 (Annexure P7) are hereby set aside; and the present petition is allowed.

25.

Pending application(s) if any also stand(s) disposed of.

(Ritu Bahri)

Acting Chief Justice

(Nidhi Gupta)

Judge

09.01.2024

Sunena

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No