

Neutral Citation No. - 2024:AHC:94730-DB

Court No. - 3

Case :- WRIT - C No. - 6629 of 2024

Petitioner :- Ramraja Constructions Through Its Proprietor Jauhar Singh
Having Its Office At Village Kolwa Barusagar District Jhansi

Respondent :- State Of Up And 4 Others

Counsel for Petitioner :- Kartikeya Saran,Ujjawal Satsangi

Counsel for Respondent :- C.S.C.

Hon'ble Anjani Kumar Mishra,J.

Hon'ble Jayant Banerji,J.

1. Rejoinder affidavit filed today in Court is taken on record.
2. Heard Shri Kartikeya Saran, counsel for the petitioner. Learned Standing Counsel appears for the respondents.
3. This petition has been filed seeking the following prayer:

"1. Issue an appropriate Writ, order or direction, calling for the record, and quashing the Impugned Order dated 14.12.2023 passed by the Respondent No. 4. (Annexure No. 1);

2. Issue an appropriate Writ, order or direction, calling for the record, and quashing the Impugned Order dated 29.01.2020 passed by Respondent No. 5 (Annexure No. 1);

3. Issue an appropriate Writ, order or direction, directing the Respondents to permit the Petitioner to participate in Government Tenders;

4. Issue any other writ, order or direction in favour of the petitioner, which this Court may deem fit under the facts and circumstances of the present case.

5. Award the costs of and incidental to this application and for this, as in duty bound, the petitioner shall ever pray.

6. Issue an appropriate Writ, order or direction, calling for the record and quashing the Impugned Order dated 24.01.2020 passed by Deputy Secretary, Government of Uttar Pradesh (Annexure No.- 7)."

4. The contention is that an order of blacklisting was passed on 24.1.2020 without providing a show cause notice to the petitioner and the petitioner was blacklisted for an indefinite period. It is stated that earlier a writ petition bearing Writ-C No. 28468 of 2023 was filed by the petitioner

which was disposed of by an order dated 23.8.2023 directing the District Magistrate to consider the grievance of the petitioner and pass appropriate reasoned orders considering the request of the petitioner to lift prospectively the order of blacklisting as expeditiously as possible preferably within a month. By another impugned order of 14.12.2023, the representation of the petitioner has been rejected on the ground that there is no guideline specifying the period of blacklisting and the decision for blacklisting was taken at the State Government level.

5. Learned Standing has opposed the petition and has drawn the attention of the Court to the page no. 21 and 61 of the counter affidavit to contend that there were serious allegations of fraud with respect to the tender process and therefore, on coming to know of that, the order was blacklisting was passed. It is stated that the tenders were cancelled. No other argument has been advanced by the learned Standing Counsel.

6 On record is a letter dated 24.12.2019 sent by the District Magistrate, Jhansi to the Principal Secretary, Minor Irrigation Department, Government of Uttar Pradesh, Lucknow (Annexure No. 7) on the subject of irregularities committed by the officers/ employees in the office of the Executive Engineer, Minor Irrigation regarding invitation of tenders under the scheme of 'Bundelkhand Package (Third Stage)'. It is stated in the letter that irregularities were conducted in the procedure adopted by the Minor Irrigation Department for inviting tenders; an enquiry by the Chief Development Officer, Jhansi was ordered by the District Magistrate in which enquiry it was recommended that the tender process be cancelled and that an enquiry officer be nominated; that accordingly, the tender was cancelled by the District Magistrate by an order dated 29.11.2019 and an enquiry was ordered; that as per the exhaustive inquiry report, serious irregularities were found and it was recommended, inter alia, that action be taken against several engineers including the Executive Engineer and the accountant; that it was also recommended that the firms/contractors involved in the tender process be

blacklisted and **for a limited period** their participation in government tenders be prohibited.

7. By a letter dated 24.1.2020, the Deputy Secretary of the Government of Uttar Pradesh wrote to the District Magistrate, Jhansi (Annexure No. 8), stating that he has been ordered to state that firms/contractors found involved in the process be blacklisted and they be barred from participating in government tenders in the future and first information report be lodged against them.

8. It appears that a letter dated 8.6.2023 was written by the Executive Engineer to the District Magistrate, Jhansi stating that 59 firms have been barred from participating in the tender process for more than 3 years, which is causing difficulty and it would be appropriate to stop the bar imposed against the 59 firms from participating in the tender process.

9. Since, no decision was taken, the petitioner approached this court by means of a writ petition bearing Writ C No. 28468 of 2023, which was disposed of on 23.8.2023 directing the District Magistrate to consider the grievance of the petitioner and pass appropriate reasoned orders, considering the request of the petitioner to lift prospectively the orders of blacklisting. By the order dated 14.12.2023, the District Magistrate rejected the letter of the petitioner submitted pursuant to the aforesaid order dated 23.8.2023 passed by this court in the writ petition of 2023.

10. Learned Standing Counsel has referred to a letter dated 29.11.2019 issued by the Chief Development Officer, Jhansi to the District Magistrate, Jhansi (page no. 21 to the counter affidavit) in which it was stated that the process adopted in the tender process was enquired into and for completing the enquiry with regard to the tender process, the technical bids and the financial bids are required to be opened. In it, it was proposed that the tender process be cancelled with immediate effect. It was further requested in the letter that an enquiry officer be made available for completing the enquiry.

11. Learned Standing Counsel has also referred to the letter sent by the District Magistrate, Jhansi to the Principal Secretary (page 61 of the counter affidavit) dated 24.12.2019, which has already been referred to hereinabove.

12. In the case of **Kulja Industries Limited Vs. Chief General Manager Western Telecom Project BSNL**¹, the Supreme Court was considering the question whether the respondent- Bharat Sanchar Nigam Limited could have blacklisted the appellant for allotment of the future contracts for all times to come. In that case, the allegation of BSNL was that four of its officers had abused their official position and fraudulently generated 'voucher numbers' on the duplicate and triplicate copies of the bills submitted by the appellant to facilitate payments as if the said bills were genuine and thereby causing wrongful loss to the BSNL. A corresponding gain to the appellant resulting in an excess payment of 7.98 crores made and credited to the account of the appellant. By a letter, the BSNL blacklisted the appellant permanently on the grounds that the appellant had committed gross misconduct and irregularities. While considering the matter, the Supreme Court observed as follows:

“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 pre-condition 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. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with *Erusian Equipment and*

1 MANU/SC/1014/2013

Chemicals Ltd. v. State of West Bengal and Anr. MANU/SC/0061/1974: (1975) 1 SCC 70 where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed:

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.

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24. 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.

25. In the case at hand according to the Respondent- BSNL, the appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the Respondent- corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when (a) the appellant is supplying bulk of its manufactured products to the Respondent- BSNL, and (b) the excess amount received by it has already been paid back.

26. 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. 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. We say so for two precise reasons. Firstly, because blacklisting is in the nature of penalty the quantum whereof is a matter that rests primarily with the authority competent to impose the same. In the realm of service jurisprudence this Court has no doubt cut short the agony of a delinquent employee in exceptional circumstances to prevent delay and further litigation by modifying the quantum of punishment but such considerations do not apply to a company engaged in a lucrative business like supply of optical fibre/HDPE pipes to BSNL. Secondly, because while determining the period for which the blacklisting should be effective the Respondent-Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of

debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While, it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the Respondent- Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor.”

Thus, from perusal of the above judgment, it is evident that severe civil consequences befall a person or an entity who or which is blacklisted. The fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is blacklisted. The concerned authority is mandated to have an objective satisfaction given the fact that a disability is created by the order of blacklisting. Moreover, debarment is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractors. The aforesaid judgment of the Supreme Court in **Kulja Industries** was affirmed by a three Judge Bench of the Supreme Court in **Vetindia Pharmaceutical Limited Vs. State of Uttar Pradesh and another**², in which, the Supreme Court has observed as follows:

“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.

13. This Court in *Kulja Industries Ltd. v. Western Telecom Project BSNL* [*Kulja Industries Ltd. v. Western Telecom Project BSNL*, (2014)

14 SCC 731] , despite declining to interfere with an order of blacklisting, but noticing that an order of permanent debarment was unjustified, observed : (SCC p. 744, para 28)

“28.2. Secondly, because while determining the period for which the blacklisting should be effective the respondent Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor.”

14. Since the order of blacklisting has been found to be unsustainable by us, and considering the long passage of time, we are not inclined to remand the matter to the authorities. In *Daffodills Pharmaceuticals [Daffodills Pharmaceuticals Ltd. v. State of U.P., (2020) 18 SCC 550 : 2019 SCC OnLine SC 1607]* , relied upon by the appellant, this Court has observed that an order of blacklisting beyond 3 years or maximum of 5 years was disproportionate.”

13. Nowhere in the counter affidavit filed on behalf of the respondent nos. 1 and 2 has it been stated that any opportunity or a notice was afforded/given to the petitioner prior to passing of the order of blacklisting.

14. Even otherwise, it is evident from the record that the petitioner was being taken to task due to the acts of the officers and employees of the Irrigation Department. Moreover, despite this Court permitting the respondents to consider the grievance of the petitioner in its order dated 23.8.2023 in the aforesaid Writ-C No. 28468 of 2023, the respondents simply failed to pay any heed.

15. The writ petition is, therefore, **allowed**. The order of blacklisting dated 24.1.2020 and the other impugned order passed by the District Magistrate dated 14.12.2023 are quashed. In view of the illegal procedure

adopted by the respondents in blacklisting the petitioner without notice and extending the blacklisting for an indefinite period, and that too without any statutory sanction, this Court finds that it is a tainted exercise of power by the respondents. Accordingly, the petitioner shall be entitled to cost of Rs. 1,00,000/-, that shall be paid to the petitioner within a period of one month from today.

Order Date :- 24.5.2024

A. V. Singh