



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

Date of decision: 24th MAY, 2024

IN THE MATTER OF:

+ **W.P.(C) 7799/2021 & CM APPLs. 24293/2021, 58358/2023**

KTECH ENGINEER BUILDERS CO. PRIVATE LIMITED

..... Petitioner

Through: Mr. Raj Shekhar Rao, Sr. Advocate
with Mr. Vikas Mishra, Mr. Nikhil
Chawla, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Vikram Jetly, CGSC with Ms.
Shreya Jetly, Advocate.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court under Article 226 of the Constitution of India challenging two Work Load Returns dated 08.06.2021 & 26.07.2021 containing adverse remarks against the Petitioner, issued by the Respondent No.3 herein.
2. It is the contention of the Petitioner that due to the said adverse report, the Petitioner is not being awarded any tender and, therefore, it amounts to Petitioner being blacklisted. It is contended that the Petitioner has not been given any notice of blacklisting and the impugned order is contrary to the law laid down by the Apex Court in Gorkha Security Services vs. Govt. of NCT of Delhi, (2014) 9 SCC 105, and UMC Technologies (P) Ltd. v. Food Corpn. of India, (2021) 2 SCC 551.
3. The facts, in brief, leading to the present Writ Petition are as under:



- a. The Petitioner is engaged in the work of civil constructions, building constructions and other related works for more than half a decade and has been an enlisted contractor of the Military Engineering Services (MES) for the past 60 years and is enlisted in the “SS” Class with the MES with unlimited tendering since 2004.
- b. It is stated that a tender bearing No. CA No. CEDZ-63/2005-2006 for construction of an Army Mess and Auditorium at Delhi Cantt was floated by the MES. The Petitioner placed its bid and was awarded the tender for a total contract amount of Rs.38.27 Crores. The said work was to be completed by 12.10.2007.
- c. It is stated that on 30.06.2010 a commendation certificate was issued by the MES to the petitioner stating that the work for the Construction of the Army Mess and Auditorium at Delhi Cantt. had been completed in a commendable manner.
- d. The project was completed by the Petitioner on 14.12.2010.
- e. On 20.12.2010, a completion certificate was issued to the petitioner subject to rectification of defects which were pointed out to the petitioner.
- f. On 16.03.2011, a Recommendation Letter was issued by the MES to the petitioner stating that the quality of workmanship is excellent and the project has been recognised by the Indian Building Congress. An Excellence certificate was awarded to the project in the Built Environment Category at the Annual Convention of the Indian Building Congress. The



Recommendation letter stated that the petitioner firm is technically capable and financially sound for executing works of high Magnitude.

- g. On 29.07.2011, a defect rectification certificate was issued by the Respondents to the petitioner against the project of construction of Army Mess and Auditorium at Delhi Cantt.
- h. The defect liability period of the project lapsed in 2011.
- i. Material on record indicates that disputes arose between the parties regarding payments and the matter was referred to arbitration pursuant to which an award dated 16.12.2013 was passed in favour of the Petitioner.
- j. The Award was challenged by the Respondents by filing OMP 331/2014 before this Court and the same was rejected by this Court *vide* Order dated 11.05.2015 and the same was confirmed by the Division Bench of this Court *vide* Order dated 02.11.2015.
- k. After a lapse of about six years of time of defect liability period, on 17.07.2017, the MES wrote a letter to the Petitioner stating that Leakage/seepage has developed at the ROC Roof at Mayur Hall and Zorawar Auditorium at the Manekshaw Centre located in the project and the Petitioner was requested to rectify the same to avoid further damage to the building.
- l. Material on record indicates that a structural audit report was undertaken by the IIT, Delhi using Partial, Non- Destructive Tests and other on site investigations and it was found that the structure has deteriorated and damaged to the extent that it does



not meet the criteria laid down in the National Building Code provisions. The audit report also stated that the quality of concrete used was doubtful.

- m. A Show Cause Notice dated 28.02.2020 was issued to the Petitioner by the Respondents pointing out the defects primarily relying on the structural audit report of the IIT Delhi. Vide the said Show Cause Notice, the Petitioner was directed to take necessary steps to make up for the deficiencies and to show cause as to why the matter should not be reported to the competent authority for suspension of the Petitioner firm.
- n. Material on record shows that the Petitioner placed its bid for another tender floated by the Respondents on 04.11.2020 and the same was rejected by the Respondents on 29.12.2020.
- o. It is stated that the Petitioner challenged the rejection by filing an appeal before the competent authority, i.e. the Chief Engineer, Western Command.
- p. The Petitioner also filed a Writ Petition before this Court challenging the rejection, being W.P.(C) 154/2021, and the same was disposed of by the Division Bench of this Court permitting the Petitioner to file a fresh appeal before the competent authority. It is stated that the Petitioner filed a supplementary appeal before the competent authority and the same was allowed vide Order dated 24.02.2021. Resultantly, the Petitioner was awarded the tender for Provision of Deficient Sailors MD ACN (72 DUS) at Naraina Bagh, New Delhi.
- q. It is stated that on 08.06.2021 and 26.07.2021 the impugned



work load returns were issued by the MES for the quarters ending in December, 2020 and March, 2021 respectively and the Petitioner was not considered for handling more workload as the work of the Petitioner had ‘serious defects’.

r. The Petitioner has approached this Court challenging the impugned work load returns.

4. The Writ Petition came up for hearing on 05.08.2021 and a coordinate Bench of this Court held that the effect of the adverse remarks tantamounts to blacklisting of the Petitioner without giving any reason or affording any hearing to the Petitioner. The learned Single Judge, therefore, stayed the operation of work load return. In the same Order, the learned Single Judge has also recorded the case of the Respondent that the Respondents have not issued any show cause notice to the Petitioner as they were awaiting a report from the Technical Board of Officers which had been constituted to look into the defects.

5. Pleadings were completed.

6. In the interregnum, the report of the Technical Board of Officers has also been filed which primarily indicates that the problem has arisen because of the faults in designing of the building.

7. Learned Counsel for the Petitioner contends that the impugned work load return is actually an order of blacklisting which has been passed without issuing any Show Cause Notice to the Petitioner and the same is contrary to the law laid down by the Apex Court. He also places reliance on the report of the Technical Board of Officers which categorically states that the leakage/seepage has developed at the ROC Roof at Mayur Hall and Zorawar Auditorium at the Manekshaw Centre primarily because of the



defects in the design given by the designing consultant. The report recommends a strict action against the Consultant. Learned Counsel for the Petitioner states that the Petitioner has received commendations for the work done by it and the grudge of the Respondent has arisen primarily after the award dated 16.12.2013 has been passed in favour of the Petitioner. He also states that the work at Mayur Hall and Zorawar Auditorium at the Manekshaw Centre was completed way back in 2010 and the defect period is also over. He states that the problems in the aforesaid buildings have arisen after six years of the lapse of the defect period and, therefore, that alone cannot lead to passing an adverse work load return against the Petitioner having the effect of blacklisting the Petitioner. He also states that the Petitioner had also requested the IIT Roorkee to examine the structure and the IIT Roorkee has also found fault with the designing of the buildings in question. He states that the Report of the IIT Roorkee came prior to the report of the Technical Board of Officers which also confirms that the defect is primarily in the design of the building. He states that once reports from two entities state the same fact, the report of IIT Delhi cannot be completely relied on for the purpose of issuance of adverse remarks on work load returns which amounts to blacklisting.

8. *Per contra*, learned Counsel for the Respondent contends that before issuing adverse work load return, the Respondent had requested IIT Delhi to conduct a structural audit of the buildings in question and the report of IIT Delhi shows that the work of the Petitioner is shoddy and on this basis, a Show Cause Notice was issued to the Petitioner. He, therefore, states that the decision not to award any further work to the Petitioner because serious defects were found in the Petitioner's earlier work, cannot be found fault



with. He also contends that the work load return is not a blacklisting order but is only a decision by the Respondent not to award any further work to the Petitioner because of the defects that have been found in the Petitioner's earlier completed projects.

9. Heard the Counsels for the parties and perused the material on record.

10. The Material on record discloses that a decision has been taken by the Respondent not to award any further work to the Petitioner on the ground that the work done by the Petitioner is defective.

11. A perusal of the impugned work load returns indicates that contractors have been held ineligible from entailing more work load either because of the fact change in the constitution of the firm had not been intimated to the Respondent or because of slow progress made by the firms in completing the projects. However, in the case of the Petitioner, the reason for not awarding any work to the Petitioner are the defects that have been found in the Petitioner's earlier completed work. The decision not to give any further work to the Petitioner is because of defective work. The order certainly amounts to a blacklisting order. The Petitioner would now never be given any work by the MES and a stigma has been cast upon the Petitioner by way of the adverse remarks. In light of the above, the contention of the Petitioner that the Petitioner has been blacklisted without giving any show cause notice has to be sustained and it can be said that the impugned adverse remarks on the work load returns which actually amounts to a blacklisting order is violative of the law laid down by the Apex Court in Gorkha Security Services (supra) and UMC Technologies (P) Ltd.(supra).

12. In UMC Technologies (P) Ltd.(supra) the Apex Court has observed 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. Custodian General, Evacuee Property* [*Nasir Ahmad v. Custodian General, Evacuee Property*, (1980) 3 SCC 1] 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, particularised and unambiguous show-cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatisation 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 take 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. In the present case as well, the appellant has submitted that serious prejudice has been caused to it due to the Corporation's order of blacklisting as several other government corporations have now terminated their contracts with the appellant and/or prevented the appellant from participating in future tenders even though the impugned blacklisting order was, in fact, limited to the Corporation's Madhya Pradesh regional office. 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 W.B. [Erusian Equipment & Chemicals Ltd. v. State of W.B., (1975) 1 SCC 70] in the following terms: (SCC pp. 74-75, paras 12, 15 & 20)

“12. ... The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who



has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

15. ... 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 blacklists are “instruments of coercion”.

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.”

17. Similarly, this Court in Raghunath Thakur v. State of Bihar [Raghunath Thakur v. State of Bihar, (1989) 1 SCC 229] struck down an order of blacklisting for future contracts on the ground of non-observance of the principles of natural justice. The relevant extract of the judgment in that case is as follows: (SCC p. 230, para 4)

“4. ... [I]t is an implied principle of the rule of law that any order having civil consequences 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.”

18. *This Court in Gorkha Security Services v. State (NCT of Delhi) [Gorkha Security Services v. State (NCT of Delhi), (2014) 9 SCC 105] 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. It has been held thus: (SCC p. 115, para 16)*

“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.”

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.

25. The mere existence of a clause in the bid document, which mentions blacklisting as a bar against eligibility, cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show-cause notice. The Corporation's notice is completely silent about blacklisting and as such, it could not have led the appellant to infer that such an action could be taken by the Corporation in pursuance of this notice. Had the Corporation expressed its mind in the show-cause notice to blacklist, the appellant could have filed a suitable reply for the same. Therefore, we are of the opinion that the show-cause notice dated 10-4-2018 does not fulfil the requirements of a valid show-cause notice for blacklisting. In our view, the order of blacklisting the appellant clearly traversed beyond the bounds of the show-cause notice which is impermissible in law. As a result, the consequent blacklisting order dated 9-1-2019 cannot be sustained.”

13. In any event, the report of the Technical Board of Officers has already held that the defects have occurred due to fault in the design of the constructions. At this juncture, it is pertinent to reproduce the recommendations of the Technical Board of Officers and the same reads as under:

“In view of deliberations, analysis and findings of the TBOO, following are recommendations of the TBOO: -

93) The TBOO acknowledges timely start of remedial



measures and rehabilitation to take care of the imminent danger to the structure.

94) It is beyond reasonable doubt that the leakage seepage and structure distress in Main Entrance Area and Banquet Dining Area is on account of deficiency in design service by the consultant. Deficiency is also in failure in visualizing, identifying and resolving the problems related to leakage seepage and structural distress during weekly site visits. TBOO is of the opinion that had adequate attention been paid by the consultant with requisite deliberations among all the stake holders, some of these issues could have been addressed at the time of execution itself.

Therefore, the TBOO recommends that the convening authority may consider taking up the case with the enlisting authority to consider action for such deficiency of service by the consultant in terms of enlistment and extant policies/rules.

95) The TBOO recommends that the repairs and rehabilitation work must be executed strictly as advised by IITD.

96) While carrying out rehabilitation of the structure for leakage seepage and structural distress, surgical precision is required in understanding the distress and executing rehabilitation work. Accordingly, consultation with IITD or similar specialist agency may be considered for continuous consultation till conclusion of the repairs.

97) The TBOO recommends that considering the importance of the structure, utmost care is required in use & maintenance of the structure. Any alterations like mobile towers, solar plants etc should be taken up only after consultations with all stakeholders. Similarly systematic and timely disposal of rainwater must be



ensured.

98) The TBOO recommends that deliberations and analysis in these BPs may be shared, if considered in order, with the executives supervising the ongoing Special repair work, for better appreciation of the problem and accordingly ensuring targeted repairs.”

14. A perusal of the recommendations shows that the leakage, seepage and structural distress in the buildings in question is primarily on account of deficiencies in designing of the building by the design consultant and the Petitioner has not been found fault with.

15. In view of the report of the Technical Board of Officers, which is a Committee of the Officers of the Respondents, the adverse remarks on the work load returns against the Petitioner cannot be permitted to survive. The Petitioner cannot be blacklisted only on the basis of the report of IIT Delhi without giving any opportunity to the Petitioner to defend itself.

16. In view of the above, this Court is inclined to allow the Writ Petition. The adverse remarks in the work load report against the Petitioner stands expunged. However, it is always open to the Respondents to issue a fresh Show Cause Notice to the Petitioner and proceed further in accordance with law if they still feel that the Petitioner is at fault or that the seepage/leakage in the building has occurred only because of the defective work of the Petitioner.

17. Accordingly, the Writ Petition is allowed. Pending application(s), if any, stand disposed of.

SUBRAMONIUM PRASAD, J

MAY 24, 2024/Rahul