

Prajakta Vartak

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (L.) NO.1665 OF 2022

M/s. Moonline Express Cargo Pvt. Ltd. ..Petitioner

Vs.

Union of India through Divisional
Railway Manager (Commercial) ..Respondent

Mr. Mutahhar Khan i/b. Mr. Rajesh Gupta for Petitioner.

Mr. T. J. Pandian with Mr. T. C. Subramanian and Mr. Dheer Sampat for
Respondent.

CORAM : G.S. KULKARNI, J.

DATE : JANUARY 27, 2022.

PC.:

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") whereby the petitioner has prayed for interim reliefs pending the arbitral proceedings. The disputes between the parties have arisen under a contract entered by the respondent -Railways with the petitioner, awarded in pursuance of a tender floated by it on 03 March, 2021, for grant of leasing rights in respect of a "3.9 Ton parcel space in Train No. 03202 (FL WLRRM) LTT-PNBE Spl Ex. Operating between Lokmanya Tilak Terminus and Patna" for a period of five years.

2. It is also necessary to note the date on which petitioner, participated in such tender which was on 26 March, 2021. The dates of issuance of the tender and the date on which the petitioner submitted its bid, according to the petitioner are indicative of quite a normal period

after the first wave of the Covid 19 pandemic. The petitioner has contended that in April 2021 the second wave of Covid-19 had commenced, consequent to which lockdown restrictions were imposed in Mumbai as also in Patna.

3. On 17 May 2021, the respondent having accepted the petitioner's bid, issued a 'Letter of Allotment' in favour of the petitioner. This was during the time when the lockdown restrictions were imposed. As per the letter of allotment the respondent called upon the petitioner to commence loading within 15 days of issuance of the letter of allotment.

4. It is the petitioner's case that due to the circumstances created by the lock down , it was not possible for the petitioner to comply with the requirement of immediate loading as contained in the letter of allotment. On the issue of commencement of the loading there was correspondence between the parties. By its letters dated 31 May, 2021, 29 June, 2021 and 19 July, 2021 the petitioner informed the respondent about the lockdown restrictions in Mumbai as also in Patna and due to which it had become difficult for the petitioner to comply with such conditions as contained in the letter of allotment.

5. The petitioner's request however was not accepted by the respondent and a show cause notice dated 26 July, 2021 came to be issued to the petitioner calling upon the petitioner to start loading with effect from 01 August, 2021, failing which the petitioner was put to a notice that its allotment would stand terminated. It is the petitioner's

case that the show cause notice did not refer and /or contain any intimation or a threat that the petitioner would be debarred or blacklisted from submitting its bid in future tenders.

6. The petitioner responded to the show cause notice of the respondent by its letter dated 28 July, 2021 *interalia* setting out the circumstances which were prevailing. The petitioner categorically pointed out that when the tender in question was floated by the respondent as also when the petitioner submitted its bid, the circumstances of a lockdown were not existing, that is in March 2021. The petitioner has contended that the respondent although considered the petitioner's reply to the show cause notice, however, the reasons as pointed out by the petitioner were not accepted by the respondent, inasmuch as the respondent on 8 September, 2021 issued a termination letter to the petitioner, terminating the award of the said contract and forfeiting the earnest money deposit of Rs.1 Lakh, as also, debarring the petitioner from participating in the future tenders of the respondent for a period of two years. Such termination letter dated 8 September, 2021 was received by the petitioner on 16 October, 2021.

7. The petitioner being aggrieved by such action of the respondent to debar the petitioner from participating in future tenders, approached this Court by filing Writ Petition No.3581 of 2021, which came to be filed on 28 October, 2021. However, as an alternate remedy was available to the petitioner including resorting to arbitration, a Division

Bench of this Court by an order dated 17 January, 2022 permitted the petitioner to withdraw such petition, with liberty to pursue the available alternate remedy including arbitration keeping open all contentions. Accordingly, the petitioner has filed this petition on 19 January, 2022.

8. Mr. Khan, learned counsel for the petitioner at the outset would submit that the grievance of the petitioner in the present proceedings is on the action of the respondent to debar the petitioner from participating in any tender of the respondent for two years. Mr. Khan, would submit that the relief in regard to such a condition has become necessary, in as much as, the respondent has floated tender for leasing rights in respect of certain trains. Such tenders would be opened on 28 January, 2022. It is submitted that the petitioner, who is desirous to participate in such tender, would lose an opportunity of participating in such tender in view of the arbitrary condition of debarment imposed by the respondent in the termination letter dated 8 September, 2021.

9. Mr. Khan submits that to debar the petitioner for any period, was not the case of the respondent, in the show cause notice issued to the petitioner. It is submitted that an action of debarring the petitioner was certainly an action involving civil consequences and if such action was to be taken against the petitioner, in that event, the respondent ought to have followed the due procedure, as known to law and a specific show cause notice ought to have been issued to the petitioner, and thereafter following the principles of natural justice, by granting the petitioner an

opportunity of being heard on such show cause notice, an appropriate order could have been passed by the respondent. It is submitted by Mr. Khan that such lawful procedure has been given a complete go-bye by the respondent in imposing on the petitioner, a drastic consequence of debarment for a period of two years. Mr. Khan has submitted that the action to debar is an action of blacklisting the petitioner for a period of two years and in a manner completely unknown to law. To support such contentions, Mr. Khan placed reliance on the decisions of the Supreme Court in **Erusian Equipment & Chemicals Ltd. v. State of West Bengal**¹, **Gorkha Security Services v. Government (NCT of Delhi) and Ors.**², **Southern Painters versus Fertilizers & Chemicals Travancore Ltd. & Anr.**³ and in a recent judgment of Supreme Court in **UMC Technologies Private Limited Versus Food Corporation of India and Another**⁴ to submit that this is a clear case where the lawful procedure of adherence to the principles of natural justice in blacklisting a contractor has not been followed by the respondent which would render the respondent's action, as assailed, totally non est in law. In these circumstances, it is his submission that the petitioner has become entitled to the reliefs as prayed for in prayer clause (c), wherein the petitioner has prayed for stay to the effect and operation of the condition as contained in the termination letter dated 8 September, 2021, to the extent it seeks to

1. (1975) 1 SCC 70.

2. (2014) 9 SCC 105

3. 1994 Supp (2) Supreme Court Cases 699

4. (2021) 2 Supreme Court Cases 551

debar the petitioner from participating in any tenders floated by the respondent for a period of two years.

10. On the other hand, Mr. Pandian, learned counsel for the respondent in opposing the reliefs as prayed by the petitioner, has placed reliance on the reply affidavit of Mr. Dharendra Singh, Divisional Commercial Manager, Central Railway, Mumbai CSMT. In the arguments as advanced by Mr. Pandian, his principal contention is that the petitioner would not be entitled to any reliefs, as in the tender documents under which the petitioner was issued an allotment letter, a provision for an appeal has been made in clause 1.6 *inter alia* against cancellation of registration or termination of lease contracts, which would lie with the Chief Commercial Manager of Zonal Railways. It is his submission that in view of such condition, it was not correct for the petitioner to invoke the jurisdiction under Section 9 of the Act. Mr. Pandian however does not dispute that clause 1.5 of the tender condition which also forms part of the contract confers an authority on the respondent, in a manner as specifically set out in the said condition to debar the contractor from fresh registration for a period of five years, which was not invoked by the respondent against the petitioner. Mr. Pandian is not in a position to support the action of the respondent to debar the petitioner on the basis of the show cause notice which was issued to the petitioner. Thus, the only contention of Mr. Pandian is that

the petitioner ought to have availed the remedy of appeal as set out in clause 1.6 of the tender.

11. Having heard Mr. Khan and Mr. Pandian, learned counsel for the parties, in my opinion, there is much substance in the contention as urged by Mr. Khan, that an action to debar the petitioner for any period, was certainly not in contemplation of the respondent, when the respondent issued to the petitioner, the show cause notice dated 26 July, 2021. Such show cause notice was conspicuously silent on any action of a debarment/blacklisting to be taken against the petitioner. Thus, no opportunity was available to the petitioner to defend an action of debarment being resorted by the respondent against the petitioner. The petitioner could not have been taken by a surprise by the respondent. If the respondent wanted to initiate any action against the petitioner by invoking clause 1.5 of the tender condition which according to Mr. Pandian would confer a contractual authority on the respondent to debar the petitioner, then necessarily the law would require issuance of a specific show cause notice on debarment, when such cause to debar stems under the contract between the parties, as in the present case.

12. Adherence to the principles of natural justice which would include issuance of a show cause notice and an effective hearing to be given to the person against whom a debarment action is proposed are a *sine qua non*, as clear from decisions of the Supreme Court which hold the field for more than last 46 years (see: **Erusian Equipment & Chemicals Ltd.**

(supra)) and several other decisions as rendered by the Supreme Court after such decision. Mr. Khan's reliance on a recent decision of the Supreme Court in **UMC Technologies Private Limited** (supra) is well founded. The facts of the said case are quite similar to the facts of the case in hand. Under the bids invited by the respondent-FCI, the appellant had submitted its bid and was declared to be a successful bidder for undertaking the tender work of conducting recruitment of watchman for the FCI. On certain materials gathered by the FCI against the appellant a show cause notice was issued to the appellant which was completely silent on any action of blacklisting to be taken against the appellant. The proceedings of the show cause notice however resulted in the FCI terminating the appellants contract as also blacklisting the appellant from participating in any future tenders for a period of five years. The appellant failed before the High Court in its writ petition challenging such action of the FCI. Allowing the appellants appeal the Supreme Court referring to several earlier decisions held, that it is the first principle of civilized 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. It was observed that the basic principle of natural justice, is to the effect that, before an adjudication starts, the authority concerned should issue a notice to the affected party putting up the case against him, so that he can defend himself. It was observed that blacklisting of a person or of an entity by the State or a State Corporation, the requirement of a valid,

particularized and unambiguous show cause notice was crucial due to the severe consequences of blacklisting and the stigmatization that accrues to the person/entity being blacklisted. It was observed that blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. Such privilege arises because it is the State who is the counter party 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. The Court held that not only does blacklisting takes away this privilege, it also tarnishes the blacklisted person's reputation and brings the person's character into question. It was observed that blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person. The Court referring to the decision in **Erusian Equipment & Chemicals Ltd.** (supra) observed that 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, made it mandatory that the principles of natural justice are followed as blacklisting casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. It was observed that black list are instruments of coercion. The Court also referred to its decision in **Gorkha Security Services** (supra) wherein the Supreme Court had observed that blacklisting was equivalent to a civil death of a person, because blacklisting was stigmatic in nature and

which debars a person from participating in government tenders. These principles of law are aptly applicable in the facts of the present case.

13. Considering the aforesaid principles of law, in my clear opinion, prima-facie the respondent appears to have acted in complete derogation of its dominant contractual position in debarring the petitioner for a period of two years under the termination order. Although for justifiable reasons even assuming that such a right was available to the respondent under the contract in question, however, it could not have been exercised in a manner alien to the well settled principles of law as laid down by the Supreme Court as noted above. A party to the contract like the respondent was under a more solemn obligation to adhere to the principles of law in imposing a debarment on the petitioner acting under the contract. It is also significant that the petitioner's registration has not been cancelled, a consequence of which is that the petitioner continues to be a panel contractor. However, by issuing a debarment and that too illegally, the respondent has meted out to the petitioner a consequence of a civil death. The action on the part of the respondent is thus prima facie not only perverse to the contractual conditions, but also illegal affecting the legal and constitutional rights of the petitioner as held by the Supreme Court.

14. In the aforesaid circumstances, in my opinion a strong prima facie case has been made out by the petitioner for grant of interim measures pending the arbitral proceedings to the extent it debars the petitioner for

a period of two years. It would be the requirement of law for the Court to stay the effect of such illegal condition being inserted in the termination letter dated 8 September, 2021, as such condition is prima facie *void ab initio* being contrary to the settled principles of law as laid down in the decisions as discussed above.

15. In so far as the prayers as made in clauses (a) and (b) are concerned, I am not inclined to grant any relief to the petitioner, as prayed for in such prayers, as these reliefs are in the nature of reliefs, which can be granted only on final adjudication of the disputes, in the proposed arbitral proceedings. The petition is accordingly disposed of by the following order:-

ORDER

- i. The respondent is directed not to act upon the condition of debarring the petitioner for a period of two years as contained in the termination letter dated 8 September, 2021. Consequently, the petitioner is permitted to participate in the tenders which may be issued by the respondent.
- ii. In the event the respondent intends to initiate any action of blacklisting/debarring the respondent for any reason, it is open for the respondent to follow the procedure as known to law.
- iii. The petitioner is directed to invoke arbitration. As the present proceedings are filed before invocation of the arbitral proceedings, the provisions of sub-section (2) of Section 9 of the Act would become

applicable making it incumbent upon the petitioner to commence the arbitral proceedings within a period of 90 days.

iv. If the petitioner does not commence the arbitral proceedings as provided for under sub-section (2) of section 9, it would be open for the respondent to apply for vacating of the protection granted to the petitioner by this order.

v. All contentions of the parties in the arbitral proceedings are expressly kept open.

vi. Disposed of in the above terms. No costs.

[G.S. KULKARNI, J.]