

M/S. Erusian Equipment & Chemicals Ltd.

Vs

State of West Bengal and Another

Union of India and Others

Vs

A. K. Mithiborwala and Others

Writ Petitions Nos. 34/74 and 959/73 and Civil Appeal No. 318 of 1974,

(CJI A. N. Ry, K. K. Mathew, H. R. Khanna JJ)

11.11.1974

JUDGMENT

RAY, C. J. -

1. The two writ petitions and the civil appeal raise the question as to whether a person who is put on the black list by the State Government is entitled to a notice to be heard before the name is put on the black list.
2. Sale of cinchona is held by the State Government at meetings of the Sales Committee. Sealed quotations are invited for intending buyers. The State maintains a list of buyers or bidders. The State has the right to reject a bid at auction.
3. The petitioners in the writ petitions were engaged in the business of purchase and export of cinchona products between the years 1966 and 1971. They submitted tender for purchase of cinchona. Their tender was accepted. They entered into contracts with the State Government during those years for purchase of cinchona for large sums of money.
4. The petitioners submitted tender once on February 15, 1973 and again on December 4, 1973. The petitioners allege that since the month of December, 1970 all offers of the petitioners were rejected though in most cases their offer was the highest. The petitioners contend that there is discrimination and lack of fair play at the sale. The petitioners submit that they are entitled to receive the same treatment and to be given the same chance as anybody else for the purchase of cinchona. The petitioners are interested in the purchase of cinchona in course of their trade and business.
5. The respondent State alleges that the petitioners were guilty of misdeclaration of goods in their export transactions. The Sales Committee of the State learnt from a secret letter from the Collector of Customs, Calcutta that the firm of the petitioners was involved in malpractices, and their case was under investigation. The Sales Committee at a meeting on January 21, 1971 resolved not to deal with the firm of the petitioners till the firm was cleared of charges of malpractices. It is because of this resolution that the tender of the petitioners was not accepted. The petitioners according to the respondent came to know of this resolution at the meeting of the Sales Committee on December 4,

1973. The State could not however produce the original resolution in this Court.

6. It may be mentioned here that the petitioners have challenged the charges and cases under the Foreign Exchange Regulations Act in the High Court at Calcutta in writ Petition No. 959 of 1973 which is pending.

7. The respondent in Civil Appeal No. 318 of 1974 was on the approved list of the Director General, Supplies and Disposals since the year 1942. The last renewal of registration of the respondent was on June 5, 1963 for three years. Certain reports were received against the respondent regarding shortage of timber. The Special Police Establishment took charge of account books of the respondent in the month of August, 1964. A departmental enquiry was made against the storekeeper and the storeholder in the Bombay Telephone Workshop. Those two employees were suspended in the month of December, 1964. On December 4, 1965 the department put the name of the respondent on the black list. The employees of the Government who had been suspended in the year 1964 were dismissed on June 1, 1967. In the month of January, 1968 the respondent applied to the Court for return of the account books which had been taken by the Special Police Establishment. In the month of March, 1968 the account books were ordered to be returned.

8. The respondent filed a writ petition in the High Court at Bombay on January 20, 1969. On January 12, 1973 the High Court allowed the writ petition of the respondent setting aside the order whereby the respondent was blacklisted. The State filed an appeal. The High Court of Bombay dismissed the appeal. The present appeal is against that judgment.

9. The employees who had been dismissed by the State also applied to the High Court for setting aside their dismissal. The High Court accepted the prayer of the employees by an order, dated August 3, 1972.

10. In writ petitions Counsel for the State submitted that the petitioner was not entitled to any order of mandamus inasmuch as the sales were contractual. It was said that the petitioner was not entitled as of right to acceptance of tender. It was also said that the attitude of the State was not discriminatory against the petitioner but that the State wanted that the pending proceedings against the petitioner for alleged violation of Foreign Exchange Regulation Act should be adjudicated first and thereafter the State would deal with the petitioner.

11. The Solicitor General on behalf of the appellant in civil Appeal No. 318 of 1974 made these submissions. The Government could choose any person for entering into a contract. Further, the State could insist on dealing with persons in whom the State had trust for integrity. The sales were not under a statute. Blacklisting is an internal and confidential step. Rights under Articles 14, 19 and 21 do not extend to the compelling of any third party including the Government to negotiate or enter into a contract. The duty to act fairly may include in many cases duty to act judicially and those would be cases where there is existing vested rights. The duty to act fairly would not always mean a duty to hear the party affected. Whereas public blacklisting is not confidential, departmental blacklisting will be a confidential matter. If natural justice does not come into play in rejecting a bid, natural justice does not operate at the time of entering into contract.

12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject

to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person 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.

13. But for the order of blacklisting, the petitioner would have been entitled to participate in the purchase of cinchona. Similarly the respondent in the appeal would also have been entitled but for the order of blacklisting to tender competitive rates.

14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.

15. The blacklisting order does not pertain to any particular contract. 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 black lists are "instruments of coercion".

16. In passing an order of blacklisting the Government department acts under what is described as a standardised code. This is a code for internal instruction. The Government departments make regular purchases. They maintain list of approved suppliers after taking into account the financial standard of the firm, their capacity and their past performance. The removal from the list is made for various reasons. The grounds on which blacklisting may be ordered are if the proprietor of the firm is convicted by court of law or security considerations to warrant or if there is strong justification for believing that the proprietor or employee of the firm has been guilty of malpractice such as bribery, corruption, fraud, or if the firm continuously refuses to return Government dues or if the firm employs a Government servant, dismissed or removed on account of corruption in a position where he could corrupt Government servants. The petitioner was blacklisted on the ground of justification for believing that the firm has been guilty of malpractices such as bribery, corruption, fraud. The petitioners were blacklisted on the ground that there were proceedings pending against the petitioners for alleged violation of provisions under the Foreign Exchange Regulations Act.

17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arise because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a from of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.

19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein.

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.

21. With regard to the case of the petitioners, it is made clear that the authorities will give an opportunity to the petitioners to represent their case and the authorities will hear the petitioners as to whether their name should be put on the blacklist or not. This is made clear that the decision on this question will not have any effect on the proceedings pending in Calcutta High Court where the petitioner has challenged the adjudication proceedings under the Foreign Exchange Regulations Act. Any decision of the authorities on the blacklisting will have no effect on the correctness of any of the facts involved in those proceedings.

22. For these reasons, the petitioners succeed.

23. The appeal is dismissed, The parties will pay and bear their own costs.

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