SUPREME COURT OF INDIA

M/s Kulja Industries Limited

Vs.

Chief Gen. Manager W.T. Proj.BSNL

C.A.No.8944 of 2013

(T.S.Thakur and Vikramajit Sen JJ.)

04.10.2013

JUDGMENT

T.S. THAKUR, J.

1. Leave granted.

2. The short question that falls for determination in this appeal is whether the respondent-Bharat Sanchar Nigam Limited (for short 'BSNL') could have blacklisted the appellant for allotment of future contracts for all times to come. High Court of Judicature at Bombay before whom the blacklisting order was assailed by the appellant has answered that question in the affirmative and dismissed Writ Petition No.2289 of 2011 filed by the appellant giving rise to the present appeal.

3. Two tender notices for supply of Permanent Lubricated HDPE Pipe (Telecom Ducts) and Installation of O.F. Cable through Blowing Technique were issued by BSNL in the year 2004 and 2005. It is common ground that the appellant-company emerged successful in regard to both the tender notices. It is also not in dispute that several orders for supply of the material were placed with the appellant-company during the years 2004-2006 and that goods were supplied to various consignee units of BSNL pursuant to the same. The appellant's case is that a "receipt certificate" was issued in its favour after delivery of the goods and that bills for payment of the price of the goods were raised in triplicate to the Chief Controller of Accounts, WTP BSNL, Mumbai from time to time. The appellant's further case is that a single account to receive 95% of the payment due from BSNL was maintained by it and since the amounts received from the respondent-BSNL by

cheques did not carry any particulars of the consignment for which such payment was being made it could, in no way, discover excess payment, if any, released by BSNL against the bills sent by the appellant.

4. The appellant's further case is that on gaining knowledge about the excess payments received by it, an offer for reconciliation of the accounts was made to the BSNL and since any such reconciliation was likely to take 30 to 45 days, the appellant offered to adjust the excess amount credited to its account towards the outstanding bills on an ad hoc basis. A letter dated 10th May, 2006 was, according to the appellant, addressed to the respondent-BSNL in that regard.

5. The respondent-BSNL on the other hand has a different story to tell. According to it 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 thereby causing wrongful loss to the respondent- BSNL and a corresponding gain to the appellant. There was in this process an excess payment of Rs.7.98 crores made and credited to the account of the appellant by the accounts officer of respondent-BSNL.

6. Taking note of the fraudulent payments made to the appellant, the BSNL lodged an FIR with CBI ACB Mumbai against one of its Senior Accounts Officers and a Director of the appellant-company alleging commission of offences punishable under Section 120B read with Section 420 Indian Penal Code and Section 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988. Investigation that followed has culminated in a charge-sheet filed before the Special Judge for CBI cases, Bombay in which four officials of the BSNL including D. Tripathi-Senior Accounts Officer, Laxman Dixit-Assistant Accounts Officer, Krishnakumari Patnaik-Junior Accounts Officer, Poolchand Yadav-Cashier and Lalit Gupta-Director and Bhavani Sharma-Consultant of the appellant-company have been arraigned as accused persons.

7. What is important for the present is that by a letter dated 21st April, 2010, BSNL blacklisted the appellant permanently on the ground that the appellant had committed gross misconduct and irregularities by receiving excessive payments amounting to Rs.7,98,55,508/- from BSNL thereby wrongfully causing loss to the said company. The appellant denied these allegations, inter alia, contending that BSNL Policy/Manual did not provide for punitive action in the nature of blacklisting and that excess payment at best was an irregularity which had been cured by refund of the amount in question. The appellant also alleged that

reconciliation of accounts revealed that the appellant was entitled to an amount, far in excess of the payments received by it. That assertion was repeated in a legal notice sent by the appellant-company but since BSNL took no corrective action in terms of the reconciliation, W.P. No.4536 of 2010 was filed before the High Court of Judicature at Bombay in which it assailed the blacklisting order. The High Court allowed the petition on the short ground that the appellant had not been afforded any opportunity of being heard before the blacklisting order was issued by the respondent. The High Court did not go into the merits of the dispute but reserved liberty to the appellant to raise all such contentions as were open to it if and when BSNL issued a show cause notice for blacklisting it again. The BSNL was left free to pass a fresh order and take a final decision in the matter within six weeks from the date of the issue of the show cause notice.

8. A show cause notice was accordingly issued by BSNL on 4th November, 2010 to which the appellant filed a reply. The appellant was also called for a personal hearing in support of its reply to the show cause notice as directed by the High Court. By an order dated 15th January, 2011 BSNL once again directed the blacklisting of the appellant, inter alia, holding that the appellant had defrauded BSNL by using duplicate and triplicate copies of the bills that stood already cleared for payment. These bogus and fraudulent claims made under bogus and fabricated bills were then processed by some of the officers of the BSNL for payment resulting in double and at times triple payment in favour of the appellant. The relevant portion of the blacklisting order is to the following effect:

> "Hence, the supplier with a clear intention to defraud BSNL, WTP, Mumbai, have prepared duplicate and triplicate copies of bills already processed for payment and have again put up the same for payment with BSNL. Thus, in short these were bogus and/or fraudulent claims made on the basis of forged and/or fabricated bills/documents. Thereafter, by joining hands with some of the erring officers of BSNL, the supplier has got the afore mentioned duplicate and triplicate copies of bills processed for payment and have fraudulently received double/triple payment(s) for supplying material only once.
>
> Therefore, by not only claiming but also receiving double and/or triple payment on the basis of forged/fabricated/duplicate and triplicate copies of same bills, the supplier has committed gross fraud on the public exchequer. The fraudulent act on the part of supplier got completed by not only claiming such bogus payments but also by receiving the same from BSNL. Moreover, by letter dated 10th May, 2006, the supplier has not only

acknowledged but have also accepted the fact of claiming as also accepting aforesaid bogus payments and hence the supplier had agreed for reconciliation of same after deducting such bogus payments. If the accounts would not have reconciled, the supplier would have caused huge losses to the public exchequer.

Hence, there is every apprehension that if the supplier is allowed to deal in any manner with the BSNL in future, the supplier will venture into committing same and/or similar fraud (s) on the public exchequer and therefore, it is not at all in the interest of public exchequer that the supplier continues to be authorised supplier of BSNL.

Hence, in view of the all the above facts and circumstances and the entire record and proceedings of this case, it is possible for this organisation to take a view to permanent banning and impose penalty upon the supplier so as to prevent the supplier from dealing with entire BSNL, throughout the country in any manner, consequently stopping all the future business transactions of entire BSNL with the supplier.

Hereby M/s. Kulja Industries Ltd., Solan (Himachal Pradesh) is permanently banned and is consequently prevented from having any business dealing with entire BSNL through the country.

This is issued with the approval of the competent authority.

Sd/-

AGM (MM) 15.1.2011

O/o CGM, WTP, Mumbai-54"

9. Aggrieved by the above order the appellant once again approached the High Court in W.P. No. 2289 of 2011 which was heard and dismissed by a Division Bench of the High Court in terms of the order impugned in this appeal. The High Court was of the opinion that reconciliation of the account had proved that the appellant had received payment twice over for the supplies made by it and that merely because the excess payment received had been subsequently refunded by the appellant did not obliterate the act of misconduct and fraud. The High Court observed:

> "In the order impugned, the Authority has stated that on the reconciliation of the account, it was found as a fact that the Petitioner has received payment twice for the supply of the same material, because the supply was ongoing and the amount was found to be payable to the Petitioner, that was paid to him. Mere payment of the amount does not wipe out the fact that the Petitioner had submitted the Bills claiming double payment. In our opinion, in view of this finding, no interference is called for in the order impugned. The Petition is rejected. No costs."

10. The present appeal calls in question the correctness of the above order of the High Court as noticed earlier.

11. Appearing for the appellant-company, Mr. Mukul Rohatgi, strenuously argued that debarring the appellant permanently and for all times to come was wholly arbitrary and unjustified. It was contended that the blacklisting order had serious civil consequences for the person blacklisted making it obligatory for the Authority passing the order to act fairly and reasonably. Inasmuch as respondent-BSNL had blacklisted the appellant permanently, the decision was neither fair nor reasonable. Paras 31 and 32 of the bid document also, according to the learned counsel, provides for blacklisting only for a "suitable period". This implies that blacklisting had to be for a definite period and not for all times to come. Since the products manufactured by the appellant were mostly, if not entirely, supplied for consumption to the respondent-BSNL, any order permanently blacklisting the appellant from entering into contracts making supplies was tantamount to rendering the appellant jobless and economically defunct. No such order of blacklisting could, therefore, be sustained as the punishment implicit in such an order was totally disproportionate to the gravity of the offence allegedly committed by the appellant.

12. On behalf of the respondent-BSNL, it was argued by Mr. Bansal that the blacklisting order under challenge was not relatable to paras 31 and 32 of the bid document. The order simply declared the petitioner-company ineligible for allotment of any contract in future in terms of para 2.3 of the tender document, the relevant portion wherefore reads as under:

> "2.3 Disqualification Clause: The supplier/ Manufacturers in the following category are not eligible to bid in the said tender.
>
> i ....

ii. Firms against whom investigation cases are registered with the CBI or other statutory investigations agencies of State/Central Govt.

iii ...."

13. It was further contended by the learned counsel that even if the order was held to be referable to paras 31 and 32 of the bid document, an order permanently blacklisting the appellant was also justified having regard to the nature of the fraud committed by it in collusion with the officers of the respondent-corporation and involving a huge amount of nearly eight crores.

14. We may at the outset deal with the contention whether paras 31 and 32 of the bid document to which Mr. Rohtagi has made reference is the only source of the power to blacklist a defaulting contractor. These paras are as under:

"31. Purchaser reserves the right to disqualify the supplier for a suitable period who habitually failed to supply the equipment in time. Further, the suppliers whose equipment do not perform satisfactory in the field in accordance with the specifications may also be disqualified for a suitable period as decided by the purchaser.

32. Purchaser reserves the right to blacklist a bidder for a suitable period in case he fails to honour his bid without sufficient grounds."

15. A plain reading of the above would show that BSNL, the purchaser has reserved the right to disqualify any supplier who

(a) habitually fails to supply the equipment in time or (b) the equipment supplied by the supplier does not perform satisfactory in the field in accordance with the specifications or

(c) fails to honour his bid without sufficient grounds.

16. A literal construction of the provisions of paras 31 and 32 extracted above would mean that the power to disqualify or blacklist a supplier is available to the purchaser only in the three situations enumerated in paras 31 and 32 and no other. Any such interpretation would, however, give rise to anomalous results. We say so because in cases where a supplier is found guilty of much graver offences, failures or violations, resulting in much heavier losses and greater detriment to the purchasers in terms of money, reputation or prejudice to public interest may go

unpunished simply because all such acts of fraud, misrepresentation or the like have not been specifically enumerated as grounds for blacklisting of the supplier in paras 31 and 32 of the tender document. That could in our opinion never be the true intention of the purchaser when it stipulated paras 31 and 32 as conditions of the tender document by which the purchaser has reserved to itself the right to disqualify or blacklist bidders for breach or violation committed by them. If bidders who commit a breach of a lesser degree could be punished by an order of blacklisting there is no reason why a breach of a more serious nature should go unpunished, be ignored or rendered inconsequential by reason only of an omission of such breach or violation in the text of paras 31 and 32 of the tender document. Paras 31 and 32 cannot, in that view, be said to be exhaustive; nor is the power to blacklist limited to situations mentioned therein.

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 & Chemicals Ltd. v. State of West Bengal and Anr. (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."

18. Subsequent decisions of this Court in M/s Southern Painters v. Fertilizers & Chemicals Travancore Ltd. and Anr. AIR 1994 SC 1277; Patel Engineering Ltd. Union of India (2012) 11 SCC 257; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors. (2006) 11 SCC 548; Joseph Vilangandan v. The Executive Engineer, (PWD) Ernakulam & Ors. (1978) 3 SCC 36 among others have followed the ratio of that decision and applied the principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.

19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer res integra. The decisions of this Court in Radha krishna Agarwal and Ors. v. State of Bihar & Ors. (1977) 3 SCC 457; E.P. Royappa v. State of Tamil Nadu and Anr. (1974) 4 SCC 3; Maneka Gandhi v. Union of India and Anr. (1978) 1 SCC 248; Ajay Hasia and Ors. v. Khalid Mujib Sehravardi and Ors., (1981) 1 SCC 722; R.D. Shetty v. International Airport Authority of India and Ors., (1979) 3 SCC 489 and Dwarkadas Marfatia and sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 293 have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a Writ Court exercising powers under Article 226 or Article 32 of the Constitution. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in M/s Mahabir Auto Stores & Ors. v. Indian Oil Corporation Ltd., (1990) 3 SCC 752 should, in our view, suffice:

"11. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court

in Miss Radha Krishna Agarwal and Ors. v. State of Bihar and Ors., [1977] 3 SCR 249 ….. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable……. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

20. The legal position governing blacklisting of suppliers in USA and UK is no different. In USA instead of using the expression 'Blacklisting' the term "debarring" is used by the Statutes and the Courts. The Federal Government considers 'suspension and debarment' as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions. Comprehensive guidelines are, therefore, issued by the government for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise unable to perform satisfactorily. These guidelines prescribe the following among other grounds for debarment:

a) Conviction of or civil judgment for --

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) xxxx

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

21. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

a) The actual or potential harm or impact that results or may result from the wrongdoing.

b) The frequency of incidents and/or duration of the wrongdoing.

c) Whether there is a pattern or prior history of wrongdoing.

d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official."

22. As regards the period for which the order of debarment will remain effective, the guidelines state that the same would depend upon the seriousness of the case leading to such debarment.

23. Similarly in England, Wales and Northern Ireland, there are statutory provisions that make operators ineligible on several grounds including fraud, fraudulent trading or conspiracy to defraud, bribery etc.

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.

27. In the result, we allow this appeal, set aside the order passed by the High Court and allow writ petition No.2289 of 2011 filed by the appellant but only to the extent that while the order blacklisting the appellant shall stand affirmed, the period for which such order remains operative shall be determined afresh by the competent authority on the basis of guidelines which the Corporation may formulate for that purpose. The needful shall be done by the Corporation and/or the competent authority expeditiously but not later than six months from today. The parties are left to bear their own costs.