

(2011) 09 JH CK 0013

Jharkhand High Court

Case No: W.P (C) No. 5510 of 2008

Nagarjuna Construction
Company Ltd.

APPELLANT

Vs

State of Jharkhand, Water
Resource Department and
Others

RESPONDENT

Date of Decision: Sept. 19, 2011

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 21
- Constitution of India, 1950 - Article 226
- Jharkhand Enlistment of Contractors Rules, 2001 - Rule 18(2)

Hon'ble Judges: Poonam Srivastav, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Poonam Srivastav, J.

The Petitioner is represented by Ms. Priya Kumar, assisted by Shri Deepak Sinha, Advocate and learned Advocate General, assisted by junior counsel, appears on behalf of the State.

2. The writ petition is preferred for quashing the letter contained in Memo No. 1/YO13341/20012048, Ranchi dated 17.06.2008 (Annexure12) and order of deregistration and blacklisting dated 10.06.2010 issued by Respondent No. 3 Chief Engineer, Water Resource Department, Government of Jharkhand, Ranchi.

3. The Water Resources Department, State of Jharkhand floated a tender in the year 2004 for "Suru Reservoir Scheme/Project". This project was for construction of Earthen Dam, Ogee Chute, Profile spillway, Right Main Canal, Left Main Canal, Approach Channel, Spill Channel, Canal Drop, Cross Drainage Work, SLR Bridges, Water Escape, Inlet, Distribution Network to irrigate 90% of command area etc. The

Petitioner was allotted the tender on 14.08.2004 with the stipulation that the work was to be completed in 30 months and the cost of the project was Rs. 39,60,43,200/-. Pursuant to the acceptance of the tender, an agreement was executed between the Petitioner and Respondent No. 1 on 30.08.2004. The project started having problems right at its inception on account of non-availability of land and forest clearance. This resulted in a number of controversies. A joint meeting of the parties to discuss the problems was held on 16.02.2006 and according to the submission of the Petitioner, the Respondents admitted in the said meeting that there were certain unavoidable impediments in execution of the work.

4. The Petitioner made a claim of Rs. 10,72,66,483/- before the Executive Engineer, Water Ways Division, Water Resource Department, Chaibasa, Jharkhand, which was rejected by the Respondents on 20.12.2006 stating therein that there is no infrastructure on the site, neither any machinery is installed nor any work has commenced and, therefore, the claim was rejected outright. It was contended that the work commenced on 10.09.2004 and the Petitioner had mobilized men, material, machinery, equipments etc., but could not proceed. The Petitioner specifically expressed its inability to commence the work as per the agreed programme on account of non handing over work fronts. The said letter is annexed as Annexure 6 to the writ petition. An application for extension of time was given by the Petitioner up to 10.09.2009 on account of the reason that the Respondents did not make the work front available due to non-clearance of the forest land. Since the claim on behalf of the Petitioner for Rs. 10,72,66,483/- incurred by the Petitioner as well as loss calculated up to 30.10.2006, was refused by the Respondent, the Petitioner invoked the remedy of arbitration clause, as provided in Clause 23 of the agreement. Perusal of the letter dated 25.05.2007 written to the Chief Engineer, Water Resource Department, it transpires that a claim was referred to the Chief Engineer for adjudication and recommendations, but there was no response for a period of 45 days from the Chief Engineer, therefore, the Petitioner invoked the arbitration clause under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act"), suggested two names as Arbitrator, Shri P.N. Sinha, retired Chief Engineer, 32, Opposite Road No. 4, Budha Bihar, Ashok Nagar, Ranchi, Jharkhand and the second name was Shri Ramjee Pandey, retired Chief Engineer, H.N.225, Nehru Nagar, Patna.

5. The contention of the Petitioner is that since there was no response to appoint an Arbitrator amongst the two names suggested, an application was moved before the High Court on 28.11.2007 for appointment of an Arbitrator.

6. Counter affidavit was filed on behalf of the Respondents on 04.04.2008 in the proceedings initiated u/s 11 of the Arbitration Act.

7. Submission is that simultaneously the impugned show cause notice was issued to the Petitioner on 17.06.2008 (Annexure 12 to the writ petition) as to why the registration of the Petitioner should not be cancelled and also liable for penal action

and blacklisting. The show cause notice also clearly details a number of controversies arising out of the terms of the agreement giving rise to certain contractual dispute such as, violation of terms and conditions of the contract and also invocation of the arbitration clause by filing an application before the High Court for appointment of an Arbitrator. The Petitioner submitted his reply on 23.06.2008 (Annexure13 to the writ petition) stating therein that since the appointment of Arbitrator was subjudice and pending before the Court, and also that disputes detailed in the notice are the matter which will be decided by an Arbitrator, the appropriate reply will be submitted by the Petitioner before the Arbitrator. On receipt of the reply on behalf of the Petitioner in response to the show cause, another letter was written by the Respondents dated 15.07.2008 (Annexure14 to the writ petition) reiterating that the terms of the contract was violated and also that the Petitioner is liable to be subjected to penal action, deregistration, cancellation of the agreement and also be blacklisted.

8. The Petitioner preferred instant writ petition challenging the show cause notice dated 17.06.2008 and also the letter dated 15.07.2008. The writ petition was instituted on 10.11.2008. During the pendency of the writ petition, the contract/agreement between the Petitioner and the Respondent was terminated, vide order dated 09.02.2009. In the meantime, the application u/s 11 of the Arbitration Act, vide Arbitration Application No. 46 of 2007 was allowed by this 4 Court on 04.09.2009, whereby Hon'ble Mr. Justice S.B. Sinha, retired Supreme Court Judge, was appointed as the sole Arbitrator.

9. Learned Counsel has brought to my notice that the proceedings commenced before the Arbitrator and issues were framed in presence of both the parties on 03.04.2010. During the continuation of the proceedings and after framing of the issues, the Respondent cancelled the registration of the Petitioner under Jharkhand Enlistment of Contractors" Rules, 2001 and blacklisted the Petitioner for an indefinite period under Clause 18(II) of the aforesaid Rules, vide order dated 10.06.2010 (Annexure15 of the writ petition). According to the order sheet of the present Writ Petition, this order was also challenged by means of an I.A. No. 2407 of 2010. An order was passed on 27.09.2010 by the Court allowing the I.A. and Petitioner was permitted to bring on record subsequent development and amend the prayer challenging order dated 10.06.2010, the same will form part of the main writ petition. The learned A.G. made a request to put up the case after two weeks to enable him to file counter affidavit. Another order was passed in the present petition that till further orders, the impugned order of blacklisting dated 10.06.2010 will be confined only to the Water Resource Department, Government of Jharkhand, Ranchi. On 26.04.2011, subsequently an order was passed modifying the earlier order dated 27.09.2010 to the extent that order of blacklisting dated 10.06.2010 was stayed. On 26.04.2011, the Petitioner had given an assurance that he will not partake in any tender within the State of Jharkhand. Thereafter, another I.A. No. 1544 of 2011 was moved on behalf of the Petitioner for permission to participate in

other tenders of the State of Jharkhand, apart from Department of Water Resource, State of Jharkhand and the said I.A. No. 1544 of 2011 was disposed of allowing the prayer, vide order dated 19.05.2011.

10. Submission on behalf of the Petitioner is that the proceedings relating to blacklisting is only a counter blast to the invocation of remedy of arbitration by the Petitioner. Learned Counsel has emphasised that a bare perusal of the show cause notice, letter dated 15.07.2008 and order dated 10.06.2010, speaks for itself that the ground for blacklisting are, besides the contractual disputes regarding non commencement of the work on account of nonavailability of work front or the claim of the Petitioner being not maintainable. It is also apparent that the initiation of arbitration proceedings at the instance of the Petitioner was also a major cause for calling off the contract and blacklisting.

11. Ms. Priya Kumar, Advocate, has highlighted that the final order of blacklisting dated 10.06.2010, incidentally coincides with the framing of issues etc. during Arbitration Proceedings. The very purpose was to frustrate the proceedings of arbitration. The grounds for cancelling the agreement and blacklisting the Petitioner relates to the same questions of violation of terms of contract regarding which, issues were framed by the Arbitrator. The Respondent continuously participate in the proceedings and thus, the Respondents should have refrained from cancellation of agreement and blacklisting. Learned Counsel has also challenged the order of blacklisting being violative of principles of natural justice since the show cause notice was given only to circumvent the arbitration proceedings. None of the grounds mentioned in Clause 18(II) of Jharkhand Enlistment of Contractors' Rules, was shown to be violated and, thus, the Petitioner was never put to notice or violation of any clause of agreement which could entail extreme punishment to blacklist the Petitioner for an indefinite period. Thus, the show cause notice is termed by the learned Counsel to be violative of principles of natural justice and the parameters laid down by the Apex Court in various pronouncements.

12. Learned Advocate General appearing on behalf of the Respondent department at the very outset has questioned the maintainability of the writ petition on the basis that the order of blacklisting is after giving an opportunity and issuance of show cause notice and, therefore, the factual controversies cannot be subjected to judicial review, besides, while replying to the argument that the arbitration proceedings are in continuation and at an advance stage. It is submitted that the arbitration proceedings has not yet commenced, therefore, this argument is not available to the Petitioner. A number of decisions have also been relied and cited by the Advocate General in the case of [Rajasthan Housing Board and Another Vs. G.S. Investments and Another](#) . It was held that the courts should be slow in its interference as it does not sit in appeal while examining cases relating to contractual matters relating to the Government. The principles applied in judicial review of administrative decisions, the interference by the high courts should only

be limited specially in contractual matters by Government bodies to prevent arbitrariness or favouritism. There is an inherent limitation in exercise of power of judicial review. The Apex Court followed its earlier decision in the case of [Tata Cellular Vs. Union of India](#), and also [Sterling Computers Limited and Others Vs. M and N Publications Limited and Others](#), .

13. The Advocate General also cited the case [Grosons Pharmaceuticals \(P\) Ltd. and Another Vs. The State of Uttar Pradesh and Others](#), . The Apex Court has laid emphasis in a number of decisions that the Government must have freedom of contract and the court should not try to examine each and every action relating to contractual matters as an expert to correct the administrative actions and decisions. The emphasis on behalf of the Respondent is that the Government must have freedom of contract since an administrative functioning in an administrative sphere or quasi-administrative sphere, is an exclusive domain with the Government. Several decisions elucidated the scope of judicial review has been placed; [Radhakrishna Agarwal and Others Vs. State of Bihar and Others](#), .

14. The Advocate General has stressed different clauses of the N.I.T. and the agreement such as violation of Clauses 15 and 27. The contractor was to submit the land acquisition and interdepartmental land transfer plans which it failed to do so with the sole intention of extracting money. All the conditions of N.I.T. are a part of the agreement and was accepted by the Petitioner, therefore, it is obvious that though the Petitioner has been paid a sum of Rs. 1,98,02,160/- as mobilization advance, he was also provided with the sanctioned drawing of the dam selected by the Central Water Commission, New Delhi, but nothing was done at the instance of the Petitioner.

15. The Advocate General has laid emphasis regarding the conduct of the Petitioner. It is submitted that the work was started in a lethargic manner and also failed to establish the quality control laboratories at the work site. Thus, the conduct of the Petitioner was not honest right from the inception. Replying to the argument that the work front was not provided, counsel appearing on behalf of the Respondent states that at the time of tender, the process of land acquisition and clearance of forest land was already under process. Everything was informed during the prebid conference. The contractor was required to conduct survey and submit a land acquisition plan and since the Petitioner failed to give land acquisition and interdepartmental land transfer plans, it is he himself to blame and not the Respondents.

16. I have carefully considered arguments advanced by the respective parties and gone through the record of the case. The various dates which have been stressed and emphasised by the counsel appearing on behalf of the Petitioner discloses the fact that the dispute between the parties relates to various clauses of the contract and involved resolving of factual questions claimed by both the parties. The Petitioner had given an application dated 14.05.2007 (Annexure 27 annexed with the

supplementary affidavit) for extension of time and the Respondent allowed the extension up till 10.09.2009 for the reason due to nonclearance of the forest land. An application u/s 11 of the Arbitration Act was moved in the High Court on 28.11.2007 for appointment of an Arbitrator to which the Respondent filed a counter affidavit on 04.04.2008. The show cause notice detailing the contractual dispute and the violation of terms of contract was issued two months after the filing of the counter affidavit on 17.06.2008. The show cause notice is Annexure12 and as pointed out by the learned Counsel, the Respondents have not welcomed the filing of the application u/s 11 of the Arbitration Act. Annexure13 is a reply of the Petitioner to the show cause notice which is apparently a short reply drawing attention of the Respondent that the matters will be solved by an Arbitrator. This again was not accepted by the Respondent and vide notice dated 15.07.2008 (Annexure14 to the writ petition), the Petitioner was questioned that the terms of the contract was violated and the Petitioner was entitled for severe action at the instance of the Respondent. The present writ petition was filed at this stage in the month of November, 2008 and the contract was terminated on 09.02.2009. The Arbitration Application was allowed on 04.09.2009 appointing the sole Arbitrator and the proceedings were carried out. Issues were framed on 03.04.2010 and the impugned order cancelling the registration of the Petitioner under the Jharkhand Enlistment of Contractors" Rule, 2001 and blacklisting the Petitioner under Clause 18(II) was passed on 10.06.2010. This order has also been challenged by means of another I.A. Thus, apparently during the continuation of the proceedings before the sole Arbitrator the impugned order were passed. The grounds of blacklisting and deregistration are expressly regarding certain work, delay and other terms of the agreement. The Respondents have clearly demonstrated in the show cause notice and the impugned order for no fulfillment of agreed work which the Petitioner was liable to complete. These violations are also enumerated in the counter affidavit filed by the State, Copy of the agreement is part of the counter affidavit and various clauses have been highlighted to substantiate the inaction of the Petitioner and thus, the emphasis is that various terms of the agreement is violated. It is, therefore, a controversy which is factual in nature and involves breach of terms of contract. The agreement annexed with the counter affidavit is not disputed by either of the parties and Clause 23 of the agreement speaks about resolution of the disputes pertaining to the contract/agreement by an Arbitrator. Clause 23 reads as under: Clause 23: In case any dispute or difference shall arise between the parties or either of them upon any question relating to the meaning of the specifications, designs, drawings and instructions here before mentioned or as to the quality of workmanship or materials used on the work or as to the construction of any of the conditions or any clause or thing there in contained or as to any question, claim, rights of the parties or any matter or things whatsoever in any way arising out of or relating to the contract designs, drawings specifications, estimates, instruction order or these conditions or otherwise concerning the work or the execution, or

failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof or as to the breach of this contract then either party shall forthwith give to the other notice of such dispute or difference in writing and such dispute or difference shall be referred to the Engineer in Charge. The E/I will take decision within 30 days. Even if the matter is not resolved it will be referred to Chief Engineer/Engineer in Chief where it will be resolved in 45 days. If the party is not satisfied with the decision the matter may be referred for arbitration on which request as per rule under "The Arbitration and Conciliation Act, 1996". No work under the contract shall unless otherwise directed by the Engineer in Charge discontinue during the arbitration proceedings.

17. The assertion on behalf of the Respondent that mobilization amount was already disbursed at the time of agreement and the question as to which of the party was liable to submit an acquisition plan for the land front to commence the work is once again a factual dispute which can be resolved after examining the terms of the agreement as well as the liability of the respective parties before the agreement. The Petitioner has already invoked arbitration clause. The Respondents had appeared in the proceedings u/s 11 of the Arbitration Act and filed counter affidavit, the proceedings for deregistration and blacklisting of the Petitioner was initiated afterwards. Thus, it is correct assertion on the part of the Petitioner that impugned notice and order was after initiation of Arbitration.

18. I am not in agreement with the submission made on behalf of the Respondent that the arbitration proceeding had not commenced on the date the show cause notice was issued. Section 21 of the Arbitration Act provides commencement of arbitral proceedings. The provision itself is vocal regarding the date of commencement; it is on the date a request for the dispute to be referred to Arbitrator is received by the Respondent. The remedy of arbitration in the instant case was invoked by the Petitioner and after the request to make reference of the dispute to the sole Arbitrator was not accepted, and no response from the Chief Engineer was received ever after lapse of 45 days, therefore, vide letter dated 25.05.2007 (Annexure 11 to the writ petition) to the Chief Engineer, Water Resource Department, Government of Jharkhand, written by the Petitioner, two names, namely, Mr. P.N. Sinha, Retd. Engineer, 32, Opposite Road No. 4, Budha Bihar, Ashok Nagar, Ranchi, Jharkhand and Sri Ramjee Pandey, Retd. Chief Engineer, H.N.225, Nehru Nagar, Patna, was suggested for nomination as the sole Arbitrator to adjudicate the dispute and pass an Award. This letter was also not replied and no Arbitrator was nominated. The application u/s 11 of the Arbitration Act was filed in the High Court for appointment of an Arbitrator on 28.11.2007. Thus, the first request for nominating an Arbitrator was 45 days earlier to the letter dated 25.05.2007 or it was the date on which aforesaid letter was written invoking Clause 23 of the condition of the contract to nominate one of the two names suggested by the Petitioner.

19. Thus, in my opinion, the first request to refer the dispute to arbitration was on 25.05.2007 and in view of Section 21 of the Arbitration Act, the arbitral proceeding commenced on that date. The Respondent filed a counter affidavit to the application u/s 11 of the Arbitration Act in the High Court on 04.04.2008 and the show cause notice was issued more than two months subsequent to filing of the counter affidavit. Perusal of the show cause notice discloses that invocation of arbitration clause before the High Court was one of the many grounds for showing cause why the proceedings for deregistration and invoking penal clause of blacklisting be not initiated. The Petitioner had given a short reply that the questions of dispute and the violation of the various clauses of the contract was a subject matter of arbitration and, therefore, it would be finally decided by the Arbitrator to be appointed by the High Court. The reply dated 23.06.2008 is Annexure 13 to the writ petition. This reply was obviously rejected. However, Meanwhile, the instant writ petition was preferred and the order of blacklisting under Clause 18(II) of the Rules was also challenged in the writ petition by means of I.A. No. 2407 of 2010 on 27.09.2010. Thus, evidently, the order of blacklisting was passed during the pendency of the arbitral proceedings. In fact, on a close scrutiny of various dates, it transpires that the impugned order was passed only after questions of dispute were already raised i.e. issues were framed by the sole Arbitrator. The Respondent had also submitted to arbitration and had appeared before the sole Arbitrator on the dates fixed. This fact has not been disputed by the Respondent. In the circumstances, I hold that the order challenged in the writ petition was after commencement of the arbitral proceeding.

20. Now, I proceed to decide the argument raised on behalf of the Petitioner that the order of blacklisting has an effect of depriving a person equality of opportunities in the matters of public contract and the show cause notice is violative of principles of natural justice. This argument is advanced on the ground that the show cause notice fails to mention any of the clause of 18(II) of the Rules. In fact, the said Rule is not even mentioned in the show cause notice dated 17.06.2008.

21. In view of this assertion, the contention of the Petitioner appears to be justified that it was never put to notice that he is likely to be blacklisted for an indefinite period for violating Rule 18(II). Rule 18(II) of the Jharkhand Contractors' Enlistment Rules, 2001 reads as under:

Blacklisting: If obvious defect is found at a later date on the work done by the contractor or his conduct and behaviour is found unbecoming of a civilized person either during or after the construction period but within the period of registration or he is found guilty of any criminal offence, or it is established that he has managed to receive excess payment from the Department or engineers employed by him are found to be associated or employed simultaneously with other firms, or any information furnished by him is found to be wrong or misleading during any time his registration is valid, then of any, or all of the above reasons, it will be open to the

Department to blacklist the contractor for an indefinite or a specified period and/or deregister him and withhold any further payment due to him and forfeit his earnest money and security deposit after giving him proper opportunity to represent his case. During the period the contractor has been blacklisted, he will not be eligible to purchase tender or apply for any work or receive contract anywhere for any work in the Department.

Reliance has been placed on various decisions of the [Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another](#), [Joseph Vilangandan Vs. The Executive Engineer, \(PwD\), Ernakulam and Others](#), [New Samundri Transport Co. \(P\) Ltd. Vs. The State of Punjab and Others](#), [Board of Technical Education, U.P. and others Vs. Dhanwantri Kumar and others](#), and Savitri Devi v. MCD 55 (1999) DLT 391 (DB).

22. In all these cases, the Apex Court was of the view that blacklisting in respect of business venture has civil consequence for the future business of the person concerned, and even if the Rules do not expressly provide, an elementary principle of natural justice that parties affected by any order should have right of being heard and making representation is a cardinal rule. A show cause notice issued without material particulars is not a proper show cause notice, as required by principles of natural justice and one cannot be expected the notices to give an effective reply. Obviously, where a corporation is an instrumentality or agency of Government in exercise of its power or discretion, it is evidently subjected to constitutional limitations and arbitrary action is liable to be questioned by the court of law. It is true as suggested by the Advocate General that the scope of judicial review in matters of contract and tenders is limited, but in the case of [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), it was held that cases involving blacklisting stand on a different footing as they require high degree of fairness in action. The Hon"ble Supreme Court in Siemens Public Communication Networks Pvt. Ltd. and Anr. v. Union of India and Ors. (2008) 16 SCC 215, held that cases involving blacklisting or imposition of penal consequences of a tenderer/contractor or distribution of State largesse stands on a different footing.

23. Thus, in my view, the order of blacklisting during continuation of arbitral proceedings cannot stand the test of natural justice and it is liable to be set aside for the reason that the factual dispute which is contractual in nature raised in the show cause notice was already a subject matter before the sole Arbitrator duly appointed by the High Court. The Respondents had also submitted to the arbitration proceeding without raising any objection before the Arbitrator or making any attempt to get the proceedings stayed before the sole Arbitrator. No questions were raised regarding jurisdiction of the Arbitrator and once having submitted to the said jurisdiction, the same questions of dispute were raised in the show cause notice. The Respondents had also made their discontentment evident in the said notice for initiating arbitration proceedings and this itself was one of the reasons for

blacklisting the Petitioner.

24. I cannot lose sight of the fact that the Petitioner has been blacklisted under Rule 18(II), but perusal of the show cause notice does not mention any of the grounds on which the contractor could be blacklisted under the aforesaid Rules. I have examined the show cause notice and the order of blacklisting very closely, but there appears to be a complete nonexistence of the grounds on which a person could be blacklisted under Rule 18(II), reference be made to the said Rule quoted above. Besides, the fact that the order of blacklisting was passed as a ploy to circumvent the arbitration proceedings. Incidentally, the proceedings before the Arbitrator appears to have continued, since it is not brought to my notice that whether it was stayed or the sole Arbitrator has stayed its hand to proceed any further after the order of blacklisting.

25. In view of all these aspects, the order of blacklisting and deregistration dated 10.06.2010 (Annexure 15 to the writ petition appended in the I.A. No. 2407 of 2010) based under the Jharkhand Enlistment of Contractors' Rules, 2001 cannot stand the judicial and legal scrutiny. It is already discussed that the order impugned also does not pass the test of fairness and obviously laced with arbitrariness. It is, therefore, quashed in exercise of jurisdiction under Article 226 of the Constitution of India.

26. Disputed questions of contract or agreement between the two parties is a subject matter before the Arbitrator which is admittedly, continuing and since both the parties have submitted to the arbitration proceedings, those questions are liable to be decided by the sole Arbitrator. This Court in exercise of an extraordinary jurisdiction under Article 226 of the Constitution of India cannot examine the terms of contract and violation thereof and the final consequences and claim of the respective parties which is the subject matter of dispute before the sole Arbitrator.

27. In the circumstances, I decline to give my opinion on the factual aspects and various disputed arguments regarding the terms of contract which has already been looked into and taken care by the sole Arbitrator.

28. I am of the opinion that the impugned order of deregistration and blacklisting is for the reasons already subjudice before the sole Arbitrator. I am of the view that the writ petition is liable to be allowed. The order dated 10.06.2010 which is a consequential order of the show cause notice dated 17.06.2008 is hereby quashed, but the questions and controversies referred to the sole Arbitrator will continue and it will reach its logical end.