(2013) 08 CAL CK 0030

Calcutta High Court

Case No: W.P. No. 314 of 2010

B.M.W. Ventures Limited		APPELLANT
	Vs	
Export Credit Guarantee Corporation of India Limited		RESPONDENT

Date of Decision: Aug. 8, 2013

Citation: (2014) 1 CHN 118

Hon'ble Judges: S. Banerjee, J

Bench: Single Bench

Judgement

S. Banerjee, J.

The legal issue that has arisen in this petition under Article 226 of the Constitution of India is whether the inclusion of the name of the petitioner company in a special list maintained by the first respondent corporation amounts to the petitioner company being blacklisted. If the placement of a person''s name on the specific approval list (S.A.L.) is deemed to be the blacklisting of such person, the writ of prohibition as sought has to be issued to quash the decision since it is the undeniable position that the petitioner company had not been afforded an opportunity to present its defence prior to its name being placed on the S.A.L. If the inclusion of a name in the S.A.L. is not perceived to be the blacklisting of such person, it has then to be assessed whether the respondent corporation has been arbitrary in its decision to include the name of the petitioner company in the S.A.L. The second petitioner, who is a director of the petitioner company, appears to be the principal person in control of several commercial entities and may be regarded as the controlling mind of the several group companies. Two other companies under the control of the second petitioner obtained credit facilities from banks. The respondent corporation, which is a government company, provided credit insurance covers to the relevant banks on export finance facilities extended by the banks to such other companies controlled by the second petitioner. Though the petition makes an attempt to feign ignorance of the transactions pertaining to the two other companies, Contessa Commercial Private Limited and S.R.M. Private Limited, since the second petitioner appears to be

the controlling mind of such companies, the petitioners ought to have avoided the hide-and-seek in the petition and made a clean breast of the second petitioner''s association with the other transactions.

2. True to the Indian commercial ethos after obtaining bank loans, Contessa and S.R.M. failed to repay the amounts owed to the respective banks. The banks or the assignees of the banks'' debts instituted proceedings against the said companies controlled by the second petitioner before the appropriate Debts Recovery Tribunal or, at any rate, one of the banks approached such tribunal. In Contessa''s case the relevant bank entered into a compromise and received Rs. 1.40 crore against its claim of Rs. 1.80 crore. The claim against S.R.M. was settled at Rs. 1.52 crore against a certificate sought for Rs. 3 crore. In view of the settlements by the banks, the respondent corporation suffered a loss in either case as it had covered the exposure of either bank to the exporter.

3. The corporation refers to its circular of August 6, 2007. Clause 14 of the circular is relevant in the present context. Clause 14.1 recognises the previous guidelines which provided that "if in respect of a claim paid account, the bank had concluded OTS and the Corporation had approved the same, if a part of the claim paid amount is to be sacrificed by the Corporation, the exporter shall continue in S.A.L. for a period of 3 years." The new guidelines formulated by the circular is recorded at clause 14.2 thereof:

14.2 It has now been decided that no fresh exposure can be taken in respect of any exporter or group where the Corporation has sacrificed the claim paid amount either in part or full, unless the entire claim paid amount is received by the Corporation. It has also been decided that such an exporter or Group of the exporter or any connected person shall not be removed from S.A.L., if the Corporation has to sacrifice part of the claim amount on account of any unit of the group. However, where the sacrifice is on account of the legal charges incurred by the bank which could not be recovered from the exporter, the exporter can be delisted based on the recommendations of the branch office. As regards the legal charges, the Branches shall carefully examine the settlement proposals and satisfy themselves that these charges were borne by the bank and could not be recovered from the exporter. If the same is recovered from the exporter, the full claim paid amount shall become refundable and branches have to ensure the same before recommending delisting from S.A.L.

4. The corporation claims that as a credit risk insurer it has the unassailable legal right to assess the credit risks that are offered to it for cover and to decline such risks that are found to be patently uninsurable or bad risks. The corporation argues that no insurer can be asked or expected to underwrite any risk unless it is afforded an opportunity to evaluate the same. The corporation refers to two of its policies being popular in case of bank financed export transactions. It insists that the S.A.L. maintained by the corporation and circulated to all banks is not a blacklist as it is

merely a list "provided to banks (as) an important source of information for identifying exporters who have defaulted...(and)...is mainly aimed at advising banks to exercise caution while dealing with such exporters."

5. The petitioners suggest that since the S.A.L. is not secretly maintained by the corporation itself but it is circulated to all banks, it is a form of blacklisting a person whose name figures therein. The petitioners have relied on a circular issued by the Reserve Bank of India on January 21, 2009, inter alia, advising banks not to grant credit facilities to concerns which are defaulters and whose names appear in the S.A.L. prepared by the corporation herein. The petitioners have disclosed at least one standard form in which particulars have to be furnished by an applicant seeking credit facilities from a nationalised bank. One of the sections in the form requires a declaration to be made as to whether the applicant''s name figures in the "E.C.G.C. caution list".

6. The parties have referred to several judgments. The petitioners maintain that since the consequence of a person being placed on the S.A.L. is grave, particularly in the light of the advice in the Reserve Bank circular of January 21, 2009, due care and caution should be exercised before including a name in the list. They refer to the celebrated judgment reported at Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, and the even more cited decision reported at Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, . In Erusian Equipment, the petitioner before the Supreme Court was blacklisted for its malpractices which were under investigation, without being afforded any prior notice. The Supreme Court emphasised on the equality of opportunity in matters of public contracts and held that the State could not choose to exclude by discrimination. The law as enunciated at paragraph 16 to 20 of the report is instructive:

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 malpractices 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 petitioner for alleged violation of provisions under

the Foreign Exchange Regulation 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 arises 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 form 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 form 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 with providing opportunity for an oral hearing. It will depend upon 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.

7. The judgment in Mahabir Auto Stores is cited by the petitioners for the recognition at paragraph 12 of the report that every action of the State or an instrumentality of the State "must be subject to rule of law and must be informed by reason." The petitioners say that whenever any action of the State or any of its instrumentalities has the effect of prejudicing a person, the person has to be

afforded a previous opportunity to present such person''s version before the State can resort to the act resulting in the person being prejudiced. That, according to the petitioners, is the ratio decidendi as evident from the Erusian Equipment judgment which has been re-affirmed from a different perspective in Mahabir Auto Stores.

8. The petitioners have relied on the minority view in a Full Bench judgment reported at V. Punnen Thomas Vs. State of Kerala, where the majority view was that the State had a right to refuse to deal with any person without giving any reasons therefore and for any reason that the State thought fit; and, the affected person could not seek to have the decision set aside on grounds of violation of either Article 14 or the principles of natural justice. The Kerala Full Bench judgment has since been specifically overruled in a judgment reported at M/s. Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd. and another, which accepted the minority view of the Full Bench decision. The petitioners next rely on a judgment reported Raghunath Thakur Vs. State of Bihar and Others, where the Supreme Court referred to an implied principle of the rule of law that any order having a civil consequence should be passed only after following the principles of natural justice. The petitioners finally place a recent decision reported at Patel Engineering Limited Vs. Union of India (UOI) and Another, where the State''s authority to decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose has been upheld with the caveat that "the only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary...."

9. The corporation has referred to a judgment reported at 82 Comp Cas. 470 (Rajaram Bandekar (Sirigao) Mines Pvt. Limited v. Export Credit and Guarantee Corporation Limited) where a Division Bench of the Bombay High Court has rendered the following opinion at page 486 of the report:

We are satisfied that maintaining a "caution list" is a policy matter of the first respondents. We have seen two books where innumerable parties have been also put on "caution list" and this is not a case where the petitioners have been singled out. On the facts we also find that the "caution list" or "prior approval list" cannot be equated with blacklisting and, therefore, the ratio laid down by the Supreme Court in Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, , is not applicable. The question in the case cited supra was that the tenderer was put in the blacklist with the result that there was no question of accepting his tender. The case at hand is entirely different where the request for cover of insurance was to be decided on the merits of the application.

10. Another Division Bench judgment reported at (2006) 4 Mad LJ 230 (Export Credit Guarantee Corporation of India Ltd. v. A. Jay a Kumar) has been brought by the corporation wherein the S.A.L. maintained by the corporation was found to be a list "only meant for the guidance of the E.C.G.C. itself and it was observed that such "caution list cannot be equated with the blacklisting." An unreported Single Bench

judgment of this Court rendered on March 17, 2010 in W.P. No. 14731(W) of 2007 (International Industrial Gases Limited v. Union of India) has been placed in extensio by the corporation for the recognition therein that the preparation of the S.A.L. by the corporation without notice would not violate the principles of natural justice.

11. The judgment in International Industrial Gases Limited would have been binding and would have covered the present petition. However, the finding on the merits in such judgment has to be regarded as obiter dictum as the maintainability of the writ petition in that case was challenged, as evident from paragraph 28 of the judgment, and the petition was found to be not maintainable at paragraph 35 thereof:

35. Considering all these aspects I hold that the instant writ petition is not maintainable at all and there is no merit both in law and in fact in this writ petition which is accordingly dismissed....

12. With respect, if an action is not maintainable and is held to be such, no pronouncement on the merits thereof would be necessary and, to the extent, there is any decision on the merits, the same cannot be cited as a binding precedent. But, more importantly, the Bombay, Madras and Calcutta judgments placed by the corporation found, on facts, that placing a person''s name on the S.A.L. did not amount to blacklisting such person. It does not appear that the material that the petitioner has carried to Court to suggest that placing a person''s name on the S.A.L. amounts to blacklisting such person, was placed before the relevant Courts in the reported cases. It is such material that demonstrates that serious prejudice is occasioned to a person whose name is placed on the S.A.L. maintained by the corporation and it is akin to blacklisting a person. The list, on the corporation''s admission, is not merely retained by the corporation; it is circulated to banks as an advisory.

13. The dictum in Erusian Equipment cannot be confined only to a case when the action is admitted to be a form of blacklisting. The principle would apply where any conditions are imposed regarding the rejection or acceptance of the other qualifications of a person in future transactions. Blacklisting is not defined in any applicable statute. The authority of the State or its instrumentalities to blacklist a person has been upheld, provided the procedure involved is fair and equitable. It is open to the State or its instrumentalities to not enter into any contract with a person or impose special conditions for entering into a contract with a person, but it must do so fairly, without discrimination and by adopting an equitable procedure.

14. It is evident on facts that the future application for credit facilities or risk cover by a person whose name figures in the S.A.L. is dealt with more strictly in view of clause 14.2 of the circular issued by the corporation and the Reserve Bank guidelines of 2009. Standardised bank forms relating to applications for credit facilities warrant a declaration to be furnished as to whether the applicant''s name figures in the S.A.L. These facts lead to the obvious conclusion that there is a civil

consequence upon a person''s name being placed on the S.A.L.; at least, that to some extent such person is worse off than another who is similarly circumstanced but whose name does not figure in the S.A.L. The rule of law and the principle of natural justice which is an adjunct thereto would demand that a person be afforded an opportunity to present such person''s version to the State or its relevant instrumentality before the State or the instrumentality takes an action which causes any prejudice to such person. The corporation has not been able to demonstrate that any notice was issued prior to the petitioner company''s name being placed on the S.A.L. In such circumstances, the procedure or the decision-making process that culminated in the petitioner company''s name being included in the S.A.L. cannot be regarded to have been fair or equitable or in consonance with the principles of natural justice as constitutionally recognised.

15. It is made clear that the merits of the corporation''s decision to place the petitioner company on the S.A.L. have not been gone into. The decision to place the petitioner company on the S.A.L. is set aside only in the procedure leading to the decision being found to be arbitrary and unconscionable.

16. W.P. No. 314 of 2010 is allowed by quashing the decision of the corporation to place the name of the petitioner company on the S.A.L. but by leaving the corporation free to do so afresh, if the circumstances so warrant, upon following a fair procedure and after affording the petitioner company an opportunity to present its version before taking such decision.

17. There will be no order as to costs. Urgent certified website copies of this judgment, if applied for, be urgently made available to the parties, subject to compliance with all requisite formalities.