

BLACKLISTING OF CONTRACTORS – EFFECT

**By
P.C. Markanda,
Naresh Markanda
Sr. Advocates**

and

**Rajesh Markanda
Kavita Markanda
Surabhi Markanda
Advocates**

1. Meaning of Blacklisting

Blacklist is a list of persons against whom its compilers convey to all and sundry that such people are unworthy of credit and deserve to be kept out from entering into contracts or dealings. Blacklisting is a part of paraphernalia of a strike and can be said to represent the malignant hate and revenge of the parties taking resort to it. By blacklisting a person, the compiler sends a message which is loud and clear that such a person is prevented from the privilege and advantage of entering into legal relationship with the department for purposes of gain. In fact, blacklists are real instruments of coercion because the compiler seeks to influence others from trading with such a person. Therefore, a blacklist can be said to be a list of persons marked out for special avoidance.

In case of any lapse on the part of the contractor, which is too grave to be ignored or which runs well-established trade practice or is highly unethical, calls for severance of legal relationship, commonly known as blacklisting. No employer would normally sever legal relationship unless so compelled by circumstances as it also involves its reputation. In trading community, word of mouth runs very fast. Once it is known that a particular organization is extremely rigid and harsh in its dealings, very few contractors would come forward to bid for tenders, resulting in lack of competition.

In Random House Dictionary of the English Language (Unabridged edition), p. 154, “blacklist” has been defined to mean:

“Blacklist means a list of persons under suspicion, disfavor, censure; a list privately engaged among employers containing the names of persons to be debarred from employment because of untrustworthiness or for holding opinions considered undesirable; a list drawn up by a labour union containing the name of employees to be boycotted for unfair labour practices.”

As per Encyclopedia of the Laws of England, blacklist means:

“Blacklist is a list of persons or firms against whom its complier would warn the public, or some section of the public; a list of persons unworthy of credit, or with whom it is not advisable to make contracts. Thus, the official list of defaulters on the Stock Exchange is a blacklist. To put a man’s name on such a blacklist without lawful cause is actionable; and the further publication of such a list will be restrained by injunction. A list of persons, firms, companies etc. boycotted or punished”.

2. Effect of blacklisting

Blacklisting affects the reputation of a person put on the blacklist not limited to his dealings with the Government but also in dealings with private firms and amounts to affecting his business prospects. A blacklist order leads to civil consequences. Such an order must not be passed by any authority without affording due opportunity of being heard to the person likely to be affected by such an order.

No authority should act in an arbitrary manner to put a person on blacklist and must act in a fair manner. The principles of natural justice are attracted in case a person is to be deprived of entering into business relationship, particularly so when such a person has reasonable expectation of making a gainful contract with the Government. The Government is under a constitutional obligation not to discriminate. It owes a duty towards citizens to act fairly, without fear or favour.

The State cannot take away the rights of a citizen in an arbitrary manner. If the State unfairly puts a party on blacklist, it will amount to denial of an equal opportunity of being able to compete with his adversaries. Blacklisting any person would mean deprivation of an equal opportunity of competing with others. Thus, where valuable rights are sought to be taken away by the Government in depriving a person in dealing with it, the writ courts cannot act as mere spectator and shall intervene to do justice to the aggrieved party.

Another aspect of putting a party on blacklist is the stigma attached with it, besides depriving him of rightful gains which he would have made from the contract had he not been put on blacklist. A situation may arise when the party put on blacklist from executing the contracts in hand. In such a case, it not only puts a stigma on the contractor but also affects his civil rights.

When a contractor is blacklisted by a department, he is debarred from obtaining a contract and may not be able to get any contract for a long time,

thereby putting him out of business. Such a course would have a disastrous effect on him.

In some cases, an express order of blacklisting may not be the only cause for debarring a contractor from competing in the tender process. For example, when a declaration is made stating that a particular contractor is a defaulter, its effect is akin to a blacklisted contractor. In such cases, tender form is not issued to the contractor so long as the department concerned does not withdraw order whereby he had been declared a defaulter. Obviously, therefore, till the date of withdrawal of default notice, the contractor is deprived of his right to continue with his business.

3. Power to blacklist

Only the authority designated in the tender documents, or duly authorized by the parties to the contract, can exercise authority to put a contractor on blacklist since initiation for blacklisting a contractor is not a routine matter nor is it mechanical. It is to be based on the subjective satisfaction of the designated authority competent to pass the final order.

The authority issuing the notice is the final authority for taking action. It would be against the principles of law for one authority to issue a notice and for another authority to pass the final order of blacklisting. However, the position would be different when the designated authority is of the opinion that no case is made out to initiate any proceedings, he may be pre-empted by a superior initiating the proceeding and then transferring the matter to him leaving him with a little thought to disagree with the superior. (1)

Exception to the rule of blacklisting a contractor would be the banning order. It is not always necessary that action must be taken by the same person who had given the hearing unless and until the petitioner can specifically show that a serious prejudice had been caused to him on account of this. The logic behind such a rule seems to be that in big organizations, officers keep on shifting from one place to another and, therefore, if hearing is given by one and the decision is taken by the successor, it cannot be said that rules of natural justice had not been followed. (2)

4. What amounts to blacklisting

The Corporation had appointed the appellant as Lube distributor. He had supplied large quantity of lubricants to it for as many as 18 years whereafter the Corporation suddenly stopped supplies to the appellant without any notice whatsoever. Furthermore, no hearing was also afforded. This action, according the appellant, amounted to blacklisting and was not only illogical but arbitrary and against the principles of natural justice. It was held that the action of the Corporation of bringing to an end the dealings without informing the affected party is not a fair action even though the Corporation had taken

the step of stopping the supplies to the appellant due to change in its policy. It was further held that the minimum that the Corporation could do in such a case would be to inform the appellant that due to change in its policy, further dealings would come to an end. (3)

5. Blacklisting is an instrument of coercion

The order of blacklisting has the effect of depriving a person from equality of treatment in the matter of public contract. The State is bound to ensure equality since it cannot choose to exclude persons by discrimination. A person who had been dealing with the Government for sale and purchase of material has a legitimate interest or expectation. It cannot be a matter of debate that the State can enter into a contract with any person or to deal with it since no person can insist that Government must enter into contract with him. But the order of blacklisting debars a person from dealing with the Government and is also a slur on him. The blacklist is thus, called an “element of coercion”.

It is imperative on the part of the authority blacklisting the contractor to act with due caution and give to the aggrieved person an opportunity of being heard. This certainly will meet the ends of justice. Any undue haste would be seen with suspicion by the courts and there is every chance that such an order may be struck down by the courts. Where the Railway Board banned all dealings with a contractor for an indefinite period without either assigning any reasons or affording an opportunity of being heard, then such an order deserves to be struck down being totally arbitrary and discriminatory. (4)

It is obligatory and mandatory on the part of the designated authority to assign cogent reasons in support of the order of blacklisting because such an order bans business dealings. If the order does not disclose the reasons leading to the contractor being put on blacklist and also shows that the party likely to be affected by the order was not afforded an opportunity of being heard, then it shall be violative of principles of natural justice.

Where the Government had put certain transport companies and booking agencies on the blacklist on the ground that the leave travel concession allowed to the Government servants was being misused by them but no opportunity of hearing was given, it was held that the order was illegal as it violated the principles of natural justice. (5)

6. State must act in a transparent manner

The designated authority must act in a manner which shows in no uncertain terms that the action taken is strictly in accordance with the rule of law. All actions by the State must be fair, impartial and unbiased.

It cannot be disputed that no person has a right to enter into a contract with the Government but certainly they are entitled to equal treatment with others who offer tenders. This privilege arises because it is the Government which is trading with the public and the democratic form of the Government demands equality and absence of arbitrariness and discrimination in such transactions. The State need not enter into contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. (6)

Where a contractor was blacklisted because of his failure to commence work as also because of his active involvement in making interpolations in the agreement, the plea of the contractor that a number of civil and criminal cases were pending in the courts and till decision of such cases, matter with regard to blacklisting may be kept in abeyance, could not be accepted and the order having been passed after hearing the party was good in law. (7)

If the State acts in an unfair and arbitrary manner, which smacks of personal vendetta, such an order is liable to be set aside by the Courts, in view of the fact that it would be destructive of rule of law. Where a contractor made a complaint against a particular Chief Engineer and the said Chief Engineer attended the meeting of Board of Chief Engineers who later passed the order of blacklisting, it was held that the Chief Engineer adorned the role of Prosecutor as well as Judge and became a judge in his own cause and thus, the order was bad in law. (8)

Where the order of blacklisting was challenged by means of a writ petition by the petitioner on the ground that respondent had not acted in a *bona fide* manner and had ignored the principles of natural justice, it was held that as civil consequences of gargantuan proportions are bound to follow because of draconian decisions such as blacklisting, the order deserved to be quashed and the existence of an arbitration clause would not preclude the court from entertaining the writ. (9)

7. Blacklisting when justified

The Government may blacklist a proprietor of a firm who is convicted by a Court of law or if the security considerations so warrant or if there is a strong justification for believing that the person had been guilty of malpractices, such as bribery, corruption, fraud or if a firm employs a Government servant, dismissed or removed on account of corruption in a position where he could corrupt a Government servant. (10)

Where work was awarded in favour of the petitioner and he failed to commence the work despite repeated orders, inasmuch as he offered unsuitable reply to the show cause notice and failed to give reasonable excuse for not starting work when oral hearing was given, then the order of blacklisting cannot be interfered with, more particularly when clauses of bid

documents authorize blacklisting in the event of non-commencement of work. (11)

By a corrigendum to the notice inviting tenders, the period for completion of the work was reduced from 2 months to 25 days. On failure of the contractor to adhere to the time schedule of 25 days, a show cause notice was issued, which did not fetch suitable reply. Held that there was no violation of the principles of natural justice and the order debarring the contractor from tendering in future was justified. (12)

8. Blacklisting when not justified

A contractor was blacklisted by the Government on the ground that he had sub-let the work to a sub-contractor without seeking its approval. It was noted that there was no stipulation in the contract documents enjoining upon the contractor to seek any such approval. Held that the Government misinterpreted the clauses of the contract and thus the order of blacklisting was bad in law. (13)

9. Order of blacklisting cannot be circulated to other Departments

The Government passed a banning order according to which only non-statutory "business dealings" between the petitioner and the Government was to be suspended for a period of three years. The order was circulated not only to the other ministries of the Government but also to the statutory Corporations with the intention that they also should boycott petitioners in their dealings. It was held that the Government had no right to induce another legal person not to enter into contractual relations with the petitioner. (14)

10. Blacklisting for misbehaviour

A contractor physically assaulted an officer of the respondent. Respondent served a show cause notice why the firm be not blacklisted. After perusal of reply and after being given hearing, the firm was blacklisted for a period of five years. The order was challenged in a writ petition. Held that the order of blacklisting was not bad in law but the banning order for five years appeared to be harsh in view of the fact that the firm had not been paid for over a year for work done prior to the date of the misbehaviour. (15)

Before a contractor is put on a blacklist, it is essential that a show cause notice must be served on him. A contractor was served a show cause notice by the Chief Engineer as to why he should not be blacklisted for having manhandled a junior engineer in response to which a reply was sent but the Chief Engineer was not satisfied with the reply. He put the contractor on the blacklist. The contractor challenged the order. Held that the Court could not

interfere where due opportunity had been given before order of blacklisting was passed. (16)

11. Show cause notice essential before blacklisting

The State Government suspended business dealings with a Firm on the ground that it had provided false information for securing an earlier contract. The State also proposed blacklisting of the Firm without serving any show cause notice. No FIR was filed against the Firm nor was any show cause notice served on the Firm before suspending business dealings with it. Held that action of the State was against principles of natural justice and the State must not only serve a show cause notice on the Firm but must also afford personal hearing before taking any action against it. (18)

Where an Electricity Board entered into a contract with a contractor for supply of electrical equipment which later was said to be defective, the action of the Board in blacklisting him without serving any show cause notice and without affording opportunity of hearing was violative of the principles of natural justice. (18)

When the claims and counter-claims are pending adjudication before the arbitrator, the respondent, on the same allegation, blacklisted the contractor. The contractor challenged the order before the Court. Held that the order was unjustified because the notice did not disclose any reason as to why such drastic action had been taken, and that such proposed administrative action, even after rescission of the contract, had become the subject-matter of arbitration. (19) If a matter is pending adjudication before arbitrator, it is obligatory on the part of the respondent to wait for the outcome of the arbitration matter and not to act in a tearing haste. (20)

12. Opportunity of hearing before passing order of blacklisting

Even in cases where it is not a requirement in the departmental rules to afford an opportunity of hearing, it is always desirable that the same cannot be denied. It is an implied principle of the rule of law that any order having civil consequences should be passed only after following the principles of natural justice. Blacklisting any person in respect of business ventures has civil consequences for the future business of the person concerned in the event. (21)

It is illegal on the part of the State to put a contractor on the blacklist without affording him an opportunity of being heard. The mere fact that there was no provision in the auction sale notice, before cancellation of registration number and forfeiture of registration fees, was held to be immaterial. (22) Where an order of blacklisting is passed without issuance of show cause notice or opportunity of oral hearing such an order of blacklisting cannot be recognized in law. (23)

The person who is proposed to be blacklisted for having committed malpractice in trade has to be given an opportunity of hearing. A simple notice before blacklisting a person is not enough. However, when the petitioner himself admitted that he had met the Director personally and explained his position, it is sufficient compliance of the requirement of oral hearing. (24)

A Public Sector unit refused to issue tender form to the contractor who was duly qualified. His name was deleted from the list of qualified contractors on the basis of Vigilance Report. However, no notice of such a deletion was given to the contractor nor an opportunity of being heard was given. It was held that both show cause notice as well as hearing ought to have been given since the personal and professional reputation of the contractor was at stake. (25)

Where the bidders had agreed not to withdraw their offer for a stipulated period until the decision of the Standing Committee and it was also agreed that if any bidder withdrew the offer within such stipulated time he could be blacklisted and the lowest bidder withdrew the offer, it was held that an opportunity of being heard should have been given. (26)

13. Show cause notice must mention proposed action

When the Government served notice on the contracting firm to show cause as to why action be not taken for supplying sub-standard material but no mention of the proposed action was indicated in the notice, it was held that the subsequent act of the Government in blacklisting the contractor firm was in violation of the principles of natural justice. (27)

It is essential for a show cause notice to indicate the precise scope of notice and also to indicate the points on which the person concerned is expected to give reply. If the notice does not disclose the proposed action and the points to be answered by the person concerned, then the order of blacklisting passed by the designated authority would be liable to be set aside. (28)

14. Order of blacklisting must be reasoned

The respondent department informed the petitioner contractor that as he had withdrawn the tender he would not be allowed to take part in the departmental transactions in future. When the order was passed the Department had relied upon a document and stated that the decision is based on that document. It was held that the document relied upon by the Department gave reasons different from those appearing in the order of blacklisting and thus the order was not proper. (29)

The employer is under an obligation to assign reasons in support of the show cause notice. In the absence of reasons in the order of blacklisting, which may be subject to appeal or judicial review, the appellate authority or the Court exercising the power of judicial review could not be in a position to ascertain as to how and in what manner the concerned authority had applied its mind. (30)

Where the order of blacklisting contained only allegations against the petitioner-contractor but no reasons in support thereof had been given, it was held that the order of blacklisting has civil consequences, and, therefore, must be stated and since it was a non-speaking order, it was liable to be aside. (31)

It is not a requirement of law that the reasons should be elaborate as in the decisions of the Court of Law. The extent and nature of the decision would depend upon the particular facts and circumstances of each case. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. (32)

15. Authority cannot supplement grounds after order of blacklisting

When a statutory authority makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the form of affidavit otherwise an order bad in the beginning may, by the time it comes to the Court on account of a challenge gets validated by additional grounds later brought out. (33)

Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. (34)

16. No blacklisting in absence of concluded contract

While writing down in words the bid amount, the bidder erroneously quoted a rate ten times of what he had quoted in figures. On enquiry, the contractor stated that it was a human error and the amount quoted in figures was correct. The Railways served a show cause notice on the contractor as to why he be not blacklisted. Held that the error was human and thus the show cause notice was bad in law. (35)

Where no concluded contract had come into existence, a tenderer cannot be blacklisted if he is not informed previously that such a penalty can be imposed if the offer made by him is withdrawn. Thus a new condition not

previously known to the contractor cannot be inserted with retrospective effect in the invitation of tender. The action of the respondent in removing the petitioner's name from the enlisted contractors is arbitrary and unsupported by law. (36)

In commercial transactions, if the price or quality of product does not suit a person, he may choose not to enter into a contract, but that shall not be a cause or ground for blacklisting a firm. The object of blacklisting is to debar a firm for unbusiness like dealings. Normally it should be carried out after the contract has been executed between the parties. Therefore, the action of the respondent in blacklisting a firm on the ground that it had quoted a high rate for its product does not stand the test of reasonableness. (37)

17. Blacklisting period to be specified

An order blacklisting the contractor cannot be for an indefinite period. The order by which a contractor is blacklisted must mention the period for which he is put on the blacklist because blacklisting cannot debar a party forever as a registered contractor. Where a contractor was blacklisted on cancellation of a contract and he did not cooperate with the Enquiry Officer in a proper manner, the order to pay the amount in question to the respondent-Department and thereafter he would be entitled to register himself as fresh contractor with the Department was held to be justified and reasonable. (38)

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1. Vikas Construction vs State of Bihar, AIR 2008 Pat 141
 2. Sahney Kirkwood Pvt. Ltd. vs Union of India, 2009(2) RAJ 157 (Del) (DB)
 3. Mahabir Auto Stores vs Indian Oil Corporation Ltd., (1990)3 SCC 752: AIR 1990 SC 1031
 4. Mohinder Singh vs State of Bihar, AIR 1977 Del 156
 5. Pannu Tourist Services (O) Ltd. vs Home Secretary, Chandigarh Administration, AIR 1984 P&H 205 (DB).
 6. Erusian Equipments and Chemicals Ltd. vs State of West Bengal, (1975)1 SCC 70: AIR 1975 SC 266
 7. Om Metals & Minerals Pvt. Ltd. vs State of Bihar, AIR 2002 Pat 71 (DB)
 8. Sri Shiva Shakti Construction Pvt. Ltd. vs Engineer-in-Chief, AIR 1999 AP 270
 9. Bretton Woods Finlease Ltd. vs MTNL, 2005(2) CTLJ 236 (Del)
 10. Erusian Equipments and Chemicals Ltd. vs State of West Bengal, supra
 11. Mayashankar R. Singh vs Brihanmumbai Municipal Corporation, 2007(1) CTLJ 287 (Bom)
 12. B.S. Construction Company vs Commissioner of MCD, 2008(1) CTLJ 257 (Del) (DB)
 13. P.T. Samber Mitra Jaya vs NHAI, AIR 2003 Mad 221 (DB)

14. Ram Krishna Kulwant Rai vs Union of India, AIR 1969 Cal 18
15. UEE Electrical Engineers Pvt. Ltd. vs DDA, 2005(1) RAJ 490 (Del) (DB)
16. Mohan Lal Bishnoi vs State of Rajasthan, AIR 1999 Raj 303
17. Unibros vs All India Radio, AIR 1995 Del 368 (DB)
18. Elite Engg. Co. vs Bihar State Electricity Board, AIR 2000 Pat 170
19. NBCC Ltd. vs NDMC, 2007(2) RAJ 162 (Del)
20. ibid
21. Raghunath Thakur vs State of Bihar, (1989)1 SCC 229: AIR 1989 SC 620
22. B.K. Datta and Co. vs M.D., Orissa Development Corporation Ltd., AIR 2008 NOC 2521 (Ori) (DB)
23. J.K. Enterprises vs State of Madhya Pradesh, AIR 1997 MP 68
24. Monika Plastic Pipes (P) Ltd. vs Director of Industries, AIR 1998 All 111
25. Southern Painters vs Fertilizers and Chemicals Travancore Ltd., 1994 Supp (2) SCC 699: AIR 1994 SC 1277
26. Hasmukhlal & Co. vs Municipal Corporation of Greater Mumbai, 2005(2) CTLJ 65 (Bom)
27. Janata Supply Syndicate vs Chairman, PPT, AIR 2010 NOC 140 (Ori) (DB)
28. Sri Shiva Shakti Construction Pvt. Ltd. vs Engineer-in-Chief, AIR 1999 AP 270
29. Chetanram Ramgopal vs Chief Engineer, AIR 1999 Raj 315
30. Jagbir Singh Sharma vs M.C.D., 2006(2) CTLJ 98 (Del) (DB)
31. Veekay Contractors (P) Ltd. vs National Small Industries Corp. Ltd., AIR 2005 All 57 (DB)
32. Breen vs Amalgamated Engg. Union, (1971)1 All ER 1148
33. Mohinder Singh Gill vs Chief Election Commissioner, (1978)1 SCC 405: AIR 1978 SC 851
34. Commissioner of Police vs Gordhandas Bhanji, AIR 1952 SC 16: 1952 SCR 135
35. K.M.A. Contractors vs Indian Railways Catering, (2006)3 Pun LR 32 (Del) (DB)
36. Bhim Sain vs Union of India, AIR 1981 Del 260
37. Supra Enterprises vs Punjab State Electricity Board, AIR 2007 P&H 23 (DB)
38. Ponniah & Co. vs Superintending Engineer, AIR 2006 NOC 1515 (Mad)