
(2016) 03 JH CK 0156
In the Jharkhand High Court
Case No : W.P. (C) No. 4602 of 2015

Ganesh Ram Dokania

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 21

Citation : (2016) 162 AIC 769 : (2016) 3 AIRJharR 138 : (2016) 3 JCR 371 : (2017) 2 JLJR 393

Hon'ble Judges : Aparesh Kumar Singh, J.

Bench : Single Bench

Advocate : Sachin Kumar, Advocate, for the Appellant; Jai Prakash, AAG and Chaitali C. Sinha, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

Aparesh Kumar Singh, J.—1. Heard learned counsel for the parties.

2. Petitioner was under an agreement to construct a high level bridge project over the Barakar river in Barbendiya village on Nirsa-Jamtara Road under Nirsa Block vide Agreement No. 03/2007-08 dated 30.01.2008 awarded by Rural development Special Division. The work awarded on turnkey basis was to be completed within a period of 30 months i.e. June, 2010 from the date of work order dated 30.01.2008. Value of work was Rs. 36,87,000,00/- (Thirty Six Crores and Eighty Seven Lakhs). Agreement is at Annexure-2 to the writ petition. Bridge in question consists of 56 Piers, 57 Slabs and 2 Abutments. Petitioner had constructed 56 Piers. 5 Piers got washed away on 18.08.2009, which petitioner attributes to heavy release of water from nearby Maithan Dam due to unprecedented rain for last 5 days in the rainy season.

3. Petitioner was asked to stop the work on 04.09.2009 by the Executive Engineer under instruction from the superior officers of the Department. Petitioner made representation showing its readiness and willing to complete the

bridge as per agreement within the stipulated time of completion and without any further claim of cost. A committee comprising of Chief Engineer, Rural Development Special Zone, Ranchi, Superintending Engineer, Rural Development Special Circle, Ranchi and Executive Engineer, Rural Development Department, Special Division, Ranchi inspected the site on 23.08.2009 pursuant to the direction of the Secretary, Rural Development Department. As per report at Annexure-5, it opined that the incident was a result of failure of foundation as piers were not embedded on hard rock. Prima facie it showed act of negligence and fraud on the part of the contractor. Assistant Engineer and Junior Engineer were also found responsible in dereliction of duty in not ensuring their presence at the time of piling of piers as per the specification and embedding on hard rock. It suggested proper scientific investigation by reputed Technical Institutions like BIT, Meshra, IIT, Roorkee, etc. so that no further accident takes place. It further suggested that ultra sonography of all piers be conducted for which services of AMIL Ltd. New Delhi, can be taken. It also suggested completion of work at the cost of contractor.

4. Petitioner was debarred on the basis of that report vide letter dated 09.09.2010 bearing No. 6533, Annexure-10 issued by the Rural Development Department. It alleged that for the damage caused to the under construction project, an FIR has also been instituted against the contractor. This order of debarment was challenged by the petitioner in W. P. (C) No. 7836 of 2011, which after consideration of the stand of the rival parties, was decided vide order dated 19.09.2014 directing the petitioner to approach the respondent No. 1, Chief Secretary, Government of Jharkhand by way of a detailed representation. Learned Single Judge took into account the submission of the petitioner that the order of debarment had continued for four years and was causing serious prejudice to the petitioner. It could not be continued for an indefinite period as it violates Article 14 and 21 of the Constitution of India. Learned Single Judge, however, found himself unable to interfere with the impugned orders dated 09.09.2010 and 11.07.2012, (the latter order was passed during pendency of the writ petition after giving due opportunity to the petitioner i.e. at Annexure-13 to the present writ application). Petitioner on being dissatisfied had approached learned Division Bench in LPA No. 447 of 2014, which was decided on 21.05.2015 in the following terms:--

"In case the appellant-writ petitioner submits a detailed representation in this regard before respondent No. 1 within two weeks" time from today, he shall accord consideration to the same and pass a detailed order within two months thereafter, undoubtedly, keeping in consideration the observation made by their Lordships in case of M/s. Kulja Industries Limited (Supra), on individual facts of the present case but without being prejudiced by the observations made by the learned Single Judge while disposing of the main writ petition.

It goes without saying that the order shall be communicated to the appellant-writ petitioner firm by respondent No. 1.

The instant appeal stands disposed of in the aforesaid terms along with the interlocutory applications (I.A. No. 5823 of 2014 & I.A. No. 6360 of 2014)."

5. The Respondent-Chief Secretary, Jharkhand, thereafter, has passed the reasoned order dated 19.08.2015 bearing memo No. 2664, Annexure-19 impugned herein along with earlier orders of debarment dated 09.09.2010 and 11.07.2012. The debarment has been upheld and to remain effective for a period of 10 years from 09.09.2010 to 08.09.2020.

6. Learned counsel for the petitioner has assailed the impugned orders on following grounds:--

"(i) by referring to the first report of three man committee headed by Chief Engineer, Rural Development Special Zone, Ranchi (Annexure-5) and the deposition of the same officer dated 21.07.2010 in a departmental proceeding against delinquent engineers (Annexure-8), it is submitted that findings of negligence or fraud on the part of the committee and the Chief Engineer was on the basis of a prima facie view and further clarified in his deposition as based on eye estimation. The deposition of Chief Engineer dated 21.07.2010 also refers to the report dated 26.08.2009 submitted by the committee being part of the charge sheet served upon the delinquent engineers.

(ii) Learned counsel for the petitioner refers to the report of BIT Mesra, Ranchi at Annexure-9, which has opined probable reasons of failure of damage to piers as having been caused due to large quantity of flood water, gushed through a much contracted cross-sectional area of the river with increased velocity during the period on account of 5 days of previous sudden heavy downpour in monsoon season 2009. It has also opined that piles have to rest on hard and sufficiently thick rock strata. Many time stone fragment coming out with slurry gives misleading results. Therefore, it may be possible that piles have not embedded on firm strata causing the failure of piers. It was not possible to find the actual depth up to which the piles have been driven in the present situation of the ponded river bed. It further opined that there is no structural error in the design and substandard use of construction material was not found.

(iii) Learned counsel for the petitioner then refers to report of Sonic Integrity Test on Pile conducted by SANRACHANA Structural Strengthening Pvt. Ltd., an expert agency. This report at Annexure-15 dated 13.01.2014 was called for on the basis of instruction issued by Cabinet, Vigilance Department, Ranchi through letter No. 872 dated 21.07.2012 to the Rural Development Department contained at Annexure-14. The report of SANRACHANA is on different heads (i) Ultrasonic Pulse Velocity Test (ii) Half Cell Potential Test and Carbonation Test (iii) Core Strength (iv) Pile Integrity Test."

7. It is submitted that agency in its conclusion and summary after conduct of various test at the site opined that quality of concrete is as per the proposed design grade of concrete and pile integrity in terms of cross section and length continuity is within the reasonable acceptable limit.

8. Under heads of Ultrasonic Pulse Velocity Test, agency found that quality of concrete is in reasonably good category with only few numbers falling into medium category and no readings show any doubtful category. In respect of Half Cell Potential Test and Carbonation Test also it found depth of carbonation has not exceeded 20 mm (more than 75% areas its 10 mm only), which is less than the depth of cover for the reinforcements. Strength tests results show that the average value of corrected cube strength is 31 Mpa, which is quite close to the design grade of 30 Mpa used for casting various structural element at site. Pile Integrity Test, on field investigations at 197 pile locations showed pile integrity as OK for all tested pile locations. No doubtful reading was observed after processing of the test data as per IS14893-2001.

(iv) Learned counsel for the petitioner then refers to final form submitted on 31.12.2014 by the Vigilance Department before the Court of Special Judge, Vigilance, Ranchi in connection with Vigilance Case No. 27 of 2010 registered on 10.07.2010 against the present petitioner and several engineers. This is Annexure- 22 to the rejoinder affidavit. It concludes that the matter remained pending on account of lack of any input from the Rural Works Department for long since 2012. After furnishing of the report of the agency SANRACHANA, Structural Strengthening Pvt. Ltd., the Superintendent of Police, Vigilance Department directed submission of final form in the matter as the institution of the case was found to be based on misplaced facts.

9. Counsel for the petitioner based upon this factual foundation and grounds assailed the impugned order asserting that it does not show any application of mind. It fails to take into account that the report, referred to hereinabove, by expert agency did not find any specific acts of negligence or use of sub standard materials in the construction. It is submitted that though Sonic Integrity Test has been taken note of in the impugned order and found to be proper in all constructed piers but the inference drawn is completely perverse and not based on the material available before the respondent authorities. It is submitted that petitioner has suffered for five long years since the passing of the order of blacklisting and on this occasion, it has been upheld to be continued for 10 years. It is wholly disproportionate to any such alleged acts of negligence on the part of the petitioner. This kind of debarment/blacklisting over a period of 10 years is like a death-knell on a firm engaged in construction activity as it acts as a bar in participation in any tender or contract with any other State or instrumentality across the country. This approach of the respondents is de hors reasoning and is not in tune with the judgment rendered by the Apex Court specifically in the case of M/s. Kulja Industries Ltd. v. Chief General Manager, W.T. Proj., BSNL and Ors. reported in , AIR 2014 SC 9. It is further submitted that reliance of the respondent on an extract of circular of Water Resources Department of erstwhile State of Bihar at Annexure-A to the supplementary counter affidavit is again of no help as it is itself in teeth of ratio rendered by the Apex Court in the case of M/s. Kulja Industries Ltd. (Supra), which has held that debarment or blacklisting cannot be for an indefinite period. It is submitted that

in the standard bidding document of Building Construction Department under the Government of Jharkhand, there are specific condition incorporated, which provides guidelines for imposition of order of blacklisting for defined period based upon estimated value of loss of work due to negligent acts of the contractor. The Rural Works Department under which this present work was executed has not framed any such guidelines or rules in absence of which decision to debar for a period i.e. 10 years has been taken on whims and fancies of the respondent authorities. Such course cannot be countenanced in the eye of law. Therefore, the impugned order deserves to be interfered both on the touchstone of Wednesbury Principles of reasonableness as also on the grounds of proportionality.

10. Learned counsel for the respondent-State has defended the impugned order. It is submitted that order of debarment was left untouched by learned Single Judge when it only gave a window to file representation to the petitioner before the respondent authorities as the debarment had continued for more than 4 years. It is submitted that the impugned order has been passed after due application of mind considering the fact that on account of negligent acts of the contractor, such an important bridge, which connects two distinct places in the district of Dhanbad has been delayed for a considerable period resulting in loss of exchequer to the tune of Rs. 22,10,000,00/-. It is submitted that conduct of the petitioner has been enquired by the respondent department through its own committee comprising of engineers and also through agencies. The opinion of agencies does not completely exonerate the petitioner on all counts. On termination of his agreement, the work is now to be executed through another agency by a fresh tender which would extend the time for construction not only to the disadvantage of the user public but also enhancing the cost to a considerable extent. It is also not clear whether learned Court of Special Judge, Vigilance has accepted the final form submitted by the Vigilance Bureau in Vigilance Case No. 27 of 2010 which the petitioner is facing. Reference to the statements of Chief Engineer is being misinterpreted by the petitioner, though it is only failure of the petitioner prima facie which led to the damage of under construction bridge. The BIT, Mesra in its report has also given the probable reasons of failure and observed that depth of piers up to which the piles have been driven in the present situation of the ponded river bed could not be ascertained. These reports cannot be construed to give a clean chit to the petitioner. Reliance has also been placed by the respondents also upon the judgment rendered by the Apex Court in the case of M/s. Kulja Industries Ltd. (Supra) and also in the case of M/s. Meinhardt Singapore Pte. Ltd. and Anr. v. State of Jharkhand & Ors. in Special Leave to Appeal (C) No. 16048 of 2012 dated 14.10.2014.

11. I have considered the submission of the parties in some detail and gone through the relevant materials on record. Upon a survey of the authorities on the point, the principle of law in matters of judicial review on a question of blacklisting of contractor have been laid down by the Hon"ble Supreme Court in

the case of M/s. Kulja Industries Ltd. (Supra). Para-17 of the judgment is quoted hereunder:--

"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 and Chemicals Ltd. v. State of West Bengal and Anr.*, (1975) 1 SCC 70 : (AIR 1975 SC 266) 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 :"

12. The Hon"ble Supreme Court has held that the freedom of contract or not to contract by the State or its instrumentality is subject to judicial review. This implies that any such decision will be open to judicial scrutiny not only on the touchstone of principles of natural justice but also on the doctrine of proportionality. Whether order of blacklisting is reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court. The Hon"ble Apex Court in the instant matter considered the question relating to indefinite period of debarment/blacklisting imposed upon the appellant and discussed the legal position regarding blacklisting of suppliers in USA and UK and the guidelines which are followed for debarment. Debarment is treated as synonymous with blacklisting in USA and UK. The observation at para-20, 21 and 26 of the judgment rendered by the Apex Court in the case of M/s. Kulja Industries Ltd. (Supra) are profitable to be quoted hereunder:--

"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 "debarment" 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 offence 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 offence 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.

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."

13. The opinion rendered by the Apex Court on the point of proportionality shows that the authority empowered to take a decision on the question of debarment is required to keep into account gravity of offence and the violation of breaches that may be prescribed by the guidelines framed in the concerned organization. Various nature of misdemeanor or violations of contractual obligation by the contractor may entail various degree or period of debarment considering the gravity of misconduct or violation. The guidelines to be kept in mind while taking such a decision have been enumerated in the above quoted paragraphs of the Judgment such as:--

"(a) Conviction of or civil judgment for-

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

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

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

(f) 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.

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

(h) Whether the contractor has accepted responsibility for the wrongdoing and

recognized the seriousness of the misconduct and such conditions which also contemplates investigation into the circumstances surrounding the cause of debarment, etc."

14. The conspectus of facts noted hereinabove show that in the first place, the order of debarment passed on 09.09.2010 was based upon a prima facie opinion of the three man committee headed by Chief Engineer of the Department, which also found negligence not only on the part of the petitioner, but other engineers. Scientific report were also obtained from the agencies such as BIT Mesra and on other reputed agency i.e. SANRACHANA, which conducted the Sonic Integrity Test on the piers.

15. Report of BIT Mesra at Annexure-9 and that of an expert agency SANRACHANA, Structural Strengthening Pvt. Ltd. at Annexure-15, both employed by respondent-Department leads to the impression that scientific test conducted at the site under various sub heads have not found any structural error in the design and substandard use of construction material. The probable reasons of failure in the report of BIT Mesra at Annexure-9 referred to hereinabove, also indicated that probably as a consequences of large quantity of flood water gushing through a much contracted cross-sectional area of the river with increased velocity, it would have caused scouring and other effects that resulted in instability of the piers and foundations. It had noted that there was huge sudden heavy downpour for 5 continuous days in monsoon session in 2009. It observed that piles have to rest on hard and sufficiently thick rock strata. Many time stone fragments coming out with slurry gives misleading results. It may be possible that piles have not embedded on firm strata causing the failure of piers. Report of SANRACHANA, Structural Strengthening Pvt. Ltd. has also been referred to hereinabove, which after conducting test under four different sub heads, had concluded that quality of concrete is as per the proposed design grade of concrete and pile integrity in terms of cross section and length continuity is within the reasonable acceptable limit. It further transpires that investigating agency i.e. Vigilance Bureau took into account of the scientific report of SANRACHANA, Structural Strengthening Pvt. Ltd. and came to a conclusion that institution of criminal prosecution against the accused contractor and other persons were based upon incorrect facts. Perusal of the impugned order does not show due consideration of all these reports as also the final form by the investigating agency on 31.12.2014, though the impugned order was passed on 19.08.2015. Prima facie some negligence may have been found in the construction on the part of the petitioner, which entailed his debarment at the inception in 2010. However, when the matter was being reconsidered after the submission of the scientific reports of BIT, Mesra and SANRACHANA and on submission of final form by investigating agency, due consideration to the relevant materials were required to be accorded for arriving at a fair and proper adjudication of the entire issue relating to blacklisting of the petitioner and the period for which it has to be continued. As a matter of fact, the blacklisting has continued since in its inception on 09.09.2010 till date and the decision of the

respondent to continue it for a period of 10 years till 08.09.2020 cannot pass the test of proportionality. Blacklisting for a period of 10 years, in the circumstances, discussed hereinabove would definitely be disproportionate to any misconduct or violation of contractual obligation on the part of the contractor. Such a decision to debar/blacklist the petitioner for a period of 10 years would have serious adverse civil consequences on the firm as it acts as a bar for participating in any tender or contract with any other State or its instrumentality across the country. This approach of the respondent therefore, does not stand the test laid down by the Apex Court in the case of M/s. Kulja Industries Ltd. (Supra).

16. Therefore, on consideration of all the facts and the reasons discussed, the impugned order dated 19.08.2015 can not be upheld in the eye of law as it suffers from non application of mind to the relevant materials on record and requirement of reasonableness, at the same time the period of 10 years of debarment also is grossly disproportionate to the alleged misconduct and the violation of contractual obligation. Accordingly, it is quashed.

17. The respondents, if so desire, are at liberty to pass fresh order in accordance with law taking into account all relevant material facts and the observations made hereinabove.

18. Accordingly, this writ petition is allowed in the manner and to the extent indicated hereinabove.