

(2018) 08 PAT CK 0084

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 268 Of 2017

M/S. Raj Traders Through Its Proprietor Pushpa Devi

APPELLANT

Vs

State Of Bihar Through The Secretary And Ors

RESPONDENT

Date of Decision : 03-08-2018

Acts Referred:

Indian Penal Code, 1860 — Section 120(B), 411

Essential Commodities Act, 1955 — Section 7

Arbitration And Conciliation Act, 1996 — Section 10(vii), 11(xxxix), 12(1)(d)

Citation : (2019) 1 PLJR 74

Hon'ble Judges : Nilu Agrawal, J

Bench : Single Bench

Advocate : Prabhat Ranjan, Chandan Kumar, M.N. Roy, Namrata Mishra

Final Decision : Allowed

Judgement

1. Heard Mr. Prabhat Ranjan, learned counsel for the petitioner and Mrs. Namrata Mishra, learned counsel for the Bihar State Food and Civil

Supplies Corporation Ltd. as well as the counsel for the State.

2. Petitioner had initially filed the writ application for quashing of the notice to show cause vide letter No. 14948 dated 27.12.2016 (Annexure-7) issued

under the instructions of the Managing Director of the Bihar State Food and Civil Supplies Corporation (hereinafter referred to as the Corporation)

requiring the petitioner to reply against the contemplated action why the agreement be not cancelled, bank guarantee forfeited and the petitioner firm

be blacklisted for a period of five years as well as recovery of price of 3017.50 quintals of rice confiscated and why fifteen trucks of the petitioner be

not prohibited from transporting the goods of the Corporation on the ground of institution of First Information Report being Sikarhatta P.S. Case No.

13 of 2016 lodged on 02.02.2016. Petitioner immediately rushed to this Court against the said show cause notice. Subsequently, the impugned order was passed on 30.01.2017, Annexure-12 which the petitioner challenged by filing I.A. No. 773 of 2017 whereby the agreement was rescinded, security deposit and bank guarantee forfeited, the petitioner was restrained and blacklisted for a period of five years and the price of 3017.50 quintals of rice was sought to be recovered/ deducted from the transportation bills of the petitioner and as per the District Magistrate's order dated 30.08.2016 out of the confiscated rice i.e. 471.80 quintals was to be sold and proceeds deposited in the treasury, which has also been challenged by the petitioner. Since I.A. No. 773 of 2017 is challenging the subsequent order of blacklisting, the same is allowed.

3. The facts of the case is that petitioner was appointed as a transporter and handling agent for the district of Bhojpur by the respondent-Corporation by way of an agreement dated 18.02.2013. The controversy arose in the month of January, 2016 when some of the trucks, which were used by the petitioner for transportation of food grains of the Corporation were found parked in the vicinity of one M/s Singh Rice Mill, Ara. Raising suspicion that the petitioner was transporting food grains of the Corporation to the mills and thus indulging in black-marketing, the matter was enquired and subsequently led to lodging of a First Information Report being Sikarhatta P.S. Case No. 13 of 2016 dated 02.02.2016 for the offence under Sections 411, 120(B) of the Indian Penal Code and Section 7 of the E.C. Act. Simultaneously, vide Letter No. 1568 dated 04.02.2016, the petitioner was asked to show cause for violation of the terms of the agreement and why the agreement be not cancelled and securities be forfeited. The said show cause dated 04.02.2016 being contrary to the express terms of the agreement was challenged by the petitioner in earlier writ being C.W.J.C. No. 3191 of 2016 (Annexure-6 to the writ application). During pendency of the earlier writ application, the petitioner was served with second show cause notice vide Letter No. 1976 dated 11.02.2016 placing reliance on a report of the District Magistrate in Letter No. 348 dated 05.02.2016, which was an ex parte report of the District Magistrate. The petitioner had challenged the first show cause notice dated 04.02.2016, the report of the District Magistrate dated 05.02.2016 before this Court in the earlier writ application.

4. The earlier writ application was C.W.J.C. No. 3191 of 2016 as well as C.W.J.C. No. 8035 of 2016 was filed against the order of recovery. The

petitioner in the earlier writ application had also challenged the final order dated 04.03.2016, (which was passed during pendency of the earlier writ

application after referring to the letter of the District Magistrate as also recommendation made by the District Magistrate for legal action) blacklisting

of the petitioner, cancelling the agreement for violation of clause 9 of the agreement, security money as also bank guarantee had been forfeited and

for black- marketing of grains, cost of food grains seized in the First Information Report dated 02.02.2016 was to be recovered from the petitioner.

This Court in the earlier writ application had observed that the impugned order dated 04.03.2016 has been passed essentially on the basis of the letter

dated 05.02.2016 of the District Magistrate, copy of which was not supplied, which was the sheet anchor of the decision arrived. Since the said report

was not supplied to the petitioner, it was in violation of the principles of natural justice and a liberty was granted to the respondents to issue fresh show

cause. This Court also opined that mere filing of a First Information Report cannot be a ground for blacklisting any person which entails grave civil

consequences, as the allegations made in the First Information Report have to be investigated by the police and report filed in Court after investigation

and that recovery sought to be made from the petitioner was not explained as to what loss had been caused to the Corporation by the action of the

petitioner.

5. It is in consequence to the liberty granted by this Court in the earlier writ application that the impugned show cause and subsequently the impugned

order of blacklisting has been passed, which is under challenge in the present writ application. The petitioner has challenged the show cause notice

dated 27.12.2016, Annexure-7 on the ground that the said show cause has again been issued on the same allegations in a mechanical manner

replicating the earlier show cause notice set aside by this Court in the earlier round of litigation. He has challenged the show cause notice also on the

ground that:-

(1) The show cause notice has been issued mechanically by the Managing Director of the Corporation and the proposed action of blacklisting on the

ground of institution of Sikarhatta P.S. Case No. 13 of 2016, which is not

permissible in terms of the agreement, which has been held to be bad in the earlier round of litigation as merely filing of the First Information Report cannot be a ground for blacklisting any person as such allegations have to be investigated by the police and a report filed in the Court after investigation, but no report has yet been filed with regard to the said First Information Report and investigation is pending.

(2) The show cause notice could not have been issued under orders of the Managing Director, as, as per Clause 17 of the agreement, the Managing Director of the Corporation was the sole arbitrator in case of disputes and the Managing Director could not have assumed the role of the complainant and the prosecutor, who has to be an independent and impartial person in view of the 5th Schedule read with Section 12(1)(d) of the Arbitration and Conciliation Act, 1996. The show cause notice was issued with a premeditated mind as even at the stage of issuance itself, action of blacklisting and that too, for a period of five years was contemplated.

(3) No specific show cause for contemplating action of recovery was passed and the petitioner was not at all called upon to explain as to why the recovery be not made. The contemplated action of recovery of price of 3017.50 quintals of rice was also impermissible as no loss was caused to the Corporation. The rice was in the custody of the Corporation and have been claimed by one Niraj Kumar, Proprietor of M/s Singh Rice Mill and has been released in his favour by the orders of this Court in CWJC No. 5652 of 2016, which is Annexure-8 to this application.

6. Petitioner has also filed I.A. No. 5189 of 2018 wherein he has prayed for quashing of the notice inviting Tender No. 577 dated 06.07.2018 issued by the Bihar State Food and Civil Supplies Corporation Ltd., Lakhisarai and notice inviting Tender No. 749 dated 09.07.2018 issued by the Bihar State Food and Civil Supplies Corporation Ltd., Aurangabad for selection and empanellment of the main and door step delivery transporting contractors for transportation of food grains, but on account of blacklisting, the petitioner is unable to participate in any tender process.

7. I.A. No. 5189 of 2018 is allowed to be treated as part of the writ application.

8. The petitioner has in the present writ application challenged the show cause notice being contrary to law, hence, it was not replied by the petitioner but challenged the same before this Court. During pendency of the writ

application, the order of blacklisting dated 30.01.2017, Annexure-12 has been passed wherein the premeditated and contemplated action of blacklisting as per the show cause has been passed solely on the ground of institution of

First Information Report, which is not only contrary to the terms of the agreement, but also in the teeth of the mandate of the decision of this Court in

the earlier writ application, as blacklisting or any action having civil consequence solely on the ground of lodging of First Information Report is

impermissible. It has also been submitted that the show cause notice alleged violation of clause 2(d), 2(e) and Clause 9 of the agreement, which is

Annexure-7, but the impugned order of blacklisting has been passed in view of Sections 10(vii) and 11(xxxix) of the terms and conditions of the

Corporation, which was not the part of the agreement and neither was the postulate of the show cause notice. The petitioner further contends that the

impugned order of blacklisting has again taken into consideration the report of the District Magistrate dated 05.02.2016, as the District Magistrate

virtually assumed the role of the Investigating Officer. When the entire allegation was pending investigation in the First Information Report dated

02.02.2016 by the police, which is still under consideration, there was absolutely no reason for the District Magistrate to have conducted the said

inquiry and come to a conclusion during pendency of the investigation and that too ex parte without giving any opportunity to the petitioner.

9. Learned counsel for the petitioner submits that the impugned order of blacklisting and recovery has been passed being completely oblivious to the

fact that no loss has been caused to the Corporation as food grains, which were entrusted to the petitioner for being transported to the SFC godown

was properly loaded in the godown, the same was entered in the register maintained in the godown and after proper verification of the transportation

bills and the godown bills have been cleared on 02.11.2016, Annexure10 to this application, which was done after proper verification and after

institution of the First Information Report and the report of the District Magistrate.

10. To buttress his contention, learned counsel for the petitioner relies upon the judgment of the Apex Court in the case of Chairman-cum-Managing

Director, Coal India Limited and others Versus Ananta Saha and others, since reported in (2011) 5 Supreme Court Cases 142, paragraph 32 stating

therein that the show cause had initially been challenged and if initial action is not in consonance with law, subsequent proceeding would not sanctify

the same, as such, on the legal maxim *sublato fundamento cadit opus* is applicable, meaning thereby, in case a foundation is removed, the

superstructure falls. Since the impugned show cause was with a premeditated mind and not in consonance with law, the order of blacklisting is also

bad. He also substantiated the said proposition relying upon the judgment in the case of *Aslam Mohammad Merchant Versus Competent Authority*

and others, since reported in (2008) 14 Supreme Court Cases 186, paragraph 54 that once the show cause notice is found to be illegal, the same would

vitiating all subsequent proceedings. With regard to the loss caused to the Corporation, he relies on the decision in the case of *Om Kumar and others*

Versus Union of India since reported in (2001) 2 Supreme Court Cases 386, paragraphs 34 and 35 stating therein that there must be congruence and

proportionality between the injury to be prevented or remedied and the means adopted to that end as in the present matter after proper enquiry that no

loss has been caused to the Corporation, the transportation bills have been cleared on 02.11.2016.

11. For the proposition of doctrine of bias, learned counsel for the petitioner contends that the Managing Director, who was the sole arbitrator as per

the agreement for the disputes between the parties, show cause notice could not have been issued under the orders of the Managing Director of the

Corporation and even the order of blacklisting has been passed by the Managing Director, as such, the Managing Director could not have assumed the

role of complainant and the prosecutor. He relies on the decision in the case of *Union of India and others Versus Sanjay Jethi and another*, since

reported in (2013) 16 Supreme Court Cases 116, paragraphs 33.4 and 46.

12. Learned counsel for the Respondent-Corporation submits that it is in pursuance to the earlier order of this Court passed in CWJC No. 3191 of

2016 a fresh show cause, Annexure-7 has been issued along with a copy of the enquiry report of the District Magistrate dated 05.02.2016 and since

the petitioner had nothing to say in defence, the order of blacklisting dated 30.01.2017 has been passed. She submits that the food grains were

released in favour of one Mr. Niraj Kumar in compliance to the order passed by this Court in CWJC No. 5652 of 2016 as food grains were perishable

commodity but this Court had ordered that the said release would be subject to final result of the Confiscation Case No. 9 of 2015-16 as well as

Sikarhatta P.S. Case No. 13 of 2016. She contends that the confiscation case as well as P.S. case are pending before the different judicial forums and

the show cause notice dated 27.12.2016, the subsequent order of blacklisting and recovery dated 30.01.2017 are in accordance with law and the

agreement has been cancelled as per the terms of the agreement and terms and conditions of the Corporation.

13. Learned counsel for the State supports the contention of the Corporation.

14. On a consideration of the facts and circumstances of the case and submissions of learned counsels for the parties, this Court finds sufficient force

in the submissions of the learned counsel for the petitioner. The impugned show cause dated 27.12.2016 issued under the instructions of the Managing

Director of the Corporation was passed with a premeditated mind as the wordings of the show cause notice has culminated in the order of blacklisting

and from the language of the show cause notice, it is evident that at the stage of issuance of the said show cause itself, the action of blacklisting and

that too for a period of five years was contemplated. The order of the District Magistrate dated 30.08.2016 was passed in the case of one Niraj

Kumar, Proprietor of M/s Singh Rice Mills in whose favour the food grain has been released by orders of this Court passed in CWJC No. 5652 of

2016. On the basis of enquiry conducted by the District Magistrate, enquiry report being 05.02.2016 was an ex parte enquiry without hearing the

petitioner, which was in violation of the principles of natural justice. Even the notice to show cause as per the orders of the Managing Director was in

violation and contrary to the amendment of the Arbitration and Conciliation Act, 1996, 5th Schedule read with Section 12(1)(d) as the impartiality and

independence of the arbitrator would be doubted when as per clause 17 of the agreement, the Managing Director of the Corporation was the sole

arbitrator and the Managing Director could not have assumed the role of the complainant and the prosecutor, as if any dispute had to be resolved

through arbitration, Managing Director being the sole arbitrator, there was reasonable apprehension of bias as the show cause had been issued on the

orders of the Managing Director and the order blacklisting the petitioner for five years was passed by the Managing Director himself, although he was

sole arbitrator as per clause 17 of the agreement. Hence, there was apprehension and likelihood of bias. The enquiry report of the District Magistrate dated 05.02.2016 was done ex parte behind the back of the petitioner and even the order dated 30.08.2016 passed by the District Magistrate was with regard to release of food grains in favour of one Niraj Kumar, Proprietor of M/s Singh Rice Mills. Mere lodging of the First Information Report, which was the postulate of cancellation of agreement and blacklisting together with the forfeiture of the bank guarantee and stoppage of work was based on the footing that the First Information Report had been lodged but merely filing of the First Information Report cannot be a ground for blacklisting any person as investigation has to be done by the police and a report to be filed after investigation before the Court. Mere filing of the First Information Report per se would not be ground for show cause and the subsequent order of blacklisting as the show cause ought to have stated facts upon which the First Information Report had been instituted so that the petitioner could meet the same. In fact, the show cause under challenge dated 27.12.2016 replicated the earlier show cause issued, which has been held to be bad in law in the earlier writ application. Furthermore, action of blacklisting in violation of Section 10(VII) and 11(XXXIX) of the terms and conditions of the Corporation which was not the postulate of the show cause notice dated 27.12.2016 and new terms and conditions of the Corporation has been incorporated in the order of blacklisting, which was not the contents of the show cause notice. No loss has been caused to the Corporation as the bills of the petitioner have been cleared on 02.11.2016, which was done after proper verification and after institution of the First Information Report and the report of the District Magistrate. Hence, the show cause notice dated 27.12.2016 issued by a premeditated mind and subsequent order of blacklisting dated 30.01.2017 passed by the Managing Director who was also the sole arbitrator in terms of clause 17 of the agreement would obviously have a substantial possibility of bias and since the show cause notice was not in consonance with law as held in the case of Chairman-cum-Managing Director, Coal India Limited and others (supra) as well as Aslam Mohammad Merchant (supra), this Court is in agreement with the contention of the learned counsel for the petitioner that the impugned show cause notice was issued with a premeditated mind. This Court also agrees with the contention of the learned counsel for the petitioner that since no notice of

recovery has been passed and after proper enquiry, transportation bills have been cleared by the Corporation on 02.11.2016, in view of the judgment in

the case of Om Kumar and others (supra), the loss having not been assessed, bills having been cleared, it amounts to no loss caused to the

Corporation. Since the show cause notice dated 27.12.2016, which was the substratum of the subsequent order of blacklisting was not in consonance

with the law, the order of blacklisting dated 30.01.2017, which is super structure cannot be allowed to stand.

15. Accordingly, the show cause notice dated 27.12.2016, Annexure-7 and the order of blacklisting dated 30.01.2017, Annexure-12 are quashed. The

writ application is allowed.