(2015) 11 PAT CK 0019

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 14216 of 2011

Rama Kant Singh APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 06-11-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 32
Penal Code, 1860 (IPC) — Section 120B, 406, 409, 420
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2)

Citation : (2015) 11 PAT CK 0019

Hon'ble Judges : Mihir Kumar Jha, J.

Bench : Single Bench

Advocate : Shashi Anugrah Narain, Senior Advocate and Lal Babu Singh, Advocate, for the Appellant; Ajay Bihari Sinha, SC19, for the Respondent

Judgement

Mihir Kumar Jha, J.—Heard learned counsel for the parties.

2. The prayer of the petitioner in this writ application reads as follows:

"1(i) For quashing of the order of blacklisting contained in memo No. 3982 dated 30.9.2008.

(ii) For quashing of the order of the respondent Secretary contained in Memo No. 11258(s) dated 2.8.2010 whereby the appeal preferred against the order of blacklisting was rejected.

(iii) For a direction to the respondents not to act upon the orders of blacklisting and the appellate order rejecting the appeal against the order of blacklisting and allow the petitioner the privilege under the Enlistment Rules of Contractor, 2007.

(iv) for a direction to the respondents to consider the case of the petitioner for registration under 2007 Enlistment Rules notwithstanding the order of blacklisting dated 30.9.2008 and the appellate order dated 2.8.2010.

(v) For appropriate declaration that the entire proceeding of blacklisting is based on non est ground and in the facts and circumstances of the case it is totally without jurisdiction.

(vi) For a further declaration that the successive order of blacklisting despite quashing of the same by this Hon''ble Court is malafide and colourable exercise of power."

3. Mr. Shashi Anugrah Narain, learned Senior counsel appearing on behalf of the petitioner, in support of the aforementioned prayer while assailing both the impugned orders dated 30.9.2008 (Annexure 9) and the appellate order dated 2.8.2010 (Annexure 12) has submitted that not only there is a complete non-application of mind by the authorities but the impact of the two impugned orders blacklisting the petitioner permanently forever would be in teeth of law laid down by the Apex Court in the case of Kulja Industries Limited Vs. Chief Gen. Manager W.T. Proj. BSNL and Others, .

4. Per contra, Mr. A.B. Sinha, learned counsel appearing on behalf of the State, while defending the impugned orders has submitted that once the petitioner was given an opportunity to file his show cause reply and he did not do so, his mere production of a copy of the writ petition filed earlier by him before the authority cannot amount to non-consideration of the case of the petitioner, especially when he did not disclose any specific defence against he allegations incorporated in the show cause notice. In this regard he has placed reliance on the judgment of the Apex Court in the case of Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, , as also to the judgment in the case of Gorkha Security Services Vs. Govt. of NCT of Delhi, . He has also sought to distinguish the judgment of the Apex Court in the case of M/s. Kulja Industries Ltd. (supra) on the ground that the nature of misconduct against the petitioner was quite grave and serious.

5. The facts giving rise to this writ application lie in a narrow compass. The petitioner, a registered Class I-A contractor having registration No. 228/1985, was declared successful in the tender and allotted the work for widening and strengthening of road of Ekangar Sarai-Telhara road and such work was also completed by the petitioner in the year 2000 and six months liability period under contract had also expired in the year 2000. The petitioner in fact claims that its earlier registration as a contractor of the year 1985 under which he had been awarded the contract and had completed the allotted work of Ekangar Sarai-Telhara road had expired on 28.12.2000 and when its renewal was refused on the ground of late submission of the application by the petitioner he had filed a writ petition seeking a direction for such renewal being C.W.J.C. No. 3874/2002 in which this Court had issued a direction to the respondents to dispose of pending application of the petitioner for renewal of the licence.

6. The registration of the petitioner as a contractor, however, was not renewed and when the same was rejected by the State Government on 31.5.2002 the petitioner had filed a fresh application for registration in terms of the Bihar

Contractor Registration Rules, 1996 and was granted registration No. 771/2003 again as a Class I-A contractor and under this registration also the petitioner claims that he had been allotted and also successfully completed several new work.

7. According to the petitioner, it was only in the year 2006 that by a show cause notice dated 26.6.2006 based on some internal vigilance inquiry conducted by the officials of the Road Construction Department he in respect of alleged lapses and shortcoming of his completed work of Ekangar Sarai-Telhara Road, he was also to explain as to why his existing registration of contractor of the year 2003 should not be cancelled and he be also black listed. The petitioner, in response to the aforesaid show cause notice had submitted his reply on 18.7.2006 initially by filing a preliminary show cause reply on 18.7.2006 and later on also his final reply on 22.12.2006, on receipt of the documents asked for the petitioner.

8. In such show cause reply by the petitioner he had raised both the issues, namely that his existing registration as a contractor of the year 2003 could not have been made subject matter of cancellation on the ground of its earlier work of Ekangar Sarai-Telhara road allotted and completed in the year 2000 on the basis of his 1995 registration and in this regard he had specifically asserted that under new registration of 2003 as a contractor he had incurred no disqualification so as to be subjected to its cancellation. In addition to the aforesaid stand, the petitioner had also taken a plea that the subject matter of the show cause notice was in fact also subjudice before this Court in a writ petition, C.W.J.C. No. 6773/2006 questioning the government decision with regard to realization of the price as well as the rate of the bitumen and also in another case pending before this Court being Cr. Misc. No. 35189/2006 questioning filing of Laheri P.S. Case No. 88/2006 by the authorities pertaining to alleged misappropriation of the Government money involving price of bitumen. The petitioner in this regard had also relied on an interim order passed by this Court restraining the respondents from taking any coercive step against him.

9. It is also relevant to note here that while the Government had not taken any final decision with regard to cancellation of registration of the petitioner on the basis of the aforementioned show cause notice, this Court by a judgment dated 27.4.2007 in C.W.J.C. No. 6773/2006, had quashed the demand notice issued by the Executive Engineer, Road Division, Bihar Sharif dated 10.4.2006 and had directed the petitioner to deposit the amount of Rs. 48,92,355/- by a Bank draft being the price of the bitumen at penal rate and held as follows:

"On perusal of Clause 12 of the Special agreement I do not find that the respondents are correctly interpreting it. No where it has been mentioned in clause 12 that penal rate will be chargeable for unconsumed supplied articles. In specific words, it is said, that penal rate will be chargeable for excess supplied materials beyond the estimation of circle analysis. Demand made by the respondents for payment of cost of penal rate for unconsumed bitumen is based on wrong interpretation of Clause 12 of the special agreement and as such not sustainable.

Accordingly letter No. 460 dated 10.4.2006 issued by respondent No. 4 is quashed. The respondents are directed to issue fresh demand letter in terms of clause 12 of the Special Agreement. Petitioner on receipt of such demand letter, will take payment, for supplied bitumen in excess of estimation of circle analysis, within four weeks of the receipt of demand letter.

This application is accordingly allowed."

10. In view of the aforesaid judgment the petitioner claims that he had made a request to the Executive Engineer for raising a fresh demand and a sum of Rs. 1,19,678/- was also deposited by the petitioner on 19.6.2007 pursuant to the demand notice issued by the Executive Engineer in its letter dated 15.6.2007 while complying the direction of this Court in the aforesaid order dated 27.4.2007 in C.W.J.C. No. 6773/2006.

11. It has also to be borne in mind that the registration of the petitioner of the year 2003 as a contractor had also expired on 1.12.2006 and though the petitioner had deposited a Challan of Rs. 2500/- for its renewal on 23.12.2005 but its renewal was not made and in the meantime Bihar Enlistment of Contractor Rules, 1996 was repealed and was replaced by the Bihar Enlistment of Contractor Rules, 2007 envisaging now deposit of Rs. 2 lacs for fresh registration by an intending Class I-A contractor and therefore, the petitioner had also deposited a sum of Rs. 1,97,500/- to complete the amount of Rs. 2 lacs.

12. According to the petitioner while his fresh registration as a contractor was yet to be made, its earlier registration as a contractor of the year 2003 bearing Registration No. 771/2003 which had already lapsed on 1.12.2006 was in fact sought to be cancelled and he was blacklisted on the ground of its shortcoming in execution and completion of the work of Ekangar Sarai-Telhara road by an order dated 2.11.2007. This order dated 2.11.2007 was accordingly assailed by the petitioner in C.W.J.C. No. 15851/2007.

13. The further case of the petitioner is that during pendency of the aforementioned writ petition, C.W.J.C. No. 15851/2007, his another pending criminal case before this Court for quashing of the prosecution of the petitioner on the basis of Laheri P.S. Case No. 88/2006 was also quashed by this Court by a judgment dated 21.2.2008, the relevant portion whereof reads as follows:

"23. Counsel for the petitioner, Ramakant Singh, has submitted that the foundation for institution of the present case was non-recovery of the cost of surplus unconsumed bitumen as well as non-realization of sales tax royalty from the petitioner, who is contractor. The letter No. 651, dated 13.6.2006, of the Executive Engineer is self explanatory to this effect that cost of bitumen sales tax and royalty were realized prior to institution of the case. The foundation of first information report was false as on completion of the work the bills were prepared measurement were taken. So far the standard of quality of the work is concerned, there was no allegation, which is evident from the finalization of the official bill by the Executive Engineer. The sales tax and royalty were adjusted from the official bill of the petitioner in spite of that for realization of penal rate for the alleged excess bitumen the petitioner was intimated through a demand letter. He filed C.W.J.C. No. 6773 of 2006. In this writ application when the respondents were directed to file their counter affidavit, as a counter blast first information report was instituted. The writ application was allowed, excess demand made by the Executive Engineer for realization of penal rate for the alleged excess bitumen was quashed. Respondents were directed to issue fresh demand in accordance with law. Fresh demand was issued and entire payment has been made. Now nothing remains to be paid for which allegation of embezzlement can be made. Otherwise also lodging of criminal case for realization at penal rate of bitumen was ex facie and abuse of criminal case. It was a civil dispute for which several provisions were there. In the agreement itself, without exhausting that forum criminal case was instituted. I find much substance in the submission and good ground for quashing of the order taking cognizance. In the given facts and circumstances, continuation of the criminal proceeding will be an abuse of the process of the Court.

24. The counsel for the petitioners has also submitted that the cognizance has been taken for offences under sections 406 , 409 and 420 of the Indian Penal Code. The allegations made in the first information report do not make out a case of cheating. There is no allegation that right from very inception there was intention on the part of the petitioners to cheat. So far the sanctioning of the cost of the project, extension of time for complying the work and approval of the final bill for payment are concerned, petitioners are not responsible. There can be no presumption that they had any intention right from beginning for cheating or embezzlement for the offences which have been alleged. The case has been instituted merely on suspicion and such proceeding can not continue for harassment of the petitioners.

25. In the light of the discussions, made above, and the findings, recorded in the decisions, relied upon by the parties as well as the material on record of the case, I am of the view that the present case comes in those categories in which continuation of the criminal proceeding will amount to an abuse of the process of the Court.

26. Accordingly, the order taking cognizance as well as the entire criminal proceeding is quashed."

14. Soon thereafter the petitioner''s writ application also being C.W.J.C. No. 15851/2007 against the order of his blacklisting dated 2.11.2007 was also allowed by this Court by a judgment dated 22.4.2008, wherein it was held as follows:

"In both these writ applications the order passed by the Engineer-in-Chief, Road Construction Department, blacklisting the two petitioners of the writ applications under the provision of the Bihar Contractor Registration Rules, 2007 is in question. The facts are not in dispute.

Counter affidavits in both cases and rejoinders have been filed.

With the consent of the parties, the writ applications have been heard and are being disposed of at the stage of admission itself.

Petitioners, in both the writ applications, are Class 1A contractor whose registering authority under the said rules is the Engineer-in-Chief. Both had undertaken some works with the Road Construction Department. The Secretary cum Commissioner, Road Construction Department, issued separate notices to both the petitioners to show cause against proposed blacklisting in terms of the rules aforesaid. Both the petitioners filed their show causes before the said secretary cum Commissioner. They were not granted any hearing by any person but ultimately, the impugned order blacklisting the petitioners has been passed by the Engineer-in-Chief, Road Construction Department and not by the Secretary cum Commissioner, Road Construction Department.

The validity of the order has been challenged primarily on two grounds. Firstly, it is submitted that only a person who is competent to pass the final order could initiate the proceeding under the rules. In other words, a person must be competent to initiate the proceeding and he must be competent to pass the final order based on such notice. Secondly, it is urged that the Secretary cum Commissioner, is the appellate authority from any order of blacklisting passed under the rules. In the present case he himself has initiated the proceeding though the final order was passed by the Engineer-in-Chief. Thus, the initiation of the proceeding was by the appellate authority. As such even if the petitioner preferred an appeal it would be an empty formality and the appellate authority himself initiated the proceeding. On these two grounds the action is impugned.

Having considered the matter I am of the view that the writ petitions must succeed.

As per the rules aforesaid initiation of proceeding for blacklisting a contractor is not as a matter of course nor is it mechanical. It is discretionary and is based on a subjective satisfaction of the designated authority, who has to pass the final order. In my view, it is a notice of assumption of jurisdiction to take punitive action, in absence whereof there would be no jurisdiction to pass a final order. If notice is issued by one then it is he who assume jurisdiction to adjudicate and pass final order. A person not competent to pass a final order, at the first instance, cannot assume jurisdiction to initiate a proceeding otherwise it would lead to innocuous result and chaos. For example, in a case where the designated authority is of the opinion that no case is made out to initiate a proceeding 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 his superior. I am, therefore, of the view that it is only an authority, which assume jurisdiction by issuance of notice who is competent to pass the final order upon adjudication pursuant to notice issued by him. In the present case, the notice was undisputedly issued by the Secretary cum Commissioner of Department. He is the senior most officer. He also happens to be the only appellate authority available under the rules. The scheme is clear that by implication he cannot initiate a proceeding himself, for, where he does so he would render the provision of appeal oitis. That surely would not be the intention of the rule maker. In the present case, the Engineer-in-Chief, who passed the final order did not assume jurisdiction in the matter by issuance of any notice. As indicated above though notice is issued on subjective satisfaction of the authority, the final orders are to be passed on objective consideration by the same authority. This, in my view, is sufficient to vitiate the impugned orders of both the writ applications.

The second part of submission I have already discussed above and I only reiterate. The Secretary cum Commissioner being the appellate authority himself could not have initiated the proceeding even if he would otherwise be competent to do so then having initiated the proceeding it is he who should pass the order. In substance I hold that one who initiate the proceeding must conclude the proceeding except where administrative exigency provides otherwise. Where a proceeding is initiated by Sub-divisional Officer it must be concluded by a Sub-divisional Officer though a person may change, the office remain. A Collector cannot then usurp the proceeding and pass an order or the proceeding having been initiated for the purposes of final order, the Block Development Officer cannot be authorized unless law provides for such delegation. No such delegation brought to my notice, the provision of Rules 11 and 12 are clear and unambiguous.

In view of the finding of this Court I do not find it proper to decide other issues as raised by the parties.

In the result, both the writ petitions are allowed and the impugned orders blacklisting the petitioners of both the writ applications are set aside."

15. After the aforesaid first order of blacklisting of the petitioner dated 2.11.2007 was quashed by this Court on 22.4.2008 and though no liberty was given to the respondents to initiate a fresh proceeding for blacklisting the petitioner, the respondent Engineer-in-Chief had again issued a fresh show cause notice to the petitioner on 10.7.2008 in purported exercise of power under Rule 11(ka)(ii), (vi), (vii) and (viii) of the Bihar Enlistment of Contractor Rules, 2007. The petitioner this time had straightway questioned the aforesaid show cause notice dated 10.7.2008 in C.W.J.C. No. 11213/2008 but during the pendency of the aforesaid writ petition another order of blacklisting the petitioner was passed on 30.9.2008. This Court by an order dated 23.4.2010 had disposed of the writ application by directing the petitioner to file an appeal against the order of blacklisting dated 30.9.2008 as prescribed in 2007 Rules.

16. The petitioner thereafter had filed an appeal before the Secretary of the Road Construction Department against the order of blacklisting dated 30.9.2008 and

by the impugned order dated 2.8.2010 the Secretary had rejected the appeal, whereafter the present writ application was filed on 25.8.2011 in which by an order dated 4.11.2011 the operation of both the impugned orders dated 30.9.2008 and 2.8.2010 were stayed by passing the following order:

"Heard learned counsel for the petitioner and the learned counsel for the respondents.

2. This writ petition has been filed by the petitioner for the following reliefs:-

(i) For quashing of the order of blacklisting contained in memo No. 3392 dated 30.9.2008.

(ii) For quashing of the order of the respondent Secretary contained in Memo No. 11258(s) dated 2.8.2010 whereby the appeal preferred against the order of blacklisting was rejected.

(iii) For a direction to the respondents not to act upon the orders of blacklisting and the appellate order rejecting the appeal against the order of blacklisting and allow the petitioner the privilege under the Enlistment Rules of Contractor, 2007.

(iv) for a direction to the respondents to consider the case of the petitioner for registration under 2007 Enlistment Rules notwithstanding the order of blacklisting dated 30.9.2008 and the appellate order dated 2.8.2010.

(v) For appropriate declaration that the entire proceeding of blacklisting is based on non est ground and in the facts and circumstances of the case it is totally without jurisdiction.

(vi) For a further declaration that the successive order of blacklisting despite quashing of the same by this Hon''ble Court is malafide and colourable exercise of power.

(vii) For any other relief or consequential reliefs to which the petitioner may be found entitled to in the facts and circumstances of the case.

3. the claim of the petitioner is that the petitioner was a contractor and was assigned the work of widening and strengthening Ekangarsarai-Telhara Road under Naxal Yojna and F2 Agreement was entered into between the petitioner and the Executive Engineer, according to which the liability to maintain the road was only for six months.

4. Learned counsel for the petitioner submits that at the instance of the respondents, Laheri P.S. Case No. 88 of 2006 (Special Case No. 30/2006) was instituted against the petitioner and others and charge sheet was also submitted and cognizance was taken for offences punishable under sections 406 , 409 , 420 , 120B of the Indian Penal Code and 13(2) read with 13(1)(d) of the Prevention of Corruption Act by the Special Judge, Vigilance, Patna. However, the said proceeding was challenged by the petitioner in Cr.Misc. No. 35189 of 2006, which was allowed by a Bench of this Court on 21.2.2008 and the entire criminal

proceeding was quashed.

5. Learned counsel for the petitioner also submits that earlier the petitioner''s firm was blacklisted by the authorities concerned, which was challenged by the petitioner in C.W.J.C. No. 15851 of 2007, which was also allowed by a Bench of this Court vide order dated 22.4.2008 and the impugned order of blacklisting the petitioner''s firm was set asides.

6. Learned counsel for the petitioner avers that again on the same grounds, order dated 26.9.2008 (Annexure 9) was passed by the authorities blacklisting the petitioner''s firm. Against the said order, the petitioner filed C.W.J.C. No. 11213 of 2008, which was permitted to be withdrawn vide order dated 23.4.2010 (Annexure 10) for enabling the petitioner to first exhaust the statutory remedy of appeal against the impugned order. He also states that thereafter the petitioner filed an appeal before the appellate authority, namely, the Secretary of the Road Construction Department, but the said authority, without considering the points taken by the petitioner and the materials on record, passed the impugned order dated 29.7.2010 (Annexure 12).

7. On the other hand, learned counsel for the respondents submits that from the impugned order of the appellate authority dated 29.7.2010 (Annexure 12), it is quite apparent that the authority was satisfied and only thereafter the order was passed and a first information report was lodged and in that case investigation is till going on. Learned counsel for the respondents also submits that in view of the complicated facts of the case, a counter affidavit is required and seeks four weeks'' time for filing counter affidavit.

8. In the said circumstances, let this case be listed on 13.12.2011 under the heading ''Admission'' in regular course.

9. During the pendency of this writ petition, operation of impugned order dated 20/30.9.2008 (Annexure 9) and 29.7.2010 (Annexure 12) passed by the authorities concerned shall remain stayed."

17. During the pendency of this writ application the petitioner, however, was given a conditional registration as a contractor on 10.12.2013 by making it subject to the final result of the present writ application and the petitioner therefore is continuing as a registered contractor.

18. Mr. Shashi Anugrah Narain, learned Senior counsel, while assailing both the orders, has not only relied on the two inter parte judgments of this Court dated 27.4.2007 in C.W.J.C. No. 6773/2006 and other one being 21.2.2008 in Cr. Misc. No. 30150/2006 but has also submitted that the decision to blacklist the petitioner forever was even otherwise unsustainable in view of the law laid down by the Apex Court in the case of M/s. Kulja Industries Ltd. (supra). According to Mr. Narain the aforesaid two judgments of this Court had given a clean chit to the petitioner in respect of the work completed by it relating to Ekangar Sarai-Telhara road and therefore, the authorities could not have sat over the findings

recorded therein much less could have blacklisted the petitioner on identical allegations.

19. The respondents in defence of their action have filed a counter affidavit wherein it has been stated that the petitioner had committed various illegalities and irregularities in the work allotted to him relating to widening and strengthening the Bihar Sharif-Ekangar Sarai-Telhara road which on verification was found to be inferior in specification by use of substandard quality material. It has been further explained by the Respondents that the petitioner was also facing allegation in respect of another work allotted to him in 2006, namely, Ghogha-Sarhaula Road for a total length of 44 K.Ms. for which fresh agreement was entered into by the petitioner in the year 2006-07 but that work was not completed by him. The respondents have also come out with further allegation that the petitioner had submitted a forged N.S.C. certificate by way of earnest money alongwith his tender paper for strengthening work of Ghogha-Sonahula road and also did not execute the work and for this part of the allegation of submitting forged N.S.C. certificate by way of earnest money a criminal case has been lodged against the petitioner at Adampur Police Station, Bhagalpur. As with regard to quashing of the F.I.R. of Laheri P.S. Case No. 88/2006 by this Court in the judgment dated 21.2.2008 in Cr. Misc. No. 30150 of 2006, it has been stated that the Government had decided to file Special Leave Petition before the Apex Court.

20. In the said counter affidavit it has also been explained by the Respondents that notwithstanding their contemplated moving the Apex Court in the criminal case quashing the F.I.R. against the petitioner by this Court, the Department in terms of the 2007 Contractor Rules had taken step for blacklisting him and after following the prescribed procedure of show cause notice the impugned order of blacklisting was passed. Finally, it has also been sought to be impressed by the Respondents that the said executed work of the petitioner of Ekangar Sarai-Telhara road in the enquiry of the Vigilance Department was found to be of inferior quality leading to damage of the road within a very short time.

21. The petitioner in his reply to the counter affidavit while denying the averments and allegations in the counter affidavit has almost repeated the facts and it has been stated that once the petitioner was given the conditional registration subject to the result of this writ application he cannot be subjected to the order of blacklisting.

22. Whatever facts have been noted above for the purposes of noticing the submission of the learned counsel for the parties will give only one impression that the petitioner was given a job of completion of construction of the road work in the year 1998-99 and that was completed by the petitioner, whereafter final measurement was made and the petitioner''s liability being only for a period of six months under 1998 agreement he could not have been held liable by way of show cause notice dated 10.7.2008 which for the sake of clarity and convenience is quoted hereinbelow:

23. As would be apparent from reading of the show cause notice the contract given to the petitioner in the year 1998-99 was made subject matter after nine years without taking into consideration the earlier inter-party judgment of this Court dated 22.4.2008 wherein the earlier impugned order passed against the petitioner of his blacklisting dated 2.11.2007 was quashed which was for the same allegation as in the present show cause notice. As a matter of fact the subsequent show cause notice was also issued on the basis of allegation in the criminal case even when the criminal prosecution against the petitioner had also stood quashed in terms of the judgment dated 21.2.2008 in Cr. Misc. No. 35189/2006. Thus, there would be little left for this Court but to hold that the impugned show cause notice dated 10.7.2008 and the consequential order was passed without there being any fresh leave given by this Court. What would make the order still bad is that the Engineer-in-Chief had passed the order during the pendency of the writ application assailing the aforementioned show cause notice without taking into account the effect of inter-party judgment dated 27.4.2007 in C.W.J.C. No. 6773/2006 as also quashing of the prosecution against the petitioner in the judgment dated 21.2.2008 in Cr. Misc. No. 30150/2006 and finally the inter-party judgment dated 22.4.2008 in C.W.J.C. No. 15851/2007.

24. That apart, the impugned order passed by the Engineer-in-Chief still bad and unsustainable because that the petitioner''s show cause reply filed by him by producing copy of his writ petition containing all his explanation was straightway rejected by the Engineer-in-Chief by holding as follows:

(underlining for emphasis)

25. This Court in fact had directed the learned counsel for the petitioner to produce the copy of the writ petition, C.W.J.C. No. 11213/2008 which was produced by the petitioner by way of his defence before the Engineer-in-Chief to the show cause reply and from its perusal this Court finds that almost all the issues raised in the show cause reply with connecting documents were filed before the Engineer-in-Chief and therefore, if the Engineer-in-Chief had found had found any vagueness in the explanation furnished by the petitioner he was required to at least give an opportunity to the petitioner instead of passing the impugned order. By now law is well settled that mere issuance of show cause notice is not sufficient compliance of the principles of natural justice but in fact the resultant order passed after the show cause reply has also to show application of mind. Reference in this connection may usefully be made to the judgment of Apex Court in the case of The Siemens Engineering and Manufacturing Co. of India Ltd. Vs. The Union of India (UOI) and Another, and in the case of S.N. Mukherjee Vs. Union of India, and in the case of Kranti Associates Pvt. Ltd. and Another Vs. Sh. Masood Ahmed Khan and Others, . In the case of Kranti Associates (supra), the Apex Court, after considering various judgments, had formulated the requirement of recording reasons as a necessary fulfillment of the principle of natural justice in the following words:-

"47. Summarizing the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior Courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants'' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or ''rubber-stamp reasons'' is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-737).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See (1994)

19 EHRR 553 , at 562 para 29 and Anya v. University of Oxford, , 2001 EWCA Civ 405 , wherein the Court referred to Article 6 of European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

26. When this Court analyzed the impugned order in the backdrop of the aforesaid settled law by the Apex Court in the case of Kranti Associates (supra), there will be no difficulty in holding that the impugned order passed by the Engineer-in-Chief in the present case, does not contain any reason in support of the decision of blacklisting the petitioner. As a matter of fact, even the show-cause reply filed by the petitioner by way of producing a copy of the writ application which had contained the full facts and details was keenly brushed aside. Thus, there will be no difficulty in holding that the impugned order is in violation of the principle of natural justice.

27. The impugned order in fact is a bald and non-speaking order which again is based on a composite ground of the allegation of the year 1998-99 in relation to construction of the road work of Ekangar Sarai-Telhara road as also failure of the petitioner to take up and complete the work of Ghogha-Sonahula road. It has to be kept in mind that while the allegation of discrepancy in work or use of bitumen relating to Ekangar Sarai-Telhara road could not have been made subject matter of the show cause notice on account of inter-party judgment dated 27.4.2007 in C.W.J.C. No. 6773/2006 as well as quashing of the criminal prosecution pertaining to the same allegation of misuse of coal tar vide judgment dated 21.2.2008 in Cr. Misc. No. 30150/2006 as well as the earlier order of blacklisting of the petitioner being quashed by another judgment of this Court dated 22.4.2008 in C.W.J.C. No. 15851/2007 but then when these facts were brought to the notice of the Engineer-in-Chief by the petitioner by producing the copy of the entire writ petition containing those judgments he was required to consider the effect of inter-party judgment at least with regard to the allegation of Ekangar Sarai-Telhara road of the year 1998-99.

28. This Court must hasten to add that the subject matter of Ghogha-Sonahula road or alleged discrepancies by the petitioner in respect to that allotment of work or non-completion of work being neither the subject matter of the two writ petitions filed by the petitioner or quashing of the criminal case under the judgment of this Court, that could have been separately made subject matter of a show cause notice but the compact show cause notice and the compact order has made the impugned order unsustainable.

29. As a matter of fact when these issues were raised by the petitioner in appeal somehow the Departmental Secretary also had failed to examine the issue in

true perspective as would be evident from the following part of the impugned appellate order:

30. Though the appellate order does contain reasons which this Court would deal in the subsequent paragraphs but, then, in absence of reason in the original order passed by the Engineer-in-Chief, that cannot be compensated by disclosure of reason in the appellate order was also held in the case of ORYX Fisheries Private Limited Vs. Union of India (UOI) and Others, wherein this aspect of the matter also was dealt in the following terms:-

"41. In the instant case the appellate order contains reasons. However, absence of reasons in the original order cannot be compensated by disclosure of reason in the appellate order.

42. In Institute of Chartered Accountants of India Vs. L.K. Ratna and Others, , it has been held: (SCC pp. 553-54, para 18)

"18.......after the blow suffered by the initial decision, it is difficult to contemplate complete restitution through an appellate decision. Such a case is unlike an action for money or recovery of property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property, with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding."

(emphasis in original)

43. For the reasons aforesaid, this Court quashes the show cause notice as also the order dated 19.03.2008 passed by the third respondent. In view of that, the appellate order has no legs to stand and accordingly is quashed."

31. Additionally this Court would also find that each of the reason given by the appellate authority is also unsustainable because if the appellate authority accepts that the final bill was already prepared for the work of Ekangar Sarai-Telhara road he ought to have been made aware of the provisions in the PWD Code and the agreement which lays down that once final bill is passed, the claim of the parties against each other in relation to the work automatically comes to an end. Yet again when the appellate authority has found that the petitioner in compliance of the order of this Court in C.W.J.C. No. 6773/2006 had deposited the price of bitumen, that could not have been reopened because this Court had also clearly gone to hold that the petitioner was not required to pay the penal rate and from him only the price of bitumen could be recovered. Pursuant to the aforementioned judgment the petitioner in fact had already deposited the amount on 19.6.2007 and therefore, that part also could not have been made subject matter of the show cause notice or the impugned order or the appellate order.

32. What makes the order of the appellate order equally bad is that the appellate authority also has proceeded on the composite notice relating to the allegation against the petitioner both on Ekangar Sarai-Telhara road as also Ghogha-Sonahula road. As noted above, Ekangar Sarai-Telhara road was subject matter of an agreement and the work order of the year 1998-99 which was completed by the petitioner in all respect in the year 2000 and after its completion by way of settlement of the final bill, the same could not have been in any way made subject matter of the show cause notice, especially in view of inter-party judgment dated 22.4.2008 quashing the order of blacklisting dated 2.11.2007 based on the same ground.

33. The findings of the appellate authority while affirming the order of the Engineer-in-Chief, the original authority, that since the petitioner was not given any fresh registration of contractor after registration No. 771/2003 and therefore, the same could have been cancelled by the impugned order and affirmed by the appellate order will be going beyond the life of the order of registration of the petitioner as a contractor. As noted above, the petitioner had completed his work of Ekangar Sarai-Telhara road under his earlier registration No. 228/1985, validity of which had expired on 2812.2000. By 28.12.2000 when the final bill of the petitioner was already passed and the validity of registration of the petitioner as a contractor of the year 2000 did not exist, the fresh registration given to the petitioner as a contractor for the period 2003-06 in view of registration No. 771/2003 could never have been cancelled after life of 2003 registration came to an end on 20.12.2006.

34. As a matter of fact the show cause notice was issued to the petitioner as with regard to the present impugned order after expiry of the life of registration No. 771/2003 on 1.12.2006, inasmuch as, such show cause notice was issued to the petitioner only on 30.9.2008. As on 30.9.2008 the petitioner''s registration under 2007 Rules was still pending after depositing a sum of Rs. 2 lacs and on that day i.e. 10.7.2008 the petitioner had no valid existing registration of contract which could be cancelled under the provisions of the Bihar Enlistment of Contractor Rules, 2007.

35. Finally, when the appellate authority had taken note of the pendency of the arbitration proceeding between the petitioner and the State in Reference Case No. 2 of 2009, 19 of 2010 and 20 of 2010 before the Bihar Construction Contract Arbitration Tribunal, it ought to have not pre-judge the issues even in respect of affirming the order of blacklisting passed by the Engineer-in-Chief, inasmuch as, on the one hand there is a dispute between the parties with regard to execution of the work pertaining to Ghogha-Sonahula road on account of non-fulfillment of certain terms and conditions of the contract between the petitioner and the State Government and on the other hand, for that very reason of non-execution of work, the petitioner is sought to be blacklisted. Such action of the State Government and its authorities would virtually amount to being judge of its own cause. In this context, this Court must usefully refer to the judgment of the Apex

Court in the case of J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, wherein in paragraph No. 15, it has been held as follows:-

"15. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committee breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal. In State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, this Court held that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. This Court held that one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. This Court held (Paras 7 and 8 of AIR):

"Even assuming for argument''s sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the other officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed.""

36. This Court in fact is also inclined to accept the submission of Mr. Narain, learned Senior counsel appearing on behalf of the petitioner, that in any event the impugned order of blacklisting the petitioner forever cannot be sustained because of the law laid down by the Apex Court in the case of M/s. Kulja Industries Ltd. (supra). He explains that before such a conclusion for blacklisting a contractor forever is taken it has to be shown from the show cause notice that the allegations were so serious that nothing less than blacklisting forever could be the consequence.

37. As noted above, in this case the allegations relating to the petitioner for the

work of Ekangar Sarai-Telhara road of the year 1998-99 having been made subject matter of both the criminal proceedings and the blacklisting proceedings and decided in favour of the petitioner, those allegations could not have made looked into for passing the impugned order of blacklisting especially with regard to registration of the petitioner as a contractor of the year 2003-06. As a matter of fact, 2007 Rules itself came into force with prospective effect and, therefore, it could not have been made applicable for the allegations against the petitioner of the period 1998-1999. In this regard it would be relevant to quote Rule 11 of 2007 Rules, which reads as follows:-

(underlining for emphasis)

38. From a bare reading of the aforesaid Rules, it would also transpire that there are various types of misconduct explained and/or bifurcated in as many as of 10 categories which as per the aforesaid Rules could lead to consequence of blacklisting or suspension or even downgrading the categorization of the contractor. The Rules however are completely silent on the issue of which one or more of the ten types of misconduct could lead to suspension, lowering of categorization or blacklisting.

39. This court would however fail in its duty if it does not take into consideration a subsequent letter issued by the Engineer-in-Chief dated 28.10.2009 wherein it was clarified by him that only misconduct of certain nature as classified in Rule 11 could lead to punishment of blacklisting. The said letter of the Engineer-in-Chief dated 28.10.2009 reads as follows:-

40. Thus, on a close perusal of the aforesaid government circular dated 28.10.2009 read with Rule 11 of the Rules, it would become clear that for an indisciplined behavour by the Contractor with the officials as per Rule 11(i) or for any mode of incompletion of the work of agreement as per the Rule 11(ii) or for creating law and order problem at the time of receipt or presentation or any work related thereto of the tender paper as per the Rule 11(iii) or for insulting and/or assaulting the concerned officer as per the Rule 11(v) or participating/walking out in the process of tender by forming cartel under Rule 11(x), the Government had fixed the maximum punishment of suspension of the contractor''s registration or downgrading the registration. For other remaining misconduct under the Rules such as subletting under Rule 11 (iv) or being found guilty for selling the departmental materials, namely, cement, steel and coal tar etc. under Rule 11(vi) or for submitting incorrect amount of advance or security and document under 11(vii) or (x) for not executing the agreement in respect of allotted work under Rule 11(viii) or for being involved in any criminal case under Rule 11(ix), the Government could blacklist the Contractor.

41. From a bare reading of the aforesaid circular, it becomes very clear that various nature of misconduct has been classified with different type of punishments and, therefore, it cannot be said by a rule of thumb that blacklisting forever could alone be consequence of all types of misconduct under Rule 11(iv)

(vi) (vii) (viii) & (ix). Even in this category of misconduct, there are clear and marked difference in the nature of misconduct, inasmuch as, it cannot be said that a Contractor found to be indulging in sale of departmental material such as cement steel and coal tar under rule 11(vi) could be equated with a Contractor who had deposited incorrect amount of advance security and/or incorrect document. In fact, from the nature of misconduct enumerated under Rule 11 where the Department finds that it has been put to huge loss by the Contractor, it may go for a punishment of blacklisting forever but, then, the misconduct has to be of that serious nature.

42. In this regard, this Court cannot ignore the basic principle emanating from Article 14 of the Constitution of India as with regard to elimination of arbitrariness in any and every government action or decision. Way back in the case of Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , it was held as follows:-

"11. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, ... In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable....... It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

43. Thus, if in all type of misconduct covered by Rule 11(iv) (vi) (vii) (viii) & (ix), the Government can resort to power of blacklisting a Contractor forever, it can well be that a Contractor may have been found to sold one bag of cement, a misconduct under Rule 11(vi) even he could be blacklisted forever. Similarly,

even a deposit of Rs. 100 less by way of security or advance or producing a document having no effect in the ultimate award of contract, being a misconduct under Rule 11(vii) could be used as a misconduct for blacklisting the Contractor forever. On the same analogy, if a Contractor could not appear for executing a contract awarded to him on account of its being held up for even one day due to reasons beyond its control can be saddled with the blacklisting forever. In the same vein, a Contractor convicted and sentenced for a minor offence such as violation of even a traffic law could be blacklisted forever. Thus, either the rules or the circular, both of whom are only by way of executive instruction, inasmuch as, the nomenclature of its being Rule is not under any statutory provision, its application, may lead to disastrous consequences and it is here that the Government needs to further clarify the nature of punishment of blacklisting in terms of the misconduct defined under Rule 11(iv) (vi) (vii) (viii) and (ix).

44. All these aspects in fact have been considered at some great length in relation to an action of the authority in blacklisting a Contractor forever in a recent decision in the case of M/s. Kulja Industries Limited (supra) wherein after examining the law prevailing in India as also in foreign countries on the issue of blacklisting, it has been held as follows:-

"24. Suffice it to say that ''debarment'' is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the ''debarment'' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.

25. In the case at hand according to the respondent-BSNL, the appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the respondent-corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when (a) the appellant is supplying bulk of its manufactured products to the respondent-BSNL and (b) The excess amount received by it has already been paid back.

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.

27. In the result, we allow this appeal, set aside the order passed by the High Court and allow writ petition No. 2289 of 2011 filed by the appellant but only to the extent that while the order blacklisting the appellant shall stand affirmed, the period for which such order remains operative shall be determined afresh by the competent authority on the basis of guidelines which the Corporation may formulate for that purpose. The needful shall be done by the Corporation and/or the competent authority expeditiously but not later than six months from today. The parties are left to bear their own costs."

(Underlining for emphasis)

45. On the basis of the law laid down by the Apex Court in the case of M/s. Kulja Industries Limited (supra) and particularly its underlined portion, it can be safely said that blacklisting a Contractor forever is too harsh and severe punishment and has to be resorted in rare and exceptional case only in the event of gross misconduct committed by erring Contractor.

46. Thus, in view of the law laid down by the Apex Court in the case of M/s. Kulja Industries Limited (supra) as also on the basis of the materials on record, this Court will have no difficulty in holding that the permanent debarment or blacklisting of the petitioner forever by the impugned order passed by the Engineer-in-Chief and its affirmance by the Secretary in the Appellate order cannot be even otherwise sustained.

47. One has also to keep in mind that in the present case even this guideline by way of circular of the Engineer-in-Chief dated 27.10.2009 was not in existence, the date on which the impugned order of blacklisting the petitioner was passed, inasmuch as in terms of 2007 Rules whereas the show cause notice was issued to the petitioner on 10.7.2008 the classification of misconduct against the contractor for inflicting punishment of blacklisting was laid down only on 28.10.2009. This, it can be safely said that when the impugned order was passed against the petitioner by the Engineer-in-Chief blacklisting him even this guideline was not available as was found to be necessary by the Supreme Court in the case of M/s. Kulja Industries Ltd. (supra).

48. The reliance placed by Mr. A.B. Sinha, learned counsel for the State, on the judgment of Gorkha Security Services (supra) is also wholly misplaced, inasmuch as that was a case where show cause notice with regard to blacklisting was not given and that was held to be in violation of the principles of natural justice as would be apparent from reading of paragraphs No. 15, 26, 27 and 31 of the judgment:

"15. It is in this backdrop question which has arisen for our consideration in the present case is as to whether action of blacklisting could be taken without specifically proposing/contemplating such an action in the show cause notice? To put it otherwise, whether the power of blacklisting contained in Clause 27 of the NIT, was sufficient for the appellant to be on his guards, and to presume that such an action could be taken even though not specifically spelled out in the show cause notice?

26. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show cause notice, it can be clearly inferred that such an action was proposed, that would fulfill this requirement. In the present case, however, reading of the show cause notice does not suggest that notice could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.

27. In the instant case, no doubt show cause notice dated 6.2.2013 was served upon the appellant. Relevant portion thereof has already been extracted above. This show cause notice is conspicuously silent about the blacklisting action. On the contrary, after stating in detail the nature of alleged defaults and breaches of the agreement committed by the appellant the notice specifically mentions that because of the said defaults the appellant was "as such liable to be levied the cost accordingly". It further says "why the action as mentioned above may not be taken against the firm, besides other action as deemed fit by the competent authority". It follows from the above that main action which the respondents wanted to take was to levy the cost. No doubt, notice further mentions that competent authority could take other actions as deemed fit. However, that may not fulfil the requirement of putting the defaulter to the notice that action of blacklisting was also in the mind of the competent authority. Mere existence of Clause 27 in the agreement entered into between the parties, would not suffice the aforesaid mandatory requirement by vaguely mentioning other "actions as deemed fit".

31. When it comes to the action of blacklisting which is termed as ''Civil Death'' it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person

only on the premise that this is one of the actions so stated in the provisions of NIT."

49. Thus, in the considered opinion of this Court reliance placed by the learned counsel for the State on the judgment of this Court in the case of Gorkha Security Services (supra) is of no avail in the facts and circumstances of this case.

50. As noted above, the impugned order of blacklisting the petitioner was based on composite show cause notice relating to the alleged discrepancy of completing the work of Ekangar Sarai-Telhara road and also Ghogha-Sonahula road. The issue relating to the work of Ekangar Sarai-Telhara road stands concluded by the inter-party judgment dated 24.7.2007 in C.W.J.C. No. 6773/2006 and yet another judgment dated 21.2.2008 in Cr. Misc. No. 30150/2006 and therefore, no action for blacklisting against the petitioner can now be taken for this alleged discrepancy in completion of work of Ekangar Sarai-Telhara road.

51. As with regard to the other allegation against the petitioner relating to work of Ghogha-Sonahula road the amount of Bank guarantee has also already been realized by the Government and is now subject matter of pending arbitration proceeding in Reference Case No. 2 of 2009, 19 of 2010 and 20 of 2010 before the Bihar Construction Contract Arbitration Tribunal. Such work in fact was allotted to the petitioner on the basis of a registration of the year 2003 whose life has also come to an end on 31.123.2006 and therefore, in absence of any saving clause in 2007 Rules this Court would restrain of taking any step for blacklisting the petitioner on the allegation of discrepancy in Ghogha-Sonahula road till pending arbitration cases are decided by the Arbitration Tribunal. It would be, however, open to the competent authority to take any action for blacklisting the petitioner for his alleged lapses in respect of Ghogha-Sonahula road depending on the outcome of the arbitration proceedings.

52. In view of the aforesaid discussion, this Court is of the considered opinion that the show cause notice dated 10.7.2008 as also the impugned order of blacklisting of the petitioner cannot be sustained either on fact or in law and therefore, the show cause notice dated 10.7.2008 (Annexure-7) as also the order passed by the Engineer-in-Chief dated 30.9.2008, as contained in Annexure 9, and its affirmance by the Secretary to the Road Construction Department dated 2.8.2010 (Annexure 12) are declared to be bad and accordingly quashed.

53. That being so, this application is allowed only to the extent indicated above. There would be, however, no order as to costs.

