
(2021) 01 PAT CK 0132

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 3601 Of 2020

Rishi Builders India Pvt. Ltd

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 07-01-2021

Acts Referred:

Bihar Contractors Registration Rules, 2007 — Section 11(d)

Citation : (2021) 01 PAT CK 0132

Hon'ble Judges : Ashutosh Kumar, J

Bench : Single Bench

Advocate : Ashish Giri, Narendra Kumar Singh

Final Decision : Disposed Of

Judgement

1. Heard the learned counsel for the parties.

2. The petitioner/company, which is a Class-I contractor, has challenged the order dated 27.01.2020 passed by the Engineer-in-Chief, Road

Construction Department, Govt. of Bihar, Patna, whereby the petitioner's firm has been blacklisted for ten years and the excess amount, which is

said to have been paid to the petitioner/company for the work which was never executed, has been directed to be recovered.

3. The matter was heard on 18.02.2020 and this Court recorded as follows:

2. It appears from the records that a tender was bagged by the petitioner for widening and strengthening of road for the year 2017-18. Certain

anomalies were found by the Flying Squad with respect to the work executed by the petitioner/company and, therefore, a notice was issued to the

petitioner/company on 06.08.2019, indicating such anomalies and the petitioner/company was directed to furnish his explanation within seven days of

the receipt of such notice as to why the agreement with the petitioner/company be not cancelled. It further appears from the records that the

petitioner/company sought certain documents for effectively replying to the notice especially the report of the Flying Squad which was never supplied

to the petitioner/company.

3. From the order impugned, it appears that the report of the Flying Squad was analyzed by a Special Committee under the Chairmanship of the Chief

Engineer of the Road Construction Department, which then recommended for serious action against the petitioner/company for having received

payment without execution of actual work for which only the petitioner/company was held to be responsible. Considering such recommendation by the

Committee referred to above, the petitioner/company has been blacklisted for ten years and the amount which is stated to have been paid in excess of

the work, which was actually carried out by the petitioner/company, is directed to be recovered.

4. Learned counsel for the petitioner has challenged the aforesaid order on two grounds, namely, (i) that the notice which was served upon the

petitioner/company did not indicate the action to be taken in case the explanation of the petitioner was not found to be satisfactory and (ii) that the

Flying Squad report was never made available to the petitioner/company. Apart from this, it has also been urged that blacklisting the petitioner for ten

years without adverting to the explanation which could have been offered by the petitioner, is much too harsh in comparison to the anomalies which

have been pointed out by the Flying Squad.

5. Over and above, learned counsel for the petitioner has raised a grievance that without quantification of the amount which is said to have been

received by the petitioner/company without the actual work having been carried out, the order of recovery is bad.â??

4. On the same day, i.e., on 18.02.2020, this Court directed the State to file counter affidavit in the matter and stayed the recovery from the

petitioner/company.

5. In the counter affidavit, it has been stated that the relevant record of the work allotted to the petitioner/company was verified and it was found that

there were huge inconsistencies in the actual work done and the entries made in the measurement book.

6. On the basis of the aforesaid analysis, a memo of charge, containing six charges, were framed and a show-cause notice was asked from the petitioner/company on 06.08.2019. When no reply to the show-cause notice was received in the office of the respondents, a reminder was sent to the petitioner/company on 24.10.2019. In the meanwhile, the entire records were sent to the Special Technical Committee which submitted its report on 14.11.2019, clearly stipulating that excess payment against carriage and VAT/GST was also found.

7. It has further been submitted that since the Special Technical Committee's report was not available when the first show-cause notice was issued to the petitioner/company, another show-cause notice, incorporating the irregularities pointed out by the Special Technical Committee, was issued and the petitioner/company was asked to reply within seven days, failing which, the concerned Department would be free to take action under the provisions of Bihar Contractors Registration Rules, 2007.

8. The show-cause notice was replied by the petitioner/company reiterating its stand that all the works had been carried out as per the agreement, but also asked for certain documents to be supplied to it for filing a detailed reply.

9. The aforesaid reply by the petitioner/company was considered and only after due consideration, it was found that the reply was unsatisfactory and that bills were raised and payments were received without doing the actual work. The petitioner/company was also found to have received illegal payment for extra carriage without submitting any voucher in support of the same.

10. It was also contended on behalf of the respondent/State that the order of blacklisting is appealable under Rule 11(d) of the Bihar Contractors Registration Rules, 2007 and the petitioner/company would be well advised to prefer an appeal rather than approach this Court straightway.

11. Mr. Ashish Giri, learned Advocate for the petitioner/company has submitted that the grounds raised in the reply have not at all been considered.

He further reiterates that the notice did not indicate the contemplated action by the respondent/Department. The omission to state such contemplated action in the notice has caused prejudice to the petitioner/company in as much as there was no effective representation on its behalf. Lastly, it has been submitted that the decision of blacklisting and rescission of agreement with

the petitioner/company is based on the report of the Flying Squad, which report has not been furnished to the petitioner/company. It has also been urged that blacklisting for such a long period of ten years is not at all sustainable in the eyes of law.

12. On perusing the records and after hearing the learned counsel for the parties, what becomes very clear is that the notice to the petitioner/company did not at all indicate the contemplated action in case the explanation was to be found unsatisfactory. The document demanded by the petitioner/company, viz., the report of the Flying Squad has not been furnished to the petitioner/company. There does not appear to be any discussion or rationale in the impugned order with respect to the blacklisting of the petitioner/company for ten years.

13. In *Gorkha Security Services Vs. Government (NCT of Delhi) & Ors.*; (2014) 9 SCC 10, 5an interesting question of law pertaining to the form and content of show-cause notice which is required to be served before deciding as to whether the noticee is required to be blacklisted or not, was raised.

In the aforesaid case, the petitioner/noticee was aggrieved by the fact that the show-cause notice made no reference to the proposed blacklisting and,

therefore, there was no effective opportunity of making any representation in that regard. The aforesaid ground amongst others raised by the

petitioner therein did not find favour with the learned Single Judge of the Delhi High Court, which had held that the power to blacklist an entity was a

necessary concomitant of the executive power of the State to carry on the trade or the business and making of contracts for any purpose. The

purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which an action is proposed against it. Absence of any

stipulation regarding contemplated action in case the explanation is not found to be satisfactory does not make the notice ambiguous and does not

therefore render it open to assail.

14. The aforesaid view of the learned Single Judge of the High Court was affirmed and upheld by the Division Bench of the High Court.

15. However, the Honâ??ble Supreme Court repelled the aforesaid logic and after referring to the decisions of the Supreme Court rendered in

Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal : (1975) 1 SCC 7;0
Raghunath Thakur Vs. State of Bihar : (1989) 1 SCC 229 and

Patel Engineering Ltd. Vs. Union of India : (2012) 11 SCC 257, held that not stating the proposed action in the notice, renders the notice incomplete. It

is important to mention in the notice regarding the action which is proposed to be taken. It was specifically held that in order to fulfill the requirements

of principles of natural justice, a show-cause notice must meet two requirements, viz., (i) the material grounds must be stated, which according to the

Department necessitates an action and (ii) particular penalty/action which is proposed to be taken.

16. The Supreme Court went on to explain that if the proposed action is spelled out in the notice, the noticee gets an opportunity of explaining why

such extreme penalty may not be justified. It can also make a list of extenuating circumstances and specific explanation qua the defaults pointed out

by the Department.

17. Thus, it is well established by now that when a harsh penalty like blacklisting is imposed, such contemplated action, in the event of the explanation

not being found to be satisfactory, is required to be stated with clarity in the notice and the absence of the same would make the notice incomplete.

18. Apart from this, a very long duration of blacklisting, prima facie, does not satisfy the conscience of the Court. An order of blacklisting operates to

the prejudice of a commercial person not only in praesenti, but also is highly stigmatic and an echoes the death-knell of the institution.

19. In Vetindia Pharmaceutical Ltd. Vs. State of Uttar Pradesh & Anr. : 2020 SCC OnLine SC 91 2t,he Supreme Court has observed that the

possibility always remains that if a proper show-cause notice had been given and the reply furnished would have been considered in accordance with

law, even if the Department decides to blacklist the entity, a different consideration may have prevailed in their minds with regard to the duration of

the blacklisting. Blacklisting for a long period, prima facie, is disproportionate. [refer to Kulja Industries Ltd. Vs. Chief General Manager, Western

Telecom Project Bharat Sanchar Nigam Ltd. : (2014) 14 SCC 731 and Daffodills Pharmaceuticals Ltd. Vs. State of U.P. : (2019) 17 Scale 758.]

20. The aforesaid discussion, therefore, makes it imperative that the petitioner/company be allowed a fresh opportunity of explaining his cause.

21. The order of blacklisting the petitioner/company dated 27.01.2020, which has been impugned in the present petition, is, therefore, quashed.

22. The respondent/Road Construction Department, Govt. of Bihar, Patna is directed to furnish a fresh show-cause notice to the petitioner/company, intimating the proposed course of action to be taken, in case the explanation/reply of the petitioner/company will be found to be satisfactory and also make available to the petitioner/company the documents which have been relied upon for primarily coming to the opinion that action need be taken against the petitioner/company, within a period of four weeks from the date of receipt/production of a copy of this order.
23. The reply by the petitioner/company shall be filed within a further period of four weeks thereafter.
24. The final decision shall be taken by the respondent/Department, after considering the entire aspect of the matter, within a further period of four weeks positively by a reasoned order.
25. This time schedule has been given, keeping in mind that blacklisting is a very serious penalty and has immeasurable evil consequences.
26. The final order passed by the respondent/Department shall be communicated the petitioner/company forthwith.
27. With the aforesaid observation/direction, the writ petition stands allowed and disposed off.