
(2018) 08 PAT CK 0034

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No.13668 of 2018

Satyendra Kumar Construction Pvt. Ltd.

APPELLANT

Vs

State of Bihar & Ors

RESPONDENT

Date of Decision : 14-08-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 201, 120B, 409, 420
Bihar Contractors Registration Rules, 2007 — Rule 11, 10

Citation : (2018) 08 PAT CK 0034

Hon'ble Judges : NILU AGRAWAL, J

Bench : Single Bench

Advocate : Prabhat Ranjan, Chandan Kumar, Vikash Kumar, Sri Ram Krishna

Final Decision : Allowed

Judgement

Heard Mr. Prabhat Ranjan along with Mr. Chandan Kumar learned counsel appearing on behalf of the petitioner and Mr. Vikash Kumar S.C.-11

along with Mr. Sri Ram Krishna, A.C. to S.C.-11 appearing on behalf of the State.

Petitioner in the present writ application seeks the following reliefs:

â??(i) Quashing of the Notice to show cause vide Letter No. 957 dated 15.03.2018 (Annexure-4) issued by the Respondent No.2 whereby the

petitioner has been directed to submit the reply within a period of 15 days failing which an action of blacklisting of the firm has been contemplated; and

(ii) Quashing of the consequential Letter No. 1582 dated 08.05.2018(Annexure-6) by which, the petitioner has been again reminded to submit the reply

to Show Cause failing which, again, an exparte action of blacklisting.â??

The facts of the case is that a contract for execution of the Malai Barrage across Kao River (NIT No. 02/2013-14) was advertised by the

respondent-Executive Engineer, Irrigation Division, Nawa Nagar District-Buxar, Bihar of the Water Resources Department. By letter of acceptance

dated 05.10.2013, the contract was awarded to the petitioner (Annexure-1 to the writ application).

Pursuant to furnishing of requisite security and after signing of contract the petitioner was instructed to proceed with the execution of the said work in

accordance with the contract document vide letter dated 25.10.2013. The period of completion of the work was within two years of the agreement.

However, since due to certain restraints and obstructions, the work could not be completed within the time frame nor within the extended period for

reasons beyond the control of the petitioner. During course of the execution of the agreement, it came to light to the respondent authorities that the

design which was approved for execution of the said work, there was some discrepancies in the bed level of the river which required special

treatment. The matter required further enquiry, hence the work was stopped on 30.05.2016 and was sent to the Chief Engineer and by letter no. 50

dated 15.06.2016, the Chief Engineer, Irrigation Division, Dehri sent the designs for technical opinion to the Chief Engineer, Central Design and

Research, Water Resources Department, Patna. In view of the meeting held with the Minister, Water Resources Department for 19.11.2016, it was

discussed that Pier no. 3-4 which had tilted, the work would again start after the local inspection is made and new design is approved. The Chief

Engineer Irrigation, Water Resources Department by letter no. 933 dated 29.11.2016 also found that the bed level of the river pier no. 3-4 had tilted

and new design had to be approved. Thus, by letter no. 85 dated 17.03.2018 the In-charge Executive Engineer informed the Superintending Engineer

Dehri that because of the said defects the barrage had to be re-designed and recommended for the closing of agreement under Clause 13 of the

S.B.D. However, a show cause notice vide letter no. 957 dated 15.03.2018 was also served on the petitioner to show cause as to why the petitioner

be not blacklisted. The said show cause reply had to be submitted within 15 days. The reason assigned was that on inspection by the Vigilance Cell of

the Department and from the said enquiry report, it was found that the petitioner had proceeded with the work which was based on wrong design and

the work done so far would be of no utility, causing huge revenue loss for which the petitioner was found guilty. The petitioner replied to the said show

cause stating therein that the genesis of the entire proposed action is on the basis of an enquiry report said to have been submitted by the technical

Vigilance Cell and such enquiry report having not been served to him no effective reply could be submitted. He, therefore, requested for supply of the

said enquiry report. Again a show cause notice dated 08.05.2018 which is Annexure-6 to the writ application was served on the petitioner along with

the enquiry report and the petitioner was asked to submit his show cause within one week as to why an action blacklisting the firm be not initiated.

Learned counsel for the petitioner has challenged the said two show cause notice dated 15.03.2018 and 08.05.2018 Annexure-4 and Annexure-6

respectively on the ground of being arbitrary, contrary to rules and the basis of which was an internal enquiry regarding the incorrect design furnished

to the petitioner with the work order and the department themselves found defects in the said design. He refers to the enquiry report which is part of

the show cause as contained in Annexure-6 and submits that the petitioner was never made known of such discrepancies in the work order and the

petitioner was stopped from proceeding with the work order as it was found that design submitted to the petitioner was defective, the enquiry officer

was of the opinion that the design data mentioned in the design calculation should be cured, the exiting defective design data mentioned in the design

given to the petitioner should be re-drawn after actual field condition and the regional officers who had prepared the design would be responsible and

unnecessary expenditure be recovered from those Regional Officers. For proper appreciation the opinion of the enquiry officer dated 29.08.2017 is

reproduced herein below:

Learned counsel for the petitioner submits that since the work had to be done as per the design submitted, the petitioner had no say in the design so

given to him and he worked with the full satisfaction of the authorities. The design being defective the petitioner could not be saddled with liability nor

could such show cause notice be issued for blacklisting the firm of the petitioner. He submits that the said discrepancies in the design was never made

known to him and he was only issued a show cause dated 15.03.2018 although on 17.03.2018 the in-charge Executive Engineer had reported to the

Superintending Engineer of the said discrepancies in the design which had to be re-designed and the liability of the same could not have been saddled

on the petitioner. He submits that the enquiry report at clause-2, the points for enquiry was; (a) the defects in the design level be cured and the work

be completed immediately

(b) the officer who had given approval to such defective design level, strict action be taken against him. The enquiry was proposed only on the basis of

said two points (a-b) and nowhere in the enquiry dated 29.08.2017, it was alleged or found that the petitioner was responsible for such defective

design, non utility of the work, but in the show cause (Annexure-4) dated 15.03.2018 the petitioner has been saddled with the liability of the defective

design, incomplete work and revenue loss for which the show cause for blacklisting has been issued. He urges that under the Bihar Contractors

Registration Rules, 2007 (hereinafter referred to as the "Rules, 2007") blacklisting and suspension has been defined under Rule 11 and has 10

clauses (i) to

(x). Petitioner does not come under any of the 10 clauses of Rule 11 of the Rules, 2007. He submits that there was no occasion for the respondents to

have invoked Rules, 2007 for showing cause to blacklist the petitioner as there was no violation of any clause of the agreement and even the enquiry

report does not allege of any clauses of Rule 11 of the Rules, 2007 against the petitioner. He thus submits that the show cause for blacklisting is fit to

be set aside.

However, learned counsel for the state has stated that the writ is not maintainable as it is against the show cause notice and is at a pre-mature stage.

The show cause notice could have been responded and in anticipation of an adverse order writ is not maintainable. He refers in the case of Union of

India & Anr. Vs. Kunisetty Satyanarayana since reported in (2006) 12 SCC 28 Para-13 that:

"13. It is well settled by a series of decisions of this court that ordinarily no writ lies against a charge-sheet or show-cause notice vide Executive

Engineer, Bihar State Housing Board V. Ramesh Kumar Singh, Special Director V. Mohd. Ghulam Ghouse, Ulagappa V. Divisional Commr., Mysore,

State of U.P. V. Brahm Datt Sharma, etc."

He further submits that FIR has been lodged against Executive Engineer, Sub Divisional Officer, Assistant Engineer and Junior Engineer being Nawa

Nagar P.S. Case No. 29 of 2018 dated 07.03.2018 under Sections 409, 420,

120B, 201/34 of the Indian Penal Code. He submits that the petitioner being a Class-I Contractor having sufficient technical knowledge and manpower should have been informed the respondents about the faulty design and level, which he failed to do so and which caused tilting of two piers.

Learned counsel for the petitioner, in a reply, to whether the writ is maintainable against show cause notice relies in the case of Union of India & Anr. Vs. Vicco Laboratories, since reported in (2007) 13 SCC 270 Para-31 & 32 stating therein that where a show cause notice is issued without jurisdiction or in abuse of process of law writ court would not hesitate to interfere even at the stage of issuance of show cause. He submits that in the present case the show cause was issued to the petitioner on the basis of an enquiry report in which the Enquiry Officer has not found the petitioner guilty of any of the conditions of violation of the agreement or any violation of the conditions enumerated in Rule 11 of Contractors Registration Rules 2007. Hence challenge to the notice to show cause for blacklisting is maintainable in the writ jurisdiction. He relies on the said proposition in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors., since reported in (1998) 8 SCC 1 Para-20 and 21. He further relies in the case of K.K. Kochunni Vs. State of Madras, since reported in AIR 1959 SC 725 that even if there is an existence of other adequate remedy but the fundamental right and a breach actual or threatened of such right is alleged, writ is maintainable. He submits that the show cause notice to the petitioner against blacklisting is itself infringement of fundamental right of the petitioner as well as challenge to the show cause is maintainable in writ jurisdiction. He urges that the agreement was closed because of the wrong design and even the enquiry did not culminate in alleging any default on the part of the petitioner. He further submits that the respondent-State has tried to improve the show cause of blacklisting in the counter affidavit stating that the petitioner being Class-I Contractor was to inform the respondents about the faulty design and level which is not permissible as held in the case of Rashmi Metaliks Limited and Anr. Vs. Kolkata Metropolitan Development Authority and Ors. since reported in (2013) 10 SCC 95 para-16 is reproduced as under:

â??16. The following observations found in the celebrated decision in Mohinder Singh Gill V. Chief Election Commr. are relevant to this question:

(SCC p. 417, para-8) 8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its

validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise,

an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We

may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*: (AIR p. 18, para-9) 9. public orders, publicly made, in exercise

of

a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what

was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the

actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.

After hearing the parties and the rival submissions, I am in agreement with the counsel for the petitioner as the work order given to the petitioner was

abandoned midway due to faulty design for which the enquiry report dated 29.08.2017 which is part of the show cause dated 08.05.2018 (Annexure-

6) has in express terms opined that the earlier original design was defective as it did not take into consideration the level of the depth of the river link

channel and deviation which has to be re-designed as per actual site verification and the Regional Officers were responsible for such faulty designs,

hence action be taken against those Regional Officers. Nowhere has the petitioner been found at fault, none of the clauses of Rule 11 of the

Contractors Rule, 2007 could have been attracted for blacklisting the petitioner as held in *Whirlpool Corporation Vs. Registrar of Trade Marks,*

Mumbai & Ors. (supra). Notice to show cause for blacklisting could be challenged as it amounted to infringement of fundamental right of the

petitioner as held in *K.K. Kochunni Vs. State of Madras (supra)* and *Union of India & Anr. Vs. Vicco Laboratories (supra)*. The contention of the

State counsel that it was incumbent upon the petitioner to have informed about the faulty design and the level was not part of the show cause against

blacklisting and the show cause notice could not be improved by way of notice as

held in Rashmi Metaliks Limited and Anr. Vs. Kolkata Metropolitan

Development Authority and Ors. (supra). The enquiry report in no uncertain terms speaks of any delay or fault by the petitioner or of violation of any

of the clauses of the agreement by the petitioner which is the basis for the show cause against blacklisting. Hence, the show cause notice 15.03.2018

as contained in Annexure-4 as well as the show cause notice dated 08.05.2018 as contained in Annexure-6 are quashed.

Writ application is, accordingly, allowed.