

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.13511 of 2015

M/s Shakti Construction, a partnership firm having its registered office at New Area, Aurangabad through one of its partner namely Sri Rajkumar Singh son of Sri Sheo Bachan Singh, resident of behind Bal Bihar School, New Area, Aurangabad, Bihar

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Water Resource Department, Government of Bihar, Patna
2. The Principal Secretary, Water Resource Department, Government of Bihar, Patna
3. The Principal Secretary, Road Construction Department, Government of Bihar, Patna
4. Executive Engineer, Road Construction Department, Road Division No. 1, Aurangabad
5. The Engineer-in-Chief (Central), Water Resources Department, Patna
6. M/s. Birendra Prasad Singh, through its Partner Birendra Prasad Singh, son of Late Subedar Singh, resident of village Barki Mahuli, Via Takia Bazar, P.S. Karahgar, District- Rohtas (Bihar)
7. M/s Sharda Construction, a partnership firm having registered office at New Area, Maharajganj Road, Aurangabad, Bihar through its Partner Smt. Geeta Singh wife of Sri Kaushal Kumar Singh, resident of New Area, Aurangabad, P.S. & District- Aurangabad (Bihar)

.... Respondents

Appearance :

For the Petitioner : Mr. Y.V. Giri, Sr. Advocate
Mr. Ashish Giri, Advocate
For the State : Mr. Ray Shivajee Nath, AAG 3
Mrs. Manjari Nath,
Mrs. Divya Verma ACs. to AAG 3
For Respondent No.6: Mr. Prabhat Ranjan, Advocate
For Respondent No.7: Mr. S. A. Narain, Sr. Advocate
Mr. Raj Kishore Prasad, Advocate

CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 08-12-2015

The present writ petition has been filed for quashing the order dated 30.07.2015 issued by the respondent-Engineer-in-Chief (Central), Water Resource Department, Government of Bihar, Patna by which the registration of the petitioner bearing no. 29/2011 (First Class) has been blacklisted in exercise of power under Rule 11(ga) of the Bihar Contractor

Registration Rule, 2007 (for short, the 'Rules') as being wholly without jurisdiction and contrary to Rule 11 of the said Rules as well as in violation of the principles of natural justice.

2. I.A. No. 7482 of 2015 has been filed for amendment of the relief mainly to include prayers (i) for quashing the order bearing no. 5447(E) dated 27.08.2015 by which the decision has been taken by the Departmental Tender Committee, Road Construction Department in the meeting held on 22.08.2015 declaring the technical bid of the petitioner to be unresponsive/unsuccessful in light of the blacklisting order dated 30.07.2015, (ii) for quashing the order passed by the respondent Secretary, Water Resources Department, Government of Bihar, Patna vide order no. 11/03-02/2015/4344 dated 04.09.2015 by which the appeal preferred by the petitioner under Rule 11(gha) of the said Rules against the order of blacklisting dated 30.07.2015 has been dismissed, (iii) for quashing the decision of the Departmental Tender Committee, Road Construction Department held on 03.09.2015 communicated vide letter nos. 5721 (E) and 5724 (E) dated 04.09.2015 wherein the intervenor-respondent M/s Sharda Construction (respondent no. 7) has been held financially qualified, and (iv) for a direction to the respondent-authorities not to enter into any agreement with M/s Sharda Construction (Respondent No. 7) in relation to the works in question pursuant to NIT No. RCD/Road Division No. 1, Aurangabad/01/2015-16 and also in relation to work at item no. 3 pursuant to NIT No. RCD/Road Division No. 1 Aurangabad/02/2015-15 dated 24.04.2015.

3. In view of the nature of the reliefs sought, the interlocutory

application No. 7482 of 2015 stands allowed.

4. The petitioner is a partnership firm and is a registered Class-I Contractor under the provisions of the said Rules vide Registration No. 29/2011 in the Water Resources Department, as well as vide Registration No. 228/2008 under the Road Construction Department. It appears that pursuant to a tender issued by the Minor Irrigation Department in the year 2001, the petitioner was awarded the work of construction of Tube well Division in Sasaram Camp, Dehri under NABARD Phase III at Karma and Akhodhi. It is claimed that the work was duly completed in the year 2002 itself and due payments were made to the petitioner based on actual measurements taken by the concerned authority. Pursuant to two separate NITs vide NIT No. RCD/Road Division No. 1, Aurangabad/01/2015-16 dated 06.04.2015 and NIT No. RCD/Road Division No. 1, Aurangabad/02/2015-16 dated 24.04.2015 issued through the office of the Executive Engineer, Road Construction Department, the petitioner submitted its tenders. On opening of the technical bids, the petitioner was found to be 'in the race' along with three other tenderers. Financial bids were slated to be opened on 10.05.2015 and 17.05.2015 but, however, the same was delayed for no apparent reason. Thereafter the petitioner came to receive a show cause notice dated 02.07.2015 as to why it should not be blacklisted in terms of Rule 11 (ka)(ii) of the Rules having fraudulently received payments in connection with the work of Tube well Division tendered by the Minor Irrigation Department and in respect of which FIR No. 29/03 at Akhodhi Gola Police Station and FIR No. 235/03 at Sasaram Muffasil Police Station had been lodged. A detailed show cause reply dated



17.07.2015 was filed by the petitioner claiming, inter alia, that the construction work has been duly completed by it in the year 2002 itself. With regard to the criminal cases it was clarified that the Superintendent of Police, Rohtas had exonerated the petitioner from involvement in both the cases. Nevertheless, the impugned dated 30.07.2015 blacklisting the registration no. 29/2011 of the petitioner came to be passed on the basis of recommendation of the Minor Irrigation Department in its letter no. 1260 dated 27.07.2015 which, in turn, referred to Departmental letter no. 1961 dated 12.04.2003 in which the Minor Irrigation Department had recommended to the Executive Engineer, Tube well Division, Sasaram Camp, Dehri for institution of first information report and for blacklisting of the petitioner in terms of Government decision taken to that effect.

5. Learned senior counsel for the petitioner, Mr. Y.V. Giri, submits that the entire action of the respondents is wholly arbitrary and unsustainable in law. The impugned order of blacklisting dated 30.07.2015 has travelled beyond the show cause notice and on that score alone, the same is void. While the show cause notice dated 02.07.2015 is referable to the two criminal cases for allegedly receiving payments through fraud, the impugned order goes on to take into consideration and rely upon a subsequent letter no. 1260 dated 27.07.2015 issued by Minor Irrigation Department. It is claimed that such additional material was neither supplied nor was the petitioner confronted in this regard prior to passing of the impugned order which is thus violative of the fundamental principles of natural justice and vitiates the entire decision making process. It is further submitted that the impugned appellate order dated 04.09.2015

dismissing the appeal against the impugned order of blacklisting also suffers from a similar vice, having taken into consideration and relying upon yet another letter No. 1517(Mo) dated 01.09.2015 of the Minor Irrigation Department containing adverse recommendations against the petitioner, without however first supplying a copy of the same or granting any opportunity of hearing in that regard to the petitioner.

6. Mr. Giri also invites attention to Rule 11 of the relevant Rules to submit that blacklisting of the petitioner has resulted by reason of the criminal cases for allegedly receiving payments through fraud by the petitioner rather than failure to effect the completion of work and as such the order of blacklisting is thus not referable to Rule 11(ka)(ii) as cited in the impugned order. It is further submitted that even if the applicability of Rule 11(ka)(ix) of the Rules be tested, the same contemplates conviction, and not mere accusation, in a criminal case and is thus ex-facie inapplicable in the present case. Admittedly, the petitioner has not been convicted in either of the criminal cases and as such, the order of blacklisting is completely de hors the Rules. As a result, the petitioner has illegally been denied the opportunity of participation in the financial bids. It is submitted that the entire action of the respondents disqualifying the petitioner is politically motivated, considering that first the dates of the opening of the financial bids were bypassed for no apparent reason and then an old episode relating to the work awarded in the year 2001 and completed in 2002 has been reopened in the year 2015 pursuant to a letter dated 19.05.2015 written by a Member of the Bihar Legislative Assembly.

7. Learned Additional Advocate General No. 3, Mr. Ray Shivaji



Nath, appears on behalf of the State and submits that the impugned order of blacklisting is valid and has been passed in accordance with law for non-completion of the work by the petitioner. Such misconduct is referable to Rule 11(ka)(iii) of the Rules as duly mentioned in the impugned order itself and Rule 11(ka)(ix) has not been invoked at all. The allegation against the petitioner was that the payment had been fraudulently taken by the petitioner and work was completed only subsequently. It is further submitted that the letter dated 27.07.2015 adverted to in the impugned order could not be said to have caused prejudice to the petitioner as the earlier letter no. 1961 dated 12.04.2003 enclosed therewith was already well within the knowledge of the petitioner. It is therefore submitted that the petitioner cannot complain of violation of Natural Justice. He further relies on the decision rendered in Patna Regional Development Authority & Ors. Vs. M/s Rashtriya Pariyojana Nirman Nigam & Others [1996 (2) PLJR (SC) 99] wherein it has been observed that “in considering whether the decision of the Tender Committee to award the tender to the fourth respondent is arbitrary or unreasonable, one will have to examine the existing circumstances at the time when the decision was taken”. The past conduct of the petitioner culminating in the blacklisting order has thus rightly been taken into account by the respondents while rejecting the petitioner’s technical bids.

8. Mr. Shashi Anugrah Narain, learned senior counsel representing respondent no. 7, has not only supported the submissions made on behalf of the State but has rather forayed deeper into various finer aspects of the case. He has sought to question the very maintainability of



the writ petition on the ground of suppression of facts by the petitioner with regard to the status of the two criminal cases, in one of which, namely, Akhodhi P.S. Case No. 29 of 2003, cognizance had been taken against the petitioner and the matter was also referred to the Economic Offence Wing for investigation. It is further stated that pursuant to orders of this Court dated 19.12.2012 in Cr. Misc. No. 45295 of 2011 passed in the case of co-accused Executive Engineer Kamla Kant, Sasaram P.S. Case No. 235 of 2003 has been directed to be investigated by the Vigilance Investigation Bureau which is ongoing. It is further submitted that letter dated 12.04.2003 of the Minor Irrigation Department referred to above took note of the fact that a Government decision had been taken for instituting first information reports and for blacklisting the petitioner and also that the Executive Engineer, Tube well Division, Sasaram Camp, Dehri had been required to take action in the matter accordingly. These facts must have been known to the petitioner but have been suppressed in the writ petition. The petitioner has deliberately sought to create an impression that in both the criminal cases, the petitioner had been exonerated in view of the recommendations of the Superintendent of Police and hence, in view of such misleading statements, the writ petition ought not to be entertained. It has been submitted that even though the petitioner is accused in two pending criminal cases, the petitioner is feigning ignorance while all the time roaming freely and participating in tenders without fear of the law, all of which goes to show the audacity of the petitioner apart from connivance with the authorities. Mr. Narain has also addressed submissions in great detail on technical grounds such as the applicability of the Rules as well as

on the merits of the matter, to submit that no fault can be found with the order of blacklisting.

9. Mr. Prabhat Ranjan, learned counsel appears on behalf of the respondent no. 6 and also opposes the writ petition. He adds that the petitioner has not filed rejoinder to any of the counter affidavits filed by the respondents and as such the facts stated in the same must be treated as having been admitted by the petitioner. It has also been pointed out that the petitioner has neither challenged the aforesaid Government decision of the year 2003 to blacklist the petitioner nor has he appeared before the Court despite cognizance having been taken in the criminal case despite such fact having now come to his knowledge by way of the averments made in the counter affidavits.

10. This Court is of the view that having regard to the nature of the order proposed to be passed, it is not necessary to consider and discuss the detailed submissions on merits advanced by the respective parties with respect to the numerous aspects of the case.

11. It is evident from a bare reading of the impugned order of blacklisting dated 30.07.2015 that the same has relied upon fresh material by way of the letter dated 27.07.2015, and thus also letter no. 1961 dated 12.04.2003 enclosed therewith, without however first confronting the petitioner with the same nor granting any opportunity to it in that regard. Even if the letter dated 12.04.2003 be accepted to have been in the petitioner's knowledge, the same was in some other context. Nothing prevented the authorities from having regard to the said letter dated 27.07.2015 in the show cause notice, when the petitioner would have had



ample opportunity to address its objections to the same in the specific context of blacklisting. The same not having been done, it cannot be said that the petitioner has not suffered any prejudice and there is a clear violation of Natural Justice. This Court further finds that the appellate order dated 04.09.2015 also suffers from similar vice in relying upon the letter no. 1517 (Mo) dated 01.09.2015 containing fresh recommendation of the Minor Irrigation Department without however supplying a copy thereof to the petitioner nor granting any opportunity in that regard. This Court also does not find any merit in the submissions of the respondents that the petitioner has made any material suppression of fact inasmuch as the respondents have merely implied that the petitioner ought to have been aware of the pendency of the two criminal cases but however nothing concrete has been placed to indicate that the petitioner had in fact any knowledge of the same. The principle of 'constructive knowledge' cannot be applied in the present context as sought to be invoked on behalf of the Respondent No. 7.

12. Having heard the parties at length and on careful consideration of the materials on record, this Court finds merit in the stand of the petitioner with regard to violation of principles of natural justice while passing both the impugned order of blacklisting dated 30.07.2015 as well as the appellate order dated 04.09.2015 which are accordingly quashed. So also the decision of the Technical Evaluation Committee based solely on the order of blacklisting dated 30.07.2015 is accordingly quashed. The issue of blacklisting of the petitioner is remitted back to the Engineer-in-Chief (Central), Water Resources Department, Patna (Respondent no. 5)



with a direction to pass orders afresh in accordance with law after supplying all relevant material proposed to be relied upon, and after grant of opportunity of hearing to the petitioner. The matter should be disposed of within a period of three months from the date of receipt/production of a copy of this judgment, on its own merits and without being influenced by any observations contained herein. The writ petition stands allowed to the extent indicated above.

13. All the interlocutory applications stand disposed of.

(Vikash Jain, J)

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