

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9896 of 2016

Sai Engicon And Construction Pvt. Ltd. the company registered under Companies Act, 1956, having its registered office at R.T. Bhawan, Punaichak, Patna-800023, through its Managing Director, Sri Ritesh Ranjan Singh Son of late Manoranjan Singh Resident of RT Bhawan , PNB Campus, Punaichak, Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary-cum-Commissioner, Department of Road Construction , Government of Bihar, Patna.
2. The Engineer-in-Chief Cum Additional Commissioner Cum Special Secretary, Road Construction Department ,Patna.
3. The Executive Engineer, Road Construction Department, Road Division, Bhagalpur.

.... Respondent/s

with

Civil Writ Jurisdiction Case No.5558 of 2015

Sai Engicon And Construction Pvt. Ltd., the company registered under Companies Act, 1956 having its registered office at R.T. Bhawan, Punaichak, Patna-800023 through its Managing Director, Sri Ritesh Ranjan Singh son of Late Manoranjan Singh resident of RT Bhawan, PNB Campus, Punaichak, Patna
2. null null null

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary-Cum-Commissioner, Department of Road Construction, Government of Bihar, Patna.
2. The Superintendent Engineer, Road Construction Department, Road Division, Bhagalpur.
3. The Executive Engineer, Road Construction Department, Road Division, Bhagalpur.

.... Respondent/s

Appearance :

(In CWJC No.9896 of 2016)

For the Petitioner : Mr. Jitendra Singh, Senior Advocate
Mr. Mrigank Mauli
Mr. Prince Kumar Mishra
Mr. Sanket

For the Respondents : Mr.Kinkar Kumar, S.C.9
Mr. Zaki Haider, A.C. to S.C.9

(In CWJC No.5558 of 2015)

For the Petitioner : Mr. Jitendra Singh, Senior Advocate
Mr. Mrigank Mauli
Mr. Prince Kumar Mishra

Mr. Sanket

For the Respondents : Mr.Madanjeet Kumar, G.P.20

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
ORAL ORDER

4 14-09-2016

Heard learned counsel for the petitioner and learned counsels for the State in both the writ applications.

Both the writ applications have been filed by the same petitioner against two different orders arising out of the same subject matter. Hence, they have been heard together and are being disposed of by this common order.

C.W.J.C.No.5558 of 2015 has been filed by the petitioner for quashing the order dated 31.03.2015 passed by the respondent No.3, the Executive Engineer, Road Construction Department, Road Division, Bhagalpur, by which he has rescinded the Agreement dated 05.05.2014 for execution of the strengthening work of Ganga Bridge (Vikramshila Setu) approach Road including Four lane, Service Lane and Beautification work in Ist K.M. (Length of Road-10.60 K.M.) under IRQP for the year 2013-14 on the ground of delay in execution of work. The writ application further seeks quashing of the consequential order dated 31.03.2015, by which it has been directed that the balance of the work would be carried out at the risk and cost of the petitioner and further the bank guarantee as well as the security deposit shall

be forfeited and the additional expenses incurred for getting the work completed shall be realized by way of instituting certificate case. Further direction has been sought for restraining the respondent authorities from invoking the bank guarantee and forfeiting the security deposit of the petitioner, apart from others.

C.W.J.C. No.9896 of 2016 has been filed for quashing the order dated 11.05.2016 passed by the Principal Secretary-cum-Commissioner, Road Construction Department, Government of Bihar, by which the appeal assailing the order dated 15.07.2015 passed by respondent No.2, Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Road Construction Department, Government of Bihar, blacklisting the petitioner under Rule 11 (a) (ii) of the Contractors Registration Rules, 2007 and Rule 8 (1) (a) of the Office Order No. 154 dated 18.06.2015 has been rejected. Further for quashing the said order dated 15.07.2015.

The brief facts as relevant for deciding the present matter are that the petitioner, pursuant to a notice inviting tender, was granted contract for strengthening work of Ganga Bridge (Vikramshila Setu) approach road including four lane, service lane and beautification work in Ist K.M. (Length of Road-10.60 K.M.). The bid of the petitioner was 15% below the scheduled rate. The provisional work order dated 28.02.2014 was issued. The work



was to be completed within a period of seven months. Various problems indicated in the writ petition, including the damage to Pirpanti-Shivnaraynpur Bridge through which the materials had to be brought were informed to the authorities. A direction by the Election Commission dated 21.04.2014 for the stoppage of contract work till 16.05.2014 was issued. Further, permission was sought by the petitioner to bring minor minerals from the State of Jharkhand which was not replied and the respondents kept on directing the petitioner to complete the work within the timeframe. Apart from threatening to take other action, penal action against the petitioner was threatened under the provisions of Bihar Contractors Registration Rules. While granting additional lead for bringing materials by letter dated 04.10.2014 the respondents thereby admitted the problem with regard to the damage to various bridges. Further, there was failure of the respondents to regulate the traffic jam on the Vikramshila Bridge over which the major part of the work was to be carried out but the same was not done by the respondent authorities.

After threatening the petitioner with the rescission of the contract work if the work was not completed by 31.12.2014, ultimately a show cause notice dated 24.02.2015 was issued to the petitioner to file its reply within three days as to why action be not taken against it. Further a show cause dated 28.03.2015 was also



issued to the petitioner asking it as to why the Agreement be not rescinded on account of delay in execution of the work. The petitioner furnished a detailed reply to the same. Thereafter, by the impugned order dated 31.03.2015, the Executive Engineer after holding that the explanation given by the petitioner was not satisfactory rescinded the contract of the petitioner and further directed that the remaining work shall be carried out at the risk and cost of the petitioner. By another letter of the same date, order was issued to forfeit the advance amount, security deposit and the amounts deducted as security from the bills and for recovery of the excess cost to be incurred for getting the work completed by filing certificate case against the petitioner. Aggrieved by the same, the petitioner has filed C.W.J.C. No.5558 of 2015.

Thereafter, another show cause notice dated 29.04.2015 was issued by the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, referring to the rescission of the contract of the petitioner by order dated 31.03.2015 and the further action taken by the second order dated 31.03. 2015, as to why the petitioner be not blacklisted. The petitioner filed reply to the same. However, by the impugned order dated 15.07.2015 after considering the show cause of the petitioner it was rejected and the petitioner was directed to be blacklisted for a period of ten years in terms of clause 11 (ka) (ii) of the Bihar Contractors Registration



Rules, 2007 and the Departmental Circular dated 18.06.2015 in its clause 8 (1) (a) and appeal against the same was rejected by the Principal Secretary, Road Construction Department, Government of Bihar by order dated 11.05.2016. Aggrieved by the same, the petitioner has filed C.W.J.C. No.8986 of 2016.

Learned counsel for the petitioner submits that so far as the order of rescission of the contract work is concerned, the same is in violation of the principles of natural justice, as no consideration is to be found in the impugned order dated 31.03.2015 regarding the detailed reply to the show cause notice filed by the petitioner and merely by a one line statement that the explanation submitted therein was found to be unsatisfactory, the contract has been rescinded. It is further stated that the impugned order is based upon a complete non-application of mind which amounts to violation of the principles of natural justice and practically has the effect of making issuance of the show cause notice a mere empty formality.

Learned counsel for the State has sought to support the order on the basis of various facts stated in the counter affidavit that the petitioner had defaulted in completing the work within the timeframe earlier. He is, however, unable to defend the said order as to how it amounts to compliance of the principle of natural justice, if no consideration is given to the reply to the show cause

filed by the petitioner in the order that was ultimately passed rescinding the contract.

On a consideration of the impugned order dated 31.03.2015, it is evident that the same does not comply with the principles of natural justice as absolutely no consideration has been given to the reply to the show cause filed by the petitioner which had stated in detail the reasons which led to delay in carrying out of the work. Failure to consider the reply to the show cause, therefore, makes the issuance of show cause notice itself a mere ritual without anything more and for the said reason alone the impugned order dated 31.03.2015 cannot be permitted to stand. It is, accordingly, quashed. As a result, the consequential order dated 31.03.2015 passed on the same date forfeiting the bank guarantee and security deposit as also other directions issued therein is also quashed.

So far as the order of blacklisting of the petitioner is concerned, learned counsel for the petitioner submits that the petitioner had given cogent reasons for the delay caused in completing the contract work and as a matter of fact the petitioner had sought further a short period of time for completing the same despite all the problems but the respondents did not accept the same and proceeded to award the contract to another person who was supposed to complete the work within five months but



ultimately had to be granted an extension of further 170 days in order to complete the work. The said extension was given mainly on the grounds that had been raised by the petitioner as the reason for delay in completion of work by it. It is submitted that as a matter of fact so far as the order of blacklisting is concerned, the matter is squarely covered by a decision of this Court in the case of M/s. NCC Ltd. vs. The State of Bihar and others: 2013 (1) PLJR 952, in paragraph Nos. 25 and 27 of which it has been held as follows:-

“25. From a perusal of the facts and circumstances enumerated above it is evident that in the present matter the petitioners have been declared defaulters in carrying out their contractual work by the authorities of the State which factual situation is denied by the petitioners who have on the other hand made allegations against the State authorities as being equally liable and at fault in the matter. The contention of learned counsel for the petitioners that in such circumstances the issue regarding default can only be decided by an impartial adjudicatory body has much force in view of the law laid down by the Apex Court in



M/s. J.G. Engineers case (supra). The Apex Court has clearly held that the question whether the other party has committed a breach cannot be decided by the party which alleges the breach nor the contract can provide that one party to the contract can decide whether they committed the breach or the other party committed the breach, which question can only be decided by a judicial form, i.e., a court or an Arbitral Tribunal.

27. This Court also finds substantial force in the submission of learned counsel for the petitioners that the Circular dated 25.11.2011 cannot be applied to the cases of the petitioners for declaring them defaulters in terms of the procedure and the percentage of progress laid down in the said Circular. For the said reason also the impugned orders dated 18.10.2011 and 30.9.2011 cannot be permitted to be defended on the basis of the Circular dated 25.11.2011.”

It is evident from the aforesaid decision that whenever disputed issues of fact are raised by the contractor concerned with regard to the allegations made against him and may be also with



regard to the inaction of the State authorities, in such circumstances, it is not open to the respondent authorities to sit in judgment over and decide the same, rather such issue should be decided by an independent adjudicatory forum, i.e., a Court or an Arbitral Tribunal, and only on the basis of such findings action of blacklisting or debarment can be made by the respondent authorities of the State.

Learned counsel for the State is unable to show how the decision in M/s. N.C.C.'s case (supra) does not apply to the facts of the present matter.

Another aspect of the matter has been pointed out by learned counsel for the petitioner that the period of blacklisting has been fixed as per the Circular dated 18.06.2015 which was not at all in existence at the time when the agreement was entered into or even when the default was committed by the petitioner and thus the same could not have been relied upon to fix the period of blacklisting.

This Court is in agreement with the submissions of learned counsel for the petitioner on this aspect of the matter also apart from the fact that the blacklisting order itself could not have been passed unless the issue raised by the petitioner had been adjudicated by an independent adjudicatory authority, a Court or an Arbitral Tribunal.

In the aforesaid circumstances, all the impugned orders in the two writ petitions are quashed. The writ applications are allowed. In Case, the respondent Executive Engineer intends to proceed in the matter of rescission of contract then he shall give the petitioner an opportunity to file an additional reply to the show cause in view of certain relevant facts which have arisen subsequent to the passing of the earlier order. It shall also be open to the respondents to proceed in the matter of blacklisting after the issues are decided by an independent adjudicatory body.

V.P.Sinha/-

(Ramesh Kumar Datta, J)

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