

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No 1107 of 2013

IN

Civil Writ Jurisdiction Case No 11994 of 2006

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Lalan Shukla Son Of Late Indradeo Shukla Resident Of Indra Raj Bhawan,
Fazaiganj, Sasaram, Rohtas

.... Appellant/s

Versus

1. The State Of Bihar
2. The Secretary, Rural Engineering Organization, Government of Bihar, Patna
3. The Engineer-In-Chief, Rural Engineering Organization, Government of Bihar, Patna
4. The Chief Engineer, Rural Engineering Organization, Government of Bihar, Patna
5. The Superintending Engineer, Sasaram Circle, Rural Engineering Organization, Sasaram, Rohtas
6. The Executive Engineer, Rural Engineering Organization, Works Division, Sasaram, Rohtas
7. The District Magistrate, Rohtas
8. The Divisional Forest Officer, Rohtas, Sasaram
9. The Assistant Mining Officer, Rohtas At Sasaram

.... Respondent/s

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Appearance :

For the Appellant/s : Mr Tej Bahadur Singh, Sr Advocate with
M/s Rakesh Narayan Singh & Prabhat
Ranjan Singh, Advocates

For the Respondent/s : Mr Anjani Kumar, AAG IV with
Mr Brajesh Kumar, AC to AAG IV

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CORAM: HON'BLE MR JUSTICE NAVANITI PRASAD SINGH

And

HON'BLE JUSTICE SMT NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR JUSTICE NAVANITI PRASAD SINGH)

Date: 22-09-2016

This intra-Court appeal arises from the order of the learned Single Judge dated 11.09.2012 passed in CWJC No 11994 of 2006 (Lalan Shukla –Versus- State of Bihar & Others). The appellant



is the writ petitioner. The writ petition was filed, challenging Memo No 5059 dated 11.01.2007 by which consequent to cancellation of the petitioner's agreement in respect of construction of road under Prime Minister's Gramin Sadak Yojna (for brevity, *PMGSY*), the appellant has been blacklisted by order of the Principal Secretary, Road Construction Department, Government of Bihar. The learned Single Judge was of the view that under the Enlistment of Contract's Rules 2007, there is a provision of appeal against the order of blacklisting which should have been availed of, and, accordingly, directed the writ petitioner to prefer appeal.

2 It may be noted that the writ petition was filed in the year, 2006 and upon the order of blacklisting being issued during pendency of the writ petition, the learned Single Judge had granted stay of the aforesaid order on 14.02.2007 itself. It was submitted before the learned Single Judge that consequent to the stay granted, the writ petitioner was awarded several other works from time to time and all have been successfully completed, but the learned Single Judge was of the view that as appellate provisions were there, the writ petitioner should prefer appeal, and, with that direction, disposed of the writ petition. The writ petitioner has, thus, filed this intra-Court appeal.

3 We have heard Shri Tej Bahadur Singh, learned Senior



Counsel in support of the appeal and Shri Brajesh Kumar, learned counsel for the State and deem it proper, with their consent, to dispose of this matter at this stage itself, as in our view, no useful purpose would be served keeping this appeal pending. We have perused the pleadings including the counter affidavit and rejoinder filed to the writ proceedings.

4 The writ petitioner-appellant had filed tenders to execute certain works under the PMGSY. In the very district, several other people have also similarly been tendered. All the tenders were taken up together and finalized. These were road relaying tenders. The two major components in any such tender was the use of quartz (stone chips) and bitumen. As per the agreement, the contractors were to get stone chips from only a particular quarry in the vicinity itself. So far as bitumen is concerned, the price thereof was also fixed. The agreement also provided that the road relaying would be done in stages/layers and as and when each layer is completed, payments would be made for the work done. The agreements were signed in July, 2003 and the work was to be completed by January 2004, that is within six months. No sooner the agreement was entered into, it is not in dispute that State put a total ban on quarry. Thus, the very quarry from which the stone chips were to be procured became non-functional. This ban was lifted only after January, 2004 that is after



the date of completion of the contract. In fact, the quarries started working much later. While the initial work was done by the petitioner, three layers having been laid out, petitioner kept demanding payment which was due to him but payments were not made. Because of this delay in the execution of the contract, there was an abnormal increase in the price of bitumen which rose from Rs 1.40 lakhs per 9 tonnes to Rs 2 lakhs per 9 tonnes for any road contract, as noted above. In the aforesaid circumstances, the work got inordinately delayed. Similar was the circumstances with other contractors also including one Ajay Kumar Singh. The agreement of Ajay Kumar Singh was also executed on the same very date alongwith the petitioner and for similar work in the same area and he was also faced with the same problem. Ultimately, both the contracts of the petitioner-appellant and Ajay Kumar Singh were cancelled with orders for forfeiture of earnest money. Subsequently, not being satisfied with the aforesaid cancellation and forfeiture of the security deposit, State blacklisted both the writ petitioner and Ajay Kumar Singh by orders of the same date during pendency of their writ petitions. Considering the entire facts and circumstances, in the case of Ajay Kumar Singh being *CWJC No 15240 of 2006*, learned Single Judge, by judgment and order dated 11.02.2014, allowed the writ petition and set aside the order of not only cancellation of the contract,

forfeiture of the security but also the order of the State Government, blacklisting the petitioner.

5 First, we may deal with the order of the learned Single Judge as passed in the appellant's writ petition. The learned Single Judge directed the writ petitioner-appellant to file an appeal. To us, it appears that probably it was not brought to His Lordship's notice that the order of blacklisting was passed on 11.01.2007 whereas the Bihar Enrolment of Contractors Rules which provided for an appellate forum for the first time came into being with effect from 07.05.2007. The forum of appeal was not under the old Rules and not available when the blacklisting order was passed. Thus, the learned Single Judge was not correct in directing the petitioner-appellant to prefer an appeal. Secondly, the appeal is to the State Government. Here, the order has been passed by the Principal Secretary himself. It is elementary that there cannot be an appeal to a person who himself has passed the order. In other words, there cannot be an appeal from Caesar to Caesar's wife as has been held by the Apex Court in the case of *Ram and Shyam Company –Versus- State of Haryana & Others* (AIR 1985 Supreme Court 1147).

6 For the reasons aforesaid, it is clear that the order of the learned Single Judge cannot be sustained. We, accordingly, set it aside.

7 Now the question is, what is to be done. Shri Tej Bahadur Singh, learned Senior Counsel in support of the appeal submits that the case is identical to the case of *Ajay Kumar Singh*, as referred to above. Both the facts have already been noted in the said judgment which are also identical. Therefore, all the pleadings having been there, the result should also be the same.

8 We think he is correct for more than one reason. Firstly, the facts are not really in dispute but what has more weighed us is that the order of blacklisting was passed way back in the year, 2007. Thereafter, the writ petitioner-appellant, having got stay from this Court, was awarded several contracts which have all been successfully executed. To allow the order of blacklisting to operate, at this distant point of time after 10 years, would be a travesty of justice. Apart from this, the fact that the contract was to be completed within a period of six months, is not in dispute. It is also not in dispute that for the entire period of six months, the designated quarry, from where the stone chips were to come, had been closed by Government orders. In fact, it was a general policy of the Government to close all quarries of the State. Price of bitumen also abnormally had gone up. Even the authorities were cognizant of this and were trying to negotiate with the Petroleum Company for supply of bitumen at old rate. The area in which the work had to be done was undoubtedly an extremist affected



area where the contractors were regularly threatened, their equipments burnt or destroyed. Considering these factors, if at all anything the State ought to have done would be to close the contract, instead of withholding the payments which were reciprocal conditions, cancelling the contract and subsequently, during pendency of the writ petition, blacklisting the contractor. It may be noted that in the contract, there are provisions for penalty for delayed completion of contract. If such provision is inbuilt in the contract, the normal Rule would be invocation of the delay penalty. Cancellation is an extreme step and the last resort, because, both penalty and cancellation provision in a contract of this nature is in aid of getting the work done, because that is the object of the contract. These powers have to be cautiously used but when we come to blacklisting, then it is a very extreme step, because not only it amounts to cancellation of the present contract but it debars a contractor from future business which, of course, in the present case, has been done for a period ad infinitum which cannot be done. Even if we take that the contractor is barred by blacklisting for five years, that is a death blow to the contractor. It plays upon his reputation and bars business for five years. There cannot be any greater punishment than this. The greater and the more drastic the power with such consequences, it becomes the duty of the Court to examine the facts cautiously.

9 In the facts aforesaid, as noted above, as has been held in Ajay Kumar Singh’s case (*supra*), so also in this case, there were justifiable grounds for the delay. There were serious disputes as to the price escalation, the source of chips and others.

10 In such a situation, not only the cancellation but the blacklisting are liable to be set aside and they are, accordingly, set aside. This appeal is, accordingly, allowed. The consequence would also be that to the extent work had been done and admitted by the State, the petitioner-appellant would be entitled to receive payments which are long overdue.

(Navaniti Prasad Singh, J)

M.E.H./-AFR

(Nilu Agrawal, J)

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