

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.981 of 2014
IN
Civil Writ Jurisdiction Case No. 1842 of 2007**

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1. M/s. Kumar A.S. Construction, Ashok Nagar, P.S.- Bhatt Bigha, Gaya- 823001 through its Managing partner Smt. Pramila Singh.
2. Smt. Pramila Singh, W/o Sri Anuj Kumar Singh, one of the Managing Partner, M/s. Kumar A.S. Construction, Ashok Nagar, P.S.- Bhatt Bigha, Gaya

.... Appellants

Versus

1. The State of Bihar
2. The Commissioner-cum-Secretary, (now Principal Secretary), Rural Engineering organization, Govt. of Bihar, Patna
3. The Additional Secretary to the Government, Rural Development Department, Bihar, Patna
4. The Engineering-in-chief-cum-Additional Secretary-cum-Special, Secretary, Public Work Department, Govt. of Bihar, Patna
5. The Chief Engineer, Rural Engineering Organization, Department of Rural Development, Govt. of Bihar, Patna
6. The Superintendent Engineer, Rural Engineering Organization, Work Circle, Sasaram, District- Rohtas
7. The Executive Engineer, Rural Engineering Organization, Work Division, Bhabhua, District- Kaimur

.... Respondents

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Appearance :

For the Appellant/s : Mr. Shrawan Kumar, Sr.Advocate with
M/S Ashok Kumar Dubey, Mamta
Vijaya, Advocates

For the Respondent/s : Mrs. Shama Sinha, AC to AAG 9

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**CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE ARUN KUMAR**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 15-12-2016

The appeal has been filed against the order dated 19.11.2013 passed in CWJC No.1842 of 2007 by a learned Single Judge of this Court by which the writ application has been disposed of with a liberty to the petitioner to file an appeal against the impugned order of blacklisting before the Commissioner and Secretary, Rural Engineering Organisation, Government of Bihar, in terms of the Bihar Contractors Registration Rules, 2007 which must be filed within one month



and shall be considered after condoning the delay, if any, on merits and final decision shall be taken in accordance with law.

The writ petitioner-appellant is a contractor registered with the Rural Engineering Organisation, Government of Bihar and was given a contract of two works for construction of roads under Pradhan Mantri Gram Sadak Yojana (PMGSY) for Kaimur district to the tune of Rs.97,93,032/- pursuant to an advertisement in the month of September, 2001. The work was awarded on 30.12.2001 and was to be completed by 31.3.2002 after reducing the period from one year to three months. The metal/stone chips for construction of road were to be supplied from Karbandiya mines of the district but on account of the murder of the then Forest Officer, Sasaram the mining and crushing of the stone chips was stopped. It is stated that the work had accordingly come to a halt on account of non-supply of metal/stone chips of the said mines and the Engineer-in-Chief of the Department wrote to the Executive Engineer on 19.4.2003 for alternative arrangement for getting stone chips available. It is the stand of the petitioner that no such alternative arrangement was made for years together and then the appellant wrote to the Executive Engineer for making arrangement of the metal/stone chips so that the work could be completed within a time frame. The Executive Engineer directed the appellant to use old metals dug from the road which was estimated to be 70% of the total requirement but in fact it was found to be only 30-35%. Thereafter the appellant was issued a show cause notice on 13.5.2006 by the Chief Engineer as to why he should not be blacklisted, to which he replied on 26.5.2006 explaining the reason for the delay and stating that he had completed substantial work within a short span of time from the date of commencement of the work and for which he was paid also. By the Government Resolution dated 24.1.2007 the appellant-Company was blacklisted under the provisions of the Bihar Contractors Registration Rules, 1996.



Learned counsel for the appellants submits that the direction of the learned Single Judge holding that the appellant had not availed of the alternative remedy available and disposing of the writ application with a liberty to file an appeal before the Commissioner and Secretary is contrary to the factual and legal position. It is submitted that the order itself has been passed on 24.1.2007 which was before the Bihar Contractors Registration Rules, 2007 came into force and under the earlier Bihar Contractors Registration Rules, 1996 there was no provision for filing appeal against the order of blacklisting.

It is further submitted that the second reason for the order being contrary to law is that the impugned Resolution dated 24.1.2007 was itself issued by the order of the Governor and was accordingly a decision of the Government over which the Commissioner and Secretary cannot sit in appeal, he being himself a party to the said Resolution during the course of movement of file right up to the Departmental Minister before issuing of such Resolution.

The third and most important ground raised by learned counsel for the appellants is on the merits of the matter: he submits that it is evident from the facts of the case that the respondent authorities of the State were equally, if not more, responsible for the delay that occurred in the completion of the work on account of the closure of the mines within a month of the grant of the contract. Because of the closure of the mines in the districts of Rohtas and Kaimur the work had come to a halt and instead of making alternate arrangement for providing metal/stone chips the respondents had simply made correspondences in the matter. In the said circumstances it is urged that it is not open to the respondents to have blacklisted the writ petitioners-appellants. In this regard learned counsel for the appellants relies upon 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 which one of us (R.K.Datta,J.) had relied upon the decision of the Supreme Court in the



case of M/s. J.G.Engineers Pvt. Ltd. vs. Union of India & Anr. : AIR 2011 SC 2477, in paragraph-15 of which it has been held by the Apex Court as follows :

“In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal. In State of Karnataka v. Shree Rameshwara Rice Mills (1987) 2 SCC 160 : (AIR 1987 SC 1359) this Court held that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. This Court held that one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. This Court held (Paras 7 and 8 of AIR):

“Even assuming for argument’s sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the other officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed.”

The observations of this Court in paragraphs 25 and 26 of NCC case (supra) are 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 forum, i.e., a court or an Arbitral Tribunal.

26. The said proposition laid down by the Apex Court applies squarely in the present situation where the petitioners have been declared defaulters by alleging breach of contractual terms on their part and as being liable and at fault on account of the slow progress of the work as compared to what was required under the contract. This should be specially so since the petitioners not only do not admit such allegation of liability and fault on their part as made by the respondents but have on the contrary raised the plea of liability and fault on the part of the State authorities in the matter on various grounds. It is evident that the authorities of the State cannot be permitted to decide such matter which involves liability on the part of the State officials also. Thus, even if it is accepted that the authorities of the State have the power to debar a contractor from participating in future contract after they are declared defaulter on account of not making the targeted progress to the extent of 80% in the work, still the finding regarding the default cannot be made by the State authorities and that must come from a proper adjudicatory forum, whether a court or arbitral tribunal. Only after such finding it can be open to the authorities of the State to declare a contractor as a defaulter and debar it from participating in future tenders. It is evident that the effect of such declaration as defaulter and debarment would have serious civil consequence on the party concerned and cannot be left to be decided by the party which has made allegation against whom also there is counter allegation by the contractor concerned.”

Learned counsel for the appellants also points out that in the order of blacklisting no period has been prescribed therein.

Learned counsel for the State, on the other hand, submits that the writ petitioners-appellants had failed to complete the work despite the passage of nearly five years and thus the State authorities have rightly acted in the matter by blacklisting the writ petitioner-Company.



We have considered the submissions of learned counsels for the parties. It is evident that the present matter was not a fit case for remand in view of not only the fact that there was no provision of appeal against the blacklisting order in the Bihar Contractors Registration Rules, 1996 but even more considering the fact that the blacklisting order has been passed in terms of the Government Resolution dated 24.1.2007 which was in the name of the Governor of Bihar and the Resolution in fact could not have been issued without the approval of the Commissioner and Secretary of the Department as also of the Departmental Minister. For the said reasons the order of remand is wholly unjustified.

Coming to the merits of the matter it is evident that this Court can take judicial notice of the fact also that on account of closure of the Karbandiya mines and that too stoppage of work on a large scale, since the mines had been ordered to be closed by the orders of the State authorities hence any alternative arrangement with regard to metal/stone chips had to be provided by the State authorities and if they had failed to do so they could not have fastened the blame on the contractor, like the appellant before us.

Moreover, in the reply to the show cause filed by the appellant the said facts had been brought to the notice of the authorities and once it had been pointed out to the authorities of the State that they were equally responsible for the default that had taken place in completion of the work, on the basis of the principles laid down by the Apex Court in J.G.Engineers case (supra) and by this Court in NCC case (supra) relying upon the said decision, the facts ought to have been allowed to be adjudicated by an independent forum, whether a court or an Arbitral Tribunal and only on the basis of the said finding, if any, the action with regard to blacklisting could have been taken if so found necessary.

Thus, we are clearly of the view that the action of the respondents



in issuing the Resolution of blacklisting against the writ petitioners-appellants was wholly unjustified and not in accordance with the law as laid down by the Apex Court in J.G. Engineers case (supra) and by this Court in NCC case (supra) which has been followed in a large number of cases by different Benches of this Court.

We also accept the submission of learned Sr.Counsel for the appellant that a blacklisting order cannot be passed for an indefinite period of time. However, on a consideration of the fact that the entire order is being quashed, the same may not be relevant any more in the present matter.

For the aforesaid reasons the impugned order dated 19.11.2013 passed by the learned Single Judge of this Court is set aside and the appeal as also the writ application is allowed quashing the Resolution dated 24.1.2007 blacklisting the petitioners-appellants.

At this stage learned counsel for the appellants submits that an interlocutory application had been filed for quashing the order of termination of contract and the forfeiture, etc. passed by the respondent authorities which unfortunately had not been allowed before the matter was disposed of. It is made clear that the appellants shall have liberty to challenge the same in appropriate proceedings.

(Ramesh Kumar Datta, J)

spal/-

(Arun Kumar, J)

AFR/NAFR	
CAV DATE	
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