

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16044 of 2016

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Bipin Ray, son of Late Somnath Rai, resident of Village- Dumduma, P.S. Kudhani,
District- Kaimur at Bhabhua.

.... Petitioner

Versus

1. The State of Bihar.
2. Principal Secretary, Water Resources Department, Government of Bihar, Patna.
3. Secretary, Water Resources Department, Government of Bihar, Patna.
4. Under Secretary, Water Resources Department, Government of Bihar, Patna.
5. Engineer-in-Chief (Sinchai Srijan), Water Resources Department, Government of Bihar, Patna.
6. Chief Engineer (South), Water Resources Department, Government of Bihar, Patna.
7. Executive Engineer Dehri Division, Water Resources Department, Government of Bihar, Patna.

.... Respondents

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Appearance:

For the Petitioner/s : Mr. Girish Chandra Sharma

For the Respondent/s : Mr. VIKASH KUMAR- SC11

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 23-02-2017

Heard learned counsel for the petitioner and learned
counsel for the State.

2. In the present case, the petitioner is challenging the order dated 16.09.2016 passed by the Principal Secretary, Water Resources Department, Government of Bihar, Patna, and the same has been communicated through the Under Secretary, Water Resources Department, Government of Bihar, Patna, vide Memo No.5092 dated 16.09.2016, whereby and whereunder the order passed by the Engineer-in-Chief dated 05.08.2016 has been



approved and affirmed. The petitioner is claiming that both the orders are illegal, arbitrary and liable to be quashed.

3. The short facts of the present case that the petitioner is the Director of the firm namely, M/s Shyama Buildcon Private Limited, which has been registered in the year 2007. The petitioner is claiming that he is a Class-1 contractor and has successfully executed the work allotted to him from time to time as has been mentioned in paragraph No.5 of the writ application. The Irrigation Department, Government of Bihar floated a tender in the year 2015 for execution of the work of scheme namely "*Dehri Parichhetradhin Dehri Pramandal Dehri, Godsara Vitarni Ka Punarsthapan Avam Seva Path Pakkikaran Karya*".

4. In pursuance of the notice, the petitioner submitted the sealed cover tender document for the allotment of the aforesaid work. A letter dated 26.11.2015 was issued by the Engineer-in-Chief (South)-respondent No.5, asking the petitioner to show cause for attachment of tampered experience certificate for the purposes of obtaining the Work Order in his favour. In pursuance of the show cause, the petitioner submitted his reply, there he has taken a plea that the certificate which he has filed was issued by the Executive Engineer, R.W.D. Works Division, Ramgahr, vide Letter



No. 564 dated 19.8.2015. On perusal of the same, it appears that except some variations in typing, both the documents are same, it was a typographical/clerical mistake as there is a cutting and overwriting in the column No. 5 and 6 of the said certificate. After examining the show cause, the Engineer-In-Chief vide letter containing Memo No.4291 dated 5.8.2016 has arrived to a finding that the certificate attached with the tender document was a manipulated and tampered document, which is an act of criminality with the bad taste to obtain the Work Order. Hence, the establishment of the petitioner vide registration No. 54 of 2011 has been blacklisted for 10 years.

5. The petitioner filed a writ application being C.W.J.C. No.13531 of 2016, which was allowed to be withdrawn with the liberty to pursue the remedy of appeal before the appropriate authority under the Bihar Contractors Registrations Rules, 2009. In pursuance of direction of this Court, the petitioner filed an appeal before the competent authority, attaching all the documents what he could have attached. The Principal Secretary after hearing the counsel for the petitioner and representative of department found *prima facie* charges are proved and has refused to modify or reduce the period of blacklisting, holding if the period is reduced it would



violate the right of equality and dismissed the appeal filed by the petitioner.

6. Learned counsel for the petitioner submits that the petitioner has attached the certificate what he had received from the office of the Executive Engineer, later on the Executive Engineer, has modified the certificate which was not communicated to him and as such he cannot be held liable for being bracketed in the blacklisted category inasmuch as the period of blacklisting is disproportionate to the alleged misconduct and the order of punishment is not fair, rational, rather it is illegal, arbitrary and not sustainable in law.

7. Whereas, learned counsel for the State has submitted that the document, which was attached by the petitioner is clearly an act of fraud as attached document was found to be not genuine, but a tampered one and on consideration of the admitted fact the punishment of blacklisting for 10 years is just and proper, in view of the order dated 14.03.2016 issued by the Department in pursuance of the judgment passed by the Hon'ble Supreme Court in the case of *M/s. Kulja Industries Limited vs. Chief General Manager, W.T. Project, B.S.N.L. and Ors.* reported in 2013 (4) *PLJR*, 447 and also in the case of *Suraj Nirman Private Limited*



vs. The State of Bihar & Ors, which was arising from the order of the Hon'ble Supreme Court itself, directed the Government to fix the period of blacklisting rationally according to nature and gravity of misconducts, taking into consideration the aforesaid office order issued by the Department, the punishment has been awarded against the petitioner. He further submits that this order has been issued so that there should not be any complaint of discrimination by any person and arbitrary exercise of power.

8. Learned counsel for the State submits that the office order 14.03.2016 fixing different punishment would be applicable even to earlier misdemeanour committed by the contractors, to maintain the uniformity, the Engineer-in-chief as well as the Principal Secretary has passed the order blacklisting the establishment of the petitioner for 10 years. Hence, no wrong has been committed either in recording the finding or passing the order of blacklisting for 10 years.

9. Learned counsel for the petitioner further submits that the office order dated 14.03.2016 issued by the Irrigation Department is in the nature of Executive Instructions that emanates from Article 162 of the Constitution of India, cannot be applicable for the past act of misdemeanour.



10. Having heard learned counsel for the parties, in the present case there are two facets, that has to be examined by this Court; first with regard to proving of the charge of misdemeanour and second with respect to quantum of punishment. The first aspect is whether the finding of misconduct recorded by both the authorities suffers from any arbitrariness, illegality or irrationality or whether it is rational, legal and sustainable in law. To understand this aspect of the matter, it is required to be noted that under the judicial review the Court has to examine the correctness of decision making process not the decision, unless the finding recorded by inferior authority are perverse or against to the weight of the evidence or the fact which were taken into consideration was not relevant at all or refused to take into consideration the fact which are relevant for decision. On these aforesaid counts, the Court can exercise its power of judicial review that too in a contract matter.

11. Considering the facts of the present case, it will be appropriate to place reliance on the decision of the Hon'ble Supreme Court in the case of *Tata Cellular vs. Union Of India*, reported in (1994) 6 SCC, 651, there the Court has held that the Court under judicial review will not act as an appellate Court, but only if the parameters defined would be basis for the interference,



further held there should be play in the joints in the administrative action.

12. In the present case, on comparison of the certificates which was filed by the petitioner and the verified certificate communicated by the Executive Engineer, it appears that both are at variance and they are incompatible to each other. Not only this, some corrections have been made in column No.5 and 6 and both the documents are quite different and distinct in letter and numerical figure.

13. In such view of the matter, this Court cannot hold that the finding recorded by both the authorities are in any way suffers from any illegality, irrationality or the finding are perverse in the sense that no reasonable person would arrive to such a finding or it is against the weight of the evidence.

14. Further question arises about the quantum of punishment. Relevant to take into consideration the judgment of *Kulja Industries (supra)* the Supreme Court has held as under:-

“26. The next question then is whether this Court ought to itself determine the time period for which the appellant should be blacklisted or remit the matter back to the authority to do so having regard to the attendant facts and circumstances. A remand back to



the competent authority has appealed to us to be a more appropriate option than an order by which we may ourselves determine the period for which the appellant would remain blacklisted. We say so for two precise reasons. Firstly, because blacklisting is in the nature of penalty the quantum whereof is a matter that rests primarily with the authority competent to impose the same. In the realm of service jurisprudence this Court has no doubt cut short the agony of a delinquent employee in exceptional circumstances to prevent delay and further litigation by modifying the quantum of punishment but such considerations do not apply to a company engaged in a lucrative business like supply of optical fibre/HDPE pipes to BSNL. Secondly, because while determining the period for which the blacklisting should be effective the respondent-Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While, it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent-Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor.

27. *In the result, we allow this appeal, set aside the*



order passed by the High Court and allow writ petition No.2289 of 2011 filed by the appellant but only to the extent that while the order blacklisting the appellant shall stand affirmed, the period for which such order remains operative shall be determined afresh by the competent authority on the basis of guidelines which the Corporation may formulate for that purpose. The needful shall be done by the Corporation and/or the competent authority expeditiously but not later than six months from today. The parties are left to bear their own costs.”

15. In the aforesaid judgment, the Hon’ble Supreme Court has held that the punishment should be proportionate to the gravity of charges proved. It is a fact, no one can challenge the inherent power of the management in the matter of awarding the punishment to the erring contractor, but the question would arise as the misconduct committed by the contractor is of 2015 whereas the Department has issued the office order on 14.03.2016, which is in the nature of Executive Instructions will not have retrospective operation covering past act of misdemeanour in a situation when it is in the nature of penalty, otherwise it would also violate the principle enshrined in Article 20 of the Constitution of India, which prohibits awarding the punishment with respect to any past act committed by the person concerned.



16. In the supplementary counter affidavit, the Department has brought the order dated 17.12.2015 issued by the Irrigation Department, thereby the order No.154 dated 18.06.2015 issued by the Road Construction Department has been adopted, thereby the Irrigation Department has been made empowered to inflict the punishment according to the nature of misdemeanour committed by the contractor mentioning in the tabulation form. With respect to misconduct committed by the contractor by submitting wrong earnest money or reimbursement money (अग्रधन या प्रतिपूर्ति राशी) and also for submitting wrong papers, punishment has been provided for 10 years. This letter itself mentions that adoption of Notification No.154 dated 18.06.2015 of the Road Construction Department and there also punishment has been classified in the same manner. In final office order dated 14.03.2016 the punishment of 10 years has been provided for the misdemeanour as mentioned hereinabove, not required to be repeated.

17. For understanding the applicability of this Notification imputing the punishment mentioned therein is based upon the office orders brought on record and connected documents. As it appears that the advertisement was published on 18.05.2015, the Irrigation Department has received the tender of the petitioner on



26.08.2015 as has been mentioned in paragraph No.4 of the counter affidavit.

18. Learned counsel for the State further points out that the office order dated 14.03.2016 issued by the Irrigation Department is nothing but a substitution of office order No.1/PMC/Misc./879/2012-909 dated 17.12.2015. He further submits that earlier also the department has prescribed the nature of punishment which would be awarded for the submission of wrong document. He also submits that the petitioner is a registered firm under the Road Construction Department, which is a nodal department and there the notification prescribing different punishment has been enforced before the commission of misdemeanour.

19. Learned counsel for the petitioner submits that though there may be notification issued by the Road Construction Department, but finally that notification has been enforced vide office order dated 14.03.2016 and as such the office order dated 14.03.2016 cannot be made applicable to any past act committed by the person concerned.

20. In support of the submission, he has placed reliance on



the decisions of the Hon'ble Supreme Court in the case of *Ratan Lal vs. State of Maharashtra*, reported in *AIR 1966 S.C. 722*, in the case of *Sri Vijaylakshmi Rice Mills vs. State of Andhra Pradesh*, reported in *AIR 1976 SC 1471* and in the case of *Chandravathi P.K. and Others vs. C.K. Saji and Others*, reported in *(2004) 3 SCC 734*.

21. Whereas, learned counsel for the State has tried to buttress his argument by placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Zile Singh vs. State of Haryana and Others*, reported in *(2004) 8 SCC-1*.

22. The case of *Ratan Lal vs. State of Maharashtra* (supra) is dealing with the legislative enactment, which is not the subject matter of present proceeding as legislative enactment is quite different to the Executive instructions, cannot hold the same position as that of the enactment. So it is not very much applicable to the facts of the present case. Even in the legislative enactment the Court has held that subsequent declaration by the State that they were fit for use of the intoxicating liquor could not have any retrospective operation and possession which was innocent could not by subsequent act of the State, be declared as offending the statute.



23. It will be useful to quote relevant part of paragraph No.8 of the said judgment, which read as under:-

“8... Possession of the medicinal preparations which were unfit for use as intoxicating liquor was, at the date when they were attached, not an offence. A subsequent declaration by the State that they were fit for use as intoxicating liquor, could not have any retrospective operation, and possession which was innocent could not, by subsequent act of the State, be declared as offending the statute.”

24. In the case of *Sri Vijaylakshmi Rice Mills* (supra) the Hon’ble supreme Court has held that it is a well recognized rule of interpretation that in the absence of express words or implied language from which retrospectivity, may be inferred, a notification takes effect from the date it is issued and not from any prior date. The principle is also well settled that statutes should not be construed so as to create new disability or obligations or impose new duties in respect of transactions which were completed before the time the Amending Act came into force.

25. The same thing has been reiterated in the case of *Chandravathi P.K. and Others* (supra) and in the judgment placed reliance by the learned counsel for the State in the case of *Zile*



Singh (supra).

26. So from the analysis of the aforesaid judgments it appears that in absence of express word or implied language or by necessary enactment of applicability of the statute retrospectively, the statute would operate prospectively. But this is not the question involved in the present case, but in the present case, the question been raised whether the office order will have a retrospective effect in the present case. It is known principle of law that the Executive Instructions cannot be compared with legislative enactment, the legislature has plenary jurisdiction to legislate the enactment retrospectively or prospectively, but the Executive Instruction cannot be given retrospective effect, but in the present case it is not very much required to be looked into as admittedly the misdemeanour has been committed while the Executive Instruction of the Road Construction Department as well as the Irrigation Department was in operation. But this is not the end of the matter, this Court has asked a question to learned counsel for the State as to whether the punishment which has been prescribed in the letter is the minimum punishment or the maximum punishment. In reply, he has submitted that it is the only punishment. If proposition laid by the State is accepted it will bring absurd situation. This Court holds



that punishment without considering the nature and gravity of misconduct is an arbitrary exercise of power in the matter of awarding punishment, as punishment should be proportionate to the nature of misdemeanour otherwise, it cannot be testified on anvil of Article 14 of the Constitution of India.

27. In such view of the matter, this Court is of the view that the punishment has been awarded without examining the gravity of the misconduct cannot be sustained. Accordingly, only for the limited purpose the order of punishment is set aside with a direction to the respondent authority after examining the material on record, taking into consideration the misdemeanour alleged against the petitioner including taking into consideration his past conduct, pass fresh order on punishment.

28. With the aforesaid observations and directions, this writ application is allowed to the aforesaid extent.

(Shivaji Pandey, J)

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AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
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