IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17451 of 2016

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M/s Ghanshyam Lal through its Managing Partner G.L. Madhogaria @ Ghanshyam Lal Madhogaria Son of Late Laxmi Narayan Madhogaria Resident of Simrahi Bazar, P.O.- Simrahi Bazar, P.S.- Raghopur, District- Supaul.

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Old Secretariat, Patna.
2. The Secretary, Road Construction Department, Vishweshwaraiya Bhawan, Bailey Road, Patna.
3. The Engineer-in-Chief-cum-Additional Secretary-cum-Special Secretary, Road Construction Department, Vishweshwaraiya Bhawan, Bailey Raod, Patna.
4. The Joint Secretary (Technical Cell), Road Construction Department, Vishweshwaraiya Bhawan, Bailey Raod, Patna.
5. The Chief Engineer, Transport, North Bihar Section, Road Construction Department, Darbhanga.
6. The Superintending Engineer, Road Construction Department, Road Circle, Saharsa.
7. The Executive Engineer, Road Construction Department, Supaul.

.... Respondent/s

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Appearance :
For the Petitioner/s : Mr. Lal Babu Singh, Adv.
For the Respondent/s : Mr. Chitranjan Sinha- PAAG2

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL JUDGMENT
Date: 20-03-2017

Heard learned counsel for the parties.

In this case the petitioner is challenging the order dated 28.9.2016 passed by the Secretary, Road Construction Department, Bihar, Patna, whereby and whereunder, it has been recorded that the case of M/s Vishal Builtech (l) Pvt. Ltd. is different to the present petitioner. It has also been recorded, no material has been produced to wipe out the charges made against the petitioner rather only tried to show, both the cases are identical, inasmuch as, the case is bereft of any material evidence, thereby, vide Memo No. 3487 (E) dated 18.5.2016, the Secretary, Road Construction Department affirmed the order passed by the Engineer-in-Chief cum Additional Secretary cum Special Secretary, Road Construction Department, who has also recorded a finding that there is a substantial difference in the case of the petitioner vis-à-vis the case of M/s Vishal Builtech (l) Pvt. Ltd.

This case has a chequered history as for 3 to 4 times, the same issue raised in this case came for consideration before this Court. Before dealing with the matter, it will be relevant to examine background facts of this case and the findings in different proceeding recorded from time to time relating to the present dispute.

The Government of Bihar has floated a tender Notice Inviting Tender (N.I.T.) dated 29.12.2008 for the I.R.Q.P. and Cross Drainage and Road Saving Work of Narayanpur Chock (N.H.-57) Jhilla Shahpur-Prithvipatti-Chhitahi- Satanpatti- Sahtola- Pandit Tola-Jagdish-Karjain Bazar (N.H.-106) in K.M. 1 to 7, 8(p), 10 to 13, 14(p), 15(p), 16 to 21 and 22(p), Total 19.92 K.M. In response to the notice, the petitioner and three other Contractors submitted their tender in two sealed packets, one for technical bid and another for the financial bid. As per the standard norms, the technical bid, with respect to that work, was opened and after scrutiny, the petitioner and M/s Vishal Builtech (l) Pvt. Ltd. were declared successful in the technical bid. In the financial bid, the petitioner succeeded in run, as being the lowest tenderer, was found most responsive, was selected. The Executive Engineer, vide letter dated 15.2.2009, recommended for the allotment of work to the petitioner whereupon M/s Vishal Builtech (l) Pvt. Ltd., a rival contractor, could not get success, made a complaint to the authority that the petitioner has manipulated the tender document, whereupon, a show-cause notice was issued to the petitioner on 5.5.2009. The petitioner filed his show-cause on 18.5.2009 which was described as preliminary show-cause, reserved his right to submit final reply on receipt of the desired document. The petitioner was not supplied the document but, by letter contained in Memo No. 1940(E) dated 5.6.2009, the respondent gave liberty to inspect the documents lying in the office, on the same day vide letter dated 15.6.2009, requested the Engineer-in-Chief to supply document as he can not make an inspection as he was suffering from illness. While the matter was pending, in the meanwhile, without refunding the earnest money and without assigning any reason, the respondent published fresh Notice Inviting Tender (N.I.T.) for the same work on 8.6.2009 in which the petitioner was found to be lowest tenderer. The petitioner approached this Court in C.W.J.C. No. 7126 of 2009 challenged the advertisement of NIT published in daily newspaper "Hindustan Daily" dated 8.6.2009, this Court considered the response of the State, the writ application was ultimately dismissed but, was made entitled to refund of the earnest money and to participate in the fresh tender if he has not been otherwise prohibited from participating in the tender.

After disposal of the writ application, as aforesaid, the petitioner addressed a letter to the Engineer-in-Chief that in terms of the order of the writ court, to allow him to participate in the fresh tender as on earlier occasion he had qualified in the technical bid, was also declared L-1 in the financial bid, requested the earnest money, which were lying, be treated as deposit of earnest money against the fresh tender but, strangely, instead of allowing him to participate in the fresh tender, the Department, vide memo no. 3037 (E) dated 19.8.2009, visited the petitioner with punishment of placing him in the blacklist for an indefinite period to frustrate the representation dated 17.8.2009, itself indicates, in hurried manner, the Department illegally blacklisted him. The petitioner was not allowed to participate in the fresh tender. The petitioner, being dissatisfied with the order passed against him, challenged the action of Department in CWJC No. 11412 of 2009 claiming that the order of blacklisting has been issued without following the principle of natural justice as he was not served any show-cause, giving him chance to reply, directly put him in the list of blacklisted contractors. Instead of going in to the merit of the case, the

Court relegated the petitioner to approach the appellate authority. Accordingly, the petitioner filed an appeal before the Secretary of the Road Construction Department who, vide office order no. 10598 dated 24.9.2009, recorded that he has tampered and manipulated the tender document, indicated the identification mark in the tender document for arriving to such findings, recorded that in the left side of upper portion of tender documents having two holes, indicates after filing, the tender document were tampered, for that the petitioner was served show-cause notice in terms of Rule 11 (Ka) of the Bihar Contractor Registration Rule, 2007, he failed to produce any material to show allegation made against him was wrong. In consequence, he refused to overturn the order of blacklisting passed against the petitioner.

M/s Vishal Builtech (I) Pvt. Ltd., who was one of the participant in the tender, was found involved in the tampering and manipulating the tender document. The matter was enquired into and it was found that M/s Vishal Builtech (I) Pvt. Ltd. also, in an identical manner, had manipulated and tampered the tender document and in exercise of power provided under Sub-Rule (vii) of Rule 11(Ka) of the Bihar Contractor Registration Rule, 2007, blacklisted the Company which challenged the same before this Court in C.W.J.C. No. 12343 of 2009 taking a plea that he was wrongly blacklisted without giving an opportunity of hearing which is sine qua non, before passing such order as it has a civil consequence. This Court, after hearing the parties, set aside the order of blacklisting, remanded back the same for fresh consideration. It is relevant to quote paragraph no.13 of the judgment which reads as follows:-

> *"13. Having heard counsel for the parties and having perused the writ application and the supplementary affidavit as also the contents of the relevant file contained in Annexure-14 to the supplementary affidavit, I am of the view that the charge against the petitioner is of committing fraud in collusion with the departmental functionaries, the details of the allegation constituting the overt act including the names of those who colluded with the petitioner was required to be mentioned in the charge memo. The copy of the internal inquiry report on the basis of which charge of fraud was drawn against the petitioner was also required to have been given to him. The financial bid last page whereof is alleged to have been replaced by the petitioner in collusion with the departmental authorities should also have been shown to the representative of the petitioner who took inspection of the file on 12.6.2009. The Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary who is authorized under the Rules to consider the show cause reply exonerated the petitioner of the charge under his note dated 3.8.2009 whereafter the matter was considered by the Secretary on 27.8.2009 who having perused the original financial bid document as also having considered other circumstances connected therewith overruled the Engineer-in-Chief-cum-Additional Commissioner-*

cum-Special Secretary under his note dated 27.8.2009 and soon thereafter the impugned order bearing Memo No. 3411(E) dated 9.9.2009, Annexure-13 was issued by the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary black listing the petitioner. In the circumstances, it is not difficult for this Court to conclude that the impugned order has been passed by the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary on the basis of the findings recorded by the Secretary of the Department in his note dated 27.8.2009. The authority to consider the show cause reply being the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary having already exonerated the petitioner of the charge of fraud under note dated 3.8.2009 could not have issued the impugned order on the basis of the findings recorded by the Secretary in his note dated 27.8.2009. The competent authority, namely, the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary has issued the impugned order on the basis of the findings recorded by the Secretary who was not authorized to deal with the show cause reply of the petitioner and to record his finding in terms of the provisions of the Rules. In view of the fact that the impugned order is passed on the basis of the findings of the Secretary of the department who is not authorized to deal with the show cause as per provisions of the Rules there is no difficulty in holding that the impugned order is without jurisdiction, which is accordingly, set aside and the matter remitted back to the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary to reconsider the matter and pass fresh orders in accordance with law without being impressed by the opinion of the

> *Secretary of the Department. In the event, the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary is of the view to again examine the charge levelled against the petitioner he should amend the memo of charge so as to include the name of the departmental authorities who colluded with the petitioner in replacing the last page of the financial bid and further indicate therein the manner in which fraud was committed by the petitioner in collusion with the named departmental authorities."*

After remand, the Engineer-in-Chief cum Additional Secretary cum Special Secretary, Road Construction Department vide order dated 6.11.2009 exonerated from all charges holding that the case of M/s Vishal Builtech (India) Pvt. Ltd. was reconsidered afresh, it was found the Company was not involved in tampering the tender document, in such circumstances, there is no need of any fresh enquiry, in consequences, the order of blacklisting was withdrawn from the date of issuance of the same. From the record and impugned order, it appears, on the earlier occasion, the case of M/s Vishal Builtech (l) Pvt. Ltd. was considered by the Engineer-in-Chief cum Additional Secretary cum Special Secretary, having found that there was no material showing M/s Vishal Builtech (l) Pvt. Ltd. was involved in any manner, manipulating or tampering the tender document but, when the matter was examined by the Secretary of the Department, found sufficient material for imputing the allegation of tampering the document by M/s Vishal Builtech (l) Pvt. Ltd. and recorded a contrary finding that the Engineer-in-chief, later on the Engineer-in-Chief passed order blacklisting against the M/s Vishal Builtech (l) Pvt. Ltd. The Court took view that the Secretary was not competent authority to pass an order as it was/is the Engineer-in-chief, is competent to take a decision with respect to blacklisting the M/s Vishal Builtech (l) Pvt. Ltd., when the Engineer-in-chief earlier had arrived to a finding, having not found to have committed tampering of tender document, later on, recorded adverse finding, having under the influence of the Secretary, passed the order of blacklisting. After remand, the Engineer-in-Chief considered the case of M/s Vishal Builtech (l) Pvt. Ltd., the matter was reviewed, recorded findings that there is no material connecting M/s Vishal Builtech (l) Pvt. Ltd. involved in tampering and manipulating of the tender document, accordingly, the Company was delisted from the date of issuance of the order but, the findings recorded by the Engineer-in-chief, on the face of it, indicates that the manner he recorded such finding let off from the charges of manipulation of the tender document raises many questions.

The petitioner has again moved before this Court in CWJC No. 14913 of 2009 challenging the order of blacklisting as well as order of the appellate authority on the ground of having not given a fair opportunity to place his case, has also taken a plea that his case is identical to M/s Vishal Builtech (l) Pvt. Ltd. as there is no any difference in both matters whereas the present petitioner has been blacklisted, affirmed by the appellate authority whereas M/s Vishal Builtech (l) Pvt. Ltd. has been exonerated claimed parity in the treatment as has been given to M/s Vishal Builtech (l) Pvt. Ltd. without recording any finding on the merit of the case. The matter was again remanded back to appellate authority for fresh reconsideration to take appropriate decision. The relevant portion of the order reads as follows:-

> *"Without expressing any opinion on the merits of the two orders contained in Anexure-9 and Annexure-12, the writ application is disposed of with liberty to the petitioner to bring all these aspects to the notice of the Secretary. The appellate authority may pass an appropriate order if the petitioner succeeds in establishing parity with Vishal Builtech (l) Private Limited.*
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> *Since the order of blacklisting has consequence for the petitioner, it is advisable that his matter is decided within a period of eight weeks from filing of such an application by the petitioner before the appellate authority."*

In pursuance of the direction, the petitioner filed his representation taking a ground that the case of the petitioner vis-à-vis the case of M/s Vishal Builtech (l) Pvt. Ltd. is identical as the nature of imputation against both are the same, inasmuch as, there is a Laboratory report indicates the document has been tampered and manipulated by the M/s Vishal Builtech (l) Pvt. Ltd., requested for same benefit as has been given to M/s Vishal Builtech (l) Pvt. Ltd. his name should be removed from the list of blacklisted Contractors as has already caused mental and financial distress for about six months i.e. since the issuance of the order of blacklisting dated 19.8.2009. The Secretary, Road Construction Department recorded that M/s Vishal Builtech (l) Pvt. Ltd. in terms of the order dated 16.10.2009 in CWJC No. 12343 of 2009 on the technical ground has been delisted and the order has not been passed on the merit of the case. The document which has been processed by the M/s Vishal Builtech (l) Pvt. Ltd. was sent to the Forensic Laboratory, submitted report indicating that M/s Vishal Builtech (l) Pvt. Ltd. was involved in manipulating and tampering with the tender document, action would be taken after obtaining opinion from the Law Department. The petitioner could not produce any material to show the petitioner was not involved in tampering and manipulating the tender document and refused to reverse the earlier order of blacklisting. Accordingly, the appeal was rejected.

Against that order, the petitioner moved this Court in C.W.J.C. No. 15190 of 2010. The Court, after detail consideration, found that the approach of the Secretary was not correct as he has not considered and recorded any finding and reasons, in what manner, there is difference in between the case of the present petitioner and

M/s Vishal Builtech (l) Pvt. Ltd. It has been held that the authority has not taken into consideration the observation made in the earlier order dated 12.1.2010, nor does the Authority take into account the department's circular prescribing different nature of punishment for different kind of misconduct and, accordingly, quashed the order dated 18.8.2009 and order dated 23.8.2010 affirmed by the Appellate Authority. Again the matter was remanded back giving direction that the original authority, the Chief Engineer, would consider the whole matter afresh after extending opportunity of hearing to the representative of the petitioner, liberty was given to the petitioner to file a representation showing similarity of his case with M/s Vishal Builtech (l) Pvt. Ltd. and would also take into consideration the period of blacklisting undergone by the petitioner as against the period of blacklisting suffered by the M/s Vishal Builtech (l) Pvt. Ltd. The Court further directed that the authority would consider the period of blacklisting suffered by the petitioner is sufficient looking to the relevant factors and also keeping in mind the similarity with the case of M/s Vishal Builtech (l) Pvt. Ltd. The Court has opined that the original authority while taking decision, would not be guided by the fact constituting blacklisting order passed against M/s Vishal Builtech (l) Pvt. Ltd. has been withdrawn but, would take decision on its merit as well as in the light of the circular dated 28.10.2009 and law laid down by the Apex Court in the case of ***M/s Kulja Industries Limited Vs. Chief Gen. Manager, W.T. Proj., BSNL and Ors.*** reported in ***AIR 2014 SC 9***. It will be relevant to quote paragraph nos. 23, 24, 25, 34, 35, 36, 37 to 41 which reads as follows:-

> *"23. There can however be no dispute that the departmental Secretary has clearly violated the directions given by this Court in the aforesaid underlined portion of the observations while passing the impugned order. From a bare reading of the order of the departmental Secretary, infact it becomes more than clear that the departmental Secretary was satisfied that though the blacklisting of M/s Vishal Builtech (I) Private Ltd., was also done on the alleged misconduct of changing of the tender document but the action against M/s Vishal Builtech (I) Private Ltd., was to be taken in the light of the report of Forensic Science Laboratory (F.S.L). This order however was passed on 23.08.2010 and even after four years when the department has come out in its supplementary counter affidavit that no action has been taken against M/s Vishal Builtech (I) Private Ltd., it becomes absolutely clear that the department has not considered the case of the petitioner objectively while passing/affirming its blacklisting order for ever. Let it be noted that there was a specific observation of this Court in favour of the petitioner that blacklisting order, should be reconsidered by the respondents on same parity after examining the case of the petitioner vis a vis M/s Vishal Builtech (I) Private Ltd.*
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> *24. In that view of the matter, now when the department has chosen to take no steps against M/s Vishal Builtech (I) Private Ltd., it will have to reconsider the case of the petitioner in the light of the fact that the petitioner also has been blacklisted for a similar allegation of changing the pages of the financial bid in league with the departmental officials.*

25. The submission of Mr. P.K. Verma that the misconduct on the part of the petitioner will be graver and greater because in the case of the petitioner the change of pages of bid sheet is a proven fact whereas in the case of M/s Vishal Builtech (I) Private Ltd., only photocopy was sought to be retained for its being replaced does not actually appeal to this Court. The net effect of the misconduct either by the petitioner or M/s Vishal Builtech (I) Private Ltd., was one and the same i.e., to procure the order by changing the documents of the bid sheet which were in custody of the officials of the department. When the officials of the department have got away either by way of stoppage of two increments, that too without any cumulative effect or proposed demotion of the Executive Engineer as per the cabinet memorandum dated 23.12.2014 produced by learned AAG-5 before this Court, the petitioner cannot be allowed to remain under blacklisting for ever specially when Vishal Builtech has not been blacklisted till date.

34. On the basis of the law laid down by the Apex Court in the case of M/s Kulja Industries Limited (supra) and particularly its underlined portion, it can be safely said that blacklisting a Contractor forever is too harsh and heavy punishment and has to be resorted in rare and exception case only in the event of gross misconduct committed by erring Contractor.

35. Thus, in view of the law laid down by the Apex Court in the case of M/s Kulja Industries Limited (supra) as also on the basis of the materials on record, this Court will have no difficulty in holding that the permanent debarment or blacklisting of the petitioner forever by the impugned order passed by the Engineer-in-Chief and its affirmance by the Secretary in the Appellate order cannot be, even otherwise, sustained.

36. As a matter of fact when this Court finds that the order of permanent black-listing of the petitioner is not only too harsh keeping in view of the law laid down by the Apex Court in *the aforesaid case of M/s Kulja Industries Pvt. Ltd. (supra) but also in violation of the specific direction given by this Court, there can be no escape from the irresistible conclusion that the impugned orders cannot be sustained as they are in teeth of the observations and directions given by this Court in the order dated 12.1.2010. This aspect of the matter as with regard to effect of the order passed by an authority in violation of the Court's order being nullity in the eye of law is well settled. Reference in this connection may be usefully made to the judgment of the Apex Court in the case of* ***Manohar Lal Vs. Ugrasen,*** *reported in* ***(2010)11 SCC*** *557, wherein the law has been laid down as follows:*

> *"24. In Mulraj Vs Murti Raghunathji Maharaj reported in AIR 1967 SC 1386 this Court considered the effect of action taken subsequent to passing of an interim order in its disobedience and held that any action taken in disobedience of the order passed by the Court would be illegal. Subsequent action would be a nullity.*
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> *25. In Surjit Singh Vs. Harbans Singh reported in (1995)6 SCC 50 this Court while dealing with the similar issue held as under: (SCC p.52, para 4)*
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> > *"4.... In defence of the restraint order, the alienation/assignment was made. If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the court orders, otherwise. The court, in these circumstances has the duty, as also*

the right, to treat the alienation/assignment as having not taken place at all for its purposes."

26. In All Bengal Excise Licensees Assn. Vs. Raghabendra Singh reported in (2007) 11 SCC 374, this Court held as under (SCC p.387 para28)

"28....a party to the litigation cannot be allowed to take an unfair advantage by committing breach of an interim order and escape the consequences thereof. .... the wrong perpetrated by the respondent contemnors in utter disregard of the order of the High Court should not be permitted to hold good."

27. In DDA V. Skipper Construction Co. (P) Ltd. reported in (1996) 4 SCC 622 this Court after making reference to many of the earlier judgments held: (SCC p. 636, para 18)

"18.... On principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

28. In Gurunath Manohar Pavaskar Vs. Nagesh Siddappa Navalgund reported in (2007) 13 SCC 365, this Court while dealing with the similar issues held that even a court in exercise of its inherent jurisdiction under Section 151 of the Code of Civil Procedure, 1908, in the event of coming to the conclusion that a breach of an order of restraint had taken place, may bring back the parties to the same position as if the order of *injunction has not been violated.*

29. In view of the above, it is evident that any order passed by any authority in spite of the knowledge of the interim order of the court is of no consequence as it remains a nullity."

37. Thus, for the reasons indicated above, the two impugned orders dated 23.8.2010 (Annexure 19) which is definitely not in keeping with the observations made earlier in the order dated 12.01.2010 nor does take into account the department's own circular dated 28.10.2009, prescribing different nature of punishment of blacklisting for different kind of misconduct, must be and is hereby quashed. As a result thereof the initial order dated 19.8.2009 (Annexure 9) which has been only affirmed in the order dated 23.8.2010 (Annexure 19) is also quashed.

38. The matter is remitted back to the original authority namely, Engineer-in-Chief who shall now reconsider the whole matter after extending opportunity of hearing to the representative of the petitioner. It would also be open for the petitioner to file a representation as with regard to not only the similarity in the misconduct of the petitioner vis a vis M/s Vishal Builtech (I) Private Ltd., but also the period of blacklisting already undergone by the petitioner as against the period of blacklisting suffered by M/s Vishal Builtech (I) Private Ltd.

39. What period of blacklisting if at all necessary, in the facts of the case of the petitioner would be sufficient will have to be also decided by the competent authority department itself after looking into all the relevant facts keeping in view of the similarity of the case of M/s Vishal Builtech as recorded in the order dated 12.01.2010 passed in the cases by this Court as well as the law laid down by the Apex Court in the case of ***Kulja Industries (supra).***

40. This Court hopes and believe that this time when the original authority would reconsider the issue relating to *blacklisting of the petitioner he would not only be guided by the facts constituting the blacklisting order of M/s Vishal Builtech (I) Private Ltd., but also by its own decision not to proceed against M/s Vishal Builtech (I) Private Ltd., in a period of more than four years as well as in the light of the circular dated 28.10.2009 and the law laid down by the Apex Court in the case of Kulja Industries (supra).*

41. With the aforementioned observation and direction, this application is disposed of."

The paragraphs of the judgments, as mentioned hereinabove, speaks that the wavelength of the allegation and the material against the petitioner as well as against the M/s Vishal Builtech (l) Pvt. Ltd. runs in the same manner. The allegation against both the firms that both of them have replaced and tampered the tender document as it appears from Rule 11 of the Bihar Contractor Registration Rule, 2007 sub-clause (vii) indicates that furnishing a wrong document has been classified as one class. No further classification has been made, if tampering done in the technical document or in the financial bid document is the same misdemeanour cannot be said to be a different nature of misdemeanour. This Court on two occasions has remanded back the matter to apply conscious judicial mind and calibrate and do measurement of the allegation whether the nature of allegation and material against both the firms are identical or different. M/s Vishal Builtech (l) Pvt. Ltd. had approached this Court in C.W.J.C. No. 12343 of 2009, has not given a clean chit but, case was remanded back for the purpose for fresh consideration, relevant to mention that the Chief Engineer recorded a findings in favour of M/s Vishal Builtech (I) Pvt. Ltd. whereas the Secretary of the Department gave a contrary finding, the Court, while relegating the matter, has observed that the Chief Engineer will not be swayed away or in any way influenced by the order of the Secretary of the Department but, was to apply his conscious independent judicial mind. The nature of allegation and the weight of evidence, in both the cases, cannot be said to be different but, is same. It is one thing to say that the petitioner could not produce any material to wash off his hand from the charge of misdemeanour made against him but, it is another thing to say that both similarly situated establishments, against whom an identical allegation has been made, the quality and weight of evidence is of same wavelength, in such circumstances, arriving to a different findings appears that the authority failed to apply his independent conscious judicial mind, but remained obsessed with the earlier view taken on earlier occasion against the present petitioner. This Court, while deciding the C.W.J.C. No. 1590 of 2010 has placed reliance on the judgment of the Hon'ble Apex Court in the case of ***M/s Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation Ltd.*** reported in ***(1990) 3 SCC 752*** in which the Hon'ble Supreme Court held, while taking decision the authority should keep in mind the test provided under Article 14 of the Constitution of India as the decision must be rational and reasonable including assigning the proper reason is a part of Article 14 of the Constitution of India. If the action of the Government does not satisfy the test of reasonableness will lead to unreasonable consequences. It is also known principle of law the arbitrariness is an antithesis of rule of law. While taking a decision, the authority must see that there should not be any discrimination in the identical matter, rule of fair play would be applied so that a common man must understand in a normal mind that he has been treated fairly and justly. It will be better to quote paragraph no.11 of the aforesaid judgment which reads as follows:-

> *"11. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in M/s Radha Krishna Agarwal & Ors. v. State of Bihar & Ors., [1977] 3 SCC 457.1t appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the*

action of State organ under Article 14 can be checked. See M/s Radha Krishna Agarwal v. State of Bihar, (supra) at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether heating is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu & Anr., [1974] 4 SCC 3; Maneka Gandhi v. Union of India &

Anr., [1976] 1 SCC 248; Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors., [1981] 1 SCC 722; R.D. Shetry v. International Airport Authority of India & Ors., [1979] 3 SCC 1 and also Dwarkadas Marlaria and sons v. Board of Trustees of the Port of Bombay, [1989] 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

In both occasions, the Court prima facie found, both the cases runs in a common thread having same weight of evidence, remanded back for fresh consideration. The petitioner, on remand of the case, has again filed an application before the Engineer-in-Chief cum Additional Secretary cum Special Secretary, Road Construction Department who has rejected the application. It appears that he was swayed away by his earlier view, without recording any finding of difference, merely recorded that the case of present petitioner is different to the case of M/s Vishal Builtech (l) Pvt. Ltd. without understanding in both the cases, the allegation has been made of manipulation and tampering of tender document placing reliance on the executive instruction of Government. The Government has issued the executive instruction dated 18.6.2015, which is of later date having been applied, has to be examined its applicability in the present case as executive instruction cannot be given retrospective operation rather will be applicable prospectively. The applicability part will be seen later on but, for understanding the nature of punishment corresponding to misconduct for furnishing अग्रधन (earnest money) या प्रतिभूति (security) एवं गलत कागजात समर्पित करने पर will suffer the punishment of blacklisting for ten years. In this case, the misconduct mentioned (गलत कागज जमा करने के लिए) (submission of wrong document) will be applicable. So any establishment submits wrong document has been classified as one class, no further classification has been made. In any manner, if an establishment or individual indulges in tampering the document will constitute one class, treatment or punishment will be depending on the gravity of misdemeanour proved against the establishment. The punishment of 10 years of blacklisting is not minimum punishment but is a maximum punishment which can vary from one to ten years, will depend on the nature of gravity of misconduct. The appellate authority rejected the appeal of the petitioner in the same manner as he also found the case of M/s Vishal Builtech (l) Pvt. Ltd. is quite different to the case of present petitioner, recorded that the present petitioner could not wash off his hand from the taint which has been leveled against him but, the question would arise when this Court has recorded in both the judgments, the nature of allegation or the weight of evidence is same, in such circumstances, the authority is required to examine threadbarely as in what manner both can be treated differently. So, in my view, both the orders could not stand to the test of reasonableness rather suffers from arbitrary exercise of power and stand quashed.

Before parting with this judgment, it is the duty of this Court to say that in the case of ***M/s Kulja Industries Limited Vs. Chief Gen. Manager, W.T. Proj. BSNL & Ors.*** reported in ***2013(4) PLJR 447***, the Court has taken a view that the punishment should be in consonance with the misdemeanour levelled against the establishment and the sweeping order will not subserve the purpose of punishment. The Hon'ble Supreme Court has set out the factors in consideration, inflicting the punishment of debarment or blacklisting will be dependent on the nature of gravity of misdemeanour and breach of conduct inclusive of frequency of misdemeanour. It is relevant to quote paragraph nos. 21 to 27 which reads as follows:-

"21. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(h) Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the

circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

22. As regards the period for which the order of debarment will remain effective, the guidelines state that the same would depend upon the seriousness of the case leading to such debarment.

23. Similarly in England, Wales and Northern Ireland, there are statutory provisions that make operators ineligible on several grounds including fraud, fraudulent trading or conspiracy to defraud, bribery etc.

24. Suffice it to say that 'debarment' is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the Regulations under which such contracts were allotted. What is notable is that the 'debarment' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.

*25. In the case at hand according to the Respondent-BSNL, the Appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the Respondent-corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when **(a)** the Appellant is supplying bulk of its manufactured products to the Respondent-BSNL and **(b)** The excess amount received by it has already been paid back.*

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."*

Yet another point which comes to the mind of this Court, as has been argued by the learned counsel for the petitioner that both the authorities have not given a due weight and consideration on the point raised by the petitioner as well as the same should have been a speaking and reasoned one, connected to the issue involved, as it is well known principle of law that reason is a living link in between the order and mind of decision maker, which is part of natural justice. The reason discloses how the mind of decision maker reacted to the subject matter, either it is purely administrative or quasi judicial. There must be rational nexus between the reasons and the subject matter. The opinion or decision must be just and reasonable. It will be relevant to quote paragraph no.18 of the judgment passed in the case of ***J. Ashoka Vs. University of Agricultural Sciences & Ors.*** reported in ***2017 (1) PLJR 242 SC*** which reads as follows:-

"18. Reasons are the links between the materials on which certain conclusions are based and the actual

> *conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. We, therefore, are of the considered opinion that the relevant provisions of the Statute were fully complied with."*

Same view has been taken in the case of ***Chairman & Managing Director, United Commercial Bank and Ors. Vs. P.C. Kakkar*** reported in ***(2003) 4 SCC 364***.

As it appears that both the appellate authority and the Disciplinary Authority have not applied their conscious judicial mind without considering the fact that in the case of M/s Vishal Builtech (l) Pvt. Ltd. the order of punishment has been withdrawn from the date of issuance whereas the petitioner has remained blacklisted since 19.8.2009 is a quite a long period and has been argued by the learned counsel for the petitioner that their case would not be governed by the executive instruction dated 18.6.2015 which classifies the nature of punishments corresponding to misconducts. In this case, the allegation is related to of the year 2009 and the executive instruction has come after a long lapse of time which is punitive in nature, cannot be made applicable giving retrospective effect. The infliction of punishment will always be dependent on the nature and gravity of misconduct and its repetition.

In the result, both the orders are quashed. The matter is relegated to the Engineer-in-Chief cum Additional Secretary cum Special Secretary who will consider in what manner the case of the petitioner is different to the case of M/s Vishal Builtech (l) Pvt. Ltd., would pass reasoned order after giving proper opportunity of hearing to the petitioner.

With the aforementioned observation and direction, this application is allowed.

(Shivaji Pandey, J)

Rishi/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.03.2017
Transmission Date	