

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.15400 of 2018

M/s Baba Hans Construction Pvt. Ltd., a company incorporated under the provisions of the Indian Companies Act, 1956, having its registered Office at 162, Anandpuri, West Boring Canal Road, Patna, through its Managing Director Sri Satyendra Kumar Singh S/o of Jagdish Prasad Singh Resident of 162, Bhola Apartment, Anandpuri, West Boring Canal Road, Patna.

... .. Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Water Resources Department, Government of Bihar, Patna.
2. The Principal Secretary, Water Resources Department, Government of Bihar, Patna.
3. The Engineer-in-Chief, Headquarter, Water Resources Department, Government of Bihar, Patna.
4. The Engineer-in-Chief, Irrigation Creation, Water Resources Department, Government of Bihar, Patna.
5. The Chief Engineer, Irrigation Creation, Water Resources Department, Dehri Region, Dehri, Rohtas.
6. The Superintending Engineer, Durgawati Construction Circle, Bhitri Bandh, Rohtas.
7. The Executive Engineer, Durgawati Left Main Canal Division, Bhitri Bandh, Rohtas.
8. The Executive Engineer, Durgawati Right Main Canal Division, Chenari, Rohtas.
9. The Executive Engineer, Durgawati Works Division, Chenari, Rohtas.
10. The Branch Manager, State Bank of India, Kadamkuan Branch, Patna-3

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Mr. Raj Kishore Prasad, Advocate
For the Respondent-State:		Mr. Anjani Kumar, AAG-4 Mr. Shailendra Kr. Singh, AC to AAG-4
For the SBI	:	Mr. Santosh Kumar Singh, Advocate

CORAM: HONOURABLE JUSTICE SMT. NILU AGRAWAL
C.A.V. JUDGMENT

Date : 23-08-2018

Heard Mr. Y.V. Giri, learned Senior Advocate duly assisted by Mr. Raj Kishore Prasad, Mr. Anjani Kumar, learned AAG-4 duly assisted by Mr. Shailendra Kumar Singh and Mr. Santosh Kumar Singh, learned counsel appearing for the State Bank of India.



2. Petitioner in the present writ application has prayed
for following reliefs :

“i) To issue an appropriate writ(s), order(s), direction(s) in the nature of writ of Certiorari for quashing the order passed by the respondent Executive Engineer, Durgawati Works Division, vide Letter no. 439 dated 23.07.2018 (as contained in Annexure-17 to this writ application), whereby and whereunder the work allotted to the petitioner vide Agreement No. 01 SBD/2016-17 dated 09.07.2016, has been rescinded in purported exercise of his power under Clause-3 of Standard Bidding Document (in short SBD), as a result thereof, the earnest money and Security Deposit will be forfeited, besides that, the Department will be free to get the balance work completed at the risk and cost of the petitioner under Clause-14 of the SBD.

ii) To issue an appropriate writ(s), order(s), direction(s) in the nature of writ of Certiorari for quashing the show cause notice issued to the petitioner by the respondent Engineer-in-Chief vide his letter no. 2909 dated 30.07.2018 (as contained in Annexure-18 to this writ application) by which the petitioner has been asked to submit an explanation within a week as to why the registration of the petitioner (Registration No. 33/2016 class-I) be not blacklisted for ten years, as the petitioner has failed to complete the work in question and the Agreement No. 01 SBD/2016-17 dated 09.07.2016 has already been rescinded.



iii) To issue an appropriate writ(s), order(s), direction(s) in the nature of writ of Mandamus, directing the respondents to allow the petitioner to complete the balance work at the present rate itself, as there is no latches on the part of the petitioner in not completing the work in question within the stipulated period in terms of the Agreement and actually, it is the Department on whose non-cooperation, the work has been delayed.

iv) To issue an appropriate writ(s), order(s), direction(s) in the nature of writ of Mandamus, directing the respondents to make payments to the petitioner with respect to the pending bills and admitted amount of dues for the work done by the petitioner and accordingly direct the respondents to extend the period of completion of work adequately and further to provide valid clear site of the work so that the petitioner could be able to complete the work without any hindrance, particularly the land which has not yet been acquired by the Government, upon which the petitioner has to execute the work in question.

v) To any other relief or reliefs for which the petitioner is found to be entitled in the facts and circumstances of the case.

3. During pendency of the writ application, the order of blacklisting dated 06.08.2018 has been passed, which the petitioner challenges by way of I.A. No. 6078 of 2018 seeking amendment in the prayer of the main writ application, which is as follows :



“To issue an appropriate writ(s), order(s), direction(s) in the nature of writ of Certiorari for quashing the order passed by the respondent Engineer-in-Chief vide his Memo No. 2996 dated 06.08.2018 (as contained in Annexure-23 to this application), whereby and whereunder the petitioner (Registration No. 33/2016, class-I) has been blacklisted for ten years from the date of issuance of the order under Rule-11(ka) (ii) of the Bihar Contractors Registration Rules, 2007, without affording any opportunity to file explanation to the show-cause notice.”

4. Considering the nature of claim made by the petitioner, I.A. No. 6078 of 2018 is allowed.

5. Consequent to the order of blacklisting bank guarantee has been revoked and a demand draft of Rs. 1,59,28,000/- has been prepared in the name of the Executive Engineer, Durgawati Works Division, Chenari by the State Bank of India, Kadamkuan Branch, Patna dated 06.08.2018 brought on record by the petitioner as Annexure-21, which has been kept in custody of the learned Registrar General, Patna High Court, Patna vide order dated 08.08.2018, passed by this Court.

6. Petitioner is a registered Class-I contractor engaged in construction of canals, service road, building etc. under the Water Resources Department of the State of Bihar. The respondents-



Water Resources Department floated a tender for construction of canals and its distribution system of Durgawati Reservoir Project (NIT) No. 01/2016-17 of an estimated cost of the project of Rs. 40.54 crores. The work had to be completed within 12 months. Petitioner being the successful bidder, at a contract price of Rs. 36,49,00,200/- a letter of acceptance was issued by the Respondent-Executive Engineer and a formal agreement was executed between the petitioner and Respondent No. 9, the Executive Engineer, Durgawari Works Division, Chenari, Rohtas on 09.07.2016 vide Agreement No. 01SBD/2016-17, which is Annexure-1 to the writ application. In terms of the agreement, the work had to be completed within 12 months of the agreement i.e. by 08.07.2017. The petitioner also deposited the performance security including additional performance security of Rs. 2,09,82,000/-. Immediately during course of execution of the work petitioner found that there were several hurdles as the land on which the work had to be executed, had not been acquired under the Land Acquisition Act, the local villagers had not been paid their compensation and, as such, work could not have been completed within the stipulated period of 12 months. A review meeting was convened on 17.04.2017 (Annexure-2) under the Chairmanship of the Principal Secretary, Water Resources



Department and the Engineer-in-Chief also participated. In the said meeting it was informed by the Executive Engineer, Incharge of the Project that in various distribution systems the local villagers had requested to change the alignment and with the consent of the villagers under the lease policy of 2014 work should proceed. Where the villagers were not giving their consent the work in those alignments should be stayed. It was also found that in Bhabhua-Sambhar Road there was a box culvert and the road had to be crossed, therefore, the map to be obtained from the Road Construction Department and then work to be started. It was also stipulated that for land acquisition, the Director, Land Acquisition be directed to accelerate the process of land acquisition. Thus, in the review meeting the hurdles in execution of work was discussed making it clear that till April, 2017 clear site could not be handed over to the petitioner for execution of work. Because of the said hurdles petitioner could only start execution of work with effect from 15.12.2016 instead of 09.07.2016. The petitioner was asked to submit an application for grant of adequate time extension and vide order dated 02.11.2017 (Annexure-3) the Executive Engineer Incharge of the Project recommended for extension of time up to 30.03.2018, which was signed by the three Executive Engineers including the Superintending Engineer and other concerned



officials. In the said order dated 02.11.2017(Annexure-3) it was found that 50% of the work has been completed and the reasons for extension of time was specified in point 1.1.2 that non-working period was between 15.06.2016 to 25.11.2016 because of Kharif season and 01.01.2017 to 25.03.2017 because of Rabi season. At point 1.1.9 it was found that because the land acquisition is not complete, the work could not proceed. At point 1.2.2 it was found that Naxalities had burnt the pokelane and JCB and had also kidnapped the pokelane operator. At point 1.2.3 it was found that the Public Works Department (PWD) did not provide NOC for construction of DLR bridge. At point 1.2.5 it was found that since the local villagers were not given compensation of their land acquired they had created obstacles in execution of work. At point 1.2.6 it was found that apart from the agreement the petitioner was asked to do enhanced extra substituted items. Hence, time was extended for completion of work till 30.03.2018.

7. It was, thus, submitted by the learned counsel for the petitioner that, although the work had to be completed by 08.07.2017, but till December, 2017 the process of land acquisition was not completed and only advertisements inviting objections had been issued by the Special Land Acquisition Officer, even then 50% of the work had been completed as reported by the Executive



Engineer, Incharge of the Project vide letter dated 02.11.2017. Petitioner apprised the Project Incharge about the said problems vide letters dated 08.06.2017, 18.07.2017 (Annexures-5 & 6) but in spite of those alarming problems the petitioner had completed the work at Chain Nos. 273, 568, 617, 810, 830, 1015, 1038 within time. Petitioner vide letter dated 20.07.2017, as contained in Annexure-7, also apprised the Chief Engineer of the reasons for non-completion of work and also requested for payment for the work executed by him in the said financial year. Vide letter dated 02.11.2017 the petitioner again requested the Incharge of the project to provide site clearance including land acquisition certificate of the land acquired so that work could be completed without any hindrance. It was also apprised by letter dated 24.11.2017 that some bad elements had burnt the pokelane machine and severely assaulted the operator of the pokelane, which is Annexure-9 to the writ application. A reminder was sent on 18.12.2017 to the Incharge of the project to resolve the dispute regarding land acquisition, non-availability of soils within the sanctioned lead, site clearance and non-availability of sand on account of change in the policy of the Government with respect to settlement of sand ghat. It was also apprised that in Tikra Distributory work had been completed up to 52 chains. Thereafter



the local villagers are not allowing the work to be executed. Hence, the work was stopped. Similarly, in Darigaon Minor there was dispute of land acquisition besides in Chain No. 95 to 110, there was soil/earth available within the sanctioned lead. Similar was the position with regard to Ulho Minor, Netpur Minor in between Chain No. 11 to 55, Bhagwanpur Minor in Chain No. 19 to 30 and 70 to 113, Sihanpura Minor and Agni Minor in Chain No. 0 to 40 and 40 to 102. Therefore, a request was made to the Executive Engineer Incharge of the Project to solve these problems otherwise it was not possible for the petitioner to complete the work within the stipulated time. Considering these problems the completion of work was again extended up to 30.06.2018 by the Department.

8. Mr. Y.V. Giri, learned Senior Counsel for the petitioner submits that the Incharge of the project was fully aware of the reasons for non-completion of work within the stipulated period and extended the time for completion of work. He submits that work of Amarpur Minor at Chain No. 18 was closed in terms of the direction of the Executive Engineer, wherever the land was available, work was already completed but clear site was not provided by the authorities either because of dispute or on account of non-acquisition of land or non-availability of soil within the



sanctioned lead for which the petitioner was not at all responsible. Further the bills of the petitioner were not paid within the prescribed time in terms of the agreement, which was also one of the causes for delay in completion of work.

9. The Respondent-Executive Engineer, Durgawati Works Division, Chenari in order to shirk from his own responsibility issued show cause notice dated 30.06.2018, Annexure-11 to submit explanation as to why in terms of Clause- 3 of the agreement, the agreement in question be not rescinded and rest work be not completed at the risk and cost imposed on the petitioner in terms of Clause 14 of the agreement. The petitioner was also asked to explain as to why procedure for blacklisting the registration of the petitioner be not started in terms of the provisions of Bihar Contractors Registration Rules, 2007 (hereinafter referred to as the 2007 Rules) as after lapse of two years only 46% of the work could be completed.

10. Learned counsel for the petitioner submits that during evaluation of the work progress and the hurdle under the Chairmanship of the Principal Secretary, Water Resources Department on 02.11.2017, 50% of the work was assessed to have been completed. Hence, notice dated 30.06.2018 alleging completion of only 46% of the work is contradictory. Petitioner



submitted a detailed explanation on 09.07.2018(Annexure-12) stating therein that the allegations are baseless and non-completion of the work entailed only on account of fault of the Department, particularly because of non-acquisition of land, which is still not done, technical decision was not taken on time, design drawing also not submitted on time and local dispute with villagers was not resolved, even in spite of such constraints 100% work has been completed on encroachment free Government land. Hence, the assessment of 46% of work done was totally false. It was also stated that out of 17 Minors to be constructed by the petitioner, three Minors have already been closed by the Department itself, as the land had not yet been acquired by the Department. Work of Tikra Minor was stopped at 55th Chain, although, 66 Chain had to be constructed. The petitioner also stated that vide various letters beginning from 12.01.2017 to 08.01.2018 the petitioner had requested to provide the design chain-wise profile and reach-wise profile but no such design profile was provided. No NOC was obtained from the PWD for construction of DLR bridge. The respondents themselves did not provide 100% clear site, which prevented the petitioner from completing the work. It was also due to non-availability of sand for which several letters were written to the respondents on 18.12.2017, 26.12.2017 and 08.01.2018. It was



on account of laches, delay and negligent approach of the Department that delay occurred, which was beyond the control of the petitioner. Petitioner had also enclosed several letters written to the Department and Project Incharge with his explanation dated 09.07.2018 as contained in Annexure-12. Similarly, show cause notice was issued by the respondent Executive Engineer, Durgawati Left Main Canal Division, Bhitri Bandh dated 02.07.2018 of having completed only 30% of the work, which is contained in Annexure-13. Petitioner gave a detailed reply, Annexure-14 dated 09.07.2018 stating therein the same problem regarding non-acquisition of land, non-availability of soil within the sanctioned lead not excluding the non-working period and also non-availability of sand.

11. Likewise, the respondent Executive Engineer, Durgawati Right Canal Division, Chenari, Rohtas also issued a show cause dated 02.07.2018, as contained in Annexure-15, as to why Clause-3 and 14 of the agreement be not invoked for non-completion of work. Petitioner submitted similar reply dated 09.07.2018, as contained in Annexure-16. However, without considering the show cause reply of the petitioner, the respondent-Executive Engineer, Durgawati Works Division, Chenari vide letter No. 439 dated 23.07.2018, as contained in Annexurer-17,



which is under challenge in the present writ application, has been pleased to rescind the contract/agreement in purported exercise of power under Clause-3 of the SBD. As a result, his earnest money and security deposited has been forfeited and in terms of Clause-14 of the SBD the rest work has been directed to be completed at the risk and cost imposed on the petitioner.

12. Learned counsel for the petitioner submits that the said order rescinding the agreement, forfeiture and imposition of risk and cost on the petitioner vide order dated 23.07.2018 is arbitrary, illegal and malafide as the work had not been completed within the stipulated or extended time due to fault of the Department which has been specifically detailed in the show cause reply. He further submits that the order rescinding the agreement also takes notice of the inspection report of the Superintending Engineer, which was never made available to the petitioner, hence, non-supply of the enquiry report is in violation of principles of natural justice which vitiates the order dated 23.07.2018. Admittedly, the Department had failed to acquire land under Land Acquisition Act and also failed to pay compensation to farmers whose land had been acquired creating unrest amongst the local farmers for which work was stopped, as the matter was not resolved by the Department. Since the contract bound both the



parties, there was equal responsibility upon the Department to give the clear site, design details and hurdle free site. Loading the petitioner with such allegation, any penal action against the petitioner in terms of the provision of the agreement would be totally arbitrary, illegal and in complete violation of Articles 14, 16 and 19(1)(g) of the Constitution of India.

13. The respondent-Engineer-in-Chief, Headquarters, Water Resources Department thereafter issued show cause notice dated 30.07.2018, as contained in Annexure-18 to show cause within a week why the registration of the petitioner being Registration No. 33/2016 (1st Class) be not blacklisted for a period of 10 years as petitioner has failed to complete the work in question, which is also under challenge.

14. During pendency of the writ application, on 04.08.2018, petitioner filed his reply, as contained in Annexure-23, for providing certain documents and details relating to the work awarded i.e. as to how many Distributaries were closed on account of non-acquisition of land, how many farmers have been paid/ not paid their compensation for their land acquired by the Department, how many culverts have been constructed on those lands not yet acquired so that a detailed reply could be filed. Without providing the said details the order dated 06.08.2018, as contained in



Annexure-24, has been passed by the respondent Engineer-in-Chief, Headquarters blacklisting the petitioner for a period of 10 years, which is also under challenge by the petitioner by way of Interlocutory Application, on the ground of being arbitrary, illegal and malafide.

15. It is further submitted that the action of the respondent authorities in rescinding the contract is illegal, arbitrary and malafide as the Department failed to take into account the fact that the hurdles and dispute were far too many and has not yet been resolved. Petitioner was not given clear site by the Department on account of non-acquisition of land of local farmers, the unrest and hindrance created by the local farmers on account of non-payment of compensation, design drawing was not made available, no NOC granted by the PWD for DLR bridge, non-availability of sand due to Government mining policy and non-working period due to Kharif and Rabi season. Hence, the estimate of the period of completion was itself faulty by the Department. These grounds for rescinding the contract, revocation of security and performance guarantee and blacklisting for 10 years getting the remaining work done at the risk and cost of the petitioner was totally arbitrary, malafide and in violation of Articles 14, 16 and 19(1)(g) of the Constitution of India. He submits that the



impugned order of rescinding the contract on the inspection report of the Superintending Engineer was not made available to the petitioner and, hence, the decision stands vitiated on account of violation of principles of natural justice. He further submits that petitioner had completed 80% of the work in question and the respondents themselves closed about 20% of the work on account of non-acquisition of land and non-payment of compensation to the farmers. He submits that the impugned order of rescinding the contract dated 23.07.2018 was passed by the Engineer Incharge who could not be a judge of its own cause as through various letters the petitioner had brought to the fore the hurdles faced by the him. Hence, the respondent Executive Engineer Incharge of the Project ought to have referred the dispute to a 3rd party for resolution.

16. Learned counsel for the petitioner also refers to Rule 11 of the 2007 Rules, specifically Rule 11 (ga) stating therein that the order of blacklisting could be passed by the authority registering the contract i.e. the respondent Executive Engineer, Durgawati Works Division, Chenari, Rohtas but the order of blacklisting dated 06.08.2018 has been passed by the Engineer-in-Chief, Headquarters, which is in violation of Rule 11(ga) of the 2007 Rules and is a malafide action on the part of the Department.



17. Learned counsel for the petitioner further submits that even the show cause notice was issued for blacklisting dated 30.07.2018 whereby petitioner was given one week time to file reply to the so called proposed blacklisting, but with the pre-determined mind on 06.08.2018 i.e. on the 7th day i.e. within 7 days on 06.08.2018, the order of blacklisting was passed which shows that even at the stage of the show cause notice the respondents had completely made up their mind and reached a definite conclusion about the alleged guilt of the petitioner. In fact, the show cause notice dated 30.06.2018, as contained in Annexure-11, which was a notice given to the petitioner to submit his reply as to why clause-3 of the agreement be not invoked, his security be not forfeited and remaining work be not carried out at the risk and cost of the petitioner as per Clause 14 of the agreement, was also with the pre-determined mind rendering the subsequent order an empty ritual and an idle formality. In this connection, he relies on the decision in the case of *Oryx Fisheries Private Limited vs. Union of India and others* since reported in (2010) 13 SCC 427, paragraph 31.

18. He further submits that the order rescinding the agreement forfeiting the performance guarantee and security imposing risk and cost of the remaining work upon the petitioner



and also the order of blacklisting the petitioner for a period of 10 years is arbitrary and malafide as the respondent authorities were themselves at fault in not providing free site for the project and had made a mistaken estimate of completion of work for which they themselves extended the time twice considering the problems and hurdles. He submits that the action of blacklisting is stigmatic in nature and is described as “civil death of a person who is foisted with the order of blacklisting” as it debars such a person from participating in Government tenders which means precluding him from the award of Government contracts. In support of the said proposition, learned counsel for the petitioner relies on the decision of this Court in the case of *M/s NCC Limited vs. The State of Bihar and others* since reported in *2013(1) PLJR 952* stating therein that the present matter is squarely covered by the decision rendered in the case of M/s NCC Limited (supra), as in the present case also the authorities have extended the period of contract realising the fact that the authorities were also largely to be blamed for the execution of the contract for the reason shown by the petitioner for the same and, thus, their action declaring the petitioner a defaulter rescinding the contract and blacklisting him is contrary to the action of extending the period of contract. It is also the contention of the petitioner that the authorities being party



to the contract, it is not open to them to take a decision that the petitioner is a defaulter when the petitioner has not admitted any such fault and has alleged liability and fault on the part of the respondent authorities in the matter and the said issue can only be decided by an impartial adjudicatory body. Paragraphs 24, 25, 26 of the judgment is extracted hereinbelow for ready reference :

“24. The effect of an order declaring defaulter is grave enough so as to debar a contractor from participating in any future tender. Clause 3.3 of the SBD itself makes it clear that if such an action is taken by any of the authorities, including any State or any public sector undertaking or even by the Central Government, then the other authorities act upon the said defaulter orders and the contractor in question is practically debarred from participating in any future tender with all such authorities. Such an action would have serious consequences upon the right of a contractor to exercise his fundamental right under Article 19(1)(g) of the Constitution and hence cannot be considered as a purely contractual situation or violation of contractual right. Thus, the issue not only of jurisdiction but also of compliance of principles of natural justice would automatically arise in such cases and it cannot be assumed that such a matter is not maintainable before this Court in its writ jurisdiction. The challenge to the maintainability of the writ applications is, accordingly, rejected.

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.”

19. The said view of NCC Limited (supra) has been followed by this Court in the case of *M/s J.K.M. Infra Projects Limited vs. The State of Bihar through Principal Secretary, Water Resources Department & Ors.* since reported in 2014(1) PLJR 20 and in the case of *McNally Bharat Engineering vs. The Bihar State Electricity Board & Ors.* since reported in 2015(4) PLJR 556.



20. Learned counsel for the petitioner made yet another prayer that he is still ready to complete the remaining work at the present rate itself and be allowed 9 months working time to complete the work and respondents be directed to make timely payment of the work done by the petitioner. He submits that only 20% of the work has to be completed and in public interest and considering the financial consequences he may be permitted to complete the work and relies on the decision in the case of M/s B.K. Enterprises, Dhanpura, Ara vs. The State of Bihar & Ors. since reported in **2008(1) PLJR 473, paragraphs 9, 10, 11**, which is as follows :

“9. Coming to the cancellation and retender aspect of the matter, I feel that though the authorities cannot be faulted for cancelling the tender because the petitioner failed to execute the same within the extended time, the authorities can consequently be faulted with re-tendering the balance work. Merely, because there has been a default in completing the work in time, does not give right to the authority to cancel and retender because the consequences thereof has to be kept in mind as the authorities are the custodian of public finance as well. If balance work is re-tendered then apart from work being completed there will be no other benefit which State would get, rather to the contrary State would be obliged to pay at the present with current revised rate and as such would incur an extra expenditure over rupees twenty seven lakhs. This would be a



waste of public money, the work being the same. On the contrary if the period is further extended with the petitioner himself, which the petitioner has been asking since long and it has also been recommended again and again by the Executive Engineer even after cancellation of the work, then both the objectives would be achieved that is the work would be done and no extra expense would incur. This would save substantial public finance. The facts, aforesaid, are not disputed by the State but the stand is that as the petitioner has delayed, they had a right to cancel and pursuant to the said right to cancel, a decision to cancel has been taken.

10. To my mind this court has not questioned either the authority or the right to cancel but the propriety to cancel and its financial consequence. If the petitioner is ready to do the same work at the cost at which he was doing earlier part of the work then the authority instead of cancelling ought to have extended the period rather than re-tendering at a substantial extra spend. That to my mind would have been prudent, fair, equitable and a business like approach rather than cause loss to the public exchequer by paying higher rate which now prevalent in the year 2007.

11. In that view of the matter, keeping in view the financial aspect of the matter and in order to save of public money, I direct the authority to reconsider the matter and consider the desirability of granting petitioner further time to complete the work and pass appropriate orders with regard to the dispute, which was pending before the



authority.”

21. Mr. Anjani Kumar, learned AAG-4 for the State, on the other hand, submits that the present writ application is not maintainable as the right of the petitioner is in the nature of a contractual right. The manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review only on the touchstone of natural justice, non-discrimination, equality and proportionality. In this connection, he refers to the judgment of the Hon'ble Supreme Court in the case of *Joshi Technologies International Inc. vs. Union of India and others* since reported in *(2015) 7 SCC 728* and with reference to paragraph 69 submits that the principles for judicial review in contractual matters has been elaborately discussed and it has been held that when the dispute is in the realm of contract or interpretation thereof then the discretionary remedy under Article 226 of the Constitution is not available.

22. Learned counsel for the State refers to a series of letters issued by the different authorities of the State from time to time informing the petitioner that work was not progressing properly. It is urged that from the various correspondences on the record including those mentioned in the impugned orders, it is evident that several opportunities were given to the petitioner to



rectify the situation by speeding up the progress of work but no such action was taken by the petitioner. Thus, the petitioner has been rightly declared defaulter and debarred from participating in all future tenders for a period of 10 years.

23. It is also the contention of the respondents that after execution of the agreement the petitioner did not take effective steps towards completion of work in the scheduled time but by unnecessary communications tried to mislead the respondent authorities stating about various inconveniences in execution of the work caused by the respondent authorities, although, there were no such hindrances. It is also the contention of the respondents that the petitioner had completed only 34% of the work by the last date fixed in the contract and only 50.72% of the work till 30.07.2018 so it had failed to make proportionate progress of work. It is urged that on account of default of the petitioner, which was pointed out and specific instructions and directions were issued by the respondent authorities in that regard from time to time and warning of action to be taken against them and also made to them as per the terms and conditions of the agreement, yet they failed to improve the progress of work. Thus, in terms of Clause-3 of the agreement the petitioner was declared defaulter, contract was rescinded, performance guarantee and



security deposit has been forfeited and in view of Clause- 14 the remaining work of the contract would be carried out at the petitioner's risk and cost. He submits that, as a matter of fact, the authorities have themselves extended the contract of one year to 2 years, but in spite of extended time petitioner has not been able to complete the work, hence, the orders passed by the respondent authorities dated 23.07.2018 and 06.08.2018 blacklisting the petitioner for the period of 10 years has been passed as per terms and conditions of the contract. He further submits that so far as allegation of not making payment in time is concerned, it was found that as per Clause-7 of the SBD, the contractor has to prepare and submit bill for payment, which the petitioner did not submit. Despite that payment from time to time has been made on the basis of entry made in the measurement book and an amount of Rs. 1875.50 lakhs has been paid for the work executed till 15.06.2018 and now no amount is due for payment to the petitioner. He further submits that the authorities are facing anger of farmers of Rohtas and Kaimur districts due to non-completion of work and not extending the irrigation facility to their fields. Under these compelling circumstances, it was decided in public interest to rescind the contract and to get the remaining work completed through other contractor at the risk and cost of the



petitioner. Such action has been taken against the petitioner in view of Rule 11 (ii) of the 2007 Rules and notice against the proposed action, as postulated in Rule 11 (kha) of 2007 Rules, has already been undertaken and if the petitioner is aggrieved by the punishment order there is provision of appeal before the Appellate Authority as postulated in Rule 11 (gha) of the 2007 Rules, instead the petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, hence, writ is not maintainable on this ground also.

24. He further submits that even otherwise writ is not maintainable as there is a specific clause in the agreement i.e. Clause-25 that disputes with regard to all such matters and all such questions could be resolved through arbitration. He submits that the reply to the show cause notice dated 30.07.2018 against blacklisting, as contained in Annexure-23, although, is dated 04.08.2018, but the same has been sent by the petitioner through mail dated 06.08.2018 and the receipt also shows that it was received on 06.08.2018. Hence, the reply to the show cause against blacklisting was not filed within a week and order of blacklisting the petitioner for a period of 10 years was passed on 06.08.2018.

25. Learned counsel for the State also submits that the project has a public purpose and in similar matter this Court in



L.P.A. No. 1192 of 2016 and another analogous case by order dated 04.12.2017 has held as follows :

“4. The only clarification which is required to be made is that the question of black-listing of the private respondent-the petitioner and the liability which will come upon him due to re-tendering etc. will be subject matter of the arbitration proceeding before the Tribunal. However, the work assigned to the respondent No. 2, must carry on and respondent No. 2 will be well advised to ensure that there is no omission on their part in completing the contract within a time frame.”

26. Learned counsel for the petitioner in reply submits that although the show cause notice for blacklisting dated 30.07.2018 provided a reply within a week but on the 7th day i.e. on 06.08.2018 the order of blacklisting was passed which shows the malafide intention of the respondent authorities and order passed on 7th day would not amount to reasonable opportunity without even replying to the show cause dated 04.08.2018 and hurriedly the order of blacklisting was passed by the Department.

27. With regard to blacklisting and contractor not being given sufficient opportunity against notice of blacklisting counsel for the petitioner refers to the decision rendered in the case of ***Kulja Industries Limited vs. Chief General Manager, Western***



Telecom Project Bharat Sanchar Nigam Limited and others since reported in ***(2014) 14 SCC 731*** stating therein that since blacklisting is in the nature of penalty and blacklisting the petitioner for a period of 10 years without affording reasonable opportunity and without serving enquiry report of the Superintending Engineer on the petitioner is violation of principles of natural justice and, as such, the matter be remanded to the authorities for reconsideration after providing reasonable opportunity of hearing to the petitioner.

28. Counsel for the petitioner further submits that the writ application is maintainable as the action of the respondents is wholly without jurisdiction having violated the principles of natural justice, as an order affecting the right of the petitioner has been passed without affording reasonable opportunity as held in the case of ***Whirlpool Corporation vs. Registrar of Trade Marks [(1998) 8 SCC 1]*** followed in the case of ***Popcorn Entertainment and another vs. City Industrial Development Corpn. and another*** since reported in ***(2007) 9 SCC 593*** as the action of the respondents is illegal without jurisdiction, there is violation of principles of natural justice and the petitioner's fundamental rights has been violated. He submits that since the ingredients of interference under writ jurisdiction is made out, relegating the



petitioner to alternative remedy of appeal, as provided under Rule 11(gha) of the 2007 Rules, would not be fair and reasonable.

29. It is also submitted that there was clear failure on the part of the respondents to remove the hurdles and problems, thereby not giving a free site for execution of work allotted to the petitioner and order of penalty has not been imposed with due application of mind by the authority competent to impose such penalty which resulted in great prejudice and grave civil consequences to the petitioner as held in the case of ***Gorkha Security Services vs. Government (NCT of Delhi) and others*** since reported in ***(2014) 9 SCC 105***.

30. It is contended that since the respondents had illegally terminated the contract with the petitioner, although, there was availability of alternative remedy as on account of procedural delay the work could not be completed within the stipulated period of 12 months and the authorities themselves reviewed the matter and extended the period by one year and that the petitioner could not be saddled with the cost of work at his risk and cost and since the petitioner was ready to complete the balance work from the left over tender, the writ jurisdiction under Article 226 of the Constitution cannot be fettered by any alternative remedy available to authorities, as held in paragraph 26 of the judgment in the case



of *Union of India and others vs. Tania Construction Private Limited* since reported in (2011) 5 SCC 697.

31. Counsel for the petitioner further relies on the decision in the case of *Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and another vs. Sri Seetaram Rice Mill* since reported in (2012) 2 SCC 108 that in spite of alternative remedy of appeal the Hon'ble Apex Court while referring to various judgments has specifically held in paragraph 83 of the judgment that exercise of writ jurisdiction by the Court is merely on the risk of available statutory remedy. Paragraph 83 of the judgment is extracted hereinbelow for ready reference :

“83. This Court while referring to various judgments of this Court and specifying the cases where the alternative remedy would not bar the exercise of jurisdiction by the Court, held as under: (Whirlpool Corpn. case²⁵, SCC pp. 9-11, paras 14-15 & 19-21)

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the fundamental rights contained in Part III of the Constitution but also for ‘any other purpose’.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to



entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

32. Having consciously considered the rival submissions of the parties, it is not in dispute that it is only on account of delay that the impugned action has been taken against the petitioner. It is also a fact that the authorities have themselves extended the period of contract realising the fact that there were certain hindrances and hurdles in implementation of the work order. Thus, the respondents were also responsible for the delay which is the foundation for the action of rescinding the contract, forfeiture of earnest money and security deposit and executing the remaining work at the risk and cost of the petitioner as well as the consequential action and the order of blacklisting which rests on the adjudication of the delay



aspect. Hence, in my opinion, the respondents are precluded from passing any such orders until the issue of delay is adjudicated and deliberated by an independent forum i.e. the Tribunal. Until such time the issue of delay is adjudicated by the Tribunal, the respondents cannot proceed against the petitioner for either cancellation of contract or blacklisting.

33. In the result, the entire action of the respondents beginning from the order dated 23.07.2018, as contained in Annexure-17 rescinding the contract, forfeiting the earnest money and security deposit and Department to complete the remaining work at the risk and cost of the petitioner, show cause notice dated 30.07.2018, as contained in Annexure-18 by which the petitioner has been asked an explanation within a week as to why he be not blacklisted for a period of 10 years and the order of blacklisting the petitioner for a period of 10 years dated 06.08.2018 as contained in Annexure-23, are all held illegal and are, accordingly, set aside. All the questions and liability which will come on the petitioner will be subject matter of arbitration proceedings before the Tribunal. However, since the specific averment has been made by the petitioner that he is ready to complete the remaining work, as about 80% of the work has been completed and he is ready to complete the remaining work at the present rate itself for which he



has prayed to be allowed at-least nine months' working time to complete the work, the respondent authorities in the light of the order passed in the case of *M/s B.K. Enterprises, Dhanpura, Ara (supra)* and considering the public interest and the financial consequences may permit the petitioner to complete the balance work.

34. The performance guarantee/ security deposit invoked by the Department and the Demand Draft No. 716452 dated 06.08.2018 prepared by the Branch Manager, State Bank of India, Kadam Kuan Branch (Patna) in favour of the Executive Engineer, Durgawati Works Division, Chenari for an amount of Rs. 1,59,28,000/- deposited in the custody of the Registrar General on 09.08.2018 in pursuance to the order dated 08.08.2018, passed by this Court in the present writ application, be handed over to the Bank-Respondent No. 10 through his counsel, would be treated to be cancelled and proceeds deposited in the same said account of the petitioner.

35. Writ application is, accordingly, allowed.

Rajesh/-

(Nilu Agrawal, J)

AFR/NAFR	AFR
CAV DATE	09.08.2018
Uploading Date	23.08.2018
Transmission Date	NA

