

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3952 of 2019

H. R. Builders through its authorized signatory Mr. Yusuf Khan Son of Chand Khan, Resident of HU-78, Pitampura, Delhi-110034

... .. Petitioner

Versus

1. The State of Bihar through Principal Secretary, Road Construction Department, Government of Bihar, Vishweshwaraiya Bhawan, Jawahar Lal Nehru Marg, Patna, Bihar- 800001
2. The Principal Secretary, Road Construction Department, Government of Bihar, Vishweshwariya Bhawan, Jawahar Lal Nehru Marg, Patna, Bihar- 800001
3. The Engineer-in-Chief Cum Additional Commissioner cum Special Secretary, Road Construction Department, Government of Bihar, Patna.
4. The Chief Engineer, Road Construction Department, North Bihar.
5. The Superintending Engineer, Road Construction Department, Hajipur Circle, North Bihar.
6. The Executive Engineer, Road Construction Department, Government of Bihar, Gopalganj Road Division, Gopalganj.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr.Sandeep Kumar, Advocate Mr.Neyaul Hoda, Advocate Mr.Rohit Raj, Advocate
For the Respondent/s	:	Mr.Sanjay Kumar, AC to GA-13

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

4 08-07-2019 Petitioner in the present case has moved this Court for quashing of the order dated 28.12.2017 issued by the Executive Engineer, Road Construction Department, Government of Bihar (hereinafter referred to as 'RCD or Respondent No. 6' as the case may be) alleging that the Respondent No. 6 has withheld lawful payments of the petitioner. Petitioner also prayed for reimbursement of a sum of



Rs. 76,49,012/- which according to the petitioner has been wrongfully forfeited by invoking the performance bank guarantee. One of the prayers of the petitioner is to quash the order of blacklisting dated 18.12.2017 as contained in Annexure '11' to the writ application issued by Respondent No. 6 by which the petitioner has been blacklisted for a period of 10 years.

It appears from the records that the petitioner is a firm engaged in construction of Roads, Pathways, Highways etc. It was awarded a project of "Long Term Output and performance based Road Assets Maintenance Contract Work Package No. 37/OPRMC/Gopalganj" for construction and maintenance of roads. The documents containing the provisions under which the technical and official bids were conducted have been brought on record as Annexure '2' series to the writ application. Agreement in question was executed on 29.03.2014, however, it appears that a dispute arose between the parties for several reasons which this Court is not required to go into as the scope and ambit of the writ application have now been brought down to the limited submissions of the learned counsel for the petitioner that the matters relating to termination of contract, invocation of performance bank guarantee, imposition of penalties etc. may be



resolved in terms of the provisions as contained in Clause 6.1 providing for the settlement of disputes read with the provisions contained in Clause 6.1.2 and 6.2.3 under Section VII of the particular conditions (PC) of the contract and so far as the order of blacklisting is concerned, since the same cannot be a subject matter of dispute before the Dispute Review Expert (DRE) and the Arbitration Tribunal, this Court may examine the same within the parameters laid down by the Hon'ble Supreme Court in the case of **M/S Kulja Industries Ltd. Vs. Chief Gen. Manager W.T. Porj. Bsnl Industries** reported in **AIR 2014 SC Page 9.**

Learned counsel for the petitioner has taken this Court through impugned order of blacklisting as contained in Annexure '11' to the writ application at Page 744 of the brief to submit that the order of blacklisting for 10 years has been passed without giving any reasons and by simply recording that the petitioner had failed to submit it's show cause despite reminder sent to them. Learned counsel submits that while the show cause notice for blacklisting was issued to the petitioner initially on 12.10.2017 and lastly on 03.11.2017, there are ample materials available on the record which the petitioner has brought before this Court to show that the petitioner had been



writing letters and reminders as also placing their stand before the concerned Executive Engineer during this period.

Attention of this Court has been drawn towards letter dated 07.11.2017 (Annexure '13' to the writ application) which has been placed with the supplementary affidavit filed on behalf of the petitioner. It is submitted that Annexure '13' was written by the petitioner in response to Letter No. 1519 dated 30.10.2017. It is submitted that in the letter dated 30.10.2017 copy of which has been brought on record by the respondents as Annexure 'H' to their counter affidavit, the petitioner was informed about the proposed action of blacklisting, termination of contract and award of work at risk and cost basis. It is submitted that this letter (Annexure 'H') was specifically replied by the petitioner vide its letter dated 07.11.2017 as contained in Annexure '13' to the supplementary affidavit, therefore, the order of blacklisting saying that the petitioner had not submitted any response, is not factually correct. Learned counsel submits that there are umpteen numbers of correspondences which have been enclosed with the supplementary affidavit to show that the petitioner had placed its stand before the concerned Executive Engineer much before the passing of order of blacklisting but no consideration whatsoever was given to those correspondences. It



is, thus, submitted that the impugned order of blacklisting as contained in Annexure '11' to the writ application is liable to be set aside on the ground of violation of principles of natural justice inasmuch as no consideration of the material available on the record has been given while blacklisting the petitioner which has got an effect of causing a civil death to the petitioner.

Learned counsel further submits that so far as the other disputes are concerned, they may be permitted to raise the dispute before the 'DRE' and in case occasion so arises before the Bihar Public Works Contract Arbitration Tribunal in accordance with the conditions of the contract.

On the other hand, learned counsel for the State has opposed the writ application stating that the petitioner had miserably failed to discharge its obligation under the contract, hence, in terms of the conditions of contracts the respondents had acted and got the residual work carried out by another contractor on risk and cost of the petitioner for which the petitioner has been informed at each steps i.e. right from estimate, NIT publication and agreement with another contractor. It is stated that the petitioner has been directed to deposit the expenses incurred because of the work taken from the third party from various letters. It is stated that because the



petitioner did not work as per terms of agreement, hence payment was stopped, however, with the completion of agreement on 27.02.2019 entire admissible payment against OM has been made to the petitioner after adjustment of price neutralization and small part of amount on risk and cost. It is submitted that upon preparation of final bill adjustments have been made amounting to Rs. 1,53,03,621/- however, the risk and cost amount is Rs. 1,32,78,045/- which is yet to be recovered from the petitioner.

Regarding the provision of the Constitution of the 'DRE' a stand has been taken that in terms of the agreement selection of 'DRE' is to be done immediately after letter of acceptance is issued and if it was not so done within 28 days of the date of letter of acceptance then upon the request of both the parties the 'DRE' shall be selected as soon as practicable by the appointing authority specified in the P.C. of the agreement. The "Appointing authority" under Section VII of the P.C. is the Chairman, the Institute of Engineers/IRC/ Indian Institute of Arbitration. In Paragraph '31' of the counter affidavit stand has been taken that the 'DRE' has not been selected then upon the request of either or both the parties the 'DRE' can be selected by the appointing authority. The same facts have been reiterated in



Paragraph '33' of the counter affidavit. However in Paragraph '33' one improvement has been made with a statement that since neither parties have requested the appointing authority to select 'DRE' as such it has not been selected till date and now the terms of agreement has expired on 27.02.2019, hence contention made in this paragraph is to be rejected.

As regards the submissions that the petitioner had submitted it's response in different letters which have been brought on record with the supplementary affidavit, it is submitted that the fact remains that the petitioner had not submitted his show cause in response to the notice to show cause issued to the petitioner.

Having heard learned counsel for the parties and on perusal of the records, this Court finds that so far as the dispute with regard to the termination of contract, invocation of performance of bank guarantee and imposition of penalty as also the claim and disputes towards recovery of the amount and cost are concerned, those cannot be gone into the writ jurisdiction of this Court. The agreement provides for a mechanism for settlement of dispute and Clause 6.1.1 onwards there are provisions for selection of the 'DRE' and if either the employer or the contractor is dissatisfied with the 'DRE'



decision then they may give notice to each other of their intention to commence arbitration. In terms of the P.C. the arbitration is to be conducted in accordance with the Bihar Public Work Contract Arbitration Tribunal Act, 2009. In the counter affidavit also the respondents have taken a plea in some of the paragraphs that 'DRE' can be constituted, though in Paragraph '33' a statement has been made indicating that the agreement period has expired hence contention of the petitioner be rejected. It is not specifically denied that because of the expiry of the agreement period the 'DRE' cannot be constituted. This Court is of the considered opinion that once a dispute has arisen between the parties and the agreement contains a mechanism for settlement of the dispute, only because the agreement period has expired it cannot be taken as if the existence of the provision relating to settlement of dispute stood vanished. In other words, the dispute mechanism provided under the agreement in form of 'DRE' still exists and the parties may get their disputes settled through the mechanism provided under the agreement by following the provisions incorporated therein relating to settlement through 'DRE' and Arbitration. This Court, thus, leaves for the parties to approach the appointing authority for constitution of 'DRE' in accordance with the



provision of the agreement.

As regards the order of blacklisting contained in Annexure '11' to the writ application, this Court finds from the records that while the matter relating to blacklisting of the petitioner was under consideration in the hand of the concerned authority, the petitioner had submitted its letters taking certain stand and one of the letters as contained in Annexure '13' to the supplementary affidavit of the petitioner is in response to the letter dated 30.10.2017 (Annexure 'H') to the counter affidavit of the RCD which talks of the blacklisting.

In the opinion of this Court even if there was no specific show cause available on the record pursuant to the show cause notice dated 03.11.2017 which was in form of the reminder, the respondent authorities were under obligation to consider the materials which were already there on the record. Learned counsel for the petitioner has rightly contended before this Court that by simply recording that the petitioner had not submitted his reply to the show cause the respondent authorities cannot avoid consideration of the stand of the petitioner and the materials placed by the petitioner on the record which were nothing but in form of explanation. This Court finds that there is no specific answer to this submission of the petitioner, therefore,



it has to be held that the order as contained in Annexure '11' to the writ application suffers from the vice of non-consideration of the materials available on the record which in turn is violation of one of the facets of the principles of natural justice. This Court is, therefore, of the opinion that Annexure '11' to the writ application has to be quashed and it is quashed accordingly. This would, however, not come in the way of Respondent No. 6 in proceeding afresh against the petitioner by giving an opportunity to him to submit his explanation within a given period and take a decision upon consideration thereof in accordance with law. This Court, therefore, grants liberty to Respondent No. 6 to proceed from the stage of issuance of show cause notice to the petitioner, give an appropriate time to the petitioner to submit his explanation and pass an appropriate order thereon giving reasons thereof.

The writ application stands disposed off with the observation and direction made hereinabove.

(Rajeev Ranjan Prasad, J)

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