

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3683 of 2019

Universal Interior Dacorator through its working partner Mr. Mohan Pandey, aged about 47 Years (Male), Son of Sri Gajendra Pandey, Resident of Mohalla- Mukhtar Toli, Nala Road, P.O. and P.S.- Kadamkuan, Patna-03

... .. Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Building Construction Department, Vishweshwaraiya Bhawan, Bailey Road, Patna-15.
2. The Principal Secretary Building Construction Department, Vishweshwaraiya Bhawan, Bailey Road, Patna-15.
3. The Engineer-in-Chief-cum-Additional Commissioner-Special Secretary Building Construction Department, Vishweshwaraiya Bhawan, Bailey Road, Patna-15.
4. The Chief Engineer (North) Building Construction Department, Vishweshwaraiya Bhawan, Bailey Road, Patna-15.
5. The Superintending Engineer Building Construction Department, Building Circle, Darbhanga.
6. The Executive Engineer Building Construction Department, Building Circle, Darbhanga.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr.Manish Sahay, Advocate Mr.Anil Kumar Sinha, Advocate
For the Respondent/s	:	Mr.Uday Prasad, AC to GP-22

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL ORDER

5 19-11-2019 Petitioner in this case is aggrieved by and dissatisfied with the order of his permanent debarment as contained in Letter No. 2060 dated 17.12.2018 issued under the signature of the Executive Engineer contained in Annexure 'P-9' to the writ application.

Learned counsel for the petitioner submits that the petitioner was a registered contractor of the respondent



department under Class II category and his registration was valid till 02.10.2018, because of the debarment order he has now become helpless and is unable to get his registration renewed.

The matter relates to a dispute arising out of a works contract namely “Renovation and Beautification of Chandradhari Museum Building in Darbhanga for year 2017-18”. The dispute arising out of termination of the said agreement is pending consideration before the learned Arbitration Tribunal constituted under the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008.

Learned counsel submits that so far as the order of debarment is concerned, it is his specific plea that the Executive Engineer, Building Construction Department, Construction Division, Darbhanga is not a competent authority under the Bihar Contractor Registration Rules, 2007 to pass an order of debarment. It is submitted that although under the Bihar Contractor Registration Rules the word used is ‘Blacklisting’ but there is in fact no difference in the action of ‘debarment’ and that of ‘blacklisting’ for that the consequences of both the action is the same and one. These words are some times used interchangeably in different countries and this aspect of the



matter has been discussed by the Hon'ble Supreme Court in the case of **M/s Kulja Industries Limited v. Chief Gen. Manager, W.T. Proj., BSNL and Others** reported in **AIR 2014 SC 9**.

Learned counsel further submits that prior to issuance of Annexure 'P-9' no opportunity to show cause was given to the petitioner. In the counter affidavit there is no material to show that any notice was served upon the petitioner prior to passing of the debarment order.

Learned counsel further submits that in the counter affidavit a plea has been taken that under the Bihar Enlistment of Contractor Rules, 1992, the department has power to blacklist/debar the defaulter for any indefinite specified period and also to withhold any further payment. It is submitted that the Bihar Contractor Registration Rule, 2007 has been adopted by all the works department of the Government of Bihar and in any view of the matter the contentions of the respondents that they have power to permanently debar a contractor is in the teeth of the judgment of the Hon'ble Supreme Court in the case of **M/s Kulja Industries Limited** (supra).

Learned counsel for the State is present and does not dispute the factual position as appearing from the counter affidavit with which no material has been brought on record to



demonstrate that any notice or opportunity to show cause was given to the petitioner prior to passing of the debarment order.

Consideration

Having heard learned counsel for the petitioner and learned counsel representing the State, this Court finds from the materials available on the record that the order of debarment as contained in Annexure 'P-9' has been passed without giving an appropriate opportunity of hearing to the petitioner. The impugned order is also in the nature of a permanent debarment order which is in the teeth of the judgment of the Hon'ble Supreme Court in the case of **M/s Kulja Industries Limited** (supra). Paragraph 17, 18 and 20 of the judgment in the case of **M/s Kulja Industries Limited** (supra) are quoted hereunder for a ready reference :-

“17. That apart the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because 'blacklisting' simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private



parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with *Erusian Equipment & Chemicals Ltd. v. State of West Bengal and Anr.* (1975) 1 SCC 70 : (AIR 1975 SC 266) where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed:

“20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.”

18. Subsequent decisions of this Court in *M/s. Southern Painters v. Fertilizers & Chemicals Travancore Ltd. and Anr.* AIR 1994 SC 1277 : (1994 AIR SCW 639); *Patel Engineering Ltd. Union of India* (2012) 11 SC 257 : (AIR 2012 SC 2342 : 2012 AIR SCW 3260); *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors.*



(2006) 11 SCC 548 : (*AIR 2007 SC 437* : 2006 *AIR SCW 5834*); Joseph Vilangandan v. The Executive Engineer, (PWD) Ernakulam & Ors. (1978) 3 SCC 36 : (*AIR 1978 SC 930*) among others have followed the ratio of that decision and applied the principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.

20. The legal position governing blacklisting of suppliers in USA and UK is no different. In USA instead of using the expression 'Blacklisting' the term "debarring" is used by the statutes and the courts. The Federal Government considers 'suspension and debarment' as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions. Comprehensive guidelines are, therefore, issued by the Government for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise unable to perform satisfactorily. These guidelines prescribe the following among other grounds for debarment :

(a) *Conviction of or civil judgment for—*

(1) Commission of fraud or a criminal offence in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense



indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) xxxx

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.”

Contention of learned counsel for the petitioner that the Executive Engineer, Bihar Building Construction Department, Construction Division, Darbhanga is not the competent authority to pass the order of debarment has got force inasmuch as it would appear from Rule 11(c) of the Bihar Contractor Registration Rules, 2007 that the order of Blacklisting/Suspension is to be passed by the officer who is competent to register the contractor or by the officer under whom registering officer works.

In this case, it is not in dispute that in terms of Rule



4(b), it is the Engineer-in-Chief or an officer not below the rank of Chief Engineer who shall be the Registration Officer. On the face of these materials, this Court, therefore, concludes that the Executive Engineer, Building Construction Department, Construction Division, Darbhanga is not competent to pass an order of debarment.

The writ petition, therefore, succeeds on all the three grounds raised by learned counsel for the petitioner. Annexure 'P-9' is, therefore, set aside and the writ application is allowed.

(Rajeev Ranjan Prasad, J)

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