

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.12193 of 2017

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Bipin Kumar, Son of Shyam Kishore Singh, Resident of New Area, Hanuman Nagar, P.S. Nawada Town, District- Nawada.

... .. Petitioner/s

Versus

1. The State of Bihar
2. The Principal Secretary, Building Construction Department, Bihar, Patna.
3. The Engineer-In-Chief, Building Construction Department, Bihar, Patna.
4. The Chief Engineer (South), Building Construction Department, Mechanical Division, Patna.
5. The Superintending Engineer, Building Circle ,Gaya.
6. The Executive Engineer, Building Division, Nawada.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr.Sanjay Kumar
For the Respondent/s : Mr.M.K.Ambastha-SC26

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
CAV JUDGMENT

Date : 16-09-2019

Heard learned counsel for the parties.

2. This writ application has been preferred for the following reliefs:-

- “(i) For issuance of an appropriate direction/s, order/s, writ/s for quashing order dated 18.08.2017 whereby and under the respondents have cancelled the NIT No.3/BCD Nawada/2016-17 and the respondent be directed to produce the order dated 18.08.2017 and thereafter the same may be set aside;
- (ii) For issuance of an appropriate writ/s, order/s, direction/s to the respondents to issue work order to the petitioner for the NIT No.3/BCD Nawada/2016-17 where the petitioner’s financial bid after



qualifying him in technical bid in NIT bearing no.3/BCD Nawada/2016-17 was opened and he was declared successful;

(iii) For issuance of an appropriate writ/s, order/s, direction/s to the respondents to extend the period of completion of the work which was fixed as 120 days from the date of finalization of financial bid.

(iv) To pass such other order or orders as your lordships may deem fit and proper in the facts and circumstances of the case.”

3. During the pendency of this writ application, the petitioner has filed I.A. No.95 of 2018 praying for quashing of the order dated 27.12.2017 contained in letter no.1166(B) whereby and whereunder the respondent no.3 was pleased to communicate the decision of the departmental committee to suspend the registration of the petitioner as a class I contractor for one year in purported exercise of his power under Rule 11(a) (vii) of the Bihar Contractor Enlistment Rule 2007 and debarred the petitioner from participating in any future tender. Another Interlocutory Application being I.A. No.5606 of 2018 has been filed for quashing the work order dated 13.06.2018 as contained in letter no.1081 issued by the Superintending Engineer, Building Construction Department, Building Circle, Gaya issued in favour of one Surendra Prasad & Company, Anandpura, Nawada for execution of the work namely construction of Block Cum Circle Office Cum Residential



Building, Pakaribarawan.

4. There are other three Interlocutory Applications bearing No.8329 of 2017, 8412 of 2017 and 4240 of 2018 for interim reliefs and disposal of the writ application on merit at the earliest. Since this writ application is being finally disposed of these three Interlocutory Applications are not required to be considered separately.

5. Earlier when the matter was heard on 15.04.2019, this Court passed the following order:-

“Interlocutory Application No. 95 of 2018 has been filed for adding the reliefs in addition to the prayers made in the writ application.

The petitioner has sought to challenge the order dated 27.12.2017 as contained in Letter No. 1166(B) by which during pendency of the writ application respondent no. 3 has suspended the registration bearing No. Class I (Personal)-43(B)/2017 of the petitioner for a period of one year in purported exercise of his power under Rule 11a(vii) of Bihar Contractor Enlistment Rule 2007 and thereby debarred the petitioner from participating in any future tender for a period of one year.

Earlier, learned counsel representing the State had informed this court that the petitioner had filed a separate writ application challenging the order dated 27.12.2017, however learned counsel for the petitioner has informed this court that the writ application was presented but after the defects were pointed out, the said writ application was not re-filed, and as such the token given to the petitioner has been cancelled. It is submitted that in such circumstances the I.A. bearing No. 95/2018 be treated as part and partial



of the writ application.

Learned counsel for the State submits that in fact the order put to challenge by filing Interlocutory Application has already lost its relevance by efflux of time.

Be that as it may, let I.A. No. 95/2018 be allowed to be treated as part and partial of the writ application.

I.A. No. 4240/2018 has been filed for requesting the court to decide and dispose of the writ application, as according to the respondent State, there is an interim order dated 12.01.2018 because of which the work of construction of Block Office at Pakribarawan is likely to suffer if the writ application is not disposed of.

Learned counsel for the petitioner as well as State jointly submit that enough pleadings are available on the record to dispose of the case. No further affidavit is required to be filed by either of the parties. In these circumstances this court has proceeded to hear the matter on merit.

In course of hearing, learned counsel for the petitioner submits that the decision taken by the Departmental Tender Committee in its meeting held on 25.08.2017 (Annexure 'A' to the counter affidavit filed on behalf of Respondent Nos. 4, 5 & 6) is a *malafide* decision inasmuch as it will appear that after the petitioner was already declared successful bidder in the meeting held on 29.05.2017 by the Departmental Tender Committee, as contained in Annexure '5' to the supplementary affidavit filed on behalf of the petitioner, a decision was taken to recommend the name of the petitioner for issuance of work order, there was no reason for the Departmental Tender Committee to entertain a complaint received after 06.04.2017, which was the last date fixed for submission of the complaint.

Learned counsel pointed out from Annexure '5' (relevant page 159 of the brief) that on 29.05.2017, one of the complaints received against the petitioner was considered and was



rejected. Regarding the second complaint, which was received after opening of the financial bid, the Departmental Tender Committee took a decision that because the said complaint was received after opening of the financial bid and beyond the prescribed date for submission of the objection and it is likely to result in giving rise to dispute and delay in the completion of work, the same is liable to be rejected.

It is submitted that once the complaint was rejected, there was no reason that the Technical Evaluation Committee would have taken would have taken a decision to call for an explanation from the petitioner.

Learned counsel pointed out from the materials available on the record that pursuant to said leeway granted to the Chief Engineer, he issued a letter No. 930(B) dated 31.05.2017 (Annexure 'B' to the counter affidavit) whereby he called upon the petitioner to submit an explanation as to why he had not disclosed about the work of the Buniyad Center being done by him under the Building Construction Corporation. The explanation was submitted immediately within the prescribed period of three days. The petitioner stated therein that on the date of uploading of the Tender, in the present case, there was no agreement with the Building Construction Corporation and in absence of there being an agreement he could not have provided the contract number in the prescribed column in which the contract number is to be given.

Learned counsel submits that Tender was uploaded on 15.02.2017 whereas the agreement in respect of the Buniyad Center was executed on 18.02.2017 the same was not disclosed in the Tender document. It is submitted that despite the fact that petitioner had submitted his reply on 03.06.2017, the competent authority kept on sitting over the matter and did not take any decision thereon. In this regard, the petitioner had expressed his apprehension in his letter dated



03.08.2017 addressed to the Engineer-in-Chief as well as the Principal Secretary as contained in Annexure '8' series of the writ application, the petitioner had stated in his letter that the delay is being caused purposely with an intention to allow the entire tender period to expire.

Learned counsel submits that his apprehension has come true, because ultimately, on 25.08.2017, the Tender Committee cancelled the tender on this ground alone that the tender period of 120 days has been expired.

Learned counsel submits that thereafter vide Annexure '1' which is attached with the application under Section 151 filed on behalf of the petitioner, the petitioner was called upon to show cause vide letter no. 9568 dated 30.10.2017. It is surprising that show cause was asked alleging that he had committed irregularities in the construction work of the Pakribarawan Block residential house. It is submitted that this work was never allotted to the petitioner and it is difficult to understand how this kind of unmindful letter to show cause could have been issued to the petitioner by the Engineer-in-Chief cum Additional Commissioner cum Special Secretary of the Building Construction Department.

Learned counsel submits that the petitioner had submitted his reply to the show cause notice but then without considering the reply of the petitioner, the Engineer-in-Chief decided to place the registration of the petitioner under suspension for a period of one year.

Annexure '1' to the I.A. No. 95/2018 as contained in Memo No. 11661 dated 27.12.20147 is the order by which the registration of the petitioner was placed under suspension. Submission is that even though the period of one year has expired from the date of issuance of Annexure '1', it is required to be noticed by this court in order to complete the chain of *malafide* which the petitioner is



pleading in the present case. The submission is that the letter dated 27.12.2017 was issued with the sole intention that the petitioner be not allowed to participate in the re-tender process which had taken place after cancellation of the Tender in question in which the petitioner had succeeded at the financial bid stage. Thus, by issuing the two orders, firstly on 25.08.2017 cancelling the Tender, and secondly, by issuing order dated 27.12.2017, the respondents ensured that petitioner should not participate in the Tender and no impediment should come in the way of the respondents in awarding the work to a person of their choice.

Learned counsel for the petitioner has further submitted that another public law element is involved in this case inasmuch as petitioner has quoted the rate 5.67% below the schedule rate whereas in the re-tender the work has been sought to be allotted to the tenderer who has quoted 7.02% above BOQ. It is submitted that this aspect of the matter may be considered along with the aforesaid submissions.

Learned counsel for the State has opposed the submission of learned counsel for the petitioner, as according to him, the petitioner had received the work order in respect of the work of Buniyad Center on 13.01.2017 itself. It is submitted that in the agreement dated 18th February, 2016-17 between the Bihar State Building Construction Corporation Limited and the petitioner, the date of commencement of the said work is noted as 13.01.2017 (as per work order). It is submitted that the petitioner was aware of the commitment under the said work order which he had not disclosed in the tender document.

It is submitted that because the parties indulged in leveling allegations against each other and it took some time in resolving the dispute which ultimately led to expiry of 120 days period, the Tender Evaluation Committee in its meeting held on 25.08.2017 rightly decided to cancel the



tender and to go for re-tender.

Learned counsel for the State submits that in order to satisfy this court, let this matter be listed on Monday i.e. 22nd April, 2019 under the same heading when he will place on record a copy of the work order which is said to have been handed over to the petitioner well before the date of uploading of Tender in the present case.

Learned counsel shall also inform this court as to whether pursuant to the work order issued in terms of letter no. 1081 dated 13.06.2018 enclosed with I.A. No. 5606 of 2018, the work has proceeded, if yes, then to what extent. All these informations shall be made available to the court on the next date of hearing.”

6. After the aforesaid order was passed, the State-respondents have filed a second supplementary counter affidavit in which statements have been made that an agreement in respect of the work in question has been executed vide agreement no.03/2018-19 and 01/2018-19, however, the work has not been started due to reason that old building had to be demolished. Today, however, learned Standing Counsel representing the State of Bihar has placed before this Court a copy of the letter no.1401 dated 07.09.2019 written by the Executive Engineer, Building Division, Nawada wherein the present status of the works in question have been provided. In respect of Warsaliganj Block Office it is stated that the foundation work has been completed and the work of tie-beam



is in progress. As regards the Pakaribarawan Block Office it is stated that the demolition work of the old building is almost complete and the layout work for the new building is in progress.

7. The grievance of the petitioner in this case is in fact on three aspects of the matter. Firstly the petitioner has challenged the cancellation of tender vide NIT No.3/BCD Nawada/2016-17 and the prayer is to direct the respondents to issue work order to the petitioner because the petitioner claims that he was declared successful.

8. So far as this submission of the petitioner is concerned, it appears from the pleadings available on the record that the petitioner was issued work order from the Bihar State Building Construction Corporation Ltd., Gaya on 13.02.2017 itself with respect to one work for the construction of Buniyad Centre at Nawada. The agreement for the said work was executed on 18.02.2017. On the date of submission of the tender in respect of the present work the petitioner was required to disclose his existing commitments. On 15.02.2017 when the petitioner uploaded his tender document, he was fully aware of his commitment in terms of the work order dated 13.02.2017, therefore in such circumstance if the respondent authorities



decided not to extend the validity period of the bid (120 days) and did not issue work order in favour of the petitioner, no arbitrariness in the decision making process may be found in the same. The contention of learned counsel for the petitioner that the complaint was entertained after the last date for submission of complaint loses its significance when it is found that the petitioner had not disclosed his existing work commitment. Although the petitioner had subsequently explained his stand in his explanation dated 13.06.2017 submitted to the Chief Engineer pursuant to his letter no.930 dated 31.05.2017 the respondents did not proceed further with this tender. Even though the petitioner was the lowest tenderer but the respondents did not finalize the same within 120 days, it cannot be concluded that petitioner had acquired a right to get the tender. In tender matters, it is well settled that the Courts should not impose its opinion on the decision of the employer unless arbitrariness in the decision making process writs large and the same is found to have been done with an intention to confer benefits to any other person. The prayer of the petitioner to that extent and till this stage is, therefore, not fit to be accepted.

9. The second relief prayed by the petitioner is to quash the order dated 27.12.2017 by which the registration of



the petitioner had been placed under suspension. Even though the period of one year for which the registration was suspended has expired, this Court would consider the grievance of the petitioner in order to reach to a just and proper conclusion as regards the subsequent relief prayed by the petitioner. It appears that the petitioner had been served with a show cause notice calling upon him to show cause as to why his registration be not placed under suspension. The contents of the show cause notice are reproduced hereunder:-

“बिहार सरकार
भवन निर्माण विभाग

प्रेषक,
लक्ष्मी नारायण दास
अभियंता प्रमुख-सह-अपर आयुक्त-सह-विशेष सचिव
भवन निर्माण विभाग, बिहार,
सेवा में,
विपिन कुमार,
न्यू एरिया हनुमान नगर
नवादा।

पटना, दिनांक 30.10.2017

विषय:- संवेदक श्री विपिन कुमार, न्यू एरिया
अनुमान नगर, नवादा, जिला-नवादा को कालीकृत
करने के संबंध में।

महाशय,
उपर्युक्त विषयक दिनांक-09.10.2017 को अभियंता
प्रमुख-सह-अपर आयुक्त-सह-विशेष सचिव, की
अध्यक्षता में बैठक आहूत की गयी। नवादा,
जिलान्तर्गत पकरीबरोवा प्रखंड-सह-अंचल
कार्यालय-सह-आवासीय भवन के निर्माण कार्य में
अनियमितता बरती गयी है।

अतः इस संबंध में अपना स्पष्टीकरण अधोहस्ताक्षरी
को शीघ्र भेजना सुनिश्चित करें।

कृपया इसे सर्वोच्च प्राथमिकता दी जाय।

विश्वासभाजन

ह0अ0

(लक्ष्मी नारायण दास)



अभियंता प्रमुख-सह-अपर आयुक्त-सह-विशेष सचिव”

10. The petitioner submitted his reply to the show cause notice dated 30.10.2017 and submitted that he was not awarded the work of construction of Block building and other residential houses and, therefore, there is no question of his being blacklisted. Here it is to be noticed that the show cause notice does not propose suspension of registration. Without considering the said reply of the petitioner the Engineer-in-Chief issued order dated 27.12.2017 as contained in Annexure-1 to the I.A. No.95 of 2018 by which he communicated that in the Department's meeting held on 20.12.2017 it was decided to place the registration of the petitioner under suspension for one year. It is apparent that the letter no.9572 dated 30.10.2017 was issued calling upon the petitioner to show cause on a different issue but when the order of suspension of registration was issued, it contained a totally different reason. The show cause notice was not with regard to his non furnishing of existing commitment of work and, therefore, the petitioner had no occasion to submit any reply on the said point.

11. In the case of **Gorkha Securities Services Vs. Govt. of NCT of Delhi** reported in **AIR 2014 SC 3371** while considering a case of blacklisting the Hon'ble Supreme



Court referred M/s Erusian Equipment & Chemicals Ltd. Vs.
State of West Bengal & Anr. (AIR 1975 SC 266)=(1975) 1 SCC
70 and quoted paragraph 20 of the said case as under:-

“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.”

12. Further, specifically dealing with the contents
of show cause notice their Lordships held as under:-

“19. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When



it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

20.The High Court has simply stated that the purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent. However, it is equally important to mention as to what would be the consequence if the noticee does not satisfactorily meet the grounds on which an action is proposed. To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:

(i) The material/grounds to be stated which according to the department necessitates an action;

(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.

We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.

Discussion with reference to the instant case.”

13. On application of the aforesaid principles of law and natural justice, to this Court therefore it is crystal clear that the order dated 27.12.2012 as contained in Annexure-1 to



the I.A. No.95 of 2018 is in complete violation of the principles of natural justice and the same is liable to be set aside. It is accordingly set aside. While dealing with the third aspect of the matter this Court will examine the plea of malafide as against this action of suspension of registration.

14. Now coming to the third aspect of the matter wherein the petitioner has prayed for quashing of the work order dated 13.06.2018 issued in favour of one M/s Surendra Prasad & Company, Anandpur, Nawada for execution of work. It appears that after the cancellation of the NIT No.3/BCD Nawada/2016-17 the department proceeded to float a fresh tender vide Re-tender Notice No.03/BCD Nawada/2017-18. A copy of the Re-tender Notice has been brought on record as Annexure- 'C' to the counter affidavit. Perusal of the same shows that the tender was invited on 07.11.2017. The last date for submission of tender was 07.12.2017 upto 3.00 PM. A corrigendum to the same was issued vide memo no.927 dated 30.11.2017 wherein the last date for uploading the tender was fixed till 27.12.2017 upto 3.00 PM. It is the case of the petitioner that because of the decision taken in the meeting of the Department held on 20.12.2017 which was presided by the Engineer-in-Chief-cum-Commissioner-cum-Special Secretary,



Building Construction Department, to place the registration of the petitioner under suspension, the petitioner was deprived of participation in the re-tender. It has been pointed out by learned counsel for the petitioner that the tender papers were required to be downloaded between 22.12.2017 to 26.12.2017 but just before that the Engineer-in-Chief ensured that the registration of the petitioner is placed under suspension. The order contained in the memo no.11661 dated 27.12.2017 was issued on the date (27.12.2017) which was the last date for uploading of the tender. It is submitted that the malafide writs large on the face of the materials available on the record which make it crystal clear that the petitioner was targeted by the Engineer-in-Chief and thereby the petitioner was deprived of an opportunity to participate in the re-tender.

15. Learned counsel for the petitioner has relied upon a judgment of the Hon'ble Supreme Court in the case of **Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.** reported in **(1979) 3 SCC 489** to submit that the action of the Engineer-in-Chief being arbitrary with an intention to deprive the petitioner from participating in the tender and to favour some one else, the petitioner having been deprived of the level playing field the subsequent selection



of M/s Surendra Prasad & Company and issuance of work order during the pendency of the writ application is wholly illegal and is liable to be set aside. It is submitted that the issue involved in this case has a public interest element inasmuch as it would appear that the earlier decision to cancel the first tender was taken on 25.08.2017 on the complaint of Surendra Prasad and Company after opening of the financial bid in which the petitioner was the lowest tenderer. During this period Surendra Prasad & Co. was placed in the debar list of Rural Works Department on 28.06.2017 for not satisfactorily completing the work. On 20.07.2017 said Surendra Prasad & Co. was removed from the debar list. Therefore the bid of the petitioner was within the knowledge of said Surendra Prasad. In the re-tender he was allowed to participate whereas this petitioner was placed in a position from where he could not have participated, thus against the public interest the competition was scuttled down.

It is submitted that even if with respect to the challenge to cancellation of first tender this Court takes a view that no arbitrariness may be found in the matter of cancellation of first tender so as to interfere with the cancellation of first tender, if at this stage the entire chain of facts are looked into it would appear that the official respondents did not extend the



validity period of the first tender with a per-mediation of mind on a totally irrelevant consideration with intention to favour the contractor of their choice, they suspended the petitioner only two days before the date starting for downloading the re-tender documents so that petitioner cannot participate and then work is awarded to a contract or of their choice.

16. Learned counsel has pointed out from the records that during the pendency of the writ application, this Court had passed the interim order on 12.01.2018 which is reproduced hereunder:-

“It goes without saying that any action taken by the respondents pursuant to fresh tender shall abide by the final result of this writ petition.”

17. It is his submission that it will appear from perusal of the minute of the meeting in which M/s Surendra Prasad & Company was selected that the respondents were aware of the interim order of this Court, therefore the departmental tender committee in its decision made it clear that the work order shall be issued only after filing an Interlocutory Application and passing of an order by the Hon'ble High Court. The tender committee gave this responsibility to the Executive Engineer, Building Division, Nawada to file the I.A. but without filing any application seeking an order of this Court in terms of



the decision of the tender committee, the work order was issued hurriedly with sole intention either to render the writ application infructuous or to keep the litigation pending for longer time.

18. Learned Standing Counsel for the State of Bihar has contended before this Court that because of the urgency to complete the work the work order was issued and now because the work has proceeded, this Court need not interfere with the work order.

19. Having heard learned counsel for the petitioner and learned Standing Counsel for the Government and upon perusal of the records, this Court finds much substance in the submissions of learned counsel for the petitioner. The maxim *res ipsa loquitur* i.e. the thing speaks for itself is fully attracted in the present case. It is not in dispute that even with the existing commitment of the work of Buniyad Centre for which the work order was issued in favour of the petitioner on 13.02.2017, the petitioner was eligible to participate in the re-tender. The petitioner had earlier represented to the Chief Engineer (South), Building Construction Department, Bihar, Patna vide his letter dated 13.06.2017 in response to his letter of the Chief Engineer bearing no.930 dated 31.05.2017 (Annexure-B to the counter affidavit of respondent nos.4 to 6). The Chief



Engineer had just asked for an explanation and in response to the same the petitioner had represented that even after subtraction of amount of Rs.350 lacs which is valuation of the work of Buniyad Centre the bid capacity of the petitioner is more than Rs.80,93,81,074/-. Let it be recorded that the letter of the Chief Engineer was not proposing any blacklisting or suspension of registration and after the response of the petitioner was received in the office of the Chief Engineer no further action was taken. Only thing that happened was that the validity period of 120 days in respect of first tender was not extended.

20. The decision to place the registration of the petitioner under suspension was taken in the meeting held on 20.12.2017 taking note of the department letter no.9572 dated 30.10.2017 which was also replied by the petitioner vide his show cause dated 13.11.2017. This Court has already discussed this aspect of the matter while considering the challenge to the order dated 27.12.2017 hereinabove and has found the action wholly arbitrary.

21. It is, therefore, evident that the petitioner had bid capacity available to participate in the re-tender and this fact was known to the official respondents but because of the illegal



and arbitrary decision on the part of the committee in its meeting held on 20.12.2017 under Chairmanship of the Engineer-in-Chief, the petitioner was not left in a position to participate in the re-tender. His registration had gone under suspension because of a wholly arbitrary decision. In fact the petitioner has been able to demonstrate that he had become victim of a malafide action if not in fact definitely it was a malice in law while decision making on the part of the department and the Engineer-in-Chief of the Department who was head of the Committee which took decision on 20.12.2017 to place the registration of the petitioner under suspension.

22. This Court is, therefore fully convinced that the arbitrary exercise of power by the authority i.e. Engineer-in-Chief in the garb of his authority under the Bihar Contractors Registration Rules, 2007 has caused injustice not only to the petitioner but by doing so public interest has been ignored. The public interest lies in competition among the tenderers by giving them a level playing field. Even during the pendency of this writ application when the departmental tender committee took a decision to file an I.A. seeking an order from this Court, the Executive Engineer of the Building Division, Nawada did not take care of the decision of its own department and proceeded to



issue work order pursuant to the communication contained in Annexure-1 to I.A. No.5606/2018 issued under the signature of the Superintending Engineer. It is well settled in law that action taken in haste indicates towards malafide and this Court finds the same coming true to the facts of the present case.

23. In the second supplementary counter affidavit which was filed in this Court on or about 22.04.2019 the respondent authorities have made statement that an agreement has been executed with the said Surendra Prasad & Company, copy of which has been brought on record. It is further stated that the work has not started due to reason that the old building is to be demolished. At this stage the information furnished shows that in respect of Warlisaliganj Block Office only foundation work has been completed whereas in respect of Pakaribarawan Block Office the demolition of old building is almost complete and layout work of new building is in progress. This Court finds that the decision of the departmental tender committee has taken note of the interim order of this Court wherein any action taken by the respondents shall be abide by the final result of this case. The communication as contained in Annexure-1 to I.A. No.5606/2018 also contains a stipulation that the work order is subject to result of the writ application. In



these circumstances, this Court finds that there is no need of impleadment of Surendra Prasad & Company as a party respondent who has got the work order pursuant to the decision of the departmental tender committee but in violation of the conditions stipulated by the tender committee that the work order shall be issued after filing of Interlocutory Application and passing of an order by this Court. It is not in dispute that all subsequent action including issuance of work order and agreement has taken place after passing of the interim order of this Court on 12.01.2018.

24. The manner in which the Department has acted through its' Engineer-in-Chief who has in the garb of exercise of his statutory power acted wholly arbitrarily and exercised his discretion in such a manner that it lacks bonafides, this Court is reminded of the judgment of the Hon'ble Supreme Court in the case of **Lucknow Development Authority vs. M.K. Gupta** reported in (1994) 1 SCC 243. Paragraph 11 of the said judgment is quoted hereunder for a ready reference:-

“11. Today the issue thus is not only of award of compensation but who should bear the brunt. The concept of authority and power exercised by public functionaries has many dimensions. It has undergone tremendous change with passage of time and change in socio-economic outlook. The authority



empowered to function under a statute while exercising power discharges public duty. It has to act to subserve general welfare and common good. In discharging this duty honestly and bona fide, loss may accrue to any person. And he may claim compensation which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility to pay the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. The culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same. It was never more necessary than



today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. When the court directs payment of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is, therefore, necessary that the Commission when it is satisfied that a complainant is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behaviour by dividing it proportionately where there are more than one functionaries.”

25. Again, the Hon’ble Supreme Court in the case of **Delhi Airtech Services Private Limited & Another Vs. State of Uttar Pradesh & Another** reported in (2011) 9 SCC 354 observed in paragraph 215 as under:-

“215. The concept of public accountability and performance of functions takes in its ambit, proper and timely action in accordance with law. Public duty and public obligation both are essentials of



good administration whether by the State or its instrumentalities. In Centre for Public Interest Litigation v. Union of India [(2005) 8 SCC 202 : (2006) 1 SCC (Cri) 23] , this Court declared the dictum that State actions causing loss are actionable under public law. This is a result of innovation, a new tool with the courts which are the protectors of civil liberties of the citizens and would ensure protection against devastating results of State action. The principles of public accountability and transparency in State action are applicable to cases of executive or statutory exercise of power, besides requiring that such actions also not lack bona fides. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable for both their inaction and irresponsible actions. If what ought to have been done is not done, responsibility should be fixed on the erring officers; then alone, the real public purpose of an answerable administration would be satisfied.”

26. In paragraph 218 of the judgment in the case of **Delhi Airtech Services Private Limited** (supra), the Hon’ble Supreme Court recorded as under:-

“218. Principles of public accountability are applicable to such officers/officials with all their rigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, which are ex facie discriminatory. The adverse impact of



lack of probity in discharge of public duties can result in varied defects, not only in the decision-making process but in the final decision as well. Every officer in the hierarchy of the State, by virtue of his being “public officer” or “public servant”, is accountable for his decisions to the public as well as to the State. This concept of dual responsibility should be applied with its rigours in the larger public interest and for proper governance.”

27. Recently in the case of **M/s Dhanpat Prasad Vs. the State of Bihar & Ors.** reported in **2019(2) PLJR 1071** pertaining to the same department while examining the action of the Engineer-in-Chief with regard to suspension of registration of the petitioner of the said case, this Court noticed that the said order was passed in complete violation of the principles of natural justice, therefore this Court was constrained to observe in paragraph 11 and 12 as follows:-

“11. After hearing learned counsel for the petitioner and taking into consideration the stand of the respondents as disclosed in the counter affidavit, this Court is of the considered opinion that the impugned order is liable to be quashed on both grounds i.e. violation of principles of natural justice during the period the request of the petitioner was pending consideration and non-consideration of the materials available on the record which in fact is another limb of the principles of natural justice. The Engineer-in-Chief, Road Construction



Department has acted in hot haste without realising that the stand of the petitioner as contained in Annexure-P-8 is required to be considered. It seems that he is applying his power under the Bihar Contractors Registration Rules without abiding by the principles of natural justice and the provisions of the Rules which clearly mandate that before passing any such order the contractor has to be heard. In this case, no doubt a show cause notice was issued but when the contractor/petitioner submitted his reply the same has not been considered which amounts to violation of the Rules. Recently in a number of cases which has come before this court and one of them being CWJC No.2398/2019 which has been decided by this court only on 29.03.2019 this Court has noticed that order is being passed by the Engineer-in-Chief, Road Construction Department suspending the license or debarring the contractor without giving a show cause or considering the reply. This matter has to be taken up seriously as it has a tendency to give rise to litigation. The order passed by the Engineer-in-Chief has got a civil consequence, therefore, while dealing with such matters it is incumbent upon him to abide by the rules of natural justice.

12. It is for this reason the order is being communicated to the Principal Secretary, Road Construction Department, Government of Bihar, Patna to look into the matter and stop this kind of practice in the department of passing order in haste in violation of the provisions of the Rules and principles of natural justice particularly so when these are in the nature of drastic powers having civil



consequences.”

28. In the case of **State of Mysore Vs. P.R. Kulkarni and others** reported in (1973) 3 SCC 597 while considering the case to challenge the impugned orders on the ground of violation of principles of natural justice and misuse of power observed as under:-

“...Misuse of power” or “mis-application of power” or a *Detournement de Puvoir*” (as it is called in French Administrative Law), are terms correctly employed to describe the use of a power in this illegal fashion. It was not necessary for the respondents to go so far as to establish that such misuse took place with the deliberate object of benefiting others at the expense of the respondents, although learned Judges of the High Court were inclined to hold, not without good reasons, that such an object may also be there. It was enough to prove, as the respondents succeeded in doing, that the power of reversion was used for a collateral or legally extraneous purpose.....”

29. In the case of **Express Newspapers Pvt. Ltd. and others v. Union of India and others** reported in AIR 1986 SC 872 (paragraph 119) the Hon’ble Supreme Court held as under:-

“In *Dr. Ram Manohar Lohia v. State of Bihar* [AIR 1966 SC 740 : (1966) 1 SCR 709], it was laid down that the courts had always acted to restrain a misuse of statutory power and more readily when improper motives underlie it. Exercise of



power for collateral purpose has similarly been held to be a sufficient reason to strike down the action. In *State of Punjab v. Ramjilal* [(1971) 2 SCR 550 : (AIR 1971 SC 1228)] it was held that it was not necessary that any named officer was responsible for the act where the validity of action taken by a Government was challenged as mala-fide as it may not be known to a private person as to what matters were considered and placed before the final authority and who had acted on behalf of the Government in passing the order. This does not mean that vague allegations of mala fide are enough to dislodge the burden resting on the person who makes the same though what is required in this connection is not a proof to the hilt, as held in *Barium Chemicals Ltd. v. Company Law Board* 1966 Supp SCR 311] : [AIR 1967 SC 295) the abuse of authority must appear to be reasonably probable.”

30. In the case of **Jayrajbhai Jayantibhai Patel Vs. Anilbhai Nathubhai Patel and others** reported in (2006) 8 SCC 200 while considering the scope of judicial review in case of abuse or misuse of power their Lordships of the Hon’ble Supreme Court held that each case has to be decided on the basis of its own facts. The Hon’ble Apex Court considered the principles of Wednesbury unreasonableness and held inter alia as under:-

“..... Though judicial restraint, albeit self-recognized, is the order of the day, yet an administrative decision or action which



is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the court to intervene.....”.

31. In the case of **Uddar Gagan Properties Limited Vs. Sant Singh and others** reported in **(2016) 11 SCC 378** the Hon’ble Supreme Court recorded in paragraph 23 as under:-

“**23.** It is well settled that use of power for a purpose different from the one for which power is conferred is colourable exercise of power. Statutory and public power is trust and the authority on whom such power is conferred is accountable for its exercise. Fraud on power voids the action of the authority. Mala fides can be inferred from undisputed facts even without naming a particular officer and even without positive evidence¹⁹. In the present case, abuse of power in dealing with the matter by the functionaries of the State is more than clear as rightly found by the High Court. Challenge to acquisition may not be confined to those who have not accepted the amount of compensation or consideration. Once such order/transaction is vitiated there could be no estoppel on the ground that compensation/consideration has been received, as the land loser has little choice in the face of acquisition.”

19. State of Punjab v. Ramjilal, (1970)3 SCC 602, paras 9-10; Express Newspapers (P) Ltd. v. Union of India, (1986) 1 SCC 133, paras 119-20



32. It is well settled by judicial pronouncements that where the petitioner alleges arbitrariness and malafides in the decision making process against the respondent State and its authorities, it is not necessary to implead each and every officer by his name and the issue of arbitrariness and malafides may be considered by looking into the decision making process on the face of the materials available on the record.

33. In the opinion of this Court there are enough materials on record to conclude that the entire decision making process right from the stage of placing the petitioner's registration under suspension and then issuance of work order in favour of M/s Surendra Prasad & Company by the Executive Engineer without following the departmental decision to seek permission of this Court prior to issuance of the work order are result of not only the arbitrariness but is also detrimental to the larger public interest inasmuch as the department scuttled the competition by depriving the petitioner from participating in the tender and then awarded the same to the tenderer who was aware of the earlier financial bid of the petitioner. This Court is aware that M/s Surendra Prasad & Company is not a party respondent in this case but what is apparent from the record is that the work order has been issued in favour of the said company after the interim order of this Court passed on 12.01.2018 and pursuant to the decision of



the departmental committee which itself makes the decision subject to result of this case. In the case of **Nikki Devi VS. The State Election Commission (Panchayat) & Ors.** reported in **2019(3) PLJR 856** the Hon'ble Division Bench of this Court while holding that the appellant cannot be said to have indulged in a corrupt practice and therefore her election was not liable to be set aside did not call upon subsequently elected Mukhiya Smt. Rajkumari Devi as the Hon'ble Division Bench found that there was an interim order dated 26.02.2019 in the Letters Patent Appeal saying that the election held during pendency of the appeal shall be subject to outcome of the appeal. Elections were held in March, 2019 i.e. after interim order passed by the Hon'ble Division Bench, therefore the Hon'ble Division Bench did not find it necessary to issue fresh notices to the newly elected candidate. The same analogy is to be followed here because in this case also after the interim order of this Court the re-tender has been finalized subject to result of this case, work order has been issued in favour of M/s Surendra Prasad & Company and the agreement executed.

34. In ultimate analysis, this Court finds that the entire re-tender process leading to issuance of work order and execution of agreement have stood vitiated and are liable to be set aside and those are accordingly set aside. The writ application and



I.As are allowed to the extent indicated hereinabove. The State-respondents have deprived the petitioner from the level playing field on the strength of a wholly arbitrary and malafide exercise of power by placing the registration of the petitioner under suspension. This Court having noticed that the petitioner has been compelled to move this Court to get rid of arbitrary decisions hereby awards a cost of Rs.25,000/- to the petitioner payable within 30 days from the date of receipt/production of a copy of this order. The cost shall be recovered from the erring officials in accordance with law.

35. The Department will have to quickly amend its' manner of exercise of power by the concerned authorities so that it does not generate litigations requiring Court's intervention and the State is saddled with cost.

36. This writ application is thus allowed. The State-respondents will be at liberty to float a re-tender for the work in question and proceed accordingly.

(Rajeev Ranjan Prasad, J)

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AFR/NAFR	AFR
CAV DATE	11.09.2019
Uploading Date	16.09.2019
Transmission Date	

