

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7712 of 2020

=====

Espan Infrastructure (I) Limited Earlier known as Espan Infrastructure Ltd., a company registered under the Companies Act, having its Registered Office at B-405, Second Floor, Nirman Vihar, Delhi- 110092, At present registered at Pocket-E, Mayur Vihar, Phase- II, Delhi- 110091 through its Authorized Signatory Animesh Verma (aged about 38 years) (Male) Son of Shri Pramod Kumar Verma, Resident of 4/444 G-2, Sector-4, Vaishali, Vasundhara, P.S.- Indirapuram, Ghaziabad, Dist. -Ghaziabad (Uttar Pradesh)-201010.

... .. Petitioner

Versus

1. The State of Bihar Department of Road Construction, Visheshwaria Bhavan, Bihar, Patna- 800001 through its Principal Secretary.
2. The Principal Secretary Department of Road Construction, Government of Bihar, Visheshwaria Bhavan, Bihar, Patna- 800001.
3. The Engineer-in- Chief- Cum-Additional Commissioner-cum- Special Secretary Department of Road Construction, Government of Bihar, Visheshwaria Bhavan, Bihar, Patna- 800001.
4. The Chief Engineer Department of Road Construction, Government of Bihar, NH Division, Patna- 80000q1.
5. The Executive Engineer Department of Road Construction, Government of Bihar, NH Division, Chapra.
6. The Assistant Engineer Department of Road Construction, Government of Bihar, NH Division, Chapra.
7. The Junior Engineer Department of Road Construction, Government of Bihar, NH Division, Chapra.

... .. Respondents

=====

Appearance :

For the Petitioner/s : Mr.Alok Kumar Agrawal
For the Respondent/s : Mr. Ravi Bharadwaj

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 10-12-2020

1. Heard Mr. Alok Kumar Agarwal, learned counsel for



the petitioner and Mr. Ravi Bharadwaj, learned counsel for the respondents

2. The petitioner company had bagged the contract for periodical repair work of NH -101 for the year 2016-17 at an estimated cost of Rs. 541.61 Lakhs against the Notice Inviting Tender(NIT) bearing No. 2/16-17 issued by the Executive Engineer, Chapra. The work had to be completed within five months. After the agreement was signed, the work started from 16.01.2017 and it was duly completed within the stipulated period of five months on 15.06.2017.

3. While executing the work under the agreement, the petitioner company had obtained Bitumen from Mathura Refinery of Indian Oil Corporation Limited (hereinafter referred to as "IOCL") because of scarcity of Bitumen in Barauni Refinery and the aforesaid procurement was ratified by the respondents. Immediately after the completion of the project, the NH was sub-merged with flood water and some stretch of the roads repaired by the petitioner company got damaged. However, the necessary repairs were made and the Executive Engineer was informed about the same. The



repair work was certified by the Assistant Engineer after proper inspection.

4. However, the petitioner was again noticed about certain pot-holes on the road, which were asked to be repaired or else disciplinary action under the Bihar Contractor Registration Rule, 2007 was threatened.

5. Learned counsel for the petitioner has submitted that this notice was nothing but an attempt to anyhow delay the final payment of bills to the petitioner.

6. Shortly thereafter, another notice was issued to the petitioner intimating him that he had procured the Bitumen / emulsion from Mathura Refinery when he was required to procure the same from Barauni Refinery and that certain challans of procurement were not produced before the respondents. On this pretext, it has been urged that the payment to the petitioner was withheld.

7. The case of the petitioner is that according to clause -17 of the special conditions of contract, the Bitumen had to be procured only from any Government of India undertaking oil company and in the event of any dispute regarding



Bitumen procurement or its specification, the decision of the Superintending Engineer was to be final and binding.

8. The petitioner had made known to the authorities that at the time of repair work/execution of work, no dispute was ever raised with respect to procurement of Bitumen or its specification and such objection was only being raised to delay the payment of bills to the petitioner.

9. Without considering the aforesaid issue, a show-cause notice was again issued to the petitioner on 05.02.2018 informing him that only ten out of 31 challans of procurement were found to be genuine.

10. In response to the aforesaid charge, the petitioner clearly intimated that since the Bitumen was procured from Mathura Refinery, which had confirmed the supply of Bitumen, any statement issued by the Patna IOCL regarding some of the challans being fake, cannot be accepted. In support of the claim of the petitioner that the Bitumen was procured from Mathura Refinery, the authorities were made known and were provided with the bank statement regarding payment by the petitioner to the Mathura Refinery for



procurement of Bitumen. This, in the estimation of the petitioner, clinched the issue with respect to procurement of Bitumen and the issue ought to have been set at rest at that point. But without considering the aforesaid issues, by the impugned order dated 24.12.2018 issued by the Engineer in Chief, the petitioner company has been blacklisted for a period of ten year under clause 11(Ka) of Bihar Contractor Registration Rules, 2007 (hereinafter referred to as the "rules").

11. The aforesaid order of blacklisting the petitioner company for ten years has been challenged in the present writ petition as being wholly illegal, arbitrary and in complete violation of principles of natural justice.

12. It has been urged that the order has been passed on the opinion of Executive Engineer/ Superintending Engineer, which opinion has not been furnished to the petitioner. There does not appear to be any application of mind and blacklisting the petitioner for ten years only reflects a vindictive and partisan approach of the respondents.

13. Defending the order, Mr. Ravi Bharadwaj, learned



counsel for the respondents has submitted that the challenge to the order of blacklisting has been made after a delay of twenty months, without giving any explanation whatsoever for such delay. The other objection of the respondents with respect to maintainability of this petition is that the alternative remedy of appeal, which has been provided in the rules of 2007 has not been exhausted and the petitioner, therefore, would be disentitled from seeking any discretionary relief under Article 226 of the Constitution of India. Apart from this, it has been submitted that certain challans furnished by the petitioner did not appear to have been issued by the Mathura Refinery.

14. However, there is no reply/response with respect to the assertion of the petitioner that Mathura Refinery was paid by the petitioner, which payment was confirmed by the bank statement and that the Patna IOCL office would not be in a position to comment on the genuineness of the challans issued by the Mathura Refinery.

15. All that has been stated in defence of the impugned order is that the same has been passed after considering the



reply of the petitioner.

16. However, a disturbing fact was revealed in the counter affidavit that an F.I.R. has been lodged in this connection on the asking of the Engineer-in-Chief, Road Construction Department, Patna by the Executive Engineer vide F.I.R No. 235 of 2020 for the offences under Sections 420, 467, 468 and 471 of the of Indian Penal Code.

17. There is no information from either the petitioner or the respondents about the stage of investigation or the materials which have come uptill now during the course of investigation.

18. However, lodging of the F.I.R or conclusion of investigation would be a different matter but the issue here is with respect to blacklisting the petitioner company for ten years.

19. The penalty of blacklisting and its consequences have been very aptly formulated in **Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and Anr. (1975) 1 SCC 70**. In the aforesaid case, it was held that the order of blacklisting has the effect of depriving a person



of equality of opportunity in the matter of public contract. Nobody may have a right to enter into contract with the Government or Government Agencies but everyone is entitled to equal treatment with others, who offer tender or quotations for the work. The State has complete freedom to enter into any contract with anyone but if it does so, it must do so fairly, without discrimination and without unfair procedure. The reputation is a part of person's character and personality. Blacklisting tarnishes one's reputation. It has the effect of preventing a person/company from the privilege and advantage of entering into lawful relationship with the Government for the purposes of gains. The fact that that the disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play would require that a person concerned should be given an opportunity to represent his case before he is put on blacklist (also refer to Patel **Engineering Ltd. Vs. Union of India 2012 (11) SCC 257; Kulja Industries Ltd. Vs. Chief General Manager, Western Telecom Project, BSNL 2014 (14) SCC 731;**



Southern Painters vs. Fertilizers and Chemicals Travancore Ltd. 1994 Supl. (2) SCC 699; B.S.N. Joshi & Sons vs. Nair Cole Services Ltd. 2006 (11) SCC 548) etc.

20. In **Daffodils Pharmaceuticals Ltd. & Anr. vs. State of U.P. & Anr 2019 (12) JT 283 ; UMC Technologies Pvt. Ltd. vs. Food Corporation of India, Civil Appeal No. 3687 of 2020 ; Raghunath Thakur vs. State of Bihar 1989 (1) SCC 229; Gorkha Securities Services vs. NCT of Delhi 2014 (9) SCC 105** also, the same principle has been reiterated.

21. Apart from the conditions and parameters of the notice to a firm before blacklisting the same conforming to the requirements laid down, it is also of utmost importance that the explanation offered by the petitioner is properly considered.

22. The Hon'ble Supreme Court in **Vetindia Pharmaceuticals Ltd. vs State of Uttar Pradesh and Anr. (Civil Appeal No. 3647 of 2020)** has also reiterated the principle delineated in Kulja Industries Ltd.



(supra) that while determining the period for which blacklisting should be effective, the authority, for the sake of objectivity and transparency must formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of offences, violations and breaches must be prescribed by such guidelines.

23. While saying so, the Supreme Court has taken note of the fact that it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanor or violations of contractual obligations by a contractor but the State, as far as possible should try and reduce if not totally eliminate, arbitrariness in exercise of power vested in it and inspire confidence in the fairness of the order, which the competent authority may pass against the defaulting contractor.

24. It is also required to be noted that in Daffodils Pharmaceuticals (supra), the Supreme Court has observed that an order of blacklisting beyond three years or maximum of five years is disproportionate .

25. In this background of legal position, the debarment /



blacklisting of the petitioner company for ten years appears to be rather harsh, vindictive and does reflect malafides.

26. There is no explanation whatsoever regarding the justification of accepting the report of the Patna IOCL regarding the genuineness of challans issued by the Mathura Refinery.

27. Normally, this Court would have quashed the order of blacklisting of ten years for the alleged misdemeanor of furnishing fake challans, which allegation does not seem to have been proved even reasonably, but regard being had to the fact that an F.I.R. has been registered against the petitioner company with respect to such procurement, I am not inclined to remit the matter to the authority which has blacklisted the petitioner company for reconsideration.

28. The interest of justice and of the petitioner would be better sub-served if a direction is issued to the Appellate Authority, namely, the Departmental Secretary to hear the appeal against the order of blacklisting, should such an appeal be filed within a period of fifteen days and if need be, a personal hearing be given to the petitioner and only after



taking the entire circumstances to be put forth by the petitioner and taking into account the position of law as adumbrated above, a reasoned order be passed within a limited time frame, say two months from the date of receipt of such appeal, without raising any objection with respect to delay in preferring the appeal and communicating the same to the petitioner.

29. It is ordered accordingly.

30. The writ petition is, therefore, disposed of with a direction to the petitioner to prefer an appeal against the order of blacklisting within a period of 15 days and the Appellate Authority shall consider all aspects of the matter, keeping the law of blacklisting in mind and shall pass a final reasoned order within a period of two months to be counted from the date of filing of memo of appeal by the petitioner.

31. The writ petition is disposed of accordingly.

(Ashutosh Kumar, J)

sunilkumar/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

