

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3601 of 2020

=====

Rishi Builders India Pvt. Ltd. having its registered office at Sri Krishna Nagar, Motihari, District- East Champaran, Bihar- 845401 and Administrative Office At House No. 45, Anandpuri, West Boring Canal Road, Patna- 800001, represented through its Managing Director, namely, Sri Shashi Bhushan Rai, aged about 56 years (male), son of Shadeo Rai, Govindganj, District- East Champaran.

... .. Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Road construction Department, Government of Bihar, Patna.
2. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
3. The Engineer-in-Chief, Road Construction Department, Government of Bihar, Patna.
4. The Executive Engineer, Road Construction Department, Road Division, Motihari.

... .. Respondent/s

=====

Appearance :

For the Petitioner/s : Mr. Ashish Giri, Adv.

For the Respondent/State : Mr. Narendra Kumar Singh, Adv.

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date : 07-01-2021

Heard the learned counsel for the parties.

2. The petitioner/company, which is a Class-I contractor, has challenged the order dated 27.01.2020



passed by the Engineer-in-Chief, Road Construction Department, Govt. of Bihar, Patna, whereby the petitioner's firm has been blacklisted for ten years and the excess amount, which is said to have been paid to the petitioner/company for the work which was never executed, has been directed to be recovered.

3. The matter was heard on 18.02.2020 and this Court recorded as follows:

"2. It appears from the records that a tender was bagged by the petitioner for widening and strengthening of road for the year 2017-18. Certain anomalies were found by the Flying Squad with respect to the work executed by the petitioner/company and, therefore, a notice was issued to the petitioner/company on 06.08.2019, indicating such anomalies and the petitioner/company was directed to furnish his explanation within seven days of the receipt of such notice as to why the agreement with the petitioner/company be not cancelled. It further appears from the records that the petitioner/company sought certain documents for effectively replying to the notice especially the report of the Flying Squad which was never supplied to the petitioner/company.

3. From the order impugned, it appears that the report of the Flying Squad was analyzed by a Special Committee under the Chairmanship of the Chief Engineer of the Road Construction Department, which then recommended for serious action against the



petitioner/company for having received payment without execution of actual work for which only the petitioner/company was held to be responsible. Considering such recommendation by the Committee referred to above, the petitioner/company has been blacklisted for ten years and the amount which is stated to have been paid in excess of the work, which was actually carried out by the petitioner/company, is directed to be recovered.

4. Learned counsel for the petitioner has challenged the aforesaid order on two grounds, namely, (i) that the notice which was served upon the petitioner/company did not indicate the action to be taken in case the explanation of the petitioner was not found to be satisfactory and (ii) that the Flying Squad report was never made available to the petitioner/company. Apart from this, it has also been urged that blacklisting the petitioner for ten years without adverting to the explanation which could have been offered by the petitioner, is much too harsh in comparison to the anomalies which have been pointed out by the Flying Squad.

5. Over and above, learned counsel for the petitioner has raised a grievance that without quantification of the amount which is said to have been received by the petitioner/company without the actual work having been carried out, the order of recovery is bad.”

4. On the same day, *i.e.*, on 18.02.2020, this Court directed the State to file counter affidavit in the matter and stayed the recovery from the petitioner/company.

5. In the counter affidavit, it has been stated



that the relevant record of the work allotted to the petitioner/company was verified and it was found that there were huge inconsistencies in the actual work done and the entries made in the measurement book.

6. On the basis of the aforesaid analysis, a *memo of charge*, containing six charges, were framed and a show-cause notice was asked from the petitioner/company on 06.08.2019. When no reply to the show-cause notice was received in the office of the respondents, a reminder was sent to the petitioner/company on 24.10.2019. In the meanwhile, the entire records were sent to the Special Technical Committee which submitted its report on 14.11.2019, clearly stipulating that excess payment against carriage and VAT/GST was also found.

7. It has further been submitted that since the Special Technical Committee's report was not available when the first show-cause notice was issued to the petitioner/company, another show-cause notice, incorporating the irregularities pointed out by the Special Technical Committee, was issued and the petitioner/company



was asked to reply within seven days, failing which, the concerned Department would be free to take action under the provisions of Bihar Contractors Registration Rules, 2007.

8. The show-cause notice was replied by the petitioner/company reiterating its stand that all the works had been carried out as per the agreement, but also asked for certain documents to be supplied to it for filing a detailed reply.

9. The aforesaid reply by the petitioner/company was considered and only after due consideration, it was found that the reply was unsatisfactory and that bills were raised and payments were received without doing the actual work. The petitioner/company was also found to have received illegal payment for extra carriage without submitting any voucher in support of the same.

10. It was also contended on behalf of the respondent/State that the order of blacklisting is appealable under Rule 11(d) of the Bihar Contractors Registration Rules, 2007 and the petitioner/company would be well advised to prefer an appeal rather than approach this Court



straightway.

11. Mr. Ashish Giri, learned Advocate for the petitioner/company has submitted that the grounds raised in the reply have not at all been considered. He further reiterates that the notice did not indicate the contemplated action by the respondent/Department. The omission to state such contemplated action in the notice has caused prejudice to the petitioner/company in as much as there was no effective representation on its behalf. Lastly, it has been submitted that the decision of blacklisting and rescission of agreement with the petitioner/company is based on the report of the Flying Squad, which report has not been furnished to the petitioner/company. It has also been urged that blacklisting for such a long period of ten years is not at all sustainable in the eyes of law.

12. On perusing the records and after hearing the learned counsel for the parties, what becomes very clear is that the notice to the petitioner/company did not at all indicate the contemplated action in case the explanation was to be found unsatisfactory. The document demanded by the



petitioner/company, viz., the report of the Flying Squad has not been furnished to the petitioner/company. There does not appear to be any discussion or rationale in the impugned order with respect to the blacklisting of the petitioner/company for ten years.

13. In ***Gorkha Security Services Vs. Government (NCT of Delhi) & Ors.; (2014) 9 SCC 105***, an interesting question of law pertaining to the form and content of show-cause notice which is required to be served before deciding as to whether the noticee is required to be blacklisted or not, was raised. In the aforesaid case, the petitioner/noticee was aggrieved by the fact that the show-cause notice made no reference to the proposed blacklisting and, therefore, there was no effective opportunity of making any representation in that regard. The aforesaid ground amongst others raised by the petitioner therein did not find favour with the learned Single Judge of the Delhi High Court, which had held that the power to blacklist an entity was a necessary concomitant of the executive power of the State to carry on the trade or the business and making of



contracts for any purpose. The purpose of show-cause notice is primarily to enable the noticee to meet the grounds on which an action is proposed against it. Absence of any stipulation regarding contemplated action in case the explanation is not found to be satisfactory does not make the notice ambiguous and does not therefore render it open to assail.

14. The aforesaid view of the learned Single Judge of the High Court was affirmed and upheld by the Division Bench of the High Court.

15. However, the Hon'ble Supreme Court repelled the aforesaid logic and after referring to the decisions of the Supreme Court rendered in ***Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal : (1975) 1 SCC 70; Raghunath Thakur Vs. State of Bihar : (1989) 1 SCC 229*** and ***Patel Engineering Ltd. Vs. Union of India : (2012) 11 SCC 257***, held that not stating the proposed action in the notice, renders the notice incomplete. It is important to mention in the notice regarding the action which is proposed to be taken. It was specifically held that in order to fulfill the requirements of principles of natural



justice, a show-cause notice must meet two requirements, viz., (i) the material grounds must be stated, which according to the Department necessitates an action and (ii) particular penalty/action which is proposed to be taken.

16. The Supreme Court went on to explain that if the proposed action is spelled out in the notice, the noticee gets an opportunity of explaining why such extreme penalty may not be justified. It can also make a list of extenuating circumstances and specific explanation *qua* the defaults pointed out by the Department.

17. Thus, it is well established by now that when a harsh penalty like blacklisting is imposed, such contemplated action, in the event of the explanation not being found to be satisfactory, is required to be stated with clarity in the notice and the absence of the same would make the notice incomplete.

18. Apart from this, a very long duration of blacklisting, *prima facie*, does not satisfy the conscience of the Court. An order of blacklisting operates to the prejudice of a commercial person not only *in praesenti*, but also is



highly stigmatic and an echoes the death-knell of the institution.

19. In ***Vetindia Pharmaceutical Ltd. Vs. State of Uttar Pradesh & Anr. : 2020 SCC OnLine SC 912***, the Supreme Court has observed that the possibility always remains that if a proper show-cause notice had been given and the reply furnished would have been considered in accordance with law, even if the Department decides to blacklist the entity, a different consideration may have prevailed in their minds with regard to the duration of the blacklisting. Blacklisting for a long period, *prima facie*, is disproportionate. [refer to ***Kulja Industries Ltd. Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Ltd. : (2014) 14 SCC 731*** and ***Daffodills Pharmaceuticals Ltd. Vs. State of U.P. : (2019) 17 Scale 758.***]

20. The aforesaid discussion, therefore, makes it imperative that the petitioner/company be allowed a fresh opportunity of explaining his cause.

21. The order of blacklisting the petitioner/company dated 27.01.2020, which has been



impugned in the present petition, is, therefore, quashed.

22. The respondent/Road Construction Department, Govt. of Bihar, Patna is directed to furnish a fresh show-cause notice to the petitioner/company, intimating the proposed course of action to be taken, in case the explanation/reply of the petitioner/company will be found to be satisfactory and also make available to the petitioner/company the documents which have been relied upon for primarily coming to the opinion that action need be taken against the petitioner/company, within a period of four weeks from the date of receipt/production of a copy of this order.

23. The reply by the petitioner/company shall be filed within a further period of four weeks thereafter.

24. The final decision shall be taken by the respondent/Department, after considering the entire aspect of the matter, within a further period of four weeks positively by a reasoned order.

25. This time schedule has been given, keeping in mind that blacklisting is a very serious penalty and has



immeasurable evil consequences.

26. The final order passed by the respondent/Department shall be communicated the petitioner/company forthwith.

27. With the aforesaid observation/direction, the writ petition stands allowed and disposed off.

(Ashutosh Kumar, J)

Praveen-II/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	16.01.2021
Transmission Date	N/A

