**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**Civil Writ Jurisdiction Case No.9597 of 2021**

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M/s EMS Infracon Pvt. Ltd., M/s Technocraft Construction Pvt. Ltd. (JV), a joint venture between two Private Limited Companies, Regd. Office of lead partner at 701, DLF Tower A Jasola, New Delhi 110025 through its Authorized signatory, namely, Pankaj Kumar Srivastava (Male), aged about 50 years, Son of Prakash Chandra Srivastava, Resident of 397/C, Raj Colony, Hussenabad, Jaunpur, Jaunpur City, Uttar Pradesh, P.S. Line Bazar Jaunpur, Town and District- Jaunpur.

... ... Petitioner

Versus

1. The State of Bihar through the Chief Secretary, Main Secretariat, Patna.
2. The Development Commissioner, Bihar-cum-Chairman, Bihar Urban Infrastructure Development Corporation Ltd., (BUIDCo), Main Secretariat, Patna.
3. The Principal Secretary, Urban Development and Housing Department (UD and HD), Government of Bihar cum Project Director, State Program Management Group (SPMG) Vikash Bhavan, Bailey Road, Patna.
4. The Bihar Urban Infrastructure Development Corporation Ltd. (BUIDCo), near Rajapur Pul, West Boring Canal Road, Patna- 800001 through its Managing Director.
5. The Managing Director, BUIDCo, near Rajapur Pul, West Boring Canal Road, Patna- 800001.
6. The Chief Engineer, Design, Planning and Monitoring, BUIDCo, Patna.
7. The Union of India, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation through its Secretary having its Office at Shram Shakti Bhavan, Rafi Marg, New Delhi-110001.
8. The National Mission for clean Ganga, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi through its Director General.
9. The Director General, National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi.
10. The Executive Director, Technical, National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi.
11. The Executive Director, Projects, National Mission for Clean Ganga, Ministry of Water Resources, Ministry of Jal Shakti, Department of Water Resources, River Development and Ganga Rejuvenation, Government of India, 1st Floor, Major Dhyanchand Stadium, India Gate, New Delhi.
12. M/s Toshiba Water Solutions Pvt. Ltd. in JV with Kevadiya Construction Pvt. Ltd., a joint venture between two Private Limited Companies having the Office at 4th Floor, Tower-D, Pioneer Urban Square, Sector- 62, Gurugram,

Haryana.

... ... Respondents

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**Appearance :**

For the Petitioner : Mr. S.D.Sanjay, Senior Advocate
Ms. Parul Prasad, Advocate
Mrs. Sushila Agrawal, Advocate
Mr. Mohit Agarwal, Advocate
For the Respondent State of Bihar: Mr. Lalit Kishore, Advocate General
For the Respondent BUIDCo : Mr. Lalit Kishore, Senior Advocate
Mr. Rabindra Kumar Priyadarshi, Advocate
For Respondent Union of India : Dr. K.N.Singh, A.S.G.
For Respondent No. 12 : Mr. P.K. Shahi, Senior Advocate
Mr. Saket Tiwari, Advocate

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH**
**CAV JUDGMENT**
**Date : 19-07-2021**

Heard Mr. S.D. Sanjay, learned Senior Counsel for the petitioner, Mr. Lalit Kishore, learned Advocate General representing the State of Bihar and Bihar Urban Infrastructure Development Corporation Limited (BUIDCo for short), Mr. K.N. Singh, learned Additional Solicitor General of India on behalf of the Union of India and Respondents No. 8 to 11 and Mr. P. K. Shahi, learned Senior Counsel representing private Respondent No. 12 through *on-line* video mode, because of COVID-19 pandemic restrictions.

**2.** The petitioner is a joint venture (hereinafter referred to as M/s EMS for short) of two private limited companies and the Directors and Shareholders of both the constituents of the joint venture, namely, M/s EMS Infracon Pvt. Ltd. and M/s Technocraft

Construction Pvt. Ltd. carry on their commercial activities within the territorial jurisdiction of this Court, as stated in the application,

**3.** In its original form, the petitioner had sought, *inter alia,* for a declaration that Bihar Contractor Registration Rules, 2007 (Public Works Department) was *ultra vires* and not enforceable to the extent the same was repugnant to the provisions of Bihar Financial Rules, 1950. However, the said relief has been given up, as recorded in a Division Bench order of this Court dated 06.07.2021 passed in this case, which reads as under :-

> *"Shri S.D. Sanjay, learned senior counsel, under instructions, states that the petitioner gives up Prayer Clause(i).*
>
> *In this view of the matter, matter needs to be listed before the learned Single Judge, as per the current roster.*
>
> *At this stage, Shri S.D. Sanjay, learned senior counsel states that similar petition filed by the very same petitioner i.e. C.W.J.C. No. 8786 of 2020, titled as M/s. EMS Infracon Pvt. Ltd. Vs. The State of Bihar, is listed on 8th of July, 2021 before the learned Single Judge (Hon'ble Mr. Justice Chakradhari Sharan Singh)."*

**4.** In the light of the aforesaid, the matter has been placed before this Bench under the orders of Hon'ble the Chief Justice.

**5.** On close reading of the reliefs which the petitioner has sought, as indicated in paragraph 1 of the writ application, it can be noticed that the petitioner is mainly aggrieved by an order of blacklisting dated 04.03.2021, passed by BUIDCo in exercise of powers stipulated in the Bihar Contractor Registration Rules, 2007 (the Rules for short). The immediate consequence of the said order of blacklisting is that the petitioner stands disqualified for award of any contract by BUIDCo for a term of one year, including work which is subject-matter of dispute in the present case, namely, (i) "Design and Building Sewage Treatment Plant of capacity 30MLD including MPS (45 MLD) and all pertaining structures and allied works (ii) Survey, review the designs, redesign where necessary and build new underground sewerage network of 167.3 KM length including trenchless and survey design, construction of five No. pumping stations and all appurtenant structures and allied works and (iii) Operation and maintenance of the complete works of sewerage treatment plant, sewerage network and pumping stations at Munger, State of Bihar, India".

**6.** In the aforesaid background, the petitioner is also seeking a declaration that the provisions of the said Rules are not applicable to the externally aided projects *i.e.* the projects funded by the World Bank, the Asian Development Bank, etc..

**7.** It is noted that the order of blacklisting has been passed on the allegation that the petitioner has falsely and fraudulently mentioned certain wrong facts in Forms 2 and 3B of the Standard/ Model Bid Documents (SBD), submitted in response to an invitation for bid for the work in question. It is the petitioner's contention that the BUIDCo does not have any jurisdiction to take any final decision on the consequence of any purported incorrect or misleading facts in the tender documents, which is purely within the domain of the World Bank and, therefore, the BUIDCo illegally invoked the provisions of the said Rules for the purpose of blacklisting of the contractor, as tender in question is mandatorily governed and funded by the World Bank.

**8.** Hence, the petitioner has challenged the legality of the Technical Bid Evaluation Reports (TBER) of the BUIDCo dated 04.11.2020, 23.11.2020, 22.12.2020 and 21.01.2021 whereby the petitioner was not recommended, it having been blacklisted by BUIDCo and, therefore, non-responsive *apropos* the bid in question. The other bidders, namely, Larson and Toubro Limited and the M/s Toshiba Water Solutions Pvt. Ltd. in JV with Kevadiya Construction Pvt. Ltd., a joint venture between two Private Limited Companies (Toshiba in short) impleaded as Respondent No. 12 herein have been declared technically responsive. The petitioner is further seeking a direction to the BUIDCo to declare it as responsive in the technical bid in accordance with the observations made by the World Bank communicated to National Mission for Clean Ganga (NMCG in short) under the Ministry of *Jal Shakti,* Department of Water Resource, River Development and Ganga Rejuvenation, Government of India, on the TBER of the respondent-BUIDCo.

**9.** It emerged during the course of hearing of the case, on the basis of submissions advanced on behalf of the parties that admittedly the Rules are not statutory in character and are in the nature of executive instructions issued by the Road Construction Department, Government of Bihar. A copy of the said Rules has been annexed as Annexure- 25 to the writ application, from which it can be easily discerned that its main purpose is for registration of contractors for construction of roads and the bridges in different categories, renewal of such registration and black-listing of a registered contractor or demoting the category of a contractor in certain events as mentioned in Rule 11 thereof. The BUIDCo in its 35th meeting of Board of Directors vide agenda item No. 35/7 is said to have resolved that the said Bihar Contractor Registration Rules, 2007 shall be applicable "on BUIDCo". It is the stand on behalf of the BUIDCo that the said Rules have been adopted in 'totality' for all projects of BUIDCo.

**10.** The BUIDCo is a Government of Bihar undertaking and is said to be under the department of Urban Development and Housing, Government of Bihar. There is a provision in Rule 11(*Gha*) of the Rules that an appeal can be preferred by a contractor against a punishment imposed under the said Rules within 30 days before '*Ayukta-Evam-Sachiv*'. Referring to the said provision, Mr. Lalit Kishore, learned Senior Counsel representing the BUIDCo has raised a preliminary objection over maintainability of the writ petition on the ground that the petitioner has an alternative remedy of appeal. In response to a query made by this Court as to whether there is any post of '*Ayukta-Evam-Sachiv*' in the BUIDCo, he stated that the said expression '*Ayukta-Evam-Sachiv*' refers to the Departmental Commissioner and Secretary of the Urban Development and Housing Department, Government of Bihar. The said submission in the Court's opinion is neither convincing nor acceptable because of the vagueness of the description of the so-called appellate authority as mentioned in 2007 Rules, which was framed by the Road Construction Department in accordance with which the Commissioner-cum-Secretary of the Road Construction Department could be described as the appellate authority. If the BUIDCo intended to adopt the said Rules, the BUIDCo could have designated any 'body' or 'a person' or 'an office' with definite description as an appellate authority, which is conspicuously absent. Interestingly, Mr. Lalit Kishore has produced before this Court an office order dated 06.08.2020 issued by the Managing Director, BUIDCo wherein Director-cum-Secretary/Principal Secretary Urban Development Department has been designated as the Appellate Authority against an order of removal from service of contractual employees of BUIDCo, in support of his contention that it is the of the Secretary of the Urban Development which is the appellate authority under the Rules. I fail to understand how the said office order can support the contention of Mr. Lalit Kishore that appellate authority stands fully described for the purposes of the Rules.

**11.** For the aforesaid reason, I do not find any force in the submission on the point of maintainability of the writ application on the ground of availability of alternative remedy of appeal. In any view of the matter, availability of alternative remedy does not put a bar on this Court's jurisdiction to exercise power of judicial review under Article 226 of the Constitution of India. It is only the self imposed restriction, which the Courts exercise while exercising such inherent extraordinary jurisdiction of judicial review, when an expeditious effective alternative remedy is available to the party aggrieved.

**12.** It may be noted, at this stage itself, that there is another set of Rules, again in the shape of executive instructions, christened "Bihar Contractor Registration Rules, 2007" (Rural) issued by the Public Works Department Government of Bihar, which contains similar provisions with some variance, as in the Rules issued by the Road Construction Department, with some variations.

**13.** It is the case of the BUIDCo that by the said resolution of the Board of Directors of the BUIDCo in its 35th meeting held on 15.03.2016, the Contractor Registration Rules, 2007, as framed by the Road Construction Department was adopted and not the one framed by the Rural Works Department. It is the stand of the BUIDCo that the Rules framed by the Rural Works Department has the nomenclature and Bihar Contractor Registration Rules (Rural), 2007 whereas the name of the Rules adopted by the BUIDCo. is "Bihar Contractor Registration Rules, 2007" which is name of the set of Rules issued by the Road Construction Department.

**14.** The said resolution of the Board of Directors of BUIDCo has been brought on record with the counter affidavit filed on behalf of the BUIDCo, which reads as under : -

> *"Agenda 35/7*
>
> ***To make Bihar Contractor Registration Rules, 2007 applicable on BUIDCo***
>
> *The Managing Director detailed the Board the need to adopt the Bihar Contractor Registration Rules, 2007 and make it applicable on all the projects of BUIDCo in **totality**. The Members approved the proposal and passed the following resolution:*
>
> *"RESOLVED THAT the Bihar Contractor Registration Rules, 2007 be applicable on BUIDCo". "* (Highlighted for emphasis)

**15.** A bare reading of the said resolution of BUIDCo would indicate that it does not even refer to the Department of the State Government of which the BUIDCo was adopting the Rules. These aspects are being mentioned not for the purpose of conclusive determination, in the present case as to which set of Rules shall have application, but for the purpose of noticing the casual manner in which a decision was taken by a State Government owned Company viz. BUIDCo in relation to application of a set of Rules. Further, the resolution dos not even refer to the date of issue of notification of the said Rules, which could have attached some sense of certainty as to which set of Rules, the BUIDCo had intended to adopt by the said resolution. This is not the end of the matter. In the show cause notice issued to the petitioner, seeking its explanation as to why it should not be black-listed, the BUIDCo referred to Rule 11 A(vii) of Bihar Contractor Registration Act, 2007. There is no legislation in the name of Bihar Contractor Registration Act, 2007. The show cause notice was issued by none else than an officer of the rank of Chief Engineer of BUIDCo. A plea could have been taken, which has not been taken, that there was typographical error in the show cause notice, which required correction by issuance of a corrigendum. Be that as it may, for the reasons which are being mentioned hereinunder, I shall not go into the legality of the show cause notice on the ground of incorrect mentioning of the provisions, namely, 'Bihar Contractor Registration Act, 2007'. It is, however, reiterated that these facts certainly display clumsy state of affairs, lacking in care and responsibility, prevalent in BUIDCo which, the Court has been made to understand, has been entrusted with execution of all important huge infrastructure projects for the State of Bihar. They also speak of a casual and cavalier manner in which the BUIDCo has been found to be functioning while dealing with a matter of black-listing a contractor, which has grave consequences, as has been repeatedly and consistently noted in various decisions of the Supreme Court and this Court.

**16.** I am, however, not to entering into the controversy of wrong mentioning of the provision in the show cause notice in the background of facts mentioned hereunder.

**17.** The petitioner had earlier approached this Court by filing a writ application, giving rise to C.W.J.C. No. 8929 of 2020, putting to challenge an order of black-listing dated 04.11.2020, which was passed by the BUIDCo, after issuance of the same show cause notice dated 31.10.2020. A co-ordinate bench of this Court allowed the writ application by an order dated 04.02.2021 noticing Rule 11 of the Bihar Contractor Registration Rules, 2007 as annexed in that case by the petitioner. Rule 11 of the said Rules was quoted in the order. It transpires from a subsequent order of this Court passed by the said bench in the same C.W.J.C. No. 8929 of 2020 that according to the learned Senior Counsel representing the BUIDCo, inadvertently Bihar Contractor Registration Rules, 2007 of Rural Works Department was annexed in the writ application, whereas Bihar Contractor Registration Rules, 2007 (Public Works Department) was applicable to the affairs of BUIDCo,. Sub-Clause(vii) of Rule 11 of Bihar Contractor

Registration Rules, 2007 of Rural Works Department, which was quoted in the order dated 04.02.2021 was found to be not applicable to the affairs of the BUIDCo. This Court, upon noticing rival submissions made on behalf of the parties, modified the said order dated 04.02.2021 by an order dated 18.02.2021 in following terms : -

> *"After having heard learned counsel for the respondents as well as the petitioner, this Court is satisfied that the Rules which are relevant for the purposes of disposing off this petition is the Bihar Contractors Registration Rules, 2007 (Public Works Department) and not the one issued by Rural Works Department. Vide a valid resolution of the Board of Governors of the BUIDCo, the Bihar Contractors Registration Rules, 2007 of the Public Works Department have been adopted. Sub-clause (vii) of rule 11 of the said Rules lists misleading information or furnishing of wrong security deposit as one of the grounds for black-listing any firm.*
>
> *In that view of the matter, there is enough justification for Mr. Lalit Kishore, learned senior Advocate to ask for deletion of paragraph 12 of the order.*
>
> *Paragraph 12 of the order, which reads as hereunder, stands deleted:*
>
> > *"12. The argument of Mr. S. D. Sanjay that the order reflects non-*

*application of mind in as much as this could not have been a ground for black-listing the petitioner has substantial force. The petitioner was incapacitated to participate in the tender after the technical stage because it was held to be technically unresponsive for having furnished misleading information."*

*Per force, paragraph 11 of the order is also required to be deleted as it extracts the rules which are non-applicable to the affairs of BUIDCo.*

*This Court however on fresh appraisal of facts is satisfied that the petitioner's explanation ought to be reconsidered and a reasoned order be passed.*

*In that view of the matter, the directions of this Court, which are contained in paragraphs 15 to 17 of the order dated 04.02.2021, shall remain in force.*

*The order dated 04.02.2021 stands modified to the extent indicated above."*

**18.** Paragraph 13 of the order of this Court dated 04.02.2021 passed in C.W.J.C. No. 8929 of 2020 has considerable significance for determination of the petitioner's challenge to the impugned black-listing order in the present case, which was not modified by subsequent order dated 18.02.2021, reads thus : -

*"13. This court is of the considered view that assuming but not admitting that the relevant information furnished by the petitioner with respect to the extent /percentage of participation in the joint venture may not be complete but it surely did not call for an action in the nature of blacklisting for one year."*

**19.** While setting aside the order of black-listing this court directed the concerned authorities to pass an order afresh taking into account "the explanation offered by the petitioner and all other attendant/relevant factors". Evidently, the respondent BUIDCo was required to pass an order afresh on the explanation submitted by the petitioner pursuant to the said show cause notice dated 31.10.2020. Further, the Coordinate Bench discussed in considerable detail as to which set of Rules were adopted and applicable in case of the projects under BUIDCo. The point of non-applicability of Clause 11 A(vii) of Bihar Contractor Registration Act (apparently mentioned 'Act' in place of Rules as was mentioned in the show cause notice), 2007 was specifically taken by the petitioner in its explanation.

**20.** The facts of the case are that a national competitive bidding vide its Invitation For Bids (IFB) dated 05.08.2019 was invited for the project in question by the BUIDCo. A copy of the said IFB has been brought on record by way of Annexure-1 to the writ application, which indicates that it follows a general procurement notice in the said project that appeared in UNDB (United Nations Development Business) *on-line* on 30.03.2011 and updated last on 31.01.2014. The Project, namely, Ganga River Basin Project through *e*-procurement is funded by the World Bank. Clause 2 of the IFB indicates that National Ganga River Basin Authority (NGRBA) under the Ministry of Environment and Forest, Government of India, has received finance to the tune of US$ one billion from the World Bank towards the cost of National Ganga River Basin Project, which intends to apply to a part of proceeds towards payment under contract for the work in question. The National Mission for Clean Ganga (NMCG), some of the State Governments including the State of Bihar are said to have entered into a memorandum of understanding for implementation of MGRBA programme in respective states. Further, the State Government of Bihar, BUIDCo, Patna Municipal Corporation and Ministry of Environment and Forest, Government of India, have also entered into memorandum of understanding towards implementation of the project forming part of the said MGRBA programme. There is a stipulation in the IFB to the following effect : -

> *"Bidding will be conducted through the National Competitive Bidding Procedure as*

*specified in the World Bank's Guidelines : Procurement of Goods, Works and Non-consulting Services under IBRD Loans and IDA Credits & Grants, January 2011, revised July, 2014, and is open to all eligible bidders as defined in the Guidelines. In addition, please refer to paragraphs 1.6 and 1.7 of the Guidelines setting forth the World Bank's policy on conflict of interest."*

**21.** The last date for submission of the hard copy of the bid was 23.09.2019 up to 3 PM and the time fixed for opening of the technical bid was 23.09.2019 at 3.30 PM subject to change. Four bids were received by BUIDCo including that of the petitioner and private respondent No.12. It is the petitioner's case that Annexure-A part-h of the standard bid document having the heading 'qualifications, criteria' prescribed essential qualifications, one of them being experience in construction, operation and maintenance of sewage treatment plant and sewerage network. The requirement is that a bidder must have designed, developed, built, tested and commissioned at least one sewage plant of 22 MLD capacity of secondary treatment of sewage during last seven years preceding the bid submission date. It is specific case of the petitioner that it qualifies in terms of the said requirement as it fully satisfies the criteria.

**22.** This is an admitted fact that altogether four bids were received by the respondent BUIDCo from following bidders : -

(i) EMS Infracon Pvt. Ltd., in JV with M/s Technocraft Construction Pvt. Ltd.

(ii) LC Infra Enviro PCS Joint Venture,

(iii) Larsen & Toubro Limited, and

(iv) M/s Toshiba Water Solutions Pvt. Ltd. in JV with Kevadiya Construction Pvt. Ltd.

**23.** The Technical Tender Committee of BUIDCo disqualified the petitioner on the ground that it had concealed the fact that it was black-listed by U.P. Jal Nigam by letter No. 297 dated 15.10.2019. The Technical Tender Committee, while doing so, referred to a circular issued by the Road Construction Department, Government of Bihar which stipulates that a firm, which had been black-listed even after bid submission due date, the technical bid of such firm shall be rejected. The technical bid of another bidder, namely, LC Infra Enviro PCS Joint Venture, was also rejected. The bid of respondent No. 12 was found to be responsive by the Technical Tender Committee. The Technical Tender Committee forwarded its observation in the form of a report to the State Programme Management Group (SPMG in short) for onward submission to NMCG and the World Bank for their 'NOC' of Technical Bid Evaluation Report (TBER). It was indicated that upon receiving the NOC, the result of the Technical Bid Evaluation shall be uploaded at the *e*-procurement *web site*. The financial bid was to be opened thereafter, if no complain was received and otherwise, after disposal by the competent authority of any complaint.

**24.** The petitioner made a representation against the said decision of Technical Tender Committee stating that as on the date of submission of bid, no such order of black-listing was in operation and further that the Allahabad High Court vide an order dated 09.02.2020 passed in Misc. Bench No. 4059 of 2020 had already stayed the order of black-listing. The petitioner took specific stand in its representation that the petitioner had no knowledge about the said order of black-listing, which was, for the first time, brought to its notice on 20.01.2020. Evidently, in the light of the representation made by the petitioner, the recommendation of the Technical Tender Committee was returned to BUIDCo for reconsideration in the light of the order of Allahabad High Court. The Technical Tender Committee, again, held its meeting on 17.06.2020. The Technical Tender Committee again rejected the technical bid of the petitioner as per clause 1.7

of the Qualification Criteria on the ground that it had concealed the fact about the black-listing. The petitioner again represented through its letter dated 30.06.2020 reiterating its stand as disclosed in representation dated 04.06.2020 to the effect that it was completely unaware of the black-listing, which was neither notified nor was communicated and, for the first time, came to the notice of the petitioner in a proceeding before the Allahabad High Court. It is the petitioner's case that subsequently, the order of black-listing against the petitioner passed by the U.P. Jal Nigam was recalled retrospectively. In that wake, the World Bank appears to have queried as to how black-listing could be said to have been concealed by the petitioner. Reliance has been placed by the petitioner on Annexure-9 to the writ application, which is photocopy of *e-mail* dated 14.07.2020 which contains observations after review made by the World Bank on the TBER in question. *Apropos*, reference by the Technical Tender Committee to the circular issued by the Road Construction Department, Government of Bihar, dated 23.01.2013 for rejecting the technical bid on the basis of black-listing even after bid submission due date, the World Bank recorded the following observation : -

> *"3. TBER para 5.1. states that as per a circular issued by the Road Construction Department, Govt. of Bihar, dated 23 January,*

> *2013, "Any firm who has got black-listed even after bid submission due date, the technical bid shall be rejected". In this context, kindly note that the Bank may agree, if requested by the Borrower, that bidding documents under NCB procedures include a clause rendering ineligible for Bank financing a firm, or an individual, of the Borrower country that is under a sanction of debarment from being awarded a contract by the appropriate judicial authority of the Borrower country and pursuant to its relevant laws, provided that the Bank has determined that the firm, or the individual has engaged in fraud or corruption and the judicial proceeding afforded the firm or the individual adequate due process. However, kindly note that no such clause is included in the approved Bidding Document."*

**25.** The Technical Bid Evaluation Committee again in its meeting held on 20.07.2020 summarized its finding and observed that though the petitioner had mentioned in Form-7 that it had no litigation history with respect to Environmental, Social, Health and Safety (ESHS in short) aspects, non compliance of ESHS safety norms by the petitioner-company had resulted into loss of life of five persons, which was a matter of big concern.

**26.** The petitioner again represented though his letter dated 11.08.2020 addressed to the Managing Director of BUIDCo with a copy to other functionaries of the Government of India, Government of Bihar as well as the Director, NMCG, New Delhi and Team Leader, World Bank, New Delhi, asserting that it was wrongly being declared disqualified by the Bid Evaluation Committee. The Director (Projects), NMCG, addressed a letter dated 14.08.2020 to the Secretary, Urban Development and Housing Department, Government of Bihar, and the Programme Director, SPMG, with reference to following four previous communications : -

> *"1. NMCG's e-mail dated 15.07.2020, regarding interim response of World Bank*
>
> *2. SPMG's compliance to World Bank's observations vide letter no.314 dated 21.07.2020;*
>
> *3. SPMG'2 e-mail dated 25.07.2020 in response to NMCG's e-mail dated 23.07.2020 and 24.07.2020.*
>
> *4. Letter from UP Jal Nigam vide letter no.30/PC/Conf./General/(2121-0408)/2020 dated 04.08.2020 (copy enclosed)."*

**27.** The Project Director, NMCG, thereafter, made following observations in its communication : -

> *"2. As per reference point no. 4, UPJN has informed NMCG that M/s EMS Infracon was black-listed on 16.12.2019 however the notice of black-listing was served to M/s ESM on*

*20.1.2020. Hence it is very clear that the black-listing notice was served after the bid due date which was on 07.01.2020.*

*3. Also in World Bank's interim response point no.1, it was mentioned that the bidder (here M/s EMS) has mentioned the information pertaining to litigation with respect to ESHS performance in form no.6 (copy enclosed). Hence, it is evident that BUIDCo's argument on information held is not sustainable.*

*4. In light of para 2 and World Bank's interim response, you are requested to revisit the TBER with respect to M/s EMS at the earliest."*

**28.** After having observed, as noted above, in the light of paragraph 2 of the World Bank's interim response, the Secretary, Urban Development and Housing Department, was requested to recommend the TBER with respect to the petitioner at the earliest.

**29.** There is no material on record to show whether the aforesaid request made by the Director Project of the NMCG, which was issued with the approval of the competent authority was given its due before issuance a show cause notice for black-listing.

**30.** The BUIDCo instead issued a show cause notice dated 31.10.2020 (Annexure-13) asking the petitioner to explain as to why it should not be black-listed by invoking clause 11 A(vii) of the Bihar Contractor Registration Rules, 2007, as, according to the said show cause notice, the petitioner had mentioned wrong facts in Form- 2 and Form 3B of the technical bid.

**31.** From the said show cause notice, it transpires that it was alleged against the petitioner that it had claimed the experience of design, construction, erection, testing and commissioning of 36 MLD sewage treatment plant based on a Sequential Batch Reactor (SBR) at Shastripuram, Agra, on turnkey basis on its own name only under the Office of Project Manager, U.P. Jal Nigam Unit-8, Agra. Subsequently, a complaint was received stating therein that there were four JV partners for the aforementioned work. In course of verification, the BUIDCo issued letter to the Project Manager (C & DG) U.P. Jal Nigam vide its letter No. 7204 dated 16.10.2020 to clarify in this regard. The BUIDCo subsequently received a reply from U.P. Jal Nigam stating there that for the aforesaid work, M/s Awadh Developer Pvt. Ltd. was the lead partner and M/s Satish Kumar merged with Ms/ Infracon Pvt. Ltd. (petitioner) was the joint venture partner having share of 20%. Based on report of U.P. Jal Nigam that the work in question was not completed by the petitioner alone and even it was not the lead partner, the petitioner-company claimed experience of entire 36 MLD, which was misleading, false and fabricated. The petitioner was allowed four days time to file its reply against proposed action of black-listing and he was made to submit his reply by 04.11.2020.

**32.** The show cause reply was submitted by the petitioner stating therein that it was unjustified to say that any false or fraudulent information was mentioned in Form-2 and 3B; the genuineness of the performance certificate issued by the U.P. Jal Nigam in respect of the experience of the aforesaid design, construction, erection, testing and commissioning of 36 MLD sewage treatment plant could be verified from the Department. It was specifically stated in the reply to the show cause notice that the petitioner was not claiming technical qualification on the basis of the said certificates, which was submitted for reference purpose only. It was also submitted in the reply that some of the data was not filled/left blank, which came to the notice of the petitioner through said show cause notice and it did not claim in the Information Forms-2, 3A and 3B that EMS was the sole bidder and hence such allegation had no basis. The petitioner then gave a brief background of the said 36 MLD Agra project stating that during the project some financial issues were noticed between the JV partners wherein in the interest of satisfactory completion of project, M/s EMS had decided to replace 100% contract performance, bank guarantee of lead partners M/s Awadh Developers Pvt. Ltd. and said CPDG is still with U.P. Jal Nigam. It was reiterated that the petitioner had sufficient relevant qualification and even if the experience of 36 MLD STP was rejected due to insufficient information in the information form, the petitioner, as joint venture, fully qualified, based on the experience of the joint venture partner. This is to be noted that the copies of the information form-2 and information form 3B are available on record, from which it transpires that the petitioner-company, though claimed experience of general design, build, operation and maintenance in respect of aforesaid 36 MLD Sewage Treatment Plant, Agra, it left blank a column in which contract role and percentage share in total contract was to be mentioned. On the very next day, on 04.11.2020, BUIDCo passed an order of black-listing for a period of one year rejecting the petitioner's explanation, on the basis of the allegation of not giving correct information in Form-2 and Form 3B. Simultaneously, on the same day, on 04.11.2020, the Technical Tender Committee disqualified the petitioner on the ground that it had already been black-listed. It accordingly recommended only two bids, of Larsen and Toubro Limited and that of respondent no. 12.

**33.** I must note here that in the minutes of the meeting of the Technical Tender Committee of the BUIDCo, there is reference of black-listing of the petitioner under 'Bihar Contractor Registration Act, 2007', which, as has been noted above, does not exist. Though wrong mentioning of the provision, i.e., 'Bihar Contractor Registration Act, 2007', may not itself render the decision of the Technical Tender Committee, BUIDCo illegal, it surely portrays either their ignorance about the set of provisions, which deal with black-listing of contractors, which has very serious consequences or were very casual in discharge of their function.

**34.** It is significant to note, at this stage, that the Technical Tender Committee of BUIDCo in its meeting dated 04.11.2020 (Annexure-16) mentioned about a complaint received from one Jagbir Nagpal through *e-mail* dated 03.10.2020, wherein it was alleged that experience certificate submitted by EMS Infracon Pvt. Ltd. For work of 36 MLD Sewage Treatment Plant at Shastripuram, Agra, has been done by joint venture of their partners, whereas it has claimed 100% work in its own name. It further mentions that the show cause notice was issued to the petitioner on 31.10.2020, which is the notice seeking explanation for taking action of black-listing. Though the said show cause notice dated 31.10.2020 refers to a complaint received by the BUIDCo, it did not refer to the name of the complainant nor copy of the complaint formed part of the show cause notice.

**35.** From Annexure-17 and Annexure-17A to the writ application, it transpires that subsequently, the Technical Tender Committee, BUIDCo, held its meeting on 23.11.2020 and 22.12.2020 in order to review the matter in response to the World Bank's observation dated 27.08.2020 and NMCG's procurement stipulations observation dated 04.12.2020 and reiterated its view that the petitioner being a black-listed agency by the BUIDCo, it could not be awarded any work by the BUIDCo as per the said Rules. Thereafter, the NMCG through its letter dated 04.1.2021 addressed to the Principal Secretary (Urban Development and Housing Department) and Programme Director, SPMG, Government of Bihar, referring to the World Bank's observation through *e-mail* dated 27th August, 2020, SPMG mail dated 02.09.2020 regarding BUIDCo's response, NMCG's communication dated 09.09.2020, SPMG's letter dated 04.11.2020, record of all the discussion held with the World Bank, SMCG and BUIDCo dated 12.11.2020 sent to BUIDCo by *e-mail* dated 23.11.2020, Technical Tender Evaluation Report dated

23.11.2020, NMCG's letter dated 14.12.2020 and SPMG's letter dated 22.12.2020 recorded , *inter alia*, as under : -

> *"2. As per the point no.1 of the Technical Committee report of BUIDCo (dated 22.12.2020), we understand that the other 2 bidders (namely M/s EMS and M/s LC Infra) are also getting qualified through their other certificates along with other 2 bidders M/s L&T and M/s Toshiba."*

**36.** The letter further mentioned that necessary clarification might be provided in the light of the Notification of Government of Bihar (Finance Department) dated 28.10.2016 in which it is mentioned that in externally aided projects (namely, World Bank, ADB, DFID etc.), where compliance of Financial Agreement/Procurement Guidelines is compulsory, the rules contained in Bihar Financial (Amendment) Rules, 2005 will not be applicable.

**37.** The Technical Tender Committee again held its meeting on 21.01.2021, understandably in the light of the said communication dated 04.1.2021 recording therein that fund share between The Government of India and the Government of Bihar for the said project was 70:30 for the said project. It further recorded that though the Financial Rule was not applicable for externally aided projects the "Bihar Contractor Registration Act, 2007" is applicable for all the contractors registered in Department/PSUs in the Government of Bihar. The Technical Tender Committee accordingly opined that its decision dated 22.12.2020 and 23.11.2020 shall prevail.

**38.** The tenor of the language used in the minutes of the meeting of the Technical Tender Committee dated 21.1.2021 discloses that the BUIDCo claimed its status in the decision making process for deciding as to whether a bidder qualifies on the basis of technical bid or not on the ground that the fund sharing between the Government of India and the Government of Bihar was 70:30 for the said project and on that basis it asserted that "Bihar Contractor Registration Act, 2007" is applicable for all contracts. In almost all the proceedings of the Technical Tender Committee, non-existent "Bihar Contractor Registration Act, 2007" has been mentioned and, as has been noted above, the Court is of the view that before incorporating the said provision in minutes of their meetings, they apparently had not even seen the said provision so as to incorporate its name correctly in their proceedings.

**39.** As has been mentioned hereinabove, the decision of the BUIDCo to black-list the petitioner by order dated 04.11.2020 was put to challenge before this Court by filing a writ application, which had given rise to C.W.J.C. No. 8929 of 2020. A coordinate Bench of this Court set aside the order of black-listing by a judgment and order dated 04.2.2021 remanding the matter back to the authorities to pass an order afresh after taking into account the explanation offered by the petitioner and all other attendant/relevant factors within a period of 60 days from the date of receipt/production of a copy of this order. The Court further observed that it would be highly appreciated if an order afresh was passed before taking a final decision in respect of selection of a concessionaire and it would allay the apprehension of the petitioner that it has been disqualified for helping out another competitor.

**40.** Incorrect/inadequate mentioning of the Rules mentioned in the black-listing order created certain complications because of which, this Court had to modify the order dated 04.02.2021 to some extent by a subsequent order dated 18.02.2021. Certain paragraphs of the order dated 04.02.2021 were directed to be deleted. Paragraph 13 of the order dated 04.2.2021, however, remain unaltered, which has been quoted above.

**41.** The BUIDCo passed a reasoned order on 04.03.2021 in compliance of the order of this Court dated 04.02.2021 read with the order dated 18.02.2021 passed in C.W.J.C. No. 8929 of

2020, which is under challenge in the present writ application. By the said impugned order, the Chief Engineer, Planning, Design and Monitoring, Urban Development and Housing Department, Government of Bihar, has black-listed the petitioner for one year with effect from 04.11.2020 purportedly upon consideration of all facts and provisions, exercising power under 11(*Ka*) vii of the Bihar Contractor Registration Rules, 2007. Though the order dated 04.03.2021 has been passed on the letter head of BUIDCo (Annexure-22) it does not reflect as to in what capacity the Chief Engineer, Planning, Design and Monitoring, Urban Development and Housing Department, Government of Bihar, passed the order; whether he passed the said order in his capacity as Chief Engineer of a Department of the Government of Bihar or an authority under BUIDCo.

**42.** In view of nature of order, which I intend to pass in the present case, I shall not, for the present, go into the authority of the Chief Engineer of the Department to pass an order of black-listing in purported exercise of power under Bihar Contractor Registration Rules, 2007. It is, however, recorded that this court has failed to notice any material to suggest that the Chief Engineer of the Department is the Chief Engineer of the BUIDCo also.

**43.** Let it be recorded, at this stage, that M/s Toshiba Water Solutions Pvt. Ltd. (respondent No.12) was earlier known as UEM India Private Limited. It is the case of the petitioner that said UEM had specifically claimed to be the sole contractor with 100% share in relation to design, build, construction, installation, testing, erection and commissioning of 148 MLD Raw Sewage Pumping Station and 74 MLD Sewage Treatment Plant on SBR with Biological Nutrients Removal at Indirapuram, Ghaziabad etc., which was factually incorrect and as a matter of fact, the said work was executed by M/s UEM India Private Limited and Ultratech Joint Venture and UEM was lead partner, the work order was issued in the name of UEM only. According to the petitioner, the said claim of Toshiba about its experience was false and despite that, the petitioner has been selectively black-listed and disqualified in the tender to favour Toshiba. This is to be noticed that another bidder namely M/s LC Infra Projects Private Limited was also black-listed by an order dated 04.11.2020 which has been set aside by an order of this Court dated 25.03.2021 passed in C.W.J.C. No. 8973 of 2020, with observations as under : -

> *"21. I have heard learned counsel for the parties and have gone through the materials available on record. It appears that the petitioner has submitted the additional work certificate*

*apart from the other work experience certificate submitted by the petitioner which otherwise fulfilled all the eligibility criteria and even the corrected certificate of 32.51 MLD issued by the Executive Engineer, Gujarat Water Supply & Sewerage Board, Public Health Works Division, Devbhumi Dwarka, Jamkhambhaliya was much above the criteria laid down in the bid document. From the corrected clarificatory letter issued by the author of the certificate it is very much clear that the certificate uploaded by the petitioner was not forged and fabricated rather the author of the certificate has accepted that due to oversight and mistake the quantity of work was incorrectly mentioned. It further appears that the certificate in question was issued in the year 2018 and the same was uploaded along with the bid document on 07.01.2020 as such it can not be said that the petitioner procured the work certificate in order to secure the present contract with an intention to mislead the respondent authorities.*

*22. In view of the aforesaid discussion and conspectus of facts this Court comes to the conclusion that the petitioner did not make any attempt to mislead the respondent authorities and it was due to sheer oversight and inadvertent mistake on the part of the author of the certificate that there was some discrepancy in the quantity of work completed by the petitioner and was incorrectly mentioned. Merely because the* *petitioner signed all the documents including the work certificate in question at the time of uploading the bid document, it cannot lead to the conclusion that intention of the petitioner was to mislead the respondent authorities"*

**44.** A counter affidavit has been filed on behalf of Respondents No. 3 to 6 (BUIDCo), wherein it has been stated that a complaint was received against Toshiba. It has been stated in the counter affidavit regarding the experience certificate of the said bidder. It has also been stated that as per the bid condition there was no restriction for the bidder to submit work experience certificate issued by the prime contractor only. In respect of another complaint against Toshiba regarding Indirapuram, Ghaziabad 74 MLD STP Project, the BUIDCo, upon enquiry and reply received from it has found its bid to be regular and responsive, there being no requirement of passing any order of black-listing against it.

**45.** It has been stated in the counter affidavit that as the project is 30% financed by the State Government and, therefore, upon receiving opinion from the Legal Department, Government of Bihar, it has been concluded that the guidelines issued by the State Government relating to award of contract cannot be allowed to be flouted.

**46.** In the counter affidavit filed on behalf of the respondent No.12, the allegation made in the writ petition that the respondent No. 4 has shown any favoritism towards the said respondent has been controverted as false and incorrect. Respondent No. 12 has asserted that it is incorrect plea of the petitioner that the answering respondent made any false claim in the information Form-3B submitted along with the bid that it was the sole contractor and 100 participant in the project at Indirapuram, Ghaziabad. It has been stated that the respondent was awarded 74 MLD Project in its sole capacity by the U.P. Jal Nigam post pre-qualification evaluation stage (not a joint venture/consortium with Ultratech or any other party). It is the case of respondent No. 12 that the show cause notice issued by the BUIDCo was duly replied and the decision of the respondent No. 4 to declare the answering respondent responsive is correct and is in conformity with the tender condition.

**47.** It is to be noticed, at this stage, that when this matter was taken up on 25.06.2021 by a Division Bench, learned Additional Solicitor General for India was requested to seek instructions in the light of submission made on behalf of the petitioner that NMCG had instructed the State Government to consider the petitioner's bid for the project in question. When the matter was taken up on 28.06.2021 by the Division Bench, learned Additional Solicitor General for India had placed on record a communication dated 25.06.2021 addressed to him, annexing the communication dated 18.06.2021 forwarded by the NMCG, wherein a request was made that bids be opened and the financial opening be positively completed within 30th July, 2021. The said letter dated 18.06.2021 appears to have originated from one Mr. Jagan Mohan of NMCG addressed to the Managing Director, BUIDCo, in the light of a mail received from the World Bank regarding 'NOC' for TBER of Munger Project. The mail sent by the World Bank has noted a letter written by NMCG submitted to the Bank on June 15, 2021 through STEP conveying recommendation to 'technically qualify all four participating bidders' and open their financial parts of the bid. It was further mentioned that the Bank had no objection to the NMCG's recommendation to technically qualify all the four bidders to open their financial parts of the bid in public based on the information provided and subject to addressing certain comments mentioned therein. The said communication of the World Bank further states that the financing/loan agreement for the project between the Government of India and the World Bank mentions that all procurements under the project to be financed out of the proceeds of the loan/credit shall follow the World Bank's Procurement Guidelines, January, 2011 and Consultant Guidelines, January, 2011. Financing/Loan Agreement being an international treaty supersedes any national or state level Act/Rule, which has also been reinforced by DEA (e.g. OM dated October 19, 2020). The World Bank has reiterated in its said communication that only debarment/suspension by the Bank is valid in the said Bank funded procurement. It has been finally mentioned in the said communication as under : -

> *"Accordingly, the Bank requires that the financial bid evaluation, including the Bank's prior review and Government's internal approvals, to be completed and the contract awarded within July 31, 2021, and would only agree to extend the bid validity one last time until July, 31 2021, to give sufficient time for the Bank to view and issue its no objection and for the Letter of Award to be issued. We would like to highlight upfront that the Bank may not favourably consider requests for extension of bid validity period beyond July 31, 2021 and may taken remedies for inordinate* delays, should the process exceeds that date."

**48.** Mr. S.D. Sanjay, learned Senior Counsel appearing on behalf of the petitioner, has submitted that the respondents have exercised the power of black-listing only for the purpose of keeping the petitioner out of competition in the tender process in question. He has submitted that the chain of events show that the black-listing order has been passed hurriedly only for the purpose of disqualifying the petitioner in the tender process in question and in order to favour respondent No. 12.

**49.** He has argued that the BUIDCo has, apparently for ulterior reasons, attempted to overreach the direction of NMCG and the World Bank on the basis that funding share of the State Government was also there to the extent of 30%. He has strongly contended that despite direction of this Court by its order dated 04.02.2021 to take into account the explanation offered by the petitioner, the impugned order of black-listing has been passed without adverting to various points raised in the petitioner's explanation. He has further contended that the BUIDCo has deliberately ignored the observations made by a coordinate Bench of this Court in paragraph 13 of its judgment and order dated 04.02.2021 passed in C.W.J.C. No. 8929 of 2020 to the effect that the relevant information furnished by the petitioner with respect to strength/percentage of participation in the joint venture had not been complete but it would surely not entail in the nature of black-listing for one year. According to him, the impugned order is a prejudged order in which the earlier order of black-listing dated 04.11.2020 has been reiterated. Further, according to him, the complaint filed by one Jagbir Nagpal, which was the basis for issuance of show cause notice for black-listing the petitioner was never supplied to it. On the question of the information furnished by respondent No. 12 in respect of its experience, which, according to the petitioner, was false, he has submitted that the petitioner does not intend to contend that it should also have been black-listed, maintaining parity.

**50.** He has, however, submitted that the petitioner has the sole grievance that it should not be held to be non-responsive in the technical bid on the basis of the order of black-listing, which is, according to him is patently illegal. He has argued that the Technical Tender Committee and BUIDCo has unauthorizedly attempted to overreach the guidelines issued by the NMCG and the observations made by the World Bank, which has funded the project. He has further relied on the Supreme Court's decision in case of ***Oryx Fisheries Private Limited vs Union Of India and Others*** reported in **(2010) 13 SCC 427**, to submit that the impugned order of black-listing is void inasmuch as it is based on a notice, which did not disclose the name of the complainant and enclose copy of the complaint and further that the order does not adequately deal with the explanation submitted by the petitioner.

**51.** Mr. Sanjay has submitted with reference to the Supreme Court's decisions rendered in case of ***Erusian Equipment & Chemicals Ltd. vs State Of West Bengal & Anr.*** Reported in***(1975) 1 SCC 70***,***Raghunath Thakur vs State Of Bihar & Ors*** reported in **(1989) 9 SCC 29**, ***Gorkha Security Services vs Govt. Of NCT Of Delhi & Ors.***, reported in (2014) 9 SCC 105, ***Daffodils Pharmaceuticals Ltd. and Another vs. State of U.P. and Another***, reported in 2019 SCC OnLine SC 1607 and ***UMC Technologies Private Ltd. vs Food Corporation Of India and Another***, reported in 2020 SCC OnLine SC 934, that black-listing is a drastic adverse action having grave consequences inasmuch as it has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for the purpose of aids. He has submitted that the impugned order of black-listing deserves interference by this Court on the basis of violation of well settled principles of natural justice and fair play. He has further contended that since the black-listing of the petitioner is the only basis to disqualify him from the tender process in question, the respondents should be directed to reconsider the technical bid and declare the petitioner a responsive bidder. According to him, the respondents have not delved into the specific stand taken in the explanation filed by the petitioner in response to the show cause notice for black-listing that since the clauses in the tender documents were based on model tender documents under the funding arrangement of the World Bank, provisions under Bihar Contractor Registration Rules, 2007 is not applicable.

**52.** Mr. Lalit Kishore, learned Senior Advocate representing BUIDCo has submitted that the impugned order of black-listing does not suffer from any legal infirmity inasmuch as the petitioner was given adequate opportunity to respond to the show cause notice, which he had availed and subsequently, in the light of this Court's order dated 04.02.2021 passed in C.W.J.C. No. 8929 of 2020, the competent authority has passed a reasoned order, which cannot be faulted with. He has drawn my attention to the documents in information Form-2 and 3B to submit that it was a deliberate act on the part of the petitioner not to fill in the relevant slot in the said form depicting contract performance and percentage share in the total contract, in order to create an impression that he had 100% experience of the works mentioned therein. By referring to the said documents, Mr. Lalit Kishore has submitted that it was a fraud played on the part of the petitioner in order to illegally obtain award of contract in its favour of the project in question. He has accordingly submitted that there being no procedural infirmity in the decision of the respondents black-listing the petitioner nor there being any apparent breach of principle of natural justice, this Court may not go into the correctness of the decision and substitute its own decision by exercising power of judicial review under Article 226 of the Constitution of India. He has also relied on the Supreme Court's decision in case of ***Tata Cellular vs. Union of India*** reported in **(1994) 6 SCC 651,** ***Raunaq International Ltd vs I.V R. Construction Ltd. and Others***, reported in **(1999) 1 SCC 492**, ***State of Jharkhand and Others vs. CWE-Soma Consortium***, reported in **(2016) 14 SCC 172** and ***Afcons Infrastructure Ltd vs Nagpur Metro Rail Corporation***, reported in **(2016) 16 SCC 818**, to submit that the Court has limited role in the matter of award of Government contracts, while exercising power of judicial review under Article 226 of the Constitution of India.

**53.** Mr. P.K.Sahi, learned Senior Counsel appearing on behalf of respondent No. 12 has very fairly submitted that to the extent the writ application relates to the petitioner's challenge to the order of black-listing, the same is between the petitioner and the BUIDCo. He has submitted that respondent No.12 has nothing to comment upon the said decision of BUIDCo, but he has submitted that the argument made on behalf of the petitioner that respondent No. 12 had played a fraud by concealing any material fact while submitting the tender documents is wholly incorrect and unsustainable. He has reiterated the settled law on the limited scope of judicial review in the matters of award of Government contracts.

**54.** Dr. K.N. Singh, learned Additional Solicitor General For India, on the point of black-listing of the petitioner and another bidder by the State authorities, namely, BUIDCo, has submitted that the World Bank Guidelines are to be adhered to and the World Bank has raised some observations in its communication through *e-mail* dated 14.07.2020 and 27.08.2020 on the technical bid evaluation report which cannot be completely overlooked. He has reiterated that the project is funded by the World Bank and, therefore, World Bank Procurement Guidelines are to be adhered to and followed, including black-listing and debarment of the participants. He has referred to the communication of the World Bank dated 15.06.2021, which has been noted above to submit that the deadline as prescribed by the World Bank for final bid evaluation cannot be given a go-by.

**55.** I have carefully examined the materials on record and considered the submissions made on behalf of the parties. On careful reading of the show cause notice dated 31.10.2020, it can be easily noticed that there is a reference to a ‘complaint received’, but it does not mention the source of such complaint received. No copy of the complaint was enclosed with the said show cause notice, which was communicated to the petitioner, which is an admitted fact.

**56.** Further, the show cause notice alleged against the petitioner of having falsely and fraudulently mentioned wrong facts in Form-2 and Form 3B. In the impugned order dated 04.03.2021, which came to be passed by the Chief Engineer of the Urban Development and Housing Department, Government of Bihar, he has referred to the incorrect information furnished by the petitioner in Form-3A also, which is an additional new ground taken by the BUIDCo for black-listing the petitioner, which was neither mentioned in the show cause notice nor in subsequent communication made by the petitioner. Further, the specific case of the petitioner in its show cause reply in relation to the information furnished in Form-2 and Form-3B that the performance certificate issued by the U.P.Jal Nigam was genuine without any alteration and in any case, based on the said certificate, the petitioner did not claim its technical qualification has remained unquestioned. Thus, the petitioner's case that without furnishing any information in Form-2 and Form-3B, it fulfilled the technical qualification is undisputed. The impugned order does not disclose that by failing to fill up the relevant slots in Form-2 and Form-3B, the petitioner was going to derive any commercial gain or benefit. There is no discussion in the impugned order on the petitioner's contention that the tender documents being based on model tender document set by NMCG under World Bank and, therefore, Clause 11(*Ka*) vii of the Bihar Contractor Registration Act/Rules, 2007, was not applicable.

**57.** The impugned order of black-listing dated 04.03.2021 contains 13 paragraphs. Upto paragraph 6.6 of the impugned order the chain of events, beginning from the previous order of black-listing dated 14.11.2020 and developments subsequent thereto including passing of the order dated 04.02.2021 has been incorporated and reference to explanation submitted by the petitioner in reply to the show cause notice on various aspects has been made . The impugned order does not even notice the stand taken by the petitioner in its show cause reply that Clause 11(vii) of the Bihar Contractor Registration Rules, 2007, was not applicable as the tender document was based on the model tender documents set by NMCG under fund arrangement of the World Bank. Paragraph 7 of the impugned order has referred to Information Form-2 and has reached a conclusion that by leaving column in the form against contract performance vacant, the petitioner attempted to claim 100% share of work experience in question, though it was executed by joint venture in which petitioner was not even a lead partner and that he deliberately concealed about the joint venture arrangement for the aforesaid work. Similar is the case with the finding recorded in paragraph 9 of the impugned order. Paragraph 8 of the impugned order, as has been referred to above, is in relation to Information Form-3A submitted with the technical bid in respect of which also adverse finding has been recorded though allegation of furnishing incorrect information or concealment of facts in respect to Form-3A was not part of the show cause notice. Further, the petitioner had taken specific plea that even if the Department rejected the experience of 36 MLD STP due to insufficient information in the Information Forms, the petitioner as joint venture was fully qualifying, based on experience of joint venture partner. This aspect has not been gone into by the respondents in the impugned order. Furthermore, the respondents were under obligation to consider the explanation of the petitioner that in any event, by non-filling of the column in question, the petitioner could not have derived any financial gain or benefit. The petitioner mentioned in his explanation that some of the data were not filled/left blank, which mistake came to its notice only after receiving the said show cause notice. There was specific observation made by a coordinate Bench of this Court in its order dated 04.02.2021 in C.W.J.C. No. 8929 of 2020 to the effect the relevant information furnished by the petitioner with respect to the extent/percentage of participation in the joint venture may not be complete, but it surely did not call for an action in the nature of black-listing for one year' (emphasis added). The Chief Engineer, in its impugned order dated 04.03.2021, has completely overlooked rather defied the said clear observation made by this Court. It is evincible that the reason for black-listing as recorded in the impugned order is just the opposite of the observations made by this Court

**58.** Mr. S.D. Sanjay has rightly placed reliance on the Supreme Court's decision in case of ***Erusian Equipment & Chemicals Ltd.*** (supra), ***Raghunath Thakur*** (supra), ***Gorkha Security Services*** (supra), ***Daffodils Pharmaceuticals Ltd.*** (supra), and ***UMC Technologies Private Ltd.*** (supra), in order to make out his case that the black-listing order involves serious civil consequences. It casts a slur and creates a barrier between persons black-listed and the Government in the matter of transactions. The Supreme Court observed in case of ***Erusian Equipment & Chemicals Ltd.*** (supra), that the black-listing are instrument of coercion. The Supreme Court, in the said case laid down in paragraph 20 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."*

**59.** Considering the gravity of consequences of an order of black-listing, which has been repeatedly noted by the Supreme Court in various decisions, some of them have been noted above, there cannot be any inkling of doubt that there must be strict adherence to the principles of natural justice and fair play before taking such drastic action against a contractor. In the present case, it has been noticed that many significant points taken by the petitioner in his show cause reply have not at all been dealt with in the impugned order. In the Court's opinion, it was obligatory on the part of the respondents to have recorded a clear finding as to why the points taken by the petitioner in its reply to the show cause notice were not acceptable. The impugned order appears to be based on a presumption that non-filling of information in Form-2 and 3B amounted to claiming 100 percent work experience. There is absolutely no discussion in the impugned order that by leaving a particular column blank, the petitioner with joint venture is going to derive any advantage in the background of the petitioner's case that EMS with joint venture was otherwise having the technical qualification.

**60.** Most significantly, the Chief Engineer conveniently left in his impugned order, to discuss the points taken by the petitioner that the said Rules was not applicable for the project in question as the tender document was based on model tender document set by NMCG under the funding agreement of the World Bank. Subsequent correspondences made by the NMCG with the World Bank and the World Bank with the NMCG demonstrate that the plea taken in this regard could not have been left unanswered so casually by the Chief Engineer.

**61.** As has already been noted above and at the cost of repetition, it is recorded that the Bihar Contractor Registration Rules, 2007, incorrectly described in most of the proceedings of the Technical Tender Committee as Bihar Contractor Registration Act, 2007, is nothing but executive instruction issued by one Department of the Government of Bihar, which has been adopted by the BUIDCo. It raises a question of bigger significance as to whether on the strength of the plea that the project has 30% funding by the State Government, can BUIDCo as an executing body completely ignore arrangements with the World Bank, which is funding the project.

**62.** In view of the aforesaid discussion, the Court is of the considered opinion that the respondent BUIDCo has acted irresponsibly in passing the impugned order in casual and cavalier manner, which has serious adverse consequence not only in respect of the petitioner's eligibility to participate in the bid with others in Government contracts, but has also adversely affected the progress of the project in question.

**63.** The impugned order of black-listing dated 04.03.2021 is hereby set aside for the reasons noted above. It is clarified that the Court is interfering with the impugned order mainly for four reasons. Firstly, it does not duly consider the explanation submitted by the petitioner in response to the show cause notice. Secondly, it has referred to a new fact in relation to Form-3A, which was not part of the show cause notice though there is reference to this information form in the petitioner's reply to the show cause notice. Thirdly, it has completely ignored the observations made by this Court in the order dated 04.02.2021 passed in C.W.J.C. No. 8929 of 2020. Fourthly and the most importantly, the Chief Engineer had an obligation to record a finding on the applicability of Bihar Contractor Registration Rules,, which is in the nature of executive instructions for taking action in relation to the bid process in question where tender documents is based on model tender document set by NMCG in funding arrangement of the World Bank, a plea which was specifically taken in the reply to the show cause notice. This aspect goes to the root of the matter, which has been completely ignored.

**64.** It is, therefore, observed that the Court has not given a complete clean chit to the petitioner, which possibly cannot be done in exercise of power under Article 226 of the Constitution of India. The respondents shall be at liberty to act in accordance with law in this regard. For the said purpose, however, the respondents shall be under obligation to issue to the petitioner a fresh show cause notice, if black-listing is proposed under Bihar Contractor Registration Rules, 2007. Before issuance of such show cause notice, however, the competent authority shall be obliged to record a finding that the said executive instruction is applicable even in respect of the externally aided project in question.

**65.** I need not refer to the decisions relied on by Mr. Lalit Kishore, learned Senior Counsel on the scope of this Court's power of judicial review under Article 226 of the Constitution of India as the Court has interfered with the impugned order of black-listing for the reasons noted above. The legal principles laid down in the said decisions need no reiteration.

**66.** Consequently, the Technical Tender Committee shall be required to revisit the TBER and take a decision accordingly. The Technical Tender Committee shall be obliged to consider all communications received from NMCG in this regard. As has been noticed hereinabove, initially, the technical tender of the petitioner was rejected on some other grounds. By a subsequent letter dated 14.08.2020, the Secretary, Urban Development and Housing Department, Government of Bihar, and the Programme Director, SMCG were asked to revisit the TBER with respect to M/s EMS. Leaving those points, which were the basis for rejecting the petitioner's tender documents, the BUIDCo put the petitioner on notice for proposed black-listing through the show cause notice dated 31.10.202 on a different ground altogether.

**67.** Noticing the chain of events mentioned hereinabove, in the peculiar facts and circumstances of the case, in the interest of justice I am constrained to direct that let a fresh evaluation of the technical bid be done by a technical committee with the Development Commissioner, Bihar, as its Chairman and Executive Director, Technical, National Mission for Clean Ganga (respondent No. 10) as one of the members. The Development Commissioner shall be at liberty to reconstitute Technical Tender Committee for the purpose of said evaluation. It will be open for the Technical Tender Committee to take into account the facts mentioned in the show cause notice and the petitioner's reply thereto, keeping also in mind this Court's observation in paragraph 13 of the order dated 04.02.2021(supra), for the limited purpose of evaluation of technical bid of the work in question; if permitted under the model bid document and other arrangements under which the project is to be implemented to disqualify the petitioner. It is expected that the Chairman and other members of the Technical Tender Committee shall go into wider aspects of the matter in accordance with the mandatory requirements under World Bank's Guidelines January, 2011. Considering the dateline for finalization of the tender as noted in the letter of the World Bank dated 15.06.2021, the Court expects that the meeting of the Technical Tender Committee be held, if not before, by Thursday (22.07.2021) at appropriate place and time to be decided by the Development Commissioner, Bihar. Since three orders of black-listing the bidders of the same IFB passed by the same Chief Engineer have been found to be illegal and quashed by this Court, the Development Commissioner should consider whether he should be allowed to participate as a member of the Technical Tender Committee for evaluation of the technical bid and whether there is any chance of his view being biased because of the facts and circumstances of this case recounted herein above.

**68.** Before I part with the present judgment, I must record that if the State of Bihar or any of its Undertakings intend to have or adopt any document in the form of Act, Rules, Regulations, Notifications or Guidelines for the purpose of black-listing a contractor, the same must be clear and structured in its form as half-baked arrangement of casually adopting an executive instruction issued by the Road Construction Department for all works and projects under the State Government or its Undertakings, in Court’s opinion, does not go well, keeping in mind steep rise in infrastructure development projects under the State Government. The said executive instructions simply refers to requirement of issuance of a show cause notice before passing an order of black-listing. In view of the law laid down by the Supreme Court in series of decisions, stating the serious and grave consequences of an order of black-listing, it is high time that the State respondents may consider framing of statutory rules. A misconduct of a contractor during a bid process may have the consequence of rejection of his bid on any of the grounds mentioned in the tender documents. However, if any agency, which is 'State' within the meaning of Article 12 of the Constitution of India intends to black-list a contractor, it should lay down comprehensive and clear provisions in the form of an enactment or subordinate legislation or even executive instructions, for achieving objectivity, certainty and consistency in the decision making process. Black-listing of a contractor can have more serious consequence than dismissal of an employee under the State for the reason that if an order of dismissal is found to be illegal by a superior authority or Court, an employee's status may be restored with other consequential benefits. A black-listed contractor, on the other hand, becomes ineligible to participate in any competitive bid floated by the State by virtue of black-listing during the currency of the order of black-listing. Even if such order of black-listing is subsequently held to be illegal by a competent forum or Court law, the loss incurred because of the ineligibility during the interregnum period cannot be compensated. The Court exercising power of judicial review cannot direct the State respondents to frame Rules. However, it is expected that the respondents shall consider this aspect of the matter and this Court's observations in correct perspective and proceed in a manner which suits the public interest most.

**69.** This application stands allowed to the extent noted above with aforesaid directions and observations.

**70.** There shall be no order as to costs.

**(Chakradhari Sharan Singh, J)**

Pawan/-

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| **AFR/NAFR** | NAFR |
| **CAV DATE** | N/A |
| **Uploading Date** | 19.07.2021 |
| **Transmission Date** | N/A |