

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7240 of 2020

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Kashish Developers Limited Registered Office at-87 Old AG Colony, Kadru, Ranchi, Jharkhand-834002, Local Address at-201, Kamla Sadan Apartment, Punai Chak, District-Patna, through its Director Mukesh Kumar, aged about 45 years, Gender-Male, Son of Sri Mukut Prasad Rao, Resident of 171, Mushahari, Bijbaniya, P.S.-Lauriya, West Champaran, District-West Champaran.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary-cum-Commissioner, Building Construction Department, Government of Bihar, Patna.
2. The Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Building Construction Department, Government of Bihar, Patna.
3. The Chief Engineer, Building Construction Department, Government of Bihar, Patna.
4. The Superintending Engineer Division No. 2, Building Construction Department, Bihar, Patna.
5. The Executive Engineer, Construction Division No. 2, Building Construction Department, Bihar, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. P.K.Shahi, Sr. Adv. Mr. Ranjeet Kumar, Adv. Mr. Yogesh Kumar, Adv.
For the State	:	Mr. Uday Shankar Sharan Singh, GP-19 Mr. R.K.Chandram, AC to GP-19

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL JUDGMENT

Date : 28-01-2021

The present writ petition has been filed for setting aside the office order contained in letter no. 718 dated 02.07.2020 issued under the signature of Executive Engineer, Construction Division No. 2, Building Construction Department, Bihar, Patna, whereby and whereunder the agreement bearing



agreement no. 05 SBD 2015/16 for construction of Vidhayak Awasan (MLC Parisar), entered into between the petitioner and the respondent authorities has been rescinded. The petitioner has further prayed that upon setting aside of the aforesaid order of termination of agreement, the respondent authorities be directed to grant eight months' time to complete the balance work inasmuch as the delay, which has occurred in the execution of the work in question, was beyond the control of the petitioner or on account of the lapses / laches on the part of the respondents and moreover, the last four months expired during the period of lock-down on account of Covid-19, Pandemic.

2. Shorn of the details, it would suffice to state that an agreement bearing agreement no. 05 SBD 2015/16 dt. 10.08.2015 was executed in between the petitioner-company & the Executive Engineer, Construction Division No. 2, Building Construction Department, Bihar, Patna, with respect to the construction of Vidhayak Awasan (MLC Parisar) at



Patna. The work order was issued by the Executive Engineer, Construction Division No. 2, Building Construction Department, Govt. of Bihar, Patna, vide memo no. 911 dated 10.08.2015 with a stipulation that the work was to be commenced from 10.08.2015 and time of completion was fixed as 24 months, thus, the deadline for completion of the work was 10.08.2017. The petitioner is stated to have commenced the work, but the same got hampered on account of several unavoidable reasons like encroachment upon 80% of the construction site, number of trees present within the construction site which were required to be cleared for the purposes of construction and position of underground high tension electrical cable and water pipeline having not been provided.

3. It is the further case of the petitioner that subsequently, the work in question also got hampered on account of demonetization, ban on supply of sand, implementation of GST, irregular payments, Covid-19 Pandemic, and two supplementary agreements being executed for



extra work. It is the contention of the petitioner that several communications had taken place in between the petitioner and the respondents, however, in the meantime, the Government of Bihar declared lock-down on account of outbreak of Covid-19 Pandemic vide notification dated 17.03.2020 / 22.03.2020 with effect from 23.03.2020, which was further extended up to 5th of June, 2020, whereupon the petitioner had requested the respondent-Executive Engineer to pay the outstanding dues of the petitioner and accordingly, extend the time for completion of the work in question, however, in the meantime, the agreement in question was rescinded by the impugned order dated 02.07.2020.

4. The learned Senior Counsel for the petitioner, Sri P. K. Shahi, assisted by Sri Ranjeet Kumar, Advocate, has made a short and crisp submission to the effect that Clause 14 of the Contract itself envisages issuance of a notice in writing to the contractor prior to cancelling of the contract, however, in the present case, admittedly, no show



cause has been issued to the petitioner by the respondents prior to passing of the impugned order dated 02.07.2020, rescinding the agreement in question. It is submitted that compliance of the principles of natural justice is inherent in Article 14 of the Constitution of India and any deviation or breach thereof would render such decision of the authority illegal and void. It is further submitted that substantial work has been completed by the petitioner and it undertakes to complete the remaining work within a period of eight months from the date of passing of the judgment in the present case. In this regard, the learned senior counsel for the petitioner has relied on a judgment rendered by a coordinate Bench of this Court dated 18.09.2017, passed in CWJC No. 10091 of 2017 (***Kems Services Pvt. Ltd. Vs. South Bihar Power Distribution Company Ltd. & Ors.***), to buttress his argument to the effect that the writ courts are also empowered to issue directions to the contractors to complete the work within a stipulated time period.



5. Yet another decision, which has been relied upon by the learned senior counsel for the petitioner in this regard, is the one reported in ***B.K. Enterprises, Dhanpura, Ara v. State of Bihar, 2007 SCC OnLine Pat 44 : (2008) 1 PLJR 473***, paragraphs no. 8 to 10 whereof are reproduced herein below:-

“8. Coming to the cancellation and retender aspect of the matter. I feel that though the authorities cannot be faulted for cancelling the tender because the petitioner failed to execute the same within the extended time, the authorities can consequently be faulted with re-tendering the balance work. Merely, because there has been a default in completing the work in time, does not give right to the authority to cancel and retender because the consequences thereof has to be kept in mind as the authorities are the custodian of public finance as well. If balance work is re-tendered then apart from work being completed there will be no other benefit which State would get rather to the contrary State would be obliged to pay at the present with current revised rate and as such would incur an extra expenditure over rupees twenty seven lakhs. This would be a



waste of public money, the work being the same. On the contrary if the period is further extended with the petitioner himself, which the petitioner has been asking since long and it has also been recommended again and again by the executive engineer even after cancellation of the work, then both the objectives, would be achieved that is the work would be done and no extra expense would incur. This would save substantial public finance. The facts, aforesaid, are not disputed by the State but the stand is that as the petitioner has delayed, they had a right to cancel and pursuant to the said right to cancel, a decision to cancel has been taken.

9. *To my mind this Court has not questioned either the authority or the right to cancel but the propriety to cancel and its financial consequence. If the petitioner is ready to do the same work at the cost at which he was doing earlier part of the work then the authority instead of cancelling ought to have extended the period rather than re-tendering at a substantial extra spend. That to my mind would have been prudent, fair, equitable and a business like approach rather than cause loss to the public exchequer by paying higher rate which now*



prevalent in the year 2007.

10. *In that view of the matter, keeping in view the financial aspect of the matter and in order to save of public money. I direct the authority to reconsider the matter and consider the desirability of granting petitioner further time to complete the work and pass appropriate orders with regard to the dispute, which was pending before the authority.”*

6. Thus, it is submitted that keeping in mind the larger public interest i.e. saving of substantial public finance, the writ courts are fully empowered to direct for completion of work by the same contractor within a stipulated period.

7. The learned senior counsel for the petitioner has further relied on a judgment rendered by the Hon’ble Apex Court in the case of **Union of India & Ors. Vs. Tania Construction Pvt. Ltd.**, reported in **(2011) 5 SCC 697**, paragraphs no. 33 and 34 whereof are reproduced herein below:-

“33. Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause



included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

34. We endorse the view of the High Court that notwithstanding the provisions relating to the arbitration clause contained in the agreement, the High Court was fully within its competence to entertain and dispose of the writ petition filed on behalf of the respondent Company. We, therefore, see no reason to interfere with the views expressed by the High Court on the maintainability of the writ petition and also on its merits."



8. Yet another judgment relied upon by the learned senior counsel for the petitioner is the one rendered in the case of ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors.***, reported in **(1998) 8 SCC 1**, paragraphs no. 14, 15, 20 and 21 whereof are reproduced herein below:-

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the



alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

20. *Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.*

21. *That being so, the High Court was not*



justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the “Tribunal”.”

9. The learned senior counsel for the petitioner has lastly relied on a judgment rendered by the Hon’ble Apex Court in the case of **Popcorn Entertainment & Anr. Vs. City Industrial Development Corporation & Anr.**, reported in **(2007)9 SCC 593**, paragraphs no. 21, 22, 23 and 47 whereof are reproduced herein below:-

“21. *As regards non-maintainability of the writ petition, the appellant relied upon the following decisions of this Court wherein this Court has held that the writ petitions can be held to be maintainable under certain circumstances:*

(i) Gunwant Kaur v. Municipal Committee, Bhatinda [(1969) 3 SCC 769]

(ii) Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal



Council [(1970) 1 SCC 582]

(iii) Bal Krishna Agarwal (Dr.) v. State of U.P. [(1995) 1 SCC 614 : 1995 SCC (L&S) 356 : (1995) 29 ATC 163]

(iv) Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1]

(v) Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107]

(vi) Corpn. of the City of Bangalore v. Bangalore Stock Exchange [(2003) 10 SCC 212]

(vii) ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. [(2004) 3 SCC 553]

(viii) Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd. [(2005) 8 SCC 242]

22. *He invited our attention to Whirlpool Corpn. case [(1998) 8 SCC 1] wherein this Court has held that there are three clear-cut circumstances wherein a writ petition would be maintainable even in a contractual matter. Firstly, if the action of the respondent is illegal and without jurisdiction, secondly, if the principles of natural justice have been violated, and thirdly, if the appellants' fundamental rights have been*



violated.

23. *According to the learned Senior Counsel, all the three principles as laid down in Whirlpool Corpn. [(1998) 8 SCC 1] have been made out in the instant case because the action of CIDCO is wholly without jurisdiction as it is seeking to resile from a concluded contract contrary to the express terms of the contract. Secondly, CIDCO, has violated the principles of natural justice as an order affecting the right of the appellant has been passed without giving an opportunity of hearing to the appellant and thirdly, the appellants' fundamental rights as guaranteed under Article 14 of the Constitution of India have been violated because similar allotments made without calling for tenders are not sought to be cancelled and the appellant is being singled out by CIDCO while seeking to cancel the allotment in favour of the appellant.*

47. *We have given our careful consideration to the rival submissions made by the respective counsel appearing on either side. In our opinion, the High Court has committed a grave mistake by relegating the appellant to the alternative remedy when clearly in terms of the law laid down*



by this Court, this was a fit case in which the High Court should have exercised its jurisdiction in order to consider and grant relief to the respective parties. In our opinion, in the instant case, 3 of the 4 grounds on which writ petitions can be entertained in contractual matter were made out and hence it was completely wrong of the High Court to dismiss the writ petitions. In the instant case, 3 grounds as referred to in Whirlpool Corpn. [(1998) 8 SCC 1] have been made out and accordingly the writ petition was clearly maintainable and the High Court has committed an error in relegating the appellant to the civil court.”

10. Thus, the case of the petitioner, in nutshell, as argued by the learned senior counsel for the petitioner is that the agreement in question has been rescinded by the impugned order dated 02.07.2020 in violation of Clause 14 of the contract, which clearly envisages issuance of a show cause notice prior to rescinding / cancellation of the agreement in question, however, the same has not been complied with and admittedly, there is a breach of the principles of natural justice, hence, applying the aforesaid law laid down by the



Hon'ble Apex Court, the impugned order dated 02.07.2020 is void and liable to be set aside. The other issue raised by the learned senior counsel for the petitioner in the present case is that since there was a complete lockdown in the country including the State of Bihar with effect from 22.03.2020 on account of the outbreak of the Covid-19 Pandemic and during the said period there had been a complete shutdown, except relaxation only for essential commodities and services, which had continued till 05.06.2020 and thereafter also the things have not normalized, the respondents could not have rescinded the agreement in question, nonetheless, the agreement in question has been rescinded by the impugned order dated 02.07.2020 without considering the lockdown situation prevailing all over the country as also in the State of Bihar and despite there being an order dated 30.04.2020 passed by the Ld. Full bench of this Court, in CWJC No. 5633 of 2020 **(In Re: Functioning of Courts in Bihar during the period of Covid-19,**



PANDEMIC vs. The State of Bihar & Ors.) to
the following effect:-

“7. As such, clothed by the orders passed by
the Supreme Court (supra), this Court issues
further following directions:-

(vi) Considering the prevalent attending
circumstances, unless essentially required in
public interest, it is expected of the State not
to precipitate any action till 17th of May, 2020
so as to compel the citizens to approach the
Court for redressal of their grievances.”

The Ld. Senior Counsel for the petitioner has
further submitted that the aforesaid direction of
the Ld. Full Bench of this Court has been extended
from time to time vide Orders dated 30.04.2020,
18.05.2020, 19.06.2020 and 09.07.2020
respectively.

11. Thus, it is submitted that considering the
bona fide offer of the petitioner company, the
petitioner company should be granted an



opportunity of completing the balance work in question within a period of eight months of passing of the present judgment, after quashing the impugned order dated 02.07.2020, whereby and whereunder the agreement in question has been rescinded since the said order dated 02.07.2020 is void ab initio being contrary to the principles of natural justice as also contrary to Clause 14 of the Contract in question. At this juncture, it would be relevant to reproduce Clause-14 of the Contract herein below:-

Clause-14

“Cancellation of contract in full or part

If the contractor:

- (i) At time makes default in proceeding with the works or any part of the work with due diligence and continues to do so after a notice in writing of 7 days from the Executive-incharge; or*
- (ii) Commits default to comply with any of the terms and conditions of the contract and does not remedy of or take effective steps to remedy it within 7 days after a notice in writing is given to him in that behalf by the Engineer-in-*



Charge; or

- (iii) Fails to complete the works or items of work with individual dates of competition, on or before the date(s) of completion; and does not complete them within the period specified in a notice given in writing in that behalf by the Engineer-in-Charge; or*
- (iv) Shall offer or give or agree to give to any person in Government service or to any other person on his behalf any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in*
- (v) Shall enter into a contract with Government in connection with which commission has been paid or agreed to be paid by him or to his knowledge, unless the particulars of any such commission and the terms of payment there of have previously disclosed in writing to the Accepting Authority /Engineer-in-Charge; or*
- (vi) Shall obtain a contract with Government as a result or wrong tendering or other non-bonafide*



methods of competitive tendering; or

(vii) Being an individual, or if a firm, any partner thereof shall at any time be adjudged insolvent or have a receiving order or order for administration of his estate made against him or shall take any proceedings for liquidation or composition (other than a voluntary liquidation for the purpose of amalgamation or reconstruction) under any a voluntary liquidation for the purpose of amalgamation or reconstruction) under any insolvency Act for the time being in force or make any conveyance or assignment of his effects or composition or arrangement for the benefit of his creditors or purport so to do; or if any application be made under any Insolvency Act for the time being in force for the sequestration of his estate or if a trust deed be executed by him for benefit of his creditors; or

(viii) Being a company, shall pass a resolution or the Court shall make an order for the winding up of the company, or a receiver or manager on behalf of the debenture holders or



otherwise shall be appointed or circumstances shall arise which entitle the Court or debenture holders to appoint receiver or manager; or

(ix) Shall suffer an execution being levied on his goods and allow it to be continued for a period of 21 days; or

(x) Assigns, transfers, sublets (engagement of labour on a piece-work basis or of labour with materials not to be incorporated in the work, shall not be deemed to be subletting) or otherwise parts with or attempts to assign, transfer sublet or otherwise parts with the entire works or any portion thereof without the prior written approval of the Competent Authority;

The Competent Authority may, without prejudice to any other right or remedy which shall have accrued or shall accrue hereafter to Government, by a notice in writing to cancel the contract as a whole or only such items of work in default from the Contract.”

12. Per contra, the learned counsel for the respondent-State has submitted that the petitioner was required to complete the work within a period of 24 months from the date of agreement i.e.



10.08.2015, however, on account of certain technical issues, the work was actually started in the month of April, 2016, nonetheless, the petitioner-company could hardly complete 24.24% of the construction work in a period of one year and three months, which shows that the progress of the work was negligible. It is submitted that several letters were written to the petitioner-company, requesting it to complete the incomplete work and rectify the faults but to no avail. Finally, being fed up with the slow progress of work, inasmuch as the petitioner company could complete only 64% of the work within a span of more than 48 months, a show cause notice dated 25.06.2020 was duly served upon the petitioner-company, before rescinding the contract in question by the impugned order dated 02.07.2020 and the petitioner-company was told to immediately restart the construction work and show substantial progress, failing which appropriate action would be taken under the provisions of the agreement. The grounds / reasons



put forth by the petitioner for delay in completion of the work in question has also been refuted by the learned counsel for the respondents and it has been submitted that the petitioner has deliberately defaulted in completing the work in question and its pace of work had always been slow. It has also been submitted that the petitioner has already been paid the outstanding due amount.

13. At this juncture, the Ld. Senior Counsel for the petitioner has contended that as far as the aforesaid show cause notice dated 25.06.2020 is concerned, the same is firstly not in accordance with the provisions contained in Clause 14 of the Contract and secondly, the said show cause notice dated 25.06.2020 does not contain any particulars regarding the penalty / action, which is proposed to be taken, resulting in violation of the principles of natural justice inasmuch as the petitioner has not been provided adequate and meaningful opportunity to show cause against the said proposed punishment, hence, the show cause notice itself is void and cannot be said to be



fulfilling the requirement mandated under Clause 14 of the Contract. In this regard, the learned Senior Counsel for the petitioner has referred to a judgment reported in **(2014) 9 SCC 105 (Gorkha Security Services vs. Govt. (NCT of Delhi) & Ors.)**, paragraphs no. 16, 20, 22, 26, 27, 29, 30 and 34 whereof are reproduced herein below:-

***“16.** It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as “civil death” of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.*

20. Thus, there is no dispute about the



requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg. [Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445]

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

(i) The material/grounds to be stated



which according to the department necessitates an action;

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

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

26. *In the present case, it is obvious that action is taken as provided in sub-clause (ii). Under this clause, as is clear from the reading thereof, the Department had a right to cancel the contract and withhold the agreement. That has been done. The Department has also a right to get the job which was to be carried out by the defaulting contractor, to be carried out from other contractor(s). In such an event, the Department also has a right to recover the difference from the defaulting contractor. This clause, no doubt, gives further right to the Department to blacklist the contractor for a period of 4 years and also forfeit his earnest money/security deposit, if so*



required. It is thus apparent that this sub-clause provides for various actions which can be taken and penalties which can be imposed by the Department. In such a situation which action the Department proposes to take, need to be specifically stated in the show-cause notice. It becomes all the more important when the action of blacklisting and/or forfeiture of earnest money/security deposit is to be taken, as the clause stipulates that such an action can be taken, if so warranted. The words "if so warranted", thus, assume great significance. It would show that it is not necessary for the Department to resort to penalty of blacklisting or forfeiture of earnest money/security deposit in all cases, even if there is such a power. It is left to the Department to inflict any such penalty or not depending upon as to whether circumstances in a particular case warrant such a penalty. There has to be due application of mind by the authority competent to impose the penalty, on these aspects. Therefore, merely because of the reason that Clause 27 empowers the Department to impose such a penalty, would not mean that this



specific penalty can be imposed, without putting the defaulting contractor to notice to this effect.

27. *We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.*

29. *No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either*



specifically or by necessary implication excludes the application of any rules of natural justice, in exercise of power prejudicially affecting another must be in conformity with the rules of natural justice.

30. *We are conscious of the following words of wisdom expressed by this Court through the pen of Krishna Iyer, J. in Board of Mining Examination v. Ramjee [(1977) 2 SCC 256 : 1977 SCC (L&S) 226] : (SCC pp. 258 & 262, paras 1, 13 & 14)*

“1. If the jurisprudence of remedies were understood and applied from the perspective of social efficaciousness, the problem raised in this appeal would not have ended the erroneous way it did in the High Court. Judges must never forget that every law has a social purpose and engineering process without appreciating which justice to the law cannot be done. Here, the socio-legal situation we are faced with is a colliery, an explosive, an accident, luckily not lethal, caused by violation of a regulation and consequential cancellation of the certificate of the delinquent shot-firer,



eventually quashed by the High Court, for processual solecisms, by a writ of certiorari.

13. ... Natural justice is no unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt—that is the conscience of the matter.

14. ... we cannot look at law in the abstract or natural justice as a mere artefact. Nor can we fit into a rigid mould the concept of reasonable opportunity.”



34. *For the aforesaid reasons, we are of the view that the impugned judgment [Gorakha Security Services v. Govt. (NCT of Delhi), (2013) 205 DLT 309] of the High Court does not decide the issue in the correct perspective. The impugned Order dated 11-9-2013 passed by the respondents blacklisting the appellant without giving the appellant notice thereto, is contrary to the principles of natural justice as it was not specifically proposed and, therefore, there was no show-cause notice given to this effect before taking action of blacklisting against the appellant. We, therefore, set aside and quash the impugned action of blacklisting the appellant. The appeals are allowed to this extent. However, we make it clear that it would be open to the respondents to take any action in this behalf after complying with the necessary procedural formalities delineated above. No costs."*

14. The learned Senior Counsel for the petitioner has also pointed out that the impugned order dated 02.07.2020 suffers from another fallacy inasmuch as the last paragraph thereof would show that the Executive Engineer, Construction



Division No. 2, Building Construction Department, Bihar, Patna, who is the competent authority under the contract to terminate the contract in question, has not applied his mind and has not decided for himself by exercising his independent mind and unfettered judgment as to whether the contract is required to be terminated or not inasmuch as he has acted in light of the departmental directions given by the Chief Engineer (Patna), Building Construction Department, Patna vide letter no. 581 dated 02.07.2020 and by the Superintending Engineer, Construction Circle, Building Construction Department, Patna, vide letter no. 300 dated 02.07.2020, hence, on this ground alone, the impugned order dated 02.07.2020 is fit to be set aside. In this connection, the learned Senior Counsel for the petitioner has referred to a judgment reported in **AIR 1952 SC 16 (Commissioner of Police v. Gordhandas Bhanji)**, paragraph no. 44 to 46 whereof are reproduced herein below:-

44. We have held that the Commissioner



did not in fact exercise his discretion in this case and did not cancel the license he granted. He merely forwarded to the respondent an order of cancellation which another authority had purported to pass. It is evident from these facts that the Commissioner had before him objections which called for the exercise of the discretion regarding cancellation specifically vested in him by Rule 250. He was therefore bound to exercise it and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the license or reject the objections. That duty he can now be ordered to perform under section 45.

45. It was objected as to this that there is no specific law which compels him to exercise the discretion. Rule 250 merely vests a discretion in him but does not require him to exercise it. That is easily met by the observations of Earl Cairns L.C. in the House of Lords in *Julius v. Lord Bishop of Oxford* [5 App. Cas. 214 at 222, 223.], observations which have our full and respectful concurrence:—

“There may be something in the nature of the thing empowered to be done,



something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.”

46. The discretion vested in the Commissioner of Police under Rule 250 has been conferred upon him for public reasons involving the convenience, safety, morality & welfare of the public at large. An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor can it be evaded; performance of it can be compelled under section 45.

15. When this Court had put a query to the learned counsel for the respondent-State, not only with regard to the aforesaid issues raised by the learned Senior Counsel but also as to whether any show cause notice has been issued, strictly in



terms of Clause 14 of the Contract, to the petitioner-company, before rescinding the agreement in question, by the impugned order dated 02.07.2020, the learned counsel for the respondent-State has fairly submitted that no such show cause notice was issued to the petitioner prior to rescinding the agreement in question.

16. I have heard the learned counsel for the parties and perused the materials on record. At the outset, it would suffice to state that as far as the issue of maintainability of the writ petition is concerned, this Court finds that admittedly, no show cause notice has been issued to the petitioner herein prior to passing of the impugned order dated 02.07.2020, rescinding the agreement in question, thus, not only Clause 14 of the Contract in question has been violated, but also the impugned order has been passed in violation of the principles of natural justice, hence, the present case is squarely covered by the law laid down by the Hon'ble Apex Court in the aforesaid decisions rendered in the cases of **Whirlpool Corporation**



(Supra), Popcorn Entertainment & Anr. (Supra) and Gorkha Security Services (Supra). In this connection it would be apt to refer to a Judgment rendered by the Ld. Division Bench of this Court dated 15-01-2015, passed in Letters Patent Appeal No.1288 of 2013 (M/S Dirghayu Mahavir Diagnostic Vs. The State of Bihar & Ors.), relevant paragraphs whereof are reproduced herein below:-

"The respondents intended to make alternative arrangements in the place of SML. On the spot verification of the performance of various agencies were undertaken. The petitioner herein was selected for establishing centre at Motihari and Muzaffarpur. Through order dated 25.3.2011 passed by the competent authority, it was directed that the appellant shall be entitled to function till the regular arrangement is made by the State or the agency is terminated in accordance with law. Through order dated 25.03.2013, the respondents terminated the contract of the appellant. The same was challenged by filing CWJC No.7059 of 2013.

Further the impugned order was not preceded by any show cause notice. It is too late day to



emphasise the importance of principles of natural justice. Mere proof of violation thereof, not necessarily, the prejudice flowing from the denial of audi alterum partem is sufficient to set at naught the order that suffers from vice. The order dated 25.03.2011, through which the agency was entrusted by the appellant, by itself, does not spell out any provision for arbitration. It is stated that in the agreement that has to be executed, as a sequel that, there existed a clause for arbitration. Whatever be the importance of such clauses, in the civil contract; where public interest is not involved, the same cannot be pressed into service, to sustain, an administrative order which is patently illegal. In the ultimate analysis, the plea raised by the respondent is the one, of existence of alternative remedy. It is fairly well known that a writ court does not countenance such plea when the order challenged before it is passed in violation of principles of natural justice. Further, in the field of administrative law, the clause providing arbitration has its own limitation. The services that are required to be provided are of emergency nature. On the one hand, the State did not provide the facility and, on the other hand, it has terminated the contract. At any rate the respondents did not



invoke any specific clauses in the agreement for cancelling the agency. Hence the plea of the respondents as regards arbitration cannot be accepted. The result of the impugned order is that the Government hospitals are without any facilities. The respondents want the matter to lie over, because if arbitration is initiated, it will take its own time. This Court would not permit such approach, lest the public interest suffers. We, therefore, allow this Letters Patent Appeal and set aside the order dated 23.07.2013 passed by the learned Single Judge in CWJC No.7059 of 2013. The writ petition is allowed and the impugned order is set aside. The respondents shall continue with the agency of the appellant forthwith, on the same terms and conditions as existed earlier; till they establish and commence their own centres."

Thus, on this ground alone i.e on account of non-compliance of the principles of natural justice and violation of Clause 14 of the Contract, the impugned order dated 02.07.2020 is held to be void and is accordingly quashed, consequently, any subsequent action taken by the respondent authorities are also held to be null and void.



17. The impugned order dated 02.07.2020 is also bad in law, for the reason that the Executive Engineer, Construction Division No. 2, Building Construction Department, Bihar, Patna, who is the competent authority under the contract to terminate the contract in question, has not applied his mind and has not decided for himself by exercising his independent mind and unfettered judgment as to whether the contract is required to be terminated or not inasmuch as he has acted in light of the departmental directions given by the Chief Engineer and the Superintending Engineer, as aforesaid, hence, on this ground as well, the impugned order dated 02.07.2020 is fit to be set aside, more so being squarely covered by the law laid down by the Hon'ble Apex Court in the aforesaid decision rendered in the case of ***Gordhandas Bhanji (Supra)***.

18. As far as the issue regarding grant of opportunity to the petitioner-company to complete the work in question within a period of eight



months is concerned, the petitioner is granted liberty to approach the respondents by filing appropriate representation, which shall be considered by the respondents sympathetically, especially taking into account the effect of complete lock-down in the country as also in the State of Bihar on account of the Covid-19 Pandemic and the effect of the full Bench judgment of this Court rendered in CWJC No. 5633 of 2020 (***In Re: Functioning of Courts in Bihar during the period of Covid-19, Pandemic vs. The State of Bihar & Ors.***), as also considering the judgments rendered in the case of ***Kems Services Pvt. Ltd.*** (supra) and ***B. K. Enterprises*** (supra). It is needless to state that in case such a representation is filed by the petitioner-company before the competent authority within a period of four weeks from today, the same shall be disposed of by taking appropriate decision in accordance with Law within a period of four weeks of filing of the said representation by the petitioner-company.

19. The writ petition stands allowed on the



aforesaid terms.

(Mohit Kumar Shah, J)

Ajay/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	06.02.2021
Transmission Date	NA

