

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.24956 of 2019

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1. The Art Gallery (TAG) Situated at 1st floor, Chandrakanta Complex, Ashiyana More, P.O.- B.V. College, P.S.- Shastri Nagar, Distt.- Patna, through proprietor Ashok Kashyap, Gender- male, S/o Bhikhari Nath, aged about 57 years, at present R/o Kautilya Nagar, B.M.P. Road, P.O.- B.V. College, P.S.- Airport, Distt. Patna, Bihar permanently residing at Vill.- Makra, Naya Ganw, Distt.-Saran.
 2. Ashok Kashyap S/o Bhikhari Nath At present R/o Kautilya Nagar, B.M.P. Road, P.O.- B.V. College, P.S.- Airport, Distt. Patna, Bihar permanently residing at Village- Makra, Naya Ganw, Distt.-Saran.

... .. Petitioner/s

Versus

1. The State of Bihar through Chief Secretary Government of Bihar, Secretariat, Bailey road, Patna.
2. Chief Electoral Officer Bihar at Patna-7, Sardar Patel Marg, Mangles Road, P.S.- Sachivalaya, Distt.- Patna.
3. District Election Officer-cum- District Magistrate Gopalganj, P.S.- Gopalganj Sadar, Distt.- Gopalganj.
4. Deputy Election Officer P.S.- Gopalganj Sadar, Distt.- Gopalganj.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Ashish Giri, Advocate
		Mr. Gyanendra Kumar Shukla, Advocate
For the Respondent/s	:	Mr. Mithilesh Kumar Upadhya, AC to GP-3

CORAM: HONOURABLE MR. JUSTICE ANIL KUMAR SINHA
CAV JUDGMENT

16-11-2021

Heard Mr. Ashish Giri, learned counsel for the petitioners and Mr. Mithilesh Kumar Upadhya, learned AC to Government Pleader-3 for the State.

2. The petitioners/company has challenged the order of blacklisting dated 08.11.2019 (Annexure-4) issued under the signature of Deputy Election Commissioner, Gopalganj whereby the petitioners/company has been



blacklisted from participating in any tender published in the District of Gopalganj.

3. The facts giving rise to this petition is that pursuant to the NIT for preparation of voters list for sixth Vidhan Sabha segment in the parliamentary constituencies of Gopalganj under two bidding system published *vide* NIT dated 08.08.2019 (Annexure-1), the petitioners/company also submitted its bid and was declared successful in the technical bid. The total 26 items were published for tender. In the financial bid for 12 items, the petitioners/company was rated to be the lowest tenderer because of its having quoted zero rate. For the other 10 items, petitioners/company was again found to be the lowest tenderer and for remaining four items, one company in the name of M/s Datatek Software Solution Pvt. Ltd had quoted the lowest price. For those four items for which M/s Datatek Software Solution Pvt. Ltd was the lowest tenderer, the petitioners/company was asked to give an affidavit that it would accept offer for those four items also but only at the rate quoted by the aforesaid M/s Datatek Software Solution Pvt. Ltd.

4. Learned counsel for the petitioner submits that the Respondent/authority entered into rate negotiation with the petitioners/company and communicated its offer *vide* letter



dated 26.09.2019 (Annexure-2) where amongst others, petitioners/company was directed to file an affidavit agreeing to proceed with the work by matching the lowest rate in four items which was offered by the other tenderer, as would be evident from para-3 of the said letter. The petitioners/company, however, vide letter dated 28.09.2019 (Annexure-3) responded to the offer of the respondent and clarified that it can proceed with the work only with the original offer made by it inasmuch as the zero rate offered in 12 items is to be compensated by the petitioners/company from other items rate to make the same financially viable for the company. Accordingly, the petitioners/company submitted its affidavit which is at page 30 of the writ petition as a counter offer of the company for entering into the agreement of the original offered rate.

5. He further submits that the Respondent/authority found the affidavit submitted by the petitioners/company to be misleading and did not accept the same and as a result, cancelled the tender but while doing so also proceeded to blacklist the petitioners/company from further participating in any tenders in the District of Gopalganj on the ground that the affidavit so provided by the petitioners/company was not in terms of the direction of the Respondent inasmuch as



the petitioner did not agree to match lowest rate as directed/offered by the Respondents.

6. It has also been submitted by the petitioner that the impugned order of blacklisting is wholly arbitrary, whimsical and is violative of Articles 14 and 19(1)(g) of the Constitution of India as there was no concluded contract between the parties, as such, the question of blacklisting did not arise and the order of blacklisting, thus, became wholly without jurisdiction. Learned counsel next submits that the impugned action amounts to forcing the petitioner to enter into the contract on the unilateral terms which was not agreeable by the petitioner and as per the provisions of Sections 7, 10, 13, 14 and 46 of the Contract Act 1972, no person can be forced to enter into a contract. Referring to Clause 22 (GA)(4) (5) of the terms of NIT, learned counsel submits that the power of blacklisting could have been exercised by the authority only once an agreement was entered into between the parties and if the petitioner had failed to complete the work within the stipulated time. In the present case, no agreement was entered into between the parties.

7. In support of the aforesaid arguments, the petitioner relied upon the following decisions:-



- 1. 2016 SCC online Patna 7834 (M/S Suraksha Diagnostic Pvt. Ltd v. The State of Bihar & Ors).**
- 2. AIR 1980 DEL 260 (Bhim Sain v. Union of India & Ors)**
- 3. 2021 SCC online SC487 (South Eastern Coalfields Ltd & Ors v. S. Kumar's Associates AKM (JV).**

8. It has also been submitted by the learned counsel for the petitioners/company that another illegality in the order of blacklisting is that prior to passing of the impugned order dated 08.11.2019, no show-cause notice was ever issued or served by the Respondent upon the petitioners showing its intention that the petitioner would be blacklisted, if not agreeable to the offer of the Respondent. Learned counsel also submits that the aforesaid fact has specifically been stated in paragraphs 15 and 18 of the writ petition which has not been denied by the Respondents in their counter affidavit. He also submits that the impugned order of blacklisting is for indefinite period and is in the nature of permanent debarment which is not permissible in law as has been held by the decision of the Hon'ble Apex Court in the case of *M/S Daffodills Pharmaceuticals & Anr v. State of UP & Anr* as reported in *(2019) 17 SCALE 758* and again reiterated in the case of *Ventindia Pharmaceuticals Ltd v. State of UP & Anr* as



reported in *(2020) 1 SCC 804*.

9. On the other hand, learned counsel for the State submits that the petitioners/company had submitted its tender but its tender was found to be defective, hence, vide office letter no. 1744 dated 26.09.2019 (Anneuxre-2) affidavit and assurance of work done in minimum rate was asked for but petitioners/company did not submit satisfactory reply, accordingly, the District Purchase Committee in its meeting held on 03.01.2019 decided to reject the tender of petitioners/company and blacklisted the petitioners from participating in future tender published from the District. He also submits that the petitioners/company was directed to furnish an affidavit and assurance of work at the rate quoted by M/s Datatek Software Solution Pvt. Ltd but the petitioners/company submitted the misleading and unsatisfactory affidavit and also did not submit its consent letter agreeing to the rate quoted by another tenderer in four items.

10. I have heard learned counsel for the parties and have carefully gone through the materials available on record. It appears that NIT stipulates the terms and conditions of financial bid and upon perusal of Clause (GA) (4) and (5), it would be evident that before award of work order the successful



bidder was required to enter into an agreement with the Respondents. It further stipulates that if the work is not completed within the completion period, a sum of Rs. 1000/- shall be deducted per day for the delay of one day and if one week after the date of completion the work is not completed, in that case, the security deposit shall be forfeited and the firm shall be blacklisted.

11. From the close scrutiny of the conditions prescribed in NIT, it transpires that the contract would stand concluded after entering into agreement by the successful bidder with the Respondents and then only work order would be issued. It also appears that the condition-precedent for blacklisting as prescribed in the NIT is that, in case, agency fails to complete the work within the period of completion mentioned in the agreement and if the delay in completion goes beyond one week after the date of completion. Thus, Clause (Ga), (4) and (5) of NIT clearly put a pre-condition that firstly before award of work the successful bidder has to enter into an agreement with the respondents and secondly if the agency fails to perform the work within stipulated time, the order of blacklisting may be passed by the Respondents owner.

12. Accordingly, for treating the contract to be



concluded contract as per Clause-4, an agreement is required to be executed between the parties. In the case of ***Bhim Sain v. Union of India & Anr.*** as reported in ***1980 SCC OnLine Del 256: AIR 1981 Del 260***, in almost identical fact where after the extension of the validity period of offer made by the petitioner, it became uneconomical for the petitioner to keep his tender open and the petitioner withdrew the tender and accordingly, the firm in question was blacklisted. Hon'ble Delhi High Court has held that by withdrawing the tender, the petitioner had not committed breach of any contract and a contractor being blacklisted on the ground of committing a breach of contract is understandable. Where, however, no concluded contract had come into existence, a tenderer cannot be blacklisted if he is not informed previously that such a penalty can be imposed if the offer made by him is withdrawn. In other words, a new condition not previously known to a tenderer cannot be inserted.

13. In the case of ***M/s Suraksha Diagnostic Pvt. Ltd v. The State of Bihar & Ors*** as reported in ***2016 SCC OnLine Pat 7834***, a Bench of this Court has held that the order of blacklisting of the petitioner could also not have been passed in absence of concluded contract as the Memorandum of Understanding (MOU) had not been executed between the



parties and request for proposal did not also authorize the Respondents to pass an order of blacklisting against the petitioner.

14. In the facts of the present case, the admitted position is that no agreement was executed between the petitioners and the Respondents-authorities and there was no concluded contract between the parties. Only because the petitioner refused to work for those four items at the rate offered by M/s Datatek Software Solution Pvt. Ltd and refused to accept the terms imposed by the Respondents at the time of rate negotiation and before entering into an agreement, in my opinion, the same does not violate any terms and conditions of the NIT. A contractor being blacklisted on the ground of violation of the terms and conditions of the contract and or the terms and condition of NIT may be accepted but in my opinion, in the present case, none of the above conditions is available inasmuch as no concluded contract had come into existence in the present case and from perusal of the terms and conditions of the NIT regarding blacklisting, it would be clear that petitioner has not committed any breach of the same. The impugned order of the Respondents, therefore, in blacklisting the petitioners/company, is completely, arbitrary and unsustainable



in law.

15. It is settled principle of natural justice that before passing the order of blacklisting which entails serious civil consequences, the person concerned against whom the action is proposed, is required to be given the reasonable opportunity to defend himself and as held in the case of ***UMC Technologies Private Limited v. Food Corporation of India & Anr.*** as reported in ***(2021) 2 SCC 551***, a notice/show-cause must contain particularly, the penalty/action which is proposed to be taken, should be mentioned specifically and unambiguously.

16. From the perusal of the impugned order of blacklisting, it appears that the decision to blacklist the petitioners/company has been taken in a meeting of District Purchase Committee, however, it does not appear that a show-cause/notice was ever issued or served upon the petitioners/company before arriving at the decision to black list the petitioners/company. It further appears that the specific averment made by the petitioners in para-15 of the writ petition that no opportunity was afforded to the petitioners before the impugned order of blacklisting was passed, has not been replied adequately by the Respondents in the counter affidavit. Accordingly, I find that the order of blacklisting is also bad in



law for not granting reasonable opportunity to the petitioner and failure on the part of the respondents to serve a show-cause upon the petitioners is violative of principles of natural justice.

17. As regards the order of blacklisting of the petitioners/company being bad on the ground that the same has been made permanent in nature, the Hon'ble Apex Court in the case of *Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project, BSNL* reported in *2014 (14) SCC 731*, has held that an order of permanent debarment is unjustified and further the case of *M/S Daffodills Pharmaceuticals (supra)*, relied upon by the petitioner, the Hon'ble Apex Court has observed that an order of blacklisting beyond three years or maximum of five years was disproportionate.

18. Perusal of the impugned order makes it clear that the order of blacklisting is in the nature of permanent debarment/blacklisting and accordingly, the same is not sustainable on this count also.

19. From the above discussions on the facts as well as on law, I come to the conclusion that the impugned order of blacklisting is arbitrary, violative of principle of natural justice and is in the nature of order of blacklisting for indefinite



period, accordingly, the same is not sustainable. As a result, the impugned order dated 08.11.2019 (Annexure-4) issued under the signature of Deputy Election Commissioner, Gopalganj blacklisting the petitioners/company is, hereby, quashed.

20. The writ petition stands allowed.

21. However, there shall be no order as to costs.

(Anil Kumar Sinha, J)

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AFR/NAFR	AFR
CAV DATE	04.10.2021
Uploading Date	16.11.2021
Transmission Date	

