

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3526 of 2021

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S.N BHOBBE ASSOCIATES PVT. LTD having office at 4th Floor, Pudhari Bhavan, Near Sanpada Railway Station, Sector-30A, Vashi-Navi Mumbai 400705, through its authorised representative Mr. Sanjeev Kumar

... .. Petitioner

Versus

1. The State of Bihar through Principal Secretary, Road Construction Department, Patna, Bihar
2. Bihar Rajya Pul Nirman Nigam Ltd. through its Managing Director, 7, Sardar Patel road, Patna-800015

... .. Respondents

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Appearance :

For the Petitioner	:	Mr. Y.V.Giri, Senior Advocate Mr. Prabhakar Nath Rai, Advocate
For the Respondent State:		Mr. S.D.Yadav, AAG-9 Mr. Dinesh Maharaj
For the Respondent Nigam :		Mr. Lalit Kishore, Senior Advocate Ms. Binita Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 10-05-2022

Invoking the writ jurisdiction under Article 226 of the Constitution of India, the petitioner has filed the present writ application seeking the following relief: -

“That in the instant writ application, the petitioner prays for issuance of rule calling for the records and calling upon the respondent to show cause as to why a writ in the nature of mandamus or certiorari or any other appropriate writ should not be issued for setting aside the order dated 25.03.2019 and subsequent order dated 26.06.2020 holding the same is illegal, null and void and/or so



as to be pleased to make the rule absolute And/or be pleased to pass any other/orders/directions as your Lordship may deem fit and proper.”

2. It is significant to note at the very outset that judgment in this case was reserved on 22.03.2022 for being delivered on 29.03.2022. However, considering the nature of issues involved in the writ application, it was deemed proper to pass following order on 29.03.2022: -

“This matter has been listed under the heading ‘For Judgment’ today. However, the Court has considered it desirable to seek additional information from the State of Bihar in view of the nature of controversy which has arisen in the present writ application in respect of the consequence of the order dated 25.03.2019.

Let the Bihar Rajya Pul Nirman Nigam Limited file an affidavit stating specifically the consequence of the said order dated 25.03.2019 mentioning clearly as to whether the decision as contained in the said order dated 25.03.2019 shall have the consequence of debarring the petitioner from participating in any tender process in future which may be undertaken by the Respondent- Bihar Rajya Pul Nirman Nigam Limited. The affidavit must be filed by 05.04.2022.

List this matter on 05.04.2022 under the same heading.”



3. The matter was subsequently directed to be listed for judgment on 11.04.2022. However, in the meanwhile, the respondent Bihar Rajya Pul Nirman Nigam Limited ('BRPNNL' for short) decided to modify its impugned orders 25.03.2019 and 26.06.2020 by issuing another order dated 08.04.2022. The said order dated 08.04.2022 has been brought on record by way of supplementary affidavit. Considering the peculiar facts and circumstances of the case and the subsequent development, the Court, by an order dated 11.04.2022 recalled the earlier order, whereby the judgment was reserved, in the interest of justice. The matter was subsequently re-heard on 26.04.2022. In the light of this Court's order dated 26.04.2022, this case has been placed for judgment today.

4. The petitioner, it is stated, is an architectural and design consultant firm having international recognition. It was issued a work order by the BRPNNL for preparing the design of a flyover bridge from R-Block to G.P.O., Patna on 10.10.2006. Subsequently, an agreement was entered into between the petitioner and BRPNNL on 16.03.2007, with 10.10.2006 as the date of the commencement of the work, i.e., the date on which the work order was issued. The construction work of the said flyover had begun on the basis of partial design and drawing submitted by



the petitioner. During the course of the execution of the work, certain discrepancies in the design submitted by the petitioner were noticed. The said deficiencies in design were brought to the notice of the petitioner by letter dated 28.03.2017, which has been brought on record by way of Annexure-5 to the writ application. In view of the nature of deficiencies, so detected, the petitioner was asked to get the practical difficulties arising out of defective design resolved immediately after sending an experienced designer of the petitioner's company, failing which the BRPNNL would be constrained to take appropriate action in terms of the agreement. By a subsequent letter dated 30.03.2017 addressed to the Managing Director of the petitioner-company issued by the Senior Project Engineer, Special Works Division, BRPNNL, it was informed that the contractor engaged in the execution of the work had raised the issue of adequacy of provision made in the design of the flyover, which was required to be urgently resolved since the construction of the flyover was in progress and the respondents were going to cast the superstructure of the fly-over.

5. Subsequently, by letter dated 13.04.2017, issued by the Managing Director, BRPNNL, the petitioner was asked to submit an explanation as to why the petitioner be not black-listed. It was mentioned that if such explanation was not submitted within



24 hours or if explanation submitted within the said period was found to be unsatisfactory, the firm shall be black-listed. The said letter No. 473 dated 13.04.2017, which is part of Annexure-8 series to the writ application, clearly mentions the nature of deficiencies in the drawing and design submitted by the petitioner. The petitioner submitted his explanation through a letter dated 14.04.2017. By a letter dated 19.04.2017 issued under the signature of Senior Project Engineer of BRPNNL, the decision to black-list the petitioner was communicated, as the explanation submitted by it was not found satisfactory. The petitioner thereafter made a representation on 30.05.2017 objecting to the decision of black-listing. It is asserted in the said letter that the action of black-listing was in violation of the principles of natural justice inasmuch as only 24 hours' time was allowed to the petitioner to respond to the show-cause notice for black-listing because of which it was not adequate for it to demonstrate that there was no irregularity in the design provided and approved by an approved consultant. The petitioner's said representation dated 30.05.2017 was rejected by the BRPNNL as communicated through a letter dated 29.06.2017 issued under the signature of the Senior Project Engineer, Special Works Division, BRPNNL. The petitioner had earlier approached this Court by filing a writ



application putting to challenge the letter of black-listing dated 19.04.2017 giving rise to C.W.J.C. No. 9550 of 2017. This Court, by an order dated 05.09.2017 allowed the writ application by setting aside the communication dated 19.04.2017 of black-listing mainly on the ground of the same being bereft of reasons. The matter was, however, remanded to the competent authority to pass a reasoned order after giving the petitioner an opportunity of hearing. It was clearly mentioned in this Court's order that if so advised, the petitioner could file additional show cause, if so required, which also would be looked into by the competent authority while taking decision. This Court had further directed the petitioner to remain present before the competent authority on 09.10.2017 with additional show cause, if any. The competent authority was in turn directed to consider the same and decide the matter within a period of eight weeks from that date, after giving the petitioner an opportunity to defend its position, in compliance with this Court's order dated 05.09.2017.

6. Without referring to such factual details, which are not of much relevance for the present adjudication, it is noted that in compliance with the said order dated 05.09.2017 passed in C.W.J.C. No. 9550 of 2017, the Managing Director of BRPNNL passed a reasoned order issued vide Memo No.665 dated



25.03.2019, which is impugned in the writ petition. The Managing Director, in his impugned order noticed that in the absence of any provision for black-listing in the agreement and in view of the fact that Bihar Contractors Registration Rules, 2007, was not applicable in the petitioner's case, the petitioner's name was decided to be removed from the list of black-listed contractors. However, it was decided to remove the petitioner from the list of enlisted consultants of BRPNNL with the further stipulation that in the future the petitioner company shall not be enlisted in the list of consultants. Invoking clause 8.2 of the agreement, it was decided by the impugned order dated 25.03.2019 that the excess amount spent for the completion of the balance work shall be recoverable from the petitioner. The petitioner thereafter again made a representation through a letter dated 29.04.2019 against the decision as contained in the order dated 25.03.2019. It raised an objection that the proposed action to de-list the petitioner from the list of consultants was not mentioned in the show-cause notice. Further, there was no such provision in the concerned agreement, which permitted such action to be taken by the BRPNNL. The petitioner questioned the legality of the decision to recover the additional cost, asserting that the petitioner had rather a claim against BRPNNL to the effect that it had engaged the petitioner for



almost ten years without any cost escalation and revision of rates. The petitioner thereafter approached the BRPNNL through a letter dated 07.06.2019 by way of representation against the letter/order dated 25.03.2019. The petitioner again approached this Court by filing a writ petition giving rise to C.W.J.C. No. 2025 of 2020 raising its grievance that the representation(s) filed by it against the decision to de-list the firm was not being considered and disposed of. This Court disposed of the writ petition by an order dated 26.02.2020 with a direction to the Managing Director of the BRPNNL to dispose of the said representation within four weeks. In compliance with the said order of this Court dated 26.02.2020, the Managing Director, BRPNNL, has passed an order dated 26.06.2020 refusing to review its earlier decision dated 25.03.2019. The said order passed on 24.06.2020 issued vide Memo No. WC-1,994 dated 26.06.2020 has been put to challenge in the present writ application as has been noticed at the very outset. The petitioner has filed a supplementary affidavit bringing on record its empanelment as D.P.R. consultant vide Memo No.1013 dated 23.12.2017. It is the petitioner's case that because of de-listing, the petitioner stood debarred from participating in any tender floated by the BRPNNL.



7. As has been noted in the very beginning of the present judgment, the BRPNNL has modified the orders dated 25.03.2019 and 26.06.2020 to the extent that the petitioner shall not be enlisted in the panel of preferred consultants of the Corporation for a period of five years in place of an indefinite period. Be it noted that by the impugned order dated 25.03.2019, the BRPNNL had removed the petitioner from the list of empanelled consultant with the stipulation that it shall not be empanelled as consultant in future. The petitioner's request seeking review of the said order was turned down by the subsequent order dated 26.06.2020.

8. We have heard Mr. Y.V.Giri, learned Senior Counsel appearing on behalf of the petitioner, and Mr. Lalit Kishore, learned Senior Counsel with Ms. Binita Singh, learned Counsel for BRPNNL. Mr. S.D.Yadav, learned AAG-9 has appeared on behalf of the State of Bihar.

9. Mr. Y.V. Giri, learned Senior Counsel, has submitted that the impugned communication dated 26.06.2020 is in clear breach and in violation of the principle of natural justice inasmuch as it does not contain cogent reasons for rejecting the petitioner's representation against the order dated 25.03.2019. Referring to the impugned order dated 25.03.2019, whereby the petitioner has been de-listed from the list of consultants, he has submitted that the said



order is also in violation of the principles of natural justice inasmuch as there was no show-cause notice disclosing the proposed action of de-listing the petitioner from the list of design consultants of the BRPNNL. He has further submitted that the said impugned order not to enlist the petitioner even in future as a consultant is akin to black-listing the petitioner's company permanently, which is impermissible in the light of the Supreme Court decision in case of *Kulja Industries Ltd. v. Western Telecom Project BSNL*, reported in (2014) 14 SCC 731 and subsequent decisions. He has contended that de-listing the petitioner will have serious consequences, which has been recognized by the Supreme Court in a series of decisions including in the case of *Daffodills Pharmaceuticals Ltd. v. the State of U.P.*, reported in (2020) 18 SCC 550. He has also placed reliance on a single Bench decision of this Court in the case of *Ramanand Rai Vs. The State of Bihar and Others*, reported in [2021 (5) BLJ 377] to contend that the impugned order is in breach of principles of natural justice. He has placed heavy reliance on the Supreme Court's decision in the case of *Gorkha Security Services v. Govt. (NCT of Delhi)*, reported in (2014) 9 SCC 105. Reliance has also been placed on the Supreme Court's decision in the case of *Oryx Fisheries (P) Ltd. v. Union of India*, reported in (2010) 13 SCC



427 in support of the contention that in the absence of proposed action mentioned in the show cause notice itself, the impugned order of de-listing is unsustainable.

10. Referring to the subsequent order of the BRPNNL dated 08.04.2022, Mr. Y.V. Giri, learned Senior Counsel for the petitioner has submitted that during the pendency of the present writ application, the respondents ought not to have modified the order under challenge in the writ application without obtaining this Court's leave. He has further submitted that in any view of the matter, the effect of delisting of the petitioner is its black-listing, which is unsustainable in view of the admitted fact that the proposed action of black-listing/de-listing was never indicated in the show cause notice issued to the petitioner, which renders even the subsequent order vulnerable in the light of Supreme Court's decision in the case of *Daffodills Pharmaceuticals Ltd.* (supra) (Para 14), *Gorkha Security Services* (supra) (paras 16 and 20) and *Raghunath Thakur v. State of Bihar*, reported in (1989) 1 SCC 229 (Para 20).

11. At this juncture, it is worthwhile mentioning that by the impugned order dated 25.03.2019, a decision had been taken also to recover the excess amount spent by the BRPNNL for completion of balance work from the petitioner invoking Clause



8.2 of the agreement. Mr. Giri, learned Senior Counsel for the petitioner, has submitted that such a decision of the respondents is in clear breach of the principles of natural justice. It is noteworthy that there is an arbitration clause in the agreement, which provides, *inter alia*, that all disputes or differences in respect of which the decision, if any, of the Chief Engineer has not become binding shall, on the initiative of either party, be referred to the Managing Director, BRPNNL, and his decision thereon shall be final, conclusive and binding. In response to a query made by this Court as to why this writ application should be entertained on the point of the impugned decision of the BRPNNL to recover the amount from the petitioner upon invoking clause 8.2 of the agreement, there being an arbitration clause, Mr. Y.V. Giri, learned Senior Counsel, has submitted that the said arbitration agreement is not workable in view of the provision under Section 12(5) of the Arbitration and Conciliation Act, 1996, read with 7th Schedule appended thereto. Because of the relationship of the Arbitrator/Managing Director, BRPNNL with one of the parties (BRPNNL). He has accordingly submitted that in view of the said provision, remedy of arbitration is not available to the petitioner. He has submitted that in any view of the matter, the availability of an alternative remedy does not prohibit the High Court from



entertaining a writ petition in appropriate cases. In support of his contention, he has relied on a recent decision of the Supreme Court on the case of *State of Andhra Pradesh (Now State of Telangana) V. A.P. State Wakf Board and Others*, reported in **2022 SCC OnLine SC 159**.

12. A counter affidavit has been filed on behalf of the BRPNNL. A supplementary counter affidavit has also been filed dealing with the averments made in the supplementary affidavit filed on behalf of the petitioner. It is stated in the counter affidavit that noticing certain serious defects in the design prepared by the petitioner during the course of execution of the work, a decision was taken to black-list the petitioner after informing him about the nature of defects and seeking comments thereon. He was put to show cause notice against the proposed action of black-listing the firm. Further, by letter dated 15.04.2017, the Deputy Chief Engineer, South Bihar Circle, Patna, had issued direction of terminating the petitioner's agreement, its performance having been found dissatisfactory. A plea has been taken in the counter affidavit that a fly-over designed by the petitioner in Surat (Gujarat) had collapsed in the year 2014 leading to the death of ten persons and upon inquiry conducted by the Indian Institute of Technology, it was found that the collapse of the fly-over was on



account of faulty design suggested by the petitioner. Statements have been made in the counter affidavit dealing with the technical aspects of the controversy in respect of the defective design prepared by the petitioner-firm, which need not be dealt with in view of the nature of the order, which we intend to pass in the present matter. It will, however, be appropriate to notice the facts relating to the empanelment of the D.P.R. consultant by BRPNNL as explained in the supplementary counter affidavit filed on behalf of BRPNNL. It has been stated that the petitioner firm was empanelled as D.P.R. Consultant vide Memo dated 23.12.2017 under the terms and conditions of expression of interest dated 01.11.2017. The tenure of empanelment was not stipulated, rather the empanelment was made till further orders. Referring to the press notice inviting expression of interest, which has been brought on record by way of Annexure-M to the supplementary counter affidavit, it is the case of the BRPNNL that it was specifically provided that BRPNNL reserves the right to cancel the empanelment at any stage.

13. It has been argued on behalf of the BRPNNL, on the other hand, that upon due application of mind, the competent authority decided to recall the order of black-listing in the absence of any provision for black-listing under the agreement and in view



of the fact that the petitioner was not registered under the Bihar Contractors Registration Rules. Replying to the question of violation of principles of natural justice, it has been submitted that this Court had earlier noticed this aspect in its order dated 05.09.2017 passed in C.W.J.C. No. 9550 of 2017 and accordingly after having noticed the violation of principles of natural justice had set aside the order of black-listing dated 19.04.2017 on the sole ground of lack of reasons. It has been submitted that the petitioner, at this stage, cannot plead absence of notice in view of this Court's observation in the order dated 05.09.2017. The petitioner had taken several grounds before this Court to assail the order of black-listing, but the same was interfered with on the sole ground of lack of reasons. Once, the matter was remanded back to the competent authority for passing reasoned order, after reasoned order having been passed, it is impermissible for the petitioner to raise such points, which were available to him in the earlier proceeding, in the present case. It has further been submitted that there being effective provision made under the agreement for settlement of claims between the parties by way of arbitration, this writ application under Article 226 of the Constitution of India may not be entertained, dealing with the disputed and technical aspects relating to defective design prepared by the petitioner. It has also



been submitted that the provision under Section 12(5) of the Arbitration and Conciliation Act read with the arbitration clause under the agreement does not deter the petitioner from raising his dispute by invoking the arbitration clause.

14. Responding to the submissions advanced by Mr. Y.V.Giri, learned Senior Counsel for the petitioner, Mr. Lalit Kishore, learned Senior Counsel representing the BRPNNL has contended that the absence of stipulation in the show cause notice of proposed action of de-listing is no more a ground available for the petitioner to assail the impugned order of de-listing for the reason that earlier an order of de-listing was already passed, which was interfered with by this Court on the ground of the same being unreasoned. He has submitted that in the light of an order of this Court dated 05.09.2017 passed in C.W.J.C. No.9550 of 2017, whereby the order of black-listing was set aside, the matter of de-listing was remanded back, whereafter the petitioner was given an opportunity of hearing. Subsequently, a reasoned order came to be passed. He has submitted that the purpose of disclosure of proposed action in the show cause notice is to make aware the person likely to be affected, about such action which may be taken. The petitioner was clearly aware about the action stipulated against it before opportunity of hearing was given in the light of



this Court's order dated 05.09.2017 passed in C.W.J.C. No.9550 of 2017. Further, the petitioner was given a liberty to file an additional show-cause by this Court apparently in a proceeding relating to impugned action of de-listing of the petitioner. He has submitted that it is impermissible for the petitioner to raise the ground of absence of the proposed action in the show-cause notice, at this stage, in the aforesaid background to assail the impugned action.

15. We have noticed relevant materials on record and considered rival submissions made on behalf of the parties. There appears to be no dispute that the agreement in question has been terminated by BRPNNL. By the impugned order dated 25.03.2019, the BRPNNL has directed for: -

(i) Removal of the petitioner firm from the list of preferred consultants with the stipulation that it will not be enlisted as the consultant by BRPNNL in future.

(ii) Recovery of the excess amount from the petitioner spent on completion of balance work by the BRPNNL, invoking clause 8.2 of the agreement.

16. To the extent the dispute relates to the terms of the agreement either in the nature of the termination of contract or recoverability of any amount by invoking any clause of the



agreement, in our opinion, there being an arbitration clause, we are not inclined to enter into such dispute. It would be appropriate, at this stage, to notice that the petitioner in his representation dated 29.04.2019 presented after passing of the impugned order dated 25.03.2019 has asserted that it is rather the petitioner who has a claim on BRPNNL that it engaged the petitioner for almost ten years without any cost escalation and revision of rates. These assertions in the representation disclose that this proceeding involves a disputed question of fact on the issue as to whether the decision of BRPNNL to recover the additional amount spent by it for the balance work is in accordance with the terms of the agreement or not. We refuse to accept the submission of Mr. Y.V. Giri that this Court exercising power of judicial review under Article 226 of the Constitution of India should interfere on this aspect of the matter, which arises out of a contractual obligation on the ground that before taking such decision to recover the amount no show-cause notice was given to the petitioner. We do not find any force in the submission made on behalf of the petitioner that the arbitration clause of the agreement has lost its significance because of the provision under Section 12(5) read with the 7th Schedule of the Arbitration and Conciliation Act, 1996. The effect of Section 12(5) of the Arbitration and Conciliation Act is only to



the effect that the Managing Director of BRPNNL has become ineligible to be appointed as an Arbitrator. The fact remains that there exists an arbitration clause under the agreement. Section 11 of the Arbitration and Conciliation Act lays down the procedure for appointment of an Arbitrator, which cannot be said to have become inoperative in the present case because of the stipulation in the arbitration clause of the agreement read with Section 12(5) of the Act. Reference may be made in this regard to a recent decision of the Supreme Court in the case of *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.* reported in (2020) 20 SCC 760, rendered on an application under Section 11(6) read with Section 11(12)(a) of the Arbitration and Conciliation Act, which had arisen out of an agreement containing a dispute resolution clause, which stipulated, *inter alia*, adjudication of the dispute through arbitration by a sole arbitrator appointed by the CMD, HSCC. It was also stipulated therein that no person other than a person appointed by CMD, HSCC, should act as an arbitrator. The CMD, in that case had failed to appoint an arbitrator within the period specified under the arbitration agreement. However, the CGM had issued a letter appointing someone as the sole arbitrator. The Supreme Court, upon examining various provisions under the Arbitration and Conciliation Act, the



decisions in the case of **TRF Ltd. v. Energo Engg. Projects Ltd.**, reported in **(2017) 8 SCC 377** and other judgments held in paragraphs 23 and 25 as under: -

*“23. In **TRF Limited**, the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as in discernible from para 55 of the Judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the Applicants.*

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25. In the aforesaid circumstances, in our view a case is made out to entertain the instant application preferred by the Applicants. We, therefore, accept the application, annul the effect of the letter dated 30.07.2019 issued by the respondent and of the appointment of the arbitrator. In exercise of the power conferred by Section 11(6) of the Act, we appoint Dr. Justice A.K. Sikri, former Judge of this Court as the sole arbitrator to decide all the



disputes arising out of the Agreement dated 22.05.2017, between the parties, subject to the mandatory declaration made under the amended Section 12 of the Act with respect to independence and impartiality and the ability to devote sufficient time to complete the arbitration within the period as per Section 29 A of the Act....”

17. In view of the decision rendered in the case of **TRF Ltd.** (supra) and **Perkins Eastman Architects DPC & Anr.** (supra), we are of the considered view that the submissions advanced on behalf of the petitioner that the arbitration clause of the agreement has become unworkable because of the provision under Section 12(5) of the Act cannot be accepted.

18. The submission that this Court should entertain this writ application under Article 226 of the Constitution of India to adjudicate upon the dispute squarely covered by the terms of the contract agreement despite there being arbitration clause, on the reasoning that existence of alternative remedy is not a bar for this Court to entertain a writ application in appropriate exceptional cases has no merit. Writ jurisdiction of this Court is a discretionary remedy, which is normally exercised only when a party has no other remedy. Ordinarily, this Court does not enter into disputed questions of fact to adjudicate upon rival contractual obligations.



For these reasons, we are not inclined to entertain the petitioner's relief in respect of such disputes which are covered by the arbitration clause of the agreement. The petitioner shall be at liberty to invoke the arbitration clause in respect of the disputes arising out of the agreement in question in accordance with law.

19. So far as the decision of the respondent BRPNNL to de-list the petitioner from its listed consultants with the passing of the impugned order dated 25.03.2019 is concerned, we are not convinced with the submission that the same does not disclose reasons. The reason has been clearly disclosed in the impugned order, which reads as under: -

“यहाँ स्पष्ट है कि वरीय परियोजना अभियंता, तत्कालीन विशेष प्रमंडल, पटना द्वारा Consultant से प्राप्त कारण पृच्छा का जबाव संतोषप्रद नहीं पाया गया है। वरीय परियोजना अभियंता द्वारा यह भी इंगित किया गया है कि Consultant द्वारा Soil को Hard मानते हुए Acceleration Co-eff. की गणना की गई है जबकि Design Report में उनके द्वारा ही Soil के Soft nature के होने का जिक्र किया गया है। साथ ही Horizontal Seismic co-eff. की गणना हेतु Response Reduction factor (R) को 4 लिया गया है जबकि IRC: 6/2014 के oct' 2014 में प्रकाशित Correction Slip के अनुसार R 3 लिया जाना चाहिए था। अतः इसमें कोई दो मत नहीं है



कि Consultant द्वारा निरूपण में Carelessness एवं negligence दिखाया गया है।”

A near English translation of the aforesaid would read thus: -

“It is explicit here that the reply to the show-cause received from the Consultant has not been found satisfactory by Senior Project Engineer, the then Special Division, Patna. It has also been pointed out by Senior Project Engineer that Acceleration co-eff. has been calculated by the Consultant considering the soil as hard, whereas soil has been mentioned as soft nature by he himself in the Design Report. Besides this, the Response Reduction Factor (R) has been taken as 4 for calculation of Horizontal Seismic Co-eff. whereas, according to correction slip published in IRC:6/2014 of Oct, 2014, R3 ought to have been taken into consideration. Hence, there is no doubt about it that carelessness and negligence have been shown by the Consultant in the demonstration/presentation.”

20. It is recorded, at this juncture, that since it was not clearly evincible from the materials on record as to the consequence of the order passed by the BRPNL, the Court vide order dated 29.03.2022 had asked BRPNL to file an affidavit stating the consequence of the said order. It is in the wake of the



discussions, which had taken place during the proceeding on 29.03.2022, that the BRPNNL appears to have taken a decision to modify the said impugned order dated 25.03.2019 with the passing of an order dated 08.04.2022 whereby the period of de-listing has been specified as five (05) years from the date of issuance of the revised reasoned order. In such circumstance, the contention that the order of de-listing is for indefinite period, no more survives.

21. In the light of the Supreme Court's decision in the case of *Daffodills Pharmaceuticals Ltd.* (supra), *Gorkha Security Services* (supra) and *Raghunath Thakur* (supra), there cannot be any controversy over the legal proposition that before passing an order of black-listing, it is incumbent upon a 'State' within the meaning of Article 12 of the Constitution to disclose the proposed action. We, however, find substance in the submission made by Mr. Lalit Kishore, learned Senior Counsel for the BRPNNL that the said ground is no more available to the petitioner to assail the impugned order of de-listing in the facts and circumstances of the present case as the petitioner was aware about the action of black-listing, which was already taken against it and was subsequently interfered with by this Court on the ground of the said order being unreasoned. In the light of this Court's order, the petitioner was given due opportunity of hearing. It was, thus,



known to the petitioner that what was the action proposed against it. Accordingly, the impugned orders as subsequently modified by order dated 08.04.2022 cannot be challenged on this ground.

22. However, in the facts and circumstances of this case, it is observed that the petitioner shall be at liberty to approach the BRPNNL for reduction of the period for which it has been decided not to be listed as a preferred consultant. If the petitioner approaches BRPNNL by making a representation in this connection, it is expected that the BRPNNL shall consider the same in right earnest and take a decision within a period of two months from the date of making of such representation, if such representation is made within four weeks from today.

23. This application is thus disposed of with the aforesaid direction and observation.

24. There shall be no order as to cost.

(Chakradhari Sharan Singh, J)

(Madhuresh Prasad, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	26.04.2022
Uploading Date	17.05.2022.
Transmission Date	N/A

