IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.108 of 2022
In
Civil Writ Jurisdiction Case No.7782 of 2021

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1. The State of Bihar Road Construction Department, Visheshwaria Bhawan, Bihar, Patna-800001, through its Principal Secrertary,
2. The Principal Secrerary, Road Construction Department, Visheshwaria Bhawan, Bihar, Patna-800001.
3. The Rngineer-in-Chief-Cum-Additional Commissioner-Cum-Special Secretary, Road Construction Department, Visheshwaria Bhawan, Bihar, Patna-800001.
4. The Chief Engineer, Road Construction Department, Govt of Bihar, N.H. Division, Patna-800001.
5. The Executive Engineer, Road Construction Department, Govt of Bihar, N.H. Division, Chapra.
6. The Assistant Engineer, Road Construction Department, Govt of Bihar, N.H. Division, Patna-800001.
7. The Junior Engineer, Road Construction Department, Govt of Bihar, N.H. Division, Chapra.

... ... Appellant/s

Versus

Espan Infrastructure (1) Limited Earlier known as Espan Infrastructure Ltd., a company registered under the Companies Act, having its Registered Office at B-405, Second Floor, Nirman Vihar, Delhi- 110092, at Present registered at Pocket-E, Mayur Vihar, Phase-II, Delhi-110091 through its Authorized Signatory Animesh Verma (aged about 38 years) (Male) Son of Shri Pramod Kumar Verma, Resident of 4/444 G-2, Sector 4, Vaishali, P.S.- Indrapuram, Ghaziabad, Distt.-Ghaziabad (Uttar Pradesh)-201010.

... ... Respondent/s

Appearance :
For the Appellant/s : Mr.Tripurari Nath Ambastha (AC To SC 26)
For the Respondent/s : Mr.Pranav Kumar, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJIV ROY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJIV ROY)

Date : 10-10-2023

Heard the parties.

2. The present memo of appeal has been preferred against the judgment and order dated 23.09.2021 passed by the Hon'ble Single Judge in CWJC No. 7782 of 2021 by which the writ petition preferred by the respondent- Espan Infrastructure Pvt. Ltd. was allowed while quashing the:

(i) order dated 24.12.2018 passed by the Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Road Construction Department, Bihar, Patna (henceforth for short "the RCD") by which the Company was blacklisted for a period of 10 years;

(ii) the order dated 06.01.2021 issued by the Appellate Authority (the Principal Secretary of 'the RCD') by which it confirmed the decision taken on 24.12.2018.

3. The facts leading to the present appeal is/are as follows:

4. The Espan Infrastructure (I) Limited (the sole respondent-petitioner) claims to be a Company registered under the provisions of the Companies Act.

5. The company further is/was a registered class-I contractor in terms of the provisions of the Bihar Contractors Registration Rules, 2007 and thus eligible to participate in the tenders issued by the State Government under 'the RCD'.

6. 'The RCD' came out with the notice inviting tender (NIT) vide no. 02/2016-17 dated 22.08.2016 issued by the office of the respondent Executive Engineer, Chapra for the periodical repair (PR) work in KM 46.00 to 65.00 of NH 101 for the year 2016-17 for an estimated cost of Rs. 541.61 Lac. The earnest money required was of Rs. 10.83 Lacs and the work was to be completed within a period of five months after the signing of the agreement.

7. The Company being eligible for the said tender participated alongwith 5 other tenderers and was found to be the lowest tenderer. The Departmental Tender Committee headed by the respondent Engineer -in-Chief of 'the RCD' thereafter in its meeting dated 13.02.2017 accepted the bid of Rs. 4,99,99,999.00 for the aforesaid work which was to be completed within period of five months.

8. This followed the agreement between the parties on 28.02.2017 in terms of the respondent's letter dated 16.01.2017.

9. As per the case, an important ingredient for the construction of road and execution of BM Work and BC Work is the Bitumen. As the IOCL, Barauni Refinery was having scarcity of Bitumen, to maintain the time frame for the completion of the work within a period of five months, the Company vide letter dated 21.01.2017 requested the respondents to allow it to procure Bitumen from the IOCL, Mathura Refinery with further request for issuance of letter. However, as the respondents sat over the matter, in the interest of the project, the Company obtained the Bitumen from the IOCL, Mathura Refinery.

10. The Company accordingly was able to complete the road project within the time frame as specified under the agreement. However, the case of the respondent-petitioner is that immediately thereafter, the area witnessed heavy flood due to which the road in question got submerged. Even the project office of the Company situated there was flooded causing damage to its important documents. It naturally damaged the newly constructed road.

11. This resulted into pots coming in some patches of the road for which the respondent issued the letter / inspection report including the letters dated 12.07.2017, 15.07.2017 & 01.09.2017. In compliance of the said letters, the Company immediately took steps and repaired the entire pots and further informed the respondent Executive Engineer vide its letter dated 16.10.2010 about the repair work undertaken.

12. The respondents were further informed that the road markings have also been corrected as per the specifications, the said repair work was also verified and examined by the team of respondents consisting of the Assistant Engineer and the Junior Engineer and work was found to be completed as per the specification/conditions of the agreement.

13. The Assistant Engineer further certified the same vide its letter dated 24.10.2017 addressed to the respondent Executive Engineer.

14. However, in the meantime, the respondents issued show cause letter bearing memo no. 5954(E) dated 20.10.2017 alleging that the NH 101 from Km 45.00 to 65.00 was inspected which was completed in June, 2017. However, upon the inspection report of the Superintending Engineer dated 08.06.2017 and 12.06.2017, it was found that although the pots on the said road was repaired some still exists which requires repair further why steps be not taken under Bihar Contract Registration Rules, 2007 against the Company.

15. The Company replied to the said notice on 30.10.2017 detailing out that the work was completed by June 2017 within the stipulated time period. However, the damages occurred due to the flash flood and the water logging which was immediately attended / repaired by the Company. Further, the said repair work was duly certified by the Assistant Engineer and the Junior Engineer vide its office letter dated 24.10.2017.

16. The respondents thereafter instead of making payments against the bills raised, issued memo no. 779 dated 13.10.2017 directing the Company to again repair the road and submit challans regarding the procurement of bitumen so that the payments can be done after the due verification.

17. The claim of the Company is/was that in terms of clause (e) & (f) of Clause 17 of the Special Conditions of Contract (henceforth for short 'the SCC'), the respondent Executive Engineer was obliged to collect the bitumen sample procured by the Company and test in its departmental laboratory within 7 days from the receipt of the bitumen sample and the work from this procured bitumen shall only be allowed if the test result of bitumen sample conducted is as per the IS 73 and found to be satisfactory.

18. However, no such dispute was ever raised by the respondent Executive Engineer regarding its procurement or quality during the entire period of completion of the road projects. It was only when the Company raised its third RA Bill for the payment, the respondent started raising objection for delaying the payments.

19. Further, Clause 17(h) of 'the SCC' provides that in case of dispute in either procurement or its specification of bitumen, the decision of the concerned Superintending Engineer shall be final and binding. The respondent or the Engineer in Charge at no point raised any dispute with regard to the procurement of bitumen from the IOCL, Mathura Refinery or its specification and thus, any subsequent dispute raised by the respondent in course of payment of the bill is/was arbitrary, illegal and against the conditions of the agreement.

20. The Department thereafter wrote another letter no. 85 dated 05.02.2018 under the signature of the Executive Engineer, NH Division, Chapra informing that several reminders were issued for supplying the documents regarding purchase of bitumen and further out of 31 procurements, only 10 were found to be correct by the Patna IOCL while 21 were informed as false. Thus, the Company was asked to explain regarding the illegal procurement of the bitument.

21. The Company duly replied in detail vide its letter dated 06.02.2018 drawing attention to the clause 17 of 'the SCC' and also replied that the fact that though 21 procurements have been labelled incorrect by the IOCL, Patna, the same has been confirmed by the IOCL, Mathura Refinery vide letter dated 01.09.2017.

22. Further, the work was completed on 15.06.2017 itself and the final measurement was also done by the respondents. Thus, the Company requested vide its letter dated 07.02.2018 to issue completion certificate. Further, it again vide letter dated 14.02.2018 requested for the payment which has been due against the RA bill amounting to Rs. 199.46 Lac pending for the payment against final bill.

23. Thereafter, the respondent Superintending Engineer directed the Executive Engineer to redress the grievance of the Company and to inform about the status of the payment. Accordingly, the respondent Executive Engineer vide its letter dated 10.04.2018 informed that the demand of Rs. 29.87 Lac against the repair work is not justifiable while admitting that the work was completed on 15.06.2017.

24. This followed another show cause notice vide memo no. 3290(E) dated 15.05.2018 stating that contrary to the agreement, the Company procured Bitumen from the

IOCL, Mathua Refinery and out of 31 procurement documents, only 10 documents were found to be correct. It further directed to submit explanation within a period of 15 days as to why action be not taken in terms of Bihar Contractors Registration Rules, 2007.

25. The Company replied to the said show cause through its letter dated 28.05.2018 stating therein that the entire issue has already been replied by it time and again to the respondent Executive Engineer and despite that, the same issue has been raised just to harass and delay the payment of final bill.

26. Meanwhile, the Company also obtained the bank statement by which the payments were made to the IOCL, Mathura Refinery for procurement of Bitumen as the documents including challans were damaged at the project site of the work due to the flood.

27. However, the respondent Engineer In Chief without considering the reply passed the order vide memo no. 8878(E) dated 24.12.2018 by which 'the ' Company' was blacklisted for a period of 10 years under Clause 11(Ka) of Bihar Contractor Registration Rules, 2007.

28. Thereafter, almost two years of passing of the said order dated 24.12.2018 blacklisting ‘the Company’, an FIR was lodged vide Town PS Case No. 235/2020 dated 22.04.2020 for the offences under section 420, 467, 468, 471 of IPC lodged by the Executive Engineer, NH Division, Chapra against the Director, Ved Prakash Singh alleging submission of the fake challans against the procurement of Bitumen.

29. Aggrieved by the order dated 24.12.2018, the Company preferred CWJC No. 7712 of 2020. The matter was heard at length and vide an order dated 10.12.2020, the Hon'ble Court taking into account the entire facts referred the matter to the Appellate Authority i.e. the Departmental Secretary to hear the appeal against the order of blacklisting.

30. ‘The Company’ thereafter in compliance of the direction made in the order dated 10.12.2020, preferred appeal on the same day, (10.12.2020) before the Departmental Secretary.

31. The Principal Secretary, however without giving proper opportunity to ‘the Company’ passed an order on 06.01.2021 affirming the order of the Engineer-in-Chief.

32. While passing the order, none of the grounds raised in appeal was considered nor discussed in the said order and the Appellate Authority dismissed the appeal.

33. Aggrieved, CWJC No. 7782 of 2022 was filed stating that:

(i) the ground raised in the appeal was not discussed in the order dated 06.01.2021;

(ii) it failed to consider that the work was completed within time;

(iii) bitumen can be procured from any authorized agency of Indian Oil Corporation Ltd.;

(iv) the payments were made to the Mathura refinery and the bank account details were provided;

(v) it further failed to take into account the direction of the Patna High Court in its order dated 10.12.2020 by providing opportunity to the petitioner which was not done while passing the order dated 06.02.2021.

34. The Company complained that due to it being blacklisted for 10 years, it has been debarred in any tender process that is being advertised/ floated by the Government. This is affecting the functioning of the company and is facing financial hardship.

35. The further submission in the writ petition was that no reason has been assigned for blacklisting for such disproportionate period of 10 years which is in violation of principle laid down by the Hon'ble Apex Court.

36. A counter affidavit was filed by the respondent-authorities in the writ petition justifying the orders in question.

37. The Hon'ble Single Judge took up the matter and having gone through the facts of the case, the averments made by the rival parties quashed the orders in questions vide an order dated 23.09.2021.

38. While allowing the writ petition, the Hon'ble Single Judge held that :

> (i) in the show cause, the action of blacklisting was neither proposed nor could have been inferred from the language implied by the respondents;
>
> (ii) as blacklisting denies a person an opportunity of entering into Government contracts and also has civil consequences, the respondents were obliged to incorporate in the show cause their expression of the proposed intention to black list;
>
> (iii) the Bank statements showing payments made to the IOCL, Mathura Refinery

for procurement of bitumen were not considered in the order passed by the respondents;

(iv) the appellate authority too instaed of deciding the matter by a reasoned order in appeal chose to pass a non-speaking cryptic order.

39. The writ Court thus quashed both the orders of the appellate authority dated 06.02.2021 and that of the respondent no. 3 dated 24.12.2018.

40. Aggrieved with the said order dated 23.09.2021 of the Hon'ble Single Judge, the State of Bihar has preferred the present appeal.

41. Heard learned Counsel for the parties.

42. The stand taken by the learned counsel appearing on behalf of the State is that:

(i) the Hon'ble Single Judge failed to realize that some of the '*challans*' submitted by the writ petitioner were found to be forged for which an FIR has been instituted;

(ii) the objection of the writ petitioner that the Patna Office of the Indian Oil Corporation did not make comment on the *challans* of the Mathura Refinery is not well founded;

(iii) the writ petitioner-respondent failed to substantiate any proof that there is shortage of bitumen at Baruni refinery;

(iv) sufficient opportunity was given to the writ petitioner to explain the charges but it could not satisfy the respondents.

43. Further, the case of the State is that the decision of the Hon'ble Apex Court in **UMC Technologies Private Ltd. Vs. Food Corporation of India & Ors.** reported in **(2021) 2 SCC 5000** is not applicable in the present case.

44. The respondent-writ petitioner has also filed counter affidavit and has submitted that:

(i) the work was completed within the stipulated time;

(ii) due to the heavy flood, some pots did surface which was once repaired;

(iii) there was shortage of bitumen in the Barauni Refinery of the IOCL and as such the same was procured from the IOCL, Mathura Refinery;

(iv) Mathura Refinery upon the letter issued by the Executive Engineer confirmed the purchase of 'bitumen' by the Company on 01.09.2017;

(v) the bank details showing the payments made to the IOCL, Mathura Refinery was not considered properly;

(vi) further just to harass and delay the payment of bills to the respondent-Company, incorrect statements have been made;

(vi) the assertions made by 'the Company' before the authorities were not incorporated in its order;

(vii) thus, the order of the learned Hon'ble Single Judge is just and proper.

45. We have gone through the facts of the case and submissions put forward by the learned counsels appearing for the appellant as well as the respondents, perused the records of the case including the orders quashed by the writ court vide its order dated 23.09.2021.

46. The following facts emerges to our notice:

(i) the Company was never informed about the intention of the respondent-authorities to blacklist it which has wider repercussion as it deprives a person of equality of opportunity in the matter of public contract;

(ii) admittedly, upon passing of the order blacklisting the Company for 10 years, it does not have the right to enter into any contract floated by the Government and/or its agencies;

(iii) additionally, it lowers the image of the Company before the public at large;

(iv) as such, the respondent-authorities were duty bound to inform the company about their intention to blacklist. Further, they were duty bound to carefully examine the reply filed by the respondent-petitioner in the show cause;

(v) they failed on both counts;

(vi) the appellate authority in its cryptic order took a different route and found the work undertaken to be a substandard one which was never the case of the respondents earlier.

47. Further, the blacklisting has not been done for a shorter period, say three years or five years rather it has been done for ten years which in the opinion of this Court is disproportionate as no reason has been assigned for taking decision to blacklist for such a long period.

48. In the aforesaid background, the Hon'ble Single Judge rightly held that the show cause never showed any intention to blacklist the Company, the order cannot be termed a valid one and thus the ground taken in the order is at variance with the show cause is impermissible.

49. The entire facts have been incorporated in the above paragraphs which take us to only one conclusion i.e. the reasoned order passed by the Hon'ble Single Judge in CWJC No. 7782 of 2021 need no interference.

50. The appeal is dismissed.

(K. Vinod Chandran, CJ)

(Rajiv Roy, J)

Jagdish/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	19.10.2023
Transmission Date	