

(2020) 09 PAT CK 0168

Patna High Court

Case No: Civil Writ Jurisdiction Case No. 7073 Of 2020

M/S Indian Electrical Services

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision: Sept. 14, 2020

Acts Referred:

- Bihar Contractor Registration Rules, 2007 - Rule 3(b), 11, 11(c), 11(d)
- Constitution Of India, 1950 - Article 226

Hon'ble Judges: Chakradhari Sharan Singh, J

Bench: Single Bench

Advocate: P.K.Shahi, Alok Ranjan, Abbas Haider, Nadim Seraj, Y.V. Giri, Shambhu Nath

Final Decision: Dismissed

Judgement

1. Heard Mr. P.K.Shahi, learned Senior Counsel assisted by Mr. Alok Ranjan, learned counsel, appearing on behalf of the petitioner, Mr. Abbas

Haider, learned Standing Counsel No.6, representing the State of Bihar, Mr. Nadim Seraj, learned counsel appearing on behalf of Bihar Rajya Pul

Nirman Nigam Limited and Mr. Y.V. Giri, learned Senior Counsel assisted by Mr. Shambhu Nath, learned counsel, representing respondent No.4.

2. Whether alleged non-disclosure by respondent No.4 of of his debarment as contained in a letter dated 20.10.2018 by the Executive Engineer,

Building Division, Sasaram (Annexure-3), while submitting its tender papers pursuant to a Notice Inviting Tender (NIT) dated 28.11.2019 issued by

Bihar Rajya Pul Nirman Nigam Limited (hereinafter to be referred to as "the BRPNNL") could have had the consequence of rejection of its

tender papers and incurred disqualification from the process of participation in the tender process in question, is the main issue, which needs

determination in the present writ application filed under Article 226 of the Constitution of India.

3. One of the clauses of the Notice Inviting Tender (NIT) in question required a bidder to state on affidavit that the bidder had not been

debarred/blacklisted/No contract awarded in his favour has, during the previous year, been rescinded, by any Government Institution/BRPNNL.

4. On the request, showing urgency on behalf of the petitioner in the matter, the petitioner was allowed to file the present writ application on-line

during the Pandemic and the matter has been heard at length in virtual Court proceedings.

5. On the basis of the pleadings on record and the submissions, which have been advanced on behalf of the petitioner, another question has arisen as

to whether the petitioner has attempted to mislead this Court by making false and misleading statements in the writ petition and, therefore, conduct of

the petitioner disentitles him, consideration of his claim raised in the writ application.

6. The petitioner, as has been claimed, is a partnership firm and this writ application has been filed through Shailendra Kumar Singh, who claims to be

one of the partners of the firm.

7. Several pleadings have been filed in the nature of counter affidavits, supplementary counter affidavits on behalf of the contesting respondents and

supplementary affidavit and rejoinders on behalf of the petitioner.

8. I will be dealing with such rival relevant pleadings on facts later. What culls out from the pleadings on record that there are certain facts, which are

admitted, which are being taken note of, to begin with.

9. The Senior Project Engineer, Gaya, of BRPNNL come out with the said NIT dated 28.11.2019 inviting tenders for awarding contract relating to

earth work, road crust work, cross drainage work, RCC drain water work, miscellaneous work including strengthening of Barun-Nabinagar Road from

chinage 0.0 KM to 35.10 KM (total length 35.10 KM). The last date for submission of bid was initially fixed as 26.12.2019. Subsequently, by way of

corrigendum the last date of submission of bid was extended to 15.01.2020.

10. The petitioner uploaded its tender papers on 14.01.2020. Respondent No.4 also uploaded its bid documents on 14.01.2020. Two other bidders

uploaded their bid documents on 13.01.2020 and 15.01.2020. Date of approval of technical bid was fixed as 05.03.2020. Respondent No.4, admittedly, did not disclose in its bid documents, on affidavit, that it was suffering from any debarment under any order of a Government Institution. As all the four bidders had quoted their rates below 10% of the scheduled rates notified by the BRPNL, it was decided to allot the work on the basis of lottery, which was to be held on 16.04.2020.

11. In the lottery, respondent No.4 emerged successful. On the subsequent date of holding of lottery, the petitioner filed an application/representation on 17.04.2020 to the effect that the firm of respondent No.4 was debarred from contract work, which was communicated to him by the Executive Engineer, Building Division, Building Construction Department, Sasaram, through his letter dated 20.10.2018 and 18.03.2020. According to the petitioner, respondent No.4, having concealed this information, was not entitled to award of the contract, as the firm was disqualified since it was under the order of debarment and also since this crucial fact was concealed while submitting the tender papers.

12. The order dated 20.10.2018 of debarment was issued in relation to a contract work of construction of office and residential premises in Rohtas Block and the same was, for the first time, uploaded on the website of the Building Construction Department on 18.03.2020.

13. In view of the objection taken by the petitioner about concealment of the fact of his debarment, a notice was issued to respondent No.4 by the BRPNL asking him to explain and make his stand clear. The proprietor of respondent No.4 took a plea that the said letter dated 20.10.2018 was never communicated to him before he had uploaded the tender papers pursuant to the NIT in question and, therefore, he did not have any knowledge about the said communication. He also asserted that no show cause notice was ever served on him before issuance of the said letter of debarment dated 20.10.2018 and, therefore, the same could not come in way of award of contract in his favour. He also took a plea that the work, in relation to which the said debarment letter dated 20.10.2018 was issued, had already been completed and soon after respondent No.4 learnt about the

communication dated 20.10.2018, he immediately approached the authorities for recall of the letter of debarment and by a communication dated

23.03.2020, debarment order has now been revoked.

14. On the basis of response of respondent No.4, the Board of Directors of BRPNNL took a conscious decision to award the contract in favour of

respondent No.4. It transpires that before taking the said decision, the Executive Engineer, Building Division, Building Construction Department,

Sasaram, was asked by BRPNNL to send a proof of communication of debarment, through letter dated 06.05.2020. Responding to the said

communication dated 06.05.2020, the Executive Engineer, Building Division, Building Construction Department, Sasaram, informed that the letter of

debarment dated 20.10.2018 was communicated to respondent No.4 through post. However, neither any proof of service of debarment notice was

supplied to BRPNNL nor any information was given as to when the said debarment letter had been despatched to respondent No.4. Another letter

was sent to the Chief Engineer, South, Building Construction Department, requesting him to apprise BRPNNL about the communication of debarment.

The Chief Engineer also informed through his letter dated 15.05.2020 that the debarment of the contract was not communicated to his office earlier

and the said notice had been uploaded on 18.03.2020 on the official website of the Building Construction Department on 18.03.2020. These are the

facts, which are not in dispute.

15. It is the case of the petitioner in the writ application that the last date for uploading the tender papers was 26.12.2019 and the petitioner along with

other participated in the tender process after fulfilment of all terms and conditions of the said NIT and filled the form along with all documents for the

said work, which was duly received in the office of the respondent authorities. There is specific averment in paragraph 7 of the writ application, as

under : -

“7. That in order to facilitate some of the other favourable Contractors the bid submission dated was extended till 14.01.2020 and a corrigendum to

that effect has also been issued by the respondent authorities, vide corrigendum no.20 dated 07.01.2020.”

16. On conjoint reading of the averments made in paragraphs 5, 6 and 7, it is evident that the petitioner intended to convey through the pleading that the petitioner had submitted the tender papers within the time before the last date originally fixed for uploading the same and it was to facilitate some other favourable contractors that the bid submission date was extended till 14.01.2020 (sic. 15.01.2020), with the issuance of a corrigendum on 07.01.2020.

17. I do not have any scintilla of doubt that the statements made in paragraph 7 are misleading and false for the reason that the petitioner had also uploaded his tender documents on 14.01.2020, i.e., during the extended period of submission of tender documents. The other statement made in the writ petition, which appears to be misleading, is to the effect that the petitioner could not participate in the lottery because of the lockdown since he was not allowed to reach the place where the lottery was held. It is the specific case of the contesting respondents that one agent on behalf of the petitioner, namely, Sunil Kumar Singh, was present during the lottery on 16.04.2020 and had marked his presence in the concerned register.

18. It appears that, for the first time, the petitioner has taken this plea in the present writ application that he could not participate in the process of lottery held on 16.04.2020, though on the very next day on 17.04.2020, a grievance was raised by the petitioner that respondent No.4 had not disclosed about its debarment. In one of the rejoinders filed in the present case, the petitioner has asserted that the petitioner had neither participated nor had authorised anyone on his behalf to participate in the lottery, which was held by the Tender Committee on 16.04.2020, which fact was conveyed to the authorities of the Tender Committee on telephone and a request was made that the lottery be held after few days. There is no averment that the petitioner had no connection with said Sunil Kumar Singh, who had participated as an agent for the petitioner when the lottery was held and said Sunil Kumar Singh was in no way associated with the petitioner.

19. In response to a query made by this Court, Mr. P.K. Sahi, learned Senior Counsel appearing on behalf of the petitioner, has submitted that in any event the said Sunil Kumar Singh was not authorised by the petitioner to participate in the lottery.

20. The vagueness of the averment made in paragraph 6 of the supplementary rejoinder to the counter affidavit dated 02.09.2020 clearly suggests

prevarication, suppression of material facts and a deliberate attempt to mislead this Court, on the part of the petitioner. The petitioner asserts that the

fact that the petitioner could not participate in the lottery process was conveyed to the authorities of the Tender Committee on telephone. There is

no mention as to when and which authority of the Tender Committee was conveyed by the petitioner, and on which telephone number, complaining his

inability to participate in the tender process. The fact that the petitioner did not raise any issue of non-participation in the lottery process in his

subsequent communication to the respondent BRPNNL is indicative of the fact that he is taking an incorrect plea. This opinion is strengthened by the

brazen conduct of the petitioner of making false statement in paragraph 7 of the writ application, as has been noticed hereinabove.

21. Any attempt by a litigant to obtain a favourable order from a Court exercising equitable jurisdiction under Article 226 of the Constitution of India

on the basis of false plea needs to be viewed seriously. The Court takes strong exception to the petitioner's conduct and deprecates the same in

the strong words. The Supreme Court and the High Courts have times without number, reminded the litigants to be cautious and approach the Courts

with clean hands. Jurisdiction of High Courts under Article 226 of the Constitution of India is extraordinary, equitable and discretionary and it is,

therefore, imperative that a litigant approaching the writ Court must come with clean hands and put forward all the facts before the Court without

concealing or suppressing anything before seeking an appropriate relief. If there is no candid disclosure of relevant material facts or if the petitioner is

guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of his claim, the Supreme Court observed in

case of Dalip Singh Vs. State of Uttar Pradesh, reported in (2010) 2 SCC 114.

22. In case of Amar Singh vs. Union of India and Ors., reported in (2011) 7 SCC 69, the Supreme Court frowned upon the litigant for having misled

the Court on the basis of frivolous allegations and by suppression of material facts. Taking note of various precedents, the Supreme Court held in

paragraphs 59 and 60 as under : -

59. The aforesaid requirement of coming to Court with clean hands has been repeatedly reiterated by this Court in a large number of cases. Some

of which may be noted, they are: Hari Narain v. Badri Das AIR 1963 SC 1558, Welcome Hotel and others v. State of A.P. and others (1983)

4 SCC 575, G. Narayanaswamy Reddy (Dead) by LRs. and another v. Government of Karnataka and another JT 1991(3) SC 12: (1991) 3 SCC

261, S.P. Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs. And others JT 1993 (6) SC 331: (1994) 1 SCC 1, A.V. Papayya

Sastry and others v. Government of A.P. and others JT 2007 (4) SC 186: (2007) 4 SCC 221, Prestige Lights Limited v. SBI JT 2007(10) SC

218: (2007) 8 SCC 449, Sunil Poddar and others v. Union Bank of India JT 2008(1) SC 308: (2008) 2 SCC 326, K.D.Sharma v. SAIL and others

JT 2008 (8) SC 57: (2008) 12 SCC 481, G. Jayashree and others v. Bhagwandas S. Patel and others JT 2009(2) SC 71 : (2009) 3 SCC 141,

Dalip Singh v. State of U.P. and others - JT 2009 (15) SC 201: (2010) 2 SCC 114.

60. In the last noted case of Dalip Singh (supra), this Court has given this concept a new dimension which has a far reaching effect. We, therefore,

repeat those principles here again:

1. For many centuries Indian society cherished two basic values of life i.e. satya(truth) and ahimsa (non-violence), Mahavir, Gautam

Budha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system

which was in vogue in the pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences.

However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for

personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of

facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly

resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have,

from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.â€

23. The conduct of the petitioner in this case, for the reasons recorded above, is reproachable and reprehensible. This writ application, in view of the finding recorded above, deserves to be dismissed on this score alone.

24. Coming, however, now to the main issue for determination as noted at the very outset, it is evident that the said communication of debarment was

issued on 20.10.2018 by the Executive Engineer, Building Division, Sasaram, under the Building Construction Department, Government of Bihar, for

the reason that a particular work of building construction, which was allotted to respondent No.4, was not completed within time. There is absolutely

no material that before issuance of the said debarment communication dated 20.10.2018 any show cause notice was issued to respondent No.4 by the

Executive Engineer. It has been the case of respondent No.4 that the said debarment letter was never communicated to him.

25. It is the case of the State of Bihar, on the other hand, that the said notice was issued to respondent No.4 by post. There is no averment in the

counter affidavit filed on behalf of the State of Bihar disclosing the date of despatch of the said letter. In the counter affidavit, it has been averred that

respondent No.4 was in know of the said letter because he had submitted a representation in January, 2020, seeking revocation of the debarment,

which was subsequently revoked also.

26. The Tender Committee has considered most of these aspects including the fact that, admittedly, no show cause notice was issued to respondent

No.4 before issuance of the said communication dated 20.10.2018 and there was no definite proof of service of the said letter on respondent No.4.

27. The Court would, at this stage, advert to the question as to whether the said communication dated 20.10.2018 would have had the effect of

debarring respondent No.4 from participating in the tender process or, non-disclosure of the said fact, even if the same was within his knowledge

could be the sole ground for rejecting the bid.

28. There is an ancillary question as to whether the decision of the Tender Committee after considering all the facts to award the contract in favour of

respondent No.4 can be said to be suffering from such illegality so as to warrant this Court's interference exercising power of judicial review

under Article 226 of the Constitution of India, in peculiar facts and circumstances of this case.

29. The petitioner and respondent No.4 appear to be registered contractors under Bihar Contractor Registration Rules, 2007. Rule 11 of the said Rules

stipulates blacklisting and suspension of registered contractors in circumstances stipulated therein. Rule 11(c) of the Rules specifically lays down that

before blacklisting or demoting or suspending any contractor, he shall be given an opportunity to show cause. Rule 11(d) further prescribes that

blacklisting/suspension shall be passed by the Officer, who is competent to register the contractor or by the Officer under whom the registering

Officer works. Rule 3(b) defines Engineer-in-Chief or an Officer not below the rank of Chief Engineer, so notified by the State Government, as the

registration Officer. The said communication dated 20.10.2018 cannot, thus, be treated to be an order under the Rules of 2007. It has remained

unknown the jurisdiction under which the Executive Engineer had issued the said communication of debarment and with what consequences.

30. Be that as it may, upon perusal of the documents available before the Tender Committee, the Tender Committee came to a definite conclusion that

benefit of doubt could be given to respondent No.4 in the absence of conclusive proof of service of notice of letter dated 20.10.2018.

31. The law relating to blacklisting of contractors having the effect of debarment from award of Government contracts has been fully discussed by the

Supreme Court in case of *Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited*, reported in

(2014) 14 SCC 731. While dealing with the said aspect, the Supreme Court observed in paragraph 17 that power to blacklist a contractor, whether the

work be for supply of material or equipment or for execution of any other work whatsoever, is inherent in the party allotting the contract. The

blacklisting, the Supreme Court remarked, signifies a business decision by which the party, affected by breach, decides not to enter into a contractual

relationship with the party committing the breach. The freedom to contract or not to contract is unqualified in case of private parties. But such

decisions become subject to judicial review when the same is taken by the State or its instrumentalities. This implies, the Court observed, in *Kulja Industries Limited (supra)*, that such decision would be open for scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality.

32. In *Eurasian Equipment & Chemicals Limited v. State of West Bengal*, reported in (1975) 1 SCC 70, the Supreme Court observed in paragraph 20 that blacklisting has the effect of preventing a person from the privilege and advantage of entering into a lawful relationship with the Government for the purposes of gains. The fact, that a disability is created by an order of blacklisting, indicates that relevant authorities is to have an objective satisfaction, the Court ruled.

33. Mr. P.K. Shahi, learned Senior Counsel appearing on behalf of the petitioner, has strenuously argued that if challenged, though the communication dated 20.10.2018 might or might not have stood the test on the touchstone of principles of natural justice or law laid down by the Supreme Court in this regard. He has submitted that that is not the question involved in the present proceeding. He contends that it was obligatory on the part of respondent No.4 to have disclosed the said fact at the time of uploading his tender documents and deliberate non-disclosure of this vital fact is a conduct based on which participation of respondent No.4 ought to have been held illegal, being in breach of terms of NIT.

34. I have carefully examined the pleadings on record. In all fairness to submissions advanced on behalf of the petitioner that respondent No.4 was in know of the issuance of the said communication dated 20.08.2018, I must take note of the averments made in the counter affidavit filed on behalf of respondent No.1 to the effect that the petitioner himself had applied on 08.01.2020 for revoking the said debarment and, therefore, it was within its knowledge before the date when the tender documents were uploaded by him on 14.01.2020. The said averment has been dealt with by respondent No.4 in the rejoinder to the said affidavit.

35. I am not inclined to accept the aforesaid contention, though ingenious, because of the mitigating circumstances noted above. The respondents

BRPNNL have considered the effect of the said communication of debarment. The decision of the Tender Committee to award contract in favour of respondent No.4 despite the letter of debarment rests on objective basis. The Tender Committee has taken into account admitted fact of non-issuance of any show cause notice before issuance of the communication by the Executive Engineer, Building Division, to respondent No.4. The decision of the Tender Committee to award contract, in my opinion, satisfies the principles of reasonableness and proportionality.

36. As held, in case of Mahabir Auto Stores v. Indian Oil Corporation, reported in (1990) 3 SCC 752, by the Supreme Court, ".... rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rules of law....". While making these remarks, the Supreme Court held in paragraph 12 as under : -

"12. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

37. Mr. Y.V. Giri has rightly placed reliance on the Supreme Court's decision in case of Municipal Corporation Ujjain v. BVG India Ltd., reported in (2018) 5 SCC 462, wherein the Supreme Court has laid down that only when decision making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such decision, power of judicial review can be exercised. The Court need not interfere in the exercise of power of judicial review, even if there is a procedural lacuna.

38. The principles of equality and natural justice do not operate in the field of commercial transactions, the Supreme Court observed in case of BVG India Ltd. (supra) and has held that wherever the decision has been taken appropriately in public interest, the Court should ordinarily maintain restraint.

39. In the present case the decision has been taken by the respondent BRPNNL upon consideration of tender documents and it ultimately found that

respondent No.4 had substantially complied with the purpose and object for which the disclosure in question was to be made. No interference is, therefore, required by this Court exercising power of judicial review. This view is in tune with the law laid down in case of

40. The matter might have been different had the said debarment communication been made by a competent authority having jurisdiction, after

complying with the principles of natural justice. For the aforesaid reasons, even if what has been averred in the counter affidavit of respondent No.1 is

treated to be correct, I do not consider it to be a fit case for interference, taking into account the facts noted above and the conduct of the petitioner,

which I again deprecate.

41. This writ application accordingly stands dismissed.

42. There shall be no order as to costs.