

(2021) 05 J&amp;K CK 0045

**Jammu And Kashmir High Court (Srinagar Bench)****Case No:** Writ Petition (C) No. 437 Of 2020, CM No. 879 Of 2020

Abdul Qayoom Dar

APPELLANT

Vs

Chief Engineer (Nz-V), Cpwd,  
Satwari, Jammu And OrsRESPONDENT

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**Date of Decision:** May 21, 2021**Acts Referred:**

- Arbitration And Conciliation Act, 1996 - Section 11
- Constitution Of India, 1950 - Article 14, 19, 226

**Hon'ble Judges:** Ali Mohammad Magrey, J**Bench:** Single Bench**Advocate:** Manzoor Ahmad Dar, Tahir Majid Shamsi**Final Decision:** Disposed Of

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**Judgement**

01. In this Petition, the Petitioner has prayed for the grant of following relief(s) in his favour:

â€œ(a) Quashing of the communication dated 21.1.2019 issued vide No. 23(o4)-5/2018/19 /1752 issued by respondent No.1 (Annexure-1)

in terms whereof the petitioner has been debarred from tendering or taking part in CPWD, MOEF PWD Govt of Delhi etc. for a period of

three years with effect from date of the communication/order;

(b) Declaring the communication aforesaid as being illegal, inoperative, null and void on account of being in violation of the settled legal principles; and

(c) Any other writ, order or direction which this court may deem fit in the facts and circumstances attendant to the case be passed in favour

of the petitioner so as to meet the ends of justice.â€

02. Sans details, the background facts leading to the filing of the Petition on hand, as stated by the Petitioner in his Petition, are that the Petitioner

claims to be an â€œAâ€ Class Contractor registered under the Contractors Registration Act, besides being second generation Civil Contractor

associated with the execution of various construction projects involving the Respondent-Central Public Works Department (for short â€~CPWDâ€™™)

for the last four decades. It is stated that the average turnover of the Petitioner insofar as it pertains to the execution of works of the CPWD ranges

from Rs.10 to 15 Crores per annum. It is pleaded that certain disputes arose between the Petitioner and the Respondent Department in relation to

various contract matters which were referred to Arbitrators, either appointed by the Respondent Department itself or upon seeking intervention of the

Court in terms of Section 11 of the Arbitration and Conciliation Act. The Petitioner has further proceeded to state that on account of pendency of

multiple arbitration matters between the parties, the Respondent Department, in order to inflict punishment upon the Petitioner, tried to find out ways

and means to stop the Petitioner from participating in the tendering process initiated by the Respondent Department for execution of various contracts,

one such instance being issuance of notice dated 23rd of October, 2018 bearing No 23(04)/2018/BSF/1251, asking the Petitioner to show cause as to

why he should not be debarred from taking up any work in CPWD, MOEF, PWD (Government of Delhi), etc., all over India. This show cause notice

is stated to have been issued in reference to: i) construction of Airbase, including provision for Cabin/Helicopter Hanger at BSF Campus, Humhama,

Srinagar, Kashmir alleging that the flooring work of Helicopter Hanger was found sub-standard on account of poor workmanship; ii) construction of

Trainers Training Hostel/ Farmers Hostel Block at CITH, Rangreth, Kashmir with the allegation that the subject building was not taken over by the

concerned Department on account of non-rectification of the defects; and iii) submission of false documents at the time of tendering qua mismatch in

date of renewal shown by two Executive Engineers of the State department. This show cause notice, as stated, was replied by the Petitioner vide

communication dated 9th of November, 2018, whereby all the points/ issues raised by the Respondent Department were clarified/ answered by the Petitioner in detail. Notwithstanding the reply submitted by the Petitioner to the show cause notice dated 23rd of October, 2018 and without taking into consideration the contents thereof, the Respondent No.1 has proceeded to issue the impugned communication dated 21st of January, 2019, thereby debarring the Petitioner from tendering or taking up work in CPWD, MOEF, PWD (Government of Delhi), etcetera, all over India for a period of three years with effect from the date of issuance of communication impugned. It is this communication that has been assailed by the Petitioner through the medium of the instant Petition.

03. Mr Manzoor Ahmad Dar, the learned counsel appearing for the Petitioner, submitted that the impugned communication of debarring the Petitioner has been issued by Respondent No.1 in gross violation of the principles of natural justice inasmuch as no fair opportunity of hearing was accorded to the Petitioner before issuance of the impugned communication of debarring the Petitioner. It is pleaded that since the impugned communication has visited the Petitioner with penal consequences qua debarring the Petitioner from taking up works in CPWD, MOEF, PWD, etc., all over India, thus it was incumbent upon the Respondent Department to take into consideration the reply submitted by the Petitioner in response to the show case notice, however, the response of the Petitioner has not been considered while issuing the impugned communication. It is further submitted that the impugned communication has an effect of debarring the Petitioner from executing any civil contract and that, if same is allowed to remain in operation, the Petitioner would have no chance or opportunity to execute the contracts for three years period from the date of issuance of impugned communication which would have an effect of affecting his eligibility to participate in the tendering process in future, thereby violating the fundamental right of the Petitioner as guaranteed under Article 19 of the Constitution.

04. Objections stand filed on behalf of the Respondents, resisting and controverting the averments made by the Petitioner in his Petition. It is submitted that the impugned communication of debarment in relation to the Petitioner was only issued after the Petitioner violated the terms and conditions

prescribed in the agreement(s) with respect to the works mentioned in the impugned communication. The Petitioner, as stated, did not execute the works in question in tune with the terms and conditions prescribed in the agreement(s), resulting in huge loss to Government exchequer as well as damage to the reputation of the Department. It is averred that the decision of debarring the Petitioner from further participation in the tendering process was taken after due consideration of the response/ reply submitted by the Petitioner, ground realities and in terms of the provisions of the CPWD manual by the competent authority.

05. Heard learned counsel for the parties, perused the pleadings on record and considered the matter.

06. When this matter was taken up on motion hearing, i.e., on 24th of February, 2020, this Court, after hearing the learned counsel for the Petitioner, directed that the Petitioner shall not be debarred from participating in the tendering process with a further stipulation that in case the Petitioner submitted any bid in response to any tender notice, the same shall not be finalized if he is found as the successful bidder till the next date of hearing before the Bench.

07. At the very outset, what requires to be stated is that the decision to allot the works or enter into contract with citizens has to be rational, non-arbitrary and reasonable. The decision-making process of the Government or Government agencies in contractual matters has to be reasonable and conforming to the requirements of fundamental rights of the Petitioner guaranteed under Articles 14 and 19 of the Constitution of India. In the case on hand, the Respondents have debarred the Petitioner from further participation in the tendering process on the ground that the Petitioner has not followed the terms and conditions stipulated in the tender agreements and did not execute the works concerned in the manner required. The pleadings on record bring it to the fore that prior to the issuance of the impugned communication dated 21st of January, 2019 debarring the Petitioner from further participation in tendering process, the Respondent Department issued show cause notice to the Petitioner on 23rd of October, 2018. In this show cause notice, certain discrepancies in the allotted works executed by the Petitioner were pointed out which had formed the basis for the

proposed action against the Petitioner. This show cause notice was duly replied by the Petitioner with the support of documents vide communication

dated 9th of November, 2018. The reply so submitted by the Petitioner appears to be quite elaborate and all the points raised by the Respondent

Department in the show cause notice stand replied with documentary evidence. The Respondent Department ought to have given a thoughtful

consideration to the contentions/ assertions made by the Petitioner in the reply to the show cause notice, however, this has not been done as is quite

clearly evident from a plain reading of the impugned communication of debarring. This course of action adopted by the Respondent Department has

visited the Petitioner with major punishment as the Petitioner has been debarred from further participation in tendering process, and for such major

punishment, as per procedure, fair and due opportunity of hearing had to be offered to the Petitioner by associating him in the entire process.

08. Law is no more res integra to the effect that there must be judicial restraint in interfering with the administrative action, particularly in the matters

of tender or contract and that, ordinarily, the soundness of the decision taken by the tender issuing authority ought not to be questioned, but the

decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned, firstly, if the decision made is so

arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant

law could have reached or, second, if the process adopted or decision made by the authority is malafide or intended to favour someone or, third, if the

public interest is affected. In the instant case, when the Petitioner has duly replied to all the points raised by the Respondents in the reply so submitted

by him in relation to the show cause notice and has furnished all the requisite documents in support of his claim, in such eventuality, the decision of the

Respondent Department to debar the Petitioner from further participation in the tendering process amounts to such action where they have acted in a

manner in which no responsible authority acting reasonably and in accordance with the relevant law would have acted.

09. The contention of the Respondents that in contract matters, a Writ Petition is not maintainable, in the facts and circumstances of the present case,

is not only misconceived but also misdirected as well. This is so because it is settled legal position that if an authority acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of Writ under Article 226 of the Constitution and that the Court, depending on the facts of the said case, is empowered to grant the relief. Although, ordinarily, a superior Court, in exercise of its Writ jurisdiction, would not entertain a Petition involving contractual obligations between the parties, it is trite that when an action of an authority is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a Writ Petition would be maintainable. There cannot be any doubt whatsoever that a "Writ of Mandamus" can be issued only when there exists a legal right in the Writ Petition and a corresponding legal duty on the part of the authority, but then if any action on the part of the authority is wholly unfair or arbitrary, the superior Courts are not powerless. This view is fortified by the law laid down by Hon<sup>ble</sup> the Supreme Court in case titled "Karnataka State Forest Industries Corporation v. Indian Rocks", reported as AIR 2009 SC 684.

10. Again, the Apex Court of the country, while dealing with a similar issue, in case titled "Zonal Manager, Central Bank of India v. Devi Ispat Ltd.

& Ors.", reported as (2010) 11 Supreme Court Cases 186 has, at Paragraph No.25, provided as under:

"..

It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on

a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of writ

under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N.

Guruswamy v. State of Mysore (AIR 1954 SC 592) was followed subsequently by this Court in DFO v. Ram Sanahi Singh [(1971) 3 SCC 864]

wherein this Court held:

"4. By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the course of the right which the

respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of writ. In view of the judgment of this Court in K.N. Gueruswamy case there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.â€

11. For the foregoing reasons, coupled with the enunciation of law discussed hereinabove, the impugned communication; whereby the Petitioner has been debarred from further participation in the tendering process by the Respondent Department, cannot withstand the test of judicial scrutiny. That being so, this Writ Petition is allowed and the impugned communication bearing No. 23(04)-5/2018/19/1752 dated 21st of January, 2019 issued by Respondent No.1 is hereby quashed.

12. Writ Petition disposed of on the above terms. Pending applications, if any, shall also stand disposed of, accordingly.