

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 7443 of 2009 & CM 3400/2009

Reserved on: 20th January, 2010

Decision on: 5th February, 2010

PRAKASH ATLANTA JV & ORS. Petitioners
Through Mr. Rajiv Nayyar, Senior Advocate with
Mr. Sandeep Sharma, Advocate.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
& ORS. Respondents
Through Mr. Sandeep Sethi, Senior Advocate with
Ms. Padma Priya, Ms. Sindhu Sinha and Mr. Sumit
Gahlawat, Advocates.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether reporters of local paper may be allowed
to see the judgment? No
2. To be referred to the report or not? Yes
3. Whether the judgment should be referred in the digest? Yes

JUDGMENT

S. Muralidhar, J.

1. The challenge in this petition by Prakash Atlanta JV (PAJV) and its group companies is to the validity of a show cause notice dated 27th June 2008 and the consequent decision communicated by a letter dated 24th February 2009 issued by Respondent No. 1 the National Highways Authority of India ('NHAI') barring the Petitioners from "short-listing, participating or bidding for any future projects to be undertaken by the NHAI", either directly or indirectly for a period of two years.

2. The work of construction of "Segment of the Lucknow Bypass"

connecting National Highway ('NH') No. 25 and NH No. 28 via NH 56 passing through Lucknow city in the State of Uttar Pradesh (known as Package No. E.W.-15/UP) was awarded to the Petitioners by the NHAI. On 10th August 2001 an agreement was entered into between the parties. The length of the road to be constructed was 22.66 Km and included construction of road works and bridges in accordance with drawings and the provisions of the contract. The value of the project was Rs.158,80,42,423/- and the start date of the work was to be reckoned with effect from 30th August 2001. The work was to be completed on or before 29th August 2004 i.e. within a period of 36 months.

3. The case of the Petitioners is that during the course of the execution of the work they were called upon to execute a new and major structure called viaduct for a length of 1.5 Km which was not envisaged under the original scope of work. This led to procuring additional plant and machinery. The Petitioners state that on account of variations made by the NHAI and for other reasons attributable to the NHAI, the work order extended to a period of 40 months beyond the original stipulated time period. According to the Petitioners nearly 106 variation orders were issued by the NHAI till April 2008 and as many as 58 variation orders were issued beyond the original time limit. No additional time was assigned for carrying out the variation items.

4. There was a dispute between the parties as regards the rates for the work covered by the variation orders. In terms of the contract this dispute was

referred to the Dispute Review Expert who on 9th July 2005 directed making all payments to the Petitioners at market rates. Twenty-seven months thereafter, on 4th October 2007 the NHAI invoked the arbitration clause. According to the Petitioners even the admitted payments amounting to Rs.1.5 crores were withheld from them and they have been further crippled by the NHAI encashing bank guarantees to the tune of Rs.28 crores. The Petitioners claim that against the tendered amount of Rs.158.80 crores, they executed work worth about Rs.170 crores excluding price variation up to 14th March 2008 and yet the project was nowhere near completion.

5. The Petitioners, in terms of Clause 59 (iv) of the agreement, issued a notice on 28th May 2004 calling upon the NHAI to make the payment as certified by the Engineer. A meeting was called pursuant to this notice but the NHAI did not fulfill the commitment made by it to release the withheld payments. On 12th June 2006 the Petitioners issued a termination notice. It is stated that they were persuaded by the NHAI to continue the work by formally extending the time. Ultimately, on 14th March 2008 the Petitioners wrote to the NHAI informing it that the contract stood terminated. The Petitioners stated therein that they have suffered huge losses on account of the omissions and commissions of the NHAI and claimed Rs.84,51,12,743/- on various counts.

6. The Petitioners filed a statement of claims dated 28th February 2008 before the Arbitral Tribunal. Thereafter by a letter dated 27th June 2008 the NHAI asked the Petitioners to show cause why they should not be debarred

from pre-qualification, participating and bidding in future events. The Petitioners received the aforementioned notice on 3rd July 2008 and sent a detailed reply dated 12th July 2008. In the reply a reference was made to an interim order dated 16th June 2008 passed by the Arbitral Tribunal in which the Tribunal did not accept the contention of the NHAI that it was the NHAI which had terminated the contract. It was observed that once the contract had been terminated by the Petitioners (claimant) “there was no question of termination of contract by the NHAI.” The Arbitral Tribunal observed that it was merely to resort to Clause 51(i) “that the NHAI decided to terminate an already terminated contract”.

7. On 5th September 2008 a letter was received from the General Manager (DK-I) Mr. K.V.Sharma of the NHAI granting personal hearing to the Petitioners. They were asked to appear before Mr. Nirmal Jit Singh, Member (Technical) on 16th September 2008. The Petitioners appeared for the personal hearing and also handed in their written submissions on 22nd September 2008. In the written submissions a request was made for copies of the documents and materials in support of the allegations made in the show cause since these had not been supplied to the Petitioners.

8. Mr. Nirmal Jit Singh, Member (Technical) who gave the Petitioners a personal hearing was transferred on 18th October 2008. Thereafter the impugned order came to be passed by Mr. K.V. Sharma, General Manager, DK-I on 24th February 2009 barring the Petitioners from short-listing, participating or bidding for any future projects undertaken by the NHAI.

The Petitioners state that copies of the impugned order dated 24th February 2009 were maliciously endorsed by the NHAI to various central and state government organisations by a circular dated 24th February 2009. This had the effect of severely damaging the reputation of the Petitioners. The Petitioners had been pre-qualified by the various organisations for awarding of works but as a result of the circular dated 24th February 2009 issued by the NHAI, they were not awarded contracts even by other government organisations.

9. The challenge to the impugned show cause notice dated 27th June 2008 and the consequential impugned order dated 24th February 2009 in principally on the grounds of violation of the principles of natural justice and malafides.

10. A very detailed counter affidavit has been filed by the NHAI in which it has pointed out that it is a body constituted under the National Highways Authority of India Act, 1988 and has been entrusted with the responsibilities of development, maintenance and management of national highways vested in or entrusted to it by the Central Government. It is pointed out that with a view to give a major thrust to the economic development of the country, the Central Government took a policy decision leading to the announcement by the Prime Minister in October 1998 of the work of 4/6 laning of national highways linking the four major metros as the Golden Quadrilateral Project, The North-South Corridor is from Kashmir to Kanyakumari and East-West Corridor from Silchar to Porbandar. This includes the development of some

other stretches of roads including roads connecting some of the major ports in the country. It is stated that the NHAI is mandated to implement the National Highways Development Project ('NHDP') in various phases.

11. It is pointed out by the NHAI that the Petitioner No.1 PAJV is a joint venture consisting of Petitioner No.1 and Petitioner No.2 Prakash Building Association Ltd. who jointly submitted a bid in the name of Petitioner No.1 pursuant to which the contract was awarded to them as indicated hereinbefore. According to the NHAI, the performance of the Petitioners was found to be way below the requirements as envisaged under the contract. The Petitioners failed to execute the work in a timely manner. They failed to deploy the requisite plant and machinery, manpower and financial resources into the project as was warranted and were unable, therefore, to complete the project by the scheduled completion date i.e. 29th August 2004. This caused grave inconvenience to the general public apart from causing huge revenue losses to the Government inasmuch as it is proposed to levy toll on vehicles using the completed stretch. Therefore, with each passing day there were losses to the public exchequer.

12. It is stated that due to the persistent defaults and negligence of the petitioners, repeated warnings were issued to them by the Engineer, i.e. the representative of the Supervision Consultant as envisaged under the contract, asking them to comply with the terms of the contract and remedy the defaults. These defaults as pointed out by the Supervision Consultant varied from non-deployment of manpower and resources, extremely slow progress

of work and other defaults. The NHAI states that on its part it extended all possible help to the Petitioners. They were given interest-free mobilisation advance of Rs.15.88 crores, advance of Rs.7.93 crores against the equipments brought at the site, advance of Rs.73.44 crore against material brought at site as secured advance and additional mobilization advance of Rs.5.10 crores against the increase in cost of contract due to variation. It is stated that to solve the Petitioners' cash flow problem they were given a discretionary advance to the tune of Rs.15 crores. It is pointed out that despite this, the physical progress at the site of the project for a period of 12 months between January 2007 to December 2007) was abysmally low at 3.882%. It is stated that despite several extensions of time having been granted for completion of the project, the last one having been granted on 15th November 2006, the Petitioners were able to achieve physical progress of only 78.36% of the work. In the previous 12 months ending in the month of February 2008 the physical progress of work was only 2.6% which came to a negligible 0.225% per month. This had to, therefore, be construed as a virtual stoppage of the work.

13. The NHAI stated that on 1st October 2007 a meeting was held to discuss the poor progress of the works. The Petitioners were also present at the meeting. A commitment was made by PAJV to complete 1500 sq.m. and 2500 sq.m. of Reinforced Earth Structure (RES)/ works in October and November 2007 respectively. It was further decided not to recover additional mobilization advance more than 20% of IPC, as requested by the Petitioner No.1 to help with its cash flow problem. The NHAI states that despite its support, PAJV's average monthly output of RES work in

October, November and December 2007 was only 12.43 sq.m. RES was one of the critical activities for completing the balance work. About 17000 sq.m. RES work was pending. The average monthly Reinforced Cement Concrete ('RCC') output in October, November and December 2007 was 85 cubic m. whereas balance RCC work was 3954 cubic m. According to the NHAI almost no work was done on the balance project and therefore there was hardly any progress. The NHAI contends that the situation was equivalent to permanent stoppage of work by the contractor. The defaults committed by the Petitioners were duly recorded by the Engineer by a letter dated 16th January 2008 in which the default was viewed as a fundamental breach of contract by the Petitioners in terms of Clause 59(ii) of the contract. Various defaults were also listed in a letter dated 5th February 2008 to the Petitioners.

14. It is stated that although a meeting was convened on 7th March 2008 with the Petitioners, they chose not to attend the said meeting. Thereafter a joint meeting at the request of Petitioner No.1 was again convened on 13th March 2008. It is claimed that at the meeting the Chairman, NHAI conveyed to PAJV that NHAI was willing to pay PAJV its legitimate dues expeditiously but that no commitment could be made regarding payment against disputed claims pending adjudication before the Arbitral Tribunal or the Court. It is stated that the Petitioners refused to make any commitment to complete the work. They simply stated that they would inform the Respondents of their decision later.

15. According to the NHAI instead of giving the any commitment, the

Petitioners abruptly wrote a letter dated 14th March 2008 terminating the contract. On 26th March 2008 the Engineer on behalf of the NHAI wrote to the Petitioners pointing out that the pre-mature termination of the contract was wrongful. As such the termination was itself a fundamental breach of contract on the part of the Petitioners.

16. At this stage, it is necessary to record that the notice was issued in the writ petition by a learned Single Judge of this Court on 13th March 2009 which was made returnable on 30th April 2009. No interim was passed in favour of the Petitioners at that stage. PAJV then filed an appeal being LPA No.120 of 2009 which was disposed of by an order dated 30th March 2009 by a Division Bench. It was directed that pending the disposal of the writ petition, PAJV should be permitted to submit their tenders/bids individually or with others notwithstanding the order dated 24th February 2009 as otherwise they would lose right to participate and submit bids for tenders worth Rs.36,000 crores till 30th April 2009. It was further clarified by the Division Bench that the submission of bids by the Petitioner would not create any special equities and will also be subject to the outcome of the writ petition. It was further clarified that the Clause 2.2.8 and the Office Memorandum dated 5th December 2007 were not the subject matter of the present dispute and that the NHAI would be entitled to rely upon the said clause and office memorandum while considering the request for qualification. The appellants were also permitted to put forth their case before the Respondents in respect of the above clause.

17. Aggrieved by the aforementioned order dated 30th March 2009 of the

Division Bench, NHAI filed SLP (C) No. 20941 of 2009 in the Supreme Court. By an order dated 7th January 2010, the Supreme Court while directing notice to issue in the SLP stayed the order dated 30th March 2009 passed by the Division Bench of this Court. However, this Court was requested to dispose of the writ petition “under any circumstance before the 1st week of February, 2010”. Further the order was confined “only to the contract in NHAI”. When the case was next listed before this Court on 18th January 2010, it was with the consent of the parties taken up for final hearing. The hearing concluded on 20th January 2010.

18. The submissions on behalf of the Petitioners PAJV were advanced by Mr. Rajiv Nayyar, the learned Senior counsel and on behalf of the Respondents NHAI by Mr. Sandeep Sethi, learned Senior counsel.

19. It is first submitted by Mr. Nayyar that the impugned order is without reasons and neither refers to or deals with various contentions and issues raised by the Petitioners in reply to the show cause notice issued to them by the NHAI. Reliance is placed on the decisions of the Supreme Court in *S.N. Mukherjee v. Union of India AIR 1990 SC 1984* and of this Court in *Mekaster Trading Corp. v. Union of India 106 (2003) DLT 573*; *G.D. Tewari & Co. v. DDA 2005 (1) CTLJ 267 (Delhi)*.

20. In reply it is submitted by Mr. Sethi that the impugned order does reflect the reasons for the decision to blacklist the petitioners. It is submitted that elaborate reasons are not required to be given. In terms of the settled

principles of law, it is sufficient that the order, which is at best a quasi-judicial one, should reflect the application of mind by the decision-making authority. According to the Respondents, the impugned order refers to the recommendations of the Engineer regarding the commission of defaults by the Petitioner. It also records a finding that the Petitioner is not trustworthy and reliable for future works. Reliance is placed on the judgment of the Supreme Court in *Madhya Pradesh Industries Ltd. v. Union of India AIR 1966 SC 671*. It is pointed out that the notices issued by the NHAI to the Petitioner PAJV from time to time and the correspondence between the parties, which are referred to in the show cause notice that preceded the impugned blacklisting order, indicate that the work was far behind schedule. These therefore constituted the reasons. It is not, therefore, as if the impugned order, which was passed after considering the reply of the petitioners, is without reasons.

21. The first issue that arises for consideration is whether the impugned order dated 24th February 2009 which bars PAJV from short-listing, participating or bidding for any future projects undertaken by the NHAI either directly in its name or indirectly in any other name or in association with any other person or entity with which it may use to carry on its business for a period of two years, is rendered illegal for failure to furnish reasons for such decision. The impugned order itself does use the word 'blacklisting' but the circular dated 24th February 2009 issued by the NHAI leaves no manner of doubt that it was indeed a 'blacklisting' order. The said circular reads as under:

“NHAI/Arbitration/DW-15/2002-Tech./5807 Dated:24/02/2009

CIRCULAR

Sub.: Debarring/**Blacklisting** of M/s. Prakash-Atlanta Joint Venture from short-listing participating or bidding for projects of/or to be undertaken by NHAI.

The National Highways Authority of India (NHAI) had entered into a Contract Agreement dated 10.08.2001 with M/s. Prakash-Atlanta(JV) for the project of Construction of Segment of Lucknow Bypass Connecting NH-25 & NH-28 Via NH-56 passing through Lucknow City in the State of Uttar Pradesh (Contract Package No.EW-15/UP).

NHAI has decided without prejudice to any other rights available to the NHAI in terms of the Contract and/or the applicable law **to ban/blacklist** M/s. Prakash-Atlanta(JV) who are hereby barred from short-listing; participating or bidding for any future projects to be undertaken by NHAI either directly in their name or indirectly in any other name or in association with any other person or entity in which they may choose to carry on their business for a period of two years.

The detailed **banning/blacklisting** Order No. NHAI/Arbitration/ EW-15/2002-Tech/5805 dated 24/02/2009 is enclosed. This is for information and records of all concerned.

(K.V.Sharma)
General Manager (DK-I)

Copy to :

- 1) Director General (RD) & SS, Ministry of Shipping, Road Transport & Highways.
- 2) Chief Secretaries/Secretaries (PWD/Roads) of all State Governments/UTs dealing with National Highways and Centrally Sponsored Schemes.
- 3) Chief Engineers of all States/UTs dealing with National Highways and Centrally Sponsored Schemes.
- 4) Director General (Border Roads), Seema Sadak Bhawan, Ring Road, Naraina, New Delhi – 110010.
- 5) All Officers of NHAI, HQ/PIUs/CMUs.
- 6) Media Relation/IT Divisio of NHAI with a request to get it hoisted on NHAI website.
- 7) M/s Prakash-Atlanta (JV)”

(emphasis supplied)

22. There are at least three things which are significant from the above circular. One is that the subject matter clearly says “debarred/blacklisting of M/s Prakash Atlanta Joint Venture.....”. The body of the circular refers to the impugned order dated 24th February 2009 as a “banning/blacklisting” order. Secondly, the circular was issued Mr. K.V. Sharma, General Manager (DK-I), by the same person who issued the blacklisting order. Third and most important is that the circular is sent to the “Chief Secretaries/Secretaries (PWD/Roads) of all State Governments/UTs dealing with National Highways and Centrally Sponsored Schemes; Chief Engineers of all States/UTs dealing with National Highways and Centrally Sponsored Schemes; Director General (Border Roads), Media Relation/IT Division of NHAI with a request to get it hoisted on NHAI website”. In other words, the blacklisting of the Petitioner was instantaneously given extensive publicity by the NHAI by hoisting it on a website while simultaneously transmitting it all over the country to several states and organisations. The circular underscores the extent of the adverse impact on the Petitioners as a result of the impugned blacklisting order. This has to be kept in the background while examining if the impugned blacklisting order satisfies the legal requirement of compliance with the principles of natural justice.

23. The requirement of an administrative authority to record reasons for its decisions was considered by the Constitution Bench of the Supreme Court in *S.N. Mukherjee v. Union of India* (supra). In para 9 of the said judgment (AIR @ p. 1988) one of the first questions formulated was “is there any general principle of law which requires an administrative authority to record the reasons for its decisions”. It was noticed that there was a divergence of

opinion on the issue in common law countries. While in the United States of America, the Federal Administrative Procedure Act, 1946 required administrative decisions to indicate a statement of findings and conclusions as well as reasons or basis therefor, in England there was no such requirement. A reference was then made to the recommendations of the Donoughmore Committee and the Franks Committee which led to the enactment in the United Kingdom (U.K.) of the Tribunals and Enquiries Act, 1958 which mandated the tribunal or Minister to furnish a statement, either written or oral, and the reasons for the decision, if requested, on or before the giving of notification of the decision to support the decision. The Tribunals and Enquiries Act, 1971 also contained a similar provision. As far as India was concerned, the 14th Report of the Law Commission of India relating to reforms in judicial administration, recommended that administrative decisions should be accompanied by reasons. A reference was made to the decision of the Supreme Court in *Madhya Pradesh Industries Ltd. v. Union of India* (supra) and *Bhagat Raja v. Union of India AIR 1967 SC 1606*. Reference was also made to the decisions in *Travancore Rayon Ltd. v. Union of India AIR 1971 SC 862*; *Mahabir Prasad Santosh Kumar v. State of U.P. AIR 1970 SC 1302* and *Raipur Development Authority v. M/s Chokhamal Contractors AIR 1990 SC 1426*. Thereafter in paras 34 and 35, the Supreme Court observed as under (AIR @ p. 1995):

“34. The decisions of this Court referred to above indicate that with regard to the requirement to record reasons the approach of this Court is more in line with that of the American Courts. An important consideration which has weighed with the Court for holding that an administrative authority exercising quasi-judicial functions must record the reasons for its decision, is

that such a decision is subject to the appellate jurisdiction of this Court under Article 136 of the Constitution as well as the supervisory jurisdiction of the High Courts under Article 227 of the Constitution and that the reasons, if recorded, would enable this Court or the High Courts to effectively exercise the appellate or supervisory power. But this is not the sole consideration. The other considerations which have also weighed with the Court in taking this view are that the requirement of recording reasons would (i) guarantee consideration by the authority; (ii) introduce clarity in the decisions; and (iii) minimise chances of arbitrariness in decision-making. In this regard a distinction has been drawn between ordinary Courts of law and tribunals and authorities exercising judicial functions on the ground that a Judge is trained to look at things objectively uninfluenced by considerations of policy or expediency whereas an executive officer generally looks at things from the standpoint of policy and expediency.

35. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact

whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.”

24. Thereafter in para 38, the Supreme Court observed “keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that **the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities**”. (emphasis supplied) The decision in *S.N. Mukherjee v. Union of India* by Constitution Bench of the Supreme Court, rendered in the context of court martial proceedings under the Army Act 1950, has been consistently followed by the courts in other contexts as well and in particular in the context of orders blacklisting contractors. The decision of the Supreme Court in *Madhya Pradesh Industries Ltd.*, to which a reference is made by the learned Senior counsel for the NHAI, was considered by the Constitution Bench of the Supreme Court in *S.N. Mukherjee* which then explained the law as noted hereinbefore. Therefore the decision of the larger Bench in *S.N. Mukherjee*, which has been consistently followed by this Court in the decisions noted hereinafter, holds the field.

25. In *Mekaster Trading Corp. v. Union of India* (supra), a learned Single Judge of this Court was considering the validity of an order issued by the Government of India, Ministry of Commerce and Industry, blacklisting the Petitioner, a contractor, for a period of five years with effect from 19th March 2002. The Petitioner was the Indian representative of M/s Barin Spa, Italy which had submitted a bid for procurement of Mobile Bridge Inspection Units (MBIU). The other bidder was a German company. The bid of M/s Barin was accepted and a formal contract was entered into. The Petitioner as agent of M/s Barin Spa was to act for the purpose of liaising and coordination for which M/s Barin was to pay agency commission. On 24th June 1996 the Director General of Supply and Disposal (DGS&D) issued Rejection Inspection Certificate in respect of the equipment supplied by M/s Barin. Thereafter a lot of correspondence was exchanged between the parties. The equipments were again tested and rejected by the DGS&D by its letter dated 12th May 1999. After about two years on 26th July 2001 the DGS&D issued a notice to M/s Barin asking them to show cause why they should not be blacklisted for having violated the terms of the contract. It was noticed by this Court in the said judgment that one common show cause notice was issued to both M/s Barin as well as the Petitioner M/s Mekaster Trading Corporation in which the purported lapses of both M/s Barin as well as M/s Mekaster were listed. Both M/s Barin as well as M/s. Mekaster submitted replies after which the blacklisting order was passed. It was noticed by this Court that in the blacklisting order the contentions of the two parties were brushed aside by stating “the reply submitted by them vide their letters dated 18.8.2001 and 6.2.2002 and oral representation by them during hearing of the case on 4.3.2002 have not been found convincing. The

available evidence does not reveal that the firm has fulfilled its contractual obligations”.

26. After discussing the relevant case law concerning the duty to give reasons, including the decision in *S.N. Mukherjee v. Union of India*, this Court in *Mekaster Trading Corp* quashed the blacklisting order by observing that “passing the order in such a slip shod manner which has the serious effect of blacklisting the petitioner for a long period of 5 years is certainly not an act of good administration”. It observed that “the aforesaid summation cannot be called as ‘reasons’ in support of the order. It can, at best, be termed as conclusion. Apart from this conclusion there is nothing in the order to indicate any supportive reason”. This Court pointed out that the link between the material on which conclusions are based and the actual conclusion had to be found. “If that has remained at the back of the mind of the authority passing the order, and has not surfaced on the records of the case, the ingredients of a reasoned order are not met”. Further it was emphasized that the reasons for arriving at the conclusions “should be discernible from the order itself. It is trite law that when authority has omitted to give reasons in the impugned order such a deficiency cannot be supplied by the State by adducing sufficient ground therefor when the validity of the order is challenged”.

27. The above dictum in *Mekaster Trading Corp* has been followed by this Court in *G.D. Tewari & Co. v. DDA*, *Indian Oil Corporation v. SPS Engineering Ltd.* 128 (2006) DLT 417 (DB) and *National Building*

28. Keeping the above settled position of law in view, this Court proceeds to examine the reasons contained in the impugned order. The impugned order is of 3½ pages. After narrating the contents of the circumstances that led to the issuance of the show cause notice and the case of the Respondents as set out therein, the order proceeds to recall and reject one of the contentions of the Petitioner as under:-

“It is noted that the Joint Venture and its Partners have reiterated the stand taken by them earlier i.e. that they have fulfilled their obligations under the Contract. This submission of there is found to be without merit and is contrary to the facts and circumstances of the case and the material on record including the recommendations of the Engineer/the various notices issued by him to the Contractor, establishes fundamental defaults on the part of the Contractor.”

29. The impugned order then notes and rejects the next contention of the petitioners as under:

“It is also noted that a contention has been raised by the Contractor and its Partner that the General Manager is not authorised to issue the Show Cause Notice. This contention is also found to be without any basis as the proposed action of debarment of the Contractor and its Partners has been approved by the Competent Authority of the NHAI, who has authorised the General Manager to issue the said Show Cause Notice.”

30. From a reading of the above portions of the impugned order it would appear that the petitioners did not advance any other contention. However, the petitioners’ reply dated 12th July 2008 to the show cause notice issued by

the NHAI lists out several other contentions which have not even been referred to in the impugned order, much less dealt with. The petitioners in their reply offered an explanation for the delays in completion of the project. In fact, the learned Senior counsel for the NHAI took this Court through several pages of the record which contains the correspondence between the parties concerning the delays in completion of the project. This was sought to be explained by the Petitioners in its reply to the show cause notice. For example, in paras 5.0 to 5.2, the following explanation was offered:-

“5.0 The slow rate of progress of work was due to total throttling of the cash flow and want of administrative approval to extract soil for embankment/RES work. The physical progress achieved was 78.36% and financial progress was more than 100% cost wise.

5.1 A technical representative of the patentee for Reinforced Earth Structure (RES) was present at the time of erection and the same stands substantiated by Request for Approval duly signed by the Engineer's representative. The quantity of work executed has been duly certified by representative. The quantity of work executed has been duly certified by the Engineer's representative in interim payment certificates. The RES work was virtually under suspension for a few months for want of administrative approval to extract soil for RES work. We were duty bound to mitigate the losses to the extent possible and therefore technical representative of patentee was not called to remain present on the site doing no work. Since the administrative approval was beyond our control and the Project Director himself was doing the follow up, the reasons were within the knowledge of the Engineer/Employer. The issue is now being raised only with a view to support your malafide intention of debarring us.

5.2 There were no defects in the work anywhere much less in the work as alleged by the Engineer. The defect has to be based on objective criteria. We had already replied to the Engineer's letters dated 09.08.2007 and 04.02.2008 pointing out that the work was not defective as alleged.

31. The impugned order does not refer to the above explanation at all. Now this Court proceeds to examine the remaining portions of the impugned order. These are two paragraphs, preceding the final paragraph by which NHAI has blacklisted the petitioners. These two paras read as under:

“Further, after considering the relevant record including the contractual terms, the reports of the Engineer, Show Cause Notices issued to the addresses, replies to the Show Cause notice received from them, their oral as well as written submission during the personal hearing, the facts and circumstances of the case and on analysis thereof, NHAI is of the considered view that the reply as well as written submission are wholly unsatisfactory and no justifiable grounds have been made out so as not to take the proposed action as stated in the Show Cause Notice dated June 27, 2008.

The NHAI is entrusted sovereign function of making operational highways and expressway across the country. Timely executions of said works are essential for the growth of economy and it is a national interest that there is no delay in the execution of the said work. Keeping in view the performance and conduct of the addressees, NHAI finds that they are not reliable and trustworthy for any future works.”

32. The first of the above paragraphs is no different from the reasons given by the Government of India in its blacklisting order in *Mekaster Trading Corp.* It is one solitary statement which states that after considering the

relevant records, show cause notice, replies and the oral/written submissions, the NHAI is of the view that those replies and written submissions “are wholly unsatisfactory and no justifiable grounds have been made out.” The other again is a conclusion which simply states that “keeping in view the performance and conduct of the addressees, NHAI finds that they are not reliable and trustworthy for any future works”.

33. At best the above statements can be termed as conclusions and not reasons. As pointed out by this Court in *Mekaster Trading Corp.*, the above order does not indicate that “the decision maker successfully came to grips with the main contention advanced by the parties”. It also fails to disclose “how the mind is applied to the subject matter; whether done relevantly or rationally”. There are no reasons to indicate the application of mind and the mental process leading to the conclusion. Further as pointed out by the Division Bench of this Court in *Indian Oil Corporation v. SPS Engineering Ltd.* (supra) (DLT, p.425), “reasons must be contained in the order under challenge, and mere existence of reasons in the show cause notice, or any material referred to in the show cause notice, is not sufficient....the authority concerned must, at least in brief, deal in the impugned order with the explanation given in the reply, and give its reasons for holding that the explanation is not satisfactory.”

34. In the considered view of this Court, the impugned order does not satisfy the requirement of the principles of natural justice i.e. of furnishing reasons for the conclusions. Considering that the impugned order read with the

circular dated 24th February 2009 has adverse civil consequences for the Petitioner, it simply cannot be sustained in law. The damage, that has already been done in terms of the Petitioner not being awarded works by other organizations and even by the NHAI itself in not allowing it to bid, cannot possibly be reversed. However, on this aspect this court does not wish to dwell, as it is best left to be determined in appropriate proceedings in the civil court, if instituted, by the petitioners.

35. The petition should succeed on the above ground alone. However, since other points were urged, they are also being dealt with. The next contention of the Petitioners is that they were given a hearing by the Member (Technical) but the impugned order was passed by the GM (DK-I) who was not the person who heard the Petitioners. In its counter affidavit it is sought to be explained by the NHAI that Mr. Sharma was the person who issued the show cause notice and to whom the reply was furnished. Mr. Sharma was physically present at the time the Member (Technical) gave a hearing to the Petitioner and therefore Mr. Sharma was conversant with all the submissions made in response to the show cause notice. It is accordingly submitted by the NHAI that no illegality was committed only because the person who heard the Petitioners was different from the person who passed the impugned order. Reliance was placed on certain observations of the Supreme Court in *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation AIR 1959 SC 308* where the Supreme Court disapproved of the procedure prescribed under the Motor Vehicle Rules which permitted the Secretary to give a hearing and the Minister to take the decision. It was observed that “this divided responsibility is destructive of

the public concept of judicial hearing”.

36. While prima facie the above argument appears to be attractive, in the context of the present case this Court is unable to find it to be a serious lacuna which can by itself be stated to have caused prejudice to the Petitioner. Factually, it is not denied by the Petitioner that Mr. K.V. Sharma was present when the hearing of the Petitioners by the Member (Technical) took place. Mr. Sharma was the person who issued the show cause notice. The Petitioners submitted their replies to him. It is, therefore, not possible in the facts of the present case to agree with the contention of the Petitioner that the impugned order is bad in law only because it was passed by a person different from the person who heard the Petitioners.

37. The third ground on which the impugned order is attacked is that it concerns issues which form the subject matter of arbitration proceedings. It is submitted that the Petitioners have in para 32 of the writ petition given details of the various disputes between the parties which are pending by way of arbitration before various tribunals. The learned Senior counsel for the Respondents on the other hand submits that the defects pointed out by the independent Engineer appointed in terms of the contract, and which were not contested by the petitioners, formed the basis of the blacklisting order and is therefore independent of any disputes that may be pending adjudication before the Arbitral Tribunal. It is further pointed out that given the importance of the projects of the NHAI and the necessity for completing them in time, the NHAI cannot be expected to wait for the completion of

arbitration proceedings before deciding whether a contractor should be blacklisted. In response to this argument it is pointed out by the learned Senior counsel for the Petitioner that the Engineer under the contract in terms of clause 4.1. is expected to decide “contractual matters between the employer and the contractor in the role representing the employer”. Therefore, the Engineer is in fact not an independent person as is sought to be projected by the NHAI.

38. One of the contentions raised in the show cause notice by the NHAI is that the Petitioners have by their letter dated 14th March 2008 issued “an invalid notice of termination of contract” and that by so doing the petitioners had “in no uncertain terms clearly refused to perform your obligation under the Contract”. It appears that the validity of the action of the Petitioner in terminating the contract is indeed pending reference before an arbitral tribunal. In *National Building Construction Corp. Ltd. v. NDMC* (supra), a learned Single Judge of this Court dealt with a similar issue. In para 19 of the said decision (DLT @ p. 420), the court noted that there was an “identity in the subject matter of the allegations leading up to the blacklisting order and arbitration proceedings”. After referring to the judgments in *Eurasian Equipment & Chemicals Ltd. v. State of West Bengal AIR 1975 SC 266*, *Raghunath Thakur v. State of Bihar AIR 1989 SC 620* as well as the earlier decisions of this Court, the learned Single Judge held that it was clear that the NDMC had proceeded to blacklist the contractor “even after recession of the contract which had become the subject matter of arbitration”. In *Indian Oil Corporation v. SPS Engineering Ltd.*, the Division Bench of this Court agreed with the reasoning of the learned Single

Judge that “when the entire matter was pending before the Arbitrator there was no need to have proceeded with the issue of placing the petitioner on the ‘holiday list’.” The Division Bench held: “when the matter was subject matter of arbitration, the respondent should have awaited the decision of the Arbitrator before taking such a decision in a hurry”. Therefore, on this ground also the Petitioner is entitled to succeed. There was no occasion yet for the NHAI to have issued the impugned show cause notice dated 27th June 2008 to the petitioners.

39. Consequently the impugned show cause notice dated 27th June 2008 and the consequential order dated 24th February 2009 passed by the NHAI blacklisting the petitioners are hereby set aside. The NHAI will, consistent with this order, and within a period of one week from today, issue a corrective circular to withdraw and replace its earlier circular dated 24th February 2009 which has been referred to hereinbefore. Simultaneously, the NHAI will place the new circular on its website and also send copies to all entities to whom the earlier circular was sent. It is clarified that depending on the outcome of the proceedings before the Arbitral Tribunal, it would be open to the NHAI to proceed thereafter in accordance with law.

40. The writ petition is allowed with costs of Rs.20,000/- which will be paid by the Respondents to the Petitioner within four weeks from today. All pending applications are disposed of.

S. MURALIDHAR, J

FEBRUARY 5, 2010

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