

*** THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 06.02.2013
Judgment delivered on: 29.05.2013

+ WP(C) 2620/2012

ISRAEL MILITARY INDUSTRIES LTD. Petitioner

Vs

UNION OF INDIA & ANR. Respondents

Advocates appeared in this case:

For the Petitioner: Mr Rajiv Nayar, Sr. Advocate with Mr Ajay Bhargava, Mr Darpan Wadhwa, Mr Susmit Pushkar, Ms Priyanbada Mishra and Mr Anchit Oswal, Advocates.

For the Respondents: Mr Rajeev Mehra, Additional Solicitor General with Ms Inderjeet Sidhu & Mr Ashish Virmani, Advocates with Mr. K.C. Sharma, Director, OFB.

**CORAM :-
HON'BLE MR. JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER, J

WP(C) 2620/2012 & CM No. 5630-32/2012

FACTS/BACKGROUND

1. The petitioner before me, i.e., Israeli Military Industries Ltd. (in short IMI) is a company, which is wholly owned by the Government of Israel and incorporated under the laws of Israel. IMI is aggrieved by an order dated 05.03.2012, issued by the Ordinance Factory Board (in short OFB), i.e., respondent no. 2. The impugned order impacts IMI in two ways. Firstly, it seeks to cancel a turnkey contract awarded to it, pursuant to a global tender floated, to set up a plant for manufacturing By-Modular Charge Systems (in short BMCS), alongwith associated civil works in Nalanda, in the State of

Bihar (hereinafter referred to as BMC project). Secondly, it proceeded to debar IMI from further business dealings with OFB for a period of ten (10) years.

1.1 There were also certain consequential directions issued by the impugned order, which is that, the contract would be retendered, and loss, if any sustained on account of cancellation, would be recovered by it. This course was, however, indicated while reserving the right for further recoveries and actions, as per the contract obtaining between the parties.

2. The principal ground on which the impugned order is challenged is that, it was passed without due compliance of the principles of natural justice. There were several submissions made on behalf of IMI in support of this main submission, which were really off shoots of this main submission. I shall be dealing with each of them in the course of my judgment. The respondents, as is expected, have repelled these charges. Therefore, before I proceed further, it may be relevant to set out briefly the material facts obtaining in the case, which are necessary for determining the issues at hand.

3. IMI, which claims to be one of the leading players in providing military hardware and technology, entered into a Memorandum of Understanding (in short the MOU) with OFB, on 26.10.2003. The MOU generally details out the common objective of the two parties, which was to co-operate, in the manufacture and supply, to their customers worldwide, the products which the parties intended to produce jointly. It may be useful to notice that the Government of India and the Government of Israel as a prelude to the MOU had executed a Bilateral Investment Treaty (in short the Treaty) to further the trade between the two countries, on 29.01.1996.

4. It is in the background of the above that, on 29.03.2004, OFB floated a global tender inquiry for setting up a BMCS plant at Nalanda, in Bihar.

4.1 IMI filed its bid whereupon it was declared L-1. However, for reasons best known to the parties, the tender of March, 2004 did not achieve fruition.

4.2 After nearly a gap of three years, on 26.02.2007, OFB issued a fresh global tender inquiry. In terms of the tender Requests for Proposal (RFP) were sought from interested parties. Once again, IMI participated in the tender and submitted its RFP. IMI furnished a bank guarantee in the sum of Rs.3 crores towards earnest money. Crucially, IMI sought an advance of 20% of the contract value. It appears that apart from IMI an Italian company by the name of Simmel Difesa remained in the fray.

4.3 On 20.09.2007, IMI also signed a pre-contract Integrity Pact in terms of clause 33 of the tender, which was executed as per the format provided in Annexure XV of the tender.

4.4 On 28.01.2008, price bids were opened, whereupon the petitioner once again was declared L-1. IMI claims that, its bid at Rs.1090.83 crores was lower by about 72% as compared to the next lowest bid; which was put in by Simmel Difesa. It is claimed that, Simmel Difesa quoted a figure of Rs. 1885 crores.

4.5 IMI, further claims that, negotiations were held between its representatives and those of OFB, in the presence of its main partners, Bateman Litwin and L&T. Pursuant to these negotiations, IMI reportedly reduced its offer price by 3 million Euros.

4.6 Consequent to the aforesaid steps being taken, a Letter of Intent (LOI) was issued in favour of IMI, on 11.02.2009. The LOI, evidently, made a

reference to the obligation of the respondents to pay an advance of 20% of the contract price, in terms stipulated therein.

4.7 On 16.03.2009 a formal contract was executed between IMI and OFB which had a foreign currency and an Indian currency component. The foreign currency component was crystalized at 11,30,6745 Euros, while the Indian currency component was pegged at Rs.372,29,21,000/-, which included Rs. 189,57,17,000/- towards plant and machinery and Rs. 182,72,04,000/- towards civil work.

5. It is the case of the petitioner that, in terms of article 3.1 of the contract, all time schedules, deliveries, supplies and performance of services were to commence from the date, the stipulated advance payment, was transmitted to IMI. It is conceded though, by IMI, that release of advance payment was subject to fulfilment of conditions stipulated in article 3.1 read with article 6.3.1 and 6.3.2 of the contract. Briefly, the pre-conditions for release were: the execution of an advance payment bank guarantee; the execution of a performance bond; and lastly, the issuance of an export licence by the Israeli Government in favour of IMI, which was to be sent to OFB.

5.1 It is claimed by IMI that, not only an invoice for the advance payment was submitted, but also that the aforementioned requirements were fulfilled prior to the release of the advance payment in its favour on 25.03.2009. There is some dispute with regard to this assertion of IMI. Suffice it to note, that the advance payment made by the respondents carried interest at LIBOR plus one (1) percent.

6. It may be pertinent to note at this stage that, admittedly, IMI executed five (5) bank guarantees in favour of the respondents. These comprised of two (2) advance payment guarantees, two (2) performance guarantees and

one (1) earnest money guarantee in terms of the Integrity Pact; to which a reference has been made hereinabove.

7. It appears that while, IMI was preparing itself to execute the BMCS Nalanda project, the Central Bureau of Investigation (in short CBI) had received intelligence inputs, pursuant to which investigations were commenced against the then Director General of OFB, one Shri Sudipta Ghosh and his associates. This had resulted in a FIR being: RC No. 0102009A019 dated 17.05.2009, being registered against Shri Sudipta Ghosh, Shri Aashish Ghosh, Shri Pradeep Rana and others.

8. In view of this development, respondent no. 1, through Ministry of Defence, issued an order on 01.06.2009, to put contracts dealing with defence acquisitions entered into on behalf of the Government of India with foreign suppliers, including the contract in issue, on hold.

9. IMI, on becoming aware of this development, vide communication dated 18.06.2009 respondent no.1 protested the “on hold” directive being applied to the contract in issue, as it claimed that it had always acted in strict compliance with the Indian laws.

10. Respondent no. 1, by a return communication dated 21.07.2009, formally informed IMI that the CBI had on 17.05.2009, registered a FIR against IMI and other suppliers; which alleged payment of illegal gratification to secure supply orders from OFB. IMI, was informed that, the FIR specifically mentioned that someone who allegedly acted as a middle man had agreed to pay a bribe to the then Director General of Ordnance Factory and Chairman of OFB, on its behalf, and, therefore, procurement in respect of the contract in issue and six other contracts, (in respect of six other suppliers) referred to in the FIR, had been put on hold.

11. Evidently, some of the suppliers, whose contracts had been put on hold, which included an Indian company by the name of R.K. Machine Tools Ltd, approached this court by way of writ petitions under Article 226 of the Constitution. These writ petitions were filed in 2009-2010. The lead writ petition was numbered as: WP(C) 13457/2009, and was titled as, ***R.K. Machines Tools Ltd. & Ors. vs UOI.***

11.1 By a common judgment dated 11.02.2010, the writ petitions were disposed of. The learned Single Judge allowed the writ petitions on a singular ground: which was that the decision to put the past, present and future contracts on hold, was illegal, as it was a decision made, without due adherence with the principles of natural justice. Pertinently, at this stage, respondents had not issued a show cause notice and therefore, quite obviously, not sought any explanations from the affected writ petitioners, who had approached the court.

11.2 The court, repelled the submissions made on behalf of the respondents that the FIR filed, be treated as a show cause notice.

11.3 While, allowing the writ petitions, the court made it clear that it had not returned findings on the merits of the matter, and that, the respondents were free to proceed further: “in a time bound manner, in accordance with law”. It was also made clear that, respondents were not to take any decision which would be adverse to the interest of the writ petitioners, without due compliance of the principles of natural justice.

12. Having regard to the judgment of this court, OFB issued a show cause notice on 07.04.2010, to which a reply was filed by IMI on 15.04.2010.

13. The CBI, having completed investigation in the matter, filed a chargesheet on 30.06.2010 against Sudipta Ghosh, Ashish Ghosh, Pradeep Rana and others, under Sections 7, 10, 13(2) read with Section 13(1)(a) and

(d) of the Prevention of Corruption Act, 1988 (in short the PC Act) and under Section 120B of Indian Penal Code, 1860 (in short IPC) alongwith Sections 7, 8, 9, 10, 12 14 and 13(2) and Section 13(2), 13(1)(a) and (d) of the PC Act, before the Special Judge, CBI Court, at Kolkata. This case is registered as Special Case No. 17/2010. Apparently, after the submission of the chargesheet by CBI, a copy of the same was sent to the Ministry of Defence (in short M.O.D.) accompanied by CBI's recommendation in the matter.

14. This resulted in OFB issuing a second show cause notice dated 22.12.2010, which was based on the extracts from the chargesheet filed by CBI before the Special Judge, CBI Court, Kolkata.

15. IMI, responded to the aforementioned show cause notice vide a reply dated 03.01.2011. Apart from denying the allegations contained in the show cause notice dated 22.12.2010, it also sought the material which formed the basis of the allegations contained in the said show cause notice.

16. Crucially, OFB by a return communication dated 10.02.2011, intimated to IMI that its show cause notice of 22.12.2010 was based on the extracts culled out from the chargesheet filed by the CBI.

16.1 It may be pertinent to note that, immediately thereafter, a starred question was raised in the Parliament seeking to generally know as to whether penal action against the IMI had been dropped and its name removed from the blacklist. Pertinently, in response, M.O.D., Government of India informed the Parliament that a fresh show cause notice, "***based on the contents of the chargesheet***", had been issued to IMI, which had in turn, made a request, for being supplied with underlying documents. It was further indicated that, IMI had been provided with documents available with the M.O.D.

16.2 The IMI, in response also issued a rejoinder dated 04.03.2011, in which, inter alia it mentioned the fact that, it had been declared L-1 twice, once when a global tender was floated in March, 2004, and the second time, when it was floated in February, 2007, which resulted in culmination of the contract in issue dated 16.03.2009.

17. In the meanwhile, the respondents in consonance with the judgment of the learned Single Judge of this court dated 11.02.2010, constituted a Committee of two members (hereinafter referred to as the Committee), to examine the matter in issue, and submit its report in that behalf. The Committee was constituted pursuant to an order dated 13.01.2011 issued by the Director General, Ordnance Factory and Chairman of OFB. The report was to be filed with the Chairman. The Committee, required IMI to appear before it, for a personal hearing on 18.05.2011.

17.1 Since, IMI sought accommodation, the hearing was rescheduled to 06.06.2011.

17.2 On 15.06.2011, the Committee submitted its report to the Director General, Ordnance Factory and Chairman, OFB. The recommendation made by the Committee was, that due action be taken against IMI, as per the show cause notice issued to it.

17.3 Apparently, on 24.08.2011, the respondents issued a global notice seeking offers for supply of various chemical plants, once again, to be executed on turnkey basis. It is the case of IMI that this global notice included the subject matter of the present contract. IMI claims that, no notice in respect of the same, was issued to it.

18. Apparently, on 29.08.2011, IMI received intimation through its banker in Israel that the five (5) bank guarantees in issue had been invoked by the respondents. Consequently, a petition under Section 9 of the

Arbitration & Conciliation Act, 1996 (in short the Arbitration Act) was filed, which was registered as, OMP No. 662/2011.

18.1 A learned Single Judge of this court vide order dated 02.09.2011, rejected IMI's plea for stay of the advance guarantees and the guarantee issued towards earnest money. However, an ad interim ex-parte stay was granted qua the two (2) performance guarantees. On return of notice, however, i.e., on 29.09.2011, when the learned Single Judge was informed that the two performance guarantees had been encashed, the proceedings were closed, in view of the fact that they had been rendered infructuous. The court, however, observed that the observations made in the order will not affect the rights and contentions of the parties.

19. IMI, evidently, wrote a letter to respondent no. 1 dated 22.02.2012, seeking issuance of RFP for another tender involving AFV Protection and Countermeasure System for T-90 Tanks.

20. Based on the recommendations made in the report dated 15.01.2011, generated by the Committee, the OFB issued the impugned order dated 05.03.2012 terminating the contract and debarring IMI from further business dealings with it, the Department of Defence Production and the M.O.D, for a period of ten years.

20.1 On the same day, evidently, a press release was also issued by the M.O.D debarring other five firms, similarly, for a period of ten years.

SUBMISSIONS OF COUNSELS

21. In the background of the above broad facts, the submissions on behalf of the petitioner were advanced by Mr Rajiv Nayar, learned senior counsel alongwith Mr Darpan Wadhwa, Advocate while on behalf of the respondents by the learned ASG, Mr Rajeev Mehra instructed by Ms Inderjeet Sidhu.

21.1 Mr Nayar submitted that the impugned order was in complete breach of principles of natural justice in as much as the respondents failed to supply the underlying material which formed the basis for passing the impugned order. In this behalf, it was stated that neither the FIR nor the chargesheet was supplied to the petitioner. The transcripts of the purported telephonic conversations and witness statements were also not supplied. It is his submission that, as a matter of fact, the Committee, which heard the petitioner, prior to the issuance of the impugned order, has also observed that the chargesheet was not made available to it. According to Mr Nayar, this approach was contrary to the stand taken by the respondents, in particular, by the M.O.D, in its response to the starred question raised in the Parliament. The adoption of this procedure, according to Mr Nayar, caused prejudice to the petitioner. In support of this submission, reliance was placed on the judgment of the Supreme Court in the case of *Swadeshi Cotton Mills vs UOI (1981) 1 SCC 644* at paragraphs 86 to 94.

21.2 It was contended by Mr Nayar, the approach adopted was contrary to the directions issued by the learned Single Judge of this court in *R.K. Machine Tools's* case, which involved entities similarly circumstanced as the petitioner. In support of this submission Mr Nayar relied upon the observations made in judgment of a Division Bench of this court in the case of *KanwarNatwar Singh vs Director of Enforcement (149) 2008 DLT 18 (DB)*, in paragraph 14 at page 25, and *Rama Pandey vs UOI (162) 2009 DLT 202* in paragraphs 14, 16 and 17 at pages 206 and 207.

21.3 It was stressed that the charge levied against the petitioner is based solely on the extracts of the chargesheet. It was emphasised that though the FIR was filed nearly four years ago, the petitioner had not been named as an accused in the case. The respondents in coming to the conclusion, which

they have, had shifted the burden of proof on to the petitioner. In effect, the petitioner has been called upon to prove the negative. Reliance in respect of this submission is placed on ***Erusian Equipment & Chemicals Ltd. vs State of West Bengal (1975) 1 SCC 70.***

21.4 The impugned order was passed by the persons other than who heard the petitioner. The hearing held on 6.6.2011 by the Committee was a mere formality. At the time of hearing the representatives of the petitioner was not informed that it was only a recommendatory body. The impugned order is based on the recommendations of the (two-member) committee contained in its report dated 15.06.2011. This, according to the petitioner, was contrary to the decision of the Supreme court in the case of ***Gullapalli Nageswara Rao & Ors. vs Andhra Pradesh State Road Transport Corporation & Anr. (1959) Supp 1 SCR 319.***

21.5 It was submitted, that this being not a case of institutional hearing, the judgment in the case of ***Ossein and Gelatine Manufacturers' Association vs Modi Alkalies and Chemicals Ltd. (1989) 4 SCC 264*** was not applicable, as is sought to be contended by the respondents. It was submitted that the issue whether the principle enunciated in the ***Gullapalli Nageswara Rao's*** case that the person hearing the case ought to decide the matter, would be applicable in the case of an institutional hearing, was not decided.

21.6 Neither the impugned order nor the Committee's report is reasoned as it does not deal with the contentions raised by the petitioner. Once again, reliance was placed on the judgment of the Supreme Court in ***Swadeshi Cotton Mills vs UOI*** at paragraphs 26, 78 and 106.

21.7 It was contended that the conclusions reached in the impugned order were pre-determined. The correctness of this submission was sought to be established, by seeking to draw the attention of the court to the fact that after

the submission of the report by the Committee on 06.06.2011, the respondents even prior to the issuance of the impugned order, sought requests for re-tendering the Nalanda project and went on to invoke the bank guarantees in issue, between August and September, 2011. This, according to the petitioner, was contrary to the decision in the case of ***R.K. Machine Tools***, which required the respondents not to take any coercive steps till such time the respondents reached a decision in the matter.

21.8 It was submitted that there was a mismatch between what was articulated in the show cause notice and the conclusions reached by the Committee in its report dated 15.06.2011. While the show cause notice alleged that the petitioner had paid illegal gratification for release of advance money, the Committee concluded that the petitioner was paid an advance of 20%, whereas the contract provided for payment “upto” 20%.

21.9 It was further contended that on the other hand the impugned order erroneously finds that the petitioner had wrongfully procured the BMC project. According to the impugned order the advance payments were wrongfully released to the petitioner, contrary to the provisions of article 3 of the contract, that is, prior to completion of the pre-requisites contained therein. In particular, the allegation in this behalf is, which according to the petitioner is erroneous, that the petitioner had not submitted the export license at the time when the advance of 20% of the total value of the contract was released to the petitioner. For this purpose, the petitioner relies upon the averments made and the documents appended to the rejoinder. It is submitted that in any case the respondents cannot improve upon what is stated in the show cause notice and/or in the impugned order.

22. The debarment for a period of ten (10) years, is wholly disproportionate to the charge levied against the petitioner, especially in

view of the fact that the impugned order has been passed in breach of the principles of natural justice; is arbitrary; unreasonable; lacks application of mind; is in pursuance of malafide intentions; and lastly, is against public policy. Reliance in this regard is placed on *Erusian Equipment & Chemicals Ltd.* and *Raghunath Thakur vs State of Bihar (1989) 1 SCC 229*.

22.1 The reliance by the respondents on the order of the learned Single Judge dated 02.09.2011 passed in OMP No. 662/2011, is misconceived. The said order was passed in a proceeding taken out under Section 9 of the Arbitration Act. The court on its own by a subsequent order dated 29.09.2011, clarified that observations made in the previous order would not prejudice either party.

22.2 On behalf of the respondents, the learned ASG submitted that this court has no territorial jurisdiction to entertain and adjudicate upon the writ petition for the following reason: the contract executed between the parties dated 16.03.2009, the correspondences exchanged, the FIR lodged, the criminal trial which followed thereafter, and the personal hearing which was accorded to the petitioner, are events, which occurred in Kolkata. Therefore, no part of the cause of action occurred in Delhi.

22.3 Furthermore, respondent no. 2, i.e., OFB, is an independent wing of the M.O.D., all actions and decisions in the matter were taken by the said respondent, i.e., the OFB. The reliance on the press release by respondent no. 1, to demonstrate that, all actions of respondent no. 2 had their origin in the decisions taken by respondent no. 1, i.e., the M.O.D., is misconceived. It was contended that there cannot be any assumption in this behalf, solely based on a press release issued by respondent no. 1, i.e., the MoD. It was submitted that in any case, the same cannot confer jurisdiction, on this court.

22.4 The reliance, on clause 14 of the pre-contract integrity pact, to invoke jurisdiction of this court, is also misconceived. The impugned order which directs cancellation and debarment has been taken by concerned respondent in terms of the main contract and not as per the pre-contract integrity pact. The jurisdiction clause, in the pre-contract integrity pact was directed towards the deposit made by the petitioner of Rs. 3 crores towards performance of the said contract and not for any other purpose.

22.5 Alternatively, even assuming that a miniscule part of the cause of action arose within the jurisdiction of this court, this court would not exercise its jurisdiction in favour of the petitioner by entertaining the present writ petition. Reliance in this behalf was placed on the observations contained in the judgment of this court in ***Sterling Agro-Industries vs Union of India* 181 (2011) DLT 658** at page 673 and 674 in paragraphs 32 and 33.

22.6 The petitioner, being foreign company could not maintain a writ petition under Article 19 or 14 of the Constitution. Reference was made to the following judgments in support of this proposition: ***Indo-China Steam Navigation Company Ltd. vs Jasjit Singh* AIR 1964 SC 1140** and ***Star India Pvt. Ltd. vs Telecom Regulatory Authority of India & Ors.* 146 (2008) DLT 455.**

22.7 The writ petition is not maintainable as there is an arbitration mechanism put in place, as encapsulated in the contract dated 16.03.2009, obtaining between the parties. There is a direct nexus between cancellation of the contract and debarment of the petitioner, from doing further business with the respondents. These are consequences of the breach of the terms of the contract contained in Articles 23.1, 23.2 of the contract; the consequences qua which, are contained in Article 20.1, 20.3 and 24.1.1. It

was contended that, while respondents have infact triggered four consequences upon breaches committed by the petitioner; these being: risk-purchase, debarment, cancellation of the contract and recoveries of money, alongwith interest – the petitioner has assailed only two of these four actions, i.e., termination and debarment/ blacklisting of the petitioner. Since, the petitioner itself, invoked the provisions of Section 9 of the Arbitration Act, qua invocation of bank guarantees in issue, the present action is malafide and abuse of the process of court. Reliance in this behalf was placed on the judgment of the Supreme Court in the case of ***Divisional Forest Officer vs Bishwanath Tea Co. Ltd. AIR 1981 SC 1368.***

22.8 Since, material breaches and serious violations and irregularities were committed by the petitioner, which resulted in the petitioner's blacklisting/ debarment, there is no scope for "judicial interference".

22.9 On merits, it was submitted that there was no violation of principles of natural justice. The earlier show cause notice dated 07.04.2010 was dropped, as it was informed that a chargesheet had been filed against two other similarly circumstanced entities. It is in this background that a fresh show cause notice was issued on 22.12.2010, wherein extracts from the chargesheet filed by the CBI adverting to the involvement of the petitioner in payment of illegal gratification were referred to. The investigation against other entities, which include the petitioner, is on. The respondents in these circumstances could not have supplied any material or evidence as it was not available with them.

23. The petitioner was all along aware of the basis on which the impugned action has been taken. Reference in this behalf was made to the letter dated 08.06.2009 written by the petitioner to respondent no. 1 and the replies referred to in the written submissions filed by the petitioner.

23.1 It was contended that in any event, the chargesheet and the material relied upon by the CBI could not be supplied to the petitioner as that is a material, which the trial court is required to appreciate and weigh during the course of the trial, which is in progress before the Special Judge, CBI Court, in Kolkata.

23.2 It was next contended by Mr Mehra that the petitioner has not been able to show, as to the prejudice caused to it, by respondents' failure to supply the chargesheet. Reliance in this behalf was placed on the observations made in the judgment in the case of ***Grosons Pharmaceuticals vs State of U.P. & Ors. (2001) 8 SCC 604*** at page 606 in paragraph 2 and the judgment of this court in ***Sahney Kirkwood Pvt Ltd. vs Union of India 154 (2008) DLT 555 (DB)***.

23.3 As regards the contention raised by the petitioner that the impugned order dated 05.03.2012 was in violation of the principle that, one who hears must decide, it was submitted that principle, was not applicable in the present case. The petitioner was granted hearing before a two-member committee, to examine the interim reply submitted by the petitioner so that the recommendations generated pursuant to the said hearing could be placed before the entire body of respondent no.2, i.e., OFB. Respondent no. 2, i.e., OFB consists of nine members. The two members, who formed the committee, were part of the OFB. The respondent no. 2, i.e., OFB, took the decision impugned in the present writ petition, after taking into consideration the replies and written submissions filed by the petitioner as also the recommendations of the committee. The petitioner had a full opportunity of presenting its case. As a matter of fact, before the committee, the petitioner was represented by lawyers, as well. This was a case of institutional hearing, therefore, the principle that one who hears must

necessarily decide, was not applicable. Reliance in this behalf was placed on the observations made by Supreme Court in the case of *Ossein & Gelatin Manufacturer Association* and the Division Bench of this court in the case of *Sahney Kirkwood Pvt Ltd*.

24. In respect of the submission that there was a purported variation in what was stated in the show cause notice and that qua which findings were returned in the impugned order, the learned ASG submitted that the same was baseless. The show cause notice was issued by respondent no.2, to call upon the petitioner to explain as to why action be not taken against the petitioner, for indulging in alleged acts of payment of illegal gratification for procurement and/or implementation of the contract; which was violative of the terms of the contract. The contention with regard to the petitioner having failed to submit the export license is a contention which was made by the respondents, not in the show cause notice, but in the counter affidavit in response to the averment made by the petitioner that it had fulfilled the terms of the contract, and therefore, the release of advance payment was not out of the ordinary but in terms of the contract. It was contended that as a matter of fact, the petitioner had never submitted the export licence prior to release of the advance payment, what it did submit was a certificate from the Government of Israel adverting to the fact that an export license had been issued in favour of the petitioner.

24.1 It was contended that the reliance by the petitioner on the judgment of this court in *R.K. Machine Tools* was misconceived. The petitioner had not challenged the “on hold” order. The entities which challenged the “on hold” order, obtained a favourable order on the ground that no notice had been issued to them prior to issuance of the “on hold” order.

25. In rejoinder, apart from reiterating what was said in the opening, Mr Nayar made the following additional submission with regard to the maintainability of the writ petition raised by the respondents. In so far as the issue of territorial jurisdiction of this court is concerned, it was submitted that this court would have jurisdiction for the following reason: Respondent no. 1 is situate in Delhi. Respondent no. 2 is a part of respondent no. 1 and is acting for and on behalf of the said respondent. The “on hold order” dated 21.07.2009 was issued by respondent no. 1 in Delhi. The impugned order dated 05.03.2012 was passed by respondent no. 1 at Delhi; followed by a press release issued from Delhi. The pre-contract integrity pact dated 20.09.2007 adverts to the fact that the place of performance and jurisdiction would be Delhi. Lastly, qua persons similarly circumstanced, this court in the case of ***R.K. Machine Tools*** exercised jurisdiction.

25.1 As regards availability of alternative remedy, it was contended that the issue of blacklisting was not arbitrable, since the remedy has its origin in public law. The petitioner is impugning the decision making process; therefore, the contention of the respondents that because a remedy under Section 9 had been invoked, on an earlier occasion, the remedy by way of a writ petition under Article 226 was not available, is misconceived. This court in ***R.K. Machine Tools*** entertained writ petition notwithstanding the existence of an arbitration clause, qua similarly circumstanced entities. Reliance in this behalf was placed on the observations made in the judgment of the Supreme Court in the case of ***Harbans Lal Sahania & Ors. vs IOCL & Ors. (2003) 2 SCC 107*** at page 110 in paragraph 7.

25.2 It was next contended that the petitioner had assailed the decision of the respondents under Article 14 of the Constitution, and hence a remedy

under Article 226 of the Constitution was available even to foreign entities. The respondents submission to the contrary was misconceived. Reference in this behalf was made to the judgment of this court in the case of ***Thomson- CSF & Ors. vs National Airport Authority of India AIR 1993 Delhi 252*** at pages 260-262 in paragraphs 30, 33, 34, 37 & 39.

REASONS

26. Having heard the learned counsels for the parties and perused the record, it would be relevant to touch upon, even though briefly, the principles which have been enunciated by various courts over a period of over three and a half decades, qua the issue pertaining to blacklisting. Before I advert to those judgments, let me at the very outset deal with preliminary issues raised on behalf of the respondents.

26.1 The first objection pertains to the territorial jurisdiction of this court. It cannot but be contended that the impugned order has been passed by respondent no. 2, which is an entity administered by M.O.D, under the aegis of the Union of India. As a matter of fact, respondent no. 2 is not a juridical entity [see ***State of Kerala vs General Manager, Southern Railway, Madras (1976) 4 SCC 265***]. Even, M.O.D by itself is not a juridical entity which can sue or be sued. Therefore, Union of India is a proper and necessary party to the proceedings. It cannot but be said that Union of India is situate within the territorial jurisdiction of this court and this court, therefore, could exercise jurisdiction in the matter. It is not to say though, that in a given case, where a substantial part of cause of action arises outside the territorial jurisdiction of this court, this court would be precluded from refraining to exercise jurisdiction by directing parties to approach a more suitable and appropriate forum. There are various factors which may prevail with the court including urgency in the matter and the wherewithal

of the parties to prosecute and defend the proceedings. (see the judgment of Five Judges of this court in *Sterling Agro-Industries*). In this case, however, having regard to the fact that the main administrative Ministry of the Union of India is located within the territorial jurisdiction of this court and given the fact that the order impugned has now been in existence for nearly more than a year, I would deem it fit to decide the matter on merits, and not relegate parties to another forum. This approach, is also adopted by me for the reason, that when, entities other than the petitioner had approached this court in *R.K. Machine Tools*, the respondents, in somewhat, similar circumstances did not raise an objection qua territorial jurisdiction; at least that is the distinct impression one gets on a perusal of the judgment rendered in the said case.

27. Which brings me to the other preliminary objection of the respondents to the maintainability of the petition. It is submitted on behalf of the respondents that the challenge to the impugned order on the ground that it violates Article 14, is sought to be raised artfully by giving it a veneer of violation of principles of natural justice when, in fact, this submission of the petitioner seeks to enforce a right to carry on business, which is akin to the right available to a citizen under Article 19(1)(g) of the Constitution. Rights guaranteed under Article 19 being available only to citizens, the instant writ, according to the respondents, should be dismissed in limine.

27.1 In my view, there can be no quarrel with the submission that the petitioner cannot invoke rights under Article 19, and in this case rights under Article 19(1)(g), as those are rights available only to a citizen. What the petitioner seeks to contend is that, it has a right to a fair and equal treatment under a legal regime obtaining in this country. This right flows from Article 14 of the Constitution of India which is available to all persons including

persons who are not citizens of India. Article 14 mandates equality before law and/or equal protection of the laws prevalent within the territory of India to all persons, irrespective of their origin. [See observations of the Supreme Court in *Chairman, Railway Board & Ors. vs Mrs. Chandrima Das & Ors.* AIR 2000 SC 988 at page 997; paragraph 29]

27.2 The argument that this ground of challenge, in effect, seeks to advance the petitioner's right to carry on business cannot, in my view, disable the petitioner from invoking mandate of Article 14, only because there is an element of overlap. This very argument was examined by a Seven-Bench Judgment of the Supreme Court in the case of *Maneka Gandhi vs UOI & Anr. (1978) 1 SCC 248* and roundly rejected. The relevant observations in that regard are extracted hereinbelow:

“.....The decision in A. K. Gopalan's {supra} case gave rise to the theory that the freedoms under Articles 19, 21, 22 and 31 are exclusive- each article enacting a code relating to the protection of distinct rights, but this theory was over-turned in R. C. Cooper's case (supra) where Shah, J., speaking on behalf of the majority pointed out that "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields : they do not attempt to enunciate distinct rights." The conclusion was summarised in these terms : "In our judgment, the assumption in A. K. Gopalan's case that certain articles in the Constitution exclusively deal with specific matters- cannot be accepted as correct". It was held in R. C. Cooper's case- and that is clear from the judgment of Shah, J., because Shah, J., in so many terms disapproved of the contrary statement of law contained in the opinions of Kania, C.J., Patanjali Sastri, J., Mahajan, J., Mukherjee, J., and S. R. Das, J., in A. K. Gopalan's case- that even where a person is detained in accordance with the procedure prescribed by law, as mandated by Article 21, the protection conferred by the various clauses of Article 19(1) does not cease to be available to him and the law authorising such

detention has to satisfy the test of the applicable freedom under Article 19, Clause (1). This would clearly show that Articles 19(1) and 21 are not mutually exclusive, for, if they were, there would be no question of a law depriving a person of personal liberty within the meaning of Article 21 having to meet the challenge of a fundamental right under Article 19(1). Indeed, in that event, a law of preventive detention which deprives a person of 'personal liberty' in the narrowest sense, namely, freedom from detention and thus falls indisputably within Article 21 would not require to be tested on the touchstone of Clause (d) of Article 19(1) and yet it was held by a Bench of seven Judges, of this Court in Shambhu Nath Sarkar v. The State of West Bengal and Ors. AIR 1973 SC 1425 that such a law would have to satisfy the requirement inter alia of Article 19(1), Clause (d) and in Haradhan Saha v. The State of West Bengal AIR 1974 SC 2154 , which was a decision given by a Bench of five judges, this Court considered the challenge of Clause (d) of Article 19(1) to the constitutional validity of the Maintenance of Internal Security Act, 1971 and held that Act did not violate the constitutional guarantee embodied in that article. It is indeed difficult to see on what principle we can refuse to give its plain natural meaning to the expression 'personal liberty' as used in Article 21 and read it in a narrow and restricted sense so as to exclude those attributes of personal liberty which are specifically dealt with in Article 19. We do not think that this would be a correct way of interpreting the provisions of the Constitution conferring fundamental rights. The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction. The wave length for comprehending the scope and ambit of the fundamental rights has been set by this Court in R. C. Cooper's case and our approach in the interpretation of the fundamental rights must now be in tune with this wave length. We may point out even at the cost of repetition that this Court has said in so many terms in R. C. Cooper's case that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Article 21 must be so

interpreted as to avoid overlapping between that article and Article 19(1). The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.....

..... Now, if a law depriving a person of "personal liberty" and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Article 14. This was in fact not disputed by the learned Attorney General and indeed he could not do so in view of the clear and categorical statement made by Mukharjee, J., in A. K. Gopalan case that Article 21 "presupposes that the law is a valid and binding law under the provisions of the Constitution having regard to the competence of the legislature and the subject it "relates to and does not infringe any of the fundamental rights which the Constitution provides for", including Article 14. This Court also applied Article 14 in two of its earlier decisions, namely, The State of West Bengal v. Anwar Ali Sarkar 1952 SCR 284(AIR 1952 SC 75) and Kathi Raning Rawat v. The State of Saurashtra 1952 SCR 435 (AIR 1952 SC 123) where there was a special law providing for trial of certain offences by a speedier process which took away some of the safeguards available to an accused under the ordinary procedure in the Criminal Procedure Code. The special law in each of these two cases undoubtedly prescribed a procedure for trial of the specified offences and this procedure could not be condemned as inherently unfair or unjust and there was thus compliance with the requirement of Article 21, but even so, the validity of the special law was tested before the Supreme Court on the touchstone of Article 14 and in one case, namely, Kathi Raning Rawat's case, the validity was upheld and in the other, namely, Anwar Ali Sarkar's case, it was struck down. It was held in both these cases that the procedure established by the special law must not be violative of the equality clause. That procedure must answer the requirement of Article 14...."

(emphasis supplied)

27.3 Having regard to the observations of the Supreme Court in *Maneka Gandhi* case, this objection of the respondents will also have to be rejected.

28. The other objection which the respondents have raised, is that, Article 14 is not available to the petitioner, which is a company incorporated under the laws of the State of Israel. The expression ‘any person’ used in Article 14 will not take within its ambit a company. This objection is stated to be rejected. The expression ‘any person’, would take within its ambit both a natural and an artificial person. It makes no difference whether the individual is a citizen or a company. See *Chiranjit Lal Chowdhuri vs UOI & Ors. AIR 1951 SC 41 at page 57; paragraph 63.*

29. As indicated above, before I proceed further, let me articulate the principle set forth regarding blacklisting in various judgments. The first in line, is the judgment of the Supreme Court in the case of *Erusian Equipment & Chemicals*. The Supreme Court passed a common judgment vis-à-vis two writ petitions and a civil appeal before it. In so far as the petitioners were concerned, they had participated in an auction held by the State Government from time to time for sale of cinchona. The petitioners alleged that the State Government for a period of time had been rejecting its offer even though it was the highest bidder at the auction. The respondent/State disclosed to the court that the petitioners were guilty of mis-declaration of goods, and therefore, the sales committee which accepted offers had resolved not to deal with the petitioners based on a secret letter received from the Collector of Customs. In substance the petitioners were accused of violation of the provisions of the Foreign Exchange Regulations Act, 1973. In so far as the civil appeal was concerned, it was the Union of

India which had preferred the appeal. The respondent (in the appeal), was on the approved list of the Director General, Supplies and Disposals. The respondent's request for his removal from the list of registrants maintained with DGSD was not considered, on the ground that, certain reports had been received against him regarding shortage of timber. In the meanwhile, criminal and departmental inquiries had been commenced against some of the employees of the department. The name of the respondent was not on the blacklist.

29.1 The Supreme Court allowed the two writ petitions and dismissed the appeal of the Union of India. The Supreme Court, briefly, observed that while the State has the liberty to enter into a contract with any person it chooses to and that, no person has a fundamental right to insist that the government must enter into a contract with it, a person though has the right to claim equal treatment in law. The court went on to observe: Blacklisting entails civil consequences. It casts a slur on the reputation of a person. Internal instructions, which seek to exclude a person from consideration, also falls within the ambit of blacklisting. It was, however, observed that blacklisting could be ordered: where a person is convicted by a court of law, or if security considerations, so warrant, or in case where there is a "strong justification" that the person involved is guilty of malpractices, such as, bribery, corruption, fraud etc.

29.2 More significantly, qua the issue of application of principles of natural justice, the court made the following observations in paragraph 19 and 20 of the judgment, which for the sake of convenience are extracted hereinbelow:

“.....19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade

with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein.

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.....”

(emphasis supplied)

30. The *Erusian Equipment & Chemicals* case was followed with the judgment of the Supreme Court in the case of *Raghunath Thakur vs State of Bihar*. This was a case where the appellant had bid in an auction, and after he had been declared successful, he had not deposited the ‘dak’ amount. Consequently, the appellant was blacklisted with respect to future orders by the respondents. The appellant had been given no notice prior to issuance of the order of blacklisting. The court repelled the contention that there was no requirement under the statutory rules for giving prior notice. The Supreme Court observed that it was an “implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice”.

31. Close on heels was the judgment of the Supreme Court in the case of *Joseph Vilangandan vs The Executive Engineer, (PWD), Ernakulam & Ors. (1978) 3 SCC 36*. With this verdict, the Supreme Court overruled the judgment of the Kerala High Court based on the principles set out in *Erusian Equipment & Chemicals* case. In *Joseph Vilangandan's* case the appellant was assigned an item of construction work. The work could not commence for certain reasons within the prescribed time. Consequently, a notice was issued to the appellant in the following terms:

“....You are, therefore, requested to show cause within seven days from the date of this notice why the work may not be arranged otherwise at your risk and loss, through other agencies *after debarring you as a defaulter* and making good the loss that may accrue to the department, from your subsisting contracts in this Division...”

31.1 The Supreme Court interpreted the words of the notice, extracted above, as not giving clear intimation to the appellant that there was a proposal to debar him from taking any contract, in future, with the department. According to the Supreme Court the notice, at the most, conveyed to the appellant, that an action would be taken with reference to the contract in question, and not that there was an intention to debar the appellant qua future contracts. In paragraph 18 of the judgment, the Supreme Court made the following crucial observations.

“.....18. This being the position, the rule in *Erusian Equipment's* case (ibid) will be attracted with full force. While conceding that the State can enter into contract with any person it chooses and no person has a fundamental right to insist that the Government must enter into a contract with him, this Court observed (in the said case):

Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for

purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the black list. (emphasis supplied)

32. A pragmatic approach was adopted by the Supreme Court in the case of ***Patna Regional Development Authority & Ors. vs Rashtriya Pariyojana Nirman Nigam & Ors. (1996) 4 SCC 529***. This was a case where a bid made by the lowest tenderer was rejected by the State, on the ground that, another State authority, nearly, four years ago had blacklisted the said lowest tenderer. The argument advanced was that since no show cause notice was issued to the lowest tenderer by that authority the same could not be taken into account by the appellate authority. The Supreme Court rejected this contention and observed that the appellate authority was only taking note of an existing order and could not have sat on a judgment over a blacklisting order of another authority.

33. ***Nova Steel (India) Ltd. vs M.C.D. & Ors. (1995) 3 SCC 334*** was a case where the petitioner before the Supreme Court assailed the order of the High Court whereby, its writ petition was dismissed. The petitioner had entered into a contract with the respondent to supply an agreed quantity of tor steel. Admittedly, the petitioner had not executed the contract; which impelled the respondents to issue a show cause notice for blacklisting the petitioner. Since, the petitioner, did not file a reply, the respondents passed an order debarring the petitioner from entering into a contract with them, for a period of two years. The Supreme Court dismissed the appeal with the following observations:

“.....Despite receipt of the notice of show cause, no reply thereto was given. The respondent necessarily has to take further action to get the supply of the required steel. Therefore, they exercised the power and issued notice to the petitioner which would be consistent with the principles of natural justice and passed the offending order blacklisting the petitioner for a period of two years. The conduct of the petitioner constrained the respondents to pass the order of blacklisting. The exercise of the power, therefore, cannot be said to be unwarranted nor arbitrary nor irrelevant. The High Court, therefore, is right in declining to interfere with the offending order in exercise of its discretionary power under Article 226 of the Constitution....”

(emphasis supplied)

34. In *Southern Painters vs Fertilizers & Chemicals Travancore Ltd. & Anr.* **1994 Supp. (2) SCC 699** the appellant approached the Supreme Court with a grievance that he was removed from a panel prepared by the respondent/PSU of contractors qualified to undertake painting jobs. In this behalf the respondent had relied upon a vigilance report. The Supreme Court after noticing its earlier judgments came to the conclusion that the deletion of the appellant's name from the list of approved contractors could only have been carried out after complying with the principles of natural justice.

35. In a more recent judgment of the Supreme Court in the case of *Patel Engineering Ltd. vs UOI & Anr.* **(2012) 11 SCC 257** (which was a matter taken up in appeal from a judgment of the Division Bench of this court) the question of debarment arose in the background of the following brief facts. The petitioner before the Supreme Court was accorded a contract for six laning a section of National Highway No. 6, running through the States of West Bengal and Orissa by the National Highway Authority of India (NHAI). The petitioner having quoted the highest premium, its bid was

accepted. The petitioner, however, reneged on its offer, which resulted in the NHAI issuing to the petitioner, a show cause notice for debarment for a period of five years, from participating or bidding for future projects, undertaken by NHAI. Pertinently, NHAI had also forfeited the petitioner's bid security amount equivalent to Rs. 13.97 crores. After considering the reply of the petitioner, NHAI debarred the petitioner finally, for a period of one year. This was challenged by way of a writ petition. The Division Bench of this court dismissed the writ petition. In the Supreme Court, the petitioner contended that: (i) there was no power under the contract to blacklist the petitioner except on the grounds of fraud and corrupt practices, the decision not to enter into a contract could not fall under this category; (ii) the punishment accorded to the petitioner was disproportionate, in as much as, it would affect future business of the petitioner; and (iii) lastly, no oral hearing was accorded to the petitioner.

35.1 The Supreme Court came to the conclusion that inherent in the power to enter into a contract was the power not to enter into a contract, which is akin to blacklisting. In other words, no specific power in the contract was required, for NHAI to come to the conclusion, which it did, which resulted in the petitioner being blacklisted.

35.2 In so far as the argument that the punishment accorded was disproportionate, the Supreme Court held that the reasoning given to accord such a punishment, having regard to the fact that over a period of 25 years NHAI would suffer a loss of Rs 3077 crores, was neither irrational nor perverse.

35.3 With regard to the third aspect, which is, whether the decision reached by NHAI could be held to be flawed, as no oral hearing was given, it agreed with the view taken by this court that there was no inviolable rule that a

personal hearing should precede every decision of the State. The Supreme Court's observation in this behalf are as follows:

“....Coming to the submission that R-2 ought to have given an oral hearing before the impugned order was taken, we agree with the conclusion of the High Court that there is no inviolable rule that a personal hearing of the affected party must precede every decision of the State. This court, in *Union of India & Anr. vs Jesus Sales Corporation (1996) 4 SCC 69*, held so even in the context of a quasi-judicial decision. We cannot, therefore, take a different opinion in the context of a commercial decision of State. The petitioner was given a reasonable opportunity to explain its case before the impugned decision was taken....”

36. The broad principles which may be deduced from the judgments referred to above are as follows:

- (i) The State is at liberty to decide as to whether or not it wishes to enter into a contract, like any other private entity. No person has any fundamental right to insist that the Government must enter into a contract with it, the right that a person can enforce qua a Government is the right of equal treatment in law. Therefore, the State, cannot decide the deal or trade with one person or entity or exclude the others, without good reasons.
- (ii) Blacklisting, which takes several forms including internal instructions for exclusion of entities or persons, entails civil consequences. It casts a slur on the reputation of the person/entity, which is blacklisted.
- (iii) The State can blacklist a person/entity which is convicted by a court of law or on account of security consideration or even where there is a “**strong justification**”, that a person is guilty of malpractices, such as, bribery, corruption, fraud etc.
- (iv) Where a State decides to blacklist a person/entity, it is duty bound to act fairly; meaning thereby to observe “certain aspects of the rules of natural

justice”. In this behalf, the body, which takes the decision, as to whether, or not a person or entity should be excluded, is duty bound to give “fair consideration” to the facts and to consider the representations made in that regard. In this exercise, the body vested with the right to decide is not bound to disclose the details of information in its possession (See paragraph 19 of *Erusian Equipment and Chemicals*).

(v) Duty to act fairly would entail that a person should be given notice, and a right or an opportunity to represent his case before he is blacklisted. (see *Erusian Equipment and Chemicals, Raghunath Thakur vs State of Bihar and Joseph Vilangandan’s* case). Duty to act fairly does not entail that, in all circumstances, an oral hearing should be accorded [see para 19 of the *Erusian Equipment and Chemicals*, paragraph 38 at page 268 of *Patel Engineering* and paragraph 5 at page 75 of the *Jesus Sales Corporation vs Union of India (1996) 4 SCC 69*].

37. In the light of the aforesaid principles, I propose to examine the contention of the petitioner that there was breach of principles of natural justice. The principal submissions made in support of this ground of challenge are as follows: The first submission is that the underlying documents, which formed the basis of the show cause notices, were not supplied. The show cause notice was a replica of the chargesheet filed in the criminal case instituted against Messers Sudipta Ghosh and others. The second submission being, that the impugned order was passed by OFB, while the petitioner was heard by a different entity, i.e., the Committee. In support of this submission, it was contended that the petitioner was not informed at the time of hearing that the Committee was only a recommendatory body.

38. In my view, both submissions are untenable for the following reasons. The first show cause notice was, admittedly, issued to the IMI on 07.04.2010. To this show cause notice IMI filed a reply on 15.04.2010. The narration of the facts (which include the correspondence exchanged between IMI and the respondents), would make it clear that at least since 18.06.2009, when IMI wrote to respondent no.1, it was aware of the fact that CBI had commenced investigations into the allegations of payment of illegal gratification by arms suppliers, which included IMI. If there was any doubt in this behalf, it was made clear in respondent no. 1's communication dated 21.07.2009.

38.1 All this while, respondent no. 1 did not have in its possession anything except the FIR. This was the very same FIR, which was produced by the respondents in the *R.K. Machine Tools Ltd.* case, filed by other similarly circumstanced suppliers.

38.2 On 30.06.2010, CBI filed a chargesheet in the matter against Sudipta Ghose and his associates. It is on account of this development that OFB issued a second show cause notice dated 22.12.2010, which admittedly, bears out extracts of the chargesheet filed by the CBI before the Spl. Judge, CBI Court at Kolkata. As was argued before me, by Mr. Nayyar, the impugned order itself shows that the respondents are not in possession of any material other than that which is extracted in the show cause notice dated 22.12.2010. This fact is also evident from a bare reading of the report of the Committee. Therefore, for the IMI to contend that there is breach of principles of natural justice, in as much as respondents have, according to it, failed to supply the underlying material, is in my view, unsustainable. It is not the case of IMI that the respondents had relied upon documents or material, in passing the impugned order, other than that which is extracted in

the show cause notice dated 22.10.2010. [See observations of the Supreme court in *Natwar Singh vs Director of Enforcement & Anr. (2010) 13 SCC 255* at page 269; paragraph 31]. I am fortified in my view by the observations of the Supreme Court in *Grosos*'s case, which are binding on this court. The relevant observations for the sake of convenience are extracted hereinbelow :-

“...The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant were based, was not the requirement of the principle of audi alteram partem. It was sufficient requirement of law that an opportunity to show cause was given to the appellant before it was blacklisted..”

38.3 The second submission advanced on behalf of IMI that they its representatives were accorded oral hearing not by OFB, which passed the impugned order, but by the Committee and, therefore, resulted in breach of principles of natural justice, is also not tenable. The respondents before blacklisting IMI, were duty bound to act fairly. Towards this end, admittedly, show cause notices were issued and opportunity was given to the representatives of the IMI, not only to make a written representation but also to present their case, in person, before a body whose inputs were sought by the OFB. Both, the written representation and the recommendation of the Committee were placed before the OFB. The OFB passed the impugned order after deliberating upon the same. There was, therefore, in my view, no breach of any principle of natural justice as alleged or at all. There is no requirement that irrespective of the circumstances, and the nature of inquiry at hand, every noticee should be granted an oral hearing. If this principle were to be applied, the fact that OFB did not grant the representative of the IMI an oral hearing, in my opinion, would not vitiate the impugned order. It

would make very little difference, assuming it to be correct, that the representatives of IMI were not aware of the fact that the Committee was only a recommendatory body.

39. In the course of the argument, it was submitted by Mr Nayyar that in the show cause notices issued to IMI, the charge was of having paid illegal gratification for procurement of the BMCS project, whereas in the report of the Committee, one of the findings was that IMI had been paid an advance of 20% as against the provision in the contract for release of advance payment upto 20%. In my view, this argument of IMI really amounts to, in a manner of speaking, splitting hair. The substantive charge against IMI, in respect of which hearing was given by the Committee, was that it had paid illegal gratification for procuring the BMCS project. The Committee upon hearing the representatives appears to have in substance come to the conclusion that the 20% advance was released to IMI, in haste.

39.1 Mr Nayyar in support of his argument that advance payments were made in terms of the contract and not in haste as alleged sought to contend the terms of the contract envisaged that the IMI's obligation to execute the contract would commence only upon payment of the advance both for foreign and Indian supplies in terms of article 6.3.1 and article 6.3.2 read with article 3.2 of the contract. Mr Nayyar contended that for release of advance payment IMI was required to furnish the following: advance bank guarantee and invoice; performance bank guarantee and export license guarantee. It is contended, each of these documents was supplied to the respondents and it was only thereafter that advance payment was released. It was, therefore, the submission of Mr Nayyar that the finding recorded in the impugned order that advance payments were released by Shri Sudipta

Ghosh, even before contractual obligations were completed, is baseless and in any case was not an allegation adverted to in the show cause notices.

39.2 In response to this submission respondents have contended that out of the three documents, referred to in article 3.2 of the contract, at least one document, that is, the export license was not received by the OFB on the date of release of advance payment. To be noted, the advance payment was released to IMI on 25.03.2009. The respondents contended that what it did receive, was a facsimile message dated 17.03.2009, which confirmed that IMI had been granted an export license for establishment of factories “for India, Ministry of Defence (Nalanda) in accordance with the Israeli Defence Export Control Law and under the provisions of the above license”. I must point out that though photocopies of some documents in this behalf have been filed by IMI, there is no definitive clarity reached, as to whether IMI actually tendered the export license to the respondents prior to release of advance payment. On balance, I have no reason to disbelieve the respondents that they did not receive the export license. It was, in my view, incumbent upon IMI to place the relevant material on record to put the matter beyond doubt. IMI, in my opinion, has not been able to do.

40. The more important question is, is there anything to suggest, (which is the conclusion reached both by the Committee and the respondents), that IMI had used intermediaries to secure the BMCS project.

41. A reference to the narration of events would show that, it is the IMI’s own case that when for the first time the OFB had floated a global tender for setting up a BMCS project in Nalanda in March, 2004, though IMI had been declared L-1, the said tender was abandoned. Admittedly, at that stage, between 2004-05, one entity, by the name of TSL Technologies Pvt. Ltd. (in short TSL), was used by IMI to explore the possibility of its technical

services being used. In the show cause notice of 22.12.2010 (which relates to the present tender of 2007) there is a reference to one Mr Pradeep Rana. Mr Pradeep Rana, was apparently, acting as an intermediary between one Sh. Ashish Bose and Sh. Sudipta Ghosh, and is alleged to have used a mobile phone bearing no. 9818089180, which stood registered in the name of TSL. TSL, was evidently owned and managed by one Arvind Khanna, who had been investigated by CBI in other defence deals. The show cause notice also adverts to the fact that the forensic examination of the seized laptop of Sh. Pradeep Rana had revealed that, number of mails had been exchanged between the officials of IMI and TSL, during the period 2004-2005. In those mails there was apparently a reference to the BMCS project. Furthermore, investigations had revealed that Pradeep Rana had received cheque payments from TSL. The show cause notice of 22.12.2010, as indicated above, is based on the chargesheet filed with CBI Court at Kolkata.

42. The IMI, however, contends that for the present tender it had not engaged the services of TSL or Pradeep Rana. As a matter of fact, it is contended that it has not used any intermediary to procure the BMCS project, as alleged or at all.

43. In my opinion, having regard to the fact that a criminal case has been lodged by the CBI, which is underway, the extent of involvement of Pradeep Rana who is alleged to be an intermediary of IMI, will get known, only on conclusion of the trial. Therefore, at this stage, what has to be seen is that, is there enough basis for the respondents to take a decision not to continue with the contract it entered into with IMI. The decision in this behalf would be entirely that of the respondents, i.e., the State. The courts under Article 226 of the Constitution can interfere only if it is a case where there is no

material at all or is a case of breach of principles of natural justice or lack of jurisdiction. The adequacy of material does not fall within the scope of consideration of the court. The State is free to take the stand that it will not engage with IMI. Surely this Court, exercising equitable jurisdiction under Article 226 of the Constitution, will not interdict this decision of the respondents and force them to continue a relationship, which it seeks to terminate. The argument that these are only allegations and none of these allegations are linked to the petitioner, in as much as it is not named as an accused, cannot be fully grappled with in the midst of a trial. The material presently available with the respondents would, to my mind, provide “***strong justification***” for the respondents to say that it does wish to continue to deal with the petitioner. That such a decision of the respondents’ results in a collateral damage to the reputation of the petitioner, is an aspect with which the petitioner will have to live with, at least till the trial is over.

43.1 As a matter of fact, debarment, as consequences of breach of the undertaking inter alia given by the contractor that it had not used intermediaries for procurement of the contract, is set out in article 24.1.1 of the contract. The minimum period of debarment is set out as 5 years. Ordinarily, if IMI had not alleged breach of principles of natural justice, the remedy of the petitioner, if at all, would have been by way of arbitration which is provided, as a mode for settlement of disputes and differences arising out of or in connection with the contract, under article 22 of the contract. IMI had, as noted hereinabove, taken recourse to the provisions of Arbitration and Conciliation Act, 1996; albeit at a point in time when, invocation of the bank guarantees furnished by it, was apprehended. It is another matter that the bank guarantees in issue, have got encashed. IMI,

apparently, at least till the date judgement was reserved in the matter, had not sought appointment of an arbitrator in terms of article 22 of the contract.

43.2 There being no breach of principles natural justice as alleged or at all, this court would be slow to interfere with the impugned order dated 05.03.2012, passed by the OFB.

44. It was also sought to be argued based on the judgment of a Single Judge of this court in *R.K. Machine & Tools Ltd.* case that the petitioner should be given the precise material which constitutes the basis for the decision. As is noticed above by me, IMI was not party to the said case. Nevertheless, the petitioners who had approached this Court in that case had filed their writ petitions at a time when only a FIR was lodged. Thereafter, since a chargesheet was filed, the respondents did issue a second show cause notice, which is the only material available with the respondents. This material was supplied in the form of an extract contained in the body of the show cause notice. Therefore, this argument advanced on behalf of the IMI is also misconceived and hence rejected.

45. I shall also deal with the submission made on behalf of the IMI, though fleetingly, that the period of debarment is disproportionate to the charge levied. The court's jurisdiction to interfere in the quantum of the punishment imposed, is very limited. The punishment accorded in a given case has contextual attributes which are best known to the decision maker. The courts can interfere only if the punishment is unconscionable. [see observations in *State of Karnataka vs H. Nagaraj (1998) 9 SCC 671*; *UOI vs R.K. Sharma (2001) 9 SCC 592* and *Om Kumar vs UOI (2001) 2 SCC 386*]. Having regard to the nature of the contract, which involves a project having implications for national security, in my view, no interference is called for. The submission is accordingly rejected.

46. For the foregoing reasons, there is no merit in the writ petition and, therefore, it is, accordingly, dismissed. The costs shall, thus, follow the result.

RAJIV SHAKDHER, J

MAY 29, 2013

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