

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

% *Judgment Reserved on: January 22, 2013*
Judgment delivered on: February 18, 2013

+ **OMP No.981/2012**

M/S SAI CONSULTING ENGINEERS PVT LTD Petitioner

Through Mr.Parag P.Tripathi, Sr.Adv. with
Mr.Shamik Sanjanwala & Mr.Kunal
Bahri, Adv.

versus

RAIL VIKAS NIGAM LTD & ORS Respondents

Through Mr.Anil Seth, Adv. with
Mr.M.K.Pathak, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner is in the business of providing various types of consultancy services, inter-alia, related to the field of civil engineering contracts. Respondent No.1 is a Government of India undertaking registered under the Companies Act, 1956, and established as a Special Purpose Vehicle by the Ministry of Railways, the same is wholly owned and controlled by the Government of India. Respondent No.2 is the competent authority, who issued the impugned order dated 1st October, 2012. Respondent Nos.3 and 4 are officers of the respondent No.1.

2. By this present petition, the petitioner inter alia, seeks relief for stay of operation of the impugned order dated 1st October, 2012 passed by the respondent No.2 authority against the petitioner.

3. It is averred by the petitioner that in view of arbitrable disputes having arisen between the parties with regard to contract having an arbitration clause, the respondents have bypassed the said procedure and proceeded to illegally issue the impugned order dated 1st October, 2012, banning the business of the petitioner and its allied/sister concerns and partners for five years with effect from 30th June, 2011.

4. The petitioner has admittedly issued notice dated 3rd October, 2012 invoking arbitration and nominating Justice G.T.Nanawati (Former Supreme Court Judge) as one of the arbitrators. The respondents have been called upon to nominate their arbitrator.

5. The brief facts for the purpose of deciding the present controversy are as under:

- i) On 27th September, 2006 the respondents issued a letter of acceptance to the petitioner for the Project Management Consultancy for the construction of roadbed, major and minor bridges and installation of track in connection with the provision of third line in Bhatapara-Urkura Section in the State of Chhattisgarh, India. The respondents accepted the petitioner's negotiable offer for a total price of ₹2,57,59,000/- under the PMC contract. The petitioner was supposed to supervise the construction of the roadbed, major and minor bridges, and installation of track signaling and electrical work in connection with the provision of third line in Bhatapara-Urkura Section (58.71 kms in the State of Chhattisgarh).
- ii) A show-cause notice dated 18th November, 2009 (hereinafter referred to as first show-cause notice) was issued by the respondent No.1 alleging certain irregularities committed by the

petitioner including raising allegations regarding 'poor performance' of the petitioner. Show-cause notice was issued to the petitioner as to why it should not be declared as a 'Poor Performer' and debarred from all future contracts by the respondents.

- iii) The petitioner sent the detailed reply to the show-cause notice vide letter dated 22nd December, 2009 denying all the allegations. By letter dated 26th January, 2010, respondent No.1, by referring to the show-cause notice dated 18th November, 2009 decided to declare the petitioner as a 'poor performer' for a period of one year. The same was not challenged by the petitioner in Court.
- iv) After the expiry of said period of one year, the respondent No.1 issued another show-cause notice dated 30th June, 2011 (hereinafter referred to as second show-cause notice) proposing to ban the petitioner from business dealing for 5 years on the basis of allegations, some of which are common in first show-cause notice. As per the case of the petitioner, the second show-cause notice amounted to double jeopardy as it was issued on the same cause of action and material/basis as the first show-cause notice.
- v) The second show-cause notice was challenged by the petitioner before this Court in W.P.(C) No.5599/2011, titled as *M/s SAI Consulting Engineering Pvt. Ltd. Vs. Chief Project Manager, Rail Vikas Nigam Ltd., Raipur and Another*. The same was withdrawn for want of territorial jurisdiction. The petitioner filed the same very petition in Chhattisgarh High Court and by order dated 11th August, 2011 passed in W.P. (C) No.4531/2011, interim order was granted staying the final outcome of the show-cause

proceedings. The petitioner also challenged the impugned memo dated 28th June, 2011 and communication dated 18th July, 2011 issued by the respondents by filing of another petition No.5599/2011 before High Court of Chhattisgarh.

- vi) On 5th July, 2012 the High Court decided both the petitions pending before it, being W.P.(C) No.4531/2011 challenging the show-cause notice dated 30th June, 2011 and W.P.(C) No.5599/2011 challenging the communication of the respondents dated 18th July, 2011. By order passed in W.P.(C) No.4531/2011, it was held by the Court that it does not wish to probe and embark upon any kind of factual inquiry in the dispute sought to be raised in its writ jurisdiction. Thus, both the writ petitions were disposed of, granting liberty to the writ petitioner to file proper reply to the impugned show-cause notice issued by the respondents.
- vii) After passing the said order, the petitioner submitted its detailed reply along with supporting documents denying the allegations contained in the show-cause notice on 13th September, 2011. The petitioner also attended the hearing on 14th September, 2012 and explained its point of view in response to the show-cause notice. The respondents issued an order dated 1st October, 2012 ordering inter alia as under:

“Business with M/s SAI Consulting Engineers Pvt. Ltd. and its allied/sister concerns and partners be banned on Rail Vikas Nigam Ltd. for five years. The five year period will be reckoned from 30.06.2011 i.e. the date of issue of show-cause notice on M/s SAI Consulting Engineering Pvt. Ltd. for banning of business.”

6. The petitioner has given various reasons to stay the operation of the order passed on 1st October, 2012. According to the petitioner, it was passed contrary to the terms of contract and with ulterior motive. The main reasons are as under:

- (I) Petitioner has not breached any clause of the agreement as alleged in the show-cause notice, yet the impugned order has been passed without even considering the orders passed on 5th July, 2012 in W.P.(C) No.4531/2011 wherein it was mentioned that on filing of the reply to the show-cause notice, the respondents would decide the fate of the second show cause notice on its perusal and keeping in view the terms of the contract in accordance with law.
- (II) As allegations of the kind made in the second show-cause notice are disputed facts between the parties, therefore, it is incorrect to allege in the order dated 1st October, 2012 that no disputes have arisen and/or that the respondent in passing the impugned order was not deciding any disputes between the parties.
- (III) The penalty of debarment of the petitioner for five years from future contracts is illegal as the petitioner cannot be punished twice for the similar allegations particularly solely on the grounds that detailed reports were not available at the time when first show-cause notice was issued. In case of any dispute arising out of the service provided by the petitioner under the contract and any penalty sought to be imposed, including debarment/ban/blacklisting for alleged deficiency in such service would fall within the arbitration agreement and it would have been decided by the Arbitral Tribunal. The respondents themselves cannot be believed being a judge in their own cause. The said imposition

would violate all principles of natural justice and the petitioner cannot be simply banned/debarred/blacklisted from all future contracts.

7. It is argued by Mr.Parag Tripathi, learned Senior counsel appearing on behalf of the petitioner that due to the blacklisting order/banning of business order, the petitioner's business has come to a standstill. It is not only ineligible for RVNL contract but even for other Government concerns as every tender has a clause making the petitioner ineligible if he has been blacklisted by any Government Department/Public Sector Undertaking. The chart of loss of opportunities has been produced by the petitioner in Court during the course of hearing after the issuance of second show-cause notice.

8. It is submitted that the second show-cause notice was challenged in W.P.(C) No.4531/2011 filed before the Chhattisgarh High Court. The High Court in its order dated 5th July, 2012 while relegating the parties to the mechanism available under the contract and that this being essentially a contractual matter arising out of the contract between the parties. In the order passed by the writ Court, it was held that it is a contractual dispute. Now it is not open for the respondents to now contend that blacklisting is not contractual matter.

9. The respondents raised the following objections with regard to maintainability of the petition under Section 9 of the Arbitration and Conciliation Act, 1996:

- (i) The Court is not having the territorial jurisdiction.
- (ii) There is no arbitration agreement with respect to award of "future contracts" between the parties. Thus, this petition filed under Section 9 of the Act with regard to banning of "future dealings" is not an arbitral dispute.

- (iii) The arbitration agreement in previous contract dated 27th September, 2006 invoked by the petitioner does not cover any dispute in respect of award of future contracts. The arbitration agreement only deals with 'disputes' and differences arising out of that contract.

10. It is argued by the respondents that the second show-cause notice dated 30th June, 2011 issued to the petitioner was based on joint inspection report at site in Chhattisgarh duly signed by petitioner and Geo Tech Reports, the said report received by the respondents after the expiry of period of one year imposition of ban on the basis of first show-cause notice. Therefore, the second show-cause notice was correctly served upon the petitioner. Against the said notice, the petitioner filed the petition in this Court and the same was withdrawn by the petitioner on the ground that the Delhi Court has no 'territorial jurisdiction'. The petitioner thereafter challenged the show-cause notice dated 30th June, 2011 by filing petition in the High Court of Chhattisgarh. The Division Bench of Chhattisgarh High Court vide order dated 5th July, 2012 disposed of the matter by directing respondents to proceed with the show-cause notice after considering reply of the petitioner. The petitioner had filed its reply to the show-cause notice before the Competent Authority who had also granted opportunity for personal hearing to the petitioner. Thereafter, the Competent Authority passed an order on 1st October, 2012. The petitioner after receiving copy of order dated 1st October, 2012 issued the notice by invoking the arbitration clause on 3rd October, 2012.

11. It is alleged that the petitioner has been blacklisted considering the gravity of the charges proved against the petitioner. The respondent will like to draw attention of the Role and Obligation of the Project Management

Consultants (PMC), who is Engineer of the Project, who is responsible for getting the big infrastructure Project executed, certify payments for the work done and on his Certificate, payments are released by respondent to the Contractors. From the above, it is clear that PMC has to be person of integrity with unblemished past record and the employer must have full faith in him.

12. It is submitted by the learned counsel that the first show-cause notice dated 18th November, 2009 was based on only irregularities found during vigilance check and was not based on the Report of Enquiry. There is no reference report in the notice, nor the same was provided to petitioner. Second show-cause notice dated 30th November, 2011 was issued after receiving copy of the report dated 17th April, 2008 and 18th April, 2008 from Railway Vigilance Department along with other documents like Geo Tech Report on 13th May, 2011 and after finding gravity of the misconduct by the petitioner.

The second notice was based on additional evidence received by respondent on 13th May, 2011 which proves gravity of misconduct. The report is based on Test Checks carried at site at few locations on track of 58.71 km. There is additional charge in the second show-cause and additional grounds, details and new evidence has been stated in the notice dated 30th June, 2011.

13. On the first issue raised by the respondents about the territorial jurisdiction of this Court, learned counsel appearing on behalf of respondents submitted that the contract was awarded by respondent to petitioner from its Mumbai office on 27th September, 2006 and the work was executed in the State of Chhattisgarh and the same was managed from the office of the respondent at Chhattisgarh. Thus, no cause of action has arisen

in Delhi. The petitioner earlier had itself withdrawn its writ petition filed in Delhi High Court on the ground of no territorial jurisdiction and had thereafter filed writ petition in the High Court of Chhattisgarh. The respondent's counsel has relied upon the judgment passed by this Court in the case of *Inox Air Products Ltd. Vs. Rathi Ispat Ltd.* reported in **2006 (4) Arb. L.R. 50 (Delhi) (para 25 to 30)**. In this judgment, this Court has referred to its earlier 5(five) judgments, which all were under Section 9 of the Act.

14. Let me now first consider the objection raised by the respondents with regard to territorial jurisdiction. The petitioner in order to invoke the jurisdiction of this Court has made the following averments in para 7 of the petition which is not denied by the respondent. The same are read as under:

“7. The petitioner submits that this Hon'ble Court would have jurisdiction to entertain the present petition as the respondent No.1 has its registered office in New Delhi and respondent Nos.2 to 4 operate out of the respondent No.1's office in New Delhi. Further the arbitration proceedings have to be held in New Delhi and the venue of the arbitration is the office of the respondent No.1 in New Delhi. Further as per Article 16 (Section 16.03) of the Special Conditions of the Contract, if any of the party fails to appoint an Arbitrator then the Managing Director Rail Vikas Nigam Ltd., New Delhi, respondent No.1, shall appoint the learned Arbitrator. The impugned order dated 01.10.2012 is also sent from the respondent No.1's office in New Delhi. The show-cause notice was adjudicated at New Delhi. The petitioners were called for hearing at New Delhi and were heard at New Delhi. The correspondence between the

parties is also addressed at New Delhi. Thus, the Hon'ble High Court has jurisdiction to entertain the present petition.”

15. In the recent case decided by the Supreme Court in the matter of ***Bharat Aluminium Co. Ltd. Vs. Kaiser Aluminium Technical Services, 2012 (9) SCC 552 (Para 96)*** which reads as under:

“96. We are of the opinion, the term “subject matter of the arbitration” cannot be confused with “subject matter of the suit”. The term “subject matter” in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties.....”

16. The show-cause notice dated 30th June, 2011 was adjudicated and decided upon in Delhi. A personal hearing to the petitioner pursuant to the show-cause notice dated 30th June, 2011 was also given on 14th September, 2012 at the respondent No.1's office in Delhi. The correspondence to the respondents has been addressed to the Delhi office.

If the order of the authority is issued from Delhi, it will confer jurisdiction on the courts in Delhi is clear, inter alia, from the proposition laid down by the Hon'ble Supreme Court in ***Kusum Ingots & Alloys Ltd. vs. Union of India*, (2004) 6 SCC 254, para 27**. As regards the withdrawal of earlier writ petition on the issue of jurisdiction is concerned, admittedly the order dated 1st October, 2012 was not passed on that date.

17. Clause 16.01 of the contract provides that the arbitration shall take place in New Delhi. The seat of arbitration confers jurisdiction on the Courts situated there. This is the view taken by the latest judgment of the Hon'ble Supreme Court in Bharat ***Aluminium Company*** (supra). This judgment has held that the courts where the seat is situated will have supervisory jurisdiction and this would be irrespective of whether the contract has to be performed somewhere else.

After having considered the rival submissions of the parties and the latest decision of the Apex Court i.e. Bharat Aluminium Company (supra), I do not find any merit in the objection raised by the respondents on the issue of territorial jurisdiction.

18. The second submission of the respondents is that the petition under Section 9 of the Act of 1996 is not maintainable as relief sought by petitioner is beyond the scope of Arbitration Agreement and is not arbitrable, this Court cannot give relief with respect to future contracts. Further, the order of blacklisting had been passed after the previous contract was closed over and black-listing is not under the previous contract but is for future contracts.

The respondent relied upon the case of ***Booz Allen & Hamilton Inc. Vs. SBI House Finance Ltd.*, (2011) 5 SCC 532**. Relevant para 34 reads as under:

“34. The term “arbitrability” has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:

(i) *Whether the disputes are capable of adjudication and settlement by arbitration?* That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) *Whether the disputes are covered by the arbitration agreement?* That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement.

(iii) *Whether the parties have referred the disputes to arbitration?* That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be “arbitrable” if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.”

19. It is argued by the respondents’ counsel that in the present case the issue of black-listing is beyond scope of Arbitration Agreement and it cannot be decided by the Arbitral Tribunal and hence, no order under

Section 9 of the Act is maintainable, when the matter is not arbitrable. The issue of future contractors, which is beyond scope of Arbitration Agreement. No relief against not to award future contracts can be referred to the arbitration. Hence no interim relief can be granted for the future contract under Section 9 of the Arbitration and Conciliation Act, 1996. It is also argued that the award of future contracts cannot be contractual issue of previous contract. The same is an Executive Function and each party has the right not to do deal with another on whom he has got no faith. Even the Arbitrator has got no jurisdiction over issue of future contracts. Moreover, as per settled law, 'Arbitration Agreement' is independent of other conditions of the contract.

20. It was also argued by him that the present case is not a case of double jeopardy as it is neither criminal case, nor there is any judicial order by any court under Article 20(2) of Constitution is applicable. It was held by Constitution Bench in the matter of *Thoman Dare Vs. State of Punjab*, **AIR 1959 SC 376 (para 9)** which reads as under:

“It is manifest that in order to bring the petitioners’ case within the prohibition of Art. 20(2), it must be shown that they had been “prosecuted” before the Collector of Customs, and “punished” by him for the “same offence” for which they have been convicted and punished as a result of the judgment and orders of the courts below, now impugned....”, the petitioners will have failed to bring their case within the prohibition of Art, 20(2).”

Counsel submitted that in the present case the firstly the order has not been passed by Judicial Forum nor petitioner has been punished. Thus, the show-cause notice based on new evidence does not fall within ambit of Article 20(2).

21. Mr.Parag P.Tripathi, learned Senior counsel in reply to the arguments of the learned counsel appearing on behalf of the respondents submits that a party cannot be punished twice for the same alleged breach. The petitioner was charged with the same allegations in the second SCN as were the subject matter of the first SCN. Both the SCN's were based out of the same vigilance report of 17th April, 2008 except with additional charges of using unapproved quality of grease. Punishing a person twice for the same alleged breach amounts to double jeopardy and is therefore illegal. The question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbitrator to decide whether he committed breach or the other party committed breach. That question can only be decided by an adjudicatory forum, that is, a court or an Arbitral Tribunal. A party cannot be a judge in its own cause.

22. Mr.Tripathi, learned counsel also argued that the second show-cause notice and debarment order passed against the petitioner is in relation to the alleged breach of the terms of the contract by the petitioner. Thus, it is a contractual matter and since disputes have arisen regarding performance and breach of the contract, the question of whether the petitioner is in breach and thereby liable to be blacklisted has to be decided in accordance with the mechanism provided under the contract for such dispute resolution. Thus, the issue of breach will have to be decided in arbitration by the arbitrators. Hence the order of blacklisting could not have been passed by the respondent authority. The following decisions are relied upon by the petitioner on this aspect:-

- (i) ***SPS Engineering Ltd. Vs. Indian Oil Corporation Ltd., 113 (2004) DLT 70, Paras 8 to 10***

In this case IOCL issued a SCN that the petitioner be put in holiday list and be barred from future contracts with IOCL. The petitioner replied and stated that all disputes should be referred to arbitration, to which IOCL declined on the ground that blacklisting is a non-contractual matter. The petitioner had invoked the arbitration prior to the SCN and it moved the court for appointment of arbitrator. Before the court on 17.3.2003, parties agreed that all disputes be referred to arbitration, subject to Section 16 objections. IOCL then on 10.4.2003 passed an order putting the petitioner on holiday list and debarring it from future contracts with IOCL.

In these facts, Court held that the entire basis for placing the petitioner on holiday list is founded upon the allegations qua performance or non-performance with regard to the contracts that were awarded. Hence it is not proper for IOCL to contend that it is a non-contractual matter. IOCL therefore, ought to have awaited adjudication by the arbitrator on issue of breach, and not straightway proceeded in hot haste to put the petitioner in holiday list.

(ii) *National Building Construction Corporation Vs. NDMC*, 138 (2007) DLT 414. Relevant para 25

Where arbitration is pending in respect of those very charges for which the person is ought to be blacklisted then the authority should await the conclusions and determination by the arbitrator.

In this case disputes were pending before the arbitrator. Nevertheless NDMC issued a show-cause and passed an order debarring petitioner for five years. Court held relying on IOCL judgment above, that NDMC acted in haste in issuing the blacklisting order when arbitration was pending on the same allegations. It held that it was necessary for NDMC to await conclusion of the arbitration proceedings and the blacklisting order is therefore arbitrary.

- (iii) ***Rashtriya Ispat Nigam Limited vs. Verma Transport*, (2006) 7 SCC 275. Relevant para 43, page 30 of JPB and para 47**

Once it is found that the dispute arose out of the contract, Section 8 of the Arbitration Act would be attracted. In this case court held that the illegal termination of contract and blacklisting are the cause of action arising out of the contract. It further held that the question in regard to jurisdiction of arbitrator can be determined by the arbitrator himself in terms of Section 16 of the Act.

- (iv) ***Sutlej Construction Ltd. Vs. State of Jharkand & Ors.*, 2005 (2) JCR 445. Para 7.**

When there is an arbitration clause, it is beyond the jurisdiction of the authority to blacklist. It is for the arbitral tribunal to decide all those issues.

23. Learned counsel for the petitioner has also referred a decision of this Court in the case of ***Anilma Associates Vs. UOI*, 106 (2003) DLT 262. Relevant paras 15 and 19**, on the aspect of double jeopardy. In the said case, it was held that once an order of banning of first kind (banning by one Ministry) is passed by the railways, it was not permissible for the respondents to pass second type of order (Banning by all the Ministries) and therefore its action amounted to double jeopardy.

24. I have considered the rival submissions of both the parties as well as the decisions referred by them. Let me first refer the details of the common allegations in the first show-cause notices dated 18th November, 2009 and second show cause notice dated 30th June, 2011. The same are:-

Common points in Show Cause Notice dated 18/11/2009 & 30/06/2011

Sr. No.	SCN No.C/CPM/BYT-URK/216 dated 18/11/2009		SCN No.C/CPM/BYT-URK/627 dated 30/06/2009																																																																																									
2.3	During Vigilance check conducted by Railway Board Vigilance on 17.4.2008 following severe irregularities were noticed.		<u>Imputation of misconduct for banning of business</u>																																																																																									
2.3 (i)	The gradation analysis of ballast as well as measurement were found to be at variance during the Vigilance check compared to what has been measured and entered into the MB by PMC. Details of gradation done by PMC and as found during the check are tabulated as under: <table><tr><th rowspan="3">Stack No.</th><th colspan="6">Retention on Sieve size (%)</th></tr><tr><th colspan="2">On 65 mm Sieve</th><th colspan="2">On 40 mm Sieve</th><th colspan="2">On 20 MM Sieve</th></tr><tr><th>As per MB</th><th>During check</th><th>As per MB</th><th>During check</th><th>As per MB</th><th>During check</th></tr><tr><td>305</td><td></td><td></td><td>59</td><td>31.11</td><td></td><td></td></tr><tr><td>53</td><td>2.36</td><td>7.14</td><td>66.27</td><td>95.23</td><td></td><td></td></tr><tr><td>12</td><td>0</td><td>5.68</td><td>54</td><td>65.90</td><td></td><td></td></tr><tr><td>478</td><td></td><td></td><td>52.1</td><td>74.39</td><td></td><td></td></tr></table>	Stack No.	Retention on Sieve size (%)						On 65 mm Sieve		On 40 mm Sieve		On 20 MM Sieve		As per MB	During check	As per MB	During check	As per MB	During check	305			59	31.11			53	2.36	7.14	66.27	95.23			12	0	5.68	54	65.90			478			52.1	74.39			2.0 2.1	<u>Acceptance of Sub-Standard Quality of track ballast</u> During the joint check up on 17.04.2008 and 128.04.2008, sieve analysis of – ballast stacks having nos.305, 363, 53, 12 & 478 was carried out. Results of sieve analysis of the said five stacks were as under:- <table><tr><th>Location</th><th>Stack No.</th><th>Total Weight In Kgs</th><th colspan="3">Retention on ballast over sieve in kg (%) for</th></tr><tr><td></td><td></td><td></td><th>65 mm Sieve</th><th>40 mm Sieve</th><th>20 MM Sieve</th></tr><tr><td>766/6-8</td><td>305</td><td>45</td><td>Nil (0%)</td><td>14.00 (31.11%)</td><td>45 (100%)</td></tr><tr><td>767/20-22</td><td>363</td><td>42</td><td>Nil (0%)</td><td>18.00 (42.85%)</td><td>42 (100%)</td></tr><tr><td>787/4-6</td><td>53</td><td>42</td><td>3.0 (7.14%)</td><td>40.00 (95.23%)</td><td>42 (100%)</td></tr><tr><td>786/10-12</td><td>12</td><td>44</td><td>2.5 (5.68%)</td><td>29 (65.90%)</td><td>44 (100%)</td></tr><tr><td>790/6-8</td><td>478</td><td>41</td><td>0.5 (1.21%)</td><td>30.5 (74.39%)</td><td>41 (100%)</td></tr></table>	Location	Stack No.	Total Weight In Kgs	Retention on ballast over sieve in kg (%) for						65 mm Sieve	40 mm Sieve	20 MM Sieve	766/6-8	305	45	Nil (0%)	14.00 (31.11%)	45 (100%)	767/20-22	363	42	Nil (0%)	18.00 (42.85%)	42 (100%)	787/4-6	53	42	3.0 (7.14%)	40.00 (95.23%)	42 (100%)	786/10-12	12	44	2.5 (5.68%)	29 (65.90%)	44 (100%)	790/6-8	478	41	0.5 (1.21%)	30.5 (74.39%)	41 (100%)
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2.3 (ii)	(ii) The measurement was also found to vary a lot specially into the stacks, which are tabulated as under: <table><tr><th>Stack No.</th><th>As per MB</th><th>As per joint check (in cum)</th><th>Difference (in cum)</th><th>Different (in%)</th></tr><tr><td>12</td><td>275.151</td><td>260.928</td><td>+14.223</td><td>+5.45%</td></tr><tr><td>478</td><td>168.257</td><td>152.576</td><td>+15.681</td><td>+10.27%</td></tr></table>	Stack No.	As per MB	As per joint check (in cum)	Difference (in cum)	Different (in%)	12	275.151	260.928	+14.223	+5.45%	478	168.257	152.576	+15.681	+10.27%	3.0	<u>Making excess payment for the track ballast supply</u> 3.1 In a joint check conducted on 17.04.08 and 18.04.08, quantity of ballast in stack no.325, 363, 12 & 478 was measured. The quantity found during joint check and quantity paid by RVNL, is as tabulated as under: <table><tr><th>Stack No.</th><th>Quantity of ballast paid by RVNL (in cum)</th><th>Quantity of ballast measured in joint check (in cum)</th><th>Difference (in cum)</th><th>Different (in%)</th></tr><tr><td>305</td><td>90.600</td><td>85.526</td><td>+5.074</td><td>+5.9%</td></tr><tr><td>363</td><td>146.014</td><td>149.92</td><td>-3.906</td><td>-2.60%</td></tr><tr><td>12</td><td>275.151</td><td>260.928</td><td>+14.223</td><td>+5.45%</td></tr><tr><td>478</td><td>168.257</td><td>152.576</td><td>+15.681</td><td>+10.27%</td></tr></table>	Stack No.	Quantity of ballast paid by RVNL (in cum)	Quantity of ballast measured in joint check (in cum)	Difference (in cum)	Different (in%)	305	90.600	85.526	+5.074	+5.9%	363	146.014	149.92	-3.906	-2.60%	12	275.151	260.928	+14.223	+5.45%	478	168.257	152.576	+15.681	+10.27%
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2.3 (iii)	(iii) During Vigilance check the blanketing material was also checked with respect to RDSO Specification for blanketing material. Two sets of samples of blanketing material were collected and got tested at Geo-Technical Engineering Laboratory/Con/ Bilaspur, SEC Railway. The laboratory test of the blanketing material result clearly shows that both samples crossed the guiding enveloping curves, at both the ends. The same demonstrate that PMC has miserably failed in	4.0	<u>Acceptance of sub-standard quality of blanketing material</u> 4.2 The laboratory test results have been compared with the RDSO specification for Blanketing material, as under: <table><tr><td>Sieve Size (mm)</td><td>Cum % passing</td></tr><tr><td></td><td></td></tr></table>	Sieve Size (mm)	Cum % passing																																						
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its duties to get the blanketing material tested before its use at site.				As per test report		As per RDSO Specification (%)		
				Sample No.1	Sample No.2	Grade A	Grade B	Grade C
			20	100	100	100	93-100	80-100
			10	90.31	93.78	95-100	85-95	65-85
			4.75	49.17	41.88	92-99	70-92	43-70
			2	16.33	15.83	65-90	46-65	22-46
			0.600	9.81	8.84	33-55	22-33	08-22
			0.425	9.62	8.46	28-40	18-28	05-18
			0.212	9.44	8.09	16-27	10-16	00-10
			0.075	9.38	7.87	00-12	00-10	00-08
		5.0	<u>Use of un-approved quality of greases for greasing of Elastic Rail Clips</u>					
		5.1	During joint check on 17.04.20087, no evidence of grease as per IS: 408-1981 being used for ERC greasing, was seen. To confirm the quality of grease. RVNL was requested to show the packet of grease either exhausted or new packet, but they could not produced the same.					

25. It appears from the order dated 1st October, 2012 itself that after considering the reply given by the petitioner to the show-cause notice dated 11th November, 2009, the petitioner was merely declared Poor Performer and was imposed one year ban with effect from 26th January, 2010 on the following grounds:-

- (i) Non-deployment of suitably qualified and experienced Project Managers at site for supervising the work;
- (ii) Negligence in processing contractor's bills;
- (iii) Acceptance of sub-standard quality of concrete for PSC girders for bridges on continuous basis over a long period of time and allowing payment for the same is a serious lapse on the part of the PMC.

26. Imposition of one year was admittedly not challenged by the petitioner in Court of law. The second show-cause notice dated 30th June, 2011 served upon the petitioner wherein it was proposed to ban the business dealing with the petitioner and its sister concern, the following are the allegations/ malpractices/irregularities levelled against the petitioner:-

- (a) Acceptance of sub-standard quality of track ballast.
- (b) Making excess payment for track ballast supply.
- (c) Acceptance of sub-standard quality of blanketing material.
- (d) Use of un-approved quality of grease for greasing ERC.

27. With regard to irregularity (a) i.e. acceptance of sub-standard quality of track ballast, in the order dated 1st October, 2012, it was found by the Director Projects that the petitioner allowed use of sub-standard ballast. Similarly, in the second irregularity, i.e. making excess payment for track ballast supply, it was found in the order that the petitioner was responsible

for recording excess measurement of ballast stacks not only in stack No.478 but also in stack Nos.305 & 12 and release of excess payment to the execution contractor. With regard to the third irregularity, i.e. (c) about the acceptance of sub-standard quality of blanketing material, no evidence was found against the petitioner. As regards the imputation of (d), it was found by the Director Projects that the petitioner failed to ensure quality of grease used for greasing ERC as per the stipulation specifications.

28. From the common points of show-cause notices issued on 18th November, 2009 and 30th June, 2011 as well as from the order dated 1st October, 2012, it appears from both that as per allegations made by the respondents, the petitioner was allegedly involved in irregularities. There are also common allegations. The petitioner has suffered a ban for the period of one year in view of first show-cause notice which was spent by the petitioner without any challenge in Court of law. It is the admitted position that additional evidence and final report was received by the respondents later on. The second show-cause notice was issued on the basis of said evidence.

29. It is also a matter of fact that the petitioner has been denying the allegations of the respondents from very beginning. But one is failed to understand in case the respondents imposed ban for one year against the petitioner for certain irregularities as mentioned in the order dated 1st October, 2012, then even at the stage of issuance of first show-cause notice could have imposed the ban for larger period in view of the fact that the respondents had the knowledge about the irregularities of the petitioner, but the ban was imposed for limited period against the petitioner only as Poor Performer. At the same time, I do not agree with the argument of the petitioner that it is a fit case of double jeopardy in view of the reason that in

the second show-cause notice there are additional charges against the petitioner on the basis of evidence and report received by the respondents after the expiry of one year ban imposed by the respondents on the basis of first show-cause notice.

30. Mr.Tripathi is right to the extent at this stage that the second show-cause notice is only of ₹2,35,000/- in terms of financial implication, the main charge No.4 pertaining to the sub-standard quality of blanketing material had alleged financial implication of ₹6.53 crores. The petitioner has been found not guilty and therefore, exonerated of that charge in the second impugned debarment order dated 1st October, 2012 and despite that, an order banning petitioner for five years which is passed for a larger period and that is too by respondent who is party to the agreement.

31. Admittedly in the present case there was a contract between the parties for execution of certain work prior to the date of first and second show-cause notice. It is admitted position that a suit as alleged by the respondent arose and two cause notices were issued to the petitioner. The order dated 1st October, 2012 of black-listing was passed on second show-cause notice by referring various clauses of agreement. Hence, this Court is not agreeable with the submission of the respondents that the question of black-listing cannot be subject matter of arbitrable as it is meant for future contract. I fail to understand that on one hand their submission is that it cannot become part of arbitration proceedings and on the other hand the order date 1st October, 2012 was passed by imposing ban while applying various clauses of the contract between the parties.

In view of above, I am of the considered view that it is for the Arbitral Tribunal to decide all issues including the question of black-listing. The question in regard to jurisdiction of Arbitral Tribunal as to whether such

dispute can be arbitrable or not, it would be for the Arbitrator(s) to decide in terms of Section 16 of the Arbitration and Conciliation Act, 1996. Both the parties are also granted liberty to move an application for interim relief under Section 17 of the Act in accordance with law.

32. As far as ban of 5 years on the basis of second show-cause notice is concerned, this court is of the view that the same is imposed for larger period in view of peculiar facts of the present case and particularly earlier ban on the basis of first show-cause for only one year and the same was already spent by the petitioner. Considering the overall facts and circumstances of the present case, I reduce the period of ban from five years to two years with effect from 30th June, 2011.

33. No further orders are required to be passed. The present petition is accordingly disposed of. No costs.

(MANMOHAN SINGH)
JUDGE

FEBRUARY 18, 2013