

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.913 OF 2016

Sarku Engineering Services SDN BHD	]	
A company registered under the laws	]	
of Malaysia, Menara Sapura Kencana	]	
Petroleum, Solaris Dutamas,	]	
1, Jalan Dutamas 1, 50480 Kuala Lumpur,	]	
Wilayah Persekutuan, Malaysia.	]	 Petitioner

Versus

1. Union of India,	]	
Through the Secretary,	]	
Ministry of Petroleum & Natural Gas,	]	
Shastri Bhavan, New Delhi – 110001.	]	
	]	
2. Oil and Natural Gas Corporation Ltd.,	]	
11 High, 4 th Floor,	]	
Bandra – Sion Link Road,	]	
Sion (W), Mumbai 400 017.	]	 Respondents

Mr. Pravin Samdani, Senior Counsel, a/w. Ms. Sowmya Shrikrishna, Mr. Amit Dingra, Mr. Vikas Kuma and Mr. Omkar Kelkar, i/by Mr. Anil T. Agarwal, for the Petitioner.

Mr. Pradeep Sancheti, Senior Counsel, a/w. Mr. Pulkit Sharma and Ms. Amrita Joshi, i/by The Law Point, for Respondent No.2.

CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

RESERVED ON : 20TH JULY 2016.

PRONOUNCED ON : 8TH AUGUST 2016.

JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. Rule. Rule made returnable forthwith. Respondents waive service. Heard finally, by consent of the parties.

2. By this Petition, filed under Article 226 of the Constitution of India, the Petitioner is invoking extra-ordinary jurisdiction of this Court for issuance of writ of certiorari or writ in the nature of certiorari for quashing the order dated 4th January 2016 issued by Respondent No.2, banning the Petitioner from all future business dealings with Respondent No.2 on the ground that the Enquiry Officer, internally appointed by Respondent No.2, has come to the conclusion that the Petitioner was responsible for the delayed completion of the project for revamp of 26 Well Platforms.

3. Facts relevant for deciding this Writ Petition can be stated as follows:-

Petitioner is a part of the Sapura Kencana Group, which is a Limited Company and is listed on the Stock Exchange of Malaysia. According to the Petitioner, it is the world's largest integrated providers of engineering, procurement, construction, installation and commissioning services to the Oil and Gas Industry. First Respondent is a Union of India, through the

Secretary, Ministry of Petroleum and Natural Gas, and exercises administrative control and supervision. Second Respondent is a Public Sector Undertaking and contributes the overwhelming majority of the India's crude oil and natural gas production.

4. In July 2005, Respondent No.2 invited bids for the work of revamping 26 existing, unmanned, well-head platforms at Mumbai Off-shore. Petitioner submitted its bid in October 2005 and was awarded the work by Respondent No.2 on 30th December 2005. A contract to that effect was executed on 20th February 2016. The contract provided the Scheduled Completion Date of the entire works as *“30th April 2007 or the date as may be extended from time to time”*.

5. It is the case of the Petitioner that, though the Petitioner diligently performed the contract work, on account of the delay and defaults committed by Respondent No.2 in performance of its contractual obligations, the planned sequence of the work was disrupted and thereby the work was delayed beyond the schedule. Another reason for the delay was that, the Petitioner was directed to perform additional and changed work, which was neither contemplated by the contract nor included in the contract. As a result, the off-shore work could not be completed before

the on-set of 2007 monsoon season. The work continued into the years 2008-09, 2009-10 and 2010-11. From time to time, the extension of time was sought and it was granted by Respondent No.2. The last extension was upto 15th May 2011 and the work was completed before that, on 28th April 2011.

6. As per the case of the Petitioner, despite the delay in execution of the work, the contract was neither abandoned by the Petitioner nor terminated by Respondent No.2. The work was completed as per the best industry standards and Respondent No.2 had no complaints about the quality of the works done by the Petitioner. During the course of the work, the Petitioner raised claims for stand-by and extra work. Amongst other claims, the Petitioner also asked for the cost for prolongation of the project on account of delays caused by Respondent No.2. However, Respondent No.2 wrongly levied liquidated damages on the Petitioner upto 10% of the contract price. Despite several written and oral communications and requests in meetings between the representatives of the parties, Petitioner did not receive payments due, and hence by the notice dated 28th May 2012, the Petitioner invoked the Arbitration Agreement containing in the contract. In response thereto, by its letter dated 21st June 2012, Respondent No.2 appointed its Arbitrator and agreed to the Arbitration

Reference. The first meeting of the Arbitration Tribunal was held on 23rd July 2012 and the schedule for the arbitration work was prepared. Now the said arbitration work is in progress and a specific issue is raised therein in respect of the claim for prolongation of the project and restoration of liquidated damages on account of the alleged delay in completion of the project work.

7. The grievance of the Petitioner is that, while the arbitration proceedings are yet in progress and nearly at the stage of completion, more than three years after the completion of the project, Respondent No.2 issued a notice, purporting to be a show cause notice, dated 24th November 2014 seeking its response as to why the Petitioner should not be banned from future business dealings with Respondent No.2, based on the sole allegation of the delayed completion of the project and claiming that violation of the contractual obligations had resulted in a loss to Respondent No.2, rendering the Petitioner liable for initiation of proceedings to ban the Petitioner from further business dealings with Respondent No.2. By its letter dated 22nd December 2014, the Petitioner responded to the said notice denying the allegations in their entirety and stating as its preliminary submission that the notice was based on *sub judice* matter pending adjudication before the Arbitration Tribunal, in which

Respondent No.2 was actively participating through its Advocates. It was specifically stated in the notice reply that the question of responsibility for causing delay is a matter directly and substantially in issue between the parties to the arbitration and any such attempt by Respondent No.2 to constitute a separate enquiry to decide on a parallel basis, the matters that were *sub judice* in the arbitration would be an attempt to overreach the Tribunal. Petitioner, thus, called upon Respondent No.2 to withdraw the show cause notice, expressly stating that the Petitioner was not commenting on the merits of the allegations made in the show cause notice, as the matter was *sub judice* in arbitration and reserving all its rights in that regard. There was no response from Respondent No.2 to the said reply. Respondent No.2 did not issue any further communication to the Petitioner, nor called for any hearing, thereby creating a reasonable belief that Respondent No.2 had decided not to proceed with its action of banning the Petitioner and to drop the show cause notice.

8. Meanwhile, arbitration proceeding continued and it was at the stage of final arguments. At that time, after delay of about 14 months from the notice dated 24th November 2014, Respondent No.2 passed the impugned order dated 4th January 2016, banning the Petitioner from all future business dealings with Respondent No.2 on the sole ground that

Respondent No.2 had come to the conclusion that the Petitioner was responsible for the delayed completion of the project work for revamp of 26 Well Platforms.

9. In this Petition, the Petitioner is challenging this impugned ban order on several counts; the first amongst them being on the count that the impugned order is totally illegal, non-est, void, *ab initio*, as it was passed without giving any opportunity of hearing to the Petitioner and, thus, passed in breach of the principles of natural justice. Secondly, it is submitted that this ban order smacks of *mala fides* as it is issued to scuttle the arbitration proceedings, when the very same issue of delay in performance of the contract is *sub judice* before the Arbitration. Thirdly, it is submitted that the ban order is totally devoid of any reasons and, therefore, it is capricious and arbitrary. Next it is submitted that the order was passed more than a entire year after the reply sent by the Petitioner, to the show cause notice dated 24th November 2014, was received by Respondent No.2. The ban order does not disclose as to why there was delay of such an extent in passing the impugned order. According to the Petitioner, therefore, the ban order is nothing but a vindictive action taken by Respondent No.2 to overreach the arbitration proceedings, in which the identical issue of delay in completion of earlier project work was *sub judice*.

10. Further, by way of amendment in the Petition, reliance is placed on Annexure “F” to the contract entitled integrity pact, more specifically being Section 3 thereunder, certain conditions are provided under which the successful bidder may be disqualified or barred from future contracts. It is submitted that the ban order does not fall within the purview of the said section or even Section 2 and, therefore, on this count also, the ban order is illegal. Lastly, it is submitted that the order banning the Petitioner from all future and further contracts with Respondent No.2, is disproportionately severe, harsh and violates the principle of proportionality.

11. Respondent No.2 has, vide the affidavit-in-reply of its Deputy Manager (Mechanical), resisted this Petition, upholding the legality and validity of the ban order. It is submitted that the project work of 26 Well Platforms, which was awarded to the Petitioner under the tender, was to be completed within the period of six months. However, the said project work was, admittedly, delayed by the Petitioner for almost four years. In case of non-completion of project within the contractual period, the contract provided for two options i.e. extension of time, subject to levy of liquidated damages, or, termination of contract. As the termination of contract would have had serious financial implications and getting the project completed, after again going through tender process would have

consumed much more time, Respondent No.2 chose the option of granting extension of time, while expressly reserving its right to claim liquidated damages from the Petitioner. However, the Petitioner took not one or two, but four more years to complete the contract and the reason for the delay was Petitioner not deploying sufficient resources off-shore. When two extensions were already granted, still project was not nearing to completion, a team of Central Technical Examiner of Chief Vigilance Commission inspected the work during the period from 9th February 2009 to 13th February 2009 and observed that the contract was unduly delayed and in spite of such delay, no action has been taken against the Petitioner by way of initiating the process of keeping the Petitioner-Firm in 'holiday list'. In September 2012, Respondent No.2 received Office Memorandum dated 4th September 2012 from the Director of Central Vigilance Commission, suggesting to keep the Petitioner on holiday list, pointing out various instances of unsatisfactory performance of the work by the Petitioner and further suggesting Respondent No.2 to recover the costs towards deficiency in quality from the Petitioner. The Commission also concurred with a view taken by the Ministry of Petroleum and Natural Gas to advise the Management of Respondent No.2 to keep the Petitioner on holiday list. The same suggestion was reiterated by the Ministry of Petroleum and Natural Gas vide its letter dated 25th September 2012 and

reminder letter in September 2013, directing Respondent No.2 to submit the action taken report.

12. According to Respondent No.2, in view of these continuous requests from the Ministry of Petroleum and Natural Gas and Central Technical Examiner of Chief Vigilance Commission, Respondent No.2 formed a committee on 11th March 2014 of its senior officers to examine the extent of responsibility of the Petitioner in delay for completion of revamping of 26 Well Platforms. The said committee submitted its report on 30th March 2014 and observed that, out of total delay of 1459 days, the delay of 1377 days was directly attributable to the Petitioner. Accordingly, an Enquiry Officer was appointed to conduct the enquiry. The Enquiry Officer vide its notice dated 24th November 2014, called upon the Petitioner to show cause as to why the business dealings of Respondent No.2 with the Petitioner should not be banned. In reply to the said show cause notice, the only contention raised by the Petitioner was that, by reason of pendency of arbitration proceedings, the proposed action of banning the Petitioner was not tenable. However, in view of the legal advice received by Respondent No.2 that the decision to black-list the contractor is based on the employer's assessment on desirability to engage the contractor for future work i.e. to avoid any recurrence of bad / poor performance resulting in the public projects being delayed, the same

can obviously not be deferred merely by reason of pendency of arbitration proceedings, as the same would result in the employer being forced to entertain such contractor for subsequent projects. It is submitted that the Petitioner deliberately chose not to have personal hearing and refrained from commenting on merits in reply to the show cause notice. Hence, the Enquiry Officer proceeded further and after considering the relevant material, came to the conclusion that the Petitioner being primarily responsible for the delay in completion of the contract, on account of its unsatisfactory performance, the Petitioner is liable to be banned for future business dealings with Respondent No.2.

13. Thus, in short, the sum and substance of the contention raised by Respondent No.2 is that, whatever action is taken against the Petitioner of banning its future business dealings with Respondent No.2, it is according to the law and after giving a fair opportunity of hearing to the Petitioner. It has got nothing to do with the arbitration proceedings as arbitration has been invoked by the Petitioner to claim refund of liquidated damages, whereas, the Enquiry Committee was formed to determine the issue of black-listing of the Petitioner because of its unsatisfactory performance. Hence, it is an independent action based on the material on record, after considering the recommendations of the Ministry of Petroleum & Natural

Gas and Central Vigilance Commission. Hence, the Petition holds no merit and deserves a fate of dismissal.

14. In the backdrop of these facts, we have heard extensive submissions advanced by the learned Senior Counsel for the Petitioner and Respondent No.2 and, with their assistance, we have also perused the Writ Petition and all annexures thereto, including the show cause notice and impugned order, banning the Petitioner from all its future business dealings with Respondent No.2.

15. As to the factual matrix of this Petition, it is not much in realm of the dispute. It is common ground that in pursuance of the tender notice issued by Respondent No.2 in July 2005 for revamping of 26 Well Platforms, Petitioner has submitted its bid and was awarded the contract on 30th December 2005. A written contract was also executed between the parties on 20th February 2006, according to which the work was to be completed by 30th April 2007 or by the extended date of completion. It is also common ground that as the work could not be completed within the scheduled date, the period was extended from time to time and ultimately, effectively, it was completed on 28th April 2011. During this period neither the Petitioner abandoned the work, nor Respondent No.2 terminated the contract of the work. It is further a matter of record that as Respondent

No.2 levied the liquidated damages on the Petitioner on account of the delay in completion of the work, the Petitioner invoked the Arbitration Agreement in the Contract; Respondent No.2 agreed to the Arbitration Reference and, accordingly, the Arbitration Tribunal was appointed, before which the proceedings are in progress. After the pleadings were filed by both the parties, on 10th July 2013, the Arbitration Tribunal has framed following points for its consideration, including the other points, in respect of the claim for prolongation of the project and for the alleged extra work done by the Petitioner.

- “6. Whether the Claimant is entitled to its claim for restoration of liquidated damages or part thereof ?*
- 7. Whether the Claimant is entitled to the amounts claimed or part thereof in respect of its claim for additional costs incurred due to prolongation of the project ?*
- 9. Whether the Claimant is entitled to the amounts claimed or part thereof in respect of its claims for delays attributable to the Respondent for 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11 seasons ?*
- 15. Whether the Respondent proves that the delay in completing the work under the contract were caused by the Claimant; and Respondent was entitled to levy and recover liquidated damages ?”*

16. When the impugned order was passed by Respondent No.2, the proceedings before the Arbitration Tribunal were nearing completion and at the stage of final arguments, whereas, now the final arguments are in progress.

17. It is in these circumstances that on 24th November 2014, Respondent No.2 issued show cause notice to the Petitioner, '*as to why the Petitioner should not be banned from future and further business dealings with Respondent No.2?*'. Petitioner replied to the said show cause notice on 22nd December 2014 and sought withdrawal of the show cause notice on the sole ground that the matter was *sub judice* in arbitration proceedings in respect of the very same issue on which show cause notice was issued and hence it is amounting to over-reaching the arbitration proceedings. However, thereafter, without Petitioner appearing or participating in the proceeding, after about one year and four months, on 4th January 2016, the impugned order of banning the Petitioner from its business dealings with Respondent No.2 came to be passed.

18. Perusal of the impugned order (Annexure 'CC') reveals that, as the project of revamping of 26 Well Platforms was completed after abnormal delay of 1459 days, i.e. on 28th April 2011, against contract work

completion date of 30th April 2007, a Committee was constituted to examine the extent of responsibility of the Petitioner in delay of the contract completion and as the Committee concluded that the delay is attributable to the contractor and it is of 1377 days, after issuing show cause notice to the Petitioner, the Enquiry Officer, submitted its report dated 16th March 2015 and in view of this Enquiry Report, which concluded that it was a case of unsatisfactory performance, thereby recommending for banning future business dealings with the Petitioner, the impugned ban order was issued. The copy of the impugned ban order is produced in the Petition on page No.125 at Exhibit “CC” of the paper-book. The relevant portion of the ban order can be reproduced as follows :-

“AND WHEREAS the Enquiry Officer, after considering the records available and having given an impartial, prudent and careful consideration to the entire facts of the case submitted its report dated 16.03.2015, and concluded that M/s. Sarku Engineering Services SDN BHD, Malaysia can be held primarily responsible for the major delay against the contract. The Enquiry Officer in its report has also brought out that timely completion is one of the major performance parameter of any project and the contractor has failed miserably in completing the project within the scheduled time period. As such, the Enquiry Officer concluded that it is a case of unsatisfactory performance and hence

recommended for banning future business dealings with the contractor viz. M/s. Sarku Engineering Services SDN BHD, Malaysia.

NOW THEREFORE, having carefully considered the findings of the Enquiry Officer by the Committee of Directors and also having considered all the facts and circumstances of the case, ONGC has decided to stop all future business dealings with M/s. Sarku Engineering Services SDN BHD, Malaysia with immediate effect from the date of issue of this order. Other group of companies of M/s. Sarku Engineering including its allied concerns, partners or associates or directors or proprietors involved in any capacity are not considered for banning. Therefore, in the future, neither any tender enquiry will be issued to M/s. Sarku Engineering Services SDN BHD, Malaysia by ONGC against any type of tender nor will their bid be considered by ONGC against any on-going tender(s) wherever contract between ONGC and M/s. Sarku Engineering Services SDN BHD, Malaysia has not been finalized.”

19. Thus, the contents of the impugned ban order make it very clear that the only cause for issuance of the same was the inordinate delay in performance of the contract, which was called as 'unsatisfactory performance on the part of the Petitioner'. We are of the confirmed view that, in this Petition, we should not and need not enter into the aspects as to whether the delay in completion of the contract was inordinate or

attributable purely to the Petitioner, as those very aspects are pending for consideration before the Arbitration Tribunal, as can be seen from the issues framed by the Arbitration Tribunal for its consideration, which are reproduced *supra*.

20. The only and essential argument advanced by learned Senior Counsel for the Petitioner in this Petition and to which we are concerned is, whether such impugned action can be taken by Respondent No.2 on the very issue of delay in completion of project work of revamping of 26 Well Platforms, which was *sub judice* in the arbitration proceedings between the parties and, especially, when such arbitration proceedings were at the completion stage, as the final arguments were in progress before the Arbitration Tribunal and that too, to the knowledge of Respondent No.2, in which respondent No.2 has willingly participated through its Advocate.

21. Thus, '*whether the pendency of arbitration proceedings can act as a bar to the passing of the ban order and if not a bar, whether it can vitiate the impugned order?*', is the first disputed issue raised for our consideration in this Petition. According to learned Senior Counsel for the Petitioner, pendency of arbitration proceeding on the very same issue, on

which ban order is issued, does act as bar and, if not as bar, at-least, it speaks of *mala fides*, being on attempt to scuttle and prejudge arbitration proceedings, which, in this case, were on the verge of completion.

22. To substantiate his submission, learned Senior Counsel for the Petitioner has relied upon the decision of the Delhi High Court in *Prakash Atlanta JV & Ors. Vs. National Highways Authority of India & Ors.*¹, wherein the impugned order of barring the Petitioner therein from future projects was challenged on the very ground that it concerns the issues, which formed the subject matter of arbitration proceedings. In this decision, after referring to the Judgments of the Apex Court in the case of *M/s. Erusian Equipment and Chemicals Limited Vs. State of West Bengal & Anr.*², and *Raghunath Thakur Vs. State of Bihar*³, it was held that, “in view of the identity in the subject matter of the allegations leading upto blacklisting order and arbitration proceedings, and when the entire matter was pending before the Arbitrator, there was no need to have proceeded with the issue of placing the Petitioner on the 'holiday list'.”

23. In this decision reliance was also placed on the observations of the Division Bench Judgment of Delhi High Court in the case of *Indian Oil*

1 *ILR (2010) V DELHI 38*

2 *(1975) 1 SCC 70*

3 *AIR 1989 SC 620*

*Corporation Ltd. Vs. SPS Engineering Ltd.*⁴, "when the matter was subject matter of arbitration, the Respondent should have awaited the decision of the Arbitrator before taking such a decision in a hurry."

24. Per contra, learned Senior Counsel for Respondent No.2 has, placed reliance upon the decision of the Calcutta High Court in *Haldia Bulk Terminals Private Limited Vs. Board of Trustees for the Port of Kolkata*⁵, wherein, while rejecting the challenge raised to show cause notice of blacklisting, it was observed that, "*mere pendency of an action, whether a civil suit or an arbitral reference, between an employer and a contractor would not preclude the employer from blacklisting the contractor on the basis of the employer's perception of the performance of the contractor qua the contract*".

25. In our considered view, these observations of the Single Bench of the Calcutta High Court have to be read and understood as made in the particular facts of that decision. In that case, the contractor has filed a Petition under Section 9 of the Arbitration and Conciliation Act, 1996 challenging the notice issued to him stating as to why the Petitioner should not be blacklisted. Hence, while deciding the maintainability of such show cause notice, it was held that the challenge was premature in

⁴ (2006) 128 DLT 417

⁵ LAWS(CAL)-2012-12-77

the sense that Petitioner had jumped the gun somewhat in not waiting for the process to be completed and challenged the show cause notice itself, without either asserting that the notice is wanting in authority or adequately establishing at the stage that even if the allegations contained therein were taken to be true, the Petitioner cannot be blacklisted. It was held that, on the basis of apprehension of being blacklisted, the Petitioner was making complaint in advance. It is in these peculiar facts and circumstances of the case, it was held that mere pendency of an action, whether a Civil Suit or an Arbitral Reference, between the employer and the contractor would not preclude the employer from black-listing the contractor on the basis of employer's perception of the performance of the contract qua the contract.

26. In our opinion, there cannot and need not be any general or omnibus proposition that in each and every matter, pendency of arbitration proceedings, will act as a bar to the action of blacklisting. It would be quite a broad proposition, to say that, mere pendency of the arbitration proceedings will act as an *ipso facto* bar or embargo for the blacklisting of the contractor. In our considered view, it will always depend on facts and circumstances of a particular case. Judicial decisions also cannot be read as Statute, as the observations therein are made in the context of the particular facts and circumstances of that case.

27. Viewed in this context, particular facts of the present case are sufficient to reveal that exactly the identical issues are pending in the arbitration proceedings initiated in the case and those arbitration proceedings are at the stage of completion. Though it was the Petitioner, who has invoked the Arbitration Agreement, Respondent No.2 has agreed "for Arbitration Reference, appointed its Arbitrator and voluntarily participated therein. The issues were framed for consideration in the said proceedings, which are referred (*supra*), and, as can be seen, they are exactly identical to the issue, on which the impugned order of banning the Petitioner is passed. The issue No.15 in the arbitration proceedings is, *'whether the delay can be attributable exclusively to the Petitioner and, therefore, Respondent No.2 was entitled to levy and recover liquidated damages from the Petitioner?'*. The perusal of the impugned order also gives the same cause of delay in performance of the contract of revamping of 26 Well Platforms for taking the action of banning the Petitioner from further business dealings with Respondent No.2. The particular para in the impugned order states that, *"in view of the Enquiry Report, holding the Petitioner responsible for the major delay against the said contract, it was a case of unsatisfactory performance and hence Respondent No.2 has decided to stop all future business dealings with the Petitioner"*.

28. Thus, it is apparent that for exactly the same cause, which is pending for adjudication and is at the final stage of adjudication, Respondent No.2 has black-listed or banned the Petitioner from future business dealings. Though the Arbitration Tribunal is yet to adjudicate the issue '*whether the cause of the delay can be attributable to the Petitioner alone?*', Respondent No.2 has, thus on the basis of some internal enquiry, prejudged the issue and attempted to overreach the Arbitration Tribunal by taking the decision of relying upon the said internal Enquiry Report and banned the Petitioner. It is also not the case that apart from this cause of delay in completion of the contract, which was pending before the Arbitration Tribunal, there was any other material before Respondent No.2 for banning the Petitioner from future business dealings, at-least neither the show cause notice, nor the impugned order states so. Before this Court also, it is admitted that the only ground for taking impugned action against the Petitioner was the delay in performance of the contract.

29. In the affidavit-in-reply filed on behalf of Respondent No.2, it is further stated in so many words and with details and particulars thereof that, because of the consistent requests, reminders and recommendations from the Central Vigilance Commission and the Ministry of Petroleum and Natural Gas to take action against the Petitioner for delay in performance

of the contract, Respondent No.2 was constrained to take action against the Petitioner of banning the Petitioner from future business dealings. This stand of the Respondent No.2 makes it clear that the only cause for issuance of impugned order was the delay, which issue was pending before the Arbitration Tribunal and on the said cause of delay, it was constrained to take action due to requests and reminders from Central Vigilance Commission and Ministry of Petroleum and Natural Gas.

30. In this respect, learned Senior Counsel for the Petitioner has drawn attention of this Court to the Office Order No.18/3/05 dated 24th March 2005, issued by the Deputy Secretary of Central Vigilance Commission, Government of India, which pertains to clarification regarding banning of business dealings with Firms / Contractors. The said Office Order reads as under :-

“Para 31 of Chapter XIII, Vigilance Manual Part-I provides that business dealings with the firms/contractors may be banned wherever necessary. It was also suggested that for banning of the business with such firms/contractors or for withdrawal of banning orders, advice of the Central Vigilance Commission need not be sought.

2. It is however observed by the Commission that some of the departments/organizations cite the Commission as the authority behind the decision in their orders while banning of the firms/contractors. This is not appropriate. The Commission once again reiterates its instructions that banning of business is an administrative matter to be decided by the management of the organization and the Central Vigilance Commission does not give its advice in such matters. This may please be noted for strict compliance.”

31. In view of this specific Office Order, which leaves the banning of business, being an administrative matter, to be decided by the Management of the Organization and the Central Vigilance Commission not giving its advice in such matters, the contention of Respondent No.2 that on account of the repeated requests and advice received from the Ministry of Petroleum and Natural Gas and the Central Vigilance Commission, the impugned order was issued, falls on the ground.

32. It is in these facts and circumstances of the case, in our opinion, that the haste on the part of Respondent No.2 in issuing the impugned order of black-listing or banning the Petitioner from future business dealings with Respondent No.2, vitiates the order being *mala fide* and arbitrary. In these circumstances, the submission of learned Senior Counsel for the Petitioner that only with an intention to scuttle the arbitration proceedings and its outcome, this action was taken by

Respondent No.2 of banning or blacklisting the Petitioner, cannot be said to be devoid of substance.

33. As observed by the Hon'ble Supreme Court of India in the case of *Erusian Equipment & Chemicals Ltd. (supra)*, relied upon by learned Senior Counsel for the Petitioner, *“blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for the purposes of gains. The fact that a disability is created by the order of black-listing indicates that the relevant authority is to have an objective satisfaction.”* Hence, while passing such an order, which is having far reaching effect on the business of the Petitioner, the objectivity and the fair play on the part of the authority issuing such order is of paramount importance, which is found conspicuously lacking in the present case.

34. The learned Senior Counsel for the Petitioner has then relied upon the decision of the Hon'ble Supreme Court of India in the case of *Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project, Bharat Sanchar Nigam Limited and Ors.*⁶, wherein it was held that, *“though the power to black-list a contractor is inherent in the party allotting the contract, such decision of black-listing is open to scrutiny not only on*

⁶ (2014) 14 SCC 731

the touchstone of the principles of natural justice, but also on the Doctrine of Proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence, is similarly examinable by a Writ Court”.

35. Apex Court was pleased to further observe in this decision that, *“it is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law.”*

36. Thus, the proper and fair opportunity of hearing and showing cause is the essential concomitant of the principle of natural justice, which is required to be followed, considering the drastic, damaging and far reaching impact, which an order of black-listing or banning has on the

contractor. It is in the nature of a civil death as it affects his goodwill and reputation in the business.

37. The facts of the present case, however, reveal that no such opportunity of hearing was given to the Petitioner; it may be true that the show cause notice was issued to the Petitioner before taking impugned action; however, the Petitioner has replied to the said show cause notice by taking objection to the maintainability of such action in view of pendency of arbitration proceedings. In his reply to the show cause notice, which is produced at Exhibit "BB" on Page No.91 of the paper-book, the Petitioner has categorically stated as follows :-

"At the outset, it is stated that the said SCN refers to matters sub judice that are to the knowledge of ONGC pending adjudication by an arbitral tribunal comprising a former Chief Justice of India and two retired Judges of the Supreme Court of India, namely, Justice N. Santosh Hegde, the Presiding Arbitrator, Chief Justice V.N. Khare and Justice S.N. Variava, proceedings in which ONGC is duly participating. This SCN is hence nothing but an attempt to pressurize a litigant (Sarku) and amounts to obstruction of justice. ONGC, by this SCN (which is issued more than three and half years after contract completion), is threatening to punish Sarku for asserting Sarku's legal rights in invoking arbitration where one of the main contentions of Sarku is that the delay, if any, in the due performance of the subject contract was attributable to ONGC. You are hence called upon to withdraw the said SCN.

Please note that Sarku reserves all its legal rights in this regard. Specifically, this communication is being given without prejudice to Sarku's view that this SCN is wholly malafide, without jurisdiction, given for extraneous reasons, and may amount to contempt of legal proceedings

Responsibility for causing delay is a matter directly and substantially at issue between the parties to the arbitration to the knowledge of ONGC. As such, any attempt by ONGC to constitute a separate enquiry conducted by your good self to enquire into and decide on a parallel basis matters that are sub judice in the arbitration would amount to a blatant attempt to overreach the arbitral tribunal. We further deny that Sarku is liable to be blacklisted or incur punishment of blacklisting by reason of its performance in the subject contract, nor can such blacklisting be done on the basis of matters that are sub judice as has been explained above. Although ONGC is actively participating in the arbitration and is in possession of the entire arbitral record, for your convenience and to appreciate that the matters are sub judice we hereby enclose the following documents which are part of the record before the arbitral tribunal.

We would like to reiterate and make it clear that we have not commented on the merits of the allegations made in the SCN as the very issue of delay, being the basis of issuing the SCN, is sub judice before the arbitral tribunal and therefore reserve all our rights in this regard as well."

38. The perusal of the last para of the reply to the Show Cause Notice (Exhibit "BB"), therefore, makes it abundantly clear that the Petitioner has reserved all its legal rights in this regard in view of the matter being *sub judice* before the Arbitration Tribunal. Thus, it is clear that the Petitioner has not given reply to the allegations made in the show cause notice on

merits, but reserved all its legal rights on that score. It, therefore, automatically follows that when Respondent No.2 decided to proceed with the impugned action on the basis of the said notice, despite the issue being pending for adjudication before the Arbitration Tribunal, which contention was raised by the Petitioner, but decided to be rejected by Respondent No.2, then, it was incumbent on the part of the Respondent No.2 to make the Petitioner aware of the said fact and to call upon the Petitioner to reply on merits also. That would have been the proper course of following the principles of natural justice i.e. giving an opportunity of showing the real cause and also a personal hearing to the Petitioner. Instead of doing so, Respondent No.2 chose to proceed with the further action on the said show cause notice. Respondent No.2 did not thereafter even called upon the Petitioner to appear in person and to show cause as to why the Petitioner should not be banned from future business dealings with Respondent No.2 and after one and a half year, proceeded to pass the impugned order, which is having the drastic consequences on the business dealings of the Petitioner, affecting not only its reputation, but also affecting the Petitioner's right to carry on business. It is fairly well settled position of law, as laid down in series of decisions of the Apex Court, one of which relied upon by the learned Senior Counsel for the Petitioner, namely, that of *Kulja Industries Limited (supra)*, that the

touchstone for judicial review of administrative action is fairness, relevance, natural justice, non-discrimination, equality and proportionality. On this touchstone the impugned action of the Respondent No.2 cannot be upheld. In the facts of the present case, it cannot be said that the Respondent No.2 has acted in fairness and followed the principles of natural justice of giving an opportunity to the Petitioner to show cause as to why it should not be barred from future dealings with Respondent No.2.

39. As to the decision of the Hon'ble Supreme Court, relied upon by learned Senior Counsel for Respondent No.2, that of *Union of India & Anr. Vs. Jesus Sales Corporation*⁷, it deals with totally different law, facts and circumstances. In that case, the issue before the Hon'ble Supreme Court was pertaining to third Proviso to Section 4-M(1) of the Imports and Exports (Control) Act, 1947. The order impugned before the Apex Court was the rejection of the Appellants' request to dispense with the requirement of pre-deposit of the amount of penalty unconditionally or with certain conditions. The condition of oral hearing before passing such order was not precedent or laid down in the section or the proviso. In the light of the said facts, it was held that the appellate authority's order directing appellants to deposit 25% of the penalty was reasonable, though no opportunity of oral hearing was given to the Appellants. It is pertinent to

⁷ (1996) 4 SCC 69

note that even at the time of upholding the order of the appellate authority of not extending the opportunity of oral hearing to the Appellants before passing of the impugned order, the Apex Court was pleased to observe that the discretion, which the quasi-judicial authority is having, cannot be exercised in an unfettered manner. It has to be exercised objectively in a reasonable and rational manner, taking into consideration the relevant facts and circumstances. As to the opportunity of personal hearing, in the context of principles of natural justice, the Apex Court was pleased to observe as follows :-

“5. The High Court has primarily considered the question as to whether denying an opportunity to the appellant to be heard before his prayer to dispense with the deposit of the penalty is rejected, violates and contravenes the principles of natural justice. In that connection, several judgments of this Court have been referred to. It need not be pointed out that under different situations and conditions the requirement of compliance of the principle of natural justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearings have to be afforded to the persons concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the competent authorities who have been vested with powers to dispose of the same. Such authorities which shall be deemed to be quasi-judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events, the quasi-

judicial authorities must hear the appellants or the applicants, as the case may be. When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points raised in the appeal or the applications shall not be held to be invalid merely on the ground that no personal hearing had been afforded. This all the more important in the context of taxation and revenue matters. When an authority has determined a tax liability or has imposed a penalty, then the requirement that before the appeal is heard, such tax or penalty should be deposited cannot be held to be unreasonable as already pointed out above.”

40. Thus, this authority, in the first place, pertains to the revenue and taxation matters and, secondly, even in such matters, the Hon'ble Supreme Court has held that the principles of natural justice cannot be given go-by. It will depend on the facts and circumstances of the particular case; whether the authority has taken into consideration all the facts and circumstances of the case. Hence, even if it is accepted that an opportunity of final hearing, or, personal hearing is not mandatory in each and every case, even then, the fact remains that the impugned order of

the State instrumentality should speak of the reasons for dispensing with such opportunity of oral hearing, or, at-least, the order should speak of the reasons, which can be found to be borne out from the material on record and does not smack of any *mala fides*. It need not be pointed out that under different situations and conditions, the requirement of compliance of the principles of natural justice vary.

41. Here in the case, considering the reply given by the petitioner to show cause notice, reserving all its rights to advance submissions on merits, it was utmost essential to give him an opportunity so that petitioner could have put up its case on merits. However, no such opportunity of hearing was given to the Petitioner. The Petitioner has proceeded on the assumption that its reply to show cause notice was sufficient, considering the contention raised therein that as the matter was *sub judice* before the Arbitration Tribunal, Respondent No.2 should not proceed further with the action and that impression was very well borne out, as no further notice was issued by Respondent No.2 calling upon the Petitioner to give the reply on merits, as Respondent No.2 has decided to overrule its objection.

42. It is also pertinent to note that Respondent No.2 has, in this case, proceeded on the basis of the report of the Enquiry Committee. The appointment of such Enquiry Officer was totally an internal matter of the

administration of Respondent No.2. As stated by the Petitioner, no notice of appointment of such Enquiry Officer or of the proceedings conducted before him was given to the Petitioner. Surprisingly, the copy of such Enquiry Report was also not furnished to the Petitioner. Thus, when the same issue of delay in performance of the contract was subject to adjudication before the Arbitration Tribunal, Respondent No.2 unilaterally proceeded with the appointment of the Enquiry Committee and on acceptance of the report submitted by the Enquiry Officer ex-parte, without notice to the Petitioner, without serving a copy of the Enquiry Report to the Petitioner, proceeded to take impugned action of banning the Petitioner from future dealings with Respondent No.2. Such action, therefore, clearly smacks of arbitrariness and *mala fides*, being in violation of the principles of natural justice and hence in breach of Article 14 of the Constitution.

43. The impugned order is also vulnerable to the attack on the ground that it is devoid of any “reasons” for the authority to come to the conclusion of banning the Petitioner for perpetuity in future business dealings with Respondent No.2. Its perusal reveals that, the order also does not give reasons to reject the objection raised by the Petitioner to the maintainability of such action on the ground that the matter was *sub judice*

before the Arbitration Tribunal. Except for referring to the Enquiry Report, it speaks of no 'reasons' to arrive at its conclusion. The Hon'ble Supreme Court has, in the case of *S.N. Mukherjee Vs. Union of India*⁸, after referring to its various earlier decisions, emphasized on the requirement of recording reasons in the order of quasi-judicial authority as follows :-

“23.

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

⁸ AIR 1990 SC 1984

35. *Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.*

44. Thereafter, in para 38, the Hon'ble Supreme Court was pleased to observe that,

“Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion,

that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities.”

45. This decision of the Hon'ble Supreme Court, rendered in the context of court martial proceedings under the Army Act, 1950, has been consistently followed by the courts in other contexts as well and in particular in the context of orders blacklisting contractors.

46. Thus, “reasons” constitute the soul of any quasi-judicial order. It is a *sine-qua-non* for upholding the validity of such order. In the instant case, perusal of the impugned order passed by Respondent No.2 is sufficient to reveal that no such reasons were recorded, at least they are not discernible from the order. The said order also does not reflect the application of mind. Order is depending solely on the report of the Enquiry Officer, copy of which was not given to the Petitioner. In the last para it states that, *“having carefully considered the findings of the Enquiry Officer and having considered all the facts and circumstances of the case, the Respondent No.2 has decided to stop all future dealings with the Petitioner”*. Which are these facts and circumstances considered by the authority are also not elaborated. As rightly submitted by learned Senior Counsel for the Petitioner, this order is more or less in the nature of only

“summation” of the Enquiry Report. Such “summation” cannot be called as “reasons” in support of the order. It can, at best, be termed as “conclusion”. Apart from this conclusion, which is arrived at on the basis of the Enquiry Report, there is nothing in the order to indicate any supportive reasons. Needless to state that, such order cannot stand the judicial scrutiny. It is trite that when an authority has omitted to give reasons in the impugned order, such deficiency cannot be supplied when the validity of the order is challenged.

47. According to learned Senior Counsel for Respondent No.2, the Courts are expected to be slow to interfere in the matters relating to administrative functions. For this proposition, he has relied on the decision of the *Delhi Development Authority and Anr. Vs. UEE Electricals Engineering (P) Limited and Anr.*⁹, wherein the Apex Court was pleased to hold that, “*in considering challenge to administrative decisions, the Courts will not interfere as if they are sitting in appeal over the decision. Unless the decision is tainted by any vulnerability, such as, lack of fairness in procedure, illegality and irrationality, the Courts should be slow to interfere*”.

48. In our considered opinion, these very observations of the Apex

9 (2004) 11 SCC 213

Court in this decision make it clear that, when there is lack of fairness in procedure, as can be discernible in the instant case, the Courts can definitely interfere. Even if this Court is not sitting in appeal over the administrative decision taken by Respondent No.2, the violation of principles of natural justice and the absence of recording of reasons in arriving at such impugned order, these two grounds, in our considered opinion, are more than sufficient to quash the impugned order, apart from the fact that by taking such decision, Respondent No.2 has scuttled the proceedings pending before the Arbitration Tribunal on the same issues.

49. Learned Senior Counsel for the Petitioner has also challenged the impugned order on the ground that contract does not provide for consequence of banning in the case of delay in its performance. The impugned ban order is, therefore, outside the purview of the terms and conditions of Integrity Pact. It is submitted that, the Integrity Pact, which is at Annexure "F" to the contract, more specifically, Sections 2 and 3 thereunder, provide the conditions under which the successful bidder may be disqualified or debarred from future contracts. Section 2 speaks about the commitments of the Bidder/Contractor to take all necessary measures to prevent corruption. Section 3 then provide that, *"if the bidder has, before the contract award, committed a transgression through a violation*

of Section 2 or in any other form such as to put his reliability or credibility as bidder into question, the Principle is entitled to exclude the Bidder/Contractor from future award process, which may be for a minimum of six months and maximum of three years". It is submitted by learned Senior Counsel for the Petitioner, the ground given in the impugned ban order does not fall within the purview of Section 2 or 3. Hence, on this count also, the ban order is patently illegal, arbitrary and capricious. In support of this submission, reliance is placed on the decision of this Court in the case of *Design Dialogues (India) Pvt. Ltd. Vs. Bharat Petroleum Corporation Ltd.*¹⁰, to which one of us (S.C. Dharmadhikari, J.) was a Member.

50. As against it, learned Senior Counsel for Respondent No.2, by relying upon the decision of the Apex Court in the case of *Patel Engineering Ltd. Vs. Union of India & Anr.*¹¹, has submitted that the authority of the State to blacklist a bidder is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for the said purpose. Therefore, there is no necessity of expressly conferring the power of blacklisting on a particular clause in the contract. Devoid of such clause also, the inherent powers of the State

¹⁰ 2015 SCC Online Bom. 6336

¹¹ (2012) 11 SCC 257

or its instrumentalities to enter into the contract with particular person or class of persons confers it with an authority of blacklisting such contractors. The specific observations of the Apex Court in the case of *Patel Engineering Ltd. (supra)*, in which the Judgment in *Erusian Equipment* case was followed, are as under :-

“15. It follows from the above judgment in Erusian Equipment case that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary – thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors.”

51. Thus, according to learned Senior Counsel for Respondent No.2, the bid document or the integrity pact for that matter can neither confer powers nor can it subtract the powers, which are conferred on the State or its instrumentalities. According to learned Senior Counsel for Respondent No.2, therefore, the integrity pact, on which the Petitioner is placing

reliance, is not determinative of the authority of second Respondent. It is further urged that the bid document or the integrity pact is not a statutory instrument. Therefore, the rules of interpretation, which are applicable to the interpretation of Statutes and statutory instruments, are not applicable to the bid documents. Therefore, failure to mention blacklisting to be one of the probable action for the delay in performance of the contract by itself will not and cannot disable the second Respondent from blacklisting the delinquent bidder, like, the Petitioner. If it is otherwise justified, such power, according to him, in the light of the law laid down by the Apex Court referred here-in-above, is inherent in every person legally capable of entering into the contracts.

52. In our view, though we may concede to the legal position that the power to debar or ban a contractor, is concomitant with the power to enter into the contract and is *de hors* of the terms and conditions of Integrity Pact or bid document, exercise of such power has to be justified in the facts and circumstances of the case. Mere existence of power cannot be a justification for its exercise. The legal limitation is laid down by the Apex Court itself upon exercise of such power, namely, the State is to act fairly and rationally, without in any way, being arbitrary and taking such decision for legitimate purpose. On this touchstone, the facts of the present case

need to be scrutinized.

53. In this case Integrity Pact in the bid document lays down only one stipulation for passing ban order, that too for a limited period of minimum six months and maximum three years. The said stipulation is about the bidder committing a transgression, before contract award, through violation of Section 2, which casts a duty on the bidder to take all measures necessary to prevent corruption.

54. In dealing with similar such situation in the case of *Design Dialogues (India) Pvt. Ltd. (supra)*, wherein the terms of main contract and Integrity Pact did not empower the Respondent to penalize holiday list / blacklist the contractor, it was held by this Court that, *"there being no such stipulation in the main contract, failure of contractor to abide by the terms of contract visits him with distinct consequences, except blacklisting. It was further held that, the power of blacklisting the contractor was not flowing from the contract. The breach of Integrity Pact can only be the basis for blacklisting and, hence, Respondent No.2's action of blacklisting the Petitioner therein does not comply with Article 14 of the Constitution of India."*

55. In this decision, after elaborately dealing with the various sections in

the Integrity Pact, which was signed by both sides, and finding that there was no such stipulation in the distinct agreement of Integrity Pact, enabling the second Respondent to put the contractor on holiday list on its particular default of refusing to enter into contract itself, it was held that, *“The law laid down by the Apex Court in the case of Patel Engineering Ltd. (supra) or in the case of Kulja Industries Ltd. (supra) that the power to blacklist a contractor is inherent and concomitant to the power to award the contract is not of much assistance to the Petitioner.”* It was further held that, *“the legal position, as laid down in the decision of Kulja Industries Ltd. (supra) must be read in the context of para No.17 of its Judgment. It is in the backdrop of that particular situation, the Hon'ble Supreme Court held that the clauses and sub-clauses thereof are not exhaustive of the power of blacklisting, which is inherent in the power to award the contract.”*

56. It was further held that, *“in the present situation, the power of blacklisting is not flowing from the contract. That power could have been exercised only if there was a breach of the Integrity Pact and not for any deficient quality of work or failure to carry out the job to the satisfaction of Respondent No.2. It is in that regard that we find that Respondent No.2's action does not comply with the mandate of Article 14 of the Constitution of India. If there was a power to be invoked only to deal with the situation*

arising out of violation of the Integrity Pact by the contractor, then, in the absence of such a case or allegation, that power cannot be exercised. Having invoked that power not to deal with the situation warranted and provided in the Integrity Pact vitiates the exercise carried out. If that power is not available, then, the impugned order and action can safely be termed as 'arbitrary and untenable in law.'

57. In the instant case also, the Integrity Pact does not contain a specific stipulation enabling the second Respondent to blacklist the Petitioner on the count of the alleged delay in performance of the contract. The Integrity Pact is enabling the second Respondent to blacklist the Petitioner only in the situation contained in Section 2 and 3 of the Pact. In such fact situation, when Respondent No.2 is invoking the power of blacklisting the Petitioner on the cause, which is outside the purview of the Integrity Pact, then, such action of Respondent No.2 vitiates the exercise and the action taken becomes arbitrary and untenable in law, unless Respondent No.2 justifies such action on sound reasoning and solid grounds. Here in the particular facts of the case, Respondent No.2 having failed to do so, we find that exercise of such power does not comply with the mandate of Article 14 of the Constitution of India.

58. We hasten to add that there could be a situation wherein the inherent power of blacklisting or placing the contractor on Holiday-list can be exercised and the stipulations or the terms of the contract may not restrict or fetter exercise of such power. Equally, mere pendency of legal proceedings cannot be a absolute bar for invoking this inherent power or exercising it. However, there have to be strong, independent and overwhelming materials to resort to this power given the drastic consequences that an order of blacklisting has on a contractor. The power to blacklist cannot be resorted to when the grounds for the same are only breach or violation of a term or condition of a particular contract and when legal redress is available to both parties. Else, for every breach or violation, though there are legal modes of redress and which compensate the party like respondent No.2, it would resort to blacklisting and by sometimes abandoning or scuttling the pending legal proceedings. Design Dialogues (supra) must be understood accordingly and after distinguishing the pre-Award terms of a contract with those which bind the parties post a concluded contract is arrived. Hence, no broader or wider controversy is being decided or considered eitherway in the present judgment.

59. This brings us to the alternative aspect of proportionality of the action taken by Respondent No.2 to visit the Petitioner of the

consequences of delay in performance of the contract. By relying on the decision of the Hon'ble Supreme Court in the case of *Coimbatore District Central Cooperative Bank Vs. Coimbatore District Central Cooperative Bank Employees' Association & Anr.*¹², learned Senior Counsel for the Petitioner has submitted that the Indian Legal System has accepted the Doctrine of Proportionality as one of the principles evolved by the Courts to control the possible abuse of discretionary powers by various administrative authorities. It is submitted that if an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, the Court can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to the law is the Doctrine of Proportionality. It was observed in the said decision that, *“Proportionality” is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine or proportionality thus steps in focus true nature of exercise – the elaboration of a rule of permissible priorities.*”

60. Here in the case, it is submitted that under the Doctrine of

12 (2007) 4 SCC 669

Proportionality, it is not only the power but the duty of the writ court to consider whether the penalty imposed or the action taken by the State instrumentality is in proportion to the alleged misconduct on the part of the contractor assuming and without admitting there is any.

61. The learned Senior Counsel for the Petitioner has in this respect placed reliance on the various observations made in the Enquiry Report, on the basis of which the impugned action was taken. It is urged that a very specific question was raised for consideration before the Enquiry Committee as to whether, apart from delay, quality of workmanship or materials were satisfactory during the entire period of contract and it was answered as follows :-

"It is evident from above that the work of revamping 26 Well Platforms was completed satisfactorily, without any issue of job quality and warranty and guarantee, except the delay, and the delay was primarily attributable to the contractor."

62. In further observations it was held that, *"the Petitioner showed their keen interest and commitment in completion of total scope under the contract, which is exhibited by the fact that every time they extended performance bank guarantee, insurance cover and also mobilized their resources each year."* It was further held by the Enquiry Committee that *"the delay on the part of the Petitioner was not intentional."* It is pointed

out that, the Enquiry Committee has, at several places in its report, reiterated that the job was completed satisfactorily and the only cause for recommending impugned action of banning the Petitioner was delay in performance of the contract, which was also held to be not intentional.

63. According to learned Senior Counsel for the Petitioner, the contract itself provided for extension of time. It was also observed by the Enquiry Committee that the nature of the contract was complex and some part of total period of delay was not attributable to the Petitioner, as out of the total delay of 1459 days, the Petitioner was held liable only for the delay of 1377 days.

64. In such fact situation, we find much substance in the submission advanced by learned Senior Counsel for the Petitioner that on the principle of proportionality also, the impugned order displays lack of rationality, reasonableness and non-application of mind.

65. As a result of the above discussion, we find that the impugned order of banning the Petitioner from future business dealings with the second Respondent cannot be sustained. Accordingly, it is quashed and set aside.

66. Rule is made absolute in terms of prayer clause (a). As a result of

the impugned order being set aside, the Petitioner is free to bid for any future contracts of Respondent No.2 and such bids shall be considered and dealt with in accordance with law, uninfluenced by the impugned order.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [S.C. DHARMADHIKARI, J.]