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

% Judgment delivered on: 17th August, 2017

\+ W.P.(C) 6844/2013

M/S. GUPTA BROTHERS (INDIA) ..... Petitioner

versus

GAS AUTHORITY OF INDIA LIMITED & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr. Sanjiv Kakra and Mr. Ishaan Aggarwal, Advocates.

For the Respondents : Mr. Ramji Srinivasan, Sr. Advocate with Ms. Purnima Maheshwari, Mr. Vivek Paul Oriel and Mr. Tushar Bhardwaj, Advocates for GAIL.

Mr. Amit Mahajan and Mr. Sumit Misra, Advocates for Union of India.

CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The petitioner, by the present petition, seeks quashing of order dated 21.10.2013, whereby, the respondent No.1 – Gas Authority of India Ltd. (hereinafter referred to as GAIL) has barred the petitioner from participating in the bidding process of GAIL in future for a period of 10 years. Further, the petitioner seeks a direction to GAIL to permit the petitioner to participate in the bidding process for future tenders and a direction to unblock the vendor's code of the petitioner firm and to release the amount due and payable to the petitioner for work already done in other contracts.

2. The relief with regard to unblocking of the vendor's code and release of the amount due to the petitioner for works executed in other contracts would be dependent on the issue of debarment of the petitioner.

3. On 28.11.2005, a contract was awarded to the petitioner for renovation at Air Training Institute of GAIL. Part of the contract was sub-contracted to M/s. Elgin Electronics. M/s. Elgin Electronics was to *inter alia* supply equipment for public address system. Audio-video equipment was provided by M/s. Elgin Electronics.

4. On 03.08.2006, the contract awarded to the petitioner was completed and a completion certificate was issued to the petitioner by the Engineer-in-charge engaged by GAIL. The entire contract value was Rs.7,41,21,588.00. Out of the said contract value, the work sub-contracted and executed by M/s. Elgin Electronics was to the tune of Rs.1 crore.

5. Post the successful completion of the contract, on 03.08.2006, there were no issues between the petitioner and GAIL.

6. On 05.07.2012, i.e., after a period of nearly six years of the completion of the contract on 03.08.2006, a show cause notice was issued by GAIL to the petitioner contending that a false completion certificate had been issued by the petitioner in favour of M/s. Elgin Electronics to the effect that M/s. Elgin Electronics had executed work in the sum of Rs.1.27 crores as against the actual work executed

of Rs.1 crores. It was contended that the said certificate was submitted by M/s. Elgin Electronics alongwith their bid for a contract with CPWD.

7. It was further contended in the show cause notice that being the main contractor, the petitioner had failed to check and point out fictitious documents submitted by M/s. Elgin Electronics towards supply of audio-visual equipment in the contract which were claimed by the Directorate of Revenue Intelligence to be smuggled goods and for which an investigation was carried out by the Directorate of Revenue Intelligence.

8. It was pointed out in the show cause notice that the petitioner was guilty of abetment of smuggling and other nefarious activities prohibited by law. The petitioner was called upon to show cause as to why action should not be taken for debarment on the above grounds.

9. The show cause notice was duly replied to by the petitioner by reply dated 10.07.2012. It was categorically stated that no certificate was issued to M/s. Elgin Electronics to the effect that they had executed a contract in the sum of Rs.1.27 crores. It was further replied that the investigation conducted by the Directorate of Revenue Intelligence was only qua M/s. Elgin Electronics and that also with regard to smuggling of mobile phones. It was stated that no mobile phone had been used in the contract awarded by GAIL. It was further contended that the authorized representative of the petitioner had joined investigation being conducted by the Directorate of Revenue

Intelligence against M/s. Elgin Electronics and there was no investigation conducted with regard the Petitioner.

10. By order dated 01.08.2013, the petitioner was banned, by GAIL, with immediate effect from participating in the bidding process for any of GAIL's tender in future for period of 10 years.

11. The petitioner impugned the said decision by filing a writ petition being WP(C) 5011/2013 titled ***M/s. Gupta Brothers (India) vs. Gas Authority of India Ltd. & Anr.***

12. On 13.08.2013, in the said writ petition, it was noticed that none of the contentions, advanced by the petitioner, in the reply to the show cause notice were dealt with while passing the order dated 01.08.2013. The case was adjourned to enable counsel for GAIL to take instructions as to whether GAIL was willing to give a fresh hearing to the petitioner and pass a fresh order.

13. Pending the above writ petition, by letter dated 03.09.2013, the reasons for passing the order dated 01.08.2013 were communicated. In the reasons supplied, vide letter dated 03.09.2013, it was stated that in the statement of the Authorized Representative of the petitioner before the Directorate of Revenue Intelligence, he had stated that the retail invoice dated 31.03.2009 (one of the incrementing material seized under the Panchnama) issued by M/s. Elgin Electronics to M/s. Gupta Bros. showing sale of 2948 mobile phones was fabricated and fake and no transaction of any goods or any amount had taken place

between the petitioner and M/s. Elgin Electronics on the basis of the said invoice. Reference was drawn to the statement of Mr. Sumit Gupta of M/s. Elgin Electronics to contend that he had admitted that M/s. Elgin Electronics had supplied imported microphones for Gail project without issuance of proper invoices. It was contended that the said fake and fabricated invoice was used as a smokescreen for supply of illicit imported microphones for the Gail Project without issuance of proper invoices.

14. It was contended that the petitioner had not submitted any evidence to rebut their complicity before the Directorate of Revenue Intelligence or to establish that the audio-visual equipment, supplied to GAIL, were procured illegally.

15. Further, with regard to the certificate for the amount of Rs.1.27 crores, attention was drawn to the statement of Mr. Pranesh Gupta of the petitioner, wherein, he had denied the issuance of the certificate in the sum of Rs.1.27 crores and had stated that only a work of Rs.1 crore was outsourced/subcontracted by the petitioner to M/s. Elgin Electronics. It was thus observed that the petitioner had not disclosed true and correct facts in the reply relating to the certificate.

16. By order dated 19.09.2013, WP(C) 5011/2013 was disposed of and the order dated 01.08.2013 was set aside permitting GAIL to pass a reasoned order after affording an opportunity of hearing to the petitioner.

17. The petitioner was heard on 25.09.2013 and the present impugned order dated 21.10.2013 has been passed.

18. The impugned order dated 21.10.2013, in effect, reiterates the findings and reasons communicated by letter dated 03.09.2013. The impugned order dated 21.10.2013, once again, debars the petitioner for a period of ten years from participating in the bidding process of GAIL in further tenders.

19. Learned counsel for the petitioner contends that the allegations contained in the show cause notice are not substantiated. It is submitted that the alleged completion certificate provided by M/s. Elgin Electronics in the sum of Rs.1.27 crores is fake and fabricated and no such certificate was issued by the petitioner. The alleged certificate is not signed by any officer of the petitioner and does not even bear the stamp and seal of the petitioner. It is further contended that if M/s. Elgin Electronics has forged and fabricated any certificate, they are responsible for the same and not the petitioner. It is contended that nothing has been shown to connect the petitioner with the alleged forged and fabricated certificate.

20. Further, it is contended that the investigation being conducted by the Directorate of Revenue Intelligence was with regard to the conduct of M/s. Elgin Electronics and the petitioner was merely summoned as a witness and no conduct of the petitioner was under investigation. It is further contended that at the time of recording of statement by the Directorate of Revenue Intelligence, the petitioner

was confronted with an invoice dated 31.03.2009 for mobile phones. It is contended that no transaction took place between the petitioner and M/s. Elgin Electronics in the year 2009 and that also for mobile phone. It is contended that the only transaction that the petitioner had with M/s. Elgin Electronics was in the year 2006.

21. Further, it is contended that there was no requirement in the contract between the petitioner and GAIL whereby petitioner was required to furnish any documentation for the equipment used in the execution of the work awarded to the petitioner. It is further submitted that GAIL had duly satisfied itself with regard to the equipment used at the time of the execution of the contract and after the contract was satisfactorily concluded, a completion certificate was duly issued. No objection was raised by GAIL at the time of the execution of the contract. Once GAIL was satisfied about the due execution of the contract, the completion certificate had been issued.

22. It is contended that there is no material to connect the petitioner with any smuggling activity. It is further contended that the investigation was not with regard to any conduct of the petitioner. The investigation further did not relate to the transaction of the year 2006 between the petitioner and M/s. Elgin Electronics and was restricted to the material/equipment seized at the premises of M/s. Elgin Electronics and an invoice for the year 2009.

23. Learned counsel for the petitioner submits that since the petitioner was not allegedly connected with any smuggling activity of

M/s. Elgin Electronics and on successful completion of the work, was issued a completion certificate as far back as in the year 2006, the petitioner could not have been debarred on account of any conduct of M/s. Elgin Electronics. Further, it is submitted that as M/s. Elgin Electronics was one of the registered vendors of GAIL, the contract was sub-contracted to M/s. Elgin Electronics.

24. Per contra, learned senior counsel for GAIL submits that the petitioner has failed to show any tax paid invoice for the equipment supplied by M/s. Elgin Electronics. It is contended that there is no averment that the petitioner has, in its possession, any tax paid invoice of the equipment supplied by M/s. Elgin Electronics. There is also no averment that the petitioner has lost its record and is, thus, not able to produce the same.

25. It is contended that M/s. Elgin Electronics had raised fictitious invoices for mobile phones to cover the sale of illicitly imported mobile phones. The petitioner, it is contended, did not proceed with abundant caution regarding procurement of audio-visual equipment and did not satisfy itself that the goods were legally procured. No document including account books/invoices have been filed to show that the goods were imported or locally procured.

26. Reference was made to the statement of Mr. Sumit Gupta of M/s. Elgin Electronics, recorded by the Directorate of DRI, to contend that he had admitted that the invoice of 2009 was fake and M/s. Elgin Electronics had supplied imported microphones for the Gail Project at

Noida without issuance of proper invoices. It is contended that the Directorate of Revenue Intelligence has concluded that M/s. Elgin Electronics has raised fictitious invoices for mobile phones to cover up the sale of illicit imported microphones.

27. In the counter affidavit, it is candidly admitted that insofar as the issue of the completion certificate of Rs. 1.27 Crores, allegedly issued by the Petitioner to M/s Elgin Electronics, is concerned, the same is *inter se* the petitioner and M/s. Elgin Electronics and the banning order dated 21.10.2013 has not been passed on account of the same.

28. GAIL has, thus, tried to justify the banning order solely based on the issue of the DRI investigation and the findings therein.

29. The show cause notice dated 05.07.2012 reads as under:-

> *"Dear Sir,*
>
> *M/s Gupta Brothers (India), 546-A, First Floor, Hanuman Road, Chirag Delhi-110017 (Registered Office: 232, Jor Bagh, New Delhi-110003) were awarded the job of GTI Renovation against above LOA. The following wrong doings by you have been brought to our notice;*
>
> *1. You have issued a false completion certificate in favour of M/s Elgin, a sub-contractor, by misrepresenting the facts therein that M/s Elgin Electronics had executed a work of Rs. 1.27 Crores which is contrary to the actual work of Rs. 1.00 Crore. The same was used and*

submitted by Elgin Electronics alongwith their bid in bagging contract from CPWD.

This is also corroborate by the fact that, in a statement recorded with Directorate of Revenue Intelligence on 5.7.10, your Shri Pranesh Gupta, partner of M/s Gupta Brothers (India) confirmed that M/s Gupta Brothers (India) had executed a job at GAIL through M/s Elgin for an amount of approximately Rs.1.00 crore and further no other job was sublet to M/s Elgin.

From the above, you have refuted your own completion certificate of Rs. 1.27 crores issued to M/s Elgin.

2. Being the main contractor of the contract, you failed to check and point out fictitious documentation submitted by M/s Elgin towards supply of audio visual equipment in the contract which have been claimed to be smuggled goods, which was investigated by Directorate of Revenue Intelligence. Therefore, you are guilty of abetment of smuggling and other nefarious activities prohibited by the Law, which calls for banning all future business with your firm on permanent basis.

You are requested to furnish reasons in writing as to why action should not be taken against M/s Gupta Brothers (India) to debar you from any future business with GAIL. The reply in this regard may be submitted to this office within 15 days of issue of this letter. It may also be noted that if we do not receive the reply within the above period it shall be presumed that M/s Gupta Brothers (India) has no reply to offer and decision shall be taken in accordance with the provisions of the contract/policy of GAIL."

30. GAIL by the Show Cause Notice raised two issues. First with regard to the issuance of a false completion certificate in favour of M/s Elgin Electronics to the effect that it had executed a work of Rs. 1.27 Crores as against the actual work of Rs. 1.00 Crore. The certificate was used and submitted by Elgin Electronics alongwith their bid in bagging contract from CPWD. It was stated that in a statement recorded with Directorate of Revenue Intelligence on 05.07.2010, Shri Pranesh Gupta, partner of the petitioner confirmed that the petitioner had executed a job at GAIL through M/s Elgin Electronics for an amount of approximately Rs.1.00 crore and further no other job was sublet to M/s Elgin. This, it is contended, refuted the completion certificate of Rs. 1.27 crores issued to M/s Elgin Electronics. The second issue raised was that being the main contractor of the contract, the petitioner failed to check and point out fictitious documentation submitted by M/s Elgin Electronics towards supply of audiovisual equipment in the contract which were claimed to be smuggled goods and which were investigated by Directorate of Revenue Intelligence. It was stated that the petitioner was guilty of abetment of smuggling and other nefarious activities prohibited by the Law.

31. Petitioner by its reply dated 10.07.2012 to the show cause notice stated as under:-

> *"1. I Pranesh Gupta, being the authorized signatory for the works referred in your letter No-GAIL/ND/PROJ/C&P/Civil/GTI-ADM/05-167/Holiday-02 Dated 05/07/12 received on 10/07/12, confirm that I*

have not issued any certificate to M/s Elgin Electronics for the said amount of Rs. 1.27 Crores. And I have no cognizance of the said certificate.

2. I joined the investigation regarding M/s. Elgin Electronics with Directorate of Revenue Intelligence, being a responsible citizen of India. I was told that the matter under investigation of smuggled goods was for mobile phones. I once again confirm that no mobile phones were used for the above referred contracts.

3. We have paid the agencies the entire amount and there are no dues balances to be paid.

4. The matter should be perused with M/s. Elgin Electronics for production of original certificates referred above and a copy of chart sheet filled by the Directorate of Revenue Intelligence indicating the products smuggled. As the undersigned during the investigation by the Directorate of Revenue Intelligence was informed that the matter of smuggled goods was related to only mobile phone handset.

5. We once again reiterate the mobile phone as mentioned in the charge sheet were not used in the above stated to works executed by M/s Gupta Bros. (India) for which the undersigned is authorized signatory.

6. We vehemently, deny the baseless allegations which are not based on the facts. We request that before any further frivolous and baseless allegations are made against M/s Gupta Bros. (India) or the undersigned the matter may be independently investigated by authorized representative of GAIL India Ltd. And the facts and documents may be collected."

32. The petitioner in their reply denied having issued any completion certificate to M/s Elgin Electronics for the amount of Rs.

1.27 Crores. Further, it is stated that the petitioner joined investigation regarding M/s. Elgin Electronics with Directorate of Revenue Intelligence. Further, it is contended that the petitioner was informed that the matter under investigation of smuggled goods was for mobile phones and no mobile phones were used for the referred contracts.

33. GAIL by the impugned order dated 21.10.2013 have debarred the petitioner for a period of 10 years from participation in the bidding process for any of GAIL's tender in future and further directed that there will be no further business dealing with the petitioner, M/s. Gupta Bros.(India), for a period of 10 years from the date of issuance of the said letter.

34. The impugned debarment order dated 21.10.2013 reads as under:-

> *"Dear Sir(s),*
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> *This has reference to your letter dated 10.07.2012 submitted in response to show cause notice dated 05.07.2012 issued by GAIL and all subsequent development resting with your letter dated 05.10.2013 (received in GAIL on 09.10.2013). We have considered your written submission dated 05.10.2013 and we do not agree with the submissions so made by you thereunder as same has no merits for the following reasons:*
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> *1) With reference to our show cause notice dtd. 05/07/2012, you have not responded in your reply dtd. 05/10/2013 to our allegations w.r.t failure on your part to check and point out fictitious documentation submitted by M/s. Elgin Electronics towards supply of audio visual equipment which*

have been claimed to be smuggled goods as investigated by DRI in the statement of Sh. Pranesh Gupta of M/s. Gupta Bros.(India) recorded on 16/06/2010 by DRI, he was confronted with the retail invoice no.1510 dtd.31/03/2009 (one of the incriminating material seized under the panchnama) issued by M/s. Elgin Electronics to M/s. Gupta Bros.(India) showing sale of 2948 mobile phones valued at Rs.63,25,305/- and also the statement of Sh. Sumit Gupta of M/s. Elgin Electronics recorded on 21/08/2009 u/s 108 of Customs Act, 1962. The said Sh. Pranesh Gupta acknowledged in his statement that the said invoice was fabricated and fake and no transaction of any goods or any amount had taken place between M/s. Gupta Bros.(India) and M/s. Elgin Electronics on the basis of aforesaid invoice and the amount of Rs.1 Crore was paid to M/s. Elgin Electronics against the contract for installation of audio visual systems related to GAIL project. Further, in the statement of Sh. Sumit Gupta of M/s. Elgin Electronics recorded on 21.08.2009 (RUD-12) in continuation of his earlier statement -15.07.2009 by DRI wherein he admitted that the said invoice was fake and they had supplied imported microphones for GAIL project at Noida on account of M/s. Gupta Bros.(India) without issuing proper invoices. In view of the aforesaid admitted statements your contention that M/s. Elgin Electronics stated in their reply to their show cause that M/s. Elgin Electronics purchased the same from the local market with tax paid invoices appears to be contrary and therefore could not be accepted.

2) *Further, in pursuance of Hon'ble Court order dtd.19.09.2013, a hearing was held on 25.09.2013 at GAIL's Corporate Office at New Delhi wherein*

besides other discussions, you were asked to show/submit bills raised by M/s. Elgin Electronics on M/s. Gupta Bros. (India) towards the supply of audio visual equipment. But ever after this opportunity, you have not given any documents and thus it indicates that you shared common knowledge with M/s. Elgin Electronics w.r.t fictitious documentation for said audio visual equipment. From this it is evident that the said invoice was fake and fabricated and the said invoice was used as a smokescreen for supply of illicit imported microphones for GAIL project at Noida and therefore illegally imported microphones were supplied to GAIL without issuing proper invoices in this regard. It is further established that no transaction relating to any mobile phones ever took place between M/s. Elgin Electronics and M/s. Gupta Bros. (India) and illegally said microphones were supplied to GAIL. Further, you have not submitted any evidence to rebut your complicity before DRI on aforesaid issue to otherwise establish that the audio visual equipment supplied to GAIL were procured legally. You have avoided replying specifically regarding the findings of DRI. Further, in absence of any evidence and satisfactory reply on aforesaid aspect in spite of GAIL's speaking communication dated 03.09.2013 and deliberation in the hearing dated 25.09.2013 and also in subsequent written submission dtd.05.1013, your complicity in the entire transaction is made out. You have not given any documents in support of your reply/contentions and thus it indicates that you shared common knowledge with M/s. Elgin Electronics w.r.t fictitious documentation for said audio visual equipment. You concealed the fact of supply of illicit imported microphones for GAIL *project at Noida and thus you deceived GAIL and therefore committee fraudulent act.*

3) *Without prejudice to above, please also note that M/s. Elgin Electronics has admitted before DRI that they had supplied imported microphones for GAIL project at Noida on account of M/s. Gupta Bros. (India) without issuing proper invoices. It was obligatory on your part to check and verify that the said goods supplied to GAIL by M/s. Elgin Electronics has been procured by them legally. You raised the bill/invoice on GAIL for the supply of said audio visual equipment. M/s. Elgin Electronics was acting for and behalf of you and any fraudulent act or misrepresentation committed by M/s. Elgin Electronics in course of your business has an effect of such fraudulent act or misrepresentation committed by you.*

4) *Further, being main contractor you have failed to fulfill your obligation in terms of clause no.37.1(iii) of GCC of contract document to prevent the act of tax evasion made by your sub-contractor M/s. Elgin Electronics as established by DRI in their investigation report.*

5) *Please note that GAIL which is a public sector undertaking cannot do business with a party which is involved in supply of illicit imported microphones to GAIL. GAIL has lost the confidence reposed in M/s. Gupta Bros.(India).*

In view of the above, your written submission dtd.05.10.13 has no merits. You are thus guilty of fraudulent acts in supply of smuggled goods to GAIL. GAIL(India) Limited has decided to ban M/s. Gupta Bros.(India) with immediate effect from participation in the bidding process for any of GAIL's tender in future *due to involvement in the fraudulent activities in execution of the contract against LOA no.GAIL/C-167/5600000189/HSB dated 28.11.2005 for the job of renovation of GTI, Noida.*

Consequently, M/s. Gupta Bros.(India) are barred from participation in the bidding process for any of GAIL's tender in future and there will be no further business dealing with M/s. Gupta Bros.(India) for a period of 10 years from the date of issuance of this letter. The decision to ban you could be reviewed based on your request after expiry of 10 years of banning.

This is for your information and record."

35. The impugned order has been passed on the grounds that the petitioner has not responded to the allegation of failure on the part of the petitioner to check and point out fictitious documentation submitted by M/s. Elgin Electronics towards supply of audio visual equipment. The said audio visual equipment was claimed to be smuggled goods and this was investigated by Directorate of Revenue Intelligence. Further the retail invoice dated 31.03.2009 was fabricated and fake and no transaction of any goods or any amount had taken place between M/s. Gupta Bros.(India) and M/s. Elgin Electronics on the basis of aforesaid invoice . Reference has been made to the statement of Sh. Sumit Gupta of M/s. Elgin Electronics wherein he admitted that the said invoice was fake and they had supplied imported microphones for GAIL project at Noida on account of M/s. Gupta Bros.(India) without issuing proper invoices. The petitioner has failed to show/submit bills raised by M/s. Elgin

Electronics on M/s. Gupta Bros. (India) towards the supply of audio visual equipment.

36. In the Counter Affidavit GAIL has contended that the debarment is not because of the completion certificate issued and is only because of the Directorate of Revenue Intelligence proceedings.

37. It would be expedient to examine the order of the Directorate of Revenue Intelligence, which has been relied upon by GAIL for the purposes of debarring the petitioner.

38. The order of the Directorate of Revenue Intelligence dated 04.08.2011, relied on by the petitioner, *inter alia*, records as under:-

> *"3. During search operations, documents, computers and laptops etc, relevant to the investigations were resumed. <u>The goods imported by M/s Elgin Electronics</u> and lying at the godown premises at.70, Daryaganj New Delhi-2,74, Daryaganj, New Delhi-2 and 1683/2, J.H. Building, Bhagirath Place, Dclhi-6 <u>were detained under separate Panchnama all dated 13.07.2009 and handed over for safe custody under Supurdginama dated 13.07.2009</u>.*
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> ***** ***** *****
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> *5. <u>The goods detained vide three panchnamas, all dated 13,07.2009</u>, as detailed in Para No. 3 above, <u>were later on seized vide three separate seizure memos, all dated 05.01.2010, on the reasonable belief that the goods had been imported without payment of customs duty and were thus liable for confiscation</u> under Section 111 of the Customs Act, 1962.*
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> ***** ***** *****

7. Shri Sumit Gupta S/o Shri S.C. Gupta, Proprietor, M/s. Elgin Electronics in his statements dated 15.07.2009 & 21.08.2009 , recorded under Section 108 of the Customs Act, 1962, interalia, stated that he was fully satisfied with the contents of panchnama proceedings held on 13.07.2009 at his residence and office premises; that his firm dealt in the business of sale, supply and installation, of Audio Visual Equipments for stadium, halls, conference rooms etc. by way of tenders apart from the sale of these goods on retail basis; that their major customers were Vigyan Bhavan, NTPC, GAIL etc. and they are importing the goods from the companies like DIS based in Denmark, Rane based in USA and Yamaha based in Japan. He also promised to produce the Bills / Invoices / Bill of Entries in respect of the goods detained at the said premises; that his father, Sh. Suresh Chand Gupta was proprietor of M/s Elgin Electronics; that he was looking after all day to day work as a manager of this firm and was engaged in entire operation undertaken by the firm but his father was signing authority in banks etc, that his firm purchased foreign make (Shure brand) Amplifiers, Mikes and Sound processors etc., from M/s. Sun Infonet Pvt. Ltd., Delhi; that his firm directly imported these goods from M/s DIS, M/s Rane and M/s Yamaha and the rest of the imported products ware purchased from the local suppliers like Sun Infonet, Hitch-Audio, Yamaha India etc.; that his firm had never dealt with any other items other than PA systems. <u>He was confronted with one of the incriminating documents at page no. 19 of file No, 4 resumed from the premises at 70, Daryaganj, Delhi-6 under panchnama dated 13,07.2009. The said document related to a retail invoice No. 1510 dated 31.03.2009 issued by Elgin Electronics to Gupta Bros. (India), 546-A, 1st Floor, Chirag Delhi, New Delhi-. 17 showing sale of 2948 pcs of Mobile phones valued at Rs, 63,25,305. Shri Sumit Gupta admitted that the invoice was fake and they had supplied imported</u>

microphones for the GAIL Project in Noida on account of Gupta Bros. without issuing, proper invoices. It thus appeared that M/s Elgin Electronics had raised fictitious invoices (for mobile phones) to cover the sale, of illicitly imported microphones.

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10. Shri Pranesh Gupta, Partner of M/s Gupta Bros. (India), in his statement dated 16.06.2010, inter-alia, stated that in the year 2005-06, his firm executed a project work of GAIL for total amount of Rs. 7.46 crores out of which the work pertaining to Audio Visual Systems (for approx. Rs, 1 crore) was outsourced / sub-c6ntracted to M/s/ Elgin Electronics. Apart from this sub-contract, they had never done any other project with M/s Elgin Electronics or Shri Sumit Gupta and also they had never purchased any item including electronics or mobiles from them. He categorically stated that his firm had never paid any amount except for the audio visual systems installed in connection with GAIL project. He was confronted with a retail invoice No. 1510 dated 31.03.2009 (one of the incriminating documents at page no. 19 of file No. 4 resumed from the premises at 70, Daryaganj, Delhi-6 under panchnama dated 13.07.2009) issued by M/s Elgin Electronics to Gupta Bros. (India), 546-A, Ist Floor, Chirag Delhi, New Delhi-17 showing sale of 2948 pcs of Mobile phones valued at Rs.63,25,305/- and the statement dated 21.08.2009 of Shri Sumit Gupta recorded under Section 108 of Customs Act, 1962. Shri Pranesh Gupta acknowledged in his statement that the impugned retail invoice was fabricated & fake and no transaction of any goods or any amount had taken place between M/s. Gupta Bros. (India) and M/s.Elgin. Electronics on the basis of the aforesaid invoice. The payment of approx. Rs.1 crore made by his firm to M/s. Elgin Electronics was against the contract for installation of Audio Visual Systems related to the GAIL project.

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15. Therefore, (a) Sh. Suresh C hand Gupta, Proprietor, M/s. Elgin Electronics,1683/2, J,K. Building, Bhagirath Place, DeIhi-6 and, (b) Sh. Sumit Gupta, Manager of M/s Elgin Electronics, 1683/2, J.H Building, Bhagirath Place, Delhi-6 <u>were called upon to show cause as to why</u>

(i) <u>The P A Systems & Parts and others goods</u> collectively valued at Rs. 77,16,288/- <u>seized under Seizure Memos all dated 05.01.2010</u>, which were smuggled into India with an intention to evade payment of Customs duty <u>should not be confiscated</u> under Section 111(a), (b), (d) and (1) of the Customs Act, 1962,

(ii) Penalty should not be imposed upon them.

(underlining supplied)

39. The discussion and finding as recorded in the order of Directorate of Revenue Intelligence reads as under:

"<u>Discussion and Findings</u>

27. I have gone through the facts of this case on record including the Show Cause Notice, the defence replies and cross-examination of the witnesses. In this case the <u>DRI has seized certain imported goods viz. Public Address Systems and parts etc as detailed in the panchnamas on the grounds that the same had been smuggled into India and after Investigation a Show Cause Notice was issued to the Noticees proposing the confiscation of the seized goods and imposition of penalty</u>.

28. <u>The main allegation in the Show Cause Notice is that the seized goods had been imported into India</u>

without payment of customs duty and without the cover of valid duty paying documents and were thus the smuggled goods liable to confiscation under the Customs Act, 1962. The notices had failed to establish before the investigating officers that the goods under seizure had been imported legally in as much as they were unable to produce the documents evidencing the illicit import of the said goods in spite of several opportunities provided to them. The documents submitted by the noticee in support of their claim of lawful procurement of the goods through legal channels were scrutinized by the DRI Officers. The goods correlating with the imports made by M/s Elgin electronics under Bills of Entry were excluded and were not taken into account for the purpose of Show Cause None. The bills/invoices showing procurement from local supplier were verified from their source of origin and the results were as follows:-

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In view of the forgoing discussion and findings, I find no merit in the arguments given by the noticees.

In view of the forgoing discussion & findings, I pass the following order.

ORDER

a) I order confiscation of the said PA Systems and parts and other goods seized under panchnamas dated 05.01.10 and collectively valued at Rupees 77,16,288/- under See 111(a), (b),(d) and (I) of the Customs Act, 1962, However, I allow the redemption of the same to Suresh Chand Gupta, proprietor, M/s Elgin Electronics, on payment of Rs.20,00,000/-(Twenty Lacs only) under Section 125 of the Customs Act; 1962 ,

b) I impose penalty of Rs. 2,00,000/-(Rupees Two Lacs only) on Shri Suresh Chand Gupta, proprietor, M/s

Elgin Electronics, under Section 112(b)(ii) of the Customs Act,1962.

c) I impose penalty of Rs. 2,00,000/-(Rupees Two Lacs only) on Shri Sumit Gupta, Manager, M/s Elgin Electronics, under Section 112(b)(ii) of the Customs Act, 1962.

40. The proceedings and order of Directorate of Revenue Intelligence that has formed the very basis of the impugned order dated 21.10.2013 leading to the banning of the Petitioner is based on the goods imported by M/s Elgin Electronics, which were detained under Panchnama dated 13.07.2009. The Proceedings were undertaken on the reasonable belief that the said goods had been imported without payment of customs duty and were thus liable for confiscation under Section 111 of the Customs Act, 1962.

41. The investigation and proceedings were conducted qua the goods that had been detained. The invoice dated 31.03.2009 which created a link between the petitioner and detained goods was admitted by M/s Elgin Electronics to be a fabricated and fictitious invoice. It had come out in evidence recorded by Directorate of Revenue Intelligence that no transaction of any goods or any amount had taken place between the petitioner and M/s. Elgin Electronics on the basis of the aforesaid invoice. The goods detained under Panchnama dated 13.07.2019 were thereafter directed to be confiscated and penalty imposed.

42. The entire proceedings of the Directorate of Revenue Intelligence were with regard to the goods that had been detained under the Panchnama dated 13.07.2019. No enquiry or proceedings were conducted by Directorate of Revenue Intelligence with regard to the equipment supplied by M/s Elgin Electronics to the Petitioner for the project of GAIL. The goods supplied by M/s. Elgin Electronics for the project of GAIL were not subject matter of any enquiry. No action has been taken by Directorate of Revenue Intelligence with regard to the said goods. The fabricated invoice that was recovered from M/s Elgin Electronics connecting the petitioner to M/s Elgin Electronics was not with regard to the equipment supplied to GAIL. No penalty proceedings were initiated by Directorate of Revenue Intelligence with regard to the equipment supplied by petitioner for the project of GAIL or on the basis of the said Invoice.

43. The work contract awarded by GAIL to the petitioner was successfully completed in the year 2006 and a completion certificate of successful completion was issued to the petitioner on 03.08.2006. The impugned show cause notice was issued by GAIL after nearly six years of the completion of the contract.

44. The show cause notice dated 09.07.2012 and the consequent banning order dated 21.10.2013 are based solely on the proceedings of Directorate of Revenue Intelligence.

45. As noticed above, the proceedings of Directorate of Revenue Intelligence were not concerning the equipment supplied for the GAIL

project but were with regard to the goods detained in the year 2010. The equipment supplied for GAIL project was never made subject matter of any proceedings by Directorate of Revenue Intelligence.

46. The very foundation of the Show Cause Notice, that the petitioner failed to check and point out fictitious documentation submitted by M/s Elgin towards supply of audio visual equipment in the contract, which have been claimed to be smuggled goods, which was investigated by Directorate of Revenue Intelligence and thus the petitioner is guilty of abetment of smuggling and other nefarious activities prohibited by the Law, does not exist.

47. GAIL has not referred to any documentation that was submitted by the Petitioner or M/s Elgin Electronics to GAIL, at the time of execution of the work, which has been found to be fictitious. There was no investigation done by Directorate of Revenue Intelligence with regard to the equipment used for the project of GAIL. There is no finding that the equipment used for the GAIL project is smuggled or that the petitioner is guilty of abetment of smuggling and other nefarious activities prohibited by the Law.

48. The justification given on behalf of GAIL for the impugned banning order, that the petitioner is liable to be banned as the Petitioner has failed to produce the Tax Paid invoices or explain their absence is not sustainable.

49. GAIL has failed to show that there was any requirement for the petitioner to have produced the tax paid invoices at the time of execution of the work and if so, then why was a completion certificate issued in the year 2006, certifying the successful completion of the work. The fact that GAIL has issued the completion certificate shows that GAIL was satisfied that all was in order and the contract has been completed to their satisfaction as per its terms and conditions.

50. Having accepted the successful completion of the contract, GAIL cannot seek to reopen the same and impose an obligation on the petitioner to now produce documents in support of the equipment purchased and used in the contract. More so, when there were no issues for nearly six years from the date of acceptance of successful completion of the contract.

51. *With Banning/blacklisting, many civil and/or evil consequences follow. It is as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has*

been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation. The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.[1]

52. Since the very foundation of the Show Cause Notice and the banning order does not exist, the impugned order dated 21.10.2013 cannot be sustained. The same is accordingly quashed. With the quashing of the impugned order dated 21.10.2013, the petitioner shall be entitled to all consequential benefits of participation in future tenders, unblocking of vendor code and release of all pending payments that had been denied and/or withheld on account of the impugned order.

53. The Writ Petition is allowed in the above terms. No orders as to costs.

SANJEEV SACHDEVA, J

August 17, 2017
St/HJ

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1 ***GORKHA SECURITIES SERVICES VERSUS GOVT. (NCT OF DELHI)*** *(2014) 9 SCC l05*