

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.08.2017

+ **W.P.(C) 3326/2017 and CM No. 14535/2017**

L N MALVIYA INFRA PROJECTS PVT LTD

.....Petitioner

Versus

**NATIONAL HIGHWAYS AUTHORITY OF
INDIA AND ANR**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Vikas Singh, Senior Advocate with
Ms Nandadevi Deka and Mr Kapish Seth.
For the Respondents : Ms Gunjan Sinha Jain and Mr Mukesh
Kumar, Advocates for R-1.
Ms Mani Gupta, Mr Rajat Kumar and
Ms Aishwarya Nabh, Advocates for R-2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioner (hereafter 'Malviya') has filed the present petition *inter alia* assailing an order dated 28.03.2017 (hereafter 'the impugned order') passed by respondent no.1 (hereafter 'NHAI') debarring Malviya and M.C. Consulting Engineers Pvt. Ltd. (hereafter 'MCC') for three years from directly or indirectly participating in any work with NHAI. The impugned order was based on the recommendations of a three member committee of CGMs of NHAI (hereafter 'the Committee'), submitted on 14.03.2017.

2. The Committee had also considered the issue of imposing punitive measures on Technocrats Advisory Services Pvt. Ltd. (hereafter 'TASPL') and the Committee had unanimously recommended that a warning letter be issued to TASPL. However, no punishment has been imposed on TASPL by the impugned order.

3. The controversy in the present petition stems from the certificates of experience submitted by Malviya, MCC and TASPL with regard to rendering services of an Independent Engineer (hereafter 'IE Services') to Madhya Pradesh Road Development Corporation Ltd. (hereafter 'MPRDC') in respect of four laning of Rewa-MP/UP Border (NH-7) Road Project (hereafter referred to as 'the Rewa-MP Project') on the basis of an agreement dated 12.09.2012. Multiple experience certificates were issued by MPRDC in respect of the IE Services. Whereas all such certificates certified that the work of IE Services in question was carried out by '*M/s M.C. Consulting Engineers Pvt. Ltd. JV M/s L.N. Malviya Infra Projects Pvt. Ltd.*', the certificate issued to Malviya - and furnished by it to NHAI - also indicated the ratio in which the work was carried out by MCC and Malviya: Malviya was stated to have carried out 96% of the works and the balance 4% was attributed to MCC.

4. The business of consultancy in the field of roads, highways and bridges carried out by MCC was demerged under a scheme of arrangement framed under Sections 391 to 394 of the Companies Act, 1956 and such undertaking along with all employees, assets and liabilities was vested in TASPL (resulting/ transferee company). TASPL also bid for the work of IE Services claiming experience of the IE Services rendered to MPRDC in respect of the Rewa-MP Project.

5. NHAI faced with multiple experience certificates for the same work, conducted an enquiry and found that since MPRDC had awarded the work of IE services in relation to the Rewa-MP Project to MCC, the experience certificates furnished by Malviya (claiming experience to the extent of 96%) as well as MCC (claiming the entire experience) amounted to misrepresentation. Malviya had contested the aforesaid allegation. According to Malviya, its representation that it had provided IE Services to MPRDC was correct. Although the Agreement for the Rewa-MP Project was entered into between MPRDC and MCC, the fact of a pre-bidding joint venture (JV) agreement between Malviya and MCC was within the knowledge of MPRDC and accordingly, all payments by MPRDC were also made to the account of the JV between MCC and Malviya. Malviya claimed that the IE Services were, in fact, rendered by it and thus, furnishing of the experience certificate by it, could not by any stretch be held to be misrepresentation.

Factual background

6. Malviya is a consultancy firm *inter alia* providing professional engineering services in projects for infrastructure development in India. It has been appointed by NHAI in several of its projects for construction of highways throughout the country. TASPL is also a concern providing consultancy services in the field of infrastructure development. Malviya and MCC had formed a JV under the name and style: ‘MC Consulting Engineers Pvt. Ltd. JV L.N. Malviya Infra Projects Pvt. Ltd.’ by an agreement dated 09.01.2012 (hereafter ‘the JV Agreement’) to submit common proposal to MPRDC to provide consultancy services pursuant to

the request for the expression of interest issued by the Managing Director, MPRDC.

7. On 28.03.2012, MPRDC issued a tender for the Rewa-MP Project. Mr. L.N Malviya, the principal director of Malviya submitted bid (as a constituted attorney of MCC) pursuant to the notice inviting tender issued by MPRDC. The aforesaid bid was accepted by issuance of the letter of acceptance (LOA) dated 05.09.2012. Thereafter, an agreement dated 12.09.2012 was executed between MPRDC and MCC in respect of the Rewa-MP Project.

8. The terms and conditions of the JV Agreement were subsequently amended by a Memorandum of Understanding (MoU) dated 14.07.2013 wherein, it was mutually agreed that MCC would pay 96% of the receipts related to the projects awarded to Malviya. It is pertinent to note that the MoU dated 14.07.2013 mentioned the Rewa-MP Project as being executed by MCC '*in association*' with Malviya.

9. After the Rewa-MP Project was completed, MCC was demerged and the transferee company/resulting company was TASPL. By the order of this Court, the scheme of demerger became effective from the appointed date of 01.01.2015. And, the consultancy division relating to roads/highways and bridges was taken over by TASPL. However, it is stated that Malviya was not informed about the demerger in violation of the JV agreement and the MoU dated 14.07.2013.

10. In June 2015, NHAI issued a Request for Proposal (RFP) for providing IE Services for Operation and Maintenance of Gorakhpur-Kasia-UP/Bihar Border Section (hereafter '*the Gorakhpur project*'). TASPL/

MCC submitted its bid, claiming the experience in respect of the Rewa-MP Project on the basis of an experience certificate dated 16.02.2015 issued in the name of the JV by MPRDC. The said certificate did not mention the percentage share of Malviya and MCC in the Rewa-MP Project.

11. Thereafter, another certificate dated 01.02.2016 was issued by MPRDC, specifying the respective percentage share of Malviya and MCC. As per the certificate, Malviya's share was certified as 96%. Malviya submitted the said experience certificate dated 01.02.2016 in connection with bids for two of NHAI's projects, namely, four laning of Ring Road/bypass for Nagpur City in Maharashtra and four laning of Barhi-Hazaribagh section. Another certificate dated 08.12.2016 was also issued by MPRDC in respect of the Rewa-MP Project, specifying the respective share in the JV agreement.

12. On account of contrary claims set up by TASPL and Malviya in regard to their respective percentage share in the Rewa-MP Project, NHAI sent a letter dated 29.08.2016 to MPRDC to get the experience certificates (dated 16.02.2015 and 01.02.2016) confirmed along with the share of each firm as per the JV Agreement. MPRDC responded to the aforesaid letter, by a letter dated 15.09.2016; it explained that the LOA in respect of the IE Services for the Rewa-MP Project and the agreement for the said project had been drawn in favour of MCC. However, during the pre-bid meeting for selection of consultant for various projects of MPRDC, it was clarified that in case of bid submitted in association, the associate partner shall be considered as a JV partner. Therefore, based on the clarification provided during the pre-bid meeting and as per terms of the JV Agreement (association) - wherein it was agreed by Malviya and MCC that they would

submit a common proposal - submitted along with the proposal, the Rewa-MP Project was deemed to be a JV between Malviya and MCC and accordingly, experience certificate dated 16.02.2015 was issued in the name of the JV. The said experience certificate had been issued as per the terms of the JV agreement wherein the share of Malviya and MCC was not mentioned. Thereafter, another certificate dated 01.02.2016 was issued by MPRDC based on the terms of the MoU dated 14.07.2013 which provided for the specific share of Malviya and MCC. Accordingly, certificate dated 01.02.2016 specified the share between the respective parties.

13. Subsequent to the above, NHAI issued a show cause notice (SCN) dated 19.12.2016 to Malviya and MCC on account of the discrepancy with respect to their claim in experience.

14. By letter dated 23.12.2016, Malviya explained that the certificate dated 01.02.2016 specified the percentage share of both the parties in the Rewa-MP Project and, accordingly, it claimed 96% share in the said project. However, the certificate dated 16.02.2015 had no mention of the respective shares of the parties and as the Rewa-MP Project had been executed by the JV between MCC and Malviya, therefore, neither Malviya nor MCC can claim 100% experience in the said project. It was also stated that MPRDC disbursed the amounts of bills in the account opened in the name of the JV. In support of its submission, it also annexed a certificate dated 09.12.2016 issued by its Chartered Accountant certifying the payment by MPRDC in the JV account and transfer of 4% of payment received as royalty to MCC.

15. TASPL also sent its reply by letter dated 09.01.2017 stating that on transfer of the consultancy business to TASPL and as per the scheme of

arrangement (demerger), the tender in the Rewa-MP Project stood transferred to it. Further, it was stated that the Rewa-MP Project was executed by MCC and not the JV. In regard to the MoU, TASPL submitted a letter by a director of MCC wherein it was stated that the MoU was an internal arrangement; the MoU does not have the force to convert the project for IE Services into a JV project. Further, it was alleged that few officials of MPRDC in connivance with Malviya had manipulated records to confer benefit on the latter.

16. Based on the replies received by TASPL and Malviya, by an office memorandum (OM) dated 03.02.2017, NHAI decided to refer the matter to a three member committee of CGMs. It was also decided that the bids submitted by Malviya and MCC will not be considered pending the disposal of the matter before the competent authority. By letter dated 06.02.2017, Malviya was afforded an opportunity to present its case before the Committee on 08.02.2017. In its letter dated 08.02.2017, Malviya reiterated its earlier stand.

17. Thereafter, on 09.02.2017, the result of the technical evaluation of the bids submitted for Supervision Consultancy Services in four laning of Nagpur-Hyderabad Section of NH-7 in Maharashtra were published wherein it was stated that the bid submitted by Malviya had not been considered for evaluation as per the decision of the competent authority in terms of which the OM dated 03.02.2017 had been issued.

18. Aggrieved by the aforesaid action, Malviya submitted representations against the same, seeking consideration of its proposal for the above project on the ground that the OM dated 03.02.2017 is limited to the projects under enquiry, that is, the Gorakhpur project and the Nagpur

project. Thereafter, Malviya's bid for another project of NHAI, was also not considered on the basis of the OM dated 03.02.2017.

19. This led Malviya to move this Court by a writ petition (W.P.(C) 1668/2017). The said writ petition was withdrawn with the liberty to file afresh after incorporating additional documents and facts. Thereafter, Malviya filed another writ petition: W.P.(C) 1746/2017. On 07.03.2017, the statement made on behalf of NHAI was recorded to the effect that the financial bids of the Nagpur project will not be opened till clarification is received from the competent authority of NHAI as warranted by the OM dated 03.02.2017. The writ petition was disposed of on 19.04.2017, in view of the challenge raised in the present petition.

20. During the pendency of W.P.(C) 1746/2017, recommendations of the Committee were made on 14.03.2017. In view of the above recommendations, NHAI rejected the proposal submitted by Malviya for six laning of Section NH-3 of the Indore-Dewas Project, by an e-mail dated 24.03.2017. Thereafter, NHAI issued the impugned order dated 28.03.2017 debarring Malviya and MCC from participating directly or indirectly in any work with NHAI for a period of 3 years. Aggrieved by the aforesaid action, Malviya filed a representation dated 01.04.2017, which has apparently, not been considered by NHAI.

Reasoning and Conclusion

21. At the outset, it is necessary to observe that blacklisting or debarring a party from entering into any contract with the State is a serious punitive measure and has far reaching adverse consequences for the party on whom such punishment is imposed. In *Erusian Equipment & Chemicals Ltd v. State*

of West Bengal & Anr: AIR 1975 SC 266, the Supreme Court observed that:-

“The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are “instruments of coercion”.

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Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction."

22. In *Gorkha Security Services v. Govt. (NCT of Delhi) and Others: (2014) 9 SCC 105*, the Supreme Court had observed as under:-

“With blacklisting, many civil and/or evil consequences follow. It is described 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.”

23. This thought was also expressed by this Court in *R.K. Associates v. The Managing Director, IRCTC & Anr.: ILR (2009) Supp.(7) Delhi 1*. Given the serious consequences of such punitive measure, the Courts have in a number of decisions emphasized the standards and relevant factors on the anvil of which the question of imposing the penalty of blacklisting must be evaluated. In *Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL & Ors: AIR 2014 SC 9*, the Supreme Court had summarised the factors which were required to be considered

while imposing punitive measures such as blacklisting and/or excluding a person from participating in contracts awarded by the State. The relevant extract of the said decision is set out below:-

“The guidelines also stipulate the factors that may influence the debarring official’s decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether the contractor has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on the basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(h) Whether the contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.”

24. In the present case, the RFP for appointment of an Independent Engineer issued by NHAI expressly sets out NHAI's policy that consultants observe the highest standards of ethics. Paragraph 1.8 of Section 2 of the RFP document provides that a firm would be declared ineligible if it was determined that the firm had engaged in “*corrupt or fraudulent practices*”. Thus, concededly, the question whether any punitive measure was warranted against Malviya, MCC or TASPL was to be considered by the Committee in terms of Paragraph 1.8 of Section 2 of the RFP document, which is set out below:-

“1.8 It is the NHAI's policy that the consultants observe the highest standard of ethics during the selection and execution of such contracts. In pursuance of this policy, the NHAI:

(a) Defines, for the purpose of this paragraph, the terms set forth below as follows:

(i) "corrupt practice" means the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to

influence the action of a public official in the selection process or in contract execution;

(ii) "fraudulent practice" means a misrepresentation or omission of facts in order to influence a selection process or the execution of a contract;

(iii) "collusive practices" means a scheme or arrangement between two or more consultants with or without the knowledge of the Client, designed to establish prices at artificial, non-competitive levels;

(iv) "coercive practices" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in a procurement process, or affect the execution of a contract.

(b) will reject a proposal for award if it determines that the Consultant recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive or coercive practices in competing for the contract in question;

(c) will declare a firm ineligible, either indefinitely or for a stated period of time, to be awarded a contract if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for, or in executing, a contract; and

(d) will have the right to require that a provision be included requiring consultants to permit the NHAI to inspect their accounts and records relating to the performance of the contract and to have them audited by authorized representatives of NHAI."

25. It is apparent from the above that in order to blacklist Malviya, rendering it ineligible for being awarded any contract for a specified

period, the concerned authority would necessarily has to be satisfied that Malviya was engaged in “*corrupt or fraudulent practices*”. The expression fraudulent practice has a negative connotation. For a representation to constitute a fraudulent practice, it must be (i) untrue; (ii) should have been made callously and/or without belief in its truth; and (iii) it should have been made to influence the selection process or the contract in execution. In the present case, Malviya asserts that it is entitled to 96% of the experience with respect to the Rewa-MP Project and this has been substantiated by Malviya by *prima facie* establishing that (i) it did perform the services as claimed; (ii) it did receive the payment for such services; and (iii) it was a JV partner of MCC and this was disclosed to MPRDC. None of the aforesaid facts have been established to be false or untrue. The only consideration that weighed with the Committee was that the contract for IE Services in relation to the Rewa-MP Project was not entered into by MPRDC with Malviya but with MCC. This by itself, in facts of the present case, is plainly not sufficient to establish that Malviya did not have the experience as it claimed.

26. The controversy as to whether Malviya was guilty of any fraudulent practice or had with *malafide* intentions misrepresented any facts has to be considered objectively in the context of all relevant facts. It is not disputed that the JV Agreement was entered into between Malviya and MCC on 09.01.2012. The said JV Agreement was entered into for the specific purpose of submitting a common proposal pursuant to a request for expression of interest issued by the Managing Director, MPRDC. Thus, admittedly, there was a pre-bid contract, whereby both Malviya and MCC had agreed to execute the works of providing IE Services as a JV.

27. The JV Agreement was not concealed and was provided to MPRDC. Pursuant to a clarification sought by NHAI, the Division Manager, MPRDC had clarified that in a pre-bid meeting, MPRDC had clarified that in case of a bid submitted in association with another entity, the associate partner shall be considered as JV partner. It was further clarified that the copy of the JV Agreement dated 09.01.2012 was annexed to the technical proposal submitted to MPRDC in respect of the Rewa-MP Project. Thus, undisputedly, the JV Agreement is on the records available with MPRDC.

28. It is also admitted that the bid for the aforementioned project of MPRDC was submitted by Mr. L.N. Malviya as a constituted attorney of MCC pursuant to the Power of Attorney (POA) executed by MCC in favour of Mr L.N. Malviya. The contents of the said POA are relevant and are set out below:-

"Be it known that authorized by the resolution of the Board of Directors passed on the meeting dated:- 05.05.2012 to appoint and associate to Mr. L.N. Malviya Director Of M/s L N Malviya Infra Project Pvt. Ltd. Add.-T-10 III Rd Floor City Center Above Vishal Mega Mart Zone-1, M.P. Nagar Bhopal is our associate consultant for Independent Engineer services for Four Laning of Rewa MP/UP Border (NH-7) and authorized representative on behalf of M/s MC Consulting Engineers (P). Ltd. Association LNMIPPL having Corporate office at 145 Mithila Apartment, Plot No. 76, I.P. Extension Pratapganj Delhi to sign all documents and tender document and agreement and all correspondence, meetings to take up and Execute the work of "Independent Engineer services for Four Laning of Rewa MP/UP Border (NH-7) of Nit No. MPRDC/BOT/ROADS/2011/15835 BHOPAL dated 28.03.2012 at out project office-T-10 III Rd Floor City Center Above Vishal Mega Mart, Zone-1, M.P. Nagar

Bhopal Client Madhya Pradesh Road Development Corporation Ltd., Bhopal."

[underlining for emphasis]

29. It is *ex facie* apparent from the above that the POA not only authorized signing of all documents, agreements and correspondence but also to take up and execute the work of "*Independent Engineer services for Four Laning of Rewa MP/UP Border (NH-07)*" Road Project.

30. MPRDC issued an LOA in favour of MCC on 05.09.2012. Thereafter, Malviya and MCC entered into the MoU dated 14.07.2013 in respect of nine different projects that were being executed by Malviya and MCC in association with each other. In terms of the MoU, those projects - which also included the Rewa-MP Project - were to be executed by Malviya with no liability to MCC. Further MCC was also entitled to 4% of the receipts of the projects as royalty. It is relevant to note that the nine projects mentioned in the MoU also included a few projects where NHAI had awarded the work of IE Services to the JV between MCC and Malviya.

31. MCC does not dispute that it was a signatory to the MoU. It is also relevant to mention that NHAI had also issued a certificate of work experience dated 08.11.2016 in respect of IE Services for operation and maintenance of four laning of Lakhnadon-Seoni Section (which was one of the nine projects mentioned in the MoU and was awarded by NHAI to the JV between Malviya and MCC). The relevant extract of the said certificate is set out below:-

"During the Consultancy period the Supervision Control of O&M works in respect of maintenance, removal of encroachment reports, Lane closure report and incident management data by M/s M.C. Consulting Engineers Pvt.

Ltd. in JV with M/s L.N. Malviya Infra Projects Pvt. Ltd. has been carried out to the entire satisfaction of authority with their dedicated efforts.

M/s M.C Consulting Engineers Pvt. Ltd. in JV with M/s L.N. Malviya Infra Projects Pvt. Ltd. have been paid Rs. 2.25 Crore up to 30.09.2016 as consultancy fee towards rendering above services.

The IE vide letter dated 03.11.2016 has submitted Memorandum of Understanding (Amendments) dated 14th July 2013 where in at point no. 25 it has been mentioned that all the receipts related to project awarded in the name of MCCEPL Under JV shall be received in the bank account of MCCEPL at New Delhi and MCCEPL shall after deducting its share of 4% shall remit entire 96% to LN Infra being Project executor. Chartered (sic) Accountant Ankur N Agarwal and Associates, Bhopal vide certificate dated 11.7.2015 has also certified that M/s LNMIPPL has received 96% share of all the payment made by client i.e. NHAI for the subjected Project as per MOU dated 14.07.2013.

The experience certificate is being issued on request of consulting firm for strictly bidding purpose only for the work executed during the completed contract period of 36 months. The contract has been extended for further period of 03 months i.e upto 25.12.2016 by competent Authority NHAI.

We wish them every success on their future projects."

[underlining for emphasis]

32. The MoU dated 14.07.2013 referred to in the above mentioned certificate of experience issued by NHAI is the same document, which also expressly records the agreement between Malviya and MCC on similar terms in respect of the Rewa-MP Project. Although there are some disputes between TASPL/MCC and Malviya regarding the MoU, it is important to note that execution of the aforesaid document is admitted.

33. There is yet another important fact, which although noted by the Committee, seems to have escaped the attention of the Committee while making its recommendations. It is not disputed that MPRDC had made payments for the IE Services to the account of '*M/s M.C. Consulting Engineers Pvt. Ltd. JV M/s L.N. Malviya Infra Projects Pvt. Ltd.*' and also deducted TDS on such interim payments. This, in my view, would be sufficient to *prima facie* establish that in the records of MPRDC, the JV between Malviya and MCC was recognised. The Committee has failed to recognise the necessary implication of this fact.

34. The Committee has proceeded solely on the basis that since MPRDC had awarded the contract for the Rewa-MP Project to MCC, the experience claimed by Malviya was a misrepresentation. The Committee has also concluded that such representation was *malafide*. However, there is no dispute that the certificate of experience as claimed by Malviya was issued by an authorised officer of MPRDC. Further, Malviya asserts the certificate to be correct.

35. There is little doubt about the fact that MPRDC had recognized Malviya as JV partner of MCC. This is plainly established by the fact that payments for the IE Services rendered in relation to the Rewa-MP Project were disbursed to the JV account of Malviya and MCC. The fact that IE Services were performed by Malviya also does not appear to be in dispute. The only case sought to be set up by MCC and TASPL is that the experience for such execution must inure to their benefit as the contract was between MPRDC and MCC. It is also contended that since the services were rendered in terms of the POA issued by MCC, the experience must inure to its benefit and consequently to TASPL. Malviya disputes the

same. Whilst this is a contentious issue, there can be little doubt about the fact that the services, in fact, were rendered by Malviya. The execution of the MoU is admitted. There is also no material to dispute that payments for the IE Services for the Rewa-MP Project were shared by the parties in the ratio as provided in the MoU, that is, 96% by Malviya and 4% by MCC. Whilst one member of the Committee had recommended that Malviya's credentials be reconsidered in the line of NHAI's policy, the other two members of the Committee had recommended that a punitive action be taken against it.

36. A plain reading of the report dated 14.03.2017 submitted by the Committee indicates that it had noted all the relevant facts which *prima facie* establish that Malviya had rendered the IE Services; however, the Committee (by majority) has observed that Malviya "*has claimed 96% of the credentials based on an arrangement outside the purview of the Contract which can better be explained by the top management of MPSRDC only and needs a legal scrutiny. But as far as NHAI is concerned, LNM claimed experience is to be treated as misrepresentation of facts*". The Committee further observed that "*M/s MC Consulting (P) Ltd. & M/s LNM had entered into an agreement which was beyond conditions of the contract, and may be termed as unethical on their part*".

37. This Court finds it difficult to accept the aforesaid findings. It is well settled that in proceedings under Article 226 of the Constitution of India, the Court would not interfere in any administrative action unless it is found that the same is perverse and unreasonable; however, in cases where punitive measure is inflicted, a slightly higher level of scrutiny would be required. Blacklisting an entity has serious adverse consequences; it is not

only the public entity that blacklists an entity which excludes the blacklisted party from entering into contracts with it, but it is also usual for various public entities to disqualify an entity which is blacklisted by any other public entity from participating in any contracts with them. Plainly, the punitive action of debarring an entity is stigmatic.

38. The findings of the Committee must therefore be examined in the context of the effect of its decision. Viewed in this context, the approach of the Committee (by majority) that merely because the JV Agreement was outside the purview of the contract with MPRDC, Malviya's claim for experience was a misrepresentation of fact is, in the given facts, too simplistic and *ex-facie* erroneous. The question whether the arrangement between MCC and Malviya was within the purview of the contract with MPRDC is of little relevance, considering that it is established that MPRDC had accepted the association of Malviya and MCC and had made payments for the services to the JV of MCC and Malviya. As noted above, the terms of arrangement between Malviya and MCC were not concealed, but were fully disclosed to MPRDC, which is the concerned party. The question whether MPRDC should have accepted the work from Malviya and made payments to the JV of MCC and Malviya is not material in the context of determining the representation made by Malviya with respect to its experience, as the substratum of the matter is that Malviya had established that it had done the work in question. NHAI was not concerned with the question whether MPRDC had rightly accepted the work from Malviya.

39. Even if it is assumed, (although this Court finds no reason to do so) that Malviya was not entitled to claim 96% experience with respect to the

Rewa-MP Project, Malviya's representation to the effect could not be termed as fraudulent since there is no material whatsoever to indicate that it was made without belief in its truth. An allegation of fraud is a serious one and must be established with some certainty before any punishment on that count is imposed.

40. This Court also finds it difficult to reconcile NHAI's approach with respect to Malviya with its approach in case of TASPL. TASPL was the transferee/resulting company and claims the experience of MCC as its own by virtue of owning MCC's undertaking relating to IE Services. A perusal of the scheme of arrangement expressly indicates that the demerger was in terms of Section 2(19AA) of the Income Tax Act, 1961 along with Sections 391 to 394 of the Companies Act, 1956. The concerned undertaking was hived of lock, stock and barrel, including the employees, the assets and the liabilities pertaining to the said undertaking.

41. It is relevant to refer to Section 2(19AA) of the Income Tax Act, 1961, which defines "demerger" as under:-

"(19AA) "demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956 (1 of 1956), by a demerged company of its one or more undertakings to any resulting company in such a manner that—

- (i) all the property of the undertaking, being transferred by demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger;

- (ii) all the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;
- (iii) the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger;
- (iv) the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis [except where the resulting company itself is a shareholder of the demerged company];
- (v) the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger, otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company;
- (vi) the transfer of the undertaking is on a going concern basis;
- (vii) the demerger is in accordance with the conditions, if any, notified under sub-section (5) of section 72A by the Central Government in this behalf.”

42. Thus, TASPL could not have possibly claimed any experience relating to the IE Services, which was different from MCC's experience. It is apparent from the above that the entire undertaking of MCC was hived off but the controlling interests in the said business remained almost the same since in terms of the scheme, the shareholders of MCC, holding not less than 3/4th of the shareholding in value also became shareholders of TASPL (in terms of Section 2 (19AA)(v) of the Income Tax Act, 1961).

43. Given the said position, it is difficult to understand how TASPL's representation that it was entitled to claim the credentials for the experience of IE Services that were neither performed by TASPL nor by MCC could be sustained. It appears that the Committee had proceeded on the basis that TASPL is an independent entity and had relied upon MCC's representation for claiming such experience. However, it is apparent that the nature of the demerger, which resulted in MCC's undertaking being hived off to TASPL, has escaped the attention of the Committee. The Committee, perhaps, failed to take into account the implication that TASPL's undertaking (erstwhile MCC's undertaking) continued to be same, both at the operational level (the employees being the same) as well as at the overall control level (the shareholders' level). Thus it is difficult to accept the contention that TASPL claimed its experience based on the representation of MCC.

44. Having stated the above, this Court is not called upon to finally decide as to whether the findings of the Committee and the decision of the NHAI with regard to TASPL and MCC are warranted or not. The examination in the present petition is limited to the decision of NHAI to debar Malviya.

45. It has been pointed out that MPRDC has also initiated punitive action against Malviya. The allegation against Malviya appears to be that it had misused the POA and attempted to show Malviya as a JV partner of MCC. The learned Senior Counsel appearing for Malviya had contended that the issuance of the said order by MPRDC had been prompted by the action taken by NHAI and is wholly unsustainable as all relevant documents were admittedly available with MPRDC and MPRDC, recognising the association between Malviya and MCC, had made payments to the JV account. This Court is refraining from making any observations in that regard. Firstly, for the reason that this is not a subject matter of the present petition; secondly, MPRDC would be a necessary party for adjudication of any such dispute; and thirdly, this controversy is a subject matter of a writ petition pending before the High Court of Madhya Pradesh at Jabalpur (W.P. 10373/2017). This Court is informed that certain interim orders have also been passed by the High Court of Madhya Pradesh restraining MPRDC from rejecting any tender of Malviya on the ground of Malviya being blacklisted.

46. In view of the above, the impugned order is set aside insofar as it relates to Malviya. The petition is allowed. The pending application also stands disposed of.

47. The parties are left to bear their own costs.

VIBHU BAKHRU, J

AUGUST 08, 2017
RK/pkv