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

+ **W.P.(C) 7474/2015 & CM No. 13798/2015**

**ROSHNI ENTERPRISES THROUGH ITS
PROPRIETOR**

..... Petitioner

Through: Mr Amit Sibal, Senior Advocate with
Mr Arvind Kumar Sharma,
Advocates.

versus

**DIRECTOR GENERAL OF SUPPLY AND
TRANSPORT & ORS.**

..... Respondents

Through: Mr Anurag Ahluwalia, CGSC for R-1
to 3/UOI alongwith Capt. Juhi
Sharma from the Department.

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER
26.07.2017**

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VIBHU BAKHRU, J

1. This case has a chequered history and this petition is, in fact, the fourth round of litigation concerning petitioner's application dated 30.11.2006 for re-verification of Roshni Enterprises' status as a registered ASC Contractor with the respondents.

2. Smt. Roshni Devi (petitioner), widow of late Sh. D.P.S. Sangwan, is the proprietor of Roshni Enterprises (hereafter 'the petitioner's concern'). The petitioner made an application dated 28.11.1995 for registration of the petitioner's concern as an approved ASC Contractor which was granted on 19.12.1996. The said concern was once again registered as an approved

contractor on 07.01.2002, after re-verification, and this registration was valid up to 06.01.2007.

3. The petitioner applied for re-verification for maintaining the concern's registration as an ASC contractor for a further period, on 30.11.2006. It is not necessary to narrate in detail the course of events that followed, it is sufficient to note that the petitioner's application for re-verification was not processed which led the petitioner to file a petition in this Court. The respondents did not grant further registration (complete the re-verification) and aggrieved by this action of the respondents, the petitioner filed a writ petition (being W.P.(C) no. 9529/2007) *inter alia* seeking a direction to the respondents to complete the re-verification at an early date. The said writ petition was heard on 26.02.2008 and this Court directed the respondents to complete the re-verification within a period of one week. In compliance with the aforesaid order dated 26.02.2008, respondent no.2 passed an order dated 04.03.2008 rejecting the petitioner's request for re-verification for several reasons including the reason as set out below:-

"(a) Your firm is an allied firm of M/s. DPS Sangwan and M/s. Sangwan Trading which have been suspended. Since suspension is extendable to allied firms, re-verification of your firm can not be completed."

4. Since, respondents had disposed of the petitioner's request for re-verification by the order dated 04.03.2008, the above mentioned petition (W.P.(C) 9529/2007) was disposed of by this Court with liberty to the petitioner to challenge the said order. Thereafter, the petitioner filed another petition - W.P.(C) 2702/2009 - challenging the order dated 04.03.2008. This petition was disposed of by an order dated 19.05.2009 whereby this Court

set aside the order and issued certain directions. The operative part of the said order reads as under:-

"8. The petitioner is given liberty to file additional documents along with a supporting affidavit with the Respondents within three weeks. In case they reject the Petitioner's request for re-verification, the speaking order will deal with the letter issued by Deputy Commissioner of Police, Special Branch, Delhi dated 10th January 2008 and the letter dated 17th January 2008. They shall also deal with the question of allied firms and the contention of the petitioner. The re-verification application will be disposed of within a period of one month after the petitioner files his affidavit in term of the order passed today. The order dated 4th March, 2008 is set aside. The petitioner will be at liberty to seek redressal of grievance in case of an adverse order".

5. Respondent no. 2 once again rejected the petitioner's request for re-verification by an order dated 26.10.2009. The petitioner's application for re-verification was rejected on the following grounds:-

“(a) Address of your firm i.e M/s Roshini Enterprise (Proprietor Smt Roshni Devi) has been shown as WZ-156, Lajwanti Garden, New Delhi-46 as per Bank Report, PAN Card and Vehicles details reed from Govt of National Capital Territory of Delhi, Transport Department, 5/9 under Hill Road, Delhi-110054. The mentioned address is common to following firms, which have been suspended earlier by Army authorities:-

(i) M/S Sangwan Trading (Proprietor Jai Prakash brother of Smt Roshni Devi).

(ii) M/s. Sangwan Enterprise (Proprietor Deepak Sangwan Son of Smt Roshni Devi).

(b) Your new address WZ-169A/5, Lajwanti Garden, New

Delhi-46 has not been verified by civil authorities.

- (c) During re-verification process, it has emerged that Smt Roshni Devi (Proprietor of M/s Roshni Enterprises) has blood relations with Shri Jai Prakash (Proprietor of M/s Sangwan Trading) and Shri Deepak Sangwan (Proprietor of M/s Sangwan Enterprise). Thus M/s Roshni Enterprise is an allied firm of M/s Sangwan Trading and M/s Sangwan Enterprise and both these firms have been suspended by Army.”

6. The aforementioned order (subsequently amended by order dated 31.10.2009) was impugned by the petitioner by filing another writ petition - the third petition - being W.P.(C) 459/2010.

7. As is apparent from the above, one of the principal reasons for rejection of the petitioner's application for re-verification was that she was related to persons whose proprietorship concerns had been banned / suspended by the Army. Sh. Deepak Sangwan (proprietor of Sangwan Enterprises) is the son of the petitioner and Sh. Jai Prakash (proprietor of M/s Sangwan Trading) was the brother of the petitioner and their firms had been suspended. This Court concluded that merely because the petitioner was related to the persons whose firms were suspended and/or banned from dealing with the Army could not be the reason for denying the petitioner's request for re-verification. Accordingly, this Court set aside the order dated 26.10.2009 (as clarified by the subsequent order dated 31.10.2009) and disposed of the petition by directing respondent no.2 to pass an appropriate order allowing the petitioner's request for re-verification of the petitioner's concern as an ASC Contractor within a period of three weeks.

8. The learned Single Judge had noted that the application for re-

verification was required to be considered in the light of the 'Revised Procedure for Conclusion of ASC contracts for Perishable Items' dated 26.09.2006. Paragraph 29 of the said policy was relevant to the controversy and reads as under:-

"All firms/companies, which come within the sphere of effective influence of the banned/ suspended firms/proprietorship/companies, shall be treated as allied firms. In determining this, the following factors may be taken into consideration:-

- (i) Whether the management is common.
- (ii) Majority interest in the management is held by the partners or directors of banned / suspended firms/companies.
- (iii) Substantial or majority shares are owned by the banned/suspended firms, their directors/shareholders and by virtue of this, it has a controlling voice."

9. The aforesaid policy was further clarified by the respondents by a clarification issued in November 2009. The relevant extract of which reads as under:-

"A firm can be assigned as an allied firm only when the following three factors are present:-

- (a) Whether management is common.
- (b) Majority interest in the management of the new firm is held by partners or directors of banned/ suspended firms.
- (c) Substantial or majority shares of new firm is owned by the banned/suspended firms.

to be just and fair, the authority in whom powers vests has to consider presence of any of the three factors mentioned above to assign a firm as allied firm. The other extraneous consideration like applicant having relatives with persons whose firms have been banned/suspended, the applicant having legally transfer the property of the individual/relations whose firms have been banned/suspended or having common address can not form legal reasons to assign a firm as allied firm because it does not include the three factors mentioned above. The competent authority, if however, still feels that effect to influence exists in spite of the above mentioned three factors not being present, then reasons thereof will have to be clearly mentioned before declaring the firm as allied firm. It would also be appropriate that such reasons be assigned during the course of operation of business based on any action which is detrimental to the interest of the organization rather than based on perception.”

10. This Court considered the aforesaid policy and found that the respondents' decision to reject the petitioner's request for re-verification merely on the ground that the petitioner was related to certain persons whose firms had been suspended, was not sustainable. The operative part of the order 01.06.2011 reads as under:-

"33. The impugned order dated 26th October 2009 as clarified by the subsequent order dated 31st October 2009 is hereby set aside. Respondent No.3 is directed to pass an appropriate order allowing the Petitioner's request for re-verification as an ASC contractor within a period of three weeks from today."

11. The respondents appealed against the aforesaid order to the Division Bench of this Court (in LPA No. 788/2011), which was disposed of by the Division Bench by an order dated 03.10.2011 by clarifying that the

respondents were required to examine the petitioner's application for re-verification keeping in mind the parameters indicated in the policy dated 26.09.2006 and particularly the clarification issued. The Division Bench observed that in the circumstances, it would be necessary for the respondents to examine whether the persons who are related to the petitioner (respondent therein) and whose firms have been banned and suspended, are in a position to exercise influence over the petitioner.

12. Thereafter, the respondents once again passed a detailed order dated 12.05.2014 (which is impugned in the present petition), once again rejecting the petitioner's request for re-verification.

13. Mr Anurag Ahluwalia, learned counsel for the respondents referred to the impugned order and submitted that respondents had found that there were a large number of financial transactions between the petitioner's concern and other proprietary concerns of her relatives; this according to the respondents indicated that the resources of the said concern and the banned / suspended firms were common. He also emphasized that the address of the petitioner's concern and the banned / suspended firms were common and the details of vehicles submitted by the petitioner as a part of her resources were identical to the details submitted by proprietorship concerns of her relatives.

14. Mr Sibal, learned Senior Counsel appearing for the petitioner had contested the findings as recorded in the impugned order. He submitted that petitioner's concern was registered much prior in time to any of the concerns of her relatives and thus, it could not be said that the petitioner was using the resources of other concerns. He also referred to various findings recorded in

the impugned order and submitted that none of the said findings were sustainable.

15. According to the respondents, the petitioner's concern is an allied concern of M/s Sangwan Enterprises (proprietorship of the petitioner's son - Deepak Sangwan); M/s Sangwan Trading (proprietorship concern of the petitioner's brother - Jai Prakash); M/s DPS Sangwan (proprietorship concern of the petitioner's late husband - DPS Sangwan); and M/s Haryana Trading.

16. The petitioner's husband expired on 10.12.2008 that is almost nine years ago; thus it is difficult to understand as to what influence he could exert over petitioner's business. Clearly the allegation that the address of the petitioner's concern and that of her relatives is common was also one of the factors urged by the respondents in the earlier petitions and this Court was not persuaded to sustain the order rejecting the petitioner's request for registration. In terms of the respondents' policy, a common address is expressly clarified as being not a factor for denying re-verification. The scope of inquiry was limited to determining whether the banned persons exercised any influence on the concern in question. Viewing the issue from this perspective, the fact that the petitioner's relatives had also indicated certain vehicles, which the petitioner claims as her assets, does not in any manner indicate that those persons exerted influence over the petitioner's business. Of course, the respondents can verify whether the vehicles in question are registered in the name of the petitioner, but the mere fact that a list of those vehicles were submitted by the relatives of the petitioner as a part of their resources is not indicative of their influence, if any, over the

petitioner's concern. The fact that there are financial dealings between the said concern and other banned concerns, by itself, also does not establish presence of any influence. There is no determinative finding that any of the banned/suspended persons (concerns) have substantial investment in petitioner's concern.

17. Having stated the above, this Court is of the view, that it is also not necessary to examine the question whether petitioner's concern is or at the material time was an allied concern of the banned/suspended persons. This is so for the reason that more than a decade has now passed since the petitioner filed the application for re-verification and thus, even if the respondents had found that the banned / suspended concerns of her relatives exercised control over the petitioner's sole proprietorship concern - which was apparently cited as a reason for rejecting the application for re-verification - the petitioner's concern could not have been denied re-verification or registration indefinitely. This would amount to blacklisting the petitioner for an indefinite period which is not permissible.

18. In *Kulja Industries Limited v. Chief General Manager, Western Telecom Project BSNL & Ors.: AIR 2014 SC 9*, the Supreme Court had observed as under:-

“Suffice it to say that "debarment" is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the "debarment" is never permanent and the period of debarment would

invariably depend upon the nature of the offence committed by the erring contractor."

Thus, the provision for blacklisting a contractor cannot be for an indefinite period.

19. Denial of re-verification amounts to excluding the petitioner for being considered for contracts by the respondents and thus has serious adverse consequences for the business of the petitioner. Although the petitioner does not have a right to enter into a contract with the respondents, she does have a right of equal treatment and equal opportunity as others. The exclusion of the petitioner from being considered so thus affects her fundamental rights and thus such orders of rejection must be passed objectively and must pass the test of fairness required of the State. 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... 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"

20. In *Kulja Industries Limited (supra)*, the Supreme Court had summarised the factors required to be considered by an authority while determining the issue to impose a punitive measure. 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 a 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.

(1) 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.”

21. In addition to the above, this Court is also of the view that the respondents would have to evaluate the question of 'proportionality'. The only allegation against the petitioner's concern is that allied concerns have been banned/ suspended. There is no allegation that the petitioner's concern is guilty of any misconduct in any manner. Thus, evaluating whether the said concern should be blacklisted and for which period, the respondents would necessarily have to keep in mind that the punitive measure would have to be proportionate.

22. In ***Om Kumar & Ors. v. Union of India: (2001) 2 SCC 386***, the Supreme Court has explained the principle of proportionality as under:-

“27. The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even *long before that, the Indian Supreme Court has applied the principle of “proportionality” to legislative action since 1950*, as stated in detail below.

28. By “proportionality”, we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to

achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the *legislature* and the *administrative authority* “maintain a *proper balance* between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve”. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.”

23. The Supreme Court further referred to a number of earlier decisions and observed that "*In all these matters, the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the courts did not call this proportionality but it really was.*"

24. An administrative order blacklisting a contractor or excluding him for participating in contracts with the State, thus, must also pass the test of proportionality. This principle was also clearly stated by the Supreme Court in ***Kulja Industries Limited*** (*supra*) in the following words:-

"The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on 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.”

25. In *Chairman, All India Railway Recruitment Board & Anr. v. K Shyam Kumar & Ors.*: (2010) 6 SCC 614, the Supreme Court held as under:-

"Proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The court entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.”

26. If the case of the petitioner is now considered in the context of proportionality, it is at once clear that the petitioner has already suffered a punitive measure much in excess of what could be reasonably considered as proportionate.

27. For the reasons stated above, the impugned order dated 12.05.2014 is set aside. However, as noticed above, the petitioner's concern has been effectively excluded from participating in the contracts floated by the

respondents for over ten years now and, therefore, the petitioner would have to satisfy the respondents that the petitioner and her proprietorship concern satisfies the requirements of the current policy for registration. In the circumstances, it is directed that the petitioner is at liberty to apply afresh for re-verification. The petitioner's application for re-verification be considered on the current parameters as adopted by the respondents in respect of registration of firms for such services. This would be uninfluenced by any alleged relation or connection with the firms: M/s Sangwan Enterprises, M/s DPS Sangwan, M/s Haryana Trading Company and M/s Sangwan Trading.

28. In the event, the petitioner provides all necessary information for re-registration within a period of two weeks, the same would be considered by the respondents within a period of two weeks, thereafter.

29. The petition and the pending application are disposed of with the aforesaid directions.

JULY 26, 2017
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VIBHU BAKHRU, J