

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.01.2018

+ **W.P.(C) 5851/2016**

HYUNDAI ROTEM COMPANY

..... Petitioner

Versus

DELHI METRO RAIL CORPORATION

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Kapil Sibal, Senior Advocate, Mr Sudhir Sachdeva, Senior Advocate with Mr Arunav Patnaik, Mr Shikhar Saha and Mr Karun Pahwa.

For the Respondent : Mr A. K. Singla, Senior Advocate with Mr Tarun Johri, Mr Ankur Gupta and Mr Puneet Garg.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning an order dated 06.07.2016 (hereafter 'the impugned order') passed by the Managing Director of the respondent corporation (hereafter 'DMRC') blacklisting the petitioner and holding the petitioner to be ineligible for award of any contract by DMRC either as a firm or as a part of JV firm/JV SPV in any name and style for a period of five years with effect from 15.07.2015.

2. The aforesaid order has been passed on the basis that the petitioner had secured the contract (RS-10) with DMRC for supply of Metro Cars on the basis of a false declaration in its offer and thus, was guilty of a “fraudulent practice”. The petitioner had submitted its offer for supply of Metro Cars pursuant to an invitation to offer issued by DMRC. The petitioner’s offer was the lowest and was accepted by DMRC on 24.05.2013.

3. Thereafter, on 16.06.2015, DMRC issued a show cause notice alleging that the petitioner had indulged in a fraudulent practice as defined under clause 4.33.1 of the General Conditions of Contract (GCC) as it had not disclosed the information at the time of making offer that the Airport Authority of India (hereafter ‘AAI’) had debarred the petitioner from bidding for its contracts for a period of three years.

4. The petitioner responded to the said show cause notice. However, the same was not found satisfactory and the Board of Directors of DMRC passed a resolution on 15.07.2015 blacklisting the petitioner for a period of five years. Consequently, a communication dated 29.07.2015 was issued by DMRC in view of the resolution passed by the Board of Directors of DMRC. The said communication was impugned by the petitioner in a writ petition filed before this Court (being W.P.(C) 7265/2015). In the said petition, an order dated 31.07.2015 was passed by this Court directing that a personal hearing be afforded to the petitioner with a further direction to DMRC to pass an appropriate order within a period of one week thereafter.

5. In compliance with the aforesaid order dated 31.07.2015, a personal hearing was afforded to the representatives of the petitioner by two Directors who, after hearing the petitioner, reiterated the earlier decision

for blacklisting the petitioner for a period of five years with effect from 15.07.2015.

6. Aggrieved by the aforesaid decision, the petitioner preferred another petition (being W.P.(C) 7656/2015) impugning the communication dated 10.08.2015.

7. Since a Coordinate Bench of this Court did not accede to the petitioner's request for an urgent interim relief, the petitioner preferred an appeal before the Division Bench of this Court (being LPA No. 547/2015).

8. The said appeal was disposed of by an order dated 23.11.2015, whereby the Division Bench of this Court set aside the blacklisting orders dated 29.07.2015 and 10.08.2015. The Court allowed the petitioner's two writ petitions - W.P.(C) 7265/2015 and 7656/2015 - principally on the grounds that the said orders were unreasoned and the authority which had passed the said orders had not afforded the petitioner any opportunity of being heard.

9. The Managing Director of DMRC heard the representatives of the petitioner on 19.01.2016 and thereafter, passed the impugned order.

10. The present writ petition was moved on 08.07.2016. This Court found no infirmity with the decision of the Managing Director of DMRC in holding that the petitioner was guilty of a fraudulent practice as defined under clause 4.33.1 of GCC. The contentions advanced on behalf of the petitioner to contest the findings of the Managing Director as returned in the impugned order and the decision making process were rejected; however, this Court issued a limited notice on the question whether the

punishment of blacklisting the petitioner for a period of five years, was highly disproportionate.

11. Aggrieved by the aforesaid decision, the petitioner preferred an appeal before the Division Bench of this Court in **LPA No. 397/2016** captioned **Hyundai Rotem Company v. Delhi Metro Rail Corporation**. The Division Bench of this Court upheld the decision of this Court accepting that the allegation of fraudulent practice had been established and, accordingly, dismissed the appeal by an order dated 21.07.2016.

12. In view of the above, the limited controversy that remains for consideration of this Court is whether the punishment of debarring the petitioner for a period of five years is highly disproportionate and thus, offends Article 14 of the Constitution of India.

13. Mr Kapil Sibal, learned Senior Counsel appearing for the petitioner contended that non-disclosure of a communication dated 14.12.2011 issued by the AAI debarring the petitioner from participating in AAI's contract for a period of three years was not intentional. He reiterated that the division involved in executing the contract with the AAI was completely different and, therefore, the management did not, in fact, have any knowledge of the said order. He fairly conceded that this contention had not been accepted by this Court as in the order dated 08.07.2016, this Court had held that the said contention did not inspire any confidence.

14. He submitted that immediately on becoming aware that the AAI had debarred the petitioner, the petitioner company had instituted an enquiry at its head office in Seoul and had issued notices to the two employees (Mr Chug and Mr Lee) who were responsible for dealing with the AAI's bid. The enquiry revealed that the pre-qualification bid to the AAI pertained to

supplying Passenger Boarding Bridges at Indian Airports. He submitted that the petitioner's Aerobridge business was carried out by the Plant and Machinery Division of the petitioner company and was a very small part of its overall business comprising less than 0.5% of the total revenue of the petitioner company. He submitted that the enquiry had revealed that the two officials of the Plant and Machinery Division had not informed the company about the developments with the AAI. In their defence, the said employees had contended that they had misunderstood and ignored the letters received from AAI. This explanation was not found acceptable and the petitioner had taken the necessary disciplinary action by terminating the employment of the said two employees (Mr Chung and Mr Lee).

15. He submitted that this clearly established that the petitioner had taken the necessary internal remedial measures and had not condoned the action of its employees.

16. Next, Mr Sibal submitted that the petitioner had also initiated a drive to train its employees in order that such a lapse does not occur in future.

17. Mr Sibal also submitted that the petitioner had successfully bid for supplying trains for Delhi Metro in the past (RS-1 for 280 cars during the period 2001 to 2007; RS-3 for 196 cars during the period 2007 to 2011; RS-9 for 92 cars during the period 2013 to 2015) and had also delivered 50 train cars in performance of the contract in question (RS-10). He submitted that in addition, the petitioner had supplied 150 train cars for Bangalore Metro Phase-I and 171 train cars for Hyderabad Metro. He submitted that this clearly established that the petitioner was not wanting in performance of the contracts awarded to the petitioner and this factor ought to have been considered while passing the impugned order.

18. Next, Mr Sibal contended that the petitioner had been deprived of bidding for over 23 contracts with the aggregate value of several thousand crores. He handed over a tabular statement of the number of contracts for which the petitioner could not bid on account of the punitive measure imposed in terms of the impugned order. He stated that this had already caused substantial loss to the petitioner and that the punitive measure imposed was clearly very harsh and disproportionate to the alleged offending act.

19. Next, Mr Sibal referred to the General Financial Rules, 2017 issued by the Ministry of Finance, Department of Expenditure and drew the attention of this Court to Rule 151 of the said Rules, which expressly provides that a bidder may be debarred if he has been convicted for an offence under Prevention of Corruption Act, 1988 or the Indian Penal Code, 1860 for a period not exceeding three years. He submitted that a bidder could also be debarred from commercial transactions for a period of two years if it is determined that the bidder had breached the Code of Integrity.

20. He emphasised that in terms of Rule 175(1) of the said Rules, the Code of Integrity included serious acts of misconduct and yet maximum punishment provided was of debarment of two years. He earnestly contended that the punishment must commensurate with the petitioner's alleged offence viewed in the context of the General Financial Rules, 2017 and the same warranted that only a token penalty be imposed.

21. Mr Sibal also referred to a letter dated 11.03.2015 issued by the Japan International Co-operation Agency (hereafter 'JICA'), whereby the JICA had suspended the petitioner's eligibility for participation in tenders

for contracts for a period of four months with effect from 11.03.2015 to 10.07.2015. The said letter indicated that the same had been issued on the basis of the punitive measure initiated by DMRC. He submitted that JICA was the funding agency for RS-10 Project and it had taken action against the petitioner in terms of Article 5 of “JICA Rules on Measures against Persons Engaged in Fraudulent Practices etc in Projects of ODA Loan and Grant Aid” and Article 4 of “JICA Rules on Sanctions to Suspend Eligibility for Participation in Tenders for Contracts”.

22. Mr Singla, the learned Senior Counsel appearing for DMRC countered the submissions advanced on behalf of the petitioner. He submitted that the question whether the petitioner was guilty of fraudulent practice had been established and the punishment imposed on the petitioner could by no stretch be considered as unreasonable. He drew the attention of this Court to the Checklist (“Filter of Applicants – Checklist”), which formed a part of the tender documents and submitted that the petitioner was specifically required to respond whether it had been debarred by JICA/Government of India/any State Government in India or any Central or State Government Undertaking. He also referred to the Note-2 at the end of the Checklist, which clearly stated that if the answer to any of the specified questions was in the affirmative, the same would disqualify the applicant. He submitted that the petitioner provided an incorrect answer to the queries listed in the Checklist, and therefore would have been disqualified from participating in the bidding for the contract in question. He contended that in the given circumstances, the petitioner’s debarment for a period of five years could not be considered as harsh or disproportionate.

Reasoning and Conclusion

23. At the outset, it is necessary to observe that there is no dispute that if the petitioner had filled in the correct information in the tender documents, the petitioner would have been disqualified from participating in the bids for the RS-10 Contract. The relevant extract of the “Filter of Applicants - Checklist” filled in by the petitioner is set out below:-

S. No.	Criteria	Yes	No
xxxx	xxxx	xxxx	xxxx
6.	Has the Applicant being debarred by JICA/Government of India/any State Government in India/Central or State Government undertaking as on the due date of submissions of bid? (Bidder to furnish a specific undertaking to this effect)		✓
7	xxxx	xxxx	xxxx
8	Has any misleading information been given in the application?		✓

Note- 2. A “YES” answer to any question 1,3,4,5,6 or 8 will disqualify the applicant.”

24. This Court had, in the order dated 08.07.2016 held that the knowledge of the two employees who had handled the submission of pre-qualification bids to the AAI would be sufficient to impute knowledge of the same to the petitioner. The Court further held that it was not believable that the management would not be aware of the reasons for being unsuccessful in the bid submitted to the AAI and the circumstances clearly

establish that the petitioner was aware of the debarment order passed by the AAI.

25. In view of the above, there could be little doubt that the decision of DMRC to debar the petitioner cannot be faulted. Thus, as observed above, the only question that falls for consideration is whether the punishment imposed is disproportionate to the conduct of the petitioner, which has been found to be fraudulent.

26. It is now well settled that State/State Instrumentalities must act reasonably and fairly. Fair play, natural justice, non-arbitrariness are now well recognized facets of Article 14 of the Constitution of India. Undisputedly, DMRC had the discretion - subject to the discipline of Article 14 of the Constitution - to decide, who it desires to enter into contracts with and its decision not to deal with a party who has been found to have secured a contract by submitting incorrect information, cannot be questioned. However, DMRC, being a State, is enjoined to act reasonably and fairly; its decisions must be informed by reason and cannot be arbitrary. Thus, it is essential that the punitive measure imposed by DMRC be commensurate with the offending conduct of the petitioner. It is also well settled that the period of debarment cannot be permanent. In ***Kulja Industries Ltd v. Chief General Manager, Western telecom Project BSNL & Ors: AIR 2014 SC 9***, the Supreme Court observed as under:-

“24. 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.”

27. In ***Kulja Industries Ltd.*** (*supra*), the Supreme Court had also noticed that the legal position governing blacklisting of suppliers in United States of America (USA) and United Kingdom (UK), was no different. The Court also noted that in USA, the Federal Government had issued comprehensive guidelines, which also stipulated the factors that would influence the decision of debarment. As regards the period of blacklisting is concerned, the Supreme Court had observed that for the sake of “objectivity and transparency”, the respondent therein may frame guidelines to be followed in various cases. The Supreme Court had also summarized certain factors to be used as a guide by the concerned authority for determining the question of blacklisting a party. 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.

(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.”

28. Admittedly, DMRC has not set out any guidelines for determining the period of blacklisting. It is, thus, necessary to refer to the impugned order to examine the factors that weighed with the MD, DMRC for determining the period of blacklisting. The relevant extract of the impugned order is set out below:-

“13 Period of debarment

The contract agreement clause 4.33 1 c inter-alia provides for declaring the contractor ineligible either indefinitely or for a stated period of time. I have also gone through the guidelines laid down by the Hon’ble SC in “Kulja Industries Ltd. vs. Chief General Manager, BSNL” AIR 2014 SC 9. Though it is the first case in Delhi Metro but M/s HRC did similar fraudulent act in case of M/s Airports Authority of India tender for which they were restrained for issuing tenders for future works for period of 3 years. I have also gone through the period of debarment imposed by other govt. organization and the debarment normally ranges from few months of 10 years.

I am of the opinion that debarment of M/s HRC for award of contracts by DMRC for a stated period of time may have impact on their business in India from the period of the department. However, this may not necessarily have impact on M/s HRC’s business outside India.

On the basis of submissions made by M/s HRC in their tender (tender RS 10) offer and subsequent including personal hearing. I am the considered opinion that in the instant case, M/s HRC became eligible for ward of contract RS 10 due to false declaration in their tender offer, which as per express conditions of the tender/contract (clause 4.33 1 c of GCC) shall be as, fraudulent, practice “and M/s HRC shall be declared ineligible for award of contract by DMRC for a stated period of time

I therefore, decide that M/s HRC shall be ineligible for award of any contract by DMRC either as an individual firm or any other JV firm/JV SPV in any name and style for a period of give (5) years w.e.f. 15th July to 14th July 2020”.

29. It appears from the above that the period of debarment had been determined by taking a rough average of the period of debarment as fixed by other Government organizations. According to DMRC, the period of debarment in other organizations ranges from a few months to ten years. However, there is no indication in the impugned order as to which are the orders issued by the other Government organizations that were considered by the MD of DMRC. Concededly, none of such orders had been provided to the petitioner. However, in the counter affidavit, DMRC has filed a tabulated statement of various orders passed by various organizations debarring certain contractors. Although, the said tabulated statement does indicate that in several cases, contractors have been banned for a period of five years; however, there is no indication as to the gravity of the offence in those cases. It is also seen that in most of the cases contractors have been banned for a period much less than five years.

30. According to the petitioner, the decision to debar the petitioner for five years is disproportionate and even though it cannot be characterized as irrational on the anvil of the *wednesbury* test (that is, no sensible person could possibly take the said decision in the given facts), the same would warrant interference by this Court.

31. In ***R. (Daly) v. Secy. of State for the Home Deptt.: (2001) 3 ALL ER 433 (HL)***, the House of Lords had held that the criteria of proportionality was more precise and more sophisticated than the traditional grounds of judicial review. The Court noted the following differences between the two criteria:-

“(1) Proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not

merely whether it is within the range of rational or reasonable decisions.

(2) Proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

(3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.”

32. In ***State of U.P. v. Sheo Shanker Lal Srivastava & Ors***: 2006 SCC (L&S) 521, the Apex Court referred to the decision of House of Lords in ***R. (Daly)*** (*supra*) and observed as under:-

“24. While saying so, we are not oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of *proportionality*.

25. It is interesting to note that the *Wednesbury* principles may not now be held to be applicable in view of the development in constitutional law in this behalf. See, for example, *Huang v. Secy. of State for the Home Deptt.* 2006 QB 1 wherein referring to *R. (Daly) v. Secy. of State for the Home Deptt.* (2001) 2 AC 532 it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than *Wednesbury*, but involves a full-blown merit judgment, which is yet more than *R. (Daly)* [(2001) 2 AC 532, requires on a judicial review where the court has to decide a *proportionality* issue.”

33. In ***Chairman, All India Railway Recruitment Board & Anr. v. K. Shyam Kumar & Ors***: (2010) 6 SCC 614, the Supreme Court referred to various decisions and summarised the law as under:-

“36. *Wednesbury* applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness

test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to “assess the balance or equation” struck by the decision-maker. Proportionality test in some jurisdictions is also described as the “least injurious means” or “minimal impairment” test so as to safeguard the fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice it to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalise or lay down a straitjacket formula and to say that *Wednesday* has met with its death knell is too tall a statement. Let us, however, recognise the fact that the current trend seems to favour proportionality test but *Wednesday* has not met with its judicial burial and a State burial, with full honours is surely not to happen in the near future.

37. 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.”

34. The Supreme Court further observed as under:-

“39. The courts have to develop an indefeasible and principled approach to *proportionality*, till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be

decided in the same manner whoever principle is adopted. Proportionality as the word indicates has reference to variables or comparison, it enables the court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision-maker.”

35. In view of the principles as laid down above, the order of blacklisting an entity may be subject to judicial review if it is concluded that it was not within the range of the action, which ought to have been reasonably taken. The question whether the period of debarment of five years was within the reasonable range would necessarily have to be tested on the basis of a benchmark set by the DMRC. In absence of any such benchmark, the benchmark set by other organizations ought to serve as guidelines. In this case, although it is mentioned that the competent authority had relied on other blacklisting orders passed by other organizations, the same have neither been referred to nor is it discernable whether facts in any of the cases were similar to the one in this case.

36. In the impugned order, it has been merely observed that the order of debarment ranges for a few months to ten years; thus, implying that the concerned authorities could exercise its discretion to debar the petitioner for any period within the said range. Plainly, this would suffer from the vice of arbitrariness. Blacklisting or debarring an entity from participating in contracts is a serious measure and insofar as possible must be pivoted on certain objective criteria. Since DMRC has not set out any guidelines which would serve as a benchmark as to the period of debarment in a particular situation, the MD had rightly sought to rely on orders passed by the other government organizations. This Court finds nothing wrong with the approach of drawing or adopting guidelines as set out by any other

government organization. However, the period of blacklisting must be correlated to the gravity of the offence and mitigating circumstances, if any; surrounding the case, merely referring to period of debarment in various orders *de hors* the facts in those cases or the guidelines applied therein may be of a little assistance in obviating the vice of arbitrariness and would hardly further the purpose of ensuring objectivity in the decision making process.

37. It is also relevant to mention that the instructions to tenderers expressly indicated that JICA was funding the procurement and in case funding by JICA was only in part or nil, the balance would be funded by other sources. It was expressly provided that JICA required the contractors as well as Government of India to observe the highest standard of ethics during the procurement and execution of such contracts. JICA would also recognize a contractor as ineligible for a period determined by JICA in case the contractor is found to have engaged in corrupt or fraudulent practice. The relevant extract of the instructions to bidders is set out below:-

“In case of JICA funding for the procurement, JICA requires that bidders and contractors, as well as Government of India, under contracts funded with JICA ODA loans and other Japanese ODA, observe the highest standard of ethics during the procurement and execution of such contracts. In presence of this policy JICA:

a) will reject a proposal for award if it determines that the bidder recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question;

b) will recognize a contractor as ineligible, for a period determined by JICA, to be awarded a contract funded

with JICA ODA Loans if it at any time determines that the contractor has engaged in corrupt or fraudulent practices in competing for, or in executing, another contract funded with JICA ODA Loans or other Japanese ODA.”

38. Concededly, JICA has framed Rules for taking measures against persons engaged in fraudulent practices. Since tender documents had clearly referred to JICA’s requirement for observing the highest standards of ethics and also indicated that punitive measures would be taken against the developing contractors, the rules framed by JICA would offer ready guidelines for determining the action to be taken against all delinquent bidders. It is relevant to mention that JICA had also taken punitive measures against the petitioner in terms of Article 5 of “JICA Rules on Measures against Persons Engaged in Fraudulent Practices etc in Projects of ODA Loan and Grant Aid” and Article 4 of “JICA Rules on Sanctions to Suspend Eligibility for Participation in Tenders for Contracts”. JICA had, on the basis of the incorrect statement made by the petitioner in its bid to DMRC, suspended the petitioner from being considered eligible for participation in various contracts funded by it for a period of four months.

39. The General Financial Rules, 2017 (hereafter ‘the Rules’) published by the Department of Expenditure, Ministry of Finance, Government of India also provides for debarment of bidders in case the bidders breach the Code of Integrity. Rule 151 of the General Rules is set out below:-

“Rule 151 Debarment from bidding.

- (i) A bidder shall be debarred if he has been convicted of an offence—
 - (a) under the Prevention of Corruption Act, 1988;
 - or

(b) the Indian Penal Code or any other law for the time being in

force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract.

(ii) A bidder debarred under sub-section(i) or any successor of the bidder shall not be eligible to participate in a procurement process of any procuring entity for a period not exceeding three years commencing from the date of debarment. Department of Commerce (DGS&D) will maintain such list which will also be displayed on the website of DGS&D as well as Central Public Procurement Portal.

(iii) A procuring entity may debar a bidder or any of its successors, from participating in any procurement process undertaken by it, for a period not exceeding two years, if it determines that the bidder has breached the code of integrity. The Ministry/Department will maintain such list which will also be displayed on their website.

(iv) The bidder shall not be debarred unless such bidder has been given a reasonable opportunity to represent against such debarment”

40. Rule 175(1) of the aforesaid Rules, provides for Code of Integrity and is set out below:-

“Rule 175 (1) Code of Integrity

No official of a procuring entity or a bidder shall act in contravention of the codes which includes

(i)prohibition of

- (a) making offer, solicitation or acceptance of bribe, reward or gift or any material benefit, either directly or indirectly, in exchange for an unfair advantage in the procurement process or to otherwise influence the procurement process.
 - (b) any omission, or misrepresentation that may mislead or attempt to mislead so that financial or other benefit may be obtained or an obligation avoided.
 - (c) any collusion, bid rigging or anticompetitive behaviour that may impair the transparency, fairness and the progress of the procurement process.
 - (d) improper use of information provided by the procuring entity to the bidder with an intent to gain unfair advantage in the procurement process or for personal gain.
 - (e) any financial or business transactions between the bidder and any official of the procuring entity related to tender or execution process of contract; which can affect the decision of the procuring entity directly or indirectly.
 - (f) any coercion or any threat to impair or harm, directly or indirectly, any party or its property to influence the procurement process.
 - (g) obstruction of any investigation or auditing of a procurement process.
 - (h) making false declaration or providing false information for participation in a tender process or to secure a contract;
- (ii) disclosure of conflict of interest.
- (iii) Disclosure by the bidder of any previous transgressions made in respect of the provisions of sub-clause(i) with any entity in any country during the last three years or of being debarred by any other procuring entity.”

41. It is seen from the above that in terms of clause (h) of Rule 175(1)(i) of the Rules, making a false declaration or providing false information to secure a contract would amount to breach of the Code of Integrity and, in terms of Rule 151(iii), such breach would invite a punitive measure of debarment of a bidder for a period not exceeding two years.

42. Plainly, although it is not mandatory for DMRC to follow the above Rules, DMRC could use the same as a benchmark to determine the quantum of punishment to be imposed on the petitioner in absence of any internal guidelines.

43. The Tabular chart provided by the petitioner indicates that there are as many as 23 contracts for which the petitioner has been unable to bid on account of the blacklisting order. It is also relevant to note that DMRC has not cancelled the petitioner's bid although it was entitled to do so.

44. As noted above, the Supreme Court in *Kulja Industries Ltd.* (*supra*) had laid down the factors that ought to be considered by the competent authority while taking a decision to blacklist an entity. Although, it does appear that the impact of the wrongdoing in this case is material as the petitioner was able to secure the contract for which it was disqualified to bid for; however, there is little material to conclude that the petitioner had planned to initiate and carry out the wrongdoing. The petitioner had explained that the Division, which was concerned with the business aerobridges, was the Plant and Machinery Division of the petitioner and not the Division that was involved in the RS-10 contract. Concededly, the petitioner is a very large organization and it is expected that each division would have considerable amount of autonomy in conducting its business. Whilst the knowledge of officers involved in bidding for Aerobridges to

AAI is also imputed to the petitioner organization and the petitioner cannot absolve itself of the liability for making an incorrect statement, there is little material to conclude that the wrong statement made by the petitioner while bidding for the RS 10 Contract, was carefully deliberated and planned.

45. The petitioner has also asserted that it had conducted an inquiry and had taken disciplinary action against its employees who were found responsible for the bids submitted to the AAI. This Court does not find any reason to doubt the same. The petitioner also claims that it has taken steps to train its officers and had taken remedial steps to ensure that such incidents do not happen in future. If serious disciplinary action has been taken against senior officers involved with the bids submitted to the AAI, it is expected that the message within the petitioner's organization would be clear.

46. In view of the above, it cannot be disputed that there are certain mitigating factors that ought to have been taken into account while fixing the period of debarment.

47. Keeping the Rules and the punitive measures imposed by JICA as well as the explanations provided by the petitioner, the period of debarment is plainly disproportionate. During the course of arguments, this Court had suggested that the period of debarment be reduced to three years. However, it would be apposite for DMRC to reconsider the period of blacklisting keeping in view the observations and principles as noticed above. It is so directed.

48. The petition is disposed of with the aforesaid directions. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JANUARY 09, 2018
RK

