

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

Reserved on: 06.02.2018
Pronounced on: 09.04.2018

+ **W.P.(C) 10854/2017**

ATLANTA LIMITED

..... Petitioner

Through: Mr. Parag Tripathi, Sr. Adv. with Mr. Chirag
M. Shroff and Ms. Neha Sangwan, Advs.

versus

UNION OF INDIA AND ANR.

.... Respondents

Through: Mr. Ruchir Mishra, Mr. Kavindra Gill and Mr.
Mukesh Kumar Tewari, Advs. for UOI.
Ms. Gunjan Jain, Mr. Mukesh Kumar and Mr. Simranjeet
Singh, Advs. for NHAI.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The writ petitioner is aggrieved by clause 2.1.19 of the tender conditions stipulated by the second respondent, National Highway Authority of India ("NHAI" in short) and impugns it as arbitrary.

2. The facts in brief are that the petitioner is incorporated under the Companies Act, 1956, and has a diversified work portfolio: Engineering, Procurement, Construction (EPC) & Realty, involved in executing Public Private Partnership (PPP) Infrastructure Development Projects. The petitioner responded to a tender taken out by NHAI for construction, operation and maintenance of six laning from 401.200 km to 494.410 km of NH-8 in the State of Gujarat on Hybrid Annuity basis. In terms of Article

2.20 of the 'Request for Proposal', the Petitioner furnished a bid security of ₹10,93,00,000/- (Rupees Ten Crores Ninety Three Lakh Only). The petitioner's bid was accepted and the Letter of Award(LOA) was issued on 24.01.2017.

3. In terms of the RFP and LOA, the Petitioner incorporated Sabarkantha Annuity Private Limited (SAPL), for project implementation and execution of the concession agreement. The Concession Agreement was executed between NHAI and SAPL on 28.04.2017. In terms of Clause 9.1 of the RFP the petitioner had to furnish a Performance Security Bank Guarantee, amounting to ₹64.60 Crores from a bank within 30 days of the date of agreement on or before 27.05.2017. The petitioner requested for extension of time on 25.05.2017, to submit the performance security; NHAI agreed, by letter, dated 03.07.2017. It later submitted two bank guarantees in the sum of ₹8 crores and ₹ 6.6 crores by its letter dated 01.07.2017. By the said letter, the Petitioner contended that it would furnish the performance seeking guarantee for the balance amount of ₹ 50 crores from State Bank of India in due course, on the premise that a proposal for the same was pending before the Wholesale Bank Credit Committee of SBI. Thereafter, the Petitioner sought for further time to furnish the balance performance guarantee on 08.07.2017. NHAI gave a final opportunity to the Petitioner to deposit the balance performance guarantee in the sum of ₹ 50 crores within five days failing which action as contemplated under Clause 9.1.2 of the concession agreement and termination of the agreement would be initiated. The petitioner failed to comply with this requirement and informed NHAI, on 14.09.2017, that performance bank guarantee limit of ₹ 50 crores had been sanctioned by Punjab & Maharashtra Cooperative Bank Ltd. and the same

would be submitted on 20.09.2017. NHAI insisted that the Concessionaire must only furnish a bank guarantee issued only by a nationalized or scheduled commercial Bank, and, therefore, the contract was liable to termination as per Clause 9.1.2 of the Concessionaire Agreement. On 15.09.2017 NHAI terminated the said contract. Aggrieved, the Petitioner filed W.P.(C) No. 8327/ 2017 before this Court, claiming directions to the NHAI to either accept the Bank Guarantee furnished by the Petitioner from Punjab Maharashtra Cooperative Bank or, direct the extension of time so as to enable the Petitioners to get the Bank Guarantee from a nationalized bank as demanded. A restraining order against NHAI not to take any coercive steps in the matter including termination of the contract and invocation of Bank Guarantees (Bid Securities) was sought.

4. By order dated 23.10.2017, a learned single judge dismissed the writ petition primarily on the ground of maintainability, because there existed an arbitration agreement between the parties and the petitioner has recourse to an alternate dispute resolution mechanism, and granted liberty to the petitioner to appropriate remedies including under the *Arbitration and Conciliation Act, 1996* (“Arbitration Act”). The learned single judge’s order was unsuccessfully appealed to the Division Bench of this Court, which dismissed the letters patent appeal on 03.11.2017, on the ground that the contract stood terminated on 15.09.2017 and that writ proceedings were not maintainable. The Petitioner thereafter filed a Petition under Section 9 of the Arbitration Act in OMP (I)(COMM) No. 456/2017, seeking interim reliefs *inter-alia* to protect the Bid Security Bank Guarantees from being improperly/fraudulently invoked by NHAI. That petition was dismissed by

order dated 15.11.2017, on the ground that Clause 9.1.2. of the Agreement, spoke of an exclusive right of the authority to encash the bid security.

5. The Petitioner thereafter filed SLP(C) No.32238/2017 before the Supreme Court challenging the Division Bench order dated 3.11.2017. The Supreme Court by order dated 01.12.2017 dismissed the special leave petition and at the same time directed NHAI to return all amounts that may have been paid by the petitioner to NHAI. The petitioner has approached this court, in a fresh writ petition.

Contentions:

6. The Petitioner firstly contends that, its Concessionaire's agreement was terminated according to Clause 9.1.2. of the Agreement and, therefore, in terms of clause 2.1.19 of the said agreement the Petitioner was disqualified from participation in future bids for upto 2 years from the date of such termination. Learned Senior Counsel, Mr. Parag Tripathi, appearing for the Petitioner, submits that clause 9.1.2. states that the termination as per the conditions of this clause would be deemed to be termination by mutual agreement, and hence could not be termed as "termination" as stipulated under Clause 2.1.19. Hence, in the present case the Petitioner shall not be barred from participating in any future bid under Clause 2.1.19. Clause 9.1.2 reads:

"9.1.2 Notwithstanding anything to the contrary contained in this Agreement, in the event Performance Security is not provided by the Concessionaire within a period of 30 (thirty) days from the date of this Agreement, the Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to

*have ceased with the concurrence of the Concessionaire, and this Agreement shall be **deemed to have been terminated by mutual agreement of the Parties.** "*

7. The relevant conditions of the Instructions to bidders (Section 2), which have been impugned in this case, reads as follows:

"2.1.18 Any entity which has been barred by the Ministry of Road Transport & Highways or its implementing agencies for the works of Expressways, National Highways; ISC and EI works, and the bar subsists as on the date of Application, would not be eligible to submit the BID, either individually or as member of a Joint Venture.

2.1.19 The Bidder including individual or any of its Joint Venture Member should, in the last 2 (two) years, have neither failed to perform for the works of Expressways, National Highways, ISC & EI works, as evidenced by imposition of a penalty by an arbitral or judicial authority or a Judicial pronouncement or arbitration award against the Bidder including individual or any of its Joint Venture Member, as the case may be, nor has been expelled or terminated by Ministry of Road Transport & Highways or its implementing agencies for breach by such Bidder including individual or any of its Joint Venture Member"

8. Second, Mr. Tripathi submitted that the tender condition in Clause 2.1.19 is arbitrary and unreasonable, and the NHAI's decision of termination is bad in law, as it is without any arbitral or judicial adjudication. Therefore, being arbitrary and unreasonable, such termination is *prima facie* violative of Article 14 of the Constitution of India. It is further submitted that the said clause/condition is violative of the principles of natural justice, because NHAI cannot be allowed to be a judge in its own cause and conclusively

determine the validity of their actions by unilateral termination, without giving the petitioner or any other contractor a fair chance of hearing.

9. It is further argued by the learned Senior Counsel that such unilateral and arbitrary termination, has barred the Petitioner from participating in the bid and hence it is *prima facie* violative of Article 19(1)(g) of the Constitution of India i.e. the right of Petitioner to carry out business.

10. Mr. Tripathi primarily urged that the said tender condition under clause 2.1.19 is arbitrary and unreasonable inasmuch as it prohibits a bidder from participating in the bid, if NHAI has terminated the bidder's contract. With regard to the same the counsel for the Petitioner relied on a judgment of the Punjab & Haryana High Court, in the matter of *M/s R.S. Labour and Transport Contractor v. Food Corporation of India and others*, 2017 SCC Online P&H 166, where it was held that a party inviting tender has the inherent right to blacklist a party from participating in the tenders invited by it, if the party's EMD has been forfeited in another case, but such would only be possible after following the procedure relating to black listing which would include affording the party sought to be blacklisted an opportunity of meeting the condition, including giving him a personal hearing.

11. Mr. Tripathi stressed that the impugned condition had three separate situations, all of which are premised on "*failed to perform for the works of Expressways, National Highways, ISC & EI works, as evidenced by; firstly, "imposition of a penalty by an arbitral or judicial authority or a Judicial pronouncement"* secondly, "*or arbitration award against the Bidder including individual or any of its Joint Venture Member, as the case may be*" and the last category is "*nor has been expelled or terminated by Ministry of Road Transport & Highways or its implementing agencies for breach by such*

Bidder including individual or any of its Joint Venture Member”. It is urged that whereas the first two categories are dependent upon penalty or consequence preceded by a judicial or arbitral decision (which means independent and neutral appraisal of evidence), the last category, i.e contract termination or expulsion by the ministry or its implementing agencies, meant that the NHAI had unbridled and arbitrary power, violative of Article 14 of the Constitution of India.

12. Ms. Gunjan Jain Sinha, appearing for NHAI submitted that the present case does not attract the interference of this court, due to the settled law that the court shall exercise judicial restraint in administrative action, as laid down in a catena of decisions of the Supreme Court, such as in *Tata Cellular v. Union of India*, (1994) 6 SCC 651, *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, *Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.*, AIR 2005 SC 2299. Ms. Sinha relied upon the decision of the Supreme Court in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & Anr.* 2016 (16) SCC 818 and urged that tender conditions cannot be judicially reviewed lightly as arbitrary, because the state or its instrumentalities have considerable latitude to prescribe suitable tender conditions.

Analysis and Conclusions:

13. Before proceeding to evaluate the merits of the petitioner’s case, it would be appropriate to remind ourselves of the scope of judicial review under Article 226 of the Constitution in tender matters involving a public authority. Among the catena of decisions of the Supreme Court, it would be useful to refer to the seminal decision in *Tata Cellular v. Union of India*,

(1994) 6 SCC 651, where, having reviewed the law on award of public contracts, the Supreme Court laid down the following guiding principles:

- 1) *“The modern trend points to judicial restraint in administrative action.*
- 2) *The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
- 3) *The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
- 4) *The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
- 5) *The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.*
- 6) *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”*

14. Likewise, *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, the Supreme Court stated that there must be two questions that the Court must ask itself while exercising judicial review in tender matters involving a public authority:

“Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.”

15. Again in *Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.*, AIR 2005 SC 2299, the Supreme Court noted that courts’ role is not to review or oversee the award of contract, on the merits of the decision, but rather consider whether the decision making was regular, legal, procedurally fair and untainted by *mala fides*.

16. After recollecting the correct approach under Article 226, the court has to first examine the contention that whether the termination of the Concessionaires Agreement as per Clause 9.1.2 classifies as “termination” for the purpose of disbarring the Petitioner as per Clause 2.1.19 of the agreement. For the same we first must consider the two clauses in question:

“9.1.2 Notwithstanding anything to the contrary contained in this Agreement, in the event Performance Security is not provided by the Concessionaire within a period of 30 (thirty) days from the date of this Agreement, the Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and

this Agreement shall be deemed to have been terminated by mutual agreement of the Parties. "

17. The disqualifying condition (Clause 2.1.19), to the extent it stipulates that parties who face penalties, or adverse awards, etc are not permitted to bid, pertinently stipulates that a bidder "*including individual or any of its Joint Venture Member, as the case may be*" should not have in the past two years faced penalty imposed by an award or after a judicial determination, nor should have been, "expelled or terminated by Ministry of Road Transport & Highways or its implementing agencies for breach by such Bidder including individual or any of its Joint Venture Member."

18. With regard to the above contention this court is of the opinion that a "deemed termination" would not primarily fall within the disqualifying condition in Clause 2.1.19. Clause 9.1.2, states that on non-fulfillment of the criteria laid therein the agreement shall be deemed to have been terminated by mutual agreement of the parties. Now, there can be various situations *especially like in the present case*, where the stipulation of furnishing bank guarantee or some other compliance by a contractor is time bound. For some reasons: maybe its own, or for extraneous reasons beyond its control, there cannot be any compliance. If parties mutually agree for waiver of such condition, or extension of such time (regardless of the time stipulation in the contract), there is no "deemed termination." More fundamentally, the impugned condition pre-supposes a conscious termination or a conscious action on the part of NHAI or the ministry, as is clear in the use of the expression "expelled". The expression "termination" is used with "expelled". There can be no deemed expulsion. Therefore, the termination of a contract, by operation of a condition, entered into by mutual agreement does not in

any way, fall under the “termination” at the behest of NHAI, as stipulated by clause 2.1.19. In the present case, clause 9.1.2 being applied to terminate the Petitioners’ agreement, meant that the contract was terminated by mutual agreement; consequently clause 2.1.19 would be inapplicable and cannot result in debarring or disqualifying the petitioner from participating in other tender bids taken out by NHAI for the period indicated.

19. This court is also of the opinion that the other reason for holding the petitioner’s grievance to be justified is that the two other contingencies, contemplated in Clause 2.1.19, i.e penalty after a judicial decision or by an arbitral award, are based on *objective and independent determination about the contractor’s fault, preceded by consideration of the materials and evidence*. In the case of the third contingency, i.e termination or expulsion, there is no such objective consideration, but a unilateral judgment by one party, which may well, result, in many situations, with an adverse judgment or award against the ministry or implanting agency, i.e. NHAI. Therefore, to equate these two inherently disparate conditions, would result in discrimination.

20. Clause 2.1.19 or rather, the way it has been made to operate, results in arbitrariness and is unreasonable, to the extent that, in the matter of a case falling under the said clause it amounts to automatic blacklisting of the party, from participating in any other tender bid taken out by NHAI for a period of two years. The Petitioner in this context had relied on *M/s R.S. Labour and Transport Contractor v. Food Corporation of India and others*, 2017 SCC Online P&H 166, where the court held as follows:

“25. If the respondents are permitted to disqualify a party from submitting a tender in respect of a contract merely on account of the EMD of such a party having been forfeited in another contract, it would have the disastrous consequences of blacklisting the party without affording it an opportunity of being heard or dealing with the order of blacklisting in any manner whatsoever. This cannot be permitted. A term in a notice inviting tenders which disqualifies absolutely a party from submitting its bids merely on account of its EMD having been forfeited in another contract, is illegal being unreasonable, arbitrary and violative of the principles of natural justice. If the term merely confers a right upon the party inviting tenders or gives it the discretion to disqualify a party whose EMD had been forfeited in another contract, it would be valid. However, in such a case, the party inviting tenders would have to grant the party sought to be disqualified an opportunity of showing cause against the proposed disqualification. Call it by any name, such a term, in effect, debars a party from participating in the tender process and must, therefore, have read into it the principles of natural justice as applicable to cases of blacklisting.

26. The clause in this case reads: “The parties whose EMD is forfeited by FCI will not be qualified”. The clause is absolute in its terms which is clear from the words “will not”. The clause entails an automatic blacklisting merely on the ground that the EMD has been forfeited. The clause does not stipulate the circumstances in and the reasons for which the EMD is forfeited. The notice inviting tenders does not restrict the grounds on which the first respondent may forfeit the EMD. In other words, the clause disqualifies a party from the tender process even when the EMD has been forfeited for an innocuous reason.

27. Having said that, however, it must be remembered that it is not necessary for a notice inviting tenders to include a clause for blacklisting in order to entitle the party inviting tenders to blacklist a person. A party inviting tenders has an inherent

right to do so. It was so held by a Division Bench of this Court, to which one of us (S.J. Vazifdar, C.J.) was a party, in a case between the petitioners and the first respondent-2016 AIR (Punjab) 98 (paragraph-12). A party inviting tenders would be entitled to consider the forfeiture of EMD under one contract as a ground for disqualifying a party in respect of tenders invited for other contracts but only after following the procedure necessary for blacklisting/debarring a party. The forfeiture of the EMD under one contract cannot by itself be a ground for blacklisting a party in respect of other contracts. Terminating a contract is one thing. Blacklisting a party is another thing altogether. There may be a genuine difference in perception that leads to the termination of a contract and forfeiture of the EMD. Not every case of forfeiture of EMD, however, would justify the drastic consequences of blacklisting. Each case would have to be considered on its own merits. If the forfeiture is on account of a reason which justifies an inference that it is not desirable to enter into a contract with a party, a decision not to do so may well be justified. Thus, for instance, if the conduct of a party in respect of another contract has been such that the party inviting tenders would be justified in not wanting to deal with it for a certain period of time, it would be entitled not to do so. That, however, can be done after following the procedure relating to blacklisting which would include affording the party sought to be blacklisted an opportunity of meeting the same including by a personal hearing.

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29. The view that we have taken does not prejudice the respondents in any manner. As we mentioned earlier, a party inviting tenders has an inherent right to blacklist a party from participating in the tenders invited by it. It is not necessary for a notice inviting tenders to include a term entitling the party to blacklist any category of person otherwise eligible from participating in the tender process. Thus, if a party's EMD has been forfeited for reasons which justify the party inviting tenders refusing to enter into a contract with such a party, it can always do so. In the present case also, it would be open to

the official respondents to blacklist the petitioners provided the EMD was forfeited for such a reason. The mere forfeiture of the EMD, however, does not entitle the official respondents to debar the petitioners from participating in the tender process. The mere termination of a contract and/or the forfeiture of the EMD does not, absent anything else, compel the party to afford the other party an opportunity of being heard. The dispute in that regard must be settled as in the case of any other contract. When, however, such termination or forfeiture of EMD is followed by or is the basis of blacklisting the party, different considerations arise. It would be necessary for the party blacklisting to follow the rules of natural justice applicable in such cases.”

21. The above decision clarifies that every contractor or party has a right to be heard before a blacklisting or debarring provision is given effect (though it may be part of a tender or contract). Importantly, the procedure for blacklisting shall be such that the party sought for disbarment shall be given an opportunity via a hearing in order to put forth his case for such disbarment. Secondly, each case would have to be considered on its own merits, which means that the reasons for the termination in one case, shall be such that they justify the disbarment of the party in the present tender case as well. In the present case it is evident that clause 2.1.19 automatically blacklists the party without giving an opportunity for a hearing to put forth their case against such disbarment, and hence does not follow principles of natural justice.

22. In a long line of decisions starting from *Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal*, (1975) 1 SCC 70, it has been ruled that fundamentals of fair play require that the party against whom such blacklisting is sought shall be given an opportunity to represent his case

before he is put on such blacklist. This would be equally applicable in the case of debarring from participating in a tender process. In *Erusian Equipment (supra)*, the court held as follows:

“17.....The State need not enter into any contract with anyone but if it does so, it must do as fairly without discrimination and without unfair procedure. Reputation is a part of person's character and personality. Blacklisting tarnishes one's reputation.

18.Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods by discriminating against him in favor of other people.....

19.Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised the nature of sanctions involved therein.

20. 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. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.”

23. The *Erusian Equipment (supra)* line of reasoning was later followed and applied in *Joseph Vilangandan Vs. Executive Engineer (PWD) Ernakulam*, (1978) 3 SCC 36 and *Raghunath Thakur Vs. State of Bihar & Ors.*(1989) 1 SCC 229. In a decision of the Division bench of this court, in *Indian Oil Corporation Ltd v. SPS Engineering Ltd* 128 (2006) DLT 417 (DB) the judgment of a learned single judge was upheld. The court ruled that where disputes were pending *inter parties*, about performance or breach of a contract, the public authority should not base its decision to place the party/contractor in the “holiday list” or debar it for a limited time. It was also submitted that the public agency (in that case, the New Delhi Municipal Corporation) could not state that the contractor had sought additional damages for the wrongful action (of termination of contract).

24. As a result of the discussion above it is held that clause 2.1.19 of the tender conditions is arbitrary and unreasonable to the extent that, in the matter of a case falling under the said clause, it amounts to automatic debarring of the party, from participating in any other tender bid taken out by NHAI for a period of 2 years without a hearing. The condition is, therefore, held to be applicable in other cases of termination, if and only if NHAI or the public agency affords the party a right of hearing against such disbarment and second the disbarment from participating in another tender, due to tender termination in one case, shall be justified only after considering the merits of each case with respect to such other tender. The court is also of the opinion that such a wide “debarment” condition is disproportionate in that it directs the authority (NHA) to rule out absolutely consideration of tenders and bids for a period of two years. Termination of contracts can be for various reasons; they may be at the beginning of the contractual period or at the fag

end of the completion period. Given these variations, treating all contracts alike in regard to the result of debarring the private parties who might have not caused any or at least not caused substantial injury to NHAI's interest, results in arbitrariness.

25. This court is of opinion that the NHAI's position that it would not consider any tender submitted by the petitioner for any future contract, for the duration mentioned in the impugned condition, is arbitrary. Such threshold "debarment" through automatic application of contractual conditions, which may subsequently be held to be unjustified (and may later result in damages) do not in any manner retribute the loss of opportunity to tender, which the private party such as the petitioner would inevitably suffer. The right to trade or carry on occupation does not certainly guarantee that one can secure a public contract; however, surely that right carries within it a right to be considered fairly, if the party seeking to enter into the contract fulfills the eligibility conditions and is not hobbled by plainly unfair or arbitrary conditions.

26. For the above reasons, it is hereby declared that Clause 2.1.19 to the extent it states that a contractor or its associate "*has been expelled or terminated by Ministry of Road Transport & Highways or it implementing agencies for breach by such Bidder including individual or any of its Joint Venture Member*", does not apply to automatic and unilateral *contractual* termination of agreements; it can apply only and only in cases, where for good and justified reasons, NHAI terminates a contract, and proposes to apply the said condition (Clause 2.1.19) after granting hearing and opportunity to the concerned party. In the present case, the said condition cannot apply to the petitioner. Its bids in future should, therefore, be

necessarily considered on their merits and not rejected at the threshold. The writ petition is accordingly allowed, but without order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

APRIL 09, 2018

