

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

Date of Reserved: 06.11.2019

Date of Decision: 19.12.2019

+ W.P.(C) 9602/2019 & CMs 39541/2019, 42717/2019,
43517/2019, 45123/2019

ANEUSER BUSCH INBEV INDIA LIMITEDPetitioner

Through: Mr.Rajiv Nayar, Sr. Adv. with
Mr.Ajay Bhargava, Mr.Ayush
Mehrotra, Ms.Trishala Trivedi,
Mr.Upkar Agrawal &
Mr.Saurabh Sethi, Advs.

versus

COMMISSIONER (EXCISE, ENTERTAINMENT AND
LUXURY TAX) & ORS Respondents

Through: Mr.Ramesh Singh, SC/GNCTD
with Mr.Ishan Agrawal &
Mr.Dhananjaya Mishra, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This writ petition was originally filed challenging the order dated 05.08.2019 passed by the respondent no.1-Commissioner (Excise, Entertainment and Luxury Tax), Department of Excise, Government of NCT of Delhi, dismissing the application of the petitioner seeking stay of the operation of the order dated 16.07.2019 passed by the respondent no.3-Deputy Commissioner of Excise, Entertainment and Luxury Tax.

2. The respondent no.3 by the said order dated 16.07.2019, had blacklisted the petitioner for a period of three years under Rule 70 of the Delhi Excise Rules, 2010 (hereinafter referred to as “Rules”).

3. By the order dated 03.09.2019, this Court taking cognizance of the submissions made by the learned counsel for the respondent no.1 that the Appeal pending before the respondent no.1 was listed for final hearing on 09.09.2019, adjourned the hearing of the petition to await the outcome of the said Appeal.

4. The respondent no.1 by the order dated 20.09.2019 partially allowed the Appeal filed by the petitioner by reducing the period of blacklisting from three years to 18 months. The said order was challenged by the petitioner before this Court by filing an application being CM No.43517/2019 seeking amendment of the Writ Petition. The said application was allowed by this Court by its order dated 27.09.2019.

5. In view of the above, the primary challenge before this Court is to the order dated 20.09.2019 passed by the respondent no.1.

6. The brief facts giving rise to the Impugned Order are as under:

- a) On 16.08.2016 the premises of M/s Barshala, respondent no.5 herein, were inspected by a team from the Excise Department of the Government of NCT of Delhi. It is alleged that during the said inspection, by means of a ‘HHT device’, the status of 12 beer bottles (11 Foster Beer and 01 Haywards 5000) present in the premises was found to be at

Ware house of the L-1 licensee, that is, the Petitioner herein. It was therefore concluded that the bottles were not brought in the premises of the respondent no.5 through proper Transport Permit. The respondent no.5 was directed not to sell the bottles till further orders from the Excise Department.

- b) A show Cause Notice dated 07.09.2016 was issued to the respondent no.5 to explain the discrepancy. This Show Cause Notice was, admittedly, not addressed to the petitioner and called upon the respondent no.5 to show cause as under:

“Now, therefore, keeping in view of the above, I Praveen Mishra, Deputy Commissioner (Excise)/Licensing Authority, to show cause the licensee within 7 days as to why L-17/L-17F license may not be suspended/cancelled for violation of the terms and conditions of the license/Delhi Excise Act, 2009 and Rules framed there under, failing which the license of the licensee shall be suspended/cancelled forthwith without giving any further notice.”

- c) The respondent no.1 claims to have sought a report from the TCS, the Implementing Agency of ESCIMS Module of Department of Excise, GNCTD regarding the status of the bar codes of the above bottles.
- d) TCS in its report dated 15.12.2016, reported that while the Haywards 5000 and 10 beer bottles of Foster were supposed to be at the warehouse of the petitioner, one bottle of Foster

beer was reported as “damaged at bonded warehouse”.

- e) TCS by the subsequent reports dated 08.12.2017 and 14.12.2017 further reported that bottles with the same bar codes as the 12 bottles seized were sent on 29.11.2016 to M/s Barshala from the bonded warehouse of the petitioner.
- f) A notice dated 13.09.2018 was issued to the respondent no.5, with a copy marked to the petitioner, by the Excise Department with a “*direction to appear before Licencing Authority alogwith submissions in regard to the show cause notice dated 07.09.2016*”.
- g) The petitioner by its replies dated 27.11.2018, 18.12.2018, 04.01.2019 and 03.04.2019, supplied various information to the respondents regarding the Inquiry/Show Cause Notice. In all the said replies, the petitioner raised a preliminary grievance that the Show Cause Notice dated 07.09.2016 was not issued to the petitioner company and the petitioner was merely being directed to attend the proceedings in relation to the said Show Cause Notice.
- h) By the order dated 16.07.2019, the respondent no.3, however, held both, M/s Barshala and the petitioner herein, to have violated the provisions of Section 2 (47)(a)(ii), (iii), 11, 33 read with Section 44 and 38 of the Delhi Excise Act, 2009 (hereinafter referred to as “Act”) and cancelled the licence of M/s Barshala alongwith blacklisting of its Directors for a period of three years. As far as the petitioner was concerned, the respondent no.3 noted that as the

petitioner's licence had already expired due to implementation of new Excise Policy/Terms and Conditions and as the cancellation of the licence was no longer possible, the petitioner was blacklisted for a period of three years.

- i) The petitioner challenged the above order by way of an Appeal under Section 72 of the Delhi Excise Act, 2009, before the respondent no.1. The petitioner further prayed for stay of the operation of the order dated 16.07.2019 passed by the respondent no.3.
- j) As noted hereinabove, the application seeking stay was rejected by the respondent no.1 vide its order dated 05.08.2019.
- k) Thereafter some hearings were also conducted before the respondent no.1 on the merits of the Appeal. However, as the matter was being adjourned, the petitioner filed an Appeal under Section 72 (3) of the Act before the Financial Commissioner, the respondent no.2 herein, challenging the order dated 05.08.2019 passed by the respondent no.1 as also seeking stay of the order dated 16.07.2019 passed by the respondent no.3. However, the said Appeal could not be heard due to non-availability of the respondent no.2.
- l) It is only at this stage that the present petition was filed by the petitioner before this Court.

7. At this stage, the prayer made in the petition as originally filed, also needs mention and is reproduced hereinbelow:

a) issue a writ in nature of certiorari or any other appropriate writ, order or direction setting aside and/or quashing the Impugned Order dated 5 August 2019 passed by Respondent No.1, inter alia, black listing the Petitioner;

b) Issue a writ in nature of certiorari or any other appropriate writ, order or direction staying the operation of the Order dated 16 July 2019 passed by Respondent No. 3;

c) Issue an appropriate writ in the nature of prohibition restraining the Respondents from taking any coercive actions against the Petitioner in terms of the Order dated 5 August 2019 and Order dated 16 July 2019;

d) Issue an appropriate writ directing Respondent No.1 to dispose of the Appeal within 30 days;

e) Issue an appropriate writ directing the Respondent authorities to allow the Petitioner to apply for a license without being prejudiced by the Order dated 16 July 2019;

f) Issue an appropriate writ directing that the Petitioner be non-blacklisted under the Excise Act.”

8. A reading of the above prayers would clearly show that the same are premised on a fact that the Appeal filed by the petitioner before the respondent no.1 was not being heard. However, in the Amended Petition a substantive challenge was made to the order dated 16.07.2019 passed by the respondent no.3. In fact the entire

arguments of the learned senior counsel for the petitioner revolved around challenging of the said order.

9. The learned senior counsel for the petitioner submits that the order dated 16.07.2019 passed by the respondent no.3 is liable to be set aside by this Court as having been passed in violation of the Principles of Natural Justice. He submits that the said order has been passed in purported exercise of power under Rule 70 of the Rules. Rule 70 (1) of the Rules itself prescribes that no such order shall be passed without giving reasonable opportunity of hearing to the person concerned. He submits that in the present case, the Show Cause Notice dated 07.09.2016 was issued only to the respondent no.5- M/s Barshala and not to the petitioner. The petitioner was thereafter called upon to attend the hearing of the said Show Cause Notice and filed submissions/documents and explanation. The petitioner, while submitting such documents and submissions, had been reiterating before the respondent no.3 that the proceedings were only against the respondent no.5 and not against the petitioner. Therefore, the order dated 16.07.2019 has been passed without putting the petitioner to a Show Cause Notice.

10. The learned senior counsel for the petitioner further submits that even if, for the sake of the arguments, it is accepted that the notice calling upon the petitioner to attend the hearing is a Show Cause Notice, as the same did not mention the punishment that the petitioner would be visited with, the same cannot be treated to be a Show Cause Notice as explained by the Supreme Court in its judgment in **Gorkha**

Security Services v. Government (NCT of Delhi) & Ors., (2014) 9 SCC 105.

11. The learned senior counsel for the petitioner further submits that the order dated 16.07.2019 passed by the respondent no.3 being in violation of the Principles of Natural Justice, was null and void and merely because the same has been approved in the Impugned Order dated 20.09.2019 passed by the respondent no.1 in Appeal after hearing the petitioner, the illegality of the said order cannot be said to have washed off. He places reliance on the judgments of the Supreme Court in ***Institute of Chartered Accountants of India v. L.K. Ratna and Ors.***, (1986) 4 SCC 537; ***Oryx Fisheries Pvt. Ltd. v. Union of India and Ors.***, (2010) 13 SCC 427; ***Shri Farid Ahmed Abdul Samad and Anr. v. The Municipal Corporation of the City of Ahmedabad and Anr.***, (1976) 3 SCC 719, ***Aslam Mohammad Merchant v. Competent Authority & Ors.***, (2008) 14 SCC 186, ***State of U.P. v. Mohammad Nooh***, 1958 SCR 595, and of this Court in ***L.P. Desai v. UOI & Ors.***, 2003 (71) DRJ 553.

12. To counter the submissions of the learned counsel for the respondents on the availability of an alternate remedy against the order dated 20.09.2019 in the form of an Appeal before the respondent no.2, the learned senior counsel for the petitioner, relied upon the judgments of the Supreme Court in ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.***, (1998) 8 SCC 1; ***Popcorn Entertainment & Anr. v. The City Industrial Development Corporation & Anr.*** (2007) 9 SCC 593; and ***Harbanslal Sahnia & Anr. v. Indian Oil***

Corporation Ltd. and Ors., (2003) 2 SCC 107 to submit that mere availability of an alternate remedy would not bar the jurisdiction of this Court to entertain the present petition especially where the original order dated 16.07.2019 is *ex-facie* passed in violation of the Principles of Natural Justice.

13. The learned senior counsel for the petitioner lastly submits that even otherwise, the order dated 20.09.2019 passed by the respondent no.1 visits the petitioner with a penalty which is totally disproportionate. He submits that for mere 12 beer bottles the petitioner has been blacklisted for period of 18 months which is completely disproportionate and is liable to be set aside. In this regard he placed reliance on the judgment of the Supreme Court in **Excel Crop Care Ltd. v. Competition Commission of India & Anr.**, (2017) 8 SCC 47 and of this Court in **M/s Otik Hotels and Resorts Pvt. Ltd. v. Indian Railways Catering and Tourism Corporation Ltd.** (judgment dated 05.10.2016 passed in WP(C) 9159/2016).

14. On the other hand, the learned counsel for the respondents submits that the present petition is not maintainable in view of the alternate remedy in form of an Appeal to respondent no.2 being available to the petitioner. He submits that in the present case, the petitioner has availed the statutory remedy not only in form of filing an Appeal before the respondent no.1 against the order dated 16.07.2019 passed by the respondent no.3, but also by filing of an Appeal to the respondent no.2 against the order dated 05.08.2019 passed by the respondent no.1. He submits that the petitioner having

exercised its statutory remedies, must be relegated to the same. He places reliance on the judgment of the Supreme Court in *State of Rajasthan v. Union of India & Ors.*, (2018) 12 SCC 83 in support of its contentions.

15. On merits, the learned counsel for the respondents submits that there was a substantial compliance with the Principles of Natural Justice by the respondent no.3. He submits that the petitioner was granted full opportunity of hearing by the respondent no.3 after giving a full inspection to the entire record. He further submits that in any case, the petitioner having been granted a hearing at an appellate stage, any defect in the procedure before the respondent no.3 stood cured and the order passed by the respondent no.1 could not be set aside on this ground alone. In support of his contention he places reliance on the following judgments:

1. *Ferd Dawson Calvin v. Johan Henry Brownlow Carr and Others* (Privy Council) [1980] AC 574;
2. *Lloyd and Ors. v. McMahon*, [House of Lords] [1987] 1 AC 625;
3. *Canara Bank v. V.K. Awasthy*, (2005) 6 SCC 321;
4. *Sreeshyla Industries Employees Union v. State Bank of India & Ors.*, MANU/KA/0003/1983;
5. *West Bengal State Electricity Regulatory v. Impex Ferro Ltd. & Ors.*, MANU/WB/0299/2015;
6. *Canara Bank and Ors. v. Debasis Das and Ors.*, (2003) 4 SCC 557; and

7. ***Union Carbide Corporation & Ors. v. Union of India & Ors.***, (1991) 4 SCC 584.
8. ***United Planters Association of Southern India v. K.G. Sangameswaran & Ors.***, 1997 (4) SCC 741.

16. The learned counsel for the respondents further submits that the test to be applied by this Court while considering the application of Principles of Natural Justice has to be influenced by the fact that the trade in liquor has been held to be *res extra commercium* and there is no Fundamental Right of any person to trade in the same.

17. He submits that as the power to blacklist is available in Rule 70 of the Rules, a separate Show Cause Notice warning the licensee of exercise of such power by the Department was not required. In this regard he placed reliance on the judgment of this Court in ***M/s Otik Hotels and Resorts Pvt. Ltd. v. Indian Railways Catering and Tourism Corporation Ltd.*** (judgment dated 05.10.2016 passed in WP(C) 9159/2016) and ***Raman Kalra v. Govt. of NCT of Delhi & Ors.*** (judgment dated 24.07.2017 passed in WP(C) 713/2017).

18. On the question of proportionality, the learned counsel for the respondents submits that the petitioner was found evading the Excise Duty and therefore, deserved strict punishment. Placing reliance on the judgment of the Supreme Court in ***Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited & Ors.***, (2014) 14 SCC 731, ***Devchand Kalyan Tandel v. State of Gujarat and Anr.***, (1996) 6 SCC 255 and ***Jagdamba Sales Corporation vs. State (GNCT of Delhi) & Ors.*** (Judgment dated

17.07.2018 passed by this Court in WP(C) No.2660/2018), he submits that in cases of economic offences, the Court cannot take a lenient view as the exact proportion of tax evasion cannot be estimated.

19. I have considered the submissions made by the learned counsels for the parties.

20. Rule 70 of the Rules provides as under:

“70. Excise Black List, manner of blacklisting.—(1) Any licensee, tenderer, bidder, manufacturer or supplier, whose products are sold in Delhi, may be blacklisted by the Deputy Commissioner for violation of the provisions of the Act and the rules framed thereunder or for any other reason which may be considered detrimental to the interest of revenue or public health. No such order shall be passed without giving reasonable opportunity of hearing to the person concerned.

(2) Any person whose name is mentioned in the black list shall be debarred from applying for or holding any excise licence within Delhi for such period, not exceeding five years, as may be specifically indicated in the blacklisting order.

(3) The name of the black listed persons shall be circulated by the Deputy Commissioner to the Excise Authorities of the neighbouring States.”

21. A reading of the above would show that an order of blacklisting cannot be passed without giving a reasonable opportunity of hearing to the person concerned.

22. In ***Gorkha Security Services (supra)***, the Supreme Court has explained the law with respect to the form and content of the Show Cause Notice that is required to be served before deciding as to

whether the noticee is to be blacklisted or not. I may hereinbelow quote from the said judgment:-

“16. It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as “civil death” of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.

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20. Thus, there is no dispute about the requirement of serving show-cause notice. We may also hasten to add that once the show-cause notice is given and opportunity to reply to the show-cause notice is afforded, it is not even necessary to give an oral hearing. The High Court has rightly repudiated the appellant's attempt in finding foul with the impugned order on this ground. Such a contention was specifically repelled in Patel Engg.

Contents of the Show Cause Notice

21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another

requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.

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26. In the present case, it is obvious that action is taken as provided in sub-clause (ii). Under this clause, as is clear from the reading thereof, the Department had a right to cancel the contract and withhold the agreement. That has been done. The Department has also a right to get the job which was to be carried out by the defaulting contractor, to be carried out from other contractor(s). In such an event, the Department also has a right to recover the difference from the defaulting contractor. This clause, no doubt, gives further right to the Department to blacklist the contractor for a period of 4 years and also forfeit his earnest money/security deposit, if so required. It is thus apparent that this sub-clause provides for various actions which can be taken and penalties which can be imposed by the Department. In such a situation which action the Department proposes to take, need to be specifically stated in the show-cause notice. It becomes all the more important when the action of blacklisting and/or forfeiture of earnest money/security deposit is to be taken, as the clause stipulates that such an action can be taken, if so warranted. The words “if so warranted”, thus, assume great significance. It would show that it is not necessary for the Department to resort to penalty of blacklisting or forfeiture of earnest money/security deposit in all cases, even if there is such a power. It is left to the Department to inflict any such penalty or not depending upon as to whether circumstances in a particular case warrant such a penalty. There has to be

due application of mind by the authority competent to impose the penalty, on these aspects. Therefore, merely because of the reason that Clause 27 empowers the Department to impose such a penalty, would not mean that this specific penalty can be imposed, without putting the defaulting contractor to notice to this effect.

27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.

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31. When it comes to the action of blacklisting which is termed as “civil death” it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in the provisions of NIT.

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33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned Additional Solicitor General. In the first instance, we may point out that no such case was set up by the respondents that by omitting

to state the proposed action of blacklisting the appellant in the show-cause notice, has not caused any prejudice to the appellant. Moreover, had the action of blacklisting being specifically proposed in the show-cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to blacklist the appellant. Therefore, it is not at all acceptable that non-mentioning of proposed blacklisting in the show-cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant.”

23. A reading of the above would clearly show that the requirement of serving a Show Cause Notice is a *sine qua non* before taking any action of blacklisting. The Show Cause Notice must state the alleged breach / default as also the nature of action which is proposed to be taken for such a breach. These two components of the Show Cause Notice, if not specifically mentioned therein, must be clearly and safely discernible from a plain reading. Mere presence of a power to blacklist cannot amount to a sufficient notice. In absence of a Show Cause Notice, extreme nature of a harsh penalty like blacklisting, would itself amount to causing prejudice to the person against whom such order is passed.

24. Applying the above test, there can be absolutely no doubt that the order dated 16.07.2019 was passed by the Deputy Commissioner (Excise) in complete violation of the Principles of Natural Justice.

25. The show cause notice dated 07.09.2016, apart from the fact that it was issued only on M/s Barshala, also called the said noticee to show cause why its licence be not suspended / cancelled.

26. The power to suspend/cancel the licence is provided under Section 17 of the Act. This clearly is a power distinct from blacklisting as provided in Rule 70 of the Rules.

27. The submission of the learned counsel for the respondents that the power of blacklisting is somehow traceable to the power of suspension and cancellation of licence cannot be accepted.

28. Therefore, in the present case, the second requirement of a Show Cause Notice as laid down by the Supreme Court in ***Gorkha Security Services (supra)*** regarding setting out the proposed action, was also clearly not satisfied.

29. Apart from this, in my opinion, even the first condition of Show Cause Notice as laid down by the Supreme Court in ***Gorkha Security Services (supra)*** regarding the material/grounds to be stated in the Show Cause Notice, was also not satisfied.

30. As noted hereinabove, the show cause notice dated 07.09.2016 was addressed to M/s Barshala not to the petitioner. The petitioner was, by a separate notice, called upon to attend the hearing. One such

notice is reproduced hereinbelow for the sake of appreciating its contents and scope:

“I am directed to inform that date of hearing in the matter of show cause notice dated 07.09.2016 served upon M/s Barshala (A Unit of Indospirit Bars Pvt. Ltd.) 2, Community Centre, East of Kailash, New Delhi-110065 (copy enclosed for ready reference) has been fixed for 24.09.2018 at 11:00AM.

You are therefore directed to appear before the Dy. Commissioner (Excise)/Licensing Authority on aforementioned date.”

31. The petitioner in all its replies kept insisting that no Show Cause Notice has been issued to the petitioner and that it was participating in such proceedings merely to give information as required and called upon by the Licencing Authority. In spite of these submissions, the Licencing Authority never put the petitioner to notice of allegations against it or the proposed penalty. The mere fact that the petitioner was allowed to take an inspection of all the records, cannot satisfy the test of putting the petitioner to a specific notice of allegations against it.

32. In view of the above, it is held that the order dated 16.07.2019 passed by the Deputy Commissioner (Excise) was in complete breach of the Principles of Natural Justice.

33. The learned counsel for the respondents sought to undermine the violation of Principles of Natural Justice by contending that trade or business in liquor is *res extra commercium* and therefore, has to be

tested on a different pedestal while considering the question of violation of Principles of Natural Justice. I cannot subscribe to the said plea.

34. As noted hereinabove, the Principles of Natural Justice are embodied in Rule 70 of the Rules. They are therefore, statutory requirements and pre-conditions before an order of blacklisting can be passed. Non-compliance with the Principles of Natural Justice would therefore, be a statutory violation as well. Though the trade /business in liquor can be regulated and even prohibited by the State, in the present case, the blacklisting order was clearly passed in violation of a Statutory Rule and Principles of Natural Justice.

35. Equally, the submission of the learned counsel for the respondents that in presence of the power under Rule 70 of the Rules, once an act of violation is communicated, the licensee is *ipso facto* put to the notice that it may be blacklisted also cannot be accepted.

36. As noted hereinabove, blacklisting is one of the consequences that a licensee may be visited with for the violation of the provisions of the Excise Act and the Rules. Furthermore, the period of blacklisting can extend up to five years. It is therefore, imperative that before taking any such action of blacklisting, the licensee is put to notice that the Department intends to invoke such power and for what period. As held by the Supreme Court in ***Gorkha Security Services (supra)***, mere presence of a Clause (in this case a Rule), empowering the Authority to pass an order of blacklisting, cannot act as a substitute or as an exemption from issuing a Show Cause Notice proposing such

penalty and calling upon the noticee to show cause why the same be not levied.

37. For the said reason, reliance placed by the learned counsel for the respondents on the judgments of this Court in *M/s Otik Hotels, Raman Kalra and Jagdamba Sales Corporation (supra)* cannot be accepted.

38. In *Otik Hotels (supra)*, the Court discussed the consequence of non-deposit of Licence Fee which was debarment from participating in any bidding process for future project. The petitioner therein had specifically agreed to the said condition as given in the Tender Documents. The period of debarment was also provided to be one year. In those specific facts, the Court held that the judgment of the Supreme Court in *Gorkha Security Services (supra)* would not apply.

39. In *Raman Kalra (supra)*, this Court, in fact rejected the argument that punitive measure like debarment would follow automatically without affording the bidder a chance to represent against the same. The same was the view taken in *Jagdamba Sales Corporation (supra)*.

40. The learned counsel for the respondents further submitted that even assuming that the order passed by the Deputy Commissioner, Excise was in violation of Principles of Natural Justice, the petitioner having been granted a full opportunity of hearing by the Commissioner, (Excise) in its appeal filed against the order of the Deputy Commissioner, the infirmity in the order of the Deputy

Commissioner, if any, stood rectified and therefore, the petitioner must be relegated to its statutory remedies.

41. The answer to the above submission would require consideration of two linked questions of law; (a) whether granting an opportunity of hearing and compliance with the Principles of Natural Justice by an Appellate Authority cures the defect in the order passed by the Original Authority; (b) whether the petitioner having availed its statutory remedy in the form of a first appeal, must be relegated back to its subsequent statutory remedy in form of a second appeal.

42. On the first question, the learned counsels for the parties have cited extensive case laws, which requires reference.

43. In the *Institute of Chartered Accountants of India (supra)*, the Supreme Court while considering whether a Member of the Institute is entitled for a personal hearing by the Council of the Institute after the Disciplinary Committee has submitted its report to the Council of its enquiry into the allegations of misconduct against the Member, rejected the submissions of the Institute that it is not mandatory that the Member should be heard by the Council before it proceeds to record its finding as the Member has a right to appeal against such finding. The Supreme Court relied upon the observations of Megarry, J. in *Leary vs. National Union of Vehicle Builders*, (1971) Ch 34 holding as under:

“17. It is then urged by learned counsel for the appellant that the provision of an appeal under Section 22-A of the Act is a complete safeguard against any

insufficiency in the original proceeding before the Council, and it is not mandatory that the member should be heard by the Council before it proceeds to record its finding. Section 22-A of the Act entitles a member to prefer an appeal to the High Court against an order of the Council imposing a penalty under Section 21(4) of the Act. It is pointed out that no limitation has been imposed on the scope of the appeal, and that an appellant is entitled to urge before the High Court every ground which was available to him before the Council. Any insufficiency, it is said, can be cured by resort to such appeal. Learned counsel apparently has in mind the view taken in some cases that an appeal provides an adequate remedy for a defect in procedure during the original proceeding. Some of those cases as mentioned in Sir William Wade's erudite and classic work on "Administrative Law" 5th Edn. But as that learned author observes (at p. 487), "in principle there ought to be an observance of natural justice equally at both stages", and

If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."

And he makes reference to the observations of Megarry, J. in Leary v. National Union of Vehicle Builders. Treating with another aspect of the point, that learned Judge said:

"If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be

satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.”

The view taken by Megarry, J. was followed by the Ontario High Court in Canada in Re Cardinal and Board of Commissioners of Police of City of Cornwall. The Supreme Court of New Zealand was similarly inclined in Wislang v. Medical Practitioners Disciplinary Committee and so was the Court of Appeal of New Zealand in Reid v. Rowley.

18. *But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed. There are cases where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on subsequent appeal. For instance, as in the present case, where a member of a highly respected and publicly trusted profession is found guilty of misconduct and suffers penalty, the damage to his professional reputation can be immediate and far-reaching. “Not all the King's horses and all the King's men” can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal. To many a man, his*

professional reputation is his most valuable possession. It affects his standing and dignity among his fellow members in the profession, and guarantees the esteem of his clientele. It is often the carefully garnered fruit of a long period of scrupulous, conscientious and diligent industry. It is the portrait of his professional honour. In a world said to be notorious for its blase attitude towards the noble values of an earlier generation, a man's professional reputation is still his most sensitive pride. In such a case, after the blow suffered by the initial decision, it is difficult to contemplate complete restitution through an appellate decision. Such a case is unlike an action for money or recovery of property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property, with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding.”

44. In ***Shri Farid Ahmed Abdul Samad & Anr. (supra)***, the Supreme Court held that if an order at the inception is invalid, its invalidity cannot be cured by its approval or by its confirmation by the concerned Authorities. Paragraphs 24 to 26 of the said judgment are quoted hereinbelow:

“24. We are clearly of opinion that Section 5A of the Land Acquisition Act is applicable in the matter of acquisition of land in this case and since no personal hearing had been given to the appellants by the Commissioner with regard to their written objections the order of acquisition and the resultant confirmation order

of the State Government with respect to the land of the appellants are invalid under the law and the same are quashed. It should be pointed out, it is not a case of failure of the rules of natural justice as such as appeared to be the only concern of the High Court and also of the city civil court. It is a case of absolute non-compliance with a mandatory provision under Section 5A of the Land Acquisition Act which is clearly applicable in the matter of acquisition under the Bombay Act.

25. *We should also point out that the acquisition order must be an order valid under the law and the question of appeal arises only after confirmation of the order by the State Government. If the order is, at inception, invalid, its invalidity cannot be cured by its approval of the Standing Committee or by its confirmation of the State Government.*

26. *Besides hearing of objections under Section 5A of the Land Acquisition Act to be given by the Commissioner under the Bombay Act cannot be replaced by a kind of appeal hearing by the City Civil Judge. The Bombay Act having assigned the duty of hearing objections to the Commissioner, he alone can hear them and not the City Civil Judge even assuming that all objections could be entertained by him in appeal. (See **Shri Mandir Sita Ramji v. Ltd. Governor of Delhi.**)”*

45. In **Oryx Fisheries Pvt. Ltd.** (*supra*), the Supreme Court reiterated that absence of reasons in the original order cannot be compensated by disclosure of reasons in the appellate order. It followed with approval the law stated in the **Institute of Chartered Accountants of India** (*supra*).

46. In ***Aslam Mohammed Merchant*** (supra), the Supreme Court held that once the Show Cause Notice issued under the provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 is found to be illegal, the same would vitiate all subsequent proceedings.

47. In ***Mohammad Nooh*** (supra), the Supreme Court held as under:

“11. On the authorities referred to above it appears to us that there may conceivably be cases – and the instant case is in point – where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior court’s sense of fair play the superior court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the court or tribunal of first instance, even if an appeal to another inferior court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity for reasons aforementioned. This would be so all the more if the tribunals holding the original trial and the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice. The superior court will ordinarily decline to interfere by issuing certiorari and all we say is that in a proper case of the kind mentioned above it has

the power to do so and may and should exercise it. We say no more than that.”

48. This Court in **L.P.Desai** (*supra*) held that mere fact that the petitioner therein had filed an appeal and was heard in the appeal would not alter the situation that the original order passed was in violation of the Principles of Natural Justice and therefore, *void ab initio*. This Court held as under:

“18. Before parting with this case, it would be relevant to note that though the aforesaid discussion has proceeded on the assumption that no prejudice has been caused to the petitioner, in point of fact prejudice has actually been caused to the petitioner. This is so because the Show Cause Notice was not issued to the petitioner. Even the show cause notice issued to the company did not contain specific allegations against the petitioner to which he could reply. No opportunity as such was given to the petitioner to represent against the proposed imposition of penalty. Obviously, the petitioner was not heard before the order in original was passed whereby the aforesaid penalty was imposed upon him. The mere fact that he filed an appeal and was heard in the appeal would not alter the situation. The proceedings against him were void ab initio. Had the petitioner been issued a notice in terms of section 4L of the said Act, he could have represented against the imposition of such penalty. He could have placed on record various facts and circumstances to show that no offence was committed by the company and that even if such offence was committed by the company, he had no hand in it. All these circumstances, if he were able to establish them, would have absolve him of the liability of penalty which he now bears like a garrotter round his neck. So, even if the question of prejudice were to be taken up, it would be

clear that the order in original as well as the Appellate Order imposing a penalty on the petitioner could not be sustained.”

49. The learned counsel for the respondents has placed reliance on the judgment of the Privy Council in ***Calvin vs. Carr (Privy Council)*** (*supra*) to contend that the law stated by Megarry J. in ***Leary (supra)*** was held to be too broadly stated and cannot be applied to every case. He submits that where the appeal, like in the present case, is presented before an Appellate Authority both on fact and in law and almost tantamounts to rehearing of the entire facts, the order cannot be set aside as being in violation of the Principles of Natural Justice. He relied upon the following passages:

*“At the other extreme are cases, where, after examination of the whole hearing structure, in the context of the particular activity to which it relates (trade union membership, planning, employment, etc.) the conclusion is reached that a complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage. This was the result reached by Megarry J. In *Leary v. National Union of Vehicle Builders* [1971] Ch. 34. In his judgment in that case the judge seems to have elevated the conclusion thought proper in that case into a rule of general application. In an eloquent passage he said, at p. 49:*

“If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? As a general rule I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.”

In their Lordships' opinion this is too broadly stated. It affirms a principle which may be found correct in a category of cases: these may very well include trade union cases, where movement solidarity and dislike of the rebel, or renegade, may make it difficult for appeals to be conducted in an atmosphere of detached impartiality and so make a fair trial at the first—probably branch—level an essential condition of justice. But to seek to apply it generally overlooks, in their Lordships' respectful opinion, both the existence of the first category, and the possibility that, intermediately, the conclusion to be reached, on the rules and on the contractual context, is that those who have joined in an organisation, or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect.

In their Lordships' judgment such intermediate cases exist. In them it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result. Many rules (including those now in question) anticipate that such a situation may arise by giving power to remit for a new hearing. There may also be cases when the appeal process is itself less than perfect: it may be vitiated by the same defect as the original proceedings: or short of that there may be doubts whether the appeal body embarked on its task without predisposition or whether it had the means to make a fair and full inquiry, for example where it has no

material but a transcript of what was before the original body. In such cases it would no doubt be right to quash the original decision. These are all matters (and nodoubt there are others) which the Court must consider. Whether these intermediate cases are to be regarded as exceptions from a general rule, as stated by Megarry J., or as a parallel category covered by a rule of equal status, is not in their Lordships' judgment necessary to state, or indeed a matter of great importance. What is important is the recognition that such cases exist, and that it is undesirable in many cases of domestic disputes, particularly in which an inquiry and appeal process has been established, to introduce too great a measure of formal judicialisation. While flagrant cases of injustice, including corruption or bias, must always be firmly dealt with by the courts, the tendency in their Lordships' opinion in matters of domestic disputes should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced."

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"Their Lordships agree, and have given reasons for concluding, that in this field there is no automatic rule. But they do not understand the Court of Appeal to be subscribing to a view that cases of "insulation" or "curing," after a full hearing by an appellate body, may not exist: on the contrary, Cooke J. expresses the opinion that the court, in the exercise of its discretion, when reviewing the domestic or statutory decision, should take into account all the proceedings which led to it, the conduct of the complaining party and the gravity of any breach of natural justice which may have occurred. This, though perhaps with some difference in emphasis, is their Lordships' approach.

It remains to apply the principles above stated to the facts of the present case. In the first place, their

Lordships are clearly of the view that the proceedings before the committee were in the nature of an appeal, not by way of an invocation, or use, of whatever original jurisdiction the committee may have had. The nature of the appeal is laid down by section 32 of the Australian Jockey Club Act 1873, and by the rules. Under the Act, the appeal is to be in the nature of a rehearing—a technical expression which does little more than entitle the committee to review the facts as at the date when the appeal is heard (see Builders Licensing Board (N.S.W.) v. Sperway Constructions (Sydney) Pty. Ltd. (1977) 51 A.L.J.R. 260, 261, per Mason J.) not one which automatically insulates their findings from those of the stewards. The decision is to be “upon the real merits and justice of the case” – an injunction to avoid technicalities and the slavish following of precedents but not one which entitles the committee to brush aside defective or improper proceedings before the stewards. The section is then required to be construed as supplemental to and not in derogation of or limited by the Rules of Racing. This brings the matter of disputes and discipline clearly into the consensual field. The Rules of Racing (Local Rules 70 to 74) allow the committee to take account of evidence already taken and of additional evidence, and confer wide powers as to the disposal of appeals.”

50. In ***Lloyd & Ors. vs. McMahon (House of Lords)*** [1987] 1 AC 625 relied upon by the learned counsel for the respondents, the Court of Appeal approved the dictum of ***Calvin (supra)*** and held as under:

“In my view in cases such as this the question the court should ask is whether, taking into account the complainant’s rights of appeal, and if those rights have

been exercised what happened on the appeal, the complainant, viewing the combined proceedings as a whole, has had a fair hearing? I regard this approach as appropriate because if Parliament makes provision for an initial hearing followed by appeal then what Parliament should be presumed to intend is that the persons affected by those proceedings should be treated fairly in the proceedings as a whole. Where there are shortcomings in the initial proceedings but the appellant has in fact been dealt with fairly when the proceedings as a whole are considered, to regard the proceedings as invalid would be to condemn something as being unfair because of a flaw in a part when if the whole was considered the flaw would be sufficiently insignificant to enable the whole procedure to be regarded as unblemished. Expressing the matter slightly differently, if the whole procedure is properly regarded as being fair, then to strike that procedure down because of a flaw in part will be to apply an unduly technical approach. My view of the test receives some support in de Smith's Judicial Review of Administrative Action, 4th ed. (1980), p. 242 et seq. and is in accord with Lord Wilberforce's opinion in Calvin v. Carr [1980] A.C. 574. Furthermore it does not have the flaw to which Megarry J. Referred in Leary v. National Union of Vehicle Builders [1971] Ch. 34 because it presupposes Parliament gave the complainant no more than a right to a fair hearing in the proceedings as a whole."

51. In the appeal filed, the House of Lords held as under:

"Lord Keith of Kinkel-

Upon the view which I take, that the district auditor's decision was not vitiated by procedural unfairness to the question whether such unfairness, had it existed, was capable of being cured by the appeal to the High Court does not arise directly for decision. It is, however, my

opinion that the particular appeal mechanism provided for by section 20(3) of the Act of 1982, considered in its context, is apt to enable the court, notwithstanding that it finds some procedural defect in the conduct of an audit which has resulted in a certificate based on wilful misconduct, to inquire into the merits of the case and arrive at its own decision thereon. Section 20(3)(b) empowers the court to “confirm the decision or quash it and give any certificate which the auditor could have given.” The relevant rules of court enable a rehearing of the broadest possible scope to take place. Evidence may be given on oath, which is not possible before the auditor, and there is no limit to the further material which may be introduced so as to enable the whole merits to be fully examined. There is no question of the court being confined to a review of the evidence which was available to the auditor. In the circumstances, it would be quite unreasonable and not in accordance with the intendment of the enactment to hold that the court, where an issue is raised as to the fairness of the procedure adopted by the auditor, is confined to a judicial review species of jurisdiction so as to have power only to quash or affirm the auditor’s certificate without entering upon its own examination of the merits of the case. No doubt there may be cases where the procedural defect is so gross, and the prejudice suffered by the appellant so extreme, that it would be appropriate to quash the auditor’s decision on that ground. But in my opinion the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course. I may add that I agree entirely with all that is said upon this aspect of the appeal in the speech of my noble and learned friend Lord Bridge of Harwich.”

“Lord Bridge of Harwich

These conclusions would be sufficient to dispose of the appeals. But I return to the question of more general importance whether, if there had been any unfairness in the procedure followed by the auditor, this would necessarily have led, as the Divisional Court thought, to the quashing of the certificate or whether, as the Court of Appeal concluded, the full hearing of the appeal to the court on the merits was in law able to make good any deficiency in the auditor’s procedure. It was in order to set this question in its proper context that I thought it necessary, earlier in this opinion, to set out the relevant statutory provisions in extenso. The question how far in domestic and administrative two-tier adjudicatory systems a procedural failure at the level of the first tier can be remedied at the level of the second tier was considered by the Privy Council in Calvin v. Carr [1980] A.C. 574 in which all the relevant previous authorities on the subject are reviewed. I do not find it necessary in this case to examine the general principles there discussed, nor would I think it appropriate in this case to seek to lay down any principles of general application. This is because the question arising in the instant case must be answered by considering the particular statutory provisions here applicable which establish an adjudicatory system in many respects quite unlike any that has come under examination in any of the decided cases to which we were referred. We are concerned with a point of statutory construction and nothing else.”

“Lord Templeman

My Lords, when by statute an appeal lies from a tribunal to a court of law, the statute must be construed to determine whether the court is free to determine the appeal on the basis of the evidence before the court or is bound by the evidence or information laid before the tribunal. In the present case I have no doubt that it was

for the court of law to consider whether “willful misconduct” was proved and for that purpose to consider the evidence laid before the court. The task of the court was to “give any certificate which the auditor could have given” (section 20(3) of the Act of 1982). The court was not concerned with any defects in the procedure adopted by the auditor because those defects (if any) did not hamper the prosecution or conduct of the appeal. Different considerations apply if a statute only allows an appeal to a court of law on a question of law, or entitles or oblige the court of law to rely on the facts found by the tribunal. And the defects in the inquiry conducted by the tribunal may be so prejudicial to the aggrieved person that the court in its discretion may decide to quash the decision and not to proceed with an appeal on the merits in the absence of the views of the tribunal after a proper inquiry. In the present case the Divisional Court was entitled to consider the appeal on its merits and on the basis of the evidence presented to the court.”

52. The Division Bench of the Karnataka High Court in ***Sreeshyla Industries Employees’ Union (supra)*** also held that the position of law in ***Leary’s (supra)*** is too broadly stated. It has held as under:

“39. But, we think that what emerges from a conspectus of the case law is that the proposition in Leary’s case [1971] 1 Ch 34 is too broadly stated. There are cases and cases and though no general principle of universal validity, valid for all situations cannot be predicted, yet it is possible to say, even in cases of statutory or “domestic” appeals, that a fair appellate procedure can cure the infirmity in the original proceedings resulting from breaches of the rules of natural justice. Each case has to be decided on its own facts and on the existence of the requisite curative elements and factors in the appellate procedure including the nature and width of the

appellate jurisdiction; the nature, depth and intensity of the infirmity and the operative remedial factors in the appeal. The rule that were the rules of natural justice are concerned, a favour appellate proceeding cannot be substituted for an unfair trial, is one of application in the generality of cases and does admit of and is not inconsistent with a rule of equal validity that a satisfactory appellate procedure might also be cure. Then again distinctiveness if judicial proceeding must be kept clearly distinguished. The principle that an appropriate appellate procedure is said can be curative, in our opinion, operates a fortiori in the context of purely judicial proceedings, if there is, as of right, an appeals on facts and law to an appellate forum with plenary appellate jurisdiction co-extensive with that of original court and if the aggrieved party had full opportunity of presenting its whole case and a decision on merits is made.

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49. *The principle that in judicial proceedings a full-fledged appellate hearing where opportunity is afforded to an aggrieved party to present his case and evidence and the appellate court in exercise of a jurisdiction, co-extensive with that of the original jurisdiction, decides a matter on merits, then the consequences of non-compliance of rules if natural jurisdiction in the original proceeding may be held to by been cured, is a recognized principle. We think this principle should operate here.”*

53. The Calcutta High Court in ***West Bengal State Electricity Regulatory (supra)***, applied the principles laid down by the Supreme Court in ***Canara Bank & Ors. vs. Debasis Das & Ors.*** 2003 4 SCC 557 to hold that where oral hearing has been granted by the Appellate Authority, the same amounts to a post-decisional hearing which

obliterated the procedural deficiencies of a pre-decisional hearing provided no prejudice in the factual situation of the case is demonstrated. I may herein quote from the said judgment as under:

“47. Similar view appears to have been expressed by the Apex Court in Canara Bank & Ors. v. Debasis Das & Ors, MANU/SC/0225/2003 : (2003) 4 SCC 557 wherein the Court held that an opportunity of oral hearing granted by the appellate authority amounted to a post-decisional hearing which obliterated the procedural deficiency of a pre-decisional hearing provided no prejudice in the facts situation of the case is demonstrated. The Apex Court held as follows:-

“10. It is to be further noted that in the appeal before the Appellate Authority findings of the Inquiry Officer were challenged and, therefore, the question of any prejudice does not arise. Since employee had the opportunity to meet the stand of the Bank, it was to his advantage, and opportunity for personal hearing was also granted, though Regulation 6(18) does not even speak to grant such an opportunity. Keeping in view what was observed in B.Karunakaran’s case (supra) there was no question of violation of principles of natural justice.

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23. As was observed by this Court we need not go into ‘useless formality theory’ in detail; in view of the fact that no prejudice has been shown. As is rightly pointed out by learned counsel for the appellants unless failure of justice is occasioned or that it would not be in public interest to dismiss a petition on the fact situation of a case, this Court may refuse to exercise said jurisdiction (see Gadde Venkateswara Rao v. Govt. of A.P. and ors. (MANU/SC/0020/1965 : AIR 1966 SC 828). It is to

be noted that legal formulations cannot be divorced from the fact situation of the case. Personal hearing was granted by the Appellate Authority, though not statutorily prescribed. In a given case post-decisional hearing can obliterate the procedural deficiency of a pre-decisional hearing. (See Charan Lal Sahu vs. Union of India etc.) (MANU/SC/0285/1990:AIR 1990 SC 1480)

48. Hence, in view of Canara Bank (supra), it appears that in a given case where a party is given full opportunity of hearing before an Appellate Tribunal (as in section 111 of the Act of 2003) both on facts and in law, procedural defect in the initial order would not vitiate the decision making process unless prejudice is demonstrated. As to how respondent/writ petitioners may be prejudiced if oral hearing is not given to them by the State Commission while considering their written objection has not been made out on facts in the instant case.”

54. In ***United Planters Association of Southern India vs. K.G. Sangameswaran & Anr.*** (1977) 4 SCC 741, the Supreme Court in relation to the Industrial Dispute held that the Appellate Authority had full jurisdiction to record evidence to enable it to come to its own conclusion and therefore, even where the domestic enquiry held by the employer was defective, opportunity of hearing afforded at the appellate stage will sufficiently meet the demands for a just and proper enquiry. It observed as under:-

“28. In the instant case, the appellant has contended that the respondent did not participate in the domestic enquiry in spite of an opportunity of hearing having been provided to him. He was also offered the inspection of the documents, but he did not avail of that opportunity. He himself invoked the jurisdiction of the Appellate Authority and the order of dismissal passed against him

was set aside on the ground that the appellant did not hold any domestic enquiry. It has already been seen above that the Appellate Authority has full jurisdiction to record evidence to enable it to come to its own conclusion on the guilt of the employee concerned. Since the Appellate Authority has to come to its own conclusion on the basis of the evidence recorded by it, irrespective of the findings recorded in the domestic enquiry, the rule laid down in Ratna case will not strictly apply and the opportunity of hearing which is being provided to the respondent at the appellate stage will sufficiently meet his demands for a just and proper enquiry.”

55. The Supreme Court in ***Union Carbide Corporation (supra)*** also observed that the principle in ***Leary (supra)*** might perhaps be too broad a generalization. I may herein quote from the said judgment:

“165. We might recall here that the Privy Council in Calvin v. Carr had expressed its reservations about Megarry J.’s ‘General Rule’ in Leary case. However, the reservations were in the area of domestic jurisdiction, where contractual or conventional rules operate. The case did not involve a public law situation. But the House of Lords in Lloyd v. McMohan applied the principle to a clearly public law situation. The principle in Leary might, perhaps, be too broad a generalisation.”

56. Recently the Supreme Court by its judgment dated 30.04.2019 passed in Civil Appeal No. 4476/2019 ***63 Moons Technologies Limited vs. Union of India and Others*** considered the above issue as also the judgment of ***Union Carbide Corporation & Ors (Supra)*** in relation to the above question held as under:-

“75. However, the learned Senior Advocates for the respondents have argued that an order of nil compensation is equally an order that is passed under Section 396(3) which could have been appealed against but was not appealed against. For this reason, therefore, it is not correct to state that the condition precedent mentioned in Section 396(4)(aa) has not been fulfilled. It will be noticed that the language used in the appeal provision, i.e. Section 396(3A), is “any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may..... appeal to the Tribunal, and thereupon the assessment of the compensation shall be made by the Tribunal.” The pre-requisites for the application of sub-section (3A) are that a person first be aggrieved by an “assessment of compensation” “made” by the prescribed authority. Where no assessment of compensation whatsoever is made by the prescribed authority (and on the facts here, the prescribed authority has not, in fact, stated that for the reasons given by it, compensation awarded to FTIL, its shareholders and creditors is nil), no person can be aggrieved by an order which does not assess any compensation, which may be interfered with by the Appellate Tribunal which must then assess the compensation for itself. The statute clearly entitles such shareholders and creditors to have compensation assessed first by the prescribed authority and then by the appellate authority. This Court, in **Institute of Chartered Accountants of India v. L.K. Ratna and Ors.**, [1986] 3 SCR 1049, held that the defect in observing the rules of natural justice in the trial administrative body cannot be cured by observing such rules of natural justice in the appellate body. It was held:

“It is then urged by learned counsel for the appellant that the provision of an appeal under Section 22-A of the Act is a complete safeguard against any insufficiency in the original proceeding before the Council, and it is not mandatory that the member should be heard by the Council before it proceeds to record its finding. Section 22-A of the Act entitles a

member to prefer an appeal to the High Court against an order of the Council imposing a penalty under Section 21(4) of the Act. It is pointed out that no limitation has been imposed on the scope of the appeal, and that an appellant is entitled to urge before the High Court every ground which was available to him before the Council. Any insufficiency, it is said, can be cured by resort to such appeal. Learned counsel apparently has in mind the view taken in some cases that an appeal provides an adequate remedy for a defect in procedure during the original proceeding. Some of those cases as mentioned in Sir William Wade's erudite and classic work on "Administrative Law" (5th Edn.). But as that learned author observes (at p. 487), "in principle there ought to be an observance of natural justice equally at both stages", and

"if natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."

And he makes reference to the observations of Megarry, J. in Leary v. National Union of Vehicle Builders [(1971) 1 Ch. 34, 49]. Treating with another aspect of the point, that learned Judge said:

"If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing de novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a

process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.”

*The view taken by Megarry, J. was followed by the Ontario High Court in Canada in **Re Cardinal and Board of Commissioners of Police of City of Cornwall**, [(1974) 42 D.L.R. (3d) 323]. The Supreme Court of New Zealand was similarly inclined in **Wislang v. Medical Practitioners Disciplinary Committee**, [(1974) 1 N.Z.L.R. 29] and so was the Court of Appeal of New Zealand in **Reid v. Rowley** [(1977) 2 N.Z.L.R. 472].”[(at pp. 1065-1066)]*

*This judgment was the subject matter of comment in **Union Carbide Corporation v. Union of India**, [1991] Supp (1) SCR 251, where this Court held, following the judgment in **Charan Lal Sahu v. Union of India**, (1990) 1 SCC 613, that non-compliance with the obligation to issue notices to persons effected by the Bhopal gas leak did not, for this reason alone, vitiate the settlement that was entered into with Union Carbide by the Government on their behalf. This Court, in passing, commented that the principle laid down in **Leary v. National Union of Vehicle Builders**, [1971] Ch. 34 might perhaps be too broad a generalisation, except in cases involving public interest. This was an observation made in answer to an argument by Shri Shanti Bhushan, stating that a defect of natural justice always goes to the root of the matter. Ultimately, given the fact that the settlement fund was held to be sufficient to meet the needs of just compensation to the victims of the Bhopal gas leak tragedy, it was held that the grievance on the score of not hearing the victims first would not really survive. However, what is of fundamental*

importance is the fact that in the present situation, a clear statutory right is given to every member or creditor who shall be entitled to an assessment of compensation, first by the prescribed authority and then, a right of appeal to the Appellate Tribunal. In such cases, therefore, the orders of “non-assessment” by the prescribed authority can more appropriately be challenged in judicial review proceedings, in which the High Court, acting under Article 226 of the Constitution of India can, if an infraction of Section 396(3) is found, send the matter back to the prescribed authority to determine compensation after which the right of appeal under sub-section (3A) of Section 396 would then follow. In fact, in Writ Petition 2743 of 2014, which challenged both the draft order and the final order of amalgamation, the appellant took out a chamber summons for amendment of its writ petition to challenge the order of assessment of compensation, dated 01.04.2015, which amendment was allowed vide order dated 16.02.2016. The order of “non-assessment” of compensation has thus been challenged by FTIL in proceedings under Article 226 of the Constitution of India. Even otherwise, this is a case where there is complete non-application of mind by the authority assessing compensation to the rights and interests which the shareholders and creditors of FTIL have and which are referred to in Section 396(3) of the Act. This being the case, it is clear that Section 396(3) has not been followed either in letter or in spirit.”

57. I may also herein note the opinion of the Author in **MP Jain & SN Jain Principles of Administrative Law** (8th Edition) (Volume 1) page 741 wherein the Author after considering the judgment in **Leary** (Supra) and **Calvin vs. Carr** (Supra) as also various judgments of the Indian Courts concluded as under:-

“The ruling in Calvin v. Carr to the effect that failure of natural justice at the original stage may be cured by a hearing at the appellate stage is subject to three inherent limitations: (1) the ruling is concerned only with consensual bodies and not with governmental or administrative bodies; (ii) the ruling refers to a two tier adjudicatory system – first tier deciding the dispute originally and the second tier hearing appeal from the original decision; and (iii) the appeal is by way of rehearing and the appellate body gives a full-fledged hearing to the party concerned. If the appeal is not by way of rehearing, but is limited only to the points of law, and the appellant remains bound to accept the determinations of fact as found by the original body, then the Calvin ruling would not apply.

Calvin v. Carr qualifies the Leary principle to some extent. The Leary principle applies in all cases except those of consensual domestic bodies (such as, social clubs etc.) where proceedings at both levels (original and appellate) taken together satisfy the demands of natural justice. It is to be noted that in Calvin, the appeal was by way of rehearing. This distinguishes Leary from Calvin in an important aspect. Ultimately, however, it is for the court to decide whether the doctrine of Leary or Calvin should be applied in a particular situation. It is suggested that in India, the Leary principle should be applied in most of the situations as it is necessary that the initial decision making bodies are made to follow the principles of natural justice rather meticulously. The Calvin principle will introduce too much uncertainty into the law. Also, in India, adjudication is done primarily by government bodies, its officials and statutory bodies which fall outside the pale of the Calvin principle. Even the professional bodies, like the Institute of Chartered Accountants, are statutory bodies and not consensual bodies. The Calvin principle may be applied, if at all, to bodies like clubs and associations which a person joins, and voluntarily accepts the rules thereof.”

58. From the above it would be evident that the general rule is that where there is a violation of Principles of Natural Justice, the High Court while exercising its extraordinary powers under Article 226 could not relegate the aggrieved party to the appellate remedy as mere availability of a right of appeal cannot absolve the original authority to follow the Principles of Natural Justice.

59. However, having said, what would happen if the aggrieved party actually avail of its appellate remedy instead of approaching the High Court in the first instance and in such appeal he is granted a full hearing on merits. Can he, having availed of the appellate remedy, challenge the order of the original authority before the High Court by way of Writ Petition?

60. In my opinion, the answer to the above question lies in appreciating in facts whether the hearing granted in appellate proceedings were in any manner restricted causing prejudice to the aggrieved party. For example, where the appeal is only on question of law or more as a revisional jurisdiction, the aggrieved party would clearly remain prejudiced by initial violation of Principles of Natural Justice. However, where the appellate authority considers the case de-novo, granting full opportunity of hearing to the aggrieved party, and there is a right available with the aggrieved party to file a second appeal against such decision, the aggrieved party cannot approach High Court again challenging the order of the original authority. Allowing the party to do so would clearly amount to allowing the party to have two bites of the same cherry and do forum shopping. In

such cases, having availed of the appellate remedy, the party must be relegated back to the same. Of course, where there is no other remedy available to the aggrieved party, the party may be entitled to challenge both the original and the appellate order by way of a Writ Petition before the High Court. There certainly cannot be a straight jacket answer to the above question.

61. In the present case, though the order passed by the original authority that is the Deputy Commissioner of Excise was clearly in violation of Principles of Natural Justice, the petitioner chose the statutory remedy of filing an appeal before the Commissioner (Excise). Section 72 of the Delhi Excise Act, 2009 provides for remedy of appeal. It is quoted hereinbelow:

“72. Appeal.-

(1) Any person aggrieved by any decision or order passed under this Act by an excise officer, subordinate to the Deputy Commissioner, may appeal to the Deputy Commissioner.

(2) Any person aggrieved by any decision or order passed under this Act by the Deputy Commissioner may appeal to the Excise Commissioner.

(3) Any person aggrieved by any decision or order passed under this Act by the Excise Commissioner may appeal to the Financial Commissioner.

(4) Such appeal shall be filed within thirty days from the date of communication of such decision or order together with self-attested copy thereof: Provided that a further period of thirty days may be allowed if the appellant

establishes that sufficient cause prevented him from presenting the appeal within the aforesaid period of thirty days.

(5) At the hearing of an appeal, an appellant may be allowed to go into any ground not specified in the grounds of appeal or take additional evidence if necessary, if it is established that such omission was not wilful or unreasonable.

(6) The appellate authority, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order, as the case may be.

(7) The appeal shall be heard and decided within one year from the date on which such appeal is filed: Provided that if an appeal is not decided within one year the relief prayed for in the appeal shall be deemed to have been granted.”

62. A reading of the above provision would show that the Appellate Authority is entitled to make further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order of the original authority, as the case may be. The powers of the Appellate Authority are therefore, wide.

63. The petitioner not only chose to exercise such appellate remedy by filing the first appeal before the respondent no. 1- Commissioner (Excise), but also, on being declined an order of stay by the order dated 05.08.2019, preferred a second appeal before the respondent no.

2-Financial Commissioner. It is only when the second appeal could not be heard that the petitioner preferred the present petition.

64. In the present petition also, the petitioner primarily sought the setting aside of the order dated 05.08.2019 (rejecting the stay) and for a stay of the order dated 16.07.2019 (order of blacklisting the petitioner) rather than laying a substantive challenge to the order dated 16.07.2019 passed by the Deputy Commissioner-respondent no. 3.

65. It is only when the Commissioner Excise dismissed the appeal filed by the petitioner in so far as the petitioner was found guilty of having breached the provisions of the Act and the Rules and visited the petitioner with a lesser period of blacklisting, that the petitioner by way of an amendment application sought to challenge the order dated 16.07.2019 before this Court in a substantive manner.

66. The petitioner, therefore, having availed of the statutory remedies under the Act, must be relegated to the same. It is not the case of the petitioner that the petitioner was not afforded an opportunity of hearing by the Commissioner Excise. By that stage, the petitioner was fully aware of the allegations against it and the proposed penalty. It had full opportunity to meet allegations on merit as also counter the extenuating circumstances that would justify an order of blacklisting the petitioner even for a lesser period. In fact, detailed written submissions dated 02.08.2019, 14.08.2019 and 23.08.2019 were filed by the petitioner before the Commissioner (Excise), including on merits of allegations and its defence. The order dated 20.09.2019 passed by the Commissioner Excise, in fact, reduces

the period of blacklisting from three years to 18 months. In such circumstances, Doctrine of Election would clearly become applicable. If the petitioner is aggrieved of the order dated 20.09.2019, its remedy would be in form of filing of an appeal against the same before the Financial Commissioner.

67. In *Whirlpool Corporation (supra)*, *Popcorn Entertainment (supra)* and *Harbanslal Sahnia (supra)*, the Supreme Court has held that existence of alternative remedy would not operate as a bar *inter alia* when there is a violation of the Principle of Natural Justice, however, in the present case, the petitioner having itself availed of the alternative remedy, must be relegated to the same.

68. As far as the submission of the learned senior counsel for the petitioner that the penalty imposed by the order dated 20.09.2019 is also disproportionate, in my view, the same also can be considered in an appeal filed by the petitioner as it would necessarily require examination of facts that are pleaded for and against such penalty. I, therefore, refrain from making any further comments on the merits of such submission except observing that while considering such issue, the Financial Commissioner shall also keep in mind that the petitioner was denied an opportunity of fair hearing by the Deputy Commissioner and that an order of blacklisting in effect results in ‘civil death’ of the business and, therefore, the penalty must be proportional.

69. Having said so, I must also note that the Commissioner (Excise) in his order dated 20.09.2019 has also observed as under:

“31. The Show Cause Notice No. F.1(1408)/Ex/R/L-17/L-17F/201-17/450 dated 07.09.2016 is clear that the action shall be taken as per the terms of the License and the Delhi Excise At, 2009, and that the same can also be safely discerned from the reading thereof.

32. It is but beyond dispute that a licensee under the Delhi Excise Act, 2009, is bound not only by the terms and conditions of the said license but also the Act, 2009 and rules framed thereunder.

33. Thus, when a licensee, having a license been granted under the Act, 2009, is being proceeded against by the competent authority under the Act, 2009, as per the provisions of the Act, 2009, for the alleged contravention of the provisions of the Act, 2009, the said Licensee cannot claim that he is but ignorant of the penalties under the Act, 2009, and rules thereunder which may be imposed upon him by the competent authority.

34. Thus, once the officers of the Appellant have examined the record, and in fact confirmed the same to the Deputy Commissioner, the Appellant can neither claim any ignorance of the facts of the case being made out against it. The Appellant cannot claim a lack of fair opportunity in rebutting the case against it particularly when the record reflects that the Appellant not only participated in numerous hearings before the Deputy Commissioner but also led arguments and filed written submissions upon the case against it on three occasions viz. on 27.11.2018, 18.12.2018 and on 03.04.2019.

35. Thus, it emerges that not only the Appellant was served with a show cause notice in relation to the inspection carried out at Barshala, the Appellant was also informed of the nature of the proceedings, the cause for the proceedings and also the specific case of M/s Barshala whilst discharging its own burden of

accounting of the said bottles found during the inspection at its premises.

36. The record reflects the Appellant participated extensively in the proceedings over a prolonged period of time, raised its defences, and also gave written submissions denying liability and malafide on its part.

37. Thus, it cannot be said that the Appellant was in the dark about any allegation against it or that it was caught by surprise during the proceedings. In such circumstances, it cannot be held that there was any failure of natural justice with respect to the Appellant. Thus, this contention of the Appellant is accordingly rejected.”

70. In view of my findings hereinabove, the finding of the Commissioner (Excise) rejecting the submission of the petitioner of violation of Principle of Natural Justice by the Deputy Commissioner of Excise, cannot be sustained and is accordingly set aside. However, as the Commissioner (Excise) has also considered the submissions of the petitioner on merits against the allegations made against it, the petitioner may challenge the same in an appeal filed under Section 72 of the Act. In such appeal, the Financial Commissioner shall also consider the effect of the present order on the order passed by the Commissioner (Excise).

71. In view of the above, the present petition is dismissed granting liberty to the petitioner to challenge the order dated 20.09.2019, if so advised, in the form of an appeal as provided in Section 72 of the Act. It is directed that incase the petitioner files such appeal, the same must

be decided in accordance with law and within a period of thirty days of its filing.

72. The parties shall bear their own costs of the present proceedings.

NAVIN CHAWLA, J

DECEMBER 19, 2019/Arya/RN

