

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.01.2019

+ **W.P.(C) 5525/2018**

COASTAL MARINE CONSTRUCTION AND
ENGINEERING LIMITED & ANR

..... Petitioners

versus

INDIAN OIL CORPORATION LTD & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr C.S. Vaidyanathan, Senior Advocate along with Mr Aditya Verma, Mr Bimal Rajesekhar and Mr Shrey Patnaik, Advocates.

For the Respondents : Mr Raman Kapur, Senior Advocate with Mr Amit Meharia, Ms Tannishtha Singh and Ms Rupali Bansal, Advocates for R-1/IOCL. Ms Shubhra Parashar and Mr Virender Pratap Singh Charak, Advocates for R-2/UOI.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition impugning an order dated 30.03.2018 passed by the Director (Pipelines) of respondent no. 1 (hereafter 'IOCL'), whereby the petitioner no.1's appeal against the order dated 15.11.2017 (hereafter 'the impugned orders') passed by the General Manager of IOCL debarring petitioner

no.1 (hereafter the 'petitioner') from entering into any contract with IOCL for a period of three years, was rejected.

2. Concededly, the punitive action of blacklisting the petitioner (referred to as placing the petitioner on a holiday list) was taken on the ground that the petitioner had breached the contract entered into with IOCL. The petitioner disputes this allegation. It is also the petitioner's case that the action of blacklisting the petitioner is arbitrary, unreasonable and disproportionate to the allegations made against it. In addition, the petitioner also claims that the action is *mala fide* and was initiated to support the petitioner's competitor who has been enjoying the monopoly in respect of IOCL's contracts of the specified nature, for over the past three decades.

Factual Context:

3. The petitioner is a company, which was incorporated in the year 1995. The petitioner was promoted by former officers of the Indian Navy and is specialised in providing marine services for oil, gas, port, power and marine infrastructure sector. It is further claimed that the petitioner has approximately 300 employees on its rolls. It has three independent business verticals, namely, (i) Marine Terminals and Seawater System Management; (ii) Geosciences services including offshore surveys and geotechnical investigation; (iii) Erection Procurement & Commissioning (EPC) of Marine Structures and Seawater Intake and Outfall Pipelines. The petitioner claims that it has

an unblemished history of providing services to various Public Sector Undertakings (PSUs) and Government agencies.

4. In December, 2016, IOCL invited tenders for the maintenance and operation of offshore terminal and facilities in the Gulf of Kutch, Off Salaya, Vadinar, Gujarat. In response to the aforesaid tender, the petitioner submitted its bid on 06.02.2017. The petitioner's bid was the lowest and it was declared as L-1. On 18.05.2017, IOCL issued the letter of acceptance (LOA), accepting the petitioner's bid for the aforesaid contract and a formal contract was executed on 02.06.2017 (hereafter 'the Contract').

5. On 18.05.2017 – IOCL issued a specific notice of commencement of work. In terms of the Contract, the petitioner was required to, *inter alia*, deploy manpower equipment and a “marine spread” for operating and maintaining the offshore terminals and facilities at Vadinar, Gujarat. The marine spread comprised of five vessels: (a) a maintenance vessel (as per specifications specified in Exhibits A and E of the tender documents); (b) a support maintenance vessel (as per technical specifications specified in Exhibits B and E of the tender documents); (c) a pollution response vessel (as per technical specifications specified in Exhibit C of the tender documents); and (d) two support boats (as per Exhibit D of the tender documents).

6. It is stated that during the evaluation of the tender, IOCL approved several vessels indicated by the petitioner. A tabular

statement indicating the vessels that were found to be technically compliant by IOCL is tabulated below:-

Sl. No	Vessel category	Offer Vessels/Boats	Technically Accepted Vessels/boats	Vessels/boats required to be deployed
1	SPs 2008 complaint Maintenance Vessel	1.Coastal Commander 2. Cassandra -9 3. Raptor-II	1.Coastal Commander 2. Cassandra 9	1
2.	Support Maintenance Vessels	1. Sealinkmaju 27 2. Coastal Triumph 3. Kitty Fox V	1.Sealinkmaju 27 2. Coastal Triumph	1
3.	Pollution Response Vessels	1. SealinkMaju 8 2. Coromondel Supporter-III/Unistar 32399 3. SealinkMaju 28	1. SealinkMaju 8 2. Coromondel Supporter-III 3. SealinkMaju 28	1
4.	Support Boats	1. Jaya Durga-1 2. Ganesh 3. Sri Anjana 4. Gayathri	1. Jaya Durga-1 2. Ganesh 3. Sri Anjana 4. Gayathri	2

7. Initially the petitioner offered the following vessels to constitute the marine spread: (a) maintenance vessel – M.V Coastal Commander; (b) support maintenance vessel – Coastal Triumph; (c) pollution response vessel – Coromandel Supporter III; and (d) Two support boats – M.V. Gayathri and M.V. Sri Anjana. The vessels Coastal Commander and Coastal Triumph, which were to be deployed as maintenance vessel and support maintenance vessel are owned by the petitioner. The petitioner intended to charter the remaining three vessels and to deploy them at site.

8. In terms of the tender conditions, the petitioner was required to deploy the manpower equipment and the marine spread within a period of fifty days from the date of issuance of specific notice of commencement (which was issued on 18.05.2017). Thus, the petitioner was required to mobilise the marine spread on or before 07.07.2017. It is stated that the kick-off meeting was held between the representatives of the petitioner and IOCL on 26.05.2017. At the said meeting, the petitioner agreed to deploy the marine spread by 01.07.2017.

9. The petitioner claims that sometime in the second week of June 2017, it learnt that a winding up petition had been instituted against the parent company (Great Offshore Ltd.) of Kei Rsos Maritime Ltd., which owned the vessel Coromandel Supporter III. As noticed above, the said vessel was intended to be deployed by the petitioner as the pollution response vessel. The petitioner claims that in view of the said litigation, it did not wish to risk dealing with the company which was facing financial difficulties and, therefore, decided not to deploy the vessel Coromandel Supporter III. Instead of the said vessel, the petitioner chartered another vessel, namely, AHTS Maria, which according to the petitioner, complied with the technical specifications and was capable of undertaking the contractual work.

10. The petitioner also claimed that the owner of M.V. Gayathri which was to be deployed as one of the support boats, also reneged on his commitment and, therefore, for reasons beyond the control of the petitioner, was not in a position to deploy that vessel. Nonetheless, in

order to comply with the contractual obligations, the petitioner chartered another vessel Rishi Vistara I as a substitute of M.V. Gayathri.

11. The intention of the petitioner to substitute the vessels M.V. Coromandel III and M.V. Gayathri was communicated to IOCL by an email dated 15.06.2017.

12. The petitioner also forwarded the relevant documents relating to the said two vessels (Maria and Rishi Vistara I) which was arranged as a substitute for Coromandel Supporter III and M.V. Gayathri. By an email dated 16.06.2017, ICOL confirmed that vessel Maria met all the technical parameters as per the tender documents and requested for inspection of the vessel and verification of original documents. As far as the support boat Rishi Vistara I is concerned, IOCL confirmed that it met all the technical parameters except that the moulded depth of the boat was four meters against the stipulated specification of 2.2 to 3.2 metres. IOCL agreed that the said boat would be able to carry out all functions but may have difficulty in coming along with SPM Buoy and, therefore, the same could not be accepted. The petitioner was called upon to provide an alternate support boat as per the tender specifications.

13. The petitioner responded to the said mail by clarifying that Rishi Vistara I had a huge fuel and fresh water capacity due to which the moulded depth was four meters. It was stated that the petitioner would maintain minimum bunkers of fuel and freshwater on board and ensure

that the vessel draft is kept minimum at all time during her deployment at location. In other words, the petitioner explained that the said vessel's depth could be reduced by keeping the fuel and fresh water capacity at the minimum. In addition, the petitioner also offered another vessel named Alliance. It was stated that the said vessel was involved in similar work for Bharat Petroleum Corporation Limited (BPCL) at Kochi and was presently undergoing a docking survey. The petitioner stated that the said vessel was to be undocked on 06.07.2017 and would be available for deployment by around 10.07.2017. Further, the petitioner also committed that it would deploy an additional boat KB XII with no additional cost to IOCL so that adequate resources are available at site to overcome all initial teething and settling down issues.

14. On 19.06.2017, IOCL sent a letter calling upon the petitioner to deploy only Coromandel Supporter III and M.V. Gayathri and further threatening to terminate the Contract if the petitioner did not adhere to the same.

15. The petitioner responded to the above letter by explaining reasons why the vessels originally offered could not be deployed. It also pointed out in its communications that IOCL had permitted departures from very critical and crucial terms of the relevant tender to accommodate the operator engaged previously to provide the service, which was now contracted to the petitioner. By an email dated 19.06.2017, the petitioner confirmed that it had already made

arrangements to deploy its marine spread and informed IOCL of the current status in a tabular form which is set out below:-

Sr	Name	Owned /Hired	Duties	Present Status	Remarks	EDA Vadinar, agwwp
1	Coastal Commander	Owned	Maintenance Vessel (SPS)	Ready by 21 st June		26 th June
2	Costal Triumph	Owned	Support Maintenance Vessel	Ready by 21 st June		26 th June
3	Coromandel Supporter-III	Hired	Pollution Response	Owner Parent Company under liquidation Chartered by Underwater/Samson	Alternate vessel "AHTS MARIA", meeting and exceeding all specifications with valid certificates hired	29 th June
4	Sri Anjana	Hired	Support Boat	Enroute to Vadinar		28 th /29 th June
5	Gayathri	Hired	Support Boat	Charter by Underwater/Samson	Alternate vessel, Tug Rishi Vistara1/Tug Alliance meeting and exceeding all specifications with valid certificates hired	26 th June
6	KB XII	Hired	Additional Boat		Additional Support Boat	26 th June

16. On 30.06.2017, the petitioner sent further emails to IOCL confirming its state of readiness. It is stated that simultaneously the senior management of the petitioner and representatives of IOCL also held meetings.

17. On 02.07.2017, IOCL carried out an inspection of the pollution response vessel M.V. Maria (which was chartered by the petitioner as a substitute for Coromandel Supporter III). On 03.07.2017, IOCL issued a communication, *inter alia*, stating that M.V. Maria did not meet the tender specifications. IOCL claims that during speed trial of the vessel, it was observed that the speed of the vessel at 8.5 knots instead of the minimum speed of 10 knots as mentioned in Exhibit C of the Contract. In addition, IOCL also mentioned that the vessel crane could not be tested due to some fault in hydraulic hose.

18. The petitioner responded to the said communication contesting IOCL's claim that M.V. Maria did not meet the stipulated technical specifications. It was reiterated that as per the registry certificate issued by Marine Mercantile Department and the classification certificate issued by Indian Register of Shipping, the design speed of the vessel was 13 knots. It is stated that the speed trial was conducted under inclement weather conditions which was not apposite for conduct of such trial. The petitioner further agreed to conduct a fresh trial once the weather conditions improved. On 06.07.2017, a meeting was held between representatives of the petitioner and IOCL. The said minutes indicate that the petitioner had offered eight vessels for its marine spread. The maintenance vessel Coastal Commander and support maintenance vessel M.V. Coastal Triumph were already at site and there was no dispute that the said vessels met the contractual specifications. In respect of M.V. Maria (pollution response vessel), the same was also available at site. Whereas the petitioner claimed

that it conformed to the tender specification, IOCL disputed the same. However, re-inspection of the said vessel was agreed to be scheduled on 07.07.2018. In so far as the support boats are concerned, Rishi Vistara I was at site but did not meet the contractual specifications. The petitioner had offered an additional boat - KB XII which was also available at site but according to IOCL did not meet the contractual specifications. In addition, the petitioner had offered three other separate boats: Resco IV, Alliance and Anjana. Resco IV was expected to arrive on 06.07.2017 and the other two support boats were expected to arrive on 12.07.2017.

19. There is a controversy as to the minutes of the meeting held on 06.07.2017, the petitioner claims that the said minutes are one sided and they were compelled to sign the same. IOCL, on the other hand, disputes the said contention. The minutes indicate that IOCL had agreed to allow the petitioner to mobilize its complete marine spread by 12.07.2017, failing which IOCL reserved its rights to take suitable action in terms of the Contract.

20. Apparently, M.V. Maria was inspected on 07.07.2017. According to IOCL, the re-inspection carried out on 07.07.2017 also indicated that M.V. Maria did not meet the tender specifications. It was observed that the vessel speed was 10.4 knots in the favourable tide current (which conformed to the tender specifications). However, the vessel speed was 8.9 knots in the reverse direction, which according to IOCL failed the speed trial. The petitioner seriously disputes the aforesaid methodology of carrying out the speed trial.

21. On 08.07.2017, the petitioner's remaining support vessel (vessel Resco IV) arrived at site and was found compliant with the technical specifications. The support boat Anjana also arrived at site on 11.07.2017. In addition to not accepting that some of the vessels were technically compliant, IOCL had also raised an issue with regard to documents relating to the charter party of the said vessels. According to IOCL, the said vessels could not be accepted as the petitioner had not produced the charter party in respect of the said vessels.

22. On 20.07.2017, IOCL terminated the Contract with the petitioner by referring to Clause 23.1.1 of the Special Conditions of contract (SCC) which entitled IOCL to terminate the Contract, *inter alia*, on account of failure on the part of the petitioner to comply with any of the obligations under the Contract including for failure to commence work at site. Thereafter, on 25.07.2017, IOCL floated a limited tender.

23. On 01.08.2017, the petitioner responded to the termination notice describing the same as wrongful and constituting a repudiatory breach of contract by IOCL. On 22.08.2017, IOCL floated a re-tender. The petitioner submitted its bid once again in terms of the said tender and it is the petitioner's case that its technical bid was compliant with the technical specifications. The time for opening of the technical bid was extended from 20.09.2017 to 04.10.2017 and the date for opening the financial bid was fixed on 21.11.2017. On 06.10.2017, IOCL issued a show cause notice calling upon the petitioner to show cause

why it should not be put on a holiday list on account of breach of the terms of the Contract.

24. The petitioner responded to the said communication on 19.10.2017 disputing that it had breached the Contract in question.

25. On 15.11.2017, IOCL passed an order placing the petitioner on holiday list for a period of three years from the said date. Thereafter, by a letter dated 20.11.2017, the petitioner was informed that it was disqualified from being awarded the tender. The petitioner filed an appeal against the order dated 15.11.2017.

26. Since the petitioner received no response in this regard, the petitioner filed a writ petition before this Court being W.P.(C) 2503/2018. The said petition was disposed of by an order dated 16.03.2018 directing the Director (Pipelines), IOCL to dispose of the petitioner's appeal at the earliest after affording the petitioner an opportunity of being heard.

27. Thereafter, the petitioner was afforded a hearing on 27.03.2018 and the impugned order was passed on 30.03.2018.

28. In the meanwhile, the petitioner had invoked the arbitration clause seeking to refer the disputes between the parties to arbitration.

29. On 23.04.2018, the petitioner received a communication from IOCL *inter alia* stating that the claims raised by the petitioner were excluded from the scope of Arbitration Clause invoked by the petitioner. A plain reading of the Arbitration Clause contained in the

Contract indicates that the same is limited to “notified claims” and IOCL’s contention that the disputes raised by the petitioner were not arbitrable is merited. Accordingly, by a letter dated 07.05.2018, the petitioner withdrew its invocation notice while reserving its right to seek relief in respect of wrongful termination before an appropriate forum.

Submissions:

30. Mr C.S. Vaidyanathan, learned Senior Counsel appearing for the petitioners contended that the only allegation against the petitioner is that of breach of contract and the same was insufficient for taking the punitive measure of blacklisting the petitioner. He contended that the ground that the petitioner was an undesirable entity for entering into a contract was referred to for the first time in the impugned order dated 15.11.2017 which was passed in an appeal against the order of blacklisting.

31. He further submitted that the impugned orders were harsh and disproportionate to the allegations made against the petitioner. He referred to the decision in the case of ***Kulja Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL & Ors.: AIR 2014 SC 9*** and submitted that none of the relevant factors as noticed in the said decision were taken into account while imposing the penalty for debarring the petitioner for a period of three years. He had also referred to the decision of the Division Bench of the Bombay High Court in ***Sarku Engineering Services SDN BHD v. Union of India***

and Anr.: 2016 SCC OnLine Bom 5233 in support of his contention that the power to blacklist a contractor could not be resorted to unless there was overwhelming material warranting such an order.

32. Next, he submitted that the allegations of breach of contract on the part of the petitioner were wholly erroneous and the termination of the Contract was wrongful. He submitted that the petitioner had made all arrangements to perform the Contract but was effectively prevented from doing so. He further submitted that the objections raised by IOCL regarding the vessels hired by the petitioners were perfunctory and raised only with the view to oust the petitioner. He submitted that the contract for maintenance and operation of offshore terminal facilities had been cornered by one contractor (referred to as 'Underwater') for the past over three decades and IOCL had terminated the Contract with the petitioner only with the view to award the same to Underwater. He submitted that IOCL had, in the past condoned the non-performance by Underwater and had also accepted the vessels provided by that contractor even though the same did not comply with the technical specifications. However, contrary to their conduct with the other contractor, IOCL had not only terminated the Contract with the petitioner citing certain technical reasons, which are not sustainable but had also blacklisted the petitioner in order to exclude the petitioner from the future tendering process.

33. Mr Raman Kapur, learned Senior Counsel appearing for IOCL countered the submissions made by Mr Vaidyanathan. He submitted that the validity of the action of IOCL in terminating the Contract

could not be examined in this petition. He contended that the petitioner was in breach of the Contract as the petitioner had failed to mobilize the marine spread as required in terms of the Contract. He submitted that in terms of the guidelines for “holiday listing/de-listing of vendors/contractors” (“Blacklisting Guidelines”) IOCL was well within its right to place a contractor, who was in breach of a contract, on a holiday list. He further contended that the impugned orders had been passed after affording the petitioner due opportunity to be heard and after following the principles of natural justice and, therefore, no interference was warranted with the impugned orders.

34. He contended that IOCL had accepted more than one vessel in each category and, therefore, the petitioner had full flexibility in arranging another vessel from the approved list, if any of the vessels were not available. However, the petitioner had changed the vessels frequently, thus, jeopardising operations of the offshore terminal and facilities at Vadinar. He also submitted that the Contract in question was very critical to IOCL for continuity of its operations. He submitted that SPM (Single Point Mooring) at the site catered to crude oil requirements of IOCL’s refinery at Mathura, Panipat and Koyali and, therefore, it was essential that the facilities remain operational without any interruption. He submitted that breach of such contract would have serious consequences on IOCL’s operations and, therefore, IOCL had considered the petitioner as an undesirable person for entering into future contracts.

Discussions and Conclusion:

35. At the outset, it is necessary to observe that the question whether the petitioner had committed a breach of the Contract is inextricably linked with the punitive measure imposed by IOCL. Although, there is merit in the contention that this Court is not called upon to adjudicate the dispute regarding the validity of IOCL's action in terminating the Contract, nonetheless, it is essential to examine the controversy as IOCL's action of blacklisting the petitioner is premised solely on the basis that the petitioner had breached the Contract entered into with IOCL.

36. It is now well settled that blacklisting a person visits him with serious adverse consequences. In **Erusian Equipment & Chemicals Ltd v. State of West Bengal and another**: (1975) 1 SCC 70, the Supreme Court had observed as under:-

“The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are “instruments of coercion”.”

37. The Supreme Court in **Gorkha Security Services v. Government (NCT of Delhi) & Ors.** : 2014 SCC Online SC 599 had made the following observation:

“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.”

38. Indisputably, the impugned orders blacklisting the petitioner have severe adverse consequences for the petitioner. It is not disputed that the petitioner is essentially involved in executing contracts for various PSUs and Government agencies. It is usual for all Government undertakings and PSUs to specify eligibility criteria that excludes any person who has been blacklisted by any other Government agency, from participating in contracts or for tendering for contracts with Government agencies. Undisputedly, the import of the impugned orders blacklisting the petitioner is that the petitioner would also be disabled from participating in bidding processes or entering into contracts with other PSUs and Government agencies. The magnitude of the punitive measure is further enhanced as the petitioner has three independent business verticals and the business of rendering marine support is a small fraction of the overall business of the petitioner. The impugned orders would not only affect the petitioner in conducting the business with regard to marine support but also disable the petitioner from executing contracts relating to its other business verticals.

39. There are two facets to the challenge that require consideration. First of all, whether the allegations made against the petitioner warrant a punitive measure of this nature; and secondly, whether the quantum of punishment imposed is proportionate to the alleged misconduct.

40. Before proceeding further, it would be necessary to observe that insofar as the breach of contract is concerned, the parties have their remedies in law. An order debarring a party from entering into any contracts in future is not pivoted on a disagreement relating to contractual obligations but on a premise that it is undesirable to enter into a contract with such an entity. As observed by the Supreme Court in *Kulja Industries Ltd.* (*supra*), such measures are also used to discipline an errant contractor.

41. Plainly, a contested allegation of breach of a contract simpliciter does not invite the punitive measure of blacklisting. This is not to say that an order of blacklisting cannot be founded on the conduct of a party who is found to be in breach of a contract. Obviously, the presumption is that a person who has failed and neglected to perform his contractual obligations is unworthy of being considered for any contractual arrangements in future. The principal consideration for imposing the punitive measure is whether such a party is unworthy of being engaged for performing a contract. There may be cases where the conduct of the party is found so wanton and callous that it not only amounts to that party breaching his contractual obligations but may also lead to the conclusion that it is not desirable to enter into any contract with the said party. However, there may be cases where a party is unable to perform a contract or is disabled from doing so, for unforeseen reasons, which may be beyond the control of that party. There may be cases where despite the party making all *bona fide* attempts to fulfil its contractual obligations is unable to do so for

reasons that he cannot be held responsible for. In certain cases, there may be a serious controversy, whether the party has, in fact, breached the contract. Clearly, in such cases, non-performance of a contract would not indicate that the party is unworthy of being awarded contracts in future.

42. As observed by the Supreme Court in *Erusian Equipment & Chemicals Ltd.* (*supra*), an order of blacklisting casts a slur on the party being blacklisted and is stigmatic. Given the nature of such an order and the import thereof, it would be unreasonable and arbitrary to visit every contractor who is in breach of his contractual obligations with such consequences. In *Sarku Engineering Services* (*supra*), a Division Bench of the Bombay High Court considered the case of a contractor (the petitioner therein) who had been blacklisted on the allegation that it was responsible for major delay in execution of a contract entered into with Oil and Natural Gas Corporation Limited (respondent no.2 therein). The contractor disputed the allegation that it was in breach of its obligations; however, Oil and Natural Gas Corporation Limited found the performance of the petitioner therein to be unsatisfactory and, therefore, decided to avoid future dealings with the said petitioner. The question whether the petitioner therein was, in fact, responsible for the delay was a disputed question that was pending adjudication by an arbitral tribunal. In the aforesaid context, the Bombay High Court had observed as under:-

“58. We hasten to add that there could be a situation wherein the inherent power of blacklisting or placing the

contractor on Holiday-list can be exercised and the stipulations or the terms of the contract may not restrict or fetter exercise of such power. Equally, mere pendency of legal proceedings cannot be an absolute bar for invoking this inherent power or exercising it. However, there have to be strong, independent and overwhelming materials to resort to this power given the drastic consequences that an order of blacklisting has on a contractor. The power to blacklist cannot be resorted to when the grounds for the same are only breach or violation of a term or condition of a particular contract and when legal redress is available to both parties. Else, for every breach or violation, though there are legal modes of redress and which compensate the party like respondent No.2, it would resort to blacklisting and by sometimes abandoning or scuttling the pending legal proceedings.”

43. Plainly, if a contractor is to be visited with the punitive measure of blacklisting on account of an allegation that he has committed a breach of a contract, the nature of his conduct must be so deviant or aberrant so as to warrant such a punitive measure. A mere allegation of breach of contractual obligations that is disputed, *per se*, does not invite any such punitive action. In the present case, IOCL had relied upon the Blacklisting Guidelines in support of the impugned orders. In terms of paragraph 2.1(i) of the Blacklisting Guidelines, a party could be put on a holiday list if he had committed a breach of a contract.

44. At this stage, it would be relevant to refer to paragraphs 2.1, 2.3 and 5 of the Blacklisting Guidelines, which are set out below:-

“2.1 The purpose of putting a party on holiday list is to protect the Corporation from dealing with an undesirable party. Reason for putting a party on

holiday list may include any one or more of the following:

If a party

- a) has indulged in malpractices such as bribery, corruption, fraud and pilferage, bid rigging/ price rigging
- b) is bankrupt or insolvent or is being dissolved or has resolved to be wound up or proceedings for winding up or dissolution have been instituted.
- c) has submitted fake, false or forged documents / certificates.
- d) has substituted materials in lieu of materials supplied by IOCL or has not returned or has short returned or has unauthorisedly disposed off materials/ documents / drawings / tools or plants or equipment supplied by IOCL.
- e) has obtained official company information or copies of documents, in relation to the tender / contract, by questionable methods / means.
- f) has deliberately violated and circumvented the provisions of labour laws/regulations/rules, safety norms or other statutory requirements.
- g) has deliberately indulged in construction and erection of defective works or supply of defective materials.
- h) has not cleared IOCL's previous dues.
- i) has committed Breach of Contract or has failed to perform a contract or has abandoned the contract.

- j) has refused to accept Fax of Acceptance / Letter of Acceptance / Purchase Order / Work Order after the same is issued by IOCL within the validity period and as per agreed terms & conditions.
- k) after opening of Price Bid, on becoming L1, withdraws/ revises his bid upwards within the validity period.
- l) has parted with, leaked or provided confidential /proprietary information of IOCL given to the party only for his use (in discharge of his obligations against an order) to any third party without prior consent of IOCL.
- m) any other ground for which, in the opinion of the Corporation makes it undesirable to deal with the party including the followings:
 - i. if the security consideration, including questions of loyalty of the party to the State so warrants
 - ii. if the Director/ Owner of the party, proprietor or partner of the party is convicted by a Court of Law under normal process of law for offences involving moral turpitude in relation to its business dealings during the last five years.

Moral Turpitude means to be a conduct contrary to justice, honesty, modesty or good morals and contrary to what a man owes to a fellowman or to society in general.
 - iii. If the party uses intimidation/threatening or brings undue outside pressure on IOCL

or its official in acceptance/ performances of the job under the contract.

- iv. Poor performance of the party in one or several contracts.
- v. Transgression of Integrity Pact for which in the opinion of IOCL makes it undesirable to deal with the party.
- vi. Based on the findings of the investigation report of any investigative agency, Government Audit, any law enforcement agency or government regulator against the party for malafide/unlawful acts or improper conduct on his part in matters relating to IOCL or even otherwise.

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- 2.3 The grounds /reasons for holiday listing indicated in para 2.1 above are merely illustrative and are intended to provided a guideline for considering placing a party on holiday list. It will be for the initiating department in each case to evaluate whether the conduct of the party is such as it makes it undesirable for the Corporation to deal further with the party and for the committee (refer clause 4 hereinafter) and approving authority (refer clause 6 hereinafter) to determine this on reviewing all relevant factors.

Divisional director or Chairman may also direct such an exercise without reference to Vigilance or any other investigating agencies.

Vigilance Department of each unit/ Corporate Vigilance, based on the fact of the case, gathered during investigation may also recommend

appropriate action against the Party as per this Policy.

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5. Duration of Holiday

The Committee at para 4.1 above should deliberate on duration for which the party is to be put on holiday. Ordinarily, the period for which a party is place on holiday should not exceed 3years, however, in extra-ordinary circumstances, the period may be more than 3 years & specific reasons for the same shall be recorded.”

45. A plain reading of paragraph 2.1 of the Blacklisting Guidelines indicates that it lists out several reasons on account of which a party may be blacklisted. The said reasons must be read in a meaningful manner. In terms of Clause (a) of paragraph 2.1, a party who has indulged in malpractices, such as bribery, corruption, fraud and pilferage, bid rigging/price rigging can be blacklisted on account of indulging in such malpractices. Similarly, under Clause (c) submission of fake, false or forged documents / certificates can be a reason for blacklisting a party. Clearly, such acts cannot be equated with an allegation of a breach of contract simpliciter.

46. Reasons as listed out on paragraph 2.1 of the Blacklisting Guidelines are merely indicative reasons. The same must be read in the context of the overarching requirement of blacklisting persons who are found to be undesirable for entering into contracts or for taking a punitive measure against an errant party. The underlying premise for any such action would necessarily relate to the conduct of a party. The

conduct must be so reprehensible so as to invite a punitive measure that has such grave consequences as noticed hereinbefore. A drastic measure of blacklisting cannot be visited merely on account of *bona fide* controversies relating to contractual matter.

47. Paragraph 2.3 of the Blacklisting Guidelines expressly provides that the grounds and reasons listed in paragraph 2.1 of the said guidelines are merely illustrative and are intended to provide a guideline for placing a party on holiday list. It also makes it amply clear that before taking any punitive measure of blacklisting a party, his conduct must be evaluated on the touchstone of whether it makes it undesirable for the corporation to deal with him. Thus, the initiating department is required to evaluate whether the conduct of the party is such that it makes it undesirable for a corporation to deal further with the party.

48. In the present case, the show cause notice dated 06.10.2017 issued to the petitioner merely cited the following reasons for proposing to take the action:-

- “a. Failure to commence work at job site in accordance with the time prescribed in this behalf in the Progress Schedule;
- b. Failure to carry out on the works or any of item to meet the Progress Schedule;
- c. Failure to deploy complete marine spread as per contractual specifications even within mutually agreed extended timeline;

- d. Failure to execute the works or any of item in accordance with the Contract;
- e. Disobedience of any order or instruction of the Engineer-in-Charge and/or Site Engineer;”

49. It is apparent from the above that the aforesaid reasons were lifted from the contractual terms and some of them are inapplicable in the facts of the present case. Failure to meet the progress schedule or disobedience of any order or instruction was clearly not an issue in the present case. Thus, the only effective reason cited in the show cause notice was alleged failure on the part of the petitioner to commence the work and to deploy the marine spread as per contractual specifications.

50. The impugned order dated 15.11.2017 is fairly elaborate but apart from giving reasons why the petitioner was found in breach of the Contract, does not indicate any reason why the petitioner’s conduct should be considered as reprehensible or one that would warrant any action other than initiation of remedies for a breach of contract.

51. There is a serious dispute as to whether the petitioner has breached the terms of the Contract as alleged. Mr Kapur had contended that the petitioner had withdrawn its arbitration claim and, therefore, has accepted that the petitioner was in breach of its obligations and the action of IOCL terminating the Contract is valid. The said contention is unmerited. It fails to take into account that it was IOCL’s stand that the disputes were not arbitrable, which as noticed above was merited. The arbitration clause devised by IOCL in its standard contract appears to be a one sided clause where only such claims that are notified can be

referred to arbitration and further any dispute whether any claim is a notified claim or not, is also an excepted matter. The dispute as to termination of the Contract by IOCL was not a notified claim and, therefore, the petitioner had little option but to withdraw the same. In its writ petition, the petitioner had unequivocally stated that it is in the process of instituting an appropriate action and there is no reason to doubt the same. However, the question whether the petitioner institutes an action for alleged wrongful termination of the Contract is not material. The petitioner may, keeping into account various factors such as costs of litigation, choose not to pursue its remedies against the termination of the Contract that it believes to be wrongful; but that does not mean that the petitioner does not dispute the same.

52. The petitioner was to deploy a marine spread comprising of five vessels. There is no dispute regarding two of the said vessels, namely, the maintenance vessel (M.V. Coastal Commander) and support maintenance vessel (M.V. Coastal Triumph). The dispute, essentially, relates to the remaining three vessels, namely, the pollution response vessel and the two support boats. Admittedly, IOCL had approved the vessel M.V. Anjana as a support boat and indisputably, the said vessel was available at site on 12.07.2017. Insofar as the pollution response vessel is concerned, the said vessel also met with the technical specifications except for the controversy regarding the speed trials as is evident from the IOCL's email dated 16.06.2017. The contents of the said email are set out below:-

“Dear Sir,

The documents for the vessel Maria and Rishi Vistara have been reviewed and our observations are as under:

Vessel Maria(pollution response vessel)

- The vessel meets all the technical parameters as per the tender document.
- Original documents need to be verified.
- Please confirm dates for the inspection of the vessel

Boat Rishi Vistara-I (support boat)

- The boat meets all the technical parameters.
- However, the depth of the boat as per certificate of Registry is 4.0magainst tender requirement of 2.2 to 3.2 mts. This support boat will be able to carry out all functions like hose handling, passing of ropes to taker but due to higher depth may have difficulty incoming along with the SPM buoy. Therefore, the boat cannot be accepted technically.
- You are required to provide an alternate support boat meeting the specifications as per our tender terms.

Regards

Deepak Kumar Agarwal
MNM (Offshore)
PLHO, NOIDA”

53. The controversy with regard to the speed of the vessel Maria was raised subsequently. There is a serious dispute as to the manner in which the speed trials were conducted by IOCL. Be that as it may,

even according to IOCL, the vessel had met the speed test as it was observed that its speed was 10.4 knots in the favourable tide current. However, according to IOCL, the vessel failed the speed test in the reverse direction. It is relevant to note that there is no dispute that the Registry Certificate issued by the Marine Mercantile Department and the Classification Certificate issued by the Indian Register of Shipping indicated that the design speed of the vessel to be 13 knots. Clearly, the petitioner's case that the said vessel (M.V. Maria) met the technical specification and it was entitled to substitute the same, is not unsubstantial.

54. Insofar as the support boat is concerned, the petitioner had arranged for a support boat (Resco IV), which had arrived at Vadinar on 08.07.2017 and there appears to be no dispute that the said vessel complied with the technical specifications. In addition to the above, the petitioner had also placed an additional support boat KB XII and Rishi Vistara I. As far as Rishi Vistara I is concerned, it had complied with all technical specifications other than moulded depth. The petitioner had offered an explanation for the same and indicated that the depth of four meters was on account of a high capacity to carry fuel and fresh water and the said vessel could be operated with a minimum level of fuel and water.

55. It is not necessary for this Court to examine the rival contentions regarding whether these vessels strictly met the technical specifications or not. However, it is clear that the petitioner had made serious efforts to deploy a viable marine spread.

56. Although there are allegations that the petitioner had not submitted that charter party, admittedly the contractual terms did not require the petitioner to do so. The petitioner had the option to either submit a charter party or an MOU. Further, even if it is accepted that failure to do so was a breach of the terms of the Contract, it cannot be ignored that the vessels were present at Vadinar for performance of the work in question. Thus, without going into the question whether the alleged failure to submit document amounted to a breach of contract, it is clear that as far as the petitioner is concerned, it had made efforts to execute the work at site. Plainly, non-submission of document does not warrant action of blacklisting.

57. This is, clearly, not a case where the petitioner's conduct could be found as so wanton and reprehensible so as to effectively disqualify the petitioner from conducting its business for a period of three years.

58. The second issue that requires to be examined is whether the action of the respondents is disproportionate so as to warrant interference by this Court. In this regard it is relevant to refer to certain observations of the Supreme Court in **Kulja Industries Ltd.** (*supra*). In the said decision, it had held as under:-

“24. Suffice it to say that ‘debarment’ is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable

is that the ‘debarment’ is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.”

59. It is apparent from the above that the measure of blacklisting is imposed on a deviant supplier. However, the object is not to commercially eliminate the contractor. Thus, it is essential that the punishment imposed on the concerned person is commensurate with his actions. In its guidelines, IOCL had also provided that ordinarily the period of blacklisting should not exceed three years except in extraordinary circumstances. Thus, three years has been provided as an indicative upper limit of the blacklisting period.

60. In terms of paragraph 5 of the Blacklisting Guidelines, the maximum period of blacklisting should be maximum period of three years. In the present case, IOCL has awarded the maximum period of debarment that could be ordinarily imposed. If one examines this period of debarment with reference to the grounds as listed in paragraph 2.1 of the Blacklisting Guidelines, it would be apparent that the action taken is wholly disproportionate to the allegation made against the petitioner. The punitive measure of blacklisting a contractor for a period of three years, would be imposed in cases of malpractices such as bribery, corruption, fraud and pilferage, bid rigging/ price rigging [paragraph 2.1(a)]

61. Such measure would also be imposed in cases where fake, false or forged documents / certificates have been issued by a contractor

[paragraph 2.1(c)] or where a contractor has deliberately indulged in construction and erection of defective works or supply of defective materials [paragraph 2.1(g)]. Keeping the gravity of such offences in mind it is at once clear that blacklisting the petitioner for the maximum permissible period on account of an alleged breach of contract and where there is a real controversy as to the allegation, is *ex facie* arbitrary and disproportionate.

62. In ***Kulja Industries Ltd.*** (*supra*), the Supreme Court had summarized the factors that were necessary to be considered by an authority determining the punitive measure. The same are set out below:-

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

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

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

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

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

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

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

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

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

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

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

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

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

63. It is apparent that the authorities had also not considered the aforesaid factors while blacklisting the petitioner for a period of three years.

64. Mr Kapur had contended that since the concerned authorities had duly given show cause notice and had followed the principles of

natural justice, no interference in the impugned orders by this Court is warranted. This Court finds the said contention unpersuasive.

65. The decision of the administrative authorities is not only to be tested on the anvil of procedural irregularity but also on the doctrine of proportionality. The measure which is highly disproportionate would, indisputably, also fail the test of reasonableness and thus fall foul of Article 14 of the Constitution of India.

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

“(1) First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights.”

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

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

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

68. The Supreme Court in **All India Railway Recruitment Board v. K. Shyam Kumar & Ors.:** (2010) 6 SCC 614 referred to various decisions of the English Courts as well as the earlier decisions of the Supreme Court and summarised the law as under:-

“36. *Wednesbury* applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to “assess the balance or equation” struck by the decision-maker. Proportionality test in some jurisdictions is also described as the “least injurious means” or “minimal impairment” test so as to safeguard the fundamental rights of citizens and to ensure a fair balance

between individual rights and public interest. Suffice it to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalise or lay down a straitjacket formula and to say that *Wednesbury* has met with its death knell is too tall a statement. Let us, however, recognise the fact that the current trend seems to favour proportionality test but *Wednesbury* has not met with its judicial burial and a State burial, with full honours is surely not to happen in the near future.

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

69. In *Kulja Industries Ltd.* (*supra*), the Supreme Court had held that “.... *The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice*

but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court.”

70. It is also relevant to note that the petitioner had made specific allegation in its email dated 24.06.2017 that the only deviation in the past in relation to performance of the same work had been condoned. The deviations referred to by the petitioner are set out below:-

- “c. Past Precedents of actual deviations being allowed in the past for the same contract
 - i. the Pollution Response Vessel (PRV) and the Support Maintenance Vessels were mobilized two months after the start date of 1st July 2014.
 - ii. Furthermore, although the specifications of the tender document (for the contract starting 2014) required the Pollution Response Vessel to have a bow thruster which is critical, fundamental and mandatory for vessel manoeuvrability, the vessel deployed for the past 34 months (Sept 2014 till date is without a bow thruster.”

71. The said statement was not disputed. It has also not been disputed before this Court that the petitioner had condoned deviations in respect of the contractor engaged earlier to perform the same work that was awarded to the petitioner. Clearly, if in case of such deviations, IOCL had condoned the same and accepted the

performance of contract by a contractor engaged earlier, it would be highly disproportionate for IOCL to now impose punitive measures on account of certain deviations, which are disputed.

72. Mr Vaidyanathan had contended that the action of blacklisting cannot be taken on mere allegation and unless it is adjudicated upon that the petitioner was in breach of the Contract, it would not be open for IOCL to pass any such order. He relied on the decision of this Court in *Indian Oil Corporation Limited v. S.P.S. Engineering Ltd.*: **2006 (88) DRJ 93 (DB)** and *Prakash Atlanta JV & Ors. v. National Highways Authority of India & Ors.*: **ILR (2010) V Delhi 38**.

73. Undoubtedly, in certain circumstances, it would be necessary for the concerned authorities to await the outcome of adjudicatory proceedings before initiating action that is premised solely on the issues, which are subject matter of adjudication. However, the said rule is not one of universal application. In cases, where an authority believes that the action and conduct of a party is so reprehensible or that the party is so untrustworthy that it would not be in its interest or in the public interest to enter into any contract with such party; it certainly is not powerless to debar the said party from entering into any contract with it.

74. In *Patel Engineering Ltd. v. Union of India and Anr.*: **(2012) 11 SCC 257**, the Supreme Court had explained that the power of the State to blacklist a bidder is a necessary concomitant to its executive

power to carry on business. The relevant observations of the Supreme Court are set out below:-

“15. It follows from the above judgment in Erusian Equipment case that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into a contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary - thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors.”

75. Thus, undoubtedly, IOCL would have the power to blacklist a contractor, even though the disputes with the said contractor are pending adjudication. However, the said power is not absolute. It is circumscribed by well settled principles. Exercise of such power must be *bonafide*. It must be exercised for cogent reasons and in circumstances where the authority finds it necessary. The punishment imposed must also be proportionate to the offending conduct.

76. In the present case, this Court is unable to sustain the impugned orders blacklisting the petitioner, as the said orders have been passed

without reference to the underlying object, that is, to disbar people who were found to be undesirable for entering into contracts. In the present case, the action has been taken only on account of a dispute regarding performance of contractual obligations. In the given facts, it is apparent that there is a *bona fide* dispute raised by the petitioner and there is no material to indicate that IOCL had found the petitioner's conduct so reprehensible that it was undesirable for IOCL to deal further with the petitioner. Although, the Appellate Authority has made observations to the aforesaid effect, in the context of the importance of the contract in question, however, that was not the ground mentioned in the show cause notice or the ground on which the impugned order dated 15.11.2017 was passed.

77. This Court also finds that the action of blacklisting is wholly disproportionate and unreasonable in the given facts, as it is apparent that the petitioner had made efforts to perform its Contract and its contention that it was not in breach of the Contract, is *bona fide* and not insubstantial.

78. In view of the above, the impugned orders are set aside. The parties are left to bear their own costs.

79. The petition is disposed of in the aforesaid terms along with the pending applications, if any.

80. It is clarified that nothing stated herein shall be read as a conclusive expression of opinion on the question whether the petitioner has, in fact, failed to perform its obligations under the

Contract or whether the termination of the Contract by IOCL was wrongful.

VIBHU BAKHRU, J

JANUARY 15, 2019

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