

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 23444 of 2019

With

WPA No.221 of 2020

Sahakar Global Limited and another

Vs.

The State of West Bengal and others

For the petitioners : Mr. Jishnu Saha,
Mr. Souritro Ganguly,
Mr. Sandip Agarwal,
Mr. Tanay Agarwal,
Mr. S. Bhinsaria.

For the State : Mr. Kishore Dutta,
Mr. Md. T.M. Siddiqui,
Mr. Srikanta Paul.

Hearing concluded on : 22.04.2021

Judgment on : 11.06.2021

Sabyasachi Bhattacharyya, J:-

1. The respondent-authorities floated a tender for toll collection on the bridge over the river Ajay. The petitioners' bid of Rs.5,13,000/- per day was accepted, whereupon a Letter of Acceptance (LoA) was issued to the petitioners on November 27, 2017, followed by a formal work order dated November 29, 2017. The work order was issued for a period of 730 days from November 30, 2017.
2. It was mentioned in the tender notice that toll charges were payable by the following four categories of vehicles:

- (i) Light Motor Vehicles (LMV) including motor car, 'matador' and 'tempo';
 - (ii) Medium Commercial Vehicle (MCV) including bus, truck, lorry, mini bus;
 - (iii) Heavy Construction Machinery (HCM) or Earth Moving Equipment (EMQ) or multi-axel vehicle with three to six axles; and
 - (iv) Oversized vehicles (seven or more axles).
3. The respective rates of toll charges for the above categories were also specified in Part II of the tender notice.
 4. Pursuant to the terms of the work order, the petitioner deposited a sum of Rs.74,89,000/- as contract of 73 days' bid money in advance.
 5. Clause 22 of the Special Terms and Conditions of the tender (STC) required the successful bidder to deposit 15 days of the offer bid value after every 15 days of toll collection. Such payment was made by the petitioner without default till October 25, 2018.
 6. However, the tender also provided for execution of a lease deed by the bidder/lessee as per terms and conditions of the tender. Such lease deed was never executed.
 7. Severe restrictions on vehicular traffic movement over the Ajay bridge were imposed subsequently by the Public Works Department (PWD), as evidenced by a letter dated September 17, 2018 written by the Principal Secretary of the Government of West Bengal to the Director General of Police, which, *inter alia*, recorded that the authorities had

requested to restrict commercial traffic over the bridge and restriction of the speed of other light vehicles up to 10 kilometre per hour.

8. The bridge was inspected by engineers of the PWD, during which the Engineer-in-Chief, as well as the author of the said letter were allegedly present. Due to the bridge being in a “very distressed” condition requiring replacement, the repair work was being taken up by the PWD and a new bridge was being constructed by the side of the existent bridge, which was supposed to be completed by the end of 2019.
9. The letter further stipulated that all commercial vehicles may be stopped from plying on the bridge. However, if not possible due to existing lack of connectivity, the following were advised:
 - (a) No overloaded vehicle should be allowed on the bridge;
 - (b) Vehicles should be allowed alternatively from either side of the bridge, that is, at any point of time only one direction of traffic should be allowed;
 - (c) There should not be more than one heavy vehicle in one span at a time, that is, there should be a gap of 15 metres between two successive heavy vehicles;
 - (d) Speed of vehicles should be restricted to 10 km/hour.
10. While the above restrictions were still in force, the respondents terminated the petitioners’ contract by a letter dated August 26, 2019.

- 11.** Pursuant thereto, an order of debarment of the petitioners was issued by the respondent-authorities on December 26, 2019, against which WPA No.221 of 2020 has been preferred.
- 12.** Such debarment of the petitioners from participating in any procurement bidding process of the Government of West Bengal for a period of two years with effect from November 19, 2019, was issued as per sub-clause 6.1 under Clause 17(c) of the tender notice.
- 13.** It is relevant to mention that, preceding the debarment, the respondents passed an order dated November 7, 2017 suspending the petitioner from participating in any procurement process of the Government of West Bengal for a period of six months with effect from October 24, 2019 as per sub-clause 4.1.3 under Clause 17(c) of the tender notice, against which the petitioners also filed a writ petition, bearing WPA No.23444 of 2019.
- 14.** The subsequent order of debarment dated November 26, 2019 was passed during the pendency of WPA No.23444 of 2019.
- 15.** The termination and the following suspension as well as debarment were primarily on two grounds. First, the petitioners did not execute the lease deed as required by Clause 20 of the tender notice. Secondly, the petitioners did not deposit the bid money as per Clause 13 of the tender notice.
- 16.** The termination order has not been challenged by the petitioners.

- 17.** Learned counsel for the petitioners contends that, even after severe restrictions on traffic and complete restriction on plying off commercial heavy vehicles on the Ajay bridge, the petitioners went on paying the fortnightly amounts, while giving representations to the petitioners, *inter alia*, on October 25, 2018 and November 23, 2018, seeking exemption from depositing the full amounts of the agreed toll charges of Rs.5,13,000/- till regularisation of traffic movement on the Ajay bridge and restoration of toll collection to the existing average prior to imposition of such vehicular restrictions.
- 18.** Subsequently, upon the petitioners enquiring about the diversion of traffic on Ajay bridge by its letter dated October 15, 2018, the Deputy Superintendent of Police, by his letter dated October 22, 2018, informed the petitioners that, upon finding the bridge to be in a very distressed condition, commercial heavy vehicles plying on the bridge had been diverted from, and Kolkata-bound commercial traffic (overloaded vehicles) were being diverted towards, Bhimgarh, Pandabesar, to curtail pressure on the bridge.
- 19.** However, the respondents, without accepting the petitioners' request by its letter dated December 3, 2018, issued a show-cause notice on December 10, 2018 to the petitioners. The petitioners, by their letter dated January 8, 2019, requested the termination of the project without taking any action against them in view of the unforeseen circumstances of unanticipated restrictions of traffic on the said bridge, which was beyond the control of the petitioners.

- 20.** On July 22, 2019, the respondents issued a second show-cause notice as to why the contract with the petitioners would not be terminated with penalty on account of the petitioners' failure to perform the works as per the contract.
- 21.** On August 26, 2019, the contract was terminated with penalty in writing and the bridge was taken over from the petitioners on August 28, 2019.
- 22.** The petitioners contend that following the termination of contract, on September 20, 2019 the respondents served on the petitioners a notice to be present before a Suspension Committee. On November 7, 2019, the respondents suspended the petitioner for six months with effect from October 24, 2019, from participating in any procurement process of the Government of West Bengal, in terms of sub-clause 4.1.3 under Clause 17(c) of the tender notice.
- 23.** As indicated above, the petitioners filed WPA No.23444 of 2019 against such suspension order, during the pendency of which, the petitioners were debarred from participating in any procurement process of the government of West Bengal by an order dated November 26, 2019, in terms of sub-clause 6.1 under Clause 17(c) of the tender.
- 24.** Learned counsel for the petitioners argues that neither the order of suspension nor the order of debarment deals with the factum of imposition of severe traffic restrictions on Ajay bridge and/or the consequent requests of the petitioners for exemption of the daily toll charge and/or termination of the contract without penalty.

- 25.** Free movement of vehicles on the Ajay bridge, without imposing any restrictions on their movement, was fundamental to the contract as per the petitioners. The bidders had been called upon to make their bids only upon inspection of the site. After such inspection and a preliminary survey of the regular flow of traffic on the bridge, the petitioners tendered their bid, which was accepted. However, the distressed condition of the Ajay bridge was never disclosed in the tender notice. Since the performance of the contractual obligation, in part or in its entirety, is dependent on fulfilment of the reciprocal obligation of the petitioners to allow free flow of traffic, the suspension and debarment were unjust and *de hors* the law, according to the petitioners.
- 26.** Learned counsel for the petitioners specifically refers to Sections 37, 39, 51 to 54 and 56 of the Indian Contract Act, 1872 in such context.
- 27.** In view of non-performance of thereciprocal promise, which was essential to the performance of the petitioners' part of the contract, having not been performed by the respondents by allowing free flow of traffic, the respondents were not entitled either to terminate the contract with penalty and/or to suspend or debar the petitioners thereafter as a consequence.
- 28.** It is further argued that since the performance of the contract to pay the bid amount as originally fixed became impossible and unlawful by reason of the restrictions imposed by the Government Authorities themselves, which the petitioners could not have contemplated at the

time of its inspection for the purpose of making the bid, the respondents ought to compensate the petitioners for any loss sustained by the petitioners due to such non-performance of the promise by the respondents instead of terminating, penalising, suspending and/or debarring the petitioners.

29. Learned counsel lays stress on the non-consideration of the petitioners' repeated requests for exemption of deposit of the fixed amount of toll charges per day as well as sit tight over the petitioners' prior request for termination of the contract without any penalty, having rendered the subsequent impugned actions of the respondents illegal. The possession of the bridge was, in fact, taken back from the petitioners immediately after the termination.
30. It is argued by the petitioners that the respondents cannot take advantage of their own wrong, by relying on the doctrine of *Nullus Commodum Capere Potest De Injuria Sua Propria*. In this context, reference is made to Broom's Legal Maxims, 10th Edition, page 191 and the judgments of *M.K. Shah Engineers and Contractors Vs. State of Madhya Pradesh*, reported at (1999) 2 SCC 594 and *Kusheshwar Prasad Singh Vs. State of Bihar and Ors.*, reported at (2007) 11 SCC 447.
31. Learned counsel for the petitioners further contends that Clause 5 of the Special Terms and Conditions (STC), stipulated in Section-C of the tender notice, is intended to protect the respondents' entitlement to toll tax in case of any stray event of bandh, strike, suspension of

vehicular traffic, etc., and not any long-term suspension of vehicular traffic. Any other interpretation, it is argued, would render the contract absurd and commercially inefficacious. Learned counsel for the petitioners argues that it is settled law that all commercial contracts must be interpreted from the standpoint of business efficacy and such construction of the contract which will render the same commercially inefficacious must be avoided. In support of such proposition, learned counsel appearing for the petitioners places reliance on *Citibank, N.A. Vs. TLC Marketing PLC*, reported at (2008) 1 SCC 481 and a decision of the Supreme Court of the United Kingdom in the case of *Wood Vs. Capita Insurance Services Ltd.*, reported at (2017) 2 WLR 1095.

- 32.** It is alternatively argued by the petitioners that, even if Clause 5 is given a literal construction, it should be read down, being clearly unfair and oppressive. In support of such proposition, learned counsel for the petitioners cites *Indian Oil Corporation Limited Vs. Nilofer Siddiqui and others*, reported at (2016) 3 CHN (SC) 44, which relied on *Central Inland Water Transport Corporation Limited and another Vs. Brojo Nath Ganguly and another*, reported at (1986) 3 SCC 156 and *Mahabir Auto Stores and others Vs. Indian Oil Corporation Limited and others*, reported at (1990) 3 SCC 752.
- 33.** Learned counsel for the petitioner also places reliance on *Pioneer Urban land and Infrastructure Limited Vs. Govindan Raghavan*, reported at (2019) 5 SCC 725 in such context. Clause 5 of the STC, it

is argued, is clearly contrary to the provisions of the Contract Act on its plain reading. The same is a 'dotted-line' contract and it will be patently unfair and unconscionable in the event the respondents' interpretation is accepted.

34. The petitioners further allege that neither the order of suspension nor that of debarment discussed the contentions and representations of the petitioners regarding the restrictions imposed on the free flow of traffic on Ajay bridge. It is contended that the orders were without reasons and passed in a pre-determined manner, without any application of mind to the material facts and circumstances.
35. Learned counsel for the petitioners refers to a Delhi High Court judgment, being *Makastar Trading Corporation Vs. Union of India and others*, [(2003) 71 BRJ], wherein it was held, *inter alia*, that an order must be a speaking one and state the elements which led to the decision. The reasons are links with the materials on which certain conclusions are based and actual conclusions drawn and must disclose how the mind is applied to the subject-matter, whether in a relevant or rational manner.
36. Learned counsel next relies on *Dyna Technologies Private Limited Vs. Crompton Greaves Limited*, [2019 SCC OnLine SC 1656], wherein the Supreme Court held that reasons must be proper, intelligible and adequate. In absence of the said characteristics, the order reveals of flaw in the decision-making process.

37. Learned counsel for the petitioners next places reliance on *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293] and *Kumari Shrilekha Vidyarthi and Ors. Vs. State of U.P. and Ors.* [(1991) 1 SCC 212] in support of the proposition that when the State acts unfairly in enforcing the terms of a contract, the same must be struck down.
38. Non-execution of the lease deed, considered as one of the breaches on the part of the petitioners leading to the termination and subsequent suspension and debarment of the petitioner, was a non-essential term. The work was collection of toll tax on the Ajay bridge and no execution of lease was required in law for the same.
39. Learned counsel cites *M/S Poddar Steel Corporation Vs. Ganesh Engineering Works* [(1991) 3 SCC 273], where the Supreme Court held that the requirements in a tender notice can be classified into two categories - essential conditions of eligibility and ancillary/subsidiary to the main object to be achieved by the condition.
40. Specifically relying on Section 63 of the Contract Act, the petitioners argue that every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which it thinks fit. Hence, there is scope to dispense with or remit performance of a promise, wholly or in part.
41. The execution of a lease being a non-essential term of the contract, was essentially dispensed with or remitted and never insisted upon at

the commencement of collection of toll at Ajay bridge. Although the petitioners were called upon to execute the lease deed from time to time subsequently, it was never insisted upon as a condition for continuing with the contract. No prior warning was given to the petitioners with regard to termination of contract of such ground. Collection of toll is an independent activity, unconnected with the proposed lease of the bridge and such requirement in the contract was unsupported by any consideration. Hence, the condition requiring the execution of a lease deed was invalid, it is argued, as there cannot be any contract without consideration. The respondents did not raise such issue as a ground for termination of contract since the commencement of the petitioners' contract on December 14, 2017 but cited the same for the first time on July 22, 2019. Hence, the said ground was an afterthought.

- 42.** Learned counsel for the petitioners submits that the suspension and debarment of the petitioners from participating in future tenders of the Government of West Bengal for two years for breach of a non-essential clause of the contract was arbitrary and violative of the doctrine of proportionality. Such orders amount to orders of blacklisting and affect the fundamental rights of the petitioners assured by Article 19(1)(g) of the Constitution. Reference is made in this context to the case of *Gohil Vishvaraj Hanubhai Vs. State of Gujarat* [(2017) 13 SCC 621].

- 43.** Since the action against the petitioner was founded on the respondents' own failure to perform their obligation to allow free flow of traffic on the bridge, the debarring of the petitioner from participating in trade for a significant period was in violation of Article 19(1)(g) of the Constitution. The test of proportionality was not satisfied in the present case for the administrative action of suspension and debarment, contrary to Article 19(1)(g) and Article 21 of the Constitution.
- 44.** Learned counsel appearing for the State-respondent contends that the termination of contract on August 26, 2019 attained finality, since the petitioners never challenged the same. The absence of such challenge to the termination amounts to acceptance of the omission or allegations made against the petitioners.
- 45.** The debarment order was passed on the same allegations after providing opportunity of hearing to the petitioners twice, which was not availed of by the petitioners. As such, the State-respondent argues, the petitioners cannot allege non-compliance of the principles of natural justice.
- 46.** Moreover, it is argued that the debarment is not permanent and is proportionate to the breach committed by the petitioners.
- 47.** By several letters, annexed at pages 72, 89, 98, 103, 105, 108 and 130 of the Affidavit-in-Opposition of the State, the petitioners were requested to execute the lease deed, but in vain.

- 48.** The writ petitioners, it is further alleged, did not deposit the full bid money in spite of several requests in that regard, which are evident from the communications annexed at pages 87, 106, 107, 114, 115, 118 and 129 of the State's Affidavit-in-Opposition.
- 49.** That apart, the petitioners sought remission/reduction of bid money on the ground of restrictions on traffic movement. Clause 5 of the STC clearly contemplates only a complete closure of traffic for the bidder to ask for such reduction of bid money. The same was informed to the petitioners by several communications, annexed at pages 55, 68, 91, 121, 133, 134 and 136 of the Affidavit-in-Opposition filed by the State.
- 50.** There never was full closure of traffic on the bridge, but mere regulation of the traffic. In fact, marginal increase in traffic was found during survey. Learned counsel for the State relies on page 133 of the Affidavit-in-Opposition in such context.
- 51.** Blacklisting, it is contended, is a power inherent with the Government to choose persons with whom to contract. In case of blacklisting, the party which is blacklisted is only entitled to an opportunity to represent. Learned counsel for the State relies on *Erusian Equipment & Chemicals Limited Vs. State of West Bengal & Another* [(1975) 1 SCC 70] in support of the proposition.
- 52.** Learned counsel further relies on *M. C. Mehta Vs. Union of India & others* [(1996) 6 SCC 237] for the proposition that, in case of admitted and undisputed facts where only one conclusion is possible, no writ petition would lie on grounds of breach of natural justice.

Blacklisting, it is argued, is tested on the grounds of fairness, natural justice and proportionality and is an inherent power of the tendering authority not to enter into future contracts and to discipline deviant contractors. For such proposition, learned counsel relies on *Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited & Others*, [(2014) 14 SCC 731.

53. Addressing the allegation of closure of traffic on the Ajay bridge, learned counsel for the respondents categorically reiterates that, although there were necessary restrictions/curtailment of traffic on the bridge, there is no scope for remission within the contemplation of Clause 5 of the STC, in Section C. In view of the absence of full closure of traffic, which was the essential ingredient for remission, there was no scope for remission/reduction of the payable amount.
54. As regards the contention of the petitioners that contract for the balance work on the same bridge was granted subsequently to a new contractor at a much lower rate than the petitioner, the respondents argue that a subsequent contract on a different bargain cannot be a sufficient indicator of less traffic movement on the bridge and/or have any bearing on the termination of contract and subsequent suspension and debarment of the petitioner. That apart, the petitioner accepted the termination of contract on the same allegations and, as such, cannot reopen the said ground at this juncture.
55. Regarding the allegation of the petitioners that the Executive Engineer, Birbhum Division, PWD created a false impression by stating that

there was no closure of traffic on the Ajay bridge as per Clause 5 of Section C (the STC), the respondents argue that the relevant meeting referred to by the petitioners took place on October 24, 2019, that is, much after the termination of contract of the petitioners on August 26, 2019.

56. The respondents further argue that the petitioners' contention, regarding Clause 5 of the STC pertaining to temporary periods, is not tenable in the eye of law since the expression "for any reasons whatsoever" negates the scope of application of the principle of *ejusdem generis* to the prior-mentioned events such as bandhs, strikes, etc. Moreover, a commercial contract has some inherent risks which a commercial entity must have the expertise to foresee.
57. The respondents further submit that, after accepting the termination on the same allegations, the petitioners are debarred from raising the question of applicability of Clause 12, regarding respective toll charges payable for vehicles, which, in any event, is irrelevant.
58. Clause 5 of the STC is again relied on by the respondents to controvert the petitioners' arguments on Section 56 of the Contract Act, 1872, relating to the doctrine of frustration. The said doctrine, it is argued, is only applicable when the contract becomes impossible to be performed or there is any supervening impossibility. Since the bridge was not closed fully for traffic in the present case, there cannot arise any question of any supervening impossibility preventing the performance of their part of the contract by the petitioners.

- 59.** The petitioners have also contended that, prior to debarment, the authorities never insisted on execution of the lease deed but accepted the amounts paid by the petitioner as per the terms of the contract. It has also been argued that Clause 15 of the tender document, regarding execution of lease deed is a non-essential clause.
- 60.** In answer, the respondents argue that, in the present case, the tender stage was over and a contract entered between the parties was under execution. At the contract stage, the issue of non-essential term or clause of the tender cannot apply.
- 61.** While dealing with the judgments relied on by the petitioners, learned counsel for the respondents argues that *M.K. Shah Engineers and Contractors* (supra) is not applicable in the present case, since the ratio therein was in connection with an arbitration case, in which, the Supreme Court held that if a party does not take steps preceding a reference to arbitration, it is a deemed waiver and the party cannot take advantage of its own wrong. In the instant case, however, the petitioners themselves tried to take advantage of their own wrong.
- 62.** While addressing *Kusheshwar Prasad Singh* (supra), learned counsel for the respondents contends that in the said case, the authorities were not passing the final statement of excess land within a reasonable time. The Supreme Court held that default in taking statutory action within time should not prejudice the other party. Such principle, it is argued, is not applicable in the present case.

- 63.** Regarding *Citibank, N.A.* (supra), the question which fell for consideration before the Supreme Court was whether for deficiency in service, arbitration clause can be invoked, where the Supreme Court held that the contract document must be read in a manner to give efficacy to the contract rather than to invalidate it. The said principle, it is contended, is also not applicable to the facts of this case.
- 64.** Next addressing *Gedala Satchidananda Murti Vs. Commr., Deptt. Of Endowments*, [(2007) 5 SCC 677], the respondents submit that dismissal of an application for deletion of the name of a charitable institution from the statutory list maintained by the Andhra Pradesh State was under challenge and the judgment was on group estoppel, the Supreme Court holding that the parties are bound by their own interpretation of the contract. However, in the present case, the respondents did not deviate from its own interpretation of the contract.
- 65.** *Transmission Corporation of Andhra Pradesh Ltd. Vs. GMR Vemagiri Power Generation Ltd.*, [(2018) 3 SCC 716, it is argued, was on the principle of interpretation of contract by parties in course of dealing with the contract. In case of ambiguity in contract, the Supreme Court held, surrounding circumstances, correspondence, etc. are to be considered to be make out the intention of the parties. However, there is no ambiguity in any of the clauses of the present contract. Rather, in the said report, it was held that there is no need to enquire whether their particular interpretation is correct or not – or whether they were mistaken or not, or whether they had in mind the original terms or

not. Suffice it that they have, by their course of dealing, stick to their own interpretation on their contract and cannot be allowed to go back on it.

- 66.** *Indian Oil Corporation Limited* (supra) pertains to dotted line contracts, where the main clause provided for unilateral termination of distributorship without assigning reasons, which was held to be violative of Article 14 of the Constitution. In the present case, however, the respondents contend that there was no question of any dotted line contract or unequal bargaining power. The instant case relates to a commercial contract where the State is distributing its largesse.
- 67.** Regarding *Brojo Nath Ganguly* (supra), the respondents have argued that the Supreme Court held there that the Court should strike down an unfair clause in case of unequal bargaining power. In Paragraph 89 of the report, it was held that the principle laid down in *Brojo Nath Ganguly* (supra) will not apply to commercial contracts, where the bargaining powers of the parties are equal or almost equal. The same principles were also laid down in the judgments of *ICOMM Tele Ltd. Vs. Punjab State Water Supply and Sewerage Board*, [(2019) 4 SCC 401] and [(2009) 4 SCC 357].
- 68.** *Mahabir Auto Stores* (supra) was a case of discontinuance of supply of lubricants to a distributor without reasons, which was held to be blacklisting. The Supreme Court commented upon the violation of Article 14, Constitution in dealing with distributors, as opposed to the

present case, where every opportunity was given to the petitioners before debarment.

- 69.** As regards *Pioneer Urban Land* (supra), the respondents submit that the same was a case of unconscionable bargain clause in an apartment buyers' agreement, which was held to be unfair in a dotted line agreement and not binding. However, judgments on dotted line agreements do not apply to commercial contracts but are those where a party have either signed to sign the agreement and avail of the services or leave the services, for example, an electricity supply agreement with the licensee where the consumer has no option but to sign the agreement.
- 70.** *Dyna Technologies Private Limited* (supra), it is argued, was regarding necessity of passing a reasoned arbitration award and is not applicable at all to the present case.
- 71.** As far as *Dwarkadas Marfatia and Sons* (supra) and *Kumari Shrilekha Vidyarthi* (supra) is concerned, learned counsel for the respondents contend that the ratio laid down therein do not apply to commercial contracts entered after a tendering process.
- 72.** Addressing *M/S Poddar Steel Corporation* (supra), the respondents contend that the same relates to non-essential conditions of the tender and ancillary or subsidiary conditions of the tender. The present case, however, had crossed the tender stage. The ratio is not applicable at the contract execution stage in a concluded contract, it is argued.

- 73.** Lastly, learned counsel for the respondents argues that *Gohil Vishvaraj Hanubhai* (supra) is not applicable in the present case, since the same was a service matter with allegations of malpractices in the examination process, leading to cancellation of the examination. Considering the large scale malpractice, the Supreme Court held that innocent candidates, including the wrongdoers, should get an opportunity of participating in fresh examination.
- 74.** Learned counsel for the petitioners, in reply, mostly reiterates the petitioners' original contentions.
- 75.** Regarding the termination order having attained finality and/or accepted by the petitioners, it is argued that the petitioners, being entitled to repudiate the contract for reasons mentioned in the writ petitions, had itself written to the respondent No.4 requesting the termination of the contract without taking any penal or other action against it. Thus, there arises no question of the petitioners themselves challenging the termination of the contract. Moreover, the correspondence on record shows that the allegations of any breach of contract were never accepted by the petitioners. That apart, the petitioners challenged the order of suspension dated November 7, 2019 on the same allegation of breach in WPA No.23444 of 2019.
- 76.** As far as the respondents' contention that debarment was not a permanent one, learned counsel for the petitioners argues that since the petitioner No.1 has not committed any breach, there cannot be any question of debarment or the debarment being proportionate to the

breach. The action against the petitioner No.1 is founded on the respondents' own failure to perform its obligation by allowing free flow of traffic. Thus, the fundamental freedom of the petitioner of participating in trade, as guaranteed by Article 19(1)(g) of the Constitution cannot satisfy the test of proportionality or be curtailed. Moreover debarring, akin to blacklisting, carries with it a tremendous stigma, the petitioners argue, which is bound to taint the image of the petitioner No.1 as one of the largest toll operators across the country and also affect its future business prospects.

77. *Om Kumar* (supra) is also relied on in this context.

78. As far as the alleged requests of the respondents to execute the lease deed are concerned, it is argued that the contract was for toll collection, which did not require any lease of the bridge to be granted to the petitioner No.1. No transfer of the bridge to the petitioner No.1 for the latter's exclusive possession, as contemplated in a lease, was reflected in the tender terms or correspondence. Thus, there was a confusion as regards the manner in which the document would be stamped and registered, which was not clarified in the contract. Before such confusion could be resolved, the distressed condition of the Ajay bridge was announced by the PWD of the State, accompanied by serious restrictions on the plying of vehicles, adversely impacting the performance of the petitioners. The petitioners also sought termination of the contract without penalty. Thus, there arose no question of execution and registration of the purported deed of lease,

which clause was, in any event, non-essential to the collection of toll tax.

- 79.** The writ petitioners further argue that there was no scope for the petitioner No.1 to deposit the full bid money, since such action was directly dependent on the performance of the respondents' obligation to ensure free and unfettered movement of vehicles over the bridge. The respondents having failed to perform such obligation, petitioner No.1 was automatically discharged from performing its obligations and became entitled to compensation from the respondents.
- 80.** Regarding full closure of traffic at the bridge, the petitioners reiterate their contentions in the original arguments and place stress on the fact that the restrictions imposed in the present case were permanent in nature and was not lifted even at the time of filing of either of the writ petitions. Clause 5 clearly applies to temporary restrictions of traffic and, as such, does not debar the petitioners from seeking termination and/or compensation, let alone make the petitioners liable for termination of their contract and subsequent debarment/suspension.
- 81.** Regarding blacklisting being an inherent power and blacklisted entities being entitled to get only the opportunity to represent, the petitioners argue that debarring has severe consequences and taints the reputation of a manufacturer, supplier, contractor and is directly violative of Article 19(1)(g) of the Constitution. It has been ruled again and again by the Supreme Court that arbitrariness and discrimination

cannot be the basis of blacklisting and is subject to judicial review under Article 226 or under Article 32 of the Constitution.

- 82.** It is reiterated by the petitioners that the several representations of the petitioner No.1 were not considered by the respondents before suspending and/or debarring the petitioners. Any appearance of the petitioners at the hearing in response to the debarment notice, when the respondents had clearly made up their mind, as evident from their previous communications, would have reduced the hearing into a mockery of the rules of natural justice.
- 83.** The suspension and debarment of the petitioner No.1 was unreasonable, unfair, arbitrary and disproportionate and ought to be set aside.
- 84.** The award of a subsequent contract on a substantially lower amount, the petitioners reiterate, is certainly material to the present adjudication, since it demonstrates that it was no longer possible to generate the toll revenue offered by the petitioner No.1 consequent to the severe restrictions imposed.
- 85.** As such, learned counsel for the petitioners concludes by submitting that the respondents' response to the petitioners' arguments were inadequate and ought not to be considered.
- 86.** The challenge in WPA 23444 of 2019 is against the suspension orders (*vide* Memo No. 1218/CE/WZ/PWD dated November 7, 2019 and *vide* Memo No.1237/CE/WZ/PWD dated November 18, 2019).

87. WPA 221 of 2020, on the other hand, has been preferred against the order of debarment of the petitioner dated November 26, 2019.
88. In view of the cause of action for both the writ petitions being identical for all practical purposes, the two are being adjudicated together.
89. The bone of contention is primarily whether the petitioners were entitled to reduction/remission of bid money, payable every 15 days, and/or compensation for the loss suffered by the petitioners due to the restrictions imposed on traffic movement over the Ajay Bridge.
90. The other ground, on which the initial suspension and subsequent debarment orders were passed, was non-execution of a lease deed by the petitioners. The question which arises for consideration in this context is whether the execution of a lease deed by the petitioners was mandatory, being an essential condition of the contract between the parties.
91. The expression 'debarment' has been defined in Clause 3.5 of the Notice Inviting Tender (NIT) dated March 22, 2017, which is as follows:

"3.5 Debarment:- An administrative penalty, in addition to the contract provision, disqualifying a bidder from participating in any procurement process under Public Works Department, Government of West Bengal for a given period."

92. The term 'suspension' is defined in Clause 3.13 which is as follows:

"3.13 Suspension:- Temporary disqualification of a bidder from participating in the procurement process of Public Works Department for a period of 6 (six) months when an offence is made out against a bidder."

- 93.** Clause 4.13 provides that failure by the contractor to fully and faithfully comply with its contractual obligations without valid cause, or failure by the contractor to comply with any written lawful instruction of the procuring entity or its representative(s) pursuant to the implementation of the contract would furnish grounds for suspension and debarment, among other grounds.
- 94.** Clause 5.1 of the NIT describes first degree of offence to comprise of those covered by Clauses 4.1 to 4.16 (including 4.13) and Clause 6.1 stipulates the penalty for a first degree offence as disqualification of a bidder from participating in any procurement process under the Public Works Department, Government of West Bengal up to 2 (two) years.
- 95.** It is provided in Clause 9(a) of the NIT that a bidder placed under suspension/debarment by the competent authority will not be allowed to participate in any procurement process, within the period of suspension/debarment, under the Public Works Department and that the earnest money of the suspended bidder shall stand forfeited to the Government.
- 96.** Regarding the requirement of executing a lease deed, the last portion of Clause 13 provides that the successful highest bidder will execute a deed of lease in prescribed format with the Tender Issuing Authority (as lessor) on requisite non-judicial stamp paper valued at 4 per cent of the total value of bid for the whole contract period for the original

and a similar stamp paper of Rs.50/- for duplicate and triplicate copies each. Clause 20 stipulates that the successful bidder shall have to execute the deed of lease as per the Indian Stamp Act and Registration Act, as amended up to date.

- 97.** Clauses 13 and 20, read in conjunction, clearly indicate that a mandate is given to the successful bidder to execute a deed of lease as per law in accordance with the specifications of the stamp papers as stipulated therein. The format of such deed of lease has been clearly given in Section D of the NIT.
- 98.** It is relevant to mention that Clause 22 of the Special Terms & Conditions, provided under Section C of the NIT, provides that the successful bidder will have to deposit the amount equivalent to 15 (fifteen) days of bid value regularly in the form as prescribed therein, after every 15 days of toll collection. The frequency/period of remittance would be every 15 days.
- 99.** The specific rates of toll charges for vehicles of different descriptions are stipulated in Part-II of the NIT.
- 100.** It is further noticed that several clauses of the Special Terms & Conditions (e.g. Clauses 5, 11, 13, 14, 15, 16, 17, 20, 21, 23 and 25) refer to the bidder as the “lessee” and the juristic relation as “lease”, thereby giving a clear indication that the execution of the deed of lease was an essential clause of the contract, without the execution of which several other provisions of the NIT would be rendered meaningless.

101. Thus, under normal circumstances, Clause 4.13 of the NIT would be attracted in case of violation by the petitioners of the contractual obligations, including timely payment of the bid amount as fixed, with the only rider that such failure to comply was without valid cause, and execution of the lease deed.

102. In defence, the petitioners place reliance on Clause 5 of the Special Terms & Conditions under Section C of the NIT, which is reproduced below:

“5. The Lessee shall give an undertaking to the effect that he would realize tolls as per rates prescribed in Annexure-A (enclosed) and shall abide by the provisions of the India Tolls Act, 1951 as subsequently amended from time to time. This will constitute one of the terms and conditions of the contract. No reduction or remission of bid money will be admissible for the reasons whatsoever (viz. Bandh, Strike, Suspension of vehicular traffic, natural calamities, public agitation, and/or suspension of traffic movements for any other reasons whatsoever). However in case of full closure of Traffic by issuance of notice by competent authority of Govt. of W.B. the successful bidder will apply to the accepting authority of the bid for remission/partial remission. No police or Security arrangements would be made by this Department.”

103. It is submitted by the petitioners that Clause 5 implies reduction or remission of bid money even in case of severe traffic restrictions on the bridge of a permanent nature. The expression “full closure of traffic”, read in appropriate context, it is argued, would include all traffic restrictions of permanent nature, as imposed in the present case. The petitioners argue that the expression “for any other reasons whatsoever” is to be read *ejusdem generis* with the immediately

preceding provisions, which take into account only closures of a temporary nature, in which case the bidder would not be entitled to remission of the bid amount.

104. The petitioner has relied upon several letters claiming compensation as well as remission under protest, including the letters dated May 8, 2019, May 16, 2019, May 30, 2019, June 7, 2019, June 14, 2019 and June 21, 2019. Such documents have been annexed from page 189 to 198 and 204 of the writ petition, bearing WPA 234444 of 2019. In most of the aforesaid letters, relied upon by the petitioners themselves, the petitioners referred to the traffic hindrance as “restrictions of traffic movement” and not “full closure”.

105. The restrictions of traffic movement by the PWD appear at pages 202 and 207 of the petitioners’ reply. At page 249, information obtained under the Right to Information Act, dated June 14, 2019, is also annexed. Such documents clearly indicate that although there was closure of heavy vehicles due to the precarious condition of the Ajay Bridge, restricted traffic movement was allowed throughout the relevant period. There was no total closure of traffic movement over the bridge at any point of time.

106. The petitioners’ claims for exemption from payment of the bid amount and compensation find place at pages 209 to 210 of WPA 23444 of 2019. Further reminders thereof are annexed at pages 211 and 212 of the same.

- 107.** The refusal by the PWD to exempt the bid amount was reiterated, along with issuance of threat of legal action, in its letter dated December 3, 2018, annexed at page 213 of WPA 23444 of 2019, which refers to Memo No. 330/G-41 dated February 12, 2018 and Memo No. 3308/G-41 dated October 29, 2018.
- 108.** A show-cause notice dated December 10, 2018 (at page 214 of WPA 23444 of 2019) was also issued to the petitioners. Both the communications, dated December 3, 2018 and December 10, 2018 respectively, were issued on the ground of non-deposit of bid money.
- 109.** The petitioner made a request on December 14, 2018 not to take penal measures (page 216 of WPA 234444 of 2019). A request for termination of the contract without penal or other action was issued by the petitioners on January 8, 2019. On April 11, 2019, a settlement was sought on the ground of traffic diversion by the petitioners, which stand had also been taken in a communication dated March 12, 2019.
- 110.** The petitioner also sought a reconsideration of the request for exemption and termination of the contract on May 16, 2019 and a joint survey by its letters dated May 31, 2019, June 21, 2019 and June 27, 2019.
- 111.** On May 6, 2019 the PWD reiterated its dues from the petitioners and alleged a marginal increase in traffic over the concerned Bridge. The petitioners' request for review was refused on May 8, 2019 and 7 (seven) days' notice for legal action was issued on June 6, 2019.

- 112.** On July 22, 2019, a further show-cause notice was issued by the respondent-authorities to the petitioners for termination of the contractual relationship with the petitioners with penalty on the grounds of non-payment of bid amount as well as non-execution of the required lease deed. The petitioner responded thereto on August 6, 2019 upon receiving the letter dated July 22, 2019 on August 3, 2019.
- 113.** The contract was terminated in writing on both the aforementioned grounds on August 26, 2019. A document dated August 28, 2019, annexed at page 267 of WA 23444 of 2019, shows that possession of the Bridge was taken over by the respondent-authorities from the petitioners on the self-same date.
- 114.** The date of hearing on suspension was re-scheduled *vide* a communication dated September 20, 2019. The petitioners sought compensation again on April 23, 2018, which was refused by the PWD on May 21, 2018.
- 115.** Pursuant to hearing in presence of the petitioner on October 24, 2019, a communication was made on November 7, 2019, annexed at page 277 of WPA 23444 of 2019. The minutes of the decision of suspension of the petitioners for 6 (six) months with effect from October 24, 2019, taken on the same date, are annexed at pages 278 to 283 of the said writ petition.
- 116.** By a communication dated November 18, 2019, annexed at page 284 and 285 of the writ petition, the PWD Suspension Committee revised

the decision of suspension and made it operative “with effect from November 19, 2019” (instead of October 24, 2019, as previously communicated).

117. On November 26, 2019, a notice of hearing for debarment was intimated to have been fixed on December 4, 2019.

118. On December 3, 2019, an adjournment was sought for three weeks by the petitioners.

119. On July 4, 2019, a fresh tender was floated for the remaining part of the work which was initially given to the petitioners. A second hearing notice for December 18, 2019 was issued to the petitioners on December 4, 2019. A letter was given by the petitioners for adjournment of further two weeks on December 11, 2019, which was referred to in the subsequent order of debarment passed against the petitioners on December 26, 2019.

120. As indicated earlier, WPA 221 of 2020 has been preferred against the debarment order dated December 26, 2019 and WPA 23444 of 2019 against the suspension orders *vide* Memo No. 1218/CE/WZ/PWD dated November 7, 2019 and Memo No. 1237/CE/WZ/PWD dated November 18, 2019.

121. It is crystal-clear from the documents on record that the restrictions imposed on the movement of traffic on the Ajay Bridge were limited in nature and, by no stretch of imagination, could be termed as “full closure” of traffic, which would entitle the petitioners to remission/partial remission in respect of the bid amount. The prior

portion of Clause 5 under Section C, that is, the Special Terms & Conditions under the NIT, clearly bar any reduction or remission of bid money on the grounds including suspension of vehicular traffic and/or suspension of traffic movement on certain occasions, illustrations of which have been given in Clause 5 itself, as well as for “any other reason whatsoever”. It is nowhere indicated in Clause 5 that partial restriction of traffic, even of a permanent nature, would entitle the petitioners to any reduction/remission of bid money, which would only be entailed by “full closure” of traffic movement on the bridge.

122. Clause 22 of the NIT clearly stipulates that 15 days’ bid money is to be deposited after every 15 days.

123. Clauses 13 and 20 of the NIT dated March 22, 2017 cast an obligation on the bidder to execute a lease deed as per the Stamp Act and the Registration Act. Section D of the NIT clearly provides a proforma of such lease deed, as referred to in Clauses 13 and 20.

124. That apart, several clauses of the NIT use the expression “lease” and “lessee” to describe the contract and the bidder respectively, thereby presupposing the execution of a lease deed as an essential condition of the NIT.

125. Thus, both the grounds of suspension and debarment of the petitioners were mandatory in nature.

126. Clause 4.13 clearly provides non-compliance with the terms of the NIT without a valid cause as a ground for suspension/debarment. Clause

5.1 describes the same as a first degree offence, for which Clause 6.1 provides the penalty of disqualification from participating up to two years.

127. Clause 9(a) clearly indicates that the status of a disqualified bidder would entail that the bidder would be precluded from participating in any further bid and for forfeiture of the earnest deposit by the bidder.

128. Therefore, both the orders of suspension and debarment of the petitioners were fully tenable in law and in accordance with the terms of the NIT.

129. Since no violation of natural justice or error on the part of the respondent-authorities has been demonstrated by the petitioners in passing the impugned orders of suspension and debarment, the judgments of *M.K. Shah Engineers and Contractors* (supra), *Kusheshwar Prasad Singh* (supra) and the proposition mentioned in Broom's Legal Maxim, 10th Edition as well as *ICOMM Tele Ltd.*(supra) are not applicable in the present case at all. No error or violation of natural justice was committed by the respondents while passing such orders.

130. As regards the judgments of *Citibank* (supra), *Wood* (supra), *Gedela* (supra) and *Transmission Corporation* (supra) are concerned, the principles laid down therein do not have any direct relevance in the present matter. Even if commercial contracts are to be interpreted from the standpoint of business efficacy rather than to invalidate those, the petitioners, with their eyes wide open, entered into the

present commercial contract, being fully aware of the terms thereof. Clause 5 of Section C of the NIT, if literally interpreted, leaves no scope of further interpretation in tune with the petitioners' argument.

131. That apart, Clause 10 of the NIT clearly encouraged the bidder to visit and examine the site of works and its surroundings and obtain all information that may be necessary for preparing the bid and entering into a contract for the work as mentioned in the NIT. Traffic management and exclusion of works in all respects was the responsibility of the successful bidders at their own risk and cost as per the said clause. It is an admitted position that the petitioners took advantage of the said clause and visited the site and its surroundings, but restricted its examination merely to the density of traffic movement instead of taking into account the then condition of the bridge as well. It is obvious from the language of Clause 10 that, since the condition of the Bridge itself would have a direct impact on the traffic circulation, such information was necessary for preparing the bid and entering into a contract in terms of the NIT. The petitioners, admittedly established in their business and being engaged in similar works elsewhere as well, cannot now feign ignorance of the existing condition of the Bridge at the relevant point of time.

132. The deterioration in condition of the bridge, necessitating the traffic restrictions, took place much later. Thus, no question of suppression by the tender issuing authority of the damaged condition of the bridge

could have arisen at the stage of floating the tender. It was entirely the failure of the petitioners to assess the then condition of the bridge and such liability cannot now be shifted, as an afterthought, to the respondent-authorities. The terms of the contract were not unfair from any perspective and the NIT could not be labelled as a 'dotted line contract' or 'contract of adhesion' since it was a commercial contract. The risk involved was deliberately undertaken with full knowledge by the petitioners. Thus, the ratio of *IOL* (supra) cannot help the petitioners in any manner in the present case.

133. So far as the requirement of administrative orders being speaking orders, the orders of suspension and debarment left no scope of doubt as regards the reasons for suspension and subsequent debarment of the petitioners and were preceded by sufficient prior notice and full scope of hearing being afforded to the petitioners. The reasons, as discussed above, for passing the impugned orders, were proper, intelligible and adequate, as mandated in *Dyna Technologies* (supra). The State has not acted unfairly in enforcing the terms of the contract-in-question and the doctrine of proportionality is not applicable in the present case in view of the consequences of failure to comply with the terms of the NIT were clearly enumerated in the tender document itself. The conditions of the NIT, which were violated by the petitioners, being mandatory in nature and essential to the contract, the suspension and following debarment were fully within the domain of the contract and the authority of the respondents.

Hence, the line of judgments cited in that respect by the petitioners does not aid the petitioners in any manner as well.

134. Rather, the propositions laid down in *Erusian* (supra) and *M. C. Mehta* (supra) as well as *Kulja* (supra), cited by the respondents, are squarely applicable to the facts of the instant case. The opportunity of representation was amply provided to the petitioners (who are the 'blacklisted parties' here). Moreover, the power of blacklisting/debarment being an inherent power of the authorities and the impugned orders being sustainable on the anvil of fairness, natural justice and proportionality, the conclusions arrived at by the respondents in passing the impugned orders were justified and well within their authority and disclosed sufficient intelligible reasons.

135. Hence, examining the matter from all perspectives and in the backdrop of the provisions of the Contract Act, 1872, there is no scope of interference by the Writ Court with the impugned orders of suspension and debarment.

136. In the light of the above discussions, WPA 23444 of 2019 and WPA 221 of 2020 are dismissed on contest without, however, any order as to costs, thereby affirming the orders of suspension and debarment of the petitioners impugned therein.

137. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)