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

Reserved on:10.08.2021

Date of decision: 25.08.2021

+ **W.P.(C) 5989/2021**

M/S JOHNSON AND JOHNSON PVT LTD Petitioner

Through Mr. Mukul Rohatgi and Mr. Saurabh Kirpal, Sr. Advs. with Mr. Raunak Dhillon, Mr. Ashwin Sapra, Mr. Akshat Razdan, Mr. Biplab Lenin, Ms. Isha Malik, and Ms. Niharika Shukla, Advs.

versus

ALL INDIA INSTITUTE OF MEDICAL SCIENCES NEW DELHI

..... Respondent

Through Mr. Tushar Mehta Ld. SG, with Dr. Harsh Pathak, Mr. Neeraj, Mr. Sahaj Garg, Mr. Vedansh Anand, Mr. Rudra Paliwal, Mrs. Shaveta Mahajan, Mrs. Maya Pathak, Mr. Sidharth Shukla and Mr. Mohit Choubey Advs.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J

JUDGMENT

1. The present petition preferred under Article 226 of the Constitution of India seeks quashing and setting aside of an order dated 29.04.2021 passed by the respondent cancelling its contract with the petitioner and debarring it from participating in any of its tenders for a period of two years.
2. The petitioner - Johnson & Johnson Private Limited claims to be the Indian arm of the Johnson & Johnson USA, a multinational corporation that

develops medical devices, pharmaceutical products, and consumer packaged goods. The respondent is the All India Institute of Medical Sciences, New Delhi, an autonomous medical university and healthcare centre located in New Delhi, established under the All India Institute of Medical Sciences Act, 1956. It is the case of the petitioner that even though it has been collaborating with the respondent for the last several decades for supply of various medical devices without any complaint, the respondent passed the impugned order against the petitioner by holding it guilty of 'corrupt and fraudulent practices' on account of an erroneous presumption that the petitioner had deliberately misrepresented facts to influence the tender procurement process.

3. On 27.09.2019, the respondent, for the benefit of its Surgical Block (hereinafter referred to as '**AIIMS, SB**'), issued a Tender Enquiry Document bearing Reference No. 03/SB/M&E/2019-20/St. (hereinafter referred to as '**TED**') inviting bids for providing endo surgery equipment, namely, 12 Combined Single Generators for Ultrasonic Cutting and Coagulation device with advanced Radio-Frequency (RF) Energy technology, along with an equivalent number of accessories and consumables (collectively referred to as '**equipment**'). These bids were invited online in a two-bid system, comprising of techno-commercial and financial bid components. Pursuant thereto, the petitioner submitted its bid on 15.11.2019 and, while the same was pending consideration with the respondent, a bid it had submitted on 14.09.2018 for supply of the same type of generator with different quantities of capital, accessories and consumables – sought under an earlier tender floated by the National Cancer Institute, Jhajjar (hereinafter referred to as '**the NCI**') on 10.08.2018 - came to be accepted. The petitioner was consequently awarded the tender by the NCI on 15.02.2020, which it accepted on 19.03.2020.

4. About a year later, the respondent invited the petitioner for price negotiations in respect of its bid submitted on 15.11.2019. On 12.03.2021, the petitioner's representatives met with the Price Negotiation Committee of the respondent wherein they disclosed information regarding two contracts the petitioner had executed previously for supply of similar equipment to the Comprehensive Rural Health Services Project of AIIMS in Ballabgarh, in the year 2016 (hereinafter referred to as '**CRHP, Ballabgarh**'), as well as the AIIMS Department of Emergency Medicine in 2015 (hereinafter referred to as the '**AIIMS Emergency**'). On 27.03.2021, the respondent, after finding the petitioner's bid technically and commercially sound, issued a supply order in its favour, being S.O. No. 08/Surgical Block/M&E/2020-21/St. The parameters of the contractual relationship between the parties was set out under this supply order, which contained an arbitration clause, and required the equipment to be delivered and installed on or before 31.03.2021. It is pertinent to note that the petitioner duly executed the supply order and effected delivery and installation of the equipment within time.

5. On 08.04.2021, the petitioner claims that, to its surprise, the Senior Stores Officer (Surgical Block) of the respondent issued a show cause notice to it, which reads as under:

*“ALL INDIA INSTITUTE OF MEDICAL SCIENCES
DEPARTMENT OF SURGICAL DISCIPLINES
ANSARI NAGAR, NEW DELHI-110029
Email:storesection.newsurgicalblock@gmail.com
(Surgical Block)*

MOST URGENT/TIME BOUND

Dated: 08.04.2021

S.O. NO. 08/Surgical Block/M&E/2020-21/St.

To,

M/S JOHNSON AND JOHNSON PVT. LTD.
PLOT NO. 118. P SECTOR-44
GURGAON 122 002
EMAIL: amishr24@its.jnj.com,
vchopral@kn.ing.com

Subject: Purchase of Combined Single Generator for
Ultrasonic Cutting and Coagulation device with advance
Radio-frequency energy (12 Nos.) -Show cause notice
thereof.

Ref: 1. Tender No. 03/SB/M&E/2019-20/St,
2. Supply order No. S.O. No. 08/Surgical Block/M&E/2020-
21/St. dated 27.03.2021.

Sir,

Please refer to your quotation submitted against tender No. 03/SB/M&E/2019-20/St. and subsequent supply order No. S.O. No. 08/Surgical Block/M&E/2020-21/St. dated 27.03.2021 for the purchase of Combined Single Generator for Ultrasonic Cutting and Coagulation device with advance Radio-frequency energy (12 Nos.) which has been supplied on 30.03.2021.

In this connection it has come to our notice that during the process of finalization of above tender and during process of reasonability of prices, you have concealed the rates of same quoted items (Equipment and Consumables) in NCI, Jhajjar quoted through some other distributor. The said tender was called by HLL wherein rates are lower than what quoted in above referred tender. Further it is also informed that the rates quoted for equipment alongwith consumables are lower than rates already approved in running rate contract with AIIMS vide No. 126/H/Suture Material. It has also come to the notice that M/s Johnson and Johnson Pvt. Ltd. has quoted lower rates to NCI Jhajjar through purchase done by HLL

even when there is running rate contract with AIIMS, Delhi. This unethical practice and concealment of facts have been viewed seriously by the competent authority and directed to issue show cause notice and explain the followings:

(a) Why the supply of equipment, accessories/consumables has been made at NCI, Jhajjar, Ballabgarh and Emergency Medicine at different rates?

(b) Why the copy of supply order issued by M/s HLL for same equipment at NCI, Jhajjar was not submitted to Store. Surgical Block while ascertaining reasonability of prices on the basis of like to like comparison of prices?

(c) Why you have quoted higher rates to Surgical Block for the same equipment and consumables as compared to NCI, Jhajjar?

(d) Why you have not informed the Store Officer, Main Hospital that you have lowered the rates of consumables/accessories at NCI, Jhajjar?

Your reply to this show cause notice must reach to the undersigned within 3 (three) days from the date of issue of this show cause notice but not later than 12.04.2021 upto 4.30 pm. In case, you failed to reply within stipulated date and time or satisfactory reply is not received, appropriate administrative action like cancellation of purchase order no. 08 Surgical Block/M&E/2020-21/St. dated 27.03.2021. debarring the firm for two years, recovery of excess amount paid so far in other running rate contracts and forfeiture of performance security shall be taken and no further correspondence in this regard, shall be entertained what so ever it may be.

It is issued with the approval of the competent authority. It may be accorded TOP PRIORITY.” (emphasis supplied)

6. The petitioner sent its reply to the show cause notice on 15.04.2021

and, while requesting for a personal hearing, also gave a detailed explanation for not disclosing details of the contracts that had been mentioned in the show cause notice. The relevant extract of the reply sent by the petitioner reads as under:

"15 April 2021

To,

*Sr. Stores Officer (Surgical Block),
All India Institute of Medical Sciences,
Department of Surgical Disciplines,
Ansari Nagar, New Delhi - 110029*

Subject: Show cause notice dated April 8, 2021 with S.O. No. 08/Surgical Block/M&E/ 2020-21/St. in relation to Purchase of Combined Single Generator for Ultrasonic Cutting Radio-frequency energy (12 Nos.)

*Ref: 1. Tender No. 03/SB/M&E/ 2019-20/St.
2. Supply order No. S.O. No. 08/Surgical Block/M&E/2020-21/St. dated 27.03.2021.*

Respected Sir/Madam,

We, Johnson and Johnson Private Limited ("J&J" or "Company") are in receipt of the captioned show cause notice with ref: S.O. No. 08/Surgical Block/M&E/ 2020-21/St. dated April 8, 2021 ("Show Cause Notice"). We also refer to your email dated April 12, 2021, wherein we were permitted to submit response to this Show Cause Notice by April 15, 2021. In this regard, the Company is making the following submissions for your kind consideration and perusal.

A. Factual Background

** * * * **

7. We state that given that the five (5) tenders under consideration in the Show Cause Notice are separate and distinct and each has its pricing that is dependent on various

parameters that are unique to each tender, a comparison of pricing under the assumption that all tenders are alike in all respects would be incorrect. When we quote for tenders, we provide our quote on the basis of the tender requirements to ensure that the best possible price is offered to the customer. This is also stated in the price disclaimer that is submitted. It is also relevant to point out that Ballabgarh Tender and Emergency OT Tender were one-time orders and proprietary purchases, hence by no iota of imagination can a comparison with the AIIMS, SB Tender be drawn in isolation without considering the parameters and specific nuances of each of these tenders. Whilst there might be subtle similarities across identifiable parameters between NCI Tender, Ballabgarh Tender and Emergency OT Tender, the same were separate and distinct tenders too with no correlation and benchmarking to one another. The referenced tenders are separate and distinct from the AIIMS Tender. In view of this fact, you would appreciate that our Company has transparently disclosed "Disclaimer language" in the individual price bids for NCI Tender and AIIMS, SB Tender, respectively, highlighting the fact that the price quoted is the best price offered for the tendered quantities and price lower than the prices quoted may exist due to the terms of sale and other conditions applicable to such tenders.

The copies of price disclaimer letters dated October 12, 2018 and November 7, 2018, respectively filed with NCI Tender and AIIMS, SB Tender, respectively are annexed and marked herewith as Annexure I (Colly.).

8. We would further like to state that our Company had participated in the afore stated tenders through a process of competitive bidding, and upon due scrutiny and examination of our bids in line with the tender's technical and commercial requirements, the same were awarded to our Company by the Competent Authority after proper review and diligence.

9. With respect to tender 126/H/Suture Materials/2013-14 (126H tender"), we would like to state and submit that this tender was floated in 2014 for procurement of individual items

like sutures and other consumables including only one of the consumable items (HP054) that was included in NCI tender. This tender was awarded in 2015, and was valid only for two years, i.e., till 2017. The 126H tender did not contain any equipment or other consumables as contained in the NCI Jhajjar tender. It is also important to note that the 126H tender did not contain any minimum quantity commitment in the tender. Post expiry of the initial two years, the 126H tender was extended from time to time. The 126H tender being a tender for individual items without any minimum quantity commitment cannot be compared with the NCI Tender, which was a composite tender with detailed quantities of equipment, consumables and accessories to be provided in the tender.

10. It is germane to mention here that the terms of sale and pricing and technical specifications for every tender is exclusive to that tender and is premised on certain commercial, technical and management decisions prevailing at the relevant time. The Competent Authority has referred to five (5) tenders in their Show Cause Notice, having dissimilar-attributes and fulfilled between the years 2015 to 2021, hence no reasonable comparison can be made by the Competent Authority, whether in terms of price, terms of sale and/or other specifications after the successful grant and fulfillment of those tenders.

xxx ”

(emphasis supplied)

7. The petitioner's request for personal hearing was granted and the hearing was subsequently conducted on 20.04.2021 by a Committee constituted by the respondent. Pursuant to this hearing, the respondent, on 29.04.2021, passed the impugned order whereunder, the supply order dated 27.03.2021 was cancelled, the Earnest Money Deposit paid by the petitioner at the time of bid submission stood forfeited, and the petitioner was declared debarred from participating in any future tenders issued by the respondent for a period of two years from the date of passing of the impugned order. The

impugned order, passed on 29.04.2021, reads as under:

“i. The argument made by rep. of M/s Johnson & Johnson Pvt. Ltd. that all tenders are different and they can quote different rates in different tenders was not accepted by the Personal Hearing Committee as in the tender acceptance form, they have accepted all tender conditions under section-IX including fall clause undertaking at Serial No.33 of the TED.

ii. More importantly, firm informed the rates of supply order bearing no. 19/Emer. Med./M&E/PAC/2015-16 dated 30.12.2015 and supply order no. 145/BHC/Stores/2015-16 dated 22.02.2016 which were finalized during Financial Year 2015-16 but did not disclose the recent rates offered in NCI, Jhajjar vide Supply Order No. HITES/PCD/NCI-AIIMS/31/2019-20/7179 dated 15.02.2020 for ascertaining the reasonability of prices in Surgical Block Tender. This has been considered to be unethical, misleading and unjustified on the part of the firm. The firm has deliberately misrepresented the facts to influence a procurement process within the meaning of fraudulent practice under the clause 48 of TED. Accordingly, AIIMS invoked TED 'Corrupt or Fraudulent Practices' clause at sr. No. 48 of GIB against the firm."

(emphasis supplied)

8. Being aggrieved, the petitioner, vide its letters dated 01.05.2021, 10.05.2021, and 13.05.2021, approached the respondent seeking review and revocation of the impugned order primarily on the ground that no comparison could be made between the subject tender, i.e., the AIIMS, SB tender, and the tenders issued by the NCI, the CRHP, Ballabgarh and the AIIMS Emergency, as they were all unique and incomparable tenders with different terms and conditions of sale and involved orders with different quantities, combinations

and constructs. The petitioner's request for review was declined by the respondent who, vide the letter dated 21.05.2021, advised the petitioner to immediately take back the equipment provided by it against the supply order dated 27.03.2021. The petitioner, however, vide its letters dated 24.05.2021, 27.05.2021, and 31.05.2021, reiterated its request for review of the impugned order, but to no avail. It is in these circumstances that the present petition came to be filed before this Court on 17.06.2021.

9. On 29.07.2021, after learned senior counsel for the petitioner had concluded their submissions, learned Solicitor General appearing on behalf of the AIIMS had raised an objection regarding the maintainability of the petition by contending that the contractual relationship between the parties was governed by the supply order dated 27.03.2021, which contained an arbitration clause and had, therefore, contended that if aggrieved, the petitioner ought to seek arbitration in accordance with Clause 15 contained in Annexure 2 of the said supply order. He had urged that in view of the self-imposed judicial policy of limiting exercise of the extraordinary powers of the High Court under Article 226 of the Constitution, when an alternative and equally efficacious remedy is available with a litigant, it ought to be made to pursue the said remedy instead of being given a free reign to invoke the special jurisdiction of this Court. He also had urged that since the petitioner's termination had been duly effected as per the terms of the TED, and most of the issues raised by the petitioner were disputed and raised complex questions of facts pertaining to the terms and conditions of the AIIMS, SB tender – all of which required oral evidence, this Court, ought to decline the exercise of its writ jurisdiction and relegate the petitioner to arbitration in accordance with the terms of the contract.

10. In rebuttal, learned senior counsel for the petitioner submitted that an

arbitrator had very little power to deal with the issues raised in the present petition. The petitioner had been debarred, which, in effect, was an act of blacklisting; given that the consequences of blacklisting travelled far beyond the dealings with any one particular government entity and had real time consequences on the entire business of the petitioner company, even if termination of the contract could be assailed in arbitration, an order of blacklisting could not. It was then submitted that an arbitrator is, after all, a creature of the agreement and impugning an act of blacklisting was a public law action, not contractual; therefore, any order to blacklist an entity demanded public law remedies that could only be granted by a Court with writ jurisdiction. It was further submitted that the arbitrator, in any event, does not have any power to apply the test under Article 14 of the Constitution of India and other public law principles liable to be invoked in the facts of the present case, such as the doctrine of arbitrariness, for the purpose of setting aside a debarment order - only a Constitutional Court was empowered to do that. It was, therefore, submitted that arbitration could not be considered an equally efficacious remedy in any manner. It was finally urged, without prejudice to the aforesaid, that jurisdiction under Article 226 of the Constitution is neither excluded in the presence of an arbitration agreement, nor is the availability of an alternate remedy an absolute bar to writ jurisdiction. Subsequent to the response given by the petitioner, the learned Solicitor General did not really press the point of maintainability any further and, instead, chose to address his contentions on merits.

11. Before referring to the submissions made by the parties on merits, it may be noted that while this petition was being heard, the petitioner received communications from two medical institutions; two letters from the Sawai Man Singh Hospital at Jaipur, declaring the bids made by the petitioner

through its distributors under NIB No. 1350 dated 28.04.2021 non-responsive on account of the impugned order, and one letter from King George's Medical University at Lucknow on 29.07.2021, where the petitioner currently stands engaged in a contract, seeking clarifications in respect of its continued engagement. These letters were placed on record by the petitioner in support of its plea that the impugned order not only affects its business relationship with the respondent, but also has a cascading effect on its business relationship with other medical institutions.

12. Learned senior counsel Mr. Mukul Rohatgi and Mr. Saurabh Kirpal, advanced submissions on behalf of the petitioner. It was submitted that the petitioner, being a global healthcare and medical technology company present in over 65 countries, as a brand enjoys tremendous goodwill in the market and is a well-regarded name in the industry. For this reason, the petitioner has always ensured that its actions do not offend any national laws or regulations and the petitioner, even in the present case, has not indulged in any unethical practices or concealment of material facts in respect of the tender in question. It was contended that, for starters, the impugned order is premised on a wholly erroneous interpretation of the 'Fall Clause' provision and other terms and conditions of the TED. It was submitted that the terms and conditions of the TED did not at all make it incumbent on the bidder to either provide the lowest prices to the respondent, or disclose the rates offered in *all* recently executed contracts for ascertaining the reasonability of prices quoted by the bidder. It was urged that the contractual provision that required bidders to disclose rates in recently executed contracts could be invoked only in case of tenders with identical terms and conditions, which is clearly not the case here. Given that the 'Fall Clause' could only come into effect after the petitioner and the respondent had executed the contract between themselves, there was

no question of the petitioner disclosing details of the contract with the NCI which was executed much earlier. It was submitted that the petitioner earned a major part of its revenue from the number of consumables ordered, which differed in the case of the orders placed by the NCI and AIIMS, SB, therefore they were substantially different and could not be compared. The petitioner had, in fact, made this position very clear when it sent a price disclaimer to the respondent on 07.11.2019, prior to submitting its bid, stating that it may have quoted lower prices for the equipment earlier, depending on the terms of sale and other conditions applicable during the pendency of such other contract. It was urged that even otherwise when the petitioner had submitted its bid on 15.11.2019, there was admittedly no concluded contract with the NCI at that point and, therefore, the petitioner could not be expected to furnish details of its contract which it entered into with the NCI only on 19.03.2020, in its bid submitted much prior thereto, i.e., on 15.11.2019. It was, thus, contended that there was no question of the petitioner having deliberately concealed any information from the respondent and indulging in any corrupt or fraudulent practice under Clause 48 of the TED. Further, by placing reliance on the decisions in *Mekaster Trading Corporation Vs. Union of India & Ors.* 2003 (71) DRJ 376 and *Rama Pandey Vs. Union of India & Anr.* ILR (2009) 6 Del 752, Mr. Rohatgi urged that even otherwise, the impugned order was wholly cryptic and does not deal with the primary defense of the petitioner that when the quantity of consumables and accessories ordered by the NCI and AIIMS, SB were very different, the contracts with each of them could not be called identical at all. Finally, it was contended that the 'Fall Clause' provision, which the respondent has invoked in the impugned order, is wholly inapplicable to the facts of the present case, as the said clause has a very limited purpose of vesting the respondent with

the option of seeking a price reduction— which was not the case here as the petitioner did not receive any request from the respondent for reducing the price of the goods being supplied under the subject contract. Moreover, it was specifically reiterated that the ‘Fall Clause’ could be invoked to seek a price reduction only upon a comparison with *identical contracts having the same terms and conditions* which, it was urged, was not the position in the present case.

13. It was then submitted that the impugned order was arbitrary, discriminatory and completely disproportionate to the violations alleged to have been committed by the petitioner. The respondent could not have arbitrarily resorted to the extreme and harsh step of debarring the petitioner as a punishment in the ordinary course of business, considering that the act of debarment was, in effect, an act of blacklisting – which has serious consequences. It was submitted that the cancellation of the contract awarded in the petitioner’s favour had caused it significant financial losses and damaged its reputation, which was only likely to increase in the aftermath of the blacklisting. In this regard, reliance was placed on the decision of the Supreme Court in *Kulja Industries Limited Vs. Chief Gen. Manager* (2014) 14 SCC 731 to contend that the decision of the respondent to blacklist the petitioner had to withstand the test of fairness, natural justice, relevance, non-discrimination, quality and proportionality. Yet, the entire premise of the impugned order was an erroneous assumption that the petitioner, while submitting its bid to the respondent in November 2019, had *malafidely* chosen to not inform the respondent about the price quoted by it for the equipment ordered by the NCI, without considering the admitted position that the contract with the NCI was executed only in March 2020. It was ultimately urged that, given the petitioner’s reliable brand name in the field of supplying

medical devices for decades, its past record of having satisfactorily serviced the respondent under previous contracts with no complaint of any wrongdoing, and its inability to reveal details of a contract which did not exist in November 2019, the decision to blacklist the petitioner was clearly disproportionate and unwarranted. It was prayed that the impugned order be quashed and set aside for the aforesaid reasons.

14. *Per contra*, learned Solicitor General submitted that the decision to blacklist the petitioner arose after a careful deliberation upon the facts of this case. It was submitted that at the time of personal hearing before the respondent's Committee, the petitioner did not plead that the terms and conditions of the contracts executed between the NCI and the petitioner on the one hand, and the petitioner and the respondent on the other hand, were incomparable. It was further submitted that the respondent, after executing the supply order in favour of the petitioner on 27.03.2021, later found out that the petitioner had participated in the tender process with unclean hands since it had failed to disclose material information regarding its previous business arrangement with other hospitals in respect of the very same equipment. The terms and conditions of the TED showed that the respondent wanted all bidders to ensure the highest standards of ethics at the stage of procurement of the order and its execution and to that end, required certain disclosures from them at the time of bid submission. For instance, the Qualification Criteria in Section VIII of the TED made it incumbent on all bidders to meticulously disclose the names of the firms and details of orders specified in Proforma 'A', titled Proforma for Performance Statement, wherein similar equipment meeting major parameters of technical specification had been supplied and installed in the last five years. Given that the TED sought supply of Combined Single Generators for Ultrasonic Cutting and

Coagulation device with advance Radio-Frequency Energy, the petitioner was required to submit a disclosure as per the format in Proforma 'A', which contained details of other orders for supply of the same equipment, that had been executed in the five preceding years. Ideally, the petitioner ought to have provided details of more recent orders that had been placed for the same equipment, such as the ones executed with the NCI in 2020 and CRHP, Ballabgarh in 2018 while submitting its bid. Instead, the petitioner filled the disclosure form with details of an order that was placed as far back as in 2012 - that quoted relatively higher prices for the equipment. It was contended that even if the petitioner's plea that it could not disclose the prices quoted to the NCI in November 2019 at the time of bid submission since the contract with the NCI had not been executed by then were to be believed, there is still no explanation as to why the petitioner did not disclose the same at the time of appearing for price negotiations before the respondent's Price Negotiation Committee in March 2021, even though the contract with the NCI had been admittedly executed in March 2020 itself. The fact that the possibility of such a disclosure had not been conceived by the petitioner cannot be believed since it was at the time of price negotiations that it had furnished to the respondent other contracts that it had executed with the CRHP, Ballabgarh and AIIMS Emergency in respect of the equipment. It was submitted that the intent behind seeking such mandatory disclosures of past price quotations was to ensure that the respondent could purchase the equipment at the best market price, which meant that the respondent did not have a free hand to pick and choose which of its recently concluded project ought to be disclosed to the respondent. Notwithstanding the aforesaid, the petitioner, while submitting its bid on 15.11.2019 and participating in price negotiations in March 2021 prior to finalizing the Supply Order, had willfully failed to

disclose to the respondent details of its ongoing contracts with the NCI executed on 19.03.2020. It was urged that this omission was a calculated decision on the part of the petitioner to withhold from the respondent that it had quoted lesser prices for the equipment in previous, more recently executed contracts. It was further urged that, by committing such an omission, the petitioner was guilty of 'fraudulent practices' under Clause 48.1(a)(ii) contained in Section II of the TED to influence the procurement process or contract execution, to the detriment of the respondent by charging it much higher prices for the same equipment. It was submitted, by delving into the purpose of the 'Fall Clause' provision and emphasizing upon the use of the term 'identical product' therein, that the 'Fall Clause' is a price safety mechanism which provides that, if the contract holder reduces its price or is selling identical goods at a lower price to any person or organization during currency of the contract with the respondent, the contract price would be automatically reduced with effect from that date for all the subsequent supplies under the contract and the contract in question shall stand amended accordingly. It was contended that there was absolutely no merit in the petitioner's contention that the 'Fall Clause' would have come into play only after execution of the contracts dated 27.03.2021 as the said provision was fully applicable to any sale during the currency of the respondent's supply order, which was valid for a period of one year and, thus, brought existing contractual arrangements with CRHP, Ballabgarh and the NCI, very much within the purview of the 'Fall Clause' provision. It was urged that by adopting such hyper-technical interpretation of the 'Fall Clause' provision, the petitioner was attempting to deflect any questions on the obvious omissions and misrepresentations it had indulged in, in order to mislead the respondent into executing the supply order. It was submitted that in this

manner, the petitioner was found guilty of violating crucial provisions of the TED.

15. It was then submitted that the impugned order, a speaking order, has been passed by the respondent by duly following the principles of fairness, non-discrimination, and natural justice since the petitioner had been served with a show cause notice, given time to file its reply thereto and provided with ample opportunities to present its case. Besides, the entire text of the undertaking under Proforma 'A' clearly stated that in case any information furnished by the bidder was proved to be false or incorrect, the respondent would have the power to take any action, as deemed fit, against the erring bidder. Clause 48.1(c) of Section II of the TED also empowered the respondent to declare an erring bidder ineligible to be awarded a contract with it, either indefinitely or for a stated period of time, if the respondent determined that the erring bidder had engaged in corrupt or fraudulent practices in competing for, or in executing the contract. For these reasons, the debarment itself could not be deemed arbitrary or unforeseen. It was submitted that, at the time of negotiating with the respondent for the subject tender, since the petitioner already knew that it was offering the very same equipment to the NCI at much lesser prices, it was the petitioner's duty to inform the respondent of this position. However, the petitioner had deliberately failed to do so with the selfish interest of bagging the contract, which concealment had been viewed seriously by the respondent. It was urged that the petitioner's actions violated the respondent's trust and rendered it guilty of 'fraudulent practice' under Section 48 of the TED, leading to the passing of the impugned order. It was submitted that in any event, the order of debarment is not in respect of all private or public medical institutions or hospitals; all that it implied was that the respondent was not interested in

doing any further business with the petitioner for a period of two years. It was finally urged that this Court could not sit as a Court of appeal over the decision of the respondent, especially since the decision was informed by the application of two clauses in the TED, which had been known and accepted by the petitioner at the time of submitting its bid. It was, however, always open for the petitioner, if it felt it had been wronged, to institute a suit against the respondent in order to seek damages for the alleged losses that had been caused to it on account of the impugned order.

16. I have heard learned senior counsel for the parties and, with their assistance, perused the record. At the outset, as noted earlier, the respondent had initially raised an objection as regards the maintainability of this petition on the ground that the supply order issued in favour of the petitioner on 27.03.2021, whereunder the contractual relationship between the parties was crystallized, contained an arbitration clause which read as under:

“15. Resolution of Dispute/Arbitration:

If dispute or difference of any kind shall arise between the Purchaser/Consignee and the supplier in connection with or relating to the contract, the parties shall make every effort to resolve the same amicably by mutual consultations.

If the parties fail to resolve the dispute or difference by such mutual consultation within twenty one days of its occurrence, then, unless otherwise provided in the SCC, either the Purchaser/Consignee or the supplier may give notice to the other party of its intention to commence arbitration, as hereinafter provided the applicable arbitration procedure will be as per the Arbitration and Conciliation Act, 1996 of India. In the case of a dispute or difference arising between the Purchaser/Consignee and a domestic Supplier relating to any matter arising out of or connected with the contract, such dispute or difference shall be referred to the sole arbitration of an officer in the Ministry

of Law and Justice, appointed to be the arbitrator by the Director, AllMS. The award of the arbitrator shall be final and binding on the parties to the contract subject to the provision that the Arbitrator shall give reasoned award in case the value of claim in reference exceeds Rupees One lakhs (Rs.1,00,000/).”

(emphasis supplied)

17. The existence of this arbitration clause is a matter of record and, undoubtedly, the respondent is not incorrect when it claims that it was open for the petitioner to seek arbitration in accordance therewith. At the same time, it is a settled position of law, as reiterated recently by the Supreme Court on 12.05.2021 in its decision in ***Uttar Pradesh Power Transmission Corporation Ltd. & Anr. Vs. CG Power and Industrial Solutions Limited &Anr.*** 2021 SCC Online SC 383, that the existence of an alternative remedy, or in this case, an arbitration clause, does not prevent a Court from entertaining a writ petition in appropriate cases. In these circumstances, given that the petitioner is essentially claiming that the impugned order debarring it for a period of two years is an infringement of its fundamental right under Article 19(1)(g) of the Constitution of India to carry on trade and business, and the legal position that the presence of an arbitration clause does not prohibit this Court from examining this case to ascertain the veracity of this grievance, as also the significant fact that the respondent did not press this point any further while presenting its submissions, I am of the view that this issue need not detain the Court any further. In these circumstances, I now proceed to deal with the submissions of parties on merits.

18. The four issues that ultimately arise for my consideration are as follows – were the actions of the petitioner company ‘corrupt and fraudulent’ within the meaning of Clause 48 of the TED; Was the respondent correct to apply the ‘Fall Clause’ provision, contained in Clause 33 of Section IV of the

TED, to the facts of the present case in order to institute action against the petitioner; whether the impugned order sufficiently addressed the explanations put forth by the petitioner in its reply to the show cause notice, dated 15.04.2021; and finally, was the impugned order, to the extent that it debarred the petitioner from participating in any future tenders of the respondent for a period of two years, disproportionate to the wrongs allegedly committed by the petitioner.

19. Inasmuch as the first issue is concerned, it is the case of the petitioner that the terms and conditions of the TED have been misinterpreted by the respondent to set up its case that it was incumbent on the petitioner to reveal details of all its contracts with other medical institutions/entities, especially the prices quoted thereunder. In order to appreciate this plea, it may be apposite to visit the relevant terms and conditions of the TED, as published on 27.09.2019. The goods and related services that were sought under the TED were listed in Part I of Section VI of the TED under the title 'List of Requirements' and read as under:

<i>Sl. No.</i>	<i>Name of Equipment</i>	<i>Consignee</i>	<i>Quantity per Deptt. (No.)</i>	<i>Total Quantity per Schedule (No.)</i>	<i>Warranty Period</i>	<i>CAMC period after warranty</i>
<i>1</i>	<i>Combined Single Generators for Ultrasonic Cutting and Coagulation device with advance Radio-Frequency Energy</i>	<i>New Surgical Block</i>	<i>12</i>	<i>12</i>	<i>05 years</i>	<i>05 years</i>

20. This list of requirements has to be read along with Section VII of the TED that set out the technical specifications for the twelve generators and the accessories ordered along with them. The petitioner was also provided with a format in Proforma 'A' of Section VIII of the TED for a Performance Statement disclosing certain information about the previous orders it had executed in respect of supplying the equipment, including the value of the order, description of the equipment, date of delivery, and a certification that the equipment supplied had been satisfactorily functional for the entire period of its use. The Performance Statement concluded with a statement from the petitioner/bidder certifying the following:

"We hereby certify that the details of all orders received in last 5 years of quoted equipment (including AIIMS, PGIMER, JIPMER, RML Hospital, Safdarjung Hospital, Institute of National Importance) has been furnished. We hereby further certify that if at any time, information furnished by us is proved to be false or incorrect, we are liable for any such action as deemed fit by the purchaser in addition to forfeiture of the Bid Security."

21. As regards this statement, the petitioner has claimed that phrasing of the format in Proforma 'A' of the TED did not make it necessary for the petitioner to reveal details pertaining to its contracts with the AIIMS Emergency and the CRHP, Ballabgarh, but that it chose to do so nevertheless when the petitioner met for price negotiation with the respondent's Committee on 12.03.2021. The petitioner also claims that insofar as the contract with the NCI was concerned, the same was executed only on 19.03.2020, much after the petitioner had submitted its bid to the respondent on 15.11.2019, which meant that at the time of bid submission, the contract with the respondent in question did not exist. A further contention of the

petitioner is that the orders placed by the respondent and the NCI are entirely incomparable and cannot be deemed to be the same 'equipment'. To substantiate the submission, the petitioner has placed on record the following tabulated comparison of the equipment sought in the cases of the NCI, and the respondent, to differentiate between them:

	NCI Tender	AIIMS, SB Tender	Definition
<i>GENII</i>	6	12	<i>Capital</i>
<i>CRT11</i>	6	12	<i>Accessory</i>
<i>FSW11</i>	6	12	<i>Accessory</i>
<i>HGA11</i>	12	12	<i>Accessory</i>
<i>HP054</i>	120	12	<i>Consumable</i>
<i>HPBLUE</i>	-	12	<i>Consumable</i>
<i>HARH36</i>	300	12	<i>Consumable</i>
<i>NSLG2C35A</i>	-	12	<i>Consumable</i>
<i>HARH23</i>	300	-	<i>Consumable</i>
<i>ETR103 25H</i>	300	-	<i>Consumable</i>
<i>ETR103 35H</i>	300	-	<i>Consumable</i>
<i>NSLG2S I 14</i>	-	-	<i>Consumable</i>
<i>NSEAL X22I</i>	-	-	<i>Consumable</i>
<i>NSLG2S 25</i>	-	-	<i>Consumable</i>
<i>NSLG2S 35A</i>	-	-	<i>Consumable</i>
<i>HAR9F</i>	-	-	<i>Consumable</i>
<i>FCS9</i>	-	-	<i>Consumable</i>
<i>FCS17</i>	-	-	<i>Consumable</i>
<i>HAR36</i>	-	-	<i>Consumable</i>
<i>SNGCB</i>	-	-	<i>Consumable</i>
<i>SNGHK</i>	-	-	<i>Consumable</i>
<i>HDH05</i>	-	-	<i>Consumable</i>
<i>FCS9</i>	-	-	<i>Consumable</i>
<i>FCS17</i>	-	-	<i>Consumable</i>
<i>HDH05</i>	-	-	<i>Consumable</i>
<i>EGA11</i>	-	-	<i>Accessory</i>
Total	1350	96	
Total Consumables	1320	48	

22. It is the petitioner's case that the equipment sought under each of the four contracts, can be characterized under the head of capital, accessories and consumables. Relatively, while the respondent did requisition the most number of capital - being 12 generators, it only sought 48 accessories and consumables each, whereas the contract with the NCI sought 1320 consumables. The petitioner claims that since in contracts of such nature, most of the revenue is generated from consumables, it is only when quoting prices for consumables that a bidder can secure a profit margin for itself. Thus, the number of consumables ordered plays a significant factor in determining the prices quoted, and if the quantity ordered thereof is large, the price quoted would see some reduction. It is, therefore, the petitioner's case that since the number of consumables sought by the respondent were significantly less than that sought by the NCI, which made them completely different from each other and, therefore, prevented any comparison between them. On the other hand, the respondent has claimed that the concluding sentence of the Performance Statement made it very clear that the bidder was required to provide details of *all* the orders received in the last five years in respect of the quoted equipment.

23. Primarily, the petitioner's contention is that the difference in the number of consumables meant that the contracts were completely different, which implies that it considers the quantity of the consumables ordered as a major parameter. In my view, this explanation offered by the petitioner has to be considered in the light of the admitted position that in all of the four contracts executed by the petitioner with the respondent, the NCI, AIIMS Emergency, and CRHP, Ballabgarh respectively, while the primary product being ordered was the Combined Single Generator with the Ultrasonic Cutting and Coagulation device, the remaining products are the accessories

and consumables required to operate the former. The product bearing Model Code CRT11 is a generator cart, FSW11 stands for the accompanying foot switch and cable, HGA11 is the adapter for ultrasonic and radiofrequency instruments like the generator, HP054 is a hand piece/transducer compatible with various hand instruments used in open and laproscopic surgeries of the kind to be carried out by the device, HARH36 refers to the ultrasonic probes whereas NSLG2C35A is an articulating tissue sealer. Since the quantities ordered of each of these accessories and consumables, in each case, did differ in significant quantities, the petitioner was not in the wrong to contend that there were major variations in these orders.

24. In the light of this position, it is necessary to consider whether the petitioner can be said to be guilty of having indulged in fraudulent practices, under Clause 48.1 of the TED which reads as under:

“H. CORRUPT OR FRADULENT PRACTICES

48. Corrupt or Fraudulent Practices

48.1 It is required by all concerned namely the Bidder /Suppliers/ Purchaser/Consignee/End User etc. to observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy, the Purchaser: -

(a) defines, for the purposes of this provision, the terms set forth below as follows:

(i) "corrupt practice" means the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement process or in contract execution; and

(ii) "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Purchaser,

and includes collusive practice among bidders (prior to or after Bid submission) designed to establish Bid prices at artificial non-competitive levels and to deprive the Purchaser of the benefits of free and open competition;

(b) Will reject a proposal for award if it determines that the Bidder recommended for award has engaged in corrupt or fraudulent practices in competing for the contract in question;

(c) Will declare a firm ineligible, either indefinitely or for a stated period of time, to be awarded a contract by the purchaser if it at any time determines that the firm has engaged in corrupt or fraudulent practices in competing for, or in executing the contract.”

(emphasis supplied)

25. While the entire principle behind a provision like Clause 48 is to endorse the high standard of ethics that is expected to be shown by all bidders, the petitioner's plea is that, being a penalty provision, the same needs to be strictly construed, keeping in view the plain language of the contract. It is, therefore, necessary to visit the facts of the present case, especially the terms and conditions of the TED, to ascertain whether the petitioner had violated any contractual obligations that invited the application of this penalty clause, at all.

26. What emerges is that, *firstly*, at the time of bid submission on 15.11.2019, the bidding process for the NCI was still at a nascent stage and was yet to culminate into a contract between that Hospital and the petitioner. Thus, the petitioner is right to contend that, when the contract with the NCI had not been executed when the bid was submitted on 15.11.2019, there was no question of furnishing details pertaining to it at that time. *Secondly*, it is undisputed that the petitioner had made a real and serious effort to bring the

contracts executed with the AIIMS Emergency and CRHP, Ballabgarh on record, by placing them for the consideration of the respondent at the time of price negotiations. *Thirdly*, the petitioner had already sent a price disclaimer letter to the respondent on 07.11.2019, stating that in the case of other Government Department/Institution or any other institution, it may have quoted lower prices for the equipment, than the prices it had quoted to the respondent, and that such decrease in prices was in accordance with the terms of sale and other conditions applicable during the pendency of such contract. Given these factors, it cannot be said that the conduct of the petitioner was not completely transparent or that it had failed to inform the respondent in advance about lower prices having been quoted in different contracts. Furthermore, the respondent has not seriously dispute the petitioner's plea that, as per general practice, contractors supplying sophisticated medical technology, such as the petitioner, earn more money from the consumables that are sold. As a result, the price quotations made by the bidders are made by taking the quantity of consumables, forming part of the contract, to arrive at the optimum pricing arrangement for themselves and the customers. To put it plainly, in the case of orders seeking higher quantities of consumables, such as that of the NCI, the price of consumables would be decreased and, in cases such as the respondent's where the number of consumables sought were less, the price of the consumables would see a relative increase. When this was already known to the respondent, I am of the view that it cannot be permitted to conduct a mere superficial comparison of the pricing of different tenders, without taking into consideration the different parameters contained therein, to force a contractually unspecified obligation upon the petitioner to reveal details of previous contracts at the time of conducting price negotiations. Finally, and most significantly, as already noted above, there is

absolutely no provision in the TED which makes it mandatory for the shortlisted bidder to disclose previous contracts at the stage of price negotiations. Therefore, I am of the view that in the absence of any such contractual obligation, it would be unreasonable to stretch the applicability of a penalty clause, being Clause 48 of the TED, to penalize the petitioner and hold it guilty thereunder of 'corrupt and fraudulent practice'.

27. At the same time, I cannot lose sight of the fact that the spirit behind a provision such as Clause 48 of the TED is to secure the highest ethical standard from the contractor during the procurement and execution process. This was, after all, not a run-of-the-mill contract and, instead, dealt with the supply of highly complex and nuanced medical equipment that would be put to use by medical professionals for the benefit of the public. Considering that the respondent enjoys the trust and goodwill of millions of citizens, hailing from rural and urban settings alike, when it comes to receiving quality healthcare, the immense responsibility owed by the respondent Hospital to its patients cannot be downplayed. It is in this background that one can truly appreciate the effect and importance of a provision such as Clause 48 of the TED and the disclosures it sought from the contractors it intended to partner with. Being one such contractor and partner, the petitioner was subject to the same standards and expectations, and had a duty to discharge these roles earnestly, and with the utmost care.

28. Even if the petitioner was under the impression that the contract with the NCI, and the one executed with the respondent were unique, different, and incomparable, the petitioner had a chance to confer with the respondent on this aspect and seek a clarification thereupon from the Price Negotiation Committee. In fact, I may note that the reply sent by the petitioner to the show cause notice on 15.04.2021 shows that the petitioner also bore the same

impression in respect of the contracts executed with the AIIMS Emergency and CRHP, Ballabgarh, and believed them to be incomparable with the contract executed with the respondent. Yet, this did not prevent the petitioner from furnishing these contracts for the perusal of the Price Negotiation Committee on 12.03.2021. Thus, even if there was no explicit contractual provision fastening an obligation upon the petitioner to make such a disclosure during price negotiations, the petitioner chose to exercise due caution in advance and reveal details of similar contracts to the respondent; this transparency, however, did not seem to be recreated in respect of the contract with the NCI. Ultimately, the equipment, being Combined Single Generator for Ultrasonic Cutting and Coagulation device with advance Radio-Frequency Energy, had been supplied to the NCI far more recently than the equipment supplied to the AIIMS Emergency, CRHP, Ballabgarh or the Dr. B.R.A. Institute-Rotary Cancer Hospital, AIIMS, New Delhi on 13.12.2012, and does lend some credence to the respondent's grievance that the petitioner could not pick and choose which contracts to disclose at the time of negotiations. The petitioner's decision to be selective with the information it furnished to respondent at the time of negotiations does betray the cavalier manner in which the petitioner discharged its solemn duties as a contractor for the respondent. I am, therefore, inclined to agree with the respondent that the petitioner's conduct was not entirely fair to begin with. It also lends credence to the respondent's apprehension to partner up with the petitioner, in view of the complete loss in trust between them once the respondent came to know that the petitioner had withheld important information from it in respect of the equipment. Moreover, this erosion of trust and the respondent's anxieties as to whether the petitioner, being a company of worldwide repute, had honoured its responsibility to act in their

mutual interest and for the general public good at the time of executing the contract between them, are material considerations and cannot simply be brushed aside. While the absence of any contractual violation is manifest, the apprehensions of the respondent have to be balanced in view of the fact that the actions of the petitioner were not completely above board and, given the numerous and deliberate omissions that it partook in, rather unfair. Thus, while holding that Clause 48.1(a) of the TED is not applicable to the facts of the present case, I am not inclined to set aside the decision of the respondent to cancel the contract executed under the supply order dated 27.03.2021.

29. This brings me to the second question raised in this petition, whether the 'Fall Clause' contained in Clause 33 of the General Conditions of Contract contained in Section IV of the TED was applicable at all, in the light of the allegations existing against the petitioner. To truly understand this aspect, it may be apposite to extract hereinbelow the 'Fall Clause' of the TED:

"33. Fall Clause

Fall clause is a price safety mechanism. The fall clause provides that if the contract holder reduces its price or sells or even offers to sell the contracted goods of identical specification and terms & conditions to that of the contract, at a price lower than the contract price, to any person or organization during the currency of the Contract, the Contract price will be automatically reduced with effect from that date for all the subsequent supplies under the Contract and the contract amended accordingly."

30. The petitioner contended that the respondent has completely misinterpreted the terms of the 'Fall Clause' and, resultantly, erred in assessing whether the same could be invoked in the context of the petitioner's

case at all. The petitioner also contended that the 'Fall Clause' came into effect after the contract between the parties was executed under the Supply Order dated 27.03.2021, and was only a price safety mechanism that vested the respondent with a right to seek reduction in price quotation in case it found that the petitioner was supplying the same equipment to another party for lower prices. A careful examination of the provision in question shows that the petitioner was right to contend that the 'Fall Clause' provision neither gave the respondent a right to terminate the contract, nor to debar the petitioner from participating in future contracts. Rather, I find that all that the 'Fall Clause' provision enabled the respondent to do was to seek reduction of prices, which the respondent admittedly never sought. Thus, for the respondent to take shelter under Clause 33 of Section IV of the TED to defend its decision to terminate the contract and debar the petitioner, would tantamount to permitting the respondent to forcibly stretch the limited contours of the 'Fall Clause' provision to change its character from a remedial provision to a penalty clause. This simply cannot be permitted in view of the narrow purpose of the 'Fall Clause' and, for the aforesaid reasons, the impugned order insofar as it invokes the 'Fall Clause' provision of the TED to cancel the respondent's contract with the petitioner, and then blacklist it, is set aside.

31. This brings me to the next question, whether the impugned order had been passed after duly considering the defense put forth by the petitioner. Administrative orders, such as the impugned order, require the Authority passing it to clearly set out the reasons as to why it arrived upon a decision to penalize an entity. This makes such administrative orders, and the manner in which they are written, of special interest to the affected party and the Courts that deal with their grievances. In *Mekaster (supra)*, a Coordinate Bench of

this Court made the following observations:

“DUTY TO GIVE REASONS:

22. It is now well settled proposition of law, laid down by series of judgments, that even an administrative authority is required to support its decision by reasons. Lord Denning in Breen Amalgamated Engineering Union, (1971) 2 QB 175 (CA) observed that “giving of reasons is one of the fundamentals of good administration”. Fairness founded on reasons is the essence of guarantee epitomised in Article 14 of the Constitution. The requirement of giving reason is a shackle on acting arbitrarily and whimsically. It is for this reason that the rule requiring reasons to be given in support of an order is now accepted as a basic principle of natural justice.

23. In S.N. Mukherjee's case (supra) the Supreme Court pointed out that if reasons are recorded it would enable the Supreme Court or the High Courts to effectively exercise the appellate or the supervisory power. Such orders passed are subject to judicial review; albeit on the limited grounds on which such judicial review is available. These grounds include observance of principle of natural justice, namely, proper hearing and decision by an unbiased person, taking into consideration the relevant factors and conversely excluding all irrelevant factors in the decision making process etc. Therefore, in order to appreciate as to whether there was proper application of mind to the contention raised by the noticee and those who are duly considered, it is not necessary to give reason. It is for this reason that in S.N. Mukherjee's case(supra) the Court laid down some other considerations. In the background of the dicta laid down in the aforesaid judgment as well as other judgments and commentaries of celebrated authors on administrative law, following justifications can be enlisted in support of the proposition that there is a need to give reasons for administrative decisions:—

- A) It would guarantee consideration by the authority;*
- B) It would introduce clarity in the decisions;*

C) It would minimise chances of arbitrariness in decision making in dictating that the authority has given due consideration to the points in controversy;

D) A duty to give reasons entails a duty to rationalise the decision. Reasons, therefore, help to structure the exercise of discretion, and the necessity of explaining why a decision is reached;

E) Furnishing reasons satisfies an important desire on the part of the individual to know why a decision was reached (Lawrence Baxter, Administrative Law (1991 p. 228);

F) Basic fairness requires that those in authority over others should tell them why they are subject to some liability or have been refused some benefit (De Smith, Woolf and Jowell, Judicial Review of Administrative Actions (1995 p. 459);

G) Rationale criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review;

H) If reasons are assigned, they can provide guidance to others on the administrator's likely future decisions, and so deter applications which would be unsuccessful.

I) It may also protect the body from unjustified challenges, because those adversely affected are more likely to accept a decision if they know why it has been taken.

24. Thus, the most impelling consideration for insistence upon disclosure of reasons in support of an order or decision is that it ensures proper application of mind, reduces the possibility of casualness and minimises whim and caprice, and thereby serves to provide legal protection to persons against arbitrary official conduct (See Bhagat Raja v. Union of India, AIR 1967 SC 1606; Travancore Rayons v. Union of India, AIR 1971 SC 862 and C.B. Gautam v. Union of India, 1993 (1) SCC 78.

25. Another judicial rationale for requirement of reasons is that a person affected by an adverse order is entitled to know why the decision has gone against him or her. 'The

decision might be perfectly right, but the person against whom it was made was left with the real grievance that he was not told why the decision had been made' (See Poyser and Mills' Arbitration, [1964] 2 QB 467 at p. 467). The obligation to give reasons according to the decision of the Supreme Court in Siemens Engg. & Mfg. Co. of India Ltd. v. Union of India, AIR 1976 SC 1785 stems from the mandate of natural justice. The Court held that absence of reasons leads to denial of justice because "the rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law". These threads were picked up and given a further boost in Organo Chemical Industries v. Union of India, AIR 1979 SC 1803. There, the Court emphasised that one of the requirements of natural justice was "spelling out reasons for the order made, in other words, a speaking order. The inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasijudicial performance" ..

26. The recording of such reasons is imperative not only when the administrative authority discharges quasi-judicial function but also it is a pure administrative function and the decision is visited by civil or evil consequences as far as affected party is concerned (See Ramesh B. Desai v. Union of India, AIR 1988 Delhi 288). So far as cases of blacklisting are concerned, this requirement will, all the more, be imperative having regard to the spirit of the judgments of the Supreme Court in the cases of M/s. Erusion Equipment(supra) and M/s. Star Enterprises(supra).

EXTENT OF REQUIREMENT TO GIVE REASONS:

27. Having said that it has now become an obligation to give reasons in support of an administrative order, we may hasten to add that what is needed is not a detailed or elaborate judgment, but a brief and pithy statement of reasons for the decision. The administrative authorities, after all, are not discharging the judicial function like that of a Court and,

therefore, not required to write an order in the manner in which normally a judgment is written by a court of law. The reasons given by an authority need be no more than a concise statement of the way in which it arrives at the decision. Way back in the year 1996 the Supreme Court pointed out in M.P. Industries' case(supra) that "when we insisted upon reasons, we do not prescribe any particular form or scale of the reasons. The extent and the nature of the reasons depend upon each case." What is essential is that the order must be a speaking order and must state the elements which had led to the decision and tell its own story and one is able to infer as to why the order was made. De Smith, Woolf and Jowell point out that the reasons must "meet the substance of the principle arguments that the tribunal was required to consider. In short, the reasons must show that the decision maker successfully came to grips with the main contention advanced by the parties, and must tell the parties in broad terms why they lost, or as the case may be one". Reasons are links between materials on which certain conclusions are based and the actual conclusion drawn. They would disclose how the mind is applied to the subject matter; whether done relevantly or rationally. Therefore, it would be sufficient if reasons indicate application of mind is discernible and mental process leading from the dispute to its solution is found in the order."

(emphasis supplied)

32. Against this legal position, I may note the relevant facts of this case. The reply sent by the petitioner on 15.04.2021, in response to the show cause notice, meticulously traversed various preliminary grounds in its defense setting out, *inter alia*, that the allegations in the notice arose from a comparison of incomparable contracts, the precise parameters which made these contracts incomparable, and that the respondent was erroneously scrutinizing individual prices quoted for each item, which was unusual in the case of composite tenders such as the one issued by AIIMS, SB. The respondent went on to state its seriatim-wise response to the queries

contained in the show cause notice, setting out the various facets of each answer in great detail. However, when the impugned order came to be passed on 29.04.2021, the respondent concluded that:

“i. The argument made by rep. of M/s Johnson & Johnson Pvt. Ltd. that all tenders are different and they can quote different rates in different tenders was not accepted by the Personal Hearing Committee as in the tender acceptance form, they have accepted all tender conditions under section-IX including fall clause undertaking at Serial No.33 of the TED.

ii. More importantly, firm informed the rates of supply orders bearing no. 19/Emer. Med./M&E/PAC/2015-16 dated 30.12.2015 and supply order no. 145/BHC/Stores/2015-16 dated 22.02.2016 which were finalized during Financial Year 2015-16 but did not disclose the recent rates offered in NCI, Jhajjar vide Supply Order No. HITES/PCD/NCI-AIIMS/31/2019-20/7179 dated 15.02.2020 for ascertaining the reasonability of prices in Surgical Block Tender. This has been considered to be unethical, misleading and unjustified on the part of the firm. The firm has deliberately misrepresented the facts to influence a procurement process within the meaning of fraudulent practice under the clause 48 of TED. Accordingly, AIIMS invoked TED 'Corrupt or Fraudulent Practices' clause at sr. No. 48 of GIB against the firm.”

(emphasis

supplied)

33. Suffice it to say that the above extracted portion of the impugned order contains the only semblance of reasoning that was given by the respondent for imposing a penalty on the petitioner and it certainly leaves a lot to be desired. The first paragraph of the reasoning curtly disallows the detailed defense of the petitioner by making a brief reference to it and then stating that the same was rejected because the petitioner had accepted all terms and

conditions under Section IX of the TED, including the 'Fall Clause' provision. I do not see any rational nexus between the petitioner accepting the terms and conditions of the TED and, on that ground, being forced out of its contract with respondent without being properly informed of the provision which it was allegedly guilty of violating. Insofar as the application of 'Corrupt and Fraudulent Practice' and the 'Fall' Clauses are concerned, this Court has already found hereinabove that the respondent did not have a concrete basis for invoking either of them in the facts of the present case. Apart from the alleged breach of Clauses 33 and 48, which has already been set aside, I am of the view that the impugned order fails to set out any valid ground for the respondent to proceed against the petitioner. Given that the petitioner had provided the respondent with a 13-page long reply to the show cause notice setting out its case, at the very least, the respondent, being an instrumentality of the State under Article 12 of the Constitution, ought to have provided the petitioner with sufficient reason as to why its detailed defense was being rejected. However, I find that the impugned order neither discusses any of the petitioner's explanations, nor provides a cogent basis for rejecting them. For instance, if it were the case of the respondent that the number of consumables ordered could not be construed as a major parameter insofar as orders in respect of Combined Single Generators for Ultrasonic Cutting and Coagulation device with advance RF Energy technology were concerned, it was incumbent on the respondent to state as much in its impugned order and give reasons for taking such a stance. In **Rama Pandey** (*supra*), the Court had briefly dealt with the difficulties of cryptic administrative orders imposing harsh punishments, by making the following observations:

"10. The impugned order dated 15th April, 2009 is cryptic and

does not deal with the contentions and the pleas raised by the petitioner. It is the case of the petitioner that repeat episodes might have been submitted because of human error or mistake. The said contention has not been specifically taken into consideration and discussed. The impugned order quoted above only records the final conclusion without any discussion or reasons and assumedly rejects the pleas of the petitioner. The respondents were entitled to reject the contentions and the pleas of the petitioner but only after recording reasons for rejecting the same. The final decision or operative portion giving the final verdict is not a substitute for reasoning. A penal order should contain reason, albeit brief reasons may suffice. To this extent, therefore, the impugned order cannot be sustained and is arbitrary and contrary to law.”

34. The impugned order fails on all of these counts. It not only miserably fails to deal with the contentions and plea raised by the petitioner, it goes on to abruptly record the final conclusion of the respondent without providing any cogent reasoning therefore, in my view, the impugned order, lacking on this count, fails to qualify as a speaking order.

35. This brings me to the final grievance of the petitioner as regards the impugned order; could the respondent, in the facts of the present case, debar the petitioner from participating in any of the tenders issued by the respondent for a period of two years w.e.f. 29.04.2021 and was this punishment proportionate to the wrongs alleged to have been committed by the petitioner. Although, learned Solicitor General urged that the impugned order was not a ‘blacklisting order’ that sought to impact the petitioner’s commercial interests with other private or public medical institutions or hospitals, the fact remains that mere difference in nomenclature does not determine the effect or purpose of the impugned order. In fact, when the State made a similar argument recently in ***Daffodills Pharmaceuticals Ltd. &Anr.***

Vs. State of U.P. & Anr. 2019 SCC Online SC 1607, the Supreme Court quickly dismissed it by holding as follows:

“14. Although, State of U.P. has argued that the impugned order requiring that no procurement ought to be made from Daffodills, is neither a blacklisting nor a debarring order, in our opinion, in fact and in reality, that order is nothing but an order or a directive, debarring and preventing the State of U.P. from local purchase of medicines from Daffodills for an indefinite duration. Unlike a “normal” blacklisting order which has a finite life span (of three or maximum five years), the indefinite directive (which appears to be co-terminus with the lifetime of the criminal case) is facially far more disproportionate than a blacklisting order. Even as on date, it is not clear whether formal charges have been framed against the accused i.e. Surender Chaudhary.”
(emphasis supplied)

36. The impugned order was passed in order to declare that the respondent was not interested in doing any further business with the petitioner for a period of two years. A quick glance at the bottom of the impugned order also shows that a copy thereof had been distributed to the Chiefs of various centres within the respondent Hospital such as the CN Centre; Dr. RPC; JPNATC; CDER; NDDTC; Dr. BRA IRCH; NCI, Jhajjar and CRHP, Ballabgarh, as also the Senior Stores Officer/Stores Officer/Assistant Stores Officer of all Centres/Hospitals of the respondent. That being said, the respondent Hospital is an institute of national importance, operating in 22 cities spread across the entire country and its decision to desist from doing business with the petitioner is likely to cause the petitioner enormous financial losses. At the same time, the respondent, being a Government hospital, is an instrumentality of the State under Article 12 of the Constitution

of India and, keeping in view the settled legal position set out by the Supreme Court in *Kulja Industries limited Vs. Chief Gen. Manager* (2014) 14 SCC 731, any decision made by the respondent in furtherance of its freedom to contract or not to contract with a private entity is subject to judicial review by a writ Court. Therefore, even if the relationship between the parties had been crystallised in the form of a contract, the decision of the respondent, a government hospital, to blacklist the petitioner for alleged violations of the contract ought to withstand the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality.

37. Now, insofar as the established position of law in respect of blacklisting is concerned, mere breach of a contract is not sufficient to merit an order of blacklisting. A Coordinate Bench of this Court had eloquently explained this legal position in the following extracts of its decision in *Coastal Marine Construction and Engineering Limited Vs. Indian Oil Corporation Ltd.* 2019 SCC Online Del 6542:

“35. 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: (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”.”

36. The Supreme Court in *Gorkha Security Services v. Government (NCT of Delhi)*: 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.”

37. 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.

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41. 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, the mere pendency of legal proceedings cannot be a 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.”

42. 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.”
(emphasis supplied)

38. Essentially, what makes a decision to blacklist serious are the consequences that are borne from it, for the person in respect of whom it is

passed. Not only does such a blacklisting order significantly dent the reputation and goodwill that the company enjoys in the market and may have spent years cultivating, it also deprives them from a level playing field in respect of future business opportunities. As was aptly put by the Supreme Court in *Erusian Equipment & Chemicals Ltd. Vs. State of W.B. (1975) 1 SCC 70*, blacklisting is an 'instrument of coercion' which has the effect of creating a disability. Usually, when participating in a tender, the bidder is required to furnish a statement undertaking that it has not been blacklisted by any institution so far and, if that is not the case, provide information of such blacklisting. This serves as a record of the bidder's previous experience which gives the purchaser a fair picture of the bidder and the conduct expected from it. Therefore, while the debarment itself may not be permanent and may only remain effective for a limited, pre-determined period, its negative effect continues to plague the business of the debarred entity for a long period of time. As a result, it is viewed as a punishment so grave, that it must follow in the wake of an action that is equally grave.

39. This begs the question, does non-disclosure of the contract with the NCI warrant debarment of the petitioner from all hospitals and centres of the respondent for a period of two years, as directed under the impugned order? In the light of the discussion thus far, it is clear that while the conduct of the petitioner was to some extent marred with omissions and may not have been completely fair, the same was not in clear violation of the contract between the parties, seeing that there were no contractual provisions addressing the peculiar circumstances that arose in this case, nor can the petitioner's omissions be characterized as being grave enough to have caused serious harm or financial losses to the respondent.

40. On the other hand, the petitioner has already suffered enormous

financial losses as a result of having its tender with the respondent scrapped, which has only mushroomed in the aftermath of the impugned order. It needs to be noted that solely on the ground of the existence of the impugned debarment order, the petitioner's bid submitted on 29.07.2021 was quickly declared non-responsive by Sawai Man Singh Hospital, Jaipur on 30.07.2021, in respect of the tender bearing NIB No. 1350 dated 28.04.2021. The petitioner has also placed on record a letter dated 29.07.2021 received from King George's Medical University, Lucknow where the petitioner has participated in a tender as well, requesting for more details of the impugned order. Keeping in view that blacklisting orders involve consequences for the contractor leading to its civil death, the impugned order appears to be operating the same way for the petitioner and is exhibiting a domino effect, inasmuch as other government medical institutions/hospitals are now relying on the impugned blacklisting decision to bar the petitioner from participating in their tenders. In this manner, there is an imminent and grave threat to the remaining 67 tenders that the petitioner is presently engaged under, with other medical institutions, and, as per its own calculation, the petitioner apprehends a further potential loss of business of INR 200 crore on account of the impugned order.

41. Now, the respondent is right to contend that the equipment was not routine, but was a specialized item that required high quality manufacturing and maintenance services. In goods of such nature which are used by medical professionals in the course of treatment and have a real time impact on the lives of persons, the petitioner was required to consistently maintain a high ethical standard and, to that end, had the solemn responsibility to ensure absolute transparency in respect of the equipment and to disclose all relevant information relating to it. Be that as it may, the respondent was free to

proceed under the contract and institute appropriate proceedings against the petitioner for breach thereof, instead of travelling beyond the contours thereof to fasten it with the rather harsh punishment of being blacklisted. The petitioner has already suffered the blacklisting and has had its bids rejected on that count, for about four months at this point.

42. An equally important factor to be considered at this point is that when it comes to sophisticated, specialized equipment to be used by medical professionals, such as the one sought by the respondent in the tender in question, the number of manufacturers in the country are quite limited. It is also an admitted fact that amidst such limited competition, the petitioner happens to be a notable and well-regarded player in this business, and has executed numerous supply contracts for such medical equipment in the past, without any complaint. In fact, the petitioner has been engaged by the respondent many times, with no allegations of fraudulent conduct, and has successfully rendered its services under all such contracts to the full satisfaction of the respondent. I cannot also lose sight of the fact that the impugned order is likely to adversely impact public healthcare facilities as well, considering that there are over 600 units of GENII/Harmonic, supplied by the petitioner, that are presently installed in several government institutions in the country and are being used to carry out approximately 1,10,000 procedures annually. The impugned order blacklisting the petitioner is likely to have a negative effect on the fresh orders for consumables being placed with the petitioner, by its existing customers against these earlier orders. This, in the long run, may compromise the integrity of medical procedures conducted with the equipment supplied by the petitioner. Above all, if the debarment order were allowed to operate, it would be an albatross around the petitioner's neck, singling it out and prejudicing its business from

crossing the minimum threshold in all tender processes of having an unblemished past experience of providing the services in question. I, thus, have no hesitation in holding that the decision to blacklist the petitioner is entirely unwarranted in the facts of the present case.

43. For the aforesaid reasons, the writ petition is partly allowed by setting aside the impugned order dated 29.04.2021, insofar as it debars the petitioner from participating in any tenders issued by AIIMS for a period of two years. However, in view of my findings hereinabove, I see no reason to interfere with the cancellation of the supply order under the impugned order.

(REKHA PALLI)
JUDGE

AUGUST 25, 2021
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