

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 11524 OF 2022

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

M/s Lallooji & Sons Petitioners
and another

-Versus-

State of Odisha and Others Opp. Parties

For Petitioners : Mr. Pinaki Mishra, Sr. Advocate
along with M/s Ashok Panigrahi,
S.A. Pattnaik, G. Das Krishnan
and P. Dash, Advocates.

For Opp. Parties : Mr. T. Pattnaik,
Addl. Standing Counsel

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
HONOURABLE MR. JUSTICE S.K. MISHRA**

Date of hearing and judgment: 13.07.2022

DR. B.R. SARANGI, J. By means of this Writ Petition, the
Notice to Show Cause dated 05.01.2022 under

Annexure-14 for blacklisting/declaring the Petitioner Firm as ineligible from participating in procurement process by Department of Tourism, Government of Odisha, and consequential Order dated 28.04.2022 under Annexure-23 blacklisting the Petitioner Firm for a period of two years, are sought to be quashed as the same are violative of terms of Requests for Proposal (RFP) dated 31.03.2021 and 21.09.2021.

2. The factual matrix of the case, in brief, is that Petitioner No.1 is a Partnership Firm registered under the Partnership Act, 1932 consisting of ten (10) Partners, and having its Branch Office, At-A-2, Shivalik Business Centre, Off. S.G. Highway, B/h, Rajpath Club, Ahmedabad-380054, Gujarat, India. Petitioner No.2 is the Managing Partner of the Petitioner No.1 Firm and is authorized to file this Writ Petition.

2.1 Petitioner No.1, being a Partnership Firm, is engaged in the business of providing Temporary Event Infrastructure, Decorative Items and General Supply of

various kinds of articles and items, such as, Tents of various descriptions, Pandals and other Structures, Barricades and Furniture for temporary use on various occasions like fairs, exhibitions and other congregations etc. for Government Departments, Public and Private Organizations.

2.2 Opposite Party No.1 invited a Request for Proposal (RFP), vide Tender Call Notice No.3929/TSM dated 31.03.2021, for Leasing-cum-Development Upgradation, Operation and Management of tourism properties of Department of Tourism, Odisha, for seven different properties for a period of 30 years. In response to the same, the Petitioner-Firm submitted its bid in July, 2021. The very same Opposite Party No.1, further invited a RFP, vide Tender Call Notice No.7703/TSM dated 21.09.2021, for selection of Agencies for Set-up, Operation and Management of Eco Retreats at multiple locations in Odisha for a period of 5 years from 2021 to 2026. The due date of submission of the said bid was

21.10.2021 upto 5.00 P.M. and the Petitioner-Firm submitted its bid in October, 2021.

2.3 The Petitioner-Firm participated in both the RFPs. However, after opening of the Financial Bid in respect of the RFP dated 31.03.2021, no communication was received by the Petitioner-Firm with regard to the same till issuance of the Show Cause Notice dated 05.01.2022. So far the bid submitted with regard to RFP dated 21.09.2021, the same was declared as non-responsive and ineligible for further stages of the RFP, vide letter dated 29.10.2021, by Opposite Party No.1. The Petitioner-Firm filed representation against the letter dated 29.10.2021, declaring its bid to be non-responsive and ineligible, stating that it was not blacklisted by any State or Central Government Department or any Agency. The Petitioner-Firm had also referred to Rule 151 of the General Financial Rules, 2017, by which the debarment of Firm would entail that the name of the Firm be displayed on the website of the

Department/Authority blacklisting the Firm and that the said debarment would be prospective from the date of listing on the Central Public Procurement Portal of Government of India and such list of Firms will be maintained by the Department of Commerce. Since no such action was taken in case of the Petitioner-Firm, it is proved that Petitioner-Firm was never blacklisted/debarred by any Authority. The representation filed by the Petitioner was rejected by the Authority, vide letter dated 05.11.2021, confirming the decision dated 29.10.2021. Aggrieved by such decision of Opposite Party No.1 dated 29.10.2021, which was communicated vide letter dated 05.11.2021, the Petitioner-Firm approached this Court by filing W.P.(C) No. 35042 of 2021, in which the following order was passed on 17.11.2021:

“1.This matter is taken up through hybrid mode.

2. The Petitioner aggrieved of the order dated 29th October 2021(Annexure-4 at page 153), whereby their bid for RFP No.7703 for selection of agency for setting up, operation and management of eco retreats at multiple

locations in Odisha for a period of five years (201-2026) has been found to be an non-responsive and further considered ineligible on account of falsification by declaration and suppression of material facts; further challenge is to the Memo dated 5th November, 2021 (Annexure-10) whereby the representation against Annexure-4 has been rejected as also the allegations made qua ineligibility of the other bidder/O.P.2-Deepanshu Agarwal have been rejected.

3. Heard learned counsel for the Petitioner and the learned Advocate General at some length, and with their able assistance perused the documents on record.

4. Prima facie we find that in the light of the order dated 3rd December, 2020 (Annexure-5) passed by the previous employer of a contract executed by the Petitioners contains sufficient material for treating the Petitioners as ineligible for the present contract as also for the withholding material facts. However, in the light of the Memo dated 19 August, 2021 (Annexure-8) pertaining to forfeiture of performance guarantee of successful bidder-O.P.2 and thereby affecting his eligibility, a response would be necessary.

5. Issue notice. Mr. T. Pattnaik appears and waives of notice on behalf of O.P.1. Mr. R. K. Rout appears and waives of notice on behalf of O.P.2. Let requisite number of copies of the paper book be furnished to the counsel for the parties during course of day.

6. List on 28.01.2022.”

2.4 When the aforesaid Writ Petition is *subjudice* before this Court, another Firm, namely, E-Factor Entertainment (P) Ltd. was selected for awarding of the

contract, despite the fact that it was in the knowledge of the Opposite Parties that E-Factor Entertainment (P) Ltd. was made to forfeit its Performance Guarantee by the Government of Rajasthan in another tender for failure to perform the contract, thereby, affecting its eligibility to perform the contract awarded by the Opposite Parties under the RFP dated 21.09.2021.

2.5 On 18.12.2021, the Petitioner-Firm entered into a compromise agreement with Prayagraj Mela Pradhikaran (PMP) before the Arbitral Tribunal, Allahabad, and amicably settled its dispute. It was also within the knowledge of the Opposite Parties that PMP had duly withdrawn its order dated 03.12.2020 and had declared the Petitioner-Firm as eligible for further contracts with PMP, vide order dated 21.12.2021. Therefore, the grounds for which the Petitioner-Firm was declared ineligible in respect of both the RFPs do not subsist, in view of the order dated 21.12.2021. Despite such fact was in the knowledge of the

Authorities, Opposite Party No.3 issued a Show Cause Notice against the Petitioner-Firm on 05.01.2022 for determining as to why the Petitioner-Firm should be blacklisted/declared ineligible from participating in procurement process by the Department of Tourism, Government of Odisha for a period of next five years. By the time the Notice of Show Cause was issued, the matter was *subjudice* before this Court in W.P.(C) No. 35042 of 2021. The Petitioner sought for extension of time to file reply to the Notice of Show Cause, which was granted till 03.03.2022, vide letter dated 18.02.2022. But thereafter, Opposite Party No.3 issued another Notice of Show Cause on 18.02.2022 for forfeiture of Earnest Money Deposit, when the matter was *subjudice* before this Court. Finding no other way out, Petitioner-Firm submitted its reply to the Notice of Show Cause on 18.02.2022, regarding forfeiture of EMDs, stating that as per Clause-14 of the RFP, the Petitioner was not covered by any of the circumstances

enumerated by virtue of which its EMD could be forfeited. The Petitioner-Firm also filed detailed reply to the Notice of Show Cause for blacklisting on 03.03.2022 stating that the Petitioner- Firm had been conducting 'Kumbh Mela' for many years and has also participated in successfully conducting the Eco-Retreat Glamping in Odisha for its first two editions. It was also brought on record that in view of the order dated 21.12.2021 passed by the PMP, there is no Order of ineligibility against the Petitioner-Firm and, therefore, the Notice of Show Cause itself was not warranted. Even otherwise, it was elucidated that the Petitioner-Firm was never blacklisted by the Authority or any State or Central Government Department for that matter. Thereby, the Petitioner-Firm prayed for recalling of the Notice of Show Cause dated 05.01.2022. But no action has been taken thereof and subsequently Opposite Party No.3, vide letter dated 05.04.2022, called upon the Petitioner-Firm to appear on 12.04.2022, at 4 P.M., for personal

hearing with regard to Notices of Show Cause dated 05.01.2022 and 18.02.2022. In response to the same, the Petitioner- Firm appeared before the Authority for personal hearing on 12.04.2022 and placed its contentions before the Opposite Parties. But the Opposite Parties, without taking into consideration the contentions raised by the Petitioner-Firm in proper perspective, passed the order impugned dated 28.04.2022 blacklisting the Petitioner-Firm for a period of two years. Hence, this Writ Petition.

3. Mr. Pinaki Mishra, learned Senior Counsel appearing along with Mr. Ashok Panigrahi, learned Counsel for the Petitioner-Firm, contended that the blacklisting order dated 28.04.2022 passed by Opposite Party No.1 vide Annexure-23, is violative of the terms of the RFPs dated 31.03.2021 and 21.09.2021, as well as Articles 14 and 19 (1) (g) of the Constitution of India. It is further contended that the Petitioner-Firm was never blacklisted by any Central Government or State

Government or any Private Agency and, as such, there was no complaint against the Petitioner-Firm with regard to its work. It is further contended that the reliance placed on the order dated 03.12.2020 of the PMP has been duly withdrawn by the PMP, vide order dated 21.12.2021, and, as such, PMP has further declared the Petitioner-Firm to be eligible for future contracts with PMP. It is contended that the Order impugned has been passed after PMP executed a compromise agreement with the Petitioner-Firm and it stood recorded before the Arbitral Tribunal, Allahabd. But the same was not considered by the Authority and without any application of mind, the Authority mechanically passed the Order impugned, which cannot be sustained in the eye of law. It is contended that relying upon the order dated 03.12.2020, Notice of Show Cause was issued on 05.01.2022 and consequentially the Order of blacklisting dated 28.04.2022 was passed, which cannot be sustained in

the eye of law and the same is liable to be quashed. It is further contended that by passing the blacklisting Order, effectively the lis, which was pending before this Court in W.P.(C) No. 35042 of 2021, has become infructuous for all purpose.

3.1 It is further contended that Opposite Party No.1 has clearly misinterpreted Clause-7.1.2 read with Clauses-6.1 and 6.2 of the RFP, relating to termination of contract due to failure to perform the contract, inviting a penalty on the Bidder, who has been awarded such contract, to be applicable to the Petitioner-Firm. It is further contended that the Petitioner-Firm has not even fully participated in the tender process, but let alone being awarded the contract. Thereby, the entire action of blacklisting the Petitioner-Firm, vide Order impugned dated 28.04.2022, cannot be sustained and the same is liable to be quashed. As such, Opposite Party No.1 has entirely failed to distinguish the scope

and effect of an order of ineligibility and that of blacklisting.

To substantiate his contention, learned Senior Counsel appearing for the Petitioner-Firm has relied upon the judgments of the apex Court in the case of **Gorkha Security Services v. Government (NCT of Delhi) and others**, (2014) 9 SCC 105 and **Erusian Equipments and Chemicals Ltd. v. State of West Bengal**, (1975) 1 SCC 70.

4. Per contra, Mr. T. Pattnaik, learned Addl. Standing Counsel appearing for the State-Opposite Parties, vehemently contended that as per the terms and conditions of the RFPs, where any information provided by a Bidder is found to be patently false or amounting to a material misrepresentation, Department of Tourism reserves the right to reject the proposal. As such, the Petitioner-Firm had not furnished the information, as required under Sub-Clause-(f) Part-A (Technical Proposal) of Clause-22 of the RFPs, which

prescribes that the Bidder should not be blacklisted by any Government Institution/Private Agency. A self-declaration of non-blacklisting on the Letter Head of Bidder shall be submitted. Subsequently, when Opposite Party No.1 came to know that the Petitioner-Firm was subjected to a proceeding by PMP, it incurred disqualification and as a consequence thereof, Notice of Show Cause was issued for blacklisting. In response to the same, the Petitioner-Firm gave reply, which was also taken into consideration. Consequent thereof, the Order impugned was passed. Thereby, no illegality or irregularity has been committed by the Authority in passing the Order impugned, which does not warrant interference of this Court at this stage.

To substantiate his contention, learned Additional Standing Counsel appearing for the State-Opposite Parties has relied upon the judgments of the apex Court in the cases of M/s **Kulja Industries Limited v. Chief General Manager W.T. Project,**

BSNL, (2014) 14 SCC 731 and **M/s Patel Engineering Limited v. Union of India**, (2012) 11 SCC 257.

5. This Court heard Mr. Pinaki Mishra, learned Senior Counsel appearing along with Mr. Ashok Panigrahi, learned Counsel for the Petitioner and Mr. T. Pattnaik, learned Addl. Standing Counsel appearing for the State-Opposite Parties by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned Counsel for the parties this Writ Petition is being disposed of finally at the stage of admission.

6. On the basis of undisputed facts, as delineated above, the sole question to be decided by this Court is as to whether the Order dated 28.04.2022 passed by Opposite Party No.1 blacklisting the Petitioner-Firm under Annexure-23, is legally tenable?

7. Before delving into the issue involved in this case, relevant provisions of the RFPs are to be gone

into. Clause-5 of the Bid Document deals with Bid Evaluation Criteria. Clause-5.3 deals with Other Terms. Clause-5.3.2 deals with Bid Evaluation Criteria, which reads as under:-

“5.3.2 In order to determine whether the Bidder satisfies the eligibility criteria. DoT will examine the documentary evidence of the Bidder’s eligibility and qualification submitted by the Bidder and any additional information which DoT receives from the Bidder Upon request by DoT. Where any information provided by a Bidder is found to be patently false or amounting to a material misrepresentation, DoT reserves the right to reject the Proposal.”

Clauses-6 and 7 of RFP for Selection of Agency (s) for Set-up, Operation and Management of Eco Retreats at multiple locations in Odisha for a period of 5 years (2021-2026), read as under:-

“6. Termination of the Contract:

6.1 In case of deficiency or non-fulfillment of obligation as per the scope of work, DoT shall serve a notice to the concerned operator to rectify/fulfill the obligations within a period 3 days to cure the defect, failing which DoT shall be at the liberty to execute the work through any other agency at the cost of the operator, in addition to the right of DoT to cancel the contract.

6.2 DoT reserves the right to terminate the agreement in case of deficiency in services or poor performance of the operator for any subsequent years. For this, DoT shall intimate the operator by June of corresponding year. In this respect, the view of DoT about the performance is final and binding.

6.3. DoT reserves the right to drop any location during the contract period at no cost to DoT, with prior intimation to the Operator, by June of every year, which may necessitate termination.

7. PENALTY-

7.1-Failure in fulfillment of performance as indicate in Clause 6.1 and 6.2 shall warrant the following:

7.1.1 Forfeiture of Performance Bank Guarantee in case of failure to successfully perform/complete the deliverables as per the MDO and /or in case of any midway unilateral withdrawal from the contract.

7.1.2 Bidder shall be blacklisted from bidding for any Contract/tender/EoI/RFP with Department of tourism, Government of Odisha for a period of 3 years.”

Clause-20 of the RFP, which deals with right to reject any or all proposals, reads as under:

“Notwithstanding anything contained in this invitation document, DoT reserves the right to accept or reject any Proposal and to annul this selection Process and reject all proposals, at any time during the bidding process without any liability or any obligation for such acceptance rejection or

annulment, and without assigning any reasons thereof.

DOT, also, reserves the right to reject any proposal if:

a) At any time, a material misrepresentation is made or uncovered, or

b) The Bidder does not submit sufficient information as being asked for.”

Under Clause-22 of the RFP, Part-A (Technical Proposal) deals with Documents to Accompany the Proposal, which reads as under:

“PART-A(Technical Proposal)

The bidder must submit the following particulars/document along with the Technical proposal failing which the proposal may be treated as non-responsive:

- a) Covering Letter and Details of Bidder as per Annexure I and Irrespectively*
- b) Bid Processing Fee for each site applied for*
- c) Earnest Money Deposit*
- d) The bidder shall submit their Company Registration Certificate, Photocopy of PAN Card, GST Registration.*
- e) Balance Sheets and Income Statements for the last three Financial year duly certified by Chartered Accountant indicating the Annual Turnover for the mentioned years.*
- f) The Bidder should not be blacklisted by any Government Institution /Private Agency. A self-declaration of non-blacklisting on the letterhead of bidder shall be submitted.*
- g) Proof of work experience of similar nature in the form of Work-Orders and Client Certificates issued from the organizations in*

each such case has to be submitted in the format mentioned in Annexure III.

- h) Checklist of documents with indexing submitted duly signed and sealed on the letterhead of the bidder.*
- i) Bidder failing to submit all the specified documents shall be summarily rejected .Any other documents as mentioned in the RFP including Annexure IV,V,VIII,IX as required in this RFP*
- j) All pages of the tender document shall be initialed and sealed by the Bidder at the lower left-hand corner.*

PART-B (Financial Proposal)

The bidder must submit the Financial Proposal as per format provided in Annexure VI. The financial proposal shall also include Annexure VII (bill of Quantity/ Minimum Development Obligation).

In case a bidder is submitting bids for more than one site, only one technical proposal (with names of sites clearly highlighted on the envelope and cover letter) may be submitted. However, financial proposal for each site shall be submitted separately, in separate sealed envelopes.”

Rule-151 of the General Financial Rules, 2017 are quoted below:-

“Rule 151 Debarment from bidding.

- (i) A bidder shall be debarred if he has been convicted of an offence-(a) under the Prevention of Corruption Act,1988;or (b)the Indian Penal Code or any other law for the time being in force, for causing any loss of life or property or causing a threat to public*

health as part of execution of a public procurement contract.

- (ii) A bidder debarred under sub-section (i) or any successor of the bidder shall not be eligible to participate in a procurement process of any procuring entity for a period not exceeding three years commencing from the date of debarment. Department of Commerce (DGS&D) will maintain such list which will also be displayed on the website of DGS&D as well a central Public Procurement Portal.*
- (iii) A procuring entity may debar a bidder or any of its successors, from participating in any procurement process undertaken by it, for a period not exceeding two years, if it determines that the bidder has breached the code of integrity. The Ministry/Department will maintain such list which also be displayed on their website.*
- (iv) The bidder shall not be debarred unless such bidder has been given a reasonable opportunity to represent against such debarment."*

8. On careful reading of the aforementioned provisions, it would be evident that under Clause-5.3.2 of the RFP dated 31.03.2021 at Annexure-2 it has been clearly provided that where any information provided by a Bidder is found to be patently false or amounting to a material misrepresentation, the Department of Tourism

reserves the right to reject the proposal. Therefore, if according to the Opposite Parties, the Petitioner-Firm had not furnished the information with regard to the pending litigation with PMP, that itself cannot entail blacklisting of the Petitioner-Firm debarring it from participating in the bid. But fact remains, the Petitioner-Firm had entered into a compromise agreement with PMP before the Arbitral Tribunal, Allahabad, and had amicably settled the dispute and, as such, PMP had duly withdrawn its order dated 03.12.2020, declaring that the Petitioner- Firm is eligible to work with PMP, vide order dated 21.12.2021. Therefore, whatever allegation was under consideration, that itself had culminated to finality because of the Order dated 21.12.2021 passed by the PMP withdrawing the Order dated 03.12.2020 and declaring the Petitioner-Firm as eligible for future contract. Therefore, it cannot stand on the way of the Petitioner-Firm to participate in the bid and it cannot be

construed that the Petitioner-Firm had ever misrepresented Opposite Party No.1. Even if according to the Opposite Parties, the Petitioner-Firm misrepresented, in that case also they have a right to reject its proposal, instead of blacklisting it for a period of two years, vide order impugned dated 28.04.2022.

8.1 As per Clause-7.1 of the RFP dated 21.09.2021, failure in fulfillment of performance, as indicated in Clause-6.1 and 6.2, shall warrant forfeiture of Performance Bank Guarantee in case of failure to successfully perform/complete the deliverables as per the MDO and/or in case of any midway unilateral withdrawal from the contract. But under Clause-7.1.2 of the said RFP, it has been specifically provided that Bidder shall be blacklisted from bidding for any contract/tender/EoI/RFP with Department of Tourism, Government of Odisha, for a period of three years. But such penalty under Clause-7.1.2 of the RFP can only be imposed on failure in fulfillment of performance, as

indicated in Clause-6.1 and 6.2. Clause-6 of the RFP dated 21.09.2021 deals with termination of contract. Clause-6.1 provides that in case of deficiency or non-fulfillment of obligations, as per the scope of work, DoT shall serve a notice to the concerned Operator to rectify/fulfill the obligations within a period of 3 days to cure the defect, failing which DoT shall be at the liberty to execute the work through any other Agency at the cost of the Operator, in addition to the right of DoT to cancel the contract

9. Mr. ★ T. Pattnaik, learned Addl. Standing Counsel appearing for the State-Opposite Parties, fairly admitted that there was no execution of the contract between the Petitioner-Firm and the Opposite Parties. It is contended that no such notice had ever been served on the Petitioner-Firm indicating the deficiency or non-fulfillment of obligation, as per the scope of the work calling upon it to reply within three days. Needless to say, against non-selection and rejection of

representation, W.P.(C) No.35042 of 2021 is pending adjudication. Admittedly, the work has not been awarded in favour of the Petitioner-Firm. Therefore, question of any deficiency or non-fulfillment of obligation, as per the scope of the work, does not arise. Even if the same is accepted, the obligation goes on the Opposite Parties to serve notice on the Petitioner-Firm to rectify its obligations within three days to cure the defect. But no such notice was served on the Petitioner-Firm, as no work was awarded in favour of the Petitioner-Firm and the matter is *subjudice* before this Court. Assuming that the work was awarded in favour of the Petitioner-Firm, for any deficiency or non-fulfillment, power is vested with DoT to cancel the contract, as per Clause-6.1 of RFP dated 21.09.2021 at Annexure-3. Under Clause-6.2 even DoT reserves the right to terminate the Agreement in case of deficiency in service or poor performance of the Operator. Therefore, failure in fulfillment of performance, as indicated under

Clauses-6.1 and 6.2 of the RFP dated 21.09.2021 at Annexure-3, penalty can be imposed, as per clause-7.1.2, for blacklisting the Firm from participating in any contract/tender/EoI/RFP with the Department of Tourism, Government of Odisha for a period of 3 years. Thereby, the punitive action with regard to blacklisting the bidder can only be made under Clause-7.1.2 of the RFP dated 21.09.2021 in the event of failure of performance as per Clauses-6.1 and 6.2. But fact remains, since no work was awarded in favour of the Petitioner-Firm, question of invoking Clause-7.1.2 of the RFP dated 21.09.2021 does not arise. As such, the matter is *sub-judice* before this Court in earlier Writ Petition bearing W.P.(C) No. 35042 of 2021.

10. It is to be noted here that Clause-20 of the RFP dated 21.09.2021 provides a right to reject any or all proposals, which only arise, (a) at any time, a material misrepresentation is made or uncovered, or (b) the Bidder does not submit sufficient information as

being asked for. Clause-22 of the RFP dated 21.09.2021 provides documents to accompany the proposal. Sub-Clause-(f) of Clause-22 provides that the bidder should not be blacklisted by any Government Institution/Private Agency. A self-declaration of non-blacklisting on the Letter Head of Bidder shall be submitted. As it appears, invoking this Clause, referring to a proceeding pending between the Petitioner and PMP, Opposite Party No.1 has come to a conclusion that there is misrepresentation of fact. But the same is absolutely misconceived one, in view of the correspondences made pursuant to compromise arrived at between the parties and the order dated 03.12.2020 having been withdrawn and declaration having been made that the Petitioner- Firm is eligible for future contract with PMP, vide order dated 21.12.2021, as the basic ground for holding that the Petitioner-Firm is ineligible for the present RFP, does not subsist. This fact has not been taken into consideration by Opposite

Party No.1 in proper perspective. As a consequence thereof, the Order impugned blacklisting the Petitioner-Firm, vide Order dated 28.04.2022, cannot be sustained in the eye of law.

11. Considering the matter from other angle, Rule-151 of the General Financial Rules, 2017, which deals with debarment from bidding, has given elaborate procedure and, as such, it provides that Bidder shall not be debarred unless such Bidder has been given a reasonable opportunity to represent against such debarment. Blacklisting the Petitioner-Firm amounts to debarment and that could not have been made without giving reasonable opportunity to represent against such debarment. Even though a Show Cause Reply was sought for vide Annexure-14, pursuant to which the Petitioner submitted its reply and to that personal hearing was given and consequentially the Order impugned has been passed, but Rule-151 provides that debarment of Firm would entail that the name of the

Firm be displayed on the website of the Department/Authority blacklisting the Firm, and that the said debarment would be prospective from the date of listing on the Central Public Procurement Portal of Government of India and such list of Firms will be maintained by the Department of Commerce. In view of such provision, no action has been taken in the case of the Petitioner-Firm, which clearly proves that Petitioner-Firm was never blacklisted/debarred.

12. On perusal of the Order impugned dated 28.04.2022, it appears that Opposite Parties have relied upon mostly the meaning of ineligible and blacklisting in Paragraphs-15 and 16 thereof. If the same is adhered to, neither the Petitioner-Firm is ineligible nor is it required to be blacklisted within the meaning prescribed therein. Admittedly, due to non-consideration of the case of the Petitioner-Firm, the matter is *sub-judice* before this Court in W.P.(C) No. 35042 of 2021.

13. Mr. T. Pattnaik, learned Addl. Standing Counsel appearing for the State-Opposite Parties relied upon the judgment of the apex Court in the case of **Kulja Industries Limited** (supra), wherein the apex Court held as under:-

“20 The legal position governing blacklisting in USA and UK was also considered and it was noticed the USA the term ‘debarring’ is used by the statutes and the courts and comprehensive guidelines have been issued in this regard. The observations made in the judgment in this respect are as follows:-

“21. The legal position governing blacklisting of suppliers in USA and UK is no different. In USA instead of using the expression “blacklisting” the term “debarring” is used by the statutes and the courts. The Federal Government considers “suspension and debarment” as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions.

23. Similarly in England, Wales and Northern Ireland, there are statutory provisions that make operators ineligible on several grounds including fraud, fraudulent trading or conspiracy to defraud, bribery etc. (Emphasis supplied)

24. Suffice it to say that ‘debarment’ is recognized and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations,

falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the 'debarment' is never permanent and the period.

Comprehensive guidelines are, therefore, issued by the government for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise unable to perform satisfactory. These guidelines prescribe the following among other grounds for debarment:

(a) Conviction of or civil judgment for:-

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain , or performing a public or private agreement or transaction;

(2) Violation of Federal or state antitrust statutes, including those proscribing price fixing between competitors, allocation of customer between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as.—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transaction; (3) *A willful violation of a statutory or regularly provision or requirement applicable to public agreement or transaction ;*

(c) xxxxxxxxxxxxxxx

(d) Any other cause of so serious or compelling a nature that it affects is your present responsibility.

22. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

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

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

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

(d) Whether contractor has been excluded or disqualified by an agency of the Federal Government or have been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the cause for debarment specified in this part.

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

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

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

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

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

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

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

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

From the above, it is made clear that the term 'ineligible' amounts to debarment or blacklisting and it is a disability imposed on the person who is declared ineligible.

14. In **Patel Engineering** (supra), on which reliance was also placed by learned Addl. Standing

Counsel appearing for the State-Opposite Parties, the apex Court in Paragraph-17 of the said judgment held as under:-

“17 The authority of the 2nd respondent to enter into contracts, consequently, the concomitant power not to enter into a contract with a particular person, does not flow from Article 298, as Article 298 deals with only the authority of the Union of India and the States. The authorities of the 2nd respondent to enter into a contract with all the incidental and concomitant powers flow from Section 3(1) and (2)[4] of the National Highways Authority Act. The nature of the said power is similar to the nature of the power flowing from Article 298 of the Constitution though it is not identical. The 2nd respondent, being a statutory Corporation, is equally subject to all constitutional limitations. Which bind the State in its dealings with the subjects. At the same time, the very authority to enter into contracts conferred under Section 3 of the NHA Act, by necessary implication, confers the authority not to enter into a contract in appropriate cases(blacklist). The bid document’ can neither confer powers which are not conferred by law on the 2nd respondents, nor can it subtract the powers, which are conferred by law either by express provision or by necessary implication. The bid document is not a statutory instrument . Therefore, the rules of interpretation, which are applicable to the interpretation of statues and statutory instruments , are not applicable to the bid document. Therefore, in our opinion, the failure to mention blacklisting to be one of the probable actions that could be taken

against the delinquent bidder does not, by itself, disable the 2nd respondent from blacklisting a delinquent bidder, if it is otherwise justified. Such power is inherent in every person legally capable of entering into contracts.”

15. It is of relevance to note that both the judgments, i.e, **Kulja Industries Limited** and **Patel Engineering** (supra) were delivered on their own facts and circumstances and, as such, the same will have little assistance to the Opposite Parties, in view of the settled principles laid down by the apex Court in the case of **State of Orissa v. Sudhansu Sekhar Mishra**, AIR 1968 SC 647 that each case would be decided on the basis of its own facts and circumstances. Therefore, the judgments relied upon by learned Addl. Standing Counsel, having been decided basing on the facts and circumstances of those cases, have no application to the present case, in view of the fact that the Petitioner-Firm was neither selected nor awarded with the work. Therefore, the question of ‘eligibility’ and ‘ineligibility’ or ‘debarment’ or ‘blacklisting’ is far from consideration,

particularly when the matter with regard to the same is *sub-judice* before this Court and, as such, by virtue of the Order impugned, in fact the pending Wit Petition has become infructuous. Therefore, the Petitioner-Firm has been doubly jeopardized, which is violative of Article 20 of the Constitution of India. Reason being, on the one hand, the Petitioner-Firm was found ineligible for which it approached this Court, and when litigation is pending, on the other hand, the order of blacklisting was passed. Thereby, the Order impugned so passed for blacklisting the Petitioner-Firm cannot be sustained in the eye of law, because the Petitioner-Firm cannot be penalized twice for the selfsame cause of action. More so, the so called 'ineligibility', which was attributed because of the dispute pending before the Arbitral Tribunal in respect of PMP, having been withdrawn and the Petitioner-Firm having been declared as eligible to participate in future contract, the ground of blacklisting does not survive.

16. In **Erusian Equipments and Chemicals Ltd.,** (supra), the apex Court held 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.’”

17. In **Gorkha Security Service** (supra), the apex Court held as under :

“.....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 in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts.”

18. Relying upon the aforesaid two judgments, in **Vetindia Pharmaceuticals Limited v. State of Uttar Pradesh and another,** (2021) 1 SCC 804, the apex Court in paragraph-12 of the said judgment held as under:-

“12. In view of the aforesaid conclusion, there may have been no need to go into the question of the duration of the blacklisting, but for the arguments addressed before us. An order of blacklisting operates to the prejudice of a commercial person not only in prasenti but also puts a taint which attaches far beyond and may well spell the death knell of the organization/institution for all times to come described as a civil death.....”

In **Vetindia Pharmaceuticals Limited**

(supra), the judgment in **Kulja Industries Ltd.** (supra)

has also been referred to, wherein in Paragraph-13, it

has been observed as under:-

“28.2. Secondly, because while determining the period for which the blacklisting should be effective the Respondent Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of the offences. Violations and breaches maybe prescribed by such guidelines. While it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanor. Or violations of contractual obligations by a contractor, the respondent Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor.”

19. On careful analysis of the factual matrix and propositions of law, this Court is of the considered view that the Order of blacklisting dated 28.04.2022 under Annexure-23 is not sustainable in the eye of law and the same is liable to be quashed and is hereby quashed.

20. Resultantly, the Writ Petition is allowed. However, there shall be no order as to costs.

S.K. MISHRA, J.

I agree.

.....
DR. B.R. SARANGI,
JUDGE

.....
S.K. MISHRA,
JUDGE

Orissa High Court, Cuttack
The 13th July, 2022, Ashok/GDS