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

+ **W.P.(C) 2857/2023 and CM APPL. 11037/2023**

Reserved on: 12th July, 2023

Date of Decision: 5th September, 2023

VERT EQUIPMENT PRIVATE LIMITED & ANR. Petitioners

Through: Mr. Atul Nanda, Sr. Adv, with Ms. Rameeza Hakeem, Mr. Balaji Subramanian, Mr. Akash Kundu, Mr. Martand Singh & Ms. Vartika Aggarwal, Advs. (M: 9911169696)

versus

UNION OF INDIA

..... Respondent

Through: Mr. Ravi Prakash (CGSC) Mr. Farman Ali, Mr. Varun Aggarwal, Mr. Aman Rewaria & Ms. Astu Khandelwal, Advs.

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been done through hybrid mode.
2. The Petitioner No.1 - Vert Equipment Private Limited (formerly known as Vectra Advanced Engineering Private Limited) and Petitioner No.2 - Mr. Deepak Chopra, Plant Head, Head Administration and Factory Manager of Petitioner No.1 have filed the present petition seeking setting aside of the impugned order dated 14th August, 2020 being *MOD ID No. 31022/1/2020/D (Vig.)* and extension orders dated 3rd September, 2021 and 10th January, 2022 by which Petitioner No.1 has been suspended from business dealings by the



Respondent - Ministry of Defence, Union of India. The main impugned suspension order dated 14th August, 2020 reads as under:

“Subject: Suspension of M/s Vectra Advanced Engineering Pt Ltd (VAEPL) for a period of one year from in terms of the Guidelines of the Ministry of Defence for Penalties in business dealings with entities'-reg.

Consequent to the registration of the CBI case in FIR No. RC AC1 2012 A0004 dated 30.03.2012 (Tatra Truck Deal Case and the FIR No. RC AC1 2012 A0014 dated 19.10.2012 (Case of alleged bribery filed by Gen VK Singh, ex COAS) Hon'ble Raksha Mantri has approved suspension of business dealings with M/s VAEPL for a period of one year from the date of issue of this letter in terms of Para D2 of the Guidelines of the Ministry of Defence for Penalties in business dealings with entities issued vide MoD ID Not. 31013/1/2016-D(Vig) dated 21.11.2016

2. It is requested that strict compliance of the above decision may be ensured by all Wings in this Ministry and Services.”

Brief facts

3. Petitioners have filed the present petition seeking setting aside of the impugned orders on the ground that indefinite prolonged suspension from business dealings by the Respondent, effectively amounts to a permanent blacklisting of the Petitioner No.1. In addition, it also seeks quashing of Clause C and D of the Guidelines for Penalties in Business Dealings with Entities dated 21st November, 2016 issued by the Respondent (*hereinafter, 'MoD Guidelines'*) and Paragraph 9 of the Procedure for Penal Action under the Guidelines of the Ministry of Defence for Penalties in Business Dealings



with Entities' dated 30th November 2016, (*hereinafter* 'Procedure for Penal Action').

4. Petitioner No.1 has been in the business of providing engineering equipment to the Government of India and the Indian Army since 2007.

5. The impugned suspension order records that it is based on two FIRs being RC AC1 2012 A0004 (*hereinafter*, 'FIR A0004') dated 30th March, 2012 and RC AC1 2012 A0014 (*hereinafter*, 'FIR A0014') dated 19th October, 2012 registered by the CBI. It is the case of the Petitioner in respect of the first FIR, a closure report stands filed but the same has not yet been accepted by the Court. In respect of the second FIR, charge sheet has already been filed but the Petitioner or its promoters are not named in the said charge sheet.

6. The Respondent took the view that on account of the two FIRs, the Pre-contract Integrity Pact (PCIP) entered between the Respondent and Petitioner No. 1 stood violated by Petitioner No. 1.

7. The Petitioner No. 1 filed writ petitions being ***W.P. (C) 6443/2014*** titled ***M/s. Vectra Advanced Engineering Pvt. Ltd. & Anr. v. Union of India*** and ***W.P.(C) 4443/2020*** titled ***Vectra Advanced Engineering Private Limited & Anr. v. Union of India & Anr.*** in respect of two different tenders wherein the Respondent had held that the PCIP stood violated by the Petitioner No.1. In ***W.P. (C) 6443/2014*** the Id. Division Bench dismissed the Petition vide order dated 8th March, 2018. The Id. Single Judge vide order dated 18th August, 2020 dismissed the Second Writ Petition. The Petitioner No. 1 preferred an appeal being ***LPA 252/2020*** against the said decision.

8. While proceedings in the above second writ petition were pending, the Respondent, without issuing any show cause notice or in any manner informing the Petitioner No.1 of any proceedings commenced by it, issued the



impugned suspension order dated 14th August 2020, thereby suspending business dealings with Petitioner No.1 for a period of one year, specifically and solely invoking Clause D.2 of the *MoD Guidelines*. Thereafter, the Respondent passed the impugned suspension (extension) orders dated 3rd September, 2021 and 10th January, 2022 extending the suspension by six months each. Suspension lists dated 8th December, 2022 and 9th February, 2023 were later discovered by the Petitioner No. 1 which displayed its status as suspended.

9. The case of the Petitioners is also that when the Respondent took this decision in the year 2020, it had been aware of more than six years ago, through communication dated 15th July, 2014 and 25th August, 2014 addressed to it by the CBI, that a closure report had been filed in the FIR 0004 whereas in the FIR 0014, Mr. Ravinder Rishi had not been charge-sheeted. It is further alleged that Respondent suspended the Petitioner No. 1 and further, extended the suspension against without notice or hearing.

Submissions

10. Mr. Atul Nanda, Id. Senior Counsel appearing for the Petitioner submits as under:

- (i) that the Petitioner was suspended on 14th August, 2020 and till date the Committees which are reviewing the said suspension, are continuing the suspension time and again, without any reasons.
- (ii) that since, the impugned suspension order records that the Petitioner No.1 has been suspended in terms of the Clause D.2 of the *MoD Guidelines* it is clear that the suspension has been



done in view of the communication by the CBI based on FIR 0004 and FIR 0014.

- (iii) that in the case of FIR 0004, the closure report has already been filed and the same is pending for acceptance before the Id. Trial Court. In the FIR 0014, though the trial is going on, the Petitioner has never been named as an accused nor has been charge sheeted.
- (iv) that Mr. Ravinder Rishi, who was the Promoter of Petitioner No.1 and named in both the FIRs passed away on 13th March, 2016.
- (v) that in the judgment of the Hon'ble Supreme Court in *U. Subhadramma v. State of Andhra Pradesh, Criminal Appeal No. 1596/ 2011* it was observed that to argue that a prosecution cannot be continued against a dead person and in the present case. Thus, since Mr. Rishi has passed away, the criminal proceedings itself would abate as there would be no vicarious liability in criminal law.
- (vi) that the association with Mr. Ravi Rishi of the daughters and the wife of the promoter of the Petitioner company, does not exist anymore. Thus, the Petitioner company cannot be made to suffer. The main accused Mr. Ravinder Rishi having himself passed away, no criminal case can continue and the same would stand abated. Thus, there can no longer be any chargesheet against Mr. Ravi Rishi and hence, the justification for debarment does not exist anymore.



- (vii) that Clause F.2 of the *MoD Guidelines* makes it clear that it is only the filing of a chargesheet that would result in debarment. In the present case, the Petitioner has not been charge sheeted and thus, since the final penalty of debarment cannot be imposed, the suspension cannot be continued indefinitely against the Petitioner.
- (viii) that Clause F.3 of the *MoD Guidelines* would reveal that the period of banning would be inclusive of the period of suspension meaning thereby the suspension is an *interim* measure that is taken when banning is contemplated. In the present case, since there is no possibility of the Petitioner or anyone connected with the Petitioner, being either convicted and no chargesheet having been filed, banning cannot be imposed. Thus, the suspension cannot continue.
- (ix) that General Financial Rules, 2017 and Guidelines for Debarment of Firms from Bidding, dated 2nd November 2021 issued by the Ministry of Finance would supersede the *MoD Guidelines*.
- (x) that in so far as the orders passed in ***W.P.(C) 6443/2014*** and ***W.P.(C) 4443/2020*** are concerned, in the former, the prayer was for finalization of the tender, which was not granted by the Id. Division Bench. In the latter, the observation of the Court was that since the PCIP was not challenged in the earlier writ petition, challenge to the same was not permitted to be raised in the second writ petition. Thus, the violation of the PCIP has not been gone into by the Court, on merits.



11. On the other hand Mr. Ravi Prakash, Id. CGSC appearing for the Respondent submits as under:

- (i) that even though Mr. Ravinder Rishi has passed away, the linkages to the Petitioner company cannot be completely eliminated.
- (ii) that the closure report filed before the Trial Court, has not been accepted by the said Trial Court.
- (iii) that reliance is placed upon the **W.P.(C) 6443/2014** wherein vide judgment dated 8th March, 2018 the Id. Division Bench holds that the cloud of suspicion *qua* the Petitioner No.1 would still remain. Further reliance is also placed upon the decision of Id. Single Judge of this Court in **W.P.(C) 4443/2020** dated 18th August, 2020.
- (iv) that the guidelines of the Ministry of Defence in Clause A1 and A2, which prescribe that the highest standard of propriety ought to be maintained by defence suppliers.
- (v) that the definition of 'entity' in Clause B.2 is broad enough to cover the company itself as also the individuals, who are associated therewith. In view thereof, the investigation and the allegations against the promoter of the Petitioner No.1, who may no longer be alive, could still be made against the Petitioner No.1, inasmuch as the closure report having not been accepted, the discretion of the Court in the said matter is still wide open.
- (vi) that defence contracts cannot be treated in the same manner as other tenders and contracts are treated. The same was held in the decision of the Id. Division Bench of this Court in **Vectra**



Advanced Engineering Pvt Ltd. vs Union Of India (W.P.(C) 6443/2014).

- (vii) that there was no factual foundation raised to the submission that Mr. Ravi Rishi's entities were never suspended as there is no allegation in the writ petition that any of the companies were ever given a tender by the Ministry of Defence.

Analysis and Findings

12. The present petition was heard along with ***W.P.(C) 1746/2022*** titled ***Defsys Solutions Pvt. Ltd. v. Union of India & Anr.*** in which similar challenges were raised to a suspension order passed by the Ministry of Defence. Submissions were made in both matters by counsels. The facts in both the cases are in variance and accordingly separate judgments are being rendered. The prayers in this writ petition are as under:

- “(a) Call for the records of the case pertaining to the Suspension Order being MOD ID No. 31022/1/2020/D (Vig.) dated 14.08.2020 and extension Orders dated 03.09.2021 and 10.01.2022;*
- (b) Quash the above decision(s) of the Respondent suspending business dealings with the Petitioner vide the aforesaid Suspension Order/ extension orders;*
- (c) Quash paras C and D of the Guidelines for Penalties in Business Dealings with Entities dated 21.11.2016;*
- (d) Quash Para 9 of the Procedures for Penal Action under the Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities dated 30.11.2016;*
- (e) Pending adjudication of this writ petition, in the interim, stay the effect of the impugned Suspension Order(s) dated 10.01.2022 or thereafter/the Suspension*



Lists uploaded on the website of the Respondent on 08.12.2022 and 09.02.2023;

(f) And Grant any other and further relief that this Hon'ble Court may deem fit in the interest of justice"

The legal position under the MoD Guidelines

13. The impugned order of suspension, has been passed relying on the *MoD Guidelines* dated 21st November, 2016 issued by Respondent No.1. The said Guidelines are the fulcrum of the challenge in the present case. They are supported by the following two documents –

- *'Procedure for Penal Action under the Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities'* dated 30th November 2016, (hereinafter '*Procedure for Penal Action*')
&
- *'Frequently Asked Questions'* on the *Business Dealing Guidelines* dated 30th November 2016 (hereinafter '*FAQs*').

14. Insofar as amendments to the *MoD Guidelines* are concerned dated 6th March, 2018 the same primarily deal with Clause B which deals with entities and management of entities who would be covered by guidelines. Since the said issued is not being gone into by this Court, the amendments would not be of relevance.

15. In order to appreciate the true purport and intent as also the legality of these guidelines, they need to be read and analysed with the aforementioned documents. The *MoD Guidelines* start with the following preamble:

"A.4 In applying the measures provided for under the guidelines, the concerned authorities shall be guided by the need to ensure probity, transparency, propriety and compliance in the defence procurement process. Equally, the concerned authorities shall *also ensure fairness, impartiality, rigour and correctness in dealing with*



entities, keeping in view the overall security interests of the country.”

16. The aforementioned Preamble, while laying down the need for the *MoD Guidelines*, makes it clear that it is necessary to ensure fairness, impartiality, rigor and correctness while dealing with the entities in case of defence procurement. The said guidelines also seek to maintain the standards for defence procurement in the security and overall interest of the country.

17. The *MoD Guidelines* contemplate two broad types of actions that can be taken by Respondent No.1 against erring entities viz., -

- (i) Banning and;
- (ii) Financial Penalties.

18. The *MoD Guidelines* also permit suspension under the broad umbrella of banning. The provisions permitting suspension and banning are clauses C, D and F of the said Guidelines. The said clauses are extremely relevant and are set out below:

“(C) Causes for Suspension and Banning of Business Dealings with Entities

C.1 The competent authority may levy financial penalties and/or suspend/ban business dealings with an entity for one or more of the grounds listed below:-

- a) Violation of Pre-Contract Integrity Pact (PCIP) (where such PCIPs are entered into between the Ministry of Defence and an entity).*
- b) Resort to corrupt practices, unfair means and illegal activities during any stage of bid/contract to secure a contract, even in cases where PCIP is not mandated.*
- c) Violation of Standard Clause in the contract of agents/agency commissions.*
- d) If national security considerations so warrant.*



- e) *Non-performance or under performance under the terms and conditions of contract(s) or agreements(s) not covered in grounds listed in (a) to (c) above in accordance with provisions in contract or agreement.*
- f) *Any other ground for which the competent authority may determine that suspension or banning of business dealings with an entity shall be in the public interest.*

(D) Suspension

D.1 Suspension of business dealing with an entity may be ordered by the competent authority pending a full proceeding into allegations or facts related to any grounds enumerated in paragraph C.1 (a) to (f) above.

D.2 The competent authority may suspend business dealings with an entity when it refers any complaint against the entity to CBI or any investigating agency or when intimation is received regarding initiation of criminal investigation or enquiry against any entity.

D.3 An order of suspension of business dealings with an entity will be issued for such period as the competent authority may deem fit. The period of suspension shall not ordinarily exceed one year. A review of the Order of suspension of business dealings with an entity shall be undertaken within six months of the issue of such an Order and before expiry of the period specified therein. The suspension of an entity may be extended beyond the period of one year, on the order of the Competent Authority for subsequent periods of six months each. The total period of suspension of business dealings with an entity shall not exceed the maximum period of banning of business dealings with an entity for the same cause of action.

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(F) Banning of Business Dealings with an Entity/
Debarment of an Entity

F.1 Banning of business dealings with an entity may be ordered by the competent authority on acceptance of misconduct related to any of the grounds enumerated in paragraph C.1 (a) to (f) above by the entity or establishment of such misconduct by a competent court/tribunal/ authority.

F.2 Banning of business dealings with an entity may be ordered by the competent authority on receipt of information regarding filing of chargesheet in the court of law by CBI or any other investigating agency.

F.3 The order of banning of business dealings with an entity will be issued for such specified period as the competent authority may deem fit. For the grounds listed in paragraph C.1 (a) to (d) above, the period of banning of business dealings with an entity shall not be less than five years. For the grounds listed in paragraph C.1 (e) and (f) above, banning of business dealings may be resorted to if, in the view of the competent authority, the grounds for action are such that continuation of business dealings with the entity would be detrimental to public interest. In such cases, the period of banning of business dealings with an entity shall not ordinarily exceed three years. The period of Banning of business dealings with an entity in both the categories will be inclusive of period of suspension of business dealings with an entity, if any, for the same cause of action. In exceptional cases and those involving national security considerations the competent authority may order a longer period of banning of business dealings with an Entity, as deemed appropriate.

19. The Petitioners have challenged the legality and validity of Clauses C and D above. In addition, challenge has been raised to paragraph 19 of the *Procedure for Penal Action* which reads as under:



“19. Business dealings with an entity may be banned under the circumstances listed at Para F.1 and F.2 of the Guidelines. The Competent Authority for banning of business dealings with entities under the Guidelines shall be the Raksha Mantri.”

Grounds for suspension/banning/financial penalties

20. Clause C.1, of the *MoD Guidelines* enumerates the grounds on which suspension, banning or financial penalties can be resorted to. Clause C.1 (a), (b), (c) and (e) provide that in order to suspend, ban or levy financial penalties against an entity, the Competent Authority must be satisfied that grounds such as violation of a Pre-Contract Integrity Pact (PCIP), corrupt practices, unfair means, illegal activities or breach of clauses in the contract are made out.

21. In addition, there are two broad grounds enumerated in Clause C.1 (d) and (f). They are ‘*national security considerations*’ and ‘*public interest*’. Grounds (d) and (f) vest wide powers in the Competent Authority to suspend dealings with the erring entities.

22. Clause D of the *MoD Guidelines* again reaffirms that the Competent Authority has the power to suspend dealing with any entity on any ground enumerated in C.1 (a) to (f) of the said Guidelines. Under clause D.2 suspension can be resorted to if the Competent Authority refers a complaint against any entity to the CBI/ other investigation agency or receives any complaint from them.

23. The first issue that arises for consideration is whether grounds under C.1(a) to (f) have to be made out for suspending an entity under D.1 or D.2 of the *MoD Guidelines* - Or in the alternative can the suspension of business dealings under clause D.2 be independent of the grounds enumerated in C.1(a) to (f).



24. The *Procedure for Penal Action* in paragraph 8 provides that suspension may be done in terms of clause D.1 and D.2 of the *MoD Guidelines*. The said paragraph is as under:

“8. Business dealings with an entity may be suspended under the circumstances listed at Para D.1 and D.2 of the Guidelines. The Competent Authority for suspension of business dealings-with entities under the Guidelines shall be the Raksha Mantri.”

25. Further, question 6 in the *FAQ* to the *MoD Guidelines* provides that penal levies and/or suspension/ banning can be resorted to for any of the circumstances specified in paragraph (a) to (f) of the question. Question 6 set out below:

“Q6. What are grounds for penal levies and/or suspension/banning of Business Dealings with an Entity?”

Ans: The grounds for levy of financial penalties and/or suspension/banning of business dealings with an Entity are as follows: -

(a) Violation of Pre-Contract Integrity Pact (PCIP) (where such PCIPs are entered into between the Ministry of Defence and entity).

(b) Resort to corrupt practices, unfair means and illegal activities during any stage of bid/contract to secure a contract, even in cases where PCIP is not mandated

(c) Violation of Standard Clause in the contract of agents/agency commissions.

(d) If national security considerations so warrant.

(e) Non-performance or under performance under the terms and conditions of contract(s) or agreements(s) not covered in grounds listed in (a) to (c) above in accordance with provisions in contract or agreement.



(f) Any other ground for which the competent authority may determine that suspension or banning of business dealings with an entity shall be in the public interest.”

26. A perusal of the answer to Question 6 of the *FAQs* makes it apparent that paragraphs (a) to (f) therein, are identical to C.1 (a) to (f) of the *MoD Guidelines*. Thus, the cause for suspension, banning and financial penalties has to fall in any of the six grounds enumerated in C1 (a) to (f).

27. Further, the manner in which clause D.1 and D.2 of the *MoD Guidelines* are worded indicate that the requirement of satisfying the grounds in C.1 (a) to (f) has to be fulfilled even in case of initiation of criminal investigation having been ordered by the CBI/ other investigation agency by themselves or under a complaint by the Ministry of Defence/ Competent Authority.

28. Thus, an overall reading of the *MoD Guidelines* with the *Procedure for Penal Action* and the *FAQs* suggests that the reason for an order of suspension, ban or levy of financial penalties has to fall within the enumerated grounds specified in clause C.1 (a) to (f) of the *MoD Guidelines*. A perusal of clause C.1 read with the *FAQs* also makes it very apparent that the said clause is exhaustive in nature and there are no grounds contemplated beyond the said clause on the basis of which business dealings with an entity can be suspended by Competent Authority. Grounds C.1(d) and (f) are very wide. Clause C.1(f) in particular provides that the Competent Authority has the power to suspend on any ground when the suspension is deemed to be in public interest. Though, clause D.2 could give an impression that it is a standalone clause, in fact it is not. The intimation to the CBI/other investigating agency by the Ministry or any intimation received from the CBI/other investigating agency in terms of clause D2 would necessarily have to relate to grounds specified in



C.1 (a) to (f). This is because, in the case of such intimations, the investigations could be related to a completely unconnected allegation of commission of an offence against some director or promoter – say a matrimonial case or a family dispute. It is not in all circumstances mandatory for a party to be suspended merely on an intimation being received. The same has to be examined and the Competent authority ought to come to a conclusion that the said investigation requires suspension to be directed, considering the background and the nature of investigation. Unless and until the investigation attracts any of the grounds enumerated in Clause C.1, a suspension cannot be directed automatically, simply upon receipt of an intimation of commencement of investigation.

Procedure for suspension/banning/financial penalties

29. The next question to be considered is what are the procedural safeguards provided in the *MoD Guidelines*, *Procedure for Penal Action* and the *FAQs* for banning and suspension of an entity by the Competent Authority.

30. *Procedure for Penal Action* prescribes the procedure that is to be applied under the *MoD Guidelines*. The *Procedure for Penal Action* in paragraphs 8 and 9 stipulates that a suspension does not require a showcase notice. Paragraph 16 of the *Procedure for Penal Action*, read with clause D.3 of the *MoD Guidelines* makes it clear that if a suspension order is issued, the same would have to be reviewed within six months of the issuance of the order. The said clauses read as under:

***“Procedure For Penal Action Under The Guidelines
Of The Ministry Of Defence For Penalties In Business
Dealings With Entities, dated 21st November, 2016***



D.3 An order of suspension of business dealings with an entity will be issued for such period as the competent authority may deem fit. The period of suspension shall not ordinarily exceed one year. A review of the Order of suspension of business dealings with an entity shall be undertaken within six months of the issue of such an Order and before expiry of the period specified therein. The suspension of an entity may be extended beyond the period of one year, on the order of the Competent Authority for subsequent periods of six months each. The total period of suspension of business dealings with an entity shall not exceed the maximum period of banning of business dealings with an entity for the same cause of action.

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Procedure for Penal Action under the Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities' dated 30th November 2016

"8. Business dealings with an entity may be suspended under the circumstances listed at Para D.1 and D.2 of the Guidelines. The Competent Authority for suspension of business dealings with entities under the Guidelines shall be the Raksha Mantri.

9. It is not necessary to give any show-cause notice to the entity before issuing the order of suspension of business dealings with an entity.

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16. A review of order of suspension shall be undertaken before expiry of the period specified therein or within six months of the issue of such order, whichever is earlier. The concerned Wing of Ministry of Defence shall examine the case for review and submit the proposal for extension or revocation of suspension order or otherwise to the Competent Authority for consideration and appropriate decision.



31. On the other hand, clause F of the *MoD Guidelines* deals with banning/ debarment of business dealings with an entity. The said clause provides that banning of an entity may be ordered where:

- (i) There is either acceptance of misconduct to any of the causes mentioned in C.1 (a) to (f) of the *MoD Guidelines* or;
- (ii) Establishment of misconduct by a competent court, tribunal or authority or;
- (iii) Information is received of filing of a chargesheet in a court of law by the CBI or any other investigation agency.

32. Thus, while the ground for suspension is sending of an intimation or initiation of investigation, one of the grounds for banning is filing of charge sheet. Further, paragraphs 19 to 39 of the *Procedure for Penal Action* deal with the procedure of banning/ debarment of entities. They provide that banning is to be resorted to in terms with Clause F.1 and F.2 of the *MoD Guidelines*. They also contemplate that proceedings for banning can be initiated even without resorting to suspension. The said paragraphs provide the following procedure to be followed in case of banning/ debarment of an entity:

- (i) Issuance of a showcause notice explaining the grounds for banning; (*paragraph 21 of the procedure*)
- (ii) Reasons and grounds for taking the action, specifying the same in the showcause notice; (*paragraphs 21, 24(a) of the procedure*)
- (iii) Providing an opportunity to the entity to explain its case; (*paragraph 21 of the procedure*)
- (iv) Nature of penalty of banning contemplated, including the entities/ firms which are likely to be banned;



- (v) Reply by the entity within 30 day; (*paragraph 24(b) of the procedure*)
- (vi) Proposal by the concerned wing of the Ministry to the Competent Authority; (*paragraph 28 of the procedure*)
- (vii) Constitution of a Committee to recommend the banning or otherwise; (*paragraphs 29 & 30 of the procedure*)
- (viii) Issuance of a speaking order containing the facts as also the consideration of the representation or the reply; (*paragraph 35 of the procedure*).

33. Paragraphs 40-46 of the *Procedure for Penal Action* provide a similar procedure to be followed in case of levying of financial penalty on entities.

34. The aforementioned discussion shows that for the purposes of banning, necessary safeguards of show-cause notice, reply and consideration thereof is already mandated. However in case of suspension, the same can be directed without issuing a show cause notice. Even at the stage of review, no notice to the affected party is mandated. Suspension can continue for a period which is the maximum period of banning. Thus, suspension which has the same effect as a ban can be directed and continued for a long period without any show-cause notice. Thus, the procedures for ban/ debarment and suspension of an entity under the three documents are very different. A conjoint reading of the three documents provide substantive safeguards in the case of banning, however on a literal reading there are virtually no procedural safeguards in case of suspension of an entity.

Period of suspension/ banning

35. The stand of the Id. CGSC is that there is no maximum limit for the period of suspension as the same can be for as long as banning is permissible.



A perusal of the clauses shows that the period of suspension is intricately linked with the period of banning. This is evident from two clauses which provide that the period of suspension would be subsumed in the banning period and the period of suspension cannot exceed the maximum period of banning. Thus, it is necessary to understand what is the period of banning under the *MoD Guidelines*. The period of banning under Clause F.3 is:

- (i) Ordinarily not more than 3 years – in case of ground C.1 (e) & (f) *MoD Guidelines*;
- (ii) Not less than 5 years and not more than 10 years – in case of ground C.1 (a) to (d) *MoD Guidelines*;
- (iii) Under exceptional circumstances, banning can be even beyond ten years without a maximum limit – Paragraph 31 of *Procedure*.

36. Going by the above clauses, while generally the period of banning is from three years to five years or even ten years, under exceptional circumstances it can be beyond the ten year limit, without a ceiling. If this is the position, can suspension continue indefinitely – that too without a show cause notice?

37. Thus, the next question before this Court is whether the period of suspension can be perpetual and if not what is the maximum period of suspension under the *MoD Guidelines*.

38. A perusal of Clause F.3 of the *MoD Guidelines* shows that the period of suspension is included in the period of ban. Thus, in the context of these guidelines it can be said that suspension is an urgent *interim* measure which can be resorted to by the Competent Authority while the process of banning of business dealings is under consideration.



39. Insofar as period of the period of banning/ suspension is concerned, there is considerable confusion in the three documents. In order to appreciate the fact that the period specified for suspension and banning is unclear the relevant provisions of the three documents are set out below in tabular form:

Particular	MoD Guidelines	Procedure for Penal Action	FAQ
<i>Suspension</i>	<i>Shall <u>not</u> ordinarily exceed 1 year.</i> (Clause D3) <i>Total period cannot exceed maximum period of banning.</i> (Clause D3)	<i>Total period of suspension shall not exceed maximum period of business dealings for the same cause of action. (Paragraph 11)</i>	<i>Period of suspension can be for a <u>maximum period of 1 year</u> ordinarily.</i> (Question 10) <i>In any case, period of banning shall not be more than <u>10 years</u>.</i> (Question 10) <i>Total suspension period <u>cannot exceed maximum period of banning</u> for the same cause of action.</i> (Question 11)



	<i>Maybe extended beyond 1 year for subsequent periods of 6 months (each). (Clause D3)</i>	<i>A review of the suspension order within 6 months or within the period specified in the order, whichever is earlier. (Paragraph 16)</i>	<i>Suspension can be extended beyond 1 year by reviewing every six months. (Question 10)</i>
	<i>Review within six months. (Clause D3)</i>	<i>A review every 6 monthly basis. (Paragraph 18)</i>	
<i>Banning</i>	<i>Such specified period as competent authority deems fit. (Clause F3)</i>	<i>The ban period can be as the competent authority may deem fit. (Paragraph 30)</i>	
	<i>For ground C.1 (a) to (d) not less than 5 years. (Clause F3)</i>	<i>For C.1 (a) to (d), period of banning shall be minimum of five years. Maximum of 10 years. (Paragraph 31)</i>	
	<i>For grounds C.1 (e) & (f) not ordinarily more than 3 years. (Clause F3)</i>	<i>For C.1 (e) & (f) banning shall not ordinarily exceed 3 years. (Paragraph 32)</i>	



	<i>Period of banning will be inclusive of period of suspension. (Clause F3)</i>	<i>Period of banning shall include the period of suspension. (Paragraph 33)</i>	
	<i>Exceptional cases involving national security considerations longer period of banning permissible. (Clause F3)</i>	<i>In exception cases national security considerations longer period of banning is permissible. (Paragraph 34)</i>	

40. A perusal of the above table as also the various clauses, paragraphs and questions shows that there is lack of clarity as to the various periods of suspension/ banning. The contradictions become evident illustratively as under:

- i) As per the *MoD Guidelines*, the period of suspension ordinarily shall not exceed one year. In the Procedure, the total period of suspension cannot be more than the period of business dealings. But in FAQs, the maximum period of suspension, ordinarily is one year. Thus, the period of Suspension can be –
 - Less than one year;
 - More than one year;
 - Maximum of one year, ordinarily or;
 - Total period of business dealings -which is open ended and depends on the contractual terms.



ii) While the *MoD Guidelines* clarify that the total period of suspension cannot exceed the maximum period of banning, paragraph 31 of the *Procedure for Penal Action* provides that the maximum period of banning **ordinarily** can be for 10 years. However, clause F.3 of the *MoD Guidelines* state that in cases involving national security considerations longer period of banning permissible. A conjoint reading of the *MoD Guidelines* and *Procedure for Penal Action* in the light of the submissions made by Id. CGSC, means that in some cases, suspension can even be perpetual.

Conclusion on the above three documents

41. In light of the above documents, the suspension of any entity could be indefinite, without showcase notice, without opportunity of reply and without any grounds being provided. There is a procedure prescribed for review, or for consideration of the committee every six months. Further, even if a review is done, the entity is not given an opportunity to rebut the allegation or evidence. A literal reading of these three documents shows that it is not within the spirit of fairness, impartiality, rigor and correctness which the guidelines contemplated in the preamble to the *MoD Guidelines*.

42. Moreover, the *MoD Guidelines* are not law enacted by Parliament or even Rules under any statute. They are executive instructions which are being given the colour of law, by the Respondent. The three documents when read together clearly show that there is a need for clarity and uniformity in terms of the substantive powers of the Competent Authority as also the procedure, in these documents. The contradictions and ambiguity between the three documents are too glaring for this Court to ignore. It is clear that the guidelines which is as an exercise of Executive power of the State are capable



of misuse and arbitrariness. The three documents issued by the Respondent No.1 give unbridled power to the authorities in the case of suspension of an entity. While there can be no doubt that in the area of defence procurement due to security considerations the discretion with the Competent Authority has to be wider and broader, the same cannot be untrammelled. There has to be a semblance of fairness, non-arbitrariness and compliance of principles of natural justice even in such cases and the Guidelines would have to be read as such.

43. Ld. Sr. Counsel for the Petitioner has relied on the *Guidelines on Debarment of firms from Bidding* issued by the Ministry of Finance vide Office Memorandum dated 2nd November, 2021. The said Guidelines read with the General Financial Rules, 2017 require that the concerned Ministry or Department issuing the debarment order against the firm must ensure that reasonable opportunity is given to the concerned firm including a personal hearing, if requested. The relevant clauses of the Ministry of Finance's Office Memorandum dated 2nd November, 2021 are set out below:

“Subject: Guidelines on Debarment of firms from Bidding Attention is drawn towards Rule 151 of General Financial Rules (GFs), 2017) regarding Debarment from Bidding which is reproduced as under:

(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 as 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 will 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.

Guidelines on Debarment of firms from Bidding – Annexure

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4. The terms “banning of firm”, ‘suspension’, ‘Black-Listing’ etc. convey the same meaning as of “Debarment”.

5.

e. The concerned Ministry/Department before issuing the debarment order against a firm must ensure that reasonable opportunity has been given to the concerned firm to represent against such debarment (including personal hearing, if requested by firm).

xxx xxx xxx

13. Ministry/Department before forwarding the proposal to DoE must ensure that reasonable opportunity has been given to the concerned firm to represent against such debarment (including personal hearing, if requested by firm). If DoE realizes that sufficient opportunity has not be given to the firm to represent against the debarment, such debarment requests received from Ministries/Departments shall be rejected.



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25. *All Ministries/Departments must align their existing Debarment Guidelines in conformity with these Guidelines within two months of issue of these Guidelines. Further, bidding documents must also be suitably amended, if required.”*

44. The Office Memorandum issued by the Ministry of Finance primarily recognizes that principles of natural justice ought to be complied with even while resorting to suspension, banning, blacklisting or debarment. The stand of the Respondent is that these guidelines would not apply for defence procurement as there are security considerations which are involved. This would however not deter the Court from considering the spirit of the guidelines issued by the Ministry of Finance. The MoF Guidelines in fact make it clear that suspension, banning, debarment, blacklisting etc. have the same effect.

45. Ld. CGSC has laid enormous emphasis on the decision of the Hon’ble Supreme Court in *Ex-Armyman’s Protection Services Private Limited v. Union of India, CA No. 2876/2014* to argue that in issues concerning national security, the interference by the Courts would be minimal and that in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. The observations in *Ex-Armyman (Supra)* relied upon by the Id. CGSC are as under:

“15. It is difficult to define in exact terms as to what is national security. However, the same would generally include socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace, etc.

16. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the court to decide whether something is in the interest of



State or not. It should be left to the Executive. To quote Lord Hoffman in Secretary of State for the Home Department v. Rehman (2003) 1 AC 153:

...in the matter of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of national security are not a matter for judicial decision. They are entrusted to the executive.

17. Thus, in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases it is the duty of the Court to read into and provide for statutory exclusion, if not expressly provided in the rules governing the field. Depending on the facts of the particular case, it will however be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party."

46. In the case of **Ex-Armyman (Supra)**, the writ petitioner therein was in the business of ground handling services on behalf of various airlines at the different airports and it's security clearance was withdrawn in national interest. A post decisional hearing was directed and the material relied upon by the authorities was also to be furnished. The gist of allegations were not disclosed. In these facts the Hon'ble Supreme Court after perusing the files in a sealed cover dealt with the issue of national security.

47. As per the Id. CGSC, the said decision has also been relied upon in other decisions such as **M/s. Mohan Kumar v. Union of India & Ors.,**



W.P.(C) No. 6904 of 2019 and Digi Cable Network (India) Pvt. Ltd. V. Union of India & Ors. 2019 (4) SCC 451.

48. At this stage, it is relevant to note that the decision in *Ex-Armymen (Supra)* has, however, been considered in the recent decision of Hon'ble Supreme Court in *Madhyamam Broadcasting v. Union of India & Ors., CA No.8129/2022*. In the said case, on the issue of compliance of principles of natural justice, the Hon'ble Supreme Court observed as under:

“Madhyamam Broadcasting Ltd. v. Union of India & Ors., CA No.8129/2022

“47. The judgment of this Court in Maneka Gandhi (supra) spearheaded two doctrinal shifts on procedural fairness because of the constitutionalising of natural justice. Firstly, procedural fairness was no longer viewed merely as a means to secure a just outcome but a requirement that holds an inherent value in itself. In view of this shift, the Courts are now precluded from solely assessing procedural infringements based on whether the procedure would have prejudiced the outcome of the case. Instead, the courts would have to decide if the procedure that was followed infringed upon the right to a fair and reasonable procedure, independent of the outcome. In compliance with this line of thought, the courts have read the principles of natural justice into an enactment to save it from being declared unconstitutional on procedural grounds. Secondly, natural justice principles breathe reasonableness into the procedure. Responding to the argument that the principles of natural justice are not static but are capable of being moulded to the circumstances, it was held that the core of natural justice guarantees a reasonable procedure which is a constitutional requirement entrenched in Articles 14,19 and 21. The facet of audi alterum partem encompasses the components of notice, contents of the notice, reports of



inquiry, and materials that are available for perusal. While situational modifications are permissible, the rules of natural justice cannot be modified to suit the needs of the situation to such an extent that the core of the principle is abrogated because it is the core that infuses procedural reasonableness. The burden is on the applicant to prove that the procedure that was followed (or not followed) by the adjudicating authority, in effect, infringes upon the core of the right to a fair and reasonable hearing.

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74. The following principles emerge from the above judgements:

(i) The party affected by the decision must establish that the decision was reached by a process that was unfair without complying with the principles of natural justice;

(ii) The State can claim that the principles of natural justice could not be followed because issues concerning national security were involved;

(iii) The Courts have to assess if the departure was justified. For this purpose, the State must satisfy the Court that firstly, national security is involved; and secondly, whether on the facts of the case, the requirements of national security outweigh the duty of fairness. At this stage, the court must make its decision based on the component of natural justice that is sought to be abrogated; and

(iv) While satisfying itself of the national security claim, the Courts must give due weightage to the assessment and the conclusion of the State. The Courts cannot disagree on the broad actions that invoke national security concerns - that is, a question of principle such as whether preparation of terrorist activities by a citizen in a foreign country amounts a threat of national security. However, the courts must review the assessment of the State to the extent of determining whether it has proved through cogent material that the



actions of the aggrieved person fall within the principles established above.

75. The contention of the respondent that the judgment of this Court in Ex-Army men's Protection Services (supra) held that the principles of natural justice shall be excluded when concerns of national security are involved is erroneous. The principle that was expounded in that case was that the principles of natural justice may be excluded when on the facts of the case, national security concerns outweigh the duty of fairness. Thus, national security is one of the few grounds on which the right to a reasonable procedural guarantee may be restricted. The mere involvement of issues concerning national security would not preclude the state's duty to act fairly. If the State discards its duty to act fairly, then it must be justified before the court on the facts of the case. Firstly, the State must satisfy the Court that national security concerns are involved. Secondly, the State must satisfy the court that an abrogation of the principle(s) of natural justice is justified. These two standards that have emerged from the jurisprudence abroad resemble the proportionality standard. The first test resembles the legitimate aim prong, and the second test of justification resembles the necessity and the balancing prongs."

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84. Thus, the expression national security does not have a fixed meaning. While courts have attempted to conceptually distinguish national security from public order, it is impossible (and perhaps unwise) to lay down a text-book definition of the expression which can help the courts decide if the factual situation is covered within the meaning of the phrase. The phrase derives its meaning from the context. It is not sufficient for the State to identify its purpose in broad conceptual terms such as national security and public order. Rather, it is imperative for the State to prove through the submission of cogent material that non-disclosure is in the interest



of national security. It is the Court's duty to assess if there is sufficient material for forming such an opinion. A claim cannot be made out of thin air without material backing for such a conclusion. The Court must determine if the State makes the claim in a bona fide manner. The Court must assess the validity of the claim of purpose by determining (i) whether there is material to conclude that the non-disclosure of the information is in the interest of national security; and (ii) whether a reasonable prudent person would arrive at the same conclusion based on the material. The reasonable prudent person standard which is one of the lowest standards to test the reasonableness of an action is used to test national security claims by courts across jurisdictions because of their deferential perception towards such claims. This is because courts recognise that the State is best placed to decide if the interest of national security would be served. The court allows due deference to the State to form its opinion but reviews the opinion on limited grounds of whether there is nexus between the material and the conclusion. The Court cannot second-guess the judgment of the State that the purpose identified would violate India's national security. It is the executive wing and not the judicial wing that has the knowledge of India's geo-political relationships to assess if an action is in the interest of India's national security.

85. We now proceed to assess if on the facts of the case, there is sufficient material to conclude that the action is in furtherance of the interests of confidentiality and national security, as contended."

49. Thus, the Hon'ble Supreme Court in ***Madhyamam Broadcasting (supra)*** was of the view that even in cases where national security considerations are raised, the duty of the State to act fairly cannot be precluded. It is only in a case where national security would outweigh the duty



of fairness that principles of natural justice can be excluded. It was also held that the impact of the order would have to be assessed and the same ought to be proportionate and not disproportionate. Thus, even in cases where national security is cited as a reason, the same has to be borne out from the record as justifying a suspension or ban without compliance with the principles of natural justice. It was further held that the expression national security does not have a fixed meaning. The manner in which judicial review would have to be done in a case where issues of national security are raised is laid down by the Hon'ble Supreme Court in *Madhyamam Broadcasting (Supra)*.

50. From the above observations in *Madhyamam Broadcasting (Supra)*, it is clear that the State has to make out a case for non-disclosure in the interest of national security.

51. Further, in the case of *Manohar Lal Sharma v. Union of India 2021 SCC OnLine SC 985*, it was held that the Government must prove its stand that the information relied upon by them must be kept in secret as their divulgence would affect national security concerns. The Hon'ble Supreme Court observes that the mere invocation of national security by the State does not render the Court a mute spectator. The relevant part of the said decision is as under:

“Manohar Lal Sharma v. Union of India 2021 SCC Online SC 985

“50. Of course, the Respondent-Union of India may decline to provide information when constitutional considerations exist, such as those pertaining to the security of the State, or when there is a specific immunity under a specific statute. However, it is incumbent on the State to not only specifically plead such constitutional concern or statutory immunity but they must also prove and justify the same in Court on affidavit. The



Respondent-Union of India must necessarily plead and prove the facts which indicate that the information sought must be kept in secret as their divulgence would affect national security concerns. They must justify the stand that they take before a Court. The mere invocation of national security by the State does not render the Court a mute spectator.”

52. Ld. CGSC has relied upon the judgement of the Hon’ble Madhya Pradesh High Court in ***Peethambara Granite Gwalior v. State of Madhya Pradesh, WP(C) 19958/2020*** dated 22nd December 2020, and the Hon’ble Supreme Court in ***AKK Nambiar v. Union of India & Anr., (1969) 3 SCC 864***. Insofar, as the judgement of ***Peethambara Granite (Supra)*** is concerned, the same would not apply to the present case as in the said case, although opportunity of hearing was not afforded to the erring entity, the suspension order passed by the Collector contained the reasons for suspension. The suspension period was also not perpetual but for a definitive period of 10 years. Further, in the said judgement the Hon’ble Court limited itself to the point that show cause notice is not a condition precedent for suspension. In the opinion of this Court, even the judgement of ***AKK Nambiar v. Union of India & Anr., (1969) 3 SCC 864*** would not be applicable to the present case as the said decision was taken in the context of All India Service (Discipline and Appeal) Rules, 1955 and did not relate in any way to defense procurement. However, the said judgment is correct to the extent that the Court is not to be concerned with the correctness and the propriety of the report of the investigating authority and is to only examine whether the order of suspension is warranted by the rule and also whether it was in honest exercise of powers.



53. Ld. CGSC has also relied on the judgement of ***SCOD 18 Network Private Limited v. Ministry of Information and Broadcasting & Ors. 2015 SCC OnLine Bom 6570*** to submit that opportunity of being heard would not enable the petitioner to probe confidential or secret information. Ld. CGSC, further submits that in the case of ***M/s Add Lounge Services Pvt. Ltd. v. Union of India & Ors.-2016 SCC Online Del 517*** this Court observed that it may not be possible to gather enough proof for conviction or even for FIR for diverse reasons. However, the same cannot come in the way of assessing a person as a security risk in view of the larger public interest. It is noticed by this Court that in the case of ***Cdr. Amit Kumar (Supra)***, the Hon'ble Supreme Court has deprecated the practice of not disclosing relevant material to the affected party. The said practice is loosely referred to as 'sealed cover jurisprudence'. In respect of the same, in ***Cdr. Amit Kumar (Supra)***, the Court observed as under:

“28. The non-disclosure of relevant material to the affected party and its disclosure in a sealed-cover to the adjudicating authority (in this case the AFT) sets a dangerous precedent. The disclosure of relevant material to the adjudicating authority in a sealed cover makes the process of adjudication vague and opaque. The disclosure in a sealed cover perpetuates two problems. Firstly, it denies the aggrieved party their legal right to effectively challenge an order since the adjudication of issues has proceeded on the basis of unshared material provided in a sealed cover. The adjudicating authority while relying on material furnished in the sealed cover arrives at a finding which is then effectively placed beyond the reach of challenge. Secondly, it perpetuates a culture of opaqueness and secrecy. It bestows absolute power in the hands of the adjudicating authority. It also tilts the balance of power in a litigation in favour of a



dominant party which has control over information. Most often than not this is the state. A judicial order accompanied by reasons is the hallmark of the justice system. It espouses the rule of law. However, the sealed cover practice places the process by which the decision is arrived beyond scrutiny. The sealed cover procedure affects the functioning of the justice delivery system both at an individual case- to case level and at an institutional level. However, this is not to say that all information must be disclosed in the public. Illustratively, sensitive information affecting the privacy of individuals such as the identity of a sexual harassment victim cannot be disclosed. The measure of nondisclosure of sensitive information in exceptional circumstances must be proportionate to the purpose that the non-disclosure seeks to serve. The exceptions should not, however, become the norm.

29. During the course of the hearing, it has clearly emerged before this Court that material which was relied upon by the AFT for determining the vacancies which were available and for assessing as to whether they were utilised correctly has not been disclosed to the appellants. Similarly, the Board proceedings that were relied upon by AFT to determine if the selection for PC was fair have not been disclosed to the appellants. We are cognizant of the wide range of sensitive information in the records of board proceedings. The respondents are not required to disclose the deliberations on the selection for PC within the closed Board setting. While the AFT on a perusal of the records concluded that there was no gender bias or mala fides in the grant of PC, it must be borne in mind that the officers do not possess the material to challenge this observation. The respondents while protecting the confidentiality of the proceedings of the Board must disclose the position in merit of the appellants vis-à-vis the parameters and their weightage devised by the respondents.”



54. The Id. Division Bench of this Court in the case of ***Trident Infosol Pvt. Ltd. v. Union of India & Ors.*** 2022 SCC OnLine Del 2314 discussed the application of principles of natural justice in respect of a tender for defence equipment. The Id. Division Bench of this Court upheld the principle that if criminal proceedings and investigations are pending against the entity, disqualification could be justified. The observations of the Court are as under:

“19. Hence, while the State's instrumentalities ought to act fairly entering contracts with private parties, this cannot impinge upon the right of the Government in setting the terms of the tender. Hence, this Court ought only to intervene if the condition is arbitrary, discriminatory, mala fide or actuated by bias.

20. As has been noted, the present tender was floated by Labs of Respondent No. 2, which are specialised labs engaged in research pertaining to critical defence technologies and systems. It is in this context that the Respondent Nos. 3 and 4 have imposed the Impugned Condition to sift through entities which have criminal proceedings/investigation pending against them. This condition is imperative to maintain the integrity of such projects which deal with matters of national importance, security and are of immense public importance.”

55. Further, in the case of ***JBM Electrical Vehicle v. Union of India***, 2022 SCC Online Del 2405 it was observed that the power not to deal if taken on justifiable grounds would have to be recognised as an inherent right of the State.

56. The aforesaid decisions make it clear that the principles of natural justice ought to be complied with generally and that even if no prejudice is caused, following of procedural guarantees is mandatory. It is only when national security concerns outweigh the duty of fairness that the said



procedure can be given a go by. In each and every case when the principles of natural justice are not followed, there has to be a justification and merely citing national security considerations is not enough. The material should reveal that there would be national security considerations, justifying non-grant of opportunity of reply or hearing.

57. In view thereof, there is a need to read the *MoD Guidelines*, the *Procedure for Penal Action*, and the *FAQs* in a manner so as to bring them within the four corners of law. In order for these documents to operate within the realm of legally permissible limits, they shall have to be implemented in a legally permissible manner. Although the Competent Authority's power to take action of suspension, banning or financial penalties in the larger public interest or for national security considerations cannot be in doubt, the procedure to be followed while exercising this power would have to be reasonable, non-arbitrary and in compliance with the principles laid down in the aforementioned decisions.

58. Every Governmental action has to be based on a legally valid policy while following proper procedure. The intent in the three documents is clearly to eliminate corruption, irregularities, illegalities in defence procurement contracts with the Government of India. If any entity is even suspected or found to indulge in impermissible conduct, immediate suspension can be ordered, banning and financial penalties are also permissible.

59. The grounds which can be invoked by the Competent Authority under the *MoD Guidelines* include national security and public interest considerations. Initiation of criminal investigation or enquiry for any of the grounds above can also be raised as a ground for suspension. Thus, irrespective of any criminal investigation or enquiry if any of the grounds



C1(a) to (f) are even suspected, immediate suspension would be permissible. The initiation of any criminal investigation for any of the grounds specified in (a) to (f) could also trigger suspension. However, immediately after the suspension, there is a need for a review within 6 months. Such a review has to be meaningful and ought to be with due application of mind and not a ministerial act.

60. In the context of the *MoD Guidelines*, suspension is a subset/ species within debarment/ banning and not an independent measure. It is nothing but an urgent, interim or immediate measure preceding banning. Thus, indefinite suspension without resort to the safeguards prescribed for banning would not be permissible. This is so because the period of suspension is included within the maximum banning period as per Clause F.3 of the *MoD Guidelines*. Accordingly, the stand of the Respondent No.1 that suspension can extend till the maximum period of ban and the ban can be indefinite would lead to a completely unsustainable conclusion that in effect, suspension can be indefinite. Such an interpretation could render the entire guidelines itself unconstitutional.

61. In view thereof, for a prolonged suspension, all the procedural safeguards i.e., the recourse to principles of natural justice provided in the *MoD Guidelines* in case of debarment/ banning would also be applicable to suspension. Accordingly, if any entity is suspended, a review within 6 months has to be done and it is expected that the authorities shall ordinarily issue a show-cause notice setting out the grounds for which suspension has been resorted to and make out the grounds which would lead to a ban on the entity. In this process, the show-cause notice has to consist of the grounds which could be any of the grounds contained in Clause C1 (a) to (f). A reply would



have to be sought after properly considering the reply, a reasoned order shall have to be passed. Further, the period of suspension and banning cannot be indefinite, unless in exceptional circumstances.

62. In the opinion of the Court therefore, the *MoD Guidelines* would have to be read in a manner which is consistent with the legally enshrined principles of non-arbitrariness. The *MoD Guidelines*, the *Procedures for Penal Action* and the *FAQs* as they stand could lead to abuse of power and, thus, have to be read in a manner consistent with sound and legally established principles. It would not be permissible to have a perpetual state of suspension without showcause notice, that too for an indefinite period. It is also pertinent to note that defence contracts by their very nature consist of only one customer i.e., the Government and perpetual suspension can be even worse than blacklisting as it is backed by the power of the Government, leading to unintended consequences for the credibility of such entities and lives of the employees of such entities.

63. Further, the Hon'ble Supreme Court in the case of ***Indian Social Action Forum (INSAF) v. Union of India, CA No.1510/2020*** observed that in cases of vague and ambiguous provisions instead of declaring any statute as unconstitutional, the court can read down the same. The relevant part of the said judgement is as under:

“20. Where the provisions of a statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provisions occur and purpose for which it is made, the doctrine of “reading down” can be applied. To save Rule 3(v) from being declared as unconstitutional, the Court can apply the doctrine of “reading down.”



64. It is clear from the aforementioned discussion that the provisions of the MoD Guidelines, especially provisions related to suspension, banning and the period and procedure for the same are ambiguous and vague. This court is of the opinion that the MoD Guidelines would have to be read in a manner that is holistic and part of a complete scheme. This is clear from a perusal of the policy, guidelines and FAQs which show that in case of banning, hearing, show cause notice, reply is mandatory. Suspension cannot be read in isolation but has to be read as a part of the banning process. Thus, when for the final punishment of banning itself, a proper procedure is required, it cannot be held that repeated suspension orders can be issued without complying with the principle of *audi alteram partem*. It is nigh possible that suspension may have to be resorted as an urgent measure and thus advance notice may not be possible. However, *post* the suspension, notice would still have to be given, if the same is to be continued for a long period.

65. In the opinion of the Court therefore, in the context of defence procurement, bearing in mind the discretion vested in the Competent Authority in cases of national security and the impact of suspension the following procedure ought to be followed for suspension, under the MoD Guidelines, unless circumstances warrant otherwise:

- a) If any entity is found allegedly violative of any of the grounds set out in clause C.1 (a) to (f), the competent authority can immediately suspend dealings with such an entity.
- b) If any intimation or complaint is received from CBI or any other investigating agency that a criminal investigation has been initiated or if the competent authority refers any complaint against the entity to CBI or any investigating agency or when intimation is received regarding



initiation of criminal investigation or enquiry against any entity, dealings can be suspended immediately. *Per contra* Clause F.3 of the *MoD Guidelines* requires the filing/ existence of the chargesheet for banning. Thus, if filing of a chargesheet is intimated, banning can be resorted.

- c) In case of suspension, the same has to be compulsorily reviewed every 6 months. For the said purpose, the nature of investigation ought to be examined and if the same has a nexus with the nature of the relationships i.e. it relates to the business of the entity between the Government and the entity/person, ordinarily a show-cause notice ought to be issued to the suspended entity within a reasonable period after suspension orders are issued, preferably within the 6 months period. Such a show-cause notice ought to set out any of the grounds enumerated in C.1 (a) to (f) for the suspension or the proposed ban. Any material which may form the basis of such showcause notice ought to be communicated to the firm/entity. If a show-cause notice is not to be issued, proper reasons ought to be recorded for the same, to justify that national security considerations exist.
- d) A reply ought to be sought from the concerned entity/person in terms of paragraph 24 of *the Procedure for Penal Action*.
- e) For the purpose of review, a committee would have to be appointed to evaluate the allegations independently as to whether any of the grounds in clause C.1 (a) to (f) of the *MoD Guidelines* are made out. The committee may be headed by a two star or equivalent officer in terms of paragraph 17 of *the Procedure for Penal Action*.



- f) If the committee is satisfied that the said grounds in C.1 (a) to (f) are made out, then the suspension can be extended. The said grounds ought to be spelt out in a reasoned manner, so as to stand the test of scrutiny.
- g) A suspension cannot be for an indefinite period. After the initial period of suspension and any reasonable periods of extension thereof, if the same is to be extended for a longer period, the procedure prescribed for the purposes of Banning would have to be resorted to.
- h) If the competent authority decides to ban the entity/person, after following the prescribed procedure, the period of ban has to be then fixed bearing in mind the period of suspension already undergone which would be subsumed in the banning period.
- i) If any of the procedures prescribed above is to be not adhered to, there has to be exceptional circumstances or overwhelming reasons to do so, with sufficient material to back the same as held in ***Madhyamam Broadcasting (supra)***.

66. In so far as Banning/Levying of financial penalties is concerned, the procedure prescribed in the aforementioned three documents would have to be strictly complied with.

Conclusion on facts

67. The impugned suspension order dated 14th August, 2020, the extension orders as also the published list dated 9th February, 2023 would show that in effect, for a period of three years, the Petitioner has remained under suspension, without issuance of a show-cause notice. A perusal of the same shows that no reasons have been spelt out except mentioning that the same is based on two FIRs filed by the CBI i.e., the CBI case in FIR A0004 dated 30th



March, 2012 (*Tatra Truck Deal Case*) and the FIR A0014 dated 19th October, 2012 (*Case of alleged bribery filed by Gen VK Singh, ex COAS*).

68. A perusal of the FIR A0004 would show that the incident/event in respect of *Tatra Truck Deal Case* occurred in Czechoslovakia in 1987. The said incident is more than 35 years old and the criminal trial arising out of the same has been continuing for the past 11 years. In so far as the second FIR being FIR A0014 is concerned, the same relates to alleged bribery incident which dates back to October 2010. Both the FIRs are more than ten years old. The Petitioner No. 1 was not named in the FIR A0004, however, the FIR named one Mr Ravinder Kumar Rishi (since deceased), who was then the majority shareholder/ Promoter of the Petitioner. Even in the FIR A0014, Petitioner No. 1 was not named in the FIR, nor did the allegations in the FIR pertain to it. However, the name of Mr. Rishi figured in the body of the said FIR.

69. In FIR A0014 the CBI filed the chargesheet only against one Lt. Gen. Tejinder Singh, and Mr. Rishi was not charge sheeted. Insofar as FIR A0004 is concerned, on 27th August, 2014, the CBI, informed that the investigation could not substantiate the levelled allegations and a closure report was filed in the Court of Special Judge, Patiala House, Delhi. Further, Mr. Ravinder Kumar Rishi passed away on 13th March, 2016.

70. A perusal of the record shows that the Petitioner had filed two writ petitions being *W.P.(C) 6443/2014* and *W.P.(C) 4443/2020* before this Court. In *W.P.(C) 6443/2014* titled *M/s. Vectra Advanced Engineering Pvt. Ltd. & Anr. v. Union of India* vide decision dated 8th March, 2018, the Petitioner in its earlier avatar had challenged its non-consideration from another tender floated by Respondent No.1 . The Id. Division Bench has held as under:



“7. In the present case, it is not disputed by the petitioner that the respondent invoked the bank guarantee on 08.08.2014. Interestingly, the petitioner has not challenged the invocation nor has asked for any relief pertaining to the invocation based upon the respondent’s assessment that the Pre-Contract Integrity Pact (“PCIP”) had been violated. This assumes importance because the subsequent arguments and proceedings before this Court in this petition are entirely hinged upon the action of the respondent in proceeding to hold that Integrity Pact was violated. The closure report which the respondent eludes to in its counter affidavit pertinently states that the Special Judge in the New Delhi Courts refused to proceed upon the report on 25.08.2014 and evidently therefore, as on date, when the decision to encash the bank guarantee on the determination that the PCIP was violated, the respondent had some basis to do so. In the subsequent event, i.e. omission to invite petitioner for the contract negotiations then cannot be termed as arbitrary.

8. The Court is also of the opinion that whilst the petitioner’s submission that it did all that it could do to comply with the terms imposed by the tender and that its reluctance to extend the bank guarantee, was premised upon by the respondents to encash it, has to be seen in the overall circumstances. The lowest tenderer, undoubtedly, has an expectation. In this case, the petitioner perhaps entertained such an expectation. It is not entirely unreasonable but as to whether that expectation – crystallizes into a contract, would depend upon the terms of the contract and the evaluation by the agency. In the facts of this case, the agency (the Central Government) had some reasons which the Court, in its discretion under Article 226 of the Constitution, cannot substitute and hold to be inadequate.



For the above reasons, it is held that there is no merit in the writ petition; it is accordingly dismissed.”

71. Similarly, in ***W.P.(C) 4443/2020*** titled ***Vectra Advanced Engineering Private Limited & Anr. v. Union of India & Anr*** vide decision dated 18th August, 2020, the Id. Single Judge refused to interfere in the action of the Respondent holding the Petitioner to be in violation of PCIP. The observations of the Court are as under:

*“21. Having heard the learned counsel for the parties and perused the record, the first issue that needs to be decided is whether the petitioners who have challenged the invocation of Bank Guarantee, which is unconditional, the remedy for them would be to seek damages, that too in a Civil Court. I am not in agreement with this plea of Mr. Kumar for the reason, the petition has been filed laying challenge to the decision of the respondent no.1 that the petitioner no.1 has breached the PCIP, which also contemplates, upon such a breach, the Bank Guarantee can be invoked. So the invocation is consequential to the breach of PCIP. The substantive relief sought, being against the decision of respondent no.1, holding that petitioner no.1 has breached the PCIP, surely the petitioners are within their right to seek a consequential prayer with regard to Bank Guarantee that too against respondent no.1, which comes within the definition of State as per Article 12 of the Constitution of India, action of which surely have a public law element. Mr. Subramanian is justified on placing reliance on the Judgment of the Supreme Court in ***Joshi Technologies Ltd.*** (Supra), wherein in Para 69.1, the Supreme Court has said*

“The Court may not examine the issue unless the action have some public law character attached to it”

24. Having said that, the plea advanced by Mr. Subramanian that the action is in violation of principles of natural justice as no show cause notice was issued



before invoking the Bank Guarantee is without any merit for the reasons (i) the ground for invocation of Bank Guarantee is the same as was in the year 2014 (ii) when the invocation of Bank Guarantee of 2014 has not been challenged, but accepted, the show-cause notice is not required to be given as the grounds for invocation are already known (iii) even otherwise, no such notice is required to be given as such a notice is not contemplated in the terms of the Bank Guarantee which in fact is unconditional. Even the plea of proportionality pleaded by Mr. Subramanian is unsustainable as action of 2014, upheld in the year 2018 was identical inasmuch as the invocation of the Bank Guarantee was on the same grounds with same consequence, i.e., invocation of Bank Guarantee for Rs. 3 Crores. In so far as the plea of Mr. Subramanian that the action has been taken without referring to the Monitors is concerned, the same is also not appealing. I agree with the submission of Mr. Kumar, who had relied upon the Clause 12.4 of PCIP which contemplates, if any, complaint is received by the buyer in a procurement case, the buyer shall refer the complaint to the Monitors for comments / enquiry. He also relied upon the guidelines of 2015 which contemplates two types of complaints (a) from public (b) competing vendors. Admittedly, the action taken is not on the basis of the complaints from the public / competing vendors but on the basis of cases investigated by CBI. The clause for reference to mediators has no applicability in the case in hand.”

72. A perusal of the above two orders would show that the Court observed that the bank guarantees had been invoked by the Respondent. The Court also holds that the integrity pact violation was the ground of the FIR A0004 and FIR A0014 on which the Respondent had taken action and that there was some basis to do so. Further, from the decision rendered in ***W.P.(C) 4443/2020*** an



appeal being - *LPA 252/2020* titled *Vectra Advanced Engineering Private Limited & Anr. v. Union of India & Anr* is pending.

73. In the present case, the impugned order dated 14th August, 2020 suspended the Petitioner for a period of one year and thereafter the suspension was continued for a period of six months each by communications dated 30th September, 2021 and 10th January, 2022. A list was also published on 9th February, 2023 wherein the Petitioner's name finds a mention as Vectra Advanced Engineering Private Limited (old name of the Petitioner). Thus, the Petitioner has remained under suspension for a period of three years.

74. In the present case, no notice was issued prior to the suspension, no reply was called for and no hearing was held. There was no consideration of the proportionality and the impact of the suspension. Even at the stage of review, no opportunity of hearing was afforded. Thus, in effect, the impugned suspension order and the subsequent extension orders are merely based on the fact that the name of a deceased majority shareholder/ Promoter finds mention in two FIRs filed by the CBI.

75. In this background, the question is whether the impugned orders of suspension without a hearing, notice and communication of reasons can be justified and if Clauses C and D of the MoD Guidelines are arbitrary, discriminatory and deserve to be quashed.

76. The overall rationale applied by the Respondent in the suspension process is that the two FIRs pending against Mr. Rishi (since deceased) who was the promoter of Petitioner No.1 would attract Clause D2 of the *MoD Guidelines*.

77. The same is not tenable as, the present is not a case where there has been initiation of enquiry or an investigation or an enquiry is ongoing. The



investigations concluded and resulted in charge-sheet being filed in FIR A0014 wherein Mr. Rishi has not been named. Even in respect of FIR A0004 where no charge-sheet has been filed, the investigation has been going on for more than ten years and a closure report has been filed.

78. Admittedly, the person i.e. Mr. Rishi against whom the allegations were initially made in the FIRs, has passed away. Criminality, if any, of the said individual, no longer would be determined even by the Id. Trial Court in view of the law laid down in *U. Subhadramma (Supra)* where the Hon'ble Supreme Court has held that criminal proceedings cannot continue against a dead person.

79. However, in the present case, the suspension, in effect has become indefinite. The same is untenable in law and the suspension at some point of time has to result in due process being followed for banning or has to be revoked. As held by the Supreme Court in *Kulja Industries Limited v. Chief Gen. manager W.T. Proj. BSNL & Ors., AIR 2014 SC9*, debarment is never permanent and the debarment would invariably depend upon the nature of the offence committed by the erring contractor. Even if defence procurement can stand on a different footing, there is no material to support the dispensing of the principles of natural justice completely.

80. The impact of the charge-sheet filed by the CBI as also the major development of the accused in respect of whom the Petitioner entity remained suspended, having passed away, ought to be considered by the Competent Authority.

81. In so far as the Clause C and D of the *MoD Guidelines* are concerned, while the Respondent shall be the appropriate authority to decide from whom to procure defence equipment in the interest of the nation and may enjoy the



right to suspend any party or person as an immediate measure owing to justifiable reasons as held in the judgment of the Delhi High Court in ***JBM Electric Vehicles (supra)***, in the facts of this case, the mere fact that it involves defence procurement, does not justify non-issuance of a show-cause notice. Within a reasonable period a show cause notice shall have to be issued. Thereafter, a reply be sought and if hearing is sought, the same may be granted. After hearing the parties, a reasoned order is to be passed by the Competent Authority. Thus, although Clause C and D of the *MoD Guidelines* are not declared unconstitutional. As held in ***INSAF (supra)***, they ought to be read in terms of paragraph 65 of this judgement in order to bring them into the four corners of law.

82. Accordingly, in the facts of this case and analysing the aforementioned decisions, the following directions are issued:

- i) A show cause notice shall be issued to the Petitioner within a period of 2 weeks from today setting out the reasons for banning, if any. In these facts, if the Respondent does not intend to ban the Petitioner, the same shall also be communicated to the Petitioner.
- ii) Any relevant material in respect of allegations against the Petitioner shall be put to the Petitioner along with the show cause notice.
- iii) An opportunity to reply shall be afforded to the Petitioner and if a hearing is sought, the same shall be granted.
- iii) After affording a hearing, a reasoned order shall be passed within 3 months.
- v) All remedies of the Petitioner are left open to be availed of in accordance with law.



83. The present writ petition along with all pending applications is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 05, 2023
Rahul/kt