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

Judgment reserved on: 06.10.2023

% **Judgment delivered on: 03.11.2023**

+ **W.P.(C) 8619/2023 and CM APPL. 32714/2023 & CM APPL. 36561/2023**

TPF ENGINEERING PVT LTD & ANR. Petitioners

Through: Mr. Darpan Wadhwa, Sr. Advocate with Mr. Malak Bhatt, Mr. Akash Singh, Ms. Neeha Nagpal, Mr.Siddharth Kumar, Ms. Ananya Kanoria, Ms. Divita Vyas and Mr.Amer Vaid, Advocates.

versus

NATIONAL HIGHWAYS LOGISTICS MANAGEMENT LIMITED & ANR. Respondents

Through: Mr. Arun Kumar Varma, Sr. Advocate with Mr. Vikas Goel, Mr.Abhishek Kumar, Mr. Vivek Gupta and Ms. Twinkle Kataria, Advocates for respondent No.1/ NHLML.
Mr. Bhagvan Swarup Shukla, CGSC and Mr. Sarvan Kumar, GP for respondent No.2/ UOI.

**CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA**



J U D G M E N T

SATISH CHANDRA SHARMA, C.J.

A. Introduction

1. The present writ petition emanates from the issuance of a letter issued by National Highway Logistics Management Limited (hereinafter “NHLML” or “**Respondent No. 1**”) whereby, TPF Engineering Private Limited (hereinafter “**TPFE**” or “**Petitioner**”) has been declared technically unresponsive; and has been disqualified from the tendering process of the Tender (*defined below*) on account of the extension / application of the Debarment Order (*defined below*) to the Petitioner.

B. Brief Facts

2. The Petitioner before this Court is a company engaged in construction of roads, bridges and other ancillary activities, and admittedly part of a conglomerate i.e., M/S TPF S.A. (“**TPFS**”), a consultancy firm with global presence.

3. The facts reveal that Respondent No. 1 issued a request for proposal dated 31.12.2022 for the purpose of *inter alia* the feasibility study for development of certain identified ropeway projects i.e., the Ropeway Projects (Bundle-3) (*as defined under the Tender*) (the “**RFP**” or “**Tender**”). Pertinently, the bids in relation to the Tender were invited in 2 (two) phases: (i) the technical bid; and (ii) the financial bid. Undisputedly, the Petitioner



and its joint-venture and / or consortium partner i.e., MDP Consulting submitted its technical bid in relation to the Tender.

4. On the other hand, *vide* a letter of debarment dated 05.06.2023 bearing number: DC/53/DraftTermination/NewAE/efile-201323, the National Highways Authority of India (“**NHAI**”) debarred M/S TPF Gentisa Eurustudios S.L (“**TPFG**”) for a period of 2 (two) years from the date of issue of the said order from participating in future national highway (“**NH**”) projects of the NHAI and / or the Ministry of Road Transport and Highways (“**MoRTH**”) or its executing agencies either directly or indirectly (the “**Debarment Order**”).

5. Pertinently, in the interregnum between the issuance of the Debarment Order and the declaration of the results of the technical evaluation of bids submitted in relation to the Tender as more particularly identified in Paragraph 6 of this Judgement below. Respondent No.1 by way of an email dated 12.06.2023 sought a clarification from the Petitioner in relation to the relationship between TPFG and the Petitioner by 3:00 PM on 13.06.2023 (the “**Query**”). The Petitioner responded to Query within the requisite time period *vide* a letter dated 13.06.2023 whereunder, the Petitioner clarified that the relationship between TPFG and the Petitioner is limited to that of a common majority shareholder i.e., TPFS; and further clarified that the management, structure and company administration of TPFG and the Petitioner is distinct, independent and separate from each other.

6. Thereafter Respondent No. 1 *vide* a letter dated 23.06.2023 declared (i) the result of the technical evaluation of the bid(s) in relation to the Tender



whereunder the Petitioner scored 96.05 points and found itself in the top 3 (three) amongst the 8 (eight) bidders; (ii) clarified that the financial bids of all technically responsive bidders in relation to the Tender were scheduled to be opened at 11:30 AM on 27.06.2023; and (iii) declared the Petitioner as disqualified on account of the Debarment Order read with a circular dated 04.01.2022 issued by MoRTH bearing number RW/NH- 33044/76/2021-S&R(P&B) framing *inter alia* standard operating procedures (“SOP”) whereunder any debarment order qua a non-performing firm, stands automatically extended to all ‘*allied firms*’ of the said non-performing firm i.e., herein the Petitioner was debarred on account of the Debarment Order passed in relation to TPFGE (the “**Circular**”) (the “**Impugned Letter**”).

7. Aggrieved by the Impugned Letter, the Petitioner has preferred this present writ petition seeking *inter alia* the quashing of the Impugned Letter; and a direction to treat the Petitioner as ‘technically responsive’ so as to enable the Petitioner to participate in the financial bidding process under the Tender.

C. Submissions on behalf of the Petitioner

8. Mr. Darpan Wadhwa, Senior Counsel appearing on behalf of the Petitioner has submitted before this Court that the Petitioner has been disqualified from the tendering process solely on account of Respondent No. 1 treating TPFGE as an ‘*allied firm*’ of the Petitioner on account of an interpretation of the Circular read with an Office Memorandum bearing number bearing No. F.1120/2018-PPD dated 02.11.2021, formulating



guidelines on ‘Debarment of Firms from Bidding’ issued by Department of Expenditure, Ministry of Finance, Procurement Policy Division (the “OM”).

9. In this regard it has been submitted that admittedly, TPFG and the Petitioner have the same holding company i.e., TPFS. However, TPFG was debarred *vide* the Debarment Order by a sister concern of the Respondent i.e., the NHAI and accordingly, the application of the said Debarment Order to the Tender issued by Respondent No. 1 relying on the OM and the Circular was without any foundation or in consonance with the terms or conditions of the Tender. Accordingly, it was submitted that the issuance of the Impugned Letter to the extent of disqualification was improper and ought not to be made the basis of disqualification of the Petitioner from the tendering process.

10. Furthermore, it has been reiterated that the reliance of Respondent No. 1 on the term ‘*allied firms*’ under Paragraph 3 of the OM is misplaced as the case herein does not pertain to a situation wherein either the Petitioner or its own holding company has been blacklisted, however this is a case wherein an ancillary company has been debarred and the same has been extended to the Petitioner i.e., the sole commonality between the Petitioner and TPFG is limited to that of a common majority shareholder / holding company. Accordingly, it is submitted that in the absence of a commonality qua management structure, administrative staff, managerial set-up or the workforce between the Petitioner and TPFG, the Petitioner could not have been classified as an ‘*allied firm*’ of TPFG. Reliance has also been placed on certain identified provisions of the Companies Act, 2013 (the “**Companies Act**”); the Income Tax Act, 1961 (the “**IT Act**”) to contrast the test(s) for



commonality between two identified persons to contend that TPFG and the Petitioner ought not be treated as ‘*allied firms*’ defined under Paragraph 3 of the OM. For ease of reference, the definition of ‘*allied firms*’ is reproduced hereunder:

“3. Allied firm: All concerns which come within the sphere of effective influence of the debarred firms shall be treated as allied firms. In determining this, the following factors may be taken into consideration:

- a. Whether the management is common;*
- b. Majority interest in the management is held by the partners or directors of banned/ suspended firm;*
- c. Substantial or majority shares are owned by the banned/ suspended firm and by virtue of this it has a controlling voice.*
- d. Directly or indirectly controls, or is controlled by or is under common control with another bidder.*
- e. All successor firms will also be considered as allied firms.”*

11. In this regard it has been submitted that the aforementioned definition is vague and contrary, and consequently the extension of the Debarment Order to the Petitioner is arbitrary and in contravention to Article 14 of the Constitution of India on account of the lack of any nexus between the Petitioner and the debarred firm i.e., TPFG.

12. Lastly, it has been contended before this Court that Respondent No. 1 could not have issued the Impugned Letter in the absence of affording the Petitioner an opportunity to be heard. Accordingly, it is submitted that the



actions of Respondent No. 1, are contrary to the well-established principles of natural justice. In this regard, reliance has been placed on:

- (i) ***Sunrise House Keeping & Support Services Private Limited v. Chandigarh Industrial & Tourism Development Corporation Limited & Anr.***, W.P. (C) 1879 of 2017 (P&H);
- (ii) ***Frontier Alloy Steels Ltd. v. Union of India***, 2007 SCC OnLine All 940;
- (iii) ***Pritam Singh & Sons v. State of Punjab***, 1996 SCC OnLine P&H 405;
- (iv) ***Roshni Enterprises v. Union of India***, 2011 SCC OnLine Del 2540;
- (v) ***Raghunath Thakur v. State of Bihar***, (1989) 1 SCC 229; and
- (vi) ***JBM Ecolife Mobility (P)Ltd. v. Union of India***, 2022 SCC OnLine Del 3350 (“***JBM Ecolife II***”).

D. Submissions on behalf of the Respondent(s)

13. Mr. Arun Kumar Varma, Senior Counsel appearing on behalf of Respondent No. 1 has submitted before this Court that the Petitioner i.e., National Highways Logistics Management Limited (previously known as Cochin Port Road Company Limited) is a wholly owned special purpose vehicle (“SPV”) of NHAI which was incorporated on 19.01.2004 under the Companies Act, 1956. Further, it is submitted that the MoRTH directed the implementation of multi-modal logistics parks (“MMLPs”), high connectivity to ports and other ancillary works through Respondent No. 1.



Accordingly, the Tender came to be issued under the *Parvatmala Pariyojana* by Respondent No. 1.

14. In this background, it has been contended before this Court that the Petitioner's contention qua the alleged violation of principles of natural justice in issuing the Impugned Letter is misguided as no contract has been entered into between the Petitioner (or its joint venture / consortium) and Respondent No. 1. Furthermore, Mr. Varma has placed reliance on Paragraph 5 of Appendix II of the RFP to contend that the Petitioner has waived its right to challenge the rejection of its bid. For ease of reference, on Paragraph 5 of Appendix II of the RFP is reproduced as under:

“5. I/We acknowledge the right of the authority to reject our application without assigning any reason or otherwise and hereby waive our right to challenge the same on any account whatsoever.”

15. Accordingly, it has been submitted that in light of the unambiguous terms of Clause 5 of Appendix II of the RFP; and in light of the well settled principle of law i.e., that the terms of a tender must be construed strictly, the contention of the Petitioner cannot be sustained in light of Petitioner waiving its right to challenge the rejection of its application / bid by Respondent No. 1. Furthermore, this Courts' attention has been drawn to Paragraph 14, Paragraph 15 and Paragraph 19 of the OM to contend that the question of affording an opportunity of hearing to the Petitioner simply does not arise when the OM categorically prohibits the issuance of contracts to *inter alia* 'allied firms' of debarred persons. Furthermore, he has also submitted that similarly, the revocation of a debarment order shall also apply immediately



and uniformly without affording the Respondent(s) an opportunity to contest the same. For ease of reference, Paragraph 14, Paragraph 15 and Paragraph 19 of the OM are reproduced hereunder:

“14. An order for debarment passed shall be deemed to have been automatically revoked on the expiry of that specified period and it will not be necessary to issue a specific formal order of revocation.

15. A debarment order may be revoked before the expiry of the Order, by the competent authority, if it is of the opinion that the disability already suffered is adequate in the circumstances of the case or for any other reason.

x x x

19. The Debarment shall be automatically extended to all its allied firms. In case of joint venture/ consortium is debarred all partners will also stand debarred for the period specified in Debarment Order. The names of partners should be clearly specified in the "Debarment Order".”

16. It was submitted that, in the aforementioned context, Respondent No. 1 dispensed with granting the Petitioner an opportunity of being heard as the same would be reduced to a mere formality. Reliance in this regard has been placed on a decision of this Court in ***JBM Ecolife Mobility (P) Ltd. v. Union of India***, 2022 SCC OnLine Del 1397.

17. Thereafter, Mr. Varma has vehemently contended that the issuance of the Impugned Letter cannot be faulted, especially on account of a common holding company between the Petitioner and TPFPG i.e., a fact that has not been disputed by the Petitioner, which would result in the Petitioner being



treated as an ‘*allied firms*’ under Paragraph 3 of the OM. Furthermore, it has been submitted that the said definition is merely indicative, not determinative and accordingly, the reliance placed by the Petitioner on the provisions of the Companies Act and IT Act to restrict the latitude of the debarment order is misguided on account of a clear policy decision to restrict business dealings with non-performers and its allied firms. Additionally, it has been submitted that the aforementioned policy decision is reflected under Clause 1.4 of the Tender whereunder the Petitioner would have been rendered ineligible. The same reads as under:

“1.4 The Consultants may apply either as a sole firm or forming Joint Venture with other consultants. In case of Joint Venture, the maximum number of Joint Venture partners is limited to three including Associate partner, if any (i.e. Case 1: one lead + JV 1 +JV 2 or Case 2: one Lead + one JV partner + one Associate partner). The Applicant whether a sole applicant or joint venture may include an Associate company also. Any entity which has been barred by the Ministry of Road Transport and Highways (MORTH) or its implementing agencies for the works of Expressways, National Highways, ISC, EI Works and any other work being carried by MoRTH/ NHAT NHIDCL/ NHLML and the bar subsists as on the date of application, would not be eligible to submit the bid, either individually or as a member of a Joint Venture.”

18. Lastly, it has been submitted that not only is the holding company a commonality between the Petitioner and TPFPG but the Board of Directors of both companies also feature a common director. Accordingly, the contention raised by the Petitioner qua the erroneous treatment of the Petitioner as an allied firm of TPFPG ought to be rejected.



19. In rejoinder, Mr. Wadhwa has submitted that the prohibition under Clause 1.4 of the Tender could not have been agitated against the Petitioner, as on the date of submission of bids, no Debarment Order subsisted against even TPFG; and that on account of a single common director, the management could not be said to be common.

E. Analysis & Findings

20. This court has heard the Learned Counsel(s) appearing on behalf of the parties and perused the record.

21. Pertinently, as a precursor, it would be relevant to reiterate that this Court passed an interim order dated 28.06.2023, in the present writ petition whereunder Respondent No. 1 had been directed to consider the Petitioner's technical and financial bid on merits subject to the outcome of the present petition. Thereafter, *vide* an order dated 20.07.2023, the Respondents were directed to open the financial bids received in the Tender and present the results to this Court in a sealed cover. On 25.07.2023, the Petitioner was identified as H-1 in relation to Package No. 2 (*as defined under the Tender*) and accordingly, this writ petition now stands confined to the abovementioned section of the Tender.

22. Undisputedly, the Petitioner participated in the tendering process pursuant to the Tender and successfully submitted its bid. Thereafter, on 12.06.2023, Respondent No. 1 *vide* the Query sought certain clarifications in relation to the nature of the relationship between the Petitioner and TPFG i.e. a company that had since been debarred by the NHAI. In furtherance of the Query, the Petitioner *vide* a letter dated 13.06.2023, delineated the nature



of the relationship between the Petitioner; and TPFG. Pertinently, it was disclosed that the two companies shared a common majority shareholder / holding company. The shareholding of (i) the Petitioner; and (ii) TPFG are reproduced below:

M/s. TPF Engineering Pvt. Ltd.	
Name of the Shareholder	% of shareholding
M/s. TPF SA	51.00%
Atul Damodar Bhobe	49.00%
TOTAL	100.00%

M/s. TPF Getinsa Euroestudios S.L.	
Name of the Shareholder	% of shareholding
M/s. TPF SA	98.19%
Gregorio Lopez Vallejo	00.75%
Jonathon Morgan	00.76%
Ahmed El Khadri	00.07%
Jose Manual Ballesteros Lopez	00.23%
TOTAL	100.00%

23. Subsequently, the Impugned Letter came to be issued whereunder *inter alia* the Petitioner was (i) declared technically unresponsive; and (ii) disqualified from the tendering process of the Tender by extending the application of Debarment Order upon the Petitioner on account of the guidelines framed under the SOP; and the Circular whereunder a debarment order automatically stands extended to all '*allied firms*' of such debarred firm. Aggrieved by the issuance of the Impugned Letter, the Petitioner has filed this present writ petition.

24. The fulcrum of the dispute before this Court is whether the Petitioner could be classified as an '*allied firm*' of the TPFG and accordingly could be disqualified from the tendering process of the Tender.



25. At the outset it would be relevant to refer to the OM issued by Department of Expenditure, Ministry of Finance, Procurement Policy Division whereunder the capitalised term(s) ‘*Allied Firms*’ and ‘*Firm*’ have been defined. Upon a perusal of the definition of the capitalised term ‘*Allied Firms*’ and ‘*Firm*’ defined under Paragraph 3 of the OM, this Court is of the considered opinion that, the said term is inclusive so as to extend to firms which may ‘be controlled by’; or under the ‘common control of’ a particular person. Pertinently, a parallel may be drawn against Section 2(76) of the Companies Act whereunder, the capitalised term ‘*Related Party*’ has been defined to include “*a subsidiary of the same holding company*”. For ease of reference Section 2(76) of the Companies Act is reproduced as under:

“2. (76) “*related party*”, with reference to a company, means—

(i) *a director or his relative;*

(ii) *a key managerial personnel or his relative;*

(iii) *a firm, in which a director, manager or his relative is a partner;*

(iv) *a private company in which a director or manager is a member or director;*

(v) *a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. of its paid-up share capital;*

(vi) *any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;*

(vii) *any person on whose advice, directions or instructions a director or manager is accustomed to act:*



Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is—

(A) a holding, subsidiary or an associate company of such company; or

(B) a subsidiary of a holding company to which it is also a subsidiary;

(ix) such other person as may be prescribed;”

26. Accordingly, in light of the language of the OM whereunder the term ‘allied firms’ has been defined; this Court is of the considered opinion that a firm which is controlled by a common parent or a holding company or is controlled by a subsidiary or under the common control with another related party would satisfy the definition of allied firms. Accordingly, as TPFS exercises “common ownership interest” (*defined under the Tender*) in both the Petitioner; and TPFG both TPFG and the Petitioner have rightly been treated as allied firms / related parties by Respondent No. 1.

27. Therefore, this Court must now consider whether Respondent No. 1 could have disqualified the Petitioner on account of it being an ‘*allied firm*’ of TPFG. Pertinently, TPFG was debarred *vide* the Debarment Order, thereafter, *vide* the issuance of the Impugned Letter, the application of the Debarment Order was extended to the Petitioner. As we have already held hereinabove, that the Petitioner was rightly treated as an *allied firm*, accordingly, the question before this Court is whether the extension of the Debarment Order under Paragraph 9.3 of the Circular to the Tender was



proper. For ease of reference Paragraph 9.3 of the Circular is reproduced as under:

“9.3 Debarment/declaration as non-performer of a particular firm shall automatically extend to all its allied firms. In case a joint venture/ consortium is debarred, all partners/members shall stand debarred for the entire period.”

28. Upon, a perusal of the aforementioned circular, the application of the Debarment Order is deemed to automatically extend to all its *allied firms*. Under Paragraph 9.3 of the Circular, the Debarment Order is self-activating qua the Petitioner herein and therefore it would naturally restrain the Petitioner from participating in future NH projects of NHAI / MoRTH or its executing agencies either directly or indirectly.

29. In the context, it would be relevant to note that Tender was issued by Respondent No. 1 under the *Parvatmala Pariyojana* formulated by the MoRTH. Undoubtedly, Respondent No. 1 is an executing agency of the NHAI / MoRTH which has as per the counter affidavit filed by Respondent No. 1, has been incorporated as a SPV of NHAI for the implementation of *inter alia* MMLPs, high connectivity to ports and other ancillary works.

30. Accordingly, the application of the Debarment Order to the Tender must be tested against the anvil of Paragraph 9.3 of the Circular and the terms and conditions of the Tender. In this background, it would be pertinent to note that Paragraph 9.3 of the Circular contemplates an automatic or self-activating extension of an order of debarment to *allied firms* of the debarred entity. Furthermore, Paragraph 12 of the Debarment Order contemplates a prospective prohibition from participation in NH projects of NHAI /



MoRTH or its executing agencies either directly or indirectly. Furthermore, Clause 1.4 of the Tender clarifies that a prospective bidder would have been deemed ineligible to submit its bid in the event that an order of debarment operated against such prospective bidder as on date of the application. The relevant extracts of the Debarment Order; and the Tender are reproduced as under:

(i) Relevant Paragraph of the Debarment Order:

“12. In view of the above and in accordance with St. No. 3 (a) Et (e) of table given in Para-4.1 NHAI Policy Circular no. 16.12 dated 18.01.2022, the Competent Authority has approved the debarment of the Consultant i.e. TPF Getinsa Eurostudios S.L. and Segmental Consulting Et Infrastructure Advisory (P) Ltd. for a period of 2(two) years from the date of issue of this Order from participating in future NH projects of NHAI/MoRTH or its executing agencies either directly or indirectly.”

(ii) Relevant Clause of the Tender:

“1.4 The Consultants may apply either as a sole firm or forming Joint Venture with other consultants. In case of Joint Venture, the maximum number of Joint Venture partners is limited to three including Associate partner, if any (i.e. Case 1: one lead + JV 1 +JV 2 or Case 2: one Lead + one JV partner + one Associate partner). The Applicant whether a sole applicant or joint venture may include an Associate company also. Any entity which has been barred by the Ministry of Road Transport and Highways (MORTH) or its implementing agencies for the works of Expressways, National Highways, ISC, EI Works and any other work being carried by MoRTH/ NHAI NHIDCL/ NHLML and the bar subsists as on the date of application, would not be eligible to submit the bid, either individually or as a member of a Joint Venture.”



31. Admittedly, the Tender was issued on 31.12.2023, thereafter the Petitioner submitted its bid on 22.03.2023; and subsequently on 11.05.2023, the Petitioner was found to be technically qualified in respect of the Tender. However, *vide* the Impugned Letter, the Petitioner was *inter alia* disqualified from the tendering process of the Tender on account Clause 1.4 of Tender; Paragraph 9.3 of the Circular; read with the Debarment Order.

32. Therefore, this Court must consider whether the rigors under Clause 1.4 of the Tender would only apply in the event a Debarment Order subsist on the date of the application i.e., which as per the Petitioner must be interpreted to mean that an order of debarment must subsist as on the date of submission of the bid; or whether the rigors of Clause 1.4 of the Tender could be invoked through the various stages of tendering process prior to the issuance of the Letter of Allotment (“LoA”), as contended by Respondent No. 1. In this regard, it would be necessary to refer to certain decisions of the Hon’ble Supreme Court of India (the “**Supreme Court**”) in relation to scope of judicial review in the interpretation of a tender document.

33. The Supreme Court in *Agmatel India (P) Ltd. Vs. Resoursys Telecom*, (2022) 5 SCC 362, has analysed the scope of judicial review in contractual matters, particularly in relation to the process of interpretation of a tender document. Accordingly, the Supreme Court in *Agmatel India (P) Ltd. (Supra)* relying on *Galaxy Transport Agencies Vs. New J.K. Roadways, Fleet Owners & Transport Contractors*, (2021) 16 SCC 808; *Montecarlo Ltd. v. NTPC Ltd.*, (2016) 15 SCC 272; and *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818, held as under:



“26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.”

34. Moreover in, ***Silppi Constructions Contractors v. Union of India***, (2020) 16 SCC 489 the Supreme Court observed as under:

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted.



If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

35. Lastly, the Supreme Court in **Michigan Rubber (India) Ltd. v. State of Karnataka**, (2012) 8 SCC 216 enunciated principles warranting judicial interference in contractual matters involving the State, the same are reproduced as under:

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is



proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:



- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached? and*
- (ii) Whether the public interest is affected?*

If the answers to the above questions are in the negative, then there should be no interference under Article 226.”

36. Accordingly, the extension of the Debarment Order to the Tender qua the Petitioner and the consequent disqualification of the Petitioner from the Tender must be considered in this narrow scope of judicial review so as to determine whether the interpretation of Clause 1.4 of the Tender adopted by Respondent No. 1 was arbitrary, irrational, biased, mala fide or perverse. In the considered opinion of this Court, the interpretation of the Tender adopted by Respondent No. 1, is manifestly in consonance with the language adopted under the Tender. The interpretation of Clause 1.4 of the Tender advanced by the Ld. Counsel appearing on behalf of the Petitioner would frustrate the object of the Debarment Order. On the other hand, the interpretation adopted by Respondent No.1 cannot be faulted for being irrational, whimsical and / or arbitrary as the extension of the Debarment Order to the Petitioner qua the Tender is in consonance with the underlying



policy considerations of the tendering authority i.e., limiting exposure of the State exchequer to non-performers and their allied firms / related parties. In this background, Respondent No. 1 has undoubtedly, acted reasonably, fairly and above all, in public interest.

37. In this context, we are unable to accept the arguments of the Petitioner vis-à-vis the restrictive interpretation of Clause 1.4 of the Tender. Such an interpretation would amount to permitting the Petitioner to continue in the tendering process of the Tender while the Debarment Order is in operation against it. Debarring an entity from participation in participation in NH projects of NHAI / MoRTH or its executing agencies either directly or indirectly cannot be limited to mean only debarment from submission of a bid but would naturally include all other subsequent stages of the tendering process culminating into an award of a contract.

38. Accordingly, following the decisions of the Supreme Court as more particularly outlined above, this Court finds no infirmity qua the interpretation of the terms and conditions of the Tender and consequently, the issuance of the Impugned Letter to the Petitioner, thereby disqualifying the Petitioner from the tendering process of the Tender.

39. We must now turn to another facet of the present dispute before us. Mr. Wadhwa, has framed in essence the following questions for our considerations whether (i) the Petitioner was independently required to be afforded an opportunity of hearing before the application / extension of the Debarment Order; and (ii) whether the issuance of the Impugned Letter is liable to be interfered with consequent to a failure on the part of the



Respondent No. 1 to have provided that opportunity of hearing to the Petitioner.

40. Undisputedly, as observed in the Debarment Order, TPFPG was provided with multiple opportunities to refute all the allegations levelled against it and show cause as to why disciplinary action should not be taken against it. Moreover, the said opportunities were availed by TPFPG who has *inter alia vide* a letter bearing number: 225 dated 14.03.2023 submitted its clarifications which have been duly considered by the NHAI prior to the issuance of the Debarment Order. Furthermore, prior to the issuance of the Impugned Letter, *vide* an email dated 12.06.2023, Respondent No. 1 called upon the Petitioner to explain its relationship with TPFPG i.e., the debarred entity. *Vide* a letter dated 13.06.2023 issued to Respondent No.1, the Petitioner disclosed that it shared a common holding company with TPFPG. Thereafter, the Impugned Letter came to be issued as a consequence of the Debarment Order issued in favor of TPFPG. As observed herein above, the extension of the Debarment Order qua an allied firm i.e., the Petitioner herein is an automatic and inevitable consequence of an order of debarment being issued to an allied firm / related party. Accordingly, it is in this background that the contravention of principles of natural justice would have to be considered.

41. It would be pertinent to refer to the decision of the Supreme Court in ***Dharampal Satyapal Ltd. v. CCE***, (2015) 8 SCC 519, wherein, the Supreme Court has appreciated the underlying historical context qua principles of natural justice; and thereafter went onto observe that the principles of natural justice cannot be applied in a straitjacket formula whilst appreciating (i) the



rule of prejudice; and (ii) useless formality exception . The relevant extracts of *Dharampal Satyapal (Supra)* have been reproduced below:

“19. What is the genesis behind this requirement? Why it is necessary that before an adverse action is taken against a person he is to be given notice about the proposed action and be heard in the matter? Why is it treated as inseparable and inextricable part of the doctrine of principles of natural justice?”

20. Natural justice is an expression of English Common Law. Natural justice is not a single theory—it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural justice. It is also called “naturalist” approach to the phrase “natural justice” and is related to “moral naturalism”. Moral naturalism captures the essence of commonsense morality—that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.

*21. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision-making by judicial and quasi-judicial bodies, has assumed a different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must give (sic an opportunity) to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as “natural justice”. The principles of natural justice developed over a period of time and which is still in vogue and valid even today are : (i) rule against bias i.e. *nemo debet esse judex in propria sua causa*; and (ii) opportunity of being heard to the party concerned i.e. *audi**



alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is the duty to give reasons in support of decision, namely, passing of a “reasoned order”.

24. The principles have a sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide a great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take an administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision-making that a decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.

25. This aspect of procedural fairness, namely, right to a fair hearing, would mandate what is literally known as “hearing the other side”. Prof. D.J. Galligan [On “Procedural Fairness” in Birks (Ed.), The Frontiers of Liability, Vol. 1 (Oxford 1994)] attempts to provide what he calls “a general theory of fair treatment” by exploring what it is that legal rules requiring procedural fairness might seek to achieve. He underlines the importance of arriving at correct decisions, which is not possible without adopting the aforesaid procedural fairness, by emphasising that taking of correct decisions would demonstrate that the system is working well. On the other hand, if mistakes are committed leading to incorrect decisions, it would mean that the system is not working well and the social good is to that extent diminished. The rule of procedure is to see that the law is applied accurately and, as a consequence, that the social good is realised. For taking this view, Galligan took support from Bentham [A Treatise of Judicial Evidence (London 1825)] , who wrote at length about the need to follow such principles of natural justice in civil and criminal trials and insisted that the said theory developed by Bentham can be transposed to other



forms of decision-making as well. This jurisprudence of advancing social good by adhering to the principles of natural justice and arriving at correct decisions is explained by Galligan in the following words:

“On this approach, the value of legal procedures is judged according to their contribution to general social goals. The object is to advance certain social goals, whether through administrative processes, or through the civil or criminal trial. The law and its processes are simply instruments for achieving some social good as determined from time to time by the law-makers of the society. Each case is an instance in achieving the general goal, and a mistaken decision, whether to the benefit or the detriment of a particular person, is simply a failure to achieve the general good in that case. At this level of understanding, judgments of fairness have no place, for all that matters is whether the social good, as expressed through laws, is effectively achieved.”

Galligan also takes the idea of fair treatment to a second level of understanding, namely, pursuit of common good involves the distribution of benefits and burdens, advantages and disadvantages to individuals (or groups). According to him, principles of justice are the subject-matter of fair treatment. However, that aspect need not be dilated upon.

38. But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may



not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

*39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason—perhaps because the evidence against the individual is thought to be utterly compelling—it is felt that a fair hearing “would make no difference”—meaning that a hearing would not change the ultimate conclusion reached by the decision-maker—then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in *Malloch v. Aberdeen Corpn.* [(1971) 1 WLR 1578 : (1971) 2 All ER 1278 (HL)] , who said that : (WLR p. 1595 : All ER p. 1294)*

“... A breach of procedure ... cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain.”



Relying on these comments, Brandon L.J. opined in Cinnamon v. British Airports Authority [(1980) 1 WLR 582 : (1980) 2 All ER 368 (CA)] that : (WLR p. 593 : All ER p. 377)

“... no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing.”

In such situations, fair procedures appear to serve no purpose since the “right” result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of “prejudice”. The ultimate test is always the same viz. the test of prejudice or the test of fair hearing.

47. In Escorts Farms Ltd. v. Commr. [(2004) 4 SCC 281] , this Court, while reiterating the position that rules of natural justice are to be followed for doing substantial justice, held that, at the same time, it would be of no use if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. It was so explained in the following terms : (SCC pp. 309-10, para 64)

“64. Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory procedure prescribed and violation of rules of natural justice. In these appeals



preferred by the holder of lands and some other transferees, we have found that the terms of government grant did not permit transfers of land without permission of the State as grantor. Remand of cases of a group of transferees who were not heard, would, therefore, be of no legal consequence, more so, when on this legal question all affected parties have got full opportunity of hearing before the High Court and in this appeal before this Court. Rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. In view of the legal position explained by us above, we, therefore, refrain from remanding these cases in exercise of our discretionary powers under Article 136 of the Constitution of India.”

48. Therefore, on the facts of this case, we are of the opinion that non-issuance of notice before sending communication dated 23-6-2003 has not resulted in any prejudice to the appellant and it may not be feasible to direct the respondents to take fresh action after issuing notice as that would be a mere formality.”

42. Furthermore, the Supreme Court in ***State of U.P. v. Sudhir Kumar Singh***, 2020 SCC OnLine SC 847 enunciated certain principles in relation to interference by Courts in matters claiming the contravention of principles of natural justice. Pertinently, the Supreme Court in ***Sudhir Kumar Singh (Supra)*** observed as under:

“39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.



(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The “prejudice” exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.”

43. Accordingly, as the Petitioner was afforded an opportunity to explain its relationship with TPF; and in light of the admission by Petitioner qua the relationship between itself and TPF i.e., subsidiaries of a common holding company, this Court is of the considered opinion that, an additional opportunity of hearing prior to the issuance of the Impugned Letter would necessarily be reduced to a mere ritual / useless formality. Furthermore, in light of Clause 9.3 of the Circular read with Paragraph 3 of the OM whereunder once the relationship between Petitioner and TPF has been



admitted to include a common holding company the classification of the Petitioner as an allied firms / related party, the extension of the Debarment Order is a natural, self-activating, automatic and invariable consequence, accordingly, no fruitful purpose would have been served by extending the Petitioner an additional opportunity of hearing.

44. Therefore, following the aforementioned decisions of the Supreme Court and in light of the admitted position vis-à-vis TPF; and the Petitioner, this Court does not consider it necessary to exercise its jurisdiction under Article 226 of the Constitution of India in relation to the non-observance of natural justice particularly in light of the unambiguous terms of the OM and the Circular as more particularly identified above.

45. Before we conclude we must also deal with the judgements cited by Mr. Wadhwa in relation to the application of principles of natural justice to the case herein.

46. Firstly, reliance was placed on *Sunrise House Keeping & Support Services Private Limited (Supra)* to contend that the Petitioner could not have been disqualified by Respondent No. 1 merely on account of TPF being disqualified in the absence of a prior opportunity of hearing. Pertinently in the said case, the Chandigarh Industrial & Tourism Development Corporation Limited issued a tender in relation to mechanized cleaning services however, it went on to blacklist the petitioner therein by piercing the corporate veil i.e., by identifying common directors between the blacklisted firm and the petitioner therein to justify the extension of the blacklisting in the absence of any policy or guidelines mandating such a



procedure. In the considered opinion of this Court, the said case is distinguishable on facts, as the facts of the present case reveal that a duly formulated policy had been enacted whereby a debarment order is extended to ‘*allied firms*’ of a debarred firm.

47. Secondly, reliance was placed on ***Frontier Alloy Steels Ltd. (Supra)*** and ***Roshni Enterprises (Supra)*** to contend that principles of natural justice demanded that prior to the determination of the Petitioner as an ‘*allied firm*’ of the debarred entity, an opportunity of hearing ought to have been provided. In the present case, the Petitioner pursuant to the Query, disclosed that it shared a common holding company with the debarred entity i.e., TPFGE. Accordingly, once the relationship is admitted and the said relationship satisfied the definition of ‘*allied firms*’ the question of a further opportunity of hearing became immaterial. Therefore, the reliance placed by the Petitioner on the aforementioned cases is misguided and does not assist the Petitioner herein.

48. Thirdly, reliance on ***Pritam Singh (Supra)*** is misdirected as the said case pertains to the blacklisting of firms by way of a non-speaking; and unreasoned order. In the present case, neither has the Petitioner been blacklisted nor is the Impugned Letter and / or Debarment Order non-speaking or unreasoned. Accordingly, the reliance placed ***Pritam Singh (Supra)*** would not assist the Petitioner herein.

49. Fourthly, the reliance was placed on ***Raghunath Thakur (Supra)*** is erroneous as the observations of the Supreme Court were made in relation to providing the primary entity an opportunity of hearing and accordingly, has



no weight in the present case wherein TPGF i.e., the debarred entity has been afforded multiple opportunities of hearing prior to the issuance of the Debarment Order.

50. Finally, reliance was placed on *JBM Ecolife II*, however the said case is distinguishable on facts as therein the primary debarment order was set aside and accordingly, the subsequent order i.e., extending the primary debarment order to the sister concern / allied firm was also set aside. In the present case, the factual matrix does not envisage the primary Debarment Order being set aside.

Conclusion

51. For the foregoing reasons, we find that the Petitioner has been unable to make out a case warranting interference of this Court under Article 226 of the Constitution of India.

52. The writ petition is, accordingly, dismissed.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SANJEEV NARULA)
JUDGE

NOVEMBER 03, 2023