



\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

**Reserved on: 01st December, 2023
Pronounced on: 06th December, 2023**

+

LPA 672/2023, CM APPL. 50867-69/2023, and 54218-19/2023**DEFSYS SOLUTIONS PRIVATE LIMITED**

..... Appellant

versus

UNION OF INDIA

..... Respondent

+

LPA 682/2023, CM APPL. 51678-51679/2023**UNION OF INDIA**

..... Appellant

versus

DEFSYS SOLUTIONS PRIVATE LIMITED

..... Respondent

Advocates appearing for the parties:-

Mr.Mukul Rohatgi, Mr.Rajiv Nayyar, Mr.Sandeep Sethi and Mr. Rajshekhar Rao, Senior Advocates with Mr.Mahesh Aggarwal, Mr.Pawan Sharma, Mr.Rishi Agarwal, Maj.Nirvikar Singh, Mr.Aditya Chatterjee, Mr.Parminder Singh, Ms.Devika Mohan, Mr. Ankit Banati, Mr. Sharvan Niranjan, Ms.Tarini Khurana, Mr.Rishabh Sharma, Mr.Abhay Agnihotri, Mr.Vikram Choudhary, Ms.Riya Kumar, Mr. Sumer Dev Seth, Ms. Shreya Sethi, Mr. Harshil Wason and Ms.Vaishali Joshi, Advocates, for *Defsys Solutions Private Limited*.

Mr. Chetan Sharma, ASG and Mr. Kirtiman Singh, CGSC with Ms. Vidhi Jain, Mr. Waize Ali Noor, Mr. Amit Gupta, Mr. R.V. Prabhat, Mr. Vinay Yadav and Mr. Vikramaditya Singh, Advocates for *UOI*.



CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

YOGESH KHANNA, J.

1. LPA 672/2023 and LPA 682/2023 are filed challenging the same impugned order dated 05.09.2023 passed by the learned single Judge. The brief facts are: On 08.01.2007 the appellant company was incorporated and has been regular supplier to the Government of India for its requirements in the armed forces for being one of the foremost and sought after suppliers in the Indian private sector defence industry. Mr.Sushen Gupta, was appointed as director of the appellant in the year 2013 and thereafter he ceased to be a director by 2018. Many contracts were issued to the appellant between the year 2018-21 by the respondent. On 09.12.2022 the appellant was surprised to learn from the press reports, the respondent had passed an order suspending the appellant from all business dealings with respondent No.1. It was purported this was due to an ex-director of the appellant having been involved in the Augusta Westland case. The suspension order was not served upon the appellant and till date has not been provided to the appellant.

2. On 15.12.2022 the appellant addressed a representation to the respondent citing rules of natural justice but no response was received from the respondent. The appellant challenged the suspension order in W.P.(C)17456/2022. On 23.12.2022 during the pendency of the writ petition the learned Single Judge passed an interim order granting relief to the petitioner in relations to the existing contracts between the appellant and the



respondent, based on respondent's statement the ongoing contracts would not be affected. On 05.09.2023 the learned Single Judge passed the judgment in W.P.(C)17456/2022 wherein it found the suspension was based in violation of principles of natural justice but it failed to quash it and instead directed the respondent to issue a show cause notice and dispose of the issuance of suspension after giving a hearing. On 19.09.2023 without prejudice, an application CM.APPL.48747/2023 was moved by the appellant seeking to clarify the continuation of the suspension order, but no clarification was ever issued. Hence this appeal.

3. It is submitted the suspension order dated 09.12.2022 was passed only on a direct intimation received from the CBI seeking certain queries from one of the directors of the appellant and it was not a reasoned order. It is stated Augusta Westland case is pending for the last ten years. The FIR in the said case was registered on 12.02.2013 and on 06.09.2017 first chargesheet was filed against 12 persons. On 17.09.2020 first supplementary chargesheet was filed against 15 persons and on 15.03.2022 second supplementary chargesheet was filed against 5 more accused persons. The said FIR is pending trial.

4. A notice was issued by CBI on 13.01.2023 under Section 160 Cr.P.C. seeking certain queries. The reply was given on 18.01.2023 by the appellant stating inter alia they have nothing to do with Augusta Westland case or its sister concerns, but despite the suspension order was never revoked. The second notice was issued on 16.01.2023 under Section 91 of the Cr.P.C. It is submitted the appellant is not an accused in said FIR and rather the main accused viz. Augusta Westland is not under suspension. The Government of India is still doing business with the said company.



5. The crux of the impugned order dated 05.09.2023 is *per* preamble the concerned authority shall ensure fairness, impartiality, rigour and correctness in dealing with the entities keeping in view of the overall interest of the country; Ministry of Defence guidelines contemplate two broad types of actions viz. banning and financial penalties and it also permits suspension under the broad umbrella of banning; The provisions of suspension and banning are clauses C, D and F of the said Guidelines which have been discussed in the impugned order; as per clause C1(d) and (f), the suspension can be if the national security consideration so warrant and/or any other ground for which the competent authority may determine that suspension shall be in the public interest; D2 says suspension can be ordered *when intimation is received regarding initiation of criminal investigation or enquiry against any entity*; the cause of suspension/banning and financial penalties has to fall in any of the six grounds enumerated in clause C1(a) to (f) of the Ministry of Defence guidelines; the intimation to the CBI/other investigating agency by the Ministry or any intimation received from the CBI or other agencies in terms of clause D2 would necessarily have to relate to the grounds mentioned under clause C1(a) to (f); it is not in all circumstances mandatorily for a party to be suspended merely on an intimation received and the same should 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*; the procedure for penal action in para nos.8 and 9 stipulates the suspension does not require a show cause notice; clause D3 says suspension of an entity *can be beyond the period of one year* and the order of competent authority for subsequent periods of six months each and the



total period of suspension shall not exceed the maximum period of banning of business dealings with an entity for the same cause of action; the procedure contemplate the proceedings can be initiated without resorting to suspension and in case of suspension the same can be directed without issuance of a show cause notice; 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; there is a lack of clarity as to various periods of suspension or banning and the suspension of any entity can be indefinite, without show cause notice; without giving an opportunity of reply and without any grounds being provided and hence it is not within the spirit of fairness, impartial, rigour and correctness as contemplated in the Ministry of Defence guidelines; there need to be a clarity in terms of substantive powers of the competent authority as also procedure in these documents and there should be a public 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; it is only when the national security concern overweigh the duty of fairness the said procedure can be given a go by, but there must be some material justification for such non grant; indefinite suspension without resort to the safeguards prescribed for banning would not be permissible since the period of suspension is included within the maximum banning period as per clause F.3; it is only when the national interest overweigh the duty of fairness 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 there would be



national security considerations, justifying non-grant of opportunity of reply or hearing; the stand of respondent no.1 that suspension can extend till the maximum period of ban would lead to complete unsustainable conclusion that in effect suspension can be indefinite; the period of suspension and banning cannot be indefinite in unless in exceptional circumstances.

6. The Court also took note of the fact the Government of India is dealing with the petitioner in other contracts and even the suspension of Augusta Westland has since been revoked and thus there is no reason why the suspension in the present case of the appellant would be indefinite.

7. The Court had read the principles of fairness in suspension *primarily* because of two reasons *a)* the suspension in the facts of case can be indefinite and *b)* even at the stage of review no opportunity of hearing is afforded. The Court rather observed the suspension cannot be *indefinite* and at some point of time has to result in *due process being followed for banning or has to be revoked*.

8. The argument of the learned senior counsel for the UoI/respondent is based *primarily* on two grounds *a)* the suspension does not require any show cause notice and *b)* they have no access to the material of investigation and even if they had it they would not be able to disclose it to the appellant herein.

9. Regarding *a)* above, the learned senior counsel for the respondent has relied upon *Bhim Sen Singh vs. University of Delhi and Ors.* MANU/DE/0480/2013 to say since *an order of suspension is not a penalty or substantive punishment, it does not attract the provision of Article 311 of the Constitution of India and thus no show cause notice is required to be issued before imposing the same*. The learned counsel for the respondent



also relied upon *Mayuranathan vs. State of Kerala and Ors.* MANU/KE/0216/1960 wherein *the Court after examining several other cases observed it has been uniformly held by the different High Courts that no prior notice is necessary to validate the same* (viz. show cause before suspension). Reference was also made to *Peethambara Granite Gwalior vs. State of Madhya Pradesh* MANU/MP/1605/2020 wherein the Court held *conceptually the power of suspension to be exercised in any field be it mines and minerals, services etc. does not depend upon the principle of audi alterm partem as a condition precedent.*

10. We are not inclined to deliberate upon the judgments so referred to above by the learned senior counsel for the respondent as the learned single Judge had not declared the initial suspension in the absence of show cause notice is void. The only issue before us is whether the principle of natural justice are to be applied in cases where suspension is *indefinite*. We fully agree with the view taken by the learned single Judge that no suspension can be indefinite, especially in view of the fact that even at the time of review, such principles are not to be adhered to. We thus find no illegality to this part of the order passed by the learned single Judge.

11. Qua **b)** it was argued the suspension of business dealings against the entity on receipt of an intimation regarding initiation of criminal investigation or inquiry against such entity is a well established and well known ground for suspension and also is provided for in D.2 of the guidelines dated 21.11.2016 and the appellant is not required to and even otherwise may not examine the merits of investigation being carried out by the CBI in relation to the Augusta Westland VVIP Helicopter case. Reference was made to *A.K.K.Nambiar vs. Union of India* AIR 1970 SC 652



where the Court held *it was not concerned with the correctness and propriety of the CBI report and that it has only to examine whether the order of suspension was warranted by the rule and also whether it was in honest exercise of powers and the order of suspension satisfied both the test in the said case. A.K.K.(supra) also deals with initial suspension.*

12. The learned counsel for respondent then referred to *Trident Infosol Pvt. Ltd. vs. Union of India and Others* 2022 SCC OnLine Delhi 2314 wherein the validity of a condition of tender makes ineligible a prospective bidder against whom any enquiry is going on by the CBI/ED or any of the Government agency came up for consideration, the Court after detailed consideration *said the condition is not bad in law or violative of Article 14 of the Constitution of India.*

13. It was argued the parameters of scrutiny would vary keeping in mind the nature and subject of procurement and since the present case concerns defence procurement cannot be equated with the ordinary tender process. The respondents are thus aggrieved of the fact the learned single Judge has asked them to critically examine the nature of investigation and discuss the material available with them qua investigation and considering the reply given by the respondent, pass a reasoned order.

14. We are not inclined to buy this argument of respondents in view of peculiar facts of this case since investigation is going on against some other accused not related to parties, since 2013 and there being no clarity as to when it shall complete. The remedy suggested by the respondent that the petitioner should approach the State for expeditious completion of investigation and not for quashing of suspension order, would not be feasible in view of the fact there seems to be no end to the investigation



since 2013.

15. On the other hand the learned senior counsel for the appellant argues the entire judgment is in favour of the appellant herein and it seeks to confirm that no case of suspension is made out and the order of suspension does not disclose *how the queries made by the CBI would affect the national security*. Hence while ordering for a fresh *Show Cause Notice* suspension ought to have been revoked. It was argued when the accused in Augusta Westland case is allowed to do business, the petitioner which is not even remotely connected with Augusta Westland and its other companies, cannot be put under suspension.

16. The learned senior counsel for the appellant has referred to paragraph No.57 of the impugned order dated 05.09.2023, as under:

*“57. In the context of the 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. 72. In the overall conspectus, till date, there is **no clarity** as to what is the nature of allegations, what is the nature of investigation and since when the investigation has been continuing as no reasons are spelt out. If it is presumed that the investigation against the Petitioner started in 2013, along with the investigation against Agusta Westland, it is not clear as to why the CBI gave an intimation to the Respondent No.1 for the first time only in December, 2021 i.e., 9 years after inception of the Agusta Westland investigation. This is especially ironical considering the fact the Respondent No.1 had been procuring defence equipment all along from the Petitioner continuously since 2007. Further, there are no circumstances which explain the change in position prior to December, 2021 and post December 2021 in the investigation.”*



17. It the submission of the appellant the Court has found no material against the appellant herein and the appellant was never an accused in the investigation of CBI in Augusta Westland case and that the learned Single Judge had independently applied her mind and did not find material necessary for continuation of suspension and since no enquiry has been initiated till date it held the respondent cannot deprive the petitioner of natural justice. Reference was also made to *Liberty Oil Mills and Others vs. Union of India and Others* (1984) 3 SCC 465 as under:

“28. Xxx However, we wish to impress upon the authorities that those entrusted by statute with the task of taking prejudicial action on the basis of their subjective satisfaction should, first, bestow careful attention to the allegations forming the basis of the proposed action and the probable consequences which may ensue such action and, next, take the trouble of reciting in the order issued by them the satisfaction forming the basis of the action and a concise statement of the allegations forming the basis of the satisfaction. If the necessary recitals are not found, there may be serious sequels. In cases involving civil liberties, the orders will necessarily have to be quashed. In other cases also, it is possible to envisage similar results depending on the rights involved, the object of the statute and other facts and circumstances. As it is the circulars in question are hopelessly drafted adding to the confusion created by the sadly drafted clause 8B. In the facts and circumstances of this, case, the real remedy of the party, as we conceive it, is to make a representation to the concerned authority setting out his version of the facts and the law and the prejudice to himself and the public interest as a consequence of the action under clause 8B. We would have first directed the authority to communicate, within a specified time, to the party the allegations forming the basis of the action. But we do not consider it necessary to do so as the party is now fully apprised of the allegations against him. In the circumstances, we think that it would be proper if we direct the authority concerned to consider any representation that may hereafter be made by the party within 10 days from the date of its receipt. Subject to this directions, the writ petition is dismissed but without any order as to costs.”

18. Further in *S.L. Kapoor Vs. Jagmohan and Ors.* 1980 (4) SCC 379, it was held:

“9. xxx xxx In our opinion the status and office and the rights and



*responsibilities to which we have referred and the expectation of the Committee to serve its full term of office would certainly create sufficient interest in the Municipal Committee and their loss, **if superseded, would entail civil consequences so as to justify an insistence upon the observance of the principles of natural justice before an order of supersession is passed.***

19. Thus the submission of the learned senior counsel for the appellant is the learned single Judge ought to have quashed the suspension order or lest should have passed a *pre-emptive* order that in case the respondent does not issue a show cause notice within a particular period, the suspension order be revoked.

20. Heard.

21. We have examined the record. Admittedly after the Suspension Order dated 09.12.2022, the Appellant was issued 2 notices – (a) notice under Section 160 of the CrPC dated 13.01.2023; and (b) notice under Section 91 of the CrPC dated 16.01.2023. These notices also do not in any way accuse the Appellant. Vide such notices also, the only information sought by the CBI was regarding the names of its Directors and Shareholders and foreign remittances received.

22. In the Reply dated 18.01.2023 to the notices given, the Appellant stated as under:

*“Serial No.4 – Kindly note that in the entire operating history of the Company, it has had **no transactions with the Augusta Westland Group of Companies, directly or through Companies** mentioned in the point under reply (M/s IDS Tunisia and M/s Interstellar Technologies, Mauritius).”*

23. Pertinently, Augusta Westland’s (the main accused in 3 chargesheets of CBI) suspension of business by the Respondent was withdrawn/lifted/revoked on 14.12.2021.

24. It is a matter of record main accused Augusta Westland in the



Augusta Westland case is no more under suspension. In fact, Augusta Westland suspension stood revoked even prior to the Appellant's suspension. There appears to be no cause whatsoever to first connect the Appellant to Augusta Westland and then seek to suspend the Appellant on the basis of the Augusta Westland case, after the suspension of Augusta Westland has been revoked.

25. The respondents though have contended before this Court that *(a)* the power to suspend is unconditional, *(b)* suspension need not be followed by a banning order and can be extended ad infinitive, *(c)* a show cause notice if provided would reveal the CBI's case and thus secrecy will have to be maintained forever, and *(d)* exercise of providing show cause notice is futile because even if the Appellant respond to such suspension notice, MOD will never be able to decide the same by application of mind since it would result in disclosure of CBI's case, but the MOD Guidelines do not provide that the Respondent has to maintain secrecy of any grounds of suspension/banning of any party. The contention of MOD results in making MOD just a *postman* inasmuch as, upon a mere intimation of CBI, the Respondent MOD is obliged to suspend a party without applying its mind or without even allowing principle of natural justice to play. It is incongruent because a party who is wholly innocent and not even accused by the CBI can be punished by MOD ad infinitum merely because CBI at some point in time had intimated MOD.

26. Under Clause C.1 of the MOD guidelines, six specific causes have been provided which may lead to suspension and then final banning under Clause F. Emergent suspension, however, can be ordered under Clause D.2. However, D.2 can be exercised only if causes under Clause C.1 exists. The



UOI has contended that power to suspend under Clause D.2 is independent of Clause C.1. This contention is patently wrong on the reading of the two clauses. In any case, the power to suspend under Clause D.2 does not lead to banning under Clause F. Under Clauses F.1 to F.3, there are specific time periods provided for banning. The suspension period must relate to banning, otherwise it is causeless. Neither of Clauses *F.1 to F.3* refer to Clause D as a cause for banning. An intimation by CBI of a pending investigation is not a cause for banning, only a chargesheet is. In the present case, there is neither a chargesheet nor any other cause mentioned in Clause C.1. The above factors demonstrate the MoD violates the MoD's own Guidelines which requires it to be "satisfied that such action [such as suspension] is appropriate and necessary in the circumstances of the case".

27. Clause D.1 of the MoD Guidelines prescribes that "*full proceeding*" has to be initiated by the competent authority before suspension is attempted in respect of any of the causes mentioned in C.1 (a) - (f). The word proceeding *inheres* in itself a show cause notice; reply to the show cause notice, and then an order of suspension, if required to be issued.

28. In the same breath, is the second part of D.2, where if an intimation is received by the competent authority for initiation of criminal investigation or inquiry against any entity, could allow such competent authority to suspend business with the entity. In this case, initiation of criminal investigation must relate back to clause D.1 first and then Clause D.2's first part, where the competent authority sends the complaint to the investigating agency and agency can initiate criminal investigation.

29. Clause D.2 of the MoD Guidelines, which the MoD has sought to invoke, stipulates as follows: "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.”

30. Obviously, by a reading of the above, Defsys itself, which is the “entity” is not under an “ongoing investigation” by the CBI at the time of issuance of the suspension order. Any investigation of an ex-director cannot attribute to the company by itself.

31. The Appellant alleges to have developed, manufactured and produced defence equipment for the Respondent in line with the vision of “Atmanirbhar Bharat” for the last 16 years. The Appellant is a MSME who is supporting more than 200 families of highly skilled engineers. To deny an opportunity to the Appellant to participate in tenders despite having an unblemished record without any pending allegation/ accusation, would effectively lead to civil death of the Appellant and all its employees and their families.

32. No suspension can be continued ad infinitum as being attempted by the Respondent because such continuation would be contrary to established law of the land.

33. The reference made to *Trident* (supra) is not relevant since the facts in the *Trident's* case were different. The Court in the said case deliberated upon an eligibility condition of tender and held unless such condition is wholly arbitrary it cannot be examined by the Court concerned. In *Tata Cellular vs. Union of India* 1994(6) SCC 651 the Court rather held the terms of invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally the decision to accept the tender or award the contract is reached by process of negotiations through several tiers and more often such decisions are made qualitatively



by experts, hence the judicial review be minimum.

34. Thus the peculiar facts of this case where FIR against Augusta Westland viz. the prime accused was lodged in the year 2013 and the investigation is still not complete and in view of the positive assertion viz. the directors and shareholders of the appellant company are not an accused *coupled* with the fact in 2021 the prime accused Augusta Westland itself was removed from the suspended list and the appellant being a domestic manufacturer having stated on oath that it had never supplied/purchased anything from Augusta Westland and is selling its produce only to the Government of India and all its exports are being regulated by the Government of India and we see no infirmity in the impugned order of the learned single Judge when it says the order of suspension *cannot continue indefinitely* and a show cause notice ought to have been issued and such show cause notice must relate to the grounds enumerated in clauses 1(a) to 1(f) and *the material which may form the basis* of such show cause notice be communicated to the petitioner and if the show cause notice is not to be given, *proper reasons ought to be recorded* for justifying the same that *national security concern exists* and review would be conducted by the committee to determine as to whether the grounds in clauses 1(a) to (f) are made out and if the suspension is to be extended for a longer period, the procedure prescribed for the purpose of extension need to be resorted to.

35. Since now the period of one year of suspension is nearing completion and the suspension is to be reviewed, hence in view of circumstances narrated by us above, we direct the compliance of the impugned order dated 05.09.2023 passed by the learned Single Judge, more specifically its para No.79 except the time period as given in clauses (i) and (iv) of para 79



(*supra*) is reduced to *one* week and *one* month respectively. In case of non-compliance, the suspension order shall *automatically stand revoked after one month*. We are of the considered view that order passed by the learned Single Judge is in consonance with the *preamble* of Guidelines which ensure *fairness, impartiality, rigour and correctness in dealings*.

36. This order is passed in peculiar facts of this case and be not treated as a precedent.

37. In view of the above, both the LPA 672/2023 and LPA 682/2023 stand disposed of along with pending application(s).

YOGESH KHANNA, J.

TUSHAR RAO GEDELA, J.

DECEMBER 06, 2023

DU