

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(APPELLATE SIDE)**

Present:

The Hon'ble Justice Rai Chattopadhyay

WPA/9302/2023

M/s. Sharma Transport Agency & Anr.

Vs

Damodar Valley Corporation & Ors.

with

WPA/9306/2023

M/s. Sharma Transport Agency & Anr.

Vs

Damodar Valley Corporation & Ors.

For the Petitioners

: Mr. Subhabrata Datta,
: Mr. Suvojit Seal,
: Mr. Debashis Sarkar.

For the D.V.C

: Mr. Pradip Tarafdar,
: Mr. Subir Pal.

Heard on: 16/04/2024

Judgment on: 16/04/2024

Rai Chattopadhyay, J.

1. Two writ petitions being WPA 9302 of 2023 and WPA 9306 of 2023 (both affirmed on 17th April, 2023) are heard analogously since the issues involved in those writ petitions are similar. The said two writ petitions are being disposed of by dint of this common judgment.

2. The orders passed by the respondent Damodar Valley Corporation, that is, respondent no. 1, dated 27th August, 2022, 15th September, 2022 and 6th March, 2023, have been challenged by the writ petitioners in this case.
3. It may be noted *inter alia* that the order of the respondent corporation dated 27th August, 2022, relates to cancelation of work order earlier granted by it in favour of the present writ petitioner. The order dated 15th September, 2022, is with regard to termination of contract by the said Corporation with the petitioner Transport Agency. And lastly, that dated 6th March, 2023, would relate to a suspension notice issued to the petitioner Transport Agency, from participating in any tender of the respondent Corporation. All the impugned orders shall be dealt with in detail in the later part of this judgment.
4. At this juncture let the factual background necessary for proper appraisal of this case be discussed, as herein below. The writ petitioner no. 1 is an M.S.M.E Business Entity, registered under the Micro, Small and Medium Enterprises Development Act, 2006. The writ petitioner no. 2 is the partner and representative of the writ petitioner no. 1.
5. The writ petitioner No. 1 had participated in a tender process in response to the “Notice Inviting Tender” (NIT) dated 30th November, 2021, as was published by the respondent Corporation/respondent no.1. The writ petitioner no. 1 had emerged as successful to the extent of 20% of the total work under the said NIT and was awarded the job vide letter dated 14th February, 2022. The contract price of the work of tender was Rs. 116,12,41,83.72/- (initially), which was subsequently revised to be Rs. 115,96,34,19.72/-. The stipulated period of completion of the work was 365 days. Thus, the writ petitioner was issued with the work order vide letter dated 12th April, 2022.

- 6.** Allegedly, the real difficulty for the writ petitioner arose only thereafter. The petitioners have stated that to execute the work under contract with the respondent Corporation as mentioned above, the petitioners would be compulsorily using trucks and trippers, to carry ashes from M.T.P.S Plant to different destinations as per assignment. They say that within the locality a Syndicate of Truck Operator Association has been engaged to supply trucks as required to the contractors for the purpose of carrying ashes etc., that is, namely “Durlabhpur Truck Operator Association” (D.T.O.A). Allegedly the same is backed by political power and is the only source within the locality from where the contractor may rent a truck or tripper, to carry on the work. That syndicate, has, however not cooperated with the writ petitioners and in spite of the writ petitioners seeking adequate number of trucks from them, it has not come forward to supply the writ petitioners with the same. The writ petitioners have stated that such an inaction on part of the Syndicate of Truck Association would not be an empty gesture but would be tainted with the *mala fide* motive that a contractor like the writ petitioner may not take part in the functioning of the respondent Corporation, defying the unspoken monopoly of “Coal Mines Associated Traders Private Limited” (Coal Mines – in short), which won 60% of the projected work in the aforesaid tender process. It is alleged that due to the unholy nexus between the Syndicate of Truck Association with the Coal Mines, the writ petitioner is unable to secure availability of the adequate number of trucks from the said syndicate and thus he could not commence the schedule job within the specific time.
- 7.** The respondent Corporation informed in writing to the writ petitioner on 15th April, 2022, to submit bank guarantee and execute the agreement. It has again by sending mail emphasised the requirement for earliest inception of the work under contract as that would be a requirement for

the National Highway Authority of India, under a memorandum of understanding entered into by the same with the respondent Corporation. That was dated 22nd April, 2022. The following reminder of the respondent Corporation is dated 5th May, 2002, requesting the writ petitioner to commence the work at the earliest.

8. By dint of a letter dated 10th May, 2022, the writ petitioner has replied to the respondent Corporation as regards this and also sought for more time to commence the work. Nevertheless, that was followed with mails from the respondent Corporation is dated 17th May, 2022, 30th May, 2022 and 14th June, 2022. The writ petitioner also did not keep silent but continued to reply to the respondent Corporation by sending letters, that is, dated 24th May, 2022, 28th May, 2022 and 11th July, 2022.
9. However, the deadlock and impasse in the situation due to the alleged non-cooperation of the Syndicate of Truck Association was not removed, even till then. This has therefore not let the writ petitioner to commence the work of tender as was allowed to him. The writ petitioners say that having no other alternative and being compelled due to the law and order breakdown, in the manner as stated above, it wrote letter to the Hon'ble Chief Minister of the State dated 30th July, 2022. Not only the same, it had sent e-mail to the Hon'ble Chief Minister again on 22nd August, 2022 and 25th August, 2022. In the meantime by sending letter dated 8th August, 2022, respondent Corporation had given ultimatum to the writ petitioner, indicating the probable consequent actions to be taken up by it, in case the writ petitioner did not commence the work with priority. The writ petitioner had also replied to the same vide its letter dated 14th August, 2022. The petitioners says that, in all the letters sent by it to the respondent Corporation, it has mentioned time and again, about the difficulty faced by it, due to the resistance put forth by the Syndicate of Truck Associate, by not providing trucks to it. Regarding this, what the

petitioner has said is that, the respondent Corporation has also not taken any steps for redress, ever.

- 10.** However, all the incidents as narrated above, were followed by issuance of the three impugned letters by the respondent Corporation, that is, dated 27th August, 2022, for cancellation of the work order dated 12th April, 2022, in favour of the writ petitioner. Thereafter letter dated 15th September, 2022, terminating contract with the writ petitioner. The writ petitioners produced letter dated 8th September, 2022, in which it had protested the impugned action taken by the respondent Corporation vide letter dated 27th August, 2022.
- 11.** On 27th October, 2022, the writ petitioner was issued a show-cause notice, directing him to show-cause as to why it should not be banned to participate in the works of the respondent Corporation. The writ petitioner replied to the same vide a detailed letter dated 3rd November, 2022, specifically urging no negligence or wilful violation on his part, in not commencing the work under the tender, within due time and also stating categorically regarding his compulsion and difficulty to commence the works due to the non-cooperation of the Syndicate of Truck Association in supplying him trucks/trippers. The writ petitioner had urged that the delay, if any, in commencing the work should be attributable to a reason as above, which is beyond its control. According to the writ petitioner excepting procuring adequate number of vehicles it could not commence the work of evacuation of ash from the ash ponds and nuisance free transportation thereof along with the disposal of the same in NHAI/Government Roads Projects. The syndicate being the only source of supply of trucks within the locality, the writ petitioner would not have any other option than to procure those from the syndicate only. However, his requests to the syndicates were ignored, that allegedly for

the reasons of unholy nexus with the major player in the locality, that is, the Coal Mines.

- 12.** The petitioner is however been aggrieved that while cancelling the work order or terminating the contract or banning him, the respondent Corporation has not taken into consideration this aspect of the matter that the writ petitioners action has never been driven by his own volition but for extraneous compelling circumstances for which he actually could not have been banned, in terms of the mutually agreed conditions as mentioned in the Notice Inviting Tender (NIT). Thus being aggrieved writ petitioners have prayed for adequate relief.
- 13.** The respondents case is founded on the conditions mentioned in the Notice Inviting Tender. It has contested the case by filing affidavit-in-opposition. In the same it has stated about the cancellation/repudiation clause stipulated in the Notice Inviting Tender, in case of breach of any of the conditions of the same. It is stated that, firstly, the petitioners have not been able to initiate the schedule work within the reasonable time frame thereby jeopardising performance of function of common interest by a public authority like the respondent no. 1. Secondly, it has been stated that the condition regarding submission of performance guarantee within the stipulated period of time is also flouted by the writ petitioners as they have not been able to submit the performance guarantee within the stipulated period of time and in spite of repeated reminder. According to the respondent Corporation these deviation by the writ petitioners were sufficient to terminate his engagement, pursuant to the tender as mentioned above and there would be no illegality found in the steps taken by the respondent Corporation as against the writ petitioners. Hence, the present case, according to the respondent is liable to be dismissed.

- 14.** Mr. Datta represents the writ petitioners. He is of the strong opinion and submits that his clients have been subjected to arbitrary black listing by the respondent, that too in violation of the principles of natural justice. The same, he says, should not be maintainable.
- 15.** By referring to various documents annexed with this writ petition, Mr. Datta has indicated that since after the work order was allowed in favour of petitioner no. 1 on 12th April, 2022, it has taken all necessary and adequate steps in order to fulfill the terms of work order, by immediate initiation of the work under tender. A letter was written to the President of the Syndicate of Truck Operators for immediate supply of adequate number of vehicle, as that was the only source in the locality to obtain trucks/trippers. There the petitioners have faced inaction and rejection. This being the sole cause for the writ petitioners not to commence the works immediately after grant of work order, there could not have been any apprehension of exercise of negligence or wilful disobedience of the terms of the contract by the writ petitioners. He criticises the action taken by the respondent authority firstly, terminating the contract and thereafter banning/black listing the writ petitioner, as the same has been based on such a wrongful notion. Mr. Datta has not forgotten to mention about several e-mails and letters sent by the writ petitioner to the respondent authorities as well as seeking redress from the office of the Hon'ble Chief Minister of the State. Mr. Datta has stated that none of the communication made by the writ petitioners have ever been considered by the respondent authority, which would have otherwise duly expressed the compulsion faced by his clients resulting into delay in initiation of the works.
- 16.** Mr. Datta has referred to the show-cause notice issued to his client dated 27th October, 2022, and reply thereto dated 3rd November, 2022. His specific contention is that the show-cause notice issued as above would

not be adequate and valid in the eye of law for the reason of its being vague. Mr. Datta says that a show-cause notice, to be valid in the eye of law would require to mention the proposed action which the authority may take in absence of a satisfactory reply. The show-cause notice dated 27th October, 2022 having not adequately revealing the essential tenets of a legally valid show-cause notice, would be illegal, he says. He says further that, his reply to the said show-cause notice, though call for, but not considered by the authority, in its order. The impugned order banning him from participation in respondent's tenders, suffers from vagueness, as no reason has been afforded, as to why his reply was not entertainable. He would suggest that an arbitrary order of black listing would be prejudicial for a commercial entity, so much so that the same would put a taint and spell the death knell of the organisation for all times to come and to be described as a civil death of it. On this he has relied on two judgments of the Supreme Court reported in **(2021) 1 SCC 804 (Vetindia Pharmaceuticals Limited vs. State of Uttar Pradesh & Anr.)**, and **(2021) 2 SCC 551 (UMC Technologies Private Limited vs. Food Corporation of India & Anr.)**

17. Thereafter Mr. Datta has suggested that before taking the decision which may turn out to be of terminal effect for the contractor, that is, the writ petitioner in this case, there would be certain legal principles to be followed by the respondent authorities, without which any such decision of the authority would be rendered as a nullity in the eye of law. He says that reasonableness of the order would be the first amongst those principles. He says further that reasonableness of an order would depend on certain factors, that is, whether the reasonable opportunity of hearing has been extended to the alleged delinquent contractor or not. As a matter of fact, that would form a due compliance of the principles of natural justice towards the alleged delinquent contractor like his clients,

he says. The touchstone is of fairness, relevance, natural justice, non-discrimination, equality and proportionality, Mr. Datta emphasized. By referring to the documents particularly the reply to the show-cause given by the writ petitioners, that is, dated 3rd November, 2022, and the consequent order of his debarment dated 6th March, 2023, Mr. Datta has suggested that the specific reason delineated by the writ petitioner in his reply to the alleged show-cause notice has not been considered by the respondent authority. He further refers to the impugned order dated 6th March, 2023, to state that only merely a mention that the writ petitioner's reply has been considered, would not be sufficient in the eye of law. Instead, the order of the respondent authority should have been specific and sufficient as to the objective considerations made and reasons shown by the authority to discard as to what the petitioners have stated. On this Mr. Datta has relied on two decision of the Hon'ble Supreme Court reported in **(1975) 1 SCC 70 (M/s. Erusian Equipment & Chemicals Ltd. vs. State of West Bengal & Anr.)**, and **(2014) 14 SCC 731 (Kulja Industries Limited. vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited & Ors.)**.

18. Further point as elaborated in this case by Mr. Datta on behalf of the writ petitioners is that the apparent discrepancy of reasons shown by the respondent authority in the purported show-cause notice dated 27th October, 2022, purported order dated 6th March, 2023 and the grounds in the affidavit-in-opposition submitted it in Court. Mr. Datta has suggested that subsequent improvement of case is not acceptable as lawful and valid. He says law is now well settled that the respondent authority should not be allowed to travel beyond the reasons shown in the show-cause notice in order to substantiate its purported decision. He says that in this case, on the contrary, the respondent authority has supplied, on each and every time, a fresh reason to supplement its earlier, and thereby improved its case with time. That is an utter illegality, he states. To

support his contentions as such he has relied on the judgment of the Hon'ble Supreme Court reported in **(1978) 1 SCC 405 (Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi & Ors.)**.

19. Thus, Mr. Datta has concluded his submissions seeking adequate relief for the writ petitioners in this case.
20. Mr. Tarafdar has represented the respondent Damodar Valley Corporation. His first contention is that the termination of contract of the writ petitioner and his subsequent black listing is not for any other reason but in terms of the stipulations made in the contract itself and by operation of those stipulations. It is submitted by referring to the documents annexed with the writ petition that the writ petitioner has failed and/or violated to comply with the conditions of furnishing bank guarantee/performance guarantee, within a specified period of time. That being mandatory conditions for the contract to be operative, the contract entered into with the writ petitioner would be liable to be terminated by operation of the said Clause (Clause 4.0) in the contract itself.
21. Mr. Tarafdar has referred to the show-cause notice dated 27th October, 2022. It is stated that the same is eloquent enough regarding what the authority proposes against the writ petitioner in case of unsatisfactory explanation for violation of the contract. It is stated that a pictorial depiction may not be necessary and understandable implication of the same would be sufficient for the show-cause notice to be valid and maintainable. Therefore, on this, Mr. Tarafdar has confronted the submissions made on behalf of the writ petitioners, as discussed above. In doing so he has relied on the Supreme Court judgment reported in **(2014) 9 SCC 105 (Gorkha Security Services vs. Government (NCT of Delhi) & Ors.)**.

- 22.** Lastly, Mr. Tarafdar has submitted that the writ petitioners would not, at this stage, be allowed to raise any objection or contest as regards the submissions made by the respondent Corporation in its affidavit-in-opposition, as the doctrine of non-traverse would set in, disabling the writ petitioner to do so. It is submitted that the affidavit-in-opposition filed by the respondent Damodar Valley Corporation is not controverted by filing any affidavit-in-reply by the writ petitioner. Under such circumstances it will now be precluded to throw challenge as to the case made out by the said respondent Corporation in its affidavit-in-opposition. On this Mr. Tarafdar has relied on a decision of the Supreme Court reported in **(1993) 4 SCC 6 (Lohia Properties (P) Ltd., Tinsukia vs. Atmaram Kumar)**.
- 23.** He has thus prayed for dismissal of the writ petition.
- 24.** The jural relationship between the parties arose pursuant to the bid document. Both the parties have referred to the same, though from separate angle and on separate Clauses.
- 25.** The writ petitioner states that his contract could only have been terminated pursuant to the Clause in the bid document, only when it could have been shown that his failure to commence the work promptly, was without any valid reason. For this Clause 24.2.2. (b) of the bid document has been referred to, which reads as follows:-

“24.2.2 If the Contractor

(a)*****

(b) has without valid reason failed to commence work on the Facilities promptly or has suspended (other than pursuant to GCC Sub-Clause 24.2) the progress of Contract performance for more than twenty-eight (28) days after receiving a written instruction from the Employer to proceed.”

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(c) *****

(d) ** then the Employer may, without prejudice to any other rights it may possess under the Contract, give a notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. If the contractor fails to remedy or to take steps to remedy the same within fourteen (14) days of its receipt of such notice, then the Employer may terminate the Contract forthwith by giving a notice of termination to the Contractor that refers to this GCC Sub-Clause 24.2.”***

26. On the other hand the writ petitioners' contentions have been that due to the non co-operation of the Truck Association Syndicate he has been made to face severe difficulty to procure adequate vehicle to commence the work. According to him, this should have been considered as a “valid reason” – under the stipulations, maintained in the bid document and not in control of the petitioner. He says that existence of this “valid reason”, makes Clause 24.2.2. (b) inapplicable, in his case. His case is that while terminating his contract or black listing him, the respondent authority should have taken into consideration such a genuine difficulty of the writ petitioner and not have thrown the burden on him, of being negligent in discharging obligation under the contract. Lack of objective consideration of the most viable ground for which the writ petitioner is said to have been restrained, to carry on the work order, is the further ground, over and above the points of law raised in this case as regards non-maintainability of the show-cause notice or the impugned order of debarment of the writ petition, in this case.

27. The respondent/D.V.C would rely on the alleged default by the writ petitioner as the contractor and say that in terms of the bid document, the conditions for cancellation of work order as well as repudiation of the contract and petitioner's black listing, have been made in due compliance with the stipulated provisions of the bid document. During argument it has been submitted that as the writ petitioner has not commenced the works immediately after grant of work order and also has not furnished the performance guarantee, such action by the writ petitioner would be a

glaring breach, in terms of Clause 16 and Clause 24 of the bid document. Such breach is to result into termination of contract mandatorily and finally, black listing of the writ petitioner to restrain him in participating in all the future tenders. The respondent has stated that, its action is based on the bid document and there would not be any impropriety or illegality, as to the same.

28. Failure to commence, the work has been enumerated as a ground for termination of contract, as mentioned above. One can, however, notice that the same is qualified with the further clause that such failure by the contractor must be without any valid reason. This may be expressed in other words that every time the contractor fails to commence the work promptly, he may not be subjected to the punitive provisions of the contract, but only at a time when his such failure would not be supported by any valid reason. Therefore, contractor's failure as above, for any valid reason, has been left beyond the purview of the punitive provisions of the contract, as stated above.

29. It may be noted that right from the date 24th May, 2022, the petitioner have been writing to the respondent/Corporation, on various occasions. The crux of its representations has been that, it is not being provided with the adequate logistic support by the syndicate of truck suppliers in the locality, without whom a contractor would not be in a position to procure trucks or appropriate vehicles, to carry on its works under the contract. Receipt of those letters of the petitioner is not denied. Undeniably, therefore, the writ petitioner has shown a reason as to why it has not been able to commence the work under contract with promptitude. That, since the respondent Corporation, before termination of contract with or blacklisting of a contractor, has to come to a finding, that it has not commenced the work without a valid reason, the respondent Corporation ought to have considered the reason shown by

the petitioner, as above, not to be a justifiable one, on which the petitioner's contract may be terminated or the petitioner may be blacklisted. Records, however, do not show that the respondent/Corporation has ever addressed to the issue like this, raised before it, by the writ petitioner, through various correspondences.

30. Be that as it may, there has to be a process equitable and transparent, undertaken by the respondent authority before an order of cancellation as above can be issued. The relevant laws are well narrated and discussed in the judgments, referred to in this case. The decision of the authority should comply with the yard sticks of fairness, relevance, natural justice, non-discrimination, equality and proportionality, as it was decided by the Hon'ble Supreme Court in the case of ***Kulja Industrial Limited (supra)***.
31. Firstly, the notice directing the writ petitioner to show-cause is required to comply with the inevitable condition that the same may be sufficient, specific and categorical as regards the alleged breach committed by the concerned person and the proposed punishment thereof. This is for the reason to afford the recipient to defend his cause appropriately and sufficiently. This would be a tenet of natural justice to have been extended to the recipient and is unavoidable. The Supreme Court in the judgment of the ***UMC Technologies Private Limited (supra)*** has been eloquent on this proposition.
32. The order of cancellation of work order dated 27th August, 2022, comes as a bolt from the blue. The writ petitioner has not been served with any notice before that to explain his stand. His request subsequent to the same for re-consideration of the said order vide letter dated 8th September, 2022, was turned down. Similar mode of action was undertaken by the respondent authority while terminating contract of the

writ petitioner vide letter dated 15th September, 2022. A show-cause notice does not precede the same too.

- 33.** Thus, upto this point there has been a downright silence, on the part of the Corporation, so far as the grievance ventilated by the writ petitioner, or in the matter of citing any reason by the said authority for taking adverse actions against him. One has to appreciate that excepting ventilating his grievance, the writ petitioner had no other option to open a dialogue with the authority as regards his grievance. In that event fairness of the thing would demand a response from the authority and authority's silence shall leave the other deprived of the reason of rejection of his prayer. An unequal balance of power is evident, which is however, juxtaposed to the rights guaranteed under Article 14 and/or 21 of the Constitution of India.
- 34.** It is noticed that neither the letter dated 27th August, 2022, nor that dated 15th September, 2022 bare as a reason, non submission by the writ petitioner of the performance security. As a matter of fact the letter dated 27th August, 2022, is bereft of any reason whatsoever. That dated 15th September, 2022, would record the writ petitioners' failure to commence the work promptly that too without any valid reason, for termination of the contract, without however, spending a word relating to the reasons put forth by the writ petitioner so far, for the said delay.
- 35.** These two letters are however in complete derogation of the law as propounded by the Hon'ble Supreme Court as discussed above. Non-issuance of the show-cause notice affording him an opportunity to explain his stand and not hearing him before imposing any adverse order against the writ petitioner, would be violative of the principles of natural justice. Thus also, as against the yardsticks of reasonableness and non-arbitrariness these orders cannot stand. So far as the other order, that

is, dated 6th March, 2023, is concerned, it is found from record that a show-cause notice was issued to the writ petitioner, before issuance of such an order, that is, dated 27th December, 2022. As to what should be the traits of a show-cause notice to be valid in the eye of law has been discussed above, with reference to the law laid down by the Hon'ble Supreme Court in this regard. On the touch stone of the same however the show-cause notice dated 27th December, 2022, issued by the respondent Corporation to the writ petitioner appears to be dissatisfactory. In this regard the argument on behalf of the respondent Corporation would be that if not by specific terms even if by way of implication the show-cause notice communicates to the recipients, as to the effect thereof, that would suffice the performance. In this regard a judgment of the Hon'ble Supreme Court has been relied on, that is, ***Gorkha Security Service (supra)***.

- 36.** The Court finds the said show-cause notice not to be commensurate with the standards, in terms of clarity and specified character, so far as the contemplated punishment is concerned. Regarding the law settled about the specific characteristics to be borne in show-cause notice, the impugned show-cause notice dated 27th December, 2022, would not be commensurate with the settled law and not to be maintainable.
- 37.** The other impugned order dated 6th March, 2023, of the respondent Corporation which is for suspension of the writ petitioner from participating in any tender of D.V.C, the Court finds that Clause 24.2.2 (b), has been applied to suspend the writ petitioner to take part in any of the future tenders of the Corporation. Clause 24.2.2 (b) relates to termination for contractors default and the same has been quoted herein above. The authority has stated that the writ petitioner even after grant of work order, has not been able to promptly commence the works under tender. Even after the show-cause notice as above in which he was

directed to commence work within 30 days there from, he has failed to do so. Accordingly in terms of Clause 24.2.2 (b), they have suspended business dealings with the writ petitioner for one year. Thereafter and has finally black listed the writ petitioner by stating that it shall not be allowed to participate as an Associate for any of the tenders of D.V.C, in future times.

- 38.** The provision under Clause 24.2.2 (b) of the bid document has already been quoted above. It has provided that if not the tenderer has commenced the work with sufficient promptitude and shall not have any valid reason to explain such delay the contract with him would be terminated. The petitioner in this case has been all along pleading a reason for which he could not have commenced the work under contract, in time. The reason being non supply of vehicle to him by the Syndicate of Truck Association, allegedly for some extraneous and mala fide reasons. Be that as it may, by dint of several letters this fact has been informed by the writ petitioner to the respondent Corporation seeking redress but to no avail. Even in reply to the show-cause notice issued to the writ petitioner dated 27th December, 2022, the writ petitioner had endeavoured to explain with sufficient adequacy regarding the reasons for which he has not been able to start the work. With such a situation, as per the law settled in this regard by the Hon'ble Supreme Court, the respondent Corporation should have afforded an objective consideration to such reason shown by the writ petitioner. No doubt, a line is dedicated as regards the writ petitioner's reply to the said show-cause notice dated 27th December, 2022, mentioning the same not to be a satisfactory one. The reason thereof is conspicuously absent. In such view of the fact the Court cannot but hold that there has not been any consideration of the reasons shown by the writ petitioner for his alleged latches.

- 39.** Thus, the Court can find that the writ petitioner has been deprived of a fair opportunity to defend himself as there has been gross violation of the principles of natural justice in his case. On the first two occasions that is while cancelling the work order as well as terminating the contract the respondent authority had not cared to even call him to show any reason before imposing such punitive orders. So far as the ultimate order of restraining the petitioner from participating in tender of D.V.C is concerned, his representation of the reasons shown by him have not at all been considered by the respective authority. This must be prejudicial to the writ petitioner's rights and interests which have accrued to him consequent to grant of work order in his favour.
- 40.** So far as the ground taken by the respondent Corporation in the affidavit-in-opposition regarding non submission of performance guarantee by the writ petitioner is concerned, the Court cannot help noticing that the same has been taken for the first time before this Court in the writ petition and not before. The record reveals since after grant of work order to the writ petitioner there have been occasions when the respondent Corporation has reminded the writ petitioner to submit the performance security. However, the matter ended there. Neither in the letter dated 27th August, 2022, nor those dated 15th September, 2022 and 6th March, 2023, the respondent Corporation has relied on this ground of breach by the writ petitioners. In other words non furnishing of the performance security has never been a reason for taking punitive action against the writ petitioner. The law is well settled that unless the ground has been taken at the very inception the authority shall not have liberty to take the same up, at a later stage, to have an improvement in their case. The Supreme Court in the judgment of **Mohinder Singh Gill** (*supra*) is very much eloquent on this, in the following words. :-

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, 1951 SCC 1088 : AIR 1952 SC 16] :

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.”

- 41.** No doubt non furnishing of performance security within a specific period of time would be a ground for termination of contract with a contractor in terms of the stipulations made in the bid document. However, as discussed earlier, it would be a trait that the writ petitioner is given an opportunity to defend himself in that regard too. In this case neither any such allegation as above can be found to have been levelled earlier against the writ petitioner nor any contemplation of the consequence of such a breach has been placed before him, in order to afford him opportunity to defend his own cause in this regard. Therefore this facts being backed by the ratio of the decision of the Hon’ble Supreme Court in ***Mohinder Singh Gill’s*** case (*supra*), lead this Court to find that at this stage liberty would not be available to the respondent Corporation to raise a point as regards breach of contract by the writ petitioner, on the ground of non furnishing of the performance security. The same would be belated and not maintainable in view of the law settled in this regard.
- 42.** So far as the propriety and legality of the impugned orders dated 27th August, 2022, 15th November, 2022 are concerned, the Court finds, on

the discussion as above the same to be not maintainable and liable to be set aside. Hence, both the orders are set aside.

43. However, this will not bear any effect as on the date, as the stipulated period of one year as already been elapsed.

44. So far as the impugned order dated 6th March, 2023, is concerned regarding black listing of the writ petitioner the same is found to be unreasonable, unjust, arbitrary and illegal, for the reasons as discussed above. Hence, the same is liable to be set aside.

45. On the premises as aforesaid, both the writ petitions no.WPA 9302 of 2023 and WPA 9306 of 2023 are allowed. The same are disposed of with the following directions:-

- (i)** Orders dated 27th August, 2022 and 15th November, 2022 are set aside;
- (ii)** Order dated 6th March, 2023 is set aside;
- (iii)** The writ petitioner shall be allowed to take part in all future tenders of the respondent D.V.C, by complying with the respective terms and conditions as would be necessary in case of each of those and there shall not be any embargo any further for him to take part in the tender process of the respondent Corporation.

46. With the above direction this writ petition is disposed of.

47. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities.

(Rai Chattopadhyay,J.)