

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

FMA 853 of 2022

**Union of India and Ors.
Vs.
Anil Bareja and Anr.**

Appearance:

For the Appellants : **Mr. Arun Kumar Maity (Mohanty), Adv.
Ms. Susmita Sarkar, Adv.**

For the Respondent no. 1 : **Mr. Saptarshi Roy, Adv.
Mr. Arkadipta Sengupta, Adv.
Ms. Kakali Das Chakraborty, Adv.
Ms. Aayushi Mukherjee, Adv.**

For the Respondent No. 2 : **Mr. Abhishek Banerjee, Adv.
Ms. Parna Roy Chowdhury, Adv.
Ms. Payel Ghosh, Adv.**

Judgment On : **23.08.2024**

Harish Tandon, J.:

The Union of India has filed the Intra-court Appeal assailing the judgment dated 18.05.2022 passed by the Single Bench whereby and whereunder the letter of termination and debarring the Respondent no. 1 from participating in future tender in the South-Eastern Railway was quashed and set aside with a consequential direction upon Railway

Authorities to intimate the date to the Respondent no. 1 to resume the operation of loading and unloading in terms of the agreement after considering the issues raised by the said respondent on the difficulties faced by him in operation for loading and uploading at both the sites for which such agreement was entered into.

The facts discerned from the respective pleadings of the parties exposit that a tender was floated by the South-Eastern Railway in respect of leasing of 23 tonne parcel van (VPH) on a round basis in different trains wherein the Respondent no.1 was adjudged as the highest bidder. The letter of allotment was issued to the Respondent no. 1 with stipulation that the said respondent has to submit the security deposit to the tune of Rs. 1 crore and odd by way of a Fixed Deposits. The Respondent no. 1 was further directed to execute an agreement and it is not in dispute that all such formalities were completed and the site was also handed over to the Respondent no. 1. The said agreement stipulated that the commencement of loading and uploading at Shalimar and the Ahmedabad Stations shall commence within a stipulated time upon payment of an advanced freight. Undisputedly, the respondent commenced the loading and uploading at Shalimar and Ahmedabad stations but was facing difficulties at the Shalimar Station because of irregular placement of the parcel vans and the perishable goods which has to be staged in open shade having a limited life cannot be uploaded because of its self-short life.

The Respondent no. 1 caused a letter dated 17th June, 2019 to the Railway Authorities disclosing such difficulties and requested the authorities to take a conscious decision to remove such difficulties which is causing a

loss to the business. Simultaneously, another letter was issued on the next date intimating the authorities for suspension of the leased parcel van until the grievances so raised is addressed and the remedial measures are taken at their end. The Railway Authorities did not respond to the aforesaid letter nor any remedial measures were taken which constrained the Respondent no. 1 to cause a reminder letters on 9th December, 2019 and 4th August, 2020 respectively. The Railway Authorities caused a letter dated October 1, 2020 citing certain clauses of the agreement which provides for termination of a contract and forfeiture of the security deposit and the right of the lease holder to terminate the agreement after serving 60 days' notice to the Railway Administration and in such event not only the security deposit shall be forfeited but the said lease holder shall be debarred from entering into any tender for next two years with the rider that such debarment would not operate upon the existing tender, if any.

Immediately the Respondent no. 1 responded to the said letter and reminded the authorities that the difficulties/problems which were intimated to the Railway Administration has not been addressed and if such problem is resolved, the commencement may be restarted. It was stipulated that in the event no step has taken by taking a remedial measure, the security deposit should be refunded and also the loss, the Respondent no. 1 suffered by investing money in marketing, infrastructure etc., should also be compensated. In order to complete the sequel of events since there was no response from the end of the Railway Administration after the letter dated 09.10.2020 was issued by the Respondent no. 1, a further letter dated 06.10.2021 was caused reiterating the stand taken in the letter dated 09.10.2020. In response to the said letter, the Railway Administration

issued a termination letter dated 01.12.2021 citing the identical Clauses of the agreement which was communicated through a letter dated 01.10.2020 terminating the contract with immediate effect and forfeiting the security deposits and further debarred the Respondent no. 1 from entering into any tender for the next two years.

The writ petition was filed by the Respondent no. 1 challenging the said order of termination with further consequential reliefs as under:

“a. A Writ in the nature of Mandamus do issue upon the respondent thereby directing them to revoke, rescind, withdraw the termination letter being no. Com/G27/Parcel-Lease/VPH/ 12834/12833 dated 01.12.2021 issued by the Respondent no.4 for respondent no.3.

b. A Writ in the nature of Prohibition do issue restraining the respondent from giving any effect or further effect to the termination letter being No. Com/G27/Parcel- Lease/ VPH/ 12834/ 12833 dated 01.12.2021 issued by the Respondent no.4 for respondent no.3.

c. A Writ in nature of Certiorari do issue upon the respondent thereby directing them to transmit all the relevant records pertaining to the present case so that conscionable justice may be administered;

d. Issue RULE NISI in terms of prayer (a) to (c) hereinabove and after hearing the cause, if any, make the rule absolute ;

e. Interim order be passed restraining the respondent from giving any effect or further effect to the termination letter being No. Com/G27/ Parcel-Lease/VPH/12834/12833 dated 01.12.2021 issued by the Respondent no.4 for respondent no.3.

f. Interim order be passed restraining the respondents no.5 herein from en-cashing the fixed deposit receipt A/c No 09253031158719 dated 10.04.2019 for a sum of Rs. 1,01,55,906/- (Rupees One Crore One Lakh Fifty Five thousand Nine Hundred and Six only) which was submitted by way of security deposit;

g. Interim order be passed restraining the Railways from floating any tender in respect of 23 tonne parcel van (VPH) by Train No. 12834/12833(Howrah - Ahmedabad Express) Ex-Shalimar to Ahmedabad or from creating any third party rights in respect of the said parcel van;

h. Ad-interim order in terms of prayer (e),(f) and (g) hereinabove;

i. Cost;

j.Pass such other or further orders as Your Lordship may deem fit and proper for the ends of justice.”

It appears from the tenet of the impugned judgment the argument so basically revolved around the intention of the parties in relation to Clause 8.4 and 25.1 of the said agreement and the interpretation of the language

used therein. Apart from the same, legal point was also considered by the Trial Court pertaining to the scope and the power of judicial review enshrined under Article 226 of the Constitution of India in relation to contractual matters and the action of the Railway Administration in terminating the contract and forfeiting the security deposits with further imposition by debarring the Respondent no. 1 from participating in a future tender for a period of two years without following the principles of natural justice.

The Single Bench arrived at the conclusion that the aforesaid clause of the agreement is applicable on the happening of event indicated therein and cannot be applied indiscriminately in all situations. The Single Bench further held that the order of termination of an agreement, forfeiture of a security deposit and debarring the Respondent no. 1 from participating in future tender for two years, is in flagrant violation of principle of natural justice. The Single Bench disposed of the writ petition with the observations and the direction as under:

“71. In view of the aforesaid findings, it is palpably clear that the respondent-Authorities acted patently de hors the principles of natural justice and in contravention of the Fundamental Rights of the petitioners, in a clearly arbitrary manner, in issuing the impugned termination and blacklisting notice dated December 1, 2021.

72. Since the petitioners have expressed their willingness in their communication to the respondent-Authorities particularly, the last communication dated October 6,

2021 Exhibit P-7 at page 56 of the writ petition) that the petitioners are agreeable to continue with the lease, there cannot arise any question of refund of security deposit by the Railway Authorities either.

73. Hence, in the facts and circumstances of the case, W.P.A. No.21362 of 2021 is allowed, thereby setting aside the impugned termination and blacklisting notice of the petitioners dated December 1, 2021 vide No.Com/G27/Parcel-Lease|VPH| 12834/12833 There will be no order as to costs. The Railway Authorities shall immediately intimate the petitioners, preferably within a fortnight from date, the date from which the petitioners shall resume operations of loading and unloading in terms of the agreement between the parties, which stands revived. In so intimating, ample time should be given to the petitioner for taking appropriate preparatory steps accordingly in the meantime

74. The respondent-Authorities shall also consider the issues raised by the petitioners in respect of the difficulties faced by the petitioners in so operating, upon giving a right of representation/ hearing to the petitioners, prior to the date fixed for actual commencement of the operations.”

Mr. Arun Kumar Maity, the learned Advocate appearing for the appellant submits that Clause 8.4 of the said agreement provides for

termination of the agreement and forfeiture of the security deposits in the event the lease holder fails to operate the contract. According to him, admittedly the Respondent no. 1 fails to load and upload the parcels which lead to a failure to operate the contract and, therefore, there is no illegality on the part of the Railway Administration in invoking the said terms of the contract by terminating the agreement and forfeiting the security deposits. Mr. Maity further submits that Clause 25.1 of the agreement postulates not only the termination of an agreement, forfeiture of a security deposit but a power is also conferred upon the relevant administration to debar the lease holder from entering into any tender for the next two years with the rider that the existing contract shall not be affected by it. Mr. Maity would further submit that the Writ Court should not entertain the writ petition in relation to a contractual matter as it involves the voluminous evidence to be adduced. Mr. Maity vociferously submits that the agreement contained an arbitration clause in relation to any dispute arising therefrom to be decided by an arbitrator and, therefore, the writ jurisdiction is expressly ousted. Mr. Maity thus submits that there is no illegality on the part of the Railway Administration in terminating the contract, forfeiting the security deposit and imposing a bar in participating in future tender for next two years by invoking the terms of the agreement applicable in this regard. Mr. Maity however submits that after the termination of the agreement, a fresh tender was floated and the loading and uploading at the aforesaid site is awarded to a highest bidder therein and, therefore, the reliefs prayed by the Respondent no. 1 has eclipsed and cannot be granted in view of a subsequent event.

On the other hand, Mr. Saptarshi Roy appearing for the Respondent no. 1 submits that the invocation of the clauses pertaining to termination of

the agreement is *per se* illegal on the facts disclosed in the pleading as well as the supporting documents. According to him, though Clause 8.4 confers right upon the Railway Administration to terminate the contract/agreement but on a specific eventuality and cannot be applied indiscriminately or as per the whims and the choices of the Railway Administration. He would further submit that invocation of a Clause 25.1 of the agreement by the Railway Administration is patently illegal on a bare reading of the language used therein and, therefore, no error or infirmity can be perceived from the judgment impugned in the instant appeal. He further submits that there is no absolute bar to exercise of power of judicial review by the High Court under Article 226 of the Constitution in relation to a contractual matters, if the Writ Court found the action of the authority lacking in a degree of fairness, arbitrary and in excess of the powers reserved in the terms of a contract. In support of the aforesaid contention, the reliance is placed upon a judgment of the Apex Court in case of ***Gas Authority of India Ltd. Vs. Indian Petrochemical Corporation Ltd &Ors. reported in (2023) 3 SCC 629, Unitech Limited &Ors. Vs. Telengana State Industrial Infrastructure Corporation (TSIIC) &Ors. reported in (2021) SCC Online SC 99.*** Mr. Roy vehemently submits that debarring Respondent no. 1 from participating in the future tender for two years is in effect blacklisting the said lease holder having a stigma to be put on it without following the principle of natural justice is *per se* illegal. He further submits that the debarment in participating in the future tender being akin to blacklisting the person/entity is acivildeath and, therefore, an opportunity of hearing is inevitable despite there being no clauses or mechanism in the contract and placed reliance upon a judgment of the Apex Court in case of

UMC Technologies Pvt. Ltd. vs. Food Corporation of India & Anr. reported in (2023) 2 SCC 551 and State Bank of India & Ors. vs. Rajesh Agarwal & Ors. reported in (2023) 6 SCC 1.

Mr. Abhishek Banerjee appearing from the Respondent no. 2 fairly submits that the said respondent has a miniscule role concerning the disputes involved in the instant matter. It is further submitted that since the security deposits in the form of a Fixed Deposits relates to the said respondent, any direction or order passed by the Court shall be implemented and/or obeyed.

On the backdrop of the aforesaid facts and the submissions so advanced, we feel it pertinent to quote the relevant Clauses of the agreement entered into between the parties:

“8.4. If the leaseholder, after commencement of loading fails to operate the contract continuously for 10 days without giving any notice, his contract will be terminated and security deposit forfeited.

25.1. Lease holder shall have the right to terminate the agreement after serving 60 days notice to Railway Administration. However, leaseholder shall not be allowed to terminate the contract before one year (10 months + 2 months notice period) in case of any contract whether it is on short term or long term. In case he does so, his security deposit shall be forfeited and he shall be debarred from

entering into any tender for next two year. But he shall be allowed to operate existing tender of other trains, if any.

(The leaseholder can give notice for termination of contract after completion of 10 months. Thus 10 months + 2 months (notice period) = 12 months period will be completed. After completion of 1 year period, the leaseholder can be allowed to quit the contract. In such cases, security deposit will not be forfeited).

29.2. All disputes in regard to implementation of the policy / agreement with S.E. Railway, under this scheme, will be referred to an Arbitrator nominated by General Manager of the S.E. Railway.”

Indubitably, the tender was awarded in favour of the Respondent no. 1 being the highest bidder for leasing of 23 tonnes space in VHP on the round trip basis by a train no. 12834/12833 running between Howrah to Ahmedabad Ex-Shalimar for a period of five years as per the round trip lease freight. It is further stipulated that the loading or uploading shall be done 7 days in a week and the Railway Authorities reserved the right to impose an annual escalation of lump sumlease freight by 10 per cent from the fourth year. Pursuant to the terms and conditions embodied in the said tender the security deposit to the tune of Rs. 1 crore and odd was submitted in the form of a Fixed Deposits with the Oriental Bank of Commerce which has now merged with the Respondent no. 2 herein. Clause 8.4 of the said agreement which was entered into after the declaration of the tender process adjudging the Respondent no. 1 as a highest bidder, bestowed right upon

the Railway Administration to terminate the contract and forfeit the security deposit if the lease holder fails to operate the contract continuously for 10 days without giving any notice, after the commencement of the loading.

The plain reading of the said Clause leaves no ambiguity in our mind that the same can be activated in the event the lease holder commenced the loading and thereafter fails to operate for a continuous period of 10 days without giving any notice. The Railway Administration interpreted the said Clause in such a manner that it confers an unbridled right to terminate the agreement and forfeit the security deposit in the event of failure to operate a contract continuously for 10 days. It is no longer *res integra* that the intention of the parties, entering into the contract reduced in writing, can be gathered from the words, or the sentences deciphered therefrom. Each word or the expression used in the contract is to be considered in pursuit of ascertaining the intention of the contracting parties and its operation in a specified field. There is a fallacy in the stand of the Railway Administration in construing the said clause to operate in the event the failure on the part of the lease holder to operate the contract for a period of 10 days is evident. The said clause can be activated only after the commencement of the loading and/or uploading on the part of the lease holder to operate the contract continuously for 10 days without giving any notice. The expression “without giving any notice” has assumed significance in relation to an invocation of the said clauses which appears to have been misinterpreted by the Railway Administration in the instant case that it can be invoked after the commencement of the loading and uploading upon entered into the contract in all situations.

The Railway Administration was apprised of the difficulties in the lease operation in respect of the train for which the contract was awarded because of the huge time gap in placement of the loaded VHP as well as the attachment of the loaded VHP in the scheduled train causing immense difficulty in uploading perishable goods stacked in the open air. Through a letter dated 17.06.2019, it was clearly indicated that unless such problems are redressed, it would not be possible for the Respondent no. 1 to continue with the loading and unloading of the parcels and, therefore, the operation shall be temporarily suspended w.e.f., 15.06.2019. Since there was no response from the Railway Authorities nor any redress to the difficulties were addressed, a further letter was issued by the Respondent no. 1 on 09.12.2019 raising the above issues and percolating its dissatisfaction and asked the Railway Board to refund the security deposit. There was a complete silence on the part of the Railway Administration and a further reminder was issued on 04.08.2020 for refund of the security deposit. The Railway Administration responded to the aforesaid letters on 01.10.2020 putting Clause 8.4 and 25.1 of the agreement without adverting to the issues raised by the Respondent no. 1. The said letter apparently does not contain any attempt to redress the issues but reminding the Respondent no. 1 of the aforesaid relevant clauses. Though there is no indication in the aforesaid letter concerning the issues so raised yet, an impression can be gathered that the Railway Administration reminding the Respondent no. 1 of the Clauses of the agreement providing the termination of a contract, forfeiture of the security deposit and imposition of Bar in participating in a future contract for a period of two years.

Despite the communication having made after receiving the said letter dated 01.10.2020, the Railway Authorities terminated the contract invoking the aforesaid Clauses. As indicated above, Clause 8.4 can only operate in the event of discontinuance to load and upload the parcels for a continuous period of 10 years without giving notice. After the commencement of the operation of the Respondent no. 1 gave a notice on 17.06.2019 flagging the issues and communicating its decision of temporary suspension of its operation until such issues are redressed and/or resolved in the following:

“Till the date we have suffered huge financial setback (loss) due to above reasons and now we are not in position to bear further losses. Therefore we are temporarily stopping (suspending) the lease operation of above train round trip VPH w.e.f. 18.06.2019 till the resolution of the above issues. Without the resolution of our above problems we shall not be operating the same. It is therefore requested to resolve the above issues at early so that we may resume the lease running accordingly. However, if the same could not be resolved and no help is extended to us, we shall not run the above lease in future and hence request you to please refund of already deposited Security Money for the same at early.

It is also specifically mentioned here that we have no intention to stop the running of above lease VPH operation but the above stated circumstances are forcing us to do so because continuing business losses and rising operation

cost due to above reasons are making difficult for us. Therefore, most respectfully requested to please resolve the above issues immediately without any delay and inform us accordingly please.”

It cannot be presumed that the Respondent no. 1 failed to operate the contract after the commencement of the operation without giving notice to the Railway Administration. The contracting parties cannot depart and/or deviate from the above terms and if it is agreed that Clause 8.4 of the said agreement can be invoked on a certain eventuality, its invocation, unless such eventuality happens or manifestly evident from the conduct of the parties, is contrary to the agreement. It is preposterous to suggest that Clause 8.4 of the agreement can be invoked on failure to operate for continuous period of 10 days; on the other hand, the said Clause can only be invoked if failure to operate for a continuous period of 10 days at the behest of the lease holder after the commencement of the operation is without serving any notice. The statutory authorities cannot whimsically or capriciously invoke the Clause of the agreement upon discarding the eventuality indicated therein. Any departure from the clear and explicit meaning of the expression used in the said clause is regarded as infirm and/or illegal as the parties to the contract cannot resile therefrom and should adhere to the Clauses contained in the agreement.

It leads to another question whether the Writ Court can interfere even after finding the action of the authority is contrary to the terms and condition of a contract. The Apex Court in **Unitech Ltd. & Ors.** was considering a case where an identical issue was raised as to whether the

Writ Court can invoke the powers conferred under Article 226 of the Constitution in relation to a contractual matters. Drawing an inspiration from the earlier judgment of Supreme Court rendered in case of ***ABL International Ltd.vs. Export Credit Guarantee Corporation of India Ltd. &Ors.reported in (2004) 3 SCC 553*** wherein it was held that the writ petition against the State or its instrumentalities is maintainable even if it arises out of a contractual obligation despite the fact that some disputed facts may arise for consideration. It was further held therein that even a monetary claim can be granted as a consequential relief by the Writ Court. It is further held in the said judgment in unequivocal terms that there is no fetter on the part of the Writ Court to enquire into an issue whether the action of the State or its instrumentalities is arbitrary, unfair and in violation of Article 14 of the Constitution in the following:

“41. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute

pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. The jurisdiction under Article 226 was rightly invoked by the Single Judge and the Division Bench of the Andhra Pradesh in this case, when the foundational representation of the contract has failed. TSIIC, a state instrumentality, has not just reneged on its contractual obligation, but hoarded the refund of the principal and interest on the consideration that was paid by Unitech over a decade ago. It does not dispute the entitlement of Unitech to the refund of its principal.”

The aforesaid point further arose in a subsequent decision rendered by the Apex Court in **Gas Authority of India Ltd. (supra)** wherein it is held that even a dispute arising out of a commercial contract can be decided by the Writ Court if the State or its instrumentalities have acted unfairly and indiscriminately in the following:

“21. Although the dispute arises from a commercial contract, we find that the writ petition challenging the clauses was maintainable. It is not disputed that GAIL is a

public sector undertaking and thus qualifies under the definition of “State” as per Article 12 of the Constitution. At the time of entering into contract, GAIL was enjoying a monopolistic position with respect to the supply of natural gas in the country. IPCL, having incurred a significant expense in setting up the appropriate infrastructure, had no choice but to enter into agreement with GAIL. Thus, there was a clear public element involved in the dealings between the parties. Further, writ jurisdiction can be exercised when the State, even in its contractual dealings, fails to exercise a degree of fairness or practises any discrimination. We are fortified in our view by this Court’s decision in ABL International and Joshi Technologies.”

The exposition of law enunciated in the above reports recognised the jurisdiction of a Writ Court in a contractual matter and does not lay down in unequivocal terms that the Writ Court is denuded of powers in entertaining the writ petition under Article 226 of the Constitution of India in absolute terms. The moment the Court found that the action of the States or its instrumentalities or the authority who have entered into a contract acted unfairly, indiscriminately and departed from the terms of the agreement, there is no fetter on the part of the Writ Court to entertain such writ petition in a contractual field. The moment the State or the authority is one of the contracting party it involves a public element and, therefore, they have to act fairly and not discriminately by using their monopolistic position. The invocation of a Clause by segregating the words or the sentences used therein is impermissible nor a contract or its term can be unilaterally varied.

It is impermissible to cull out the words or expressions from the terms leaving the other important words or expressions used therein in order to suit the purpose and the moment the Court found the action of the State or the authority to be contrary to the spirit and the purport of the said clause, there is no obstacle to step in in pursuit of rendering justice even in contractual matter.

An ancillary point is also taken on the score of alternative remedy provided in the contract. In order to elaborate the point, it is sought to be contended that in view of the arbitration clause contained in the said agreement, the jurisdiction of a Writ Court is expressly ousted. The aforesaid plea does not hold water in view of the law declared by the Apex Court in ***Unitech Ltd. & Ors. (supra)*** as quoted above wherein the Apex Court in unequivocal terms held that mere existence of an arbitration clause does not create an ouster of jurisdiction conferred upon the Writ Court under Article 226 of the Constitution of India. The moment the Court found that the case involves a public element, the public law remedy justifiable warrants interference. Even in case of ***Gas Authority of India Ltd. (supra)*** the Apex Court held that mere existence of an alternative remedy does not invite the ouster of a jurisdiction of Writ Court in the following:

“22. In the present case, GAIL’s action in levying “loss of transportation charges” was ex facie discriminatory, insofar as IPCL was mandated to build its own pipeline in terms of the allocation letter and was not using GAIL’s HBJ pipeline at all. Thus, it cannot be said that merely because an alternative remedy was available, the Court

should opt out of exercising jurisdiction under Article 226 of the Constitution and relegate the parties to a civil remedy.”

Reverting to the facts of the instant case, we would be failing in our duty if we do not consider the case made out by the appellant in relation to an invocation of Clause 25.1 of the said agreement quoted hereinabove. It is fallacious to suggest that the Railway Administration can invoke the said Clause for the purpose of terminating the contract, forfeiture of the security deposit and imposition of ban/bar in participating in future contract for 2 years. The said Clause is relatable to a lease holder who opted to terminate the agreement after serving the 60 days’ notice to the Railway Administration and does not confer any power on the Railway Administration to take shelter thereunder. Clause 25.2 of the contract is repository of the power conferred upon the Railway to terminate the contract by giving the one month’s notice which does not contain any expressions relating to forfeiture of the security deposit and/or imposing the bar in participating in the future tender for 2 years. Even if for argument’s sake, the contention of the appellant is taken that Clause 25.1 of the agreement is activated as the lease holder terminated the contract within the period reserved therein inviting the consequences as stipulated therein to follow yet we do not find from the letters issued by the parties that the Respondent no. 1 ever intended to terminate in this regard. All along the Respondent no. 1 took the stand that the difficulties faced in operation of the loading and uploading is to be redressed and in the event such redressal is not done, the suspension of the operation would continue in terms of Clause 8.4 of the said agreement. On a meaningful reading of Clause 25.1 it leaves no

ambiguity that the right to terminate the contract conferred upon the leaseholder without any reason or rhymes can be done after serving 60 days' notice but it does not apply in the event of suspension of the operation for the reasons indicated in the letter and, therefore, the consequence as provided therein cannot be invoked. The Trial Court has held that the termination is bad which we do not find any infirmity and/or illegality in it.

Apart from the same, the next question that arose is debarring Respondent no. 1 from participating in future tender for a period of 2 years taken as a consequential imposition under Clause 25.1 of the agreement. The contention of Mr. Maity that debarring the lease holder from participating in a future tender cannot be equated with the blacklisting of the lease holder, does not appear to be a correct proposition in this regard. The word "debarring" in its dictionary meaning refers to an act of officially preventing someone or an entity from in an activated or entering a place". In the legal context the "debarment" is construed as a sanction that prohibits a person or an entity from participating in certain activities such as the Government contracts for a specified period due to the misconduct or failure to meet certain standard. The debarment is typically used in a formal, regulatory context especially within the Government and Public Sector as a temporary measure intended to exclude entities from participating in the future contracts or the activities. It may at times be used for a specified duration or permanently. The grammatical meaning of blacklisting the individuals is placing such individual or entity on a list of people or organisation to be avoided or not trusted. The blacklisting in a legal context refers to a person or entity to be placed in a list or deprives him from the privileges or the services, conducting businesses or entering into the

contracts for wrong doing or the failure to comply the legal obligations. The blacklisting may be for a short duration or specified duration and may at times be permanent. The Apex Court in UMC Technologies Private Ltd. (supra) has coined the blacklisting as equivalent to acivildeaths in the following:

“15. In the present case as well, the appellant has submitted that serious prejudice has been caused to it due to the Corporation’s order of blacklisting as several other government corporations have now terminated their contracts with the appellant and/or prevented the appellant from participating in future tenders even though the impugned blacklisting order was, in fact, limited to the Corporation’s Madhya Pradesh regional office. This domino effect, which can effectively lead to the civil death of a person, shows that the consequences of blacklisting travel far beyond the dealings of the blacklisted person with one particular government corporation and in view thereof, this Court has consistently prescribed strict adherence to principles of natural justice whenever an entry is sought to be blacklisted.”

In ***Rajesh Agarwal &Ors. (supra)***the Apex Court succinctly restated the concept of blacklisting held in an earlier judgment of the Apex Court in ***Erusian Equipment & Chemicals Ltd. vs. State of West Bengal reported in (1975) 1 SCC 70***as preventing a person from privilege and advantage of entering into a lawfulrelationship with the government for the

purpose of gain and creates disability into a person or entity in participating in any contacts with the Government in the following:

“58. In Erusian Equipment & Chemicals Ltd. v. State of W.B. , the issue before this Court was whether a person is entitled to a notice to be heard before being blacklisted by the Government. This Court held that since blacklisting affects the privileges of the blacklisted person, fundamentals of fair play require that such a person be provided an opportunity of being heard: (SCC p. 75, para 20)

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.”

What emerged from the aforesaid judgment that blacklisting not only invites the civil death but also creates a complete bar into a person or entity to enter into the contract with the Government and, therefore, a stigma is attached to such a person or entity. From the cumulative interpretation of the word “debar” and “blacklisting” we have no hesitation that they are

synonymous is in both the cases and a stigma is attached to a person or a contract and deprivation in participating in a future contract with the Government. The stand of Mr. Maity that both words stands on a separate footing does not appear to be correct as both the words aimed at the same destination i.e. depriving a person of a privilege and the right to enter into a future contract with the Government.

It leads to a further point whether the blacklisting/debarment can be done unilaterally without affording an opportunity of hearing to a person who is debarred/blacklisted. The law laid down in UMC Technologies Private Ltd. (supra) can be gainfully applied where it has been held that before a person is blacklisted, the adherence of principle of natural justice is inevitable or in other words mandatory in the following:

“19. In light of the above decisions, it is clear that a prior show-cause notice granting a reasonable opportunity of being heard is an essential element of all administrative decision-making and particularly so in decisions pertaining to blacklisting which entail grave consequences for the entity being blacklisted. In these cases, furnishing of a valid show-cause notice is critical and a failure to do so would be fatal to any order of blacklisting pursuant thereto.”

The aforesaid principles are reiterated in ***Rajesh agarwal&Ors.*** (supra) in the following:

59. In *Joseph Vilangandan v. Executive Engineer (PWD)*24, the issue before the two-Judge Bench pertained to debarment of a government contractor from seeking any further contract with the Government without providing an opportunity of being heard. The material sentence of the notice there read as follows: (SCC p. 41, para 17)

"17. ... *You are therefore requested to show cause ... why the work may not be arranged otherwise at your risk and loss, through other agencies after debarring you as a defaulter. (emphasis in original)

This Court applied the position of law in *Erusian Equipment & Chemicals* to hold that the Executive Engineer ought to have given the contractor adequate opportunity to represent against the proposed action of debarment.

60. In *Raghunath Thakur v. State of Bihar*, a two-Judge Bench of this Court held that since blacklisting entails civil consequences an order of blacklisting should be issued only after following the principles of natural justice: (SCC p. 230, para 4)

"4. ... Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order

having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures 35 has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order."

61. In Gorkha Security Services v. State (NCT of Delhi), the issue before this Court pertained to the form and content of a show-cause notice that is required to be served before blacklisting the noticee. A two-Judge Bench of this Court observed that that an order blacklisting a person is stigmatic. The relevant observation is extracted below: (SCC p. 115, para 16):

16. It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it.

With blacklisting, many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person. from participating in government tenders which means precluding him from the award of government contracts."

(emphasis supplied)

It emerged from the aforesaid decision that even if right to be heard before a person is blacklisted is conspicuously absent in the agreement yet, it is obligatory on the part of the authorities to follow the principle of natural justice because of the serious consequence which follows from such action of blacklisting/debarring a person entering into a future contract with the Government or the public authorities. Any action which defies the principle of natural justice which is engrained and inhered as a public element, shall entail the action of the State or the public authorities liable to be struck down. We thus do not find any ground warranting interference with the impugned order on the facts and the law applicable in this regard.

Though we held that the findings recorded by the Single Bench does not warrant any interference yet, we cannot ignore the fact as disclosed by the appellant in a supplementary affidavit filed in the instant appeal. It is revealed in the said supplementary affidavit that after the termination of an agreement, fresh tender was floated by the appellant and the contract has been awarded to a third party who is not impleaded in the writ petition as well as in the instant appeal. At this juncture if the ultimate direction

passed by the Single Bench is not modified, it would lead to an anomalous situation having a resultant effect upon a non-party who would be vitally affected. Since Respondent no. 1 has also claimed a compensation for setting up the infrastructure and also spending on the market, we feel that the respondent can pursue such remedy by invoking the arbitration Clause as it requires a voluminous evidence to be adduced in support of such claim. We, thus, modified the ultimate order to the extent that the Respondent no. 1 instead of being reinstated into its contractual position may approach the Arbitral Tribunal for the claim of compensation.

So far as the refund of the security deposits and the letter of termination having found bad in law is concerned, the same is affirmed so also setting aside the decision of the appellate authority in debarring the Respondent no. 1 from participating in future tender for 2 years.

With these directions the appeal is thus disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Prasenjit Biswas, J.)