IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 2677/2024
WITH
WRIT PETITION NO. 1310/2024
WITH
WRIT PETITION NO. 2997/2024
WITH
WRIT PETITION NO. 3090/2024
WITH
WRIT PETITION NO. 1143/2024
AND
WRIT PETITION NO. 2583/2024

WRIT PETITION NO. 2677/2024

M/s Harsha Constructions Private Limited,
(HCPL), Registered Office at League
Sujana Building, 2nd Floor, Sy. No. 36/A/9,
Gopanpally Road, Serilingampally (Mandal)
Hyderabad, Rangareddi, Telangana 500046,
Telangana

.... **PETITIONER**

// VERSUS //

Western CoalFields Limited,
Through its General Manager,
having office at Coal Estate,
Civil Lines, Nagpur

.... **RESPONDENT**

WITH

WRIT PETITION NO. 1310/2024

M/s Gaurav Contracts Co.,
A registered Partnership Firm,
Through its Partner Shri Nikul Navin Dholu,
Aged about 32 years, Occ. Business,
having its Office at 122, Puja Complex,
Station Road, Bhuj-Kutch, Gujarat 370001

.... **PETITIONER**

// VERSUS //

Western CoalFields Limited (WCL),
Through its General Manager,
Coal Estate, Civil Lines, Nagpur 440001

.... **RESPONDENT**

WITH

WRIT PETITION NO. 2997/2024

M/s Shodha Constructions Private Limited,
8-2-293/82/L/356/A, Road No. 12,
Banjara Hills, Hyderabad 500034

.... **PETITIONER**

// VERSUS //

Western CoalFields Limited,
Through its General Manager,
having office at Coal Estate,
Civil Lines, Nagpur

.... **RESPONDENT**

WITH

<u>WRIT PETITION NO. 3090/2024</u>

M/s Kaveri Engineering Projects Private Limited,
(KAVERI), Flat No. 203, #6-3-1089-1/1,
Pavani Avenue, Rajbhavan Road, Somajiguda,
Hyderabad 500082 (Telangana)

.... <u>PETITIONER</u>

// VERSUS //

Western CoalFields Limited,
Through its General Manager,
having office at Coal Estate,
Civil Lines, Nagpur

.... <u>RESPONDENT</u>

<u>WITH</u>

<u>WRIT PETITION NO. 1143/2024</u>

M/s H.D. Enterprises,
A Registered Partnership Firm,
Through its Partner Shri Harilal
S/o Devji Patel, Aged about 64 years,
Occ. Business, Office at 501-503,
Siddharth Complex, R C Dutt Road,
Vadodara, Gujarat

.... <u>PETITIONER</u>

// VERSUS //

Western CoalFields Limited (WCL),
Through its General Manager (CMC),
Office at Coal Estate, Civil Lines, Nagpur

.... <u>RESPONDENT</u>

AND

WRIT PETITION NO. 2583/2024

C5 Engineering Private Limited,
Registered Office Plot No. 270-A,
MLA Colony, Road No. 12,
Banjara Hills, Hyderabad 500043

.... **PETITIONER**

// VERSUS //

Western CoalFields Limited,
Through its General Manager,
having office at Coal Estate,
Civil Lines, Nagpur

.... **RESPONDENT**

Mr. S.V. Manohar, Sr. Adv a/b Mr. Y.N. Sambre & Mr. S.O. Ahmed, Advocates for the Petitioners in respective Petitions
Mr. C.S. Samudra, Mr. A.M. Ghare, Advocates for the Respondent in respective Petitions

CORAM : AVINASH G. GHAROTE &
SMT. M.S. JAWALKAR, JJ.

CLOSED FOR JUDGMENT ON :- AUGUST 21, 2024
JUDGMENT PRONOUNCED ON :- SEPTEMBER 23, 2024

JUDGMENT :- (PER: SMT. M.S. JAWALKAR, J.)

(1) **Rule.**

(2) Rule made returnable forthwith.

(3) Heard finally by the consent of learned counsel appearing for the parties.

(4) The challenge raised in all the Petitions are the same i.e. challenge to the order of black-listing. All the petitions are taken up together to decide them by common judgment.

(5) All the Petitions question the communication by which the Petitioners have been blacklisted and security deposits of the Petitioners have been forfeited on the ground that bids of the Petitioners violate Clause 4.2(d) of the NIT on account of the Petitioners having business relationship with another bidder, which put the Petitioners in a position to have access to the information about or influence the bid of another bidder. As similar question is involved in all the Petitions, they are taken up for final hearing together.

The contentions in the Writ Petitions are as follows:-

WP 2677/2024

M/s Harsha Construction Pvt. Ltd. - Advocate Choubey

Vs

Western Coalfields Limited – Advocate Ghare

Tender No. - 21/2023-24

Bid No. - GEM/2023/B/ 3593161

Dated – 20/06/2023

Work – For Removal of all type of Material (SOB) in all kinds of strata by Hiring of Equipment)

Joint Venture Between – Ms Kaveri Engineering Projects Limited,
M/s Harsha Construction Pvt. Ltd.
M/s C5 Engineering Pvt. Ltd.

M/s KAVERI-HCPL-C5

Disqualified for **–** Violating Clause 2(v)(d) of CIPP.

Impugned Order dated - 04/04/2024, Page No. 235, Annexure – N

Ground for passing impugned order - "The two bidders i.e. M/s M/s KAVERI-HCPL-C5 and M/s HCPL-SHPPL JV have their partners namely M/s Harsha Constructions Private Limited and M/s Sushee Hitech Projects Private Limited respectively who had formed their own JV and obtained work at Pauni II Expansion OCM of Ballarpur Area vide LOA No. Wcl/GM(CMC)/E-837017/LOA/34/2022-23/52 dated 12/12/2022 and the work is under progress/execution at present. As such, it appeared that M/s KAVERI-HCPL-C5 JV and M/s SHODHA-SHPPL JV are in business relation through common parties who are their partner companies in the JV entity. As M/s Harsha Constructions Private Limited and M/s Sushee Hitech Projects Private Limited are presently working as JV for a different work, there is a high probability that they have access to information of each other. Thus the bidders in present tender have access to information through common parties and hence would fall under "conflict of interest" as per clause 2(v)(d) of CIPP. Thus, there is apparent violation of CIPP mentioned above especially when the two bidders have also given their declaration as per Annexure-P.

Prayer - Quash and set aside impugned order dated 04/04/2024.

- Direct the respondent to refund earnest money.
- During pendency stay the operation impugned order dated 04/04/2024.

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WP 2583/2024

C5 Engineering Pvt. Ltd - Advocate A.S. Manohar

Vs

Western Coalfields Limited - Advocate Ghare

Tender No.	-	21/2023-24
Bid No.	-	GEM/2023/B/ 3592316
Dated	–	20/06/2023
Work	–	For Removal of all type of Material (SOB)
Joint Venture dated	-	05/07/2023
Between	–	M/s Kaveri Engineering Projects Limited, M/s Harsha Construction Pvt. Ltd.(HPCL) and M/s C5 Engineering Pvt. Ltd. **"M/s KAVERI-HCPL-C5 Joint Venture"**
Disqualified for	–	Violating Clause 2(v)(d) of COI
Impugned Order dated	–	04/04/2024, Pg No. 216, Annexure – N

Ground for passing impugned order – It was alleged that, M/s

Shodha Constructions Private Limited and M/s Sushee Hitech Projects Private Limited formed a Joint Venture by the name of SHODHA-SHPPL JOINT VENTURE and have participated in the above mentioned tender. M/s Kaveri-HPC.-C5 JOINT VENTURE, a Joint Venture of which the petitioner is a partner, has one partner as M/s Harsha Constructions Private Limited and M/s Sushee High-tech Projects private Limited have formed another Joint Venture by the name of M/s HCPL-SHPPL JOINT VENTURE and the said Joint Venture has obtained work from the respondent at Paoni II Expansion OCM of Ballarpur area which is presently going on.

Prayer – Quash and set aside Judgment and Order dated 04/04/2024

- Direct the respondent to refund earnest money
- During Pendency stay the effect of impugned order dated 04/04/2024

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W.P. NO. 1310/2024

M/s Gaurav Contracts Co. - Advocate Sambre

Vs.

Western Coalfields Limited – Advocate Samudra

Tender ID - 2018-WCL-10219-1

Tender No. - 3/2023-24

Bid No. -

Dated – 06/04/2023

Joint Venture between – M/s Gaurav Contracts and
M/s H.D. Enterprises Company.

Disqualified for – Violating Clause 4.2(b) of JBD

Impugned Order dated – 08/02/2024, Pg No. 159, Annexure – XII

Ground for passing impugned order – The work being executed by M/s HD Gaurav JV Neeljay Expansion OCM is a business venture undertaken by M/s Gaurav Contracts Co.. and M/s H.D. Enterprises in the present tender by forming a JV. As such it is evident that M/s Gaurav Contracts Co. and M/s H.D Enterprises have business relationship with each other and the said business relationship is presently on going this is violation of clause 4.2(d) of the instruction to the bidder as per the NIT no. 03/2023-24.

Prayer - Quash and set aside Order dated 08/02/2024

- During the pendency Stay the effect of Impugned order dated 08/02/2024.

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3090/2024

M/s Kaveri Engineering Project Pvt. Ltd. - Advocate A.S. Manohar

Vs.

Western Coalfields Limited – Advocate Ghare

Tender No. - 21/2023-24

Bid No. - GEM/2023/B/ 3592316

Dated – 20/06/2023

Joint Venture Between – Ms Kaveri Engineering Projects Limited (KAVERI),
M/s Harsha Construction Pvt. Ltd. and
M/s C5 Engineering Pvt. Ltd
"M/s KAVERI-HCPL-C5"

Joint Venture dated - 05/07/2023

Disqualified for – violating Clause 2(v)(d) of COI

Impugned order dated – 04/04/2024, Annexure – N, Pg. 219

Ground for passing impugned order - The two bidders I.e M/s

KAVERI-HCPL-C5 and M/s HCPL-SHPPL JV have their partners namely M/s Harsha Constructions private limited and M/s Shushee Hitech Projects Private Limited respectively who had formed their own VJ and obtained work at Pauni II Expansion OCM of Ballarpur Area vide LOA No. WCL/GM(CMC)/E-837017/LOA dated 12/12/2022 and the work is under progress /execution at present. As such, it appreared that M/s KAVERI-HCPL-C5 JV and coompanies in the JV entity.As M/s Harsha Construction private limited and M/s Sushee hitech Project Private Limited are presently working as JV for a different work, there is a high probability that they have access to information through common parties and hence would fall under "conflict of interest" as per clause 2(v)(d) of CIPP. Thus, there is apparent violation of CIPP mentioned above especially when the two bidders have also given their declaration as per Annexure -P.

Prayer - Quash and set aside impugned order dated 04/04/2024
- Direct respondent to refund earnest money
- Stay the effect of order dated 04/04/2024

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<u>WP 2997/2024</u>

M/s Shodha Construction Pvt. Ltd. - Advocate A.S. Manohar

Vs.

Western Coalfields Limited – Advocate Ghare

Tender Notice No.	-	21/2023-24
Bid No.	-	GEM/2023/B/ 3592316
Dated	–	20/06/2023
Joint Venture Between	–	M/s Shodha Construction Pvt. Ltd., M/s Sushee Hi-tech Project Pvt. Ltd.

"SHODHA-SHPPL JOINT VENTURE"

Disqualified for – Violating Clause 2(v)(d) of COI

Impugned order dated – 04/04/2024, Annexure – K, Pg. 210

Ground for passing impugned order - The two bidders I.e M/s KAVERI-HCPL-C5 JV and M/s SHODHA -SHPPL JV have their partners namely M/s Harsha Construction Pvt Ltd and M/s Shushee Hitech Projects Pvt Ltd respectively who had formed their own JV and obtained work at Pauni II Expansion OCM of Ballarpur Area vide LOA No. WCL..dated 12/12/2022 and the work is under execution at present. As such, it appeared that M/S SHODHA-SHPPL Joint Venture and M/S KAVERI-HCPL-C5 JV are in business relation through common parties who are their partner companies in the Jv entity. As M/S Harsha Construction pvt ltd and M/s Sushee Hitech Projects Pvt Ltd are presently working as JV for a different work and there is a high probability that they have access to information of each other. Thus the bidders in present tender have access to information through common parties and hence would fall under the "conflict of interest" as per clause 2(v)(d) of CIPP.

Prayer **-** Quash and set aside impugned order dated 04/04/2024

- Direct respondent to refund earnest money
- Stay the effect of order dated 04/04/2024

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<u>WP 1143/2024</u>

M/s H.D. Enterprises Pvt. Ltd. - Advocate Sitani & Advocate Ahmed

Vs.

Western Coalfields Limited – Advocate Samudra

E - Tender No. - 03/2023-24

Dated - 06/04/2023

Joint Venture Between – M/s H.D. Enterprises and M/s Gaurav Contracts Company

Disqualified for – Violating Clause 4.2(d) of Instructions to bidder

Impugned order dated – 08/02/2024, Annexure – M, Pg. 90/95

Ground for passing impugned order - It was observed that M/s H.D. Enterprises and M/s Gaurav Contracts Co. have been awaded HOE work at Neeljay Expansion (Deep) OCM of Wani Area by CMC department , WCL, Nagpur as a JV entity in the name M/S H.D. GAURAV JV vide LOA Ref. No. WCL/…..and the work is under progress. The work being executed by M/s H.D. Enterprises and M/s Gaurav Contracts Co. in the present tensder by forming a JV. As such, it is evident that M/s H.D. Enterpises and M/s Gaurav Contracts Co. have business relationship with each other and the said business relationship is presently going on. This is violation of clause 4.2(d) of the instruction to the bidder As per the NIT.

Prayer - Quash and set aside impugned order dated 08/02/2024.

- During pendancy stay the effect of order dated 08/02/2024.

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(6) As Writ Petition No. 1143/2024 is treated as lead Petition, the facts and contentions of the said Petition have been considered for adjudication of the issue involved in all the Petitions:-

(7) That, on 06/04/2023, the Respondent floated a tender bearing E-Tender No. 03/2023-24 inviting bids for the said Project i.e. removal of all types of materials (Hard OB) in all

kinds of strata. The Petitioner submitted its bid on 24/04/2023 at 10:37 am and the last date for submission of the bid was 24/04/2023 at 11:00 hrs. However, at the last moment, the Respondent published a Corrigendum and the last date for submitting the bids was extended upto 04/05/2023. On 04/05/2023, the Respondent opened the technical bid and disqualified the present Petitioner for violating Clause 4.2(d) of the Instructions to Bidders on 23/05/2023. The same was communicated to the Petitioner and immediately on 24/05/2023, the Petitioner filed its objection before the Respondent. The Respondent issued a Show Cause Notice dated 21/06/2023 to the present Petitioner calling for an explanation from the present Petitioner as to why action should not be taken against the Petitioner for violating Clause 4.2(d) of the Instructions to Bidders as per the E-Tender No. 03/2023-24. The said Show Cause Notice was duly replied by the Petitioner on 03/07/2023 thereby explaining that the Petitioner is a Partnership Firm and its working place/office was earlier at Bhuj, but after earthquake in the year 2001, the Petitioner shifted the office at Vadodara where-from it is operating its office.

(8) It needs to be noted here that by way of the Show Cause Notice dated 21/06/2023, the Respondent, relying on Clause 4 of the Instructions to Bidders, has observed that M/s H.D. Enterprises and M/s Gaurav Contracts Company have been awarded HOE Work at Neeljay Expansion (Deep) OCM of Wani area by CMC Department, WCL, Nagpur as a JV Entity in the name M/s HD Gaurav JV vide LOA Ref. No. WCL/GM(CMC)/LOA/04/2018-19/20 dated 03/05.01.2019 and the work is under progress/execution. From this, it is held that it is evident that M/s H.D. Enterprises and Gaurav Contracts Company have business relationship with each other and the said business relationship is presently ongoing and the same cannot be construed as being made at an "arm length" in the usual course of business, so far as this Tender is concerned. Thus, Clause 4.2(d) of the Instructions to Bidders appears to be violated.

(9) It is further alleged that the Noticee has not made any correct disclosure in Annexure-P and has furnished a false undertaking. It was informed that the following action might be initiated against the Petitioner:-

> *"1. Forfeiture of Earnest Money deposited by you for participation in NIT No. 03/2023-24.*
>
> *2. Debarment of you i.e. M/s H.D. Enterprises and all your Partners for a period of 12 (twelve) months from the date of issue of such letter from participating in any future tenders in WCL either in individual capacity or as partner in partnership / JV firm."*

(10) The Petitioner, by way of the reply, explained that there is no violation of Clause 4.2(d) of the Instructions to Bidders. The said Clause 4.2(d) specifies that it may be considered that there is conflict of interest if the bidders are in business relationship with each other and it should be such "that puts them in a position to have access to the information about or influence on the bid of another bidders". It is also submitted that Clause 4.2(d) of the Instructions to Bidders therefore, postulated that the business relationship with each other should be such that

one party has natural access to the information of the other or can influence the other which requires some functional integrity between the two or commonality between the Director/Partners/CEO or Management of the Company. In absence of such commonality or functional integrity, it cannot be said that one party has access to the information or can influence the business of the other and requested for withdrawal of the said Show Cause Notice dated 21/06/2023. Personal hearing was granted to the Petitioner on 08/07/2023. In spite of the explanation given by the Petitioner, the Respondent passed an order dated 26/08/2023 thereby holding that the present Petitioner has violated Clause 4.2(d) of the Instructions to Bidders as per NIT E-Tender No. 03/2023-24 and hence forfeited earnest money deposited by the Petitioner amounting to Rs. 50,00,000/- and further the Petitioner and all its Partners are debarred from participating in the future tenders floated by the present Respondent in their individual capacity or Partnership/Joint Venture Firm for a period of 12 months from the date of the said order. The said order was challenged by filing Writ Petition No. 5900/2023. This Court granted interim relief in terms of the Prayer Clause (d). On 30/11/2023, this Court remanded the matter back to the Respondent directing to decide afresh. Even after remand, the reply of the Petitioner was not considered and earlier order was confirmed.

(11) Mr. S.V. Manohar, learned Senior Advocate appearing for the Petitioner submits that for the present NIT, the Petitioner submitted the bid on 24/04/2023 at 10:37 am. The last date for submission was 24/04/2023 till 11:00 am. This was extended upto 04/05/2023. On 03/05/2023, one Gaurav Contracts Company, with whom the Petitioner had an earlier Joint Venture in respect of the work with WCL, also submitted its bid which is the reason for the impugned communication. According to the learned Senior Advocate, the very fact that the bid was to closed on 24/04/2023 at 11:00 am and the bid of the Petitioner was submitted was 24/04/2023 at 10:37 am, itself was indicative of the fact that there was no nexus between the Petitioner and

Gaurav Contracts Company. He further submits that not even the Petitioner and Gaurav Contracts Company were aware that any decision regarding extension of time period of bid would be taken by WCL and merely because the other member of the Joint Venture dated 24/05/2018 which was only for singular work, had submitted a bid on 03/05/2023, that does not indicate satisfaction of the requirement of Clause 4.2(d) of the NIT. It is further submitted that in the earlier round of litigation filed by the Petitioner i.e. Writ Petition No. 5900/2023, while disposing of the same on 30/11/2023, this Court had specifically directed this position to be taken into consideration, which has not been done.

(11.1) Learned counsel for the petitioner pointed out that in subsequent tender, clause 4.2 is amended deleting the word "all business relation". On perusal of said amendment it also supports the contention of petitioner. Though this amendment can not be invoked in this present tender, however, from the fact of amendment itself it is evident that the interpretation of said clause is unreasonable.

(11.2) Learned Senior Advocate appearing for the Petitioner, in support of his contentions, relied on the following judgments:-

> **"(i) Sarku Engineering Services SDN BHD, A Company registered under the laws of Malaysia vs. Union of India, Through the Secretary, Ministry of Petroleum & Natural Gas & another reported in 2016 SCC OnLine Bom 5233; and**
>
> **(ii) Blue Dreamz Advertising Private Limited & another vs. Kolkata Municipal Corporation & others reported in 2024 SCC OnLine SC 1896"**

(12) Mr. C.S. Samudra, learned Counsel for the Respondent in Writ Petition Nos. 1143/2024 and 1310/2024 vehemently argued that the word 'business' is purposely used in Clause 4.2(d) of the Instructions to Bidders which covers all business relationships.

(12.1) The decision of banning from dealing in any business with the respondent company for a period of one year is in terms of NIT and it is an administrative decision which is taken after careful scrutiny of the facts and material placed before it. Full opportunity to the petitioner was granted, therefore, the decision is not open to challenge. The Court is under obligation to confine itself to the question of legality of decision making process and not the decision itself. There is no error committed by the Respondent nor there is any scope to say that principles of natural justice are defeated.

(12.2) It is submitted that the petitioner M/s. H.D. Enterprises have uploaded several documents amongst others and undertaking as stipulated in Clause 4.2(b), 4.2(e), similarly M/s Gaurav Contract Company also uploaded undertakings. It is contended that during the evaluation of the bids submitted by the petitioner and by the M/s Gaurav Contract Company the Tender Committee noticed that these two bidders have been awarded HOE work of Neeljay Expansion (d) OCM of Vani area by WCL as a Joint Venture entity in the name of "M/s H.D. Gaurav J.V." vide LOA dated 01/08/2018 and work order dated 03/01/2019. It is alleged that the said work is presently under execution, whereas, in the present tender 3/2023-24, these two bidders are competing against each other.

(12.3) Thus, these two bidders have violated Clause 4.2(d) regarding conflict of interest as stipulated in instructions to bidder, therefore, Tender Committee proceeded to disqualify the said bidder. It is submitted that M/s Gaurav Contract Company did not challenge the decision and thus, it has become final. Therefore, petitioner is disqualified and estopped from challenging the impugned order of ban.

(12.4) There was a show cause notice in which it is specifically mentioned about intended action of forfeiture of EMD and debarment of petitioner for a period of twelve months from participating any future tender and for not furnishing correct disclosure in terms of Annexure - P. The petitioner submitted his reply, personal hearing was granted. There are deliberations made at different levels. As such, decision making process of banning the petitioner from dealing with the respondent WCL is taken after scrutiny of all the papers, deliberations made at different levels and also due application of mind, as such, no fault can be attributed.

(12.5) It is submitted by the learned Counsel Shri Samudra for Respondent Company that Clause 4.1 of instruction to bidder mandates that each bidder shall submit only one bid either individually or as a proprietor or as partner in the partnership firm or as member in the Joint Venture or as Company registered under the Companies Act, otherwise the bidder would be disqualified. Clause 4.2 (d) in the present tender is substantially different from erstwhile Clause 4.2 (d) that was existing in earlier tender. The insertion of the word “business” in Clause 4.2 (d) in the NIT has made substantial difference thereby making the intention of the authority very loud and clear. The intention of the authority is that bidders should not have "business relationship with each other" and also should not have “any business association with each other” so as to have an access to the information of another bidder.

(12.6) It is also submission of learned Counsel Shri Samudra that incidentally, if such relationship direct or indirect does exist then the likelihood of forming a "cartel" is not at all ruled out.

Clause 4.2 (d) prohibits such unfair practice of forming a "cartel" by the bidder, as the same is unfair trade practice which is not in the public interest. All the compliances are duly made by the authority before the impugned order is passed. No interference is warranted at the hands of this Court.

(12.7) In response to the contention of the petitioner that the petitioner submitted its bid on 24/04/2023 at 10:37 a.m., whereas the other bidder M/s Gaurav Contract submitted it's bid on 03/05/2023 at 18:50 p.m. during the extended period for submitting the bid, he submitted that the time and date of the bidding by the bidders is not the relevant factor for establishing conflict of interest. The knowledge about the participation of the other bidder in the tender at the time of bidding is not the relevant factor, even when petitioner got its knowledge subsequently, the undertaking and the clause gets automatically attracted. The said clause needs to be interpreted in such a manner that it will give commercial sense and meaning so as to ultimately achieve the object of inserting the word "business" in Clause 4.2 (d) for the first time.

(13) Learned Counsel Shri A.M. Ghare for Respondent in Writ Petition Nos. 2677/2024, 2583/2024, 3090/2024 and 2997/2024 supported the argument advanced by learned Counsel Shri Samudra. In addition, it is submitted that in Writ Petition No. 2583/2024, the petitioner HCPL had participated through a Joint Venture comprising of itself with M/s Kaveri Engineering Projects Limited (KAVERI) and C-5 Engineering Private Limited (C5). In the same process another Joint Venture had submitted bid comprising of firms by the name of Shodha Constructions Private Limited (SHODHA) and M/s Sushee Hitech Projects Private Limited made it (SHPPL). The firms of SHPPL and petitioner had formed a joint venture by the name of M/s HCPL-SHPPL in a bid floated at Pauni II Overcast Mine at Ballarpur Area of the respondent and having successful in securing a contract, which is still in subsistence, having been awarded on 12/12/2022. It is submitted that therefore, it is clear that one

partner of the C5-KAVERI- HCPL JV was in direct business relations with one partner of SHODHA- SHPPL JV, and both had applied for the same tender. He further submitted that as this subsisting business relation was not disclosed in the list, the technical bid of C5-KAVERI- HCPL was rejected for breach of the CIPP. The said disqualification has not been questioned by the petitioner or it's J.V. and has attained finality. It is submitted that the order of debarment is a consequential action to the disqualification. As there is no challenge to the disqualification, the order of debarment which is a consequential action to the disqualification would not be maintainable. He relied on ***Edukanti Kistamma (Dead) through L.Rs. Vs. S. Venkatareddy (Dead) through L.Rs. And others, 2010 (1) SCC 756***.

(14) We have heard both the parties at length, considered documents placed on record and citations referred. The question which falls for our consideration is whether in the facts and circumstances of the case, order of the Respondent Company dated 08/02/2024 (Annexure – M), debarring the petitioner for a

period of twelve months is valid and justified in the eye of law. Another question which falls for our consideration is whether there is any violation of Clause 4.2 at the hands of petitioners.

(15) In foregoing Paragraphs this Court has already recorded what are the contentions of the parties and why the respondent Company is saying that there is a violation of Clause 4.2(d). The impugned order is the result of such violation. Now let us turn to the clause itself to see whether there is any conclusive presumption spelt out in the clause so as to conclude that if petitioners and other bidder have business relationship, that by itself, puts them in a position to have access to information about or influence on the bid of another bidder. It would be appropriate to reproduce Clause 4.2 for the sake of convenience.

<u>Clause 4.2 Conflict of Interest.</u>

> *"A Bidder may be considered to have a conflict of interest with one or more parties in this bidding process, if:*
> *a) They have controlling partner(s) in common: or*
> *b) They receive or have received any direct or indirect subsidy/financial stake from any of them: or*

> *c) They have the same legal representative/agent for purpose of this bid: or*
> *d) <u>They have business relationship with each other, directly or through common third parties, that puts them in a position to have access to information about or influence on the bid of another Bidder, or</u>*
> *e) A Bidder or any of its affiliate participated as a consultant in the preparation of the design or technical specification of the contract that is the subject of the Bid; or*
> *f) In case of a holding company having more than one subsidiary/sister concern having common business ownership/management only one of them can bid. Bidders must proactively declare such sister/common business/management in same/similar line of Business.*
> *All such Bidders having a conflict of interest shall be disqualified."*

(16) The opening words of Clause 4.2 says that a bidder 'may' be considered to have a conflict of interest. As such, there is no conclusive presumption that if they have business relationship with each other it would be conclusive proof of having a conflict of interest with one or more parties in the bidding process. So simple business relationship is not sufficient to conclude that the parties are having conflict of interest unless there is functional integrity or commonality.

(17) The petitioner in reply to show cause specifically submitted that they do not have any common partners with M/s.

Gaurav Contracts Company (M/s. GCC) and working place/office of the petitioner is at Vadodara, Gujarat which is at a distance of 400-500 kms away from the office of M/s. GCC whose office/work place situated at Bhuj, Gujarat. Moreover, the last date for submission of bid was 24/04/2023 till 11.00 Hrs. and the petitioner had submitted the bid on 24/04/2023 at 10.37 Hrs. Thereafter, the respondent extended the last date for submission of bid till 04/05/2023 and said M/s. GCC submitted their bid on 03/05/2023 at 18.50 Hrs. It is an admitted fact that the entire tender process is floated on the Government GEM portal and it is completely online and no participant is having access to know who all are participating.

(18) In view of the above facts, one cannot conclude that there was any knowledge to the petitioner-company of any company/entity/firm, with which it had a JV participating, in the tender. If there would have been such intention, the said constituent of the JV would have submitted its bid within time and not in extended period. All the constituents of the JV are the

distinct entities and having separate legal status. The Joint Venture had been entered into only for the earlier tender notice of a project. However, it appears that there was no functional integrity between entities which had formed the JV and they were independent entities. That JVs were for a single venture and not for a continuing business, is a position not disputed by the learned counsel for the respondents. On perusal of Clause 4.2 (d), "all business" relationships are not covered by the clause. It disqualifies only those business relationship that would put a bidder in a position to have access to the information about or influence the bid of another bidder. There is no absolute presumption to the effect that if there is business relationship, it would be considered to have conflict of interest with one or more parties in the bidding process.

As indicated above, having a mere business relationship by itself is not a ground for disqualification, in light of the language of Clause 4.2 (d), for it further requires that such business relationship has put them in a position to have access to information about or influence on the bid of another bidder. Therefore, for disqualifying a bidder it has to be established that the latter part of Clause 4.2 (d) has been fulfilled and a mere business relationship cannot be the basis for holding that there is a conflict of interest within the meaning of the expression as occurring in Clause 4.2 of the Conditions of the NIT. There has to be subjective satisfaction of the Bidding Authorities.

(19) Clause 16 of the NIT Conditions contain guidelines on debarment of firm from bidding. The learned counsel for WCL sought to justify the action of debarment relying upon this Clause, which reads as under:-

> *"16. **Guidelines on Debarment of Firms from Bidding***
> *CIL and its Subsidiary Companies shall follow the following guidelines for effecting 'Debarment of firms from Bidding' with a contracting entity in respect of Works and Services Contracts.*
> *1. Observance of Principle of Natural Justice before debarment of firm from Bidding.*
> *2. The Bidder/Contractor may be debarred in the following circumstances:*
> *i)…*
> *vi) Willful suppression of facts or furnishing of wrong information or manipulated or forged documents by the Agency or using any other illegal/unfair means."*

(20) It is submitted that the petitioner as well as M/s. GCC have not made correct disclosure in Annexure-P and has furnished a false undertaking. It is not disputed that Annexure-P is submitted by M/s. H.D. Enterprises on 15/04/2023. The undertaking was to the effect that if it has any relationship with another bidder directly or through another parties, that would put a bidder in a position to have access to the information about or influence the bid of another bidder or if not of its bid affiliate participation as a consultant in the preparation of the relevant document which is a subject of the bid, it would stand disqualified. This would indicate that till the submission of undertaking, the petitioner HDE was not aware that the period is going to be extended and GCC would also file a bid. Thus, Annexure-P cannot be said to be incorrect and false so as to claim that a false undertaking had been submitted. Even if this undertaking is given, the petitioner and GCC are both different entities and there is no functional integrity. Even if they were allotted a tender in one, joint venture that does not stop them

from pursuing their independent business. Clause 16(2)(b)(vi) refers to willful suppression of facts or furnishing of wrong information for disqualification. In view of the position, then existing, there is no reason to conclude that the disclosure made therein was incorrect and false undertaking had been submitted. The respondent while passing the impugned order assumed that, "the very existence of business relationship between the Bidders is itself sufficient to infer and establish that the Bidders are in a position to have an access to the information about or influence on the Bid of another Bidder." Such presumption cannot be drawn unless it is spelt out in the relevant provision. It has to be decided in the facts and circumstances of the case. Only because there is business relationship of the petitioner with GCC will not automatically lead to conclude that they are in a position to have an access to the information about or influence on the Bid of another Bidder.

(21) Being a construction company, the petitioner may have 'N' number of business relationship, however, it is not

necessary that, it would be in a position to have an access to the information about or influence on the Bid of another Bidder unless it is found that there is functional integrity. It is unreasonable to expect the bidder to give details of the business relationship with each and every such other entity.

(22) The learned counsel for the respondent vehemently submitted that the relationship of the petitioner with GCC is not at "arm's Lenth" by virtue of the work being executed by them at Neeljay Expansion OCM. It is also the contention that, if such business association is there between two bidders, either directly or indirectly, either past or present, then the likelihood of forming a 'cartel' is not at all ruled out.

(23) The "arm's Lenth transaction" refers to a business deal in which two parties act independently without one party influencing the other. There is no such finding or evidence on record to conclude that such position was not in existence. Even if plea of possibility of 'cartel' is considered, it cannot readily be inferred. Whether in a given case, there was formation of 'cartel'

depends upon the available evidence and surrounding circumstances. It is merely a suspicion. Only because GCC also submitted its tender, it cannot be concluded that a cartel was formed. There has to be some reasonable apprehension, in addition to a mere business relationship, to establish this, which is absent here. In fact, till the last date, GCC was not in the fray. It has submitted its tender in extended period. There is no other material except that they were having one Joint Venture which is not sufficient to show that they are in a position to influence the bid of each other. Similar position avails in other petitions, where the blacklisting has been done merely on account of a JV having been entered into in view of what has been discussed above would equally apply there too.

(24) In ***Sarku Engineering Services SDN BHD, A Company registered under the laws of Malaysia*** (supra), this Court placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Erusian Equipment and Chemicals Limited V/s. State of West Bengal [(1975) 1 SCC 70]*** wherein it is held that,

> "*blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for the purposes of gains. The fact that a disability is created by the order of black-listing indicates that the relevant authority is to have an objective satisfaction.*" *<u>Hence, while passing such an order, which is having far reaching effect on the business of the Petitioner, the objectivity and the fair play on the part of the authority issuing such order is of paramount importance, which is found conspicuously lacking in the present case.</u>"*

(25) In ***Sarku Engineering Services SDN BHD, A Company registered under the laws of Malaysia*** (supra), this Court also placed reliance on the judgment of the Hon'ble Apex Court in the case of ***Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project, Bharat Sanchar Nigam Limited and Ors. [(2014) 14 SCC 731]***, wherein it was held that,

> "*though the power to black-list a contractor is inherent in the party allotting the contract, <u>such decision of black-listing is open to scrutiny not only on the touchstone of the principles of natural justice, but also on the Doctrine of Proportionality.</u> A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence, is similarly examinable by a Writ Court*".

(26) In ***Blue Dreamz Advertising Pvt. Ltd. And another Vs. Kolkata Municipal Corporation and others, 2024 SCC OnLine SC 1896***, the Hon'ble Apex Court observed as under:

> *"22. Blacklisting has always been viewed by this Court as a drastic remedy and the orders passed have been subjected to rigorous scrutiny. In Erusian Equipment & Chemicals Ltd. v. State of West Bengal (1975) 1 SCC 70, this Court observed that*
>
> > *"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…."*
>
> *23. In Mr. B.S.N. Joshi (supra), this Court while observing disasterous effect of debarment held that*
>
> *"41. … When a contractor is blacklisted by a department he is debarred from obtaining a contract, but in terms of the notice inviting tender when a tenderer is declared to be a defaulter, he may not get any contract at all. It may have to wind up its business. The same would, thus, have a disastrous effect on him. Whether a person defaults in making payment or not would depend upon the context in which the allegations are made as also the relevant statute operating in the field. When a demand is made, if the person concerned raises a <u>bona fide dispute in regard</u> to the claim, so long as the dispute is not resolved, he may not be declared to be defaulter."*
>
> *25. What is significant is that while setting out the guidelines prescribed in USA, the Court noticed that comprehensive guidelines for debarment were issued there for protecting public interest from those contractors and recipients who are non-responsible, lack business integrity or engage in dishonest or illegal conduct or are otherwise*

unable to perform satisfactorily. The illustrative cases set out also demonstrate that debarment as a remedy is to be invoked in cases where there is harm or potential harm for public interest particularly in cases where the person's conduct has demonstrated that debarment as a penalty alone will protect public interest and deter the person from repeating his actions which have a tendency to put public interest in jeopardy. In fact, it is common knowledge that in notice inviting tenders, any person blacklisted is rendered ineligible. Hence, blacklisting will not only debar the person concerned from dealing with the concerned employer, but because of the disqualification, their dealings with other entities also is proscribed. Even in the terms and conditions of tender in the present case, one of the conditions of eligibility is that the agency should not be blacklisted from anywhere.

26. In other words, where the case is of an ordinary breach of contract and the explanation offered by the person concerned raises a bona fide dispute, blacklisting/debarment as a penalty ought not to be resorted to. Debarring a person albeit for a certain number of years tantamounts to civil death inasmuch as the said person is commercially ostracized resulting in serious consequences for the person and those who are employed by him."

(27) Thus, the proper and fair opportunity of hearing and showing cause is the essential concomitant of the principle of natural justice, which is required to be followed, considering the drastic, damaging and far reaching impact, which an order of black-listing or banning has on the contractor. It is in the nature of a civil death as it affects his goodwill and reputation in the business. If Clause 4.2(d) is interpreted, in such a fashion that a

mere business relationship is sufficient to conclude that they are in a position to influence other's bid without anything more, it would literally infringe the right of a person to pursue his business, it would be in the nature of a civil death as it affects his goodwill and reputation in the business. The facts and circumstances shows that the petitioner as well as GCC are independent entities, there is no functional integrity. In our considered opinion, though an opportunity of hearing was granted, the respondent failed to consider the merit of Clause 4.2(d). The conclusion drawn is only on the basis of Joint Venture of the petitioner and GCC. True, it is that there are powers of black-listing or debarring the contractor available, they, however, are to be exercised only in certain conditions, and there has to be strong, independent and overwhelming material on record to resort to this power given, as it has the drastic consequences on a contractor. Thus, for all the reasons set out hereinabove, the orders of black-listing/debarring dated 08/02/2024 are liable to be quashed and set aside.

(28) All Writ Petition Nos. 2677/2024, 1310/2024, 2997/2024, 3090/2024, 1143/2024 and 2583/2024 are allowed and impugned orders dated 04/04/2024, 08/02/2024, 04/04/2024, 04/04/2024, 08/02/2024 and 04/04/2024 respectively are hereby quashed and set aside.

(29) Rule is made absolute in the aforesaid terms. No order as to costs.

(SMT. M.S. JAWALKAR, J.) (AVINASH G. GHAROTE, J.)

At this juncture, Shri A.M.Ghare, learned counsel for Western Coalfields Limited requests for continuation of interim orders dated 17/04/2024 in Writ Petition Nos. 2583/2024, dated 08/05/2024 in Writ Petition No. 3090/2024, dated 22/04/2024 in Writ Petition No. 2677/2024 and dated 06/05/2024 in Writ Petition No. 2997/2024, however, as the impugned order is set aside, we do not see any reason to extend such protection. As such, there is no need to continue the interim orders in relation to Western Coalfields Limited. The request for continuation of aforesaid interim orders is rejected.

(SMT. M.S. JAWALKAR, J.) **(AVINASH G. GHAROTE, J.)**

Signed by: Mr. B.T. Khapekar
Designation: PA To Honourable Judge
Date: 24/09/2024 18:13:37