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

Date of decision: 09th JULY, 2024

IN THE MATTER OF:

+ **W.P.(C) 4181/2024 & CM APPL. 17111/2024**

SA INFRASTRUCTURE CONSULTANTS PVT LTD Petitioner

Through: Mr. Joy Basu, Sr. Advocate with Ms.
Ritwika Nanda, Ms. Shruti Gupta and
Mr. Anoop George, Advocates.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA Respondent

Through: Mr. Manish K. Bishnoi, Mr. Pallavi
Singh and Mr. Khubaib Shakeel,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. Aggrieved by the decision dated 11.03.2024, taken by the Respondent herein debarring the Petitioner herein for a period of three months from the future works in NHAI from 11.03.2024 and imposing a penalty of Rs.20 Lakhs on the Petitioner in terms of Clause 7.3.1(i) of the General Conditions of Contract of the Consultancy Agreement entered into between the Petitioner and the Respondent for providing consultancy services for preparation of Detailed Project Reports (DPRs) for development of Economic Corridors, Inter Corridors, Feeder Routes and National Corridors to improve the efficiency of freight movement in India under the Bharatmala Pariyojna (*hereinafter referred to as 'the Consultancy Agreement'*) the Petitioner has filed the present Writ Petition.

2. Material on record discloses that the Petitioner was awarded a



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contract by the Respondent for providing Consultancy Services for preparation of DPR for development of Economic Corridors, Inter Corridors, Fedder Routes and National Corridors to improve the efficiency of freight movement in India under the Bharatmala Pariyojna. It is stated that subsequent to the Letter of Award, the Consultancy Agreement was executed between the Petitioner and the Respondent for providing Consultancy Services for preparation of DPRs for the project comprising of two stretches, i.e. Project Satwari and Project Pehowa. Material on record indicates that on 03.08.2020 the scope of Agreement was extended and the Petitioner was directed to prepare the DPR of two more projects, i.e. Project Shahbad and Project Ludhiana. It is stated that the Petitioner gave DPRs for Project Shahbad and Project Ludhiana. It is stated that a Concessionaire Agreement was entered into between the Petitioner and M/s Ceigall India Ltd. on Hybrid Annuity Mode for Project Shahbad. The Petitioner was served with a Show Cause Notice highlighting the deficiency in the DPR pertaining to Project Shahbad. Following deficiencies were given in the Show Cause Notice:

“i. Within Schedule B of the Concession Agreement, there is no mention of the terms 'Service Road/Slip Road'. Details provided pertain only to the Connecting Road. However, the Service Road/Slip Road has been accounted for in the DPR Cost estimate, reflected in TCS-II and included in Volume III of CA's plan and profile. Still, the specific Chainages related to TCS-II locations and the plan and profile aren't indicated in Appendix B-III(A) of Schedule B. Due to this oversight, the concessionaire now requests COS, citing this deficiency and raising additional financial implication costs on the Authority.



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ii. Appendix B-XV of Schedule B contains details of 'Culverts for connecting Roads/Road cum Drains' intended for construction by the concessionaire. In this appendix, the Type of Crossing is termed as Village Road, while the Type of Culvert is labeled as Box. However, according to IRC standards, when a structure is intended for any Road crossing, it should be termed 'Underpass'. By erroneously calling it a 'Culvert', the concessionaire plans to position the base of the structure 300 mm below ground, treating it as a drainage Culvert. Yet, as this structure is an Underpass, per clause 2.10.1 of IRC:SP:84-2019, its base should be 150 mm above ground to prevent water pooling. With the misuse of the terminology in the CA which was prepared under your guidance, the concessionaire is now claiming COS for adjusting the structures' levels above 150 mm from ground, and thereby raising additional financial implication costs on the Authority.

iii. Based on Schedule-B, Schedule-C, the provided TCS from the Concession Agreement, and IRC:SP: 84-2019, it's mandatory to install an RCC Crash Barrier with a friction slab at every RE wall site. This installation demands the construction of RE walls that reach full height. However, in the footnotes at Appendix-BXX of Schedule-B, it is stipulated that the location of RE wall/ retaining wall along the main carriage way shall be placed in such a way that lane addition could be done without recasting/reconstruction. The design and construction of a partial RE wall/ retaining wall shall be done for the full height considering future widening." Further, in Clause 2.2.7 of Schedule C, it is stipulated that "Concrete barriers shall be provided on bridges/structures, RE walls/ retaining walls as



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specified in Schedule B and Schedule D." The illustrations in TCS-II, III, IV, VI, and VII within Appendix B-1 of Schedule-B clearly show a full-height RE wall complemented by an RCC crash barrier with a friction slab. Notably, the requirement to have an RCC Crash Barrier with a friction slab at every RE wall site is reiterated in the aforementioned documents. Yet, taking the citation given in the footnote in Appendix-BXX of Schedule-B, the concessionaire has submitted designs for partial height RE walls; which is not in order considering the designs formulated in the DPR and TCS as well as Vol III."

3. Certain other discrepancies were also pointed out in the Show Cause Notice which are as under:

"3. Additionally, discrepancies in nomenclature/terminology across various other sections of the CA, which are not in alignment with model HAM RFP or IRC codal provisions have been observed; some of which are Major Bridge cum Underpass (Over Irrigation Canals) [Appendix-B- X B (I)], Major Bridge cum LVUP (Over Irrigation Canals) [Appendix-B-X B(II)], Major Bridge cum SVUP (Over Irrigation Canals) [Appendix-B-X B(III)], Special Structures (Over Rivers/Streams/Nallas) [Appendix-B-XI], Minor Bridges (Over Irrigation Canals) [Appendix B- XII(B)], Minor Bridge cum Underpass (Over Irrigation Canals) [Appendix-B-XII B (I)], Minor Bridge cum LVUP (Over Irrigation Canals) [Appendix-B-XII B(II)], Major Bridge cum SVUP (Over Irrigation Canals) [Appendix-B-XII B(III)], Culverts for Right Connecting Roads/Road cum Drain [Appendix-B-XVI] etc.

4. It is observed that the DPR Consultant had not provided their services as per the standard mandated



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under the Contract and owing to the deficiency in services, there is high chances that said matter be raised by the Concessionaire in DRB too and all of the same is solely attributable to the deficiencies on part of the DPR Consultant.”

4. It is pertinent to mention that in the Show Cause Notice the following clause of the Contract was reproduced and the same reads as under:

“7.1.1 The consultant shall be responsible for accuracy of the data collected, by him directly or procured from other agencies/authorities, the designs, drawings, estimates and all other details prepared by him as part of these services. He shall indemnify the Authority against any inaccuracy in the work which might surface during implementation of the project. The Consultant will also be responsible for correcting, at his own cost and risk, the drawings including any re-survey/ investigations and correcting layout etc. if required during the execution of the Services.”

5. It is pertinent to mention that the clause which was reproduced in the Show Cause Notice was not the actual clause of the Agreement which was entered into between the Petitioner and the Respondent.

6. The Petitioner was directed to give its reply as to why action including but not limited to debarring the Petitioner be not taken against the Petitioner under Clause 7.3.1 and 7.4 of the Agreement entered into between the parties. The Show Cause Notice also indicates that a personal hearing and briefing would also be given to the Petitioner.

7. Petitioner gave its reply on 06.11.2023 and placed reliance on the correct clause given in the Agreement. It was contended by the Petitioner in the reply that no case has been made out against the Petitioner for imposing



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any penalty against the Petitioner. In the reply it was also stated that the Petitioner does not want any oral hearing. However, a personal hearing was given to the Petitioner.

8. After considering the reply of the Petitioner, the impugned Order has been passed debarring the Petitioner for a period of three months from any future works in the NHAI. A penalty of Rs.20 lakhs was also imposed on the Petitioner. The reason given for imposing penalty on the Petitioner reads as under:

“2. Considering such deficiencies, the Authority vide its letter dated 25.10.2023 (cited at ref. ii) issued a Show Cause Notice to the Consultant seeking detailed explanation regarding the discrepancies/ deficiencies in the DPR. In response to the same, the Consultant vide its letter dated 06.11.2023 (cited at ref. iv) submitted an explanation on the contentions raised by the Authority, which have been examined thoroughly vis-à-vis the comments by the Authority. The observation of the Authority on the reply submitted by Consultant's are as below

a.) The Consultant did not use the standard RFP circulated by MoRTH/NHAI for HAM projects while preparing RFP/Schedules for instant Project. It is noted & concluded that the RFP for the instant Project was prepared from some old non-standard RFP for other project by making changes as per scope of project. The extra details in Appendices have been provided, which serves no purpose for instant package and create interpretation issue/confusion. The Consultant has shown very casual approach in preparing the technical schedules, particularly Schedule-B, in which important details are missing, but specific chainages related to TCS locations and plan



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and profiles are not indicated under Appendix B III(A) of Schedule B.

b.) The Consultant grossly erred in not providing adequate size of structures across existing BT roads & widening of existing culverts for construction of slip/service road resulting in significant CoS order for same.

c.) The nomenclature and terminology used for various scope in Schedule-B is not as per standard RFP for HAM projects, resulting in submission of CoS claim by the Concessionaire. The nomenclature of "Culvert for Connecting Roads/Road cum Drain" has been used for underpasses across existing village roads of size 4 x 4.5m, resulting in dispute by the Concessionaire regarding invert level of raft of culvert/underpass. If it is culvert then it is to be provided 300mm below natural ground and if it is underpass across road, then it is to be kept 150mm above the road level. But since in heading culvert for connecting road has been mentioned, Concessionaire was proposing this structure across road 300mm below road level. When not allowed by IE/PD, the Concessionaire has claimed COS amounting to Rs. 8.82 Cr. for increase in FRL, which although rejected by IE, due to ambiguity in the Concession Agreement dispute has been raised by the Concessionaire before DRB and DRB proceedings are in progress.

d.) The Schedule-B provides for full height retaining wall with crash barrier with friction slab. Also, TCS shows full height RE wall with crash barrier. However, in foot note in Schedule B at Appendix-BXX partial RE wall/ retaining wall shall be done for the full height considering future widening is mentioned in contravention to TCS shown in Schedule B as well as



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design formulated in DPR. Now, the Concessionaire is, taking advantage of the citation given in the footnote and the Concessionaire has submitted designs for partial height RE walls, which is not in order considering the designs formulated in the DPR and TCS as well as Vol III.

e.) No specific detail of 'Service Road/Slip Road' has been mentioned in any Annexure enclosed in Schedule B (which are to be mentioned as per standard RFP), but same is shown in typical cross section enclosed in Appendix in Schedule B along with specific chainages and Plan and Profile given in the alignment plan. Notwithstanding it, the same has been taken by IE in its submission but Concessionaire on account of the said ambiguity is claiming said COS due to the reason that exact chainage has not been mentioned in Appendix B III (A) of Schedule B which has resulted into contractual issue.

3. It is stated that as per Clause 3.1.1 of the General Condition of Contract of the Consultancy Agreement, the Consultant is obligated to perform the services and carry out their obligations here under with due diligence, efficiency and economy, in accordance with generally accepted professional techniques and practices, and shall observe sound management practices, and employ appropriate advance technology and safe and effective equipment, machinery, materials and methods. The Consultant shall always act, in respect of any matter relating to this Contract or Services, as faithful advisers to the client, and shall at all times support and safeguard the Client's legitimate interests in any dealing with Sub consultant or Third Parties. In this regard, it is stated that such errors and deficiencies in DPR



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has resulted in consequential loss to the Authority which is clear negligence of performance standards by the Consultant.

4. It is a known fact that NHAI is a public authority, and it is of utmost importance for it to make the roads safe for public use. However, if such serious breaches of the Consultant are not acted against by NHAI, it would encourage rest of the consultants/contractors to adopt the similar lackadaisical approach towards projects of public importance. It is evident that Consultant was not serious to protect the best interests of the Authority as it failed to fulfil its obligations as per the Consultancy Agreement, which entitles the Authority to take appropriate actions against the Consultant under the provisions of the Consultancy Agreement, Policy Circulars and applicable laws.”

9. It is this Notice which is under challenge in the present Writ Petition.
10. Notice was issued in the Writ Petition and replies have been filed.
11. Learned Counsel for the Petitioner contends that the Show Cause Notice issued to the Petitioner is inherently defective inasmuch as a wrong clause has been reproduced in the Show Cause Notice which do not form a part of the Consultancy Agreement and, therefore, the entire process is vitiated. He further states that the decision of imposing the punishment of debarment and penalty has been taken by the competent authority which is not a part of the Committee who heard the Petitioner. He states that the personal hearing of the Petitioner was conducted before a Committee consisting of Mr. Alok Deepankar, Member (Tech.), Mr. Prashant G. Khodaskar, CGM (Tech.) and Shri C.M. Sinha, GM (Tech.) Haryana and Punjab and Shri C.M. Sinha has signed the Impugned Order. He states that



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the principle of natural justice has been violated. He further states that ingredients of Clause 7.3.1 of the Agreement have not been met and hence it cannot be invoked. To establish the submission, attention of this Court is drawn to Clause 7.3.1 of the Agreement which states that there should be change in the scope of more than 10 per cent of the Project cost to attract imposing any punishment and since the total increase of the project cost is less than the threshold limit, Clause 7.3.1 cannot be invoked and there is no reason for proceeding further. Learned Counsel for the Petitioner further states that the penalty of Rs.20 lakhs which has been imposed on the Petitioner is not as per the Agreement inasmuch as the Agreement Clause only provides that penalty equivalent to 4% of the contract value shall be imposed. He, therefore, contends that since clause 7.3.1 of the Agreement has not been violated by the Petitioner and there is no deviation, the Petitioner could not have been debarred at all.

12. *Per contra*, learned Counsel for the Respondent contends that the fact that wrong Clauses were quoted in the Show Cause Notice has not caused any prejudice to the Petitioner inasmuch as the Petitioner has relied on the correct clauses in its reply to the Show Cause Notice. He, therefore, states that both parties knew the scope of the Agreement and the Clause which was being put against the Petitioner and in the absence of any prejudice caused to the Petitioner, the action to debar the Petitioner and impose penalty cannot be held to be bad. He states that in any event, there is no requirement for the provisions of the contract to be quoted in the Show Cause Notice and a Show Cause Notice even without quoting the provisions is valid. Learned Counsel for the Respondent has drawn the attention of this Court to



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Appendix B-XV of Schedule-B of the Concession Agreement wherein the intersection of two roads the Petitioner, the structure to be constructed, has been described as "culvert" instead of terming it "underpasses". He contends that any person with slightest of experience knows the difference between a culvert and underpass. He states in 23 locations which are at the intersection of two roads, an underpass has to be provided and not a culvert which is provided for cross- drainage purpose. It is contended that the Concessionaire is now asking for expanding the scope of work awarded to him as he has to construct an underpass as mentioned in the scope of work in the contract. He also draws the attention of this Court to Appendix B-III (A) of Schedule-B wherein the Petitioner has failed to mention 'service roads' as they were required to be constructed as part of the project, however, the same has been shown in the typical cross section. He, therefore, states that the acts of the Petitioner amounts to violation of the Agreement and, therefore, the Notice under challenge need not be interfered with by this Court.

13. Heard the Counsels for the Parties and perused the material on record.

14. The short question which arises for consideration is whether the Order of Debarment requires interference by this Court under Article 226 of the Constitution of India.

15. The action has been taken against the Petitioner primarily on the ground that there are lot of deficiencies in the DPR submitted by the Petitioner and because of deficiencies, there is a change in the scope of work and issues are being raised by the concessionaire. Clause 7.3.1 and 7.4 of the Agreement, which are important for the present case, reads as under:

"7.3.1. Penalty for Error/Variation



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i. If variation in project cost occurs due to Change of scope requests of more than 10% of the total project cost as estimated by the consultant and these change of scope requests arise due to deficiencies in the design provided by the consultant, the penalty equivalent to 4% of the contract value shall be imposed. For this purpose retention money equivalent to 4% of the contract value will be forfeited. This shall exclude any additional/deletion of items/works ordered by the client during the execution

ii. If there is a discrepancy in land to be acquired during the execution of the project upto an extent of +/- 5% of the area of land, a penalty equivalent to 3% of the contract value shall be imposed. For this purpose retention money equivalent to 3% of the contract value will be forfeited. This shall exclude any additional/deletion of Items/works ordered by the client during the execution

iii. If there is a variation in utilities shifting payments to be made during the execution of the project upto an extent of +/- 10% of the value estimated by the design consultant, a penalty equivalent to 3% of the contract value shall be imposed. For this purpose retention money equivalent to 3% of the contract value will be forfeited. This shall exclude any additional/deletion of items/works ordered by the client during the execution

iv. For inaccuracies in survey/investigation/design work the penalties shall be imposed as per details given in Table below:



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Sr. No.	Item	Penalty (%age of contract value)
1	Topographic Surveys	0.5 to 1.0
	a) The horizontal alignment does not match with ground condition.	
	b) The cross sections do not match with existing ground.	
	c) The co-ordinates are defective as instruments of desired accuracy not used.	
2	Geotechnical Surveys	0.5 to 1.0
	a) Incomplete surveys	
	b) Data not analyzed properly	
	c) The substrata substantially different from the actual strata found during construction.	
3	Traffic data found to be varying by more than 25% on resurvey at a later date, unless there are justifiable reasons.	0.2 to 0.5
4	Axle load data found to be varying by more than 25% on resurvey at a later date, unless there are justifiable reasons.	0.20 to 0.5
5	Structural Designs found to be unsafe or grossly over	1.0 to 2.0

7.4 ACTION FOR DEFICIENCY IN SERVICES

*7.4.1 Consultants liability towards the Client
Consultant shall be liable to indemnify the client for any direct loss or damage accrued or likely to accrue due to deficiency in service rendered by him.*

7.4.2 Warning / Debarring

In addition to the penalty as mentioned in para 7.3, warning may be issued to the erring consultants for minor deficiencies. In the case of major deficiencies in the Detailed Project Report involving time and cost overrun and adverse effect on reputation of NHAI, other penal action including debarring for certain period may also be initiated as per policy of NHAI."

16. The Apex Court in Patel Engg. Ltd. v. Union of India, (2012) 11 SCC 257, while considering an argument regarding the power of blacklisting has observed that the power to blacklist a bidder and prohibit it from



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participating in any future tender process is available only in those cases where the bidder is guilty of “fraud and corrupt practices” and has held as under:

“23. The authority of the second respondent to enter into contracts, consequently, the concomitant power not to enter into a contract with a particular person, does not flow from Article 298, as Article 298 deals with only the authority of the Union of India and the States. The authority of the second respondent to enter into a contract with all the incidental and concomitant powers flows from Sections 3(1) and (2) [“3.Constitution of the Authority.—(1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf, there shall be constituted for the purposes of this Act an Authority to be called the National Highways Authority of India.(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall by the said name sue and be sued.”] of the National Highways Authority of India Act, 1988. The nature of the said power is similar to the nature of the power flowing from Article 298 of the Constitution, though it is not identical.

24. The second respondent, being a statutory corporation, is equally subject to all constitutional limitations, which bind the State in its dealings with the subjects. At the same time, the very authority to enter into contracts conferred under Section 3 of the NHA Act, by necessary implication, confers the authority not to enter into a contract in appropriate cases (blacklist). The “bid document” can neither confer powers, which are not conferred by law on the second respondent, nor



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can it substract the powers, which are conferred by law either by express provision or by necessary implication.

25. The bid document is not a statutory instrument. Therefore, the rules of interpretation, which are applicable to the interpretation of statutes and statutory instruments, are not applicable to the bid document. Therefore, in our opinion, the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the second respondent from blacklisting a delinquent bidder, if it is otherwise justified. Such power is inherent in every person legally capable of entering into contracts.”

17. Further, the Apex Court in Kulja Industries Ltd. v. Western Telecom Project BSNL, (2014) 14 SCC 731, has observed as under:

“22. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing.

(d) Whether the contractor has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on the basis of conduct



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similar to one or more of the causes for debarment specified in this part.

(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.

(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.

(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(h) Whether the contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.

(i) Whether the wrongdoing was pervasive within the contractor's organization.

(j) The kind of positions held by the individuals involved in the wrongdoing.

(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.”



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25. Suffice it to say that “debarment” is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the “debarment” is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.”

18. The Show Cause Notice has succinctly brought out the deficiencies in the DPR submitted by the Petitioner. The Order impugned herein also lists out the deficiencies. The Petitioner has been heard by a Committee of experts and the Committee of experts, after looking into the deficiencies has come to the conclusion that the Petitioner has to be blacklisted.

19. This Court, while exercising its jurisdiction under Article 226 of the Constitution of India does not substitute its own conclusion to the one arrived at by the experts and this Court only looks into the fact as to whether the decision making process has been fair or not. Looking into the factors which have been enumerated by the Apex Court which can influence the decision maker, this Court is of the opinion that the decision making process has been fair and transparent. The deficiencies which have been pointed out are serious in nature. The authorities have applied their mind and have, therefore, held that in the facts of this case, the Petitioner has to be debarred for a period of three months.

20. In light of the Judgments passed by the Apex Court in Patel



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Engineering and Kulja Industries, this Court is not inclined to interfere with the decision taken by the Respondents.

21. It is the contention of the learned Counsel for the Petitioner that the principle of natural justice has been violated inasmuch as the authority who has passed the impugned Order is not the authority who has heard the Petitioner. This contention of the learned Counsel for the Petitioner is not correct inasmuch as one of the Member, who was a part of the Committee which heard the Petitioner, has passed the impugned Order and has stated that the project report given by the Petitioner was extremely faulty. Material on record indicates that the final Debarment Order has been passed by Shri C.M. Sinha who was the member of the Committee and, therefore, there is no violation of the principles of natural justice.

22. With these observations, the Writ Petition is dismissed along with the pending applications, if any.

SUBRAMONIUM PRASAD, J

JULY 09, 2024

Rahul