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

+ **W.P.(C) 12776/2024, CM APPL. 53273-53274/2024**

**OKINAWA AUTOTECH INTERNATIONAL PRIVATE
LIMITED & ANR.**

.....Petitioners

Through: Ms. Meenakshi Arora, Senior
Advocate with Mr. Manish Bishnoi,
Mr. Anurag Bhatt, Mr. Lokesh
Pathak, Mr. Ankur Gupta, Mr.
Vaibhav Vijayvargiya, Advocates.

versus

UNION OF INDIA

.....Respondent

Through: Mr. Anurag Ahluwalia, CGSC with
Mr. Kaushal Jeet Kait, Advocate.

**CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA**

**ORDER
11.09.2024**

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1. The Petitioner impugns the show cause notice dated 06th September, 2024 issued by Ministry of Heavy Industries and Public Enterprises, which requires them to respond to the proposed action of debarment or blacklisting.
2. Given that the Petitioner has approached the Court to challenge the show cause notice before any final order of blacklisting or debarment has been issued, the Court, at the outset, queried from Ms. Meenakshi Arora, Senior Counsel for the Petitioner, regarding the reasons for approaching the Court at this preliminary stage.

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3. In response, Ms. Arora argues that the impugned show cause notice is fundamentally flawed and legally untenable because it is premised on grounds that are already being contested in W.P.(C) 15125/2023, which is pending adjudication before this Court. She submits that the Respondent has acted improperly by issuing the show cause notice based on the same allegations that are already under judicial scrutiny. It was incumbent upon the Respondent to await the outcome of the pending writ petition, before proceeding with any action, including issuing the present show cause notice.

4. She further contends that since a decision has already been rendered against the Petitioner on 09th October, 2023, on the same grounds, the impugned show cause notice is a mere formality with a predetermined outcome. Therefore, she argues that the present writ petition challenging the show cause notice is maintainable. Additionally, she argues that considering that earlier punitive action is already under challenge before this Court, it was essential for the Respondent proposing further adverse action, such as blacklisting or debarment, to hold off until the pending judicial proceedings are resolved.

5. In support of her contention, she places reliance upon relevant paragraphs of the following judgments:

5.1 *Siemens Ltd. v. State of Maharashtra*¹

“9. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of U.P. v. Brahm Datt Sharma, Special Director v. Mohd. Ghulam Ghouse and Union of India v. Kunisetty Satyanarayana, but the question herein has to be considered from a different angle viz. when a notice is issued with premeditation, a writ petition would be

¹ (2006) 12 Supreme Court Cases 33



maintainable. In such an event, even if the court directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose. (See K.I. Shephard v. Union of India.) It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter-affidavit as also in its purported show-cause notice.”

5.2 Oryx Fisheries Private Limited v. Union of India and others²

“31. It is of course true that the show-cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show-cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi-judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it.”

5.3 Prakash Atlanta JV v. NHAI and Others³

“37. The third ground on which the impugned order is attacked is that it concerns issues which form the subject matter of arbitration proceedings. It is submitted that the Petitioners have in para 32 of the writ petition given details of the various disputes between the parties which are pending by way of arbitration before various tribunals. The learned Senior counsel for the Respondents on the other hand submits that the defects pointed out by the independent Engineer appointed in terms of the contract, and which were not contested by the petitioners. formed the basis of the blacklisting order and is therefore independent

² (2010) 13 Supreme Court Cases 427

³ ILR (2010) V Delhi 38



of any disputes that may be pending adjudication before the Arbitral Tribunal. It is further pointed out that given the importance of the projects of the NHAI and the necessity for completing them in time, the NHAI cannot be expected to wait for the completion of arbitration proceedings before deciding whether a contractor should be blacklisted. In response to this argument it is pointed out by the learned Senior counsel for the Petitioner that the Engineer under the contract in terms of clause 4.1. is expected to decide "contractual matters between the employer and the contractor in the role representing the employer". Therefore, the Engineer is in fact not an independent person as is sought to be projected by the NHAI.

38. One of the contentions raised in the show cause notice by the NHAI is that the Petitioners have by their letter dated 14th March 2008 issued "an invalid notice of termination of contract" and that by so doing the petitioners had "in no uncertain terms clearly refused to perform your obligation under the Contract". It appears that the validity of the action of the Petitioner in terminating the contract is indeed pending reference before an arbitral tribunal. In **National Building Construction Corp. Ltd. v. NDMC** (supra), a learned Single Judge of this Court dealt with a similar issue. In para 19 of the said decision (DLT @ p. 420), the court noted that there was an "identity in the subject matter of the allegations leading up to the blacklisting order and arbitration proceedings". After referring to the judgments in **Eurasian Equipment & Chemicals Ltd. V. State of West Bengal** AIR 1975 SC 266, **Raghunath Thakur v. State of Bihar** AIR 1989 SC 620 as well as the earlier decisions of this Court, the learned Single Judge held that it was clear that the NDMC had proceeded to blacklist the contractor "even after recession of the contract which had become the subject matter of arbitration". In **Indian Oil Corporation v. SPS Engineering Ltd.**, the Division Bench of this Court agreed with the reasoning of the learned Single Judge that "when the entire matter was pending before the Arbitrator there was no need to have proceeded with the issue of placing the petitioner on the holiday list. The Division Bench held: "when the matter was subject matter of arbitration, the respondent should have awaited the decision of the Arbitrator before taking such a decision in a hurry". Therefore, on this ground also the Petitioner is entitled to succeed. There was no occasion yet for the NHAI to have issued the impugned show cause notice dated 27th June 2008 to the petitioners,

39. Consequently the impugned show cause notice dated 27th June 2008 and the consequential order dated 24th February 2009 passed by the NHAI blacklisting the petitioners are hereby set aside. The NHAI will, consistent with this order, and within a period of one week from today, issue a corrective circular to withdraw and replace its earlier circular dated 24th February 2009 which has been referred to



hereinbefore. Simultaneously, the NHAI will place the new circular on its website and also send copies to all entities to whom the earlier circular was sent. It is clarified that depending on the outcome of the proceedings before the Arbitral Tribunal, it would be open to the NHAI to proceed thereafter in accordance with law.”

5.4. **National Building Construction Corporation Limited v. New Delhi Municipal Council & Anr.**⁴

“25. In the **Indian Oil** case, where an identical complaint was made about the public agency founding the blacklisting order, on allegations which were the subject matter of arbitration proceedings, the Division Bench upheld the decision of the single judge, that such a course of action was impermissible. The Division Bench held that:

“16. The learned Single Judge in the impugned judgment held that when the entire matter was pending before the Arbitrator there was no need to have proceeded with the issue of placing the petitioner on the 'holiday list' with the undue haste. We agree with this reasoning. When the matter was subject matter of arbitration, the respondent should have awaited the decision of the Arbitrator before taking such a decision in a hurry.”

In view of the above reasoning, I am of the opinion that the NDMC acted in haste, and precipitately, in basing the show cause notice, and issuing the blacklisting order, on the same allegations. It was necessary to await the outcome of those proceedings. The impugned blacklisting order is therefore arbitrary.

26. It was argued on behalf of the NDMC that the petitioner is in effect pursuing two remedies, in respect of the blacklisting orders. One, it has filed a claim for damages, and two, it has questioned it belatedly. I am of the opinion that there is no merit in both the submissions. The claim for damages preceded the show cause notice, and the blacklisting order; it was triggered by a letter issued by the Chairperson of NDMC about the alleged dismal performance of NBCC in its contracts, dated 17-3-2005; the blacklisting order was issued in November, 2005. As regards the argument that the NBCC being disentitled to relief, on the ground of delay, I am of the view that the decision in Patna Development Authority's case does not afford a parallel, and cannot be of assistance in this petition. The petitioner there had impugned the blacklisting four years after it was issued, and implemented, and sought to challenge its exclusion from consideration of a tender process. The court had, under such circumstances, held that the exercise of discretion under Article 226 was inappropriate. Here, however, the

⁴ 2007(94) DRJ 382



order was issued in November, 2005. The NBCC is a responsible public sector body, not expected to rush to court, but under a duty to attempt resolving disputes with other government bodies such as NDMC before approaching the court. Moreover, the cause of action for this petition arose in the end of August, 2006, when the second respondent issued a Notice inviting Tender, which contained a restrictive clause, debarring those issued with blacklisting orders, from offering bids”

6. The Court has carefully considered the submissions advanced by Ms. Arora. While the legal principles she has articulated are well-established, the Court is not convinced that they are applicable to the facts of the present case.

7. The decision in ***Siemens Ltd.*** and ***Oryx Fisheries Pvt. Ltd.***, was based on the premise that a show cause notice issued with a predetermined mind could be challenged in a writ petition. However, the present case differs significantly because there is no indication or evidence which reveals that the impugned show cause notice was issued with a ‘prejudged’ mind or predetermined outcome. The mere pendency of another related proceeding [W.P.(C) 15125/2023] does not inherently render the impugned show cause notice premature or unfair. Unlike the facts in ***Siemens Ltd.***, there is no express language or action by the Respondent demonstrating that they have already made up their mind on the issue of debarment or that a reply would serve no purpose. Likewise in ***Oryx Fisheries Pvt. Ltd.***, the Supreme Court found the show cause notice to be invalid as it conveyed a sense that the Marine Products Export Development Authority under the Ministry of Commerce and Industry had already decided the matter against the Petitioner, making the opportunity to respond, a mere formality. In the present case, the impugned show cause notice does not indicate any predetermined final conclusion by the Respondent and rather provides the



Petitioner an opportunity to present their case. Therefore, the reasoning in *Oryx Fisheries Pvt. Ltd.* does not apply, as the notice in question does not preclude the possibility of a fair hearing.

8. In *Prakash Atlanta JV*, the Court set aside the show cause notice and blacklisting order because the subject matter of the allegations in the notice were already the subject matter of arbitration. Likewise, in *National Building Construction Corporation*, the Court found that NDMC acted hastily by issuing a show cause notice while the underlying dispute was pending in arbitration. These decisions are context-specific to situations involving arbitration clauses. Therefore, the precedents cited by the Petitioner do not assist their case in the present circumstances. In any event, it is well-established that each case must be decided on its own facts and circumstances.

9. The crux of the matter is the violations of the Faster Adoption and Manufacturing of Electric Vehicles in India (FAME-II) Scheme by the Petitioner which form the basis for the Respondent's proposed debarment action. It is a settled proposition that a writ court will ordinarily refrain from intervening at the stage when a show cause notice has been issued, unless there is a clear absence of jurisdiction. In this case, however, the Court does not discern any jurisdictional infirmity in the issuance of the impugned show cause notice, which is a procedural step that does not, in itself, suggest any final determination. No stay has been granted on the decision of 09th October, 2023 which is subject matter of challenge in the earlier writ petition. There can be multiple consequences flowing from the alleged violations and the impugned notice is an opportunity to the Petitioner to present their defence. It is also pertinent to note that the Petitioner has the



occasion to raise all defences and contentions, including those articulated in the present writ petition, in response to the show cause notice which is specific to the action of debarment. The principles of natural justice require that the Respondent be allowed to consider the Petitioner's response before any adverse decision is made. If the Court were to interfere at this stage, it would effectively be pre-empting the decision-making process of the Respondent.

10. The Court cannot, at this preliminary stage, assume that the Respondent has already reached a final decision against the Petitioner. While the earlier action by the Ministry of Heavy Industries and Public Enterprises concerning the de-registration of the Petitioner from the FAME-II Scheme may be based on similar grounds, it involves a different outcome. Therefore, the prior action does not preclude the Respondent from pursuing the proposed action under the impugned show cause notice.

11. Thus, the Court is not inclined to entertain the present writ petition at this juncture. The Court clarifies that the Petitioner shall have full liberty to present the contentions, including those raised in this petition, by submitting an appropriate response to the show cause notice. The Respondent is expected to consider the Petitioner's reply in accordance with the law and make a reasoned decision thereafter.

12. Should the final decision be averse to the Petitioner, they shall have the right to challenge such a decision through appropriate legal remedies, as provided by law.

13. It is clarified that the Court has refrained from delving into the merits of the underlying dispute. Accordingly, all rights and contentions of both parties remain fully open and unaffected by this order. The Court's decision



to dispose of the present writ petition should not be construed as an expression of opinion on the substantive issues raised by either party.

14. In light of the foregoing observations, the present petition, along with any pending applications, stands disposed of.

SANJEEV NARULA, J

SEPTEMBER 11, 2024/ab