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

Date of decision: 19th JANUARY, 2024

IN THE MATTER OF:

\+ **W.P.(C) 4180/2023 & CM APPL. 16192/2023**

R. KRISHNAMURTHY AND CO. ..... Petitioners

Through: Mr. Manish Sharma, Mr. Mikhil Vij and Mr. Ninad Dogra, Advocates.

versus

MUNICIPAL CORPORATION OF DELHI & ANR..... Respondents

Through: Mr. Sanjay Vashishtha, SC with Mr. Vishal Kumar, Advocate for MCD.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The Petitioner has approached this Court challenging the Order dated 12.10.2022, passed by the Respondent No.1 herein, debarring the Petitioner herein from participating in any tender/bid of the MCD for a period of five years from the date of the said Order.

2. The factual matrix of the present case is that an Agreement was entered into between Respondent No.1/MCD and the Respondent No.2/M/s Pratibha Industries Ltd. for construction of underground multi-level car parkings at New Friends Colony, Jangpura and Kalkaji. Under the said Agreement, the work was to be completed within 15 months from the date of signing of the Agreement. It is stated that disputes arose between Respondents No.1 & 2.

3. It is stated that a Memorandum of Understanding was entered into between the Petitioner and the Respondent No.2 on 05.02.2018 for construction of underground multi-level car parkings at New Friends Colony, Jangpura and Kalkaji. Under the contract entered into between the Petitioner and the Respondent No.2, the work was to be completed within 120 days.

4. Material on record reveals that a conciliated agreement dated 24.03.2018 was entered into between the Petitioner, Respondent No.1 and Respondent No.2. As per the said agreement, the work was to be completed on or before 31.12.2018. Material on record further indicates that a Show Cause Notice dated 06.08.2021 was issued to the Petitioner and the Respondent No.2 asking them to show cause as to why they should not be debarred for five years. Petitioner replied to the show cause notice dated 06.08.2021 and a reply was filed by the Petitioner on 16.08.2021.

5. Vide Order dated 12.10.2022 the Petitioner has been debarred from participating in any tender for a period of five years. It is this Order which has been challenged in the present Writ Petition.

6. Notice in the present Writ Petition was issued on 05.04.2023. Counter affidavit has been filed.

7. It is contended by the learned Counsel for the Petitioner that the order debarring the Petitioner is bereft of any reasons. He states that debarment amounts to civil death of an entity and any order debarring an entity must contain reasons as to why the entity has been debarred. He states that the Respondent No.2, who had entered into the contract in 2010, could not complete the work in eight years and the Petitioner was expected to complete the same work in just 18 months. He states that the Petitioner and

the Respondent No.2 have not been treated alike. He states that the action of the Respondent No.1 is violative of Article 14 of the Constitution of India as the same is shockingly disproportionate to the alleged infraction on the part of the Petitioner.

8. *Per contra*, learned Counsel for Respondent No.1 contends that the counter affidavit filed by the Respondent No.1 shows the application of mind on the part of the Respondents as to why the Petitioner has been debarred for five years. He further states that the Show Cause Notice indicated that the Petitioner would be debarred for five years if proper explanation is not given. He also contends that the work which has been awarded to the Petitioner was to be completed on or before 31.12.2018 and public at large has been put to inconvenience due to non-completion of the said work and, therefore, the Respondent has taken the step to debar the Petitioner and the Respondent No.2 from participating in any tender for a period of five years.

9. Heard the Counsels for the parties and perused the material on record.

10. It is well settled that in matters of contract, even though the order terminating the contract or blacklisting might not be a reasoned order, if the reasons were recorded in the records, then it is sufficient to debar the entity. This Court in M/s. Svogl Oil Gas & Energy Ltd. v. Indian Oil Corporation Ltd., **2016 SCC OnLine Del 3296**, has observed as under:-

> *"**12**. I have further enquired from the counsel for the petitioner as to what purpose the reasons, even if had been communicated to the petitioner, would have served. This Court, in exercise of power of judicial review, is concerned only with the decision making process and not with the merits of the decision. The requirements aforesaid of IOC as a State to act fairly*

and rationally without in any way being arbitrary are found to have been sufficiently met by a) the respondent IOC having issued notice to the petitioner to show cause as to why it should not be blacklisted; b) the petitioner having submitted its reply thereto, and, c) the reasons running into seven pages handed over today given by the Committee constituted by the IOC for the said purpose for blacklisting the petitioner. On perusal of the reply submitted by the petitioner to the show cause notice and the reasoning recorded by the Committee of the respondent IOC for blacklisting the petitioner, I am satisfied that in the facts of the present case, there was no need for giving a personal hearing to the petitioner. An opportunity of being heard is an ingredient of the principles of natural justice and qua which I have in Kanachur Islamic Education Trust (R) v. The Ministry of Health & Family Welfare for reasons given in detail held that no hard and fast rule can be laid down and the parameters of which depend upon the factual situation. It was held that natural justice does not exist as an absolute jural value but is humanistically read by Courts into those great rights enshrined in Part III as the quintessence of reasonableness. It was further held that what opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation and that the rule of audi alteram partem is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise; that not all violations of natural justice knock down the order with nullity. Reference in this context can also be made to Skipper Bhawan Flat Buyers Association v. Skipper Towers Pvt. Ltd. (DB).

***13**. The requirement of recording reasons for administrative actions as of blacklisting is a corollary to the requirement that the State has to act fairly and*

rationally and without in any way being arbitrary and was in S.N. Mukherjee v. Union of India (1990) 4 SCC 594 was held to be one of the principles of natural justice which govern exercise of power by administrative authorities. However once it is shown that the decision to blacklist is a reasoned one and not arbitrary or whimsical, I am unable to decipher and the counsel for the petitioner unable to substantiate the need for communication of the reasons to the party being blacklisted. Mention may be made of Grosons Pharmaceuticals (P) Ltd. v. The State of Uttar Pradesh where it was held a) that it was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted and the reply submitted by it was duly considered and the procedure adopted while blacklisting was in conformity with the principles of natural justice; and, b) the contention that the order of blacklisting was invalid for not containing any reason was negatived holding that the record summoned showed elaborate reasons to have been recorded while passing the order of blacklisting. A Division Bench of this Court also in B.S. Construction Co. v. The Commissioner of MCD (2008) 102 DRJ 455 held that "since the reasons were recorded in the records", the contention that no speaking order was passed to debar from participating in the tender process could not be accepted. It cannot also be forgotten that the orders, as of blacklisting, are not appealable for it to be said that the communication of reasons to the aggrieved party is essential. As long as the decision taken is found to be supported by reasons recorded at the time of taking the decision, the requirement is satisfied. A distinction has to be carved out between duty to record reasons for blacklisting and communication of such reasons to the person being blacklisted. While the former is essential, to sustain an order of blacklisting, the latter is not. There indeed are some judgments of this Court quashing the decision to

> *blacklist but those are in the facts where no reasons existed for the decision to blacklist and reasons given subsequently, were not accepted. The petitioner here, appears to be having regular dealings with the respondent IOC and must be aware of the policy/practice of IOC of constituting a Committee to take a decision on blacklisting and if was really interested in knowing the reasons for it being blacklisted, would have sought the same from IOC. Instead, it rushed to this Court."*

11. After perusing the counter affidavit, this Court does not deem it expedient to interfere under Article 226 of the Constitution of India. In any event, the admitted facts are that the Petitioner had to complete the work by December, 2018 and till the show cause notice was issued, the work had not been completed. There is explanation whatsoever that why the work was not completed even after a period of more than two and half years, i.e., from December, 2018 till August, 2021. There is no reason why the work was not completed till August, 2021.

12. It is well settled that Courts while exercising its jurisdiction under Article 226 of the Constitution of India does not enter into the thicket of facts which require evidence to be led by the parties.

13. The Apex Court in the State of Kerala v. M K Jose , **(2015) 9 SCC 433,** has observed as under:-

> *"**13**. A writ court should ordinarily not entertain a writ petition, if there is a breach of contract involving disputed questions of fact. The present case clearly indicates that the factual disputes are involved.*
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> ***14**. In State of Bihar v. Jain Plastics and Chemicals Ltd. [(2002) 1 SCC 216] , a two-Judge Bench reiterating the exercise of power under Article 226 of*

the Constitution in respect of enforcement of contractual obligations has stated: (SCC p. 217, para 3)

> *"3. ... It is to be reiterated that writ petition under Article 226 is not the proper proceedings for adjudicating such disputes. Under the law, it was open to the respondent to approach the court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226."*
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> *In the said case, it has been further observed: (SCC p. 218, para 7)*
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> *"7. ... It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs."*

> ***15***. *In National Highways Authority of India v. Ganga Enterprises [(2003) 7 SCC 410] , the respondent therein had filed a writ petition before the High Court for refund of the amount. The High Court posed two questions, namely, (a) whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties and also contrary to Section 5 of the Contract Act; and (b) whether the writ petition is maintainable in a claim arising out of breach of contract. While dealing with the said issue, this Court opined that: (SCC p. 415, para 6)*
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> > *"6. ... It is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India. It has been so held in Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293] , State of U.P. v. Bridge & Roof Co. (India) Ltd. [(1996) 6 SCC 22] and Bareilly Development Authority v. Ajai Pal Singh [(1989) 2 SCC 116] . This is settled law. The dispute in this case was regarding the terms of offer. They were thus contractual disputes in respect of which a writ court was not the proper forum. Mr Dave, however, relied upon the cases of Verigamto Naveen v. State of A.P. [(2001) 8 SCC 344] and Harminder Singh Arora v. Union of India [(1986) 3 SCC 247] . These, however, are cases where the writ court was enforcing a statutory right or duty. These cases do not lay down that a writ court can interfere in a matter of contract only. Thus on the ground of maintainability the petition should have been dismissed.""*

14. Since learned Counsel for the Petitioner has raised pure question of fact as to why the work was not completed, which requires to be proved by leading evidence, the remedy is to file a suit. It was always open for the

Petitioner to file a suit and demonstrate that the Order debarring the Petitioner could not have been passed by the Respondent.

15. It is also well settled that Courts while exercising jurisdiction under Article 226 of the Constitution of India do not interfere with orders of punishment unless the punishment is so disproportionate and unduly harsh to the misconduct that it shocks the conscience of the Court. In Ranjit Thakur v. Union of India, **(1987) 4 SCC 611**, the Apex Court has observed as under:

> "***25***. *Judicial review generally speaking, is not directed against a decision, but is directed against the "decision-making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In Council of Civil Service Unions v. Minister for the Civil Service [(1984) 3 WLR 1174 (HL) : (1984) 3 All ER 935, 950] Lord Diplock said:*
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> *"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by*

> *judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community;. . .""*

16. The Petitioner was to complete the construction of underground multi-level car parking at New Friends Colony, Jangpura and Kalkaji. The contract was given in the year 2010 to Respondent No.2 and the Petitioner stepped in 2018 and the work is yet not complete and thereby causing lot of inconvenience to the public at large. The Petitioner cannot contend that the Petitioner and Respondent No.2 should be treated differently. The Petitioner is a sub-contractor of Respondent No.2. The punishment imposed by Respondent No.1, therefore, does not warrant any interference as the same is neither shocking nor is it disproportionate to the infraction on the part of the Petitioner.

17. The Writ Petition is dismissed. Pending applications, if any, also stand dismissed.

SUBRAMONIUM PRASAD, J

JANUARY 19, 2024
Rahul