AFR

Court No. - 35

Case :- WRIT - C No. - 14747 of 2020
Petitioner :- Amit Kumar
Respondent :- State of U.P. and Another
Counsel for Petitioner :- Kshitij Shailendra, Vikrant Singh Parihar
Counsel for Respondent :- C.S.C.

Hon'ble Manoj Kumar Gupta,J.
Hon'ble Dr. Yogendra Kumar Srivastava,J.

(Per : Dr. Yogendra Kumar Srivastava,J.)

1. Heard Sri Kshitij Shailendra, learned counsel for the petitioner and learned Standing Counsel for the State respondents.

2. The present petition has been filed primarily seeking to raise a challenge to the order dated 21.07.2020 (annexure 1 to the writ petition) passed by the Divisional Food Controller, Kanpur Division, Kanpur (respondent no. 2) whereby the contracts awarded by the Department of Food and Civil Supplies, Uttar Pradesh, in favour of the petitioner, in respect of certain centres in District Farrukhabad, for the years 2020-21 and 2021-22 have been cancelled, and further the petitioner has been blacklisted by the department.

3. The principal ground sought to be canvassed in order to challenge the order dated 17.07.2020 is that the same has been passed in violation of the principles of natural justice and without affording a reasonable opportunity to the petitioner. It has been contended that the eligibility criteria prescribed under the government order dated 20.04.2018 is merely in the nature of a guideline and the contract granted to the petitioner could not be cancelled on the basis of the conditions prescribed therein. It is also

sought to be argued that the order impugned has the effect of permanently blacklisting the petitioner which is not permissible under law. In this regard, reliance has been placed upon a judgment of this Court in **M/s. Vindhyawasini T. Transport Vs. State of U.P. and others**[1]**.**

4. Learned Standing Counsel appearing for the State respondents has supported the order by submitting that the award of handling and transport contracts by the Department of Food and Civil Supplies is governed by the policy guidelines contained under the government order dated 20.04.2018 and the same are of a binding nature. It is submitted that the aforementioned guidelines contain a clear condition whereunder persons whose close relatives are wholesale dealers or *Aarhatiya* are ineligible for award of contracts. It is pointed out that along with the application submitted by the petitioner for award of contract, an affidavit had been filed stating that no near relative of the petitioner was a wholesale dealer or *Aarhatiya*. The aforesaid fact having been found to be incorrect inasmuch as upon a complaint the matter was inquired into and it was found that the petitioner's mother is an owner of rice mill; accordingly, a show cause notice was given to the petitioner, and in view of the undisputed fact that the petitioner was ineligible for the award of the the contract and that he had given a false declaration in his affidavit, the order impugned has been passed, which suffers from no illegality.

5. Rival contentions now fall for consideration.

6. A perusal of the material which has been placed on

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1 2018 (4) ADJ 40 (DB)

record indicates that the award of handling and transport contracts by the Department in Food and Civil Supplies Government of U.P. is governed in terms of the policy guidelines contained under a government order dated 20.4.2018. The eligibility conditions prescribed therein are contained under Clause 9 of the said policy guidelines, which is being extracted below :-

9.	आवेदन हेतु अनर्ह व्यक्ति/फर्म	1– आढती, गल्ला व्यापारी, मण्डी समिति/व्यापार कर के खाद्यान्न/चीनी के लाइसेन्सी, सरकारी सस्ता गल्ला, चीनी, मिट्टी तेल के विक्रेता (कोटेदार/उचित दर विक्रेता), गोदाम स्वामी (ब्लाक गोदाम), चावल मिल मालिक, उनके परिवारीजन तथा निकटतम सम्बन्धी एवं अधिवक्ता उक्त आवेदन के लिये अनर्ह होंगे। 2– पारिवारिक जन तथा उनके निकटतम सम्बन्धी अथवा भागीदार ऐसे ठेकेदार जिसका पूर्व में भा0खा0नि0, खाद्य विभाग अथवा सम्बद्ध क्रय एजेन्सी से निलम्बित चल रहा हो अथवा ब्लैक लिस्ट हुआ हो, के सहभागिता की फर्म या कम्पनी आवेदन हेतु अर्ह नहीं होंगे। 3– ऐसा ठेकेदार जिसने विभाग से प्राप्त ठेका का कार्य करते समय किसी कालाबाजारी अथवा आपराधिक गतिविधियों में संलिप्त पाया गया हो अथवा उसने ठेके को किसी अन्य को सबलेट किया हो तथा ऐसा व्यक्ति जिसके विरूद्व आवश्यक वस्तु अधिनियम–1955 के उपबन्धों के अधीन दोष सिद्व हो, उसे आवेदन हेतु अनर्ह माना जायेगा।

7. In terms of a subsequent government order dated 25.5.2018 the conditions of eligibility under Clause 9 of the previous government order have been further clarified. Clause 2 of the subsequent government order dated 25.5.2018 is being extracted below :-

2– परिवहन एवं हैण्डलिग नीति के बिन्दू संख्या–09 में पारिवारिक जन तथा निकट संबंधी के अन्तर्गत निम्नवत सम्मिलित माने जायेगें:–

1.	Spouse
2.	Father
3.	Mother
4.	Son
5.	Son's wife
6.	Son's son

7.	Son's son's wife
8.	Son's daughter
9.	Son's daughter's husband
10.	Great grand son
11.	Great grand son's wife
12.	Daughter
13.	Daughter's husband
14.	Daughter's son
15.	Daughter's son wife
16.	Daughter's Daughter
17.	Daughter's Daughter's husband
18.	Grand Father
19.	Grand mother
20.	Great Grand Father
21.	Great Grand Mother
22.	Mother's Father/ mother
23.	Brother/ Sister
24.	Spouse of brother/ sister
25.	Spouse's father/mother
26.	Spouse's mother/ sister
27.	Spouse's father/ mother
28.	Spouse's brother/ sister
29.	Spouse of Spouse's brother/ sister
30.	Mother's brother/ sister and their spouse
31.	Father's brother/ sister and their spouse
32.	Grand father/ mother of spouse

8. The guidelines contained under government order dated 20.4.2018 also contain a proforma of the affidavit required to be submitted along with the application which clearly provides that in the event the applicant has made concealment of any fact, the candidature/contract would stand cancelled.

9. The petitioner has not disputed the fact that a show cause notice dated 17.7.2020 had been duly served upon

him requiring him to submit his explanation by 20.7.2020 in respect of a complaint regarding his near relative being the owner of a rice mill and to explain as to why the aforesaid fact was concealed in the affidavit submitted by the petitioner at the time of participation in the tender proceedings. In terms of the show cause notice, the petitioner was required to submit an explanation for the same failing which he was to be blacklisted.

10. It appears that instead of submitting a specific response to the show-cause notice, the petitioner submitted an application on 20.7.2020 making a request for a further three weeks' time in order to submit his reply. Taking into consideration the fact that the Clause 9 of the guidelines under the government order dated 20.4.2018 prescribing the eligibility conditions for participation in the process of award of contract makes persons whose near relatives are mill owners or *Aarhatiya* as ineligible and the petitioner's mother having been reported to be owner of a rice mill on the basis of an inquiry made by the District Food Marketing Officer Farrukhabad, the affidavit submitted by the petitioner while participating in e-tender process, was found to be false, and accordingly in terms of the guidelines contained under the government orders dated 20.4.2018 and 25.5.2018, the contracts awarded to the petitioner have been cancelled and the petitioner has been blacklisted by the department.

11. The issue with regard to entitlement to a notice and a right to be heard before blacklisting came up in the case of **M/s Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal & Anr.**[2] and referring to the powers of the

2 (1975) 1 SCC 70

State under Article 298 of the Constitution of India[3] to carry on trade or business, it was held that the exercise of such powers and functions in trade by the State is subject to Part III of the Constitution and the State while having the right to trade has the duty to observe equality and cannot choose to exclude persons by discrimination. The relevant observations made in the judgment are as follows:-

> "12. Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.
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> 13. But for the order of blacklisting, the petitioner would have been entitled to participate in the purchase of cinchona. Similarly the respondent in the appeal would also have been entitled but for the order of blacklisting to tender competitive rates.
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> 14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.
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> 15. The blacklisting order does not pertain to any

3 the Constitution

particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are “instruments of coercion”.

16. In passing an order of blacklisting the Government department acts under what is described as a standardised code. This is a code for internal instruction. The Government departments make regular purchases. They maintain list of approved suppliers after taking into account the financial standard of the firm, their capacity and their past performance. The removal from the list is made for various reasons. The grounds on which blacklisting may be ordered are if the proprietor of the firm is convicted by court of law or security considerations to warrant or if there is strong justification for believing that the proprietor or employee of the firm has been guilty of malpractices such as bribery, corruption, fraud, or if the firm continuously refuses to return Government dues or if the firm employs a Government servant, dismissed or removed on account of corruption in a position where he could corrupt Government servants. The petitioner was blacklisted on the ground of justification for believing that the firm has been guilty of malpractices such as bribery, corruption, fraud. The petitioners were blacklisted on the ground that there were proceedings pending against the petitioners for alleged violation of provisions under the Foreign Exchange Regulations Act.

17. The Government is a Government of laws and not of men. It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

18. Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable

> conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.
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> 19. Where the State is dealing with individuals in transactions of sales and purchase of goods, the two important factors are that an individual is entitled to trade with the Government and an individual is entitled to a fair and equal treatment with others. A duty to act fairly can be interpreted as meaning a duty to observe certain aspects of rules of natural justice. A body may be under a duty to give fair consideration to the facts and to consider the representations but not to disclose to those persons details of information in its possession. Sometimes duty to act fairly can also be sustained without providing opportunity for an oral hearing. It will depend upon the nature of the interest to be affected, the circumstances in which a power is exercised and the nature of sanctions involved therein.
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> 20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

12. The aforementioned proposition that no order of blacklisting could be passed without affording opportunity of hearing to the affected party was reiterated in the case of **Raghunath Thakur Vs. State of Bihar & Ors.**[4] wherein it was stated as follows:-

> "4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of

4 (1989) 1 SCC 229

> business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order..."

13. The exercise of the executive power of the State or its instrumentalities in entering into a contract with private parties flowing from Article 298 of the Constitution including the power to enter or not into a contract came up for consideration in the case of **Mahabir Auto Stores & Ors. Vs. Indian Oil Corporation & Ors.**[5] and it was held that the decision of the State or any of its instrumentalities to enter or not into a contract being an administrative action the same would be open to a challenge on the ground of violation of Article 14 of the Constitution and would also be subject to the power of judicial review. The observations made in the judgment are as follows:-

> "12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar (1977) 3 SCC 457. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See Radha Krishna Agarwal v. State of Bihar at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating

5 (1990) 3 SCC 752

reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3, Maneka Gandhi v. Union of India (1978) 1 SCC 248, Ajay Hasia v. Khalid Mujib Sehravardi (1981) 1 SCC 722, R.D. Shetty v. International Airport Authority of India (1979) 3 SCC 489 and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay (1989) 3 SCC 293. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

x x x x x

18. ...we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. It

> appears to us that in respect of corporation like IOC when without informing the parties concerned, as in the case of the appellant-firm herein on alleged change of policy and on that basis action to seek to bring to an end to course of transaction over 18 years involving large amounts of money is not fair action, especially in view of the monopolistic nature of the power of the respondent in this field. Therefore, it is necessary to reiterate that even in the field of public law, the relevant persons concerned or to be affected, should be taken into confidence. Whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket basis. It depends on the nature of the right involved and nature of the power sought to be exercised in a particular situation. It is true that there is discrimination between power and right but whether the State or the instrumentality of a State has the right to function in public field or private field is a matter which, in our opinion, depends upon the facts and circumstances of the situation, but such exercise of power cannot be dealt with by the State or the instrumentality of the State without informing and taking into confidence, the party whose rights and powers are affected or sought to be affected, into confidence. In such situations most often people feel aggrieved by exclusion of knowledge if not taken into confidence."

14. The requirement of grant of opportunity to show cause before blacklisting was restated in the case of **Gronsons Pharmaceuticals (P) Ltd. & Anr. Vs. State of Uttar Pradesh & Ors.**[6] and it was held that since the order blacklisting of an approved contractor results in civil consequences, the principle of *audi alteram partem* is required to be observed.

15. The power to blacklist a contractor was held to be inherent in the party allotting the contract and the freedom to contract or not to contract was held to be unqualified in the case of private parties; however when the party is State, the decision to blacklist would be open judicial review on touchstone of proportionality and the principles of natural justice. The relevant observations

6 AIR 2001 SC 3707

made in this regard in the case of **M/s Kulja Industries Limited Vs. Chief General Manager, W.T. Project, BSNL & Ors.**[7] are as under:-

> "17. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because "blacklisting" simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. 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."

16. The aforementioned judgment has taken note of the fact that the principle of *audi alteram partem* has been held to be applicable to the process that may eventually culminate in the blacklisting of a contractor in the earlier judgments in **M/s Southern Painters Vs. Fertilizers & Chemicals Travancore Ltd. & Anr.**[8], **Patel Engineering Ltd. Vs. Union of India**[9], **B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. & Ors.**[10], and **Joseph Vilangandan Vs. The Executive Engineer (PWD), Ernakulam & Ors.**[11].

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7 (2014) 14 SCC 731
8 1994 Supp (2) SCC 699
9 (2012) 11 SCC 257
10 (2006) 11 SCC 548
11 (1978) 3 SCC 36

17. It was held that even though the right of the petitioner may be in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to the powers of judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. In this regard reference was made to earlier decisions in **Radha Krishna Agarwal & Ors. Vs. State of Bihar & Ors.**[12], **E.P. Royappa Vs. State of Tamil Nadu & Anr.**[13], **Maneka Gandhi Vs. Union of India & Anr.**[14], **Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors.**[15], **Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.**[16] and **Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay**[17].

18. The legal position governing blacklisting in USA and UK was also considered and it was noticed that in USA the term "debarring" is used by the statutes and the courts and comprehensive guidelines have been issued in this regard. The observations made in the judgment in this respect are as follows:-

> "21. The legal position governing blacklisting of suppliers in USA and UK is no different. In USA instead of using the expression "blacklisting" the term "debarring" is used by the statutes and the courts. The Federal Government considers "suspension and debarment" as a powerful tool for protecting taxpayer resources and maintaining integrity of the processes for federal acquisitions. Comprehensive guidelines are, therefore, issued by the government 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

12 (1977) 3 SCC 457
13 (1974) 4 SCC 3
14 (1978) 1 SCC 248
15 (1981) 1 SCC 722
16 (1979) 3 SCC 489
17 (1989) 3 SCC 293

unable to perform satisfactorily. These guidelines prescribe the following among other grounds for debarment:

(a) Conviction of or civil judgment for.—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as.—

(1) A wilful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A wilful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) x x x x x

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

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 contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of

conduct 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 have made or agreed to make full restitution.

(h) Whether 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."

19. In **Patel Engineering Ltd. Vs. Union of India**[9], referring to the authority of the State and its instrumentalities to enter into contracts in view of the power conferred under Article 298 of the Constitution it was taken note of that the right to make a contract includes the right to not to make a contract; however, such right including the right to blacklist which could be exercised by the State is subject to the constitutional obligation to obey the command of Article 14. The observations made in the judgment in this regard are being extracted below:-

"13. The concept of "blacklisting" is explained by this Court in Erusian Equipment & Chemicals Limited v.

9 (2012) 11 SCC 257

State of W.B. (1975) 1 SCC 70, as under: (SCC p.75, para 20)

> "20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains."

14. The nature of the authority of State to blacklist persons was considered by this Court in the abovementioned case and took note of the constitutional provision (Article 298), which authorises both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorises the acquisition, holding and disposal of property. This Court also took note of the fact that the right to make a contract includes the right not to make a contract. By definition, the said right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel State to enter into a contract, everybody has a right to be treated equally when State seeks to establish contractual relationships. The effect of excluding a person from entering into a contractual relationship with State would be to deprive such person to be treated equally with those, who are also engaged in similar activity.

15. It follows from the judgment in Erusian Equipment case that the decision of State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into contractual relationship with such persons is called blacklisting. State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary—thereby such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

20. The aforementioned legal position has been considered in a recent judgment of this Court in **M/s Baba**

Traders Vs. State of U.P. and others[18].

21. We may thus reiterate that the right to enter into a contractual relationship is inherent in every person capable of entering into a contract with a concomitant right also not to enter into a contract. The right to refuse to enter into a contract however does not vest with the State and its instrumentalities in the same manner as it vests with a private individual. The right to enter into a contract by the State flows from the power under Article 298 of the Constitution and together with it is the right not to enter into a contract and the choice to blacklist any particular person with whom the State does not wish to enter into a contract. This decision however in case it is taken by the State or any of its instrumentalities is to be made reasonably and in accord with the principles of natural justice.

22. An order of blacklisting has the effect of depriving a person of equality of opportunity in the manner of public contract and in a case where the State acts to the prejudice of a person it has to be supported by legality. The activities of the State having the public element quality must be imbued with fairness and equality.

23. The order of blacklisting involves civil consequences and has the effect of creating a disability by preventing a person from the privilege and advantage of entering into lawful relationship with the government therefore fundamentals of fair play would require that the concerned person should be given an opportunity to represent his case before he is put on the blacklist. A fair hearing to the party before being blacklisted thus becomes

18 2019 (11) ADJ 516 (DB)

an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The applicability of the principle of *audi alteram partem* and the necessity of issuance of show cause notice also become imperative before passing of any such order of blacklisting.

24. In the instant case, the petitioner was duly served with a show cause notice calling upon him to submit his explanation in respect of the eligibility conditions provided under the guidelines for award of handling and transport contracts under the relevant government orders and to clarify the statement of fact made in this regard in his affidavit filed along with his application which had been filed while participating in the e-tender.

25. Counsel for the petitioner apart from reiterating that the petitioner had been granted only three days' time to submit a response to the notice did not dispute the fact stated in the report which had been submitted by the District Food Marketing Officer Farrukhabad wherein it had been found that the petitioner's mother was the owner of a rice mill namely M/s. Amit Rice Mill. Counsel for the petitioner also could not dispute the fact that under Clause 9 of the guidelines contained under the government order dated 20.4.2018 prescribing the eligibility criteratia, the petitioner would be ineligible. Further, it has also not been disputed that the statement of fact mentioned in the affidavit along with the application submitted by the petitioner at the time of participation in the tender process was incorrect and false, in view of the fact that the petitioner's mother was the owner of a rice mill.

26. The question which therefore now falls for consideration is as to whether any prejudice was caused to the petitioner by not allowing further time to him to submit his explanation and also as to whether grant of any further opportunity would have made any difference in the outcome or that the same would have been a mere formality.

27. The question as to whether the Court in exercise of powers under Article 226 is bound to declare an order of the government passed in alleged breach of principles of natural justice as void or whether the Court can refuse to grant relief on the ground that the facts of the case do not justify exercise of discretion to interfere or for the reason that *defacto prejudice* has not been shown fell for consideration in the case of **M.C. Mehta Vs. Union of India and others**[19], and it was held as follows :-

> "15. It is true that whenever there is a clear violation of principles of natural justice, the courts can be approached for a declaration that the order is void or for setting aside the same. Here the parties have approached this Court because the orders of the Department were consequential to the orders of this Court. The question however is whether the Court in exercise of its discretion under Article 32 or Article 226 can refuse to exercise discretion on facts or on the ground that no de facto prejudice is established. On the facts of this case, can this Court not take into consideration the fact that any such declaration regarding the 10.3.1999 order will restore an earlier order dated 30.7.1997 in favour of Bharat Petroleum Corporation which has also been passed without notice to HPCL and that if the order dated 10.3.1999 is set aside as being in breach of natural justice, Bharat Petroleum will be getting two plots rather than one for which it has no right after the passing of the latter order of this court dated 7.4.1998?
>
> 16. Courts are not infrequently faced with a dilemma between breach of the rules of natural justice and the Court's discretion to refuse relief even though rules of

19 (1999) 6 SCC 237

> natural justice have been breached, on the ground that no real prejudice is caused to the affected party."

28. On the point as to whether breach of principles of natural justice is in itself sufficient to grant relief and that no further *de facto prejudice* need be shown, the decisions in the case of **Ridge Vs. Baldwin**[20] and **S.L. Kapoor Vs. Jagmohan**[21] were considered and it was stated as follows:-

> "20. It is true that in Ridge v. Baldwin it has been held that breach of the principles of natural justice is in itself sufficient to grant relief and that no further de facto prejudice need be shown. It is also true that the said principles have been followed by this Court in several cases but we might point out that this Court has not laid down any absolute rule. This is clear from the judgment of Chinnappa Reddy, J. in S. L. Kapoor v. Jagmohan. After stating that 'principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed' and that 'non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary', Chinnappa Reddy, J., also laid down an important qualification as follows :
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> > "As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs."

29. The contention that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the court need not issue a writ merely because there is violation of principles of natural justice and as to whether relief can be refused where the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if

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20 1964 A.C. 40
21 (1980) 4 SCC 379

natural justice is to be followed, was considered by referring to the judgments of **Malloch v. Aberdeen Corporation**[22], **Glynn v. Keele University**[23], and **Cinnamond v. British Airports Authority**[24] where such a view had been held. In particular the observations made by **Straughton, L.J.,** in **R. v. Ealing Magistrates' court ex p Fannaran**[25] that there must be 'demonstrable beyond doubt' that the result would have been different, were referred to.

30. The observations made by **Lord Woolf** in **Lloyd v. McMahon**[26], were also noticed on the point that refusal of discretion in certain cases of breach of natural justice may not be disfavoured. The observations made by **Megarry, J.**, in **John v. Rees**[28] stating that there are always 'open and shut cases' and no absolute rule of proof of prejudice can be laid down and that merits are not for the court but for the authority to consider, were also referred to.

31. The application of the principles of 'useless formality theory' as an exception to the principles of natural justice was discussed and it was pointed out that even in cases where the facts are not all admitted or beyond dispute, there is considerable unanimity that the courts can, in exercise of their 'discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed.

32. We may gainfully refer to the case of **Malloch v. Aberdeen Corporation**[22] (supra) wherein considering a challenge to a resolution on the ground that the same had

22 (1971) 1 W.L.R. 1578
23 (1971) 1 W.L.R. 487
24 (1980) 1 W.L.R. 582
25 (1996) 8 Admn LR 351 (358)
26 (1987) 2 WLR 821
28 (1969) 2 WLR 1294
22 (1971) 1 W.L.R. 1578

been passed in contravention of the principles of natural justice inasmuch as the Committee had refused to receive written representations or to afford to the appellant a hearing before they passed the resolution, the following observations were made by **Lord Wilberforce,J.**

> "The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

33. A similar view was taken in **Cinnamond v. British Airports Authority**[24] wherein considering a challenge on the ground of violation of principles of natural justice based on the contention that no opportunity to make a representation has been given, **Brandon LJ.** observed as follows :-

> "If I am wrong in thinking that some opportunity should have been given, then it seems to me that no prejudice was suffered by the plaintiffs as a result of not being given that opportunity. It is quite evident that they were not prepared then, and are not even prepared now, to give any satisfactory undertakings about their future conduct. Only if they were would representations be of any use. I would rely on what was said in Malloch v. Aberdeen Corpn (1971) 1 WLR 1578, first by Lord Reid and secondly by Lord Wilberforce. The effect of what Lord Wilberforce said is that no one can complain of not being given an opportunity to make representation if such an opportunity would have availed him nothing."

34. The applicability of the 'useless formality test' or the 'test of prejudice' in the context of the nature, scope and applicability of the principles of natural justice has been explained in **Dharampal Satyapal Ltd. Vs. Deputy**

24 (1980) 1 W.L.R. 582

Commissioner of Central Excise, Gauhati and others[27] and it was held that there may be situations where it is felt that a fair hearing 'would make no difference' – meaning that a hearing would not change the ultimate conclusion reached by the decision-maker; then no legal duty to supply a hearing arises and it may not be necessary to strike down the action and refer the matter back to the authorities to take a fresh decision after complying with the procedural requirements in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. The observations made in this regard in the judgment are as follows :-

> "38. ...While the law on the principle of *audi alteram partem* has progressed in the manner mentioned above, at the same time, the courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.

27 (2015) 8 SCC 519

39. We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of *procedural fairness*, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason—perhaps because the evidence against the individual is thought to be utterly compelling—it is felt that a fair hearing "*would make no difference*"—meaning that a hearing would not change the ultimate conclusion reached by the decision-maker—then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in *Malloch* v. *Aberdeen Corpn.*, who said that: (WLR p. 1595 : All ER p.1294)

> "…A breach of procedure…cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."
>
> Relying on these comments, Brandon L.J. opined in *Cinnamond* v. *British Airports Authority* that: (WLR p. 593 : All ER p. 377)
>
> "…no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."
>
> In such situations, fair procedures appear to serve no purpose since the "*right*" result can be secured without according such treatment to the individual.

40. In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of "*prejudice*". The ultimate test is always the same viz. the test of prejudice or the test of fair hearing.

41. In *ECIL v. B. Karunakar* (1993) 4 SCC 727, the majority opinion, penned down by Sawant, J., while summing up the discussion and answering the various

questions posed, had to say as under qua the prejudice principle: (SCC pp. 756-58, para 30)

> "*30.* Hence the incidental questions raised above may be answered as follows:
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> ***
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> (*v*) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an 'unnatural expansion of natural justice' which in itself is antithetical to justice."

44. At the same time, it cannot be denied that as far as courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in *ECIL* (1993) 4 SCC 727 itself in the following words: (SCC p. 758, para 31)

> "*31.* Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee

> in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the court/tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

45. Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the present case, we find that such an exercise would be totally futile having regard to the law laid down by this Court in *R.C. Tobacco (P) Ltd. v. Union of India* (2005) 7 SCC 725.

47. In *Escorts Farms Ltd.* v. *Commr.*(2004) 4 SCC 281, this Court, while reiterating the position that rules of natural justice are to be followed for doing substantial justice, held that, at the same time, it would be of no use if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. It was so explained in the following terms: (SCC pp. 309-10, para 64)

> "*64.* Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory procedure prescribed and violation of rules of natural justice. In these

> appeals preferred by the holder of lands and some other transferees, we have found that the terms of government grant did not permit transfers of land without permission of the State as grantor. Remand of cases of a group of transferees who were not heard, would, therefore, be of no legal consequence, more so, when on this legal question all affected parties have got full opportunity of hearing before the High Court and in this appeal before this Court. Rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. In view of the legal position explained by us above, we, therefore, refrain from remanding these cases in exercise of our discretionary powers under Article 136 of the Constitution of India."

35. The aforementioned view that in a case where the facts are admitted and no amount of explanation can change the ultimate result — the same being a *fait accompli,* a Division Bench of this Court has in its recent judgment in **Krishna Nand Rai Vs. State of U.P. and others**[28] held that no purpose would be served in remitting the matter back to the authority for decision afresh after providing opportunity of hearing to the petitioner, inasmuch as the defect was incurable.

36. In the facts of the present case, the petitioner does not dispute the fact that he had been duly served upon with a notice calling upon him to submit an explanation with regard to his disqualification as per terms of the eligibility criteria prescribed under the guidelines contained in the relevant government order. The petitioner has also not disputed the fact that his mother was indeed the owner of a rice mill and accordingly as per terms of the eligibility criteria he was not eligible. It has also not been denied that the declaration made by him in

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28 Writ-C No. 13427 of 2020, decided on 29.09.2020

the affidavit filed along with his application while participating in e-tender in this regard was not correct. In view of the aforesaid facts, the contention sought to be raised on behalf of the petitioner that the opportunity granted was not reasonable, is not tenable.

37. We may reiterate that in a case of a mere technical infraction of principles of natural justice where the facts are admitted and undisputed and no prejudice can be demonstrated, there is a considerable case law and literature for the proposition that relief can be refused if the Court thinks that the case of the petitioner is not one of 'real substance' or that there is no substantial possibility of his success or that the result would not be different, even if fresh opportunity is to be granted.

38. It would be in such situation that 'useless formality theory' may be pressed into if it would be reasonable to believe that a fair hearing would make no difference or that grant of a fresh opportunity of hearing would not change the ultimate conclusion to be reached by the decision maker. In such situations, in our view, there would be no legal duty to grant a fresh opportunity of hearing and it may not be necessary to strike down the action and remit the matter back to the authority concerned to take a fresh decision.

39. In our view, every violation of a facet of natural justice may not always lead to the conclusion that order passed is always null and void. The validity of the order is to be tested on the touchstone of 'prejudice' and in a case where the petitioner is not able to demonstrate real likelihood or certainty of prejudice, this Court may refuse to exercise its discretionary jurisdiction to interfere in the

matter.

40. As regards the question whether the blacklisting can be for an indefinite period, we may reiterate that though blacklisting or debarment is recognised as an effective tool for disciplining deviant contractors but the debarment is never to be a permanent nature. In this regard, we may refer to the observations made in the judgment of the **M/s Kulja Industries Limited vs. Chief General Manager, W.T. Project, BSNL & Ors.**[7]**,** which are as follows :-

> "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."

41. The aforementioned legal position that blacklisting or debarment for an indefinite period was not permissible in law was reiterated in **B.C. Biyani Projects Pvt. Ltd. Vs. State of M.P. & Ors.**[29] and also the judgments of this Court in **M/s. Vindhyawasini T. Transport Vs. State of U.P. and others**[1] and **M/s Baba Traders Vs. State of U.P. and others**[19]**.**

42. Although, the order impugned in the present case does not provide for a specific time period for which the petitioner has been blacklisted, it is worthwhile to take notice of the fact that the disability or ineligibility of the petitioner to be awarded the contract in view of the undisputed fact that his mother is the owner of a rice mill

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7 (2014) 14 SCC 731
29 2017 (3) AWC 2840 (SC)
1 2018 (4) ADJ 40 (DB)
19 2019 (11) ADJ 516 (DB)

would continue as long as there is no variation in the eligibility criteria contained under the policy guidelines issued in terms of the relevant government orders. In the event, the eligibility criteria are varied or modified at a subsequent point of time and the petitioner comes within the prescribed eligibility criteria, it would always be open to him to apply before the authority concerned for withdrawing the order of blacklisting.

43. Subject to the aforesaid observations, the petition stands dismissed.

Order Date :- 30.9.2020
Pratima

(Dr. Y.K. Srivastava,J.) (Manoj Kumar Gupta,J.)