A.F.R.

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Neutral Citation No. - 2024:AHC:115572-DB

Court No. - 40

WRIT - C No. - 20223 of 2024

A.K. Construction Company

Vs.

Union of India and Others

For the Petitioner : Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Devansh Mishra and Sri Vibhu Rai, Advocates

For the Respondents : Sri Mahendra Pratap, Advocate

Hon'ble Shekhar B. Saraf, J.
Hon'ble Manjive Shukla, J.

(pronounced in open court by Hon’ble Shekhar B. Saraf, J.)

1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Devansh Mishra and Sri Vibhu Rai, learned counsel appearing for the petitioner and Sri Mahendra Pratap, learned counsel for the National Highway Authority of India (hereinafter referred to as the “NHAI”).

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is assailing the order dated March 31, 2024, passed by the Chief General Manager, Commercial Operations, National Highway Authority of India (being the Respondent No. 3). This order was passed pursuant to the show cause notice issued upon the petitioner dated May 24, 2024, to which the petitioner had given a reply on May 27, 2024.

3. By the impugned order, the petitioner’s contract with the NHAI for running the Kaithi Fee Plaza was terminated, and the petitioner was debarred from the list of pre-qualified bidders for a period of six months.

4. Sri Anoop Trivedi, learned Senior Advocate for the petitioner, has submitted that on a bare perusal of the impugned show cause notice, it is

clear that the said show cause notice reeks of pre-meditation and is a fait accompli by itself. He further submits that a detailed reply was submitted by the petitioner explaining each and every point that has been raised in the show cause notice. However, he submits that the authorities have blatantly erred in law in not considering the said reply of the petitioner and have passed the impugned orders in gross violation of the principles of natural justice.

5. Sri Anoop Trivedi has brought to our notice certain clauses of the show cause notice and the reply given to the same by the petitioner which have not found any mention in the impugned order. Finally, the petitioner submitted that the quantum of damages/the termination and debarment that has been issued as a penalty upon the petitioner is against the principle of proportionality and also amounts to double jeopardy. This submission is based on the fact that the petitioner had already paid the penalty of Rs. 8,00,000/- for the technical breaches committed by it. He submits that after having paid the penalty, being shouldered with the entire burden of termination of contract and debarment for the period of six months, is a punishment that is way out of proportion. To buttress his arguments, Sri Anoop Trivedi relied on the Calcutta High Court judgment in **Gp. Capt. Rajib Lochan Dey -v- Union of India** reported in **2007 SCC OnLine Cal 308**, which, in fact, dealt with the same Clause 35 that is used in the present contract. He further relied on the Supreme Court Judgment of **Siemens Limited -v- State of Maharashtra and Others,** reported in **2006 (12) SCC 33** and the case of **Oryx Fisheries Private Limited -v- Union of India and Others,** reported in **(2010) 13 SCC 427** to emphasise on the point that a show cause notice should not be pre-meditated in nature and a writ petition would be maintainable against such a show cause notice.

6. Sri Anoop Trivedi, learned Senior Advocate for the petitioner, further relied on the Apex Court judgment in the case of **M/s Kulja Industries Limited -v- Chief Gen. Manager W.T. Proj. BSNL & Ors. (Civil Appeal No. 8944 of 2013)**. He relied on the above judgment to give support to his argument that in cases of blacklisting, the threshold for such action would be

high and only based on proper scrutiny. This judgement also lays down the principle that even though the right of the petitioner may be in the nature of contractual right, the manner, the method and the motive behind the decision of the authority, whether or not contractual in nature, is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. This judgment further clarifies that the decision taken by the authority must abide by the principle of *Audi alteram partem* before the decision culminates to a decision of blacklisting of a person.

7. The last submission of the learned counsel for the petitioner is with regard to the various incidents that have been alleged in the show cause notice. Specific proof has been provided by the petitioner, including C.C.T.V. footage, documents in relation to Maafinama (given by the persons who had filed the F.I.R. against the petitioner company) that have not been taken into account by the authority while coming to the final decision.

8. Sri Mahendra Pratap, learned counsel for the NHAI, has highlighted several events that resulted in the issue of the show cause notice. He further submits that some of the events were extremely glaring infractions and were required to be punished. He further submits that even though the penalty had been imposed upon the petitioner, the same would not suffice as the consequences of the various malpractices of the petitioner needed to be addressed by the authority concerned. According to him, that is the reason as to why, apart from the penalty, termination of the contract was mandatory, coupled with the ban on the petitioner organization for six months.

9. Before proceeding with a further examination of the present case it would be apposite to analyse and examine the judgements cited before this court. The Supreme Court, in the case of **Siemens Limited (supra)**, was accosted with an issue wherein the show cause notice issued to the appellant was pre-meditated in nature. The Supreme Court held that in such cases, the making of the show cause notice becomes a mere formality as the authority had pre-determined the appellant’s liability. The Supreme Court further held

that such writ petitions would be maintainable before the High Court. The relevant paragraphs are provided below:

> *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 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.*
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> *11. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter-affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show-cause notice. The writ petition, in our opinion, was maintainable.*

10. The above paragraphs explain the legal principle regarding the jurisdiction of writ courts in India when addressing show cause notices. Typically, a writ court refrains from interfering with such notices unless they appear to be issued without jurisdiction. However, the above case highlights an exception to the general rule. When a show cause notice is issued with clear pre-meditation, suggesting that the authority has already made up its mind regarding the outcome, a writ petition can be justified. This is because a subsequent hearing in such cases is unlikely to be impartial or productive. This perspective has been supported by the Supreme Court in the case of ***K.I. Shephard -v- Union of India***, reported in **(1987) 4 SCC 431,** which acknowledges that once a decision is effectively pre-determined, further hearings do not serve their intended purpose. It is evident that the authority had already concluded the appellant's liability, as indicated by the counter-affidavit and the show-cause notice. Therefore, the court deemed the writ petition maintainable to prevent an ineffective hearing process. This

approach ensures that the principles of natural justice and fair hearing are upheld.

11. Similarly, in **Oryx Fisheries Pvt. Limited (supra)**, the Supreme Court dealing with a similar issue held as follows:

> *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.*
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> *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.*
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> *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.*

12. From the above judgment, the rationale that emerges is that a show cause notice cannot be read hypertechnically, and it is to be read reasonably. But the person who is subject to it must get the impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. A quasi-judicial authority must record reasons in support of its conclusions. The ongoing judicial trend in all countries committed to the rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. Insistence on reason is a requirement for both judicial accountability and transparency. Reasons in support of decisions must be cogent, clear, and succinct. Therefore, for the

development of law, the requirement of giving reasons for the decision is of the essence and is virtually a part of 'due process'.

13. In **Kulja Industries Limited (supra)**, the respondent BSNL had blacklisted Kulja Industries Limited citing fraudulent billing practices despite repayment of excess funds. The High Court upheld this decision emphasising that repayment did not negate the misconduct of the appellant. The Supreme Court laid down the principle with regard to the power of a Government or Public Authority to blacklist contractors. The relevant paragraphs are extracted below:

> *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. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with Erusian Equipment & Chemicals Ltd. v. State of W.B. [(1975) 1 SCC 70] where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed: (SCC p. 75, para 20)*
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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."

18. Subsequent decisions of this Court in M/s Southern Painters v. Fertilizers & Chemicals Travancore Ltd. and Anr. [1994 Supp (2) SCC 699 : AIR 1994 SC 1277] ; Patel Engineering Ltd. v. Union of India [(2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] ; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548] ; Joseph Vilangandan v. Executive Engineer (PWD) [(1978) 3 SCC 36] among others have followed the ratio of that decision and applied the principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.

19. Even the second facet of the scrutiny which the blacklisting order must suffer is no longer res integra. The decisions of this Court in Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] ; E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] ; Maneka Gandhi v. Union of India [(1978) 1 SCC 248] ; Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 : 1981 SCC (L&S) 258] ; Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] and Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay [(1989) 3 SCC 751] have ruled against arbitrariness and discrimination in every matter that is subject to judicial review before a writ court exercising powers under Article 226 or Article 32 of the Constitution. It is also well settled that even though the right of the writ petitioner is 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 judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law. We do not consider it necessary to burden this judgment by a copious reference to the decisions on the subject. A reference to the following passage from the decision of this Court in M/s Mahabir Auto Stores & Ors. v. Indian Oil Corporation Ltd., [(1990) 3 SCC 752] should, in our view, suffice: (SCC pp. 760-61, para 12)

> *"11. 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 Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] . … 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. ... 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."*

14. Upon a perusal of the relevant paragraphs above, it is evident that the judgement brings forward several critical principles concerning the judicial scrutiny of decisions to blacklist contractors by governmental or public authorities. First, the inherent power to blacklist a contractor is vested in the entity awarding the contract, typically the State or its instrumentalities. This authority does not necessarily require explicit statutory authorisation but must conform to fairness and reasonableness. It is also to be noted that any governmental or public authority's decision to blacklist a contractor is open to judicial review, ensuring adherence to natural justice principles, particularly *audi alteram partem* and the doctrine of proportionality. This means courts can examine such decisions to ensure they are just and balanced. Further, before blacklisting a contractor, the entity must provide a fair hearing, allowing the contractor to present their case and defend against the allegations or reasons for blacklisting. The decision to blacklist must also be reasonable, fair, and proportionate to the gravity of the alleged offence or breach, avoiding arbitrariness or discrimination. Additionally, actions by State authorities, including blacklisting decisions, must pass the reasonableness test under Article 14 of the Indian Constitution, which ensures equality before the law and prevents arbitrary State actions.

Furthermore, precedents and legal standards established in prior judicial decisions, such as ***Erusian Equipment & Chemicals Ltd. -v- State of W.B.,*** reported in (**1975) 1 SCC 70** and subsequent cases like ***Radha krishna Agarwal and Ors. -v- State of Bihar & Ors.,*** reported in **(1977) 3 SCC 457**, shed light on the legal framework guiding the judicial review of blacklisting decisions. These principles collectively aim to ensure that the power to blacklist is exercised judiciously, upholding fairness, reasonableness, and proportionality while safeguarding contractors' rights to a fair hearing and defense.

15. The judgement delivered by Justice Dipankar Datta (as he then was) in the judgement of the Calcutta High Court in **Gp. Capt. Rajib Lochan Dey's case (supra)** dealt with the same clause as is prevalent in the terms and conditions between the parties in the present *lis*.

16. Upon consideration of the various aspects, the Calcutta High Court held the importance of compliance with the principles of natural justice. Relevant paragraphs are delineated below:

> *29. Accordingly, this Court would proceed to consider the controversy raised herein on merits overruling the primary objection of Mr. Basak. However, this Court is not oblivious of the other objections relating to maintainability of the writ petition raised by Mr. Basak which shall be dealt with at a later stage of this judgement.*
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> *30. The inequality of bargaining power of the NHAI and the petitioner admits of no doubt. Being the weaker party, the petitioner could obtain a means of livelihood only upon acceptance of the terms imposed by the NHAI. If the petitioner had not accepted the contract, the NHAI could have several other intending contractors to choose from. Having accepted Clause 35, it is clear that choice of the petitioner, a retired defence employee, was limited and he had no other option. Clause 35 of the contract, in the manner it is worded, is clearly unconscionable and unreasonable and suffers from the vice of enabling discrimination and arbitrary action.*
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> *31. If one is conferred a drastic power, it necessarily carries with it a duty to exercise such power with a good degree of circumspection so that it is not abused. By the impugned notice, the NHAI has terminated the contract that was to subsist till 15.6.07. No reason has been assigned since Clause 35 expressly excludes assigning of any reason. Although the contract does not specifically provide that prior to termination of a contract in exercise of power conferred by Clause 35 thereof a notice is to be issued calling upon the contractor to show-cause as to why the contract shall not be terminated, can it be said that NHAI has unfettered and unbridled power*

to terminate a contract at its sweet will without notice and existence of any cogent reason? The answer has to be in the negative.

32. This Court would not venture to declare Clause 35 as void in the absence of a prayer made by the petitioner in this regard. But even if it had been challenged, on facts and in the circumstances of this case, this Court is inclined to hold that Clause 35 could be saved from being struck down and construed as reasonable if one reads natural justice into it and this would be well nigh-permissible being in consonance with fairness in action. If so read, an opportunity of showing cause ought to have been given to the petitioner prior to taking the harshest step of terminating the contract. In fact, the NHAI by reading natural justice in Clause 35 had initially asked the petitioner to show-cause as to why the contract shall not be terminated. There appears to be no cogent reason as to what prevented issuance of such notice prior to the impugned action. The NHAI cannot at its option read natural justice in Clause 35 at one stage and exclude it at a subsequent stage. One cannot in the context ignore the development intervening the action imposing penalty on 12.10.06 and the impugned termination of contract effected on 8.1.07, i.e. the fact that only two days prior to the order terminating the contract an agency appointed by the NHAI itself to offer consultancy services had, regarding the six monthly performance of the petitioner, duly certified that the performance of the petitioner's security agency was satisfactory and that it was carrying out its duties and responsibilities effectively and efficiently and further that the management and administration at the toll plaza is co-operative and sincere to raise toll collection. Importantly, despite opportunity granted to the NHAI to deal with the contents of the writ petition and the supplementary affidavit by filing a composite counter affidavit, the NHAI has not disputed the contents of the supplementary affidavit. The contents of the supplementary affidavit stand uncontroverted and the same are deemed to have been admitted by the NHAI. In view of such contemporaneous document, the contents whereof have not been disputed by the NHAI, it is hard to accept the contention that the petitioner's service being utterly unsatisfactory and resulting in the NHAI incurring financial loss, it was justified in terminating the contract. The submission of Mr. Basak that the NHAI while making the order dated 12.10.06 had reserved its right to take further action does not advance the case of NHAI any further. Right of the NHAI to take further action cannot be in doubt but that too ought to have been preceded by a notice since the NHAI owed a duty to the petitioner to act fairly. The effect of the impugned notice is to curtail the period for which the petitioner was entitled to continue subject to compliance with all formalities. If only an opportunity had been granted to the petitioner, for whatever it is worth, such report could have been used by him if not as a sword but as a shield to counter the accusations of the NHAI alongwith any other point available to him in defence. After all, reasons cited by the petitioner for decrease in toll collection were serious in nature warranting serious *consideration. That would have necessitated a reasoned decision upon proper application of mind, which in turn, could bear manifestation of a fair, just and reasonable approach to seal the petitioner's fate instead of the impugned notice which hardly reflects the mind of the decision maker and the materials considered by him prior to issuing it. Had it been so, the Writ Court's scope of enquiry would have been further restricted and it could well turn out to be not an appropriate case for interference, keeping in mind that it does not act as a bull in a china shop.*

33. It has been noticed that Clause 35 empowers the NHAI to terminate the contract by issuing a notice but without assigning any reason. Similar expression fell for consideration in Shrilekha Vidharthi (supra). It was held that "without assigning any cause" is not to be equated with "without existence of any cause". It merely meant that the reason for termination need not be communicated but absence of or non-existence of any cogent reason would be arbitrary.

34. It is the stand of the NHAI in its counter affidavit that "the decision to terminate the contract was based, inter alia, on the three surveillance reports as also on the reply to the show-cause which were found unsatisfactory". If one were to consider the report of SOWIL Ltd. dated 6.1.07 with an open mind, it really would reveal a chink in the NHAI's armoury and lay to rest any accusation of unsatisfactory performance. It is difficult to agree that lapses detected by the NHAI for which a penalty was imposed on the petitioner could form the basis for termination of the contract. That really amounts to double jeopardy, which is not permissible in our constitutional scheme. Also the subsequent report of SOWIL Ltd. is hardly of any relevance since the same was not in existence when the impugned notice was issued.

35. This Court thus holds that in not giving any opportunity to the petitioner to show-cause against proposed termination of contract and there being no sufficient reason to justify the impugned action, the NHAI has acted unfairly, unreasonably, in an arbitrary manner and in violation of principles of natural justice, thereby infringing the petitioner's right guaranteed by Article 14 of the Constitution of India.

17. Upon a perusal of the relevant paragraphs above, one realises that the judgment sheds light on several fundamental principles regarding the judicial review of administrative actions, particularly concerning the termination of contracts by public authorities such as the National Highways Authority of India (NHAI). Primarily, public authorities exercising significant powers, like contract termination, must adhere to natural justice principles, ensuring the affected party has an opportunity to be heard or to show cause before adverse action is taken. This safeguards against unreasonableness and arbitrariness, requiring that administrative actions,

including contract terminations, are based on valid reasons and reflect a fair, just, and reasonable approach. Furthermore, actions by public authorities affecting individual rights are subject to scrutiny under Article 14 of the Indian Constitution, which guarantees equality before the law and prohibits arbitrary actions. Objections related to non-disclosure of material facts may be disregarded by courts unless the non-disclosure is crucial and affects the case outcome. While courts may prefer to dismiss writ petitions citing the availability of alternative remedies, they may still hear the case on its merits if justified. The principle of double jeopardy is also highlighted, wherein imposing penalties and then using the same grounds for contract termination is generally impermissible. Moreover, contractual clauses allowing termination without assigning reasons must not be interpreted to enable arbitrary actions; the absence of communicated reasons does not imply the absence of reasons altogether. These principles collectively ensure that public authorities' power to terminate contracts is exercised judiciously, upholding fairness, reasonableness, and adherence to natural justice while safeguarding against arbitrary and unreasonable administrative actions.

18. The principles that emerge from the above judgements are as follows:

a. First, the principle of proportionality, which dictates that any decision to blacklist must be reasonable, fair, and commensurate with the gravity of the alleged offense or breach. This doctrine ensures that the punishment or action taken is appropriate and proportional to the severity of the misconduct.

b. Second, the general principles of natural justice, which include *Audi Alteram Partem* (hear the other side), *Nemo Judex in Causa Sua* (no one can be a judge in their own case), and the right to a reasoned decision. In quasi-judicial proceedings, actions by State authorities must comply with these principles to ensure fairness in the process. Further, natural justice requires that decisions are made impartially and based on sound reasoning, upholding the rights of the parties involved.

c. Third, the principles of non-arbitrariness and non-discrimination, which are essential to ensure equality before the law. Actions by

State authorities, including blacklisting decisions, must pass the test of reasonableness under Article 14 of the Indian Constitution. This principle would prevent arbitrary State actions and ensures that decisions are made based on lawful and relevant grounds, promoting fairness and equality.

d. Finally, the rule of law, which requires that every action of the State or its instrumentalities must be informed by reason and comply with legal standards. Decisions must be based on lawful and relevant grounds of public interest, ensuring that the exercise of power is justified and appropriate.

19. Upon perusal of the show cause notice, the reply given by the petitioner, and the impugned order, there seems to be a major lacuna in the impugned order with regard to addressing all the points and the submissions that have been raised by the petitioner in their reply. The nature of the show cause notice also indicates a pre-meditated mind. The extracts of some of the paragraphs are provided below:-

> *4. That the Project Director, PIU Varanasi received a letter from N./s. Adhunik Road Carrier, Vadodara Gujrat, wherein they have infornned that their vehicle was forcefully stopped at Kaithi Toll Plaza by your staff on 20th December 2023 at 17:00 Hrs and got released on 21 December, 2023 at 11:00 Hrs after intervention of PIU office, Varanasi. They have also informed that usually your staff forced vehicles to stop for 4 to 5 hours and asked them for Rs. 5000-10000, as bribe for passing the vehicles through Toll Plaza. The complainant has also provided document in support of his accusation. Letter dated 01.01.2024 (enclosed herewith) with the document sent by PD, PIU Varanasi to you. Your reply received vide letter dated 04.01.2024 (enclosed herewith) was not found satisfactory.*
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> *5. That Manager (Tech) in office of PD PIU Varanasi sent a letter dated 15.01.2024 informing to you about the news items published in News Papers on 13.01.2024 & 15.01.2024 regarding overcharging on the overloaded vehicles and making illegal collection of user fee from the Highway users. The same instance was earlier noticed by PIU Varanasi, who had also warned you to operate Toll Plaza as per provision of Contract Agreement and any illegal activity will force to impose penalty on your Agency. Copy of letter dated 15.01.2024 is enclosed herewith. Your reply received vide letter dated 16.01.2024 (enclosed herewith) was not found satisfactory.*

6. That one Dayal Sharan Mishra made a complaint dated 16.01.2024 and 01.02.2024 with affidavit regarding your illegal activities. Coples enclosed herewith of the complaint. Your affidavit received vide letter dated 03.02.2024 (enclosed herewith) was not found satisfactory.

8. That the PD, PIU Varanasi wrote a letter/notice dated 07.02.2024 regarding the inspection made by Manager(Tech) at Kaithí Toll Plaza on 18.01.2024 who has noticed various shortcomings mentioned in the letter/ notice dated 07.02.2024. The Manager (Tech) Inspected and found that there are violations of clause 12 of the Contract Agreement. During the Investigation, your staff was caught red handed with the illegal cash collection of Rs. 2500/- from the Truck passing through the Plaza. The Photographs of that person holding the illegal cash collection is enclosed with the letter. Other illegal activities have been referred which is clear from the letter dated 07.02.2024 enclosed herewith. Your reply received vide letter dated 08.02.2024 (enclosed herewith) was not found satisfactory."

20. The show cause notice further provided in paragraph 15 as follows :-

15. That, the present notice is being issued pursuant to the Order dated 21.05.2024 passed by Hon'ble Allahabad High Court in the said Writ Civil no. 17805 of 2024, and in terms of Clause 35(2)/(3) of the Contract Agreement, whereby, you are requested to explain, why, Contract Agreement dated 13.12.2023 shall not be terminated due to above detailed Contractual violations at your end and why you shall not be debarred from the list of pre-qualified bidders for a period as deemed fit and proper by NHAI.10.

21. The finding in the impugned order dated May 31, 2024, with regard to paragraph 8 wherein the authority came to a particular finding is stated below:-

PIU Varanasi letter dated 07.02.2024: -

The PD, PIU, Varanasi wrote a letter/notice dated 07.02.2024 regarding to inspection date by Manager (Tech) at Kaithi User Fee Plaza on 18.01.2024, who has noticed various short comings mentioned in the letter/notice dated 07.02.2024. The PD, PIU, Varanasi has noticed the facts found during investigation by Manager (Tech). Relevant facts from the letter/notice dated 07.02.2024 are reproduced below:

"During the inspection, your staff was caught red handed with the illegal cash collection of Rs. 2,500/- from the truck passing through the Fee Plaza. The photographs of that person holding the illegal cash collection is enclosed with this letter, Moreover, it was also found that Rs. 220 is being collected regularly from the Iccal buses by the agency without issuing any cash collection receipt, which is

also illegal and violation of operational transparency of Fee Plaza and loss of revenue to the Authority.

(iii) As per Clause 13(c), the personnel deployed have to wear prescribed uniform necessarily bearing the name of individual. During the inspection, the personnel deployed were not wearing the prescribed uniform as stated in the CA.

(iv) As per Clause 13(j), engagement of at least 30% Ex-Servicemen is mandatory, no such deployment was found at the fee plaza.

(v) Unwanted persons such as Bouncers were found to be sitted at fee plaza office, which is violation of Contract Agreement.

(vi) As per Clause 22(c) & 23(o), the Authority has right to inspect and check receipt books, register and books of accounts maintained by the Contractor at any time. During Inspection no such records were provided, when asked for checking, which shows fraudulent behaviours and violation of transparency as per Contract Agreement.

(vii) As per Clause 18(d) of Contract Agreement, the user fee collection agency shall ensure the cleanliness of the toilet blocks, filing which shall lead to the imposition of penalty on the agency. During the site visit it has been noticed that the toilets blocks are not cleaned.

(viii) Further, lots of complaints through 1033 help line, pertaining to Kaithi Fee Plaza, are also being observed."

The Competent Authority has considered your reply dated 27.05.2024. You have admitted that the money was collected at the User Fee Plaza but your defence is that the same was collected by FASTag recharge company and individual was not wearing uniform of your Agency and was also not in employment with your Agency. It is to be noted that the employee of FASTag recharge company cannot enter in User fee Plaza for l collecting money for recharge. ***If any illegal money is being taken by any person at User Fee Plaza, in cash from any NH user, you would be wholly responsible for such illegal act.*** *You have admitted that collection of Rs. 2500/- from passing through vehicle was collected at User fee Plaza, you are responsible for such illegal act. The Competent Authority found your reply not satisfactory.*

22. The above finding does not match the initial show cause notice wherein there was a charge in the show cause notice that the employee of the petitioner had taken money, whereas the finding in the impugned order is that an unauthorised person who was not an employee of the petitioner had taken money in the precinct of the fee plaza. The offence that emerges from

the impugned order now is that the petitioner allowed unauthorised people to be present in the precinct of the fee plaza.

23. It is a common principle of law that unless an accusation is made in the show cause notice, a finding with respect to the same cannot be recorded on the same in the final order. The principle behind the same is that a person who is accused of a particular act must be given a chance to defend himself for the same. The authority cannot be allowed to change the goal post while passing the order.

24. We find similar findings with regard to other allegations made in the show cause notice in the impugned order. We further find that penalty has been imposed on the petitioner for a sum of Rs. 8,00,000/- for the various infractions that took place earlier.

25. It is to be further noted that these incidents did not take place in the same month, and therefore, the application of Clause 35(2) read with Clause 20 of the terms and conditions appear to be illegal as Clause 20 requires more than three defaults in the same month. The show cause notice, as dismissed above, is pre-determined and the impugned order travels beyond the scope of the said show cause notice. Another important aspect is that the punishment of debarment has been imposed in a very casual manner without taking into consideration the fact that the penalty had already been imposed on the petitioner and without any further illegality committed by the petitioner, the petitioner was burdened with the ban amounting to double jeopardy (that appears to be harsh on the face of the present facts). This casual manner obviously has resulted in an arbitrary action and cannot be sustained in the eyes of the law. However, the court is cognizant of the fact that we are presiding over the extraordinary writ jurisdiction, and we cannot enter into the facets of contract law in this jurisdiction. Nevertheless, even though the fact that the entire controversy herein is contractual in nature, as seen from the Supreme Court judgements above, the writ court is duty bound to step in when the State acts in a whimsical, arbitrary and capricious manner.

26. In light of the same, we are of the view that the present order passed by the authority concerned suffers from the vice of violation of principles of natural justice as well as it fails on the altar of proportionality.

27. Accordingly, the impugned order dated May 31, 2024, is quashed with a direction to the authority concerned to once again issue a fresh show cause notice to the petitioner (*de hors* the prejudice in the earlier show cause notice). Once a show cause notice is issued, the petitioner shall be at liberty to file a detailed reply to the same within a period of seven days. Subsequent to the receipt of reply, an opportunity of hearing should be granted to the petitioner, and thereafter, a reasoned order be passed by the authority concerned. The authority concerned shall be at liberty to consider the judgements provided by the petitioner on the various issues.

28. With the above observations, the writ petition is allowed.

Order Date:- 19.7.2024
Gaurav/Kuldeep

(Manjive Shukla, J.) (Shekhar B. Saraf, J.)