2024 INSC 589

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2024
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 11682 OF 2018)

THE BLUE DREAMZ ADVERTISING PVT. LTD. & ANR. APPELLANT(s)

VERSUS

KOLKATA MUNICIPAL CORPORATION & ORS. RESPONDENT(s)

J U D G M E N T

K.V. Viswanathan, J.

1. Leave granted.

2. The present Appeal is filed against the judgment and order dated 21.06.2017 passed by the Division Bench of the High Court at Calcutta in M.A.T. No. 277 of 2017. By the said judgment, the High Court allowed the Appeal of the respondents and set aside the judgment of the learned Single Judge. Consequently, the Writ Petition filed by the appellant stood dismissed.

Brief Facts:

3. The respondent no. 1-Kolkata Municipal Corporation

(hereinafter referred to as the ‘Corporation’) invited bids for allotment of contract for display of advertisement on Street Hoardings (including V Shaped), Bus Passenger shelter and Kiosks within its jurisdiction. Under the tender conditions, the contract was to be awarded for a period of one year, subject to extension of two more years. By an award of 28.05.2014, the appellant who had participated in the tender and quoted the highest rate at Rs. 3,70,00,000/- each for cluster no. I, II, III, VI and VIII was notified as a successful bidder and was requested to confirm the acceptance. On 29.05.2014, the appellant conveyed its acceptance.

4. Thereafter, a series of correspondence ensued with the appellant on matters like, alleged non-receipt of any formal work order (on 11.06.2014); non-receipt of any format of the Bank Guarantee (on 13.06.2014); request for a ‘No Objection Certificate’ for obtaining new connection from Calcutta Electric Supply Corporation Ltd. (on 26.06.2014); problems with the execution like, non-matching of the unit

code numbers with the hoardings or the non-matching of locations; existence of same unit code for different locations, rendering the commencement of work incapable (letter of 26.06.2014) and existence of lesser hoardings out of the 250 street hoardings (letter of 07.07.2014).

5. The Corporation, by its letter dated 08.07.2014, demanded payment for the month of June. Thereafter, the appellant wrote a letter of 19.07.2014 stating that till date they have identified 200 numbers of street hoardings out of the 250 allotted and sought for a joint inspection to identify the rest of them. At this stage, the Corporation issued a letter of 10.09.2014 stating that there was no reason why the appellant was insisting for the Bank Guarantee Format since Bank Guarantee was not the mode of payment. According to the Corporation, the bills for 5 clusters of Rs. 4,62,67,500/- (for only July to September, 2014) had not been paid in spite of service of the bill on 08.07.2014. The Corporation also mentioned that in the joint inspection the appellant's men failed to

cover all the areas and thereafter, the appellant was asked to submit a list of allotted locations which, according to the Corporation, the appellant had not furnished. The appellant was warned that in case the payment as demanded was not paid, steps as per the tender clauses would be taken.

6. When the matter stood thus, the appellant wrote a letter on 14.11.2014 setting out all the earlier correspondence and the grievances raised by them and ultimately praying that they be granted diminution, reduction and/or adjustment of the license fee. They prayed that their demand for 174 hoardings be confirmed so that they could make the payment. The Corporation served a memo dated 06.12.2014 setting out that already a notice of 20.11.2014 was served demanding payment of 8,16,15,870/- up to December, 2014 but the same has not been cleared. The appellant was asked to appear on 12.12.2014 to show cause why the allotment of hoarding shall not be cancelled. On 28.02.2015, a Show Cause

Notice was issued asking the appellant to show cause why the appellant's allotment be not terminated as dues to the tune of Rs. 10,28,52,918/- plus interest had not been cleared.

7. In this scenario, on 29.07.2015, a notice was published in English Daily "The Times of India" Kolkata stating that the appellant had been blacklisted from participating in any advertisement in the city of Kolkata. However, on a challenge made in Writ Petition No. 960 of 2015, on 04.08.2015, a submission was made to the Court by the learned senior counsel for the Corporation that the decision of the blacklisting of appellant was to be withdrawn and that the Corporation would proceed with the matter in accordance with law after providing opportunity of hearing. The Writ Petition was disposed of.

8. The appellant had earlier filed Writ Petition No. 261 of 2015 challenging the Show Cause Notice of 28.02.2015. The learned Single Judge dismissed the Writ Petition on 04.03.2015. An appeal bearing APOT No. 89 of 2015 was

preferred along with GA No. 782 of 2015. The Appeal and G.A. were disposed of by an order of 24th August 2015 recording the submissions of the Learned Additional Advocate General appearing for the Corporation and disposing of the matter in the following terms:-

> "Due to typographical errors in the show cause notice dated 28th February, 2015, the learned Additional Advocate General very fairly submitted he is not pressing this show cause notice but the appropriate proceedings shall be taken before the Arbitrator."

9. Thereafter, the Corporation issued a Show Cause Notice dated 27.08.2015 to the appellant, stating that as on the said date Rs. 16,84,34,431/- along with interest is due and payable towards license fee/advertisement tax. The Show Cause Notice also alleged that the appellant had failed to execute the agreement for street hoardings, which was issued on 29.11.2014 and failed to submit the bank guarantee which was issued on 27.09.2014 and it also alleged that the appellant had illegally shifted several hoardings without the consent of the authority. The show cause notice asserted that in spite of repeated requests

and/or reminders, the appellant had failed to make payment and refused and/or neglected to perform the obligations as per the terms and conditions of the tender. The Show Cause Notice further clearly alleged as under:

> "In view of the aforesaid breach of the terms and conditions of the tender, you are requested to file a show cause as to why befitting action to blacklist you from participating in any tender process should not be taken all (sic.) you make the outstanding payment and comply with the terms and conditions of the tender. You are required to submit your reply within 15 days from the date of Receipt of this letter, failing which the authority will take appropriate decision in accordance with law."

10. By its reply of 15.09.2015, the appellant responded to the Show Cause Notice. The appellant mentioned therein that the tender document did not empower the Corporation to determine the alleged breach on the part of the company arising out of the contract; that in view of the submission made by the Corporation before the Division Bench, it is only the arbitrator in terms of Clause 18 who can decide the dispute mentioned in the Show Cause Notice of 27.08.2015; that Corporation is a party to the proposed arbitration proceeding and it cannot usurp the

power of the arbitrator; that the decision to blacklist the appellant without recourse to arbitration proceeding is illegal and that any decision to blacklist before the decision of the arbitrator would be prejudging the alleged guilt without deciding the issue. The appellant prayed that the Show Cause Notice be not given effect to till the disposal of the arbitration proceeding.

11. It further appears that by notice dated 05.10.2015, the appellant invoked clause 18 of the tender document and sought reference to the Joint Municipal Commissioner as arbitrator.

Debarment Order:

12. By an order of 02.03.2016, the Corporation debarred the appellant from participating in any tender for a period of five years or till the date of exoneration of the company from the allegation of negligent performance/action and also of nonpayment of huge amount or till the date of payment of entire dues with interest under the direction of any authority/forum/court, whichever is later. The order,

after recording the history of the dispute and after noticing the fact that at the hearing given, the company took the same plea as stated by them in their reply, observed as under:-

> "… …. The company had alleged that it could find only 174 hoarding out of 250 hoardings but the company in their letter dated 14th November, 2014 stated, inter alia, that they were able to find 200 street hoarding including 26-V-shaped. The company cannot take such plea particularly when the display sites/hoardings were specified in the lists under annexure-I, Il & III to the tender notice. The description of works under clause-2 of the tender notice clearly stated that the street hoarding in the annexure would be allotted in "As in where is basis". The company after having understood the scope and effect of the terms and condition of the notice the offers which were accepted by the authorities. The bills for 5 clusters amounting to Rs.4,58,97,360/- had already been served. The company was informed of its failure to pay the sum of Rs.4,58,97,360/- for the period from July 2014 to September 2014. The company paid part amount for 55 nos. of hoarding as against the said demand for the said quarter.
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> The company failed to mention the unit code on the allotted street hoarding and the company did not adhere to the instruction as made in this respect by writing letters on repeated occasions.
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> Clause-2.1 as incorporated in the tender notice is redundant in respect of the hoardings already in-existence since such hoardings remain fitted with the provision for supply of electricity. In fact, no

objection certificate is not required from the KMC in respect of the existing hoardings. All that is necessary is for confirmation of the change of the name of the user/agency. It is on record that the company continued to display the advertisement in the hoardings without requiring the no objection certificate from the KMC until 3rd March 2015 when a letter was issued in this respect. There is no document to show that the company applied to the CESC for electric connection and the CESC required no objection certificate from the KMC. It is on record that the contract period commenced from 1st June 2014 and hence there was no cogent reason to write the letter for No Objection Certificate after about 8 months. No application to the CESC in the name of the petitioners for the purpose illuminated street hoarding was submitted to the concerned authorities. The company used the supply of Electricity without requiring to inform the KMC AND EACH AND EVERY HOARDING was found illuminated during inspection failed to obtain the interim order as prayed for preferred the appeal being APOT No. 290 of 2015 and an application being G.A. No. 2374 of 2015 was filed in connection with the said appeal. The Hon'ble appeal court while dismissing the appeal and also the application by an order dated 3rd August 2015 was pleased to observe that there was no urgency in the matter in view of pendency of the writ petition. It was also observed that if the appellants were aggrieved in any manner with respect to the contract it was necessary for them to invoke arbitration clause.

The company earlier filed the writ petition being W.P. No.261 of 2015 relating to the notice to show cause dated 28th February 2015. The company was asked to show cause why the allotment should not be terminated for not clearing the dues amounting to Rs. 10,28,52,918/- as then calculated plus interest to

take defense upon certain facts in the written argument. I am not fully convinced and/or satisfied with the stand and/or explanation for several reasons and/or ground as stated hereinbefore. It appears to me that the company did not have the financial capacity to have the display of advertisement rights in 5 clusters and as such the company started creating problems on one plea to another since after obtaining the allotment of Sites. The company in one hand stopped the KMC to allot the said site to others and on the other hand itself stopped the due payment for 5 clusters. The KMC has thus suffered in both counts. Moreover the company has made an attempt to set up a bad example to others having interest to enjoy the advertisement rights.

That being the position the KMC has no alternative but to blacklist the company for gross negligent action. The company is therefore debarred from participating in any tender to have the award of contract for a period of 5 years or till the date of exoneration of the company from the allegation of negligent, performance/action and also of nonpayment of huge amount or till the date of payment of entire dues with interest under the direction of any authority/forum/court whichever is later."

13. In the meantime, it appears that in August, 2016, the appellant also filed a claim before the arbitrator claiming an award for Rs. 19,81,60,400/-. At the hearing before us, it was submitted that the arbitrator Justice (Retd.) Narayan Chandra Sil, who ultimately heard the matter, passed an award on 26.04.2024 awarding the claimant a

sum of Rs. 2,23,14,565/- after excluding the set off amount of Rs. 78,03,435/- along with interest of 8% per annum from the date of the award till realization. This statement is reiterated in the written submissions. We were also given a copy of the award. The respondent has not disputed the said fact.

Proceedings in the High Court:

14. The appellant also filed a Writ Petition, namely, Writ Petition No. 6616(W) of 2016 challenging the order of 02.03.2016. The learned Single Judge of the High Court while setting aside the order of 02.03.2016 held as under:

> "It is well settled by the above authorities that blacklisting is a civil consequence. The rules of natural justice have to be scrupulously followed. This denotes that proper reasons have to be given. The reasons, should have suggested that public interest would be affected if the writ petitioner was continued to be awarded contracts by the respondent Corporation. Or it was to be established that the writ petitioner was a dishonest business organisation, or irresponsible or wholly lacking in business integrity. The government or a government agency like the respondent-Corporation could not blacklist the writ petitioner without assigning these reasons or reasons akin thereto. There is a civil dispute between the parties. The matter has gone to arbitration. At best, the writ petitioner can be accused of taking the contract, not fully paying for it and not

performing it. The respondent Corporation has a monetary claim against the writ petitioner. It does not appear that the writ petitioner has made payment of any significant part of the contract price. It is astonishing that the respondent Corporation did not terminate the contract within the contract period and award hoardings to another party when the writ petitioner made a breach of the payment condition to pay the quarterly licence fee in advance. It waited till after the expiry of the contract period on 30th June, 2015. Thereafter, they proceeded to show cause the writ petitioner. This shows considerable fault on the part of the respondent Corporation. It also goes to indicate that expressly or impliedly the respondent Corporation had accepted the alleged breach of contract made by the petitioner.

Moreover, the defence of the writ petitioner in their written notes of argument is that 174 hoardings which were awarded to them were "non-lucrative". As the respondent Corporation did not issue a no objection certificate, CESC Limited could not give permission to light the hoardings. The writ petitioner could not put them to any use. If this is the defence raised by the writ petitioner it could not be cast aside as one totally devoid of any merit. Therefore, following the ratio laid down by Mr. Justice Sinha in the case of *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd and another* reported in (2006) 11 SCC 548 blacklisting proceeding should not have proceeded with because the writ petitioner in my opinion raised a bona fide dispute. Furthermore, blacklisting ought not to have been made until and unless this dispute was resolved.

For all the above reasons, the impugned order dated 2nd March, 2016 is set aside. Only the issue of blacklisting is decided by this order. Any observation regarding any other dispute between the parties is to be taken as tentative."

15. The matter was carried in Appeal by the Corporation and by the impugned order, the High Court has allowed the same by holding that since the appellant was given a hearing and since the order of 02.03.2016 cannot be held to be unreasonable or unfair or disproportionate, there existed sufficient reasons for debarring the appellant. So holding, the Appeal was allowed. The appellant aggrieved is before us in Appeal. This Court while issuing notice in the matter by its order of 27.04.2018 stayed the operation of the impugned judgment.

Contentions:

16. We have heard Mr. P.S. Datta, learned senior counsel for the appellant and Mr. Sujoy Mondal, learned counsel for the respondent. We have also perused the written submissions filed by the appellant. The respondent has not filed any written submissions.

17. The learned senior counsel for the appellant contends that the Corporation could at best have imposed only a 'penalty' for making late payments or in the case of default

of payments under clause 9 and there could not have been blacklisting; that blacklisting can be only made when there was deviation of clauses 2.8, 11 & 14 and that the Show Cause Notice precisely setting out why the blacklisting was to be imposed need to have been given; that the grounds of blacklisting are not the one stated in clauses 2.8, 11 & 14; that the order of blacklisting was passed during the pendency of the arbitration proceedings; that the issues relating to blacklisting were akin to the facts in issue before the arbitration; that the Corporation has failed to prove gross misconduct or irregularities or fraud involving of any element of public interest; that the learned Single Judge was right in setting aside the order of blacklisting; that the Corporation is guilty of having not acted fairly and reasonably by not facilitating the appellant to perform his contractual right; that the Corporation despite the repeated undertaking before the High Court for taking resort to arbitration has deliberately issued the order of blacklisting and that any and every act of alleged breach

of contract would not ensue blacklisting.

18. In support of their submission, the appellant relied on ***B.S.N. Joshi & Sons Ltd. vs Nair Coal Services Ltd. & Ors. (2006) 11 SCC 548***. The appellant also assailed the judgment of the Division Bench by contending that the Division Bench failed to consider that there was no element of violation of public interest involved in the conduct of the appellant and in fact the Corporation was guilty of having not acted fairly and reasonably and that the Division Bench has completely overlooked this aspect. The appellant further contended that the order of blacklisting was disproportionate and contrary to the judgment in ***Kulja Industries Ltd. vs Chief General Manager Western Telecom Project BSNL & Ors. (2014) 14 SCC 731***.

19. The learned counsel for the Corporation defended the order of blacklisting as well as the judgment of the Division Bench and prayed that there was no case for interference by this Court.

20. We have considered the submissions of the learned counsels and perused the record.

Questions for consideration:

21. The following questions arise for consideration:

a. Whether in the facts and circumstances of the case, the order of the Corporation dated 02.03.2016, debarring the appellant for a period of five years is valid and justified in the eye of the law?

b. If so, what reliefs is the appellant entitled to?

Reasons and conclusions:

22. Blacklisting has always been viewed by this Court as a drastic remedy and the orders passed have been subjected to rigorous scrutiny. In ***Erusian Equipment & Chemicals Ltd. vs State of West Bengal & Anr. (1975) 1 SCC 70***, this Court observed that

> "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...."

23. In ***Mr. B.S.N. Joshi (supra)***, this Court held that

> "41. ... When a contractor is blacklisted by a department he is debarred from obtaining a contract, but in terms of the notice inviting tender when a tenderer is declared to be a defaulter, he may not get any contract at all. It may have to wind up its business. The same would, thus, have a disastrous effect on him. Whether a person defaults in making payment or not would depend upon the context in which the allegations are made as also the relevant statute operating in the field. When a demand is made, if the person concerned raises a bona fide dispute in regard to the claim, so long as the dispute is not resolved, he may not be declared to be defaulter."
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> (Emphasis supplied)

24. This Court in ***Kulja Industries Ltd. (supra)*** after setting out the legal position governing blacklisting/debarment in USA and UK held that:

> "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.
>
> 26. In the case at hand according to the respondent BSNL, the appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the respondent Corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable

> especially when (a) the appellant is supplying bulk of its manufactured products to the respondent BSNL, and (b) the excess amount received by it has already been paid back.”

25. What is significant is that while setting out the guidelines prescribed in USA, the Court noticed that comprehensive guidelines for debarment were issued there 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 unable to perform satisfactorily. The illustrative cases set out also demonstrate that debarment as a remedy is to be invoked in cases where there is harm or potential harm for public interest particularly in cases where the person’s conduct has demonstrated that debarment as a penalty alone will protect public interest and deter the person from repeating his actions which have a tendency to put public interest in jeopardy. In fact, it is common knowledge that in notice inviting tenders, any person blacklisted is rendered ineligible. Hence, blacklisting will not only debar the person concerned from

dealing with the concerned employer, but because of the disqualification, their dealings with other entities also is proscribed. Even in the terms and conditions of tender in the present case, one of the conditions of eligibility is that the agency should not be blacklisted from anywhere.

26. In other words, where the case is of an ordinary breach of contract and the explanation offered by the person concerned raises a bona fide dispute, blacklisting/debarment as a penalty ought not to be resorted to. Debarring a person albeit for a certain number of years tantamounts to civil death inasmuch as the said person is commercially ostracized resulting in serious consequences for the person and those who are employed by him.

27. Too readily invoking the debarment for ordinary cases of breach of contract where there is a bona fide dispute, is not permissible. Each case, no doubt, would turn on the facts and circumstances thereto.

28. Examining the facts of this case from that perspective,

we find that the appellant, after the award of the tender, has admittedly paid an amount of Rs. 3,71,96,265/-, though, according to the Corporation, the outstanding amount as on the date of the debarment was Rs. 14,63,24,727/-. However, as would be clear from the facts discussed hereinabove, right from the inception there have been issues between the appellant and the Corporation with regard to the fulfilment of the reciprocal obligations in the bid document. There has been exchange of correspondence between the parties with each side blaming the other for not performing the reciprocal obligations. While the appellant had a case with regard to the non-issuance of work orders; non-receipt of formal format of bank guarantee; refusal of No Objection Certificate for obtaining connection from the Calcutta Electric Supply Corporation Ltd.; existence of only 200 out of 250 allotted street hoardings and so on demonstrating breach of obligations by the Corporation, the Corporation had a case that Bank Guarantee was not the mode of

payment and as such there was no reason to insist on Bank Guarantee; that in the joint inspection the appellant's men failed to cover all the areas and thereafter when appellant was asked to submit a list of allotted location, the appellant failed to furnish the same and further there was huge default on the part of the appellant.

29. Even in the order dated 02.03.2016 by which the appellant was debarred for a period of five years, the reason given is that the tender notice had clearly stated that the street hoardings in the annexures would be allotted on 'as is where is' basis; that the company having understood the scope and effect of the terms and conditions of the notice accepted the award; that, 'No Objection Certificate', is not required in respect of the existing hoardings; that there was no document to show that the company had applied to the Calcutta Electric Supply Corporation Ltd. for connection and that it appeared to the Corporation that the company did not have the financial capacity to pay and as such the

company was creating problems on one pretext or the other since obtaining the allotment of sites. The order also stated that the appellant had set up a bad example to others having interest to enjoy the advertisement rights.

30. All these reasons fall far short of rendering the conduct of the appellant in the present case, so abhorrent as to justify the invocation of the drastic remedy of blacklisting/debarment. The appellant very clearly has been subjected to a disproportionate penalty. The Corporation has lifted a sledgehammer to crack a nut. We disapprove of the said course of action on the facts of this case.

31. The exchange of correspondence resulted in invocation of the arbitration and today it is undisputed that by an award of 26.04.2024, the appellant has been awarded after due set off Rs. 2,23,14,565/- with 8% interest per annum under the very same dispute. We are not here concerned with the correctness of the award. What it does signify is that there was a bona fide

contractual dispute between the parties and we hold that the learned Single Judge was right in setting aside the order of debarment on the ground that there was a bona fide civil dispute between the parties.

32. What renders the matter a fortiori is that when APOT No. 89 of 2015 along with GA 782 of 2015 filed against the order of the learned Single Judge dismissing Writ Petition No. 261 of 2015, the counsel for the Corporation had submitted to the Court that the Show Cause Notice was being withdrawn at that stage and appropriate proceeding was to be taken before the arbitrator. In spite of the statement, the Corporation did not invoke arbitration.

33. The appellant invoked arbitration and no doubt a counter claim was filed by the Corporation before the arbitrator. Ultimately, the counter claim was decreed for Rs. 78,03,435/- and the claim was decreed for Rs. 3,01,18,000/- and after ordering set off, an award has been passed for Rs. 2,23,14,565/-.

34. The issues framed by the arbitrator also indicate that

the assertions and counter assertions of the appellant and the Corporation were clearly in the nature of a bona fide civil dispute only to demonstrate that aspect, the issues are extracted herein below:

> "1. Is the arbitral proceeding barred by reasons of accord and satisfaction?
> 2. Did the respondents fail to allot 250 street hoardings in terms of tender document?
> 3. Did the respondents fail and neglect to provide clear sites to the claimants by intervening and removing illegal hoardings for obstructions at the allotted sites?
> 4. Did the respondents issue 'no objection certificate' to the claimants for getting new connections from the CESCP?
> 5. Was there any mis-match of unit code and the location hoardings?
> 6. Was it established and accepted in joint inspection by the KMC that only 200 street hoardings out of 250 could be located?
> 7. Did the claimants fail to deposit the requisite amount in advance under the contract for which the KMC, the respondent, suffered substantial loss in revenue?
> 8. Was there any obligation of the respondents to identify the location of the street hoardings as the agreement was on 'as is where is basis'?
> 9. Did the parties discharge their respective liabilities under the contract and if so to what extent?
> 10. Is the claimant entitled to the claim amount as claimed?
> 11. Are the respondents entitled to the amount of counter-claim as claimed in their statement of counter-claim?
> 12. To what other relief or reliefs the parties are entitled?"

35. The Division Bench has, in our opinion, not appreciated the case in its proper perspective. Merely saying that the blacklisting order carried reasons is not good enough. Do the reasons justify the invocation of the penalty of blacklisting and is the penalty proportionate, was the real question.

36. The Division Bench has observed that blacklisting is 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. It also observed that between two private parties the right to take any such decision is absolute and untrammeled by any constraints whatsoever. The observations are too sweeping in their ambit and wholly overlook the fact that the respondent-Corporation is a statutory body vested with the duty to discharge public functions. It is not a private party. Any decision to blacklist should be strictly within the parameters of law and has to comport with the principle of proportionality.

37. The Division Bench having noticed the fact that any decision to blacklist will be open to scrutiny on the anvil of the doctrine of proportionality has failed to apply the principle to the facts of the case in the correct perspective. The Division Bench has also failed to correctly appreciate the ratio of the decision in ***B.S.N. Joshi (supra)***.

38. There has been no enquiry by the Division Bench as to whether the conduct of the appellant was part of the normal vicissitudes in business and common place hazards in commerce or whether the appellant had crossed the rubicon warranting a banishment order, albeit for a temporary period in larger public interest.

39. One such case where this Court found the Lakshman Rekha to be breached by the party blacklisted was ***Patel Engineering Limited*** vs. ***Union of India and Another***, (2012) 11 SCC 257. In that case, while upholding the order of blacklisting, this Court recorded the following:

> "33. From the impugned order it appears that the second respondent came to the conclusion that: (1) the petitioner is not reliable and trustworthy in the context of a commercial transaction; (2) by virtue of the

dereliction of the petitioner, the second respondent suffered a huge financial loss; and (3) the dereliction on the part of the petitioner warrants exemplary action to "curb any practice of 'pooling' and 'mala fide' in future".

34. We do not find any illegality or irrationality in the conclusion reached by the second respondent that the petitioner is not (commercially) reliable and trustworthy in the light of its conduct in the context of the transaction in question. We cannot find fault with the second respondent's conclusion because the petitioner chose to go back on its offer of paying a premium of Rs 190.53 crores per annum, after realising that the next bidder quoted a much lower amount. Whether the decision of the petitioner is bona fide or mala fide, requires a further probe into the matter, but, the explanation offered by the petitioner does not appear to be a rational explanation.

36. .... The dereliction, such as the one indulged in by the petitioner, if not handled firmly, is likely to result in recurrence of such activity not only on the part of the petitioner, but others also, who deal with public bodies, such as the second respondent giving scope for unwholesome practices....."

40. Equally so in ***Kulja Industries (supra)***, the party blacklisted was alleged to have fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with officials of the respondent Corporation.

41. ***Patel Engineering (supra)*** and ***Kulja Industries (supra)*** bring out the contrast between cases of that ilk

and others, like the case in question. It is this distinction the Division Bench has grossly overlooked which, however, the learned Single Judge had rightly brought to the fore.

42. For all the reasons set out hereinabove, we set aside the impugned judgment of the Division Bench dated 21.06.2017 passed in M.A.T. No. 277 of 2017 and restore the judgment of the learned Single Judge. The result will be that the Writ Petition No. 6616(W) of 2016 filed by the appellant before the High Court at Calcutta would stand allowed and the order of blacklisting dated 02.03.2016 would stand set aside. The Appeal is, accordingly, allowed. No order as to costs.

…………………………..J.
[**B.R. GAVAI**]

…………………………..J.
[**SANJAY KAROL**]

……………………………J.
[**K. V. VISWANATHAN**]

New Delhi
07 August, 2024.