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Proportionality in Blacklisting from Government Tenders (M/s. Kulja Industries Ltd. v. Chief Gen. Manager W.T. Proj. BSNL & Ors. (2014) 14 SCC 731)

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1. Introduction

1.1 The Supreme Court of India (**SC**) vide its judgment dated 04.10.2013 in the case of ***M/s. Kulja Industries Ltd. v. Chief Gen. Manager W.T. Proj. BSNL & Ors.*** **(2014) 14 SCC 731** held that an instrumentality of the State needs to act proportionally in its dealing with private entities while debarring/blacklisting its contractor(s) or supplier(s) from future contracts or tenders. SC recognised that the right of an entity to delist or blacklist any party/contractor/dealer is inherent; and no phrases or clauses in the contract can restrict that autonomy, albeit any such decision is subject to judicial scrutiny when it is taken by the State and/or State instrumentalities.

1.2 The aforesaid ruling is wherein a Civil Appeal has been filed under a Special Leave Petition before the Supreme Court by a Supplier i.e., M/s Kulja Industries Ltd. (**Appellant**) against Chief General Manager of BSNL (**Respondent**) for its order dated 15.01.2011 wherein the Respondent Company permanently blacklisted the Appellant from dealing in all its future contracts.

2. Brief Facts

2.1 The Respondent-company had floated two tenders for supply of Telecom ducts and installation of cables in the year 2004 and 2005. In both these tenders Appellant firm emerged as the successful bidder and thus several orders for supply of the concerned materials were placed and completed by the Appellant.

2.2 The Respondent alleged that the Appellant in collusion with some of the officers of the Respondent has been fraudulently generating vouchers on the copies of the bills and thereby duping them to the tune of ₹7.98 Crores. Thus, an FIR was lodged with CBI-Anti Corruption Bureau, Mumbai against the officials of the Appellant on the charges of cheating and corruption.

2.3 Thereafter, Respondent unilaterally blacklisted the Appellant permanently on the ground of gross misconduct by receiving excessive payments and causing wrongful loss to the Respondent. Appellant denied those allegations contending that the Respondent-company's Policy/Manual did not provide for punitive actions in the form of blacklisting and excess payments made had been already refunded. The Appellant asserted the same by sending a legal notice; however, no reconciliation occurred.

2.4 Subsequently, the Appellant by way of writ petition approached the Bombay High Court ('**Bombay HC**') assailing the blacklisting order, which allowed the same based on the sole ground that no opportunity of being heard was accorded to the Appellant. Thereafter, based on the High Court's direction the Respondent issued a show-cause notice and called the Appellant for personal hearing. Nevertheless, the Respondent vide another order again permanently blacklisted the Appellant.

2.5 Aggrieved by the said order the Appellant once again approached the Bombay HC, which was dismissed by the Division Bench with the observation that –

2.5.1 The reconciliation of the account proved that the Appellant had received payment in excess.

2.5.2 And any subsequent refund did not obliterate the act of misconduct or fraud on behalf of the Appellant.

Consequently, the Appellant approached the Hon'ble SC assailing the order passed by the Bombay HC.

3. Issue(s)

3.1 The issue placed before the SC was – Whether the Respondent could have indefinitely blacklisted the Appellant for allotment of future contracts?

4. Blacklisting In Public Procurement/Tenders By Government Or Public Sector Undertakings

4.1 Blacklisting can have significant consequences for the affected party, as it may lead to the loss of business, reputational damage, and financial implications.

4.2 However, it is essential that the blacklisting process follows the principles of natural justice, due process and proportionality or fairness, especially when done by a State Instrumentality or a Public Sector Undertaking.

4.3 The Indian jurisprudence regarding blacklisting or debarment has been emanating from rule of law and certain guiding principles as has been enunciated by judicial pronouncements from time to time. Until 2017, when the Government introduced certain guidelines for PSUs while debarring any entity due to latter's misconduct. For reference – Rule 151 of General Financial Rules, 2017 and Manual for Procurement of Goods, 2022.

5. Judgment & Discussion

5.1 The 2 Judge Bench of the Hon'ble SC acknowledged that the action of 'blacklisting' is simply a business decision, and between the parties this right is untrammelled by any constraints. The power is not required to be specified in any statute or reserved by a contractor, as the term 'Blacklisting' simply denotes a determination of a party affected by a breach not to enter into any future contracts with a party committing such breach.

5.2 However, such action may be open to judicial review when taken or done by the State or it's instrumentalities, not only on the grounds of principles of natural justice but also on the doctrine of proportionality.

5.3 The SC relied on the case of ***Erusian Equipment & Chemicals Ltd. v. State of West Bengal & Anr. (1975) 1 SCC 70*** which held that the blacklisting has the effect of abrogating from entering into a lawful relationship with the Government for business and that a "fair hearing" is essential before passing any blacklisting order.

5.4 Albeit it is the contractual right of the Appellant, which is being affected, but the manner, the method and the motive behind the decision is subject to judicial review on the grounds of "*fairness, relevance, natural justice, non-discrimination, equality and proportionality*" as held in the judgment of ***M/s Mahabir Auto Stores & Ors. V. Indian Oil Corporation Ltd., (1990) 3 SCC 752***.

5.5 Thus, the SC was of the opinion that since the Appellants is supplying bulk of its manufactured goods to the Respondent alone and the fact that excess amount has already been refunded to the Respondent, the order of permanent debarment seems too harsh and heavy to be considered as a reasonable action.

5.6 In reference to the time period of blacklisting the SC remanded the matter back to the Competent Authority because determining the quantum of penalty i.e., the period in the present case, rests primarily with the Competent Authority. But also, because while determining the blacklisting period, the Respondent may for the sake of objectivity and transparency formulate broad guidelines to be followed, so that so far as possible to reduce if not totally eliminate arbitrariness in the exercise of powers vested with it.

5.7 Thus, the SC set aside the order passed by the Bombay HC but only to the extent that the blacklisting order stand affirmed, the period of which shall be determined afresh by the Respondent's Competent Authority expeditiously.

6. Conclusion

6.1 The *ratio* of this judgment emphasized again on the importance of following due process and principles of natural justice while imposing blacklisting order against any party. Further, blacklisting should not be imposed arbitrarily or being of an overt action resulting in a punitive measure without sufficient evidence. Therefore, the abovementioned case reaffirmed the said principles and highlights the needs for State Instrumentalities or PSUs to exercise their powers judicially and based on objective criteria.

A copy of the judgment is annexed hereto at **page 3 to 16.**

(*iv*) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime."

25. In view of the aforesaid enunciation of law, the irresistible conclusion is that the claim of the first respondent for conferment of retrospective seniority is absolutely untenable and the High Court has fallen into error by granting him the said benefit and accordingly the impugned order[3] deserves to be lancinated and we so do.

26. Consequently, the appeal is allowed and the order passed by the High Court is set aside. The parties shall bear their respective costs.

(2014) 14 Supreme Court Cases 731

(BEFORE T.S. THAKUR AND VIKRAMAJIT SEN, JJ.)

KULJA INDUSTRIES LIMITED .. Appellant;

Versus

CHIEF GENERAL MANAGER, WESTERN TELECOM PROJECT BHARAT SANCHAR NIGAM LIMITED AND OTHERS .. Respondents.

Civil Appeal No. 8944 of 2013†, decided on October 4, 2013

A. **Government Contracts/Tenders — Enlistment/Blacklisting of Contractors — Blacklisting/Debarment of contractor — Permissibility of — Principles reiterated — Duration for which blacklisting/debarment may be imposed — Held, power to blacklist is inherent with party allotting contracts — It is a method to discipline deviant contractors for their acts of omission or commission — Such blacklisting/debarment is not permanent but such period depends upon nature of offence committed by erring contractor**

B. **Government Contracts/Tenders — Enlistment/Blacklisting of Contractors — Blacklisting contractor — Judicial review — Permissibility of — Held, if State or its instrumentality takes decision on blacklisting then such decision is subject to judicial review on grounds of principles of natural justice, doctrine of proportionality, arbitrariness and discrimination — Constitution of India, Art. 14**

C. **Government Contracts/Tenders — Enlistment/Blacklisting of Contractors — Duration of blacklisting warranted — Appellant contractor was blacklisted for withdrawing excessive money in collusion with some officials of respondent Corporation — Therefore, appellant contractor was**

3 *Ashok Kumar Srivastava* v. *State of U.P.*, (2010) 5 All LJ 550

† Arising out of SLP (C) No. 20716 of 2011. From the Judgment and Order dated 6-4-2011 of the High Court of Judicature of Bombay in WP No. 2289 of 2011

permanently blacklisted — Validity of — Held, permanent debarment of appellant contractor for all times to come is too harsh and heavy punishment as: (i) it is supplying bulk of its manufactured products to respondent Corporation, and (ii) excess amount received by it had already been paid — Hence, matter remanded to authorities of respondent Corporation for determining period for which appellant contractor is to be blacklisted — Public Accountability, Vigilance and Prevention of Corruption — Private parties abusing State machinery for private gain — Blacklisting as punishment

D. **Government Contracts/Tenders — Enlistment/Blacklisting of Contractors — Quantum of penalty to be imposed — Proper authority for, held, is competent authority and not court — Reasons for, explained**

The appellant contractor was blacklisted for drawing more money by submitting fake bills in collusion with some officials of the respondent Corporation. The appellant contractor informed the respondent Corporation that it was ready for settlement and also it was ready for repayment of extra money so received. Then also, the respondent Corporation did not respond to the request of the appellant contractor and finally blacklisted. Then the appellant contractor approached the High Court. It was noticed by the High Court that the appellant contractor was not given sufficient opportunity and matter was remanded for reconsideration. Thereafter, fresh proceedings were initiated by the respondent Corporation by issuing notice to the appellant contractor. Upon receipt of reply, the respondent Corporation blacklisted the appellant contractor forever. This order was challenged before the High Court and it was unsuccessful. Hence this appeal.

Allowing the appeal, the Supreme Court

Held :

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 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. (Para 17)

Erusian Equipment & Chemicals Ltd. v. *State of W.B.*, (1975) 1 SCC 70; *Joseph Vilangandan* v. *Executive Engineer (PWD)*, (1978) 3 SCC 36; *Southern Painters* v. *Fertilizers & Chemicals Travancore Ltd.*, 1994 Supp (2) SCC 699; *Patel Engg. Ltd.* v. *Union of India*, (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445, *applied*

B.S.N. Joshi & Sons Ltd. v. *Nair Coal Services Ltd.*, (2006) 11 SCC 548; *Radhakrishna Agarwal* v. *State of Bihar*, (1977) 3 SCC 457; *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; *Dwarkadas Marfatia and Sons* v. *Port of Bombay*, (1989) 3 SCC 293, *relied on*

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. (Para 25)

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. (Para 20)

Mahabir Auto Stores v. *Indian Oil Corpn.*, (1990) 3 SCC 752, *applied*

A literal construction of the provisions of Paras 31 and 32 of the bid document would mean that the power to disqualify or blacklist a supplier is available to the purchaser only in the three situations enumerated in Paras 31 and 32 and no other. Any such interpretation would, however, give rise to anomalous results. It is said so because in cases where a supplier is found guilty of much graver offences, failures or violations, resulting in much heavier losses and greater detriment to the purchasers in terms of money, reputation or prejudice to public interest may go unpunished simply because all such acts of fraud, misrepresentation or the like have not been specifically enumerated as grounds for blacklisting of the supplier in Paras 31 and 32 of the tender document. That could never be the true intention of the purchaser when it stipulated Paras 31 and 32 as conditions of the tender document by which the purchaser has reserved to itself the right to disqualify or blacklist bidders for breach or violation committed by them. If the bidders who commit a breach of a lesser degree could be punished by an order of blacklisting there is no reason why a breach of a more serious nature should go unpunished, be ignored or rendered inconsequential by reason only of an omission of such breach or violation in the text of Paras 31 and 32 of the tender document. Paras 31 and 32 cannot, in that view, be said to be exhaustive; nor is the power to blacklist limited to situations mentioned therein. (Para 16)

In the case at hand according to the respondent Corporation, the appellant contractor 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 contractor is supplying bulk of its manufactured products to the respondent Corporation, and (*b*) the excess amount received by it has already been paid back. (Para 26)

A remand back to the competent authority is the more appropriate option than an order by which it may itself determine the period for which the appellant contractor would remain blacklisted. It is so for two precise reasons:

Firstly, because blacklisting is in the nature of penalty the quantum whereof is a matter that rests primarily with the authority competent to impose the same. In the realm of service jurisprudence the Supreme Court has no doubt cut short the agony of a delinquent employee in exceptional circumstances to prevent delay and further litigation by modifying the quantum of punishment but such considerations do not apply to a company engaged in a lucrative business like supply of optical fibre/HDPE pipes to respondent Corporation. (Paras 28 and 28.1)

Secondly, because while determining the period for which the blacklisting should be effective the respondent Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor. (Para 28.2)

Kulja Industries Ltd. v. *Western Telecom Project BSNL*, WP (C) No. 2289 of 2011, order dated 6-4-2011 (Bom), *reversed*

Kulja Industries Ltd. v. *Chief General Manager*, WP (C) No. 4536 of 2010, order dated 5-10-2010 (Bom), *cited*

E. **Government Contracts/Tenders — Enlistment/Blacklisting of Contractors — Blacklisting contractor — Prevailing position in USA and UK — Discussed (Paras 21 to 24)**

G-M/52413/S

Advocates who appeared in this case :

Mukul Rohatgi and Pravin H. Parekh, Senior Advocates [Sumit Goel, Ms Ritika Sethi and Abhishek Vinod Deshmukh (for M/s Parekh & Co.), Advocates] for the Appellant;

Vikas Bansal, Ms Madhurima Mridula, D.S. Mahra, Gaurav Agrawal and Arvind Kr. Sharma, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445, *Patel Engg. Ltd.* v. *Union of India* 740*f-g*
2. WP (C) No. 2289 of 2011, order dated 6-4-2011 (Bom), *Kulja Industries Ltd.* v. *Western Telecom Project BSNL* **(reversed)** 735*c-d*, 738*a*, 744*f-g*
3. WP (C) No. 4536 of 2010, order dated 5-10-2010 (Bom), *Kulja Industries Ltd.* v. *Chief General Manager* 736*f*
4. (2006) 11 SCC 548, *B.S.N. Joshi & Sons Ltd.* v. *Nair Coal Services Ltd.* 740*f-g*
5. 1994 Supp (2) SCC 699, *Southern Painters* v. *Fertilizers & Chemicals Travancore Ltd.* 740*f-g*
6. (1990) 3 SCC 752, *Mahabir Auto Stores* v. *Indian Oil Corpn.* 741*d*
7. (1989) 3 SCC 293, *Dwarkadas Marfatia and Sons* v. *Port of Bombay* 741*a-b*

8. (1981) 1 SCC 722 : 1981 SCC (L&S) 258, *Ajay Hasia* v. *Khalid Mujib Sehravardi* 741*a-b*
9. (1979) 3 SCC 489, *Ramana Dayaram Shetty* v. *International Airport Authority of India* 741*a-b*
10. (1978) 3 SCC 36, *Joseph Vilangandan* v. *Executive Engineer (PWD)* 740*g*
11. (1978) 1 SCC 248, *Maneka Gandhi* v. *Union of India* 741*a-b*
12. (1977) 3 SCC 457, *Radhakrishna Agarwal* v. *State of Bihar* 741*a*, 741*e*
13. (1975) 1 SCC 70, *Erusian Equipment & Chemicals Ltd.* v. *State of W.B.* 740*d-e*
14. (1974) 4 SCC 3 : 1974 SCC (L&S) 165, *E.P. Royappa* v. *State of T.N.* 741*a*

The Judgment of the Court was delivered by

T.S. THAKUR, J.— Leave granted. The short question that falls for determination in this appeal is whether the respondent, Bharat Sanchar Nigam Ltd. (for short "BSNL") could have blacklisted the appellant for allotment of future contracts for all times to come. The High Court of Judicature of Bombay before whom the blacklisting order was assailed by the appellant has answered that question in the affirmative and dismissed[1] Writ Petition No. 2289 of 2011 filed by the appellant giving rise to the present appeal.

2. Two tender notices for supply of permanent lubricated HDPE pipe (telecom ducts) and installation of OF cable through blowing technique were issued by BSNL in the year 2004 and 2005. It is common ground that the appellant Company emerged successful in regard to both the tender notices. It is also not in dispute that several orders for supply of the material were placed with the appellant Company during the years 2004-2006 and that goods were supplied to various consignee units of BSNL pursuant to the same.

3. The appellant's case is that a "receipt certificate" was issued in its favour after delivery of the goods and that bills for payment of the price of the goods were raised in triplicate to the Chief Controller of Accounts, WTP, BSNL, Mumbai from time to time. The appellant's further case is that a single account to receive 95% of the payment due from BSNL was maintained by it and since the amounts received from the respondent BSNL by cheques did not carry any particulars of the consignment for which such payment was being made it could, in no way, discover excess payment, if any, released by BSNL against the bills sent by the appellant.

4. The appellant's further case is that on gaining knowledge about the excess payments received by it, an offer for reconciliation of the accounts was made to BSNL and since any such reconciliation was likely to take 30 to 45 days, the appellant offered to adjust the excess amount credited to its account towards the outstanding bills on an ad hoc basis. A letter dated 10-5-2006 was, according to the appellant, addressed to the respondent BSNL in that regard.

5. The respondent BSNL on the other hand has a different story to tell. According to it four of its officers had abused their official position and

1 *Kulja Industries Ltd.* v. *Western Telecom Project BSNL*, WP (C) No. 2289 of 2011, order dated 6-4-2011 (Bom)

fraudulently generated "voucher numbers" on the duplicate and triplicate copies of the bills submitted by the appellant to facilitate payments as if the said bills were genuine thereby causing wrongful loss to the respondent BSNL and a corresponding gain to the appellant. There was in this process an excess payment of Rs 7.98 crores made and credited to the account of the appellant by the accounts officer of respondent BSNL.

6. Taking note of the fraudulent payments made to the appellant, BSNL lodged an FIR with CBI, ACB, Mumbai against one of its Senior Accounts Officers and a Director of the appellant Company alleging commission of offences punishable under Section 120-B read with Section 420 of the Penal Code, 1860 and Section 13(2) read with Section 13(1)(*d*) of the Prevention of Corruption Act, 1988. Investigation that followed has culminated in a charge-sheet filed before the Special Judge for CBI Cases, Bombay in which four officials of BSNL including D. Tripathi, Senior Accounts Officer; Laxman Dixit, Assistant Accounts Officer; Krishnakumari Patnaik, Junior Accounts Officer; Poolchand Yadav, Cashier and Lalit Gupta, Director and Bhavani Sharma, Consultant of the appellant Company have been arraigned as accused persons.

7. What is important for the present is that by a letter dated 21-4-2010, BSNL blacklisted the appellant permanently on the ground that the appellant had committed gross misconduct and irregularities by receiving excessive payments amounting to Rs 7,98,55,508 from BSNL thereby wrongfully causing loss to the said Company. The appellant denied these allegations, inter alia, contending that BSNL Policy/Manual did not provide for punitive action in the nature of blacklisting and that excess payment at best was an irregularity which had been cured by refund of the amount in question. The appellant also alleged that reconciliation of accounts revealed that the appellant was entitled to an amount, far in excess of the payments received by it. That assertion was repeated in a legal notice sent by the appellant Company but since BSNL took no corrective action in terms of the reconciliation, WP No. 4536 of 2010 was filed before the High Court of Judicature of Bombay in which it assailed the blacklisting order. The High Court allowed[2] the petition on the short ground that the appellant had not been afforded any opportunity of being heard before the blacklisting order was issued by the respondent. The High Court did not go into the merits of the dispute but reserved liberty to the appellant to raise all such contentions as were open to it if and when BSNL issued a show-cause notice for blacklisting it again. BSNL was left free to pass a fresh order and take a final decision in the matter within six weeks from the date of the issue of the show-cause notice.

8. A show-cause notice was accordingly issued by BSNL on 4-11-2010 to which the appellant filed a reply. The appellant was also called for a personal hearing in support of its reply to the show-cause notice as directed by the High Court. By an order dated 15-1-2011 BSNL once again directed the

2 *Kulja Industries Ltd.* v. *Chief General Manager*, WP (C) No. 4536 of 2010, order dated 5-10-2010 (Bom)

blacklisting of the appellant, inter alia, holding that the appellant had defrauded BSNL by using duplicate and triplicate copies of the bills that stood already cleared for payment. These bogus and fraudulent claims made under bogus and fabricated bills were then processed by some of the officers of BSNL for payment resulting in double and at times triple payment in favour of the appellant.

9. The relevant portion of the blacklisting order is to the following effect:

"Hence, the supplier with a clear intention to defraud BSNL, WTP, Mumbai, has prepared duplicate and triplicate copies of bills already processed for payment and has again put up the same for payment with BSNL. Thus, in short these were bogus and/or fraudulent claims made on the basis of forged and/or fabricated bills/documents. Thereafter, by joining hands with some of the erring officers of BSNL, the supplier has got the aforementioned duplicate and triplicate copies of bills processed for payment and has fraudulently received double/triple payment(s) for supplying material only once.

Therefore, by not only claiming but also receiving double and/or triple payment on the basis of forged/fabricated/duplicate and triplicate copies of same bills, the supplier has committed gross fraud on the public exchequer. The fraudulent act on the part of supplier got completed by not only claiming such bogus payments but also by receiving the same from BSNL. Moreover, by letter dated 10-5-2006, the supplier has not only acknowledged but has also accepted the fact of claiming as also accepting aforesaid bogus payments and hence the supplier had agreed for reconciliation of same after deducting such bogus payments. If the accounts would not have reconciled, the supplier would have caused huge losses to the public exchequer.

Hence, there is every apprehension that if the supplier is allowed to deal in any manner with BSNL in future, the supplier will venture into committing same and/or similar fraud(s) on the public exchequer and therefore, it is not at all in the interest of public exchequer that the supplier continues to be authorised supplier of BSNL.

Hence, in view of all the above facts and circumstances and the entire record and proceedings of this case, it is possible for this organisation to take a view to permanent banning and impose penalty upon the supplier so as to prevent the supplier from dealing with entire BSNL, throughout the country in any manner, consequently stopping all the future business transactions of entire BSNL with the supplier.

Hereby M/s Kulja Industries Ltd., Solan (Himachal Pradesh) is permanently banned and is consequently prevented from having any business dealing with entire BSNL throughout the country.

This is issued with the approval of the competent authority.

sd/-
AGM (MM) 15-1-2011
O/o CGM, WTP, Mumbai 54"

10. Aggrieved by the above order the appellant once again approached the High Court in WP No. 2289 of 2011 which was heard and dismissed by a Division Bench of the High Court in terms of the order[1] impugned in this appeal. The High Court was of the opinion that reconciliation of the account had proved that the appellant had received payment twice over for the supplies made by it and that merely because the excess payment received had been subsequently refunded by the appellant did not obliterate the act of misconduct and fraud. The High Court observed:

> "In the order impugned, the authority has stated that on the reconciliation of the account, it was found as a fact that the petitioner has received payment twice for the supply of the same material, because the supply was on-going and the amount was found to be payable to the petitioner, that was paid to him. Mere payment of the amount does not wipe out the fact that the petitioner had submitted the bills claiming double payment. In our opinion, in view of this finding, no interference is called for in the order impugned. The petition is rejected. No costs."

11. The present appeal calls in question the correctness of the above order of the High Court as noticed earlier.

12. Appearing for the appellant Company, Mr Mukul Rohatgi strenuously argued that debarring the appellant permanently and for all times to come was wholly arbitrary and unjustified. It was contended that the blacklisting order had serious civil consequences for the person blacklisted making it obligatory for the authority passing the order to act fairly and reasonably. Inasmuch as respondent BSNL had blacklisted the appellant permanently, the decision was neither fair nor reasonable. Paras 31 and 32 of the bid document also, according to the learned counsel, provide for blacklisting only for a "suitable period". This implies that blacklisting had to be for a definite period and not for all times to come. Since the products manufactured by the appellant were mostly, if not entirely, supplied for consumption to the respondent BSNL, any order permanently blacklisting the appellant from entering into contracts making supplies was tantamount to rendering the appellant jobless and economically defunct. No such order of blacklisting could, therefore, be sustained as the punishment implicit in such an order was totally disproportionate to the gravity of the offence allegedly committed by the appellant.

13. On behalf of the respondent BSNL, it was argued by Mr Bansal that the blacklisting order under challenge was not relatable to Paras 31 and 32 of the bid document. The order simply declared the petitioner Company ineligible for allotment of any contract in future in terms of Para 2.3 of the tender document, the relevant portion wherefore reads as under:

> "2.3 *Disqualification clause*.—The supplier/manufacturers in the following category are not eligible to bid in the said tender:
>
> (*i*) * * *

1 *Kulja Industries Ltd.* v. *Western Telecom Project BSNL*, WP (C) No. 2289 of 2011, order dated 6-4-2011 (Bom)

(*ii*) Firms against whom investigation cases are registered with CBI or other statutory investigation agencies of State/Central Government.

(*iii*) * * *"

14. It was further contended by the learned counsel that even if the order was held to be referable to Paras 31 and 32 of the bid document, an order permanently blacklisting the appellant was also justified having regard to the nature of the fraud committed by it in collusion with the officers of the respondent Corporation and involving a huge amount of nearly eight crores.

15. We may at the outset deal with the contention whether Paras 31 and 32 of the bid document to which Mr Rohatgi has made reference is the only source of the power to blacklist a defaulting contractor. These paras are as under:

"31. Purchaser reserves the right to disqualify the supplier for a suitable period who habitually failed to supply the equipment in time. Further, the suppliers whose equipment do not perform satisfactorily in the field in accordance with the specifications may also be disqualified for a suitable period as decided by the purchaser.

32. Purchaser reserves the right to blacklist a bidder for a suitable period in case he fails to honour his bid without sufficient grounds."

A plain reading of the above would show that BSNL, the purchaser has reserved the right to disqualify any supplier who:

(*a*) habitually fails to supply the equipment in time; or

(*b*) the equipment supplied by the supplier does not perform satisfactorily in the field in accordance with the specifications; or

(*c*) fails to honour his bid without sufficient grounds.

16. A literal construction of the provisions of Paras 31 and 32 extracted above would mean that the power to disqualify or blacklist a supplier is available to the purchaser only in the three situations enumerated in Paras 31 and 32 and no other. Any such interpretation would, however, give rise to anomalous results. We say so because in cases where a supplier is found guilty of much graver offences, failures or violations, resulting in much heavier losses and greater detriment to the purchasers in terms of money, reputation or prejudice to public interest may go unpunished simply because all such acts of fraud, misrepresentation or the like have not been specifically enumerated as grounds for blacklisting of the supplier in Paras 31 and 32 of the tender document. That could in our opinion never be the true intention of the purchaser when it stipulated Paras 31 and 32 as conditions of the tender document by which the purchaser has reserved to itself the right to disqualify or blacklist bidders for breach or violation committed by them. If the bidders who commit a breach of a lesser degree could be punished by an order of blacklisting there is no reason why a breach of a more serious nature should go unpunished, be ignored or rendered inconsequential by reason only of an omission of such breach or violation in the text of Paras 31 and 32 of the tender document. Paras 31 and 32 cannot, in that view, be said to be

exhaustive; nor is the power to blacklist limited to situations mentioned therein.

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.

18. 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.*[3] 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)

> "*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."

Subsequent decisions of this Court in *Southern Painters* v. *Fertilizers & Chemicals Travancore Ltd.*[4]; *Patel Engg. Ltd.* v. *Union of India*[5]; *B.S.N. Joshi & Sons Ltd.* v. *Nair Coal Services Ltd.*[6]; *Joseph Vilangandan* v. *Executive Engineer (PWD)*[7] 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.

3 (1975) 1 SCC 70
4 1994 Supp (2) SCC 699 : AIR 1994 SC 1277
5 (2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445
6 (2006) 11 SCC 548
7 (1978) 3 SCC 36

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*[8]; *E.P. Royappa* v. *State of T.N.*[9]; *Maneka Gandhi* v. *Union of India*[10]; *Ajay Hasia* v. *Khalid Mujib Sehravardi*[11]; *Ramana Dayaram Shetty* v. *International Airport Authority of India*[12] and *Dwarkadas Marfatia and Sons* v. *Port of Bombay*[13] 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.

20. 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 *Mahabir Auto Stores* v. *Indian Oil Corpn.*[14] should, in our view, suffice: (SCC pp. 760-61, para 12)

> "*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 *Radhakrishna Agarwal* v. *State of Bihar*[8]. … 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

8 (1977) 3 SCC 457 : (1977) 3 SCR 249
9 (1974) 4 SCC 3 : 1974 SCC (L&S) 165
10 (1978) 1 SCC 248
11 (1981) 1 SCC 722 : 1981 SCC (L&S) 258
12 (1979) 3 SCC 489
13 (1989) 3 SCC 293
14 (1990) 3 SCC 752

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."

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 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*) * * *

(*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 (*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 the contractor has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate *b* in State or local contracts or assistance agreements on the 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 *c* 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 has made or agreed to make full restitution.

(*h*) Whether the contractor has cooperated fully with the government *d* 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 *e* 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."

f **23.** As regards the period for which the order of debarment will remain effective, the guidelines state that the same would depend upon the seriousness of the case leading to such debarment.

24. Similarly in England, Wales and Northern Ireland, there are statutory provisions that make operators ineligible on several grounds including fraud, fraudulent trading or conspiracy to defraud, bribery, etc.

g **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 *h* 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.

27. The next question then is whether this Court ought to itself determine the time period for which the appellant should be blacklisted or remit the matter back to the authority to do so having regard to the attendant facts and circumstances.

28. A remand back to the competent authority has appealed to us to be a more appropriate option than an order by which we may ourselves determine the period for which the appellant would remain blacklisted. We say so for two precise reasons:

28.1. Firstly, because blacklisting is in the nature of penalty the quantum whereof is a matter that rests primarily with the authority competent to impose the same. In the realm of service jurisprudence this Court has no doubt cut short the agony of a delinquent employee in exceptional circumstances to prevent delay and further litigation by modifying the quantum of punishment but such considerations do not apply to a company engaged in a lucrative business like supply of optical fibre/HDPE pipes to BSNL.

28.2. Secondly, because while determining the period for which the blacklisting should be effective the respondent Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor.

29. In the result, we allow this appeal, set aside the order[1] passed by the High Court and allow Writ Petition No. 2289 of 2011 filed by the appellant but only to the extent that while the order blacklisting the appellant shall stand affirmed, the period for which such order remains operative shall be determined afresh by the competent authority on the basis of guidelines which the Corporation may formulate for that purpose. The needful shall be done by the Corporation and/or the competent authority expeditiously but not later than six months from today. The parties are left to bear their own costs.

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1 *Kulja Industries Ltd.* v. *Western Telecom Project BSNL*, WP (C) No. 2289 of 2011, order dated 6-4-2011 (Bom)