

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 11247/2009

Reserved on: 9th December 2010

Decision on: 31st January 2011

BIRLA GTM - ENTERPOSE LTD.

AND ORS.

..... Petitioners

Through Mr. Ramesh Singh with
Mr. Shabyashachi Patra, Advocate

versus

UNION OF INDIA & ANR

..... Respondents

Through : Mr. Sandeep Sethi, Senior Advocate
with Ms. Padma Priya with Ms. Meenakshi Sood,
Advocates for NHAI.

CORAM: JUSTICE S. MURALIDHAR

1. Whether reporters of local paper may be allowed to see the judgment? No
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be referred in the digest? Yes

JUDGMENT

31.01.2011

1. The Petitioners Birla GTM-Entrepose Limited ('BGEL'), and its Ex-Chairman, Ex-Director and Chief Executive Officer have filed this petition challenging an order dated 6th October, 2008 issued by the National Highways Authority of India (NHAI), Respondent No.2 banning/black listing BGEL from participating or bidding for projects of/or to be undertaken by NHAI either by itself or in association with any person or entity for a period of five years from the date of the order.

Background facts

2. The Petitioners state that BGEL is a joint venture company (JV) incorporated under the Companies Act, 1956 pursuant to a JV agreement

dated 18th January, 1990 between National Engineering Industries Limited and GTM Entrepose, France (GTME). The Petitioners state that the said JV agreement provided that technical assistance of specialist subsidiaries of GTME would be available to BGEL through technical assistance contracts to be entered into on a case by case basis. It is stated that BGEL was formed with 40% equity participation of GTME. It is stated that at the relevant point of time, Entreprise Jean Lefebvre, France (EJL) was a subsidiary of GTME and specialized in road construction works.

3. It is stated that the Public Works Department, Rajasthan on behalf of the Ministry of Road Transport and Highways ('MRTH'), Government of India, Respondent No. 1 herein, awarded to BGEL the contract of carrying out the construction of works in a portion of the Delhi-Jaipur National Highway 8 ('NH 8') in the year 1992 (hereafter referred to as 'the ADB-II contract'). It is stated that BGEL bid for the contract as a JV company. The contract involved construction of additional two lanes and strengthening of the existing carriageway from KM 162.5 to KM 231 on NH 8. According to the Petitioners, the ADB-II contract, valued at Rs.80 crores, was performed to the satisfaction of the NHAI.

4. In 1995, the MRTH, on behalf of the NHAI, invited pre-qualification applications for a National Highways project under the ADB loan assistance (hereafter as 'the project') to be followed by invitation to pre-qualified bidders for international competitive bidding for execution of the project. BGEL, on behalf of itself and EJL, submitted the pre-qualification application dated 3rd April, 1995 enclosing a copy of the Memorandum of

Understanding (MOU) dated 2nd April, 1995 between BGEL and EJI. BGEL claims that while making the application, it had disclosed that BGEL and EJI proposed to enter into an agreement for forming a separate company to be called Birla – Jean Lefebvre Construction Ltd ('BJL'). However, the said agreement did not materialize.

5. By a letter dated 10th July 1995, NHAI informed BGEL that it had pre-qualified for the project subject to the condition that a proper JV agreement with EJI should be furnished prior to the bidding.

6. BGEL submitted its bid on 5th January, 1996. It bid for only one package, as against three packages for which it had pre-qualified. It is stated that BGEL and EJI entered into a technical assistance agreement dated 14th December 1995 whereby EJI agreed to provide technical assistance to BGEL to execute the said contract on the terms and conditions stipulated therein. According to the BGEL, technical obligations and responsibilities initially agreed upon to be borne by EJI in the MOU dated 2nd April, 1995 continued to be the responsibilities of the EJI in the subsequent technical assistance agreement dated 14th December 1995, a copy of which is stated to have been enclosed with the bid submitted by BGEL to NHAI.

7. It is stated by NHAI that when the JV agreement enclosed with the bid was examined, it was noticed that it was not in conformity with Clause 5.2 of the Instructions to Bidders. This was communicated to the JV by NHAI by a letter dated 17th June 1996. By a letter dated 27th June 1996, the President and authorised signatory of BGEL submitted a fresh JV agreement

dated 26th June 1996. A further modified power-of-attorney, purportedly executed jointly by the partners of the JV, was also submitted authorising BGEL to sign the contract on behalf of JV. NHAI issued a letter dated 1st July 1996 accepting the bid of BGEL. By a contract agreement dated 19th August 1996, NHAI awarded the contract for the execution and completion of the works with respect to the said project to BGEL.

8. It is stated that a coordination meeting was held on 25th January 1997 at the office of NHAI to review the progress of the project. This meeting was attended by the representatives of NHAI, BGEL and EJM. According to BGEL, during the meeting it was clarified that EJM, a subsidiary of GTME, had disclosed its intention to provide technical assistance to BGEL and that the sole responsibility for EJM's technical assistance agreement and the liability arising under the contract rested with BGEL. However, NHAI's version is different. According to NHAI, a letter dated 25th January 1997 was written by EJM to Snowy Mountains Engineering Corp. Ltd (Supervision Consultant), a copy of which was marked to NHAI, stating that they are not JV partners with BGEL as far as the project was concerned and that EJM was in fact providing only technical assistance to BGEL under a technical assistance agreement. The letter dated 25th January 1997 of EJM was followed by a letter dated 11th April 1997 by Mr. Bernard Merchant of EJM confirming that he had never signed, executed or approved any JV agreement between BGEL and EJM. In the meeting convened by the NHAI on 28th April 1997, the Chairman of BGEL confirmed that EJM was not a partner in the JV and that they were providing only technical assistance.

9. According to NHAI, the above disclosure came as a shock to it since it had awarded the contract to BGEL only on the basis that the bid was submitted by a JV. On account of the above misrepresentation by BGEL, upon which NHAI had acted in good faith, the NHAI issued a letter dated 9th June, 1997 rescinding the contract. The relevant portions of the said letter contained in paragraphs 3, 4 and 5 read as under:

“3. During the review meeting held on 25th January, 97 at New Delhi it transpired that the assertion of the BGE-EJL (JV) that it has a JV Agreement and that both partners are jointly and severally liable for the execution of the work was incorrect. At the said meeting EJL had stated that they had undertaken to provide only technical assistance to BGE and denied existence of any Joint Venture with BGE. EJL has now furnished an affidavit to NHAI in which it has been stated that the EJL has not entered into, signed, executed, ratified or approved whether in writing, verbally or by any other means any JV agreement with the BGE relating to bid for Contract-I and they have not signed any deed or document or done anything or omitted to do anything to give power or authority to BGE to include any liability and/or to enter into any Contract or agreement of any nature on behalf of the EJL in respect of Contract-I. This position was also confirmed by BGE’s representative Shri P. C. Agarwala during the meeting with you taken by Chairman, NHAI on 23.4.97 at New Delhi.

4. In view of the above it is obvious that you had secured pre-qualification as also the contract by misrepresentation.

5. In view of the above, the Contract is voidable at the option of NHAI and NHAI therefore hereby rescinds the same with immediate effect without prejudice to its or her legal rights and remedies. NHAI is also accordingly taking over the complete

possession of the site.”

10. According to the BGEL, a meeting was held on 14th June 1997 between the representatives of BGEL and NHAI. It is stated that at this meeting, NHAI agreed to issue a suitable clarification that the rescinding of the contract would not prejudice BGEL from being pre-qualified and for bidding for future contracts.

11. It is stated that on 4th August 1998, the Board of NHAI deliberated and discussed the whole issue regarding the action to be taken against the BGEL and ultimately proposed to recover Rs.5.17 crores from the Petitioners towards damages. It was also decided to drop the proposal for blacklisting the Petitioner. The Petitioners have placed on record copies of the Agenda and Minutes of the meeting of the Board of NHAI dated 4th August, 1998. Consequent upon the said meeting, a letter dated 28th August 1998 was written by the NHAI to BGEL as under:

“Sir,

Please refer to this office letter of even No. dated the 9th June, 1997 wherein you were intimated that your contract with NHAI for the work mentioned in the subject had been rescinded with immediate effect and without prejudice to the Authority’s other legal rights and remedies.

2. Consequent to the problems created by your firm resulting in the rescission of the contract and the need to fix up another agency for completing the same, NHAI has suffered certain losses and damages which are payable by you. These losses and damages have been carefully assessed in consultation with the Engineer for the project, namely, M/s SMEC, Australia and

the same amount to Rs.5,17,30,230/-

3. It is also noted in this connection that your firm had executed certain works on the project before rescission of the contract, measurements of which were taken by the Engineer and accepted by your representative. The cost of such works payable to you as intimated by the Engineer amounts to Rs.2,10,38,266/-.

4. It has, accordingly, been decided that in case you pay to NHAI the net amount of Rs.3,06,91,964/- (Rupees three crores six lakhs ninety one thousand nine hundred and sixty four only) as full and final settlement in respect of the rescinded contract, NHAI will release your performance security amounting to Rs.2618 lakhs held by us in the form of Bank Guarantee.

5. It is requested that your unconditional acceptance of the above proposal for full and final settlement in respect of the rescinded contract, may be communicated to the Authority within seven days of the receipt of this letter failing which we will presume that the proposal is not acceptable to you.

6. In case you propose to convey your acceptance of the above proposal within seven days, you may simultaneously take action to pay the said amount of Rs.3,06,91,964/- by a Bank Draft payable at Delhi or Gurgaon in favour of the project Director, Project Implementation Unit I, NHAI, Gurgaon.

7. In case either your acceptance of the above proposal is not received within seven days of the issue of this letter or after receipt of your acceptance the payment is not received by the Project Director, PIU, Gurgaon, within 30 days of the issue of this letter, we shall presume that the proposed settlement is not acceptable to you and we shall feel free to take recourse to other

options available to us for recovering the losses and damages incurred by us which may include encashment of your Bank Guarantee held by us.

8. In view of the above, an immediate reply is requested.”

12. In response to the above letter, BGEL, on 3rd September 1998, conveyed its “unconditional acceptance” of the proposal made by NHAI and asked to be furnished the detailed particulars of how the sum of Rs.5,17,30,230/- as damages had been arrived at. This was provided by NHAI by its letter dated 7th September 1998. On 28th September 1998, BGEL made payment of a sum of Rs.3,06,964 to the NHAI, which was acknowledged by NHAI by its letter dated 28th September 1998 which reads as under:

“Sir,

Please refer to your letter No. dated 3.09.1998 on the above subject, wherein you have submitted your unconditional acceptance of our proposal contained in this office letter No.1105/1/198/Tech/PU dated 28th August, 1998, in full and final with respect to the rescinded.

Further referring to your letter No. HO/19/98-99/295 dated 28th September, 1998 submitting therewith an amount of Rs.3,06,964/- as net balance payment to NHAI, in compliance to our above mentioned letter, please find enclosed herewith the Bank Guarantee No. 83/96-97 amounting to Rs.26,18,05,046/- (Rupees Twenty Six Crores Eighteen Lakhs Five Thousand and Forty Six Only) dated 24.07.1996 from UCO Bank, 10 Brabourne Road, Calcutta and amendment thereto dated 31.07.1996, duly discharged submitted by you towards performance Guarantee for the above contract.”

13. It is stated that thereafter NHAI awarded BGEL the following three

construction contracts:

	Project	Date of signing of Contract
1.	Jalandhar Bypass (NS-1) KM 372.700 to KM 387.100	16.06.1999
2.	Westerly Diversion KM 0.000 to KM 34.250 outside Pune City in Maharashtra (NH-4)	07.04.2000
3.	Pune Satara (PS-2) to NH-4 KM 760.000 to KM 797.000 (excluding Km 773 to Km 781)	11.10.2001

14. On 15th July 2003, NHAI invited bids for a stretch on Jalandhar-Amritsar Section of NH-1 from KM 387.100 to KM 407.100. BGEL submitted its bid on 21st August, 2003. Its technical bid was accepted. On 10th November, 2003 NHAI declared the bid of the BGEL to be the lowest. However, sometime in January, 2004 BGEL was informed by NHAI during discussion that NHAI was proposing to initiate proceedings for black listing BGEL for awarding of future contracts on the ground of alleged misrepresentation which led to the rescinding of the contract in question on 9th June, 1997. The Petitioner protested against this move by letters dated 27th January 2004 and 17th February 2004 by pointing out that the issue has already been settled by the letter dated 28th August 1998 of the NHAI and the payment by BGEL of the damages, as declared by NHAI. Nevertheless, NHAI did not award the Jalandhar– Amritsar Project to BGEL and the bid itself was cancelled.

15. A show cause notice dated 25th February 2004 was issued by NHAI to BGEL seeking to blacklist it in view of the misrepresentation which led to rescinding of the contract in question. According to the Petitioners, this was

based on an advice of the Central Vigilance Commission (CVC) dated 30th October 2002. A detailed reply was given by BGEL on 18th March, 2004 and a personal hearing was granted on 30th June 2004. BGEL also filed its written submissions on 2nd July 2004.

16. At this stage, the Petitioners filed Writ Petition (Civil) No.3377-80/2004 in this Court. This was on account of an apprehension that BGEL may be blacklisted for future contracts. By an interim order dated 10th March 2004, the learned Single judge of this Court held that BGEL shall not be held ineligible for award of the Amritsar-Jalandhar contract on account of the pending show cause notice. Subsequently, an order dated 9th February 2005 was passed by a Division Bench of this Court disposing of Writ Appeal No. 651 of 2004 directing that the decision of the Competent Authority of NHAI pursuant to its inquiry into the matter will be placed in a sealed cover and produced before the learned Single Judge for directions.

17. The learned Single Judge , who heard the Writ Petition (C) No. 3377-80 of 2004, on 30th July 2009, opened the sealed cover which contained the impugned order dated 6th October 2008 and made it available to the counsel for BGEL upon whose statement that he would like to challenge the said orders in appropriate proceedings, the writ petition was disposed of as having become infructuous. The NHAI was directed not to give effect to the said impugned order for a period of four weeks and not to give it publicity in the meanwhile.

18. Thereafter the present writ petition was filed challenging the said

impugned order dated 6th October 2008. While directing notice to issue in the writ petition on 28th August 2009, this Court directed that NHAI will not give publicity to the impugned order. The said interim order has continued.

Submissions of counsel

19. Mr. Ramesh Singh, learned counsel appearing for the Petitioner submitted that the matter concerning the alleged misrepresentation by the BGEL which led to the rescinding of the contract by the NHAI by its letter dated 9th June 1997 was fully and finally settled on the terms decided by the Board of NHAI in its meeting of 4th August 1998. The Minutes of the said meeting showed that the NHAI quantified the precise amount payable by BGEL to NHAI as damages. This amount was, in fact, paid by BEGL in acceptance of the terms and conditions on 28th September 1998. He further submitted that the Minutes of the meeting of the Board of NHAI held on 4th August 1998 recorded the decision to drop the proposal for blacklisting BGEL. On its part, BGEL decided not to contest the charge that it misrepresented facts since it did not want to jeopardize its chances to bid for future contracts. It is stated that by acting on the above full and final settlement, the Petitioner gave up whatever defence it may have had against the charge of misrepresentation, and agreed to accept the terms and conditions imposed by NHAI. Having altered its position and having given up its defence on the basis of such full and final settlement offered by the NHAI, which it accepted, the BGEL cannot now be sought to be blacklisted by NHAI for a matter that already stood closed. In support of his submissions, Mr. Singh has relied upon the judgments in *Nathani Steel Ltd.*

Bhagwati v. Central Bureau of Investigation (2003) 5 SCC 257 and Rashtriya Ispat Nigam Ltd. v. Verma Transport Co. (2006) 7 SCC 275.

20. Mr. Ramesh Singh next submitted that the intention of NHAI not to blacklist BGEL was apparent from the fact that at least three contracts were awarded to BGEL after the full and final settlement of the disputes as evidenced by letter dated 28th August 1998 of NHAI. The NHAI was, therefore, estopped from blacklisting BGEL thereafter. Thirdly, it is submitted that after 2003, the NHAI, in any event, stopped awarding contracts to the Petitioner. A reference is made to para 32 of the counter-affidavit of NHAI where it is stated that NHAI decided not to award the Jalandhar-Amritsar contract to BGEL because by then, it proposed to review its earlier decision of not blacklisting BGEL. Therefore from 2003 onwards, there was a de facto blacklisting of BGEL by NHAI. If the five-year period were to be counted from that date, the blacklisting had already come to an end. Therefore, there was no justification for NHAI to order a further blacklisting of BGEL for a period of five years from the date of the impugned order dated 6th October 2008. Fourthly, it is submitted that the show cause notice dated 25th February 2004 makes no mention whatsoever of the fact that there was a full and final settlement of the outstanding issues arising from the rescission of the contract by the NHAI by its letter dated 9th June 1997. The show cause notice also did not mention the fact that the Petitioner BGEL had, pursuant to such settlement, already paid the damages as determined by NHAI and further that the proposal to blacklist the BGEL had been dropped by NHAI. The fact of NHAI having awarded three contracts thereafter to BGEL was also not mentioned. These were factors

relevant for deciding whether there was any justification for blacklisting BGEL. Fifthly, it is submitted that the action initiated by NHAI to blacklist BGEL was revived in 2004 whereas the full and final settlement took place in August 1998 itself. To revive a proposal to blacklist BGEL six years thereafter was clearly unfair, unreasonable and violative of Article 14 of the Constitution. Reliance is placed on the decisions of the Supreme Court in *State of Madhya Pradesh v. Bani Singh 1990 (Supp) SCC 738* and *State of A.P. v. N. Radhakishan (1998) 4 SCC 154*. It is submitted that severe prejudice has already been caused to the Petitioner on account of the unreasonable decision of the NHAI to blacklist the Petitioner.

21. Mr. Sandeep Sethi, learned Senior counsel appearing for the NHAI submitted that the JV Agreement and the Power-of-Attorney submitted by BGEL along with its bid for the contract in question turned out to be forged and fabricated documents. Although, at one stage, NHAI decided not to pursue the matter, later when there was a thorough audit conducted and the CVC entered into the picture, it transpired that there was some more evidence of the extent of fabrication and forgery practised by BGEL. This had not been noticed in the initial stage. NHAI had to act on the report of the CVC, which categorically concluded that blacklisting proceedings had to be initiated against BGEL for the forgery and fabrication of documents. It is submitted that an FIR has also been registered against BGEL and certain officials of NHAI were purportedly involved in the transaction under Sections 420, 468 and 471 IPC.

22. Mr. Sandeep Sethi submitted that an important aspect was that BGEL

had admitted to having submitted forged and fabricated documents along with its bid. It is submitted that the JV Agreement was typed out on a stamp paper showing a date which was earlier than the date on which the stamp paper was purchased. There had been a clear attempt to mislead NHAI in awarding a contract on the basis of there being a JV with EJM, when in fact there was none. Thirdly, it is submitted that at no point in time did NHAI inform BGEL that it was dropping the proposal to blacklist BGEL. The letter dated 28th August 1998 only talked of the damages having to be paid by BGEL. It is submitted that any agreement between the parties that there would be no blacklisting would be opposed to public policy. This would be no different from an agreement not to prosecute a person who had committed the offence of forgery punishable under Sections 468, 471 read with 420 IPC.

23. Mr. Sandeep Sethi referred to certain portions of the impugned order dated 6th October 2008 of the NHAI, which showed that BGEL urged patently unsustainable pleas before the competent authority of NHAI at the hearing consequent upon the show cause notice. The conduct of BGEL did not entitle it to any equitable relief. It is submitted that the delay in instituting proceedings to blacklist BGEL cannot, by itself, be said to cause prejudice to BGEL. It is only when a party is unable to effectively present its defence to the show cause notice, due to the disappearance of evidence on account of the passage of time, that prejudice can be said to be caused to such party. In the instant case, since BGEL admitted to have forged and fabricated documents and had virtually had no defence in the matter, there was no question of any prejudice being caused to it. Finally, it is submitted

that in exercise of its powers of judicial review under Article 226 of the Constitution, this Court would be concerned only with the decision-making process and not the decision itself. When a party has admittedly used forged and fabricated documents to secure a bid and later admits to such forgery and fabrication, then no leniency ought to be shown to such party even on equity. It is submitted that the NHAI cannot be compelled to continue to deal with BGEL in the face of such grave acts of misconduct and crime on the part of BGEL.

Effect of the full and final settlement of disputes

24. The first question that arises is whether the NHAI was precluded from initiating proceedings for blacklisting BGEL after the 'full and final settlement' brought about by its letter dated 28th August 1998?

25. A perusal of the Minutes of the meeting of the Board of NHAI held on 4th August 1998 is instructive as to the deliberations that took place on that day. The minutes of the said meeting show that Agenda Item No. 11 related to the project in question. A noting against this Item reads as under:

“It was seen that in the instant case, there does not appear any apparent error in the findings of the Engineer. Further, having regard to the fact that the contractor has actually executed measurable quantity of work as also the fact that the problem regarding the joint venture was known to NHAI in January, 1997, it would not appear feasible that anymore delay other than those considered by the Engineer, while working out the probable losses and damages incurred by the NHAI, could be attributed to M/s BGE-EJL (JV).

In the light of the above, the Board approved the proposal contained in para 14 of the agenda note.”

26. The detailed Agenda notes are also relevant in this regard. The relevant paragraphs are 11, 11.1 and 11.2 which read as under:

“11. It may also be brought out that ADB had requested NHAI to take action to initiate steps to ensure legal consequences of the fraudulent action of the contractor. This would mean the process for blacklisting of the Contractor M/s BGE-EJL (JV). The following facts need to be considered in this regard:

11.1 M/s Swarup & Co. has mentioned that as there is rescission of the contract and as one of the BGE-EJL (JV) Partners has in effect stated that it has made misrepresentation, it may be appropriate for NHAI to initiate proceedings for black listing of the Contractors. They have, however, drawn our attention to the fact that the Supreme Court has laid down certain principles, which have to be followed for blacklisting. Under it, the principles of natural justice will have to be complied with. It requires that a show cause notice has to be given to the contractor and it has to be given adequate opportunity of being heard including oral hearing if requested and only after considering the same if NHAI comes to the conclusion that there was willful misrepresentation by one or both of the BGE-EJL (JV) partners whether by overt act or otherwise that it can be black listed, it would be bad in law to deny them participation in other tenders. Considering ADB’s suggestions for action, it is for consideration whether it is in the best interest of NHAI to initiate the process of black listing of the Contractors.

11.2 In this connection, it needs to be noted that the Board in its 13th Meeting held on 28.04.97 took note of the fact that M/s BGE had requested that since they were capable of executing

this project by themselves and without having a JV with EJL, they be permitted to continue with the work with the change that EJL would provide only technical assistance. The then Chairman had also informed the Board that the matter had been discussed informally with officers of ADB who had suggested that if the Authority considered it prudent and necessary in the interests of the project, it may submit a proposal for change in the composition of Contractor to the Bank for reconsideration with additional built in safeguards. The Board Members agreed that in view of the importance of the project and the need to ensure its earliest possible completion, NHAI may make one last attempt to obtain ADB's consent accepting the proposed modifications. It was also mentioned by the Chairman that in case Bank do not agree, there may be no alternative but to re-bid the project. The relevant extracts of the minutes of the Board meeting are enclosed as Annex. 'C'. Having once taken a lenient view of the lapse on the part of the Contractor, it would seem illogical if a more strict view is now taken and black listing process is initiated.”

27. The recommendations in para 14 of the agenda note, which were approved at the meeting, read as under:

“14. In view of foregone, the following are for consideration of the Board:

(a) To recover the money from the Contractor M/s BGE-EJL (JV) amounting to Rs.5,17,30,230/- (Rs.4,82,80,230/- + Rs.34,50,000/-) in respect of probable losses and damages incurred by NHAI consequent on the rescinding of the contract of M/s BGE-EJL (JV) and for getting the balance work completed through M/s BSC-RBN – PATI (JV).

(b) Simultaneously to pay a sum amounting to

Rs.2,10,38,266/- to the Contractor M/s BGE-EJL (JV) for the work done over the contract period by the.

(c) To demand from M/s BGE the net payment of Rs.3,06,91,964/- due to NHAI and in case of their failure to do so within a period of one month from the date of demand to recover the same from their performance security board.

(d) Upon receipt of payment from M/s BGE to release the performance security in the form of Bank Guarantee amounting to Rs.2618 lakhs duly discharged by the NHAI which was submitted by the Contractor M/s BGE-EJL (JV) to NHAI.

(e) To drop the proposal of initiating black-listing of M/s BGE-EJL (JV).”

28. There can be no manner of doubt that there was a conscious decision taken by the NHAI approving the recommendations contained in para 14 of the agenda note. This was to the effect that the damages incurred by NHAI consequent upon the rescission of the contract with BGEL would be quantified and recovered from BGEL after adjusting the amount due from NHAI to BGEL. Secondly, a conscious decision was taken to drop blacklisting proceedings against BGEL.

29. It is based on the decision taken at the meeting of the Board of NHAI on 4th August 1998 that the letter of 28th August 1998 came to be written by NHAI to BGEL. Although the letter does not talk of dropping of blacklisting proceedings and only talks of the recovery of damages, it is plain from the

minutes of the meeting of the Board on 4th August 1998 that the proposal to blacklist BGEL had been dropped by NHAI. Consequently, there was no mention of such blacklisting in the letter dated 28th August 1998.

30. The Petitioner was justified in thereafter proceeding on the footing that there was indeed a full and final settlement. This was reinforced by the fact that after the above decision was communicated to BGEL by NHAI by its letter dated 28th August 1998, and BGEL accepted it and made payment on 28th September 1998 of the damages determined by NHAI, BGEL was awarded three contracts by NHAI. If indeed BGEL was to be blacklisted, there was no question of NHAI awarding it three contracts in three different years thereafter, which contracts admittedly BGEL completed to the satisfaction of NHAI.

31. It was vehemently argued on behalf of the NHAI that there could have been no agreement between the parties not to blacklist BGEL and that such an agreement would be opposed to public policy and hit by Section 23 of the Contract Act. It was argued that subsequently an FIR had been registered in 2003 against certain officials of NHAI as well as BGEL. The settlement communicated by the letter dated 28th August 2008 was in effect an agreement to compound an offence which could not be compounded and, therefore, NHAI was justified in reviewing its decision taken at the meeting of the Board on 4th August 1998 not to blacklist the Petitioner. The second explanation is that the NHAI was bound by the decision of the CVC in the matter.

32. In the first place, it must be noted that the full and final settlement of the disputes was arrived at in the form of a composite agreement between the parties. The sequence of events shows that a meeting took place on 25th January 1997 followed by the rescission of the contract on 9th June 1997. This was followed by the meeting on 4th August 1998 of the NHAI Board where it was decided not to initiate blacklisting proceedings against BGEL. The very documents on the basis of which such conclusion is sought to be drawn at the time of issuance of show cause notice in 2004 were already available with the NHAI at the time of the meeting of its Board on 4th August 1998. On the basis of these very documents, it was decided that the NHAI will recover damages suffered by it on account of the rescission of the contract and that it will drop the blacklisting proceedings. The said composite agreement was accepted and acted upon by both the parties. BGEL paid the damages, as demanded by NHAI by its letter dated 28th August 1998. The payment made by BGEL on 28th September 1998 was accepted by NHAI. This brought about a final settlement to the disputes. Clearly, BGEL altered its position in the sense that it decided not to defend itself against the charge of having submitted a fabricated document with its bid and instead decided to pay up the damages. In turn, it was granted immunity against blacklisting proceedings. Granting immunity to a wrong doer in return for payment of damages or compensation by such wrong doer and the wrong doer admitting his mistake and making reparations for it is not unusual.

33. In *Hira Lal Hari Lal Bhagwati v. CBI* the Supreme Court was dealing with the consequences of grant of immunity under the Kar Vivad Samadhan
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Scheme, 1998 ('KVSS'). Under the KVSS, immunity was granted from prosecution under the Customs Act, 1962. On that basis, the assessee withdrew its appeals pending in the Supreme Court and a certificate for full and final settlement of tax arrears was issued to it. Thereafter an FIR was sought to be lodged by the CBI for offences under Sections 120-B/420 IPC. The assessee then initiated proceedings for quashing of the criminal proceedings. After being unsuccessful in the High Court, the assessee appealed to the Supreme Court. Allowing the appeals, the Supreme Court explained that the very purpose of granting immunity under KVSS was to render the assessee immune from "any criminal proceedings". The Supreme Court referred to an earlier decision in *Sushila Rani v. CIT (2002) 2 SCC 697* which explained that once the assessee opts for immunity under the KVSS, "he obtains immediate immunity under any proceeding under any and all laws in force." (SCC @ p. 276)

34. In the concurrent judgment, the rationale behind Section 95 of the KVSS which granted immunity was further explained. Once the assessee was induced into giving up the proceedings initiated by him against the Department by withdrawing his appeals, it would be unfair to thereafter prosecute him under the penal provisions of the IPC. It was observed as follows (SCC @ p. 282):

"The declarant could not be dragged and chased in criminal proceedings after closing the other opening making it a dead end. It is highly unreasonable and arbitrary to do so and initiation and continuance of such proceedings lack bonafides."

35. In *Nathani Steel Ltd. v. Associated Constructions*, the Supreme Court *W.P.(C) No. 11247/2009*

pointed out that (SCC @ p. 326-27):

“...once the parties have arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or the difference is amicably settled by way of a final settlement by and between the parties, unless that settlement is set aside in proper proceedings, it cannot lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and proceed to invoke the Arbitration clause. If this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then to question the same on the ground of mistake without having the settlement set aside.”

36. There is considerable merit in the submission that the intention of the NHAI to act on the settlement to drop proceedings to blacklist the BGEL was evident from its act of awarding contracts on three subsequent occasions in favour of BGEL. There is no reasonable explanation offered by NHAI for this. It is plain that BGEL give up its defence towards actions which led to the rescission of the contract dated 9th June 1997 and agreed to make payment of damages on the assurance that the blacklisting proceedings will be dropped. In a sense, therefore, by giving up its defence, the BGEL acted to its detriment and also parted with the amount of damages without demur. Thereafter to be faced with proceedings for blacklisting cannot but be termed as an arbitrary action on the part of the NHAI.

37. This Court is not persuaded to hold that the decision by the NHAI not to blacklist BGEL was opposed to public policy and hit by Section 23 of the Contract Act. There were cogent reasons discussed at the meeting of the

Board of NHAI at its meeting on 4th August 1998 deciding not to blacklist BGEL. This was a conscious decision taken after due deliberation. It was acted upon by both parties. Thereafter, over a period of three years, BGEL was awarded three contracts by NHAI which were executed to the satisfaction of NHAI. While, on this aspect, it must be observed that if a decision had been taken by NHAI not to pursue criminal law remedies, then it could possibly be argued that it was opposed to public policy. In fact, at a later stage, an FIR was registered. This court is not called upon to express any opinion on the proceedings arising out of the said FIR as it is beyond the scope of the present petition.

CVC's advice not based on complete facts

38. The justification offered by NHAI that it was only on account of the report of the CVC that it revived the proceedings for blacklisting is not convincing. A reading of the CVC's decision dated 30th October 2002 shows that the full facts were not in fact placed before the CVC. The relevant paragraphs of the CVC decision in this regard reads as under:

“D.1 Paras 3.6 and 3.6.2

Those paras are regarding non-recovery of Rs.2,85,18,556/- from M/s BGE-EJL (JV) who has failed to execute the work. Neither next lowest tenderer M/s DSC-RBM-PATI has been negotiated to the level of M/s BGE-EJL (JV) nor recovery has been made from M/s BGE-EJL (JV). The government has suffered losses of Rs.2,85,18,556/- and undue favour of this amount is extended to M/s BGE-EJL (JV).

D.1.3. Comments of the Commission:-

The basis of the opinion given by the Engineer M/s SMEC is not given. The NHAI has accepted the views of Engineer to prevent recoveries of Rs.2,85,18,556/-. This matter was referred to ADB and ADB advised to the NHAI to initiate steps to ensure legal consequences of fraudulent action of the Contractor as the contract was secured in fraudulent manner (Refer para 3.7 of our report). No legal action has been taken against BGE-EJL (JV). In spite of failure of M/s BGE-EJL (JV) to execute the work, the constituent firms are participating in the tender in NHAI work. Some of the works are executed by the constituent firms of this JV.

The matter was referred to legal expert of NHAI M/s. Swaroop and company Advocate also. It was advised to black-list the joint venture M/s BGE-EJL (JV) but the same has not been done on flimsy ground that NHAI will be involved in the litigation. M/s Swaroop & company Advocates in reply to queries of NHAI has advised the NHAI vide his letter dated 30.05.97 that compensation for losses and damages suffered by NHAI can be legally recovered from the contractor. Regarding method of recovery it was advised by M/s Swaroop and Company Advocates that claim for damages would be for restoration of NHAI to its original position. It will include... incurred by NHAI till date to restore NHAI to original position,... direct increase in the cost of work could also be claimed. It would have to lodge its claim on M/s BGE-EJL (JV). If M/s BGE-EJL (JV) disputes the same, reference to arbitration will have to be made.

From the legal advice of M/s Swaroop & Co. Advocates, it is clear that direct costs, i.e. difference in tendered cost is recovered from the contractor BGE-EJL (JV) in order to restore the NHAI its original position but no recovery has been made.

The opinion of the Engineer regarding non-recovery of Rs.2,85,18,556/- is favourable to the contractor and by accepting... Engineers advice which is contrary to advice of their legal advice favour has been extended to M/s BGE-EJL (JV). CVO may identify officials responsible for the above lapses along with action proposed in addition to the recovery of Rs.2,85,18,556/- from the contractor M/s Birla GTME.

The constituent partner M/s Birla GMTE is still working as contractor with NHAI. Jallundur Bye-pass work and some other works are being executed by the firm. No comments have been offered on this issue. It may be examined in detail that the firm which has failed to execute the work and secured the contract through fraudulent manner is being allowed to participate in the tender and execute the work and furnish the considered comments. Officers responsible for the lapse be identified and responsibility be fixed... Legal action against M/s BGE-EJL (JV) be also taken for securing the contract in fraudulent manner and the firm may be black-listed for future works of NHAI.” (dotted text illegible)

39. The above narration shows that the CVC was not made aware of the full and final settlement arrived at between the parties or given a copy of the minutes of the meeting of the Board of NHAI held on 4th August 1998. The CVC was also not told of the fact that acting on such full and final settlement BGEL had, in fact, paid the quantified damages to NHAI, and that NHAI had already decided to drop the blacklisting proceedings. NHAI ought to have drawn the attention of the CVC to the complete facts instead of making the CVC's report as the basis for reviewing its earlier decision dated 4th August 1998. The conduct of the NHAI in this regard cannot be said to be fair or unreasonable. In the show cause notice dated 25th February

2004 issued to BGEL by NHAI, there is no whisper of the decision taken at the meeting of the Board of Directors on 4th August 1998 which led to the letter dated 28th August 1998 of NHAI.

40. It was sought to be argued by Mr. Sethi that the amount paid by the BGEL was not towards the losses suffered by NHAI and, therefore, the CVC was justified in directing revival of the blacklisting proceedings. This Court finds that this was not even the stand of the NHAI in its letter dated 28th August 1998 to BGEL. The intention of the parties clearly was to bring about a full and final settlement of all disputes. It was impermissible to revive the demand for costs six years after the settlement.

Delay in initiation of blacklisting proceedings renders it unreasonable

41. No satisfactory explanation has been given by NHAI for initiating blacklisting proceedings six years after a full and final settlement had been arrived at. This is further compounded by the fact that after the said settlement, three contracts were awarded to the BGEL by the NHAI which BGEL had completed to the satisfaction of NHAI. The cases cited by learned Senior counsel for the NHAI in the context of disciplinary proceedings are not apposite. Moreover, in view of the peculiar facts and circumstances of the present case those decisions are distinguishable. The argument that no prejudice would be caused on account of the delayed initiation of the blacklisting proceedings is also not a convincing one. A blacklisting order severely affects the reputation of a party and by its very nature is prejudicial to such party. The delay in initiating such proceedings will certainly be a factor in determining its reasonableness. In the present

case, the decision of NHAI to blacklist BGEL, six years after the settlement, cannot be held to be just or fair. It fails to satisfy the test of reasonableness in light of Article 14 of the Constitution.

42. It was submitted on behalf of the NHAI that even in the proceedings before the Competent Authority, which led to the impugned order of blacklisting, BGEL did not deny that it had submitted fabricated documents with its bid. In the considered view of this Court, BGEL had been consistent in its stand that it was giving up its defence in respect of the documents submitted by it together with its bid and this is what had brought about the full and final settlement. The parties entered into the settlement fully aware of the legal implications. Neither of them should thereafter be permitted to resile from such settlement and retract their position in a manner that causes prejudice to the other party.

43. For the aforementioned reasons, this Court finds the impugned blacklisting order dated 6th January 2008 to be unsustainable in law and it is hereby set aside.

44. The writ petition is allowed in the above terms with costs of Rs. 10,000/- which should be paid by the NHAI to the Petitioner within a period of two weeks from today.

S. MURALIDHAR, J.

JANUARY 31, 2011
RS-akg