***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 1st May, 2015**

\+ **LPA No.242/2015**

M/S GAIL INDIA LIMITED .... Appellant

Through: Mr. Parag P. Tripathi, Sr. Adv. with Mr. Pragyan Sharma, Ms. Kanika Tandon & Mr. Gaurav Chaudhary, Advs.

Versus

M/S AVINASH EM PROJECTS PVT. LTD. .....Respondent

Through: Mr. Sanjeev Kakra with Mr. Bheem Sen Jain, Advs.

CORAM:-
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the judgment dated 6th February, 2015 of the learned Single Judge of this Court in W.P.(C) No.2041/2014 preferred by the respondent. The counsel for the respondent appeared on advance notice when the appeal came up before us on 24th April, 2015 and with the consent of the counsels, the appeal was heard finally and judgment reserved.

2. The respondent filed the writ petition from which this appeal arises impugning the order dated 18th March, 2014 of the appellant whereby the respondent was banned for an indefinite period from doing any further projects with the appellant or from participating in the bidding process for any of the tenders floated by the appellant in future (however the said decision was / is subject to review after a period of ten years).

3. Considering the aspect, to which the arguments before us were confined, we do not feel the need to elaborate the case with which the respondent filed the writ petition and the present purpose would be served merely by culling out the judgment of the learned Single Judge. In the said judgment:

A. It has been found / recorded,

(a) that the appellant had invited a tender for laying pipelines of spurlines to Bhilwara and Chittorgarh and for augmentation of the existing Vijaipur Kota pipeline;

(b) the Invitation for Bids (IFB) stipulated that only those Indian companies having minimum working capital of

Rs.4.85 crores as per their immediate preceding year's audited financial results were eligible to bid;

(c) the respondent submitted its bid along with audited financial statement dated 21st August, 2010 which reflected its working capital as on 31st March, 2010 to be Rs.6.96 crores approximately;

(d) the respondent was awarded the contract;

(e) the appellant, upon subsequently discovering that the respondent had forged and manipulated its audited financial statement, showing working capital as on 31st March, 2010 to be Rs.6.96 crores, when in fact in the balance sheet submitted to the Registrar of Companies for the year 2010-11, its working capital as on 31st March, 2010 was shown as Rs.3.01 crores approximately, issued a show cause notice to the respondent;

(f) the explanation offered by the respondent was not accepted by the appellant and the appellant passed an

order dated 16th January, 2014 blacklisting the respondent from doing any future business with the appellant;

(g) the respondent filed W.P.(C) No.465/2014 and by order dated 21st January, 2014 wherein, finding that the order dated 16th January, 2014 was not a reasoned one, the order dated 16th January, 2014 was set aside and the appellant was directed to pass a fresh reasoned order after considering all the documents on record and after affording the respondent an opportunity of hearing;

(h) LPA No.167/2014 preferred by the appellant against the said order dated 21st January, 2014 of the learned Single Judge did not meet with any success;

(i) the appellant, after giving an opportunity of hearing to the respondent, passed the order dated 18th March, 2014 (supra) and impugning which the writ petition from which this appeal arises was filed.

B. It has been held,

(j) that the denial by the respondent of the signatures on statement dated 31st August, 2010 showing working capital as Rs.6.96 crores approximately submitted along with the bid was unbelievable;

(k) that the appellant had rightly rejected the explanation tendered by the respondent for showing the working capital as Rs.6.96 crores;

(l) that the only question to be addressed was whether the appellant could blacklist the respondent for an indefinite period and whether the same was disproportionately harsh and not commensurate with the misconduct of furnishing forged / fabricated documents to secure contract with the appellant;

(m) that the nature of the respondent's work involves executing contract with PSUs and most of the work for which the respondent could bid involved participation of

the appellant, either as sole employer or as part of a consortium with other entities − thus, blacklisting of the respondent for an indefinite period albeit to be reviewed after 10 years would effectively exclude the respondent from participating in any contract with any PSU(s) and thus inevitably destroy the substratum of the respondent company;

(n) that the issue, whether such blacklisting for indefinite period was excessive, must be viewed in the context of other Clauses of the contract;

(o) that the 'integrity pact' furnished by the respondent in terms of sub-Article 35.4 of the Invitation for Bids *inter alia* provided for punishment of exclusion from participating in any of the tenders floated by appellant for a minimum period of six months and a maximum period of three years only;

(p) that the reliance in this context by the appellant on Clause 1.5 of Form 13 was not apposite;

(q) that the Supreme Court in ***Kulja Industries Ltd. Vs. Chief General Manager, BSNL*** AIR 2014 SC 9 has held that debarment is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor;

(r) that since the impugned decision of debarring the respondent was reviewable after expiry of 10 years even according to the appellant, the decision of banning the respondent from participating in the contracts with the appellant would not necessarily continue for all times;

(s) that the order for exclusion of the respondent from participating in any tender of appellant must pass the test of Article 14 of the Constitution of India and where there is little possibility for the respondent to carry on business after being blacklisted by appellant, the order of blacklisting must also be viewed in the context of Article 19(1)(g) and 19(6) of the Constitution of India;

(t) that the respondent had already been visited with significant adverse consequences following the blacklisting order; that juxtaposing the same with the consequences of fraudulent and corrupt practice as provided in Article 35 of the IFB and the 'integrity pact', the measure of blacklisting for an indefinite period appeared to be relatively harsh and disproportionate to the alleged misconduct;

(u) that the question whether a punitive measure is disproportionate must be viewed in the context of standards set by appellant itself – the appellant had provided a maximum penalty of banning for three years in the event of contractor bribing the officials of the appellant in securing the contract; applying this standard, the punishment of blacklisting for an indefinite period appeared to be clearly disproportionate and arbitrary; and

(v) that thus, though no interference was called for insofar as blacklisting of the respondent was concerned but the

blacklisting order to the extent it debarred the respondent from all future business with the appellant was set aside and the matter was remanded to the appellant:

> *"to consider the period of blacklisting afresh in view of the aforesaid observations and in the context of the period as specified in the integrity pact (i.e. minimum of six months to maximum of three years)".*

4. The senior counsel for the appellant informed that the appellant before the learned Single Judge had made a statement that in the light of the dicta of the Supreme Court in ***Kulja Industries Ltd.*** (supra), the order of blacklisting of the respondent be not treated as one for indefinite period reviewable after 10 years but of blacklisting for 10 years. He contended that the learned Single Judge has erred in, while remanding the matter to the appellant for consideration afresh, directing the appellant to decide the matter in the context of the 'integrity pact'. It was further contended that the appellant in this regard had relied upon several other clauses of the contract also which would also be applicable and the learned Single Judge erred in rejecting the applicability thereof. It was argued that since the learned Single Judge had drawn parity with the 'integrity pact' though admittedly not applicable, the

rejection of the other clauses providing for longer periods of blacklisting, is erroneous.

5. However we, on a reading of the judgment of the learned Single Judge, were of the opinion that the learned Single Judge had not bound the appellant in any manner whatsoever or bound the appellant to blacklist the respondent for a maximum period of three years only. To us, it appeared that all that the learned Single Judge has directed is for the appellant to consider the observations made in the judgment while determining the period of blacklisting of the respondent. We accordingly put so to the senior counsel for the appellant.

6. The senior counsel for the appellant responded that we may clarify so and the appellant would be satisfied therewith.

7. However the counsel for the respondent contended that the purport of the judgment of the learned Single Judge is that the period of blacklisting, to be determined by the appellant shall not be for exceeding three years. It was further the contention of the counsel for the respondent that unless the judgment of the learned Single Judge is so interpreted and read, in the event of the appellant blacklisting the respondent for a period longer than three

years, will keep the respondent embroiled in litigation. It was highlighted that this is already the second round of litigation and this Court should ensure finality thereto.

8. To hold that the impugned judgment limits the power of the appellant, while determining afresh the period of blacklisting pursuant to remand, to blacklisting for a maximum period of three years would in our view amount to this Court itself determining the maximum period for which the respondent should be blacklisted and which has not found favour with the Supreme Court in ***Kulja Industries Ltd.*** (supra). Para 26 of the said judgment is as under:

> "26. 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. 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. 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. 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 misdemeanor, 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."

The aforesaid dicta of the Supreme Court having been expressly referred to in the impugned judgment, it cannot be said that the learned Single Judge held contrary thereto.

9. As far as the contention of the counsel for the respondent, of the respondent remaining embroiled in litigation, is concerned, we need only to observe that the finding of the respondent having indulged in forgery and fabrication with the intent to secure a contract with the appellant having attained finality (the respondent has not challenged the same), the respondent has no equities in its favour and is not entitled to raise such an argument. A person who has indulged in such actions is deemed to have known that the same may entail him in litigation and cannot be allowed to cry wolf.

10. The counsel for the respondent then contended that even as per the new policy of the appellant itself, the blacklisting in such circumstances cannot be for more than three years. Clause 1 titled "Instructions to Bidders" of Section II of the prevalent General Conditions of Contract of the appellant was handed over and reference was drawn to sub-Clauses B.1, B.2 and B.2.2 of Clause 38 thereof.

11. The senior counsel for the appellant states that the determination afresh pursuant to remand by the learned Single Judge would be after considering any applicable prevalent policy and the observations of the learned Single Judge but without treating the said observations as binding.

12. The Supreme Court having held that blacklisting is in the nature of penalty, the quantum whereof is a matter that rests primarily with the authority competent to impose the same, we are of the opinion that this appeal be disposed of merely with the clarification that though the appellant while deciding the matter afresh pursuant to the remand by the learned Single Judge shall consider the observations made by the learned Single Judge but the said observations shall not be binding on the concerned authority of the appellant which may for reasons to be recorded disagree

therewith. We are however confident that due weightage and regard shall be given to the observations made in the judgment.

13. Since this appeal is being disposed of by us on this very point only, without going into the challenge otherwise made in the appeal to the observations of the learned Single Judge with respect to the quantum of punishment / period of blacklisting and further since the possibility of the respondent remaining aggrieved from such fresh determination by the appellant cannot be ruled out, we further clarify that the disposal of this appeal would not amount to this Bench having put its imprimatur on the judgment of the learned Single Judge insofar as challenged by the appellant and it will remain open to the appellant in any fresh round of litigation to challenge the observations / findings if any against it in the impugned judgment.

No costs.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

MAY 1, 2015
'gsr'