

**2022 LiveLaw (SC) 206**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**M. R. SHAH; B.V. NAGARATHNA, JJ.**

**CIVIL APPEAL NO.1083 & 1084 OF 2022; February 24, 2022**

**State of Odisha & Ors. *VERSUS* M/s Panda Infraproject Limited**

**Blacklisting - Guidelines issued by Odisha Government that blacklisting period per offence shall be limited to three years subject to an overall maximum cumulative period of ten years for multiple offences - Disapproved - Duration of blacklisting cannot be solely per offence. Seriousness of the lapse and the incident and/or gravity of commission and omission on the part of the contractor which led to the incident should be the relevant considerations. In a given case, it may happen that the commission and omission is very grave and because of the serious lapse and/or negligence, a major incident would have taken place. In such a case, it may be the contractor's first offence, in such a case, the period/duration of the blacklisting/banning can be more than three years. However, as the said guidelines are not under challenge, we rest the matter there and leave it to the State Government to suitably amend and/or modify the said office memorandum. However, what we have observed above can be a guide while determining the period of debarment/blacklisting. (Para 9.1)**

**Blacklisting - "Debarment" is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission. It is for the State or appropriate authority to pass an order of blacklisting/debarment in the facts and circumstances of the case - "Debarment" is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor. (Para 8.7 and 9.1)**

**Show cause notice - Fundamental purpose behind the serving of a show--cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement is the nature of action which is proposed to be taken for such a breach. [Referred to *Gorkha Security Services v. Govt. (NCT of Delhi) & Ors., (2014) 9 SCC 105*] (Para 8.6)**

**Blacklisting - Show cause notice was issued upon the contractor by which the contractor was called upon to show cause why he be not blacklisted; the show cause notice was replied to by the contractor and thereafter, after considering the material on record and the reply submitted by the contractor and having found the serious lapses which led to a serious incident in which one person died and eleven**

**others were injured, the State Government took a conscious decision to blacklist the contractor. Therefore, it cannot be said the order blacklisting the contractor was in violation of principles of natural justice. (Para 8.5)**

(Arising out of impugned final judgment and order dated 23-03-2021 in WPC No. 26408/2017 passed by the High Court of Orissa at Cuttack)

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## **J U D G M E N T**

### **M. R. Shah, J.**

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 23.03.2021 passed by the High Court of Orissa at Cuttack in W.P. (C) No.26408 of 2017, by which the High Court has allowed the said writ petition and has quashed and set aside the order passed by the State, banning the respondent herein from participating or bidding for any work to be undertaken by Government of Odisha and transacting any business with Government of Odisha, either directly in the name of propriety bidder or indirectly under any different name or title, the State of Odisha has preferred the present C.A. No.1083 of 2022.

2. Feeling aggrieved and dissatisfied with the subsequent consequential order passed by the High Court vide order dated 04.06.2021 in W.P. (C) No.16723 of 2021 by which the High Court, in consequence of the earlier order dated 23.03.2021 passed in W.P. (C) No.26408 of 2017, directed the State of Odisha to remove the name of the contractor – respondent herein from the list of blacklisted contractors, the State of Odisha has preferred the present C.A. No.1084 of 2022.

3. That the respondent – contractor was awarded a contract for construction of a flyover over the railway level crossing at Bomikhal Junction in Bhubaneswar. That in pursuance of the said contract the respondent – contractor constructed the said flyover. In the year 2017, a ten meter slab of the flyover collapsed during concreting of the railway over bridge at the level crossing, which resulted in loss of life and property. One person died and eleven others were injured. A highlevel inquiry was conducted by the Chief Engineer (Design) and Chief Engineer (DPI and Roads). The committee submitted a comprehensive report after a detailed inquiry and found the contractor – respondent herein guilty. It was found that the contractor did not submit the formwork design and adopted his own arrangement leading to collapse of such a huge structure during construction. It was also found that the contractor had not ensured adequate safety measures during the period of construction; otherwise such

an unfortunate fatal accident could have been avoided. It was found that the quality assurance had not been maintained as stipulated in the codes and manuals and as per the agreement. It was found that there were a lot many deficiencies in workmanship that could affect the quality of work, as found in other formwork assemblies. Therefore, the committee found the contractor responsible for such a serious accident.

**3.1** On the basis of such report the State Government took the matter very seriously and directed that immediate necessary action be taken for blacklisting the contractor following the procedure as per the Orissa Public Works Department (OPWD) Code. Thereafter, a show cause notice was issued to the contractor and the contractor was asked to show cause as to why it be not blacklisted for intentionally violating the relevant clauses of the Agreement No.15P1/ 201112. The respondent filed a detailed reply. That on considering the allegations in the said show cause notice and reply thereto, the Chief Engineer (DPI & Roads) Odisha issued an order dated 12.12.2017, whereby the respondent – contractor was blacklisted with immediate effect, for intentional violation of condition of the contract leading to injuries and loss of life. The respondent – contractor was banned from participating or bidding for any work to be undertaken by the Government of Odisha and the contractor was also banned from transacting business with Government of Odisha, either directly or indirectly.

**3.2** Aggrieved by the order of blacklisting dated 12.12.2017, the contractor filed Writ Petition (C) No.26408 of 2017 seeking quashing of the order of blacklisting and by the impugned judgment and order, the High Court has set aside the order of blacklisting mainly on the ground that the order of blacklisting is in violation of principles of natural justice. The impugned judgment and order passed by the High Court quashing and setting aside the order of blacklisting is the subject matter of Civil Appeal No.1083 of 2022.

**3.3** That thereafter the contractor filed another Writ Petition (C) No.16723 of 2021, making a grievance that despite the order of blacklisting set aside by the High Court in Writ Petition (C) No.26408 of 2017, the contractor's name continues to be shown as the blacklisted in the official portal of the Government of Odisha. By the order dated 04.06.2021, the High Court has disposed of the said writ petition by directing the State to pass appropriate orders to stop showing on the official portal of the Government of Odisha the name of the contractor – respondent herein as a blacklisted company to enable the contractor to seek renewal of its licence as well participate in future tenders. The order dated 04.06.2021 passed by the High Court in Writ Petition (C) No.16723 of 2021 is the subject matter of Civil Appeal No.1084 of 2022.

**4.** Shri Ashok Kumar Parija, learned Advocate General has appeared on behalf of the State of Odisha and Shri Sibor Sankar Misra, learned Advocate has appeared on behalf of the respondent – contractor.

**5.** Shri Ashok Kumar Parija, learned Advocate General appearing on behalf of the State of Odisha has vehemently submitted that in the facts and circumstances of the case, the High Court has materially erred in quashing and setting aside the order passed by the State of Odisha blacklisting the respondent – contractor.

**5.1** It is contended that the High Court has erred in holding that the order of blacklisting was in violation of the principles of natural justice.

**5.2** It is submitted that as such before blacklisting the respondent – contractor a show cause notice was issued and served upon the respondent. The procedure as required as far as AppendixXXXIV of OPWD Code was followed and thereafter, after considering the reply submitted by the contractor, the order of blacklisting was passed. It is submitted that therefore, the High Court has erred in holding that the order of blacklisting was in breach of principles of natural justice.

**5.3** It is further submitted by Shri Parija, learned Advocate General appearing on behalf of the State that the High Court has also erred in concluding that the blacklisting order was predecided as the same was passed on the basis of the recommendations made in the inquiry report. It is urged that in fact the findings recorded by the inquiry committee can be said to be the basis for initiating the action of blacklisting against the contractor. It is submitted that therefore, the findings recorded by the inquiry committee can be said to be a prima facie opinion while initiating the proceedings for blacklisting. It is submitted that merely because show cause notice was issued and the blacklisting order was passed on consideration of the inquiry report, that by itself it cannot be said that the blacklisting order was predecided.

**5.4** It is further submitted by Shri Parija, learned Advocate General, appearing on behalf of the State that even otherwise, while passing the impugned judgment and order quashing and setting aside the blacklisting order, the High Court has not at all considered the seriousness of the allegations against the contractor. It is submitted that it was a case of grave lapse and omission and commission on the part of the contractor; a serious incident occurred in which one person died and eleven others were injured. It is submitted that therefore, the High Court ought not to have interfered with the order passed by the State Government blacklisting the respondent – contractor 6. The present appeals are vehemently opposed by Shri Sibho Sankar Misra, learned counsel appearing on behalf of the respondent – contractor.

**6.1** It is submitted that in the facts and circumstances of the case the High Court has rightly observed and held that the order of blacklisting was predetermined and the same was in breach of principles of natural justice.

**6.2** It is submitted that before a show cause notice was issued to the respondent – contractor, a communication/letter dated 10.10.2017 was written by the Under Secretary in the Works Department to the Chief Engineer which shows that the

Government had already ordered blacklisting of the contractor and the Engineer in Chief was directed to take immediate action for blacklisting the contractor. It is submitted that as rightly observed that the action of blacklisting the contractor was predetermined. It is submitted that it is rightly observed by the High Court that giving a show cause notice was an empty formality which was not going to change the decision already taken to blacklist the contractor.

**6.3** It is further submitted that even in the show cause notice there was no reference to the letter dated 10.10.2017 and/or to the report of the committee.

**6.4** It is further submitted that even after the show cause notice containing serious allegations of violations by the contractor, the contractor was asked to execute the balance work, on a revised design, which the contractor – respondent admittedly completed to the satisfaction of the Department by 31.03.2018. It is submitted that therefore, the High Court has rightly quashed the order of blacklisting the respondent – contractor.

**6.5** In the alternative, it is contended by learned counsel appearing on behalf of the respondent – contractor that in the facts and circumstances of the case, the order of blacklisting the respondent – contractor permanently can be said to be too harsh and/or disproportionate to the charge/misconduct proved against the respondent – contractor.

**6.6** It is urged that it was the first offence by the respondent – contractor. That after the impugned order passed by the Government, the Government of Odisha, Works Department passed an office memorandum dated 26.11.2021, which provides that the blacklisting period per offence shall be limited to three years subject to an overall maximum cumulative period of ten years for multiple offences. It is submitted that the respondent has completed a period of 4 ½ years of its blacklisting. It is submitted that therefore the order of blacklisting respondent – contractor permanently also deserves to be quashed and set aside.

**6.7** Making the above submissions and relying on the decisions of this Court in the cases of **Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and Anr. (1975) 1 SCC 70**, **Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Ors. (2014) 14 SCC 731** and **M/s. Daffodills Pharmaceuticals Ltd. & Anr. Vs. State of U.P. & Anr. 2019 (17) Scale 758**, it is prayed to dismiss the present appeals and/or in the alternative to reduce the period of blacklisting.

**7.** We have heard learned counsel appearing on behalf of the respective parties at length.

**8.** By the impugned judgment and order, the High Court has set aside the order passed by the Government of Odisha blacklisting the respondent contractor mainly

on the ground that the same was predetermined and in breach of principles of natural justice.

**8.1** However, it is required to be noted that the action of blacklisting followed a highlevel inquiry conducted by two members committee, Chief Engineer (Designs) and Chief Engineer (DPI & Roads). After studying the contract provisions and drawings, as also inquiry on the spot and after a detailed consideration of the general behaviour and collapse of the formwork, a comprehensive report was submitted and the following observations were made in respect of the respondent – contractor:

“( b) In respect of the Contractor

(i) The Contractor has not submitted the formwork design and has adopted his own arrangement leading to such occurrence of collapse of such huge structure during construction. Design of the formwork is the responsibility of the Contractor and the Contractor shall also be entirely responsible for adequacy and safety of formwork, notwithstanding any approval or review of drawing and design by the Engineer.

(ii) The Contractor has not ensured adequate safety measures during construction activities with which such unfortunate fatal accident could have been avoided, even in case of failure.

(iii) Quality assurance has not been emphasized as stipulated in the codes and manuals and as per the Agreement.

(iv) There are lot many deficiencies in workmanship that may affect the quality of work, as found in other formwork assemblies."

**8.2** Thereafter, the State Government studied the report submitted by a highlevel committee and having considered the case of lapse on the part of the contractor, a serious incident had taken place of collapse of a ten meter slab and in the said incident, one person died and eleven others were injured. Hence, a decision was taken to blacklist the contractor after following the proceedings as per the OPWD Code. Thereafter, a show cause notice was issued upon the respondent – contractor and the respondent – contractor was called upon to show cause as to why he be not blacklisted. The said show cause notice was issued in terms of the provisions and the procedures in the OPWD Code. The respondent – contractor replied to the same. After considering the allegations in the show cause notice and the reply submitted by the contractor, thereafter the Government passed an order of blacklisting. Merely because the show cause notice was issued after the inquiry committee report was considered and thereafter the State Government took the decision to initiate proceedings for blacklisting, that by itself it cannot be said that the order of blacklisting was predetermined as observed by the High Court. The communication dated 10.10.2017 by the State Government to the Chief Engineer can be said to be a proposed decision to initiate the proceedings for blacklisting. In the communication dated 10.10.2017, it has been specifically mentioned that the action be taken for blacklisting after following the procedure as per the OPWD Code. Before any show cause notice is issued for any action when a tentative decision is taken, it cannot be

said that subsequent decision followed by a show cause notice and the proceedings as per the OPWD Code can be said to be predetermined. Before initiation of any proceedings for blacklisting, there can be a tentative decision on the basis of the material available forming a tentative/prima facie opinion that action is required. In the instant case a committee submitted a detailed report which was the basis for issuance of the show cause notice to the respondent. The action initiated against the respondent was not in a vacuum but after considering the committee's report and after following the due procedure as required. Therefore, the High Court has erred in holding that the blacklisting order was predetermined.

**8.3** So far as the findings recorded by the High Court that the blacklisting order was in breach of principles of natural justice is concerned, it is to be noted that the blacklisting order was passed after issuing a show cause notice to which the contractor – respondent was called upon to reply and show cause as to why he be not blacklisted. A detailed show cause notice was issued with specific allegations to which the respondent – contractor submitted a detailed reply. After considering the allegations in the show cause notice, considering the reply and also by considering the material available on record the order of blacklisting was passed. We fail to appreciate, how in such a case the blacklisting order can be said to be in breach of principles of natural justice.

**8.4** In the case of **Grosos Pharmaceuticals (P) Ltd. & Anr. v. State of U.P., (2001) 8 SCC 604**, the order of blacklisting was challenged by the contractor on the ground that the contractor was not supplied with all the materials on the basis of which charges against him were based. It was the case on behalf of the contractor that nonsupply of such material resulted in violation of principles of natural justice. To that, this Court observed that it was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted. This Court observed that the contractor was given an opportunity to show cause and it did reply to the show cause to the State Government and therefore the procedure adopted by the Government while blacklisting the contractor was in conformity with the principles of natural justice.

**8.5** In the present case as observed hereinabove, show cause notice was issued upon the contractor by which the contractor was called upon to show cause why he be not blacklisted; the show cause notice was replied to by the contractor and thereafter, after considering the material on record and the reply submitted by the contractor and having found the serious lapses which led to a serious incident in which one person died and eleven others were injured, the State Government took a conscious decision to blacklist the contractor. Therefore, it cannot be said the order blacklisting the contractor was in violation of principles of natural justice.

**8.6** As observed by this Court in the case of **Gorkha Security Services v. Govt. (NCT of Delhi) & Ors., (2014) 9 SCC 105**, the fundamental purpose behind the serving of a showcause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement is the nature of action which is proposed to be taken for such a breach.

**8.7** As per the law laid down by this Court in a catena of decisions “debarment” is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission. It is for the State or appropriate authority to pass an order of blacklisting/debarment in the facts and circumstances of the case. Therefore, the High Court has erred and has exceeded its jurisdiction in exercise of powers under Article 226 of the Constitution of India by quashing and setting aside the blacklisting order, that too, without adverting to the serious allegations and the act of omission and commission on the part of the contractor which led to a serious incident of collapse of ten meter slab while concrete work of the deck was going on and due to which one person died and eleven others were injured. It was specifically found that the safety arrangements were lacking severely in the construction work zone. It was also found that quality assurance was not emphasised as stipulated in the codes and manuals and as per the Agreement. Therefore, the High Court ought to have considered the seriousness of the incident in which due to omission and commission on the part of the contractor in constructing the flyover one person died and eleven others were injured.

**9.** The next question which is posed for consideration of this Court is, whether, in the facts and circumstances of the case the contractor was required to be debarred/blacklisted permanently? **9.1** In the case of **Kulja Industries Limited** (supra), this Court has observed that “debarment” is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.

In the said decision this Court emphasised on prescribing guidelines by determining the period for which the blacklisting should be effective. It is observed and held by this Court that while determining the period for which the blacklisting should be effective, for the sake of objectivity and transparency it is required to formulate broad guidelines to be followed. It is further observed that different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. In the present case, after the order of blacklisting was passed, the State Government has formulated guidelines by O.M. dated 26.11.2021 which provides as under:



“The blacklisting period per offence shall be limited to 03 (Three) years subject to an overall maximum cumulative period of 10 (Ten) years for multiple offences”

However, we may observe that we do not approve of the guidelines issued by the State Government by O.M. dated 26.11.2021. Duration of blacklisting cannot be solely per offence. Seriousness of the lapse and the incident and/or gravity of commission and omission on the part of the contractor which led to the incident should be the relevant considerations. In a given case, it may happen that the commission and omission is very grave and because of the serious lapse and/or negligence, a major incident would have taken place. In such a case, it may be the contractor’s first offence, in such a case, the period/duration of the blacklisting/banning can be more than three years. However, as the said guidelines are not under challenge, we rest the matter there and leave it to the State Government to suitably amend and/or modify the said office memorandum. However, what we have observed above can be a guide while determining the period of debarment/blacklisting.

In the instant case, it might be true that the offence was the first offence committed by the contractor. However, considering the seriousness of the matter that due to the omission and commission on the part of the contractor a serious incident had occurred as there was a collapse of a ten meter slab while constructing a flyover in which one person died and eleven others injured, as such the contractor does not deserve any leniency. However, to debar him permanently can be said to be too harsh a punishment. But considering the subsequent O.M. dated 26.11.2021 reproduced hereinabove (to which as such we do not agree as observed hereinabove), we are of the opinion that if the blacklisting is restricted to five years, it may be in the fitness of things.

10. In view of the above discussion and for the reasons stated above, present appeal, i.e., C. A. No. 1083 of 2022 is allowed in part. The impugned judgment and order passed by the High Court quashing and setting aside the order dated 12.12.2017 blacklisting the respondent herein – contractor is hereby quashed and set aside. However, the period of blacklisting is ordered to be restricted to five years from the date of passing of the order of blacklisting. Civil Appeal No.1083 of 2022 is allowed to the aforesaid extent.

In view of the order passed in Civil Appeal No.1083 of 2022, Civil Appeal No.1084 of 2022 stands dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

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