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

Reserved on: 7th February, 2024
Date of Pronouncement: 10th April, 2024

\+ **ARB. A. (COMM.) 39/2023 & I.A. 24552/2023**

M/S OASIS PROJECTS LTD. ..... Appellant

Through: Mr. Sanjoy Ghose, Sr Adv, Mr Mayank Arora and Mr. Prasoon Shekhar, Advs. (M. 7903017841).

versus

NATIONAL HIGHWAY AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. ..... Respondent

Through: Mrs. Malvika Trivedi, Sr. Adv with Mr. Pratishth Kaushal, Mr. Shailendra Slaria, Ms. Sujal Gupta, Ms. Raghwi Singh, Advocates, Mr. Rishinandan M. U., Manager (Technical), Mr. Anshul Agarwal, Legal Professional (M. 9599215079)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been held through hybrid mode.

BRIEF FACTS:

2. This is an appeal filed by Appellant-M/s. Oasis Projects Ltd. under section 37(2)(b) of the Arbitration and Conciliation Act, 1996 *(hereinafter referred as 'the Act')* seeking setting aside of the order dated 19th July, 2023. As per the said order, the ld. Sole Arbitrator declined the prayer for suspension of the debarment of the Appellant under Section 17 of the Act.

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The Appellant *inter alia* also seeks removal of the declaration of the Appellant as a non-performer from the Respondent's website and abey the debarment of the Appellant as per the letter dated 9th December, 2022.

3. The Appellant is a company engaged in the business of Civil Construction specializing in the construction of Highways with Asphalt-Concrete, bridges, and passes. The Respondent- National Highways and Infrastructure invited bids for *"Balance work for four-laning of NH – 39 Dimapur- Kohima Road from Design Km 152.490 to Km 166.700 [Package III]"* in the state of Nagaland. Thereafter, vide Letter of Acceptance dated 16th July, 2021, the Appellant was awarded the bid. The Appellant and the Respondent entered into an Engineering, Procurement and Construction Agreement (hereinafter referred as '*EPC Agreement*') dated 30th July, 2021 for a period of one year *i.e.*, 31st August, 2022.

4. Initially, the work for completion and maintenance of Package III was allotted to M/s. Gayatri Project Ltd. in the year 2016 for a period of 5 years which was terminated in the month of June, 2021 for non-completion of the work. Thereafter, the EPC Agreement was entered for a contract price of more than Rs. 111 crores. In terms of Clause 18 of the EPC Agreement, M/s. L.N. Malviya Infra Projects Pvt. Ltd. was appointed as the Authority Engineer to review the progress of work at the site.

5. The case of the Appellant is that it faced immense hardships in executing the work due to issues in obtaining Right of Way *(hereinafter referred to as 'ROW')*. It is averred by the Appellants that the said issue occurred because compensation was not provided to the landowners. The Appellant also avers that there was illegal mining conducted on the lands forming part of the ROW. It is further stated that they received threats and

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extortion letters from several local groups which further derailed the work. As per paragraph 16 of the Petition, the opposition from local groups coupled with all the landslides that took place, and other factors constituted '*Force Majeure*' as per clause 21.5 of the EPC. This led to delays in execution of the project.

6. The Respondent issued a Show Cause Notice dated 12th May, 2022 declaring the Appellant as a 'non-performer' due to slow progress and poor planning of work. The relevant portion of the said Show Cause Notice is extracted hereinbelow:

> "*2. Whereas, as per Clause 10.3.1 of EPC Contract Agreement, the Contractor shall construct the Project Highway as specified in Schedule-B and Schedule-C, in conformity with the Specifications and Standards set forth in Schedule-D, within 365 Days (Three Hundred Sixty-Five Days) from the Appointed Date (i.e., 1st September 2021) shall be the scheduled completion date (the "Schedule Completion Date") which is 31st August 2022, the Project Milestones w. r. t. targeted Financial Progress (%) are as below: -*

Project Milestones	*Milestone from Appointed Date as per the Contract Agreement (in days)*	*Stipulated Completion Date as per the Contract Agreement*	*Achieved on*	*Stipulated Financial Progress as per Contract Agreement*
Milestone - I	*128*	*06.01 .2022*	*05.02.2022*	*10%*
Milestone- II	*219*	*07.04.2022*	*Not Achieved*	*35%*
Milestone - III	*310*	*07.07.2022*		*70%*

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3. Whereas, the EPC contractor has failed to achieve required progress for the reasons solely attributable to EPC contractor majorly due to delay in procurement of construction materials, lack of meticulous planning, failed to mobilize key construction equipment/manpower, regular breakdown/off road of plants due to old vintage and poor mechanical condition, etc.

4. Whereas, the EPC Contractor has failed to achieve 2nd Mile Stone as per Schedule-J of Contract Agreement & submitted work programme due to poor planning, lack of adequate resources & slow progress of work.

5. Whereas, as per clause 11.10 of the Contract Agreement it is the obligation of Contractor to ensure that the Construction materials and workmanship are in accordance with the requirements specified in the Contract Agreement, specifications, standards and Good Industry Practice.

6. Whereas, Authority and Authority's Engineer have issued several Cure notices for slow progress vide the letter cited at ref. viii), x), xii), xvi), xvii}, xxv), and xxx) for expediting the progress of work wherein the Contractor was advised to mobillze adequate manpower, machineries and ensure procurement of materials at site to achieve the Milestones targets. Despite repeated instructions issued in this regard, the Contractor failed to take corrective steps for expediting the progress of work. Therefore, slow progress of the project is solely attributable to the Contractor.

7. Whereas Authority and Authority's Engineer have issued several notices on construction of breast wall and to undertake suitable slope protection / stabilisation works to avoid any untoward incident i.e., loss of life/properties vide letter cited at ref. xiv), xvii), xxv), xxx), xxxi), xxxii), xxxiii), and xxxvi), however the

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contractor failed to comply with all the notices for the safety measures till date.

8. Whereas, the Contractor has achieved merely Physical Progress of 22.348% and Financial progress of 20.60% as per Comparative Progress Report, dated 11.05.2022 submitted by Authority's Engineer.

9. Whereas, Authority has issued several letters on failure of submission of resource based work programme, design & drawing, plan & profile, launching methodology of steel bridge & design for sub-surface drain vide letter cited at ref. xxxvii) & xxxviii).

10. Whereas, EPC Contractor has failed to start BC work after passing a period of 09 months and has failed to submit its design till date.

11. Whereas, EPC Contractor failed to adhere to the letters mentioned above at ref. xxxiv) ft xxxv) for maintaining the road in traffic worthy condition during monsoon period for which daily commuters are facing inconvenience.

12. Whereas, EPC Contractor failed to adhere to the advisories issued by Authority ft Authority's Engineer vide letter cited above at ref. xviii) ft xix) to improve quality of works till date.

13. Whereas, EPC contractor has not followed good industry practices which are inherent in the Contract Agreement and reflected in poor quality of work.

14. Whereas, the above facts of Omission and commission have resulted in immense inconveniences to the public since the said project is crucial as well as has strategic importance.

15 Whereas, the Contractor neither submits a realistic resource based work programme to complete the balance work nor any proper planning for procurement of construction materials, Machineries, and other ancillary items in order to complete the project in the specific period of time which has resulted in Loss of valuable Project time.

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16. Hence, the EPC Contractor has caused the breach of to the following clauses of the Ministry circular no RW /NH-33044/76/2021 S&R (P&B), dated 06.10.2021.

(i) Failed to mobilize key construction equipment within a period of 4 months from the Appointed Date.

(ii) Failed to set up institutional mechanism and procedure as per Contract.

(iii) Failed to complete or has missed any milestone and progress not commensurate with contiguous unencumbered project length/ ROW available even after lapse of 6 months from respective project milestone/ Schedule Completion dated.

(iv) Failed to fulfil its obligations to maintain a highway in a satisfactory condition in spite of two rectification notices issued in this regard.

(v) Fails to start the works or causes delay in maintenance & repair/overlay of the project.

18. ***In view of all the above, furnish your reply within 15 (fifteen) days from the issuance of this notice that why your firm should not be considered for declaring a "non-performer" under Ministry Circular cited at ref. (i). In case of failure to submit satisfactory/justified reply within the stipulated period of 15 days, the Authority will be free to take unilateral decision in the matter.***

19. This notice is issued without prejudice to any other rights/ contention or remedy available to the Authority under the Contract Agreement and/or applicable law.

20. This issues with approval of the Competent Authority.

Yours Sincerely
12.05.2023
(Ajay Batra)
General Manager (P)
NHIDCL, PMU-Dimapur"

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7. A reply to the same was given by the Appellant on 24th May, 2022. Amicable resolution of the disputes was attempted on several occasions which did not workout. A meeting was held on 8th August, 2022, which did not fructify. Finally, on 17th August, 2022, the Appellant terminated the Contract under Clause 21.7 of the EPC Agreement. The said letter is relevant and is extracted herein below:

OASIS PROJECTS LIMITED
(Formerly known as Oasis Technocons Limited)
Building Infrastructure For The Nation

Through E-Mail

No. OASIS/D-K/357 **Date: 17.08.2022**

To,
The Managing Director,
National Highways & Infrastructure Development Corporation Ltd,
3rd Floor, PTI Building, 4-Parliament Street,
New Delhi – 110001.

Sub: Balance work for Four-laning of NH-39 Dimapur — Kohima Road from Design Km 152.490 to Km 166.700 (Existing Km 156.000 to Km 172.900), in the state of Nagaland under SARDP-NE through an Engineering, Procurement and Construction (EPC) Contract (Package-III)- **INTIMATION ABOUT TERMINATION OF CONTRACT.**

Ref.: Our Letter No. OASIS/D-K/ 292 Dated 01.08.2022

Respected Sir,

We draw your attention to our letter cited as reference above. Through the said letter we had issued a 15 days' notice to you under clause 21.7(i) of the contract. As the stipulated 15 days under the notice have expired and no reply / response from NHIDCL has been received thus far. We therefore take it that you do not wish to make any submission in this regard and your silence is taken as your tactic admission to the contents of our letter cited as reference above.

Thus, we write to inform you that we hereby terminate the subject cited contract, exercising our right under clause 21.7(i) of the contract. With this termination of contract, no contractual relation qua the subject cited contract subsists between us now.

You are therefore requested to immediately release our instruments and other sums of money that are presently available with NHIDCL since you no longer have the right to retain them, on account of the termination of contract.

This is to inform you that the site demobilization shall commence shortly.

Thanking You,

For Oasis Projects Limited

Gyan Chand
Director
(Gian Chand Garg)

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8. The Respondent also issued a Suspension Notice dated 19th August, 2022 under clauses 11.17 (Suspension of unsafe Construction Works) and 22.1 (Suspension under Contractor Default) of the EPC Agreement in the following words:

> *"4. Authority and Authority's Engineer vide several correspondences dated 25 .07.2022, 27.07.2022, 02.08.2022, 03.08.2022, 04.08.2022, 08.08.2022, 11 .08.2022, 12.08.2022, 16.08.2022,17.08.2022 have requested EPC Contractor to maintain the road as per Clause 10.4 (i) of Contract Agreement, whereas, cure notice has also been issued with regards to poor maintenance by Authority vide letter dated 30.07.2022. However, the condition of the road has been getting worse day by day and IS inviting adverse criticism from the State Government, Public, road users.*
> *5. In view of prevailing site condition, Authority's Engineer vide letter dated 01 .08.2022, 18. 08.2022 has also recommended to engage Third party for road maintenance as per Clause 10.4 (ii) of the Contract Agreement to mitigate the said 1ssue at the risk and cost of the EPC Contractor. Vide letter dated 18.08.2022, Authority's Engineer has also recommended to invoke Clause 11.17 of Contract Agreement, "Suspension of unsafe Construction works".*
> *6. In light of upcoming "Nagaland CSR & Investment Conclave 2022", as informed to you vide Authority's Engineer letter dated 17.08.2022, wherein Hon'ble Union Minister for Finance & Corporate Affairs, several VIPs including Senior Secretaries to the Govt. of India and corporate sector officials are likely to attend, an emergent repair works need to be taken up in order to facilitate smooth and safe traffic movement.*
> *7. Considering all facts mentioned above, EPC Contractor is in default as per Cl. 10.4 (ii) of CA. Therefore, as per recommendation of Authority's*

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Engineer, Clause 11 .17 & 22.1 of Contract Agreement is invoked for carrying out an "Emergent Repairs (ER)" on war footing basis to restore road width and ensure safety of road users. Thus, the EPC Contractor is hereby instructed to suspend the maintenance work of existing road from Ch 152.490 to Ch 159.490 for the period from 19.08.2022 (08:00AM) to 20.08.2022 (07:00PM).

8. It is further informed that the maintenance work will be done during the said period by engaging Third Party at your Risk and Cost as per Cl. 10.4 (ii), 11 .17 and 22.1 of Contract Agreement. The said amount will be informed to you in due course of time and the amount will be recovered from your subsequent bill.

9. The SUSPENSION NOTICE is issued without prejudice to our rights applicable under the Contract Agreement as well as the applicable laws.

9. The suspension was further revoked on 25th August, 2022. Subsequent to this on 18th September, 2022 the Respondent declared the Appellant as a 'Non-performer' on its website. Further, the Respondent issued a notice with the intention of terminating the contract dated 16th November, 2022. The relevant portion of the notice is extracted hereinbelow:

"66. Whereas, the EPC Contractor has breached the Contract Agreement, inter-alia, with the following defaults in terms of Clause 23.1 (i) of Article 23 of Contact Agreement which is reiterated as under:

i. Sub-clause (c): the Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, and continues to be in default for 45 (forty Five) days;

ii. Sub-clause (d): the Contractor abandons or manifests intention to abandon the construction or Maintenance of the Project Highway without the prior written consent of the Authority;

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iii. Sub-clause (e): the Contractor fails to proceed with the Works in accordance with the provisions of Clause 10.1 or stops Works and/ or the Maintenance for (thirty) 30 days without reflecting the same in the current programme and such stoppage has not been authorised by the Autority's Engineer;

iv. Sub-clause (g): the Contractor fails to rectify any Defect, the non rectification of which shall have a Material Adverse Effect on the project, within the time specified in this Agreement or as directed by the Authority's Engineer ;

v. Sub-clause (q): the Contractor commits a default in complying with any other provision of this agreement if such a default causes a material adverse effect on the project or on the Authority; and

66. Whereas, the Authority is left with no other option but to terminate this Contract for the defaults committed by you under Clause 23.1(i) (c)(d)(e)(g)(q) of Contract Agreement an

67. ***In the light of the aforesaid, non-exhaustive fundamental breaches and in view of the Contractor's persistent & sustained gross default in fulfilling contractual obligations, leading to a material adverse effect on the Project, the Authority hereby notifies its Intention to Termination the Contract Agreement in accordance with Clause 23.1 (ii) of the Contract Agreement and grants 15 days to the EPC Contractor to make a representation, if any. It is made clear that in the event of non-compliance and failure to rectify the defaults and irrespective of any representation, the Authority reserves its right and would be at liberty to take further step for Termination of the Contract.***

68. This Notice is issued without prejudice to any other right or remedy available with the Authority under the Contract Agreement and / or applicable Law.'

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10. Thereafter, the Respondent terminated the EPC on 9th December, 2022, in the following words:

> *71. Whereas, the EPC Contractor has breached the Contract Agreement and the Authority is left with no other option but to terminate this Contract for the defaults committed by the EPC Contractor under Article 23.1 of the Contact Agreement as mentioned below:-*
> *i. Sub-clause (c): the Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, and continues to be in default for 45 (forty Five) days;*
> *ii. Sub-clause (d): the Contractor abandons or manifests intention to abandon the construction or Maintenance of the Project Highway without the prior written consent of the Authority;*
> *iii. Sub-clause (e): the Contractor fails to proceed with the Works in accordance with the provisions of clause 10.1 or stops Works and/ or the Maintenance for 30(thirty) days without reflecting the same in the current programme and such stoppage has not been authorized by the Authority's Engineer;*
> *iv. Sub-clause (g): the Contractor fails to rectify any Defect, the non rectification of which shall have a Material Adverse Effect on the project, within the time specified in this Agreement or as directed by the Authority's Engineer;*
> *v. Sub-clause (q): the Contractor commits a default in complying with any other provision of this agreement if such a default causes a material adverse effect on the Project or on the Authority; and*
> *72.* ***In the light of the aforesaid, non-exhaustive fundamental breaches and in view of the Contractor's persistent & sustained gross default in fulfilling contractual obligations, leading to a material adverse effect on the Project, the Authority has now decided to Terminate the Contract with M/ s Oasis Projects***

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Ltd. forthwith in accordance with clause 23.1 (ii) of the Contract Agreement with immediate effect, thereby in accordance with Article 23.1.(v) of the Contract Agreement, debarring the EPC Contractor for a period of 2 years.

73. Upon termination of this Agreement in accordance with the terms of Article23, the provisions of Article 23 shall henceforth apply.

74.As per clause 23.4 of the Contract Agreement, the Contractor shall comply with and conform to the following:

a . Deliver all relevant records, reports, Intellectual Property and other licences

pertaining to the Works, Maintenance, other design documents;

b . Transfer and or deliver all Applicable Permits to the extent permissible under

Applicable Laws; and

c. Vacate the State within 15 (fifteen) days; but the Contractor has already vacated on 17.8.2022.

75. In accordance with Clause 23.5, Contractor has already taken joint measurement and it has been recorded.

76. The Authority/NHIDCL shall intimate the details of termination payment in accordance with Clause 23.6 within 30 days from the date of termination

77.The Authorised Signatory of the Contractor is directed to meet to the undersigned along with all the details pertaining to transfer or rights in accordance with Clause 23.7.

78.The Authority hereby reserves its right to recover the losses of damages and expenditures which shall be borne by the Authority on account of maintenance of the existing Project Highway or any other expenditure which the Authority will incur due to termination of the contract on account of Contractor's default.

79. This Termination Order is issued without prejudice to any other right or remedy available with the

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Authority under the Contract Agreement and applicable law.

80. This issues with the approval of the Competent Authority.

11. Simultaneously, proceedings were going on before the Guwahati High Court in ***Review Pet. 12/2022***, titled "***The Managing Director, National Highway and Infrastructure Development Corporation Ltd. and Anr. v. The Union of India and Ors***." wherein it was observed that the Appellant had "abandoned the work", and on 28th September, 2022, following directions were issued:

11. We have taken note that the work-order with regard to Package- III was issued as early as on 01.09.2021 for an amount of Rs. 111.19/- Crore and that the time stipulation to complete the work was within 12 (twelve) months. However, nothing has been done and from the various affidavits filed by the Authority Engineer we have seen that the respondent No. 12 is not serious for execution of the work with regard to Package-III. Further, as the respondent No. 12 has already abandoned the work and it is confirmed by Mr. Yashpal Sharma, Director, M/s Oasis Techno Construction Limited/ respondent No. 12 today, we are constrained to pass a direction to the NHIDCL authorities not to release any pending dues including the Bank Guarantee to the respondent No. 12 without the leave of this Court. Taking into consideration the lackadaisical, irresponsible behavior as well as making deliberate false promises on oath before this Court we direct the respondent No. 12 to liquidate 10% (ten percent) of the total contract amount (Rs. 111.19/- Crore) to the NHIDCL authorities within a period of one month from today.

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12. Thereafter, ***SLP (Civil) Diary No(s). 32354/2022*** titled "***Oasis Techno Constructions Ltd. v. The Managing Director, National Highway and Infrastructure Development Corporation Ltd.***" was preferred against the above order of the Guwahati High Court directing that Oasis Techno Construction Ltd. shall deposit 10% of the contract amount by 30th November, 2022. Vide order dated 12th October, 2022, the Supreme Court directed as under:

> *"We have heard Mr. P.S. Patwalia, learned Senior Advocate in support of the petition. Since direction regarding making over of the amount as directed in paragraph No.11 and direction commanding the presence of three directors were passed by the Court on its own, we do not deem it appropriate to issue notice in the matter and proceed to dispose of the matter with following directions:*
>
> ***(a) The appellant shall deposit 10% of the contract amount as indicated in paragraph 11 with the National Highway and Infrastructure Development Corporation Limited (NHIDCL) on or before 30.11.2022. The NHIDCL shall keep the amount in an interest bearing fixed deposit account in a nationalized Bank with auto renewal facility.***
>
> *(b) If the amount is so deposited, three Directors of the Company can enter appearance through a lawyer and their personal appearance need not be insisted upon.*
>
> ***(c) The deposit, as indicated above, shall be without prejudice to the rights and contentions of the appellant.***
>
> *(d) The appellant shall be at liberty to file such application/affidavit, indicating its stand and/or justification, if so advised. The matter shall be gone into by the High Court before passing any orders for appropriation of the amount so deposited by the appellant.*

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With these directions, the instant special leave petition and pending applications are disposed of."

13. In addition, a Section 9 petition was also filed before this Court, by the Appellant being ***O.M.P. (I) (COMM) 352/2022*** titled ***M/s Oasis Projects Limited v. Managing Director, National Highway and Infrastructure Development Corporation Limited***, wherein, interim relief sought was rejected in view of the observations made by the Guwahati High Court on 28th September, 2022. The observations of the ld. Single Judge dealing with the Section 9 petition on 1st December, 2022, are set out hereinbelow: -

"8. I have considered the submissions made by the learned counsel for the appellant.

9. At the present stage, the ex parte relief prayed for by the appellant, in my opinion, cannot be granted, especially in view of the observations made by the Gauhati High Court in its order dated 28.09.2022, passed in the Public Interest Litigation referred to hereinabove. *The relevant observations of the Gauhati High Court are reproduced hereinbelow:*

"11. We have taken note that the work-order with regard to Package- III was issued as early as on 01.09.2021 for an amount of Rs.111.19/- Crore and that the time stipulation to complete the work was within 12 (twelve) months. However, nothing has been done and from the various affidavits filed by the Authority Engineer we have seen that the respondent No. 12 is not serious for execution of the work with regard to Package-III. Further, as the respondent No. 12 has already abandoned the work and it is confirmed by Mr. Yashpal Sharma, Director, M/s Oasis Techno Construction Limited/ respondent No. 12 today, we are constrained to pass a direction to the NHIDCL

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authorities not to release any pending dues including the Bank Guarantee to the respondent No. 12 without the leave of this Court. Taking into consideration the lackadaisical, irresponsible behavior as well as making deliberate false promises on oath before this Court we direct the respondent No. 12 to liquidate 10% (ten percent) of the total contract amount (Rs. 111.19/- Crore) to the NHIDCL authorities within a period of one month from today.

12. We have also taken note of the submission made by the Authority Engineer in his progress report dated 28.09.2022 that they have appointed one contractor, M/S T. Tachu & Co. to look after the maintenance and safety works of Package-III in view of the emergent situation that has been created by the respondent No. 12. We, accordingly implead the Contractor, M/S T. Tachu & Co. as a party respondent in the present PIL. We also direct the Authority Engineer as well as the authorities of the NHIDCL and the newly appointed Contractor, M/S T. Tachu & Co. to maintain the road under Package-III so that the commuters do not face any difficulties or inconveniences."

10. The appellant challenged the said order before the Supreme Court by way of Special Leave Petition (Civil) Diary no.32354/2922, titled Oasis Techno Construction Ltd. v. The Managing Director, National Highway and Infrastructure Development Corporation Ltd. & Ors. The said petition was disposed of by the Supreme Court vide its order dated 12.10.2022 with the following directions:

"(a) The appellant shall deposit 10% of the contract amount as indicated in paragraph 11 with the National Highway and

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Infrastructure Development Corporation Limited (NHIDCL) on or before 30.11.2022. The NHIDCL shall keep the amount in an interest bearing fixed deposit account in a nationalized Bank with auto renewal facility.

(b) If the amount is so deposited, three Directors of the Company can enter appearance through a lawyer and their personal appearance need not be insisted upon.

(c) The deposit, as indicated above, shall be without prejudice to the rights and contentions of the appellant.

(d) The appellant shall be at liberty to file such application /affidavit, indicating its stand and/or justification, if so advised. The matter shall be gone into by the High Court before passing any orders for appropriation of the amount so deposited by the appellant."

11. The termination notice was issued by the respondent on 16.11.2022, alleging various violations of the contract by the appellant. Veracity of the same are to be determined in the arbitration proceedings. However, at the present stage, given the observations of the Gauhati High Court, in my opinion, the appellant has been unable to make out a prima facie case in its favour.

12. As far as the relief against the encashment of the bank guarantees is concerned, it is a settled law that the invocation of a bank guarantee can be restrained only on the appellant being able to make out a case of 'egregious fraud' or 'special equities' in the form of irretrievable injury. Both these exceptions, at least at the present stage, are not made out by the appellant. The appellant can always be compensated in case it is found that the termination of the contract by the

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respondent was wrongful or for amounts in excess of what was payable under the contract.
13. Therefore, at this stage, and in the absence of the respondent, I do not consider it proper to grant relief as prayed for by the appellant.
14. List on 18th January, 2023."

14. In furtherance to the order dated 28th September, 2022 in ***Rev. Pet. 12/2022*** linked with ***PIL (Suo Moto) 2/2019***, an ***I.A. (Civil) 203/2022 in Rev. Pet. 12/2022*** was moved seeking recall/review of the order, wherein the Court directed NHIDCL authorities not to release any pending dues including the Bank Guarantee and to deposit 10 % of the Contract amount. The Court on 31st March, 2023, observed that continuance of the order to liquidate 10 % of the Contract value would be an encroachment to the jurisdiction of the arbitrator, who needs to determine the issues arising out of non-performance. Further, the Gauhati High Court directed M/s. Oasis Techno Pvt. Ltd. that the Bank Guarantee to the tune of Rs. 7.50 crores shall be released and the direction regarding 10% of the contract amount be released. The relevant portion of the said order is hereinbelow:

"In this background, we are of the opinion that continuance of the order to liquidate/freeze 10% amount from the total contract value by the applicant/respondent No.12 would amount to an indirect encroachment into the jurisdiction of arbitrator appointed to determine the issues arising out of the non-performance of the contract in question and may also prejudice the defences of the applicant in the arbitration proceedings.
Thus, keeping view, the fact that Bank guarantee to the tune of Rs.3.50 crores furnished by the applicant has been encashed by the Corporation, we hereby modify the order dated 28.09.2022 and direct that the

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*applicant shall furnish a Bank guarantee to the tune of Rs.7.50 crores with the sole arbitrator whereupon the order dated 28.09.2022 shall s*tand *vacated/recalled and the 10% amount of the contract directed to be liquidated shall be released.*

The applicant shall be at liberty to seek revocation of the Bank guarantee/ modification of this condition in case the arbitration proceedings are not completed within 3(three) months from today.

It is further clarified that the observations made in these proceedings shall not be construed as prejudicing the case of any of the parties in the arbitration proceedings.

The I.A. (Civil) No.203/ 2022 is disposed of as above."

15. Thereafter, in ***Special Leave Appeal (C) No. 8584/2023,*** vide the order dated 1st May, 2023, the effect of operation of the order dated 31st March, 2023 in ***PIL (Suo Moto) 2/2019*** was stayed and it was directed that the Bank Guarantee to the tune of Rs. 7.50 crores shall be furnished with the ld. Sole Arbitrator. The Gauhati High Court, vide order dated 10th May, 2023, clarified that the Bank Guarantee be released in the name of NHIDCL and be submitted to the Arbitrator. The relevant portion of the said order is extracted herein below:

"Mr. S. Borgohain, learned counsel appearing for the respondent NHIDCL has placed on record copy of the order dated 01.05.2023 passed by Hon'ble the Supreme Court in Special Leave to Appeal (C) No.8584/2023 whereby, the effect and operation of the order dated 31.03.2023 passed by this Court in PIL (Suo Moto) 2/2019, has been stayed.

Mr. Mayank Arora, learned counsel for the respondent No.12 has drawn the Court's attention to the communication dated 09.05.2023 which indicates that there is some confusion regarding the Bank Guarantee

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> *submitted by the contractor, which is causing difficulty in releasing the 10% of the contract amount in terms of the order dated 31.03.2023 passed by this Court in I.A.(Civil) 203/2022.*
> *We hereby clarify that the Bank Guarantee which was required to be submitted to the Sole Arbitrator, is to be prepared in the name of NHIDCL and may be submitted to the Arbitrator thereafter, whereupon the amount shall be released to the applicant.*
> *Mr. G. Khandelia, learned counsel representing the respondent No.8 submits that the Managing Director of M/s Ramky- ECI (JV) was present yesterday in the Court but the matter could not be taken up. He further makes a statement that the works under Package Nos. I & II have been completed. The officers of NHIDCL may verify such statement."*

16. Meanwhile ***Arb. P. 1364/2022*** was filed by M/s. Oasis Projects Ltd. seeking appointment of an arbitrator and stating that conciliation is not mandatory in nature and is rather directory in nature and that the parties can proceed with arbitration in view of the facts of the present case. Vide order dated 7th February, 2023, this Court appointed ld. Sole Arbitrator in the following terms:

> *11. As far as the constitution and the procedure of the Committee not being available on the website of the respondent on the date of filing of the petition is concerned, for the reason that the case of the appellant is that such procedure even otherwise is directory in nature and is not to be mandatorily followed prior to invoking the arbitration, in my opinion, the same need not detain this Court any further. Prima facie, however, the respondent has been able to satisfy this Court that the information regarding the constitution and the procedure of the Committee was available on*

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the website of the respondent albeit under an obscure link.

12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the appellant to resort to the Conciliation process by the Committee before invoking arbitration. Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore Conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. It needs no emphasis ***that Conciliation as a Dispute Resolution Mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, Conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will.*** *Therefore, while interpreting Article 26.2, the basic concept of Conciliation would have to be kept in mind.*

17. In the present case, it is also to be noted that in terms of Article 23.1(v) of the Contract, in case the ***respondent terminates the Contract, the appellant shall be deemed to have been debarred for a period of two years and shall not be able to bid any Contract of the respondent. The appellant also fears the invocation of the performance guarantee. Therefore, in terms of Section 77 read with Clause 16 of the OM, the appellant is justified in expressing urgency in initiating arbitration for preserving its rights****.*

21. As the Arbitration Agreement and due invocation thereof are established, I see no impediment in appointing an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Contract*.*

22. I accordingly appoint Mr. Justice Manmohan Sarin, Former Chief Justice of Jammu & Kashmir

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> *High Court, [Off. Add.: D-73 Basement, Block-D, Panchsheel Enclave, New Delhi-110017; Mobile: 9818000210] as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the above Contract.*
> *23. The learned Arbitrator shall give a disclosure under Section 12 of the Act before proceeding with the reference.*

17. Thus, the arbitration proceedings commenced between the parties. In the said proceedings, the Appellant moved an application challenging and seeking stay of the debarment of two years which was imposed upon the Appellant, as an automatic consequence of termination. The ld. Sole Arbitrator on 19th July, 2023, rejected the prayer for stay of debarment, observing that without detailed examination and evidence being recorded it would be difficult to reach a conclusion regarding the validity of the termination and the consequential debarment. The relevant portion of the said order is extracted below:

> *"The crux of the matter for determination is whether from the correspondence and material on record including the Show Cause Notices. It could be discerned that Claimant had been put to notice and had been given an opportunity to Show Cause against the termination and the consequential debarment, which would follow by the deeming provision contained in Clause 23.1(v) of the Contract.*
> *14. A perusal of the said provision shows that it is clear and unambiguous that debarment of 2 years would follow as a natural consequence of the termination of contract under Clause 23 of the contract. It may be noticed that the Tribunal is bound by the contractual terms entered into between the parties. Besides, there is no challenge on the grounds of ultra-vires of the provision of automatic debarment*

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following termination. Even the courts in writ jurisdiction have set out safeguards in terms of the party being debarred is put to notice of the proposed action and gets an opportunity to respond.

The plethora of correspondence filed on record prima facie shows that Respondent had been given several opportunities to respond to numerous breaches alleged for declaring it a non-performer.

Reliance was also placed by the Respondent on the proceedings before the Hon'ble High Court of Guwahati, where the Division Bench had been hearing a PIL in the matter which also covers the instant contract. The Court had taken note of the progress report filed as well as by the Respondent. The court had observed that the physical progress was also 28.05% and financial progress was 26.45% as late as on 27.09.2022. The court took note of the cure notices issued to the Claimant and the rival contentions. It was also noted that the Claimant has abandoned the work.

Furthermore, court passed directions of non-release of any pending dues and the Claimant was directed to deposit 10% of the total contract amount of Rs. 111.19 Crores. Subsequently, the matter had also gone to the Supreme Court and pursuant to the directions given, presently the Claimant has furnished the Bank Guarantee in the sum of Rs. 7.5 Crores which is to be kept alive during the adjudication.

There is also the controversy regarding the validity of termination of the contract as far back as 17.08.2022 by the Claimant which the Respondent claims was wrongfully abandoned by the Claimant on account of failures and the alleged termination being without any justification. This led then Respondent also to terminate the contract on 09.12.2022.

15.Considering the plethora of correspondence and record and the nature of the factual controversies, allegations and counter-allegations, ***it is difficult at this stage without going through the detailed***

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> ***examination and evidence being recorded to reach a conclusion regarding the validity of the termination and the consequential debarment. These need to be determined after a thorough detailed examination with evidence being led and subject to adjudication and findings being reached on these controversies****. In view of the foregoing discussion, the relief sought by the Claimant is denied at this stage. Nothing contained or observed herein will be taken as an expression or determination of the controversy. The observations made are on a prima facie view and will not come in the way of final adjudication of Claims and Counterclaims after leading of evidence and hearing the parties and final adjudication. The relief sought in the application Vis 17 of the Act is therefore declined at this stage. Arbitral process is being expedited, with the pleadings completed and the matter being fixed for evidence. The application stands disposed."*

18. The present appeal has been filed by the Appellants challenging the above order dated 19th July, 2023 passed by the Ld. Sole Arbitrator.

ARGUMENTS

19. Notice was issued in this matter on 11th October, 2023, and submissions have been heard. The same are as under:

(i) Mr. Sanjoy Ghosh ld. Sr. Counsel for the Appellant relies upon the MoRTH circular dated 6th October, 2021 to argue that even in case of serious breaches, fifteen days notices is given *qua* debarment post termination. In the present case, there were unusual facts which led to delays in the execution of the project.

(ii) Reliance is placed upon two recent decisions of the Supreme Court in ***Isolators & Isolators v. M.P. Madhya Kshetra Vidyut***

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Vitran Co. Limited, 2023 SCC OnLine SC 444 and ACE Integrated Solutions v. FCI 2019 SCC Online Del 8422 (page 83, 93 and 99) which clearly hold that giving a Show Cause Notice is not sufficient even after notice of debarment is given, there has to be a specific notice on imposition of penalty.

(iii) Reliance is also placed upon the decisions of ld. Single judge bench in ***Defsys Solutions Private Limited v. Union of India and Ors.,2023:DHC:6380*** which has been upheld by Division Bench in ***Defsys Solutions Private Limited v. Union of India 2023:DHC:8678- DB***, (paras 53,74,78). Sr. Counsel highlights the fact that the prayer under Section 17 application is for termination leading to debarment, as also for removal of links on the website, which declare the Appellant as a non-performer.

(iv) Ld. Sr. Counsel appearing for the Appellant submits that Clause 23.1(v) of the EPC is in the nature of a deemed debarment which requires a specific Show Cause Notice and adherence to principles of natural justice.

(v) He submits that the law in respect of debarment is well-settled right from the decision in ***UMC Technologies Private Limited v. FCI and Anr. (2021 2 SCC 551)*** as also ***Atlanta Limited v. Union of India and Ors. MANU/DE/1341/2018*** of the ld. Division Bench of this Court.

(vi) He further submits that in the present case, deemed debarment is triggered only after termination and any notice during the contract period cannot be considered as a notice for debarment. He further submits that the termination notice and the

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declaration of the Appellant being a non-performer, also cannot continue post the debarment.

(vii) Further, it is argued that the MoRTH circular dated 6th October, 2021 makes it clear that all existing agreements would also be amended in terms of the circular, and debarment is to be resorted only in case of a major failure and not merely due to delays or non-performance. The said circular has been given a go by NHIDCL which would not be permissible.

(viii) He further challenges the reasoning by the ld. Sole Arbitrator to the effect that the ld. Sole Arbitrator simply rejected the prayer on the ground that detailed examination and evidence is being recorded to reach a conclusion regarding the validity of the termination and the consequential debarment.

20. Ms. Malvika Trivedi, ld. Senior Counsel appearing on behalf of the Respondent-National Highway and Infrastructure Development Corporation Ltd. submits as under:

(i) Firstly, the scope of interference under Section 37 is very limited. She relies upon a decision of this Court in ***Manish Aggarwal and Another v. RCI Industries and Technologies Limited 2022 SCC OnLine Del 1285*** (para 12 and 13) to argue that the impugned order does not warrant any interference.

(ii) Secondly, it is Ms. Trivedi's submission that the EPC Agreement itself, clearly, shows that termination would automatically lead to debarment and this fact was well within the knowledge of the contractor also. She relies upon the submissions made by the Appellant prior to the termination

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notice issued on 9th December, 2022 *i.e.* on 1st December, 2022 in ***O.M.P (I) (COMM) 352/2022, M/s Oasis Projects Limited v. Managing Director, National Highway and Infrastructure Development Corporation Limited***. She submits that in para 4 of the said judgment, it is recorded that the consequence of termination would be debarment and, therefore, the Appellant was well aware that no separate notice is required for effecting the debarment.

(iii) Thereafter, reliance is placed upon the Clause itself to argue that under Clause 23.1(3) and 5 of the EPC, debarment is clearly spelt out and vide notice dated 9th December, 2022, termination would automatically lead to debarment. The said notice is itself sufficient notice for debarment and therefore, there is no violation of the principles of natural justice.

(iv) Reliance is also placed upon various letters issued since August, 2022, when the Appellant itself terminated the contract and thereafter four different notices which are issued. All of these notices repeatedly emphasise that the Appellant is being given a chance to cure its defects and the notices also mentioned that these are under Clause 23.1.

(v) The submission on behalf of the Respondent is that such Clauses when contained in a contract, no separate notice for debarment is to be issued. She relies upon decision in ***M/s Otik Hotels and Resorts Private Limited v. Indian Railway Catering and Tourism Corporation Limited, 2016 SCC OnLine Del 5508***.

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(vi) Ms. Trivedi further submits that in response to the notice dated 16th November, 2022, which was regarding termination of EPC Agreement (Package-III) under Clause 23.2 (ii) of the Agreement, issued by the Respondent, the Appellant had replied on 19th November, 2022. The Appellant in the said reply had acknowledged the fact that the contract could be terminated. Thus, the Appellant was well aware of the natural consequence of the said termination. On behalf of the NHIDCL it is submitted that package 1 and 2 were implemented by other contractors what was allotted to the Appellant was only Package III.

(vii) Ld. Sr. Counsel has taken the Court through the Clause 2(1)(2) read along with Clause 2(1)(5) of the EPC Agreement to argue that substantial correspondence has taken place between the parties in this matter. Further, all the notices would reveal that substantial opportunity has been afforded to the Appellant to explain its position. She relies upon the decision of this Court in ***VA Tech Wabag Limited v. Delhi Jal Board 2022 SCC OnLine Del 4610*** to argue that once the clear correspondence is existing and consideration for debarment is existing, the debarment cannot be stated to be contrary to the principles of natural justice.

ANALYSIS & CONCLUSIONS

21. The grievance of the Appellant in the present case is that there is deemed debarment effected against the contractor merely upon termination itself. There was no notice for debarment, no hearing was granted either on

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the debarment or the period of debarment. The termination has been challenged in the arbitral proceedings and the question as to whether the termination is valid in law or whether there were justifiable reasons for the contractor, for the non-performance of the contract is to be adjudicated by the ld. Sole Arbitrator. From the grounds set out in the appeal there were various local issues which were faced from insurgents including threats and letters from extremist groups. According to ld. Sr. counsel for the Appellant these factors constituted *force majeure* which justified non implementation of the project.

22. The Appellant accordingly averred that, it has suffered substantial monetary losses due to the events that took place in the local area. The Appellant was the first party which terminated the contract on 17th August, 2022 and Respondent's termination was subsequently done on 9th December, 2022. The Respondent also invoked the bank guarantees. There is not a single letter on record which even mentions that the consequences of termination would be deemed debarment. A perusal of clause 23.1 would reveal that deemed debarment would happen only when there is a termination due to contractor default. The relevant clause has been extracted below:

> ***"2.1 Termination for Contractor Default***
>
> *23.1*
> *(i) Termination for Contractor Default and Grounds for Default.*
> *(ii) Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be entitled to terminate this Agreement by issuing*

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a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Contractor of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the expiry or such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.

(iii) Cure period.

(iv) After termination of this Agreement for Contractor Default, the Authority may complete the Works and/or arrange for any other entities to do so. The Authority and these entities may then use any Materials, Plant and equipment, Contractor's documents and other design documents made by or on behalf of the Contractor.

(v) ***As a natural consequence of the termination, due to the contractor's failure****, the contractor shall deemed to have been debarred for a period of 2 years and shall not be able to bid any contract of the Authority either singularly or in a JV or its Related Parties"*

23. In this case, the termination was first invoked by the Appellant-Contractor and not the Respondent. There was an obligation on the Respondent to inform the Appellant of the debarment. No notice was issued to the Appellant and no hearing has been held. The notice that was served initially on 12th May, 2022 was only regarding non-performance of contract. Thereafter, after the termination by the Appellant on 17th August, 2022, the Respondent issued another notice on 16th November, 2022 regarding termination of the already terminated EPC Agreement. The facts of each case would have to be seen as to whether the debarment is justified or not.

24. Termination of a contract, on one hand, involves the ending of a contractual agreement between parties for various reasons, such as breach of

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terms or mutual agreement. Debarment on the other hand refers to the exclusion of an individual or entity from participation in certain activities or contracts, often due to misconduct or non-compliance. Debarment encompasses a broader scope than termination, as it can prohibit an entity from entering into any contracts with a company altogether, rather than just ending one specific contract, as is the case with termination.

25. The impugned order of the ld. Sole Arbitrator dated 19th July, 2023, merely records that the issue of debarment and validity thereof would be required to be determined after detailed examination of evidence being led and findings being raised on the controversies. Such an approach could defeat the complete purpose inasmuch as out of the two years period of debarment, the Appellant has already suffered the debarment for more than one and a half years. By the time the arbitration proceedings conclude, the debarment period itself would be over, thus, there may be no way of restituting the Appellant for the opportunity cost during this period.

26. On the other hand, if the debarment is suspended and postponed for the time being, and if the ld. Sole Arbitrator comes to the conclusion that the termination by the Respondent was valid and that the Appellant was responsible for delays and breaches, the debarment can be given effect to at that stage as well. On the other hand, if the ld. Sole Arbitrator comes to the conclusion that there were events beyond the control of the Appellant which could justify the non-performance then there would be no debarment. Therefore, not deciding the issue on the basis that detailed examination of evidence is required would fail the purpose. Further, non-grant of relief at this stage would result in irreparable prejudice to Appellant.

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27. It has been repeatedly held by the Supreme Court and High Courts that *"debarment and blacklisting is in the nature of civil death"* for any person or entity. The inability to conduct business with NHIDCL, which is one of the major entities involved in the construction of highways *etc.*, would cause substantial monetary and commercial loss to the Appellant. Moreover, even in terms of the *MoRTH* circular dated 6th October, 2021, notice has to be given for the purposes of debarring or blacklisting of any party. The relevant clause reads as under:

> "*5.* ***Before deciding a contractor/concessionaire as Non-Performer or debarring/penalizing it, the concerned authority shall issue a notice to the contractor/concessionaire by giving 15 days' time to furnish its written reply and allow personal hearing, if so desired by the contractor/concessionaire, before the competent authority or any person designated for the purpose.*** *Such a notice shall not be issued without the approval of an officer below the rank of Chief Engineer/CGM/ED. In case of projects where public safety is endangered by the behavior/conduct/action of the consultant/ contractor I concessionaire, the authority may temporarily suspend the consultant/ contractor/concessionaire from participating in ongoing/ future bidding upto 1 month period during which the regular process of debarment shall be concluded."*

28. As per the above-mentioned circular, it has been made very clear that issuing of a notice is mandatory in nature in cases of non- performance or debarring/penalizing a contractor/concessionaire. In the present case, a notice pertaining to non- performance and termination does not inherently imply association with the prospect of debarment, and there should have

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been a separate Show Cause Notice issued to the concerned entity/person with respect to debarment.

The Principles of Natural Justice to be followed

29. The law on blacklisting or banning or debarring is very clear and has been fully settled by Supreme Court almost a decade ago in ***Kulja Industries Ltd. v. Western Telecom Project BSNL, (2014) 14 SCC 731*** that blacklisting, debarring, suspension are all similar terminologies. There could be various grounds for debarment or blacklisting, in such cases the compliance of principles of natural justice is of utmost importance. The principles of fairness and proportionality would also have to be considered by the Court while deciding the validity of debarment. The relevant portions of the said judgment have been extracted below:

> *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***

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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. [(1975) 1 SCC 70] 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. [1994 Supp (2) SCC 699 : AIR 1994 SC 1277] ; Patel Engg. Ltd. v. Union of India [(2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] ; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548] ; Joseph Vilangandan v. Executive Engineer (PWD) [(1978) 3 SCC 36] among others have followed the ratio of that decision and applied the principle of audi alteram

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> *partem to the process that may eventually culminate in the blacklisting of a contractor.*
>
> *25. Suffice it to say <u>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.</u>*

30. Similarly, in ***Diwan Chand Goyal v. National Capital Region Transport Corporation and Ors., 2020:DHC:2685***, the Court summarized all the general principles with respect to blacklisting, in the following terms:

> *45. Upon a reading of the aforesaid judgments cited on behalf of both the parties, the general principles, which emerge, with respect to blacklisting are;*
>
> *(a) Principles of natural justice have to be complied with before the order of blacklisting is passed;*
>
> *(b) Natural justice or audi alteram partem does not always require a hearing to be granted. Serving of show cause notice and affording an opportunity to reply to the same, is considered as being adequate opportunity and is sufficient adherence to the principles of natural justice;*
>
> *(c)Blacklisting constitutes civil death and has extremely grave consequences. Thus, the same is amenable the judicial review if the same is by governmental authorities;*
>
> *(d)Any order of blacklisting ought to contain proper reasons. The reasons need not be detailed or elaborate. It is sufficient to be brief, pithy and concise;*
>
> *(e) Reasons should be supplied to the affected party;*

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> *(f) Decision taken ought not to be arbitrary or discriminatory.*
> *(g)Blacklisting orders being amenable to judicial review can be judged on the standard of proportionality. Thus, the period of blacklisting as also terms and conditions thereof have to be proportionate to the irregularities or conduct of the bidder.*

31. A recent decision of Delhi High Court in ***Defsys Solutions Private Limited v. Union of India and Ors.,2023:DHC:6380*** which has been upheld by Division Bench in ***Defsys Solutions Private Limited v. Union of India and Ors. 2023:DHC:8678- DB*** holds that the non-compliance of principle of natural justice, even on national security concerns, would require a higher standard to be followed. The relevant portions of the decision is as under:

> *"53. The aforesaid decisions make it clear that the* ***principles of natural justice ought to be complied with generally and that even if no prejudice is caused following of procedural guarantees is mandatory. It is only when national security concerns overweigh the duty of fairness that the said procedure can be given a go by. In each and every case when the principles of natural justice are not followed, there has to be a justification and merely citing national security considerations is not enough. The material should reveal that there would be national security considerations, justifying non-grant of opportunity of reply or hearing****."*

Enhancing Clarity in Show Cause Notices

32. In ***Gorkha Security Services v. Government (NCT of Delhi) and Others., (2014) 9 SCC 105***, the Supreme Court observed that in a Show Cause Notice, it is mandatory to mention the act of blacklisting or there

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should be a clear inference to this effect, as the purpose of Show Cause Notice is to give a proper hearing to the parties by following the principles of natural justice. The relevant portion of the said judgment has been extracted below:

> ***21.*** *The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the notice 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, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the notice is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained.* ***When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.***
>
> ***22.*** *The High Court has simply stated that the purpose of show-cause notice is primarily to enable the notice to meet the grounds on which the action is proposed against him. No doubt, the High Court is justified to this extent****. However, it is equally important to mention as to what would be the consequence if the notice does not satisfactorily meet the grounds on which an action is proposed.*** *To put it otherwise, we are of the opinion that in order to fulfil the requirements of principles of natural justice, a show-cause notice should meet the following two requirements viz:*
>
> *(i) The material/grounds to be stated which according to the department necessitates an action;*

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> *(ii) Particular penalty/action which is proposed to be taken. It is this second requirement which the High Court has failed to omit.*
>
> *We may hasten to add that even if it is not specifically mentioned in the show-cause notice but it can clearly and safely be discerned from the reading thereof, that would be sufficient to meet this requirement.*

33. In the present case it can be seen that a proper Show Cause Notice was not given which gives the clarity or a clear inference that termination will lead to debarment. In ***UMC Technologies Pvt. Ltd. v. FCI & Anr. (2021 2 SCC 551)*** it has been further settled that any notice for blacklisting or debarment has to clearly specify the reasons and the intention. The same should be particularized and be unambiguous in nature, as blacklisting has civil consequences for future business prospects, and has a domino effect, which can effectively lead to the civil death. The relevant paragraphs of the said judgment are extracted below:

> ***"14.*** *Specifically, in the context of blacklisting of a person or an entity by the State or a State Corporation, the requirement of a valid,* ***particularised and unambiguous show-cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatisation that accrues to the person/entity being blacklisted. Here, it may be gainful to describe the concept of blacklisting and the graveness of the consequences occasioned by it. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts****. This privilege arises because it is the State who is the counterparty in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination.*

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Not only does blacklisting take away this privilege, it also tarnishes the blacklisted person's reputation and brings the person's character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person.

15. *In the present case as well, the appellant has submitted that serious prejudice has been caused to it due to the Corporation's order of blacklisting as several other government corporations have now terminated their contracts with the appellant and/or prevented the appellant from participating in future tenders even though the impugned blacklisting order was, in fact, limited to the Corporation's Madhya Pradesh regional office.* ***This domino effect, which can effectively lead to the civil death of a person, shows that the consequences of blacklisting travel far beyond the dealings of the blacklisted person with one particular government corporation and in view thereof, this Court has consistently prescribed strict adherence to principles of natural justice whenever an entity is sought to be blacklisted***.

Thus, from the above discussion, a clear legal position emerges that for a show-cause notice to constitute the valid basis of a blacklisting order, such notice must spell out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the issuer of the notice to blacklist the notice. Such a clear notice is essential for ensuring that the person against whom the penalty of blacklisting is intended to be imposed, has an adequate, informed and meaningful opportunity to show cause against his possible blacklisting.

xxxx

25. The mere existence of a clause in the bid document,

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which mentions blacklisting as a bar against eligibility, cannot satisfy the mandatory requirement of a clear mention of the proposed action in the show-cause notice……"

34. In ***ACE Integrated Solutions Ltd. v. Food Corporation of India & Anr. 2019 SCC Online Del 8422,*** the Court also assessed a similar question as is involved in the present case *i.e.*, whether the Show Cause Notice issued to ACE was an adequate and specific notice, that it was facing a debarment:

*"**11.** In the present case, a decision on the validity of the debarment order turns upon the validity of the show cause notice issued by FCI to ACE; and whether, by way of the show cause notice so issued, ACE had adequate and specific notice that it was facing possible debarment. The legal position in regard to an action of debarment or blacklisting consequent to issuance of a show cause notice has been clearly enunciated in a recent judgment of the Supreme Court in the case of Gorkha Security Services v. Government (NCT of Delhi) reported as (2014) 9 SCC 105 where the Supreme Court has held as under:*

*14. It is in this backdrop, the question which has arisen for our consideration in the present case is as to whether action of blacklisting could be taken without specifically proposing/contemplating such an action in the show cause notice? To put it otherwise, **whether the power of blacklisting contained in Clause 27 of the NIT, was sufficient for the Appellant to be on his guards, and to presume that such an action could be taken even though not specifically spelled out in the show-cause notice?***

*21. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. **The fundamental purpose behind the***

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serving of show cause notice is to make the notice 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, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the notice is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained.* ***When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action****.*

27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the Appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not suggest that notice could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter."

12. *It is clear therefore that for a show cause notice to be valid as a basis for issuing a blacklisting or debarment order to a contracting party,* ***the notice must spell-out clearly, or its contents be such that it***

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> ***<u>can be clearly inferred therefrom, that there is intention on the part of the person issuing notice that the penalty of blacklisting may be imposed upon the notice.</u>*** *The aim and intent is that a person or entity against whom the penalty of blacklisting or debarment is intended to be imposed must have* ***<u>clear notice and be afforded adequate, informed and meaningful opportunity</u>*** *to show cause against possible blacklisting or debarment.*

35. As per the above stated case, one clearly has to understand the purpose behind issuing a Show Cause Notice. The purpose is to make the contracting party understand the gravity of the case being set up against it, and the punishment that they may face. Accordingly, a proper reply may be given by the contracting party. In the present case, a Show Cause Notice for Non- performance and termination does not give a clear understanding of debarment and the punishment they will face.

<u>Debarment not a necessary sequitur to termination</u>

36. In ***Ace Integrated Solutions Ltd. (supra),*** the Court also held that debarment/blacklisting and termination cannot be merged together and debarment cannot be an automatic consequence or a necessary sequitur to the termination of contract. The relevant portion of the said judgement has been extracted below:

> *"**15.** That apart, Clause 42 deals only with termination of a contract; and debarment must necessarily be conceived-of as a separate and distinct matter. There is nothing to suggest that* ***<u>debarment is intended to be an automatic consequence or necessary sequitur to the termination of a contract, whatever be the reason for termination</u>***. *Debarment cannot be a necessary concomitant of every termination. If a contract were to*

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> *be terminated, say, by reason of prolonged force-majeure by mutual consent as contemplated in clause 44.3 of the Instructions, would debarment follow as a sequitur? **Surely not**.*
>
> ***16.** To be clear, while termination is a mode of ending an existing contractual relationship; debarment or blacklisting is a mode of preemptively disqualifying a party from future contractual relationships. **These are two separate and distinct matters and cannot be rolled into one**. Each must have its own rationale, grounds and procedures, including putting the affected party to specific notice as regards the specific proposed action, even more so when the party proposing the action is a State entity.*"

37. In ***Atlanta Ltd. v. Union of India & Anr.***, ***MANU/DE/1341/2018*** the Division Bench was concerned with a case where a condition in a tender which provided for automatic debarring of a party for 2 years without hearing. The Court held that such a condition is arbitrary and unreasonable as also contrary to law. The relevant paragraphs are set out below:

> *"24. As a result of the discussion above it is held that clause 2.1.19 of the tender conditions is arbitrary and unreasonable to the extent that, in the matter of a case falling under the said clause, it amounts to automatic debarring of the party, from participating in any other tender bid taken out by NHAI for a period of 2 years without a hearing. The condition is, therefore, held to be applicable in other cases of termination, if and only if NHAI or the public agency affords the party a right of hearing against such disbarment and second the disbarment from participating in another tender, due to tender termination in one case, shall be justified only after considering the merits of each case with respect to such other tender. **The court is also of the opinion that such a wide "debarment" condition is***

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> ***disproportionate in that it directs the authority (NHAI) to rule out absolutely consideration of tenders and bids for a period of two years. Termination of contracts can be for various reasons; they may be at the beginning of the contractual period or at the fag end of the completion period***. *Given these variations, treating all contracts alike in regard to the result of debarring the private parties who might have not caused any or at least not caused substantial injury to NHAI"s interest, results in arbitrariness."*

38. A similar view was taken by a ld. Single Bench in ***AL Sudais Haj & Umrah Services v. UOI, 2023 SCC OnLine Del 476***, wherein the Court placed reliance on ***Kulja (supra)*** and analysed the word "*automatically*" and held that mere use of the same, does not infer that the penalty of debarment or forfeiture is to be necessarily imposed. The relevant portion of the same has been extracted below:

> ***42.*** *Turning then to clause 2 of Annexure - II, it would be pertinent to note that the power conferred on the respondent to debar or to forfeit a security deposit cannot possibly be understood as being predetermined penalties which could be said to be inevitable or ineluctable. The mere usage of the word "automatically" also does not lead this Court to conclude that the penalty of debarment or forfeiture is to be necessarily imposed. Those penalties would be warranted provided the circumstances of a particular case or the conduct of a party warrants the imposition of those measures. The doctrine of proportionality applies with full vigor even to an action of blacklisting. This is evident from the following principles enunciated in* ***Kulja Industries****:—*

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*"**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 [(1977) 3 SCC 457 : (1977) 3 SCR 249]; 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] and Dwarkadas Marfatia and Sons v. Port of Bombay [(1989) 3 SCC 293] 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 appellant 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. [(1990) 3 SCC 752]

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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 [(1977) 3 SCC 457 : (1977) 3 SCR 249]. ... 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 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*

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> *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."*

39. The decisions cited by the Respondent *i.e.*, ***M/s. Otik Hotels and Resorts Private Limited v. Indian Railway Catering and Tourism Corporation Ltd. 2016 SCC OnLine Del 5508*** and ***VA Tech Wabag Limited v. Delhi Jal Board 2022 SCC OnLine Del 4610*** presented a different fact situation. In ***VA Tech Wabag Limited (supra)***, the correspondence revealed that debarment was contemplated, a proper debarment Committee was constituted by Jal Board which gave reasons for debarment. The Management Director of the entity concerned was also given a personal hearing on debarment. This is clear from a reading of paragraphs 24 and 25 and the same are extracted below:

> *"**24.** In the present case, the defaults in the maintenance and operation of the Project, were raised well in advance by the DJB, i.e. in 2016 itself. Adequate opportunities were given to the Appellant to rectify the deficiencies. However, the Appellant over a period of 5 years, continued to blame the DJB and the problem did not get resolved. The Debarment Committee itself consisted of a large number of senior officials of the DJB including the member, three chief engineers, one director, one member (Dr) and two senior engineers. The Executive Engineer prepared the*

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note for Debarment Committee. It held meetings on 7th September, 2020, 16th September, 2020 and 28th September, 2020. In the last meeting, the Managing Director of the Appellant was even given personal hearing. The minutes of the debarment committee meeting are as follows:

> *The third debarment committee meeting was held on 28.09.2020 wherein Sh. Rajiv Mittal, Managing Director, M/s. VATech Wabag Ltd. attended the meeting and contested the case before the committee. The firm raised the issue of sulphide contents, excess flow at the STP, requirement of sludge beds for sludge disposal and force majeure etc.*
>
> *The committee heard the views of firm intently. But the firm was unable to satisfy the committee with concrete reasons behind the non-operation of electrical and mechanical equipments at the plant, its inability to stabilize the power generation, and its inability to achieve the treated effluent parameters on regular basis.*
>
> *It was also informed to the committee that Delhi Pollution Control Committee (DPCC) vide its notice dated 18.09.2020 have issued Show Cause Notice to the firm under section 33(A) of Water (Prevention and Control of Pollution) Act, 1974 and u/s 31(A) of Air (Prevention and Control of Pollution) Act, 1981. It was further brought to the notice of the debarment committee that Yamuna Monitoring Committee appointed by Hon'ble NGT have also vide their communication dated 21.09.2020 informed about malfunctioning of this sewage treatment plant.*
>
> *The debarment committee after due deliberation and reviewing the present*

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> *performance of the executing agency M/s. VA Tech Wabag Ltd., which is operating & maintaining 45 MGD STP Kondli Phase-IV, recommends debarment of M/s. VA Tech Wabag Limited from participating in any future bids/tenders/works to be undertaken by Delhi Jal Board for next 3 (Three) years.*
>
> ***25.** Thus, the broad procedure, which has been placed on record, under the DJB's Broad guidelines for processing of cases regarding blacklisting of firms in E&M wing, 2015 has been clearly followed by the DJB. Thus, it cannot be alleged that the required procedure was not followed by the DJB."*

40. In ***M/s. Otik Hotels (supra)*** the Appellant who was a caterer with the IRCTC had not paid the required security deposit and license fee. After the award letter were communicated, if a successful bidder failed to deposit even the security deposit and license fee, debarment for 1 year was contemplated in the clause which was upheld by ld. Single Judge. In Otik Hotels the clause was clear as to the effect of non-deposit.

41. In the present case, the proceeding before the Guwahati High Court as also the order dated 1st December, 2022, passed in Section 9 petition, where stay was sought from the invocation of the bank guarantee, make it clear that the reasons for refusal of relief under Section 9 was due to the pendency of litigation before the Gauhati High Court and various other local factors prevalent then.

42. However, the situation at present is that the parties are already in arbitration. The Respondent has taken a stand that the termination results in automatic debarment of 2 years under clause 23(1)(5). The Show Cause

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Notice issued by NHIDCL on 12th May, 2022 is a notice to declare the Appellant to be a non-performer due to slow progress and poor planning of work. In the said notice, reference is made to the circular dated 6th October, 2021. The said notice does not state anywhere that the Appellant is being debarred.

43. Under clause 23.1, whether there is Contractor's failure or not is yet to be determined. Moreover, the Appellant has been debarred since 18th September, 2022 and a substantial period of debarment has been suffered by the Appellant. The declaration of non-performer also has a cascading effect on the Appellant. The existence of the same on the website would mean that the Appellant would have to reveal in all other Government contracts, the fact that it has been debarred or blacklisted by NHIDCL. Debarment and blacklisting would also thus have a domino effect and the same is not only restricted to NHIDCL.

44. **In the light of the settled legal position discussed above as also the facts of the present case which show that the Appellant's justification for non-performance requires to be adjudicated, the impugned order deserves to be set aside. The Appellant shall not be treated as non-performer or a debarred entity. The said declaration on the website of the NHIDCL shall also be removed within a week**.

45. The facts which have been presented, do show that there were some disturbances in the local areas leading to invocation of the force majeure clause and a PIL was also heard before the Guwahati High Court. These issues require detailed examination. The above shall, however, be subject to the final decision in the arbitral proceedings on the question of non-performance, breach, illegality and validity of termination *etc*. The present

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judgment would not affect the final adjudication in the arbitral proceedings. Depending on the findings on the issue of breach and termination in the arbitral proceedings, the decision on debarment shall be taken by the ld. Sole arbitrator. At that time, the period of debarment already suffered by the Appellant shall also be accounted for.

46. The appeal is accordingly allowed. All pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

APRIL 10, 2024
dj/ks

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