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

Judgment reserved on: 01.10.2021.
% Judgment delivered on: 01.06.2022.

\+ **W.P.(C) 10369/2021 and CM Nos.31899/2021 & 33396/2021**

CJDARCL LOGISTICS LTD. ..... Petitioner

Through: Mr. Anil Goel and Mr. Aditya Goel, Advs.

versus

RITES LTD AND OTHERS ..... Respondents

Through: Mr. G. S. Chaturvedi and Mr. Shrinkar Chaturvedi, Advs. for R-1.

Mr. Rajshekhar Rao, Sr. Adv. with Mr. Nakul Mohta, Mr. Parminder Singh, Ms. Misha Rohatgi Mohta, Mr. Raghav Kacker, Mr. Pranjit Bhattacharya, and Ms. Moghna, Advs. for R-3.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T O F T H E C O U R T

1. The petitioner has preferred the present writ petition seeking directions to the respondent No.1 to cancel the bids of the respondent No.3 and, consequently, for awarding the tender to the petitioner on account of being the L1 bidder. The substantial payer from the Writ petition is here under:

"It is therefore, most respectfully prayed that by way of appropriate writ/orders/directions, the Respondent No. 1 may be directed to cancel the bids of the Respondent No. 3 and in pursuance thereto the respondent no. 1 may be restrained from awarding any contract/work, to the respondent no. 3 in respect of tender no. 2021/ RITES/ EXPO/MOZ/ COACH/0821 and further the Respondents No. 1 and 2 may be directed to grant the said tender to the petitioner, being the second lowest bidder."

2. The petitioner is a company engaged in the business of logistics and transportation of goods across India by Road and Rail.

3. The respondent No.1 is RITES Ltd., a government of India Enterprise, and a company registered under Companies Act, 1956 that is directly under control of the Ministry of Railways, which is respondent No.2 in the present petition.

FACTUAL MATRIX

4. Respondent No.1 floated an E- Tender dated 30.08.2021, for engagement of freight forwarder for transportation of export project (cargo consisting of 34 nos. Passenger Coaches ex. MCF, Raebareli, UP and approx. 200 CBM of spares ex. MCF, Raebareli, UP/RITES Warehouse, Delhi via Mumbai Sea port to Maputo Sea Port, Mozambique on CIF basis).

5. The petitioner participated in the tender. The terms and conditions laid down in clause 2 of the tender document provided certain grounds for disqualification, even for those bidders who may otherwise meet the qualification criteria as laid down in the tender document. The grounds for disqualification read as follows:

"2. ***DISQUALIFICATION ON CERTAIN GROUNDS***

Even though the Bidders may meet the above qualification criteria, they are subject to be disqualified if they have

a) Concealed any information/document which may result in the Bidder's disqualification or if any statement/information/document furnished by the Bidder or issued by a Bank/Agency/Third party and submitted by the Bidder, is subsequently found to be false or fraudulent or repudiated by the said Bank/Agency/Third Party. In such a case, besides Bidder's liability to action under para 9 of Instructions to Tenderers, the Bidder is liable to face the penalty of banning of business dealings with him by RITES.

b) Records of any contract awarded to them, having been determined during the past three years prior to the deadline for submission of bids.

c) Been declared as Poor Performer by RITES and their name is currently in the 'Negative List' of RITES.

d) Their business banned or suspended by any Central/State Government Department/ Public Undertaking or Enterprise of Central/State Government and such ban is in force.

e) Non submission of all the supporting documents or not furnished the relevant details as per the prescribed format.

f) A declaration to the above effect in the form of affidavit on stamp paper of Rs.10/-duly attested by Notary/Magistrate should be submitted as per format given in Proforma3 enclosed."

6. The case of the petitioner is that the respondent No.1, in an erroneous manner, first opened the commercial bids and subsequently the technical bids of the bidders, pursuant to which respondent No.3 was declared as L1 bidder, while the petitioner company was declared L2 as bidder.

7. The case of the petitioner is that respondent No.3 was liable to be disqualified, as they were banned by the Ministry of Defence vide letter dated 04.03.3021 for one year w.e.f 19.02.2021, and by PSU M/s Food

Corporation of India, Vijayawada vide the banning order dated 30.03.2021 for a period of 5 years.

8. The petitioner stated that in order to win the tender, respondent No.3 had deliberately suppressed the said two banning orders, and submitted a false declaration as per clause 2 of the Tender document. Despite the respondent No.1 being made aware of the said suppression and misdeclaration by respondent No.3, the respondent No.1 has still cleared the technical bid of the respondent No.3; declared them as the L1 bidder in contravention to their own tender conditions, and; proceeded to award the contract to respondent No.3.

9. Aggrieved by the said action of the respondent No.1, the petitioner first made a representation before them on 10.09.2021. Thereafter, the representatives of the petitioner also met with the Technical Director and officiating CMD of respondent No.1 on 13.09.2021 and 15.09.2021 respectively. Since the petitioner did not receive any positive response, nor any personal hearing, it preferred the present writ petition to seek the reliefs aforesaid.

10. When the matter came up before this court for preliminary hearing on 16.09.2021, this Court issued notice to the respondents. The respondent No.3 appeared through their counsel, and wished to rely on a compilation of documents to show that the banning orders had been set aside or stayed. Respondent No.3 claimed that there was no obligation to disclose the same, and there was no suppression, or misstatement. Time was granted to the served respondents to file their counter affidavits before the next date of

hearing. The court also ordered maintenance of *status quo* with regard to the award of the tender and work to be performed there under.

11. The respondents filed their respective counter affidavits. Respondent No.1 has defended its action, stating that the contract was already awarded to the respondent No.3 on 06.09.2021, whereas the petitioner had preferred its representation on 10.09.2021. In any event, the respondent No.1 had sought clarifications from respondent No.3 on the objections raised by the petitioner. In reply to the communication, respondent No.3 had presented three orders. First was the order of this court in W.P (c) No. 5347/2021 dated 25.05.2021, whereby the banning order of The Defense Ministry was stayed. The Second order was of the Andhra Pradesh High Court dated 17.06.2021, in W.P (C) 8410/2021, whereby the termination order dated 30.03.2021, of the Food Corporation of India, was remanded back, on the ground of violation of Principles of Natural Justice. Third, the order of the High Court of Andhra Pradesh Order dated 30.07.21 in W.P (C) 15378/2021 was produced, whereby, the respondent No.3 was '*permitted to participate in the tender bids other, than the tender floated by the Food Corporation of India*'. The case of the respondent No.3 is that by virtue of these orders, there was no blacklisting in force against them, when they submitted their bids. Therefore, they were true in their declaration.

12. Respondent No.1 has further clarified that as per clause 12.12, 12.13 and 20 of the Bid document, the tender in question was a single packet tender, where the technical bids and commercial bids were to be opened at the same time. The relevant clauses of the tender are reproduced below:

"*12.12* ***SINGLE PACKET SYSTEM***

Envelope 1 containing scanned copy of Bid Security Declaration ~~Earnest Money~~ along with Mandate Form as per Annexure VIl, Cost of tender document of all the Tenderers and Authority (Sign as per Clause 11.0 will be opened first and checked. If Bid Security Declaration ~~Earnest Money~~ and Cost of Tender Document are not furnished as per tender stipulations, the Envelope 2 of technical bid and Envelope 3 containing financial bid will not be opened and the bid will be rejected as non-responsive unless the bidder has established that it is exempted from payment as per para 7 (f) of Cost of Tender Document and ~~Earnest Money Deposit~~ Bid Security Declaration. The Envelope 2 containing Technical Bid and Envelope 3 containing Financial Bid of other only those Tenderers who have furnished scanned copies of ~~Earnest Money~~ Bid Security Declaration and cost of Tender document as per tender stipulations will then be opened.

12.13 ***TWO PACKET SYSTEM***

Not applicable."

13. It was further submitted by the respondent No.1 that the above procedure, as laid down in the bid document, was followed. First, the Technical Bids were opened and, subsequently, the Commercial bids were opened on the same date i.e., 03.09.2021. The present tender was an online tender, where bids submitted by the bidder within the prescribed time were opened on the pre-notified time and date, and the representatives of each tenderer had the facility to view, through the CPP, the technical bids of bidders who had participated in the tender, and whose bids were opened. It was further clarified that there was also a provision for the petitioner to be present during the opening of the bids, as well as during the pre-bid meeting. However, none of the bidders attended the same.

14. In the same line, respondent No. 3 has also relied on the High Court orders; the tender opening summary document, and; the relevant clauses of the bid document, in its defense.

15. The respondent No.1, along with its counter affidavit, had also preferred CM APPL.33396/2021 to seek vacation of stay, on the ground that the nature of the project required strict timelines to be followed and any delays would derail the entire process of dispatch of the export consignment. The respondent no.1 submitted that the tender in question was for transportation of an export consignment of 34 passenger rail coaches to Mozambique, where strict time lines had been stipulated and at that moment, officials and delegates of Mozambique were already on inspection of the facility of the Govt. at MCF, Rai Bareilly, in order to assess the readiness for dispatch of the export consignment. It was extremely essential that the formalities relating to loading and other documentation with respect to the consignment were undertaken in time, as any failure in doing so would lead to the cancellation of an international export tender by the Govt. of Mozambique, leading to loss of image and reputation of the country. Reliance was placed on the delivery schedule as per the tender document, which has been reproduced below:

"DELIVERY SCHEDULE

The important details about the goods to be shipped, shipping terms etc. as per the Contract Agreement is given hereunder:

SN	***Deliverables***	***Timeline***	***Remarks, if any***
1.	*Submission of methodology along with design and drawing for*	*D + 7*	*In case of delay, penalty will be levied*

	lifting *a) Lifting and loading of Coach Upper & Bogies at MCF* *b) Lifting and loading of Coach Upper & Bogies at Mumbai Sea Port (Including unloading, arrangements from trailers in case of delay in ship)* *c) Unloading of Coach upper and bogies at Maputo Sea port, Mozambique.*		*after 7 days as per clause no. 11*
2.	*Supply of Lifting arrangement at MCF*	*D + 15*	*In case of delay, penalty will be levied after 15 days as per clause no. 11*
3.	*Transportation by Road*		
3.1	*Inland transportation of Coaches to Mumbai Sea port*	*5 days from the date of advice*	*In case of delay, penalty will be levied after 5 days as per clause no. 11*
3.2	*Inland transportation of Spares to Mumbai Sea port*	*2 days from the date of advice*	*In case of delay, penalty will be levied after 2 days as per clause no. 11*
4.	*Transportation by Sea*	*30 days*	*In case of*

	(sea Freight) to Maputo, Mozambique	*from CRN*	*delay, penalty will be levied after 30 days as per clause no. 11*

Note:

i) It will be endeavoured to provide the Coaches in Lot size of about 12 coaches+/- 2 coaches.

ii) Quantity of Passenger Coaches in LOT shall be advised along with Cargo Ready Notice (CRN).

iii) Coaches shall be offered in two/ three lots."

16. This court, on 24.09.2021, issued notice on the application and granted the petitioner two days' time to file its response. The court also directed respondent No.1 to place before the Court, the original record containing the consideration of the technical and financial bids in sealed cover, one day before the next day of hearing.

17. The petitioner through its rejoinder averred that the respondent No.1 – by awarding the tender to respondent No.3, was in utter violation of their own tender conditions, particularly of clause 2 of the Tender conditions, reproduced above. Reliance was also placed on the language of the declaration form of the Bid document for its true meaning, scope and intent. The petitioner reiterated that the respondent No.3 was technically disqualified.

18. The petitioner also averred that the respondent no.3 had concealed multiple other such instances where it was banned, or the contract had been terminated by the tendering authority. The petitioner stated that respondent No.3 had concealed that its contract with Ministry of Defense was

terminated vide its own letter dated 28.05.2019. The respondent No.3 had also not disclosed that one other contract was terminated by the Ministry of Defense on 08.05.2021. Hence, these two tenders stood determined in the years 2019 and 2021. Non-disclosure as of these determinations clearly made respondent No.3 liable for disqualification.

19. Additionally, the petitioner submitted that a perusal of the High Court order dated 30.07.2021 shows that the banning order/ termination order issued by FCI against the respondent No.3, had not been stayed. The interim relief granted to respondent No. 3 on 30.07.21, reads as follows

> *"In the meanwhile, having regard to the submission of learned counsel for petitioner, the petitioner is permitted to participate in the tender bids other than the tenders floated by the Food Corporation of India."*

20. Hence, as on date of submission of the bid in the present tender, the banning order was in full- force in context of Food Corporation of India, and by virtue of that, the declaration by respondent No.3 that its business dealings were not banned, or not suspended by any Central/ State Government Department/Public Undertaking or Enterprise of Central/ State Government, was false, and would amount to deliberate suppression and misstatement.

21. The crux of the petitioner's argument lies in the language of the tender declaration form, read with clause 2 (b) in the disqualification criteria. It was submitted that as per the declaration form, the respondent No.3 had to declare if any of its contracts had been determined, or banned, or suspended. In the letter dated 28.05.2019 referred above, respondent No.3 had written to the Ministry of defense that they would not be able to perform the work

under the said tender, and had withdrawn their bid. The said communication by respondent No.3 amounted to determination of the contract, which the respondent No.3 was bound to disclose.

22. In light of these averments, vide our order dated 28.09.21, we directed respondent No.3 to file an additional affidavit making full and complete disclosure about the cases in which the respondent No.3 had entered into a contract, and thereafter the contract was not performed. - for whatever reason. They were also required to disclose the reasons for non-performance of the contracts, or any debarment, along with supporting documents for the previous three years, prior to 03.09.2021. However, we vacated the order of *status quo* in the light of the urgency for execution of the contract placed before us.

23. The reasons disclosed by respondent No. 3, supporting the grant of the tender in question, in its favor, has been tabulated by respondent No. 3 in its additional affidavit dated 30.09.21, which is reproduced below:

"

S. NO	***Tendering Authority***	***Whether Contract executed in favour of SARR***	***Whether Banning Order passed or not***	***Reason for banning Order***	***Whether the banning order has been stayed/set aside.***	***Remarks***
1.	*Integrated HQ Ministry of*	*No*	*Yes* *Banning Order dated*	*Negotiations between the Parties before the*	*Operation of the Banning Order has*	*(i) Condition 2(b)* ***is not triggered*** *since no*

	Defence, Khamaria Ministry of Defence(IHQ,MoD) *RFP No. 71362/COE/MONUS* *CO & UNMISS/ SD- 3B* *(UN LGS) dated* *12.3.2019*		*19.02.2021 (communicated on 11.05.2021).*	*signing of the contract did not fructify. Therefore, no contract was signed.*	*been stayed by this Hon'ble Court vide Order dated 25.05.2021 in WP(C) No. 5347/2021.*	*contract was executed between SARR and IHQ, MoD.* *(ii) Condition 2(d)* ***is not triggered*** *since the banning order is not in force because it has been stayed by this Hon'ble Court.*
2.	*Ordinance Factory Khamaria Ministry of Defence (OFK ,MoD)* *Tender/Contract No.* *GEMC-*	*Contract was signed on 17.04.2021*	*NO*	*Not Applicable*		*Not Applicable*

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3.	*Engineers India Ltd. (“EIL)*	*No*	*Yes Banning Order dated 25.06.2018*	*SARR purportedly submitted a wrong certificate in the bid submitted for the Tender*	*Banning Order was set aside by Judgment dated 31.07.2018 of this Hon’ble Court.* *Liberty was granted to EIL to issue a Fresh Show Cause Notice.* *No fresh banning Order was passed by EIL pursuance to the liberty granted by this Hon’ble Court in its Order dated*	*(i) Condition 2(b) **is not triggered** since no contract was executed between SARR and EIL.* *(ii) Condition 2(d) **is not triggered** since there is no banning order in existence. No fresh proceeding/ banning Order was passed by EIL pursuant to the liberty granted by this Hon’ble Court in its Order dated*

					31.07.2018.	*31.07.2018.*
4(a)	*Food Corporation of India ("FCI)* *Tender no. S&S.16(3) /2020-21/VIZAG - PB/MMTC/Sales dated 02.12.2020*	*No*	*Yes* *Banning/Termination Order dated 30.03.2021.* *The Order also states that it is a "Termination Order"*	*SARR did not execute the contract because of non-compliance by FCI to comply to its own circular and the Government of India's circular in regards to reduction of performance security.*	*Set aside by the Hon'ble High Court of Andhra Pradesh vide Order dated 17.06.2021.* *The High Court granted liberty to FCI to pass appropriate orders after giving fresh Show cause notice.*	*(i) Condition 2(b) **is not triggered** since no contract was executed between SARR and FCI.* *(ii) Although the Banning Order dated 30.03.2021 purports to be also a "Termination Order", factually no contract was executed between the parties and the work order was not issued.* *(iii) Further, in any case,*

						the Banning order and Termination Order dated 30.03.2021 was set aside by the Hon'ble High Court of Andhra Pradesh vide Order dated 17.06.2021. *(iv) FCI vide its letter dated 18.06.2021 itself withdrew the banning/termination letter dated 30.03.2021 and while giving a fresh offer directed SARR to furnish Security Deposit pursuant to*

						which Work Order would be issued. *(v) Condition 2(d) is not triggered since the banning order has been set aside by the Hon'ble High Court of Andhra Pradesh vide Order dated 17.06.2021 and thereafter withdrawn by FCI vide its letter dated 18.06.2021.*
(b)	*Food Corporation of India ("FCI)* *Tender*	*NO*	*Yes Banning/Termination Order dated 19.07.2021*	*Firstly, Fresh Offer by FCI after expiry of the bid and*	*The Hon'ble High Court of Andhra Pradesh vide Order*	*(i) Condition 2(b) **<u>is not triggered</u>** since no contract was executed*

	no. S&S.16(3) /2020-21/VIZAG - PB/MMTC/Sales dated 02.12.2020			*retendering (in which SARR did not participate) of the same tender was not acceptable to the Respondent. Secondly, FCI again failed to comply to its own circular and the Government of India's circular in regards to reduction of performance security.*	*dated 30.07.2021 permitted SARR to participate in Tender bids other than those floated by FCI.*	*between SARR and FCI as the fresh offer was not accepted by SARR. No work Order has been issued.* *(ii) In any case, for the purpose of participation in subject Tender, order is deemed to not be in force pursuant to the Order dated 30.07.2021 of the High Court of Andhra Pradesh.* *(iii) Condition 2(d)* ***is not triggered*** *since the*

						banning order us deemed to be not in force for the purpose of participation in subject Tender pursuant to the Order dated 30.07.2021 of the High Court of Andhra Pradesh.

”

24. The petitioner submitted that respondent No.3, by making a false declaration and by suppressing the correct position, had illegally secured the contract, to the detriment of not only the petitioner, but also to the detriment of Public Interest. The petitioner submitted that respondent No.3 cannot be permitted to retain the fraudulently and illegally derived profits from the contract, and the ill-gotten profits should be disgorged from respondent No.3. In support of this submission, reliance was placed on the Judgment in ***Subash Projects and Marketing Ltd. Vs. West Bengal Power Development Corporation Ltd. And Ors,*** (2005) 8 SCC 438, relevant extracts whereof are reproduced below***:***

"*1. These appeals arise from Writ Petition No.886 of 1997 filed by M/s Larson & Toubro ('L & T' for short), in the High Court of Calcutta. Respondent No.11 in the Writ Petition M/s Subhash Projects and Marketing Limited ('Subhash Projects' for short) was the contesting respondent. By judgment dated 3.10.1997, a learned single Judge of the High Court dismissed the Writ Petition. The Writ Petitioner thereupon filed appeal No. 559 of 1997 before the Division Bench. By judgment dated 14.7.1998, the Division Bench came to the conclusion that the appeal was liable to be allowed and the Writ Petitioner granted relief. Still, it did not grant the full relief to the Writ Petitioner, the appellant before it, but directed the contesting respondent, Subhash Projects, to pay a compensation of Rs.1 crore to the Writ Petitioner. This was on the finding that the contract based on the tender floated by respondent No.1, the West Bengal Power Development Corporation Limited (hereinafter referred to as 'the Power Corporation') ought to have been awarded to the writ petitioner-L & T and the award of the same to respondent No.11 Subhash Projects was illegal, but it was inexpedient at that stage to set aside the award of the contract and the least that should be done was to direct Subhash Projects to disgorge at least some portion of the profit it would have earned out of the illegally awarded contract and make over the same as compensation to the writ petitioner-L & T, who ought to have been awarded the contract.*

x x x x x x

12. Thus, on a reappraisal of the relevant materials in the light of the submissions before us, we are not satisfied that any interference is called for with the judgment of the Division Bench in these appeals. Since we are inclined to agree with the conclusion of the Division Bench that the award of the contract to Subhash Projects was not legal, we see no reason to interfere with the course adopted by the Division Bench in the matter of awarding compensation to L & T payable by Subhash Projects. We also find the sum fixed reasonable and to the advantage of Subhash Projects. We are not inclined to entertain the plea of L & T in its appeal that the award of the contract to Subhash Projects itself must be set aside and the contract directed to be

awarded to L & T or to order a fresh tender to be invited for the work. The adopting of such a course would be counter productive in the circumstances, considering the nature of the project and the steps that had already been taken and the completion of the project itself during the pendency of these appeals.

……."

SUBMISSIONS:

25. Mr. Rajshekhar Rao, learned senior counsel appearing for the respondent No.3, has submitted that as far as the contract with the Ministry of Defense is concerned, there was no concluded contract. Hence, there was no question of it being determined. The general practice in executing the contract document involves, negotiations – even after the Letter of award has been issued, and only once the negotiations are over, the final contract is executed. Since no contract was executed with the Ministry of Defense, there was no question of any determination.

26. In the context of the Banning order issued by the Food Corporation of India, he submits that the 'Declaration Form' contemplated the bidder to answer- whether, they were black listed for RITES i.e., respondent No.1 or not, and since the respondent No.3 was never blacklisted in regard to tender of RITES – as per the Order of the High Court, in their understanding, they had rightly submitted the declaration. Vide the order dated 30.07.21, the Andhra Pradesh High court had permitted the respondent No.3 to participate in the tenders, except the tenders floated by FCI. The intention of the respondent No.3 was not to conceal any information, rather the intention was to strictly comply with the format of the bid.

27. He has further submitted that the format of the declaration was fixed, and every bidder was obligated to give the declaration, in the same format. The respondent No.3 had no option to alter/amend the declaration, and they were bound to strictly comply with the format of the bid. Therefore, the respondent No. 3 filled the declaration in the format as provided by respondent No.1. It was further submitted that the given format did not contemplate for any further details, nor it provided for any specific disclosures in context of stay orders operating on banning orders. The answer to the question was to be provided in a 'Yes/No' format. Since there was no mechanism for additional clarifications or explanations, they could not explain the underlying circumstances.

28. It was further submitted that if the declaration form of respondent No.1 had desired additional information or clarificatory statements, then the format would have provided a mechanism for disclosure of such additional information. He further submitted that a party could not be penalized for lack of clarity in the format of the declaration form issued by respondent No.1.

29. However, when the respondent No.1 sought clarifications, the same were provided to them by the respondent No.3, with all particulars and relevant details, which have been duly accepted by the respondent No.1 i.e the Tendering authority.

30. It was further submitted that the interpretation of the Tender document by the respondent No. 1 is also the same, as the interpretation adopted by the respondent No.3. Hence, unless this interpretation is found to be perverse or *mala fide*, no interference would be called. He has placed reliance on the

Judgment in ***Cartel Infotech Limited Vs. Hindustan Petroleum Corporation Ltd. And Ors.,*** (2019) 14 SCC 81**.**

31. We have considered the submissions of the counsels and perused the relevant documents and clarifications. The question that arises for our determination is: Whether respondent No.3 has furnished false and self-serving undertakings in the declaration form, and if so, whether the furnishing of the correct information would have lead to its disqualification in terms of Clause 2 of the qualification Criteria?

32. It is imperative to look at the form along with disqualification clause of the tender document. A conjoint reading of the clause and the form paints a clear picture regarding the impressed intent of the Tendering Authority. The relevant extract of clause 2 of the Bid Document, enumerating the disqualification criteria, and relevant parts of the Bid declaration form have been reproduced herein below:

> "2. ***DISQUALIFICATION ON CERTAIN GROUNDS***
>
> ***Even though the Bidders may meet the above qualification criteria, they are subject to be disqualified if they have***
>
> *a) Concealed any information/document which may result in the Bidder's disqualification or if any statement/information/document furnished by the Bidder or issued by a Bank/Agency/Third party and submitted by the Bidder, is subsequently found to be false or fraudulent or repudiated by the said Bank/Agency/Third Party. In such a case, besides Bidder's liability to action under para 9 of Instructions to Tenderers, the Bidder is liable to face the penalty of banning of business dealings with him by RITES.*
>
> *b) Records of any contract awarded to them, having been determined during the past three years prior to the deadline for submission of bids.*

c) Been declared as Poor Performer by RITES and their name is currently in the 'Negative List' of RITES.

d) ***Their business banned or suspended by any Central/State Government Department/ Public Undertaking or Enterprise of Central/State Government and such ban is in force.***

e) Non submission of all the supporting documents or not furnished the relevant details as per the prescribed format.

f) A declaration to the above effect in the form of affidavit on stamp paper of Rs.10/-duly attested by Notary/Magistrate should be submitted as per format given in Proforma3 enclosed." (emphasis supplied)

DECLARATION BY THE BIDDER

"ii) We have neither concealed any information/document which may result in our disqualification nor made any misleading or false representation in the forms, statements and attachments in proof of the qualification requirements;

iii) During the past three years prior to the deadline for submission of bids, no contract awarded to us has been determined.

iv) ***No Central/State Government Department/ Public Sector Undertaking or Enterprise of Central/State Government has banned/ suspended business dealings with us as on date.***

vii) The information and documents submitted with the Tender and those to be submitted subsequently by way of clarifications are correct and we are fully responsible for the correctness of the information and documents submitted by us."

(emphasis supplied)

33. As far as the contract with The Ministry of Defense is concerned, after being declared as the L1 bidder, respondent No.3, within 11 days sought termination of their contract vide its letter dated 28.05.2019, on the ground that the calculations – based on which it had placed the bids and emerged successfully as L1 bidder, were incorrect. From a perusal of order

dated 25.05.2021 passed by the Single Judge in W.P (C) 5347/2021, it is clear that on 19.2.2021, the Department of Defense production suspended all business dealings of respondent No.3 with the integrated headquarters of the Ministry of Defense for a period of 1 year, or until further orders. The same order further led to termination of another contract of respondent No. 3, on 08.05.2021. The respondent No. 3 had sought to challenge the termination order 19.2.2021 in the above-mentioned Writ Petition. However, the same had not been set aside till the respondent No.3 submitted its bid with the declaration form vis-à-vis the present tender. None of this has been disclosed by the respondent No.3 in its declaration. The order dated 19.02.2021 is nothing but a blacklisting order, and that is what it purports to do in the light of the conduct of respondent No.3. The respondent No.3 could not have held back this material information. Doing so was a clear case of suppression and false statement on the part of respondent No.3.

34. A plain reading of the disqualification clause shows that all bidders were required to disclose any contract, where the award was determined i.e., cancelled. The termination of the contract by respondent No.3, and the subsequent termination letter date 08.05.2021 tantamounted to determination of the contract. It is fallacious for respondent No.3 to contend that even after it had been declared the L-1 bidder, there was no binding obligation created on it qua the said tender, and it could walk out of the tender on the specious plea of committing a mistake in submitting its bid. The offer made by respondent No.3 in response to the tendering process could not have been casually withdrawn without consequences. The respondents, on 19.02.2021 decided to suspend all dealings with respondent No.3. This was nothing

short of "determination" and blacklisting/ debarment. This development is squarely covered within the disqualification criteria of clause 2, and should have been disclosed in its declaration by respondent No.3. The interpretation as advanced by respondent No.3 is self-serving, and clearly contrary to the tender terms. The question was not whether the formal execution of the contract document was undertaken. The question was, whether there was, in existence, a Backlisting Order – which clearly was.

35. The said orders, if had been communicated to respondent No.1, it would have found respondent No. 3 as disqualified under the tender conditions. The purpose behind such disclosure of blacklisting orders and termination of contracts, is not far to see, as no tendering authority would like to deal with entities which are incapable of satisfying contractual obligations, or have had a chequered past wherein they were blacklisted, or were unable to perform the task they undertook.

36. As regards the second order issued by the FCI, there was a banning order issued by FCI dated 19.07.2021. The Court order dated 30.07.2021 permitted the petitioner to participate in tenders by other authorities, except that of FCI, thereby clearly debarring them from participating in the tenders floated by FCI. Thus, there was no stay of the said banning order issued by the FCI. The said Information ought to have been disclosed, but was also not disclosed by respondent No.3 in its declaration.

37. A reading of the Clause 2 and the declaration form clearly brings out that the express intention of the tendering authority was to require the bidder to disclose any existing suspension/banning order in context of any other government/ PSU tender. It is clear that all the bidders were bound to

comply with the same. Even if we were to ignore the status of all other tenders – which were awarded to the respondent No.3, and of which we have made reference hereinabove, and give them the benefit of the doubt, the order dated 30.07.2021 clearly debars the respondent No.3 from participating in any tenders floated by the Food Corporation of India, which was not disclosed by respondent No.3.

38. The submission of the respondent no. 3 that they could not have changed the format of the Declaration form and, consequently, could not have explained the underlying circumstances in the context of each of the tenders, is evidently misplaced. The contention with regard to non- existence of a provision of providing additional documents also does not impress us. Firstly, the answer to the query vis-à-vis the FCI tender was a straight forward "yes" to the query: whether the petitioner has been banned by any Central/ State Government Department/ PSU. The same was the position qua the debarring by the Ministry of Defence. Secondly, there exist active communication channels between the tendering authorities and the prospective bidders after a tender is floated and, in some cases, there are pre-bid meetings. The pre-bid meeting is an opportunity for each bidder to seek clarification on all their doubts, which was not availed of by the respondent No.3. In any case, each bidder has to strictly follow the format and answer all the questions in light of existing facts, truthfully. Therefore, the respondent No.3 was bound to disclose all their banning orders, and non-disclosure by them – at least, of the aforesaid two banning orders, was clearly an attempt to hide the true correct factual position with an intent to steal a march, despite being disqualified, and upset the level playing field.

39. The interpretation advanced by the respondent No.3 that, by virtue of status quo orders, the banning order ceases to be in force, has no merit either. The fact that there was a stay order operating on any of the banning orders, does not efface the existence of those orders. The stay orders are, clearly, only interim orders. The respondent was obligated to disclose the existence of status quo orders. In any case, the respondent No.3 made no endeavor to disclose the facts – either by filling an affidavit, or to seek clarifications during the pre- bid meeting. It appears to us that the respondent No.3 has adopted its own self-serving and convenient interpretation of the Declaration, which is contrary to the plain language, and all canons of commercial prudence, equity and fair play.

40. The Judgement relied on by Mr. Rao in ***Cartel Infotech*** (Supra) renders no help to the case of respondent No.3, as it pertains to non-disclosure of the show cause notice. The show cause notice had not attained finality in that particular case, and there was no express banning order against the appellant. Since there was no finality in that regard, there was a possibility of the show cause notice being withdrawn. Therefore, there was no necessity to disclose the same. The facts of ***Cartel Infotech (Supra.)*** are very different from that of the present case, and the same is of no avail to respondent No.3. In the present case, the Declaration form clearly envisaged disqualification in case of concealment.

41. We are also supported in our view by the Judgement in ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd***., (2016) 16 SCC 818**,** where the Supreme Court has held as follows

"14. We must reiterate the words of caution that this court has stated right from the time when ***Ranama Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489*** *was decided almost 40 years ago, namely that the words used in a tender document cannot be ignored or treated as redundant or superfluous- they must be given meaning and their necessary significance…"*

42. We are supported in our view by the judgment of the Supreme Court in ***Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)***, (2016) 8 SCC 622, wherein it was observed:

"***35. It was further held that if others (such as the appellant in Ramana Dayaram Shetty case [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489]) were aware that non-fulfilment of the eligibility condition of being a registered IInd class hotelier would not be a bar for consideration, they too would have submitted a tender, but were prevented from doing so due to the eligibility condition, which was relaxed in the case of Respondent 4. This resulted in unequal treatment in favour of Respondent 4 — treatment that was constitutionally impermissible.*** *Expounding on this, it was held: (SCC p. 504, para 10)*

"10. … It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and

should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege." (emphasis supplied)

36. Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by rearranging the goalposts, they were denied the "privilege" of participation.

38*. In G.J. Fernandez v. State of Karnataka [G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488] both the principles laid down in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate*

from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable". ***Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination*** *in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] sense.*

43*. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract....."*(emphasis supplied)

43. At this juncture, it is pertinent to highlight that every tendering authority is bound by its own terms and conditions. This Court, while exercising jurisdiction under Article 226 of the Constitution, is only called upon to review the decision making process in the light of the terms and conditions of the tender. If the terms of the tender are clear, the Courts are bound to enforce the same. We are supported in our view by the decision in ***UFLEX Ltd. v. Government of Tamil Nadu & Ors.,*** 2021 SCC OnLine SC 738**.** The relevant extract of the discussion therein is as follows:

"6……40. We may also refer to the judgment of this Court in Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) & Anr (2018) 11 SCC 508., authored by one of us (Sanjay Kishan Kaul, J.). The legal

principles for interpretation of commercial contracts have been discussed. In the said judgment, a reference was made to the observations of the Privy Council in Attorney General of Belize v. Belize Telecom Ltd.(2009) 1 WLR 1988) as under:

*"45. ....**If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable.** An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves." (emphasis supplied)*

44. The affirmation of the interpretation as sought by respondent No.3 would render Clause 2 (d) and the declaration form totally negatory, as any bidder would conveniently be able to conceal information with regard to blacklisting; determination of previous award of tender, and; the entities' over all past conduct. This is clearly contrary to the intent of the Tender Document.

45. Unfortunately, we have not been shown any document which would show application of mind for awarding the Tender to respondent No.3. The respondent No.3 clearly concealed the aforesaid information about its blacklisting, and the respondent No.1, without any application of mind, awarded the said tender to them completely contrary to the tender conditions. When respondent No.1 has laid down the tender conditions, including the grounds for disqualification, it is bound to enforce the terms

and conditions without discrimination and favoritism. The respondent No.1 cannot disregard its own terms and conditions, and it would be strictly held to the standards laid down by it. To defend its action, respondent No.1 contended that it was only on 10.09.2021, that the petitioners wrote to them regarding the said discrepancies in respondent No.3's bid documents. Respondent No.1 wrote to the respondent No.3 for clarifications on 14.09.2021, and the respondent No.3 replied on 17.09.2021. By this time, considerable time had passed and, in any case, since the *status quo* orders were operating, the respondent No.1 did not prefer to take any action against the respondent No.3. As they were constrained due to the time lines of the work under the tender, respondent No.1 did not think it prudent to terminate the contract of respondent No.3.

46. We do not find merit in this submission. It is well settled that the tendering authority must comply with its own terms and conditions. Once respondent No.1 learnt that respondent No.3 was liable to be disqualified under the terms and conditions, it could not have proceeded to award the contract to respondent No.3 in an arbitrary and discriminatory manner. The petitioner was found to be technically qualified. The respondent no.1 could have proceeded to award the contract to the petitioner, but it could not have awarded the same to respondent No.3.

47. The plea of grave urgency urged by respondent No.1 is not supported by their conduct. They took their own sweet time (4 days) to act on the petitioner's representation to call for a response from respondent No.3. Self-created shortage of time cannot become a way to provide a free pass to entities', which do not fulfill the prescribed qualification criteria.

48. Since we have found that respondent No. 3 stood disqualified in terms of Clause 2 aforesaid, respondent No.3 cannot seek to derive any monetary benefit from the contract in question, since it was squarely guilty of suppression of relevant and material information from respondent No.1, and by doing so, it gained an unfair and undue advantage of being adjudged the L1 bidder, and of being awarded the contract. Hence the next question that arises is the costs that should be imposed on respondent No.1, and the damages that respondent No.3 should suffer for deliberate and clear violation of the terms and conditions of the tender. In view of the judgment in ***Subash Projects and Marketing Ltd. (Supra),*** we are of the opinion that deserving costs/damages should be imposed on respondent No.3, as it has obtained the tender by concealment and in violation of tender conditions. The respondent No.1 should also be directed to pay costs for improper due-diligence; belated communications, and; proceeding with the award of work to respondent No.3, despite being informed of its disqualification.

49. In a Commercial contract of such nature, the margin of profit can be estimated to be around 10% at least, of the value of the contract. In ***Dwaraka Das V. State of Madhya Pradesh & Another,*** (1999) 3 SCC 500, the Supreme Court observed:

> *"9. The claim of the petitioner for payment of Rs 20,000 as damages on account of breach of contract committed by the respondent-State was disallowed by the High Court as the appellant was found to have not placed the material on record to show that he had actually suffered any loss on account of the breach of contract. In this regard, the appellate court observed:*
>
> *'It is not his case that for due compliance of the contract he had advanced money to the labourers or that he had purchased materials or that he had incurred any obligations and on*

account of breach of contract by the defendants he had to suffer loss on the above and other heads. Even in regard to the percentage of profit he did not place any material on record but relied upon assessment of the profits by the Income Tax Officer while assessing the income of the contractors from building contracts."

Such a finding of the appellate court appears to be based on wrong assumptions. The appellant had never claimed Rs 20,000 on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract, he would have earned profit of 10% on Rs 2 lakhs which was the value of the contract. ***This Court in A.T. Brij Paul Singh v. State of Gujarat [(1984) 4 SCC 59] while interpreting the provisions of Section 73 of the Contract Act, 1872 has held that damages can be claimed by a contractor where the Government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages, the court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed: (SCC pp. 64-65, paras 10-11)***

''What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.

***

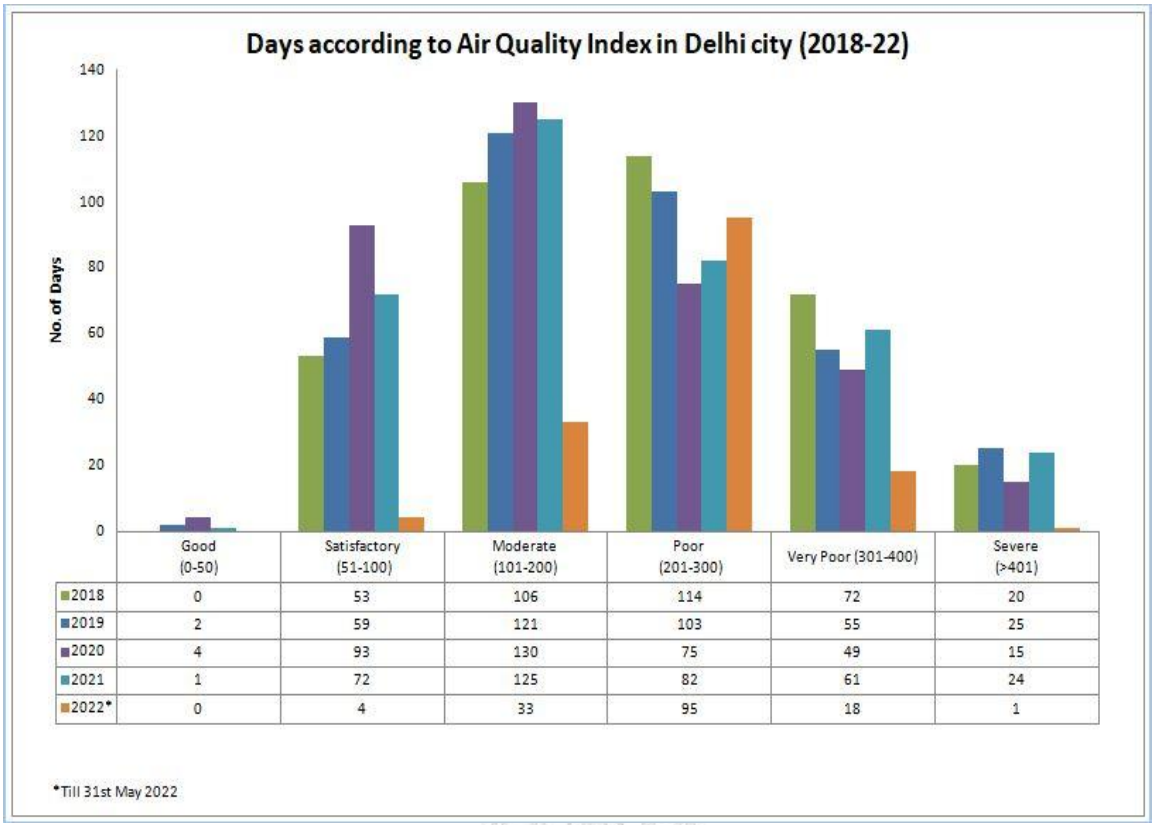
Now if it is well established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. ***Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the works contract, the damages for loss of profit can be measured."***

To the same effect is the judgment in Mohd. Salamatullah v. Govt. of A.P. [(1977) 3 SCC 590 : AIR 1977 SC 1481] After approving the grant of damages in case of breach of contract, the Court further held that the appellate court was not justified in interfering with the finding of fact given by the trial court regarding quantification of the damages even if it was based upon guesswork. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. ***In the instant case however, the trial court had granted only 10% of the contract price which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial court regarding breach of contract by specifically holding that "we, therefore, see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach of contract".*** *It follows, therefore, as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate court was, therefore, not justified in disallowing the claim of the appellant for Rs 20,000 on account of damages as expected profit out of the contract which was found to have been illegally rescinded."* (emphasis supplied)

50. In the light of ***Subash Projects and Marketing Ltd. (Supra)*** and ***Dwaraka Das*** **(Supra)**, considering the fact that the contract value is of 125 crores, it is reasonable to expect that respondent No.3 would make, at least, 10% as profits. i.e., about 12.50 crores. Had the respondent No. 3 been clean and disclosed its blacklisting, or the chequered history of its contracts, it would not have had the opportunity to make a gain of 12.50 crores as profit. The course that commends to us is that respondent No.3 should be disgorged of Rs. 12.50 crores and the said amount should partly go to the petitioner, and mainly ploughed back into the society. We, therefore, direct respondent No.3 to deposit in this Court an amount of Rs.12.50 crores within 4 weeks thereof.

51. We are of the view that the amount of Rs. 12.5 crores must be ploughed back into society.

52. According to us, Delhi is gasping for breath on account of high levels of air pollution. The Air Quality Index (AQI) level during Covid-19 period showed a decline due to lockdown and halting of industrial activities. The Delhi Pollution Control Committee (DPCC) has shared the following chart which shows a large number of 'poor', 'very poor', and 'severe' AQI days are increasing. The number of days of 'good' and 'satisfactory' air quality level is miniscule.



	Good (0-50)	Satisfactory (51-100)	Moderate (101-200)	Poor (201-300)	Very Poor (301-400)	Severe (>401)
2018	0	53	106	114	72	20
2019	2	59	121	103	55	25
2020	4	93	130	75	49	15
2021	1	72	125	82	61	24
2022*	0	4	33	95	18	1

53. Now that the commercial activities are going back to the pre-covid level, we are on the same path of the air quality becoming 'very poor' and 'severe'. This requires urgent preventive, adaptive, and mitigative steps to be taken for the purposes of inter-generational equity.

54. We are of the view that this amount of Rs. 12.5 crores should be ploughed back to the society for reducing the air pollution levels.

55. We have come across an article in the Indian Express dated 10.10.2021[1], where DPCC has signed an agreement with Tata Projects and NBCC to install, operate, and maintain Connaught Place smog tower. Rs. 20

[1] Abhinaya Harigovind, 'Delhi: Pollution control body to sign agreement with Tata Projects, NBCC to operate, maintain Connaught Place smog tower' (The IndianExpress, 10th October 2021) <https://indianexpress.com/article/cities/delhi/delhi-pollution-control-body-to-sign-agreement-with-tata-projects-nbcc-to-operate-maintain-connaught-place-smog-tower-7563197/lite/> Last accessed on 31.05.2022.

crore is the amount which is required to install the tower and the amount was paid to Tata Project and National Buildings Construction Corporation (NBCC). It has also been brought to our notice that the tower has been inaugurated in August, 2021.

56. In this view of the matter, we direct that the entire amount of Rs. 12.5 crores shall be deposited by respondent No.3 with the Registrar General of the Delhi High Court within 2 weeks from today. The Registrar General will call all the stakeholders and ensure that the smog tower is installed (maybe of a lesser capacity) at a suitable place where it will contribute towards reducing the AQI levels of Delhi. The Registrar shall take steps on a war footing to ensure the installation and operationalization of the smog tower before the advent of winter season as the situation further aggravates during winter months.

57. We hope and expect the Government of Delhi to provide suitable space for the smog tower and incase of a financial shortfall will make up the shortfall and will look after its repair, maintenance and cost of running. The smog tower shall be based on the same working and operational guidelines as the Connaught Place smog tower.

58. We also direct respondent No.1 to pay cost of Rs 25 lacs, to the petitioner for improper due diligence in awarding the tender to respondent No.3.

59. In case the aforesaid amounts and costs are not deposited by the respondents within four weeks, the matter be listed before this court for directions.

60. With these observations, the writ petition is disposed of.

61. List for compliance on 04.07.2022.

(VIPIN SANGHI)
ACTING CHIEF JUSTICE

(JASMEET SINGH)
JUDGE

JUNE 01, 2022