MANU/DE/7188/2023

IN THE HIGH COURT OF DELHI

W.P. (C) 4834/2023 and CM Appl. 29864/2023

Decided On: 20.10.2023

Appellants: Highways Engineering Consultant **Vs.** Respondent: National Highways and Infrastructure Development Corporation Limited (NHIDCL) and Ors.

Hon'ble Judges/Coram:
Manmeet Pritam Singh Arora, J.

Counsels:
For Appellant/Petitioner/Plaintiff: Vikas Singh, Sr. Advocate, Nandadevi Deka, Rohan Chandra, Savyasachi Rawat, Keshav, K.S. Jaggi and Vaishnavi, Advocates

For Respondents/Defendant: Prasenjit Keswani, Upmanyu Tewari, Advocates, Balender Shekhar, CGSC and Vedansh Anand, Central Govt. Pleader

JUDGMENT

Manmeet Pritam Singh Arora, J.

1. The instant writ petition has been preferred assailing the order dated 06.04.2023 ('Impugned Order') passed by the Executive Director (T) of Respondent No. 1 i.e., National Highways and Infrastructure Development Corporation Ltd. (hereinafter 'NHIDCL') declaring the Petitioner as a'Non-Performer' and consequently, barring it for a period of one (1) year from participating in future bids to be undertaken by Respondent No. 1, NHIDCL, and all centrally sponsored road projects, in terms of the circular bearing file no. RW/NH-33044/76/2021-S&R (P&B) and dated 07.10.2021, issued by the Ministry of Road Transport and Highways ('MoRTH').

2. Concededly, the punitive action of debarring the Petitioner was taken on the ground that the Petitioner has breached the terms of the contract for supervision consultancy services ('the contract') executed with Respondent No. 1, NHIDCL. The Petitioner, however, disputes this allegation. It is the Petitioner's case that the action of debarment is arbitrary, unreasonable and disproportionate to the allegations made against it.

3. Brief facts leading to filing of present petition are as under:

3.1. The Petitioner is a consultancy firm and is engaged in the business of providing independent engineering and supervision services for infrastructure development. The Petitioner firm was established in the year 2007 and is stated to have been associated in about 100 highway projects of the Respondent Authorities, wherein the Petitioner has provided consultation services of professional engineering.

3.2. The Respondent No. 1, NHIDCL, is responsible for construction of various highways across the north-eastern region of India. The Respondent No. 1, as a matter of practice, appoints consultancy firms such as Petitioner for supervision of construction work carried out by the contractors at site.

3.3. The Respondent No. 2, is MoRTH. The Respondent No. 1, in addition to

National Highway Authority of India ('NHAI') and PWD, is on executing agencies of Respondent No. 2. MoRTH has issued the policy circular dated 07.10.2021, which has been relied upon by Respondent No. 1, NHIDCL for issuing the impugned order.

4. The Respondent No. 1, NHIDCL, issued a notice on 09.05.2018 inviting tender with respect to consultancy services for Authority's Engineer (hereafter 'AE') for supervision of the construction and upgradation of NH-7 to 2-Lane with paved shoulder from Km. 368.000 to Km. 468.000 of Lameri to Paini under Chardham Pariyojana, which is being undertaken by third-party contractors on Engineering, Procurement and Construction (hereafter 'EPC') basis in the State of Uttarakhand, so as to enhance the traffic capacity and safety for efficient transportation of goods as well as passenger traffic in the Himalayan region ('the Project').

The Project is considered to be of significant importance by the Respondents from the perspective of national security.

4.1. The Respondent No. 1 intended to appoint an AE to oversee the activities of the EPC Contractors during the entire period of the Project and in furtherance thereto, entered into the contract with the Petitioner on 18.12.2018, for supervision consultancy services. As per clause 2.3 of Special Conditions of the contract, the AE is provided with 30 days to commence contractual work.

It is stated in the petition that the Petitioner commenced the contractual work within three (3) days of execution of contract i.e., on 21.12.2018.

4.2. As per the contract, the Petitioner was required to provide key personnel, sub-professional staff and support staff. The man-months of each staff member was specified and the respective rates of reimbursement were also mentioned therein. In addition, the Petitioner was also entitled to reimbursement of costs of rental and fixed costs towards transportation.

4.3. The Project was divided into five (5) packages, with each package referring to the construction and upgradation of a stretch of total length of the road (i.e., 100 Kms) to be constructed and upgraded. For instance, the package no.1 was for construction and upgradation of existing road to 2-lane with paved shoulder from Km 368.000 to Km 399.000, and so on. The assignment period for EPC Contractors was thirty (30) months for package Nos. I, II and III and eighteen (18) months for package Nos. IV and V.

4.4. The EPC Contractors for package Nos.I, II and III was appointed to commence work on 23.05.2018, 24.05.2018 and 23.05.2018 respectively, each having a completion period of thirty (30) months. The said construction period of thirty (30) months expired on 20.11.2020and the Maintenance/Defect Liability Period (hereafter 'DLP') of forty-eight (48) months as per the contract expired on 20.06.2021.

4.5. Since, the entire work stipulated under the EPC Contracts was not carried out by the EPC Contractors, an extension of time ('EoT') was granted up to 31.03.2022 in view of the Ministry's Circular dated 17.01.2022 issued in view of the COVID-19 pandemic.

However, despite the extension of time till 31.03.2022, the EPC Contractors failed to complete the stipulated work and submitted a revised work programme up to December, 2022, which as well was accepted by the Respondents.

4.6. In these facts, the Respondent No. 1, contemporaneously, also extended the

contractual term of the Petitioner herein first up-to 31.03.2022 and then until 31.12.2022. The said extension of time granted to the Petitioner is documented in the letters dated 29.03.2022, 21.04.2022 and 16.06.2022, placed before this Court during the course of hearing. The letters granting EoT to the Petitioner are unqualified and do not contain any adverse reference on the performance of the Petitioner.

Upon grant of EoT, the man-months of the personnel of the Petitioner were increased along-with the fixed cost part (i.e., cost towards rental and transportation).

5. Though, the contract term was extended up-to 31.12.2022, the Respondent No. 1, NHIDCL, issued a show cause notice dated 15.10.2022 ('SCN') to the Petitioner, inter alia, pointing out (i) the lack of supervision by the key personnel, (ii) replacement of 70% key personnel, (iii) failure to discharge duty and (iv) lack of reporting.

5.1. It was stated that the Petitioner was in breach of the terms of contract and more specifically, clause Nos. 3 and 4 of the terms of reference ('ToR'), clause 3.8 and 4.5 of general conditions of the contract ('the GCC') and the table of para 3 and serial No. 3 (b) (c) and (d) therein of MoRTH circular dated 07.10.2021.

5.2. The Petitioner was called upon to explain in writing, within 15 days of receipt of SCN, that why it should not be declared a 'non-performer' as per the MoRTH Circular dated 07.10.2021 or terminated from the consultancy services for supervision of the Project, as per clause 2.9.1 of the GCC.

5.3. The Petitioner filed its reply dated on 04.11.2022to the said SCN, disputing the allegations contained therein.

However, the Respondent No. 1, NHIDCL,being unsatisfied with the response furnished by the Petitioner, passed an order dated 16.01.2023 declaring the Petitioner as a non-performer and consequently, barring it from participating in any bid for National Highway projects.

5.4. The Petitioner being aggrieved by the aforesaid order, preferred a writ petition bearing W.P.(C) No. 975/2023, before this Court seeking setting aside of the said order dated 16.01.2023.

The Coordinate Bench of this Court videorder dated 07.02.2023 set aside the said order on the ground that no personal hearing was granted to the Petitioner in contravention of the mandate of the MoRTH circular dated 07.10.2021. Further,this Court directed the Respondent No. 1, NHIDCL, to accord a personal hearing to the Petitioner, enabling it to explain its position and thereafter, to pass a reasoned order within two (2) months.

5.5. It is a matter of record that the Respondent No. 1, NHIDCL,vide its communication dated 21.02.2023 scheduled the personal hearing for 24.02.2023. However, since the Petitioner expressed its inability to attend the hearing on 24.02.2023, the same was re-scheduled for 16.03.2023; on which date a hearing was granted to the Petitioner.

5.6. At the conclusion of the hearing, the Petitioner was asked to submit the deployment chart of the personnel for the period between October, 2022 to February, 2023. The Petitioner submitted a written response alongwith a deployment chart on 17.03.2023 and sought an oral hearing to explain the said deployment charts. However, no further hearing was granted to the Petitioner.

5.7. The Respondent No. 1, NHIDCL, thereafter on 06.04.2023, passed the impugned

order opining,inter-alia,that the Petitioner herein had repeatedly failed to take initiatives to ensure the timely achievement of desired targets, on account of replacement of more than 70% of key personnel during the assignment period. The impugned order substantially refers to lack of man power at the project site between October, 2022 and February, 2023.

Arguments for the Petitioner

6. Mr. Vikas Singh, learned senior counsel for the Petitioner, states that in pursuance to the order dated 07.02.2023 passed by the Coordinate Bench of this Court, the Respondent No. 1 perfunctorily granted a cursory personal hearing to the Petitioner. He states that during the said hearing, the Petitioner was called upon to explain the inadequate deployment of man power between October, 2022 and February, 2023. He states that however, since the SCN was issued on 15.10.2022, the period subsequent thereto could not have been the matter for consideration. He states that thus, no meaningful opportunity was granted to the Petitioner to present its version and the personal hearing was merely an empty formality.

6.1. He states that though the SCN was issued invoking clauses of the MoRTH circular dated 07.10.2021, the allegations in terms of the said circular were not discussed at the personal hearing.

6.2. He states that the impugned order is based on allegations, which are not enlisted in the SCN. In this regard, he refers to the conclusions recorded in the impugned order at paragraph 8 (a), (b), (c), 9 (ii), (iii), which are reproduced as under for ease of reference:

> *"8. Whereas, the submission of the Consultant firm was examined as per the factual information received from NHIDCL, RO-Dehradun, and following points are observed:*
>
> > *(a) Team Leader of the project who had left site on 15.10.2022, had rejoined the assignmenton 02.02.2023. Similarly, the Material Engineer has left the site on 26.12.2022 and againrejoined at site on 08.02.2023. The absence of adequate manpower at site has affected thesupervision of works and this has also resulted in the non-accountability of executed worksduring the absence of Key Personnels at site.* ***The month-wise availability of Key Personnel fromOct'22 to Feb'23 is as under****:*

Sl. No.	Month	Personnel present at site		Absence (in days) of important key personnels			
		Key-Personnel (total Personnel as per contract is 7 numbers)	Sub-Professional Staff (total personnel as per contract is 8 numbers)	Team leader	Resident Engineer	Material Engineer	Bridge Engineer
1	Oct-22	3	1	27	31	8	11
2	Nov-22	2	1	30	30	0	17
3	Dec-22	1	3	31	31	8	31
4	Jan-23	0	3	31	31	31	31
5	Feb-23	3	3	1	0	7	28

(b) Improper supervision by the Consultant had resulted in poor quality and workmanship inthe execution of work of construction of Wall at km. 464.750. ***Further, AE was directed videNHIDCL, PMU-Chamoli letter No. NHIDCL/PMU-Chamoli/HEC/2022-23/D-5741 dated 04.01.2023****to submit the estimate of re-construction of RCC wall at km 419+900, however, the same hasnot been complied by the Consultant till now.*

(c) AE was directed to finalize the proposal w.r.t. the work to be done by the EPCContractor, the work which is not feasible to do at site & the work which needs to be descopedfor the section of the Karnprayag and Nandprayag town.However, no action has been taken byAuthority's Engineer till now. The delay on the part of AE to process such crucialproposals/communicate site information to the Authority has resulted in further affecting thecompletion of the subject projects.

9. Whereas, the Consultant vide their letter no. HEC/NHIDCL/Chardham/2022-23/3066 ***dated 17.03.2023*** *had submitted the deployment chart and requested for revoking the letter of declaring their firm as 'Non-Performer'. Following facts are worth mentioning w.r.t. the request/justification provided by the AE firm for removing their name from the List of 'Non Performer':*

xxx xxx xxx

(ii) AE has themselves accepted the fact that Team Leader and other Key Personnel were not present at the site due to illness or other unavoidable circumstances. This itself clarifies the argument that whether AE has fulfilled their duties as per Contract Agreement. AE has also mentioned that the Authorized Signatory Sh. Avneesh Bajaj along with Bridge Engineer and Contract Specialist remained present at site during the absence of Team Leader and other Key Personnel, however this situation of compromise arising due to shortage of manpower is not allowable as per the provisions of the Contract Agreement, neither does it serves the purpose and duty of Authority's Engineer, which is required as per the Contract Agreement. ***The actual deployment of Key Personnel and sub-professionals at site is represented under the table of para 8(a), which clearly shows that majority of the***

work force remained absent during the crucial working season from Oct'22 to Jan'23, which is not at all acceptable.

(iii) AE has also argued that the clauses mentioned in MORTH Circular RW/NH-33044/76/2021-S&R(P&B) dated 07.10.2021 cannot be imposed as these are drawn after the date of the Consultancy Agreement, and since there being different clauses for the same cause of action these conditions vide this circular RW/NH-33044/76/2021-S&R(P&B) dated 07.10.2021 cannot be imposed on the consultant. In this regard it is to mention that, the MoRTH Circular is used as a mechanism to impose action against a non-performing consultant, so that necessary rectification can be done and such actions does not get repeated by the consultant, while the contract is being kept alive. The Consultant has themselves accepted the fact that they had been asked to mobilize the staff and carry out necessary replacement of the personnels, which signify that this action of declaring their firm as Non-performer was taken against the Consultant to ensure that such deficiencies/defaults does not occur in future while supervising the subject consultancy work, ***and it should not be misinterpreted as termination/closure of the work, which is provisioned in the consultancy agreement.*** *However, it is also noteworthy to mention that more than 66% of replacement has been carried out by the AE, which invites action viz.a.viz. debarment of the AE firm upto 02 years as per Clause 4.5(c)(iv) of the General Conditions of the Contract (GCC) of the RFP, which reads "For total replacements beyond 66% of the key personnel the client shall initiate action of higher penalty/termination/debarment upto 2 years as considered appropriate."Hence, the Authority for the aforesaid reason reserves its right to take action including debarment of the Consultant firm from participating in centrally sponsored projects upto a period of 02 years, as envisaged in the provisions of the Contract Agreement, which is in line with the present action initiated against the Consultant viz.a.viz declaring the firm as 'Non-Performer', on similar grounds.*

(Emphasis supplied)

6.3. He states that the gravamen of the impugned order is the allegation of non-deployment of key personnel for the period between October, 2022 to February, 2023. He states that since this period was not under the consideration in the SCN, the impugned order could not have been founded on these allegations. In this regard, he relies upon the judgment passed by the Supreme Court in Gorkha Security Services v. Government (NCT of Delhi) and Ors., MANU/SC/0657/2014 : (2014) 9 SCC 105 wherein it was held that the primary purpose of a show cause notice is to make the noticee understand the precise case set up against him, which he has to meet.

6.4. He states that the Petitioner dispute the stand that there was non-deployment of staff as alleged and that on the contrary, the Petitioner herein maintained maximum strength even through in difficult times, including the COVID-19 pandemic.

6.5. He states that there was no dispute with respect to the replacement of the personnel as the said replacement was duly approved by the Respondent No. 1, NHIDCL. He states that the replaced personnel were qualified and rendered services to the satisfaction of the Respondent No. 1.

6.6. He further states that the invoices raised for the man-months of the replaced personnel were duly approved as well and paid for by the Respondent No. 1, which evidences their satisfaction with the services rendered.

6.7. He states that since 95% financial progress has been achieved at the Project site, the Respondent No. 1, NHIDCL, by its letter dated 27.11.2021 directed the Petitioner herein to reduce deployment of its staff. He states that the said material fact has not been considered by the Respondent No. 1 while passing the impugned order.

6.8. He states that the Petitioner has been made a scapegoat for the failures committed by the EPC Contractors, who areprimarily responsible for carrying out the construction work. He states that the delay in completion of the Project is not due to any acts or omissions of the Petitioner. He states that the EPC Contractorshaveneither been directed to show-cause, nor visited with any penalty for the extended time taken in completion of the construction of the Project. He states that thus, the action of the Respondent No. 1 is arbitrary and is liable to struck down on the anvil of the doctrine of proportionality. He states the Respondent No. 1 has penalised the Petitioner by debarring it for unfounded breaches. In this regard, he relies upon the judgment passed by this Court in Coastal Marine Construction and Engineering Ltd. v. Indian Oil Corporation Ltd., MANU/DE/0154/2019.

6.9. He states that though the EoT of the contract has expired on 31.12.2022, the Petitioner's staff continues to remain deployed at the Project site as the Respondent No. 1 has declined permission to foreclose the contract. In this regard, he relies upon the letter dated 11.07.2023 issued by Respondent No. 1. He states that the act of Respondent No. 1 in continuing to avail the Petitioner's services without extending the contract evidences the exploitation by the Respondent No. 1.

He states that in the absence of grant of EoT for the period up to February, 2023; the Respondent No. 1 cannot rely upon the said period (January-February, 2023) for alleging defaults in the impugned order.

6.10. He relies upon a table of comparison filed with the written submissions dated 11.07.2023 and marked as Schedule 'A', to demonstrate that the findings returned in the impugned order are based on the grounds, which were not set out in the SCN.

6.11. He states that in the facts of this case, though the contract initially expired on 20.06.2021; it was extended first till 31.03.2022 and thereafter, till 31.12.2022. He reiterates that the Petitioner's staff continues to be deployed at the Project site till date (September, 2023), without any formal EoT. He states that the Respondent No. 1's action in continuing to avail contractual services of the Petitioner's personnel evidences the satisfaction of the Respondent No. 1. He states in these facts Respondent No. 1 has no ground for declaring the Petitioner a non-performer as the order results in 'civil death' for the Petitioner.

Arguments for the Respondent No. 1, NHIDCL

7 . Mr. Prasenjit Keswani, the learned counsel for Respondent No. 1, states that in pursuance to the order 07.02.2023 passed by the Coordinate Bench of this Court in W.P.(C)975/2023, a personal hearing was granted to the Petitioner and thus, the impugned order dated 06.04.2023 has been passed in consonance with the principles of natural justice.

7.1. He states that the impugned order is just and reasonablesince there has been

consistent and continuing default on the part of the Petitioner in discharging its obligation under the contract.

7.2. He states that the Project is of national importance and due to the Petitioner not providing requisite and stable man power, the work carried out by the EPC Contractors was not properly supervised, which has affected the 'quality' of work carried out and has caused 'delay'. He states that due to the aforesaid, the EPC Contractors on the recommendation of AE had to be twice granted EoT up-to 31.03.2022 and thereafter, up-to 31.12.2022.

7.3. He states that in the present case, SCN was issued on 15.10.2022, reply was filed on 04.11.2022, oral hearing was granted on 16.03.2023, and additional written representation dated 17.03.2023 was received from the Petitioner.He states that subsequently, after due consideration of the written representation and oral submissions, the Respondent No. 1 has passed the impugned order in conformity with the principles of natural justice. He states that all essential elements of fair administrative decision-making process have been fulfilled before passing the reasoned impugned order. In this regard he relies upon the judgment passed by the Supreme Court in UMC Technologies Pvt. Ltd. v. Food Corporation of India, MANU/SC/0858/2020 : (2021) 2 SCC 551.

7.4. He relies upon a table (Appendix A) filed with his written submissions dated 12.07.2023 to demonstrate the facts, which form the basis of the findings in the impugned order.

7.5. He relies upon the letters dated 11.10.2021, 12.11.2021 and 26.11.2021, referenced in the SCN, to illustrate the failure of the Petitioner firm to deploy the key personnel. He states that the shortage of man power deployed by the Petitioner was duly reflected in the table incorporated in the SCN as well.He has further more specifically relied upon the minutes of meeting dated 21.07.2022, wherein, the issue of lack of supervision by the Headquarter of the Petitioner on the staff employed at the Project site was emphasized.

7.6. He states that the SCN was issued to the Petitioner in pursuance to twelve (12) prior letters issued to it highlighting the default in deployment of key personnel. He states that the Petitioner failed to vet the designs/ drawings submitted by the EPC Contractors, which has caused delay in the completion of construction and unsatisfactory performance. He has relied upon the judgment passed by the Supreme Court in M/s Kujla Industries Ltd. v. Chief General Manager, Western Telecom Project BSNL and Ors., MANU/SC/1014/2013 : (2014) 14 SCC 731, to state that the Respondent No. 1 is vested with a right to debar in case of inability to deliver satisfactory performance, and the said punishment is a method of discipling a party. Healso made a reference to the judgment passed in M/s Patel Engineering Ltd. v. Union of India &Anr., MANU/SC/0438/2012 : (2012) 11 SCC 257 and State of Odisha v. Panda Infraproject Ltd., MANU/SC/0233/2022 : (2022) 4 SCC 393.

7.7. He states that as per clause 4.5(c) of the GCC, the Petitioner cannot make replacement beyond 66% of the key personnel. He states in this case, the Petitioner breached the said condition within the initial period of 30 months and therefore, the debarment proceedings can be maintained on this ground alone. He relied upon a table (at the hearing dated 04.09.2023) to show that there were atleast five (5) changes in the key personnel during the initial period of the contract.

7.8. He admits that when the Petitioner applied for replacement of the key personnel,

approval was granted by the Respondent No. 1 after satisfying itself about the credentials of the replacement personnel. He states that the approval was granted as it is in the interest of the Project.

7.9. He states that in these circumstances, the Respondent No. 1 was justified on 17.03.2023 in asking for the deployment schedule of the personnel from the Petitioner's firm from October, 2022 to February, 2023 as it would enable Respondent No. 1 to evaluate if the Petitioner has improved its performance (on the current date) and if it was so, it would have been a good ground to not debar the Petitioner. He states, however, since the newly furnished information on 17.03.2023 continue to show that the Petitioner is unable to deploy key personnel,the Respondent No. 1 was right in relying upon the said facts in the impugned order.

7.10. He states that the Petitioner from the outset was not providing the requisite man power, which is crucial to overseeing the due execution of the project, and due to its lapse, there has been delay and quality issues in the execution of the Project.

7.11. He fairly admits that no adverse action has been initiated against the EPC Contractors for the delay in completion of construction. He further states that no notice has been issued against the EPC Contractors proposing debarment on account of the delay in construction.

7.12. He states that the impugned order debars the Petitioner for the period of one (1) year, whereas the policy allows for debarment up-to two (2) years hence while passing the order, the doctrine of proportionality has been taken into account.

7.13. He fairly admits that the Petitioner continues to render services in the present contract (as in September, 2023), even though, the EoT expired on 31.12.2022 and no formal extension has been granted. He states that since the construction is in its final phase, the Respondent No. 1 did not deem it prudent to change the consultant. He states that the contract was not terminated in furtherance of SCN.

7.14. He states that this Court cannot interfere in the subjective assessment of the Respondent No. 1 with respect to the facts which led to holding the Petitioner a non-performer. He states that Respondent No. 1 has the indisputable right to debar a party which is unable to perform satisfactorily and frequently as it is an effective method for disciplining such a party.

Analysis and conclusion

8. At the outset, it is necessary to observe, the question that whether the breach of the contract alleged to have been committed by the Petitioner would merit the issuance of the punitive measure of debarment by Respondent is essential for consideration; as Respondent No. 1's action of debarment is based solely on the premise that the Petitioner has breached the terms of the contract entered with Respondent No. 1.There are no allegations of fraud, forgery, misrepresentation or allegations of like nature.

8.1. It is not in dispute that the impugned order debarring the Petitioner shall visit it with serious consequences akin to 'civil death'. The Petitioner has set out in the petition that due to the passing of the impugned order; it would be precluded from bidding in about 50 tenders of various authorities, which will be invited in the next few months. This fact was also stated in the subsequent application bearing CM APPL. No. 29864/2023 filed by the Petitioner.

In fact, the Respondent No. 1 in its counter affidavit has stated that the said order has been passed to hand out a 'penalty' to the Petitioner for the lapses on the part of the latter, while working on the Project. The impugned order is therefore, admittedly, punitive in nature.

9. There are three facets to the challenge made to the impugned order that require consideration.

(i) First, whether the allegations of breach of contractual terms made against the Petitioner warrant a punitive measure of this nature;

(ii) second, whether the impugned order of debarment is founded on allegations, which did not form part of the SCN;

(iii) and thirdly, whether the quantum of punishment imposed is proportionate to the alleged misconduct.

10. The Respondent No. 1 has emphasized in its pleadings and oral arguments that the Project is of national importance and prestigious. It is therefore, a necessary presumption that no deficiency in quality of supervision or workmanship in execution of the Project would be acceptable to Respondent No. 1.

11. In the facts of this case, the contract period originally expired on 20.06.2021. The Respondent No. 1 first extended the contract period till 31.03.2022 and thereafter, till 31.12.2022. The Respondent No. 1 continues to avail the consultancy services of the Petitioner for this Project till date. In fact, the Respondent No. 1 has emphatically declined to foreclose the contract by its letter dated 11.07.2023 despite a specific request being made by the Petitioner vide letter dated 17.05.2023. Therefore, the Respondent No. 1's action in granting extension(s)and continuing to avail the services of the Petitioner for this Project of national importance, belies its submissions that it is dissatisfied with the performance by the Petitioner of the contractual provisions.

11.1. The Petitioner admittedly, provides consultancy and supervision service through its qualified personnel, who are duly approved by the Respondent No. 1 before their deployment. Therefore, the action of the Respondent No. 1 in continuing with the services of Petitioner and its personnel discloses the satisfaction of the Respondent No. 1 with the consultancy services being rendered by the Petitioner for the Project which is of national importance.

12. Pertinently, in the SCN though show-cause against termination of the contract itself was issued, however,as a matter of fact, the impugned order does not terminate the contract.In the impugned order, the Respondent No. 1 has clarified that the declaration of non-performer should not be misinterpreted as termination/closure of the work.

It is the stated case of Respondent No. 1 in its oral arguments that it does not intend to terminate the contract. These facts again show the due satisfaction of the Respondent No. 1 with the services rendered by the Petitioner under this contract.

13. In the facts of this case, though the Respondent No. 1 has at paragraph 9(iii) of the impugned order returned a finding that the Petitioner committed breach of the contract by replacing its personnel frequently and in excess of 66% as stipulated in clause 4.5 (c)(iv) of GCC; however, Respondent No. 1 admits that each of the replaced personnel are duly qualified and were approved by the Respondent No. 1 before their deployment.

It is also admitted that while granting approval for replacement no objection of the replacement being beyond 66% was raised. The satisfaction with the services rendered by the replaced personnel during the contract, has already been noted above.

13.1. In the contract, admittedly, there are financial penalty clauses inasmuch as the remuneration paid to the replaced personnel is lower/reduced compared to the initial appointee. These penalty clauses have been duly invoked by Respondent No. 1 and the Petitioner has been suitably penalized.

13.2. The Respondent No. 1 during oral arguments had submitted a tabulated chart to show that seven (7) replacements of key personnel were made by the Petitioner. It is seen from the chart that the fifth replacement was permitted by Respondent and made on 30.03.2022, after invoking the financial penalty clause. As per Respondent No. 1 the 66% mark was breached on 30.03.2022. However, Respondent No. 1 granted EoT to the Petitioner on 21.04.2022/16.06.2022 without any qualification or reservation. There was no protest in the letters (i.e., letters dated 21.04.2022 and 16.06.2022) granting EoTwith respect to replacement of the key personnel made until 30.03.2022.

The issuance of the SCN on 15.10.2022, inter-alia, on the ground of replacement of more than 66% key personnel was therefore, not justified

It is a matter of record that the sixth replacement was approved on 16.01.2023 and was not in the contemplation of Respondent No. 1 at the time of issuance of SCN.

13.3. In these circumstances, the mere fact that the 66% mark was crossed (and no more), without impeding the progress of the Project, cannot be a ground for debarring the Petitioner as held in the impugned order at paragraph 9(iii). In this regard, the judgement passed by the Division Bench of the Bombay High Court in Sarku Engineering Services SDN BHD v. Union of India., MANU/MH/1373/2016, is apposite, wherein it was held that the power of black listing cannot be resorted to, when the grounds for the same are only breach or violation of the term or condition of a particular contract and when legal redress is available to both the parties. The relevant portion of the judgment reads as under:

> *"58. We hasten to add that there could be a situation wherein the inherent power of blacklisting or placing the contractor on Holiday-list can be exercised and the stipulations or the terms of the contract may not restrict or fetter exercise of such power. Equally, mere pendency of legal proceedings cannot be a absolute bar for invoking this inherent power or exercising it. However, there have to be strong, independent and overwhelming materials to resort to this power given the drastic consequences that an order of blacklisting has on a contractor.* ***The power to blacklist cannot be resorted to when the grounds for the same are only breach or violation of a term or condition of a particular contract and when legal redress is available to both parties.*** *Else, for every breach or violation, though there are legal modes of redress and which compensate the party like respondent No. 2, it would resort to blacklisting and by sometimes abandoning or scuttling the pending legal proceedings."*
>
> (Emphasis Supplied)

13.4. The said judgment of the Bombay High Court has been cited with approval by a learned Single Judge of this Court in Coastal Marine Construction and Engineering Ltd. (Supra).

14. The Respondent No. 1 has sought to contend that due to lack of supervision by the Petitioner, the completion of the construction of the Project was 'delayed' and the 'quality' of the same was affected. This allegation was specifically set out at paragraph 4 of the SCN and also canvassed during oral arguments.

14.1. In this Court's opinion, the allegation that the Petitioner is responsible for the delay in the completion of the construction of Project is not substantiated from the record; as it appears that the first EoTup-to 31.03.2022 was granted in view of the Ministry's Circular dated 17.01.2022, titled as 'Relief for Contractors-Developers of Road Sector given Covid-19 pandemic'.

14.2. Thereafter, the second EoT up-to 31.12.2022 was granted in view of the judgement dated passed by the Supreme Court in Citizens for Green Doon and Ors. v. Union of India and Ors., MANU/SC/1251/2021, lifting the ban and permitting hill side cutting. Consequently, the EPC Contractors of Package-II, II and III were directed to resume the hill cutting works and the EPC Contractors submitted a work programme up-to December, 2022. In view of this fact, the Petitioner herein as well was granted EoT up-to 31.12.2022.

14.3. The said facts are duly evident from the letters dated 29.03.2022, 21.04.2022 and 16.06.2022 issued while approving grant of EoT to the Petitioner up-to 31.12.2022. The relevant extract of the letters dated 29.03.2022 and 21.04.2022 reads as under:

Letter dated 29.03.2022 issued by the Petitioner

*"Concerning the above-cited subject matter and it is submitted that the Authority's Engineer Services were commenced on 21-12-2018 for 30 months, which expired on 20-06-2021 and the Competent Authority vide letter at sr. no. (03) approved and amended the Authority's Engineer man-months up to 31st March-2022.**However, after the Hon'ble Supreme Court judgment revoke suspension on Hillside cutting was issued on December-2021 stating strategic importance of Defense Vehicle movements. Following this MD, NHIDCL, New Delhi directed all EPC Contractors to resume Hill Cutting and to submit the revised work program, accordingly, the EPC Contractor submitted the revised work program up to December-2022.***

XXX XXX XXX

You are humbly requested to recommend the Authority's Engineers Extension of Time case to Competent Authority as the approved man-months will elapse on 31st March-2022. It is admitted that from June-2021 to date Authority's Engineer Fixed cost is overrunning and providing continued services needed your kind concurrence in this regards.

Letter dated 21.04.2022 issued by Respondent No. 1

"Sir,

Please refer the letter under reference (ii) vide which Proposal for extension of months Input of Authority's Engineer staff is recommended for the approval of Competent Authority.

2. The LOA of subject work was issued to the M/s Highway Engineer Consultant in Association with M/s LTElford Consulting Engineer Pvt. Ltd. on 17.12.2018 for

Rs. 10,48,88,400/-. Contract Agreement was signed on 18.12.2018 between NHIDCL & M/s HEC in Association with LTElford Consulting Eng. Pvt. Ltd.

*3. It is pertinent to mentioned there that the consultancy service of Authority's Engineer were commenced on 21.12.2018 for 30 months of Construction period and 48 months of Defect Liability Period. Construction period of Authority's Engineer as per CA has been expired on 20.06.2021. However, EPC Contractors has failed to complete the works as per scheduled timeline of the EPC Contract Agreement.**Accordingly, Man months Input of Key professional and sub professional staff of Authority's Engineer has been extended time to time as per the requirement in favour of the projects.**After the Hon'ble Supreme Court Judgment issued on 14.12.2021 to revoke suspension on hill side cutting, EPC Contractors of Package-I, II and III were directed to resume the hill cutting works and submit the work programme accordingly. The EPC Contractor has submitted the work programme up to December 2022.*

4. Accordingly, Authority's Engineer vide their letter no. 980014/NHIDCL/PMU/AE/143 dated 29.03.2022 has submitted a proposal for extension of Man Months Input of the staff for Construction phase up to 31.12.2022 to perform duties and exercise in accordance with the terms of reference (TOR) set forth in Annex I of Schedule 'N', so that the obligation of EPC Agreement can be performed till the completion of the work.

XXX XXX XXX

*9. **In view of the above, the proposal for extension of Man months input and other fixed cost is hereby recommended for approval of the Competent Authority."***

(Emphasis Supplied)

14.4. The contents of the letter dated 21.04.2022 issued by Respondent No. 1 while approving EoT upto 31.12.2022 do not substantiate its allegation that the Petitioner was considered responsible for delay in completion of project. The letter dated 21.04.2022, in fact, squarely lays the blame of delay in construction, on the EPC Contractors.

15. With respect to the physical progress of the Project, the Respondent No. 1 admits that as on 30.09.2022 physical work of Packages IV and V was complete and the physical progress of Packages I, II and III also stood substantially complete at 90.36%, 92.34 % and 95.46% respectively and the remaining incompletion was on account of 'non-availability of land' with the EPC Contractors. The Respondent No. 1 in its counter affidavit pertinently, has stated that the debarment proceedings are not related to the progress of the Project. The relevant pleading in the petition and the counter affidavit reads as under:

Writ Petition	Counter Affidavit of Respondent No.1
13. It is submitted that the as of 30.09.2022, physical work of packages IV and V had already been completed by the EPC Contractor and the physical progress of packages I, II and III stood at 90.36%, 92.34% and 95.46% respectively after EOT was granted by R-1 up to 31.12.2022. Pertinent to mention that today, the physical progress of packages I, II and III is at 96.72%, 93.1% and 97.09% respectively and ***balance incompletion is on account of non-availability of land with the EPC Contractors — which had to be made available by R-1****.*	***The contents of Para 13 are false and denied except those which form part of the record****. It is submitted that the Petitioner is trying to mislead and misdirect the Court by presenting the project progress report. The project progress and the violations/defaults done by the Petitioner while achieving that progress are two separate things. The project progress is not disputed. However, the Petitioner was appointed as the Authority's Engineer as the alter ego of the Respondent No. I for the subject project and it was only because of the lackadaisical attitude of the Petitioner and the lapses on its part that the Respondent had to interfere and constantly apprise, remind, notify, and reprimand the Petitioner to do the work it was appointed for.* ***It is re-iterated that thedebarment proceedings initiated against the Petitioner are not related to the progress of the project and any reference to the same are irrelevant.***

(Emphasis Supplied)

15.1. The aforesaid admission of the Respondent No. 1 in the pleading reflects due and satisfactory progress of the Project. The admission of the Respondent No. 1 in the pleading that the progress of the Project is not the basis of SCN negates the plea that delay in completion of construction has been occasioned by the Petitioner.

15.2. A conjoint reading of the aforesaid pleading on progress and the letters dated 29.03.2022 and 21.04.2022 with respect to grant of EoT shows that, as per the record of Respondent No. 1, the Petitioner is not responsible for the delay. Therefore, the allegation of delay in the SCN is not substantiated and cannot justify the impugned order of debarment.

16. The Respondent No. 1 has further contended that the impugned order has been issued as the 'quality' of the work executed by the EPC Contractors suffered due to the replacement/absence of the Petitioner's personnel, resulting in inadequate supervision.

16.1. The necessary inference of the aforesaid allegation is that the quality of work executed by the EPC Contractors at the Project was poor or not up to the mark. There can be no dispute that the primary responsibility for carrying out quality work is of the EPC Contractors. However, Respondent No. 1 has admittedly not initiated any proceedings for debarment against the EPC Contractors alleging poor quality of workmanship or execution. The non initiation of debarment proceedings against the EPC Contractors cannot be overlooked.

16.2. It would therefore, have to be presumed that the lack of quality, if any, in the workmanship of the EPC Contractors, in the opinion of Respondent No. 1 does not merit debarment proceedings. Presumably, the lapses of the EPC Contractors may have been penalised by imposing financial penalties. Accordingly, applying the same test, this Court is of the opinion, that Respondent No. 1 in the same project cannot selectively, initiate debarment proceedings against the Petitioner, who has a supervisory role and not the primary role.

16.3. Alternately, the satisfaction of Respondent No. 1 with the quality of work executed in this Project is evident from its stand that the Project is being carried out in the border area, which requires high quality workmanship. And, it is the stand of the

Respondent No. 1 that in fact, the said high quality has been maintained during the execution of the work with effective supervision. Therefore, the action of Respondent No. 1 in continuing to avail the consultancy services of the Petitioner for achieving the high-quality workmanship of this Project negates its allegation in the SCN that the quality of the Project has suffered.

16.4. The finding in the impugned order at paragraph 9 (i) cannot be sustained as there are no facts recorded either in the SCN or in the impugned order documenting the poor quality of work executed by the EPC Contractors. The said allegation of poor-quality work is therefore, vague and unsubstantiated. What also weighs with the Court is that the Respondent No. 1 has elected not to even issue a show cause notice to the EPC Contractors for the alleged deficiency and poor quality of work.

17. In this regard, it would be instructive to refer to the judgment of the Coordinate Bench of this Court in Coastal Marine Construction and Engineering Ltd.(Supra), wherein this Court held that the principal consideration for imposing the punitive measure is whether such a party is 'unworthy' of being engaged or performing a Contract. The relevant extract of the said judgment reads as under:

> *"40. Plainly, a contested allegation of breach of a contract simpliciter does not invite the punitive measure of blacklisting. This is not to say that an order of blacklisting cannot be founded on the conduct of a party who is found to be in breach of a contract. Obviously, the presumption is that a person who has failed and neglected to perform his contractual obligations is unworthy of being considered for any contractual arrangements in future.* ***The principal consideration for imposing the punitive measure is whether such a party is unworthy of being engaged for performing a contract.*** *There may be cases where the conduct of the party is found so wanton and callous that it not only amounts to that party breaching his contractual obligations but may also lead to the conclusion that it is not desirable to enter into any contract with the said party.* ***However, there may be cases where a party is unable to perform a contract or is disabled from doing so, for unforeseen reasons, which may be beyond the control of that party. There may be cases where despite the party making all bona fide attempts to fulfil its contractual obligations is unable to do so for reasons that he cannot be held responsible for. In certain cases, there may be a serious controversy, whether the party has, in fact, breached the contract. Clearly, in such cases, non-performance of a contract would not indicate that the party is unworthy of being awarded contracts in future."***
>
> (Emphasis Supplied)

18. Therefore, on a perusal of the record, this Court is unable to appreciate that if as per the Respondent No. 1's own stand the physical progress of the Project is satisfactory and the workmanship of the work executed is as per its standards; the debarment of the Petitioner herein for the default of replacing personnel beyond 66%, while achieving the satisfactory progress is a disproportionate punishment for the said contractual violation.

19. The act of debarring the Petitioner and precluding it from accepting future assignments, while contemporaneously using its services for a Project of national importance ex-facie evidences that the punitive measure of debarment is a disproportionate action, which is not warranted.

20. The Respondent No. 1 in its SCN and the consequential impugned order proposed the debarment by referring to specific paragraphs of the MoRTH circular dated 07.10.2021 i.e., table of para 3, serial No. 3(b) (c) and (d) which reads as under:

> "3. The circular dated 14.06.2021 mentioned at reference (iii) is superseded by this circular and following penal actions shall be taken against the Authority's Engineer/Independent Engineer/Construction Supervision Consultant/Project management Consultant in case of lapses on their part/deficiencies in services provided.

3(a)	*xxxxxxxxx*	*The concerned key personnel & team leader to be removed from the project and debarred up to years.*	*In addition to rectification of deficiencies and taking adequate measures not to repeat such instances in future, the consultant to be debarred up to 2 years.*
(b)	***Failure to detect design/quality deficiency** in Key component having substantial cost (1% of civil work cost or more) and/or implication (5% of project completion period or more)*		
(c)	***Failure to detect deficiency/not reviewing design** (including temporary works) and construction (including methodology) of structural components of flyover/bridge/underpasses/overpasses/ROB/RUB etc.*		
(d)	*Failure to propose action (like cure period notice, levy of damagers, etc.) on contractor/concessionaire as per contract agreement for their default/poor progress having material adverse effect the project implementation in terms of cost (1% of civil work cost or more) and/ time (5% of project completion period of more*		

....."

20.1. In the opinion of this Court, the invocation of Clauses 3 (b) and (c) necessarily requires a finding (first) against the EPC Contractors to the effect that the said contractor has proposed a faulty design or failed to execute the project as per the prescribed quality standards. However, in the facts of this case, Respondent No. 1 has admitted before this Court that no debarment proceedings have been initiated against the EPC Contractors. There is no material on record that the work carried out by the EPC Contractors has been held to be deficient and such a deficiency has crept in on account of supervision failure of the Petitioner herein. No facts justifying the invocation of Clause 3(b) and 3(c) have been placed on record.

20.2. Similarly, the facts necessary for invoking Clause 3 (d) have not been placed on record. The Respondent No. 1 has not issued any show cause notice to the EPC Contractors for any delay in the completion of the Project. As noted above, the primary responsibility for completing the construction of the contract lies with the EPC Contractors. There is no allegation in the letters granting EoT that the delay has been occasioned on account of the supervisory lapse of the Petitioner. On the contrary, as noted above, the two (2) extensions granted to the EPC Contractors appear to have been on account of COVID-19 pandemic and the judgment passed by the Supreme Court in Citizen for Green Doon (Supra) on hill cutting.

20.3. The Petitioner has pleaded that it has issued NCRs. (Non-confirmation Report) to the EPC Contractors for course correction and issued show-cause notices as well, which are duly marked to Respondent No. 1. It contended that under the contract an AE does not have the power to initiate penal action against the EPC Contractors. During the course of arguments, Respondent No. 1 contended that though NCRs. have been issued by the Petitioner no coercive action was recommended by Petitioner to Respondent No. 1 against the EPC Contractors.

20.4. This Court is unable to appreciate this submission of the Respondent No. 1 as it

is admitted by Respondent No. 1 that it has not initiated any debarment proceedings against the EPC Contractors for delay or poor-quality workmanship. The Respondent No. 1 being the employer could have initiated action against the EPC Contractors on its own accord, if in its opinion the quality of their work was deficient and/or designed faulty. However, no document evidencing initiation of any adverse/coercive action against the EPC Contractors has been placed on record. The aforesaid plea, therefore, appears to be red herring.

21. At this stage, it would be pertinent to refer to the finding returned by Respondent No. 1 at paragraph 8 (b) of the impugned order referring to a notice of 04.01.2023 pertaining to deficient work noticed at Km. 464.750.

21.1. Firstly, the issuance of notice on 04.01.2023 is a fact, which has occurred subsequent to issuance of SCN dated 15.10.2022 and, therefore, could not have been a ground in the impugned order, which was passed in furtherance to the said SCN, in view of the judgment of this Court in Theme Engineering Services Pvt. Ltd. v. National Highway Authority of India, MANU/DE/3405/2023, relevant portion whereof reads as under:

> *"54. The Court at the outset notes that there cannot be a dispute with respect to the right of NHAI to debar or refuse to deal with an entity while entering into a contract in the commercial sphere. The proposition that blacklisting is an inherent right and can be exercised even in the absence of a specific clause empowering them to take such action is also not one which can be said to be debatable. This clearly flows from the decision of the Supreme Court in Patel Engineering.* ***However, what strikes the Court is the fact that the ultimate order of debarment which has come to be passed, rests and is founded on various allegations which did not even form part of the SCN.*** *While, Mr. Krishnan was correct in his submission that an order of debarment could be founded even in the absence of explicit provisions contained in the contract or even in exercise of an inherent right,* ***the same does not detract from the legal obligation of NHAI to have placed the petitioner on notice of the allegations on the basis of which the debarment was proposed. Basing an order which undoubtedly has serious civil consequences on grounds and allegations with which the petitioner had not even been confronted cannot possibly be countenanced in law.*** *NHAI being State was clearly liable to proceed in the matter of a proposed blacklisting of the petitioner bearing in mind the foundational principles which flow from Article 14 of the Constitution. It would be apposite to refer to the succinct enunciation of the legal position in this regard in UMC Technologies Private Limited v. Food Corporation of India18:-"*
>
> (Emphasis Supplied)

21.2. Secondly, as per the record the EoT granted to the Petitioner herein expired on 31.12.2022 and the Respondent No. 1 has admittedly not granted any further extension. In these facts, the Respondent No. 1 has failed to explain the basis for seeking accountability from the Petitioner for the period beyond 31.12.2022. In any event, the Petitioner has duly explained that on 10.02.2023, it had already issued a Cure Notice to the EPC Contractors in this regard.

21.3. Similarly, the finding returned by Respondent No. 1 at paragraph 8 (c) cannot be a ground in the impugned order, since the allegation forming basis of the finding does not find any mention in the SCN.

22. The Petitioner has contended that the findings in the impugned order is based on the deployment of personnel between October, 2022 and February, 2023. In this regard, the attention of this Court is drawn to the findings at paragraph 8 (a) and 9 (ii) of the impugned order. The Petitioner states that no EoT has been granted till date for the period beyond 31.12.2022. The Petitioner states that since the period from October, 2022was not the subject matter of the SCN dated 15.10.2022, no debarment can be premised on the said period in view of the judgment passed in Theme Engineering Services Pvt. Ltd.(Supra).

22.1. However, the Respondent No. 1 has justified relying upon the said period to state that the status of non-performer has to be assessed as on the date of the passing of the impugned order; so that in case after the passing of the SCN the Petitioner has rectified its violations, the Respondent No. 1 would not declare it to be a non-performer.

22.2. In the opinion of this Court, this submission of the Respondent No. 1 cannot be accepted in view of the judgment passed by the Supreme Court in Gorkha Security Services(Supra), wherein it was held as under:

> *"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 noticee 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.***
>
> (Emphasis Supplied)

22.3. The submission of the Respondent No. 1 cannot be accepted for the additional reason that the impugned order fails to return a finding on the deployment schedule of personnel, which was the subject matter of the SCN at serial no. (ii). The Respondent No. 1 was obliged to first return a finding on the said deployment schedule after considering the reply of the Petitioner as provided in its written response dated 04.11.2022. The Petitioner has relied upon the letter dated 27.11.2021 issued by Respondent No. 1 calling upon it to reduce deployment as the project had achieved 93-95 % financial progress. This is a material fact, for which there is no explanation offered by the Respondent No. 1 while assessing the deployment. The impugned order is silent on the said period starting from December, 2018 to September, 2022. The relevant portion of the letter 27.11.2021 issued by the Respondent No. 1 reads as under:

> *"2. The proposal has envisaged remuneration of local professional staff which is not justified as now almost 93-95% financial progress (including de-scoped quantities) has been achieved in all three packages. Therefore, deploying full component of staff is not justified."*
>
> (Emphasis Supplied)

22.4. This Court also finds merit in the submission of the Petitioner that the period of

October, 2022 to February, 2023 cannot be considered as it is for the period beyond the SCN.

Further, as noted above for the period of January and February, 2023, the Respondent No. 1 has failed to grant an EoT and for this additional reason it cannot rely upon the said period for issuing the debarment order.

22.5. In view of the law settled by this Court in Theme Engineering Services Pvt. Ltd. (Supra), the findings at paragraph 8 (a) (b) (c) and 9 (ii) of the impugned order are liable to be struck down as admittedly the allegations in this regard did not form the part of SCN and actually, pertain to facts which came into existence after the issuance of the SCN.

23. In the facts of this case, the Respondent No. 1 has elected not to terminate the subject contract with the Petitioner and has made a conscious decision to continue with the services of the Petitioner and its personnel for completion of the construction work.

23.1. It is the stand of the Respondent No. 1 that the Project is prestigious and is of national importance. Therefore, the decision to continue with the Petitioner clearly indicates the due satisfaction of the Respondent No. 1 with the quality of services rendered by the Petitioner.

23.2. The Respondent No. 1 has already invoked the monetary penalty clauses of the contract against the Petitioner for the replacement of the personnel. In the opinion of this Court, the Petitioner has, therefore, been sufficiently penalized for the replacement of the personnel.

24. In the facts of this case, where the actions of the Respondent No. 1 evidence due satisfaction with the performance of the contract by the Petitioner, the action of Respondent No. 1 in declaring the Petitioner as a non-performer for replacing its personnel is arbitrary and the action is disproportionate to the allegations levelled.

25. The learned single Judge of this Court in Coastal Marine Construction and Engineering Limited (Supra), has held that it would be unreasonable and arbitrary to visit every contractor, who is in breach of its contractual obligations with the consequences of black listing. The relevant portion of the judgment reads as under:

> *"40. Plainly, a contested allegation of breach of a contract simpliciter does not invite the punitive measure of blacklisting. This is not to say that an order of blacklisting cannot be founded on the conduct of a party who is found to be in breach of a contract. Obviously, the presumption is that a person who has failed and neglected to perform his contractual obligations is unworthy of being considered for any contractual arrangements in future. The principal consideration for imposing the punitive measure is whether such a party is unworthy of being engaged for performing a contract. There may be cases where the conduct of the party is found so wanton and callous that it not only amounts to that party breaching his contractual obligations but may also lead to the conclusion that it is not desirable to enter into any contract with the said party. However, there may be cases where a party is unable to perform a contract or is disabled from doing so, for unforeseen reasons, which may be beyond the control of that party. There may be cases where despite the party making all bona fide attempts to fulfil its contractual obligations is unable to do so for reasons that he cannot be held responsible for. In certain cases, there may be a serious controversy, whether the party has, in fact, breached the*

contract. Clearly, in such cases, non-performance of a contract would not indicate that the party is unworthy of being awarded contracts in future.

41. As observed by the Supreme Court in Erusian Equipment Chemicals Ltd. (supra), an order of blacklisting casts a slur on the party being blacklisted and is stigmatic. ***Given the nature of such an order and the import thereof, it would be unreasonable and arbitrary to visit every contractor who is in breach of his contractual obligations with such consequences.***

"42. Plainly, if a contractor is to be visited with the punitive measure of blacklisting on account of an allegation that he has committed a breach of a contract, the nature of his conduct must be so deviant or aberrant so as to warrant such a punitive measure. ***A mere allegation of breach of contractual obligations that is disputed, per se, does not invite any such punitive action.*** *In the present case, IOCL had relied upon the Blacklisting Guidelines in support of the impugned orders. In terms of paragraph 2.1(i) of the Blacklisting Guidelines, a party could be put on a holiday list if he had committed a breach of a contract."*

(Emphasis Supplied)

26. To conclude, the Respondent No. 1 on the allegations of breach of contractual terms has elected to not terminate the contract; however, on the very same allegations of breach (and no more) the Respondent No. 1 has initiated the punitive measure of debarment against the Petitioner.

In view of the law settled by Supreme Court and this Court that action of debarment and blacklisting should be resorted to by an employer in egregious facts of fraud and gross misconduct; however, the action of Respondent No. 1 in continuing to avail the performance of the contract by Petitioner on one hand and debarring the Petitioner on other hand are inconsistent and cannot stand together. In fact, this action of the Respondent No. 1 evidences arbitrary exercise of the power of debarment by the Respondent No. 1.

If as per Respondent No. 1, acts and omissions of the Petitioner do not merit terminating the contract then surely such acts and omissions cannot justify debarment as threshold for such an action is higher and stricter.

27. The impugned order of debarment has far-reaching consequences as it disables the Petitioner from participating in bids of National Highways Projects for one (1) year. The power for debarring a person/entity cannot be resorted to when the grounds for invoking the said power is only a breach or violation of the condition of a contract, which has been compensated by the defaulting party in damages as stipulated under the contract; and where the default has not resulted in any non-performance of the agreement. In fact, in the judgments relied upon by the Respondent No. 1, serious allegations of fraud, collusion, forgery etc. However, in the facts of this case, as noted above, the progress of the Project has been held to be satisfactory by the Respondent No. 1. This Court therefore, finds that the debarment of the Petitioner in a contract which has otherwise been duly performed by the Petitioner to the satisfaction of Respondent No. 1 is arbitrary.

28. This Court finds that the action of debarment is wholly disproportionate and unreasonable in these facts; as it is apparent that the Project has been satisfactorily executed as on 15.10.2022 (i.e., the date of issuance of the SCN) and even

subsequently as is evident from the letter dated 11.07.2023 which reads as under:

> *"Sir,*
>
> *Please refer to the subject cited above and letter under reference, wherein the consultant has represented against the warning letter dated 04.05.2023 issued by NHIDCL on account of failure to arrange/provide adequate manpower at site,* ***for which it has been also desired for foreclosure of the subject contract as on as where it is basis.***
>
> *2. In this regard, the request of the Consultant for foreclosure of work is fount not tenable as there is no provision in the Contract Agreement for foreclosure of work.* ***Hence, the proposal is hereby rejected,*** *as such the major civil works (i.e., Pkg-I, Pkg-II and Pkg-III along NH-07) are nearing completion and therefore proper supervision services is highly essential for ensuring effective completion of these works, You are once again advised to work as per Good Industry Practise for the interest of the project and refrain from any such action which would affect the execution/completion of these centrally sponsored projects."*
>
> (Emphasis Supplied)

29. This Court is of the opinion that the action of blacklisting is wholly disproportionate and unreasonable in the facts of this case, as the Respondent No. 1 continues to demand performance of the contract from the Petitioner and as noted above has declined to foreclose the contract.

30. Accordingly, for all the aforesaid reasons, the instant petition is allowed. The Impugned Order dated 06.04.2023 is set aside. The petition is disposed of in the aforesaid terms along with pending applications, if any.

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