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

Date of decision: 25th April, 2019

\+ LPA 264/2019 and C.M. No.18014/2019 (for stay)

M/S ACE INTEGRATED SOLUTIONS LTD ..... Appellant
Through: Mr. Sameer Rohtagi, Advocate with Mr. Akhand Pratap Singh, Advocate, Mr. Manish Sharma, Advocate and Mr. Bahul Kalra, Advocate and Mr. Akshit Pradhan, Advocate.

versus

FOOD CORPORATION OF INDIA & ANR ..... Respondents
Through: Mr. Manoj, Standing Counsel with Ms. Aparna Sinha, Advocate for respondent No.1.
Mr. Amit Kumar, Advocate for respondent No.2.

**CORAM:**
**HON'BLE THE CHIEF JUSTICE**
**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

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

**ANUP JAIRAM BHAMBHANI, J. (ORAL)**

The appellant M/s ACE Integrated Solutions Limited (ACE) impugns order dated 25.02.2019 made in W.P.(C) No.1954/2019, by which writ petition ACE had challenged termination of its contract by respondent

No.1Food Corporation of India(FCI) and its blacklisting in the same context for a period of five years. By order dated 25.02.2019 the single Judge has dismissed the writ petition.

2. The transactions between the parties which led to disputes and litigation was a contract whereby vidé letter dated 10.04.2017 FCI had engaged the services of ACE as an agency for recruitment of watchmen in the Delhi region. Under the contract, ACE was to render services of recruiting watch and ward staff for FCI. The recruitment process was to comprise a written examination followed by a physical endurance test for the candidates.

3. It transpires that when FCI scrutinized the dossiers of candidates who were shortlisted after the written examination and the physical endurance test, several discrepancies were observed by FCI and since such discrepancies were serious, FCI decided to call the shortlisted candidates with *prima-facie* discrepancies in their dossiers for verification of documents. A committee of FCI officers formed for the purpose observed discrepancies in the photographs/signatures/thumb impressions/educational qualifications of 14 out of 17 candidates called for document verification.

4. FCI blamed ACE for such discrepancies and accused it of indulging in unfair practices and thereby permitting applicants/candidates to manipulate the examination, including by indulging in impersonation at the examination. Considering the seriousness of the matter, a criminal case was registered by the Central Bureau of Investigation (CBI) upon a complaint made by FCI.

5. In this background, FCI issued to ACE a show cause notice dated 03.07.2018, the relevant part of which reads as under:-

> *"The inability of the candidates to answer the random questions from the written exam paper, in which they have scored exceptionally good marks, and mismatch of photographs/signature/handwritings, collected from the respective candidates at different stages of the recruitment process, raise serious doubt over the efficacy and fairness of the process adopted by the recruitment agency, i.e. M/s ACE Integrated Solutions Limited for conducting the written examination, which is a clear contravention of Clause 31 and 40 of the MTF.*
>
> *Therefore, M/s ACE Integrated Solutions Limited (represented by Sh. Chandra Shekhar Verma, Director) is hereby called upon to explain the reasons for the unfair practices observed in the recruitment process conducted by the agency. The reply should reach the undersigned within seven days of receipt of this notice, failing which it will be presumed that nothing is to be submitted and action as per terms & conditions of the MTF shall be taken against the Agency."*
>
> (Emphasis Supplied)

6. In response to the show cause notice, ACE sent a reply dated 10.07.2018 denying the allegations made, and in conclusion, ACE said this :

> *"I would once again reiterate the fact that the recruitment and examination process was conducted in the most transparent, professional and fair manner. Enough safeguards were taken to prevent any anticipated malpractice like the inclusion of the aforementioned clause, creation of 12 series of question paper, videography of the PET etc. No untoward incidents/complaints were reported during/after the examination and throughout the recruitment process."*

7. The response from ACE notwithstanding, by order dated 24/29.01.2019 issued by it, FCI terminated the contract with ACE; and also debarred ACE from participating in future tenders of FCI for a period of five years. The relevant portion of order dated 24/29.01.2019 reads as under:-

> *"And therefore, in exercise of the powers conferred upon the undersigned vide above reproduced Clause 42.1 (ii) of the MTF and having examined the entire matter in its totality, the contract with M/s Ace Integrated Solutions Ltd. is hereby terminated with immediate effect. Accordingly, as per Clause 10.1 and 10.2 of the MTF, the said M/s Ace Integrated Solutions Ltd. is hereby debarred from participating in any future tenders of the Corporation for a period of 05 years. Further, the Security Deposit deposited by the agency M/s Ace Integrated Solutions Ltd. is also hereby forfeited as per Clause 15.6 of the governing MTF. Additionally, since this failure on the part of the agency has resulted into damages as defined in Clause 37 and 41.1, the agency is not entitled to any further payment in respect of the recruitment process, which could not be completed, and it is advised to refund the amount of Rs. 14,03,389/- (Fourteen Lakhs Three Thousands Three Hundred Eighty Nine) already paid to the agency. This order is issued without prejudice to any other legal remedy available with the FCI to safeguard its interest.*
>
> (Emphasis Supplied)

8. The aforesaid order dated 24/29.01.2019 was impugned by way of the writ petition before the single Judge, which writ petition was dismissed

upholding both the termination as well as the blacklisting order imposed against ACE; with the court holding that it was not delving into the contractual dispute or claim of FCI to recover amounts already paid to ACE, and was restricting itself to examining the decision of FCI to debar ACE from participating in future tenders for a period of five years. The single Judge dismissed the petition observing as under:-

> *"15. It is seen that the said decision has been taken after the petitioner was given due opportunity of being heard. This Court is also unable to accept that the punition imposed is harsh or onerous and disproportionate to the allegation.*
>
> *"16. The contention that a criminal case is pending and therefore FCI was required to watch the outcome of the same, is also unmerited. The two proceedings, blacklisting the petitioner and the criminal case, are separate proceedings. Even if it is accepted that the petitioner was not complicit with the candidates in question, it can hardly be disputed that it had failed to maintain the necessary integrity of the selection process. Thus, irrespective of whether the petitioner (or its officials) are found to be criminally liable, the action resting on its failure to duly discharge its function can be initiated."*

9. In the context of the above factual narrative, it would be relevant at this point to extract the relevant provisions of the bid document on the basis of which FCI has terminated the contract with ACE and passed the blacklisting order. The relevant clauses are as under:

*"**42. <u>TERMINATION</u> OF CONTRACT:***

*42.1 By Corporation*

*(i) In the event of the Agency having been adjudged as insolvent or going into liquidation or winding up their business or making arrangement with their creditors, the FCI shall be at liberty to terminate the contract forthwith and to realize from the Agency all resultant losses, damages, costs incurred without prejudice to any other rights or remedies under the contract and law and to get the work done for the unexpired period of the contract at the risk and cost of the Bidders.*

*(ii) The <u>FCI shall also have, without prejudice to other rights and remedies, the right in the event of breach by the Bidder of any of the terms and conditions of the contract, or failing to observe any of the provisions, obligations governing the contract, to terminate the contract</u> forthwith and to get the work done for the unexpired period of the contract at the risk and cost of the Agency and to forfeit the Security Deposit or any part thereof for recovery of all losses, damages, costs and expenses which may be incurred by FCI consequent to such termination and/or in completing the assignment. FCI may also effect recovery from any other sums then due to the Agency or which at any time thereafter may become due under this or any other contract with FCI. In case the sum is not sufficient to cover the full amounts recoverable, the Agency shall pay FCI on demand the entire remaining balance due.*

*(iii) FCI may at any time without assigning any reason terminate the contract without any liability by giving 7 working days' notice to the bidder."*

(Emphasis Supplied)

***"10. <u>DISQUALIFICATION</u> CONDITIONS:***

*Bidder who have been blacklisted or otherwise debarred by FCI or central/state Govt. or any central/ State PSU/Statutory Corporations, will be ineligible during the period of such blacklisting.*

*10.1 Any Bidder whose contract with FCI or central/state Govt. or any central/State PSU/ Statutory Corporations has been terminated before the expiry of the contract period for breach of any terms and conditions at any point of time during the last five years, shall be ineligible.*

*10.2 Bidder whose Earnest Money Deposit and/or Security Deposit have been forfeited by the FCI or central/state Govt. or any central/ State PSU / Statutory Corporations, during the last five years, for breach of any terms and conditions, shall be ineligible.*

*10.3 A Hindu Undivided Family shall not be entitled to apply for Bid in the capacity of HUF. Any bids submitted in the capacity of Hindu Undivided Family (either as a proprietor or partner of a firm) shall be summarily rejected.*

> *10.4 If the proprietor/any of the partners of the Bidder firm/any of the Directors of the Bidder company/any of the Directors or Members of the governing body of the Society have been at any time, convicted by a Court for an offence involving moral turpitude, such Bidder will be ineligible.*
>
> *10.5 While considering ineligibility arising out of any of the above clauses, incurring of any such disqualification in any capacity whatsoever (even as a proprietor, partner, Member in another firm, or as a director of a company etc.) will render the Bid disqualified.*
>
> *10.6 An unregistered partnership firm or society shall not be eligible to apply for the bids."*

10. To begin with counsel appearing for ACE contended that ACE was challenging both the termination of its contract as well as debarment order made against it by FCI. After making some submissions however, counsel conceded that insofar as the issue of termination of its contract is concerned, ACE would not press the challenge in the present proceedings provided its liberty to invoke remedies in civil law are kept open. In these circumstances, it is clarified that the scope of the present petition is confined to considering the validity *only* of the debarment order made by FCI against ACE.

11. In the present case, a decision on the validity of the debarment order turns upon the validity of the show cause notice issued by FCI to ACE; and whether, by way of the show cause notice so issued, ACE had adequate and

specific notice that it was facing possible debarment. The legal position in regard to an action of debarment or blacklisting consequent to issuance of a show cause notice has been clearly enunciated in a recent judgment of the Supreme Court in the case of ***Gorkha Security Services vs. Government (NCT of Delhi) & Others*** reported as **(2014) 9 SCC 105**where the Supreme Court has held as under:

> *"14. It is in this backdrop, the question which has arisen for our consideration in the present case is as to whether action of blacklisting could be taken without specifically proposing/contemplating such an action in the show cause notice? To put it otherwise, whether the power of blacklisting contained in Clause 27 of the NIT, was sufficient for the Appellant to be on his guards, and to presume that such an action could be taken even though not specifically spelled out in the show-cause notice?*
>
> *21. The Central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, 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.*
>
> *27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the Appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter."*

It is clear therefore that for a show cause notice to be valid as a basis for issuing a blacklisting or debarment order to a contracting party, the notice must spell-out clearly, or its contents be such that it can be clearly inferred therefrom, that there is intention on the part of the person issuing notice that the penalty of blacklisting may be imposed upon the noticee. The aim and intent is that a person or entity against whom the penalty of blacklisting or debarment is intended to be imposed must have clear notice and be afforded adequate, informed and meaningful opportunity to show cause against possible blacklisting or debarment.

12. In the present case, it will be seen that while termination of the contract was contemplated under Clause 42 of the Instruction to Bidders dated 18.11.2016 ("Instructions"), blacklisting or debarment as a ground of ineligibility was contemplated under Clause 10 thereof. *We must hasten to add that Clause 10 does not spell-out as to in what circumstances, on what grounds and by following what procedure a contracting party may be blacklisted ; but only says that a blacklisted entity would be ineligible to be a contracting party*.

13. We have carefully perused the Instructions and we find that while there is reference to blacklisting or debarment in certain clauses of the Instructions *inter alia* in clause 13.2 (which deals with a bidder resiling from the offer after submitting a bid), clause 15.4 (bidder failing to furnish security deposit after the bid) and clause 25 (bidder indulging in corrupt practices), no process for debarment has been laid-down. In fact there appears to be no provision in the Instructions setting-out any specifics, grounds, modalities or procedures for debarment. In any case, as we have observed, ACE was never put to notice, in terms which are specific or in terms from which it can be inferred, that it should answer any specific grounds *for debarment*.

14. That apart, Clause 42 deals *only* with termination of a contract; and debarment must necessarily be conceived-of as a separate and distinct matter. There is nothing to suggest that debarment is intended to be an automatic consequence or necessary sequitur to the termination of a contract, whatever be the reason for termination. Debarment cannot be a necessary concomitant of every termination. If a contract were to be terminated, say, by reason of prolonged *force-majeure* by mutual consent as

contemplated in clause 44.3 of the Instructions, would debarment follow as a sequitur? Surely not.

15. To be clear, while termination is a mode of ending an *existing* contractual relationship ; debarment or blacklisting is a mode of preemptively disqualifying a party from *future* contractual relationships. These are two separate and distinct matters and cannot be rolled into one. Each must have its own rationale, grounds and procedures, including putting the affected party to specific notice as regards the specific proposed action, even more so when the party proposing the action is a State entity.

16. A perusal of show cause notice dated 03.07.2018 shows that ACE was not put to notice, whether in specific terms or in terms from which it could be inferred, that action of debarment may follow as a consequence of the show cause notice for termination.

17. If anything, clause 16(i) of the Instructions indicates that even on FCI's own reckoning, blacklisting is a *subsequent* process at least in so far as cancellation of the tender is concerned, since the said provision recites as follows:

> *"16*
>
> *x x x x x x*
>
> *(i) Any attempt by tenderer to change the format of any of the supporting documents of the MTF while uploading or any attempt to tinker with the software of the portal will render his tender liable for cancellation and his subsequent blacklisting."*
>
> (Emphasis Supplied)

When the clause for cancellation of the tender or bid contemplates blacklisting as a *subsequent* process, then *a fortiori* blacklisting must certainly be a *subsequent* process to the termination of a concluded contract. The turn of events shows however, that in this case, there was not even a specific notice for blacklisting much less a subsequent process.

18. In our view therefore, on a conspectus of the facts and circumstances of the present case, show cause notice dated 03.07.2018 does not fulfil the requirements of a valid show cause notice for debarment or blacklisting and does not meet the requirements of the law as laid down in the case of ***Gorkha Security Services*** *(supra).*

19. In fact we must remind ourselves of the consistent line of judicial opinion of the Supreme Court in the matter of blacklisting of entities by government agencies in relation to contracts, where the Supreme Court not only mandates the requirement of a show-cause notice but goes further to say that there is a requirement of hearing before a person is placed on a blacklist. This mandate arises from a convergence of two aspects : firstly, that blacklisting visits a person with a "civil consequence" inasmuch as it casts a slur, attaches a stigma and creates a barrier between the blacklisted person and State entities in matters of commercial transactions; and secondly, that the fundamentals of fair play require that a person should be afforded an opportunity to represent his case before being put on a blacklist at the hands of a State entity. This has been the verdict of the three Judge Bench of the Supreme Court in the case of ***M/s. Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal &Anr.***(and a connected matter) reported as ***(1975) 1 SCC 70***,where, addressing the issue as to whether a

person who has been put on the blacklist by a State Government is entitled to a notice to be heard, the Supreme Court held as follows:-

> *"12. Under Article 298 of the Constitution the Executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there (sic) the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.*
>
> *x x x x x x*
>
> *"15. The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The black lists are "instruments of coercion".*

> *"20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."*
>
> (Emphasis Supplied)

It is pertinent to note that in the case of ***Erusian Equipment***(supra), the Supreme Court was evaluating the submission made that the State Government can choose to deal with a person in whom the State has trust; that the contract in question was not under a statute; that blacklisting was an *internal* and *confidential* step; and further, that the rights under Articles 14, 19 and 21 of the Constitution do not extend to compelling a party, including the Government, to negotiate or enter into a contract. It was further argued on behalf of the State that the duty to act fairly would not always mean a duty to hear an affected party; that, while *public blacklisting* is not confidential, *departmental blacklisting* is a confidential matter; and also that the rules of natural justice do not operate at the time of entering into the contract. And yet the Supreme Court held that an opportunity of hearing before blacklisting is a requirement of the fundamentals of fair play.

20. Years later in the case of ***Southern Painters vs. Fertilizers & Chemicals Travancore Ltd. & Anr.*** reported as ***1994 Supp (2) SCC 699,*** the Supreme Court relied upon its own view taken in ***Erusian Equipment*** (supra) and upheld the dissenting view in a Full Bench decision of the

Kerala High Court in the case of ***Punnen Thomas vs. State of Kerala (AIR 1969 Ker 81 (FB))***,when the Supreme Court said :

> *"8. The minority view of Justice Mathew is now the law. The majority view in V. Punnen Thomas case is not good law and must be considered to have been, impliedly, overruled by the Erusian case. Indeed, in Joseph Vilangandan v. Executive Engineer, Buildings & Roads (PWD) Division, Ernakulam it was held:*
>
> > *"The majority judgment of the Kerala High Court, inasmuch as it holds that a person is not entitled to a hearing, before he is blacklisted, must be deemed to have been overruled by the decision of this Court in Erusian Equipment...."*

In the case of ***Southern Painters*** (supra) the Supreme Court also endorsed the view it had taken in ***Raghunath Thakur vs. State of Bihar (1989) 1 SCC 229*** in the following words:

> *"10. Again, in Raghunath Thakur v. State of Bihar, this Court observed:*
>
> > *"Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right.But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected*

*by any order should have right of being heard and making representations against the order."*

(Emphasis Supplied)

21. Even in the recent case of ***Caretel Infotech Ltd. vs. Hindustan Petroleum Corporation Limited & Ors.*** decided on 09.04.2019 and reported as ***2019 SCC Online SC 494***, the Supreme Court has struck the same note, observing that the mere issuance of a show cause notice for visiting a bidder with the severe consequence of blacklisting, is unsustainable, in the following words:

> *"26.We may also look at this aspect from another perspective. Blacklisting has very serious consequences. A show cause notice may result in blacklisting or may not result in blacklisting. The mere show cause notice being issued, to visit such a severe consequence on a bidder, may be difficult to sustain.*
>
> *"27.The case of the appellant is further fortified by even the language used in the show cause notice. The show cause notice itself, in the last paragraph, calls upon the appellant to show cause as to why suitable action for blacklisting "should not be initiated". Pursuant to the response of the appellant, the next stage would have been the initiation of the blacklisting process, if the explanation was not found satisfactory. The term used in the blacklisting clause 20(i), on the other hand, talks about a situation where blacklisting has already been initiated. Plain English words used must be given their ordinary grammatical meaning, an aspect discussed in a little more detail hereinafter."*

Reference to the next stage, viz. initiation of the the *blacklisting process*, in the paragraph quoted above, would in our opinion, include an opportunity of hearing being given to the party likely to be affected. A mere show cause notice, unless the explanation given in the written response to such show cause notice is being accepted, is not sufficient and a noticee must have the opportunity of hearing before blacklisting.

22. We may also add that since there was no specific notice as regards possible debarment, FCI also did not apply the tenets and considerations as laid down by the Supreme Court in the case of ***Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited & Others*** reported as **(2014) 14 SCC 731**where the Supreme Court has spelt-out guidelines and factors that ought to guide a decision on debarring a person or entity. It may be useful to extract the observations of the Supreme Court in this regard in the case of ***Kulja Industries Limited*** (supra):

> *"22. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:*
>
> *(a) The actual or potential harm or impact that results or may result from the wrongdoing.*
>
> *(b) The frequency of incidents and/or duration of the wrongdoing.*
>
> *(c) Whether there is a pattern or prior history of wrongdoing.*
>
> *(d) Whether the contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to*

*participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.*

*(e) Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.*

*(f) Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.*

*(g) Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and has made or agreed to make full restitution.*

*(h) Whether the contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.*

*(i) Whether the wrongdoing was pervasive within the contractor's organization.*

*(j) The kind of positions held by the individuals involved in the wrongdoing.*

*(k) Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.*

*(l) Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.*

*X X X X X X*

> "*28.2 Secondly, because <u>while determining the period for which the blacklisting should be effective the respondent Corporation may for the sake of objectivity and transparency formulate broad guidelines</u> to be followed in such cases. <u>Different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed</u> by such guidelines. While it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent Corporation may do so as far as possible <u>to reduce if not totally eliminate arbitrariness in the exercise of the power vested</u> in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor."*
>
> (Emphasis Supplied)

23. Since in the present case there was no application of mind by the FCI and debarment was simply dovetailed with the decision to terminate, *straightaway and as a matter of course*, without any cogitation or assessment, the period of debarment was also not decided consciously on any specific considerations ; and the maximum possible 5-year debarment period was imposed without weighing the gravity of the breach of contract. This only makes matters worse inasmuch as it shows that the FCI neither put ACE to notice in relation to possible debarment ; nor did FCI apply any principles or tenets laid down in law for visiting ACE with the very serious consequences of debarment which, as repeatedly held by the courts, amounts

to 'civil death' of the person or entity that is blacklisted. We are tempted to extract the words of the Supreme Court on the consequences of debarment as contained in the case of ***Gorkha Security Services*** *(supra)* where the Supreme Court said :

> *"16. It is a common case of the parties that the blacklisting has to be preceded by a show-cause notice. Law in this regard is firmly grounded and does not even demand much amplification. The necessity of compliance with the principles of natural justice by giving the opportunity to the person against whom action of blacklisting is sought to be taken has a valid and solid rationale behind it. With blacklisting, many civil and/or evil consequences follow. It is described as "civil death" of a person who is foisted with the order of blacklisting. Such an order is stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of Government contracts."*
>
> (Emphasis Supplied)

24. While in the impugned judgment the single Judge cites the dictum of the Supreme Court in the case titled ***Patel Engineering Limited vs. Union of India & Anr.*** *reported as* ***(2012) 11 SCC 257*** where the Supreme Court says :

> *"The State can decline to enter into a contractual relationship with a person or class of persons for legitimate purpose. The authority of the State of blacklist a person is necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of*

> *such an authority is that the State is to act fairly and rationally without in any way being arbitrary-thereby such a decision can be taken for some legitimate purpose*."
>
> (Emphasis Supplied)

the single Judge however errs in misapplying the mandate of the Supreme Court by upholding the blacklisting in this case in which FCI has blacklisted ACE without even putting the latter to specific notice of possible debarment and without any application of mind on FCI's part. We may add that it is a given, that if authority is to be exercised fairly, rationally, non-arbitrarily and for legitimate purpose it must be exercised with prior notice to the affected party and with due application of mind on the basis of some rational criteria. FCI's action in this case does not hold-up to any of the criteria laid down by the Supreme Court *inter-alia* in the case of ***Patel Engineering Limited*** (supra).

25. While not basing our judgment on what follows, we cannot help noticing that in letter dated 21.09.2018 addressed by ACE to FCI, without mincing words, ACE has made some very serious allegations, *inter-alia that*:

> *"6.8 Our 20 years record of successfully conducting the over 500 examinations is a testimony of our integrity and efficiency. In fact we did not indulge in any wrong doing in the conduct of FCI examination even when some top officials of FCI asked us to declare some unsuccessful candidates as qualified. We diplomatically avoided all such requests for malpractices even though we were threatened that our agency will be blacklisted and our bills will not be cleared if we do not accede to their commands for unfairly manipulating the results. We knew that in not honouring such requests from*

*top officials of FCI, we run the risk of unnecessary faults being found with the conduct of examination by us and of our payments being withheld. Our company, however, as a matter of conviction and policy does nothing that can even remotely compromise with the integrity and fairness of the examination process no matter what may be the outcome of ignoring such requests. One of the officials called and met the MD of the Agency one day prior to the examination at Cannaught Place in Delhi to further his unethical demands. Which were not acceded to. One of the officials of a region had sent an envelope containing the names and details of the candidates to be accommodated and made successful. Those cases have not been accommodated and therefore, the payment has been withheld for more than a year in vengeance. These are not lone incidents. Numerous such requests were also received from all religions including Rajasthan also by their senior officials in the due course except Kerala. These requests had been turned down. The incidents so pointed out are not mere conjectures and are capable of being proved if enquired. The acts of withholding the payments are motivated by vengeance."*

(Emphasis Supplied)

ACE has also filed a complaint dated 21.01.2019 with the Central Bureau of Investigation (CBI) against a certain General Manager of FCI, which contains very specific allegations in relation to the concerned officer attempting to influence the recruitment process for the watch and ward staff that was subject matter of the contract. Since these allegations made by ACE against FCI officers are not subject matter of the present appeal, we

refrain from commenting any further upon them, except to note with consternation that these allegations have not been enquired into.

26. In light of the above, in our view, the single Judge erred in upholding the debarment order made by FCI against ACE by dismissing the writ petition. Accordingly, whereby set-aside the impugned order and hold that ACE shall no longer be on the FCI blacklist; while clarifying that both ACE and FCI shall be at liberty to pursue their remedies in relation to any *inter-se* claims or counter claims they may have arising from the contract, as may be available in law.

27. We clarify that nothing said in this judgment be taken as a reflection of our opinion on the merits of any contractual claims between the parties ; and that the present judgment is restricted only to the issue of debarment/blacklisting as aforesaid.

28. The appeal is allowed in the above terms; without however, any order as to costs.

**ANUP JAIRAM BHAMBHANI, J**

**CHIEF JUSTICE**

**APRIL 25, 2019/**Ne