Supreme court guidelines on blacklisting of contractor

In Kulja (supra), the Supreme Court had laid down the guidelines for any action of blacklisting. The factors that were necessary to be considered by the authority imposing the punitive measure were summarized as follows:-

“21. 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 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 have made or agreed to make full restitution.
(h) Whether 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."

THE HIGH COURT OF DELHI AT NEW DELHI
Judgment delivered on: 06.02.2015
W.P.(C) 2041/2014 & CM Nos. 4256/2014 & 14287/2014
M/S AVINASH EM PROJECTS PRIVATE LIMITED ..... versus.. M/S GAIL (INDIA) LIMITED
CORAM:-HON'BLE MR JUSTICE VIBHU BAKHRU,
Dated; FEBRUARY 06, 2015

The petitioner has filed the present petition impugning an order of the respondent dated 18.03.2014 (variously referred to as 'the blacklisting order' or 'the impugned order') whereby the respondent has banned the petitioner for an indefinite period from doing any future projects with the respondent or participating in bidding process for any of its tenders in future. The said decision is subject to review after a period of ten years.

2. The brief facts that are relevant for examining the controversy in the present petition are as under:-

2.1 the respondent - GAIL (India) Limited (hereafter also referred to as (GAIL) is a state-owned natural gas processing and distribution company in India. The respondent invited E-Tender no.8000002161 for laying of pipelines of spur lines to Bhilwara and Chittorgarh and augmentation of existing Vijaipur Kota pipeline (hereafter 'E-Tender 2161'). The complete scope of work of the E-Tender 2161was divided into 5 parts (Part A, B, C, D and E).

2.2 Paragraph 4.2 of the Invitation for Bids (hereafter 'IFB') stipulated that the Indian Bidders shall have minimum working capital of `30 million for Part D and `18.5 million for Part E, i.e. an aggregate of `4.85 crores, as per their immediate preceding year's audited financial results. In the event of inadequate working capital, the bidder was required to supplement the shortfall with a letter issued by the bidder's banker (having net worth not less than `1000 million) confirming availability of a line of credit to meet the specified working capital requirement. In the event, the audited financial results for the immediate preceding financial year were not available; bidders had the option to submit the audited financial result for the year immediately prior to that year for consideration of the working capital calculation. Paragraph 9 of IFB provides that a bidder would furnish documentary evidence by way of copies of work order, completion certificate, balance sheet or audited financial statements including the profit and loss

account etc. along with the bid, to establish that the qualification criteria was met.

2.3 Apart from E-Tender 2161, the respondent also invited E-Tender No.8000002119 - for annual rate contract for construction of pipelines and

 associated facilities in Northern Region for supplying gas to new/existing consumers (hereinafter 'E-Tender 2119') and E-tender No.8000003564 - for annual rate contract for construction of pipelines and associated facilities in Northern Region for supplying gas to new/existing consumers (hereinafter 'E-Tender 3564').

2.4 On 06.09.2010, the petitioner submitted its bid for Parts D and E of E-Tender 2161 and E-Tender 2119. Along with its bids, the petitioner submitted an audited financial statement dated 21.08.2010, which reflected the petitioner's company's working capital as on 31.03.2010 to be 6.96 crores approximately. The respondent awarded the contract for E-Tender 2161 and E-Tender 2119 to the petitioner based on the information and documents supplied by the petitioner in its bids.

2.5 The respondent issued a Show Cause Notice dated 29.07.2013 alleging that a forged and manipulated audited financial statement dated 21.08.2010 was submitted to secure the tenders. It was pointed out that the balance sheet submitted to the Registrar of Companies, Delhi for the year 2010-11 reflected the working capital of the petitioner company, as on 31.03.2010, as `3.01 crores approximately. The petitioner was called upon to show cause as to why penal action of banning the petitioner from doing any business with GAIL not be initiated.

2.6 The petitioner, by its letter dated 07.08.2013, replied that at the time of submission of the bid, the balance sheet for the year 2009-10 was under scrutiny and was yet to be finalized and approved. Therefore, the financial statement dated 21.08.2010, duly audited by a Chartered Accountant, was submitted to the respondent. And, subsequently the balance sheet for the year 2009-10 was approved in the Annual General Meeting held on 30.09.2010 and the same was filed with the Registrar of Companies, Delhi. The petitioner contended that the difference in the figures of the working capital in the financial statement and the balance sheet was due to the fact that the company had received cheques in the month of February 2010 from unsecured creditors, which were accounted in the books as the said cheques were valid at the time of preparation of the financial statement, however, the said cheques become stale and the entries were reversed at the time of finalizing the audited Balance Sheet.

2.7 The respondent rejected the reasons provided by the petitioner and passed an order dated 16.01.2014 blacklisting the petitioner from doing any future business with GAIL. The petitioner challenged the said order by way of a writ petition (W.P(C) 465/2014) before this Court. By an order dated 21.01.2014, a Co-ordinate Bench of this Court set aside the order dated 16.01.2014 and directed the respondent to pass a fresh reasoned order after considering all the documents placed by the petitioner on record and after affording the petitioner an opportunity of hearing.

2.8 Pursuant to the Order dated 21.01.2014, the respondent accorded a personal hearing to the petitioner on 30.01.2014 and also granted the petitioner an opportunity to present further documents. In the mean time, the respondent also filed an appeal (LPA No.167/2014) before a Division Bench of this court against the order dated 21.01.2014.

2.9 After considering the arguments and documents filed by the petitioner, the respondent passed the impugned order banning the respondent for an indefinite period.

Thereafter on 24.03.2014, the Learned Division Bench of this court disposed off the LPA No 167/2014 on the ground that as a reasoned order has been passed by the competent authority, the appeal had become in fructuous.

3. The learned counsel appearing for the petitioner advanced his arguments on the assumption that the allegation of submitting a false and fabricated financial statement along with its bids for part D & E of E-Tender 2161 and E-Tender 2119 was made out. He argued that even assuming that allegations leveled against the petitioner were true, nonetheless, the punitive measure inflicted upon the petitioner was too harsh and shockingly disproportionate to the alleged misconduct. He submitted that the petitioner employed over 300 persons and blacklisting the petitioner would, in effect, render the said workers jobless. He contended that the petitioner's expertise was in laying gas pipelines and GAIL was the main procurer of those services. He submitted that bulk of the demand for such services, as were rendered by the petitioner, emanated from GAIL and from other Public Sector Undertakings (hereinafter 'PSUs'). He submitted that blacklisting by GAIL would also result in the petitioner being debarred from tendering for projects floated by other PSUs. He emphasized that the impugned order would effectively result in a 'civil death' of the petitioner. The learned counsel further referred to various clauses of the tender documents which provided for punitive measures for various acts/breaches. He submitted that even for grave misconduct or breach of contract, the punitive measures as contemplated under the IFB, were limited to placing a contractor on a holiday for a period of six months to three years. He submitted that in this context debarring the petitioner from bidding for contracts for an indefinite period, on the allegation of procuring contracts on the basis of false documents, was disproportionate in comparison with the measures specified for breaches of contract and/or fraudulent and corrupt practices.

4. The learned counsel for the respondent submitted that it was established that the petitioner had used forged documents to procure the contracts in question and this also established the petitioner's lack of integrity. In the circumstances, GAIL could not be compelled to award any further work to the petitioner. He submitted that the quantum of punition was within the discretion of GAIL and such discretion was not amenable to judicial review under Article 226 of the Constitution of India. He further disputed the petitioner's contention that the measure of blacklisting was disproportionate to the allegations leveled against the petitioner. According to GAIL, the Court could interfere only if it is found that the action taken by GAIL failed the Wednesbury test of unreasonableness.

5. Concededly, the petitioner furnished a financial statement dated 21.08.2010 along with its bid for part D & E of E-Tender 2161 and E- Tender 2119. The said financial statement was signed by one Vishal Aggarwal and reflected the petitioner's working capital as `6.96 crores. It is not disputed that this financial statement dated 21.08.2010 was materially different from the annual financial statement dated 31.08.2010, which was audited by M/s Neeraj Vinod and Associates (i.e. auditors appointed underm the Companies Act, 1956). The financial statement as on 31.08.2010 reflected the net current assets as on 31.03.2010 to be 3.01 crores. It is also relevant to note that Vishal Aggarwal, subsequently, denied his signatures on the financial statement dated 21.08.2010 and has filed a complaint with the Karol Bagh Police Station claiming that his signatures on the financial statement dated 21.08.2010 were forged. The explanation furnished by the petitioner that there were certain cheques in hand which had been accounted for but had subsequently become stale and, therefore,

were excluded from the calculation of net assets has been disbelieved by the respondent and in my view, rightly so. Even if it is accepted that cheques, representing borrowed funds, were in petitioner's possession that would not alter the net working capital available with the petitioner. In any event, the explanation that the said cheques enhanced the petitioner's working capital is illusory as, admittedly, the cheques were not encashed.

6. The learned counsel for GAIL also pointed out that the petitioner submitted another statement as on 31.03.2011 alongwith its bid for E-Tender 3564 which also reflected its working capital as on 31.03.2010 as `6.9 crores. This statement was filed by the petitioner in September 2011 and at the material time the explanations furnished by the petitioner for variance in the figures between annual statements dated 21.08.2010 and 31.08.2010 were no longer relevant. In my view, furnishing of such
statement in 2011 is inexcusable.

7. In the aforesaid view, the only question to be addressed is whether the action of GAIL to blacklist the petitioner for an indefinite period is disproportionally harsh and not commensurate with the misconduct of furnishing forged/fabricated documents to secure contracts with GAIL.

8. The question whether the impugned order blacklisting the petitioner for an indefinite period is disproportionately harsh needs to be answered keeping in view the consequences of the impugned order.

9. The contention that the petitioner would perish as a result of the blacklisting order has not been disputed. It is not in dispute that the nature of the petitioner's work involves executing contracts with PSUs and bulk of the work for which the petitioner can bid involves the participation of GAIL either as a sole employer or as part of a consortium with other entities. Undisputedly, blacklisting the petitioner for an indefinite period albeit, to be reviewed after ten years, would effectively exclude the petitioner from participating in any contract with any PSU including GAIL and thus, inevitably, destroy the substratum of the petitioner company.

10. The issue whether such measure is excessive must also be viewed in the context of other clauses of the contract. Clause 29 of the General Conditions of the Contract (hereafter 'GCC') provides for the remedy available to GAIL in the event a contractor fails to comply with the provisions of the contract. It is specified that if a contractor refused to execute the work with such diligence as will ensure its completion within the specified time, it would be open for the employer (in this case GAIL) to determine the contract or takeover the work and complete the same at the risk and cost of the contractor. By virtue of Sub-clause 29.2 of GCC, GAIL could also forfeit the security furnished by a contractor and with hold the payment for work already done for a further period of six months from the date of termination of the contract.

11. Article 35 of the IFB provides for measures in respect of corrupt and fraudulent practices. Sub-article 35.1 of the IFB defines corrupt practices and fraudulent practices as under:- "i) ii)

12. "Corrupt Practice" means the offering, giving, receiving or soliciting of anything of value to influence the action of public official in contract execution; and "Fraudulent Practice" means a misrepresentation of facts in order to influence the execution of a Contract to the detriment of the Owner, and includes collusive practice among bidders (prior to or after bid submission) designed to establish bid prices at artificial non competitive levels and to deprive the Owner of the benefits of free and open competition." A bidder is

required to observe the highest standard of ethics during execution of a contract and in terms of Sub-article 35.2 of the IFB, any proposal for an award would be rejected if it is determined that the contractor has engaged in corrupt or fraudulent practice in competing for the contract in question. In terms of Sub-article 35.3 of the IFB, the contractor is also liable to be declared ineligible for a period as specified under Clause 32(C) of GCC. A reference to Clause 32(C) of GCC indicates that the contractor would be put on a holiday for a period of three years from the date of termination of the contract by GAIL. In other words, if a contractor engages in a corrupt and fraudulent practice as defined above, the possible consequence is that he would be put on a holiday – which implies that "neither any enquiry will be issued to the party by GAIL (India) Ltd. against any type of tender nor their offer will be considered by GAIL against any ongoing tender (s) where contract between GAIL and that particular CONTRACTOR (as a bidder) has not been finalized"- for a period of three years.

13. A contractor is also required to furnish an integrity pact in terms of Sub-article 35.4 of IFB. A bidder is required to execute the "integrity pact" in the form as appended to the IFB.

14. A perusal of the said integrity pact indicates that the bidder is to furnish the following commitments and undertakings: -

1. The Bidder/Contractor commit and undertake to take all measures necessary to prevent malpractices & corruption. He commits himself to observe the following principles during his participation in the tender process and during the contract execution:

i) The Bidder/ Contractor undertakes not to, directly or through any other person or firm offer, promise or give or influence to any employee of the Principal associated Employer associated with the tender process or the execution of the contract or to any other person on their behalf any material or immaterial benefit which he/she is not legally entitled, in order to obtain in exchange any advantage of any kind whatsoever during the tender process or during the execution of the contract.

ii) The Bidder/ Contractor undertake not to enter into any undisclosed agreement or understanding, whether formal or informal with other Bidders. This applies in particular to prices, specifications, certifications, subsidiary contracts, submission or non submission of bids or any other action to restrict competitiveness or to introduce cartelization in the bidding process.

iii) The Bidder/Contractor undertakes not to commit any offence under the relevant Anti- corruption Laws of India. Further the Bidder/Contractor will not use improperly any information or document provided by the Principal as part of the business relationship regarding plans, technical proposals and business details,including information contained or transmitted electronically for purposes of competition or personal gain and will not pass the information so acquired on to others.

d) The Bidder/ Contractor will, when presenting his bid undertakes, to disclose any and all payments made, is committed to or intends to make to agents, brokers or any other intermediaries in connection with the award of the contract.

2. The Bidder/ Contractor will not instigate and allure third persons/parties to commit offences outlined above or be an accessory to such offences."

15. GAIL further specified that any transgression of the integrity pact would disqualify the bidder from the tendering process. The relevant extract from paragraph no.3 of the integrity pact is quoted below:-

“If the Bidder, before the award of contract, has committed a transgression through a violation of any provisions of Section 2 or in any other form so as to put his reliability or credibility as Bidder into question, the Principal shall be entitled to disqualify, put on holiday or blacklist the Bidder including from the future tender process or to terminate the contract, if already signed, on that ground.

16.1. If the Bidder/ Contractor have committed a transgression through a violation of Section 2 such as to put his reliability or credibility into question, the Principal shall be entitled to exclude including blacklist and put on holiday the Bidder/ Contractor from entering into any GAIL future contract tender processes. The imposition and duration of the exclusion will be determined by the severity of the transgression. The severity will be determined by the Principal taking into consideration the full facts and circumstances of each case particularly taking into account the number of transgressions, the position of the transgressors within the company hierarchy of the Bidder and the amount of the damage. The exclusion may be imposed for a minimum period of 6 months and maximum of three years.”It is apparent from the above that if a bidder violates any of the commitments as specified under the integrity pact, he would be excluded from participating in any of the tenders floated by GAIL for a minimum period of 6 months and a maximum period of three years. It follows that even in cases where a contractor has bribed officials of GAIL to obtain an unfair advantage in the tender process, the maximum punitive measure contemplated is exclusion for a period of three years and this too is subject to the following considerations: (i) the number of transgressions; (ii) the position of the transgressors within the company hierarchy of bidder; and (iii) damage caused to GAIL.

17. At this stage, it is also necessary to refer to clause 1.5 of Form 13, which spells out the system of performance evaluation. The said clause reads as under:-

“1.5

18. The vendors and contractors will be blacklisted for submitting forged documents in respect of experience, turnover and any other requirements forming the basis for pre qualifying / eligibility criteria irrespective of their rating in the past. Such vendors & Contractors will be debarred from having business with GAIL in future.”

It has been argued on behalf of GAIL that by virtue of the above quoted clause 1.5 of Form 13, the petitioner could be debarred from participating in all tenders floated by GAIL in the future. I find it difficult to accept this contention for several reasons; first and foremost, the said clause is a part of a form which is captioned “performance evaluation”. The said form specifies the criteria for evaluation of the performance of a contractor. The substance of the said form is to apprise the contractors the method by which their performance would be evaluated on the basis of the indicated parameters. In this context, clause 1.5 of the said form must be read as a caution to a contractor that he is liable to be blacklisted in future. This does not necessarily imply that the contractor would be barred for all times to come. But, must be read only to mean that submission of forged documents in respect of any of the qualifying/eligibility criteria would invite an action of blacklisting which would result in debarring the contractors from future contracts with GAIL.

19. Secondly, it is now well settled that blacklisting for an indefinite period is not permissible. The Supreme Court in Kulja Industries Ltd. v. Chief General Manager, BSNL: AIR 2014 SC 9 had held as under:-

“24. Suffice it to say that ‘debarment’ is recognized and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of

omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the 'debarment' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor."Thus, the provision for blacklisting a contractor cannot be for an indefinite period.

20. Thirdly, GAIL has also specified that the decision of debarring the petitioner may be reviewed after expiry of 10 years. Thus, even according to GAIL, the decision of banning the petitioner from participating in the contracts with GAIL would not necessarily continue for all times to come
but was liable to be reviewed.

21. The next aspect that needs to be addressed is whether in the aforesaid context any interference with the impugned order is warranted.

22. It is contended on behalf of GAIL that the question whether a punishment is disproportionate would have to be determined by applying the Wednesbury principle, that is, no reasonable person could possibly subscribe to the view that the punishment as imposed was warranted. [See: Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.: (1947) 2 All ER 680 (CA)].

23 .The Wednesbury principle of unreasonableness and the doctrine of proportionality may overlap to some extent but it is difficult to accept that
the two principles are, essentially, one and the same.

24. The Supreme Court in Om Kumar vs. Union of India: (2001) 2 SCC 386 referred to the opinion of Lord Dip lock in Council of Civil Service Unions v. Minister of Civil Service: (1984) 3 All ER 935 whereby he had reiterated that judicial review of administrative action is permissible on grounds of illegality, procedural irregularity and irrationality. The Supreme Court also took note of Lord Dip lock's view that in addition to the above grounds, the ground of "proportionality" was a "future possibility". After taking note of the aforesaid decision, the Supreme Court explained the principle of proportionality as under:-

"27. The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while W.P.(C) 2041/2014
Page 15 of 25 judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of "proportionality" to legislative action since 1950, as stated in detail below.

28. By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality."

25. In R. (Daly) v. Secy. of State for the Home Deptt.: (2001) 3 ALL ER 433 (HL), the House of Lords had held that the criteria of proportionality was more precise and more

sophisticated than the traditional grounds of judicial review. The Court noted the following differences between the two criteria:-

"(1) Proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions.

(2) Proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

(3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights."

26. The Supreme Court in State of U.P. v. Sheo Shanker Lal Srivastava: 2006 SCC (L&S) 521 referred to the decision of House of Lords in R. (Daly) (supra) and observed as under:-

"24. While saying so, we are not oblivious of the fact that the doctrine of unreasonableness is giving way to the doctrine of proportionality.

25. It is interesting to note that the Wednesbury principles may not now be held to be applicable in view of the development in constitutional law in this behalf. See, for example, Huang v.Secy. Of State for the Home Deptt. 2006 QB 1 wherein referring to R. (Daly) v. Secy.of State for the Home Deptt. (2001) 2 AC 532 it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than Wednesbury, but involves a full-blown merit judgment, which is yet more than R. (Daly) [(2001)2 AC 532, requires on a judicial review where the court has to decide aproportionality issue."

27. The Supreme Court in All India Railway Recruitment Board v. K.Shyam Kumar: (2010) 6 SCC 614 referred to various decisions of the English Courts as well as the earlier decisions of the Supreme Court and summarized the law as under:-

"36. Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to "assess the balance or equation" struck by the decision-maker. Proportionality test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard the fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice it to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straitjacket formula and to say that Wednesbury has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but Wednesbury has not met with its judicial burial and a State burial, with full honours is surely not to happen in the near future.

37. Proportionality requires the court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The court entrusted with the task of judicial

review has to examine whether decision taken by the authority is proportionate i.e. well balanced and harmonious, to this extent the court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere."

28. The Supreme Court further observed as under:-

"39. The courts have to develop an indefeasible and principled approach to proportionality, till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be decided in the same manner whoever principle is adopted. Proportionality as the word indicates has reference to variables or comparison, it enables the court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision-maker."

29. As observed by the Supreme Court in Kulja (supra) the object of blacklisting is often used as an effective method of disciplining deviant suppliers/contractors. The object of blacklisting is not to commercially eliminate the contractor but to impose a punitive measure commensurate with his actions. The question whether administrative decision of blacklisting a contractor is disproportionate must be evaluated in the facts of each case.

30. The exclusion of the petitioner from participating in any tender of GAIL must pass the test of Article 14 of the Constitution of India. Further, in the context of this case where there is little possibility for the petitioner to carry on its business of laying pipelines after being blacklisted by GAIL, the impugned order of blacklisting must also be viewed in the context of Article 19(1) (g) and 19(6) of the Constitution of India.

31. In Kulja (supra), the Supreme Court had laid down the guidelines for any action of blacklisting. The factors that were necessary to be considered by the authority imposing the punitive measure were summarized as follows: -

"21. 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 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 have made or agreed to make full restitution.

(h) Whether 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."

32 .In addition, it would also be necessary to bear in mind the consequences of a blacklisting order. In cases where the contractor can carry on its business by executing works for other private agencies, blacklisting such contractor may not have any significant adverse impact on him. However, in cases where the effect of blacklisting would be effectively to exclude the contractor from carrying on his work and in all probability lead to shutting down his business; the adverse impact would be overwhelming. The Authority imposing the blacklisting measure would have to be conscious of the adverse impact of the punitive action.

33. In the present case, it is not contested that blacklisting would probably lead to winding up of the petitioner company. The Supreme Court in Gorkha Securities Services v. Govt. (NCT): 2014 SCC Online SC 599 had observed that "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."

34. The aforesaid observations of the Supreme Court would fairly describe the effect of the impugned order on the petitioner.

35. It is also necessary to take into account that the petitioner has already been visited with significant adverse consequences following the blacklisting order. The learned counsel for petitioner has asserted that the petitioner has already suffered the following consequences:-

a) The three contracts were terminated by GAIL on 17.01.2014;
b) Performance bank guarantees under the three contracts, of aggregate value of 7.17 crores, were invoked and encashed;
c) All other contracts with GAIL worth `161 crores apart from the three subject contracts were fore closed;
d) No payments had been released to the petitioner after October 2013;
e) The petitioner had not been able to bid in any contract for any PSU since 29.07.2013;
f) The petitioner has been unable to complete the ongoing projects on account of financial constraints resulting from the blacklisting order;
g) GAIL Gas Ltd. had also debarred the petitioner in view of the impugned order and has invoked the performance guarantees of `1.76 crores.
h) The petitioner's annual turnover – which was in excess of `100 crores – has been reduced to nil.

36. If one juxtaposes the same with the consequences of fraudulent and corrupt practices as provided in the integrity pact, the measure of blacklisting for an indefinite period appears relatively harsh and disproportionate to the alleged misconduct.

37. The question whether a punitive measure is disproportionate must also be viewed in

the context of the standards set by GAIL themselves. In the event a contractor is found to have bribed the officials of GAIL and secured the contract, he would be visited with the maximum penalty of a three year holiday. By applying this standard, the punishment of blacklisting for an indefinite period appears to be, clearly, disproportionate and arbitrary.

38. It is well settled that the High Court while exercising powers of judicial review would be reluctant to substitute its own opinion on the quantum of penalty or punishment imposed. However where the punishment imposed is shockingly disproportionate, interference with the same would be warranted. The Supreme Court in Kulja (supra) had considered a situation where a contractor had fraudulently withdrawn large sums of money in collusion with the officials of BSNL. On the same being discovered, the contractor had been blacklisted. The Supreme Court held as
under:-

"25. In the case at hand according to the respondent-BSNL, the appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the respondent-corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and
heavy a punishment to be considered reasonable especially when (a) the appellant is supplying bulk of its manufactured products to the respondent-BSNL and (b)
The excess amount received by it has already been paid back."

39. In the present case too, the petitioner specializes in works which can be executed mainly for GAIL and other PSUs and, therefore, the punitive measure would have an overwhelmingly adverse consequence on the petitioner; in the given context, the blacklisting order would be grossly disproportionate.

40. There is yet another aspect that needs to be examined. Indisputably, the benefit that a contractor obtains from any fraudulent practice would have a vital bearing on the quantum of punishment that may be imposed on the contractor for such fraudulent practice. In this case, it is alleged that the petitioner had secured the contracts in question by submitting fabricated statement of accounts. But for such fabricated statement, the petitioner would have been ineligible for being awarded the contracts. The petitioner has produced other documents in response to the show cause notice to point out that the petitioner was enjoying other working facilities from ICICI bank Ltd. at the material time and even if the petitioner did not qualify on
the basis of his existing working capital as reflected in the balance sheet,the petitioner would qualify on the basis of the working capital facilities extended to the petitioner by ICICI bank Ltd.. The said documents have been rejected by GAIL as the same had not been submitted at the relevant point of time.

41. In my view, the approach of GAIL in this respect may not be apposite.
Although such documents would have no bearing whether petitioner was guilty of alleged misconduct i.e. submission of fabricated documents, the same would be germane to consider the question whether the petitioner had acquired any benefit which he was not otherwise entitled to. And, this would have a bearing on the punitive measure to be imposed.If the working capital facilities extended by ICICI bank Ltd. to the petitioner would enable the petitioner to qualify for the tender then the petitioner would have obtained no benefit which he otherwise was not
entitled to.

42. In view of the aforesaid, no interference is called for insofar as blacklisting the

petitioner is concerned. However, to the extent that the petitioner has been debarred from all future business with GAIL, the impugned order is set aside. The matter is remanded to GAIL to consider the period of blacklisting afresh in view of the aforesaid observations and in the context of the period as specified in the integrity pact (i.e. minimum of six months to maximum of three years). Pending applications also stand disposed of. No order as to costs.

VIBHU BAKHRU, J

FEBRUARY 06, 2015