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

Reserved on: 12th July, 2023
Date of Decision: 5th September, 2023

\+ **W.P.(C) 17456/2022 & CM APPL. 55644/2022, 2057/2023**

DEFSYS SOLUTIONS PRIVATE LIMITED ..... Petitioner
Through: Mr. Sandeep Sethi & Mr. Rajshekar Rao, Sr. Advocates with Mr. Pawan Sharma, Mr. Aditya Chatterjee, Maj. Nirvikar Singh (Retd), Mr. Rishabh Sharma, Ms. Nikita Garg & Mr. Shubhansh Thakur, Advocates. (M: 9910044138)

versus

UNION OF INDIA & ANR ..... Respondent
Through: Mr. Kirtiman Singh, CGSC, with Ms. Vidhi Jain and Mr. Waise Ali Noor, Advocates (M-9999359235).

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been done through hybrid mode.

2. In the present case, the Petitioner - M/s Defsys Solutions Pvt. Ltd. has challenged the impugned order dated 9th December, 2022 bearing no. *MoDIDNo.312013/1/2016-D(VIG.)/Vol. II (Et.)* issued by Respondent No.1 - Ministry of Defence, Union of India. By the said order the Petitioner has been suspended from any business dealings with the Respondents for a period of one year or until further orders. The operative portion of the impugned order reads:

> ***"Subject: Suspension of Business Dealing with M/s DEFSYS Solutions Pvt. Ltd.***
> *WHEREAS, Ministry of Defence (MoD), Govt. of India has received intimation from the CBI regarding ongoing investigation against M/s DEFSYS Solutions Pvt. Ltd. in relation to the AugustaWestland VVIP Helicopter Case.*
> *2. WHEREAS, Ministry of Defence had circulated detailed Guidelines for Penalties in Business Dealings with Entities vide ID Note No. 31013/1/2016-D(vig.) dated 21.11.2016.*
> *3.WHEREAS, the Competent Authority may take a decision to suspend business dealings with an entity based on the parameters set forth in C and Paragraph D of the Guidelines dated 21.11.2016.*
> *4. NOW, THEREFORE, in accordance with these Guidelines, the Competent Authority has decided that business dealings with M/s DEFSYS Solutions Pvt. Ltd. will remain suspended for a period of one year from the issue of such order or until further orders.*
> *5. It is requested that strict compliance of the above decision may be ensured by all Wings in this Ministry and Services Headquarters."*

3. Respondent No. 2 is Mr. Bhupesh Pillai, under secretary (vigilance), Ministry of Defence, Union of India. Since the order is passed by the UOI and not in the personal capacity of the officer, Respondent no.2 is deleted from the array of parties.

Brief Facts

4. The case of the Petitioner is that it is a company incorporated in the year 2007 engaged in the business of designing, manufacturing, and integration of complicated electronic electro-mechanical, electro-optical and RF systems. It manufactures a wide range of air borne and land systems used by on-board military platforms. It is also engaged in the production of

external fuel tanks, missile launchers and bomb racks for certain aircrafts being delivered to the Government of India. As per the Petitioner, as on date, production and delivery of external fuel tanks, missile launchers, bomb racks *etc.*, is afoot at a state-of-the-art SEZ Facility located in Gurgaon. The Petitioner claims to be providing employment to over 200 people in high technology areas, while also provides support to several MSME companies in India.

5. It is the Petitioner's case that since 2007, the Petitioner has been a regular supplier to the Government of India for its requirements in the armed forces. It also enjoys a global reputation for being one of the foremost and sought-after suppliers in the Indian private sector defence industry. It has participated in several industry funded Make-II indigenous design, development programmes of the armed forces and has also been a keen participant in the design and development projects of various DRDO labs, namely, IRDE, DLRL, LRDE, CHESS, DARE, DEAL and DLJ. The Petitioner has also designed and delivered a variety of complex systems to the Indian Armed Forces as well as to export customers.

6. In the present case, on 7th December, 2021 commercial bids for procurement of Two Twin (Full) Dome Simulator (TES) for the Hawk MK-132 Aircraft for the Indian Air Force were opened in which the Petitioner was found to be the lowest bidder and was declared L-1. Thereafter, it was informed that the Contract Negotiation Committee (CNC) had decided to obtain the draft contract from the Petitioner. During the advanced contract drafting stage, the Petitioner was informed by letter dated 17th January, 2022 issued by Respondent No.1 that the Request For Proposal (RFP) for award of the contract stood withdrawn. The same was done without citing any

reasons.

7. On 20th June, 2022 commercial bids for the upgradation of Three-Part Task Trainers (PTT) and One Full Mission Simulator (PMS) for use in the Su-30 MKI Aircrafts were opened in which the Petitioner was found to be the lowest bidder and was accordingly declared L-1. After several rounds of discussions and negotiations Respondent No.1 shared the draft contract on 4th July,2022. In response, on 8th August 2022, the Petitioner submitted an unconditional full acceptance of the draft contract. It is stated that the Respondent No.1 has since put the contract 'on hold' without any formal communication to the Petitioner. The letter from Respondent No.1 cancelling the RFP was received by the Petitioner on 13th February, 2023 much after the impugned order dated 9th December, 2022.

8. It is claimed by the Petitioner that in December 2022, it learnt from press reports that Respondent No.1 had passed the impugned order dated 9th December, 2022. Vide the said order, Respondent No.1 suspended business dealings with the Petitioner, for a period of one year or until further orders, based on the parameters set forth in paragraph C and paragraph D of the Guidelines of the Ministry of Defence for Penalties in Business Dealing, dated 21st November, 2016, *(hereinafter, 'MoD Guidelines').* In addition, the reason given for the action was "*intimation from the CBI regarding ongoing investigation against the [Petitioner] in relation to the Agusta Westland VVIP Helicopter case".* It is the case of the Petitioner that the impugned order has come as a complete surprise to it, as it learnt of the impugned order only from the media and was never communicated the same. Further, no notice was issued prior to the said suspension.

9. In view thereof, aggrieved by the said impugned order, the Petitioner

preferred the present writ petition.

10. The matter was listed before this Court on 23rd December, 2022. After hearing preliminary submissions on behalf of both parties, the following interim arrangement was made by this Court:

> *"11. In the meantime, based on the submissions made, the following directions are issued, till the next date of hearing:*
>
> > *i. Insofar as the existing contracts are concerned, the Ministry of Defence has already clarified that the ongoing contracts would not be affected. The said statement is taken on record.* ***In view of the said statement made by the Ministry of Defence, the impugned order dated 9th December, 2022 would not take effect insofar as it relates to existing on-going contracts including offset contracts, executed prior to 9th December 2022****. Further, bankers of the Petitioners shall not, in any manner, cause impediments in the day-to-day functioning of the Petitioner qua the said existing contracts.*
> >
> > *ii. Insofar as the contracts which are listed in paragraph 20 of the present petition are concerned, it is submitted by ld. CGSC that a perusal of paragraph 20 itself shows that the same are still in the initial stages. Accordingly, if any of the said contracts mentioned in paragraph 20 of the present petition are likely to be concluded with any third-party, the Petitioner is permitted to approach this Court."*

Submissions:

11. Mr. Sandeep Sethi, ld. Senior Counsel for the Petitioner submits as under:

(i) In the Agusta Westland investigation, three chargesheets were

filed before the ld. Trial Court and in none of the chargesheets the Petitioner or any of its shareholders or directors have been named. The investigation in the said case is going on for the last ten years and on 16th January 2023 notice has been issued to the Petitioner for the first time;

(ii) The Petitioner has no transactions with Agusta Westland;

(iii) Reliance is placed on paragraph K of the counter affidavit filed by the Respondents which confirms that the suspension of Agusta Westland was discontinued after a period of 7 years and four months and not extended beyond 7th November, 2021 by the Competent Authority;

(iv) No show cause notice was issued by the Respondents. No reply has been called for. No hearing was afforded, and no reasons have been given till date or communicated;

(v) The term *'national security'* cannot be used to deprive the Petitioner of a notice and hearing which are inherent to compliance of principles of natural justice as held in ***Raghunath Thakur v. State of Bihar & Ors., C.A. No.4031/1988*** and ***C.B. Gautam vs Union Of India & Ors., 1993 (1) SCC 78***;

(vi) Clause D.2 of the *MoD Guidelines* ought to be read with clause C(1)(a) to (f) and not in an isolated manner. He submits that the intimation in relation to criminal investigation or enquiry has to have a reasonable nexus to the factors set out in C(1)(a) to (f) failing which such a criminal investigation or enquiry could be completely alien to the subject matter itself;

(vii) The impugned order is having a cascading effect inasmuch as one of the companies which was supplying ammunition to the Petitioner i.e., M/s Bharat Dynamics has stopped supplies, leading to a situation where guns and other equipment which have been manufactured by the Petitioner cannot be supplied to the Respondents;

(viii) Reliance is placed on paragraph D of the counter affidavit to argue that apart from raising the issue of 'national security' and stating that there is an ongoing investigation against the Petitioner in relation to *AgustaWestland VVIP helicopter* case, no further details have been provided.

(ix) Reliance is placed upon the following judgments:

(a) ***Cdr. Amit Kumar Sharma v. Union of India & Ors, CA No. 841-843/ 2022***

(b) ***Ex-Armymen's Protection Services Pvt. Ltd. v. Union of India & Ors., CA No. 2876/ 2014***

(c) ***M/s Mohan Kumar v. Union of India &Ors., WP(C) 6904/2019***

(d) ***JBM Electric Vehicles Pvt. Ltd. v. UoI & Anr., 2022 SCC Online Del 2405.***

(x) The *MoD Guidelines* do not constitute law under Article 13 of the Constitution. Thus, they cannot be relied upon by the Respondents to deny adherence to the principles of natural justice;

(xi) The Ministry of Finance (MoF) issued an Office Memorandum titled *'Guidelines for Debarment of Firms from Bidding'*, dated

2nd November 2021. As per the said guidelines suspension, blacklisting, banning, debarment, *etc*. are all treated as synonyms. The guidelines require under Clause 5(e) that the concerned Ministry/Department ought to give a 'reasonable opportunity' to the person concerned to represent against such debarment including personal hearing, if sought for. Reasonable opportunity is also contemplated in Clause 13 of the said guidelines. Clause 25 requires all Ministries/ Departments to align their existing debarment guidelines in conformity with the *Guidelines for Debarment of Firms from Bidding' issued by* MoF within 2 months;

(xii) the *MoD Guidelines* contemplate examination by an internal committee. However, till date, no examination has been done by any committee in terms of the *MoD Guidelines*;

(xiii) that the recent judgment of the Hon'ble Supreme Court in ***Madhyamam Broadcasting Ltd. v. Union of India & Ors, CA No. 8129/2022*** lays down various guidelines in respect of suspension, banning and the adherence to the principles of natural justice;

(xiv) the decision in ***State Bank of India vs Rajesh Agarwal, CA No. 7300/2022*** held that even if a statute does not provide for a show cause notice, the same would have to be read into the statute. Thus, in respect of guidelines this principle would apply with greater force;

(xv) There is no clarity as to whether the Petitioner is being treated as being suspended under clause C.1 (a) to (d) or D.2. In fact,

the stand of Respondent No.1 till now is that the Petitioner has been suspended under clause D.2.

Respondent's submissions:

12. Mr. Kirtiman Singh, ld. CGSC for the Respondents submits as under:

(i) The present case relates to a suspension of dealings with Respondent No.1 and the same is not a ban or a blacklisting as sought to be contended by the Petitioner;

(ii) The suspension of business dealings has been directed owing to an intimation received from the CBI regarding pendency of a criminal investigation against the Petitioner's director;

(iii) Respondent No.1 cannot examine the merits of the CBI investigation;

(iv) Paragraph 8 to 10 of the Procedure for Penal Action under the *MoD Guidelines* dated 30th November 2016 deal with the suspension of business dealings, paragraph 9 makes it clear that when suspension is resorted to under clause D.1 or D.2, then no show cause notice is to be issued. Even the constitution of a committee for consideration of suspension either prior or after the suspension is purely at the discretion of the Government. It is submitted that the order of suspension in terms of clause D.3 has to be reviewed every six months;

(v) that as per clause D.3 of the *MoD Guidelines* suspension could be for a maximum period of five years and in exceptional cases, it could be even more. He places reliance on the following judgments:

(a) ***Ex-Armymen's Protection Services Private Limited v.***

Union of India and Ors. 2014(5) SCC 409;

(b) ***M/s Mohan Kumar v. Union of India and Ors. WP(C) 6904/2019*** dated 3rd February, 2021;

(c) ***Digi Cable Network (India) Private Limited v. Union of India and Ors. 2019 (4) SCC 451***

(vi) Parallel can be drawn between the present case and the judgment in ***A.P. K. v. Union of India*** where under Rule 7 of the All-India Service (Discipline and Appeal) Rules, 1955 - if the Government learns of any investigation, enquiry or trial relating to a criminal charge against any official, the said official can be placed under suspension immediately until the termination of all the proceedings;

(vii) The judgments cited by ld. Sr. Counsel for the Petitioner are distinguishable on facts as there is no secrecy involved in the grounds for suspension since the Petitioner is aware of the notices which have been issued to it by the CBI and the investigation which is currently underway;

(viii) The judgments of ***Cdr. Amit Kumar Sharma v. Union of India & Ors, CA No. 841-843/ 2022*** and ***Raghunath Thakur v. State of Bihar & Ors., C.A. No.4031/1988***, also would have no application in the present case inasmuch as the intimation received from the CBI and the reasons thereto, are well within the knowledge of Petitioner which is evident from the documents filed by the Petitioner on record;

(ix) Since the reason for suspension is the investigation by the CBI, any review would depend upon the information received from

the CBI;

(x) The *Guidelines for Debarment of Firms from Bidding issued by* MoF would not apply to the said procurement as the same is a separate scheme by itself under the General Financial Rules (GFR) 142 and 151;

(xi) The judgement in ***Madhyamam Broadcasting (supra)*** is distinguishable from the facts of the present case as in the said writ petition, the factual position was exactly opposite of the present case. In the said case there was no reasoning for the decision which was passed. The material which was the basis of the decision was sought to be disclosed exclusively to the Court alone;

(xiii) The settled legal position is that suspension does not require show cause notice. There is a maximum debarment period, suspension cannot be beyond that but in terms of clause F.3 and the amendment of the *MoD Guidelines* read with clause 31 of the Procedure for Penal Action under the *MoD Guidelines*, it can be said that the debarment can be made for a maximum period of ten years;

(xiv) Ld. CGSC relied on the judgment in ***Ex-Armymen's Protection Services Pvt. Ltd. v. Union of India & Ors., (supra)*** which was approved in the decision of the Hon'ble Supreme Court in ***K. S. Puttaswamy & Anr. vs. Union Of India & Ors. (2017) 10 SCC 1***. The said judgment also recognises that 'national security' is a valid ground for suspending and not giving show cause notice;

(xv) The decision of the ld. Division Bench in ***Trident Infosol Pvt. Ltd. v. Union of India & Ors. 2022 SCC Online Del 2314*** clearly lays down that defence procurement has to be dealt with differently;

(xvi) Mr. Singh, ld. CGSC further relies upon the following decisions:

(a) ***A.K.K. Nambiar v. Union of India AIR 1970 Supreme Court 652***;
(b) ***SCOD 18 Network Private Limited v. Ministry of Information and Broadcasting & Ors. 2015 SCC OnLine Bom 6570;***
(c) ***M/s Add Lounge Services Pvt. Ltd. v. Union of India & Ors.-2016 SCC Online Del 517***.
(d) ***Peethambara Granite Gwalior v. State of Madhya Pradesh, WP 19958/2020***
(e) ***JBM Electric Vehicles Pvt. Ltd. v. UoI & Anr., 2022 SCC Online Del 2405.***

<u>The legal position under the MoD Guidelines</u>

13. The impugned order of suspension, has been passed relying on the *MoD Guidelines* dated 21st November, 2016 issued by Respondent No.1. The said Guidelines are the fulcrum of the challenge in the present case. They are supported by the following two documents –

- *'Procedure for Penal Action under the Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities'* dated 30th November 2016, *(hereinafter 'Procedure for Penal Action')*

&

- *'Frequently Asked Questions'* on the *Business Dealing Guidelines* dated 30th November 2016 *(hereinafter 'FAQs').*

14. In order to appreciate the true purport and intent as also the legality of these guidelines, the same need to be read together and analysed with the

aforementioned documents. The *MoD Guidelines* start with the following preamble:

> *"A.4 In applying the measures provided for under the guidelines, the concerned authorities shall be guided by the need to ensure probity, transparency, propriety and compliance in the defence procurement process. Equally, the concerned authorities shall* ***also ensure fairness, impartiality, rigour and correctness in dealing with entities****, keeping in view the overall security interests of the country."*

15. The aforementioned Preamble, while laying down the need for the *MoD Guidelines*, makes it clear that it is necessary to ensure fairness, impartiality, rigor and correctness while dealing with the entities in case of defence procurement. The said guidelines also seek to maintain the standards for defence procurement in the security and overall interest of the country.

16. The *MoD Guidelines* contemplate two broad types of actions that can be taken by Respondent No.1 against erring entities viz., -

(i) Banning and;

(ii) Financial Penalties.

17. The *MoD Guidelines* also permit suspension under the broad umbrella of banning. The provisions permitting suspension and banning are clauses C, D and F of the said Guidelines. The said clauses are extremely relevant and are set out below:

> *"**(C) Causes for Suspension and Banning of Business Dealings with Entities***
>
> *C.1 The competent authority may levy financial penalties and/or suspend/ban business dealings with an entity for one or more of the grounds listed below:-*
> *a) Violation of Pre-Contract Integrity Pact (PCIP) (where such PCIPs are entered into between the*

Ministry of Defence and an entity).
b) Resort to corrupt practices, unfair means and illegal activities during any stage of bid/contract to secure a contract, even in cases where PCIP is not mandated.
c) Violation of Standard Clause in the contract of agents/agency commissions.
d) If national security considerations so warrant.
e) Non-performance or under performance under the terms and conditions of contract(s) or agreements(s) not covered in grounds listed in (a) to (c) above in accordance with provisions in contract or agreement.
f) Any other ground for which the competent authority may determine that suspension or banning of business dealings with an entity shall be in the public interest.

(D) Suspension

D.1 Suspension of business dealing with an entity may be ordered by the competent authority pending a full proceeding into allegations or facts related to any grounds enumerated in paragraph C.1 (a) to (f) above.

D.2 The competent authority may suspend business dealings with an entity when it refers any complaint against the entity to CBI or any investigating agency or when intimation is received regarding initiation of criminal investigation or enquiry against any entity.

D.3 An order of suspension of business dealings with an entity will be issued for such period as the competent authority may deem fit. The period of suspension shall not ordinarily exceed one year. A review of the Order of suspension of business dealings with an entity shall be undertaken within six months of the issue of such an Order and before expiry of the period specified therein. The suspension of an entity may be extended beyond the period of one year, on the order of the Competent Authority for subsequent

periods of six months each. The total period of suspension of business dealings with an entity shall not exceed the maximum period of banning of business dealings with an entity for the same cause of action.
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(F) Banning of Business Dealings with an Entity/ Debarment of an Entity
F.1 Banning of business dealings with an entity may be ordered by the competent authority on acceptance of misconduct related to any of the grounds enumerated in paragraph C.1 (a) to (f) above by the entity or establishment of such misconduct by a competent court/ tribunal/ authority.
F.2 Banning of business dealings with an entity may be ordered by the competent authority on receipt of information regarding filing of chargesheet in the court of law by CBI or any other investigating agency.

F.3 The order of banning of business dealings with an entity will be issued for such specified period as the competent authority may deem fit. For the grounds listed in paragraph C.1 (a) to (d) above, the period of banning of business dealings with an entity shall not be less than five years. For the grounds listed in paragraph C.1 (e) and (f) above, banning of business dealings may be resorted to if, in the view of the competent authority, the grounds for action are such that continuation of business dealings with the entity would be detrimental to public interest. In such cases, the period of banning of business dealings with an entity shall not ordinarily exceed three years. The period of Banning of business dealings with an entity in both the categories will be inclusive of period of suspension of business dealings with an entity, if any, for the same cause of action. In exceptional cases and those involving national security considerations the competent authority may order a longer period of

banning of business dealings with an Entity, as deemed appropriate."

Grounds for suspension/banning/financial penalties

18. Clause C.1, of the *MoD Guidelines* enumerates the grounds on which suspension, banning or financial penalties can be resorted to. Clause C.1 (a), (b), (c) and (e) provide that in order to suspend, ban or levy financial penalties against an entity, the Competent Authority must be satisfied that grounds such as violation of a Pre-Contract Integrity Pact (PCIP), corrupt practices, unfair means, illegal activities or breach of clauses in the contract are made out.

19. In addition, there are two broad grounds enumerated in Clause C.1 (d) and (f). They are *'national security considerations'* and *'public interest'*. Grounds (d) and (f) vest wide powers in the Competent Authority to suspend dealings with the erring entities.

20. Clause D of the *MoD Guidelines* again reaffirms that the Competent Authority has the power to suspend dealing with any entity on any ground enumerated in C.1 (a) to (f) of the said Guidelines. Under clause D.2 suspension can be resorted to if the Competent Authority refers a complaint against any entity to the CBI/ other investigation agency or receives any complaint from them.

21. The first issue that arises for consideration is whether grounds under C.1(a) to (f) have to be made out for suspending an entity under D.1 or D.2 of the *MoD Guidelines* - Or in the alternative can the suspension of business dealings under clause D.2 be independent of the grounds enumerated in C.1(a) to (f).

22. The *Procedure for Penal Action* in paragraph 8 provides that

suspension may be done in terms of clause D.1 and D.2 of the *MoD Guidelines*. The said paragraph is as under:

> *8. Business dealings with an entity may be suspended under the circumstances listed at Para D.1 and D.2 of the Guidelines. The Competent Authority for suspension of business dealings-with entities under the Guidelines shall be the Raksha Mantri.*

23. Further, question 6 in the *FAQ* to the *MoD Guidelines* provides that penal levies and/or suspension/ banning can be resorted to for any of the circumstances specified in paragraph (a) to (f) of the question. Question 6 set out below:

> *"Q6. <u>What are grounds for penal levies and/or suspension/banning of Business Dealings with an Entity?</u>*
>
> *Ans: The grounds for levy of financial penalties and/or suspension/banning of business dealings with an Entity are as follows: -*
> *(a) Violation of Pre-Contract Integrity Pact (PCIP) (where such PCIPs are entered into between the Ministry of Defence and entity).*
> *(b) Resort to corrupt practices, unfair means and illegal activities during any stage of bid/contract to secure a contract, even in cases where PCIP is not mandated*
> *(c) Violation of Standard Clause in the contract of agents/agency commissions.*
> *(d) If national security considerations so warrant.*
> *(e) Non-performance or under performance under the terms and conditions of contract(s) or agreements(s) not covered in grounds listed in (a) to (c) above in accordance with provisions in contract or agreement.*
> *(f) Any other ground for which the competent authority may determine that suspension or banning of business dealings with an entity shall be in the public interest."*

24. A perusal of the Answer to Question 6 of the *FAQs* makes it apparent that paragraphs (a) to (f) therein, are identical to C.1 (a) to (f) of the *MoD Guidelines*. Thus, the cause for suspension, banning and financial penalties has to fall in any of the six grounds enumerated in C1 (a) to (f).

25. Further, the manner in which clause D.1 and D.2 of the *MoD Guidelines* are worded indicate that the requirement of satisfying the grounds in C.1 (a) to (f) has to be fulfilled even in case of initiation of criminal investigation having been ordered by the CBI/ other investigation agency by themselves or under a complaint by the Ministry of Defence/ Competent Authority.

26. Thus, an overall reading of the *MoD Guidelines* with the *Procedure for Penal Action* and the *FAQs* suggests that the reason for an order of suspension, ban or levy of financial penalties has to fall within the enumerated grounds specified in clause C.1 (a) to (f) of the *MoD Guidelines*. A perusal of clause C.1 read with the FAQs also makes it very apparent that the said clause is exhaustive in nature and there are no grounds contemplated beyond the said clause on the basis of which business dealings with an entity can be suspended by Competent Authority. Grounds C.1(d) and (f) are very wide. Clause C.1(f) in particular provides that the Competent Authority has the power to suspend on any ground when the suspension is deemed to be in public interest. Though, clause D.2 could give an impression that it is a standalone clause, in fact it is not. The intimation to the CBI/other investigating agency by the Ministry or any intimation received from the CBI/other investigating agency in terms of clause D2 would necessarily have to relate to grounds specified in C.1 (a) to (f). This is

because, in the case of such intimations, the investigations could be related to a completely unconnected allegation of commission of an offence against some director or promoter – say a matrimonial case or a family dispute. It is not in all circumstances mandatory for a party to be suspended merely on an intimation being received. The same has to be examined and the Competent authority ought to come to a conclusion that the said investigation requires suspension to be directed, considering the background and the nature of investigation. Unless and until the investigation attracts any of the grounds enumerated in Clause C.1, a suspension cannot be directed automatically, simply upon receipt of an intimation of commencement of investigation.

Procedure for suspension/banning/financial penalties

27. The next question to be considered is what are the procedural safeguards provided in the *MoD Guidelines*, *Procedure for Penal Action* and *the FAQs* for banning and suspension of an entity by the Competent Authority.

28. *Procedure for Penal Action* prescribes the procedure that is to be applied under the *MoD Guidelines*. The *Procedure for Penal Action* in paragraphs 8 and 9 stipulates that a suspension does not require a showcause notice. Paragraph 16 of the *Procedure for Penal Action*, read with clause D.3 of the *MoD Guidelines* makes it clear that if a suspension order is issued, the same would have to be reviewed within six months of the issuance of the order. The said clauses read as under:

> ***Procedure For Penal Action Under The Guidelines Of The Ministry Of Defence For Penalties In Business Dealings With Entities, dated 21st November, 2016***

D.3 An order of suspension of business dealings with an entity will be issued for such period as the competent authority may deem fit. The period of suspension shall not ordinarily exceed one year. A review of the Order of suspension of business dealings with an entity shall be undertaken within six months of the issue of such an Order and before expiry of the period specified therein. The suspension of an entity may be extended beyond the period of one year, on the order of the Competent Authority for subsequent periods of six months each. The total period of suspension of business dealings with an entity shall not exceed the maximum period of banning of business dealings with an entity for the same cause of action.
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Procedure for Penal Action under the Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities' dated 30th November 2016

"8. Business dealings with an entity may be suspended under the circumstances listed at Para D.1 and D.2 of the Guidelines. The Competent Authority for suspension of business dealings with entities under the Guidelines shall be the Raksha Mantri.
9. It is not necessary to give any show-cause notice to the entity before issuing the order of suspension of business dealings with an entity.
XXX
16. A review of order of suspension shall be undertaken before expiry of the period specified therein or within six months of the issue of such order, whichever is earlier. The concerned Wing of Ministry of Defence shall examine the case for review and submit the proposal for extension or revocation of suspension order or otherwise to the Competent Authority for consideration and appropriate decision.

29. On the other hand, clause F of the *MoD Guidelines* deals with banning/ debarment of business dealings with an entity. The said clause provides that banning of an entity may be ordered where:

(i) There is either acceptance of misconduct to any of the causes mentioned in C.1 (a) to (f) of the *MoD Guidelines* or;

(ii) Establishment of misconduct by a competent court, tribunal or authority or;

(iii) Information is received of filing of a chargesheet in a court of law by the CBI or any other investigation agency.

30. Thus, while the ground for suspension is sending of an intimation or initiation of investigation, one of the grounds for banning is filing of charge sheet. Further, paragraphs 19 to 39 of the *Procedure for Penal Action* deal with the procedure of banning/ debarment of entities. They provide that banning is to be resorted to in terms with Clause F.1 and F.2 of the *MoD Guidelines*. They also contemplate that proceedings for banning can be initiated even without resorting to suspension. The said paragraphs provide the following procedure to be followed in case of banning/ debarment of an entity:

(i) Issuance of a showcause notice explaining the grounds for banning; *(paragraph 21 of the procedure)*

(ii) Reasons and grounds for taking the action, specifying the same in the showcause notice; *(paragraphs 21, 24(a) of the procedure)*

(iii) Providing an opportunity to the entity to explain its case; *(paragraph 21 of the procedure)*

(iv) Nature of penalty of banning contemplated, including the

entities/ firms which are likely to be banned

(v) Reply by the entity within 30 days; *(paragraph 24(b) of the procedure)*

(vi) Proposal by the concerned wing of the Ministry to the Competent Authority; *(paragraph 28 of the procedure)*

(vii) Constitution of a Committee to recommend the banning or otherwise; *(paragraphs 29 & 30 of the procedure)*

(viii) Issuance of a speaking order containing the facts as also the consideration of the representation or the reply; *(paragraph 35 of the procedure)*.

31. Paragraphs 40-46 of the *Procedure for Penal Action* provide a similar procedure to be followed in case of levying of financial penalty on entities.

32. The aforementioned discussion shows that for the purposes of Banning, necessary safeguards of show-cause notice, reply and consideration thereof is already mandated. However in case of Suspension, the same can be directed without issuing a show cause notice. Even at the stage of review, no notice to the affected party is mandated. Suspension can continue for a period which is the maximum period of Banning. Thus, suspension which has the same effect as a Ban can be directed and continued for a long period without any show-cause notice. Thus, the procedures for ban/ debarment and suspension of an entity under the three documents are very different. A conjoint reading of the three documents provide substantive safeguards in the case of banning, however on a literal reading there are virtually no procedural safeguards in case of suspension of an entity.

Period of suspension/ banning

33. The stand of the ld. CGSC is that there is no maximum limit for the period of suspension as the same can be for as long as banning is permissible. A perusal of the clauses shows that the period of suspension is intricately linked with the period of Banning. This is evident from two clauses which provide that the period of suspension would be subsumed in the Banning period and the period of suspension cannot exceed the maximum period of banning. Thus, it is necessary to understand what is the period of Banning under the Guidelines. The period of Banning under Clause F.3 is –

- Ordinarily not more than 3 years – in case of ground C.1 (e) & (f);
- Not less than 5 years and not more than 10 years – in case of ground C.1 (a) to (d);
- Under exceptional circumstances, banning can be even beyond ten years without a maximum limit – Paragraph 31 of *Procedure.*

Going by the above clauses, while generally the period of Banning is from three years to five years or even ten years, under exceptional circumstances it can be beyond the ten year limit, without a ceiling. If this is the position, can suspension continue indefinitely – that too without a show cause notice?

34. Thus, the next question before this Court is whether the period of suspension can be perpetual and if not what is the maximum period of suspension under the *MoD Guidelines.*

35. A perusal of Clause F.3 of the *MoD Guidelines* shows that the period of suspension is included in the period of ban. Thus, in the context of these guidelines it can be said that suspension is an urgent *interim* measure which can be resorted to by the Competent Authority while the process of banning

of business dealings is under consideration.

36. Insofar as period of the period of banning/ suspension is concerned, there is considerable confusion in the three documents. In order to appreciate the fact that the period specified for suspension and banning is unclear, the relevant provisions of the three documents are set out below in tabular form:

Particular	**MoD Guidelines**	**Procedure for Penal Action**	**FAQ**
Suspension	*Shall not ordinarily exceed 1 year. (Clause D3)* *Total period cannot exceed maximum period of banning. (Clause D3)*	*Total period of suspension shall not exceed maximum period business dealings for the same cause of action. (Paragraph 11)*	*Period of suspension can be for a maximum period of 1 year ordinarily. (Question 10)* *In any case, period of banning shall not be more than 10years. (Question 10)* *Total suspension period cannot exceed maximum period of banning for the same cause of action. (Question 11)*

	Maybe extended beyond 1 year for subsequent periods of 6 months (each). (Clause D3)	*A review of the suspension order within 6 months or within the period specified in the order, whichever is earlier. (Paragraph 16)*	*Suspension can be extended beyond 1 year by reviewing every six months. (Question 10)*
	Review within six months. (Clause D3)	*A review every 6 monthly basis. (Paragraph 18)*	
Banning	*Such specified period as competent authority deems fit. (Clause F3)*	*The ban period can be as the competent authority may deem fit. (Paragraph 30)*	
	For ground C.1 (a) to (d) not less than 5 years. (Clause F3)	*For C.1 (a) to (d), period of banning shall be minimum of five years. Maximum of 10 years. (Paragraph 31)*	
	For grounds C.1 (e) & (f) not ordinarily more than 3 years. (Clause F3)	*For C.1 (e) & (f) banning shall not ordinarily exceed 3 years. (Paragraph 32)*	

	Period of banning will be inclusive of period of suspension. (Clause F3)	*Period of banning shall include the period of suspension. (Paragraph 33)*	
	Exceptional cases involving national security considerations longer period of banning permissible. (Clause F3)	*In exception cases national security considerations longer period of banning is permissible. (Paragraph 34)*	

37. A perusal of the above table as also the various clauses, paragraphs and questions shows that there is lack of clarity as to the various periods of suspension/ banning. The contradictions become evident illustratively as under:

i) As per the *MoD Guidelines*, the period of suspension ordinarily shall not exceed one year. In the Procedure, the total period of suspension cannot be more than the period of business dealings. But in FAQs, the maximum period of suspension, ordinarily is one year. Thus, the period of Suspension can be –

- Less than one year;
- More than one year;
- Maximum of one year, ordinarily or
- Total period of business dealings -which is open ended and depends on the contractual terms.

ii) While the *MoD Guidelines* clarify that the total period of

suspension cannot exceed the maximum period of banning, paragraph 31 of the *Procedure for Penal Action* provides that the maximum period of banning **ordinarily** can be for 10 years. However, clause F.3 of the *MoD Guidelines* state that in cases involving national security considerations longer period of banning permissible. A conjoint reading of the *MoD Guidelines* and *Procedure for Penal Action* in the light of the submissions made by ld. CGSC, means that in some cases, suspension can even be perpetual.

Conclusion on the above three documents

38. In light of the above documents, the suspension of any entity could be indefinite, without showcause notice, without opportunity of reply and without any grounds being provided. There is a procedure prescribed for review, or for consideration of the committee every six months. Further, even if a review is done, the entity is not given an opportunity to rebut the allegation or evidence. A literal reading of these three documents shows that it is not within the spirit of fairness, impartiality, rigor and correctness which the guidelines contemplated in the preamble to the *MoD Guidelines.*

39. Moreover, the *MoD Guidelines* are not law enacted by Parliament or even Rules under any statute. They are executive instructions which are being given the colour of law, by the Respondent. The three documents when read together clearly show that there is a need for clarity and uniformity in terms of the substantive powers of the Competent Authority, as also the procedure, in these documents. The contradictions and ambiguity between the three documents are too glaring for this Court to ignore. It is clear that the guidelines which is as an exercise of Executive power of the

State are capable of misuse and arbitrariness. The three documents issued by the Respondent No.1 give unbridled power to the authorities in the case of suspension of an entity. While there can be no doubt that in the area of defence procurement due to security considerations the discretion with the Competent Authority has to be wider and broader, the same cannot be untrammelled. There has to be a semblance of fairness, non-arbitrariness and compliance of principles of natural justice even in such cases and the Guidelines would have to be read as such.

40. Ld. Sr. Counsel for the Petitioner has relied on the *Guidelines on Debarment of firms from Bidding* issued by the Ministry of Finance vide Office Memorandum dated 2nd November, 2021. The said Guidelines read with the General Financial Rules, 2017 require that the concerned Ministry or Department issuing the debarment order against the firm must ensure that reasonable opportunity is given to the concerned firm including a personal hearing, if requested. The relevant clauses of the Ministry of Finance's Office Memorandum dated 2nd November, 2021 are set out below:

> *"**Subject: Guidelines on Debarment of firms from Bidding Attention is drawn towards Rule 151 of General Financial Rules (GFs), 2017) regarding Debarment from Bidding** which is reproduced as under:*
> *(i) A bidder shall be debarred if he has been convicted of an offence-*
> *(a) under the Prevention of Corruption Act, 1988; or*
> *(b) the Indian Penal Code or any other law for the time being in force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract.*
> *(ii) A bidder debarred under sub-section (i) or any successor of the bidder shall not be eligible to*

participate in a procurement process of any procuring entity for a period not exceeding three years commencing from the date of debarment. Department of Commerce (DGS&D will maintain such list which will also be displayed on the website of DGS&D as well as Central Public Procurement Portal.

(iii) A procuring entity may debar a bidder or any of its successors, from participating in any procurement process undertaken by it, for a period not exceeding two years, if it determines that the bidder has breached the code of integrity. The Ministry/ Department will maintain such list which will also be displayed on their website.

(iv) The bidder shall not be debarred unless such bidder has been given a reasonable opportunity to represent against such debarment.

Guidelines on Debarment of firms from Bidding – Annexure

xxx xxx xxx

4. The terms "banning of firm", 'suspension', 'Black-Listing' etc. convey the same meaning as of "Debarment".

5. .....

e. The concerned Ministry/Department before issuing the debarment order against a firm must ensure that reasonable opportunity has been given to the concerned firm to represent against such debarment (including personal hearing, if requested by firm).

xxx xxx xxx

13. Ministry/Department before forwarding the proposal to DoE must ensure that reasonable opportunity has been given to the concerned firm to represent against such debarment (including personal hearing, if requested by firm). If DoE realizes that sufficient opportunity has not be given to the firm to represent against the debarment, such debarment requests received from Ministries/Departments shall be rejected.

> *xxx xxx xxx*
> *25. All Ministries/Departments must align their existing Debarment Guidelines in conformity with these Guidelines within two months of issue of these Guidelines. Further, bidding documents must also be suitably amended, if required."*

41. The Office Memorandum issued by the Ministry of Finance primarily recognizes that principles of natural justice ought to be complied with even while resorting to suspension, banning, blacklisting or debarment. The stand of the Respondent is that these guidelines would not apply for defence procurement as there are security considerations which are involved. This would however not deter the Court from considering the spirit of the guidelines issued by the Ministry of Finance. The MoF Guidelines in fact make it clear that suspension, banning, debarment, blacklisting etc., have the same effect.

42. Ld. CGSC has laid enormous emphasis on the decision of the Hon'ble Supreme Court in ***Ex-Armyman's Protection Services Private Limited v. Union of India*** to argue that in issues concerning national security, the interference by the Courts would be minimal and that in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. The observations in ***Ex-Armyman (Supra)*** relied upon by the ld. CGSC are as under:

> *"15. It is difficult to define in exact terms as to what is national security. However, the same would generally include socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace, etc.*
> *16. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the*

court to decide whether something is in the interest of State or not. It should be left to the Executive. To quote Lord Hoffman in Secretary of State for the Home Department v. Rehman (2003) 1 AC 153:

> *...in the matter of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of national security are not a matter for judicial decision. They are entrusted to the executive.*

17. Thus, in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases it is the duty of the Court to read into and provide for statutory exclusion, if not expressly provided in the rules governing the field. Depending on the facts of the particular case, it will however be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party."

43. In the case of ***Ex-Armyman (Supra)***, the writ petitioner therein was in the business of ground handling services on behalf of various airlines at the different airports and it's security clearance was withdrawn in national interest. A post decisional hearing was directed and the material relied upon by the authorities was also to be furnished. The gist of allegations were not disclosed. In these facts the Hon'ble Supreme Court after perusing the files in a sealed cover dealt with the issue of national security.

44. As per the ld. CGSC, the said decision has also been relied upon in

other decisions such as ***M/s. Mohan Kumar v. Union of India & Ors., W.P.(C) No. 6904 of 2019*** and ***Digi Cable Network (India) Pvt. Ltd. V. Union of India & Ors. 2019 (4) SCC 451.***

45. At this stage, it is relevant to note that the decision in ***Ex-Armymen (Supra)*** has, however, been considered in the recent decision of Hon'ble Supreme Court in ***Madhyamam Broadcasting v. Union of India & Ors., CA No.8129/2022***. In the said case, on the issue of compliance of principles of natural justice, the Hon'ble Supreme Court observed as under:

> ***Madhyamam Broadcasting Ltd. v. Union of India & Ors., CA No.8129/2022***
>
> *"47. The judgment of this Court in Maneka Gandhi (supra) spearheaded two doctrinal shifts on procedural fairness because of the constitutionalising of natural justice. Firstly, procedural fairness was no longer viewed merely as a means to secure a just outcome but a requirement that holds an inherent value in itself. In view of this shift, the Courts are now precluded from solely assessing procedural infringements based on whether the procedure would have prejudiced the outcome of the case. Instead, the courts would have to decide if the procedure that was followed infringed upon the right to a fair and reasonable procedure, independent of the outcome. In compliance with this line of thought, the courts have read the principles of natural justice into an enactment to save it from being declared unconstitutional on procedural grounds. Secondly, natural justice principles breathe reasonableness into the procedure. Responding to the argument that the principles of natural justice are not static but are capable of being moulded to the circumstances, it was held that the core of natural justice guarantees a reasonable procedure which is a constitutional requirement entrenched in Articles 14,19 and 21. <u>The facet of audi alterum partem encompasses</u>*

the components of notice, contents of the notice, reports of inquiry, and materials that are available for perusal. While situational modifications are permissible, the rules of natural justice cannot be modified to suit the needs of the situation to such an extent that the core of the principle is abrogated because it is the core that infuses procedural reasonableness. The burden is on the applicant to prove that the procedure that was followed (or not followed) by the adjudicating authority, in effect, infringes upon the core of the right to a fair and reasonable hearing.

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74. The following principles emerge from the above judgements:

(i) The party affected by the decision must establish that the decision was reached by a process that was unfair without complying with the principles of natural justice;

(ii) ***The State can claim that the principles of natural justice could not be followed because issues concerning national security were involved****;*

(iii) ***The Courts have to assess if the departure was justified****. For this purpose, the State must satisfy the Court that firstly, national security is involved; and secondly, whether on the facts of the case, the requirements of national security outweigh the duty of fairness. At this stage, the court must make its decision based on the component of natural justice that is sought to be abrogated; and*

(iv) While satisfying itself of the national security claim, the Courts must give due weightage to the assessment and the conclusion of the State. The Courts cannot disagree on the broad actions that invoke national security concerns - that is, a question of principle such as whether preparation of terrorist activities by a citizen in a foreign country amounts a threat of national security. However, the courts must

review the assessment of the State to the extent of determining whether it has proved through cogent material that the actions of the aggrieved person fall within the principles established above.

75. ***The contention of the respondent that the judgment of this Court in Ex-Armymen's Protection Services (supra) held that the principles of natural justice shall be excluded when concerns of national security are involved is erroneous. The principle that was expounded in that case was that the principles of natural justice may be excluded when on the facts of the case, national security concerns outweigh the duty of fairness. Thus, national security is one of the few grounds on which the right to a reasonable procedural guarantee may be restricted. The mere involvement of issues concerning national security would not preclude the state's duty to act fairly. If the State discards its duty to act fairly, then it must be justified before the court on the facts of the case.*** *Firstly, the State must satisfy the Court that national security concerns are involved. Secondly, the State must satisfy the court that an abrogation of the principle(s) of natural justice is justified. These two standards that have emerged from the jurisprudence abroad resemble the proportionality standard. The first test resembles the legitimate aim prong, and the second test of justification resembles the necessity and the balancing prongs."*

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84. Thus, the expression national security does not have a fixed meaning. While courts have attempted to conceptually distinguish national security from public order, it is impossible (and perhaps unwise) to lay down a text-book definition of the expression which can help the courts decide if the factual situation is covered within the meaning of the phrase. The phrase derives its meaning from the context. It is not sufficient for the State to identify its purpose in broad conceptual terms such as national security and public order.

> *Rather, it is imperative for the State to prove through the submission of cogent material that non-disclosure is in the interest of national security. It is the Court's duty to assess if there is sufficient material for forming such an opinion. A claim cannot be made out of thin air without material backing for such a conclusion. The Court must determine if the State makes the claim in a bona fide manner. The Court must assess the validity of the claim of purpose by determining (i) whether there is material to conclude that the non-disclosure of the information is in the interest of national security; and (ii) whether a reasonable prudent person would arrive at the same conclusion based on the material. The reasonable prudent person standard which is one of the lowest standards to test the reasonableness of an action is used to test national security claims by courts across jurisdictions because of their deferential perception towards such claims. This is because courts recognise that the State is best placed to decide if the interest of national security would be served. The court allows due deference to the State to form its opinion but reviews the opinion on limited grounds of whether there is nexus between the material and the conclusion. The Court cannot second-guess the judgment of the State that the purpose identified would violate India's national security. It is the executive wing and not the judicial wing that has the knowledge of India's geo-political relationships to assess if an action is in the interest of India's national security.*
>
> *85. We now proceed to assess if on the facts of the case, there is sufficient material to conclude that the action is in furtherance of the interests of confidentiality and national security, as contended."*

46. Thus, the Hon'ble Supreme Court in ***Madhyamam Broadcasting (supra)*** was of the view that even in cases where national security

considerations are raised, the duty of the State to act fairly cannot be precluded. It is only in a case where national security would outweigh the duty of fairness that principles of natural justice can be excluded. It was also held that the impact of the order would have to be assessed and the same ought to be proportionate and not disproportionate. Thus, even in cases where national security is cited as a reason, the same has to be borne out from the record as justifying a suspension or ban without compliance with the principles of Natural Justice. It was further held that the expression national security does not have a fixed meaning. The manner in which judicial review would have to be done in a case where issues of national security are raised is laid down by the Hon'ble Supreme Court in ***Madhyamam Broadcasting (Supra)***.

47. From the above observations in ***Madhyamam Broadcasting (Supra)***, it is clear that the State has to make out a case for non-disclosure in the interest of national security.

48. Further, in the case of ***Manohar Lal Sharma v. Union of India 2021 SCC OnLine SC 985***, it was held that the Government must prove its stand that the information relied upon by them must be kept in secret as their divulgence would affect national security concerns. The Hon'ble Supreme Court observes that the mere invocation of national security by the State does not render the Court a mute spectator. The relevant part of the said decision is as under:

> ***Manohar Lal Sharma v. Union of India 2021 SCC Online SC 985***
> *"50. Of course, the Respondent-Union of India may decline to provide information when constitutional considerations exist, such as those pertaining to the*

> *security of the State, or when there is a specific immunity under a specific statute. However, it is incumbent on the State to not only specifically plead such constitutional concern or statutory immunity but they must also prove and justify the same in Court on affidavit. The Respondent-Union of India must necessarily plead and prove the facts which indicate that the information sought must be kept in secret as their divulgence would affect national security concerns. They must justify the stand that they take before a Court. The mere invocation of national security by the State does not render the Court a mute spectator."*

49. Ld. CGSC has relied upon the judgement of the Hon'ble Madhya Pradesh High Court in ***Peethambara Granite Gwalior v. State of Madhya Pradesh, WP(C) 19958/2020*** dated 22nd December, 2020, and the Hon'ble Supreme Court in ***AKK Nambiar v. Union of India & Anr., (1969) 3 SCC 864***. Insofar, as the judgement of ***Peethambara Granite (Supra)*** is concerned, the same would not apply to the present case as in the said case, although opportunity of hearing was not afforded to the erring entity, the suspension order passed by the Collector contained the reasons for suspension. The suspension period was also not perpetual but for a definitive period of 10 years. Further, in the said judgement the Hon'ble Court limited itself to the point that show cause notice is not a condition precedent for suspension. In the opinion of this Court, even the judgement of ***AKK Nambiar v. Union of India & Anr., (1969) 3 SCC 864*** would not be applicable to the present case as the said decision was taken in the context of All India Service (Discipline and Appeal) Rules, 1955 and did not relate in any way to defense procurement. However, the said judgment is correct to the extent that the Court is not to be concerned with the correctness and the

propriety of the report of the investigating authority and is to only examine whether the order of suspension is warranted by the rule and also whether it was in honest exercise of powers.

50. Ld. CGSC has also relied on the judgement of ***SCOD 18 Network Private Limited v. Ministry of Information and Broadcasting & Ors. 2015 SCC OnLine Bom 6570*** to submit that opportunity of being heard would not enable the petitioner to probe confidential or secret information. Ld. CGSC, further submits that in the case of ***M/s Add Lounge Services Pvt. Ltd. v. Union of India & Ors.-2016 SCC Online Del 517*** this Court observed that it may not be possible to gather enough proof for conviction or even for FIR for diverse reasons. However, the same cannot come in the way of assessing a person as a security risk in view of the larger public interest. It is noticed by this Court that in the case of ***Cdr. Amit Kumar (Supra)***, the Hon'ble Supreme Court has deprecated the practice of not disclosing relevant material to the affected party. The said practice is loosely referred to as 'sealed cover jurisprudence'. In respect of the same, in ***Cdr. Amit Kumar (Supra)***, the Court observed as under:

> *"28. The non-disclosure of relevant material to the affected party and its disclosure in a sealed-cover to the adjudicating authority (in this case the AFT) sets a dangerous precedent. The disclosure of relevant material to the adjudicating authority in a sealed cover makes the process of adjudication vague and opaque. The disclosure in a sealed cover perpetuates two problems. Firstly, it denies the aggrieved party their legal right to effectively challenge an order since the adjudication of issues has proceeded on the basis of unshared material provided in a sealed cover. The adjudicating authority while relying on material furnished in the sealed cover arrives at a finding which*

is then effectively placed beyond the reach of challenge. Secondly, it perpetuates a culture of opaqueness and secrecy. It bestows absolute power in the hands of the adjudicating authority. It also tilts the balance of power in a litigation in favour of a dominant party which has control over information. Most often than not this is the state. A judicial order accompanied by reasons is the hallmark of the justice system. It espouses the rule of law. However, the sealed cover practice places the process by which the decision is arrived beyond scrutiny. The sealed cover procedure affects the functioning of the justice delivery system both at an individual case- to case level and at an institutional level. However, this is not to say that all information must be disclosed in the public. Illustratively, sensitive information affecting the privacy of individuals such as the identity of a sexual harassment victim cannot be disclosed. The measure of nondisclosure of sensitive information in exceptional circumstances must be proportionate to the purpose that the non-disclosure seeks to serve. The exceptions should not, however, become the norm.

29. During the course of the hearing, it has clearly emerged before this Court that material which was relied upon by the AFT for determining the vacancies which were available and for assessing as to whether they were utilised correctly has not been disclosed to the appellants. Similarly, the Board proceedings that were relied upon by AFT to determine if the selection for PC was fair have not been disclosed to the appellants. We are cognizant of the wide range of sensitive information in the records of board proceedings. The respondents are not required to disclose the deliberations on the selection for PC within the closed Board setting. While the AFT on a perusal of the records concluded that there was no gender bias or mala fides in the grant of PC, it must be borne in mind that the officers do not possess the material to challenge this observation. The

respondents while protecting the confidentiality of the proceedings of the Board must disclose the position in merit of the appellants vis-à-vis the parameters and their weightage devised by the respondents."

51. The ld. Division Bench of this Court in the case of ***Trident Infosol Pvt. Ltd. v. Union of India & Ors. 2022 SCC OnLine Del 2314*** discussed the application of principles of natural justice in respect of a tender for defence equipment. The ld. Division Bench of this Court upheld the principle that if criminal proceedings and investigations are pending against the entity, disqualification could be justified. The observations of the Court are as under:

"19. Hence, while the State's instrumentalities ought to act fairly entering contracts with private parties, this cannot impinge upon the right of the Government in setting the terms of the tender. Hence, this Court ought only to intervene if the condition is arbitrary, discriminatory, mala fide or actuated by bias.
20. As has been noted, the present tender was floated by Labs of Respondent No. 2, which are specialised labs engaged in research pertaining to critical defence technologies and systems. It is in this context that the Respondent Nos. 3 and 4 have imposed the Impugned Condition to sift through entities which have criminal proceedings/investigation pending against them. This condition is imperative to maintain the integrity of such projects which deal with maters of national importance, security and are of immense public importance."

52. Further, in the case of ***JBM Electrical Vehicle v. Union of India, 2022 SCC Online Del 2405*** it was observed that the power not to deal if taken on justifiable grounds would have to be recognised as an inherent right of the State.

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

54. In view thereof, there is a need to read the *MoD Guidelines*, the *Procedure for Penal Action*, and the *FAQs* in a manner so as to bring them within the four corners of law. In order for these documents to operate within the realm of legally permissible limits, they shall have to be implemented in a legally permissible manner. Although the Competent Authority's power to take action of suspension, banning or financial penalties in the larger public interest or for national security considerations cannot be in doubt, the procedure to be followed while exercising this power would have to be reasonable, non-arbitrary and in compliance with the principles laid down in the aforementioned decisions.

55. Every Governmental action has to be based on a legally valid policy while following proper procedure. The intent in the three documents is clearly to eliminate corruption, irregularities, illegalities in defence procurement contracts with the Government of India. If any entity is even suspected or found to indulge in impermissible conduct, immediate suspension can be ordered, banning and financial penalties are also permissible.

56. The grounds which can be invoked by the Competent Authority under the *MoD Guidelines* include national security and public interest considerations. Initiation of criminal investigation or enquiry for any of the grounds above can also be raised as a ground for suspension. Thus, irrespective of any criminal investigation or enquiry if any of the grounds C1(a) to (f) are even suspected, immediate suspension would be permissible. The initiation of any criminal investigation for any of the grounds specified in (a) to (f) could also trigger suspension. However, immediately after the suspension, there is a need for a review within 6 months. Such a review has to be meaningful and ought to be with due application of mind and not a ministerial act.

57. In the context of the Guidelines, suspension is a subset/ species within debarment/ banning and not an independent measure. It is nothing but an urgent, interim or immediate measure preceding banning. Thus, indefinite suspension without resort to the safeguards prescribed for banning would not be permissible. This is so because the period of suspension is included within the maximum banning period as per Clause F.3 of the *MoD Guidelines*. Accordingly, the stand of the Respondent No.1 that suspension can extend till the maximum period of ban and the ban can be indefinite would lead to a completely unsustainable conclusion that in effect, suspension can be indefinite. Such an interpretation could render the entire guidelines itself unconstitutional.

58. In view thereof, for a prolonged suspension, all the procedural safeguards i.e., the recourse to principles of natural justice provided in the *MoD Guidelines* in case of debarment/ banning would also be applicable to suspension. Accordingly, if any entity is suspended, a review within 6

months has to be done and it is expected that the authorities shall ordinarily issue a show-cause notice setting out the grounds for which suspension has been resorted to and make out the grounds which would lead to a ban on the entity. In this process, the show-cause notice has to consist of the grounds which could be any of the grounds contained in Clause C1 (a) to (f). A reply would have to be sought after properly considering the reply, a reasoned order shall have to be passed. Further, the period of suspension and banning cannot be indefinite, unless in exceptional circumstances.

59. In the opinion of the Court therefore, the *MoD Guidelines* would have to be read in a manner which is consistent with the legally enshrined principles of non-arbitrariness. The *MoD Guidelines*, the *Procedures for Penal Action* and the *FAQs* as they stand could lead to abuse of power and, thus, have to be read in a manner consistent with sound and legally established principles. It would not be permissible to have a perpetual state of suspension without showcause notice, that too for an indefinite period. It is also pertinent to note that defence contracts by their very nature consist of only one customer i.e., the Government and perpetual suspension can be even worse than blacklisting as it is backed by the power of the Government, leading to unintended consequences for the credibility of such entities and lives of the employees of such entities.

60. Further, the Hon'ble Supreme Court in the case of ***Indian Social Action Forum (INSAF) v. Union of India, CA No.1510/2020*** observed that in cases of vague and ambiguous provisions instead of declaring any statute as unconstitutional, the court can read down the same. The relevant part of the said judgement is as under:

> *"20. Where the provisions of a statute are vague*

> *and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provisions occur and purpose for which it is made, the doctrine of "reading down" can be applied. To save Rule 3(v) from being declared as unconstitutional, the Court can apply the doctrine of "reading down."*

61. It is clear from the aforementioned discussion that the provisions of the *MoD Guidelines*, especially provisions related to suspension and the period and procedure for the same are ambiguous and vague. This court is of the opinion that the *MoD Guidelines* would have to be read in a manner that is holistic and part of a complete scheme. A perusal of the policy, guidelines and FAQs would show that in case of banning show cause notice, reply is mandatory. Suspension cannot be read in isolation but has to be read as a part of the banning process. Thus, when for the final punishment of banning itself, a proper procedure is required to be followed, it cannot be held that repeated suspension orders can be issued without complying with the principle of *audi alteram partem*. It is nigh possible that suspension may have to be resorted as an urgent measure and thus advance notice may not be possible. However, *post* the suspension, notice would still have to be given, if the same is to be continued for a long period.

62. In the opinion of the Court therefore, in the context of defence procurement, bearing in mind the discretion vested in the Competent Authority in cases of national security and the impact of suspension the following procedure ought to be followed for suspension, under the *MoD Guidelines*, unless circumstances warrant otherwise:

a) If any entity is found allegedly violative of any of the grounds set out in clause C.1 (a) to (f), the competent authority can immediately suspend dealings with such an entity.

b) If any intimation or complaint is received from CBI or any other investigating agency that a criminal investigation has been initiated or if the competent authority refers any complaint against the entity to CBI or any investigating agency or when intimation is received regarding initiation of criminal investigation or enquiry against any entity, dealings can be suspended immediately. *Per contra* Clause F.3 of the *MoD Guidelines* requires the filing/ existence of the chargesheet for banning.

c) In case of suspension, the same has to be compulsorily reviewed every 6 months. For the said purpose, the nature of investigation ought to be examined and if the same has a nexus with the nature of the relationship i.e., it relates to the business of the entity, between the Government and the entity/person, ordinarily a show-cause notice ought to be issued to the suspended entity within a reasonable period after suspension orders are issued, preferably within the 6 months period. Such a show-cause notice ought to set out any of the grounds enumerated in C.1 (a) to (f) for the suspension or the proposed ban. Any material which may form the basis of such show-cause notice ought to be communicated to the firm/entity. If a show-cause notice is not to be issued, proper reasons ought to be recorded for the same, to justify that national security considerations exist.

d) A reply ought to be sought from the concerned entity/person in terms of paragraph 24 of *the Procedure for Penal Action.*

e) For the purpose of review, a committee would have to be appointed to evaluate the allegations independently as to whether any of the grounds in clause C.1 (a) to (f) of the *MoD Guidelines* are made out. The committee may be headed by a two star or equivalent officer in terms of paragraph 17 of *the Procedure for Penal Action.*

f) If the committee is satisfied that the said grounds in C.1 (a) to (f) are made out, then the suspension can be extended. The said grounds ought to be spelt out in a reasoned manner, so as to stand the test of scrutiny.

g) A suspension cannot be for an indefinite period. After the initial period of suspension and any reasonable periods of extension thereof, if the same is to be extended for a longer period, the procedure prescribed for the purposes of Banning would have to be resorted to.

h) If the competent authority decides to ban the entity/person, after following the prescribed procedure, the period of ban has to be then fixed bearing in mind the period of suspension already undergone which would be subsumed in the banning period.

i) If any of the procedures prescribed above is to be not adhered to, there has to be exceptional circumstances or overwhelming reasons to do so, with sufficient material to back the same as held in ***Madhyamam Broadcasting (supra)***.

63. In so far as Banning/Levying of financial penalties is concerned, the procedure prescribed in the aforementioned three documents would have to be strictly complied with.

Conclusion on Facts

64. The original file of the Respondent No.1 relating to the suspension of

the Petitioner was produced before the Court and the same has been perused.

65. The file reveals that an intimation letter was received from the CBI in December 2021, in respect of various firms and companies with whom the Respondent No.1 was dealing with. The said intimation letter also informed the Respondent No.1 that the Petitioner is under investigation in Case No. RC 217/2013 A0003 i.e., the *Agustawestland VVIP Helicopter* case. The Respondent No.1 was informed that Shri. Sushen Mohan Gupta was the director of the Petitioner company from 25th February, 2013 to 29th March, 2018 and the same is owned by his family members till date. On a query by the Court to ld. Sr. Counsel for the Petitioner, it is not disputed that Mr. Gupta was one of the directors of Petitioner company and his near family members are still the directors/promotors of the Petitioner.

66. It was stated by CBI that Shri. Sushen Mohan Gupta along with his companies is under investigation in the *Agustawestland VVIP Helicopter* case. This position was also reiterated by the CBI in its second intimation of July, 2022. The record does not reveal the nature of investigation.

67. On the basis of these intimations, Respondent No.1 considered the question as to whether the Petitioner is to be suspended from business dealings or not. In view thereof, Respondent No.1 after taking into consideration the revocation of Agusta Westland's suspension and the *MoD Guidelines*, sought legal opinion and then suspended the business dealings with the Petitioner for a period of one year vide the impugned order dated 9th December, 2022.

68. The suspension was to be reviewed by a committee constituted under the *MoD Guidelines* after six months. Accordingly, in terms of clause D.3 of the guidelines, a committee was constituted for reviewing the said decision.

The Petitioner's representation dated 15th December, 2022 through its executive director Mr. Samar Bhargava was taken into consideration by the committee. The CBI's latest intimation in May, 2023 was also considered by the Committee. Thereafter, the said committee vide decision dated 6th June, 2022 decided to continue the Petitioner's suspension for a further period of six months till 8th December, 2023.

69. The overall rationale applied by Respondent No.1 in the suspension process is that the nature of allegations against the Petitioner would attract Clause C.1(b) read with Clause D2 of the *MoD Guidelines*.

70. As per the facts of the present case, the Petitioner was a regular supplier to Respondent No.1. It entered into several contracts for supply of defence equipment some of which are currently valid and running. The Petitioner was not informed of its sudden suspension from dealings with the Respondent No.1 and the Government and it is the Petitioner's case that it received information about its suspension from the media.

71. No notice was issued prior to the suspension, no reply was called for and no hearing was held. There was no consideration of the proportionality and the impact of the suspension. Even at the stage of review, no opportunity of hearing was afforded. Even the notice dated 16th January, 2023 sent by CBI to the Petitioner only sought information about the Petitioner's shareholders. Thus, in effect, the impugned suspension order is merely based on the intimation letters issued by the CBI stating that an investigation is underway against one of the ex-directors of the Petitioner and his companies.

72. In the overall conspectus, till date, there is no clarity as to what is the nature of allegations, what is the nature of investigation and since when the

investigation has been continuing as no reasons are spelt out. If it is presumed that the investigation against the Petitioner started in 2013, along with the investigation against Agusta Westland, it is not clear as to why the CBI gave an intimation to the Respondent No.1 for the first time only in December, 2021 i.e., 9 years after inception of the Agusta Westland investigation. This is especially ironical considering the fact the Respondent No.1 had been procuring defence equipment all along from the Petitioner continuously since 2007. Further, there are no circumstances which explain the change in position prior to December, 2021 and post December 2021 in the investigation.

73. Even though, the Petitioner has been suspended vide the impugned suspension order dated 13th December, 2022, the Respondent No.1 is continuing to avail of goods/services from the Petitioner in respect of contracts which are currently in operation. This was also directed by this Court vide interim order dated 23rd December, 2022.

74. It is in this background the legal position needs to be considered as to whether the infraction of the principles of natural justice by the Respondent No.1 is justified or not and if suspension without a hearing, notice and communication of reasons can be justified.

75. There is no doubt that the present case relates to defence procurement. Respondent No.1 is the appropriate authority to decide from whom to procure defence equipment in the larger national interest. Admittedly, the Petitioner, in the present case, was promoted by an individual who appears to be named as one of the key individuals in the *Augusta Westland Helicopter scam*. It is also not disputed that criminal investigation is going on in respect of the alleged scam, though the nature of investigation is not

clear.

76. It is also unclear at this point as to what is the nature of the material which was revealed to the CBI in the said investigation that resulted in the revocation of the suspension of Augusta Westland, however clearly from 2013 to 2021 for more than 8 years, after the registration of the PE against Augusta Westland, the Petitioner was not suspended.

77. After perusing the original file, it cannot be said that there is no application of mind by the Respondent No.1 in the suspension. Respondent No.1 after taking into consideration the revocation of Augusta Westland's suspension and the *MoD Guidelines*, sought a legal opinion related to suspension. However, the suspension itself cannot be indefinite. The suspension at some point of time has to result in due process being followed for banning or has to be revoked. As held by the Hon'ble Supreme Court in ***Kulja Industries Ltd. V. Chief Gen. Manager W.T. Proj. BSNL & Ors., AIR 2014 SC 9***, debarment is never permanent and the debarment would invariably depend upon the nature of the offence committed by the erring contractor. Even if defense procurement can stand on a different footing, there is no material to support the dispensing of the principles of natural justice completely. Thus, principles of natural justice would have to be complied with and the Respondent No.1 would have to go beyond merely receipt of the CBI's intimation letter.

78. While Respondent No.1 may enjoy the right to suspend any party or person as an immediate measure owing to justifiable reasons as held in the judgment of the Delhi High Court in ***JBM Electric Vehicles (supra)***, in the facts of this case, the mere fact that it involves defence procurement, does not justify non-issuance of a Show-cause notice. Within a reasonable period

a show cause notice shall have to be issued. Thereafter, a reply be sought and if hearing is sought, the same may be granted. After hearing the parties, a reasoned order is to be passed by the Competent Authority.

79. Accordingly, in the facts of this case after perusing the original records and analysing the aforementioned decisions, the following directions are issued:

i) A show cause notice shall be issued to the Petitioner within a period of 2 weeks from today setting out the reasons for suspension.

ii) Any relevant material in respect of allegations against the Petitioner shall be put to the Petitioner along with the show cause notice.

iii) An opportunity to reply shall be afforded to the Petitioner and if a hearing is sought, the same shall be granted.

iv) After affording a hearing, a reasoned order shall be passed within 3 months.

v) Insofar as the existing contracts are concerned, the interim arrangement made vide order dated 23rd December, 2022 shall continue.

vi) All remedies of the Petitioner are left open to be availed of in accordance with law.

80. The present writ petition along with all pending applications is disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 5, 2023
dj/kt