

Role of Constitutional Courts in Matters Concerning Contracts by Government and Public Contracts: a Brief Analysis of Case Law

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Abstract:

The Article examines the role of constitutional courts in interpreting the constitutional values as far as it relates to rights of individuals and/or contractors vis-a-vis rights and duties cast on the Government and public entities as defined in Article 12, Constitution of India, 1950 so as to balance the competing rights and duties of both. The Article would focus on contracts which can be said to be Government contracts, the focus on the terms of Contract and special emphasis on Law relating to entering into contract by tenders, black listing/ debarment of Contractors by the Public Sector and/or Government organizations, namely, on the contours of Articles 14,19 and 226 read with interpretation of Articles 298 and 299, Constitution of India, 1950 as interpreted in the realm of administrative/ constitutional jurisdiction of the Constitutional Courts. The Article would take the reader to the term contract and the development in area of Constitutional Law augmenting the perfection of Constitutional vision of justice, boundaries of judicial review and contours of deciding whether the contract was enforceable contract or not. The Article would take the reader to the concept of what is blacklisting, and can a company be blacklisted? If the answer is 'Yes' what are the Rules of black listing of contractors. the principles, namely, enunciated by the Apex Court. The principles of natural justice and their applicability to such debarment, was for any collateral purpose or in colorable exercise of power. The principles for which the prerogative writs are invoked time and again, and the remedies for breach of the contractual liability of the Government would also be discussed at length vis-a-vis statutory remedies of preferring suits or appeals and/or the equitable remedy. In the end on the toxicology of debarment vis-a-vis the period during which it would remain in operation is discussed.

Keywords: *Constitutional Courts, Constitution Law, Judicial Review, Public Contract, Contractual Matters.*

(A) Introduction

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Actus curiae neminem grayabit: An act of the Court shall prejudice no man.

The undersigned was pondering over a new topic on which much might have been written, but then also there may be certain unraveled areas to be written about and decided to delve into the topic of Governmental Contracts and public contracts as interpreted by Indian Courts especially Constitutional Courts. The law of contracts with government and its instrumentalities is like an ocean and effort has been made to simplify it as much as possible by going into its depth and to pick out the pearls of principles laid by the honorable Supreme Court of India. The state activities in the realm of contract have spread to various fields. The rights and liabilities of the parties to contracts are to be tested on the touchstone of law of contract with special reference to Constitutional ethos. The role of Constitutional courts is to uphold constitutional rights of the parties to the contracts with government or its instrumentalists. Indian Judiciary has tried to evaluate and see that the Constitutional values such as fundamental rights enshrined in Indian Constitution are maintained as far as the duties and obligations of the government in the realm of contracts under various legislations are concerned.

The state as would be seen promises certain benefits which then is reduced to writing and persons signatory to the same act accordingly. The rights and liabilities are to be tested on touchstone of law of contract with special reference to Constitutional ethos. The parties have shifted in each-others field due to increase in rights. The role of Constitutional courts to uphold constitutional rights of its people, which were conceived as an instrument for the protection of the individual against the power of the State. The Indian Judiciary has tried to evaluate and see that the Constitutional values enshrined in the Indian Constitution as far as the duties and liabilities of the Government in realm of contracts whether they be under the Insurance Act or under other legislations fulfill the Constitutional values namely the fundamental rights, blending it with good governance, so as to tackle the problems which comes before it. Under Article 12, Constitution of India, 1950 or public contracts public authorities who invite tenders must do so fairly. The terms of the invitation to tender by Govt. or Public Body has to be fair and they cannot contravene Article 14, Constitution of India, 1950, as held by Apex Court in *Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai*² and *Bharat Petroleum Corporation Ltd. Vs. Maddula Ratnavalli*³. The laws relating to tender is now an integral part of law of Contract and its importance is seen as the courts are often required to interpret this specie of law of contract. This article is not a research article. The discussion will mainly focus on how Indian judiciary has engaged itself with values enshrined in the Indian Constitution to tackle (a) Governance of government in realm of contractual liability (b) by Adjudicating matters relating to contracts with competing values of and against "State" as defined in Article 12, Constitution of India, 1950 as also in realm of the public contracts what are the Rules of black listing of

² *Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai* (2004) 3 SCC 214

³ *Bharat Petroleum Corporation Ltd. Vs. Maddula Ratnavalli* (2007) 6 SCC 81

contractors; the principles, namely, enunciated by the Apex Court in *Groscons Pharmaceuticals (P) Ltd. Vs The State of Uttar Pradesh*⁴, the decision of the Bombay High Court in *The Union of India Vs. A.K.Mathiborwala*⁵ and the decision of the Apex Court in *Vetindia Pharmaceuticals Limited Vs. State of Uttar Pradesh*⁶ wherein the Apex Court has laid down rules and Guidelines on blacklisting is considered at length. The author has also ventured to see if alternative methods can be explored over and above arbitration being statutory mode of A.D.R. namely lok adalat and mediation to Contractual obligations inter se public entities.

(B) General concept about contracts: -

(a) There were laws even in ancient times. Mimansa rules of construction of contracts rests on the following two maxims relating to law of contract:

(i) Qui per Alium Facit per Seipsum Facere Videtur. - He who does an act through the medium of another party is in law considered as doing it himself (ii) Vigilantibus, Non Dormientibus, Jura Subsistent. The laws assist those who are vigilant not those who sleep over their rights⁷.

(a) Contracts as per Indian Contract Act 1872: The right to contract or not flows from Indian Contract Act, 1872 (Referred as Contract Act). Provisions of Contract Act go to show that it permits, major persons to contract, but also permits the person to desist from entering into contract. The main ingredient is that there must be consensus between the two. Seven essential elements must be present before a contract is binding namely, the offer, acceptance, mutual assent (also known as “meeting of the minds”), consideration, capacity and legality. In order to be enforceable, the agreement must satisfy the requirements given in Section 10, Contract Act. This freedom is subject to certain exceptions⁸

(b) General Contract vis-a-vis Government or Public Contract; -

An exception is carved out qua the government and its authorities who do not have the same right or authority to contract as vested in individual person. This inhibition partakes within it the Government at Centre and State, instrumentalities of State and, as per the author, all those entities which would fall within the purview of Article 12, Constitution of India, 1950. A Government contract is seen as a privilege and unlike a private person who may choose with whom to contract the Govt. or public body has to act as per the terms of the Contract and the said contract cannot be opposed to public interest and is amenable to judicial review.

⁴ Groscons Pharmaceuticals (P) Ltd. Vs The State of Uttar Pradesh AIR 2001 SC 604

⁵ The Union of India Vs. A.K.Mathiborwala 76 BOMLR 659

⁶ Vetindia Pharmaceuticals Limited Vs. State of Uttar Pradesh 2020(0) AIJEL-SC 66666

⁷ Justice Makrkandey Katju. K.L. Sarkar’s Mimansa Rules of Interpretation. 4th Edition. Thomson Reuters.

⁸ Mulla. The Indian Contract and Specific Relief Acts. 15th Edition. LexisNexis.

(c) Government Contracts: -

(1) Government contracts pre-independence: Even prior to independence, the Government used to enter into contracts, it was a known phenomenon when common law governed India that Crown could not be sued in a Court for contract entered into by it before The Crown Proceedings Act of 1947.⁹ A reference to decision of the Supreme Court of Calcutta as early as 1785 in the case of *Moodalay Vs. Morton*¹⁰ held that the East India Company was subject to the jurisdiction of the municipal Courts in all matters and proceedings undertaken by them as a private trading company. Similar view was taken by the Privy Council in *R.T. Rangachari Vs. Secretary of State for India in Council*¹¹.

(2) Post Independence: - As far as period post 1950 is concerned, we will have to go by the Constitutional provisions which relate to contractual liability, award of contracts, in matter of contract and above all, the contours on the basis of which after entering into a contract, the same may be rescinded. The Constitution of India enacted provisions in terms of Articles 298 and 299. Article 298 had to be immediately amended so that it made clear that the Union and State Govt. are competent to carry any commercial or industrial undertaking. Article 298 was amended¹² the reason for to amend arose because of the decision of the Apex Court in *Sagir Ahmad Vs. State of U.P.*¹³. The government is competent to take up business which may include business of banking, exploitation of mineral resources and can also be competitor of private traders. Reference to the decision in *Ram Jawaya Vs. State of Punjab*¹⁴ would satisfy the reader about this proposition. The Apex Court in *Aniraj Vs. State of Maharashtra*¹⁵, held that the executive power of the State so as to carry on any trade or business would be subject to the legislation of the State as well as the Union Parliament. Article 298 gives Power to carry on trade, etc. whereas Article 299 relates to how the contracts are to be concluded so that it would be a binding contract.

A contract by a government must satisfy the provisions of the term contract, meaning thereby, an agreement enforceable by law as per the provision of Section 2 (h), Indian Contract Act, 1872 but all the contracts under the executive power of the Union must also be executed (a) on behalf of President or Governor (b) by such person in such manner as directed or authorized. All contracts even between the State Govt and the Central Government have to be expressed and in writing and cannot be implied. In case of *State of Bihar Vs. Majeed*¹⁶, the Apex Court held that government contract is distinct contract and in addition to the requirement of the Contract Act the formality prescribed

⁹ WADE AND PHILLIPS. 1977. CONSTITUTIONAL LAW, 623 et.seq.

¹⁰ *Moodalay Vs. Morton* (1875) I BroCC 469

¹¹ *R.T. Rangachari Vs. Secretary of State for India in Council* AIR 1937 PC 27

¹² Substituted by the Constitution (7thAmendment) Act, 1956, Durga Das Basu. 2012 Commentary on the Constitution of India. 8th Edition.

¹³ *Sagir Ahmad Vs. State of U.P.* AIR 1954 SC 728

¹⁴ *Ram Jawaya Vs. State of Punjab* (1955) 2 SCR 225

¹⁵ *Aniraj Vs. State of Maharashtra* AIR 1984 SC 781

¹⁶ *State of Bihar Vs. Majeed* AIR 1954 SC 786

under Article 299 must be fulfilled. In such cases, the State as well as the citizens with whom it contracts are both equally subjected to the law of contract. The Contracts by government and tendering may bring profiteering but it must be a reasonable profit. The property will be dealt with in such a way that it subserves public policy and public interest. The contract of tender must be above arbitrariness and should not be for extraneous consideration.

(C) Contractual Liability and Remedies :-

The Contractual liability would arise if there is written contract, executed by authorized person and expressed in the name of the President (or the Governor). The effect of non-compliance of the aforesaid has been very strictly viewed by the Courts. In *Union of India Vs. N.K. (P) Ltd.*¹⁷, it was the Director who was authorized to enter into contract on behalf of President. However, the contract was entered into by the Secretary of the Railway Board and hence it was held that it was not a valid and binding contract. Similar view was taken in *Bhikraj Jaipuria Vs. Union of India*¹⁸. The remedies for breach of contract would be civil remedies as per the Code of Civil Procedure 1908 and under the Contract Act 1872 and in cases of Govt. and or public body, writ may also lie which will have to be subject to the law laid down by the Apex Court in the decisions discussed herein above. The Courts have applied new and dynamic approach to redress competing interests of parties in *Century Spg. and Mfg. Co. Ltd. Vs. Ulhasnagar Municipal Council*¹⁹. The scope of judicial review has been laid in the above cases.

(D) E-Contracts: -

In Public procurement and in the modern times E-Procurement is a substitute for regular physical tender. We are fast developing with the recent development in the field of information technology, the Right to Information and globalization but, lack of morality and the interdependence of morality with law and the moral values, no doubt, are backbone of all laws²⁰.

(E) Constitutional values: applicability of Part -III, Constitution of India, 1950 to public contracts:

(a) Constitutional Ethos: - A Constitution provides broad outlines of administration of a country and concerns itself with the problems of the Government which has been again reiterated in 2017 in *K.S. Puttaswami Vs. Union of India*²¹. With this prelude, the

¹⁷ Union of India Vs. N.K. (P) Ltd. AIR 1972 SC 915

¹⁸ Bhikraj Jaipuria Vs. Union of India AIR 1962 SC 113

¹⁹ Century Spg. and Mfg. Co. Ltd. Vs. Ulhasnagar Municipal Council (1970) I SCC 582

²⁰ K.J. Thaker. 2005. 'A Brief History of Law and Morality and Their Interdependence : A Discussion with Reference to Present Day Scenario' GLR

²¹ K.S. Puttaswami Vs. Union of India (2017) 10 SCC 1 para 266

nature of the Constitutional values depends on morality norms which are inherited in various articles and at times dynamism would be necessary to test the guaranteeing of civil and other rights embodied in Part III.

(b) The General Principles Governing Government Contracts, Tenders and the Applicability of Art. 14 vis a vis Art. 299, Constitution of India, 1950: -State cannot choose to discriminate or act arbitrarily and/or violate Art. 12, 13, 14 and 21 in its contractual obligations. The administrative decisions can be impeached on the ground that the decision was violative of Part -III, Constitution of India, 1950. In *Radhakrishan Agarwal Vs. State of Bihar*²², the Apex court held that all Constitutional powers would carry constitutional obligation even on the Government which functions under the Constitution. The State and its instrumentalities when they enter in commercial transactions, they must exercise power in consonance to what is known Constitutional ethos.

(c) Balancing the rights by judicial Pronouncements: - The challenge to the award of contract will have to be decided on the touchstone of principles enunciated by the Apex Court in *Ramana Dayaram Shetty V. International Airport Authority of India*²³, followed in *Ganpati Metals Vs. M.S.T.C. Ltd.*²⁴ and *Sangeeta Vs. Union of India*²⁵. The Apex Court again in 2007 case titled *Reliance Energy Ltd. Vs. Maharashtra State Road Development Corporation Ltd.*²⁶, held that judicial review hinges on three heads; illegality, irrationality and procedural impropriety. These are all what are known as jurisdictional errors. The administrative action was challenged and the Apex laid down scope of judicial review holding that it could be invoked to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound or not. On analysis of this decision, it can be seen that the Apex court has laid down guidelines for courts in cases of grant of public largess. During the pendency of these matters, on 26 April 2016, court granted an interim order in favour of the successful bidder. The court referred to the several decided precedents Apex court in *N.Ramachandra Reddy Vs. State Of Telangana*²⁷, has again laid down similar principles. The breach of the *audi alteram partem* rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused. Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per-se does not lead to invalidity of the orders passed. The aforesaid recent decisions go to demonstrate that the Court has balanced equitable rights by holding that there is no rule but prejudice must be shown to have been committed and proved de-facto prejudice must be proved and refused to lay down

²² Radhakrishan Agarwal Vs. State of Bihar AIR 1977 SC 1496

²³ Ramana Dayaram Shetty V. International Airport Authority of India 1979 AIR SC 1628

²⁴ Ganpati Metals Vs. M.S.T.C. Ltd. (2005) 12 SCC 169

²⁵ Sangeeta Vs. Union of India (2005) 7 SCC 484

²⁶ Reliance Energy Ltd. Vs. Maharashtra State Road Development Corporation Ltd. (2007) 8 SCC 1

²⁷ N.Ramachandra Reddy Vs. State Of Telangana 2019 JX(SC) 1014

straight jacket formula in such matters.

(d) Law of insurance and law of indemnity: -

Modern day activities has seen a special kind of contract being entered by Nationalised companies namely one of indemnity. The insurance contracts are in this realm, where third party is benefited out of the contract entered between owner of vehicle and company. The Apex Court in case titled *Samundra Devi v/s. Narendra Kaur*²⁸, held that a contract of insurance as is well known is a contract of indemnity. In a case of accident, the primary liability under law for payment of compensation is that of the driver. The owner of the vehicle also becomes vicariously liable. In a case involving a third party to the contract of insurance in terms of Section 147, Motor Vehicle Act, 1988 providing for a compulsory insurance, the insurer becomes statutorily liable to indemnify the owner. Indisputably, the insurance company would be liable to indemnify the insured in respect of loss suffered by a third party or in respect of damages or property. In a case, therefore, where the liability is fastened upon the insurer it would be bound to indemnify the insured subject to the exceptions contained in Section 149, Motor Vehicles Act, 1988 are attached.

(e) The absence of arbitrariness in the discharge of public duty: -

It is cardinal principle that the State has to discharge duty and the power to select and enter into contract and grant largess which would not be against the guarantee contained in Article 14, Constitution of India, 1950. It would be duty of the Courts known as Constitutional Courts to decide the lis on theory of non-infringement of fundamental rights of an individual. An innovative stream of jurisprudence based on the concept that the State would be liable for acts if the person authorized to enter into contract and if he or she or authorised signatory can be demonstrated that there is violation of principles of natural justice. In *Rattan Chand Hira Chand Vs. Askar Nawaz Jung*²⁹, the Court held that it cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. Recently, the High Court of Jharkhand in *Mohammad Shahbag Alam Vs. State of Jharkhand*³⁰, held that while awarding of tender Constitutional mandate has to be followed. The award of tender has to be in consonance with Constitutional values. Constitutional values would mean that it should not be arbitrary unreasonable and suffering from vice of favoritism.

(f) Applicability of principle of waiver in Government Contracts: -

In *Andhra Pradesh State Road Transport Corporation Versus S.Jayaram*³¹, the apex court was called upon to decide the issue of applicability of principle of waiver narration of skeletal facts would make things clear. The appellant Corporation, in the interest of avoiding litigation and complaints which are often made, took a policy decision that the existing contractors in the premises owned by the Corporation will be allowed an

²⁸ Samundra Devi v/s. Narendra Kaur (2008) 9 SCC 100

²⁹ Rattan Chand Hira Chand Vs. Askar Nawaz Jung (1991) 3 SCC 67

³⁰ Mohammad Shahbag Alam Vs. State of Jharkhand AIR 2021 Jharkhand 4

³¹ Andhra Pradesh State Road Transport Corporation Versus S.Jayaram 2004 (13) SCC 792

extension of one term that is for a further period of 3 years at enhanced rates of rent @ 15 per cent, 17 per cent and 20 per cent for the first, second and third year respectively over the rent fixed for the preceding year. The circular contained a provision that the Corporation shall make an offer to the contractor occupying the premises to take benefit of the policy decision of the Corporation. A circular in this regard, being Circular No.45/81, was issued on 9 September 1981. It was fact recorded that circular was not made known to existing contractor hence question of waiver does not apply. The contractor cannot be deemed to have waived the right or the benefit available to him under Circular No.45/81 because he was not even aware of the existence of the circular. To constitute waiver there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right or conduct such as warrants an inference of the relinquishment of a known right or privilege. The trial court and the High Court directed the amount paid by the respondent under the interim order passed by the High Court to be refunded to the extent to which it is in excess of the amount which the respondent would have been liable to pay to the Corporation under the terms of Circular No. 45/81. The Apex court can be seen to have balanced the rights of parties to contract and held that no fault could be found with the view taken by the Courts below. The appeal was dismissed. The law of waiver could not be applied so to negate rights which had accrued in favour of individual.

(g) Applicability of Law of Promissory Estoppel: -

The Rule of promissory estoppel was applied by the Apex Court in *Union of India Vs. Anglo Afghan Agencies (Anglo Afghan)*³². The Government cannot go back upon the promises made in exercise of discretionary power embodied in the scheme merely on a whim³³. Principles of estoppel are enunciated in case titled *Motilal Padampat Sugar Mills Co.Ltd. Vs. State of U.P.*³⁴. The Courts have time and again interfered if the Act of the public body is such which frustrates and oppresses the purposes of the tender. Effect of frustration would be if there is a void contract and or the incidents of ordinary contract would be not applicable in such cases.

(h) Law of Debarment: -

The term debarment has been explained to mean suspension and there is procedure for debarment of suppliers, contractors' consultants which would work as a prohibition in bidding of Govt. projects. The debarment would also entail certain loss of privileges. The Courts time and again decided matters pertaining to debarment. Debarment may bring what is known as a lesser degree blacklisting. The High Court of Gujarat in *Ghanshyam Indravadan Pandya V. University Engineer*³⁵, after considering several decisions, quashed the permanent debarment directing the authority to decide the matter afresh.

³² Union of India Vs. Anglo Afghan Agencies AIR 1968 SC 718

³³ H.M. Seervai. 1999. Constitutional Law of India, Vol I 4th Edn., Delhi: Universal Book Traders, Delhi, 864

³⁴ Motilal Padampat Sugar Mills Co.Ltd. Vs. State of U.P. (1979) 2SCC 409

³⁵ Ghanshyam Indravadan Pandya V. University Engineer (2018) 3 GLH 18

Similar view was taken in *K.K.Sorathia V. Gujarat Water Supply And Sewerage Board*³⁶ wherein Court held that debarment was tainted with illegalities and, therefore, the order was interfered with and quashed. Decision in *Siddharth Mohanlal Sharma V. South Gujarat University*³⁷, though not in the whelm of contract but power of judicial review in question of debarment, the Court though upheld debarment the punishment was held to be excessive and, therefore, was interfered with.

(i) Law as to blacklisting: -

The term 'blacklisting' has not been defined in Indian Contract Act, 1872 or Constitution but it would mean a person or entity to be avoided or distrustful in contractual matters and is akin to boycott or blocked. The term debarment is only exclusion may be or may not be penal. A person/company is blacklisted whereby a person or a company would not be able to contract with the Government or its undertakings. The first effect of blacklisting as the term suggests would bring about civil consequences. At times, if the government feels that criminality has been perpetrated by the act of the individual or the company, they can even go for invoking criminal machinery so as to punish the person for his criminal activities.

(j) Role of Courts in Matters Relating to Blacklisting: -

In *M/s. Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and another*³⁸, Court held that there could not be arbitrary blacklisting and that too in violation of the principles of natural justice. In *Joseph Vilangandan vs. The Executive Engineer, (PWD), Ernakulam and others*³⁹, the Apex Court considered the question of ingredient of show cause notice and held that the show cause notice must contain an action with reference to the contract in question only. It was held that there were no words in the notice which could give a clear intimation to the addressee that it was proposed to debar him from taking any contract, whatever, in future under the Department. The Court in *Gorkha Security Services*⁴⁰ held that it was incumbent on the part of the Department to state in the show cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. The court applied ratio of the cases earlier decided and held against the authorities there by did justice to the appellant and high-handed action was set aside. The Role of the Constitutional Courts is to uphold the constitutional values. The Courts have laid down norms which would permit the Court to interfere or otherwise in the action of the authority concerned. The Courts have time and again enunciated principles for interfering in matters of blacklisting. The High Court of Gujarat in *P.C. Snehal Construction Co Vs. Gujarat Water Supply and Sewerage Board*⁴¹ in a

³⁶ *K.K.Sorathia V. Gujarat Water Supply And Sewerage Board* 2016 JX(Gujarat) 492

³⁷ *Siddharth Mohanlal Sharma V. South Gujarat University* 1982 (1) GLR 233

³⁸ *M/s. Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and another* (1975) 1 SCC 70

³⁹ *Joseph Vilangandan vs. The Executive Engineer, (PWD), Ernakulam and others* (1978) 3 SCC 36

⁴⁰ AIR 2014 SC 3371

⁴¹ *P.C. Snehal Construction Co Vs. Gujarat Water Supply and Sewerage Board* In Special Civil Application

case where the petitioner was a government approved “AA” class registered contractor. The respondent-Gujarat Water Supply and Sewerage Board (for short ‘the GWSS Board’) issued a notification, for “Dahegam Water Supply Scheme”. The petitioner’s tender was accepted and the Work Order was issued to him. The petitioner could not complete the work by 28 March 2013, due to various reasons. The petitioner invoked the provisions of Clause-20 of the Contract for referring the dispute to the Disputes Adjudication Board. The petitioner was aggrieved by the order passed by the Executive Engineer of the Board whereby, the petitioner was debarred from the GWSS Board as well as from Water Sanitation Management Organization and Gujarat Water Infrastructure Limited. The court on facts held that order under challenge was passed without issuing any notice or even affording an opportunity of hearing to the petitioner, whereby, he was debarred / blacklisted in respect of his business ventures. The respondent did not give para wise reply to the assertions made in the writ petition. It was held by the court that if, the respondent does not file reply to the averments made in the petition, same would amount to accepting the assertions made in the petition. The court relied on decision of the Apex Court in the case of *M/S Kulja Industries Ltd. Vs. Chief Gen. Manager W.T. Proj. BSN*⁴², wherein the Apex court had confirmed the View taken by it in earlier decisions that blacklisting or debarment entails civil consequences, and therefore, principles of natural justice are required to be complied with and the person, who is sought to be blacklisted /debarred, must be issued a show-cause notice so that he can supply his reply. In final analysis the court from perusal of the material on record, held that it was not brought on record that any show-cause notice was issued by the respondent, asking the petitioner as to why he should not be debarred / blacklisted. On equitable grounds the court directed the respondent to take a decision, whether to refer the matter to the Gujarat Disputes Adjudication Board or not within a period of one week., holding that the said relief was also required to be granted, then, the ends of justice would be met and the interest of the public at large may not suffer. The impugned order / communication issued by the respondent was quashed and set aside. The respondent was directed to take a decision with regard to referring the matter to the Gujarat Disputes Adjudication Board, as provided under Clause-20 of the Contract. It further gave direction under article 226 of the Constitution, that if the respondent decided not to refer the matter to the Gujarat Disputes Adjudication Board, it will pass a speaking / reasoned order in that regard. This shows the pragmatic approach of the high court to interpret the actions so as to subserve the purpose of Constitutional ethos. We can also see that the Courts have time and again seen the action from the perspective of proportionality which can be seen in the recent decision of the Apex Court in *M/s Daffodills Pharmaceuticals Ltd. & Anr. Vs. State of U.P. and another*⁴³,

No.16553 of 2013

⁴² *M/S Kulja Industries Ltd. Vs. Chief Gen. Manager W.T. Proj. BSN* AIR 2014 SC 9

⁴³ *M/s Daffodills Pharmaceuticals Ltd. & Anr. Vs. State of U.P. and another* (2019) 17 SCALE 758

followed in a very recent judgment laying down guideline for such matters. In *Vetindia Pharmaceuticals Limited Versus State Of Uttar Pradesh*⁴⁴, after referring to earlier cases decided by it namely (1) *Basanti Prasad Vs. Bihar School Examination Board*⁴⁵, (2) *Daffodills Pharmaceuticals Ltd.(Supra)*, (3) *Erusian Equipment & Chemicals Ltd. Vs. State Of West Bengal*⁴⁶, (4) *Gorkha Security Services Vs. Government (Nct Of Delhi)*⁴⁷, (5) *Joseph Vilangandan Vs. The Executive Engineer, (Pwd), Ernakulam*⁴⁸, (6) *Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited*⁴⁹, *Maharashtra SRTC Vs. Balwant Regular Motor Service*⁵⁰, *Moon Mills Ltd. Vs. Industrial Court*⁵¹ and decision in *State Of M.P. And Others Vs. Nandlal Jaiswal And Others*⁵² and came to the conclusion that the blacklisting of the company was bad and quashed the order on ground of proportionality. The company was corresponding with State government hence there was no delay in approaching the court. The courts have held that the public authority must express their mind in the show cause notice to blacklist, then party could file an appropriate response to the same. The law on blacklisting holds that order operates to the prejudice of a commercial person not only in praesenti but also puts a taint which attaches far beyond and may well spell the death knell of the organisation/institution for all times to come described as a civil death. The Limitation Act stricto sensu does not apply to the writ jurisdiction. The discretion vested in the court under Article 226 of the Constitution therefore has to be a judicious exercise of the discretion after considering all pros and cons of the matter, including the nature of the dispute, the explanation for the delay, whether any third-party rights have intervened etc. The scathing remarks in *Vetindia (supra)* taking exception to the illegality and the disproportionate nature of the order with no third-party rights affected, and the approach of high court being deprecated shows that the Apex court has come to the rescue of the appellant as illegality had never engaged the attention of the High Court in judicious exercise of the discretionary equitable jurisdiction. Recently the Apex Court in *UMC Technologies Private Limited Vs. Food Corporation of India*⁵³, has held that in cases of Blacklisting / Downgrading of Contractor / Tenderer/ Blacklisting of contractor who had concluded contract with State Corporation, from participating in future bids, the show cause notice to constitute valid basis of blacklisting order must comply with requirements of principles of natural justice. The principles are explained in detail in the said decision.

⁴⁴ *Vetindia Pharmaceuticals Limited Versus State Of Uttar Pradesh* 2020 (0) AIJEL-SC 66666

⁴⁵ *Basanti Prasad Vs. Bihar School Examination Board* 2009 6 SCC 791

⁴⁶ *Erusian Equipment & Chemicals Ltd. Vs. State Of West Bengal* 1975 1 SCC 70

⁴⁷ *Gorkha Security Services Vs. Government* AIR 2014 SC 3371

⁴⁸ *Joseph Vilangandan Vs. The Executive Engineer, (Pwd), Ernakulam* 1978 3 SCC 36

⁴⁹ *Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited* 2014 14 SCC 731, (7)

⁵⁰ *Maharashtra SRTC Vs. Balwant Regular Motor Service* AIR 1969 SC 329, (8)

⁵¹ *Moon Mills Ltd. Vs. Industrial Court* AIR 1967 SC 1450

⁵² *State Of M.P. And Others Vs. Nandlal Jaiswal And Others* 1986 4 SCC 566

⁵³ *UMC Technologies Private Limited Vs. Food Corporation of India* (2021)2 SCC 551

(F) Applicability of A.D.R. in Contractual Matters: -

(a) Initiations of Supreme Court: -

The Apex Court as early as 1992 felt that ADR mechanism must be employed so as to reduce the litigation between the Government Agencies. The Court held different limbs of Government machinery must not bring their litigation before the Court more particularly in *O.N.G.C. vs. Collector of Central Excise*⁵⁴ and *Chief Conservator of Forest, Govt. of A.P. Vs. Collector*⁵⁵. The Supreme Court even went to the extent of holding that dispute between public sector undertakings and Union of India should not be brought before the Court which would waste public time and money. The Apex Court suggested that dispute should be examined at highest governmental level and be decided there. The Cabinet Secretary looking after the matter was directed to handle the case personally and report to the Court while such litigation was pending. Constitution and Code of Civil Procedure never contemplated that two departments of a State or the Union of India would litigate in the Court of law. It was neither appropriate nor permissible for two departments of the Government to litigate in a Court of law. They must resolve their disputes to set at rest all inter-departmental controversies at the level of the Government and such matters should not be carried to a Court of law for resolution of the controversy. Pursuit to these directions the Government issued directions for-

(b) Settlement of commercial disputes between Public Sector Enterprises inter se and Public Sector Enterprise(s) and Government Department(s) through Permanent Machinery of Arbitrators (PMA) in the Department of Public Enterprises. Creation of Permanent Machinery of Arbitrators (PMA). The Government itself on suggestion of Courts with a view to expedite the settlement of disputes relating to commercial contract(s) between Central Public Sector Enterprises per se, and also between CPSEs and Government Departments, the Government of India created a Permanent Machinery of Arbitrators by issuing guidelines by **DPE O.M. No. DPE/4(10)/2001-PMA-GL-I dated 22 January 2004**. The alternative disputes as ascribed above requires to be vigorously revisited as post 2020 in 2021 all courts practically could deal with only very urgent or cases needing urgent measures would be taken up. A reference to the observation of the Chief Justice of India in a function organized on 12 September 2020 expressed fear of explosion of cases leading to huge backlog⁵⁶.

(G) Conclusion: -

The fact that the same degree of protection of the weaker party can be ensured on the basis of constitutional rights, as enunciated in *Keshwanand Bharti* (supra) reiterated in

⁵⁴ *O.N.G.C. vs. Collector of Central Excise* (1992) Supp (2) SCC 432

⁵⁵ *Govt. of A.P. Vs. Collector* (2003) 3 SCC 472

⁵⁶ *Sunday Times of India*. 2020, 13 September

later decisions have been applied by the constitutional Courts in the realm of public contracts so that the conflicting issues of the parties to a contract are redressed and the Courts have been laying down principles for judicial intervention in the realm of contract. All cases show that something more than applicability of private law has been applied in the realm of administrative law. The judicial control has to be as per the law propounded so that interests of both are save guarded. The constitutional mandate has to be balanced. The Courts have tried to balance what is known as constitutional ethos keeping and trying to balance conflicting rights of parties.