THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WP(C) No. 6627/2018

1. Assam Air Products Private Limited,
Represented by its Senior Manager,
Sri Tarun Chandra Bora, and having its office
At A.T. Road, Betbari, Sivasagar-785640, Assam.

2. Sri Tarun Chandra Bora, aged about 48 years,
S/O Late B. Bora, Resident of Konhar Gaon, P.O. Na-Ali,
Dhekiajuli, District-Jorhat, Assam, Pin-785009.

.....Petitioners

-Versus-

1. Oil India Limited,
Represented by its resident Chief Executive,
Duliajan-786602, Assam.

2. Chief General Manager, Contracts,
Oil India Limited, Duliajan-786602, Assam.

3. Premier Cryogenics Limited,
Represented by its Director, Smti. Anamika Chowdhury,
H.N.-15, Ambikagiri Nagar, Guwahati-781024, Assam.

.....Respondents

Advocates :

For the petitioners : Mr. K.N. Choudhury, Senior Advocate
Mr. N. Gautam, Advocate

For the respondent nos. 1 & 2 : Mr. S.N. Sarma, Senior Advocate
Mr. K. Kalita, Advocate

For the respondent no. 3 : Mr. K.P. Pathak, Advocate
Dates of Hearing : 04.08.2022
Date of Judgment : 27.01.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER

In this writ petition instituted under Article 226 of the Constitution of India, the petitioners including the petitioner no. 1, M/s Assam Air Products Private Limited, have laid challenge to an Order dated 31.08.2018 passed by the respondent no. 1, M/s Oil India Limited ['the OIL' and/or 'the respondent company', for short] through its Resident Chief Executive [In-Charge], whereby, the said authority as the Competent Authority in exercise of inherent power and as laid down in the respondent company's Banning Policy had banned the petitioner no. 1, M/s Assam Air Products Private Limited for a period of 3 [three] years from entering into any contract with the respondent OIL and from carrying out any business with it. The impugned Order dated 31.08.2018 had further observed that the order of banning shall be effective from the date of placing M/s Assam Air Products Private Limited under suspension, that is, w.e.f. 21.07.2018.

2. Before going into the respective contentions raised by the rival parties and the issues involved in the writ petition, it would be apposite to delineate some of the previous events which have relevance with them.

2.1. The respondent OIL, a Government of India Enterprise, in connection with its operations invited International Competitive Bids [ICB] vide Tender no. OIL/CCO/PDNG/GLOBAL/253/2009 from competent and experienced contractors for a contract-work with description :- 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis for a period of 4 [four] years extendable by another 1 [one] year' ['1st Contract-Work', for short]. The petitioner no. 1, M/s Assam Air Products Private Limited [hereinafter referred to as 'the petitioner no. 1 company' or 'the petitioner company', for the sake of easy reference] participated in the bidding process initiated by Tender no.

OIL/CCO/PDNG/GLOBAL/253/2009 by submitting its bid on 12.03.2010 along with other bidders.

2.2. By a Letter of Award [LoA] bearing reference no. CCO/CF/167/2010 dated 24.08.2010, the respondent OIL awarded the 1st Contract-Work for 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis for a period of 4 [four] years extendable by another 1 [one] year' to the petitioner company at a total estimated Contract Cost of Rs. 17,33,46,800/- inclusive of all taxes and duties except service tax which shall be to the OIL's account. The Letter of Award [LoA] dated 24.08.2010 mentioned about hiring of Gas Compression Services of 6 [six] units and also, the cost details of the 1st Contract-Work. The Letter of Award [LoA] further mentioned that the petitioner company had to complete mobilization of the 6 [six] Gas Compressor Stations [GCSs] within 210 days from the date of issuance of the Letter of Award [LoA]. Subsequently, a Contract Agreement was executed between the petitioner company and the respondent OIL on 03.11.2010 in respect of the 1st Contract-Work.

2.3. By another Letter bearing no. CCO/CF/005/2012 dated 09.04.2012, the respondent OIL requested the petitioner company to supply an additional Gas Compressor Station [GCS] against Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 on Build, Own and Operate [BOO] basis for the remaining period of the 1st Contract-Work. It was intimated that the petitioner company should try to complete mobilization as early as possible within a maximum mobilization period of 210 days from the date of issuance of the Letter dated 09.04.2012 and the contract period for the additional Gas Compressor Station [GCS] would be from the date of completion of mobilization of the Gas Compressor Station [GCS] to the remaining period of 4 [four] years of the original Contract Agreement.

2.4. By another Letter bearing no. CCO/CF/005/2012-13 dated 09.01.2013, the respondent OIL requested the petitioner company to supply two additional Gas Compressor Stations [GCSs] against Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 for hiring of Gas Compression Services on Build, Own and Operate [BOO] basis for the remaining period of the 1st Contract-Work. It was intimated that the petitioner company should try to complete mobilization as early as possible with a maximum mobilization period of 210 days from the date of issuance of the Letter dated 09.01.2013 and the contract period for the two

additional Gas Compressor Stations [GCSs] would be from the date of completion of mobilization of the Gas Compressor Stations [GCSs] to the remaining period of 4 [four] years of the original Contract Agreement.

3. The petitioner company had referred to certain other measures taken by it on being awarded the 1st Contract-Work by the above-referred Letter of Award [LoA] dated 24.08.2010 and Letters, dated 09.04.2012 and dated 09.01.2013, in the following manner :-

3.1. As the 1st Contract-Work awarded to the petitioner by the Letter of Award [LoA] dated 24.08.2010 envisaged hiring of Gas Compression Services by the respondent OIL from 6 [six] Gas Compressor Stations [GCSs] the mobilization of which were required to be completed within a period of 210 days, the petitioner company decided to entrust a part of the mobilization works of the Gas Compressor Stations [GCSs] at the 6 [six] different locations to the respondent no. 3 company. By a Work Order bearing no. AAP/WO/0825 dated 25.08.2010, the petitioner company in pursuance of the Letter of Award [LoA] no. CCO/CF/167/2010 dated 24.08.2010 entrusted that part relating to mobilization of the Gas Compressor Stations [GCSs] at the 6 [six] different locations broadly in terms of the Scope of Work outlined in Tender no. OIL/CCO/PDNG/GLOBAL/253/2009.

3.2. The Letter no. CCO/CF/005/2012 dated 09.04.2012 was followed by an Amended Work Order bearing no. AAP/WO/0825[A] dated 11.04.2012 in favour of the respondent no. 3 company in order to complete a part of the mobilization work relating to the additional Gas Compressor Station [GCS], apart from the mobilization parts relating to the Gas Compressor Stations [GCSs] at 6 [six] different locations as per the original Work Order no. AAP/WO/0825 dated 25.08.2010. The Amended Work Order no. AAP/WO/0825[A] dated 11.04.2012 was issued after the respondent OIL asked the petitioner company to mobilise one additional Gas Compressor Station [GCS] against Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 for 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis' vide Letter bearing no. CCO/CF/005/2012 dated 09.04.2012. Subsequently, another Amended Work Order no. AAP/WO/825[B] dated 12.01.2013 was issued to the respondent no. 3 company after the respondent OIL asked the petitioner company to mobilize two additional Gas Compressor Stations [GCSs] against Contract no.

OIL/CCO/PDNG/GLOBAL/253/2009 for 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis' vide Letter bearing no. CCO/CF/005/12-13 dated 09.01.2013, apart from mobilization of the Gas Compressor Stations [GCSs] at 7 [seven] different locations as per the original Work Order no. AAP/WO/0825 dated 25.08.2010 and the Amended Work Order no. AAP/WO/0825[A] dated 11.04.2012.

4. It was the case of the petitioner company that the mobilization works of the Gas Compressor Stations [GCSs] were duly completed through the assistance of the respondent no. 3 within the stipulated time period and thereafter, the Gas Compression Services from the Gas Compressor Stations [GCSs] were duly hired out by the petitioner company to the respondent OIL.

5. The petitioner company stated to have completed the 1st Contract-Work awarded to it by the respondent OIL successfully and after running the same for the original Contract period of 4 [four] years, the same was extended for another year. By a Job Completion Certificate issued under reference no. PDNG : 15/7-550 dated 30.05.2015 in relation to Contract no. OIL/CCO/PDNG/GLOBAL/253/2009, the respondent OIL certified that the petitioner company was awarded the 1st Contract-Work for a period of 4 [four] years extendable by another 1 [one] year and the petitioner company had completed the original Contract period of 4 [four] years on 15.05.2015 and the Contract was running under extension for 1 [one] year upto 14.05.2016. It was further certified that the petitioner company successfully operated the 6 [six] Natural Gas Compressor Stations [GCSs] since 15.05.2011, which was the date of commencement of the Contract, with initial total installed compression capacity of 180,000 SCMD. The capacity was augmented to 300,000 SCMD since 12.07.2013.

6. In the year 2015, the respondent OIL floated another Tender vide IFB no. CDG5213P15 for a contract-work with description :- 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis for two nos. of installations [Category-I & Category-II] for a period of 4 [four] years extendable by 1 [one] year ['2nd Contract-Work', for short]. On participation, the petitioner company was selected as the most responsive bidder. By a Letter of Award [LoA] bearing reference no. CCO/LOA/007/2015 dated 11.07.2015, the petitioner company was awarded the 2nd Contract-Work at a total estimated Contract Cost

of Rs. 15,55,44,600/-. The mobilization including commissioning against the 2nd Contract-Work was to be completed within 300 days from date of issuance of Letter of Award [LoA] dated 11.07.2015. As per the Letter of Award [LoA] Dated 11.07.2015, the duration of the Contract was 4 [four] years from the date of commencement of Contract, with a provision for extension of the Contract for another 1 [one] year at the same rate, terms and conditions depending upon the OIL's requirement and performance of the Contract.

7. On being awarded the 2nd Contract-Work by the Letter of Award [LoA] dated 11.07.2015, the petitioner company entrusted a part of the mobilization works relating to the required Gas Compressor Stations [GCSs] to the respondent no. 3 by an Amended Work Order bearing no. AAP/WO/0285[C] dated 13.07.2015.

8. In the year 2016, the respondent OIL awarded another Contract-Work :- 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis for six nos. of installations for a period of 4 [four] years extendable by 1 [one] year ['3rd Contract-Work', for short] vide a Letter of Award [LoA] bearing reference no. CCO/LOA/022/2016 dated 11.03.2016 against the respondent OIL's IFB no. CDG7663P16. The total estimated Contract Cost of the 3rd Contract-Work awarded vide Letter of Award [LoA] dated 11.03.2016 was stated as US $6,503,652. The mobilization including commissioning was to be completed within 300 days from the date of issuance of Letter of Award [LoA] dated 11.03.2016. As per the Letter of Award [LoA] dated 11.03.2016, the duration of the Contract was 4 [four] years from the date of commencement of the Contract, with a provision for extension of the Contract for another 1 [one] year at the same rate, terms and conditions depending upon the respondent OIL's requirement and performance of the Contract.

9. The petitioner company had averred that in the year 2017, the respondent no. 3 company approached the petitioner company with a request to provide it a completion report for completing the parts relating to mobilization of the Gas Compressor Stations [GCSs] the respondent no. 3 company had undertaken on behalf of the petitioner company. The petitioner company had contended that since the respondent OIL had already issued a Job Completion Certificate and was satisfactorily availing Gas Compression Services from the Gas Compressor Stations [GCSs] mobilized with the assistance of the respondent no. 3

company, the petitioner company issued a Satisfactory Completion Report dated 04.04.2017 certifying that the respondent no. 3 company had created the facilities on behalf of the petitioner company following Work Order no. AAP/WO/0825 dated 25.08.2010 in respect of 11 [eleven] nos. of Gas Compressor Stations [GCSs] mentioned therein.

10. The respondent OIL floated another Tender bearing IFB no. CPG1917P17 for a contract-work with description :- 'Construction, Testing and Commissioning of Gas Compressor Stations [GCSs] at Makum, Assam'. The petitioner company did not participate in the said tender process. The respondent no. 3 company submitted its bid in response to IFB no. CPG1917P17. Along with its bid, the respondent no. 3 company submitted the Satisfactory Completion Certificate dated 04.04.2017 [supra] issued by the petitioner company in its favour to support its claim of meeting the eligibility criteria laid down in IFB no. CPG1917P17. The respondent OIL had, however, declared the technical bid of the respondent no. 3 company as non-responsive. Aggrieved by such rejection of its technical bid, the respondent no. 3 company approached the Court by instituting a writ petition, W.P.[C] no. 4462/2017 challenging such rejection. On 28.07.2017, the Court while issuing notice to the respondents therein, had also directed that the contract-work should not be allotted pursuant to the tender process, pending the final outcome of the writ petition. Subsequently, the respondent OIL was allowed by the Court to proceed with the award of the contract-work since the project involved public interest. The respondent no. 3 carried the matter to the Division Bench of the Court by preferring an intra-court appeal, Writ Appeal no. 307/2017. The Division Bench disposed of the intra-court appeal, Writ Appeal no. 307/2017 with a direction for expeditious disposal of the writ petition. In the writ petition, W.P.[C] no. 4462/2017, the Court while issuing rule on 24.04.2018, directed the writ petition to be listed on 24.05.2018 with an observation that an endeavour would be made to dispose of the writ petition. However on 24.05.2018, the writ petition was not taken up for final consideration and it remained pending till 29.07.2019.

11. It was during the pendency of the writ petition, W.P.[C] no. 4462/2017, the contestation between the petitioner company and the respondent OIL began on and from 15.08.2017 when the respondent OIL by serving a letter of even date upon the petitioner company brought an allegation of sub-contracting against it while executing Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 [1ST Contract-Work] for which the Letter of Award [LoA]

dated 24.08.2010 was issued to it. It was informed that as per Clause 15.0 of the General Conditions of the Contract, the petitioner company could not have sub-contracted or assigned, in whole or in part, its obligations to perform under the Contract, except with the OIL's prior written consent. The allegation was that the petitioner company had neither intimated the respondent OIL nor asked for permission from the respondent OIL to sub-contract the petitioner company's obligations to perform the Contract-Work. It was alleged that the respondent no. 3 while submitting its tender in response to IFB no. CPG1917P17, had submitted few documents in support of its claim of meeting the eligibility criteria set forth therein wherefrom it reflected that the 1st Contract-Work awarded to the petitioner company by the Contract Agreement dated 03.11.2010 was done by the respondent no. 3. Making reference to the litigation ensued by the writ petition, W.P.[C] no. 4462/2017 at the instance of the respondent no. 3, the petitioner company was asked to inform as to whether any certificate was issued from the petitioner company's end to the respondent no. 3. It was further conveyed by the letter that if there was sub-contracting, the same would not only amount to violation of the Contract Agreement but would also amount to commission of fraud upon the respondent OIL. It was thereby warned that the respondent OIL would be at liberty to take actions – civil as well as criminal – against the petitioner company and also to take steps of blacklisting the petitioner company forever. The petitioner company, by the letter dated 15.08.2017, was asked to submit its reply within 7 [seven] days of receipt of the letter. The letter dated 15.08.2017 was followed by another letter dated 21.08.2017 with similar contents.

12. In response to the two letters, dated 15.08.2017 & dated 21.08.2017, the petitioner company responded by its Reply dated 09.09.2017 refuting the allegations made in those letters. It was inter alia mentioned that the contractual arrangement between the petitioner company and the respondent no. 3 did not amount to sub-contracting since the nature of the contract between the petitioner company and the respondent OIL was a service contract for the hiring of Gas Compression Services and was not a works contract for construction of the Gas Compressor Stations [GCSs].

13. After receipt of the Reply dated 09.09.2017, a Show Cause Notice dated 21.07.2018 came to be served upon the petitioner company by the respondent OIL asking the petitioner company to show cause in writing within 15 [fifteen] days from the date of

receipt of the Show Cause Notice as to why there should not be a banning of business of the respondent OIL with the petitioner company from carrying out any business for the reasons mentioned therein. By the Show Cause Notice dated 21.07.2018, the petitioner company was placed under suspension with immediate effect, thereby, restraining the petitioner company from participating in any tender and/or entering into any new business with the respondent OIL during continuation of the banning process.

14. Being aggrieved by the issuance of the Show Cause Notice to it, the petitioner company, in the interregnum, had approached the Court by a writ petition, W.P.[C] no. 5005/2018 contending *inter alia* that the respondent OIL had sought to pressurize the petitioner company to withdraw the Satisfactory Completion Report issued by it in favour of the respondent no. 3 when the matter was sub-judice in a pending writ petition and the provisions of the Banning Policy, 2017 would not be applicable to the petitioner company. The writ petition, W.P.[C] no. 5005/2018 was taken up for consideration on 30.07.2018 and after hearing the learned counsel for the parties, the Court while disposing of the writ petition, directed the petitioner company to submit its Reply to the Show Cause Notice within 10 [ten] days from 30.07.2018 and directed the respondent OIL authorities to take a decision within a period of 30 [thirty] days from the date of submission of the Reply to the Show Cause Notice and by giving an opportunity of hearing to the petitioner company, if necessary. The Court observed that placing the noticee – the petitioner company under suspension restraining it from participating in open tender process and also for the tender processes for which it had purchased the tender documents during the interregnum did not appear to be justified and it was ordered that the pendency of the proceeding shall not be a ground to debar the petitioner company from the ongoing tender processes for which it had submitted tenders.

15. In deference to the direction made in the order dated 30.07.2018 passed in the writ petition, W.P.[C] no. 5005/2018, the petitioner company submitted a Reply dated 09.08.2018 to the Show Cause Notice dated 21.07.2018 traversing the grounds brought against it, thereby, contending that the allegations levelled were unfounded, illegal and formulated upon an improper appreciation of the legal as well as factual position. It was contended that actions in terms of the Banning Policy, 2017 of the respondent OIL, which came into effect from 06.01.2017, could not have been resorted to in respect of the

disputes sought to be raised by the respondent OIL. An opportunity of personal hearing before any decision on the basis of the Show Cause Notice was also requested. After submission of the Reply, the respondent OIL issued a letter dated 24.08.2018 directing the petitioner company to appear for a personal hearing in connection with the proceedings initiated vide the Show Cause Notice dated 21.07.2018. It was made specific in the letter dated 24.08.2018 that the petitioner company could be represented through an authorized representative in the personal hearing scheduled on 31.08.2018 and no lawyer would be allowed to accompany or assist the authorized representative of the petitioner company during the personal hearing. In the personal hearing, the Managing Director of the petitioner company appeared and explained the position of the petitioner company.

16. Thereafter, the impugned order bearing reference no. RCE : 17-144 dated 31.08.2018 came to be passed by the Competent Authority in the respondent OIL with the following findings :-

> 6.0. Findings
>
> On analysis of all facts and evidences as well as submissions made by M/s AAP, it is established that –
>
> [i] The provisions of Company's Banning Policy, 2017 are applicable to M/s Assam Air Products Pvt. Ltd in the instant case. Besides, irrespective of having provisions in the Policy or not, OIL, being the Tendering Authority, has the inherent power to ban a party, who is involved in forgery against the Tendering Authority, as per the settled principle of law.
>
> [ii] The Contract No. OIL/CCO/PDNG/GLOBAL/253/2009 and Contract no. 6206734/CDG5213/PDNO/2015 are contracts comprising of both Engineering, Supply, Installation & Commissioning of Gas Compressor Stations and also supply of compressed gas, which cannot be distinguished.
>
> [iii] The provisions of "Sub-contracting" as stipulated in Clause-15.0 are applicable to entire contract and accordingly, sub-contracting is prohibited both for construction of the facilities as well as supply of compressed gas.
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> [iv] The claim of M/s AAP that award of contract to M/s PCL by M/s AAP vide Work Order No. AAP/WO/0825 dated 25.08.2010 for carrying out job of Engineering, Supply, Installation & Commissioning of Gas Compressor Stations under the Contract No. OIL/CCO/PDNG/GLOBAL/253/2009 and

Contract no. 6206734/CDG5213/PDNO/2015 is not sub-contracting in terms of Clause-15.0 of the aforesaid, is not legally and contractually tenable.

[v] The claim of M/s AAP that Design, Construction, Erection, Installation and Commissioning of 11 nos. of Gas Compressor Stations, as shown in the "Satisfactory Completion Report" were done by M/s PCL is false, baseless and unsubstantiated and without the shred of any evidence. Thus, issue relating to sub-contracting has no relevancy in the light of the fact that no installation was actually constructed by M/s PCL as shown in the "Satisfactory Completion Report".

[vi] It is established that "Work Order" No. AAP/WO/0825 dated 25.08.2010 and "Satisfactory Completion Report" dated 04.04.2017 issued by M/s AAP to its Related Company M/s PCL are false and fabricated, which were generated subsequently with the malafide intention to make M/s PCL eligible for the Tender No. CPG1917P17.

[vii] The act of M/s AAP is within the meaning of fraudulent practice with the Company in terms of Clause-2.0[ii] of the Company's Banning Policy, 2017.

17. In the impugned order, the Competent Authority had, thus, reached a finding that the respondent OIL's Banning Policy, 2017 were applicable to Contact no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work] and Contact no. 6206734/CDG5213/PDNO/2015 [2nd Contract-Work] awarded to the petitioner company. That apart, it was *inter-alia* observed that notwithstanding the provisions of the Banning Policy, 2017, the respondent OIL as the Tendering Authority had the inherent power to ban a party, who was involved in forgery against the Tendering Authority, as per settled principles of law. With such findings, the Competent Authority in exercise of purported inherent power and as per the respondent OIL's Banning Policy, 2017 had banned the petitioner company for a period of 3 [three] years from entering into any contracts with and from carrying out any business with the respondent OIL. The impugned order had further observed that the banning shall be effective from the date of placing the petitioner company under suspension i.e. from 21.07.2018. It was the order dated 31.08.2018 which is the subject-matter of challenge in this writ petition. According to the petitioners, the order dated 31.08.2018 was received by them through e-mail on 10.09.2018.

18. Heard Mr. K.N. Choudhury, learned senior counsel assisted by Mr. N. Gautam, learned counsel for the petitioners; Mr. S.N. Sarma, learned senior counsel assisted by Mr. K. Kalita, learned Standing Counsel, Oil India Limited for the respondent nos. 1 & 2; and Mr. K.P. Pathak, learned counsel for the respondent no. 3.

19. Mr. Choudhury, learned senior counsel for the petitioners had submitted that the actions of the respondent OIL stemmed from an improper understanding of the legal as well as factual position of the relationship *inter se* the parties. By referring to Clause 15.0 appearing in both the Contract Agreements, he had submitted that the respondent OIL had failed to appreciate that the two Contract Agreements for the 1st Contract-Work and the 2nd Contract-Work were for Hiring of Gas Compression Services from Gas Compressor Stations [GCSs], which would be built, owned and operated by the petitioner company. Even the plots of land on which the Gas Compressor Stations [GCSs] were built, were bought and owned by the petitioner company. There was no nexus between the Gas Compression Services which were procured by the respondent OIL from the petitioner company and the mobilization of the Gas Compressor Stations [GCSs] comprising of construction, erection, installation, commissioning, etc. by the petitioner company with the assistance of the respondent no. 3.

19.1. It was his contention that the various clauses of the two Contract Agreements executed between the petitioner company and the respondent OIL made it evident that the Contract Agreements were service contracts on **charter hire** basis and not works contracts. There was no privity of contract between the respondent OIL and the respondent no. 3 and thus, under no circumstance, it could be said that the respondent no. 3 was the sub-contractor of the respondent OIL. The object of the Contract Agreements were to provide Gas Compression Services and not to construct Gas Compressor Stations [GCSs]. Therefore, the Contract Agreements between the petitioner company and the respondent OIL were strictly contracts for services on **charter hire** basis whereunder the petitioner company had to offer only Gas Compression Services to the respondent OIL and if for the purpose of providing such services, the petitioner company entered into an arrangement with the respondent no. 3 in respect of a part of the mobilization works relating to the Gas Compressor Stations [GCSs] comprising of construction, erection, installation, commissioning, etc. by the petitioner company and the same were carried out prior to

commencement of the Contract period with the assistance of the respondent no. 3, the same would not amount to sub-contracting.

19.2. Assailing the Show Cause Notice, he had submitted that the respondent OIL had specifically alleged therein that the petitioner company had sub-contracted its obligations under Contract no. OIL/CCO/PDNG/GLOBAL/253/2009. But in the impugned order dated 31.08.2018, the respondent OIL had also blacklisted the petitioner company for sub-contracting its obligations under the 2nd Contract-Work i.e. Contract no. CDG5213/PDNO/2015. The petitioner company was never given a proper opportunity to respond to such allegations regarding the 2nd Contract-Work. Thus, the order blacklisting the petitioner company for sub-contracting its obligations under Contract no. CDG5213/PDNO/2015 was untenable in law. He had submitted that the Show Cause Notice failed to meet the twin requirements to be fulfilled by a show cause notice preceding an order of blacklisting and in that connection, Mr. Choudhury had referred to the decision of the Hon'ble Supreme Court of India in **Gorkha Security Services vs. Government [NCT of Delhi] and others**, reported in **[2014] 9 SCC 105**. He had submitted that in the case in hand, the respondent OIL never asked the petitioner company to show cause regarding any allegations of sub-contracting in relation to the 2nd Contract-Work i.e. Contract no. CDG5213/PDNO/2015 but it still proceeded to blacklist the petitioner company on such allegations.

19.3. Mr. Choudhury elaborating his submissions, had further contended that in the Show Cause Notice, the respondent OIL had relied on the Banning Policy, 2017 to ban the petitioner company whereas the Banning Policy, 2017 was clearly inapplicable in relation to concluded contracts. The Banning Policy, 2017 only allowed for banning of a defaulting agency during [i] the evaluation of the contract, [ii] the execution of a contract, & [iii] for irregularities noticed after the execution of contract but during the defect liability period. Since it was an admitted position that the respondent OIL had already issued a Job Completion Certificate to the petitioner company for Contract no. OIL/CCO/PDNG/GLOBAL/253/2009, it was not open even under the said Policy for the respondent OIL to ban the petitioner company for any dispute arising out of a contract which had already been completed. The respondent OIL had no inherent power to ban the petitioner company when it was not specifically provided under the Contract Agreements

under reference in that an administrative authority cannot exercise any inherent power unless the same was specifically conferred upon it. By seeking to enforce the provisions of the Banning Policy, 2017 unilaterally the respondent OIL had imposed a penalty which was not envisaged in the Contract Agreements in question.

19.4. It had been further contended by Mr. Choudhury, without prejudice to the above submissions, that under the Banning Policy, 2017 the only punishment that was provided for was banning for a period of 3 [three] years from the date of issuance of banning order. A penalty of blacklisting was required to be examined not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality and the doctrine of reasonableness. In respect of the two Contract Agreements under reference, the respondent OIL had availed the services fully and during the operation of the Contracts by the petitioner company the respondent OIL had never raised any complaint as regards any kind of deficiency on the part of the petitioner company in performing its obligations. He had contended that the impugned decision to ban the petitioner company for a period of 3 [three] years was the harshest possible penalty and when such administrative decision was tested on the anvil of the doctrine of proportionality, the impugned action was clearly violative of the petitioner company's right to carry on occupation, trade or business, guaranteed under Article 19[1][g] of the Constitution of India. Contending that the actions on the part of the respondent authorities as arbitrary and unsustainable in law, it had been submitted that the same were liable to be set aside in exercise of the equitable, extra-ordinary and discretionary jurisdiction under Article 226 of the Constitution of India.

20. In response, Mr. Sarma, learned senior counsel appearing for the respondent OIL authorities had submitted that the respondent OIL had initiated a tender process vide IFB no. CPG 1917P17 for 'Engineering, Procurement, Installation, Testing & Commissioning of a Gas Compressor Station [GCS] at Makum' at a cost of about Rs. 120 Crores. In response to the said tender process, the respondent no. 3 submitted its bid on the strength of the Satisfactory Completion Report dated 04.04.2017 issued by the petitioner company in support of the technical criteria as stipulated in Clause 1.0 of the Bid Evaluation Criteria [BEC]. The Report dated 04.04.2017 was issued in reference to Job Completion Certificate issued by the respondent OIL on 30.05.2015 against Contract no. OIL/CCO/PDNG/GLOBAL/ 253/2009 and Contract no. CDG5213/PDNO/2015, which were entered into by the

respondent OIL with the petitioner company for 'Hiring of Gas Compressor Services on Build, Own and Operate [BOO] basis' by it for a period of 4 [four] years, extendable by another year. When the Report dated 04.04.2017 was issued, though the tenure of Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work] was admittedly over the tenure of Contract no. CDG5213/PDNO/2015 [2nd Contract-Work] was not over.

20.1. The Report dated 04.04.2017 showed that the petitioner company had issued a Work Order being AAP/WO/0825 dated 25.08.2010 in favour of the respondent no. 3 authorizing the respondent no. 3 to carry out the job of construction, erection, installation, commissioning, etc. of Gas Compressor Stations [GCSs] at 6 [six] different locations of the respondent OIL on Lump Sum Turn Key [LSTK] basis, on the basis of the Letter of Award [LoA] no. CCO/CF/167/2010 dated 24.08.2010, which was awarded to the petitioner company in connection with Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work]. Advancing the contentions further on behalf of the respondent OIL, Mr. Sarma had submitted that a perusal of the Work Order dated 25.08.2010 would make it evident that the respondent no. 3 was authorized to carry out the entire works which were included in Contract no. OIL/CCO/ PDNG/GLOBAL/253/2009 [1st Contract-Work] as the Scope of Works of the Work Order dated 25.08.2010 included the entire Scope of Works of the bid document in Tender no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work]. Thus, as per the Report dated 04.04.2017, the facilities were created by the respondent no. 3 on behalf of the petitioner company against Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work] and Contract no. CDG5213 /PDNO/2015 [2nd Contract-Work], awarded by the respondent OIL exclusively to the petitioner company for installation of Gas Compressor Stations [GCSs] on Build, Own and Operate [BOO] basis.

20.2. It had been further contended that after issuance of the Letter of Award [LoA] dated 24.08.2010 and execution of the Contract Agreement dated 03.11.2010 in relation to Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work], subsequent contracts were issued to the petitioner company vide Letter of Intent, dated 09.04.2012 and dated 09.01.2013, for setting up 3 [three] additional installations on the same terms and conditions. The Scope of Works of the Contract, as per Clause 5.2 therein, encompassed total engineering, supply, transportation, installation, construction, commissioning, operation and maintenance of compressor plant and Clause 5.3 provided for the details of

Scope of Works for the Contractor, which the Contractor was required to perform. Clause 15.0 had, in specific terms, prohibited sub-contracting by mentioning that the Contractor shall not sub-contract or assign, in whole or in part, its obligations to perform under the Contract, save with the respondent OIL's prior written consent. As the petitioner company by the Work Order dated 25.08.2010 entrusted the jobs relating to construction, erection, installation, commissioning, etc. of Gas Compressor Stations [GCSs] at different locations, the same clearly amounted to sub-contract. There was, however, no record furnished by the petitioner company to the respondent OIL regarding engagement of the respondent no. 3 as sub-contractor.

20.3. The learned senior counsel for the respondent OIL authorities had specifically referred to Clause 15.0 : Sub-contracting in Contract no. OIL/CCO/PDNG/GLOBAL /253/2009 and Clause 15.0 : Sub-contracting / Assignment in Contract no. 6206734 /CDG5213/PDNO/2015 to urge the point that sub-contracting was prohibited and the petitioner company neither obtained any prior written consent of the respondent OIL nor the respondent OIL was intimated with regard to sub-contracting of the Contract-Works to the respondent no. 3. It was considered as breach of the terms of the Contract Agreements and accordingly, the letters, dated 15.08.2017 and dated 21.08.2017, were issued to the petitioner company asking it to clarify. In response, the petitioner company had admitted that the services of the respondent no. 3 were obtained for completion of a part of mobilization requirements, that is, construction of Gas Compressor Stations [GCSs].

20.4. It was found that the engineering, supply, transportation, installation, construction and commissioning of Gas Compressor Stations [GCSs] under the Contracts were executed by the petitioner company after importing required equipments based on essentiality certificates issued by the Directorate General of Hydrocarbons [DGH] wherein there was no role ascribed whatsoever for the respondent no. 3. There was not a single proof to substantiate the claim and thus, it was crystal clear that the Report dated 04.04.2007 and the Work Order dated 25.08.2010 issued by the petitioner company in favour of the respondent no. 3 were false, fabricated and manufactured subsequently in connivance with each other so as to make the respondent no. 3 eligible to submit its bid in the tender process in relation to IFB no. CPG1917P17. Though the petitioner company had claimed that it carried out the construction work of Gas Compressor Stations [GCSs] with the

assistance the respondent no. 3 at a cost the petitioner company failed to furnish any document related to such financial transactions including various statutory tax compliance in spite of the fact that the Work Order dated 25.08.2010 issued by the petitioner company was in the nature of a works contract. Such unauthorized and fraudulent acts on the part of the petitioner company warranted appropriate action of banning as per the respondent OIL's Banning Policy, 2017. Therefore, the petitioner company was accordingly proceeded with under the Banning Policy, 2017 by service of the Show Cause Notice dated 21.07.2018. The petitioner company was afforded due opportunity including personal hearing. It was after analyzing all the facts and evidences as well as submissions made by the petitioner company, the impugned order dated 31.08.2018 was passed holding that the petitioner company was guilty of committing forgery with respect to Contract no. OIL/CCO/ PDNG/GLOBAL/253/2009 and Contract no. 6206734/CDG5213/PDNO/2015 by issuing the fabricated Satisfactory Completion Report dated 04.04.2017 and Work Order dated 25.08.2010, which clearly attracted actions under the Banning Policy, 2017, as the petitioner company and the respondent no. 3, which are related companies, in collusion with each other practiced fraud.

20.5. It had been urged that the power to blacklist a Contractor whether the contract was for supply of materials or equipments or for execution of any other work whatsoever, was inherent in the party allotting the contract. There was no need for conferment of such power by any statute. Therefore, the respondent OIL had the power and authority to ban the petitioner company as the petitioner company was involved in unfair practice of issuing a false and fabricated certificate in favour of the respondent no. 3. It was contended that the Banning Policy, 2017 came into existence though after the expiry of the term of Contract no. OIL/CCO/PDNG/GLOBAL/253/2009, but during the subsistence of Contract no. 6206734/CDG5213/PDNO/2015 and the action clearly attracted action under Clause 4.2[ii][a] of the Banning Policy, 2017. To buttress his submissions, he had referred to the decisions in **Patel Engineering Limited vs. Union of India and another**, reported in **[2012] 11 SCC 257**; **Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others**, reported in **[2014] 14 SCC 731**; and **State of Odisha and others vs. Panda Infra Project Limited**, reported in **[2022] 4 SCC 393**,

21. Mr. Pathak, learned counsel appearing for the respondent no. 3 had supported the contents of the Satisfactory Completion Report dated 04.04.2017. By referring to the said Report, he had submitted that the part of the mobilization works of 9 [nine] nos. of Gas Compressor Stations [GCSs], entrusted to the respondent no. 3, in relation to the 1st Contract-Work was completed during the period from 09.05.2011 to 12.07.2013. Similarly, the part of the mobilization works of 2 [two] nos. of Gas Compressor Stations [GCSs] entrusted to the respondent no. 3, in relation to the 2nd Contract-Work was completed on 21.06.2016. It had been asserted by him that after the completion of the part of the mobilization works in respect of the concerned respective Gas Compressor Stations [GCSs] entrusted to it, as shown in the said Report, the same were taken over by the petitioner company immediately thereafter in order to operate the same on its own and the respondent no. 3 was not concerned with those Gas Compressor Stations [GCSs] after such taking over. The bid security submitted by the respondent no. 3 company at the time of submission of the bid in response to Tender bearing no. CPG1917P17 was returned to it by the respondent OIL on 03.11.2017. In so far as the writ petition, W.P.[C] no. 4462/2017 filed at the instance of the respondent no. 3 was concerned, Mr. Pathak had submitted that the said writ petition was withdrawn on 29.07.2019.

22. I have given due consideration to the submissions advanced by the learned counsel for the parties and have also gone through the materials brought on record by the parties through their affidavits. I have also gone through the decisions cited by the parties in support of their respective submissions.

23. From the contentions advanced by the contesting parties, it is not in any doubt that the issues involved in this writ petition, in essence, are relatable to the two Contract Agreements, that is, [i] Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 for 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis', for the 1st Contract-Work, for a period of 4 [four] years extendable by another 1 [one] year, dated 03.11.2010; and [ii] Contract no. 6206734/CDG5213/PDNO/2015 for 'Hiring of Gas Compression on Build, Own and Operate [BOO] basis', for the 2nd Contract-Work, for a period of 4 [four] years extendable by 1 [one] year, dated 18.01.2016. The two Contract Agreements are part of the case record, having been appended to the pleadings filed by the parties.

24. The 1st Contract-Work was awarded to the petitioner company by the Letter of Award [LoA] dated 24.08.2010. The Contract Agreement for the 1st Contract-Work was executed on 03.11.2010 and it is not in dispute that the period of 4 [four] years expired on 14.05.2015. On completion of the initial Contract period of 4 [four] years, the Contract period was extended by 1 [one] year w.e.f. 15.05.2015 vide the respondent OIL's Letter no. CCO/CF/003/2015 dated 07.04.2015. The extended one-year period of the 1st Contract-Work was over by 14.05.2016. Thereafter, the respondent OIL by its letter dated 18.08.2015 released the Bank Guarantee no. 31401198686 dated 09.09.2010 submitted against the 1st Contract-Work by the petitioner company stating that there was no claim.

24.1. The 2nd Contract-Work was awarded to the petitioner company by the Letter of Award [LoA] dated 11.07.2015. The Contract Agreement for the 2nd Contract-Work i.e. Contract no. 6206734/CDG5213/PDNO/2015 was executed on 18.01.2016 and the same was for a period of 4 [four] years, extendable by 1 [one] year.

25. At this juncture, it is appropriate to make a survey of the decisions, referred to by the parties, on the matter of blacklisting so as to the know about the factors germane to be taken into consideration preceding and attending any order of blacklisting.

25.1. The decision in **Patel Engineering Limited** [supra] was rendered in respect of a tender process floated by the National Highways Authority of India [NHAI] for development and operation/maintenance of six-laning of a portion of National Highway no. 6 located in the State of West Bengal and Orissa 'on design, build, finance, operate and transfer [DBFOT]' 'poll basis project through public private partnership'. The petitioner company's bid was accepted and the petitioner company was called upon by the NHAI to confirm its acceptance. When the petitioner company expressed its inability to confirm its acceptance on certain grounds, the petitioner company was issued a show cause notice calling upon to explain as to why action of debarment [blacklisting] should not be taken. The petitioner company was thereafter barred for a period of 1 [one] year by a letter dated 20.05.2011. It was contended on behalf of the petitioner company that the decision to blacklist was without any authority of law. As per the bid document, the NHAI was entitled for forfeit the bid security as damages in the various contingencies under the clauses of the bid document, but the power to blacklist a bidder and prohibit it from participating in any future

tender process was available only in those cases where the bidder was guilty of fraud and corrupt practices. It was contended that the penalty of blacklisting for a period of 1 [one] year was disproportionate. The Hon'ble Supreme Court has observed after perusal of the clauses in the bid document, that the NHAI had the right either to decline to enter into a contractual relationship with a bidder or terminate the agreement entered into with a successful bidder, if the NHAI comes to the conclusion that either the bidder or his agent committed any corrupt and fraudulent practice and such action enables the NHAI to forfeit the bid security or performance security, as the case may be, towards damages. It is further observed that the bid document did not, however, contain an express stipulation to make such bidder ineligible to participate in any tender process in the future in the event of failure of the successful bidder to execute the necessary documents to conclude the contract. But the same is not determinative of the authority of the NHAI to blacklist a bidder, who declines to execute the necessary documents for creating a concluded contract after the offer made by the bidder was accepted by the NHAI. Like the source of the power of the State to enter or not to enter into a contract with a particular person [blacklist] flows from Article 298 of the Constitution of India, the source of power in respect of the NHAI has been found traceable to Section 3 of the National Highways Authority of India Act, 1956. While observing that the bid document is not a statutory instrument, the failure to mention blacklisting to be one of the probable actions that could be taken against the delinquent bidder does not, by itself, disable the NHAI from blacklisting a delinquent bidder, if it is otherwise justified. Such power is observed to be inherent in every person legally capable of entering into contracts.

25.2. The decision in **Panda Infra Project Limited** [supra] has referred to the decision in **Gorkha Security Services** [supra] to exposit that the fundamental purpose behind the serving of a show cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that the noticee gets the opportunity to rebut the same. Another requirement is the nature of the action which is proposed to be taken out for such a breach. In **Gorkha Security Services** [supra], it has been laid down that in order to fulfil the requirements of principles of natural justice, a show cause notice should meet two requirements viz. [i] The material/grounds to be stated which according to the department necessitates an action; and [ii] Particular penalty/action

which is proposed to be taken. The twin requirements are to be fulfilled so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, the twin requirements become all the more imperative, having regard to the fact that it is the harshest possible action.

25.3. It has been held in **Patel Engineering Limited** [supra], by referring an earlier decision in **Erusian Equipment & Chemicals Limited vs. State of West Bengal, [1975] 1 SCC 70**, that blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. In **Erusian Equipment & Chemical Limited** [supra], the nature of the authority of the State to blacklist the person was considered and it has been held in the context of the constitutional provision contained in Article 298 that the same authorizes both the Union of India and the States to make contracts for any purpose and to carry on any trade or business. It also authorizes the acquisition, holding and disposal of property. The right to make a contract includes the right not to make a contract and by definition, such right is inherent in every person capable of entering into a contract. However, such a right either to enter or not to enter into a contract with any person is subject to a constitutional obligation to obey the command of Article 14. Though nobody has any right to compel the State to enter into a contract, everybody has a right to be treated equally when the State seeks to establish contractual relationships. The effect of excluding a person from entering into a contractual relationship with the State would be to deprive such person to be treated equally with those, who are also engaged in similar activity. The decision of the State or its instrumentalities/agencies not to deal with certain person or class of persons on account of the undesirability of entering into the contractual relationship with such person is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors. It has been held in **Erusian Equipment & Chemical Limited** [supra] that a blacklisting order involves civil consequences as it casts a slur. It creates a barrier between the person blacklisted and the

Government in the matter of transactions. The blacklists are termed as 'instruments of coercions'.

25.4. What emerges from the decision in **Kulja Industries Limited** [supra] is that an order of blacklisting is a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any decision of blacklisting is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But, such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities, meaning thereby, any such decision of blacklisting would be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. The writ court in its exercise of the power of judicial review can very well examine an order of blacklisting as to whether such an order is reasonable, fair and proportionate to the gravity of the offence. It has been held as well settled that even though the right of the person blacklisted is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations go to determine whether the action is sustainable in law. The Hon'ble Supreme Court has emphasized on prescribing guidelines by determining the period for which an order of blacklisting should be effective, for the sake objectivity and transparency. It has been further observed that different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. It can be easily visualised that an order of blacklisting not only affects the blacklisted person's reputation adversely for the present, it also brings long lasting civil consequences for the blacklisted person's future business prospects.

26. An order of blacklisting has a ripple effect in that once a person is blacklisted by an instrumentality/agency of the State, he can be debarred from participation in respect of other similar processes initiated by the State or other instrumentalities/agencies and as a result, the blacklisted person might be precluded from entering into any business relationship with the State or any of its instrumentalities/agencies in the times to come, thus, virtually resulting into his civil death. It is no longer res integra that with blacklisting,

many civil and/or evil consequences follow. Blacklisting is described as 'civil death' of a person who is served with an order of blacklisting. An order of blacklisting is indubitably stigmatic in nature and debars the blacklisted person from participating in Government tenders which prevents him from getting Government contracts. The blacklisted person would not be treated in similar manner with others in the field of competition, who are otherwise ought to have treated in similar manner.

27. As the bone of contention is with regard to the alleged sub-contracting of the works related to the afore-mentioned two Contract-Works, it is apposite to advert to the relevant clauses pertaining to sub-contracting appearing in the said two Contract Agreements. In the Contract Agreement dated 03.11.2010 pertaining to Contract no. OIL/ CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work], Clause 15.0 : 'Sub-contracting' had prescribed that the Contractor should not sub-contract or assign, in whole or in part, its obligations to perform under the Contract, except with the respondent company's prior written consent. In the Contract Agreement dated 18.01.2016 pertaining to Contract no. 6206734/CDG5213/PDNO/2015 [2nd Contract-Work], Clause 15.0 : 'Sub-Contracting/ Assignment' had prescribed that the Contractor should not sub-contract, transfer or assign the Contract, in full or any part under the Contract, to any third party/parties. Except for the main services under the Contract, the Contractor may sub-contract the petty support services subject to the respondent company's prior approval. However, the Contractor shall be fully responsible for complete execution and performance of the services under the Contract.

28. It was on the basis of the clauses pertaining to 'sub-contracting' incorporated in the two Contract Agreements, dated 03.11.2010 and dated 18.01.2016, in conjunction with the Guidelines contained in the Banning Policy, 2017, the respondent OIL authorities had sought to locate its purported sources of power for banning the petitioner company for the period of 3 [three] years.

29. The respondent OIL had introduced the Banning Policy, 2017 on 06.01.2017 wherein the Guidelines for appropriate action against erring and defaulting bidders, contractors, suppliers, vendors and service providers are laid down. The Banning Policy, 2017 has provided that while participating in a tender process or performing under a contract/order,

the agencies are required to meet certain standard of integrity and to adhere to the terms and conditions of the tender/contract. In case any agency fails to meet the standard benchmark of integrity, the agencies are liable to be put on holiday/banning list for specific periods in order to deter the agencies from committing such defaults. As per Clause 2.0[ii], 'fraudulent practice' includes any act or omission committed by a bidder by misrepresenting, misleading/submitting false document and or false information or concealment of facts in order to influence the procurement process as well as during the execution of contract. 'Contract', as per Clause 2.0[vii], shall mean all or any contract awarded to an agency and shall include Purchase Orders/Works Contract/Service Contract. Clause 4.2 has empowered the respondent OIL to ban a bidder, contractor, supplier, vendor, service provider in case of corrupt, fraudulent, collusive and coercive practice. Clause 4.2, which is part of Clause 4.0 : Banning, has provided for following kinds of actions :-

"4.2. Action against agencies in respect of an ongoing tender/contract where the agency has indulged in corrupt, fraudulent, collusive and coercive practice.

[i] The irregularities is noticed during the evaluation of bids :

If it is observed that bidder has indulged in committing irregularities like corrupt, fraudulent, collusive and coercive practice; the Company shall reject the bid of such bidder. If the bid is rejected after price bid opening and such bidder happens to be the lowest evaluated bidder, the tender shall be scrapped and retendered. The Earnest Money Deposit [EMD]/Bid Security submitted by such bidder shall be forfeited. Further, the bidder shall be put on the banning list after following the due process.

[ii] The irregularities noticed after the award of contract :

[a] During execution of Contract :

It the contractor is found to have indulged in corrupt, fraudulent, collusive and coercive practice, in respect of ongoing contract, such contractor shall be put on banning list of OIL after following the due process.

The concerned contract/order where irregularities have been committed shall be suspended forthwith by the Engineer-in-charge, who is supervising the contract, with the approval of the concerned HoD at Corporate Office/Head of sphere/fields/Pipeline Headquarter/project, as applicable. The work/services/supply and payment shall be suspended. The action shall be initiated for putting the vendor on banning list.

After following the due process, the order/contract where it has been concluded that irregularities have been committed shall be terminated. The contract Performance Bank Guarantee submitted by the Contractor shall be forfeited. Any payment due to the contractor for work already executed and accepted shall be payable after adjustment of any amount due from the contractor as per the provision of the contract.

In this case no Risk and Cost Clause will be applicable.

[b] The irregularities noticed after execution of the contract during defect liability period :

If it is found after execution of the contract, that the contractor has indulged in corrupt, fraudulent, collusive and coercive practice, such agency shall be banned for future business with OIL after following the due process. The contract performance bank guarantee submitted by the contractor shall be forfeited."

29.1. Under 'Clause 4.3 : Period of Banning', the period of banning shall be for a fixed period of 3 [three] years from the date of issuance of banning order.

29.2. The Banning Policy, 2017, more particularly, Clause 5.1[ix] thereof, has provided that in the event a Contractor assigns or sublets the job without having permission from the respondent OIL, the respondent OIL is empowered to initiate a process under the Banning Policy, 2017 to put such Contractor on holiday. Clause 5.3 of the Banning Policy, 2017 has provided for the duration of the holiday and according to Clause 5.3, the duration of holiday shall be 6 [six] months to 2 [two] years from the date of issue of the holiday order depending upon the gravity of the default which shall be recommended by the concerned committee. The process for putting a Contractor on holiday has been laid down in details in Clause 5.2.

29.3. 'Clause 6.0 : Contract Provision' has specifically laid down that the tender/contract condition should have relevant operating provision of the Guidelines in respect of banning and holiday to take care of issues which may lead to putting the vendor on holiday/banning list.

30. The terms and conditions in the two Contract Agreements were incorporated when those two Contract Agreements were executed on 03.11.2010 [1st Contract-Work] and on 18.01.2016 [2nd Contract-Work] respectively. Obviously, the said two Contract Agreements, at the times when they were entered into, did not include the Guidelines laid down in the Banning Policy, 2017 framed by the respondent OIL as the Guidelines for the Banning Policy, 2017 had been framed only on 06.01.2017. It is settled that every statute or statutory rule is prospective unless it is expressly or by necessarily implication made to have retrospective effect. In the absence of any express provision or necessary implication a statutory rule cannot be given retrospective effect. The Banning Policy, 2017 is neither the statutory policy nor the same are framed in exercise of any power conferred by any statutory provision. The Banning Policy, 2017 being a non-statutory one, cannot be comprehended to have retrospective effect.

31. The parties to a contract are free to substitute or rescind the entire contract or to modify, alter, vary or rescind some of its terms and conditions. Novation or modification of a contract can take place in the same manner like the execution of the original contract. If the parties are to alter or modify or rescind some of the terms and conditions of a concluded contract, the same are required to be done either by express agreement or by necessary implication. Thus, it is settled that the terms and conditions of a contract can be altered or modified but such alteration or modification cannot be done unilaterally unless there is existence of a provision in the contract itself or in law permitting such alteration or modification. A unilateral alteration or modification of a provision in a concluded contract by one party in the absence of any agreement with the other party to the contract is not binding on the other party to the contract. However, a contract may give one of the parties the power to unilaterally vary the obligation under the contract e.g. clauses of variation in quantity of supply, clauses of price variation, etc. A party is, however, not entitled to bring changes unilaterally in respect of matters which are not specifically provided for in a contract. A material alteration or modification is one which varies the rights, liabilities or legal position of the parties from the ones which are already laid down in the original contract. Novation of a contract is required to be done by following the same procedure as is to be followed for entering into a valid contract.

32. It has been specifically set forth in 'Clause 6.0 : Contract Provision' in the Banning Policy, 2017 that the tender/contract condition should have relevant operating provision of the Guidelines of the Banning Policy 2017 in respect of banning and holiday to take care of issues which might lead to putting the vendor on either banning or holiday list. There is nothing on record nor it is the case of the respondent OIL that the provisions of the Guidelines contained in the Banning Policy, 2017 regarding banning/holiday had been proposed to the petitioners for the Guidelines' incorporation in either of the two Contract Agreements at any point of time anterior to 21.07.2018 i.e. the date of Show Cause Notice, notwithstanding the expiry of the Contract period of the 1st Contract-Work already on 14.05.2016. 'Clause 6.0 : Contract Provision' of the Banning Policy, 2017 has made it clear that only in the event the Guidelines are incorporated in the concerned contract the same can be made enforceable against the other party in the contract. In the case in hand, there was no supplementary agreement incorporating the Guidelines of the Banning Policy, 2017 between the petitioner company and the respondent OIL in existence when the Show Cause Notice was served on 21.07.2018 or when the impugned Order was passed on 31.08.2018. The petitioner company was never put to notice that the Guidelines incorporated in the Banning Policy, 2017 would become parts of the two Contract Agreements, dated 03.11.2010 [1st Contract-Work] and dated 18.01.2016 [2nd Contract-Work] and there was also no material on record to even infer, not to speak of to conclude, that the petitioner company had ever agreed to make itself liable in terms of the Banning Policy, 2017 for the obligation it had undertaken under the said two Contract Agreements. Even if the two contracts are private contracts, the respondent OIL being an instrumentality of the State under Article 12 of the Constitution of India, was expected to conduct its affairs on the touchstone of Article 14 of the Constitution of India. One of the principal facets of Article 14 is fairness in action, which is required to be adhered by an instrumentality/agency of the State like the respondent company. The State or an instrumentality/agency of the State cannot be expected to conduct its affairs even in commercial matters in a manner which is not consistent with the principle enshrined in Article 14 of the Constitution of India. Upon examination of the terms and conditions of the two Contract Agreements, dated 03.11.2010 [1st Contract-Work] and dated 18.01.2016 [2nd Contract-Work], vis-à-vis the Guidelines of the Banning Policy, 2017 and also non-existence of any supplementary agreement bringing in the enforceability of the provisions regarding banning/holiday in the contractual relationship which existed between the petitioner company and the respondent

OIL, even on the day of the impugned Order [31.08.2018], this Court is of the considered view that it is not permissible for the respondent OIL to resort to the Banning Policy, 2017 at a subsequent point of time on 31.08.2018 to ban the petitioner company for any period of time, not to speak of for 3 [three] years, from entering into any contract or from carrying out any business with it, alleging violations of the Guidelines of the Banning Policy, 2017. In the given facts and circumstances, the Guidelines of the Banning Policy, 2017 including Clause 2.0 [ii] can, by no means, be read into the two Contract Agreements, dated 03.11.2010 [1st Contract-Work] and dated 18.01.2016 [2nd Contract-Work].

33. In the Show Cause Notice, the respondent OIL had contended that as per the petitioner company, the respondent no. 3 constructed the compressor facility as per the scope of work of the Contract, but there was not a single document from any third party in regard to equipment procurement invoices/vouchers, essentiality certificate issued by the Director General of Hydrocarbon [DGH] for importing foreign machineries, recommendatory letter from the OIL for issuance of essentiality certificate, etc. which were utilized during construction of the Gas Compressor Stations [GCSs], so as to corroborate the fact that the job was actually executed by the respondent no. 3, as claimed. It was the stance of the respondent OIL that on the contrary, the essentiality certificates as well as import documents were issued only in the name of the petitioner company, which itself show that the work was done by the petitioner company and not by the respondent no. 3. The stance of the petitioner company, on the other hand, was to the effect that petitioner company had to arrange for the land for setting up the Gas Compressor Stations [GCSs], carry out civil construction, arrange for equipment, obtain several regulatory approvals, arrange for skilled manpower, etc. Accordingly, the services of the respondent no. 3 were engaged for completion of a part of the mobilization requirements viz. construction of Gas Compressor facilities. After the Letter of Award [LoA] dated 24.08.2010, all the mobilization requirements were duly completed on 15.05.2011 and the respondent OIL after satisfying itself as to the satisfactory completion of the mobilization requirements, issued Work Order no. 8108643 whereby the petitioner company was directed to commence work thereafter as per Clause 8 of the Contract. The petitioner company had asserted that when the Contract Agreements were in force, it had never sub-contracted its obligation of providing Gas Compression Services under the Contract Agreements to any other party. The services of the respondent no. 3 were engaged only for the purpose of completion of pre-

commencement of Contract activities, which were prior to commencement of the activity of providing/hiring of Gas Compression Services from the Gas Compressor Stations [GCSs] which activity, according to the petitioner company, was never sub-contracted.

34. Notwithstanding what has already been held above as regards impermissibility for the respondent OIL to resort to the Banning Policy, 2017, if the Guidelines laid down in the Banning Police, 2017 are looked at, it can be easily noticed that Clause 5.0 : Holiday has provided for the provision of putting an agency on holiday in the event of such agency's non-compliance/non-performance in respect of certain provisions of the tender document/contract. As per Clause 5.1 [ix] thereof, an agency/contractor is to be considered for holiday in case the agency/contractor is found to have assigned/sub-let the job without permission from the OIL. While Clause 5.2 has laid down the process for putting agencies/contractors on holiday, Clause 5.3 has provided that the duration of holiday shall be 6 [six] months to 2 [two] years from the date of issue of the holiday order depending upon the gravity of the default which shall be recommended by the concerned committee. Thus, it is discernible that in the event violation of the clause regarding sub-contracting is found then the erring agency/contractor is to be put on holiday for a period of 6 [six] months to 2 [two] years after following the laid down procedure. From the materials on record and in the absence of an explanation, it is not comprehensible for the Court as to why the respondent OIL had resorted for the procedure to be followed for banning the Contractor [the petitioner company] for the inflexible period of 3 [three] years, instead of proceeding against it for putting it on the holiday list for flexible holiday period ranging from 6 [six] months to 2 [two] years depending upon the gravity of the default, if any. One can easily see that if the agency/contractor assigns/sub-lets any job or a part of the job, such agency/contractor is to be put on holiday and such act of assigning/sub-letting any part of the job is not be dubbed as fraudulent practice. Such action of the respondent company to opt for banning under the Banning Policy, 2017 is found to be divergent one from the actually applicable provisions of the Banning Policy, 2017. Such action in the absence of any explanation is found not in conformity with the Banning Policy, 2017, notwithstanding its inapplicability to the situation. The discussion is rested here as a finding has already been reached as regards inapplicability of the Guidelines of the Banning Policy, 2017 to the case in hand.

35. According to the respondent company, the alleged irregularities were detected during the process of evaluation of the bids submitted pursuant to the Tender bearing IFB no. CPG1917P17 as in that process, the respondent no. 3 had submitted a document in the form of the Satisfactory Completion Report dated 04.04.2017 which, according to the respondent company, was a fraudulent one. It is pertinent to note that in the said tender process, the petitioner company was not a bidder. Taking note that the Satisfactory Completion Report dated 04.04.2017 was issued to the respondent no. 3 by the petitioner company, the respondent company had made the issue to leapfrog making it relatable to the two Contract Agreements, dated 03.11.2010 [1st Contract-Work] and dated 18.01.2016 [2nd Contract-Work], about which the respondent company did not have any complaint against the petitioner company as regards the quality, etc. in respect of the services that were rendered or being rendered by the petitioner company till then.

36. An aspect which needs consideration is whether the respondent company had the inherent power to take action against the petitioner in the manner it had taken by the impugned order dated 31.08.2018 in the given fact situation obtaining in the case. For consideration, it appears also necessary to find out the nature of the two Contract Agreements, dated 03.11.2010 [1st Contract-Work] and dated 18.01.2016 [2nd Contract-Work], arrived at by the contesting parties herein. The issue which also requires examination is whether the two Contract Agreements inter se were in the nature of service contracts or otherwise. For consideration of the issues, references to some of the clauses incorporated in the two Contract Agreements, dated 03.11.2010 [1st Contract-Work] and dated 18.01.2016 [2nd Contract-Work], appear necessary.

37. In so far as interpretation of a contract is concerned, it is a settled principle in law that a contract is interpreted according to its purpose. The purpose of the contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises the joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the Court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both the parties and the joint intent of the

parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation [Ref : **DLF Universal Limited vs. Town and Country Planning Department, [2010] 14 SCC 1**].

38. As per the Contract Agreements, the respondent OIL desired that services for 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis' for a period of 4 [four] years, extendable by another 1 [one] year, should be provided by the Contractor [the petitioner company] as detailed thereunder or as the respondent OIL required. The Contractor [the petitioner company] engaged in the business of offering such services, represented that it had adequate resources and equipments, materials, etc. in good working order and fully trained personnel capable of efficiently undertaking the operations and was ready, willing and able to carry out the said services for the respondent OIL. As both the Contract Agreements contained almost similar terms and conditions, references to some of the clauses appearing in Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 are made herein. Section – II of the Contract Agreement provided for the scope of work/terms of reference/technical specifications. As per Clause 1.0[g] of the GCC, 'Services' means the work specified in Section – II and all other obligations to be complied by the Contractor pursuant to and in accordance with the terms of the Contract. While Clause 5.0 of Section – II provided for the Scope of Work, Clause 6.0 thereto had mentioned about the facilities to be provided by the respondent OIL. The facilities to be provided by the respondent OIL, as per Clause 6.0, included making available low pressure natural gas at one point at the battery limit for compression by the Contractor; providing of metering facilities in the outlet and return line from the Contractor's installation; providing of fuel gas for the prime mover [gas engine only] of compressor and generating set; etc.

39. The Scope of Work of the Contract-Work required the Contractor [the petitioner company] inter alia to compress the Natural Gas available from battery limit of OIL's installation and deliver the compressed Natural Gas at specified conditions at the OIL's battery limit by providing all necessary facilities, equipments, manpower, consumables, lubricants, spare parts, etc. It included installation of complete facilities for Gas Compression Services at different locations. As per the Scope of Work, well fluids from different fields used to be handled at the then existing various Gas Compressor Stations [GCSs] operated and maintained by the OIL's in-house facilities. In order to ensure supply

of natural gas to consumers and to reduce flare, the low pressure natural gas had to be compressed and the OIL intended to hire services from experienced parties to provide Gas Compression on Build, Own and Operate [BOO] basis. The Scope of Work inter alia encompassed total engineering, supply, transportation, installation, construction, commissioning, operation and maintenance of a suitable compressor plant having capacity of defined category and complete in all aspects on ***charter hire*** basis.

40. In the contractual arrangement agreed to by the petitioner company and the respondent OIL, the concept of **charterparty** was brought in in the afore-mentioned manner. Thus, at this juncture, it is apposite to understand the concept of **charterparty**, which is a term ordinarily associated with the shipping sector. The **charterparty** is defined as a contract by which an entire ship, or some principal part thereof, is let on hire or lease by the owner to another person, who in common parlance is called as **'the charterer'**, for a specified time or use on mutually agreed terms and conditions. The contract between the parties is called a ***charterparty***. The subject-matter of **charterparty** has been dealt with in a plain and lucid manner in **Halsbury's Laws of England, Fourth Edition, Volume 43** by the following paragraphs :-

> **402. Meaning of 'contract by charterparty'.** A contract by charterparty is a contract by which an entire ship or some principal part of her is let to a merchant, called 'the charterer', for the conveyance of goods on a determined voyage to one or more places, or until the expiration of a specified period. In the first case it is called a 'voyage charterparty', and in the second a 'time charterparty'. Such a contract may operate as a demise of the ship herself, to which the services of the master and crew may or may not be added, or it may confer on the charterer nothing more than the right to have his goods conveyed by a particular ship, and, as subsidiary to it, to have the use of the ship and the services of the master and crew.
>
> **403. Charterparty by demise.** Charterparties by way of demise are of two kinds: (1) charter without master or crew, or "bareboat charter", where the hull is the subject matter of the charterparty , and (2) charter with master and crew, under which the ship passes to the charterer in a state fit for the purposes of mercantile adventure. In both cases the charterer becomes for the time being the owner of

the ship; the master and crew are, or become to all intents and purposes, his employees, and through them the possession of the ship is in him. The owner, on the other hand, has divested himself of all control either over the ship or over the master and crew, his sole right being to receive the stipulated hire and to take back the ship when the charterparty comes to an end. During the currency of the charterparty, therefore, the owner is under no liability to third persons whose goods may have been conveyed upon the demised ship or who may have done work or supplied stores for her, and those persons must look only to the charterer who has taken his place.

404. Charterparty which is not a demise. Although a charterparty which does not operate as a demise confers on the charterer the temporary right to have his goods loaded and conveyed in the ship, the ownership remains in the original owner, and through the master and crew, who continue to be his employees, the possession of the ship also remains in him. Therefore, the existence of the charterparty does not necessarily divest the owner of liability to third persons whose goods may have been conveyed on the ship, nor does it deprive him of his rights as owner.

405. Test whether charterparty operates as demise. Whether a charterparty operates as a demise or not is a question of construction, to be determined by reference to the language of the particular charterparty. The principal test to be applied is whether the master is the employee of the owner or of the charterer. Even where the charterparty provides for the nomination of the master by the charterer, he must be regarded as the owner's employee if the effect of the charterparty is that he is to be paid or dismissed by the owner and that he is to be subject to the owner's orders as to navigation. However, if the charterparty is otherwise to be regarded as a demise, it is immaterial that the owner reserves the right, in certain circumstances, of removing the master and appointing another in his place, or of appointing the chief engineer.

407. Contracts by agents. The natural parties to a charterparty are the shipower and the charterer, and where the charterparty is executed by both, no difficulty arises. .....

> **412. Rules of construction.** Like any other mercantile document, a charterparty must be construed so as to give effect, as far as possible, to the intention of the parties as expressed in the written contract.

41. To douse any kind of equivocacy as regards the nature of the contract, a reference can be made to the decision in **Great Eastern Shipping Company Limited vs. State of Karnataka and others, [2020] 3 SCC 354**, wherein the following observations from **Scandinavian Trading Tanker Co. A.B. vs. Flota Petrolera Ecuatoriana, [1983] 2 AC 694**, are quoted :-

> "*A time charter, unless it is a charter by demise, with which your Lordships are not here concerned, transfers to the charterer no interest in or right to possession of the vessel; it is contract for services to be rendered to the charterer by the shipowner through the use of the vessel by the shipowner's own servants, the master and the crew, acting in accordance with such directions as to the cargoes to be loaded and the voyages to be undertaken as by the terms of the charter party the charterer is entitled to give to them. Being a contract for services it is thus the very prototype of a contract of which before the fusion of law and equity, a court would never grant specific performance*. **Clarke v. Price, [1819] 2 Wils Ch 157; Lumely v. Wagner, [1852] 1 De GM & G 604**. In the event of failure to render the promised services, the party to whom they were to be rendered would be left to pursue such remedies in damages for breach of contract as he might have at law. But as an unbroken line of uniform authority in this House, from **Tankexpress [ubi sup.] to A/S Awilco of Oslo v. Fulvia S.p.A. di Navigazione of Cagliari [The Chikuma], [1981] 1 WLR 314** has held, if the withdrawal clause so provides, the shipowner is entitled to withdraw the services of the vessel from the charterer if the latter fails to pay an instalment of hire in precise compliance with the provisions of the charter. So the shipowner commits no breach of contract if he does so, and the charterer has no remedy in damages against him."
>
> [Emphasis supplied in italics]

42. Reverting back to the Contract Agreements at this stage, it is found that the Scope of Work required the Contractor [the petitioner company] to arrange for lands for installation and construction of the Gas Compressor Stations [GCSs]. For the purpose of such

installation and construction, the Contractor had to acquire/hire the land at its cost and construct the Gas Compression facilities with all utilities, support services. The Contractor was required to route/transport the low pressure gas from the battery limit of the respondent OIL's installation to its installation i.e. the Gas Compressor Station [GCS], scrub the gas and then compress the gas at the required specified pressure and return the compressed gas back to the respondent OIL's installation. A Gas Compressor Station [GCS] was to be designed, constructed and operated to meet the requirements of applicable safety codes/standards. It was the Contractor who was to operate and maintain the Gas Compressor Station [GCS] including supply of trained manpower, all consumables, chemicals lubricants, spare parts, tools/tackles and replacement of defective equipments, components, parts, etc. The Contractor was allowed to commence the operation of Gas Compression facilities from the sites only after approval given to that effect by the respondent OIL. The Contractor was to make necessary arrangement for electric power to ensure uninterrupted operation of the Gas Compressor Station [GCS] through its own resources.

43. The compressed gas was to be collected at one point at the battery limit. The respondent OIL was entitled to check the Gas Compression facilities and the Contractor's other items before the commencement of the operation and if they were not found in good order or did not meet specifications, etc. the Contractor was not allowed for commencement until the Contractor had remedied such default. It was the sole obligation of the Contractor to dismantle and demobilize the Gas Compressor Station [GCS] after completion of the Contract. The Contractor was under obligation to complete demobilization within 60 days from receipt of demobilization notice from the respondent OIL which was to be issued after completion/termination of the Contract. Under Clause 18.1 of the Contract, it was inter alia laid down that within the Contract period there might be a possibility when availability of gas might go down at a particular site warranting the Contractor to remove a compressor unit with prior notice from respondent OIL. There might also be another situation in which there might be a reduction in gas availability at one site and at the same time increase in gas availability at another site which might warrant relocation of one compressor unit from one location to another. There might be another situation where the gas availability in one existing site would become nil and at the same time there would be availability of gas at another location and in such case, the Contractor might be required to

relocate the complete installation to the new site within a stipulated time period and continue operation at the new site at the same terms and conditions, subject to payment of relocation charges. The selection, replacement and engagement of the personnel were to be made by the Contractor and it was the Contractor who was to determine remuneration of those personnel. The personnel were to be the Contractor's employees solely and the Contractor was to ensure that its personnel were competent and efficient. The Contractor was to provide details of experience, qualification and other relevant data of the personnel to be deployed for scrutiny and clearance by the respondent OIL before their actual deployment and only those personnel were to be deployed which were cleared by the respondent company.

44. Annexure-I to the Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 had set forth the various liabilities of the Contractor [the petitioner company] and the respondent OIL. Annexure-I mentioned about the equipment, machinery, tools, materials supplies, instruments, services and labour, etc. which were to be provided at the location either by the respondent OIL or by the Contractor [the petitioner company] and the expenses to be borne by the respondent OIL or the Contractor [the petitioner company] were designated therein by 'X' mark in the appropriate column. A look at said Annexure-I would give a clear idea about the nature of the Contract Agreement. In such view of the matter, Annexure-I is extracted hereinbelow for ready reference :-

Sr #	**Description**	**Provided**		**At Costs of**	
		Contractor	Company	Contractor	Company
1.	Transportation and handling of contractor material/equipment between base camp and Location.	X		X	
2.	Natural Gas at Battery Limit.		X		X
3.	Pipeline for suction and delivery of Natural Gas from Gas Compressor Station to Battery Limit at OIL's nearest OCS/EPS/QPS.	X		X	
4.	Pipeline from Gas Compressor Station to OIL's OCS/EPS/QPS for condensate return and Safety Relief/Vent/Flare.	X		X	
5.	Fuel Gas for Gas Compressor and Utility.		X		X

6.	Safety System/Instrumentation/Consumables.	X		X	
7.	Security Fencing.	X		X	
8.	Manpower required for preparation and handling of equipments & other chemicals.	X		X	
9.	Transportation of contractor's personnel and equipment spares.	X		X	
10.	Equipments/instruments required for the unit as per contract and spares for their maintenance.	X		X	
11.	All personnel safety equipment for contractor's personnel.	X		X	
12.	Diesel, lub oil etc. required at Gas Compressor Station.	X		X	
13.	Chemicals & Addictives required for operation.	X		X	
14.	Electric Power supply to Gas Compressor Station.	X		X	
15.	Water supply to contractor's equipment at well site.	X		X	
16.	All repairs to contractor's equipment.	X		X	
17.	Contractor's office in Duliajan.	X		X	
18.	Accommodation of contractor's personnel.	X		X	
19.	Living quarters, office spare for contractor's personnel.	X		X	
20.	First-Aid treatment at well site.	X		X	
21.	Emergency medical treatment for contractor's personnel including emergency hospitalization.		X	X	
22.	Medical attention and other requirements of contractor's personnel at well site, base camp and while travelling.	X		X	
23.	Obtain, maintain all necessary permits, consents, licenses, and other certificates required for movement of contractor's equipment to and from worksite and to operate it.	X		X	
24.	Passport, visas, and work permits and related documentation required to maintain contractor's personnel in India.	X		X	
25.	All licenses and port charges for contractor's material and equipment whilst import.	X		X	
26.	Clearance of contractor's equipment/material through customs after securing Essentiality Certificates from DGH	X		X	
27.	All engineering and procurement services.	X		X	
28.	Correcting deficiencies of Contractor Equipment during mobilization.	X		X	
29.	Reasonable space for Base camp for Contractor's	X		X	

	Equipment and supplies.				
30.	Water and Electricity, heavy lift equipment for base camp and work place.	X		X	
31.	Casual labour for handling Contractor's Equipment, material and supplies at base camp and compressor station.	X		X	

Annexure-I to Contract no. 6206734/CDG5213/PDNO/2015 also contained similar terms.

45. When the afore-mentioned terms and conditions incorporated in the Contract Agreements entered into for 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis' are examined in the backdrop of how a ***charterparty*** contract on hiring works, it is clear that the contractual arrangement the petitioner company and the respondent OIL intended to maintain **inter se** was in the line of ***time charter party which was not a demise***, because it was the petitioner company who was the owner of the Gas Compressor Stations [GCSs] as well as of the plots of land where those Gas Compressor Stations [GCSs] were built and that apart, the petitioner company also provided the personnel, that is, the manpower to extend the Gas Compression services in the manner, agreed to by the parties under the Contracts for the entire duration of the Contracts. The petitioner company was not divested of the control either of the Gas Compressor Stations [GCSs] or over the manpower deployed by it exclusively for rendering the services from the Gas Compressor Stations [GCSs]. As per the Contract Agreements, 'Unit', that is, Gas Compressor Station [GCS] meant the complete set of the Contractor's equipment required to perform operation efficiently as specified in Scope of Work for each location. The Gas Compressor Stations [GCSs] were, during the currency of the Contract period, in the control and possession of the petitioner company. The title of the Contract, that is, 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis' along with the clauses incorporated in the two Contract Agreements clearly demonstrates that there was 'Hiring of Gas Compression Services' by the respondent company from the petitioner company who had to 'Build and Own' the Gas Compressor Stations [GCSs] first and thereafter, to 'Operate' the Gas Compressor Stations [GCSs] to provide Gas Compression services therefrom, during the duration of the Contracts, by doing mainly the assigned tasks, that is, to route/transport the low pressure gas from the battery limit of the respondent company's installations to its Gas Compressor Stations [GCSs], scrub the gas and then compress the gas at the required specified pressure and return the compressed gas back to the

respondent company's installations. The petitioner company had to meet the obligation that the Gas Compressor Stations [GCSs] were designed, constructed and operated to meet the requirements of applicable safety codes and standards.

46. The Letter of Awards [LoA] and the Contract Agreements had set forth the schedule of rates and payment. As per the Letter of Award [LoA] dated 24.08.2010, the cost details for the 1st Contract-Work were as follows :-

	Description	Unit	Qty	Rate [Rs.]	Total [Rs.]
1	Initial Mobilization charges per unit	LSM	6	2150000	12900000
2	Final Demobilization Charges per unit	LSM	6	0	0
3	Monthly Fixed Inst. Rental Charges for Category–I per unit	Month	144	573850	82634400
4	Monthly Fixed Inst. Rental Charges for Category–II per unit	Month	144	533850	76874400
5	Inter-location Movement Charges per location	LSM	1	500000	500000
6	Variable compression charges Category-I	MSCM	175200	2	350400
7	Variable compression charges Category-II	MSCM	87600	1	87600
Total Estimated Cost of the Contract = Rs. 17,33,46,800.00					

The said Contract cost was inclusive of all taxes and duties except service tax which was to be at the OIL's account.

46.1. Section VI of the Contract Agreement for the 1st Contract-Work had provided for the following rates and payments :-

1.0 Initial Mobilization Charges : For 6 [six] Units @ Rs. 21,50,000.00 Per Unit;
2.0 Final Demobilization Charges : For 6 [six] Units : No Charge;
3.0 Fixed Installation Rental Charges;
  [i] For Category–I [Total 144 Months] : Rs. 5,73,850.00 Per Unit Per Month;
  [ii] For Category–II [Total 144 Months]: Rs. 5,33,850.00 Per Unit Per Month;
4.0 Interlocation Movement Charge Per Location [For One Location] : Lumpsum : Rs. 5,00,000.00.
5.0 Variable Compression Charge;

[i] For Category–I [Total 175200 MSCM] : Rs. 2.00 Per MSCM;

[ii] For Category–II [Total 87600 MSCM] : Rs. 1.00 Per MSCM;

6.0 Charges During Repair : as provided therein;

7.0 Charges For Addition or Deletion of Contractors Equipments as per Clause 18.0 of Special Terms & Conditions of the Contract :-

[i] Fixed Installation Rental Charges for Addition of a Compressor Unit in an Installation through Fresh Sourcing :

[a] Rs. 5,73,850.00 per month per unit for Category – I;

[b] Rs. 5,.3,850.00 per month per unit for Category – II;

[ii] Mobilization Charges for Additional Compressor Unit : Rs. 21,50,000.00 per unit.

[iii] Deletion of One Unit from One Location : Fixed Charges Payable on that Unit shall be NIL

[iv] Demobilization Charges for Deletion Compressor Unit : NIL

[v] Relocation of Existing Unit from One Location to another : Lumpsum Rs. 5,00,000.00 per location.

46.2. The petitioner company as the Contractor was to be paid initial mobilization charges which were payable on completion of mobilization of all Contractor's equipments and personnel inclusive of all items, spares, consumables, accessories, etc. and it would be paid only when all equipment and operational personnel were positioned at the respective Gas Compressor Station [GCS] and ready to undertake/commence the tasks under the Contract. Initial mobilization charges covered all local and foreign costs to be incurred by the Contractor to mobilize the equipment to the designated site of the Gas Compressor Station [GCS] and included all local and foreign taxes, transport, etc. Thus, from the Schedule of rates and payment, as mentioned above, it is evident that there was no separate head under which the Contractor was to be paid separately for installation, construction, commissioning, operation and maintenance of a Gas Compressor Station [GCS] meeting the specifications and the requirements of the respondent Company.

47. It would not be irrelevant to mention here that from the Show Cause Notice dated 21.07.2018, it could be noticed that the respondent OIL floated Tender no. CPG1917P17 where the respondent no. 3 had participated, was for a contract work : 'Engineering, Procurement, Construction, Testing and Commissioning of a Gas Compressor Services

[GCS] at Makum', with the word, 'hiring' significantly missing. On a comparison of Tender no. CPG1917P17 with the Tender no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work] and Tender vide IFB no. CDG5213P15 [2nd Contract-Work], one could notice that there was a fundamental difference between the work under Tender no. CPG1917P17 on one hand and the 1st Contract-Work & the 2nd Contract-Work on the other hand. The 1st Contract-Work & the 2nd Contract-Work, awarded to the petitioner company, were for 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis' whereas the Contract-Work under Tender no. CPG1917P17 where the respondent no. 3 participated and the petitioner company did not, was not for 'Hiring of Gas Compression Services on Build, Own and Operate [BOO] basis', but for 'Engineering, Procurement, Construction, Testing and Commissioning of a Gas Compressor Station [GCS]'.

48. A works contract essentially involves transfer of property whereas in the Contract Agreements herein, there was no transfer of property from one party to the other. From the discussion made above, it is clear that the Contract Agreement that existed for the 1st Contract-Work and that was existing for the 2nd Contract-Work **inter se** the two parties - the petitioner company and the respondent company - on the date, 21.07.2018, when the Show Cause Notice was served, or on the date, 31.08.2018, when the impugned order was passed, were in the nature of **service contracts**, with no transfer of property involved in the contractual arrangement.

49. The respondent company had contended that it was during the performance of the obligations of the petitioner company under those Contracts, which this Court has found as **time charter party which were not demises** and were **service contracts**, the breaches had allegedly occurred. In the bidding processes undertaken for the 1st Contract-Work and the 2nd Contract-Work, the petitioner company was declared as the successful bidder and it was so notified by the Letter of Award [LoA] dated 24.08.2010 and the Letter of Award [LoA] dated 11.07.2015 respectively. The petitioner company as the successful bidder was asked complete the necessary mobilization within a time period of 210 days in respect of the 1st Contract-Work. As per the Letter of Award [LoA] dated 11.07.2015 issued for the 2nd Contract-Work, the mobilization period was 300 days from the effective date of the Contract i.e. the date of issuance of the Letter of Award [LoA]. By the two Letters of Award [LoAs], the petitioner company was asked to confirm its acceptance of the Letters of Award [LoAs]

and to arrange deposit of the requisite Performance security within 30 [thirty] days and 2 [two] weeks respectively from the date of issuance of the Letter of Award [LoA] dated 24.08.2010 and the Letter of Award [LoA] dated 11.07.2015. It was made specific in both the Letters of Award [LoAs] that the formal contract would be signed after receipt of the Performance security.

50. As per Clause 2.1 of the Contract Agreements, the Contracts became effective on and from the date the respondent company notified the petitioner company as the successful bidder in writing through the Letters of Award [LoAs] that it had been awarded the Contracts. Clause 2.2 of the Contract Agreements had provided for the mobilization time, as mentioned above, within which time the Letter of Award [LoA] holder had to mobilize the equipment, personnel, etc. at the nominated location and the mobilization would be declared as complete after all equipment and manpower were placed at the nominated location in readiness to commence work of Gas Compression Services as envisaged under the Contracts and duly so certified by the respondent OIL's authorized representative. But, the date of commencement of either of the two Contract Agreements was the date on which the mobilization was completed in all respects [Clause 2.3] and as per Clause 2.4, the duration of either of the two Contracts of 4 [four] years was to be counted only from the commencement date of the Contracts in terms of Clause 2.3. Therefore, the duration of the two Contracts for the period of 4 [years] commenced from the dates when the respondent OIL's authorized representative certified that mobilization of all equipment and manpower at the nominated locations of the Gas Compression Station [GCS] were complete and they were made ready to commence work of providing Gas Compression Services under the Contracts. The mobilization part of the Gas Compressor Stations [GCSs] was clearly anterior to the commencement of the Contract period of 4 [four] years duration. For example, the date of commencement of the Contract Agreement signed on 03.11.2010 in respect of the 1st Contract-Work was 15.05.2011, which was after the mobilization period. The two parts, that is, the mobilization part and the Contract period part during which the Contractor [the petitioner company] had to provide Gas Compression Service on **time charter hire** basis were separated by the respective date of commencement of the Contract. Though during the period starting from the date of issuance of the Letters of Award [LoAs] till the date commencement of the Contract period after completion of the respective mobilization the Contracts remained effective but the Contract periods did not commence. The Contract

period commenced only from the respective date of commencement, which was after inspection and giving of certification about readiness of the Gas Compression Stations [GCSs] by the respondent company and execution of the Contract Agreements.

51. A look now at the Work Order no. AAP/WO/0825 dated 25.08.2010 goes to indicate that it was an work order for EPC contract on Lump Sum Turn Key [LSTK] basis for installation of facilities for Gas Compression and by the same, the respondent no. 3 was authorized the work of design, construction, erection, installation and commissioning of Gas Compressor Stations [GCSs] at 6 [six] different locations on the basis of the Letter of Award [LoA] dated 24.08.2010 and at the broad Scope of Work as per Section-II : Scope of Work/Terms of Reference/Technical Specification of the bid document in Tender no. OIL/CCO/PDNG/GLOBAL/253/2009. The terms and conditions included Performance Guarantee Test Run and the respondent no. 3 was to carry out the same where each compressor had to undergo test run for continuous 72 hours individually. In the Satisfactory Completion Report dated 04.04.2017, the petitioner company was found to have certified that the respondent no. 3 had completed the works on LSTK basis in respect of 9 [nine] nos. of Gas Compressor Stations [GCSs] which were in connection with the 1st Contract-Work, during the period from 09.05.2011 to 12.07.2013. The Report also certified that the respondent no. 3 had completed the works on LSTK basis in respect of 2 [two] nos. of Gas Compressor Stations [GCSs] which were connected with the 2nd Contract-Work, on 21.06.2016. The part relating to mobilization of the first 6 [six] Gas Compressor Stations [GCSs] allotted to the petitioner by the Letter of Award [LoA] dated 24.08.2010 in respect of the 1st Contract-Work was completed on 15.05.2011 and the date of commencement of the Contract period of originally agreed 4 [four] years in respect of the 1st Contract-Work commenced from 15.05.2011. The mobilization of Gas Compressor Stations [GCSs] was succeeded by the date of commencement of the Contract. Similar situation prevailed in respect of the Letters of Intent, dated 09.04.2012 and dated 09.01.2013, and the Letter of Award [LoA] dated 11.07.2015. The above events regarding completion of the parts relating to mobilisation, entrusted to the respondent no. 3, represented in the Report dated 04.04.2017 are not specifically traversed by the respondent company.

52. The respondent company had made itself clear that the periods of the Contracts would commence only from the date of commencement which would be after completion of

mobilization. The irregularities alleged to have been committed by the Contractor [the petitioner company] here were, thus, prior to the respective date of commencement of the two Contracts, which were, in essence, **service contracts**. It is not the case of the respondent company that there was sub-contracting of the prime obligation undertaken by the petitioner company as the Contractor under the Contract Agreements, which was providing of Gas Compression Services. At the cost of repetition, it is to be iterated that the respondent company had hired the services of the petitioner company for providing it Gas Compression Services on Build, Own and Operate [BOO] basis for the agreed period of time.

53. It is evident from Clause 15.0 of the two Contract Agreements that sub-contracting was not a prohibited activity. As per Clause 15.0 of the Contract Agreement dated 03.11.2010 [1st Contract-Work], the Contractor shall not sub-contract or assign, in whole or in part, its obligation to perform under the Contract, except with the respondent OIL's prior written consent. It can be seen therefrom that sub-contracting or assigning, in whole or in part, the obligations to perform under the Contract for the 1st Contract-Work was permissible with the respondent OIL's prior written consent. As per Clause 15.0 of the Contract Agreement dated 18.01.2016, the Contractor shall not sub-contract, transfer or assignment of the Contract, in full or in part under the Contract, to any third party. However, except for the main services under the Contract, the Contract was permitted to sub-contract the petty support services subject to the respondent OIL's prior approval. It was specific in that the Contractor shall be fully responsible for complete execution and performance of the services under the Contract. It goes to show that sub-contract, transfer or assign the Contract, in full or in part under the Contract, to any third party was not permissible but sub-contract of the support services was permissible subject to the respondent OIL's prior approval. The Contractor was made fully responsible for complete execution and performance of the services under the Contract.

54. As has been found from above, the petitioner company as the Contractor under the two Contract Agreements, dated 03.11.2010 [1st Contract-Work] and dated 18.01.2016 [2nd Contract-Work], was obligated to perform specific obligations as by the very Contract Agreements indicated, that is, providing of Gas Compression Services from Gas Compressor Stations [GCSs] on Build, Own and Operate [BOO] basis on **charterhire** basis and there

was no dispute raised by the respondent OIL to the effect that the petitioner company as the Contractor had failed to perform its such obligations during the duration of the Contract period of 4 [four] years, extendable by another one-year, in respect of the two Contract Agreements, dated 03.11.2010 [1st Contract-Work] and dated 18.01.2016 [2nd Contract-Work]. Therefore, this Court finds that the prime obligation to be discharged by the petitioner company during the entire duration of the Contract period of 4 [four] years, extendable by 1 [one] more year, was not sub-contracted to the respondent no. 3.

55. On the basis of the materials available on record and the rival contentions, the projection of the petitioner company that the parts relating to mobilization, entrusted to the respondent no. 3 by the petitioner company, were completed prior the commencement of the duration of the Contract period of 4 [four] years is to be accepted. Per contra, the respondent company was not correct in contending assiduously that the petitioner company had sub-contracted the entire works in relation to the 1st Contract-Work & the 2nd Contract-Work to the respondent no. 3.

56. Clause 12.6 of the Contract Agreement dated 03.11.2010 for Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work] and Clause 12.5 of the Contract Agreement dated 18.01.2016 for Contract no. 6206734/CDG5213/PDNO/2015 dated 18.01.2016 [2nd Contract-Work] were similarly worded. It inter alia prescribed that if the Contractor's obligations under the Contracts were transferred or assigned without the respondent company's consent, the respondent company had the absolute discretion to terminate the Contracts. By the time the respondent company initiated action for banning/blacklisting the petitioner company with the Show Cause Notice dated 21.07.2018 even the extended duration of the 1st Contract-Work was long over on 14.05.2016. As such, no action under Clause 12.6 of the Contract Agreement dated 03.11.2010 could have been taken. But at that point of time, the duration of the Contract period for the 2nd Contract-Work was not over and it was a subsisting contract. The respondent company while holding the petitioner company guilty of fraudulent practice, forgery, etc. one hand and sub-contracting its obligations of the works relating to mobilization of Gas Compressor Stations [GCSs] on the other hand, did not chose to terminate the then on-going 2nd Contract-Work invoking Clause 12.5 of the Contract Agreement dated 18.01.2016 for Contract no. 6206734/CDG5213/PDNO/2015 dated 18.01.2016 [2nd Contract-Work]. Rather, it had

decided to go for banning of the petitioner company for a period of 3 [three] without disclosing any reason expressly for adopting such stringent action.

57. The term, 'forgery' is an offence under the Indian Penal Code. Section 463 of the Penal Code has defined forgery and it states that whoever makes any false document of false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to do cause any to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, is said to have committed forgery. Thus, the condition precedent for forgery is making of a false document or false electronic record or part thereof. The case in hand does not relate to any false electronic record. Section 464 of the Penal Code has set forth the three situations when a person can be said to have made a false document. A person is said to have made a `false document', if *firstly,* he makes or executed a document claiming to be someone else or authorised by someone else; or *secondly,* he has altered or tampered a document; or *thirdly,* he has obtained a document by practicing deception, or from a person not in control of his senses. The document involved in the case was the Satisfactory Completion Report dated 04.04.2017. It was the case of the petitioner company all along that the Report dated 04.04.2017 was issued by it. It was not the case of the respondent company that the Report dated 04.04.2017 was not issued by the petitioner company. Thus, it was nobody's claim that the Report dated 04.04.2017 was a false document. In such situation, the condition precedent for the offence of 'forgery' under the Penal Code is found absent. Thus, it is not perspicuous in what context the respondent company in the impugned Order dated 31.08.2018 had made the finding that the petitioner company was involved in forgery.

58. In respect of contractual arrangements also as like in all other State actions, the State and all its instrumentalities/agencies have to abide by the principles of Article 14 of the Constitution of India of which non-arbitrariness and fairness in action are significant aspects. Though the State and its instrumentalities/agencies can assume they have inherent power but they cannot assume that they have unfettered, unguided and unbriddled discretion in all or any of the matters in respect of contractual arrangements they have entered into with any private party and can deal with such party in any matter it likes. Article 14 casts an obligation on the State and its instrumentalities/agencies to treat

every citizen fairly and reasonably in their interaction with them, be it in the contractual sphere also. While dealing with the public, the State and its instrumentalities/agencies cannot act arbitrarily, unfairly and unreasonably as per their whims and caprice and like a private player, deal with any person as it pleases as its actions must have to be in conformity with the standards which are not arbitrary, irrational or irrelevant. With regard to the permissible extent of judicial review in contractual matters under Article 226 of the Constitution of India, the following excerpts from the decision in **Mahabir Auto Stores and others vs. Indian Oil Corporation and others, [1990] 3 SCC 752,** can be referred as most relevant in the context of the case in hand : -

> "12. It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in **M/s. Radha Krishna Agarwal v. State of Bihar, [1977] 3 SCC 457**. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See **M/s. Radha Krishna Agarwal v. State of Bihar, [1977] 3 SCC 457** at P. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration, it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State

action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a Governmental action even, in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to **E. P. Royappa v. State of Tamil Nadu, [1974] 4 SCC 3; Maneka Gandhi v. Union of India, [1978] 1 SCC 248; Ajay Hasia v. Khalid Mujib Sehravardi, [1981] 1 SCC 722; R. D. Shetty v. International Airport Authority of India, [1979] 3 SCC 489***;* and also **Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay, [1989] 3 SCC 293**. It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

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18. Having considered the facts and circumstances of the case and the nature of the contentions and the dealings between the parties and in view of the present state of law, we are of the opinion that decision of the State/public authority under Article 298 of the Constitution, is an administrative decision and can be impeached on the ground that the decision is arbitrary or violative of Article 14 of the Constitution of India on any of the grounds available in public law field. ..."

59. The following observations made in the decision of **Shrilekha Vidyarthi [Kumari] vs. State of Uttar Pradesh, [1991] 1 SCC 212**, are also of relevance :-

"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public

interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

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24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

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27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest..... With the diversification of State activity in a Welfare State requiring the State to discharge its wide-ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

60. Thus, from the above authoritative pronouncements, it is clear that the consequence of the impugned Order dated 31.08.2018 of banning the petitioner company for a period of 3 [three] years has public law elements in that the impugned decision of banning would have the effect of not only barring the petitioner company from entering into any business relationship with the respondent company for the said period but embedded into it also the ripple effect of precluding the petitioner company from entering into business relationship with the State or any other of its instrumentalities/agencies in the times to come, thus, resulting virtually into its civil death, atleast for a period of 3 [three] years. Even after elapse of 3 [three] years it would take a long period of time for a blacklisted entity to make a revival and thereafter, restore itself to its original business position in terms of reputation, volume of business, etc. it had achieved prior to being blacklisted. On many an occasion, it might not even be possible to make a revival. The impugned action has adverse bearings on the freedoms enshrined in Article 19 of the Constitution of India, that is, freedom to carry on trade or business, subject to reasonable restrictions. A decision which impairs the fundamental right without appropriate justification can be disproportionate. It is settled that

the principle of proportionality ordains that the administrative measures should not be harsher than what is necessary and the principle of proportionality is traceable to the principle of reasonableness. If an action taken by an authority is found to be grossly disproportionate in the backdrop of obtaining facts and circumstances of the case, then such a decision is not immune from judicial scrutiny. If an action taken by the authority is arbitrary, irrational, unfair, unjust or unreasonable, a court of law can interfere with such action by exercising the power of judicial review. The principle of proportionality as a part of judicial review ensures that a decision which is otherwise within the ambit of the administrative authority must not be arbitrary, irrational, unfair, unjust or unreasonable. Though in exercising the power of judicial review, the Court is not concerned with the correctness of the decision but while examining the decision making process, it can very well examine whether all the relevant factors touching upon the matter have been taken into consideration and whether the irrelevant factors have been eschewed out of the consideration in arriving at the decision and it is in the process of such consideration, the principle of proportionality enters in the arena. It has been observed in **Kulja Industries Limited** [supra] that though the power to blacklist a contractor is inherent in the party allotting the contract with no need for any such power being conferred by statute or reserved by contract, but such decision of blacklisting taken by the State or any of its instrumentalities/agencies is subject to judicial review not only on the touchstone of the principles of natural justice but also on the principle of proportionality.

61. In the Show Cause Notice dated 21.07.2018, the respondent company had brought an allegation that the Satisfactory Completion Report dated 04.04.2017 and the Work Order dated 25.08.2010 were allegedly false and fabricated and those were generated subsequently by the petitioner company so as to facilitate the respondent no. 3 to grab the contract illegally against the Tender bearing IFB no. CPG1917P17. The basis of bringing such allegation was that Satisfactory Completion Report dated 04.04.2017 had made reference to both the Contract Agreements – Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work] dated 03.11.2010 & Contract no. 6206734/CDG5213/PDNO/2015 dated 18.01.2016 [2nd Contract-Work]. The Satisfactory Completion Report dated 04.04.2017 was issued on the basis of the Job Completion Certificate issued under reference no. PDNG : 15/7-550 dated 30.05.2015 by the respondent Oil which was issued only in relation to Contract no. OIL/CCO/PDNG/GLOBAL/253/2009, certifying that the petitioner company had

completed the original Contract period of 4 [four] years on 15.05.2015 in respect of the 1st Contract-Work and the Contract was running under extension for 1 [one] year upto 14.05.2016. Since the job under the 2nd Contract-Work was then in progress, no certificate was issued by the respondent OIL in respect of the 2nd Contract-Work. Thus, inclusion of the 2nd Contract-Work in the Satisfactory Completion Report dated 04.04.2017 was false and misleading. Further, contrary to the claim that the respondent no. 3 had constructed the compressor facility there was not a single document to support the claim. At the cost of repetition, it may be mentioned that the present dispute had its genesis in the tender process initiated by the Tender bearing IFB no. CPG1917P17 for 'Construction, Testing and Commissioning of Gas Compressor Stations [GCSs] at Makum, Assam'. Participating in the tender process, the respondent no. 3 company submitted the Satisfactory Completion Certificate dated 04.04.2017 issued by the petitioner company. The respondent OIL had disbelieved the same, as per its letter dated 15.08.2017 and letter dated 21.08.2017. As per the Reply to the Show Cause Notice, the Tender bearing IFB no. CPG1917P17 had Clause 11.9 prescribing that the bid security submitted by the bidder would be forfeited if it was established that the bidder had submitted fraudulent documents or had indulged into corrupt and fraudulent practice, after due process in addition to other action against the bidder. It had been asserted by the petitioner company in its Reply to the Show Cause Notice that the respondent OIL had refunded the bid security to the respondent no. 3 by way of a Covering letter dated 03.11.2017. The impugned Order is conspicuously silent on the said aspect. Such refund of the bid security to the respondent no. 3 who submitted the Satisfactory Completion Report dated 04.04.2017 along with its bid to prove its credentials goes to show that the respondent OIL did not take any action like forfeiture of the bid security, not to speak of any other action like blacklisting, etc., against the respondent no. 3 for submission of the Satisfactory Completion Report dated 04.04.2017 under the Banning Policy, 2017 which were in force then since 06.01.2017. If the Satisfactory Completion Report dated 04.04.2017 was not a false and fraudulent document attracting punitive action against the respondent no. 3, the same yardstick appeared to be applicable for the petitioner company as well. The initiation of the process of blacklisting against the petitioner company terming the Satisfactory Completion Report dated 04.04.2017 as false and fraudulent one by the respondent OIL and thereafter, to blacklist the petitioner company was completely a different and divergent stand, after indicating earlier to the petitioner company in writing that the petitioner company might be blacklisted forever. An instrumentality/agency of the State like

the respondent company which has a duty to act fairly, is found meting out different treatments which have the effect of punishing one and relieving another for an act when both were alleged to be responsible for the act collectively. There is, thus, no discernible principle emerging from such act of not taking any action against the respondent no. 3 in respect of Satisfactory Completion Report dated 04.04.2017 and from the act of taking action of blacklisting against the petitioner company on the basis of the same document satisfying the test of reasonableness and the test of fairness. If the document was a false and fraudulent one and the same was used by the respondent no. 3 in the tender process initiated by the Tender bearing IFB no. CPG1917P17, then the mode and procedure of taking action against the erring entity was prescribed in the Banning Policy, 2017. On the other hand, the clauses in the two Contract-Agreements did not specifically provide for any action in respect of issuance of a document in the nature of Satisfactory Completion Report dated 04.04.2017 with the said Report certifying about events which were prior to commencement of the Contract period. Thus, the act of taking action against the petitioner company while leaving the respondent no. 3 without any initiation for punitive action despite prescription of mode and procedure laid down in that regard for use of an allegedly false and fraudulent document is an act unformed by reasons disclosing any discernible principle which is reasonable and fair and as such, the act is to be termed as an arbitrary and unfair one.

62. Summing up, this Court in the light of the discussion made above and for the reasons mentioned therein, holds that in absence any supplementary agreement incorporating the Guidelines of the Banning Policy, 2017, which had come into effect from 06.01.2017, as part and parcel of the two Contract Agreements – Contract no. OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work] dated 03.11.2010 & Contract no. 6206734/CDG5213/PDNO/2015 dated 18.01.2016 [2nd Contract-Work] – in terms of Clause 6.0 of the Banning Policy, 2017, the action on the part of the respondent OIL in banning the petitioner company for any period of time, not to speak of for 3 [three] years, from entering into any contract or from carrying out any business with it by unilaterally reading the Guidelines of the Banning Policy, 2017 including Clause 2.0 [ii] thereof retrospectively into the two Contract-Agreements [supra] executed at earlier points of time is impermissible and unsustainable in law.

62.1 The contractual arrangement existed between the petitioner company and the respondent OIL through the two Contract Agreements – Contract no.

OIL/CCO/PDNG/GLOBAL/253/2009 [1st Contract-Work] dated 03.11.2010 & Contract no. 6206734/CDG5213/PDNO/2015 dated 18.01.2016 [2nd Contract-Work] – was in the line of **time charterparty which was not a demise**. The petitioner company was the owner of the Gas Compressor Stations [GCSs] from which it was obligated to provide Gas Compression Services to the respondent OIL at the scheduled rates for the entire duration of the Contract period of 4 [four] years, extendable by 1 [one] more year, and during the entire Contract period, the ownership and possession of the Gas Compressor Stations [GCSs] remained with the petitioner company, and through the manpower, who were deployed by it and continued to be the petitioner company's employees. The nature of the two Contracts between the petitioner company and the respondent OIL was **service contract** for the hiring of Gas Compression Services on **time charter hire** basis and was not a works contract for construction of the Gas Compressor Stations [GCSs], with no transfer of property involved.

62.2. Under the two Contract Agreements, sub-contracting was not a prohibited activity, as sub-contracting was permissible with prior consent from the respondent OIL and the Contractor was fully responsible for complete execution and performance of the services under the Contracts. The clauses in the two Contract Agreements did not prescribe any action like blacklisting for sub-contracting. If surrounding circumstances which were in existence at the time of passing of the impugned Order dated 31.08.2018 like the Banning Policy, 2017, were taken into consideration then also, an act of sub-contracting did not attract a corresponding action like blacklisting, that too, for a period of 3 [three] years, which period was harsh and was chosen arbitrarily. The respondent company by holding the petitioner company guilty of sub-contracting its obligations of the works relating to mobilization of Gas Compressor Stations [GCSs] to the respondent no. 3, had the option of terminating the then on-going 2nd Contract-Work by invoking Clause 12.5 of the Contract Agreement dated 18.01.2016 for Contract no. 6206734/CDG5213/PDNO/2015 dated 18.01.2016 [2nd Contract-Work]. Rather, without terminating the Contract invoking Clause 12.5, it had decided to go for banning of the petitioner company for a period of 3 [three] years without disclosing any reasons expressly for adopting such action.

63.3. Further, the duration of the two concluded contracts between the petitioner company and the respondent company commenced only after the respective date of commencement of the Contract Agreement dated 03.11.2010 in respect of the 1st Contract-Work and the

Contract Agreement dated 18.01.2016 in respect of the 2nd Contract-Work. It was the respondent company who had the absolute discretion to decide about the date of commencement of the Contract duration as the duration of the two Contracts for the period of 4 [years] could commence only from the dates when the respondent company's authorized representative certified that mobilization of all equipment and manpower at the nominated location of each Gas Compression Station [GCS], mentioned in the concerned Letter of Award [LoA], were complete and were ready to commence work under the Contracts. From the Work Order dated 25.08.2010 and the Satisfactory Completion Report dated 04.04.2017, it has emerged that no role was assigned to the respondent no. 3 in the two Contracts after commencement of the respective Contract period. The petitioner company as the Contractor did not sub-contract or assign its prime contracted obligations to perform under the Contracts which were to provide Gas Compression Services on Build, Own and Operate [BOO] basis during the duration of the period of the two Contract Agreements after the respective date of commencement of the Contract period on **time charter hire** basis.. Thus, the alleged events in respect of the parts relating to mobilization, entrusted to the respondent no. 3 by the petitioner company, were completed prior the commencement of the duration of the Contract period of 4 [four] years. Such parts did not occur during the periods of the two Contracts, entered for the 1st Contract-Work by the Contract Agreement dated 03.11.2010 and for the 2nd Contract-Work by the Contract-Work on 18.01.2016. Any task allegedly entrusted by the petitioner company to the respondent no. 3 prior to such commencement period cannot be held to have occurred during the Contract period.

63.4. The respondent company had never raised any complaint as regards any kind of deficiency on the part of the petitioner company in performing its obligations of providing Gas Compression Services during the duration of the entire period of the two Contract Agreements after the respective date of commencement of the Contract period, after its authorized representatives certified that the Gas Compressor Stations [GCSs] were installed properly and were ready to commence Gas Compression Services. The two parts, that is, the mobilization part and the Contract period part during which the Contractor [the petitioner company] had to provide Gas Compression Service on **time charter hire** basis were separated by the respective date of commencement of the Contract. The irregularities alleged to have committed by the Contractor [the petitioner company] here were prior to the date of commencement of the two Contracts.

63.5. Though it was the respondent no. 3 who had submitted the Satisfactory Completion Report dated 04.04.2017 along with its bid in the Tender bearing IFB no. CPG1917P17 where the petitioner company was not a bidder, the respondent company choose not to take any action even like forfeiture of the bid security, not to speak of any other action like banning/blacklisting, etc., which was available to the respondent company to take under the Banning Policy, 2017 as the Banning Policy, 2017 was in force then since 06.01.2017. But by terming the same Report as a false and fraudulent document, the respondent company had leap-frogged from the process of the Tender bearing IFB no. CPG1917P17 and had chosen to take the action of banning the petitioner company for a period of 3 [three] years under the provisions of the Banning Policy, 2017 and by invoking purported inherent power in respect of the 1st Contract-Work and the 2nd Contract-Work whereas the provisions of the Banning Policy, 2017 were not enforceable against the petitioner company. The purported inherent power cannot be said to be so unfettered and unguided so as to sustain an action of banning the petitioner company for a period of 3 [three] years which would have the effect of the petitioner company descending towards civil death virtually for the said period, with the ripple effect that would follow even thereafter, on the principles of reasonableness and proportionately.

63.7. In the backdrop of the above fact situation obtaining in the case, the action sought to be taken by the impugned Order dated 31.08.2018 is found to be arbitrary, unfair, unjust and unreasonable for the reasons above and for failing to withstand the tests of fairness, non-arbitrariness and reasonableness. The impugned Order of blacklisting of the petitioner company for the period of [three] years from entering into any contract with the respondent OIL and from carrying out any business with it is, in the considered view of this Court, also disproportionate in view of the nature of allegations of misconduct made by the respondent company who had continued to avail the services provided by the Contractor [the petitioner company] throughout the entire duration of the Contract periods of 4 [four] years under the two Contract Agreements after being satisfied and having certified the Gas Compressions Stations [GCSs] installed, meeting all the prescribed norms, under its supervision. This Court, thus, holds that the impugned Order has failed to stand the scrutiny of law vis-à-vis the principle of proportionality.

64. After institution of the writ petition, the matter was first heard on 26.09.2018 and thereafter, on 10.10.2018 on the interim prayer. The respondent OIL authorities filed its counter affidavit on 09.10.2018. The Court heard the parties at length in detail on 12.10.2018 and passed an interim order on 12.10.2018 whereby the impugned order dated 31.08.2018 was stayed. Aggrieved by the interim order dated 12.10.2018, the respondent OIL authorities took the matter to the Division Bench by way of an intra-court appeal, Writ Appeal no. 342/2018. The writ appeal was heard and disposed of by an order dated 05.03.2019 without interfering with the interim order of stay dated 12.10.2018.

65. Having considered the matter in its entirety, this Court is of the considered view that the impugned order dated 31.08.2018 banning the petitioner company for a period of 3 [three] years from entering into any contract with the respondent company and from carrying out any business with the respondent company is unsustainable having failed to pass the scrutiny of law and being so, the same is liable to be set aside and/or be quashed. It is accordingly ordered. This Court in arriving in such finding has also taken note of the fact that a period of about more than four years have elapsed in the meantime after passing of the interim order of stay on 12.10.2018. The interim order stands accordingly merged with this order.

66. The writ petition stands allowed in the aforesaid terms. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant