

(2015) 05 GAU CK 0045
In the Gauhati High Court
Case No : WP(C) 164 of 2015

Shiv-Vani Oil and Gas Exploration Services Ltd.

APPELLANT

Vs

Oil India Limited

RESPONDENT

Date of Decision : 14-05-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 3 GLT 173

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : D. Das, Senior Advocate and R.B. Phukan, for the Appellant; S.N. Sarma, Senior Advocate and A. Sarma, Advocates for the Respondent

Final Decision : Allowed

Judgement

Arup Kumar Goswami, J—This writ petition filed under Article 226 of the Constitution of India is directed against a letter dated 20.12.2014, whereby OIL India Ltd. (for short, "OIL") had decided to put the petitioner under "Holiday List" and debar it from participating in OIL's tender or entering into any works/services/purchase contracts with OIL for a period of two years with effect from the date of issue of the letter.

2. The petitioner company professes itself as one of the leading service provider companies in the field of oil and gas in India and overseas. It had entered into various contracts with OIL from the year 1995 for execution of drilling and seismic jobs. The petitioner has two ongoing contracts with OIL. One of the contracts being Contract No. OIL/CDG4167/DRLG/12 dated 07.01.2013, is for the service of Charter Hire of 2(two) Nos. 2000HP (Minimum) capacity Drilling Rigs in Assam and Arunachal Pradesh, and the other is under Contract No. 6106952 for Charter Hire of 1 (one) No. 1400 HP (Minimum) Drilling Rig Package for drilling and completion of three exploratory wells in Andhra Pradesh. The petitioner also entered into a Joint Operating Agreement (JOA) dated 28.05.2007 with respect of the Contract Area identified as Block MZ-ONN-2004/1 (referred to

in the writ petition as "Mizoram Block"). Another Joint Operating Agreement (JOA) entered into by the petitioner with OIL is with respect to the Contract Area identified as Block AA-ONN-2004/2 (referred to in the writ petition as "Amguri Block"). The petitioner and OIL had entered into a Production Sharing Contract on 02.03.2007 with the Government of India in respect of Amguri Block with participating interest of OIL and the petitioner as 85% and 15%, respectively.

3. Previously also, by letter dated 15.03.2014, the petitioner was put under Holiday for a period of two years with effect from 11.03.2014 and OIL had debarred it from participating in any of its tenders. Challenging the said action, the petitioner had earlier moved this Court by filing a writ petition registered as WP(C) 2982/2014. By an order passed by this Court on 16.06.2014, the letter dated 15.03.2014 was stayed. Thereafter, OIL filed an application praying for liberty to allow OIL to withdraw the letter dated 15.03.2014. The said application was registered as Misc. Case No. 2035/2014. In the said application, it was stated that the letter dated 15.03.2014 had been issued prior to the framing of the Banning/Debarring Policy of OIL, which was circulated on 03.05.2014. Viewed in that perspective, the Management had considered that the letter dated 15.03.2014 suffered from procedural deficiency and, therefore, liberty was sought by OIL to withdraw the letter dated 15.03.2014 and, simultaneously, to permit to initiate de novo enquiry.

4. Having considered the submission of the learned counsel for the parties and in view of the statements made in the Miscellaneous Application, the Miscellaneous Application was disposed of by an order dated 21.07.2014, providing that the respondent would have the option to take further steps, if so advised, pursuant to the policy notified on 03.05.2014.

5. Thereafter, on 11.08.2014 a show-cause notice was issued to the petitioner with reference to the Contract No. OIL/CDG/4167/DRLG/12 dated 07.01.2013 requiring the petitioner to show cause, in writing, within fifteen days as to why there should not be a banning of business for providing services of Charter Hire of 2(two) Nos. 2000HP (Minimum) capacity Drilling Rigs and why the petitioner firm be not debarred from entering into any contract with OIL and be not de-listed from the list of approved contractors of OIL.

6. It was indicated that if the show-cause reply is not submitted within the time specified, it will be presumed that the petitioner has nothing to say and the authorities will proceed accordingly. The petitioner had submitted reply to the show-cause notice on 22.08.2014.

7. Thereafter, the impugned letter was issued on 20.12.2014.

8. A preliminary affidavit-in-opposition is filed by OIL. In the said affidavit, it is stated that a committee was constituted comprising three members to scrutinize the case of putting the petitioner company in Holiday list and the Committee had analysed the entire facets of the matter and, after proper deliberation and observing the various shortcomings in the performance of the petitioner

company, prepared its report on 07.11.2014 recommending putting the petitioner company in Holiday list for two years to ensure satisfactory and uninterrupted drilling operations to be done in future for achieving targets. The Committee's report dated 07.11.2014 was put up before the Corporate Business Committee (for short, "CBC") of OIL through a note dated 14.11.2014, issued by the Head-Legal of OIL and, in the 437th (A) meeting of the CBC, held on 05.12.2014, approval was granted for putting the petitioner company in OIL's Holiday List for a period of two years. It is stated that the CBC is the supreme body of OIL and its decision is full and final in so far as OIL's administrative decisions are concerned. Accordingly, the letter dated 20.12.2014 was issued to the petitioner.

9. The allegations of the petitioner company that the decision to put the petitioner company in Holiday list was guided by malice was denied and it was contended that such decision was taken bona fide as due to the poor performance/non-performance of the petitioner company, OIL suffered loss of about 200 Crores of rupees on account of loss of drilling meterage/production loss. Apart from that, OIL would be liable to pay amount running into hundred of Crores as penalty to the Government of India due to failure to comply with the contract within the stipulated period of time.

10. Mr. Das submits that the Notice dated 11.08.2014 in no uncertain terms has observed that the repeated shutting down etc. have been considered as unsatisfactory performance, which calls for termination of the contract and also for putting the firm in Holiday List as per the Banning Policy of OIL. It is his contention that unless termination of the contract takes place, there is no question of putting a firm in Holiday List and, in the instant case, the existing contract of the petitioner has not been terminated and, therefore, putting the petitioner firm in Holiday List, which is consequential upon termination of contract, could not have been done.

11. Further submission of Mr. Das is that the petitioner had accepted poor performance as attributed to it with the rider that the poor performance by the petitioner firm is because of the high handed action on the part of OIL. The petitioner company had sought to do what was expected of it and the resource crunch had occurred because of unauthorized and illegal deduction of more than Rs. 50 Crores and, therefore, the company could not be held to be responsible for its poor performance as alleged by OIL. Mr. Das submits that even if it is assumed that the petitioner company has admitted poor performance, the same has to be viewed in juxtaposition with Clause 12.4 of the contract agreement. The petitioner has given detailed reply, point by point, meeting the allegations and it demonstrated that the remedial actions taken by the petitioner company had resulted in 85 to 100% achievement and, this is the reason why, in terms of Clause 12.4, the contract with the petitioner was not terminated.

12. With reference to Clause 11.0 of the contract in question, Mr. Das has submitted that no amendment to the contract was effected and, therefore, the

tender and contract, in question, being prior in point of time to the framing of the Banning/Debarring Policy, the said policy cannot be made applicable to the present contract.

13. It is also submitted that the impugned order is devoid of any reason, which is the life and soul of an order and, in absence of any reason, more so, in view of the detailed and categorical reply given by the petitioner company, the impugned order cannot sustain the scrutiny of law. It is further highlighted with reference to the guidelines as to how an order of putting a company in Holiday List is to be passed, that reasons are essentially to be given before any order is passed debarring a company.

14. While drawing attention to the various clauses of the guidelines regarding banning, much emphasize is laid by Mr. Das on Clause-15 to articulate the point that the policy visualized framing of Management Guidelines before implementation to highlight the changes that would be required in the tender documents. The guidelines are also required to cover details of the parameters, which would decide a poor performance. It is asserted by Mr. Das that guidelines, as contemplated in Clause-15, has not been prepared and, therefore, the action taken against the petitioner is without jurisdiction. He has also submitted that even in the contracts entered into subsequent to the coming into force of the policy of banning, no clause incorporating Banning Policy has been inserted. To highlight this aspect of the matter, Mr. Das has placed reliance on the additional affidavit filed on 19.01.2015.

15. By drawing attention of the Court to the preliminary affidavit filed by OIL, scathing remarks have been made by Mr. Das with regard to the decision-making process, terming the same as totally arbitrary, uncalled for and vindictive in nature. He has submitted that the entire action taken against the petitioner company is orchestrated and that the company would be put under Holiday List was a foregone conclusion. The Committee, in paragraph 5.4 of its report, had taken note of the fact that the reply submitted by the petitioner company was already forwarded to the Head-Legal, OIL, by the Drilling department and, accordingly, it had opined that a final decision on the matter would be appropriate on receipt of opinion from the Head-Legal. Having said so, there was a summersault in paragraph 8 of the Report of the Committee and the Committee, without taking note of the reply filed by the petitioner company, decided that, according to its wisdom, there has been gross lapse on the part of the company in ensuring uninterrupted drilling operations through continuous shutting down due to fault of the company and, in spite of giving repeated opportunities, there was no improvement in the situation. Accordingly, the Committee recommended banning of the petitioner under Clause 3.1.0 of the Banning Policy. The Head-Legal, vide letter dated 14.11.2014, has recorded that in terms of the recommendation of the Committee of OIL, the banned party may be placed in Holiday List and, at the same time, it was indicated that reply to the notice has to be examined only by the Committee constituted for the purpose of

the explanation given by the party on the factual position of the performance. Thus, according to Mr. Das, the Head-Legal did not offer any independent opinion. However, drawing attention to Clause 4.0 of the Fax Message (Annexure-6 to the preliminary affidavit-in-opposition), learned Senior counsel submits that the CBC had approved the putting of the petitioner company in Holiday List as per legal opinion of Head-Legal, which portrays total non-application of mind on the part of the approving authority.

16. Mr. Sarma, on the contrary, has submitted that though the instant action has been taken on the basis of the contract entered into with the petitioner company, but, the foundation of the action is rooted solely in the Banning Policy and, therefore, the clauses contained in the agreement would have no relevancy whatsoever while deciding the controversy.

17. Mr. Sarma has submitted with reference to the argument advanced by Mr. Das that the Committee did not consider the reply submitted by the petitioner company is not borne out of Report of the Committee. Taking the Court through the observations and findings in Clause 5.0 of the said Report, Mr. Sarma has submitted that there are detailed deliberations of the events leading to closures and shutting down, which were duly taken note of by the Committee. Clause 5.4 of the Report of the Committee itself demonstrates that the Committee had scrutinized the reply of the petitioner and the plea regarding the financial crunch taken by the petitioner. The Committee had taken the view that these are internal issues between the Petitioner Company and OIL which are not to be taken note of and the contractor should have ensured uninterrupted operation of the works. It is also submitted by Mr. Sarma that the fact that there was poor performance is an admitted position. He submits that the contention of the petitioner company that the Committee had not considered the reply of the petitioner company, in view of the observations of the Committee that the reply had been sent to the Legal-Head, is not correct inasmuch as the observations of the Committee has to be understood in the context that the Committee opined that before a final decision is taken, it would be appropriate to have the opinion of the Legal-Head. The Committee, in Clause 8.0 of its Report, made categorical observations that the continued shutting down etc. squarely comes within the purview of Clause 3.1(o) of the Banning Policy and, thus, recommended putting the petitioner company in Holiday List. It is pointed out by Mr. Sarma that there is no denial of the shutting down, as indicated in Annexure-I, which forms a part of the impugned order and that has relevancy in the context of the case where OIL wanted to put the petitioner in Holiday List in future only without terminating the ongoing contracts. He has submitted that under the Banning Policy, without terminating the existing contract, it is permissible to put a contractor in the Holiday List for future as both are independent aspects. In a given case, putting a party in a Holiday List may follow termination, but it is not necessary that in all circumstances putting a party in Holiday List must be preceded by termination notice.

18. Referring to Clause 15.0 of the Banning Policy, it is submitted by Mr. Sarma that the contention advanced by Mr. Das on the application of the said clause is misconceived. He submits that Clause 15.0 along with Clause 14.0 has to be construed in respect of future tenders only and it is in no way related to the existing contractors. It is submitted by him that those Clauses are inserted only to make it transparent in the further tendering processes. Mr. Sarma has relied on the decisions of the Apex Court in Grosons Pharmaceuticals (P) Ltd. and Another Vs. The State of Uttar Pradesh and Others, (2001) 7 AD 479 : AIR 2001 SC 3707 : (2001) 3 ARBLR 298 : (2001) 7 JT 500 : (2001) 6 SCALE 209 : (2001) 8 SCC 604 : (2001) AIRSCW 3533 : (2001) 6 Supreme 840 , and Patel Engineering Limited Vs. Union of India (UOI) and Another, AIR 2012 SC 2342 : (2012) 3 CTC 757 : (2012) 5 JT 387 : (2012) 5 SCALE 374 : (2012) 11 SCC 257 : (2012) 114 SCL 203 : (2012) AIRSCW 3260 : (2012) 4 Supreme 21 .

19. During the course of the hearing, Mr. Sarma, learned Senior counsel has also produced before the Court four documents from the records of OIL. The said documents are taken on record. The relevant portion of the documents produced by Mr. Sarma needs to be noted for better appreciation. They read as follows:

Date: 07.11.2014

"(A) "CHAIRMAN AND MANAGING DIRECTOR OIL INDIA LIMITED NOIDA U.P.

For Group General Manager(C&P)

Sub: Note No. TCD/CBC/078/2014 dated 07.11.2014 Regarding Putting M/s. Shiv-Vani Oil & Gas Exploration Services Ltd., New Delhi in OIL's "Holiday List",

Sir,

We forward herewith the Original + 7(seven) copies of Note No. TCD/CBC/078/2014 dated 07.11.2014 along with the copies of the Note dated 07.11.2014 approved by SBU 7.1(205) report of the Committee and other relevant documents.

2.0 Kindly arrange to put up the Note to Corporate Business Committee at the earliest for their approval and advise us their decision for our further necessary action.

Yours faithfully, Sd/- (A Sarma) Chief Manager (Contractors) For Head-Contracts
For RESIDENT CHIEF EXECUTIVE"

(B) "Note to RCE/ED (E&D)/GGM (OD&RS)/GM(F&A)/GM (COM.)

Sub: Committee Report on putting M/s. Shiv-Vani Oil & Gas Exploration Services Ltd., New Delhi in OIL's "Holiday List"

The Committee formed by GM(OD&RS) vide letter No. Drilling/Plg/A.5-0618/14

dated 08.09.2014 to scrutinise the performance of M/s. Shiv-vani Oil & Gas Exploration Services, New Delhi against Contract No. OIL/CDG4167/DRLG/12 has submitted its report dated 07.11.2014 which is enclosed.

Your approval is requested to the recommendation made by the Committee for putting up a Note to Corporate Business Committee for their approval.

Date : 07.11.2014

(Dr. K. Saikia) Head-Drilling(W/O) & Convener"

NOTE TO THE CORPORATE BUSINESS COMMITTEE

Sub: Putting M/s. Shiv-Vani Oil & Gas Exploration Ltd., New Delhi in OIL'S "Holiday List"

The Committee formed by GM(OD&RS) vide letter No. Drilling/Plg/A.5-0618/14 dated 08.09.2014 to scrutinise the performance of M/s. Shiv-vani Oil & Gas Exploration Services, New Delhi against Contract No. OIL/CDG4167/DRLG/12 has submitted its report dated 07.11.2014. The detailed report is enclosed.

The recommendation of the Committee has been approved by SBU. This Note is now put up to Corporate Business Committee for approval to the recommendation. A copy of Note dated 07.11.2014 approved by SBU Committee along with the report of the Committee is enclosed in this regard.

Sd/- (M. Ali) GENERAL MANAGER (COMM)(i/c)"

Corporate Business Committee, during its 437(A) Meeting held through Circulation, took up the following Notes for discussion & after due deliberations, took the following decisions on 05.12.2014:

1.0 *** **

2.0 *** **

3.0 *** **

4.0 CBC Note No. TCD/CBC/078/2014 dated 07.11.2014 for Putting M/s. Shiv-Vani Oil & Gas Exploration Services Ltd., New Delhi in OIL's "Holiday's List".

Accorded approval Putting M/s. Shiv-Vani Oil & Gas Exploration Services Ltd., New Delhi in OIL's "Holiday's List" as per the legal opinion of Head(Legal) vide letter No. OIL/Legal/C&P)/Shiv-Vani dated 14.11.2014 (copy attached with relevant enclosure).

CBC, while approving the Note, CBC remarked as under:

Quote:

The Company's failure to mobilise a Rig to undertake drilling in acreage could have been put under the scope of the Committee's investigation.

Unquote:"

20. I have considered the submissions of the learned counsel for the parties and have also perused the materials on record.

21. In order to appreciate the contention of the parties in proper perspective, it will be useful to take note of certain clauses of the agreement, which have been referred to by the learned counsel for the parties.

22. Clause 12 of the contract agreement, in reference to which the show-cause notice dated 11.08.2014 was issued, deals with termination. Clause 12.4, 12.8, 12.9 and 12.10 of the contract agreement are quoted herein-below for ready reference.

"12.4 TERMINATION FOR UNSATISFACTORY PERFORMANCE: If the Company considers that, the performance of the Contractor is unsatisfactory, or not upto the expected standard, the Company shall notify the Contractor in writing and specify in details the cause of the dissatisfaction.

12.8 CONSEQUENCES OF TERMINATION: In all cases of termination herein set forth, the obligation of the Company to pay for Services as per the Contract shall be limited to the period up to the date of termination. Notwithstanding the termination of the Contract, the parties shall continue to be bound by the provisions of the Contract that reasonably require some action or forbearance after such termination.

12.9 Upon termination of the Contract, Contractor shall return to Company all of Company's items, which are at the time in Contractor's possession.

12.10 In the event of termination of contract, Company will issue Notice of termination of the contract with date or event after which the contract will be terminated. The contract shall then stand terminated and the Contractor shall demobilise their personnel & materials."

23. The Banning/Debarring Policy of OIL was circulated on 03.05.2014. It will be useful to extract the following clauses:

"1.0 Introduction:

1.1. Works and procurement contracting has been one of the major activities for Oil India Limited (OIL), during the course of which, the Company deals with various external Agencies viz; parties/contractors/suppliers/consultants/bidders/agents/distributors/dealers etc. These entities are expected to adopt ethics of

highest standards and a very high degree of integrity, commitment and sincerity towards the work undertaken. However, on few occasions, the terms are found to be infringed and deviations from expected behaviour are observed. It is not in the interest of the company to deal with agencies who commit deception, fraud or other misconduct in the tendering and execution process and show poor performances in one or several contracts/supplies affecting company's operation.

1.2 The terms & conditions of Tenders/Contracts/Purchase Orders generally provide rights to Company for banning business dealings, if any party is found to have committed misconduct/fraud/breach of terms/anything, unethical not expected from Contractors/Suppliers/Consultants etc. Banning of business dealing involves civil consequences for the agency concerned. Judicial pronouncements have held the same to be a quasi-judicial process and thereby insist on adherence to the Principles of Natural Justice. Therefore, it is incumbent that adequate opportunity of hearing is provided and the explanation, if tendered, is considered before taking any decision in this regard keeping in view the facts and circumstances of the case. Accordingly, the procedure for Banning of Business dealings with Contractors has been laid down in the following guidelines for implementation across the Company.

2.0 Meaning:

2.1 The meaning of "Banning", "Black Listing", "Holiday Listing" and "Removing from Approved Panel" legally are the same. Hence hereinafter the subject matter shall be referred as "Holiday Listing" only. The purpose of putting a party on Holiday List is to protect the Company from dealing with an undesirable party.

2.2 "Party" means Bidder/Vendor/Firm/Contractor/Supplier/Consultant/Agent/Distributor/Dealer/sub-vendor/sub-contractor/sub-consultant etc.

3.0 Grounds for putting a Party on Holiday:

3.1 Reasons for putting a party on Holiday List may include any one or more of the following:

If a party,

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o) Poor performance of the supplier/contractors/service provider in one or several contracts/supplies affecting company's operations.

3.3 The grounds/reasons for holiday listing indicated in para 3.1 above are merely illustrative and are intended to provide a guideline for considering, placing a party on Holiday List. It will be for the initiating department in each case to evaluate whether the conduct of the party is such that it makes undesirable for the Company to deal further with the party and for the Committee (refer clause 5.0 hereinafter) and Approving Authority (refer clause 7.0 hereinafter) to determine this on reviewing all relevant factors.

4.0 Show Cause Notice:

4.1 Before placing the party on Holiday List, a fair opportunity of hearing by means of a Show Cause Notice should be given to the party.

4.2 A Proforma of the Show Cause Notice is enclosed herein as Attachment-I. A reasonable time (of 15 days) for a reply to the show cause notice should be given. The notice period may be extended at the request of the party, if so warranted, for a further period not exceeding 15 days. If no reply is received from the party even after the extended period of show cause notice, the decision may be taken ex-parte.

4.3 This Show Cause Notice should be issued:

4.4 The show cause notice should be issued with the approval of GM(Commercial) and GM (User Department) in case of Fields. In case of Pipeline and Projects, the show cause notice shall be issued with approval of Group Heads (User Department) and the Project Head. In case of Corporate Office, the Show Cause Notice shall be issued with approval of the Head of the user Department and C&P Department.

4.5 The Show Cause Notice should be issued to the party and a copy of the same may be addressed to its CEO (Chairman/President/Managing Director/Proprietor/Managing Partner etc.) as may be appropriate.

4.6 The decision to place the party on Holiday List should be taken expeditiously considering the reply, if any, received from the party to the show cause notice.

5.0 Formation of Committee:

5.1. A Committee shall be formed by the GM of initiating department to scrutinise the case including the reply received from the party, if any, to the show cause notice and recommend action(s) thereof to the Approving Authority. The Committee will comprise of at least one representative each from Execution/User Department, Finance Department and Contracting/Materials Department.

5.2 The Committee should not be formed consisting of junior level officers (A to C grade), wherever possible. Where cases need approval of CBC, the committee members should be of L2 level & above.

5.3 The Member from the Department issuing the Show Cause Notice shall be the Convener of the Committee.

5.4 Wherever felt necessary, the Committee may refer the case to Legal Department for their views before putting up recommendations to the Approving Authority.

5.5 In formulating its recommendation(s), the Committee shall take into account the overall effect on the Company of placing a party on Holiday List.

6.0 Duration of Holiday:

6.1 The Committee at para 5.1 above should deliberate on duration for which the party is to be put on holiday. Such holiday period should not be less than 01(one) year and more than 3(three) years from its effective date. Putting a party on holiday list shall be with prospective effect i.e., for future business dealings.

7.0 Approving Authority for putting a Party on Holiday:

7.1 Heads of Projects other than Fields/Head of Pipelines/SBU Heads not below the rank of GM, shall be the Approving Authority as per the DOP with financial concurrence for putting a party on holiday for cases falling under their jurisdiction.

7.2 For placing a party on holiday in relation to tenders/contracts requiring CBC approval, CBC shall be the Approving Authority.

7.3 Commercial Head will be a member of the Approving Authority for cases not going to CBC and the member or the recommending committee for cases going to CBC.

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14.0 Disposal Tenders (For sale of goods):

The above guidelines shall also apply to parties for disposal tenders. In such cases "Lowest Bidder (L1), shall mean "Highest Bidder (H1)".

15.0 Based on this policy, a Management guideline is to be formulated before implementation highlighting the changes that would require in the tender documents. Guideline will also cover the details of the parameters which would decide the poor performance."

24. In the show-cause notice dated 11.08.2014, referring to Contract No. OIL/CDG/4167/DRLG/12 dated 07.01.2013 and various other letters issued by OIL observing very poor performance of the petitioner company in executing the contract, it was stated as follows:

"Repeated shut-downs of the "Rig operation (Total 3699.69 Hours equivalent to 154 days till date from the commencement date of 11.04.13 for Rig-1 and 06-09-13 for Rig-2) under the above contract due to your internal issues like shortage of consumables, manpower problem etc. have resulted heavy losses to OIL in terms of Drilling meterage and ultimately Production of crude oil and Gas. This has been considered as "Unsatisfactory performance" which qualifies for termination of the contract as per terms & conditions of the contract and also for putting your firm on "Holiday list" as per Banning Policy of OIL."

25. The petitioner company has stated in paragraph 4 of its reply that OIL had raised untenable cash calls against the petitioner in respect of the Mizoram and Amguri Blocks and started deducting the amounts from the bills of the drilling

contracts without any authority/approval and despite protests OIL continued to deduct the amount. It is stated that as a matter of fact, said deductions caused financial crunch in the petitioner company and created hurdles in operations causing frequent shutting downs and consequent poor performance in the execution of the contract and, as such, the petitioner is entitled to recovery of the excess deducted amount towards cash calls in those Blocks. Thus, such poor performance is not attributable to the petitioner company and it cannot be held responsible for the said poor performance in the execution of the contract. In the reply, it was stated that there is much improvement in the performance of Rigs and a chart was also given showing a comparison of the shutting downs prior to issuance of the earlier notice dated 08.03.2014 which, eventually, led to issuance of the notice dated 15.03.2014, which was the subject-matter of challenge in the earlier writ petition. It was also stated in the reply that the Banning Policy of OIL is not binding on the petitioner and the same cannot apply to the contract in question.

26. Having regard to the arguments of the parties, primarily, the following questions arise for determination:

"(i) Whether the Banning Policy circulated by letter dated 03.05.2014 is applicable to the petitioner?

(ii) Whether Clause 15 of the Banning Policy requires a Management Guideline to be formulated before the Banning Policy can be put into practice?

(iii) Assuming that the Banning Policy is applicable, whether without termination of the contract the petitioner can be put on the Holiday list?

(iv) Whether the show-cause reply given by the petitioner has received due consideration?

(v) Whether the decision-making process in putting the petitioner on Holiday List is vitiated in any manner?"

27. Before proceeding further, it will be appropriate to take note of the ratio of the cases cited by Mr. Sarma. In *Grosons Pharmaceuticals (supra)*, the Apex Court had noted that the appellant had only contractual relationship with the State Government and the relationship was not governed by any statutory rules which required that an approved contractor cannot be blacklisted without giving an opportunity of show cause and in such circumstances as the order of blacklisting of a contractor results in civil consequences, the only requirement of law while passing such an order was to observe the principle of *audi alteram partem* by way of giving an opportunity of show cause. Contention of the appellant that the order of blacklisting is vitiated, the same having been issued without supplying the materials on the basis of which the charges were sought to be established, was rejected.

28. In *Patel Engineering (supra)*, the Apex Court stated that decision of the State or its instrumentalities not to deal with certain persons or class of persons on

account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. It was further held that the authority of the State to blacklist a person is a necessary concomitant to the executive power of the state to carry on the trade or the business or making of contracts for any purpose. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally to achieve some legitimate purpose, which, in a given case, can vary depending upon various factors. In the said case, in the bid documents issued by the National Highway Authority of India, though there were provisions for blacklisting in certain eventualities, such eventualities did not embrace a situation arising from the successful bidder declining to enter into a contract. The successful bidder was blacklisted for not entering into the contract and the Apex Court rejected the contention of the blacklisted tenderer that he could not have been blacklisted holding that bid document being not a statutory instrument, the rules of interpretation of statutes and statutory instruments are not applicable to bid document and that such power is inherent in every person legally capable of entering into a contract.

29. Blacklisting is also described as putting person on Holiday List as in the instant case. Though nobody has a right to compel the State or the instrumentalities of the State to enter into a contract, everybody has a right to be treated equally when the State seeks to establish contractual relationships. The State or the instrumentalities can decline to enter into a contractual relationship with a person or class of persons for a legitimate purpose.

30. It is worth recalling at this stage that by an order dated 15.03.2014 the petitioner was put on a Holiday List, which action came to be challenged before this Court in WP(C) 2982/2014. Such order of putting the petitioner on Holiday List was passed when there was no Banning/Debarring Policy. On the ground of procedural impropriety for having issued the said order dated 15.03.2014 while there being no Banning/Debarring Policy, at the request of OIL, said order was allowed to be withdrawn and the writ petition was disposed of accordingly.

31. What stands out from above is that OIL wants to have a policy on banning/debarring and that, only on the basis thereof, steps are to be taken for the purpose of putting a contractor on a Holiday List. With that intent, Banning/Debarring Policy was framed and circulated.

32. The letter dated 03.05.2014 by which the approved Banning/Debarring Policy was circulated indicates that the same was circulated for compliance in the company with immediate effect. The Banning/Debarring Policy which was enclosed with the letter dated 03.05.2014, is styled as Guidelines for Banning Business Dealings. Such a policy stands on a much higher pedestal than a bid document in a particular contract and the policy having been framed, it stands to reason that the guidelines are adhered to at the time of exercising the power to put a contractor on a Holiday List. Assuming that the power to put a contractor on a Holiday List is inherent in OIL, by formulation of the Banning/Debarring Policy, the manner of exercise of such power has been delineated. If such policy

requires something more than giving of a notice to the contractor, or lays down parameters on which such power is to be exercised, the same would be required to be observed.

33. In Clause 1.2 thereof, it was noted that the terms and conditions of tenders/contracts/purchase orders, generally provide rights to company for banning business dealings if any party is found to have committed misconduct/fraud/breach of terms/anything unethical not expected from contractors/suppliers/consultants, etc. It is also noted that banning of business dealings involves civil consequences for the agency concerned. In Clause 1.1, it is indicated that it is not in the interest of the company to deal with agencies who commit deception, fraud or other misconduct in the tendering and execution process and show poor performances in one or several contracts/supplies affecting company's operation, and Clause 2.1 makes it explicit when it says the purpose of putting a party on Holiday list is to protect the company from dealing with an undesirable party. Clause 3.0 states the grounds for putting a party on Holiday List. It is the common case of the parties that in the instant case the petitioner was put on Holiday List in terms of Clause 3.1(o), which provides poor performance of the supplier/contractor/service provider in one or several contracts/supplies affecting company's operations. Clause 6.1 provides that putting a party on Holiday list shall be with prospective effect, i.e. for future business dealings. Clause 8.3 provides that if a party is put on Holiday list in one location/sphere and is doing the other jobs at that location, or any other location/sphere of the company, the party should be allowed to complete such works which have already been awarded.

34. A reading of the provisions of the Banning/Debarring Policy goes to show, as submitted by Mr. Sarma, that invocation of Banning/Debarring Policy is distinct and separate event which is not dependent or contingent upon termination of an existing contract. Termination of contract may also be effected along with putting a contractor on Holiday List, but it also envisages that a contractor can be put on Holiday List without terminating his existing contract. The choice is with the company. Therefore, I find no force in the submission of Mr. Das that without terminating the contract of the petitioner, the petitioner could not have been placed in the Holiday List. The fact that the show-cause notice indicated that unsatisfactory performance of the petitioner qualifies for termination of the contract as per terms and conditions of the contract and the OIL did not terminate the contract of the petitioner finally, will not be of any consequence.

35. Termination of contract, in terms of Clause 12.4 is permissible, if the company considers that the performance of the contractor is unsatisfactory, or not up to the expectation, after notifying the contractor in the manner prescribed therein and giving opportunity to him to comply with the requisitions. The consequences of termination are delineated in Clause 12.8, 12.9 and 12.10. The same may not call for elaborate discussion as termination of the contract has not taken place. Clause 11.0 of Special Conditions of Contract in Section III of the

contract agreement dealing with the subject of waivers and amendments, on which much reliance has been placed by Mr. Das, is on entirely different aspects. The Banning/Debarring Policy is a policy formulated to put a party on Holiday List with prospective effect. There is no reason why such policy cannot be applied to an existing contract provided that by application of the said policy, no prejudice is caused to a contractor. Clause 15.0 of the Banning/Debarring Policy, which speaks of changes that would be required to be effected in tender documents have to be understood in the sense that in future contracts, the contractor is aware that there is a banning policy in force. Therefore, I am unable to accept the submission of Mr. Das that the Banning/Debarring Policy will not be applicable to the petitioner inasmuch as the contract of the petitioner was prior in point of time to the coming into force of the Banning/Debarring Policy and also because of the fact that no amendment had taken place in the contract.

36. But the next question, which is an off-shoot of the question as to whether the Banning/Debarring Policy is applicable to the petitioner, is whether the petitioner could have been put on Holiday List on the allegations as contained in the show-cause notice dated 11.08.2014. While unsatisfactory performance permits termination of contract, amongst others, poor performance can be a ground for putting a contractor on Holiday List. In the show-cause notice dated 11.08.2014, there is reference to a number of letters issued prior to coming into force of the Banning/Debarring Policy. There is only one letter dated 07.07.2014 which is issued subsequent to the coming into force of the Banning/Debarring Policy. Unsatisfactory or poor performance as indicated in the said show-cause notice, starts with commencement of the contract with effect from 11.04.2013. The impugned order dated 20.12.2014, wherein a chronology of well shutdown events were given in a tabular form, as Annexure-1, has noted 14 events prior to coming into force of the Banning/Debarring Policy. It refers to only one event of shut down of 43.50 hours from 07.05.2014 to 09.05.2014, after the Banning/Debarring Policy had come into force. Poor performance was construed on the basis of all the shut downs indicated therein. OIL could not have taken into account events prior to coming into force of the Banning/Debarring Policy as the same would amount to giving retrospective effect to the Banning/Debarring Policy. If such retrospective effect is permitted to be given, it will run counter to the principles of fair play in action. The entire decision-making process revolved around shut downs starting on and from 28.04.2013, on which date the first shut down had taken place, after the contract was executed on 11.04.2013. The shut downs up to 03.05.2014 could not have been taken into account for the purpose of coming to a conclusion that there was unsatisfactory or poor performance of the contractor, though the same could have accorded a ground for termination of the contract. It bears repetition that, in the instant case, contract was not terminated on the ground of unsatisfactory performance, and the same assumes significance having regard to the fact that the Banning/Debarring Policy was sought to be invoked in respect of an existing contract with allegations of events of unsatisfactory or poor performance dating back prior to coming into force of

the Banning/Debarring Policy. It is to be noticed that though the plea of non-applicability of the Banning/Debarring Policy was taken in the show-cause reply, the issue was not even taken up for consideration.

37. There is another aspect of the matter. It is an admitted position that Management Guideline, formulation of which is contemplated in Clause 15.0 of the Banning/Debarring Policy, is yet to be formulated. It is noteworthy that the said Guideline is also supposed to cover details of the parameters which would decide poor performance. Therefore, the Banning/Debarring Policy itself visualizes laying down of parameters to determine poor performance for the purpose of banning. It cannot be on the ipse dixit of an authority as to what according to it constitutes poor performance for the purpose of putting a contractor on the Holiday list. Argument of Mr. Sarma that Clause 15.0 does not visualize such formulation of guideline and the same is relatable to disposal of tenders at Clause 14.0 under Disposal Tenders (for sale of goods), on the ground that there is no Heading of Clause 15.0 unlike other clauses, does not merit acceptance. Clause 15.0 is very specific that based on the policy, a Management Guideline is to be formulated before implementation. Therefore, even though the Banning/Debarring Policy can be applied in the case of the petitioner, before such application guidelines will have to be formulated before implementation of the Banning/Debarring Policy.

38. In view of the findings recorded by this Court on the applicability of the Banning/Debarring Policy in the facts and circumstances of the case against the respondent, it is not necessary to examine in detail question Nos. (iv) and (v) formulated by this Court.

39. In view of the above discussions, the impugned letter dated 20.12.2014 (Annexure-5 to the writ petition) is set aside and quashed. The writ petition is, accordingly, allowed. No cost.