

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

WP(C) No.2580/2022
Cav No.1569/2022

Reserved on : 30.11.2022
Pronounced on: 08.12.2022

Vinkal Sharma and others ...Petitioner(s)

Through:- Mr.Abhishek Gupta,Advocate

V/s

Union Territory of J&K and others ...Respondent(s)

Through:-Mr. Rahul Sharma, Dy. AG for R-1
Mr. Abhinav Sharma, Sr. Advocate with
Mr. Sidhant Gupta, Advocate for R-2

Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

1. The present writ petition has been filed on behalf of the petitioners, who claim to be the aspirants, who have responded to the advertisement for various examinations to be conducted by the Jammu & Kashmir Services Selection Board (JKSSB) and the two such examinations are Junior Engineer (civil), Jal Shakti Department and Sub Inspector (Home Department) to which all the petitioners have responded to and applied. The petitioners are seeking direction to respondent No.1 not to conduct the examination through respondent No.2 (M/s Aptech Limited), blacklisted in the past, which contract was given to respondent No.2 and as per the petitioners, the examinations are tentatively scheduled to be conducted from 05.12.2022 to 20.12.2022. Petitioners further seek a direction to

appoint some other agency, which is not previously blacklisted for conducting such examinations through Computer Based Test Mode (CBTM) involving public employment. According to the petitioners, prior to this, respondent No.1 has previously floated a tender for empanelment of agency for conduct of its various examinations through Optical Mark Recognition (OMR) mode exams vide e-NIT No.01 of 2021. In that tender, one ND Info Systems Private Limited was the successful bidder but respondent No.1 awarded the contract to one Merit Trac Services Pvt. Ltd. overlooking the fact that in pre-qualification evaluation for e-NIT No.01 of 2021, the Merit Trac Services Private Ltd. clearly and in unambiguous terms mentioned itself to be a blacklisted firm. The Merit Track Services Pvt. Ltd. conducted the examinations of Junior Engineer (Civil) (Jal Shakti Department) on 20.03.2022 and Sub Inspector (Home Department) on 29.03.2022 and also Finance Account Assistant exam. The malpractice occurred during the aforesaid examinations and the examination conducted by the said Merit Trac Services Pvt. Ltd. was compromised as papers were leaked, as a consequence of which these two examinations among others were scrapped by respondent No.1. It has been brought to the notice of the Court that the matter at presently is being investigated by the Central Bureau of Investigation (CBI) and recently the CBI has filed charge-sheet in these matters. The further case of the petitioners is that since the contract was given to a blacklisted agency, this was the precise reason that malpractices occurred and the matter at presently is being investigated by the CBI.

2. It is further pleaded by the petitioners that in spite of the fact that the aforesaid agency i.e. Merit Trac Services Pvt. Ltd. has indulged in malpractices and the charge-sheet has been filed by the CBI, yet respondent No.1 till date has not held them accountable or blacklisted the agency. It has been contended by the learned counsel for the petitioners that the JKSSB has issued e-Tender Notice No.18 of 2022 dated 05.09.2022 by virtue of which tenders were invited for engagement of agency for conduct of Computer Based Tests/Examinations (End to End) for J&K SSB for a period of one year. The petitioners have drawn attention of this Court to Clause 2.8 of the aforesaid tender notice, which specifically provides as under:-

2.8	<p>Affidavit- The agency must certify that----</p> <ol style="list-style-type: none"> 1. It is not under a Declaration of Ineligibility for corrupt or fraudulent practices with any Government departments/agencies/ministries or PSU's and is not blacklisted by any government departments/agency/Ministries or PSUs. 2. If successful, the bidding agency will undertake the assignment in accordance with the Scope of Work and provide a dedicated, well qualified team for the purpose. 	<p>A declaration sworn by the authorized representative of bidding Agency to be submitted as Annexure-C.</p>
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	3. All the documents enclosed are True and nothing has been fabricated.	
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3. It has further been pleaded by the petitioners that the aforesaid e-tender notice required the bidder to submit a declaration by way of an Affidavit in the form as Annexure-C. For facility of reference, relevant portion of Annexure-C: Affidavit is reproduced hereunder:-

“1.We are not under any Declaration of Ineligibility for corrupt or fraudulent practices with any Government departments/agencies/ ministries or PSU’s and we are not blacklisted by any government departments/agency/Ministries or PSUs.

2. If successful, we will undertake the assignment in accordance with the Scope of Work.

3. The firm has never been blacklisted in the past by any Govt./Private Institution of the country and there is no case pending in any Investigating Agency.

4. If successful, we will provide a dedicated, well qualified team for the purpose.

5. All the documents enclosed/uploaded in response to the above quoted tender are True and nothing has been fabricated.

6. In the event of the failure of complying with any of the above condition, we are liable for initiation of necessary legal/criminal proceeding against us along with forfeiture of the EMD.”

4. From a bare perusal of the aforesaid terms and conditions of the tender notice coupled with declaration in Form-C, it was emphatically clear that the agency was under an obligation to submit a declaration that it has never been blacklisted in the past by any Govt./Private Institution of the country and there is no case pending in any investigation agency.

5. The brief case of the petitioners before this Court is that since respondent No.2 i.e. M/s Aptech Limited did not fulfill in the aforesaid criteria, respondent No.1 with a view to award contract in favour of the said agency, issued a corrigendum No.01 dated 14.09.2022 to e-NIT No.18 of 2022 dated 05.09.2022, wherein amongst other conditions, aforesaid clause in the affidavit was changed with a view to lift the rider for Respondent No.2 to participate in the tendering process and ultimately award contract in its favour and to shower undue benefit on respondent No.2, conditions were tailor-made, so that the contract is awarded to respondent No.2 and, accordingly, aforesaid corrigendum was issued. The petitioners in the writ petition have reproduced para-9 of the aforesaid corrigendum, which specifically reads thus:-

“9. At Annexure C-Affidavit (page No.38) Condition No.3 is re-casted as “The Firm/Agency is not involved in any ongoing investigation by any investigating agency related to conduct of CBT exams. Further, Firm/Agency is not blacklisted/debarred by any govt. Body/Govt. Institution/Board/PSU of the Country as on date.”

6. The petitioners have further pleaded that it has been specifically provided in the aforesaid NIT dated 05.09.2022 in Note 4 of Clause 3 that any addendum/corrigendum to the e-NIT, if required, shall be uploaded on

the website www.jktenders.gov.in. It is the specific case of the petitioners that no such corrigendum was issued by respondent No.1 and it was published only in one newspaper namely, "State Times", which did not have wide circulation. The publication of the corrigendum in the aforesaid newspaper, which did not have wide circulation, clearly proves the conduct of respondent No.1 that it was determined to give preference to respondent No.2 right from the beginning.

7. The further case of the petitioners is that some of the aspirants came to know about the corrigendum and they started raising voice against the corrigendum as a consequence of which, respondent No.1 in a hush-up manner cancelled the tender and shortly floated a new tender in which the same condition of the corrigendum was added in place of earlier condition, which finds mention in NIT No.18 of 2022 with a view to favour their blue-eyed person i.e. respondent No.1. The specific case of the petitioners is that respondent No.1 with mala fide intention in an arbitrary manner changed the terms and condition of the earlier NIT. With a view to favour respondent No.2 the condition was tailor-made so that respondent No.2 can participate in the tendering process and ultimately the contract can be awarded to such respondent.

8. It has been specifically pleaded by the petitioners that respondent No.2 has already been involved in various malpractices and irregularities and has been blacklisted by the UP Power Corporation Limited (UPPCL). It has further been contended that respondent No.2 was involved in malpractices in Rajasthan police constable recruitment exam which was

cancelled later on. The further case of the petitioners is that vide order dated 23.05.2019 issued by the UPPCL, respondent No.2 was blacklisted for award of contract for a period of three years after it was found that it has resorted to and facilitated hacking and cheating by candidates in public examination. Feeling aggrieved of the same, respondent No.2 preferred a writ petition before the Allahabad High Court to assail the black listing order passed by the UPPCL dated 23.05.2019. The petitioners have referred to the judgment passed by a Division Bench of the Allahabad High Court dated 07.08.2019 in Civil Miscellaneous Writ Petition No.19639/2019 titled M/s APTECH Lt. v. UP Power Corporation and another. In paragraph No.4 of the judgment of Allahabad High Court, it has been observed as under:-

“14. He further submits that from a bare perusal of the F.I.R., it is evident that it contained the averment in regard to Aptech Limited being the examination conducting agency its failure to ensure that the computer systems which were installed at the examination centres, namely, J.K.Public School, Lucknow and Mahabir Prasad Degree College did not contain any virus/hacking software. Thus, from the F.I.R. it is clear that the Aptech Limited had not only failed to ensure that the computer systems were properly sanitized and free from hacking etc. but also facilitated the accused persons to install AMMY ADMIN software which gave access to such systems to the hackers to hack the examination papers and to benefit certain of the candidates illegally. The report of the S.T.F.U.P. police spells out the technical shortcoming/anomalies at the end of the petitioner.”

9. Learned counsel for the petitioners has also referred to a judgment passed by the Delhi High Court in *WP(C) No.6922/2020 titled M/s APTECH LIMITED v. Union of India and another* on 11.02.2021 wherein a cost of Rs.10,00,000/- has been imposed upon respondent No.2

by observing that organizations resorting to or permitting malpractice at an institutional level should be kept at bay, by bodies conducting public examination and such conduct ought not to be condoned. Respondent No.2 through the medium of aforesaid writ petition before the Delhi High Court had challenged disqualification dated 28.08.2020 imposed upon it with a further direction to allow respondent No.2 to participate in the tendering process. While dismissing the writ petition of respondent No.2, High Court of Delhi has observed that the writ petition filed by respondent No.2 was gross abuse of the process of Court as respondent No.2 (petitioner therein) has not come to the Court while invoking its discretionary jurisdiction with clean hands because respondent No.2 has deliberately suppressed from the Court the judgment of the Allahabad High Court, which has returned a specific finding about the blameworthy conduct of Respondent No.2, besides giving false declaration while submitting its bid on a completely specious premise. Since respondent No.2 did not disclose in its declaration that it had been blacklisted by UPPCL on 23.05.2019 for a period of three years and the said blameworthy conduct of respondent No.2 was noticed in the blacklisting order as well as in the decision of the Allahabad High Court and respondent No.2 was found guilty of having installed a software which made it possible for candidates to hack the system and to have resorted for cheating.

10. Learned counsel for the petitioners has submitted that since respondent No.2 was conscious of the aforesaid position and sought to cover its blameworthy conduct and falsity in the declaration given in Form

“B”. Accordingly, the writ petition filed by respondent No.2 was dismissed and a cost of Rs.10,00,000/- was imposed upon it.

11. According to the petitioners, when new tender bearing No.19 of 2022 was issued in favour of respondent No.2, the aspirants became curious of their future and fearing unfair recruitment process, they approached number of times to respondent No.1 and verbally appraised about the situation and consequently filed a representation dated 04.11.2022 against respondent No.2 being a blacklisted agency for UP and further in the State of Assam and Rajasthan also respondent No.2 has been indicted in the process. Further case of the petitioners is that although, two agencies, namely Aptech Limited and Eduquity Career Technologies Pvt. Ltd. prequalified for technical presentation and evaluation but the technical bid was won by Eduquity Career Technologies Pvt. Ltd. and was declared technically superior agency, who could better handle the online examination but instead the contract was awarded to respondent No.2, who has scored better in the financial bid. With a view to fortify their claim, the petitioners have placed on record the minutes of the meeting showing technical and financial score of both the bidding agencies, which clearly proves beyond any shadow of doubt that Eduquity Career Technologies Pvt. Ltd. has scored better than respondent No.2 in the technical bid.

12. It has also been contended by the learned counsel for the petitioners that owing to the scam done in the OMR based examination where there was no check on the standard of procedure adopted for conducting examination by the service provider, respondent No.1 issued tender for

selection of service provider for review/audit of examination process of computer based test of agency vide e-Tender No.20 of 2022 dated 17.10.2020 and there too, overlooking poor response from agencies, agency namely Ernst and Young LLP was given tender on 22.11.2022. It has been further pleaded that Ernst and Young LLP was fined 100 million penalty for employees cheating on CPA Ethics Exams and for misleading investigation. As per the petitioners, respondent No.1 did not learn from its past mistakes inspite of the fact that their two examinations were scrapped and matter was referred to the CBI, yet they awarded the contract for conducting examination for one year to a Agency, which was blacklisted and tainted and was involved in malpractices. Feeling aggrieved of the same, the petitioners, who are young aspirants hailing from different parts of the Union Territory have come to this Court through the medium of present writ petition and have sought the following reliefs:-

“a) Writ of Certiorari quashing the contract given by respondent No.1 in favour of respondent No.2 pursuant to e-Tender Notice No.19 of 2022 dated 30/09/2022 for conduct of its various examinations through Computer Based Test mode in favour of respondent No.2. Further also quashing the contract given by respondent No.1 in favour of respondent No.3 pursuant to e-Tender notice No.20 of 2022 dated 17.10.2022 for selection of service provider for review/audit of examination process of computer bases test (CBT) in favour of respondent No.3 and direct the respondent No.1 to get it audited by some government agency or other body and penalizing the culprits in case of any anomalies of malpractices, cheating found.

b) Writ of Mandamus directing the respondent No.1 not to conduct its various examinations through respondent No.2 being a blacklisted agency and to reissue notice inviting tender for conduct of its

examination (end to end) through Computer Based Test and appoint only a non blacklisted agency.”

13. With a view to substantiate their claim that respondent No.2 was a blacklisted agency and should not have been awarded the contract, the petitioners have also supplied brief synopsis to this Court, which was taken on record after the matter was being heard at length in which the petitioners pointed out irregularities committed by respondent No.2, which are as under:-

- “i) UP Jal Nigam recruitment scam, Aptech hired in 2016, mass irregularities and malpractices in appointments, 1188 appointments cancelled out of 1300 post in 2020 after investigation by STF.
- ii) Rajasthan Police constable recruitment scam, Aptech was hired and exam held in 2017, after complaint investigation started, director of Aptech infotech with the help of others aided in hacking IP, irregularities found in 2018.
- iii) UPPCL hired Aptech Ltd for exam in 2018 after irregularities via, system mirroring, and various other modes by STF exam scrapped and firm blacklisted for three years from May, 2019 to May, 2022.
- iv) August, 2020 Aptech conducted exam for Assam Irrigation Department, irregularities found, court stayed the result.

- v) In 2022 Allahabad High Court NTA awarded contract to M/s Aptech, allegation of irregularities after exam.
- vi) NTA has served a show cause notice to Aptech after an audit of recently conducted exams for NTA, by auditing partner of NTA.”

14. Heard learned counsel for the petitioners, Mr. Rahul Sharma, learned Deputy Advocate General appearing on behalf of respondent No.1 and Mr. Abhinav Sharma, learned senior counsel along with Mr. Sidhant Gupta, Advocate appearing on behalf of respondent No.2. However, none has appeared on behalf of respondent No.3. Since learned counsel for the petitioners submits that the petitioners will not press for any relief against respondent No.3 in the present petition, therefore, its presence was felt not necessary.

15. With the consent of learned counsel for the parties, the present writ petition is admitted to final hearing and taken up for final disposal.

16. Mr. Rahul Sharma, learned Deputy Advocate General, representing the SSB-Respondent No.1 was directed to produce the original record, which has been produced by him. Mr. Rahul Sharma has drawn attention of this Court with respect to the pre-bid queries of M/s Aptech and also decision thereof, which was agreed by the tendering committee. It is argued that the terms and conditions were changed pursuant to the decision of the tendering committee and accordingly, terms of affidavit were recast as below:-

“The Firm/Agency is not involved in any ongoing investigation by any investigating agency related to conduct of CBT exams. Further, Firm/Agency is not blacklisted/debarred by any Govt. body. Institution/Board/PSU of the country as on date.”

17. It has further been argued by learned counsel for respondent No.1 that the corrigendum was published not only in State Times but also in The Hindu, Times of India Delhi Edition, Rising Kashmir and also on the website. Mr. Rahul Sharma has also taken this Court to the minutes of the purchase committee held under the chairmanship of the Chairman on 25.10.2022 by virtue of which technical evaluation as per the criteria specified in the NIT No.19 of 2022 was reflected. Besides, learned counsel for respondent No.1 has also placed on record the evaluation result of stage-1 Eligibility of e-NIT No.18 of 2022 dated 05.09.2022 with regard to engagement of respondent No.2 for conducting computer based tests for JKSSB.

18. Mr. Abhinav Sharma, learned Senior Counsel appearing on behalf of respondent No.2, who is on caveat, along with Mr. Mayank gupta, Advocate vehemently argued that the turnover of the bidding agency, which was fixed at the minimum average turnover of INR 2000.00 lac for the last three financial year i.e. 2019-20, 2020-21 and 2021-22 from CBT examinations at Clause 2.3 was slashed by virtue of fresh tender dated 30.09.2022 to 1000. Lac for the last three financial years with a view to have maximum competition. Learned Senior counsel has justified that on the day of the tendering, respondent No.2 was not blacklisted, thus, there was no legal impediment for respondent No.2 to participate in the tendering

process. He has further submitted that since the condition in the earlier tender notice was vague in nature and subsequently terminology of the affidavit was changed with regard to the blacklisting. Because on the date of tender, respondent No.2 was not blacklisted by any government agency and thus, respondent No.2 was having every right to participate in the bidding process. It has further been argued by the learned counsel that initially respondent No.2 was blacklisted for three years w.e.f. 23.05.2019 to 22.05.2022 and on the date of the fresh tender, respondent NO.2 was not disqualified and has every right to participate in the same. It has been further argued that a transparent procedure has been adopted by respondent No.1 while awarding contract to respondent No.2 and there is no violation of the terms and conditions of the tender notice. Relying upon a judgment of the Supreme Court rendered in the case of *Kulja Industries Limited v. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others, (2014) 14 SCC 731*, learned Senior Counsel argues that the blacklisting signifies a business decision by which the party affected by the breach decides not to enter into any relationship with the party committing the breach and any such decision is subject to judicial review when the same is taken by the State or its instrumentalities. He further submitted that since as on the date of tender, respondent No.2 has not been blacklisted by the Government and thus, it is not prevented from entering into lawful relationship with respondent No.1

19. There is no denying of the fact that JKSSB is a premier recruiting agency in the Union Territory of J&K having mandate of undertaking

recruitment in a fair and transparent manner to the non-gazetted positions including Class-IV vacancies as referred to it by various government departments and has the power/authority to hold examination/interviews including skill tests wherever required for carrying out the recruitment to various posts. From the record, which has been produced by respondent No.1, it is apparent that the SSB is trying to make efforts to improve the efficacy of recruitment process by infusing technology-based interventions like CBT mode of examination which is more secure and transparent than the traditional OMR based tests. From the record, it is apparent that respondent No.1 has taken a decision on 10.08.2022 for authorizing the JKSSB to undertake end to end process including setting of question papers in computer bases test through authorized agency. Pursuant thereto, a meeting was held under the chairmanship of the Chief Secretary in which a decision was taken that the JKSSB shall conduct all the examinations through CBT mode only. The CBT mode of examinations reduced human involvement in the process thereby decreasing the chances of paper leakage as cumbersome process of printing and transportation of examination material involved in OMR bases examinations is eliminated.

20. Major recruiting agencies like the Staff Selection Commission, Railway Recruitment Board have also switched to CBT mode of examination. From the record, it is apparent that in the note-sheet, the SSB has admitted that the recent developments, which has led to the cancellation of the examination for the post of Sub Inspector (Home Department and enquiry in the examination for Accounts Assistant

(Finance) and Junior Engineer (Jal Shakti Department) has seriously dented the image and raised eye brow about the efficacy of the recruitment method adopted by the SSB and, accordingly, the SSB has taken a decision to have audit of the entire recruitment process as well as agencies involved in conduct of examinations for respondent No.1. The record further reveals that the SSB deliberated upon the issue and decided to discontinue the conduct of CBT examination through NSEIT Ltd in view of the subsequent developments leading to the cancellation of examination for the post of Sub Inspector (Home Department) and enquiry into the examination of Account Assistants (Finance) and Junior Engineer (Jal Shakti Department) and the decision of the Board was conveyed to the aforesaid agency NSEIT on 24.08.2022. The record further reveals that respondent No.1 constituted a tendering committee for finalizing a comprehensive Tender Document and for floating an e-Tender for conducting the computer based tests by the J&K Services Selection Board.

21. The record further reveals that pursuant to the issuance of e-NIT No.18 of 2022 dated 05.09.2022, the tendering Committee constituted vide order No.260 dated 25.08.2022 held a pre-bid meeting with prospective bidders on 12.09.2022, which is evident from the communication dated 09.09.2022. Pursuant thereto, from the record note of the pre-bid meeting, it is apparent that the prospective bidders highlighted various issues including pre bid queries on various clauses and items included in the Tender Document as uploaded by respondent No.1 The record note further reveals that the queries were deliberated upon by the members of the

tendering committee and the copies of the Pre-Bid queries were retained by the Tendering Committee for its decision, to be recorded against each pre-bid query on 13.09.2022.

22. I have gone through the original record with regard to the pre-bid queries of M/s Aptech and other agencies and subsequent decision thereof. The record nowhere reveals that what weighed with the authorities to change the terminology of the affidavit and what weighed with the authorities to re-cast the condition No.3 of the Affidavit by virtue of a corrigendum and subsequently issuance of a fresh tender dated 30.09.2022 vide e-Tender Notice No.19 of 2022.

23. The record further reveals that by virtue of corrigendum No.02 to e-NIT No.18 of 2022 dated 05.09.2022 dated 28.09.2022 specified the key events and dates, which is reproduced hereunder:-

“The “Key Events and Dates” mentioned at serial No.3 in the above mentioned tender document are hereby revised as below—

S.No.	Event	Earlier Scheduled date	Revised Scheduled date
1.	Date of opening of Technical Bids	27.09.2022, 2.00 PM	29.09.2022, 11.00 AM
2	Date of Presentation	29.09.2022, 11.00 AM	30.09.2022, 10.00 AM

24. Another Government Order No. 1117-JK(GAD) of 2022 dated 28.09.2022 came to be issued by virtue of which sanction was accorded to

the constitution of Purchase Committee in J&K SSB specifying the terms and conditions of the purchase committee.

25. I have gone through the record minutely. How and under what circumstances, the conditions were tailor-made for respondent No.2 is not forthcoming from the record and what weighed with respondent No.1 to carry out changes is also not borne from the record. The record further reveals that on 29.09.2022 tenders received against e-NIT No.18 of 2022 were opened and it was found that four agencies, namely, Eduquity Career Technologies Pvt. Ltd., Ava Systems, Cygnus Information Solutions Pvt. Ltd and Aptech Ltd had participated and on the same day a decision was taken to cancel the tenders and floating of fresh tenders recommended.

26. On 22.10.2022, Tenders received against e-NIT No.19 of 2022 were opened and it was found that five agencies namely Ava Systems, Diversified Business Solutions Pvt. Ltd., Aptech Ltd., Cygnus Information Solutions Pvt. Ltd. And Eduquity Career Technologies Pvt. Ltd. had participated. Eligibility document submitted by the agency were evaluated and it was found that all three agencies have submitted deficient documents and two agencies namely Aptech and Edquity has submitted all the required documents and accordingly were declared eligible for stage 2, Technical evaluation and presentations. On 25.10.2022, Both the stage 1 qualified agencies were evaluated technically and presentations were taken from them. The technical stage result was issued on 28.10.2022 wherein respondent No.2 obtained 63/70 and Eduquity obtained 66.5/70. On 31.10.2022, Financial bids of both the agencies opened and as per the

tender conditions Aptech obtained 30/30 and Eduquity obtained 23.9875/30 points. Final cumulative score obtained by Aptech and Eduquity were 93 and 90.4875 respectively. The Aptech was declared successful as per the tender conditions. On 03.11.2022, Final negotiations on quoted rates held with Aptech Ltd and award of contract in favour of Aptech Ltd. is recommended by the Govt. constituted Purchase Committee of JKSSB. On 04.11.2022, Contract was awarded in favour of Aptech Ltd. and Letter of Intent was issued. On 05.12.2022, Exams of Junior Engineer (Civil) Jal Shakti Department scheduled to be conducted on 5th and 6th December, 2022 in four shifts across different centres in the Union Territory and admit cards (first stage) have been issued. On 07.12.2022, Exams of Sub Inspector Home Department is Scheduled to be conducted from 7th December to 19th December, 2022 in 22 shifts across different centres in the Union Territory.

Locus Standi of Petitioners

27. By way of the aforesaid *mala fide* exercise of power, right of the participants to participate in a selection process for a public post in a fair and transparent manner has also been infringed and thus, the petitioners, who are aspiring candidates for such positions have a locus to call in question the mala fide action of respondent No.1 and, thus, the writ petition filed by the petitioners is maintainable. Once the right to participate in a selection process for a public post by aspiring candidates in a fair and transparent manner has been taken away by the impugned action of respondent No.1 by awarding contract to a tainted agency, the public

interest has also suffered in the present case as it is a deliberate attempt on part of respondent No.1 right from the beginning to award contract to respondent No.2. Thus, in the present case the legitimate expectations of the aspiring candidates for participating in a fair and transparent recruitment process has been infringed, which can be the basis for judicial review in the present case.

Legal Analysis

28. **Whether the process adopted or decision made by the authority is mala fide or intended to favour someone, also does Arbitrariness exist in the decision making process:** *Firstly*, This is a rarest of the rare case where the Jammu and Kashmir Services Selection Board, which is a premier recruiting agency of the Union Territory of J&K having the mandate of undertaking recruitment in a fair and transparent manner and its action in the past leading to cancellation of examination for the post of Sub Inspectors in Police Department and Junior Engineer in Jal Shakti Department has seriously dented the image and raised questions about the efficacy of the recruitment method adopted by the SSB, yet again has perpetuated its wrong in giving contract to an agency which is tainted/previously blacklisted for perpetuating fraud in the form of hacking of question papers.

29. From a perusal of the record, it appears that the SSB in view of the recent developments, has admitted its fault and accordingly, a conscious decision was taken for serious audit of the entire recruitment process as well as the agencies engaged/empanelled for conduct of examination by the

JKSSB, wherein it was observed that the candidate's faith was the paramount importance and a decision was taken that the Board shall conduct all the examinations through CBT mode only while taking the decision to float fresh tender for empanelling the most suitable agency for conducting the examinations.

30. It is not so even, respondent No.2, whose action are being investigated by the premier agency of the Country i.e. CBI and the challan has also been produced with regard to the recruitment of Sub Inspectors and Junior Engineer in Jal Shakti Department, respondent No.1 has yet again altered/changed the terms and conditions of the NIT with a view to favour their own blue-eyed persons i.e. respondent No.2 by annulling/cancelling the earlier tendering process and initiating fresh process again by issuing a fresh tender by way of changing the conditions, which were tailor-made just to give benefit to respondent No.2 so that respondent No.2 is not ousted from the zone of competing or award of contract. The SSB has, in a way, altered the terms and conditions of the NIT by incorporating negative conditions and relaxing the terminology of the affidavit by incorporating that "*The Firm/Agency is not involved in any ongoing investigation by any investigating agency related to conduct of CBT exams. Further, Firm/Agency is not blacklisted/debarred by any Govt. body. Institution/Board/PSU of the country as on date*" when in the earlier tender notice, which was cancelled, the terminology in the affidavit was that "*the Firm has never been blacklisted in the past, by any Govt./Private*

Institution of the country and there is no case pending in any Investigating Agency”.

31. Since respondent No.2 was already blacklisted in the past and there was a case pending with the investigating agency, the aforesaid condition was relaxed with a view to shower undue benefit on respondent NO.2 and the conditions were tailor-made so that respondent No.2 is not ousted from the consideration zone or award of contract.

32. The entire action of the SSB by relaxing the aforesaid conditions smacks foul play and leads to an irresistible conclusion that the SSB was bent upon to engage a previously blacklisted/tainted agency when already SSB's actions are being investigated/enquired by the CBI for awarding contract to a tainted agency in the past. By way of aforesaid action, the fundamental rights of all the participants, which are guaranteed by Article 16 of the Constitution have been infringed i.e. their right to participate in a fair and transparent manner selection process has been infringed by the impugned action on part of SSB by awarding contract in favour of a tainted agency. It goes without saying that right to participate in a selection process does not mean a mere minimal participation in a process, but which is fair and transparent and not loathed with *mala fide* consideration. No rational whatsoever is forthcoming from the record supplied to this Court for withdrawing the earlier NIT and initiating the fresh tendering process by altering the terms and conditions of the NIT with a view to favour a tainted/blacklisted agency.

33. The cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse stand on a different footing as they may require a higher degree of fairness in action. The Hon'ble Supreme Court of India in a case titled *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517 has held as under:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”.

When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind;

- *A contract is a commercial transaction.*
- *Evaluating tenders and awarding contracts are essentially commercial functions.*
- *Principles of equity and natural justice stay at a distance.*

If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will

not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

34. **Secondly**, In contractual sphere as in all other State action, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. A public authority like SSB possesses powers only to use them for public good and a duty is cast upon the SSB to act fairly and to adopt a procedure, which is fair play in action. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen

to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State action. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bonafides of the decision in a given case. The decision so made would be exposed to challenge to the ground of arbitrariness. Thus, Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

35. It goes without saying that mere reasonable or legitimate expectation of a citizen in such a situation may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law.

36. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process, which is required to be considered keeping in view larger public interest. I am fortified with the view of the Supreme Court in a case titled, *Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries*, 1993 AIR SCW 1509, wherein it has held as under:-

“In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to [Article 14](#) of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This impose the duty to act fairly and to adopt a procedure which is ‘fairplay in action’. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision making process in all State actions. To satisfy this requirement of non- arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely lo be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness.”

37. There was an implied impression in the present case that in view of the past recent developments the SSB will conduct a fair and transparent recruitment process and the doctrine of legitimate expectation has an important place in the developing law of judicial review but respondent No.1 has again given a go by to indulge in malpractices by way of awarding contract to a tainted/previously blacklisted agency. The illegalities in the present case are not isolated individual acts of malpractice but systemic illegalities that raises serious questions regarding the legitimacy of the entire selection/tender process.

38. The expression “legitimate expectation” appears to have been originated by Lord Denning, M.R. in the leading decision of Schmidt v. Secy. of State [(1969) 1 All ER 904. The Court may not insist an administrative authority to act judicially but insist it to act fairly.

39. The SSB by its own volition has entered into contract with a tainted agency, which is highly unreasonable and arbitrary and attracts the doctrine of legitimate expectations in the present case. I am fortified by the observations of Supreme Court in paragraph No.39 of **Bhushan Power & Steel Limited v. State of Orissa (2012) 4 SCC 246**, relevant extract whereof reads thus:-

“39. The State Government had, on its own volition, entered into the MOU with Bhushan Limited on 15th May, 2002, and had even agreed to request the Central Government to allot mining areas and coal blocks for operating the steel plant. Whatever differences that may have resulted on account of the dispute within the Bhushan Group, which could have led to the rethinking on the part of the State Government, have now been laid to rest by virtue of the settlement arrived at between the Bhushan Limited (now BPSL) and BSSL. The State Government has also accepted the said

position. In addition to the above, the action taken by the State Government appears to us to be highly unreasonable and arbitrary and also attracts the doctrine of legitimate expectation.”

40. The State and its instrumentalities cannot treat unequal as equals as that would be in violation of Article 14 of the Constitution. The action of respondent No.1 to cancel the earlier tender notice was worse than the problem. Altering the terms and conditions of the tender document and the affidavit class, respondent No.1, in a way, has put both categories, tainted and the rest at par, which is highly unjustified, arbitrary and unconstitutional being violative of Article 14 of the Constitution.

41. Even by virtue of the aforesaid policy by altering the terms and conditions of the tendering document, tender conditions has violated the doctrine of level playing field. When tenders were invited, the terms and conditions must indicate with legal sanctity, norms and benchmarks. This legal certainty is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment, which violates the doctrine of “level playing field”. I am fortified by the view expressed by the Supreme Court in **Reliance Energy v. Maharashtra State Road (2007) 8 SCC 1**, wherein it has held as under:

“38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. **This "legal certainty" is an important aspect of the rule of law. If there is vagueness or**

subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

42. Since there was a specific embargo/rider for the blacklisted/tainted agency to participate in the tendering process in the earlier NIT and respondent No.1 subsequently have relaxed the aforesaid condition with a view to favour respondent No.2 when such conditions cannot be abolished at the whims and fancies of some officials or members of the tendering committee when no plausible reasoning or justification is forthcoming from the record or its noting. What weighed with the authorities to change the terminology of the tender document is not forthcoming from the record nor have any reasons been spelt out for the same.

43. It is settled proposition of law that action of the State and its instrumentalities must have the nexus with the object sought to be achieved. In award of contract the **public interest is paramount** and there should be no arbitrariness in the matter of award of contract and all the participants in the tendering process should be treated alike. There are three legal principles, which would weigh with the Court to step in with regard to award of contract and the procedure adopted, which are enumerated as under:-

- “i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest;

- ii) The Government cannot arbitrary choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate;
- iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.”

44. Hon’ble the Supreme Court in **Monarch Infrastructure (P) Ltd. v. Commissioner, AIR 2000 SC 2272** has observed as under:-

“There have been several decisions rendered by this Court on the question of tender process, the award of contract and evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike”.

45. What was the reasonable nexus with the object sought to be achieved while altering the terms and conditions of the tendering document is not forthcoming from the record and the whole action on part of the SSB smacks foul play and contrary to public interest where career of thousands of the aspirants are at stake by awarding the contract to a tainted/blacklisted agency. Thus, the change of the conditions in the tender document by relaxing the standards by way of policy has no nexus with the object sought to be achieved, which is loathed with mala fide consideration.

46. **It is settled proposition of law that action of the State and its instrumentalities must reflect an approach informed by reasons.** I have gone through the record supplied by the SSB minutely and found that no reasons have been assigned while taking a decision to relax the terms and conditions of the tender document or issuing fresh NIT. Failure to give reason amounts to denial of justice. The reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at. The reasons substitute subjectivity by objectivity. One of the salutary requirements of natural justice is to spelling out reasons for altering the decision.

47. Since the reasons are the links between the materials on which certain conclusions are based and the actual conclusion. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. The reasons should reveal the real nexus between the facts considered and the conclusions reached. Only in that eventuality, the decision recorded be shown to be manifestly just and reasonable.

48. In the present case, the record does not speak what weighed with the authorities to alter the terms and conditions of the tender document or going for fresh tendering process.

49. The public authority even in contractual matters like SSB is not having unfettered discretion but the same should be exercised reasonably. Merely that the SSB has certain elbow room available for use of discretion in accepting offer in contracts, the same is still bound by and ought to be

done within the four corners of the requirements of law, especially Article 14 of the Constitution. Today the Government and its instrumentalities in a welfare state is the regulator and dispenser of the special services and provider of a large number of benefits, including jobs, contracts, licenses, quotas and mineral rights etc. The discretion of such instrumentality like the SSB is not unlimited while distributing state largesse in its monetary discretion or at its sweet will as it does not stand in the same position as a private individual. Whatever its activity, the Government and its instrumentalities will be subject to restraints, inherent in its position in a democratic society. It cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal, like it has happened in the present case where the contract has been awarded by the SSB to respondent No.2.

50. The action of the State and its instrumentalities must be in conformity with the standards or norms which is not arbitrary, irrational or irrelevant. The power of discretion of the government and its agencies in the matter of grant of state largesse including award of job, contracts, quotas, licenses etc must be confined and structured by rational, relevant and non-discriminatory standard or norms in any particular case as it has happened in the present case, the action of the government and its agencies would be liable to be struck down in the absence of any reasoning to depart on valid principle.

51. There is no denying the fact that the government and its agencies has a freedom of contract but a fair play in the joints is a necessary concomitant

for an administrative body functioning in an administrative sphere or quasi-administrative sphere. The decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by *mala fides*. I am fortified by the judgment in *Tata Cellular v. Union of India (1994) 6 SCC 651*. The relevant extract of the judgment reads thus:-

“The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*.”

52. *Monarch Infrastructure (P) Ltd. (supra) and Union of India v. Dinesh Engineering Corporation, AIR 2001 SC 3887* are the instances, where the Court intervened in exercise of judicial review. In **Dinesh Engineering Corporation** (supra), it was held as follows:-

“a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognized by courts while dealing with public property. This requirement is necessary to avoid unreasonable

*and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. **Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution.***

53. In **State of U.P. v. Johri Mal, AIR 2004 SC 3800**, the Supreme Court held as follows:-

*“where administrative action is challenged under [Article 14](#) as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the constitutional courts as primary reviewing courts to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. For judging the arbitrariness of the order, **the test of unreasonableness may be applied.**”*

54. In such eventuality, the Court can interfere when the policy or the decision with regard to the award of contract is arbitrary, discriminatory/mala fide and having no nexus with the object sought to be achieved.

55. The sweep of Article 14 of the Constitution covers all State action. Non-arbitrariness and fairness are the two immobile and unalterable cornerstones of a legal behavioral baseline. The discretion, although, lies

with the SSB to change the policy but the same must be applied fairly and should not give an impression that it was so done arbitrarily or by any ulterior criteria to favour a particular party. The basic requirement of Article 14 is fairness in the action of the State and non-arbitrariness in essence and substance is the heartbeat of fair play, as has been held by the Supreme Court in the case of **Union of India v. International Trading Co, (2003) 5 SCC 437**. The relevant extract of the judgment is reproduced hereunder:-

*“15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of [Article 14](#) is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily on by any ulterior criteria. The wide sweep of [Article 14](#) and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. **The basic requirement of [Article 14](#) is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play.....”***

56. It is settled proposition of law that the Court does not sit as a court of appeal over the decision taken by the authority to award contract in a tendering process *but merely reviews the manner in which the decision was made*, as has been held by the Supreme Court in **Tata Cellular v. Union of India, (1994) 6 SCC 651**. Besides, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by *mala fides*.

57. Admittedly, in the present case the Court is reviewing the decision of respondent No.1 for awarding contract to respondent No.2, which is

tainted/blacklisted agency and on whose 10,00,000/- penalty was imposed by the High Court of Delhi for indulging in malpractices and misleading the Court by suppressing the material facts. Judicial review of the administrative action is intended to prevent arbitrariness, irrational, unreasonableness, bias and mala fide and its purpose is to check whether the decision made is lawful or not. In the present case the alteration effected by the decision making authority smacks foul play loathed with *mala fide* consideration and intended to favour a blacklisted agency which was tainted and blacklisted in the past right from the very inception.

58. There is no denying the fact that the State or its agencies like the SSB has the power to relax or waive the terms and conditions of the tender document but the waiver/relaxation of a particular rule/condition cannot be with a view to favour one particular bidder which will create doubt in the minds of the other bidders and would impair the rule of transparent and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In my view such approach should always be avoided. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. I am fortified by the judgment of Hon'ble Supreme Court in the case of [W.B. State Electricity Board v. Patel Engineering Co., \(2001\) 2 SCC 451](#). It is essential to maintain the sanctity and integrity of process of tender/bid and also award of contract. The relevant extract of the observation of the Supreme Court in Patel Engineering Co.(Supra) is reproduced hereunder:-

“The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a causality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules.”

59. The State has to confer equal treatment to parties which are similarly placed so as to provide a level playing field, ensuring fair competition. Article 14 of the Constitution embodies the principle of “non-discrimination”. It has to be read in conjunction with rights conferred by other article like Article 21 of the Constitution. Article 21 refers to “right to life”. It includes “opportunity” to all. A Constitution Bench of nine Judges in **I.R.Coelho v. State of Tamil Nadu,(2007) 2 SCC 1** has held that Articles 21 and 14 are the heart of the chapter on fundamental rights and they cover various aspect of life. Level Playing Field is an important concept while construing Article 19(1)(g) of the Constitution and the said doctrine is subject to public interest. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest.

60. In the present case, from the record it appears that whole action of respondent No.1 from the very beginning till award of contract is to favour respondent No.2 at the cost of other bidders, who have equal rights to participate by providing a level playing field ensuring fair competition. Thus, action of respondent No.1 in restricting the zone of consideration by manipulating the terms and conditions of tender notice is violative of Article 14, 21 and 19(1)(g) of the Constitution for all other competing bidders. *Paras 36 of Reliance Energy Limited v. Maharashtra State Road Development Corporation Limited, (2007) 8 SCC 1.*

“36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. [Article 14](#) of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like [Article 21](#) of the Constitution. The said [Article 21](#) refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of [I.R. Coelho vs. State of Tamil Nadu](#) (2007) 2 SCC 1, [Article 21/14](#) is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing [Article 19\(1\)\(g\)](#) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When [Article 19\(1\)\(g\)](#) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing

field" is an important doctrine which is embodied in [Article 19\(1\)\(g\)](#) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in [Article 19\(1\)\(g\)](#). Time has come, therefore, to say that [Article 14](#) which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with [Article 21](#) which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. [Article 14](#) applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

61. It is trite law that Article 14 of the Constitution applies to the matters of policy and if the policy or any action of the Government and its agencies in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional. The basic requirement of Article 14 is fairness in action of the State and its instrumentalities and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions of the authorities like SSB are amenable in the panorama of judicial review only to the extent that the

State and its agencies must act validly for a discernible reason, not whimsically for any ulterior motive. In the case of [Union of India and another vs. International Trading Co. and another](#) - (2003) 5 SCC 437, the Supreme Court held thus :-

"14. It is trite law that [Article 14](#) of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional."

62. What weighed with the authorities to change the policy by altering the terms and conditions of the tender document is not forthcoming from the record.

63. The SSB, as per their own admission, was in the process of adopting confidence building measures amongst students and various aspirants as their action in the past was already under cloud and matter of investigation by the CBI but respondent No.1 has again perpetuated the illegality and procedural impropriety by way of awarding the contract to respondent No.2, which is a tainted and blacklisted agency. Awarding contract to a blacklisted agency does not fall within the realm of confidence building measures or to restore the glory of SSB for which it was known in the past.

64. It is settled proposition of law that the State and its instrumentalities stand at a higher footing than a private party in contractual matters. The State or its instrumentalities cannot conduct themselves like ordinary businessmen playing games with others for monetary gains. State cannot behave like a man in the street and indulge in arm twisting tactics. Its

conduct and actions have to be exemplary and decisions have to be free from bias and unreasonableness.

65. From the record, it appears that in the technical evaluation of the bidders, which participated in the NIT No.19 of 2022 dated 30.09.2022, respondent No.2 has scored 90 points and on the other hand Eduquity Career Technologies Pvt. Ltd. has scored 95 points in total and the said agency has an edge in the technical evaluation, yet the purchase committee after evaluating technical bid had allowed the contract to respondent No.2 by giving undue weightage to the commercial value ignoring the public interest, which was paramount and also ignoring the reputation of respondent no.2, which was tainted. Every action of the Government and its instrumentalities has to pass the rigorous inquisition of fair play, lack of arbitrariness and its being founded on good and sound reasons. The State or its instrumentalities cannot conduct themselves like ordinary businessmen playing games with others for monetary gains. State cannot behave like a man in the street and indulge in arm twisting tactics. Its conduct and actions have to be exemplary and decisions have to be free from bias and unreasonableness.

66. In *Michigan Rubber v. State of Karnataka, (2012) 8 SCC 216*, the Supreme Court has held as under:-

“23. From the above decisions, the following principles emerge:

(a) The basis requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and

not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the government.”

67. As it has been stated in the preceding paragraphs coupled with which emerges from the record, the terms and conditions of the tender have been tailor-made to suit respondent No.2, infact this is a reverse process evolved to achieve that objective by relaxing the tender conditions having negative impact on a tainted/blacklisted agency in the past with a view that only one party may fit in the said process. Such an endeavour has been categorized as “Decision Oriented Systematic Analysis” (DOSA).

68. The Apex Court in various authoritative pronouncements has interpreted the word “blacklisting and its effect insofar as contractual matters are concerned. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government or its agencies for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction while granting/awarding contract.

69. Merely that respondent No.2 has excelled in financial bid will not be the sole criteria to award contract, when admittedly in the technical evaluation the Respondent No.2 was not upto mark. The public interest has to give way to commercial interest because in the present case it involves career of so many aspiring candidates, who will compete in the process of selection and the award of contract in such like cases can, in no way, be given to an agency, which is tainted and already blacklisted in the past.

70. In the present case, a blacklisted agency has been allowed to compete in the tendering process and the commercial interest has outweighed the public interest and, thus, the decision taken by respondent No.1 to award contract in favour of respondent No.2 cannot sustain the test of law, as there is every likelihood of biasness, favouritism and unfairness in the said process.

71. What was the larger public interest in altering the terms and conditions of the NIT issued by respondent No.1, initially by way of a

corrigendum and subsequently by way of issuing fresh NIT, is not borne out from the record nor any reason has been spelt out from the record supplied to this Court. Respondent No.2 has already been involved in various malpractices and irregularities and was blacklisted by UPPCL. Besides, respondent No.2 was also involved in malpractices in Rajasthan Police constable recruitment, in Irrigation Department of the State of Assam, Allahabad High Court NTA, UPPCL etc. Even High Court of Delhi has imposed fine of Rs.10,00,000/- on respondent No.2. While passing the aforesaid judgment, High Court of Delhi has observed that the organization resorting to or permitting malpractices at institutional level should be kept at bay by bodies conducting public exams. Yet inspite of the clear cut direction issued by the Delhi High Court, contract has been given to respondent No.2 without any justifiable cause.

72. Respondent No.2 in the present case has been granted permission to conduct the examination on behalf of respondent No.1 and the unfairness in the selection process and the anomalies keeping in view the past conduct of respondent No.2 cannot be ruled out, which will be against the basic principle of fairness and equity, as envisaged under Article 16 of the Constitution of India. The nature of conducting public examinations requires high degree of secrecy/fairness as future of lacks of aspirants would depend upon such examination. The conduct of public examination by the Government or any instrumentality like respondent No.1 is a matter of trust and utmost faith and what impression can be gathered if such contract is given to a agency, which was blacklisted in the past, to conduct

the selection process where career of lacks of aspirants are at stake. It is pertinent to mention here that a fair and reasonable selection process is a fundamental requirement under Article 14 and Article 16 (1) of the constitution. Respondent No.1 ought to have acted in public interest outweighing the commercial interest even if it costs more to the State exchequer.

73. Keeping in view the past incidents, which have occurred and are subject matter of investigation by the CBI, again respondent No.1 has given the contract to a tainted service provider to conduct the public employment examinations, I completely agree with a view taken by Delhi High Court in a case titled M/s Aptech Limited, *supra* that organizations resorting to, or permitting malpractice at an institutional level should be kept at bay, by bodies (SSB in the present case) conducting public examination and such conduct ought not to be condoned. It would be a different matter if there are stray incidents where an employee, or some employees, may show weakness of character and indulge in isolated acts of malpractice. However, if such malpractices are adopted by an organization (M/s Aptech Limited) itself, or are facilitated by the organization itself, it is very different matter, and is indeed a serious matter since it reflects adversely on the intent of the management of the organization itself.

CONCLUSION:

74. Keeping in view the aforesaid peculiar facts and circumstances of the case and for the foregoing reasons, I am of the opinion that the process adopted /decision made by the awarding contract to Respondent No. 2 (M/s

Aptech Limited) is malafide and change of condition in tender was intended to favour Respondent No.2 and these decisions will have an effect on public interest as the Respondent No. 2 has been assigned to conduct examinations, wherein the selectees will be appointed to hold public posts, accordingly this writ petition is allowed and the contract awarded by respondent No.1 in favour of respondent No.2 pursuant to e-NIT No.19 of 2022 dated 30.09.2022 for conduct of its various examinations through computer based tests mode is quashed. Consequently, all the exams viz Junior Engineer-civil (Jal Shakti Department) and Sub Inspector (Home Department) held by respondent No.1 through respondent no. 2 in furtherance of the aforementioned “award of contract to conduct examinations” are also set aside/cancelled at whatever stage they are as on date.

75. The Government is hereby directed to constitute a high level Committee headed by not less than a retired High Court Judge to enquire into the conduct of Jammu and Kashmir Service Selection Board for the their brazen irregularities/illegality in changing the terms/conditions of the tender, also as to what weighed with them to award a contract to conduct an examination by an organization which has previously facilitated malpractices in public examinations and accordingly appropriate action be initiated against those found guilty.

76. Further, I would like to say that the by its own act of omission and commission, the functioning of Jammu and Kashmir Service Selection Board does not inspire confidence in holding public examinations. It has

become incumbent on all stake holders to review the functioning of the Board.

77. Disposed of alongwith connected CM. The caveat shall also stand discharged.

78. Record be returned to the learned State counsel.

(Wasim Sadiq Nargal)
Judge

Jammu.
08.12.2022
Vinod.

Whether the order is speaking : Yes

Whether the order is reportable: Yes