HIGH COURT OF GUJARAT

ELECTROSTEEL INFRASTURCTURE SERVICES
Versus
GUJARAT URBAN DEVELOPMENT CO LTD

Date of Decision: 08 January 2008

Citation: 2008 LawSuit(Guj) 23

Hon'ble Judges: Anant S Dave

Eq. Citations: 2008 4 GLR 3088, 2008 1 GLH 253, 2008 2 GCD 1237, 2008 18 GHJ 248

Case Type: Special Civil Application

Case No: 7450 of 2007

Subject: Constitution

Acts Referred:
Constitution of India Art 226, Art 12, Art 14, Art 19

Final Decision: Petition dismissed

Advocates: K S Nanavati, Nanavati Associates, J R Nanavati, A R Thacker

Cases Cited in (+): 1
Cases Referred in (+): 6

---

[1] This petition under Article 226 of the Constitution of India is filed by the petitioner challenging the action of respondent No.1 in blacklisting the petitioner vide order dated 20.2.2007 with regard to the work performed under contract No.GUDC/GEL/G.2-WSS-15(B11), entered into between the parties, on the ground of gross negligence, bad workmanship and serious lapse in due performance of responsibility on the part of the petitioner, as being illegal, unjust, unreasonable and arbitrary.

[2] The petitioner company is a Public Limited Company incorporated under the provisions of the Companies Act, 1956 and engaged in the manufacturing of Ductile Iron (DI) pipes. The petitioner is the turn key/EPC Projects Division of Electrosteel Castings Ltd. engaged in the implementation of world class water and waste water infrastructure management system.

[3] The respondent No.1 is a company, incorporated under the provisions of the Companies Act, 1956 and is essentially a Government of Gujarat undertaking. Respondent No.2 herein was a consultant appointed by the respondent No.1 and was at the relevant time exercising power and authority for and on behalf of the respondent No.1.

[4] For the sake of brevity, the petitioner is referred to as 'EIS' and respondent No.1 is referred to as 'GUDCL' and respondent No.2 is referred to as 'GEL'.

[5] It is the case of the petitioner that respondent No.1 being an Authority and instrumentality of the State within the meaning of Article 12 of the Constitution of India, is subject to the provisions of Part-III and part-IV of the Constitution of India, therefore, amenable to the writ jurisdiction of this Court.

[6] Short facts of the case are as under.

[7] That in the year 2002, after devastating earthquake in the State of Gujarat in the year 2001, the respondent No.1 under the Gujarat Earthquake Reconstruction & Rehabilitation Program, invited bids from pre-qualified bidders for Water Distribution System (Part I) in Zone IV for construction of Elevated Service Reservoirs (for short 'ESR') viz. Over Head Tank and also for Water Pump Systems, Water Transmission Mains, Construction of Pump Houses, Staff Quarters etc. at various places at Bhuj, Kachchh. The petitioner being lowest bidder, tender of the petitioner was accepted and contract was signed and executed by and between the petitioner and the respondent No.1 on 11.10.2002. The project was turnkey project which contained several works to be executed by the petitioner as per the site date, civil and structural engineering designs, construction drawings and works specifications provided by the respondent No.1 and respondent No.2 under the supervision of respondent No.2. Out of various projects, so far as this petition is concerned, we are concerned with construction of ESR of 10,00,000 liters capacity at Shivkrupanagar area in Bhuj, Dist. Kachchh, and the value of which was Rs.38,79,417/-. Along with aforesaid project, the petitioner was given some other projects as per the terms of the contract.

[8] It is the case of the petitioner that construction of ESR at Shivkrupanagar was shifted from the earlier site. In view of that the respondent Nos.1 and 2 could not get necessary clearance and permission for construction of ESR site as it was forest land and site was changed, which is 300 meters away from the original site. According to the petitioner, respondent Nos.1 and 2 are solely responsible for site selection and compared to the old location, new location was having considerable amount of soft strata and the soil bearing capacity of soft strata is very low. Since the strata also consisted of lot of shale, therefore, the petitioner brought to the notice of the

respondent No.2 to carry out Geo Technical Investigation. However, as per terms of the contract, the petitioner commenced the execution of ESR at the new site and adhered to the strict quality control norms and procedures laid down by the respondents and the material used and work done by the petitioner was supervised, inspected and ultimately Shivkrupanagar ESR was completed on 31.12.2003. No leakage whatsoever was noticed and structure was filled with completely 10 lacs liters of water on 2.3.2004. However, on the same day, at about 5.30 p.m. the said structure has suddenly fallen without showing any early sign/indication of breakage, cracks or damage to the structure.

[9] On 2.3.2004 a letter was issued by respondent No.2 informing that ESR had collapsed because of the fault on the part of the petitioner. The petitioner has given reply to the respondent No.2 in detail stating that respondent No.2 has regularly scrutinized and supervised the construction materials used for the said construction activities and only after its approval at each stage, the construction was carried out, therefore, there was no breach of any of the clauses of the Contract on the part of the petitioner. It was communicated by the petitioner that collapse of the structure was due to wrong site selection and faulty engineering design prepared by respondent No.2 and indicated its willingness to start reconstruction of ESR and further expressed its willingness to cooperate with the investigation by the Expert Committee and assured to construct and complete new ESR at their own cost, if it is found that the petitioner is responsible for the collapse of ESR.

[10] The respondent No.1 constituted a Committee of 4 experts and senior officers of Gujarat Water Supply & Sewerage Board (for short 'GWSSB')(a State level statutory organization), having experience of constructing major water retaining structures including ESRs in the State of Gujarat, to investigate the issue. On 5.3.2004 the expert committee visited the site and after scrutinizing drawings, correspondence, material testing reports and other testing reports of concrete etc. submitted its report in July, 2004 and the Expert Committee opined that the collapse of ESR had not occurred due to any fault in the workmanship or material used by the contractor and that the construction was satisfactory and as per the specifications. It was also observed by the said Committee that the soil below the foundation had no capacity to bear the heavy load of the structure constructed as per the design.

[11] The petitioner, on its own, called the experts from premier institutes like Indian Institute of Science, Bangalore (for short 'IISC') and Veermata Jijabai Technological Institute, Mumbai (for short 'VJTI') to assess the actual cause of collapse. The experts from VJTI and IISC had visited the site, collected the soil sample, construction drawings, design details and all other relevant documents. As per the reports of both

the institutes i.e. IISC and VJTI, the collapse of the ESR took place due to wrong site selection and not because of lacuna on the part of the petitioner.

[12] So far as the Expert Committee of GWSSB is concerned, soil investigation was done through GERI and the concrete slabs were tested through National Council for Cement & Building Materials (for short 'NCCBM'). That Committee also took the opinion of one Mr.Lavingia, Consulting Engineer, to verify the structural design, who was the Expert Structural Designer.

[13] Therefore, the State of Gujarat had appointed Dr.A.S.Arya, Structural Expert, to review the report of the Expert Committee for collapse of ESR. That after taking into consideration various aspects, including the report of Mr.Lavingia, NCCBM & GERI and the documents supplied by GUDC viz. copy of structural design, copy of structural drawing, video recording and photographs of the collapse of ESR, reports of investigations carried out by the professors of VJTI and final investigation report of the Committee of GWSSD etc., Dr.Arya concluded that the reason for the collapse of ESR was due to the joint failure in the middle ring beam which is due to the negligence of both the petitioner and the respondent No.2 and the petitioner was considered to be mainly responsible for collapse of ESR.

[14] Thus, show cause notice dated 23.8.2004 came to be issued to show cause as to why the petitioner should not be blacklisted. That detailed reply was furnished by the petitioner by reply dated 16.9.2004 denying the charges levelled therein and reiterated that there was no failure on the part of the petitioner to adhere to any terms or norms of the contract and it was completely a failure on the part of the respondent No.2 while selecting the site certain aspects were not taken into consideration viz. structure and strata of the soil and its load bearing capacity. In the reply, conclusions and opinions of the experts of VJTI and IISC and opinion of Expert Committee of GWSSB were extensively referred and a request was made to withdraw the notice dated 23.8.2004 and to resolve the matter in the spirit of mutually agreed and accepted MoM dated 15.4.2004.

[15] However, by way of abundant caution, the petitioner preferred a Civil Suit being Civil Suit No.100 of 2004 before the learned Civil Judge (Senior Division), Gandhinagar. Upon the reply filed by the respondent No.1 herein, order below Ex.14 came to be passed returning the plaint for presentation before the competent court. Against the aforesaid order, the petitioner filed Appeal from Order No.19 of 2007 before this Court and ultimately it came to be withdrawn by the petitioner with a liberty to prefer an appropriate reference before the Arbitration Tribunal for breach of contract and damages and for resolving the question of blacklisting to prefer a writ petition before this Court. Since the efforts of the petitioner to settle the dispute amicably did not

materialize in spite of the fact that the petitioner completed the work assigned to it by respondent No.1 under the Bhuj Part I & II projects etc. and performance also being satisfactory, the petitioner is compelled to challenge the impugned action of blacklisting by order dated 20.2.2007 issued by respondent No.1, before this court on various grounds.

[16] Mr.K.S.Nanavati, learned Senior Advocate for the petitioner mainly contended that the petitioner being the lowest bidder, awarded contract of construction of ESR at Shivkrupanagar along with other projects pursuant to Gujarat Earthquake Reconstruction & Rehabilitation Program and the petitioner being division of ESI project being turn key, the petitioner company has taken all due care and caution as per the terms of the contract and as per the engineering and structural design, drawings directions given by the respondents, after site location as determined by them. It is further submitted that the petitioner had no locus with regard to selection of site and after strictly adhering to the quality norms with regard to the materials used in construction which came to be supervised, inspected and tested by respondent No.2 for which the petitioner cannot be held responsible on the alleged ground of negligence, bad workmanship and sever lapses.

[17] Mr.Nanavati, learned Senior Advocate further contended that it was the sole responsibility of the respondent Nos.1 and 2 to select and finalize the site and location of the said ESR and to carry out all engineering and site surveys, preparing ground profiles, carrying out soil investigations to determine the soil bearing capacity of the place where the ESR was to be constructed. It is submitted that even though the petitioner had suggested to carry out soil investigations etc., no heed was paid to it. Therefore, for the failure on the part of the respondents to carry Geo Technical Investigation, the petitioner cannot be held responsible and on the contrary the petitioner has performed all its required contractual obligations. Mr.Nanavati further submits that new site at which ESR was to be constructed is situated at a hillock with three sides confined with the upper hill and gradual slope on the forth side. The soil at the site is a combination of soft dis-integrated rock in layers, fine course slit, shale and clay layers with boulders. There is slope on one side of the site where erosion of sand and silt is greater. The soft disintegrated mud stone/lime stone/sand stone is soluble in water which can further soften the soil. The soil bearing capacity of the location is not more than 12 MT/m2 to 13 MT/M2 and therefore, the soil under the foundation could not bear the load of the ESR when it was completely filled. It is submitted that due to this the raft foundation settled down unevenly causing differential settlement more than the permissible limit, which caused angular distortion of the raft foundation which further led to the collapse of the ESR. Learned Senior Advocate, further submits that

the reason for the collapse of ESR was mainly due to wrong selection of site which was finalized by the respondent No.2.

[18] Mr.Nanavati, learned Senior Advocate, then submits that three different expert committees have not fastened any liability upon the petitioner for the collapse of ESR at Shivkrupanagar. He relied on the findings of the experts of VJTI and IISC and a Committee of four experts and senior officers of GWSSB and submitted that the collapse was due to wrong site selection and not because of poor workmanship or usage of poor quality material on the part of the petitioner for construction of ESR. Mr.Nanavati doubted the report of Dr.Arya, Structural Expert, appointed by the respondent to review the report of the Expert Committee of GWSSB and it was submitted that before Dr.Arya also, the petitioner had raised grievance about test results conducted by NCCBM and GERI and Mr.Lavingia, a structural expert. A doubt was raised about appointment of Dr.Arya so as to brush aside the findings of expert committee of GWSSB and how reliance could have been placed by Dr.Arya on the report of Mr.Lavingia of 20.8.2004, which was later in time time than the report of Dr.Arya dated 12.8.2004. According to learned counsel for the petitioner, report of Dr.Arya was factually and technically incorrect and contrary to sound engineering principles on various grounds, as mentioned in para 28 of the petition and when cement, steel and other materials used were tested in approved laboratory as per testing standards specified by the Bureau of Indian Standards, there was no justification for finding fault with the petitioner for the collapse of ESR. Mr.Nanavati, further submitted that all other projects and work contracts came to be completed without any grievance by the respondent. It is further submitted in reply to the show cause notice of blacklisting the petitioner that though various details were given and causes were explained, no findings are reflected in the impugned order of 20.2.2007 and in spite of the fact that the whole contract was given for 5 different projects, only part of the contract was considered to be terminated, therefore also, there was no justification to ban the petitioner permanently for a long time and attaching a kind of stigma to the petitioner affecting its further business contracts.

[19] Learned counsel for the petitioner submitted that since respondent No.1 is an agency/instrumentality of the State within the meaning of Article 12 of the Constitution of India, it is amenable to the writ jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India and as the law laid down by the Apex Court in various cases, administrative action of the authority can be reviewed and this court can certainly look into the arbitrariness and unreasonableness in administrative action of the Authority, who is under obligation to act in a just and fair manner and not contrary to Articles 14 and 19 of the Constitution of India. Learned counsel for the petitioner has relied on various authorities; (1) AIR 1991 SC 537; (2) AIR 1998 Cal. 153. In support of the

above averment, Mr.Nanavati has also further relied on two judgments of two different High Courts on similar issue reported in 1981 Delhi 260 and AIR 2005 Allahabad Bench 3. Mr.K.S.Nanavati, learned Senior Advocate, further submits that the action of the respondent No.1 of permanently blacklisting the petitioner is very harsh, disproportionate to the alleged negligence which shocks the conscience of the Court and considering divergent reports of experts, by invoking doctrine of proportionality also this Court can strike down such action while reviewing the same. For this purpose, reliance was placed by Mr.Nanavati on the judgment reported in AIR 1997 SC 3387.

[20] At the outset, Mr.J.R.Nanavati, learned counsel for the respondent, submitted that the petition filed by the petitioner under Article 226 of the Constitution of India is not maintainable inasmuch as the respondent No.1 has never entered into an agreement/contract with the petitioner-Electrosteel Castings Ltd. (ECL). The petitioner has no right to file the present petition challenging the impugned order raising disputed questions of facts, therefore, the petition deserves to be dismissed at the threshold because the same cannot be maintainable under Article 226 of the Constitution of India. However, alternatively, it was submitted that execution of Gujarat Earthquake Rehabilitation Program was funded by the Asian Development Bank and ECL entered into an agreement with respondent No.1 for which no dispute arises except collapse of ESR at Shivkrupanagar for construction for capacity of 10 lac liters of water. Mr.J.R.Nanavati, further submits that dispute has arisen with regard to RCC ESR collapse. The above RCC ESR collapsed on 2.3.2004 during the hydraulic testing and after proper investigation it was found that the petitioner had shown gross negligence and bad workmanship apart from serious lapses in the performance of the responsibility as contractor, therefore, the respondent No.1 has all the powers and authority to blacklist/ban the petitioner. The action of the respondent No.1 which was taken in the interest of respondent No.1 need not to be subjected to judicial review unless it is found extremely perverse and arbitrary on the face of it, which is not in the present case. Therefore, also the present petition deserves to be dismissed in limine.

[21] Mr.J.R.Nanavati, learned counsel for the respondent No.1, has relied on the written statement filed by respondent No.1 before the Court of Civil Judge (S.D.), Gandhinagar in Special Civil Suit No.100 of 2004 (annexed along with the affidavit in reply) and submitted that now the matter is pending before the Arbitration Tribunal, which shall decide the responsibility and liability arising out of the terms and conditions of the contract. Therefore, there is no justification to interfere with the just and reasonable order passed in accordance with law of blacklisting the petitioner after issuing proper show cause notice and following principles of natural justice.

[22] Mr.J.R.Nanavati, learned counsel for respondent No.1, further submits that even assuming without admitting that there are conflicting opinions and conclusions of

different experts and Committees, in such an eventuality also, this Court has no power to go beyond the wisdom of the experts and to opine on the merits of the case in either way. In short, according to Mr.J.R.Nanavati, power to review administrative action, in the backdrop of the present case, judicially by this Court, is circumscribed to a limited extent as to whether an affected person was given proper opportunity to explain the case before the impugned action is taken by respondent No.1. In the present case, show cause notice was already issued on 23.8.2004 to explain as to why the petitioner should not be blacklisted and after considering the reply of the petitioner dated 16.9.2004 in its true spirit and also after considering various reports of the experts, it was thought just and proper by the respondent No.1 to blacklist the petitioner. Therefore, the action of the respondent No.1 cannot be said to be unreasonable, arbitrary and interference of this Court is uncalled, as laid down by the apex court in the case of Gronsons Pharmaceuticals (P) Ltd. V. State of Utter Pradesh reported in AIR 2001 SC 3707.

[23] Mr.J.R.Nanavati, learned counsel for the respondent No.1, further submits that contractual liability of the petitioner is absolute and unqualified as it is reflected from the contract produced at page 70 of the compilation and particularly paras 7.2, 7.3, 8.1 and 8.2 include general and specific obligations of the contractor and paras 13.1 and 20.1 also indicate liabilities and duties of the contractor. According to Mr.J.R.Nanavati, learned counsel for the respondent No.1, after final site selection for construction of ESR, the work was carried out by the petitioner and when the ESR collapsed at the time of hydraulic test, the responsibility cannot be shifted on the shoulder of the respondent No.2 only on the ground of selection and finalization of site by respondent No.2. Mr.J.R.Nanavati, submits that at the time of actual commencement of the work of construction of ESR it was very well known to the petitioner about the nature of the soil upon which the construction was to be carried out, which is 300 meters away from the original site. Mr.J.R.Nanavati, further submits that Dr.Arya in his reviewing report also found that the present petitioner is responsible for collapse of ESR. Mr.Nanavati, lastly submitted that, the order impugned is just and proper and no interference of this Court is called for.

[24] Having heard learned counsel for the parties and perusing the record of the case, the fact remains that challenge in this petition under Article 226 of the Constitution of India is the order of blacklisting the petitioner for ever and not any challenge about breach of conditions of contract and respondent No.1 is Authority within the meaning of Article 12 of the Constitution and amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India, therefore, the challenge is maintainable. On perusal of the terms and conditions of the contract dated 11.10.2002 entered into between GUDCL and EIS, communication between the parties and technical reports

submitted by the experts, I am of the opinion that submissions of learned counsel for the petitioner are devoid of any merit inasmuch as the action of the respondent Authority of blacklisting the petitioner especially when it was found that ESR collapsed due to gross negligence of workmanship and serious lapses in due performance on the part of the petitioner, the action of the respondent No.1 in any manner cannot be said to be unreasonable, arbitrary and illegal and violative of Articles 14 and 19 of the Constitution of India.

[25] That one of the main submissions of the learned counsel for the petitioner about selection of site for construction of ESR was the sole responsibility of respondent No.2 itself does not absolve the petitioner from performing its obligation of the contract. That selection of new site at which ESR was to be constructed consisted of soil, a combination of soft dis-integrated rock in layers, fine course slit, shale and clay layers with boulders. There is slope on one side of the site where erosion of sand and silt is greater and it is situated at a hillock with three sides confined with the upper hill and gradual slope on the forth side. On the contrary, it required special expertise of the petitioner in executing such nature of work with vast experience and perfection. For collapse of ESR at the time of hydraulic test itself indicates that either there was incorrect execution of work viz. construction of ESR contrary to specifications, designs, usage of inferior quality of materials or lack of technical skill on the part of the petitioner for executing and completing the same. Since the matter is pending before the Arbitration Tribunal about reliefs claimed therein, it will not be advisable to discuss in detail the rival claims advanced by the learned counsel for the parties, otherwise it may affect the pending proceedings before the Arbitration Tribunal for breach of contract and damages.

[26] When the technical experts viz. a Committee appointed by the Authority consisting of 4 members opined in its conclusion and found that the inspecting agency is responsible for not redesigning the structure according to the bearing capacity in case of changing the site, does not absolve the petitioner in any manner from its responsibility. At the same time report of the experts of VJIT and IISC, of course appointed by the petitioner, indicates the design analysis of ESR as O.K. and satisfactory and found differential settlement of a rigid raft foundation of ESR, which ultimately developed excessive stress from the top and resulted into sudden collapse. At the same time, a highly qualified committee of experts appointed for reviewing the reports of technical experts, including the Committee of Dr.Arya, Professor Emeritus, IIT Roorke, concluded that the reason for the collapse of ESR was due to joint failure in the middle ring beam, which is due to the negligence of both the petitioner and the respondent No.2 and the petitioner was considered responsible for collapse of ESR.

[27] Thus, nowhere in any report the petitioner is given a clean chit by completely absolving it from its obligation to execute the contract viz. to construct the ESR. On the contrary, Dr.Arya found that the petitioner is responsible for the collapse of ESR.

[28] At this juncture, it is to be noted that clause 6.1. of Section-2 of the contract dated 11.10.2002 mentions about custody and supply of Drawing and Documents. Clause of 7.1. is about Supplementary Drawings and Instructions. Clause 7.2. is about Permanent Works Designed by Contractor. Clause 7.3 is regarding Responsibility Unaffected by Approval by the Engineer in accordance with Sub-clause 7.2 and shall not relieve the Contractor of any of its responsibilities under the Contract. Clause 8.1 is about Contractor's General Responsibility, which casts duty upon the contractor to perform the contract with due care and diligence, execute and complete the works and remedy the defects. All superintendence, labour, materials, plant, contractor's equipment and all other things, whether of a temporary or permanent nature, required for such design, execution, completion and remedying of any defects so far as the necessity for providing the same is specified and is to be inferred reasonably from the Contract. Clause 8.2 of the Contract is about Site Operation and Methods of Construction, where the Contractor is fully responsible for the works executed by him notwithstanding any approval by the Engineer. The Contractor is to take responsibility for the adequacy, stability and safety of all Site operations and methods of construction.

[29] In view of the above contractual terms, contractor was obliged to discharge his duty as per the terms of the contract and when the ESR as a whole collapsed on the very first hydraulic test, the decision taken by respondent No.1 after careful consideration of various reports of technical experts cannot be said to be unreasonable, arbitrary, illegal, violative of Articles 14 and 16 of the Constitution of India.

[30] Before blacklisting the petitioner permanently, the respondent No.1 issued show cause notice and decision was taken after considering the reply submitted by the petitioner and after following procedure of law. Therefore, there is no illegality or infirmity in the decision taken by the respondent No.1 and no interference of this Court is called for.

[31] Regarding the additional and alternative submission of Mr.K.S.Nanavati, learned Senior Advocate for the petitioner, that the action of the respondent No.1 blacklisting the petitioner is harsh, excessive and disproportionate to the alleged negligence and carelessness in performance of the contractual obligation by the petitioner, therefore, the above decision required to be reviewed judicially by invoking principles of doctrine of proportionality and Wednesbury principle of unreasonableness. Learned counsel for the petitioner submits that blacklisting the petitioner permanently and debarring from

entering into any commercial and contractual relations with the petitioner forever will certainly affect the business interests of the petitioner and it will have bearing not upon further relations with the respondent No.1 but also with other assignments to be procured by the petitioner inasmuch as this incident is unfortunate and even technical experts have divergent views about the cause of collapse of ESR. Learned counsel for the petitioner relied on the decision of the apex court in the case of Union of India and another v. G.Ganayutham (Dead) by Lrs. Reported in AIR 1997 SC 3387 and submits that the permanently blacklisting the petitioner can be restricted for a reasonable period and by invoking the principles of doctrine of proportionality this Court can exercise power under Article 226 of the Constitution of India. In case of Ganayutham (supra), Their Lordships, after discussing various decision of courts abroad and earlier decisions of the apex court, in para 28 held as under :-

> "28. The current position of proportionality in administrative law in England and India can be summarized as follows :-
>
> 1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision maker could, on the material before him and within the frame work of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.
>
> 2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into England Administrative Law in future is not ruled out. These are the CCSU principles.
>
> 3)(a) As per Bugdaycay, Brind and Smith, as long as the Convention is not incorporated into English Law, the English Courts merely exercise a secondary judgment to find out if the decision maker could have, on the material before him, arrived at the primary judgment in the manner he had done.
>
> 3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English Courts will render primary judgment on the

validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

4(a) The position in our country, in administrative law, where no fundamental freedom as aforesaid are involved, is that the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of 'proportionality' and assume a primary role, is left open to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14.

Punishment in disciplinary matters : Wednesbury & CCSU tests:"

[32] Thereafter, again the above doctrine of proportionality and applicability of Wednesbury principle were discussed in the case of Om Kumar v. Union of India reported in (2001)2 SCC 386. Their Lordships in the above decision considered saying of Lord Greene in 1948 in the Wednesbury case that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited and the interference was not permissible unless one or the other of the following conditions was satisfied namely the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in the United Kingdom and in India to judge the validity of administrative action.

[33] While dealing with "proportionality", it is observed that "under the principle, the court will see that the legislature and the administrative authority maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons, keeping in mind the purpose which they were intended to serve".

[34] In the above case, taking note of various decisions of the apex court in the context of Articles 14, 19 and 21 of the Constitution of India and decision of R v. Secy. of State for the Home Deptt, ex p Brind reported in (1991)1 All ER 720 where Their Lordships laid down the principle of "strict scrutiny" or "proportionality" and primary

review, it was further noted that the seeds of the principle of primary and secondary review by courts were planted in the administrative law by Lord Bridge in the Brind case. Primary and secondary roles of the court in context of principle of proportionality was also considered and after considering the decision of the House of Lords in R v. Chief Constable of Sussex ex p International Trader's Ferry Ltd. reported in 25(1999)1 All ER 129, the House of Lords appeared to deviate and almost equate Wednesbury and Proportionality and Lord Cooke advocated a simpler test "Was the decision one which a reasonable authority could reach"?

[35] Thus, after discussing various decisions, again in para 68, the apex court has observed as under:-

> "Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the courts by applying proportionality. However, where administrative action is questioned as "arbitrary" under Article 14, the principle of secondary review based on Wednesbury principles applies".

[36] Lastly, in the judgment delivered by the apex court in the case of Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Assn reported in (2007)4 SCC 669 the apex court held as under:-

> "Doctrine of proportionality
>
> 17. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the "doctrine of proportionality".
>
> 18. "Proportionality" is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise the elaboration of a rule of permissible priorities.
>
> 19. de Smith states that "proportionality" involves "balancing test" and "necessity test". Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant

considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. [Judicial Review of Administrative Action (1995), pp.601-05, para 13.085; see also Wade & Forsyth : Administrative Law (2005), p.366]

20. In Halsbury's Law of England (4th Edn.), Reissue, Vol.1(1), pp.144-45, para 78, it is stated :

"The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness."

21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no "pick and choose", selective applicability of the government norms or unfairness, arbitrariness or unreasonable. It is not permissible to use a "sledgehammer to crack a nut". As has been said many a time; "where parting knife suffices, battle axe is precluded" .

22. In the celebrated decision of Council of Civil Service Union v. Minister for Civil Service Lord Diplock proclaimed : (All ER p.950h-j)

"Judicial review has I think developed a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality'...."

(emphasis supplied).

23. CCSU has been reiterated by English courts in several subsequent cases. We do not think it necessary to refer to all those cases.

24. So far as our legal system is concerned, the doctrine is well settled. Even prior to CCSU, this Court has held that if punishment imposed on an employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to a court to interfere with such penalty in appropriate cases.

25. In Hind Construction & Engg. Co. Ltd. v. Workmen, some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. This Court held that the absence could have been treated as leave without pay. The workmen might have been warned and fined. (But)

"It is impossible to think that any other reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner". (AIR P.919, para 7)

(emphasis supplied).

The Court concluded that the punishment imposed on the workmen was "not only severe and out of proportion to the fault, but one which, in our judgment, no reasonable employer would have imposed". (AIR pp.919-20, para 7)

(emphasis supplied)

26. In Federation of Indian Chambers of Commerce and Industry vs. Workmen, the allegation against the employee of the Federation was that he issued legal notices to the Federation and to the International Chamber of Commerce which brought discredit to the Federation the employer. Domestic inquiry was held against the employee and his services were terminated. The punishment was held to be disproportionate to the misconduct alleged and established. This Court observed that : (SCC p.62, para 34)

"The Federation had made a mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation.

27. In Ranjit Thakur referred to earlier, an army officer did not obey the lawful command of his superior officer by not eating food offered to him. Court-martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment.

28. Applying the doctrine of proportionality and following CCSU, Venkatachaliah, J (as His Lordship then was) observed : (SCC p.620, para 25)

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amounting itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review (emphasis supplied)".

[37] At this juncture, it is also relevant to note a reported decision of House of Lords in the case of R V Secretary of State for the Home Department, ex parte Daly reported in [2001]3 The All England Law Reports 433. This was a case where a new policy of Secretary of the State was introduced in 1995 governing the searching of cells occupied by convicted and remand prisoners in closed prisons in England and Wales. Under the said policy, no prisoner was allowed to be present during a search of living accommodation, and cell search staff were required, in the absence of the prisoner, to examine legal correspondence to ensure that it was bona fide correspondence between the prisoner and a legal adviser. The lawfulness of that policy was challenged by a long term prisoner, who contended that such a policy was not authorized by S. 47(1) of the Prison Act, 1952, which empowered the Secretary of State to make rules for the regulation of prisons and for their discipline and control of prisoners. The Court of Appeal held that the policy represented the minimum intrusion into the rights of prisoners consistent with the need to maintain security, order and discipline in prisons. The prisoner appealed to the House of Lords and contended that the blanket policy of requiring prisoners to be absent during the examination of legally privileged correspondence infringed, to an unnecessary and impermissible extent, a basic right recognized both at common law and under Art. 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. It was held by House of Lords that the above policy of the Secretary was unlawful and void in so far as it provided that prisoners always had to be absent when privileged legal correspondence, held by them in their cells, was examined by prison officers. It was also held that the degree of intrusion into the privileged legal correspondence of prisoners violated their common law rights and Section 47(1) of the 1952 Act did not authorize such excessive intrusion, and the Secretary of State accordingly had no

power to lay down or implement the policy in its present form. In this context, the House of Lords per curiam held as under :-

> "Per curiam. Although there is an overlap between the traditional grounds of review and the approach of proportionality applicable where convention rights are at stake, the intensity of review is somewhat greater under the proportionality approach. The differences in approach may sometimes yield different results. It is therefore important that cases involving convention rights must be analyzed in the correct way. That does not mean that there has been a shift to merits review. The respective roles of judges and administrators are fundamentally distinct and will remain so. Moreover, even in cases involving convention rights, the intensity of review will depend on the subject matter in hand".

[38] Though agreed with the majority view, Lord Cooke expressed his reservation about law laid down in Wednesbury case in para [32] as under :-

> "And I think that the day will come when it will be more widely recognised that the Wednesbury case was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd".

[39] However, as per the law of the land, the scope of judicial review of administrative action is very limited as discussed hereinabove. Therefore, considering the factual controversy of the case about the collapse of ESR and the responsibility and obligations of the petitioner arising out of the terms of contract vis-a-vis the collapse of ESR and somewhat divergent views of technical experts and past record of the petitioner in execution of such kind of contracts and also completion of other projects arising out of the same contract to the satisfaction of the respondent No.1, I deem it just and proper to direct the petitioner to make a representation to the respondent No.1 with a request to curtail the period of blacklisting the petitioner for a reasonable period in light of the above facts, discussion and law. If such a representation is made by the petitioner within a period of three weeks from today, the respondent No.1 shall decide the same within six weeks from the date of the receipt of the representation, keeping in mind the facts of the case and grounds mentioned in it.

[40] It is made clear that the views and observations of this Court on various clauses of the contract are in the context of grounds of challenge made in this petition and the same shall not have any bearing on any proceedings pending before any forum.

[41] With these observations and directions, this petition stands dismissed. Notice discharged.