



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 04.04.2024

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Judgement pronounced on :31.05.2024

+ **W.P.(C) 431/2024 & CM APP. 2002/2024, CM APP. 15510/2024**

DEFSYS SOLUTIONS PRIVATE LIMITED & ANR.

..... Petitioners

Through: Mr Neeraj Kishan Kaul, Senior Advocate, Mr Sandeep Sethi, Senior Advocate, Mr Mahesh Agarwala, Mr Rishi Agarwala, Mr Pawan Sharma, Mr Nirvikar Singh, Mr Aditya Chatterjee, Mr Parminder Singh, Mr Ankit Banati, Mr Harsh Mittal, Mr Vikram Choudhary, Ms Shreya Sethi, Ms Devika Mohan, Ms Pritha Suri, Mr Abhay Agnihotri, Mr Shravan Niranjan, Mr Prabhav Bahuguna, Mr Abhay Agnihotri, Mr Sumev Dev Seth, and Ms Riya Kumar, Advocates.

versus

UNION OF INDIA

..... Respondent

Through Mr Kirtiman Singh, CGSC, and Ms Vidhi Jain, Advocates for UOI.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE AMIT BANSAL

RAJIV SHAKDHER, J. :

I. PREFACE:



1. The petitioners claim four reliefs *via* the instant writ action.
 - 1.1 First, issuance of a writ of certiorari *qua* Clauses D.2 and D.3 of the ‘Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities’ [hereafter referred to as “MOD Guidelines”] bearing Ministry of Defence [hereafter referred to as “MOD”] ID No. 31013/1/2016-D (Vig) Vol. II, dated 21.11.2016.
 - 1.2 Second, a declaration that Clauses D.2 and D.3 of the MOD Guidelines are irrational, arbitrary, and discriminatory as they seek to penalize a person based on an "ongoing investigation" without the person being named an accused, charge-sheeted, or convicted.
 - 1.3 Third, issuance of a writ of certiorari or any other writ, order, or direction to set aside the show cause notice dated 13.12.2023 and the order dated 05.01.2024 passed by the respondent/Government of India [hereafter referred to as “GOI”].
 - 1.4 Fourth, issuance of a writ of mandamus or any other writ, order, or direction to set aside the order dated 05.01.2024 and an earlier order of suspension dated 09.12.2022.
 - 1.5 A consequential direction has also been sought, which is that petitioner no.1’s/Defsys Solutions Private Limited’s [hereafter referred to as “Defsys”] name be removed from entry number 14 contained in the respondent’s/Union of India’s [hereafter referred to as “UOI”] publication dated 14.11.2023 comprising suspended/banned entities. Defsys seeks removal from the list and all other UOI communications and websites.

II. CONTEXT:

2. The backdrop against which the petitioners seek the reliefs/directions



mentioned above would have to be captured to appreciate the controversy at hand.

2.1 Defsys, a micro, small, and medium sector enterprise [MSME], was incorporated in 2007 to manufacture and supply defence equipment. Since then, Defsys has provided defence equipment to the MOD and friendly countries, *albeit* with the requisite approval of the MOD.

2.2 Defsys also claims to have received multiple awards in recognition of its efforts, which have greatly contributed to fulfilling the GOI's *Atma Nirbhar Bharat* policy.

2.3 Although Defsys had received an award from GOI as recently as in January 2024, it appears that MOD had, as far back as 21.12.2021, received information that Defsys was "under investigation" by the Central Bureau of Investigation [hereafter referred to as "CBI"].

2.4 This development, perhaps, resulted in MOD withdrawing its request for proposal [RFP] issued to Defsys for the procurement of two Twin (Full) Dome Simulators for training Indian Air Force personnel on the Hawk-132 Aircraft [hereafter referred to as "the Hawk simulators"].

2.5 Concerned with this withdrawal, Defsys requested meetings with the Air Vice Marshal and the Defence Secretary. The request for an audience with the Air Vice Marshal was made on 24.01.2022, 02.03.2022, and 03.08.2022, while a similar request regarding the Defence Secretary, GOI, was made on 02.03.2022.

2.6 Likewise, on 08.09.2022, Defsys wrote to the Air Marshal requesting that a meeting be convened given that MOD had put on hold execution of the final contract concerning the upgradation of Three-Part Task Trainers (PTT) and One Mission Simulator (FMS) for Su-30 aircraft [hereafter



referred to as “Su-30 simulators”] after it was declared L1 and, conveyed its unconditional acceptance of the conditions incorporated in the draft contract.

2.7 In these circumstances, Defsys also wrote to the Defence Secretary on 14.11.2022 to request a meeting with its representatives.

3. It appears that meetings sought by Defsys concerning the withdrawal of the RFP for the Hawk simulators and the final contract for the Su-30 simulators did not materialize.

4. Instead, *via* order dated 09.12.2022, Defsys's business dealings with GOI were suspended for one (1) year from the date of its issuance or until further orders. On that very date, 09.12.2022, Defsys had written to the Additional Secretary, GOI, and Director General (Acquisition) requesting a meeting to remove misgivings that the said officers seem to entertain about it.

5. Having learnt of the suspension order dated 09.12.2022, Defsys addressed a communication dated 15.12.2022 to the Under Secretary (Vigilance), MOD, calling upon GOI to withdraw the order. In support of its plea that GOI should withdraw the suspension order dated 09.12.2022, Defsys put forth the following five (5) reasons:

- i) It had no dealings with Agusta Westland.
- ii) Clauses C and D of the MOD Guidelines did not apply to it.
- iii) It had, in the past, played a pivotal role in manufacturing defence equipment.
- iv) It was not granted an opportunity for a hearing before the suspension order dated 09.12.2022 was passed.
- v) If the suspension order dated 09.12.2022 continued to operate, it would result in its civil death.



6. Since there was no response to its entreaties, Defsys instituted, in and about 18.12.2022, a writ action [WP (C) 17456/2022] in this Court, among other things, to assail the suspension order dated 09.12.2022.

6.1 This writ petition came up for hearing before the learned Single Judge on 22.12.2022. On 22.12.2022, UOI was called upon to seek instructions on whether ongoing contracts would be impacted by the impugned order, i.e., the suspension order dated 09.12.2022. To make the exercise meaningful, the Court directed the counsel for Defsys to furnish a list of ongoing contracts to the counsel for UOI.

6.2 On the returnable date, i.e., 23.12.2022, the learned Single Judge, after hearing counsel for the parties and perusing the record placed before her by the counsel for the UOI, issued the following directions, which are contained in paragraph 11 (i) and (ii) of the order passed on that date:

“11. In the meantime, based on the submissions made, the following directions are issued, till the next date of hearing:

i. Insofar as the existing contracts are concerned, the Ministry of Defence has already clarified that the ongoing contracts would not be affected. The said statement is taken on record. In view of the said statement made by the Ministry of Defence, the impugned order dated 9th December, 2022 would not take effect insofar as it relates to existing on-going contracts including offset contracts, executed prior to 9th December 2022. Further, bankers of the Petitioners shall not, in any manner, cause impediments in the day-to-day functioning of the Petitioner qua the said existing contracts.

ii. Insofar as the contracts which are listed in paragraph 20 of the present petition are concerned, it is submitted by ld. CGSC that a perusal of paragraph 20 itself shows that the same are still in the initial stages. Accordingly, if any of the said contracts mentioned in paragraph 20 of the present petition are likely to be concluded with any third-party, the Petitioner is permitted to approach this Court.”

7. Within nearly three (3) weeks of the learned Single Judge's order



dated 23.12.2022, the Director of Defsys was served with a notice dated 13.01.2023 under Section 160 of The Code of Criminal Procedure, 1973 [hereafter referred to as “Cr.P.C.”], calling upon him to present himself before the concerned officer to answer questions related to case no. RC 2172013A0003 lodged against Air Chief Marshal (Retd.) SP Tyagi and Others [hereafter referred to as “the Agusta Westland case”].

7.1 This was followed by a notice dated 16.01.2023 being served on Defsys under Section 91 of the Cr.P.C. *Via* this notice, details were sought by the investigating officer from Defsys concerning the following:

- i) Names of Directors on the Board of Defsys.
- ii) Defsys shareholders' names, the percentage of equity stake they hold, and supporting documents. In the event shares were held by entities other than individuals, the names of Directors and shareholders of the holding entities since their incorporation up until 16.01.2023.
- iii) Details of foreign remittances received by Defsys directly or through group companies, between 01.04.2007 and 31.03.2013.
- iv) Details of payments received from the Agusta Westland group either directly or through IDS Tunisia, Intersteller Technologies, Mauritius, or any other company or companies.

7.2 Defsys, evidently, furnished the information sought *via* the Section 91 notice through a communication dated 18.01.2023. Pertinently, Defsys emphasized that it had had no transaction with Agusta Westland group directly or through entities alluded to in the notice dated 16.01.2023, i.e., IDS Tunisia and Intersteller Technologies, Mauritius.

7.3 In the interregnum, i.e., 17.01.2023, the learned Single Judge directed



continuance of the interim order dated 23.12.2022 passed in WP (C) 17456/2022.

8. On 05.09.2023, the learned Single Judge disposed of WP (C) 17546/2022 and issued the following operative directions, which are contained in paragraph 79 of the judgment. For convenience, the directions are extracted hereafter:

“i) A show cause notice shall be issued to the Petitioner within a period of 2 weeks from today setting out the reasons for suspension.

ii) Any relevant material in respect of allegations against the Petitioner shall be put to the Petitioner along with the show cause notice.

iii) An opportunity to reply shall be afforded to the Petitioner and if a hearing is sought, the same shall be granted.

iv) After affording a hearing, a reasoned order shall be passed within 3 months.

v) Insofar as the existing contracts are concerned, the interim arrangement made vide order dated 23rd December 2022 shall continue.

vi) All remedies of the Petitioner are left open to be availed of as per law.”

9. Significantly, these directions were based on the following findings of fact returned by the Single Judge, *albeit*, after perusing the record produced by UOI.

i) The suspension order dated 09.12.2022 passed by GOI was based on an intimation letter received from CBI in December whereby it was conveyed that investigations were underway against one of the former Directors of Defsys, i.e., Mr Sushen Mohan Gupta and his companies.

ii) Even if it is presumed that the investigation against both Agusta Westland and Defsys commenced in 2013, there was no clarity as to why CBI furnished information vis-à-vis Defsys only in December



2021, and all this while UOI, had been procuring defence equipment from Defsys without a break since 2007. There is nothing on record that would explain the change in circumstances that prevailed before and after December 2021.

iii) Despite the suspension order dated 09.12.2022 being issued, UOI continued to procure equipment vis-à-vis contracts that were already in operation; although, this was also directed by the learned Single Judge *via* the interim order dated 23.12.2022.

iv) Sushen Mohan Gupta was the Director of Defsys between 25.02.2013 and 29.03.2018. Mr Gupta's family members continue to hold a stake in Defsys and are also Directors and Promoters of Defsys.

v) After the revocation of Agusta Westland's suspension, legal opinion was sought by UOI in the backdrop of the MOD Guidelines. After considering the intimation on record and the legal opinion, the concerned authority issued the suspension order dated 09.12.2022, whereby business dealings with Defsys were suspended for one (1) year.

vi) As per the MOD Guidelines, the suspension was required to be reviewed by a committee after six (6) months. Thus, in terms of Clause D.3 of the MOD Guidelines, a committee was constituted, which considered the representation of Defsys dated 15.12.2022 and CBI's input received in May 2023. The committee, *via* a decision dated 06.06.2023, decided to continue the suspension of Defsys till 08.12.2023. The rationale applied by UOI in suspending business dealings with Defsys was that the allegations levelled against it would



attract the provisions of Clause C.1(b) read with Clause D.2 of the MOD Guidelines.

vii) Neither was Defsys issued a notice before passing the suspension order dated 09.12.2022 nor was a reply called for or a hearing given.

viii) No heed was given to the principle of proportionality or the impact the suspension would have on Defsys. Even when the committee reviewed the suspension order 09.12.2022, no hearing was afforded to the representatives of Defsys. The notice dated 16.01.2023 issued under Section 91 of the Cr.P.C. only sought certain information, *inter alia*, concerning the shareholders of Defsys.

ix) In defence procurement matters, UOI was the appropriate authority for making decisions vis-a-vis purchases, keeping national interest in mind.

x) Though Defsys was promoted by an individual, i.e., Sushen Mohan Gupta, who was one of the key individuals involved in the Agusta Westland Helicopters scam *qua* which criminal investigation was on, the nature of the investigation was unclear.

xi) There needed to be more clarity as to the nature of material that had come in the know of CBI in the course of the investigation which resulted in the revocation of Agusta Westland's suspension.

xii) Even after registration of a Preliminary enquiry [PE] against Agusta Westland, for eight years, between 2013 and 2021, no suspension order was issued by UOI *qua* Defsys.

xiii) While it cannot be said that UOI did not apply its mind in issuing the suspension order dated 09.12.2022, the suspension cannot



continue indefinitely. The suspension, at some point in time, should result in due process being followed for banning or would otherwise have to be revoked. Debarment can never be permanent. It would invariably depend on the offence committed by the erring contractor.

xiv) Even though defence procurement contracts stand on a different footing, no material was placed on record which leads one to conclude that natural justice principles should be entirely dispensed with. The principles of natural justice would have to be complied with, and UOI would have to go beyond merely acting on the intimation received from CBI.

xv) Although UOI has a right to order suspension forthwith for justifiable reasons, in the facts of the instant case [even though it is a defence procurement contract], non-issuance of a show cause notice was not justifiable.

10. The 05.09.2023 judgment of the learned Single Judge triggered cross-appeals. Defsys filed its appeal [LPA 672/2023] in and about 27.09.2023 seeking the following reliefs:

- i) Set aside paragraphs 78 and 79 of the judgment dated 05.09.2023;
- ii) Set aside the suspension order dated 09.12.2022 and the unrevealed review order dated 06.06.2023 passed by the committee.

10.1 UOI instituted its appeal [LPA 682/2023] in and about 03.10.2023, in which it asked for setting aside the judgment dated 05.09.2023 in its entirety.

11. Furthermore, on 15.10.2023, Defsys moved an application [CM 54218/2023] in LPA 672/2023 whereby it sought a direction to the effect



that UOI should be called upon to make a techno-commercial evaluation of its bid against tender no. RC/IMM/EOSYSTEM/8422LRU/114/1 issued by Hindustan Aeronautics Limited [HAL] to procure Electro Optical systems for Light Utility Helicopters. The evaluation was not being made because of the suspension order dated 09.12.2022.

12. On 19.10.2023, a coordinate bench passed an order in CM 54218/2023, preferred in LPA 672/2023, directing HAL to proceed with the techno-commercial evaluation of the bid submitted by Defsys.

13. Defsys was also not issued a Request for Commercial Offer [RCO] for a project bearing reference no. 35854/Make (APU)/GS/Mod (AC) which involved prototyping and procuring Auxiliary Power Units (APU) for T-72 and T-90 tanks [hereafter referred to as "Tank project"].

13.1 Resultantly, Defsys filed its second writ action [WP (C) 13719/2023]. In this writ petition, Defsys moved an interlocutory application [CM 54215/2023]. On 19.10.2023, the division bench directed UOI to issue an RCO for the Tank project.

14. While appeals were pending consideration, on 14.11.2023, GOI circulated a list of entities that had been debarred/put on hold/suspended from doing business with MOD. As indicated above, Defsys was mentioned against item no. 14, i.e., the entity with whom business dealings with MOD had been "put on hold/suspended".

15. The coordinate Bench disposed of cross-appeals [LPA 672/2023 and LPA 682/2023] *via* judgment dated 06.12.2023. The upshot of this judgment is that it sustained the Single Judge's dated 05.09.2023, *albeit* with slight modifications concerning directions contained in paragraph 79 of the learned Single Judge's judgment. Thus, the period to issue show cause



notice was reduced from two (2) to one (1) week, and likewise, the timeline to pass a reasoned order was truncated from three (3) months to one (1) month. It was indicated by the division bench that non-compliance with its direction would lead to the suspension order being automatically revoked.

16. This led to GOI issuing a show cause notice dated 13.12.2023 to Defsys. *Via* the said show cause notice, GOI called upon Defsys to file its response as to why the suspension of business dealings should not continue for another six (6) months in terms of the MOD Guidelines.

16.1 As required, Defsys submitted its response *via* a communication dated 20.12.2023. Amongst other things, it was pointed out by Defsys that:

- i) The show cause notice was not accompanied by the material or the grounds based on which suspension is sought to be ordered.
- ii) It was fulfilling an essential role in the defence equipment manufacturing space.
- iii) Clauses D.2 and D.3 could not be read independently of Clauses C.1 (a) to (f) of the MOD Guidelines.

16.2 Concededly, the concerned authority accorded a personal hearing to the representatives of Defsys on 27.12.2023.

17. The record further discloses that directions *pari materia* with the judgment dated 06.12.2023 in LPA 672/2023 and 682/2023 were also passed in LPA 832/2023, titled *UOI v. Vert Equipment Pvt. Ltd.* The modifications that the coordinate bench carried out were about the commencement of timelines concerning the issuance of show cause notice and rendering of speaking order and that reasons were to be provided for "suspension" and not "banning", as noted by the learned Single Judge.

18. Being aggrieved, UOI carried the judgment of the division bench



dated 06.12.2023 passed in LPA 672/2023 and LPA 682/2023 to the Supreme Court *via* Special Leave Petition [SLP] nos. 1158-1159/2024, which were instituted on 03.01.2024.

18.1 The Supreme Court, after noticing that UOI had issued not only a show cause notice dated 13.12.2023 but also passed an order dated 05.01.2024, which was the subject matter of a challenge before this Court, did not consider it appropriate to entertain the SLPs.

18.2 The SLPs were disposed of on 29.01.2024. However, while disposing of the SLPs, the Court made the following observations:

“2 In that view of the matter, we consider it inappropriate to entertain the Special Leave Petitions against the impugned order of the High Court dated 06 December 2023 which affirmed the judgment of the Single Judge requiring a show cause notice to be issued and compliance with the principles of natural justice to be effected.

3 Since the impugned order of the High Court is confined to this aspect, it will not be construed as amounting to the expression of any opinion on broader questions of law which were not involved in the appeal before the High Court.”

19. As noticed above, the instant writ petition was filed in the interregnum.

III. SUBMISSIONS BY COUNSEL:

20. Against this backdrop, submissions were advanced on behalf of the petitioners by Messrs Neeraj Kishan Kaul and Mr Sandeep Sethi, learned senior counsel while Mr Kirtiman Singh, learned CGSC, advanced arguments on behalf of the respondent/UOI.

21. The submissions made by Mr Neeraj Kishan Kaul/ Mr Sandeep Sethi can be broadly paraphrased as follows:

21.1 UOI was required to issue a show cause notice along with relevant material, which had to relate to Clauses C. C.1 (a) to (f) of the MOD



Guidelines. [See paragraphs 23 to 26, 34, and 35 of the judgment of the coordinate bench dated 06.12.2023 and the directions contained in sub-paragraphs i) and ii) of paragraph 79 of the Single Judge's judgment dated 05.09.2023].

21.2 The impugned order dated 05.01.2024 passed by UOI has lost sight that Defsys has been making supplies for over seventeen (17) years. Defsys's conduct has never been questioned on the grounds of non-performance or otherwise. Defsys continues to make supplies vis-à-vis ongoing contracts and overseas customers with the approval of MOD.

21.3 The suspension of business dealings is based on an alleged intimation from CBI that Defsys was the subject of an "ongoing investigation" in connection with the Agusta Westland case.

21.4 Although CBI has filed one (1) charge sheet and two (2) supplementary charge sheets in the Agusta Westland case, Defsys has not been named as an accused. CBI has laid no chargesheet, accusation, or allegation against Defsys.

21.5 Though a suspension order vis-à-vis Agusta Westland was issued by MOD in 2013, it was revoked by UOI on 12.11.2021. Agusta Westland continues to supply defence equipment to GOI despite facing a trial.

21.6 The directive issued by the GOI suspending business dealings with Defsys continues to operate even though suspension *qua* Agusta Westland, as indicated above, was revoked on 12.11.2021. Defsys merely received a notice under Section 91 of the Cr.P.C. in its capacity as a witness, which was replied to on 18.01.2023.

21.7 The suspension, which has continued for sixteen (16) long months, has impacted not only Defsys's reputation and business interests but also the families of its employees. Defsys, being an MSME, is struggling to sustain



its operations.

21.8 The stand of UOI that it could suspend "business dealings with an entity" solely based on the provisions of Clause D.2 without having regard to Clause C.1 (a) to (f) of the MOD Guidelines is in the teeth of division bench judgment dated 06.12.2023. [See paragraph 26 of the said judgment].

21.9 As per the directions contained in the division bench judgment dated 06.12.2023, UOI was required to supply to Defsys not only the grounds on which suspension was ordered but also the relevant material in support of the said grounds. Since the directions were not complied with, as per the terms of the judgment dated 06.12.2023, the suspension order dated 09.12.2022 stands automatically revoked.

22. Accordingly, the suspension order dated 09.12.2022, the show cause notice dated 13.12.2023, and the order dated 05.01.2024, deserve to be declared void *ab initio*.

23. In rebuttal, Mr Singh, after taking us through the history of the dispute between the parties, emphasized the following:

23.1 The record available with UOI/MOD was produced before the learned Single Judge, who rendered the judgment dated 05.09.2023. Hence, after perusing the record, the learned Single Judge did not deem it fit to set aside the suspension order dated 09.12.2022.

23.2 On behalf of Defsys, no submissions were advanced concerning the validity of the MOD Guidelines. In any event, they would be estopped from doing so in the instant proceedings having regard to the analogous principles captured in Order II, Rule 2 and Section 10 of the Code of Civil Procedure, 1908 [in short, "C.P.C."].

23.3 In any event, the learned Single Judge, *via* judgment dated



05.09.2023, had issued directions to bring the MOD Guidelines in line with requirements of fairness, reasonableness, and non-arbitrariness. Therefore, in any event, a challenge to the Guidelines would not be maintainable. [See paragraphs 54 to 62 of the judgment dated 05.09.2023].

23.4 Thus, having regard to the directions contained and the findings of fact returned in the judgment dated 05.09.2023, UOI was well within its rights to continue with the present state of affairs, i.e., suspension of business dealings with Defsys. It is well-established that upon receipt of intimation of initiation of criminal investigation or inquiry, the competent authority can suspend business dealings without having to examine the merits of the investigation. [See *AKK Nambiar v. UOI*, AIR 1970 SC 652; and *Brijmohan v. Central Information Commission* 2023 SCC Online Del 6311].

23.5 Given the submissions made above, the order dated 05.01.2024 deserves to be upheld and the writ petition challenging the same ought to be dismissed.

IV. ANALYSIS AND REASONS:

24. Before we proceed further, it may be relevant to note that in the written submissions filed on behalf of UOI, a reference has been made to the provisions of Sections 8(1)(h) and Section 24 of the Right to Information Act, 2005 [hereafter referred to as “the RTI Act”]. Section 8(1)(h) exempts disclosure of information that may impede the process of investigation, while Section 24 takes certain authorities referred to in the Schedule appended to the RTI Act out of its purview. Pertinently, neither in the counter-affidavit nor during arguments was a reference made to the



aforementioned provisions of the RTI Act. We have dealt with this aspect in the latter part of the judgment.

25. Suffice it to say, having examined the record and considered the submissions advanced by counsel for the parties, what has emerged are the following facts, regarding which there is no dispute:

25.1 Firstly, Defsys has been in existence since 2007. It has been supplying defence equipment for nearly seventeen (17) years to GOI and foreign buyers, approved by the former, i.e., GOI.

25.2 Secondly, a PE was registered against Agusta Westland in 2013. Business dealings with Agusta Westland remained suspended until 12.11.2021.

25.3 Thirdly, although a charge sheet has been filed against Agusta Westland International Ltd., Agusta Westland's suspension has been lifted.

25.4 Fourthly, even though Defsys has been investigated along with Agusta Westland because of the involvement of its erstwhile Director Mr Sushen Mohan Gupta, it has not been named as "accused", until now.

25.5 Fifthly, though UOI received intimation *vide* LD no. 30/2021-VC (MHA) 105/2460 concerning the "investigation" against Defsys on 21.12.2021, the suspension order dated 09.12.2022 was passed in exercise of emergent power, after a lapse of nearly one (1) year.

25.6 Sixthly, the record that was placed by UOI before the learned Single Judge, while adjudicating WP (C) 17456/2022, revealed that apart from the intimation dated 21.12.2022, received from CBI, that the investigation against Defsys was ongoing, no material was found linking Defsys to Agusta Westland.

25.7 Seventhly, UOI has not placed before the Court any material that



would show that the stand taken by Defsys that it had no business dealings with Agusta Westland was false.

25.8 Eighthly, as noted by the learned Single Judge, in the judgment dated 05.09.2023, UOI could not bring to the fore the change in circumstances obtaining between 2013 and December 2021 and thereafter, which had propelled it to issue the suspension order dated 09.12.2022.

26. The show cause notice dated 13.12.2023 was a consequential step taken by UOI in conformity with the directions contained in the coordinate bench judgment dated 06.12.2023, read with the Single Judge's judgment dated 05.09.2023. A perusal of the contents of the show cause notice dated 13.12.2023 and the impugned order dated 05.01.2024 would show they are foregrounded in the observations of the division bench that since nearly one (1) year had passed from the time the suspension order dated 09.12.2022 was issued, it required a review. The review, according to UOI, had revealed that Defsys was still under investigation.

27. The question, therefore, that arises for consideration is whether the suspension of Defsys can continue *ad infinitum*. The answer to this has to be in the negative for the reasons peculiar to the instant case. As noticed above, although investigations *qua* Agusta Westland have been completed and a charge sheet has been filed, the suspension order *qua* the said entity was revoked on 12.11.2021. Defsys, which was being investigated, according to the UOI, concerning the very same case, was issued a suspension order after Westland's suspension order was revoked. The suspension order was issued nearly one (1) year after UOI received CBI's intimation that Defsys was under investigation. As indicated above, this intimation was received on 21.12.2021, whereas the suspension order was



passed on 09.12.2022. Since then, the circumstances have remained the same. UOI, based on "latest inputs", has, *via* the impugned order dated 05.01.2024, extended the suspension for another six (6) months, in consonance with the provisions of paragraph D.3 of the MOD Guidelines. As to what inputs UOI has received from CBI were not put before the Court. The only input that UOI has received from CBI is that there is an "ongoing investigation" against Defsys.

28. In our opinion, such a stand of UOI is akin to being confronted with [metaphorically speaking], the "inscrutable face of a sphinx". We would have, perhaps, accepted this position as well, having regard to the fact that GOI should have complete freedom in choosing who they wish to procure defence equipment from, had not GOI lifted the revocation order against Agusta Westland even after a charge sheet was filed against the said entity.

29. Furthermore, the suspension of Defsys is even more tenuous if one considers that Defsys continues to supply defence equipment to GOI under subsisting contracts.

30. Insofar as the argument advanced on behalf of UOI that it can take recourse to the provisions contained in Clause D.2¹ *dehors* the grounds contained in Clause C.1 (a) to (f)² is concerned, it is untenable. The reason

¹ **(D) Suspension**

D.2 The competent authority may suspend business dealings with an entity when it refers any complaint against the entity to CBI or any investigating agency or when intimation is received regarding initiation of criminal investigation or enquiry against any entity.

² **(C) Causes for Suspension and Banning of Business Dealings with Entities**

C.1 The competent authority may levy financial penalties and/or suspend/ban business dealings with an entity for one or more of the grounds listed below:-

- a) Violation of Pre-Contract Integrity Pact (PCIP) (where such PCIPs are entered into between the Ministry of Defence and an entity).
- b) Resort to corrupt practices, unfair means and illegal activities during any stage of bid/contract to secure a contract, even in cases where PCIP is not mandated.
- c) Violation of Standard Clause in the contract of agents/agency commissions.



why we say so is that this submission received closure with the observations made by the coordinate bench in paragraph 26 of the judgment dated 06.12.2023. For convenience, paragraph 26 of the judgment dated 06.12.2023 is extracted hereafter:

*“26. Under Clause C.1 of the MOD guidelines, six specific causes have been provided which may lead to suspension and then final banning under Clause F. Emergent suspension, however, can be ordered under Clause D.2. **However, D.2 can be exercised only if causes under Clause C.1 exists. The UOI has contended that power to suspend under Clause D.2 is independent of Clause C.1. This contention is patently wrong on the reading of the two clauses.** In any case, the power to suspend under Clause D.2 does not lead to banning under Clause F. Under Clauses F.1 to F.3, there are specific time periods provided for banning. The suspension period must relate to banning, otherwise it is causeless. Neither of Clauses F.1 to F.3 refer to Clause D as a cause for banning. An intimation by CBI of a pending investigation is not a cause for banning, only a chargesheet is. In the present case, there is neither a chargesheet nor any other cause mentioned in Clause C.1. The above factors demonstrate the MoD violates the MoD's own Guidelines which requires it to be "satisfied that such action [such as suspension] is appropriate and necessary in the circumstances of the case".”*

[Emphasis is ours]

31. We need to, however, emphasize that our view is not just based on the approach adopted by the coordinate bench, which is that the power of suspension of business dealings under Clause D.2 cannot be exercised independent of Clause C.1 (a) to (f) of the MOD Guidelines, but is also founded on the incongruent manner in which UOI has dealt with Defsys and Agusta Westland. While Agusta Westland's suspension has been lifted; opening doors for it to do business with UOI despite facing a criminal trial, Defsys, against whom no ground is made out for suspending "business

d) If national security considerations so warrant.

e) Non-performance or under performance under the terms and conditions of contract(s) or agreement(s) not covered in grounds listed in (a) to (c) above in accordance with provisions in contract or agreement.

f) Any other ground for which the competent authority may determine that suspension or banning of



dealings" [save and except that investigations concerning its involvement in the Agusta Westland case are continuing], is put in a situation where it would be driven out of business given the fact that GOI is, practically, its only customer.

32. Lastly, the assertion made in the written submissions on behalf of UOI, that under Section 8(1)(h) of the RTI Act, it is exempt from making any disclosure concerning pending investigation is misconceived as the record shown to the learned Single Judge during adjudication of WP (C) 17456/2022 revealed that apart from a laconic input received from CBI, that Defsys was being investigated, there was nothing on record which would justify, at least for the present, the sustainability of suspension order dated 09.12.2022. Therefore, as is evident, since the professed stand of UOI is that it had no information available with it except that an investigation was ongoing against Defsys, its reliance on provisions of Section 8(1) of the RTI Act seems meaningless. Moreover, exemption from disclosure to an RTI applicant concerning material gathered during the investigation does not extend to placing the material before the Court unless privilege is claimed by the State in accordance with Sections 123 and 124 of the Indian Evidence Act, 1872 [in short, "Evidence Act"] and the Court, after inspecting the material, satisfies itself that such disclosure is injurious to public interest.³

32.1 In any event, since UOI placed the material before the learned Single Judge while adjudication of WP (C) 17456/2022 was on, and, according to it, the only input it had received was that investigation was on, the inference we can draw is that it had no material available on record which would, at

business dealings with an entity shall be in the public interest.

³ **S.P. Gupta v. Union of India and Another**, 1981 (Supp) SCC 87 [paragraph 77].



least, *prima facie*, support its contention that the suspension should continue to operate for another six (6) months.

33. As far as the relief sought in the writ petition concerning striking down Clauses D.2 and D.3⁴ of the MOD Guidelines is concerned, no arguments were advanced on behalf of the petitioners, possibly, for two reasons.

33.1 First, possibly because of the submission advanced on behalf of the petitioners that Clause D.2 could not be read independently of Clause C.1 (a) to (f) of the MOD Guidelines.

33.2 Second, perhaps because of the connection between suspension and banning. Clause D.3 of the MOD Guidelines requires a review of the order of suspension within six (6) months of the issuance of the order. It also provides that suspension should, ordinarily, not exceed one (1) year. Extension beyond a year, as per the said Clause, can be made at a time for six (6) months with a caveat that the total period of suspension cannot exceed the maximum period of banning entities for the same cause of action. Therefore, quite clearly, there is an inter-linkage between the grounds of suspension and banning inasmuch as the former is a pro tem measure while the latter is the final decision that UOI/MOD may take against an entity with which it has entered into business dealings.

V. CONCLUSION:

⁴ (D) Suspension

D.3 An order of suspension of business dealings with an entity will be issued for such period as the competent authority may deem fit. The period of suspension shall not ordinarily exceed one year. A review of the Order of suspension of business dealings with an entity shall be undertaken within six months of the issue of such an Order and before expiry of the period specified therein. The suspension of an entity may be extended beyond the period of one year, on the order of the Competent Authority for subsequent periods of six months each. The total period of suspension of business dealings with an entity shall not exceed the maximum period of banning of business dealings with an entity for the same cause of action.



34. Thus, for the foregoing reasons, we are inclined to dispose of the writ petition with the following directions:

i) The impugned suspension order dated 09.12.2022, the show cause notice dated 13.12.2023, and the impugned order dated 05.01.2024 are set aside.

ii) The UOI/MOD will have the liberty to take recourse to the MOD Guidelines for suspending/banning Defsys if, during investigation, it gathers material that discloses its involvement with the Agusta Westland case, *albeit*, as per law.

35. It is ordered accordingly. The writ petition is disposed of in the terms above. Parties will bear their respective costs.

(RAJIV SHAKDHER)
JUDGE

(AMIT BANSAL)
JUDGE

MAY 31, 2024

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