# Anchor Offshore Services Ltd. (AOSL) Vs Oil and Natural Gas Corporation Ltd. and Others

**Court:** BOMBAY HIGH COURT

**Date of Decision:** March 2, 2016

**Acts Referred:** Constitution of India, 1950 - Article 226

**Citation:** (2016) 3 AIRBomR 18 : (2016) 2 BCR 579

**Hon'ble Judges:** S.C. Dharmadhikari and G.S. Patel, JJ.

**Bench:** Division Bench

**Advocate:** Viraag Tulzapurkar, Senior Counsel, Anita Castelino, Alisha Lambay and Vikas K. Singh, i/b Lambay & Co., for the Appellant; Kevic Setalvad, Senior Advocate, Daisy Dubash, J.P. Kapadia and O. Mohandas, i/b Little & Co., for the Respondent

**Final Decision:** Dismissed

## Judgement

G.S. Patel, J.
1. Rule. Respondents waive service. By consent, Rule is made returnable forthwith and the Petition is taken up for hearing

and disposal. We have heard Mr. Tulzapurkar, learned Senior Counsel for the Petitioner and Mr. Setalvad, learned Senior Counsel for

Respondents Nos. 1 to 5. We have considered their respective submissions and, with their assistance, the material on record.

2. The challenge in this Writ Petition brought under Article 226 of the Constitution of India is to what is effectively a blacklisting order dated 5th

November 2015 passed by the 2nd Respondent, the Executive Director of the 1st Respondent, the Oil and Natural Gas Corporation Limited

(""ONGC""). By this order1 the Petitioner (""Anchor"") has been banned from all business dealings with ONGC for two years. The ostensible reason

for this ban is that Anchor allegedly violated an ""Integrity Pact"", a formal and binding contract between Anchor and ONGC. The impugned order

in terms states that no tender inquiry is to be issued to Anchor or any of its allied concerns, partners, associates, directors or proprietors for any

ongoing or future tenders during the period of the ban.

3. The additional prayer added by an amendment is that the provisions of Section 3[3] of the Integrity Pact be struck down and be held not to be

binding on the Petitioners.

4. Mr. Tulzapurkar places his challenge on three principal grounds: first, that there has been a breach of principles of natural justice, in that ONGC

considered material behind Anchor''s back and never disclosed this material to it nor gave it an opportunity of dealing with that material; second,

that contrary to ONGC''s own manual, which has a clause requiring reasons to be given, and though this is also a mandate of the law whether or

not the manual contains such a provision, the impugned order is entirely unreasoned; and third, that there is a material misdirection in regard to the

relevant clauses of the Integrity Pact.

5. We believe it is necessary, for a clearer understanding of the subsequent events and their implications and ramifications, to set out the

background of Anchor''s case. This is a company that, for the last three decades or so, has done a considerable volume of business with ONGC in

the supply, installation and commissioning of various kinds of equipment used in oil and gas production at ONGC''s various sites. Anchor''s

services and business offerings include the operation, repair and maintenance of such equipment. Anchor employs about 300 skilled and qualified

technicians and engineers. For the last eight years, Anchor says, being the lowest bidder and having acquired a reputation for excellence for the

quality of its services, it has been awarded contract for the operation and maintenance of Offshore Cranes installed on ONGC''s various offshore

production platforms. Anchor has discharged its contractual obligations successfully, demonstrating an average crane availability of about 98% as

against ONGC''s benchmark of 95%. Anchor claims that there has, as a result, been no oil and gas production loss from any of these offshore

platforms attributable to the want of any crane supplied or installed by it. Anchor''s record is untarnished.

6. An Operations and Maintenance (""O&M"") Contract for Offshore Cranes was awarded by ONGC to Anchor against a global tender. This was

for a three year period from 18th June 2011 to 17th June 2014. The contract inter alia required the execution of an ""Integrity Pact"" with ONGC.2

This was required to ensure transparency and fairness during the tendering process and during the execution of the contract, a mandate in

compliance with anti-corruption laws.

7. Under the contract, Anchor was responsible for ensuring the uninterrupted operation of the cranes in question with a minimum crane availability

of 95%. Failure to do so would result in heavy penalties and recovery by ONGC. Consequently, to ensure the uninterrupted operation of offshore

cranes, their timely repair and ongoing maintenance were critical. This in turn required the ready availability of spare parts. For this reason, the

tender required the successful bidder to have in place a MoU in a format prescribed by ONGC with the Original Equipments Manufacturers

(""OEMs"") of the manufacturers of cranes. The O&M contract bound the Anchor to procure spare parts from ONGC"s designated OEMs if called

on by ONGC. In the contract in question, there were about 28 cranes of "Patriot" and "Nautilus" makes. Their spare parts could be procured only

from their respect OEMs, viz., Patriot and Nautilus, or their authorised licensees in India. The manufacturers of the Patriot cranes advised the

Petitioners to approach the exclusive licensees in India. At the relevant time, one G&T Oil States Industries Pvt. Ltd. (""GTOSI"") was the exclusive

licensee in India of the "Patriot" and "Nautilus" makes of cranes. GTOSI was a joint venture of G&T Oil Field and Offshore Service Pvt. Ltd.

(""GTO"") and a Singapore-based company, Oil States Industries (Asia) Pte. Limited. It seems that the promoter-Chairman of GTO, one Mr.

Savera, was previously the Executive Chairman of GTOSI.

8. The Petitioner forwarded a draft MoU to GTOSI, the joint venture. This draft was in terms of the one prescribed by ONGC as part of the

tender. GTOSI did not accept the draft in the form that it was sent. It demanded changes and alterations. Anchor, in order to save time, accepted

these and the MoU was executed on 3rd October 2011,3 about five months after the award of the ONGC O&M contract. At that time it seems

that ONGC was separately already facing a problem of timely delivery of spare parts from GTOSI. Anchor claims that on 21st October 2011,

i.e., within a few days from entering into the MoU, Anchor sent a copy of the MoU to ONGC and informed ONGC that the 7% discount offered

by GTOSI on the supply of spare parts to ONGC would be passed on to ONGC. There is a great deal of controversy about this letter.

9. During the pendency of the MoU, it seems that two sheave pins of a particular Nautilus crane failed. ONGC demanded that Anchor procure

these pins and repair the crane on a priority basis. Anchor sought and received a quotation from GTOSI and sent it on to ONGC. In the meantime

ONGC had independently called for a quotation from GTOSI for the supply of these very two sheave pins and GTOSI quoted the very same

price. There was thus no price differential between the quotation obtained by Anchor and that given to ONGC directly. Anchor paid an amount of

Rs. 2,79,196.88 as the basic cost of these sheave pins to GTOSI. They were reimbursed an amount of Rs. 2,76,648/-. Anchor therefore claims to

have suffered a small loss of about Rs. 2,540/-. Although the MoU between Anchor and GTOSI required that GTOSI give Anchor a 7%

commission, no such commission was ever in fact paid. There was, therefore, no commission to pass on to ONGC in respect of the supply of two

sheave pins. There was also no material advantage to Anchor in the supply of these sheave pins. It is not in dispute that there was only a single

order in respect of these two sheave pins. It is also common ground that this was only spare parts requirement involving GTOSI during the entirety

of the O&M contract''s tenure.

10. The O&M contract was successfully completed on 17th June 2014. There was no complaint against Anchor throughout the duration of this

O&M contract.

11. Anchor claims that today all of its hard-won reputation is jeopardized only on account of an entirely false representation made by GTOSI to

ONGC''s Independent External Monitor (""IEM""). It is not mere coincidence, Mr. Tulzapurkar says, that GTOSI''s so-called ''complaint'' came to

be made only in May 2014 when the principal contract between ONGC and Anchor had neared the end of its three-year term, and again in July

2014 after the O&M Contract had ended. Ex-facie, Mr. Tulzapurkar submits, the complaint is frivolous. It is also not coincidence, according to

Mr. Tulzapurkar, that the GTOSI joint venture ended in 2014, and that since then GTO has been independently vying for tenders for these O&M

contracts for offshore cranes and for other ONGC contracts. GTOSI alleged the MoU to be illicit and illegal and violative of the Integrity Pact.

Yet GTOSI itself, through the very same Mr. Savera, signed that very MoU against which it now makes allegations. It took no action on it till very

nearly the end of the contractual term. Indeed, even the form of the MoU was one suggested by GTOSI itself, and made changes to the form in the

ONGC-prescribed format sent by Anchor.

12. Anchor says that GTO''s intentions are self-serving, motivated and mala fide. It seeks to displace Anchor from the bidding or tendering field.

Rather than seeing these actions of GTO for what they were, viz., an attempt to take down Anchor and supplant GTO itself in Anchor''s place as a

direct competitor, ONGC has, on completely incorrect, unsubstantiated, untenable and frivolous grounds preferred to target Anchor alone and to

lend untenable credence to the allegations made by GTO.

13. The Integrity Pact that Anchor was required to sign binds it to terms and conditions. Those set out in Sections 2 and 3 are relevant for our

purposes.

Section 2 - Commitment of the Bidder/Contractor

(1) The Bidder/Contractor commits itself to take all measures necessary to prevent corruption. He commits himself to observe the following

principles during his participation in the tender process and during the contract execution.

1. The Bidder/Contractor will not, directly or through any other person or firm, offer, promise or give to any of the Principal"s employees involved

in the tender process or the execution of the contract or to any third person any material or immaterial benefit which he/she is not legally entitled to,

in order to obtain in exchange any advantage of any kind whatsoever during the tender process or during the execution of the contract.

2....

3. The Bidder/Contractor will not commit any offence under the relevant Anit-corruption laws of India; further, the Bidder/Contractor will not use

improperly, for the purposes of competition or personal gain, or pass on to others, any information or document provided by the Principal as part

of the business relationship, regarding plans, technical proposals and business details, including information contained or transmitted electronically.

Section 3 - Disqualification from tender process and exclusion from future contracts:

If the Bidder, before contract award has committed a transgression through a violation of Section 2 or in any other form such as to put his reliability

or credibility as Bidder into question, the Principal is entitled to disqualify the Bidder from the tender process or to terminate the contract, if already

signed, for such reason.

(1) If the Bidder/Contractor has committed a transgression through a violation of Section 2 such as to put his reliability or credibility into question,

the Principal is entitled also to exclude the Bidder/Contractor from future contract award processes. The imposition and duration of the exclusion

will be determined by the severity of the transgression. The severity will be determined by the circumstances of the case, in particular the number of

transgressions, the position of the transgressors within the company hierarchy of the Bidder and the amount of the damage. The exclusion will be

imposed for a minimum of 6 months and maximum of 3 years.

(2) A transgression is considered to have occurred, if the Principal after due consideration of the available evidence, concludes that no reasonable

doubt is possible.

(3) The Bidder accepts and undertakes to respect and uphold the Principal"s absolute right to resort to and impose such exclusion and further

accepts and undertakes not to challenge or question such exclusion on any ground, including the lack of any hearing before the decision to resort to

such exclusion is taken. This undertaking is given freely and after obtaining independent legal advice.

(4) If the Bidder/Contractor can prove that he has restored/recouped the damage caused by him and has installed a suitable corruption prevention

system, the Principal may revoke the exclusion prematurely.

(Emphasis added)

14. Clause 15.1 of the O&M contract expressly permits the payment of a commission but this is only in respect of foreign bidders. It states that

ONGC would prefer to deal directly with manufacturers and principals abroad but should they decide to have their representatives, agents or

consultants in India and pay commission for their services, this should be a bare minimum. This clause is referenced only to indicate that the

payment of a commission by an OEM is not in and of itself obnoxious.

15. Clauses 9.1 and 9.2 of the contract, Annexure ""2"" relate to the supply of spare parts for the O&M contract in relation to Offshore Cranes.

They read:

Clause 9.1: Contractor shall bring to the notice of the ONGC''s Representative of respective platform responsible for executing the contract, the

spares requirement for carrying our maintenance at Offshore Platforms. The spares shall be provided by ONGC from its inventory.

However, if requisite spares are not available with ONGC but are essential for carrying out the maintenance (e.g. attending breakdown

maintenance), CONTRACTOR shall arrange the same on the request of ONGC.

Clause 9.2: ONGC at its discretion shall ask CONTRACTOR in writing to procure and supply the spares from the

Packagers/OEM/OES/Licensee/Exclusive Supply-Service Centres and pay the CONTRACTOR, the landed cost plus 7.5% of the basic value of

the items indicated in the invoice of the supplier towards procurement, local transportation, handling and service charges.

16. One of the tender requirements was specifically that Anchor needed to have an MoU with the OEMs in place in a format prescribed by

ONGC. This is not disputed by Mr. Setalvad, who points out that Clause 9.1(b)(ii)4 read with the Bid Evaluation Criteria5 and the prescribed

form6 references and specifies the proforma of the required MoU. This is specifically set out in Clause 1.1(a)(2)(i) of the Bid Evaluation Criteria. It

is also to be noted that the names ''Nautilus'' and ''Patriot'' appear in these documents. Consequently, Anchor approached all five crane

manufacturers/OEMs to have MoUs put in place. Anchor procured four of the five MoUs according to the prescribed format. The fifth, with

GTOSI, could not be put in place immediately.

17. Paragraph 4(xvi) of the Petition says:

(xvi) In this context, it is also important to mention here that in the past, ONGC has accepted similar agreement of the foreign supplier/contractor

with their Indian representative after the award of Contract/Order. Therefore, the Petitioners did not notice any abnormality or unusuality while

executing the said Agreement dated 03.10.2011 with M/s. G & T Oil States Industries Pvt. Ltd. (GTOSI), New Delhi as the same was duly

brought to the notice of ONGC.

There is no denial or traverse of this averment in any Affidavit filed by ONGC.

18. All four of the other MoUs were duly submitted by Anchor to ONGC, and there is no dispute about this. This is a matter that assumes critical

importance: for, it is today Anchor''s case that in the routine course, as it had done for the other four MoUs with OEMs, it forwarded to ONGC a

copy of its MoU with GTOSI. ONGC accepts that it received copies of the four OEM MoUs, but denies ever receiving the MoU with GTOSI.

The entire case seems to us to hinge on this one solitary issue.

19. At this stage, we must make reference to certain clauses of the MoU, because Mr. Setalvad also attempted a submission that irrespective of

whether or not there was any advantage obtained or retained by Anchor, the very existence of these clauses in the Anchor-GTOSI MoU was an

Integrity Pact violation. Certain clauses of this MoU are important.

1. RESPONSIBILITIES OF ANCHOR:

1.1 To use its best efforts to develop the business for and in the interest of the Vendor by generating the maximum possible requirement for the

Qualifying Products and Qualifying Services to support the execution of the Contract by ANCHOR.

1.2 To furnish to the VENDOR, in a prompt and efficient manner, all inquiries received by ANCHOR from ONGC for the Qualifying Products

and/or Qualifying Services.

1.3 ANCHOR will issue all Purchase Orders in respect of the Qualifying Products and Qualifying Services duly supported by a workable At Sight

Letter of Credit established in favour of the VENDOR for the Purchase Order/Work Order value. It is agreed to by and between the Parties that

the supply of the Qualifying Products would be made on a FOB Port of Export or Basis in case of imported items and on an ex-Works basis for

local supplies.

2. SALES COMMISSION

2.1 In cases when Order is placed on the VENDOR by ANCHOR

In consideration of the services to be performed by ANCHOR, VENDOR agrees to pay Sales Commission at the rate described below, for all

orders for Qualifying Products and Qualifying Services accepted by the VENDOR, emanating out of the Contract and substantiated by a copy of

the requirements submitted by the ANCHOR to the ONGC representative, per the provisions of para 9.1 of the Contract. The Sales Commission

will be calculated based on the net invoice value namely ex-Works/ex-Warehouse (invoice value, which shall not include transportation, packing

shipping, handling and similar charges and all taxes and customs duties). The Sales Commission percentage payable by the VENDOR to

ANCHOR will be 7% (seven percent) on the net invoice price, as explained hereinabove. The Sales Commission payable will be subject to

deduction of withholding tax and other taxes as may be applicable.

2.2 In cases when Order placed on the VENDOR by ONGC Directly

The same percentage of the net invoice value (as mentioned in the para 2.1 hereinabove) of Sales Commission will be paid to ANCHOR by the

VENDOR in the event of ONGC placing an Order on the VENDOR, emanating directly from the Contract and that which ANCHOR

substantiates by making available a copy of the requirement submitted by ANCHOR to the ONGC representative, per the provisions of para 9.1

of the Contract, establishing clearly that the sales/potential sales are as a result of ANCHOR''s efforts.

The VENDOR will issue a Credit Note for the Sales Commission amount corresponding to each invoice. The Sales Commission will be paid by

the VENDOR to ANCHOR, on a pro-rata basis within 15 days from the date of the physical receipt of payment by the VENDOR against a

specific Purchase Order.

It is recognized by both the parties that in some instances ONGC shall place an order on the VENDOR for enhanced quantities than the

requirement submitted by ANCHOR to ONGC, in such specific instance(s) the VENDOR shall in good faith and on it being satisfied that these

enhanced quantities are emanating from the requirement submitted by ANCHOR to ONGC and as a direct result of ANCHOR''s efforts, consider

such enhanced quantities as Qualifying Products and eligible for Sales Commission.

2.3 Notwithstanding the above, it is clearly understood between the Vendor and ANCHOR that in the event the VENDOR receives any Orders

directly from ONGC solely due to its efforts, no Sales Commission will be either payable or be due on paid to ANCHOR. In the interest of

ensuring clarity, it is stated that any Order for spares/sub-assemblies/components of the Products that is not supported by a copy of the written

requirement, other than to the instances referenced in para 2.2 above, submitted by ANCHOR to the ONGC representative, per the provisions of

para 9.1 of the Contracts, will not be considered as Qualifying products.

4. TERM:

4.1 This Agreement will remain in effect through-out the Contract period between ANCHOR and ONGC, as referenced hereinabove.

20. We come now to the most important document in this entire dispute. This is the covering letter dated 21st October 2011 sent by Anchor to

ONGC forwarding the Anchor-GTOSI MoU.7 It bears a reference number AOSL/127/2011/ONGC. The emphasized reference or identification

number is crucial. It is signed by one Pramod Mishra on behalf of Anchor. The letter produced shows an oval stamp with a crenellated border at

its foot indicating its receipt by ONGC on 21st October 2011.

21. On 28th August 2014, an officer of ONGC put up a working paper in regard to allegations of malpractices that had apparently by then already

been made against Anchor in relation to the Integrity Pact and the O&M contract in question. This had been referred for a legal opinion. The

working paper of 28th August 20148 references the MoU between Anchor and GTOSI. The complaint made by GTOSI was of 28th May 2014.

No copy of this complaint had been sent to Anchor. The relevant portions of this working paper read thus:

The scrutiny of the facts of the case on the basis of the relevant provisions of the Integrity Pact may reveal that M/s. Anchor by virtue of the fact

that it has entered into the Agreement dated 3rd October 2011 with M/s. G&T whereunder they are entitled to Sales Commission under Clause

No. 2 thereof, has improperly for the purpose of personal gain passed on to M/s. G&T information provided in ONGC''s Contract. The very fact

that the said Agreement dated 3rd October 2011 was entered into by M/s. Anchor behind the back of ONGC, may reflect the lack of

transparency and fairness on the part of M/s. Anchor which are bedrocks of the Integrity Pact and were required to be observed by the parties to

the Integrity Pact.

However, it is not clear from the record as available in the file whether the said personal gain which might have accrued to M/s. Anchor by virtue

of their entitlement for Sales Commission under Clause 2 of the said Agreement has been passed on to ONGC or not. Should the same has been

disclosed and passed on to ONGC without delay; the question of personal gain may not arise. However, the fact of improper use of the

information or document provided by the Principal to M/s. Anchor would remain unchanged and undisputed.

22. As a starting point of the action against Anchor, this is vital. It points to two things. First, the need for disclosure. This is, as it turns out, pivotal

to the entire case. Second, the question of commission and whether this was passed on. As we have noted, there being no evidence of any

commission having been received by Anchor, no issue ever arose of it being withheld or not passed on. This, therefore, leaves only the first

question of whether or not the MoU was disclosed to ONGC. This document also makes it clear that having an MoU that provides for

commission is not in and of itself anathema to the O&M Contract or the Integrity Pact.

23. This working paper was followed a few months later by a another note dated 10th December 2014 in which an opinion was expressed that

Anchor was in violation of the Integrity Pact on certain grounds. Paragraphs 3(a) and (b) of this document indicate that the principal cause of

concern at that time was that Anchor had obtained some benefit to which it was not entitled.9

24. On 19th February 2015, a Show Cause Notice was issued to Anchor.10 The Show Cause Notice sets out twelve questions or statements and

calls for Anchor''s responses to each. Question No. 1 makes it clear that the complaint emanated from GTOSI. This was allegedly done by a letter

dated 28th May 2014 and another letter 16th July 2014. There also appears to have been a meeting between the representatives of GTOSI and

ONGC on 9th July 2014. Portions of GTOSI''s two letters dated 28th May 2014 and 16th July 2014 are quoted. In the first, GTOSI apparently

alleged that their MoU, execution of which with Anchor GTOSI did not deny, was noticed to be in ''clear conflict'' with ONGC''s interest, and that

on realising this, ''''unilaterally'''' and ''''most immediately'''' GTOSI cancelled the MoU with Anchor. The submission to ONGC was that penal provision

should be invited against Anchor for having violated the Integrity Pact. Pausing for a moment, it is to be noted that this statement is demonstrably

incorrect. There was in fact no cancellation of the MoU at any time, let alone most immediately. The timing of this complaint is also most curious. It

will be remembered that the O&M contract between ONGC and Anchor was for a three year period from 18th June 2011 to 17th June 2014.

GTOSI''s complaint was, therefore, barely a month before the end of the principal contract, with which the MoU was co-terminus. There was no

question therefore of any ''''immediate'''' cancellation by GTOSI of its MoU with Anchor. GTOSI waited till the end of the contract before making

any complaint to ONGC. It is hardly likely to suppose that GTOSI awoke to this realisation of illegality, one that it claims was glaring, only after

three years.

25. The second letter from GTOSI, also quoted in the Show Cause Notices, is perhaps even more interesting. The allegation made in this in terms

is that ONGC would, as a result of the MoU between Anchor and GTOSI, have had to pay more for spares and assemblies; that Anchor would

have directly benefited by receiving commissions; and thus would have deprived the entire tendering and contract process of transparency. Once

again, GTOSI invited punitive action. This allegation, too, is clearly without basis, since there was no benefit at all to Anchor, no commission ever

having been paid. Indeed, as Anchor points out, far from receiving any benefit, it suffered a small loss.

26. Thus, the antecedent facts show that there was absolutely no basis for GTOSI"s complaint at all. But these were early days in the unfolding of

events, and ONGC called on Anchor to submit a detailed response to these allegations and to explain why it should not be banned by ONGC for

violations of the Integrity Pact.

27. Questions 6, 7, 8 and 9 of this Show Cause Notice are material. They read:

Q.6 As per agreement, the vendor will issue a credit note for the sales commission amount corresponding to each invoice issued by G&T Oil

States Industries. Please confirm if any such credit advice/note has been issued by M/s. G&T Oil State for the supply of sheave pins against

invoice No. GTOSI 4702/11-12/INV 005 dated 1.11.11

Q.7 Vide letter No. AOSL/127/2011/ONGC dt 21/10/2011 addressed to GM (MM), ONGC, you had indicated that sales commission @ 7.0%

received from M/s. G&T Oil States Industries shall be passed on to ONGC by M/s. Anchor. Please indicate details of any such commission

amount passed on to ONGC in this regard.

Q.8 ONGC has purchased spares worth Rs. 56,59,053/- vide PO No. 4010058933 dtd. 3.6.11 directly from M/s. G&T Oil States Industries.

As per the agreement executed with M/s. G&T Oil States Industries, 7% commission was to be paid by M/s. G&T to M/s. Anchor. Is there any

commission payment received by you as sales commission against the above referred direct purchase made by ONGC.

Q.9 Your Letter No. AOSL/127/2011/ONGC dtd. 21.10.11 appears to have been delivered to office of GM(MM) as per the seal affixed on the

body of the letter. Please confirm the mode of delivery of the letter. If delivered directly, please give the name of the person who delivered the said

letter.

28. Clearly, therefore, ONGC"s concern was principally whether any commission had been received from GTOSI and had remained to be passed

on to ONGC by Anchor (Questions 7 & 8). A subsidiary query raised in question 9 was as to the mode of delivery of Anchor"s letter dated 21st

October 2011 by which a copy of the MoU was sent on to ONGC.

29. On 17th March 2015, Anchor replied to this Show Cause Notice.11 This is a substantial reply. It deals with every aspect of the Show Cause

Notice. In the course of this Reply to the Show Cause Notice, Anchor pointed out, inter alia, that it had in fact received no commission in the

procurement of the two sheave pins, the only spare parts in question in its MoU with GTOSI, and that there was, therefore, no question of either

passing on or withholding any commission. It also drew ONGC"s attention to the conduct of GTOSI and expressed an apprehension that the

complaint against Anchor was motivated and mala fide. The allegations made by GTOSI in its complaint, including that the MoU had been

terminated, were specifically denied. Questions 7 and 8 related to the issue of commission. Both were thus answered. Anchor specifically dealt

with Question 9 regarding the delivery of Anchor''s letter dated 21st October 2011 forwarding a copy of the Anchor-GTOSI MoU. This issue

was also addressed in Anchor''s Reply.12 Anchor pointed out that at least five of its personnel regularly visited ONGC''s offices at Vasudhara

Bhavan and at 11-High for official work related to various projects. During these visits they regularly carried and brought back letters to and from

ONGC. Since the letter in question was by this time three years old, it would be difficult to recollect exactly the person who had hand delivered the

letter. Nonetheless Anchor confirmed that as per its record the letter in question was delivered to the office of GM (MM) at Vasudhara Bhavan on

21st October 2011 and an acknowledgement had been obtained on an office copy of it.

30. About eight days after this Reply to the Show Cause Notice, on 25th March 2015, ONGC''s Inquiry Officer, the 3rd Respondent, submitted

his Inquiry Report.13 We have carefully considered this Report. It appears to us to have been thorough, measured and careful. The Inquiry

Officer''s findings are set out in paragraph 9.1 of the Report.14 He concluded that there was no conclusive proof of collusion between Anchor and

GTOSI. He noted that there were four other MoUs executed by Anchor with third parties in the ONGC-prescribed format. He also noted that

during the period of contracts, spares were required to be obtained by Anchor only once, and that there was no evidence that Anchor had

received any commission against this order for spares. He also noted that even assuming that there was any commission, any possible benefit to

Anchor was a paltry Rs. 19,543/-, utterly negligible relative to the value of the contract. More importantly, the Inquiry Officer noted the complete

failure of GTO to submit any evidence to substantiate its allegations, viz., that it had paid commission to Anchor; that there was collusion between

Anchor and other crane manufacturers; and that GTO had revoked or cancelled its MoU with Anchor. The Report notes specifically that GTO

was provided with ample opportunity to substantiate its allegations but that it failed to do so. The Inquiry Officer found, and, in our view, quite

correctly, that GTO''s allegations could not be said to have been proved beyond reasonable doubt; that it was not possible to conclude that the

MoU between Anchor and GTOSI was executed with the sole intention of defrauding ONGC for Anchor''s undue benefit or personal gain; and

that there was simply no material to prove any benefit to Anchor itself. The Inquiry Officer concluded, therefore, that it would not be appropriate

to consider banning Anchor based on the allegations made by GTOSI, which had itself signed the contentious MoU. The Report noted that for the

last three decades Anchor had delivered satisfactory services without any such incident or allegation ever having been made and, therefore,

recommended that Anchor should not be considered for a ban.

31. We should have thought that matters should have rested at that. Instead, it is at this point that they took a decidedly odd turn. It seems that two

months later on 21st May 2015, the Chief Legal Services of ONGC ''disagreed'' with the Inquiry Report,15 and, specifically, disagreed that any

benefit of doubt should be afforded to Anchor. For the first time, it seems to have been alleged or contended that Anchor''s covering letter of 21st

October 2011 forwarding the MoU was never received by ONGC. It was also now contended that the stamp or seal on the receipted copy

produced by Anchor was not of ""MH asset"", the relevant office of ONGC. It is difficult to resist the prima facie conclusion that this Legal Officer

seems to have been more than somewhat peeved by the Inquiry Report being so completely against the earlier prima facie opinion expressed by

his office on 5th September 201416 and 10th December 2014.17 The result was that the Inquiry Officer was directed to re-examine the matter and

reconsider his recommendations.

32. It was pursuant to this that a second Report came to be submitted on 22nd June 2015.18 The second Inquiry Report is by the same officer

who made the first Inquiry Report, the 3rd Respondent. Strangely, this Report marks a complete volte face from the first Inquiry Report. Without

any further hearing, the same Inquiry Officer seems now to have concluded that there was in fact a probable violation of the Integrity Pact and that

Anchor ought to be banned or blacklisted from future contracts of ONGC for a period of two years.

33. It seems that shortly thereafter, on 13th July 2015,19 a view was expressed that since the Inquiry Officer''s second report of 22nd June 2015

(recommending a two year blacklisting of Anchor) was so different from his previous recommendation, it would have been advisable to give

Anchor another opportunity ""to enquire about the person who delivered their letter dated 21st October 2011 to ONGC and to whom"". Thus, it is

now apparent that the only issue on which the entire matter seemed to turn was delivery of Anchor''s covering letter dated 21st October 2011

forwarding a copy of the MoU, and that this was now being completely denied by the ONGC.

34. There then followed, most peculiarly, a third Report dated 7th September 2015 of the same Inquiry Officer.20 In this Report, the Inquiry

Officer now referred to additional material received from the dak receiving officials of ONGC''s department in question, particularly one Mr.

Madhu H. Gulabani and one Mr. Vijay Pagare. At this time and at this hearing Anchor also submitted additional documents including a forensic

examination of the acknowledgement stamp on the covering letter from Truth Labs, Hyderabad. This forensic report confirmed the authenticity and

veracity of the stamp. Anchor contends that the additional material relied upon by the Inquiry Officer, viz., the statements of the two ONGC staff,

was never in fact supplied to Anchor. It is on this basis that the Inquiry Officer now concluded that Anchor was unable to prove submission of its

letter dated 21st October 2011 to ONGC. It is an admitted position21 that the Inquiry Officer in this third round did in fact consider this additional

material.

35. It is important to note that, in his conclusions in the third Inquiry Report, the Inquiry Officer noted that there were in fact two letters of 21st

October 2011. These bore distinct reference numbers. One had a reference No. 127; this is the letter in question forwarding a copy of the MoU

between Anchor and GTOSI. The second is a letter with reference No. 121 by which Anchor forwarded a copy of an extended Performance

Bank Guarantee required by the contract. Before the Inquiry Officer, Anchor also produced ten letters showing the same stamp of

acknowledgement as was seen on its covering letter dated 21st October 2011 forwarding the MoU. A reference is made in the third Inquiry

Report to a dak register.

36. It is on this basis that the impugned order came to be passed.22 Mr. Tulzapurkar submits and, in our view, quite correctly, that the impugned

order is completely devoid of reasons. This is despite the fact that the ONGC''s own internal manual and procedures23 require that reasons be

given. In fairness, Mr. Setalvad does not dispute that even according to ONGC''s internal processes where there is a disputed question of fact, the

benefit of doubt must indeed be given to the party in question. Further, we note that the Integrity Pact''s Section 3(2) requires proof ''beyond

reasonable doubt''.

37. We have no difficulty accepting Mr. Setalvad''s contention that the ONGC has sufficient power, in its hierarchical processes, to review or

reappraise or reconsider any given report.24 This is part of ONGC''s internal procedures and systems. Mr. Setalvad however attempted a

justification of the blacklisting by inviting our attention to Clauses 2.1 and 2.3 of the MoU and contrasting these with Sections 2(1)(1) and (2)(1)(3)

of the Integrity Pact. We have set out those clauses earlier. Clause 2 of the MoU deals with Sales Commissions. Clause 2.1 says, in substance,

that when an order is placed on GTOSI by Anchor, a certain sales commission of 7% of the net invoice price is payable. Then Clause 2.2 says the

same commission is to be paid where an order is placed directly by ONGC on GTOSI. Clause 2.3, which begins with a non-obstante provision,

sets out an understanding that should GTOSI receive an order from ONGC directly, then no commission would be payable to Anchor. Section

2(1)(1) of the Integrity Pact prohibits Anchor from, in any manner, passing on any benefit whatever to any person who is not entitled to it. But this

is a prohibition that is caveated, for what is forbidden is passing on any benefit (a) to a person who is not entitled to it; and (b) it must be in order

to obtain in exchange any advantage of any kind during the tender process or contract execution. Mr. Setalvad was quite unable to demonstrate

from any material on record what benefit could reasonably be said to have been obtained by a person not entitled to it and how this could possibly

be said to have been done by Anchor to derive any undue advantage at any stage. Indeed, the record seems to us to point to the fact that Anchor

received no commission at all against the solitary order for replacement Sheave Pins. None was available to pass on to ONGC, and none was

withheld. To the contrary, it seems that Anchor paid for the Sheave Pins fully but received a reimbursement in a lesser amount.

38. We noted Mr. Setalvad''s statement that the Integrity Pact does not in and of itself prohibit an agreement for commission as is found in this

MoU. In other words, such an MoU is not absolutely barred. The only question, as Mr. Setalvad himself places it, is whether or not the MoU was

in fact disclosed, for the need of such a disclosure cannot possibly be denied.

39. We are also, in our view, not concerned with the actual merits of the case or an examination of whether or not there is in fact a violation of the

integrity pact. Our concern is more fundamental. This is as it must be in the exercise of our jurisdiction and discretion under Article 226 of the

Constitution of India: we are concerned with the decision-making process.25

40. Having regard to the trajectory of this complaint, the ensuing inquiry and its culmination in the impugned order of blacklisting, it is clear that the

heart of the dispute is not so much the content or wording of any particular clause in the MoU or in the integrity pact but whether or not Anchor''s

letter of 21st October 2011 (Reference No. 127) was in fact delivered or not, i.e., whether that MoU between Anchor and GTO was disclosed

as it was required to be, to ONGC. It is in this context that Mr. Setalvad attempted a submission in defence of the third Inquiry Report and the

impugned order that Anchor had not been able to establish conclusively delivery of its covering letter of 21st October 2011 (Reference No. 127).

Here again, we must note that we are not concerned with an examination of the merits of even this dispute or of actual proof. It is common ground

that if on any reasonable evaluation of the case, it is not established beyond reasonable doubt that the letter in question was not delivered, then the

benefit of doubt must be given to Anchor.

41. In addressing this, therefore, we are tasked with surveying ONGC''s denial of receipt of this letter and what Anchor was able to demonstrate

to refute that denial. Mr. Tulzapurkar first takes up ONGC''s dak register.26 This is a handwritten volume noting documents delivered to ONGC''s

office in question. It is ordered by date. Incoming documents are assigned consecutive serial numbers in the first column. The second column

shows the name of the party sending the letter or communication. The third column shows the reference number and the date. The pages for 21st

October 201127 show two entries against Anchor''s name. These are at Serial Nos. 15 and 26. Anchor''s name is clearly shown in the second

column. The difficulty is in the third column. Against both entries, the reference number is the same: AOSL/121/2011/ONGC. This corresponds to

the reference number on Anchor''s other letter of 21st October 2011, the one by which Anchor forwarded the original Performance Bank

Guarantee with an extended validity. The dak register does not show the reference number of Anchor''s letter of 21st October 2011 (Reference

No. 127) forwarding a copy of the MoU. It is on this basis that Mr. Setalwad submits that ONGC was correct in its submission that Anchor''s

covering letter forwarding the MoU was never delivered to ONGC.

42. Without examining the other material that Mr. Tulzapurkar has produced, and to which we will advert immediately hereafter, this answer from

Mr. Setalvad appears to us to be self-contradictory. It does not commend itself to us in the least. It is indeed surprising that ONGC could

effectively contend that it had erroneously entered the same letter from Anchor twice. This can only mean that the very document on which ONGC

bases its claim of non-delivery is inherently unreliable: again, the issue of benefit of doubt. There is nothing to show that Anchor sent the same letter

(Reference No. 121) regarding the Performance Bank Guarantee twice on that day; nobody suggests this. The explanation that comes from

ONGC that there are frequently such mistakes is in itself further reason to afford a benefit of doubt to Anchor. It can hardly provide a sustainable

resist for an order of blacklisting. It is impossible from this document to turn the tables on Anchor and to contend, as ONGC does, that Anchor

has failed to ''conclusively'' prove delivery of its covering letter forwarding the MoU.

43. But that is not the limit of the material that Mr. Tulzapurkar''s clients were able to marshal in support of their contentions. They also adduced

copies of several other letters from them to ONGC of different dates with a similar oval stamp with a serrated border.28 They also produced

documents sent to ONGC by other parties evidencing a similar stamp.29 In addition, Anchor produced a forensic report showing that the stamp

and seal on the office copies of these letters were genuine. It appears that ONGC actually had at the relevant time two different stamps: the oval

one with the serrated border that was applied to office copies of letters to indicate acknowledgement and, on the inward originals, a round stamp.

44. In the face of all this, we find it difficult to accept Mr. Setalvad''s submission that all of these 17 or more documents are forged and fabricated.

This seems to us to be an argument of desperation. There is no doubt that Anchor has a track record of at least three decades in serving ONGC.

There is no reason why it would suddenly resort to any such convoluted and large scale fabrication or forgery, especially when it has, at the end of

the day, suffered some loss and gained no benefit at all. ONGC''s demand that Anchor should identify precisely the person who delivered the letter

several years later is ex facie unreasonable.

45. What Mr. Setalvad''s argument also overlooks is material to show that one of the persons, Mr. Vijay Pagare, himself has said30 that the oval

stamp seen on the delivery-acknowledged letters was used till 2014. The other person from ONGC whose statement was used, Ms. Gulabani,

however said31 that only a round seal was used and never an oval seal. This appears to be incorrect, for there is also material to indicate32 that the

oval seal was withdrawn only much later.

46. In addition, there is the factor that the correspondence on record33 between Anchor and GTOSI indicates that the current format of the MoU,

i.e., the format in which it was finally executed was one that was desired by GTOSI itself. ONGC seems to have lost sight of this although this was

placed before it not once but twice.

47. ONGC has also surprisingly completely overlooked the role of GTOSI in this entire matter. The first Inquiry Report clearly established that

despite several opportunities GTOSI has failed to establish any of its allegations against Anchor. ONGC also overlooked the fact that there are

patent contradictions in GTO''s own complaint. The most startling one is that GTO, itself a signatory to the MoU, claimed that the MoU was

illegal, i.e., that itself was a party to the illegality. This allegation was made only at the end of the O&M contract in question. GTO''s allegation that

it had terminated the MoU immediately is demonstrably false. There was never any such termination or cancellation and none is shown to us from

the record. There is also material to indicate that Oil States Industries (India) Pvt. Ltd., a breakaway partner of GTOSI, told the Inquiry Officer

that it had no knowledge of this agreement and no approval or permission of the directors of the Board of GTOSI had been taken before taken

entering into MoU in question. The second strut of GTOSI''s complaint, viz., that Anchor received benefit, is also demonstrated to be incorrect.

48. In this view of the matter, it is indeed most surprising ONGC should have so wholly accepted such a spurious and specious complaint, one

without any substance at all, despite these overwhelming contradictions and despite the categorical finding in the first Inquiry Report. Mr.

Tulzapurkar''s submission that all of this from GTO is entirely motivated and self-serving is a submission that at least prima facie appears to be

correct. We cannot fathom how ONGC could have allowed itself to be swayed or taken in by such a motivated complaint from an interested

party. We are also unable to appreciate why no inquiry seems to have been made against GTOSI and why they have been given so complete an

exoneration. Procedurally, it seems to us that the entire process was vitiated.

49. Mr. Tulzapurkar submits that mala fides are writ large on the face of the record. It is true that the record has several perplexing inflexion points.

There is, to begin with, a strongly worded prima facie opinion, based on virtually nothing. This was quite correctly held in the first Inquiry Report to

be insubstantial. This was almost immediately followed by an insistence on a re-examination. To be sure, that is a course that is permissible, but it

must be for cogent reason. We find none, other than this entirely untenable insistence on proving delivery of a three year old letter in circumstances

that hardly redound to ONGC''s credit. This re-evaluation resulted in a full-scale somersault in the final conclusion, and then the impugned order is

passed without recording reasons. In all this, the fact that the complaint has not been proved seems to have been ignored. Also overlooked is the

role of GTOSI in dictating the terms of the MoU, waiting till the eleventh hour to assail it, and then failing to adduce a shred of evidence in support

of its allegations. Yet GTOSI seems not to have earned ONGC''s ire. In the bargain, ONGC proceeded to rely on material that was not made

available to Anchor. It is for this reason that Mr. Tulzapurkar says that if this process was not in fact triggered by some senior legal officer having

felt slighted, then the only alternative explanation is one that suggests itself and is simply unspeakable. We refrain from expressing any opinion on

this, for it is sufficient for our purposes to note only that at every stage, and as correctly noted in the first Inquiry Report, the matter was not free

from reasonable doubt; and the benefit of that doubt ought to have been given to Anchor. The only question, as we have noted, is about the

disclosure of the covering letter of the MoU. On this aspect of the matter, given the material on record produced by Anchor, it is impossible to

reasonably conclude that the case against Anchor was established beyond reasonable doubt or that Anchor was not entitled to the benefit of

doubt. We must also note that Section 3(2) of the Integrity Pact specifically states that no transgression is to be said to have occurred if there is

reasonable doubt.

50. The impugned order is itself unreasoned. The Supreme Court has repeatedly emphasized the need for reasons to be recorded by

administrative authorities: see S.N. Mukherjee v Union of India , (1990) 4 SCC 594. This is inter alia because such decisions are subject to

judicial review, one that is rendered impossible in the absence of reasons. Moreover, a reasoned order excludes (or at least reduces) chances of

arbitrariness and ensures fairness in the decision-making process. This is necessary even for such administrative decisions that are not subject to

appeal, revision or judicial review. A party is entitled to know the basis of the decision, and this, the Supreme Court says, is a third principle of

natural justice, in addition to the classical rules of audi alteram partem and the rule against bias. The entire objective is to prevent the miscarriage of

justice. In Indian Oil Corporation Ltd. v SPS Engineering Ltd., , 128 (2006) DLT 417 a Division Bench of the Delhi High Court had before it a

case of blacklisting. Here again, the order was unreasoned. Citing inter alia the Supreme Court decision in S.N. Mukherjee, the impugned order

was set aside.

51. In Gorkha Security Services v Government of NCT of Delhi & Ors., , (2014) 9 SCC 105 the Supreme Court had before it an appeal that

raised a question of the form and content of a show cause notice in a proposal for blacklisting. There was no dispute that such a show cause notice

is in fact necessary in such cases. Terming blacklisting as civil death and stigmatic, the Supreme Court observed that the issue in law is not such as

to the necessity of such a notice but of its contents. The notice must be precise. The noticee must know exactly the case set against him and which

he must meet. The nature of the action proposed must be spelt out. In other words, the notice must set out the particular grounds and the action or

penalty proposed should the noticee not be able to convincingly answer those grounds. In the case at hand, we are constrained to note that there is

no finding at all against Anchor under Section 2(1)(1) of the Integrity Pact, i.e., of it having promised or given to any third person any undue benefit

to which such person was not entitled in order to obtain any advantage. As to Section 2(1)(3), we do not see how this could have been said to

have been violated by Anchor at any stage by execution of its MoU with GTOSI. This is also not a case of a violation of the principles of natural

justice with no prejudicial effect. To the contrary, the prejudice to Anchor, an entity that has served ONGC without blemish for thirty years, is

manifest.

52. We are not in this judgment suggesting that ONGC does not have the power to blacklist. It does. This power need not even be statutory. The

power, however, must be exercised within the constraints of law and in a manner that is legally tenable and cannot withstand judicial scrutiny. In

other words, the only legal limitation on the exercise of this power is that the State, through any of its instrumentalities, must act fairly and rationally

without in any way being arbitrary.34

53. We do not think that the decision of a learned single Judge of the Gujarat High Court in Asif Enterprises v ONGC Ltd. & Ors., , AIR 2002

Guj 264 cited by Mr. Setalvad, has any application at all to the facts of the case before us. There was no factual dispute in that case about the

forgery of the bank guarantee in question. It was in that particular context that the learned single Judge held that the inquiry and final order were not

vitiated only on account of a lack of a personal hearing. That, as the Supreme Court has said, in Patel Engineering and Gorkha Security Services, is

not invariably fatal. We are also not impressed by Mr. Setalvad''s reliance on the decision of a Division Bench of this Court in Madhukar G. Wagh

v Union of India. , 2010 112 (8) Bom. L. R. 3620. That was a case of in-service misconduct, not a matter of blacklisting of contractor in a

tendered contract.

54. It is impossible to sustain the impugned order. We do not think it is necessary to enter into any larger question of the validity of Section 3(3) of

the Integrity Pact. In a given case, a mere want of a personal hearing may not vitiate an order that is otherwise unimpeachable.

55. In view of the foregoing, the impugned order dated 5th November 2015, Exhibit ""A""35 is quashed and set aside. The Petition is made absolute

in terms of prayer clause (i), which reads thus:

(i) this Hon''ble Court be pleased to issue a Writ in the nature of Certiorari or any other appropriate Writ, and/or direction or order in the nature

of Certiorari against Respondent Nos. 1 and 2 for a Writ in the nature of Certiorari or any other appropriate Writ, and/or direction inter alia calling

for the records of the entire proceedings relating to the representation made by M/s. G&T Oilfield Offshore Services Pvt. Ltd. (GTO) before the

External Independent Monitors (IEM), ONGC and to the Inquiry Officer and the enquiry conducted by the Inquiry Officer pursuant thereto and

after examining the validity, legality and propriety of the purported Order No. MR/MM/MH/SCON/O&M crane/81/GT/2010-11 dated

November 05, 2015 of the Respondent No. 2, the same be quashed and set aside;

56. There will be no order as to costs.

1Exhibit Ã¯Â¿Â½AÃ¯Â¿Â½, pages 86 to 87A

2Exhibit Ã¯Â¿Â½BÃ¯Â¿Â½ pages 88-93

3Exhibit Ã¯Â¿Â½FÃ¯Â¿Â½, pp. 116-121.

4Page 352

5Page 580 and 581

6Page 400

7Exhibit Ã¯Â¿Â½GÃ¯Â¿Â½ page 122

8Record page 894-895

9Record page 915-916

10Exhibit Ã¯Â¿Â½NÃ¯Â¿Â½ page 174 to 177

11Exhibit Ã¯Â¿Â½PÃ¯Â¿Â½, pages 179 to 213

12Record p. 209.

13Exhibit Ã¯Â¿Â½18Ã¯Â¿Â½, Pp. 950-980

14Pp.979-978

15Exhibit Ã¯Â¿Â½20Ã¯Â¿Â½, P. 982

16Pp.894-896

17P. 915

18Exhibit Ã¯Â¿Â½22Ã¯Â¿Â½, Pp. 984-989

19Exhibit Ã¯Â¿Â½24Ã¯Â¿Â½, P. 991

20Exhibit Ã¯Â¿Â½26Ã¯Â¿Â½, Pp. 993-999

21Affidavit in Reply, Paragraph 39, P. 321-322

22P. 87

23P. 938

24Afcons Infrastructure Limited & Ors v Oil & Natural Gas Corporation Ltd. & Ors., , 2013 (7) ALL M.R. 527. This involved a challenge to a

decision during a tendering or bidding process. The High Court Division Bench cited the Supreme Court decision in Ratnagiri Gas & Power Pvt

Ltd v RDS Projects Ltd., , (2013) 1 SCC 524.

25UEE Electrical Engineers P. Ltd. v Delhi Development Authority & Ors., , 2005 (81) DRJ 256 (DB)

26Exhibit Ã¯Â¿Â½30Ã¯Â¿Â½, Pp. 1022-1024

27Pp. 1023-1024

28Pp. 256-266, 1043, 1047, 1049, 1050, 1052, 1054

29Pp. 1044

30P. 1004

31P. 1003

32P. 1030

33Pp. 101-110

34Patel Engineering Ltd. v Union of India & Anr., , (2012) 11 SCC 257.

35Pp. 86-87