

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

Case No.	WP No.2281/2021
Parties Name	Health Care Medical Devices Pvt. Ltd. Vs. MP Public Health Services Corp. Ltd., & Anr.
Date of Order	16/03/2021
Bench Constituted	<u>Division Bench:</u> Justice Sujoy Paul Justice Shailendra Shukla
Order passed by	Justice Sujoy Paul
Whether approved for reporting	Yes
Name of counsels for parties	Shri Vijay Kumar Assudani, Advocate for the petitioner. Shri Aditya Khandekar, Advocate for the respondents.
Law laid down	<p>*Blacklisting and debarment-it has drastic impact on the contractor- Thus, such a drastic action can be taken by following “due process”. Issuance of a notice by which contractor can gather the nature of allegations and intended action to be taken is must. The order of blacklisting/debarment cannot be passed unless such an action is proposed in the show cause notice or it can be clearly inferred by reading of notice that such an action was proposed.</p> <p>*The parameters for taking decision of blacklisting/debarment- The actual or potential harm, impact and result of non-supply, duration of wrong doing and cooperation of contractor with Department are relevant factors.</p> <p>*Clause-10 of NIT- It's plain reading makes it clear that it can not been read in isolation because it enables the authority to take into account and take</p>

	<p>action as per prevailing provisions of tender documents/NIT. Thus, a conjoint reading of Clause-12 (d), (k) and Section 10 is permissible and action based there upon cannot be faulted with.</p> <p>*Clause-12 (explanation) a vis-majure- The petitioner in his reply to show cause notice did not take defence regarding any night curfew in the area where manufacturing plant is situated. Rest of the reasons are not covered by <i>vis-majure</i>.</p> <p>*No prejudice is shown- The petitioner understood the specific allegation and intended punishments flowing from show cause notice and filed his detailed reply. Hence, no prejudice is caused to him. Even if show cause notice is not happily worded, it does not require any interference by this Court.</p>
Significant paragraph numbers	16, 19, 20, 22, 25

ORDER**(Passed on this 16th day of March, 2021)****Per: Sujoy Paul, J. :**

In this petition filed under Article 226 of the Constitution, the challenge is mounted to the order dated 22/01/2021 (Annexure P/14) whereby the respondents have blacklisted the petitioner and further debarred him to participate in any tender process initiated by respondent-corporation for further period of two years.

2) Briefly stated, the relevant facts, are that a notice inviting tender (NIT) was issued by respondent No.1 on 05/09/2020 for supply of various types of gloves to deal with Covid-19 pandemic. The gloves were required to be supplied to various government

hospitals in the State of Madhya Pradesh. The petitioner submitted his bid along with manufacturer's authorization in prescribed form (Annexure P/4) in September 2020. On 01/10/2020, a Notification of award was issued in favour of petitioner requiring him to supply 5,70,000 pairs of gloves of 5.5 inch and 6,20,000 pairs of gloves of 7 inches. On 15/10/2020, petitioner submitted bank guarantee for performance security of Rs.96,26,800/- (Annexure P/7).

3) Shri Vijay Assudani, learned counsel for the petitioner submits that between 31/10/2020 to 20/01/2021, petitioner supplied 65% of said goods against the said order. The petitioner made various correspondences with respondent No.2 (manufacturer) requesting him to supply the gloves in order to enable the petitioner to supply the same to the respondent/corporation. In turn, respondent No.2 informed the petitioner that he could not supply the goods in time because of plant break down and night curfew imposed in his area due to second wave of Covid-19 pandemic in the State of Gujarat. By another communication dated 22/01/2021 (Annexure P/11), the respondent No.2 reiterated his stand and assigned same reason of inability to supply goods.

4) The show cause notice dated 08/12/2020 is served upon the petitioner relying upon Clause-10 of the 'procedure for blacklisting' which in the opinion of Shri Assudani categorically provided that if recovery could not be affected from the security deposit then only petitioner can be blacklisted.

5) Further more, it is urged that show-cause notice was issued in a casual and cavalier manner, without due application of mind. The show-cause notice was issued based upon Clause-10, whereas final order dated 22/01/2021 was passed for yet another reason which was not subject matter of show cause notice.

6) To elaborate, Shri Assudani submits that show cause notice cannot be an empty formality. The notice must specifically disclose as to what are the specific allegations which are required to be met by the petitioner. In addition, there must be clear indication regarding proposed action to be taken by the Department. The impugned show cause notice is a bald notice submits Shri Assudani which shows that Department was inclined to take disciplinary action without specifying as to which action was intended to be taken namely action regarding (i) levy of liquidated damages, (ii) purchase of goods at the risk and cost of petitioner, or (iii) blacklisting. The show cause notice is based on Clause-10 of the procedure whereas final order is passed relying upon Clause-12 of the procedure.

7) The order dated 22/01/2021 does not contain reasons and on this ground alone, the said order may be axed. These contentions are founded upon the judgment of the Supreme Court reported in **2010 (9) SCC 496 - Kranti Associates Private Ltd. & Anr. vs. Masood Ahmed Khan & Ors**, **2014(9) SCC 105 – Gorkha Security Services vs. Government (NCT of Delhi) & Ors.** and a Division Bench judgment of this Court in the case of **Aicon Enginnering Pvt. Ltd. vs.**

State of M.P., decided on 05/11/2019.

8) The broad parameters laid down by the Supreme Court in *2014(14) SCC 731 – Kulja Industries Ltd. vs. Chief General manager, Western Telecom Project Bharat Sanchar Nigam Ltd. & Ors.* were also referred to submit that impugned order does not reflect that any such relevant parameter was taken into account while passing a drastic order of “blacklisting”.

9) Shri Assudani fairly submits that in view of judgment of Supreme Court in *Gorkha Security Services* (supra), he is not pressing the ground regarding grant of personal hearing. Lastly, it is submitted that great prejudice is caused to the petitioner because respondents have failed to consider (i) issues urged and raised by the petitioner, (ii) being an authorized distributor, non-supply could not have been held him liable (iii) show cause notice was not clear regarding specification of penalty etc. (iv) the department has not passed order on merits and further failed to examine the parameters laid down by Supreme Court in *Kulja Industries Ltd.* (supra).

10) In support of aforesaid contentions, reliance is placed on Clause-2(i), 2(iv) and 12(e) of the NIT. Apart from this, reference is made to Condition No.10 & 12 of NIT. In support of aforesaid oral arguments, petitioner filed List of Dates and brief synopsis.

11) Per *Contra*, Shri Aditya Khandekar, learned counsel for the Corporation supported the impugned order. It is argued that the averment made in para-5.10 of petition leaves no room for any doubt

that there had been a plant break down in the manufacturing plant of respondent No.2 because of said reason and imposition of night curfew, the plant was non-operational between 15/10/2020 to 22/01/2021. Thus, admittedly the requisite supply of gloves was hampered and petitioner has failed to supply the requisite number of gloves. In this pandemic era, the gloves were required for the safety of front line Covid workers, para-medical staff and treating doctors. The non-supply had serious consequences on the entire system.

12) Shri Khandekar placed reliance on Clause-12(d) and urged that supply was required to be completed within 30 days from the date of purchase order. Clause (k) enables the Corporation to levy penalties including the penalty of blacklisting. Clause-10 must be read with Clause-12(k) which enables the Corporation to inflict the punishment of blacklisting. In this case, the ordering authority has not procured the gloves from the market and has not made any payment in this regard. Therefore, the question of adjustment of said amount from security deposit of petitioner did not arise. The blacklisting order was rightly passed as per Clause-12(k) and Clause-10 (Annexure-V) of NIT. Shri Khandekar also placed reliance on the judgment of Supreme Court in *Gurkha Security Services' case* (supra) and urged that it is discernible from the show cause notice about the penalties which could have been imposed. Hence, no fault can be found in the impugned action. Sufficient reasons have been assigned in the final order. As per petitioner's own case, admittedly he could not supply the

entire material/gloves and hence no prejudice is caused to him. The blacklisting order is in-consonance with law and does not require any interference by this Court.

13) Parties confined their arguments to the extent indicated above.

14) We have heard the parties at length and perused the record.

15) Clause 2(I) and (IV) of “Conditions of Tender” deals with qualification criteria/requirement. In absence of any dispute between the parties regarding eligibility/qualification of petitioner, these clauses pointed out by Shri Assudani are of no significance.

16) The Courts have consistently taken the view that blacklisting has a drastic impact on the contractor. Hence, such an action can be taken by following “due process”. Issuance of a specific notice by which contractor can gather the nature of allegations and intended action to be taken is must. The contractor cannot be subjected to blacklisting or debarment if such an action is not proposed in the show cause notice or it cannot be clearly inferred by reading of notice that such an action was proposed. This is clearly laid down by Apex Court in the case reported in *1975 (1) SCC 70 (Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and Anr.)*. This view is consistently followed by Supreme Court in catena of judgments including in *Gorkha Security Services* (supra). Recently in *2021(1) SCC 804 Vetindia Pharmaceuticals Limited vs. State of Uttar Pradesh & Anr.*, the *ratio decidendi* of said cases was again followed by Supreme Court.

17) The show cause notice issued in the instant case and the final order of blacklisting and debarment needs to be tested on the anvil of enabling provisions and principles laid down by Supreme Court in aforesaid cases.

18) Before dealing with the aforesaid aspect, it is apposite to quote the relevant provisions of the NIT on which heavy reliance is placed by the parties. **Clause-12(d) & (k)** reads as under:-

d) The supply should be completed **within 30 days from the date of purchase order.**

k) The order may stand cancelled at the end of 45th day from the issue of the purchase order after levying penalty on the value of the unexecuted order. Further, the Bidder **shall also be liable to pay other penalties as specified Security Deposit of such suppliers shall also be forfeited besides taking other penal action like blacklisting/debarring from participating in present and future tenders of the tender inviting authority etc.**

Blacklisting for non-supply:-

Clause 10 & 12 reads as under:-

10. The supplier should supply 100% of the ordered quantity at the designated places as per the schedule 30 days from the date of purchase order **otherwise relevant provisions of tender document (of non supply) shall be applied.** Period of 30 days will be counted **from the date of placement of online order.** If the supplier fails to supply the ordered quantity after elapse of 45 days, **then the risk and differential cost will be passed on to the original supplier** as per conditions of the tender document. **If payment for, any extra cost incurred by ordering authority on any procurement done against risk & cost after lapse of said period of 45 days from the date of issue of order, is not made by the concerned supplier within 15 days of issue of notice, then the extra payment done will be deducted from the security deposit of the concerned supplier.** If recovery could not be effected from its security deposit due to the reason of its security deposit

getting exhausted, then concerned supplier will be liable for **blacklisting apart from any other penal actions** and recovery proceedings that may be taken against it as per law.

12. (a) If the suppliers/s fail/s to execute the Purchase order and inform/s ordering authority about their inability to execute the order and in compliance of the Purchase order due to act of *vis-majure*, then the ordering authority may pass appropriate order on merits of case.

Explanation:

(a) Increase in the cost of raw materials, Power failure, Labor strike, lay off; Closure of the factory would not be considered as act of *vis-majure*.

19) A careful reading of show cause notice dated 08/12/2020 makes it clear that contractor was put to notice by giving him following informations - (i) he has not supplied the complete material despite repeated communications. (ii) The department intends to invoke Clause-10 which provides penalty of “blacklisting and other penal action” for non-supply. In our view, the singular and basic reason for issuance of show cause notice was clearly spelled out i.e. non-supply of entire material for which contract was granted. The reply of petitioner dated 10/12/2020 (Annexure P/13) shows that petitioner could clearly understand regarding the allegation mentioned in the show cause notice. He furnished explanation for non-supply in his aforesaid reply dated 10/12/2020. Thus, we are unable to hold that show cause notice falls short the requirement of principles of natural justice. In other words, the factual foundation of intended action by the Department was communicated to the contractor and understood by him. To this extent, no fault can be found in the show cause notice.

20) The Apex Court in *Gurkha Security Services* (supra) and in *Vetindia Pharmaceuticals Limited* (supra) clearly held that Department needs to state in show cause notice that Competent Authority intended to impose a penalty of blacklisting so as to provide adequate and meaningful opportunity to the contractor to show cause against the same. It was poignantly made clear that if proposed punishment is not mentioned specifically but from reading of show cause notice, it can be clearly inferred and gathered that such an action could be taken that would fulfill the requirement. In the show cause notice dated 08/12/2020, the respondents have quoted Clause-10 aforesaid which makes it clear that blacklisting could be a punishment imposed pursuant to the said show cause notice. We are unable to hold that order of blacklisting came as a bolt from blue to the petitioner.

21) In *Kulja Industries Ltd.* (supra), the Apex Court has referred to certain broad guidelines for the purpose of taking decision regarding blacklisting/debarment. In para-21 of this judgment, it is noted that in USA, instead of using the expression “blacklisting”, the term “debarring” is being used by statutes and the courts. The Federal Government considers “suspension and debarment” as a powerful tool for protecting taxpayer's resources and maintaining integrity of the processes for federal acquisitions. The comprehensive guidelines issued in this regard are reproduced in the judgment on which reliance was placed by Shri Assudani during his submissions. As per

these Guidelines, the actual or potential harm or impact that results or may result from wrong doing, duration of wrong doing and whether contractor has cooperated with the govt. etc. are relevant factors. In the show cause notice of instant case, it was made clear that petitioner has not supplied the entire quantity of gloves as per the contract. In the punishment order dated 22/01/2021, it was reiterated that because of non-supply of gloves (incorrectly mentioned as important medicine) within time limit, the supply procedure was adversely affected. The interruption in important supply of gloves had an adverse impact in combating Covid-19 in State of Madhya Pradesh. The repeated directions issued to petitioner to supply material could not fetch any result. Thus, department has taken into account relevant factors in the present case.

22) Clause-12(d) makes it clear that entire supply was required to be completed within 30 days from the date of purchase order. Clause (k) provides that order may stand cancelled at the end of 45th day from the issue of purchase order after levying penalty on the value of unexecuted order. In addition, the bidder shall also be liable to pay other penalties as specified. This Clause, in no uncertain terms, makes it clear that other penal action like blacklisting/debarring from participating in present and future tenders of tender inviting authority etc. can be taken.

23) A careful reading of Clause-10 leaves no room for any doubt that supplier was required to supply the desire quantity within

stipulated time *otherwise relevant provision of tender document regarding non-supply shall be applied. (Emphasis added)* This expression is couched in a mandatory language by using the word “shall”. Clause-10 cannot be read in isolation because it enables the authority to take into account and take action as per *relevant provisions of tender document*. Thus, we find force in the argument of Shri Khandekar that Clause-10 aforesaid covers other clauses of tender document including Clause 12(d) and (k).

24) The argument of Shri Assudani that blacklisting order could have been passed only when recovery could not be affected from petitioner's security deposit because of paucity of security deposit on the first blush appears to be attractive but pales into insignificance in the factual matrix of the present case. The simple reason is based on an undisputed fact of non supply by petitioner and clear provision of Clause-10. Clause-10 envisages that if contractor fails to supply the ordered quantity within stipulated time, then the risk and differential costs will be passed on to original supplier as per conditions of tender document, *if* payment for, any extra cost incurred by ordering authority on any procurement done against risk and cost after lapse of said period of 45 days from the date of issue of order is not made by concern supplier within stipulated time. The question of recovery from security deposit of petitioner does not arise in the instant case because admittedly no procurement has been made by the department for the material/gloves which has fallen short because of insufficient

supply by the petitioner. The use of word “if” in Clause-10 makes it clear that it is an enabling provision which can be pressed into service in cases where any procurement is done by Department against non-supply or inadequate supply of material by original contractor/supplier. Thus, we are not impressed with the argument of Shri Assudani in this regard.

25) As noticed above, the petitioner clearly understood the nature of fault/deficiency pointed out in the show cause notice. Interestingly in the reply to show cause notice dated 10/12/2020 (Annexure P/13), the petitioner assigned following reasons for his inability to supply the gloves.

“5. Disposable sterile Gloves 6.5 and 7 are lying pending for supply against your PO no.10282055844 and 10282055851, which will be supplied to consignee sites as soon as possible. **Delayed supply due to breakdown in company's machines, engineers are putting their best efforts to start machine as immediate as possible.** Not withstanding the above problem, it is our sincere intention to execute both the above orders by putting in our all out efforts and mobilising the resources on war footing basis. It is requested that the delivery period of these order extended without imposing L/D and **any other penalties, due to late supply.** Letter of Company Vijay Latex Products Pvt. Ltd. attached herewith for your kind perusal and consideration.”

(Emphasis supplied)

It is evident that no defence regarding imposition of “night curfew” was taken in this reply. A careful reading of explanation to Clause-12 aforesaid makes it clear that the reasons assigned in para-5 aforesaid does not fall within the ambit of *vis-majure*. The highlighted portion of reply further shows that petitioner clearly understood that

any other penalty due to late supply could also be imposed on him. Thus, even assuming that it is not very elaborate notice or could have been drafted in a much better way, we are not inclined to interfere on the notice and ultimate punishment because no prejudice is caused to the petitioner.

26) So far argument of Shri Assudani that petitioner was served with show cause notice regarding Clause-10 whereas while imposing punishment, Clause-12 was also taken into account which is bad-in-law is concerned, suffice it to say that Clause-10 itself permits the Department to take action as per *relevant provisions of tender document* which includes Clause-12. Clause-10 was reproduced in show cause notice dated 08/12/2020. Hence, it cannot be said that reliance on Clause-12 in the final order vitiates the decision making process or the decision.

27) In view of foregoing analysis, we do not find any serious procedural impropriety in the decision making process which requires interference by this Court. Non-supply of gloves during pandemic era is a serious matter. Thus, the impugned decision dated 22/01/2021 (Annexure P/14) taken on merits warrants no interference by this Court.

28) Resultantly, petition fails and is hereby **dismissed**. No costs.

(SUJOY PAUL)
JUDGE

(SHAILENDRA SHUKLA)
JUDGE