IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 02ND OF SEPTEMBER, 2022

WRIT PETITION NO.20308 OF 2019

Between:-

M/S HEALTH SECURE (INDIA) PVT. LTD. THROUGH ITS AUTHORIZED REPRESENTATIVES AND DIRECTOR, ANIRUDDHA WANKHEDE S/O TULSIRAM WANKHEDE, AGED ABOUT 47 YEARS, R/O C/10, MICDC, TALOJA-410208 NAVI MUMBAI, MAHARASHTRA

.....PETITIONER

(BY SHRI SANJAY AGRAWAL, SENIOR ADVOCATE WITH SHRI SARANSH KULSHRESTHA, ADVOCATE)

AND

1. **STATE OF MADHYA PRADESH, THROUGH THE PRINCIPAL SECRETARY, DEPARTMENT OF HEALTH AND FAMILY WELFARE, VALLABH BHAWAN, BHOPAL (M.P.)**
2. **STATE OF MADHYA PRADESH, THROUGH ITS COMMISSIONER DEPARTMENT OF HEALTH AND FAMILY WELFARE, VALLABH BHAWAN, BHOPAL (M.P.)**
3. **MADHYA PRADESH PUBLIC SERVICE HEALTH CORPORATION THROUGH ITS MANAGING DIRECTOR, ARERA**

HILLS, BHOPAL (MP)

.....RESPONDENTS

(RESPONDENT NOS.1 & 2/STATE BY SHRI GIRISH KEKRE, GOVERNMENT ADVOCATE)

(RESPONDENT NO.3 BY SHRI ROHIT JAIN, ADVOCATE)

.....

RESERVED ON 26.08.2022
DELIVERED ON 02.09.2022

.....

ORDER

Since the pleadings are complete, therefore, with the consent of learned counsel for the parties, the matter is heard finally.

This petition is under Article 226 of the Constitution of India questioning the legality, validity and propriety of the orders dated 15.02.2017 (Annexure-P/14), 20.02.2017 (Annexure-P/15) and 30.11.2017 (Annexure-P/20).

2. As per the petitioner, the respondents illegally and in an arbitrary manner passed the impugned orders contrary to the terms and conditions of tender document and breached the settled principle of law as before passing the orders which carries civil consequences has not followed the principle of *audi alteram partem*. As per the petitioner, the respondents before proceeding against the petitioner did not care to issue any show cause notice and passed the order of blacklisting of the petitioner and consequentially considering it to be blacklisted invoked the performance bank guarantee that too for a different product

whereas the dispute in regard to a single product.

3. The appeal preferred against the said order was rejected without going into the merits of the case and without considering the grounds raised by the petitioner in its appeal. Therefore, this petition has been filed seeking quashing of orders impugned.

4. After giving notice to the respondents by this Court, the respondents have filed their response stating therein that they have issued a notice to the petitioner before initiating action against it and that notice according to the respondents is Annexure-R/4 dated 13.12.2016. As per the respondents, there is nothing illegal committed by them but they have taken action which is well within the terms and conditions of tender document. According to them, the supply could not be completed within the stipulated period and, therefore, action has been taken as per Clause-13.3(a) of tender document. It is also submitted by the respondents that the appellate authority has discharged its obligation while deciding the appeal and also deciding the objection raised by the petitioner and that action has been taken against the petitioner after giving proper opportunity of hearing and as such, supported their action saying that the same was justified and according to them, the petition is without any substance and also filed after lapse of time and as such, it suffers from delay and laches and deserves to be dismissed.

5. Before deciding the issue involved in the case, it is

necessary to take note of relevant facts of the case, which in brief are;

(5.1) That the petitioner's company is a private limited company engaged in manufacturing of quality drugs and pharmaceuticals products and those are supplied to all government agencies across the country. As per the petitioner, it has an outstanding record of supplying the drugs to all the government agencies and no complaint till now from any of the agencies ever reported. The petitioner is a SSI Unit and duly registered under the MSME Act, 2006.

(5.2) The respondents inviting applications for supply of drugs issued an NIT on 28.08.2015 (Annexure-P/1) with the terms and conditions. In response to which, the petitioner's company submitted tender application which has been accepted by the respondents. The petitioner since stood L-1 was asked to submit bank guarantee and on 15.12.2016 a bank guarantee for an amount of Rs.24,29,590/- has been submitted which was for Vitamin-A Syrup and a bank guarantee for an amount of Rs.1,29,33,809/- was also submitted on different dates for IFA Syrup. The respective documents are available on record as Annexure-P/2. According to the petitioner, there were two distinct bank guarantees for two different products but so far as the Vitamin-A Syrup is concerned, the bank

guarantee of Rs.24,29,590/- was given. According to the petitioner, Vitamin-A Syrup has the main raw material in form of Vitamin-A Solution which is in fact manufactured by two major entities across the world and these two entities only supply to the 60% of the world company which are in the manufacturing of Vitamin-A. These two companies are based on Germany and Switzerland.

(5.3) So far as the petitioner's company is concerned, they were in the agreement of a company of Germany for purchasing 100% raw material on advance payment and that raw material is used by the petitioner for production of Vitamin-A Syrup.

(5.4) Respondent No.3 is a Corporation, established under the orders of respondent Nos.1 and 2, worked as Rate Contracting Agency and as such, finalizing the rate of various pharmaceutical products to be supplied to various entities in the State including the Chief Medical & Health Officer, Medical Colleges, Civil Surgeon, etc.

(5.5) As per the terms and conditions of the tender document, the supply which was to be made by the petitioner has to be completed within 45 days from the date of purchase order but there was a clause that the authority may accept the supply even after 45 days but penalty as prescribed in Clause-19 will be

levied. The Clause further provides that at the end of 60th day, the order stands cancelled and the penalty would be levied on unexecuted order. There was also force majeure clause which includes fire at Clause-13.10 and further states about the force majeure events in Clause 13.11.

(5.6) The respondent/department related to the State Government but they are in the habit of keeping bills pending for years together. Earlier also there was contract given to the petitioner to supply the drugs to the respondent/authority and that time also payments were not made in time.

(5.7) The petitioner also communicated to the respondent/ authorities by letter dated 01.12.2015 (Annexure-P/3) asking them to first make payment which is outstanding and then expect supply of Vitamin-A Syrup in time. It is also informed to the authority that delay in supply of Vitamin-A Syrup is possible because of pendency of bills and as such, it is not the petitioner but the respondents would be responsible for the same.

(5.8) The Deputy Director, Health Services also issued instructions to the Chief Medical & Health Officer of all the districts for making payment to the suppliers in time and further instructed not to make any deduction from the firms who are engaged in supply

of drugs.

(5.9) As per the available material documents filed by the petitioner showing that there was some delay in supplying the drugs because of withheld payments. It is also informed to the respondents that there is delay in supply due to shortage of raw material. The petitioner communicated the reasons to the respondents that the delay is being occurred due to certain unavoidable reasons and sent email to all the respective districts where Vitamin-A Syrup had to be supplied.

(5.10) By letter dated 09.01.2017 (Annexure-P/10), a request was made by the petitioner's company to accommodate with them and they are very soon supplying the IFA Syrup and the petitioner's company has also asked the respondents not to levy the penalty because of delay in supplying the drugs. In the letter it is also requested that the bills outstanding be also released and the districts authorities be communicated accordingly.

(5.11) The Chief Managing Director (Finance and Administration) of respondents' company vide letter dated 26.07.2019 directed the Joint Director, Health Services that the authorities are not releasing the bills of suppliers and unnecessary withheld the same, therefore, show-cause notice be issued to them for

taking appropriate action. On 24.01.2017, the petitioner's outstanding amount was Rs.2,40,76,213/- and a letter was sent by the petitioner to the respondents giving details therein about the outstanding amount. But ignoring all the communications made by the petitioner repeatedly demanding their outstanding payment, the respondents without considering the same issued an order on 15.02.2017 (Annexure-P/14) blacklisting the petitioner for a period of two years. As per the petitioner they have supplied almost 99.75% of the product out of 100% and as such, there was no reason for blacklisting the petitioner's company.

(5.12) Thereafter, vide letter dated 20.02.2017 (Anneuxre-P/15), the petitioner was informed that the authorities have invoked the bank guarantee of Rs.1,53,63,349/- and then the petitioner preferred an appeal against the said order but since that was not decided, therefore, the petitioner preferred a petition i.e. W.P. No.5090/2017 which was disposed of directing the appellate authority to decide the appeal. The appeal has been decided vide order dated 30.11.2017 (Annexure-P/20) dismissing the appeal. Therefore, this petition has been filed.

6. Shri Sanjay Agrawal, learned senior counsel appearing for the petitioner has contended that the order of

blacklisting is illegal because the respondents did not consider the aspect that the petitioner has already supplied 99.75% of the contract item and as such, blacklisting of petitioner's company was not required. Even otherwise, as per the settled legal position, the order of blacklisting cannot be issued without giving any opportunity of hearing or issuing show-cause notice. He submitted that the basic order of blacklisting is not sustainable in the eyes of law. He relied upon the decisions reported in **(1975) 1 SCC 70 (M/s. Erusian Equipment & Chemicals Ltd. Vs. State of West Bengal and another, (1989) 1 SCC 229 (Raghunath Thakur Vs. State of Bihar and others), (2001) 8 SCC 604 (Grosons Pharmaceuticals (P) Ltd. and another Vs. State of U.P. and others, (2007) 14 SCC 517 (Jagdish Mandal Vs. State of Orissa and others), 2014 (4) M.P.L.J. 225 (Bhupendra Singh Kushwah Vs. State of M.P. and another), (2014) 14 SCC 731 (Kulja Industries Limited Vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others)** and **(2014) 9 SCC 105 (Gorkha Security Services Vs. Govermnent (NCT of Delhi) and others).**

7. On the other hand, Shri Rohit Jain, learned counsel appearing for respondent No.3 has submitted that the submission made by the counsel for the petitioner is without any substance because show-cause notice was issued by the respondents before initiating proceeding of blacklisting and according to him that show-cause notice is Annexure-R/4 dated 13.12.2016. He further

submitted that since there was violation of terms and conditions of contract as the petitioner did not supply the required material within the specified period, therefore, consequential action was taken keeping the name of the petitioner's company in the blacklist, declaring it to be disqualified to participate in tender proceeding in future for a period of two years and forfeiture of bank guarantee is also the consequential action of violating the terms and conditions of contract.

8. Considering the submissions made by the learned counsel for the parties and after perusal of record, it is out of question to mentioned that the petitioner's company was continuously demanding the respondents to release their outstanding bills but that has not been done and outstanding payment was not released by the respondents. In the petition, it is mentioned that within the specified period, the petitioner supplied 99.75% of the material out of required material to be supplied and, therefore, it was not required for the respondents to proceed against the petitioner's company.

9. However, as per Shri Agrawal, even otherwise if that was the situation, before blacklisting the petitioner's company, the respondents could have issued a notice asking the petitioner as to why they should not be blacklisted because of violating the terms and conditions of contract. He submitted that in absence of following the principle of natural justice and giving go-bye the principle of *audi alteram partem,* action of respondents cannot

be approved. He further submitted that Annexure-R/4 is not a show-cause notice fulfilling the requirement, therefore, the stand of the respondents is contrary to law and that does not justify their action which apparently illegal and contrary to law.

10. I have perused the Annexure-R/4, which reads as under:-

"**MP Public Health Services Corporation Ltd.**
(A Government of MP Undertaking)
1, Arera Hills (In TilhanSangh Building Campus)
Bhopal, Madhya Pradesh www.mpphscl.in"
Email: procmpphscl@gmail.com, cgmt.mpphscl@gmail.com
Ph:0755-2578915

Sr.No: 3475 MPPHSCL/Tech /2016/ Dated:13/12/2016

To,
M/s Health Secure (I) Pvt Ltd
C-10, MIDC, Taloja 410206
Dist Raigad, Navi Mumbai
Email:healthsecure@rediffmail.com,
healthsecure125@yahoo.co.in

Subject:- Regarding pending supply of Vitamin-A Syrup.

Program Division has informed us that supply of more than 1.5 lack bottles of Vitamin A Syrup pending from your side against the purchase orders raised from different institutions of Madhya Pradesh. Since the said drug is a program drug & most of the purchase orders were raised in advance i.e. in the months of Sep but till date there is no supply from your side even after reminding you several time telephonically & by mails. Prescribed 60 days supply period has already been elapsed.

From the above fact it seeks that there is unnecessary delay in supply from your side which is causing disturbed supply of essential drug to the health institutions of MP and hampering an important health program of Government of India.

Please complete all the purchase order immediately & let us know the dispatch detail of said drug to respective institutions in one day time line.

To save our program hampered due to delay of supply of Vitamin-A , please explain why shouldn't we invoke risk & cost clause of the bid document thereby purchasing the Vit.-A syrup from open market at your risk & cost.

Further, please explain why we shouldn't debar you due to inordinate delay in supply.

CGM (Technical)
MPPHSCL

S.no.3476 MPPHSCL/Tec/2016 Dated 13/12/2016

Copy To:-

1. Mission Director, NHM, Bhopal.
2. Managing Director, MPPHSCL, Bhopal.
3. Chief General Manager-Co-ordination, MPPHSCL, Bhopal.
4. Dr. Pragya Tiwari, Deputy Director, NHM Bhopal.

CGM (Technical)
MPPHSCL"

11. The contents of letter dated 13.12.2016 (Annexure-R/4) nowhere fulfills the requirement of show-cause notice asking the petitioner to be blacklisted, but it is a letter asking the petitioner and apprising them that they are not supplying particular item in time and that letter very categorically reveals that suggestion was made because of delay in supply, the programme of respondents hampered and they are going to invoke risk & cost clause of tender document and purchasing Vitamin-A Syrup from open market at the risk of the petitioner.

12. Shri Agrawal repeatedly submitting that it is not a prior notice before initiating action of keeping the name of the petitioner in the blacklist. He has also submitted that even after issuing this notice, the respondents can not invoke risk & cost clause because supply was almost completed as 99.75% of the supply had already been made.

13. From the reply and submission made by Shri Rohit Jain, it is clear that they have not disputed about the quantity of material already supplied and they have also not filed any

document except Annexure-R/4 justifying that before initiation of proceeding of blacklisting any other notice was issued to the petitioner and any opportunity was granted to petitioner. It is also not disclosed that risk and cost clause invoked.

14. The Supreme Court in case of **M/s. Erusian Equipment & Chemicals Ltd.** (supra) has observed as under:-

> "20.Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

15. In case of **Raghunath Thakur** (supra), the Supreme Court has observed as under:-

> "4. Indisputably, no notice had been given to the appellant of the proposal of black-listing the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before black-listing any person. In so far as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the PG NO 869 principles of natural justice. It has to be realised that black-listing any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order in so far as it directs black-listing of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the black-list in respect of future contracts under the Collector is set aside. So far as

> the cancellation of the bid of the appellant is concerned, that is not affected. This order will, however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do so in accordance with law, i.e. giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness or otherwise of the allegations made against the appellant. The appeal is thus disposed of."

16. In case of **Grosons Pharmadeuticals (P) Otd. And another** (supra), the Supreme Court has observed as under:-

> "2. Learned counsel appearing for the appellant, urged that seeing the nature and seriousness of the order passed against the appellant, the respondent ought to have supplied all the materials on the basis of which the charges contained in the show cause notice were based along with show cause notice and in the absence of supply of materials, the order impugned is against the principles of natural justice. We do not find any merit in this contention. Admittedly, the appellant has only contractual relationship with the State government and the said relationship is not governed by any statutory Rules. There is no statutory rule which requires that an approved contractor cannot be blacklisted without giving an opportunity of show cause. It is true that an order blacklisting an approved contractor results in civil consequences and in such a situation in the absence of statutory rules, the only requirement of law while passing such an order was to observe the principle of *audi alteram partem* which is one of the facet of the principles of natural justice. The contention that it was incumbent upon the respondent to have supplied the material on the basis of which the charges against the appellant were based was not the requirement of principle of *audi alteram partem*. It was sufficient requirement of law that an opportunity of show cause was given to the appellant before it was blacklisted. It is not disputed that in the present case, the appellant was given an opportunity to show cause and he did reply to the show cause which was duly considered by the State Government. We are, therefore, of the view that that the procedure adopted by

> the respondent while blacklisting the appellant was in conformity with the principles of natural justice."

17. Further, in case of **Jagdish Mandal** (supra), the Supreme Court has observed as under:-

> "27. The learned counsel for the fifth respondent submitted that the Department ought not to have acted on a complaint received against him, without giving him an opportunity to show cause. This contention has no merit. Whether any complaint is received or not, the Department is entitled to verify the authenticity of the document pledged as earnest money deposit. Such verification is routinely done. The Committee was neither blacklisting the tenderer nor visiting any penal consequences on the tenderer. It was merely treating the tender as defective. There was, therefore, no need to give an opportunity to the tenderer to show cause at that stage. We no doubt agree that the Committee could have granted an opportunity to the tenderer to explain the position. But failure to do so cannot render the action of the Committee treating the EMD as defective, illegal or arbitrary."

18. In case of **Bhupendra Singh Kushwah** (supra), the Supreme Court has observes ad under:-

> "10. Therefore in view of the aforesaid fact and the legal position, it is clear that before passing any order of cancellation of registration or blacklisting a Contractor, the State Government or its departments are necessarily required to issue a show cause notice or to provide an adequate hearing to a Contractor, in terms of the principles of natural justice. A perusal of the document annexed with the petition and the record placed for consideration of the Court on behalf of the respondents clearly demonstrate that no show cause notice was ever issued to the petitioner before ordering for cancellation of the registration and placement of the name of the petitioner in the blacklist seriously violates the cardinal principles of *audi alteram partem*, therefore, on this ground alone, the order of cancellation of registration of Contractor and order of blacklisting deserves to be quashed."

19. Further, in case of **Kulja Industries Ltd.** (supra),

the Supreme Court has observed as under:-

> "18. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with Erusian Equipment & Chemicals Ltd. v. State of W.B. [(1975) 1 SCC 70] where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed: (SCC p. 75, para 20)
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> > "20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."
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> Subsequent decisions of this Court in Southern Painters v. Fertilizers & Chemicals Travancore Ltd. [1994 Supp (2) SCC 699 : AIR 1994 SC 1277] ; Patel Engg. Ltd. v. Union of India [(2012) 11 SCC 257 : (2013) 1 SCC (Civ) 445] ; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548] ; Joseph Vilangandan v. Executive Engineer (PWD) [(1978) 3 SCC 36] among others have followed the ratio of that decision and applied the principle of *audi alteram partem* to the process that may eventually culminate in the blacklisting of a contractor."

20. Likewise in a case **Gorkha Security Services** (supra), the Supreme Court has held as under:-

> "27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this

> requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be taken. We say so for the reasons that are recorded hereinafter.
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> 28. In the instant case, no doubt the show-cause notice dated 6-2-2013 was served upon the appellant. Relevant portion thereof has already been extracted above (see para 5). This show-cause notice is conspicuously silent about the blacklisting action. On the contrary, after stating in detail the nature of alleged defaults and breaches of the agreement committed by the appellant the notice specifically mentions that because of the said defaults the appellant was "as such liable to be levied the cost accordingly". It further says "why the action as mentioned above may not be taken against the firm, besides other action as deemed fit by the competent authority". It follows from the above that main action which the respondents wanted to take was to levy the cost. No doubt, the notice further mentions that the competent authority could take other actions as deemed fit. However, that may not fulfil the requirement of putting the defaulter to the notice that action of blacklisting was also in the mind of the competent authority. Mere existence of Clause 27 in the agreement entered into between the parties, would not suffice the aforesaid mandatory requirement by vaguely mentioning other "actions as deemed fit". As already pointed out above insofar as penalty of blacklisting and forfeiture of earnest money/security deposit is concerned it can be imposed only, "if so warranted". Therefore, without any specific stipulation in this behalf, the respondent could not have imposed the penalty of blacklisting.
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> 29. No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, in exercise of power prejudicially affecting another must be in conformity with the rules of natural justice."

21. Even this Court, has also dealt with the issue with regard to passing an order of blacklisting without following principle of natural justice and relying upon several decisions of

the Supreme Court took following view :-

"The Supreme Court in case of **Gorkha Security Services Vs. Government (NCT of Delhi) and Others** reported in **(2014) 9 SCC 105**, has very clearly observed that law of blacklisting clearly provides an opportunity of following the principles of *Audi Alteram Partem* before taking such action and has held in Paragraph Nos. 32 to 34, which read as under:-

"The "Prejudice" Argument

32. It was sought to be argued by Mr. Maninder Singh, learned Additional Solicitor General appearing for the respondent, that even if it is accepted that the show-cause notice should have contained the proposed action of blacklisting, no prejudice was caused to the appellant in as much as all necessary details mentioning defaults/ prejudices committed by the appellant were given in the show-cause notice and the appellant had even given its reply thereto. According to him, even if the action of blacklisting was not proposed in the show cause notice, the reply of the appellant would have remained the same. On this premise, the learned Additional Solicitor General has argued that there is no prejudice caused to the appellant by non-mentioning of the proposed action of blacklisting. He argued that unless the appellant was able to show that non-mentioning of blacklisting as the proposed penalty has caused prejudice and has resulted in miscarriage of justice, the impugned action cannot be nullified. For this proposition he referred to the judgment of this Court in Haryana Financial Corpn. v. Kailash Chandra Ahuja[10]: (SCC pp. 38, 40-41 & 44, paras 21, 31, 36 & 44)

"21. From the ratio laid down in B.Karunakar[11] it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot *automatically* be set aside.

* * *

31. At the same time, however, effect of violation of the rule of audi alteram partem has to be considered.

> Even if hearing is not afforded to the person who is sought to be affected or penalised, can it not be argued that 'notice would have served no purpose' or 'hearing could not have made difference' or 'the person could not have offered any defence whatsoever'. In this connection, it is interesting to note that under the English law, it was held few years before that non-compliance with principles of natural justice would make the order null and void and no further inquiry was necessary.
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> * * *
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> 36. The recent trend, however, is of 'prejudice'. Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non- observance had prejudicially affected the applicant.
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> * * *
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> 44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show 'prejudice'. Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down."

33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned Additional Solicitor General. In the first instance, we may point out that no such case was set up by the respondents that by omitting to state the proposed action of blacklisting, the appellant in the show-cause notice has not caused any prejudice to the appellant. Moreover, had the action of black listing being specifically proposed in the show cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period

in case the Department still wanted to black list the appellant. Therefore, it is not at all acceptable that non-mentioning of proposed blacklisting in the show-cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant.

34. For the aforesaid reasons, we are of the view that the impugned judgment[3] of the High Court does not decide the issue in correct prospective. The impugned Order dated 11.9.2013 passed by the respondents blacklisting the appellant without giving the appellant notice thereto, is contrary to the principles of natural justice as it was not specifically proposed and, therefore, there was no show-cause notice given to this effect before taking action of blacklisting against the appellant. We, therefore, set aside and quash the impugned action of blacklisting the appellant. The appeals are allowed to this extent. However, we make it clear that it would be open to the respondents to take any action in this behalf after complying with the necessary procedural formalities delineated above. No costs."

In the aforesaid case, the Supreme Court further held as under:-

> "No doubt, rules of natural justice are not embodied rules nor can they be lifted to the position of fundamental rights. However, their aim is to secure justice and to prevent miscarriage of justice. It is now well-established proposition of law that unless a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice, any exercise of power prejudicially affecting another must be in conformity with the rules of natural justice. When it comes to the action of blacklisting which is termed as "civil death" it would be difficult to accept the proposition that without even putting the noticee to such a contemplated action and giving him a chance to show cause as to why such an action be not taken, final order can be passed blacklisting such a person only on the premise that this is one of the actions so stated in provisions of NIT."

The Division Bench of this Court in case of **B.C. Biyani Projects Pvt. Ltd. Vs. State of M.P. and Others, 2015 SCC Online MP 6833**, has also

> relied upon the decision as quoted hereinabove in case of **Gorkha Security Services (supra).**
>
> In view of the above case law, admittedly since no opportunity nor even a show-cause notice has been issued to the petitioner, therefore, the order impugned is not sustainable."

22. Thus, it is clear that in the present case before issuing the order dated 15.02.2017 (Annexure-P/14) which is the basic order of blacklisting, it is apparent that the said order suffers from principle of natural justice and the respondent/authority did not follow the principle of *audi alteram partem* and as such, the order is not sustainable and is liable to be set aside.

23. Considering other aspect of the matter, the action taken by the respondents against the petitioner is also arbitrary because they have already completed supply of 99.75% of the material which was to be supplied and the respondents even after giving show-cause notice has not invoked the risk & cost clause and also not denied about the practice of withholding of payment despite supplying material. The order dated 15.02.2017 (Annexure-P/14) is therefore, set aside. As per settled principle of law, if the foundation of action of the authority goes, the structure and subsequent proceeding based upon that foundation would automatically fall. Consequently, the order dated 20.02.2017 (Annexure-P/15) and further order dated 30.11.2017 (Annexure-P/20) are also set aside.

24. The amount of bank guarantee which is already

invoked shall be refunded to the petitioner within a period of three months. If the same is not made within the specified period, the interest at the rate of 9% shall be made to the petitioner till realization of payment made to the petitioner.

25. The petition is accordingly, **allowed**.

No order as to cost.

(SANJAY DWIVEDI)
JUDGE

ac/-