HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (C) No. 777 of 2015

Quick Heal Technologies Private Limited Through Its Manager (Legal), Nikhil Fulambarkar, S/o Ramchandra Fulambarkar, Aged About 32 Years, Registered Address At 603, Mayfair Towers II, Wakedewaadi, Shivaji Nagar, Pune, Police Station Shivajinagar, Revenue And Civil District Pune (Maharashtra)

---- Petitioner

Versus

1. State Of Chhattisgarh through The Additional Chief Secretary, Department Of Finance, Mahanadi Mantralaya, Naya Raipur, Post Office & Police Station Naya Raipur, District Raipur (Chhattisgarh)
2. The Directorate Of Public Instruction, Through Commissioner, Pension Bada, Raipur, P/s Civil Line, Tehsil, Revenue And District- Raipur (Chhattisgarh)
3. NCS Computech Limited, Through Its Director, 3 Commercial Building, 23, N.S. Road, Kolkata- 700001.
4. NCH Technosoft Pvt. Limited, Through Its Director, 225 Risabh Complex, Mg Road, Raipur- 492001, P/s Civil Line Tehsil, Revenue And Civil District- Raipur (Chhattisgarh)
5. Issac Computer Education Pvt. Limited, Through Its Director, 12 South Avenue, First Floor, Opp. Rkc, Choubey Colony, Raipur- 492001, P/s Civil Line, Tehsil, Revenue And Civil District- Raipur (Chhattisgarh)
6. The Directorate Of Public Education Department, Chhattisgarh Having Its Office At Pension Bada, Raipur, P/s Civil Line, Tehsil, Revenue And District- Raipur (Chhattisgarh)

---- Respondents

For Petitioner:	Shri RR. Chandak and Shri Vivek Shrivastava, Advocates.
For State/Respondents No.1, 2 & 6:	Shri UNS Deo, Government Advocate.
For Respondent No.4:	Shri BP. Sharma, Advocate.
For Respondent No.5:	Shri Abhishek Shinha, Advocate.

Hon'ble The Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Order On Board

Per Navin Sinha, Chief Justice

2/11/2015

1. The Petitioner is aggrieved by order 12.11.2014 passed by

Respondent No.1 confirming the earlier orders dated 26.7.2013 and 5.8.2013, debarring the anti virus software “Quick Heal” developed by the Petitioner, for purchase by the State Government or any other government body or organization in the State of Chhattisgarh. The Petitioner had earlier assailed orders dated 26.7.2013 and 5.8.2013 in Writ Petition (C) No.467 of 2013 contending that they were issued in violation of the principles of natural justice without hearing it. The writ petition was allowed on 5.3.2013 with directions to the Respondent authorities to act in accordance with law, staying operation of the impugned orders till then. The Respondent authorities issued show cause notice on 11.4.2014 and after considering the reply have passed the fresh order dated 12.11.2014.

2. Learned Counsel for the Petitioner submits that the software developed by it is a proprietary product. Respondent No.3 was appointed as its Distributor on 1.4.2011 for the eastern region including State of Chhattisgarh. The Distributor was authorised, and appointed Respondent No.5 as channel partner. Both these agreements were on principle to principle basis and not agency. The Petitioner did not offer its product with any value added services such as installation charges and annual maintenance contract. The maximum retail price at which the product could be sold by a channel partner was mentioned on the packaging according to the Legal Meterology Act, 2009 which did not include the value added services. The Distributor or channel partner was not authorised to offer any assurances on behalf of the Petitioner to the end user without its approval. It was not responsible for any improper communication by the Distributor or channel partner to the end user. The Distributor was not authorized to remove, substitute, change or cover any name plate, label or marking from “Quick Heal” products.

3. Respondent No.2 on a comparative analysis of different anti virus software available in the market, negotiated with Respondent No.5 directly for purchase of the software as a proprietary item under Rule 4.3.1 of the Store Purchase Rules, 2002. Respondent No.5 as its own business proposition offered value added services of installation and one year free annual maintenance contract if the Respondent purchased the software for three years. It levied additional charges for the value added services by mentioning it separately. The purchase of three thousand software licenses was sanctioned on 27.3.2012 for a total contract amount of Rs.1,30,44,000/-. Subsequently purchase of 4000 software licenses for Rs.1,97,92,000/- was approved on 11.2.2013. Two free annual maintenance contracts were then signed between Respondent No.2 and 5 alone on 24.1.2013 and 23.2.2013.

4. The Respondent authorities at no point of time during negotiations with Respondent No.5 interacted with the Petitioner in any manner or make any queries from it regarding price or any other issue except for seeking a confirmation on 18.7.2013 after the purchase that Respondent No.5 was in fact authorised to deal with the products of the Petitioner to satisfy itself of the genuineness of the product. The dealings between Respondent No.3 and Respondent No. 5 were on principle to principle basis and Respondent No.5 was not acting as agent of the Petitioner while dealing with Respondent No.2. There was thus no privity of contract between the Petitioner and Respondent No.2.

5. Pursuant to order dated 5.3.2013 in the earlier writ petition, the Respondent authorities issued show cause notice issued to the Petitioner stating that Respondent No.5 had represented itself as the authorised supplier of the software supported by an authorization letter dated 1.5.2012 from one Shri Manohar Malani as authorized signatory of the Petitioner. Respondent

No.5 supplied 3000 anti-virus software applications in the year 2011-12 for a value of Rs.3,712/- each and Rs.450 as installation charge along with 5% of VAT for a total value of Rs.1,30,44,000/- paid to it. Likewise, for the year 2012-13, Respondent No.5 supplied 4000 software applications for a value of Rs.4,948/- each in the like manner for a total value of Rs.1,42,44000/- paid to it. The price charged by Respondent No.5 was in excess of the maximum retail price of the product as it had subsequently been learnt that the maximum price each was Rs.475/-+Rs.23.75 VAT = Rs.498.75 according to which the price for supplies in 2011-12 was Rs.14,96,250 only and similarly excess for 2012-13 causing financial loss of Rs.1,15, 47,750/- in 2011-12 and Rs. 1,27,47,750/- in 2012-13 to the State. The Petitioner was asked to show cause within fifteen days why the difference in cost be not recovered from it along with Respondent No.5 failing which legal action would be taken against them.

6. The Petitioner submitted a detailed reply on 28.5.2014 stating that it had entered into a distributorship agreement with Respondent No.3 who in turn was authorised to appoint channel partners. No communication was made by the Respondent authorities with the Petitioner before purchase or queries made from it except with regard to genuineness of the products sold by Respondent No.5. The Petitioner only sells it products to its distributors or channel partners through them. It does not provide any value added services like maintenance or installation which are provided exclusively by the latter as their own business proposition. The price charged from Respondent No.2 by Respondent No.5 included value added services for which the Petitioner was not answerable. The Petitioner had received Rs.400/- and Rs.750/- per product for which it received Rs.2,59,080/- for 635 quantity of products and Rs.9,18,000/- for 1200 quantity of products evident from the enclosed Tax

invoices. The maximum retail price was mentioned on the product as per the Legal Metrology Act, 2009. The Petitioner was thus not answerable for the price of Rs. 3712/- and Rs.4948/- levied by Respondent No.5 inclusive of value added services.

7. At no point of time was any other show cause notice issued to the Petitioner as to why its products be not debarred from purchase by any Department of the State Government for the aforesaid reason. The show cause was limited to recovery of the difference in cost only. Reliance was placed on (2014) 9 Supreme Court Cases 105 (Gorkha Security Services Vs. Government (NCT of Delhi).

8. In absence of any privity of contract between the Petitioner and the Respondent authorities coupled with the absence of any agreement or any dealing between them whatsoever, the action of debarment was ex facie completely arbitrary and the result of complete non-application of mind including non-consideration of the reasons in the cause shown. No person of ordinary prudence would hold the Petitioner answerable in any manner for the contract terms offered by Respondent No.5 as its own commercial venture with value added services. It was illogical to suggest that the Petitioner had indulged in any nefarious activity of deliberately overcharging the Respondent authorities. Even the general power of blacklisting in contractual matters was not available the Respondents let alone under any specific clause in absence of any contract between the parties. The last submission was that if the show cause notice was issued on a ground and the final order has been passed on another ground, it is an additional reason which vitiates the impugned order.

9. Learned Counsel for the State submitted that it was a product specific purchase by the State as end user to the knowledge of the Petitioner. The packaging was exclusive. The Petitioner had a bounden duty to make full

disclosure to the State with regard to the justification why the cost break-up was not made known to it earlier. Respondents No.3 & 5 have no independent existence in so far as the State is concerned and they are only an extended arm of the Petitioner. The Petitioner cannot escape liability if it had confirmed supply of its products by Respondent No.5. The right to debar or blacklist a person with whom the State does not wish to deal with is the discretion of the authorities and no one can compel the State to do business or have dealings with it if the State does not wish to do so. Any lacunae in the decision making process earlier has been rectified after fresh show cause notice has been issued. The cause shown has been considered and final orders passed. There remains no infirmity in the decision making process. In exercise of judicial review particularly in matters of blacklisting, the Court is only concerned with the decision making process. If there is no infirmity in the same or any infirmity found earlier has been rectified, the Court may not interfere with discretion exercised by the Respondent authorities not to purchase the products of the Petitioner.

10. We have considered the submissions on behalf of the parties.

11. The software developed by the Petitioner is a proprietary product. It appoints Distributors who in turn appoint channel partners for sales of its products in accordance with normal business practices. The relationship between them is not on agency basis but principle to principle. The maximum retail price of the product is mentioned on the packaging itself. The Petitioner does not provide any value added services like installation and maintenance. If a distributor or channel partner offers additional value added services pursuant to an agreement executed between it and the purchaser it is a distinct contract between the two with which the Petitioner has no concern. If a Distributor or channel partner levies extra charges for these value added

services over and above the maximum retail price mentioned on the packaging, it difficult to understand how it can be said that the Petitioner indulged in profiteering and misleading the Respondent authorities by charging beyond the maximum retail price. The allegation itself defies logic and common sense of an ordinary prudent person.

12. Indisputably, at no point of time did the Respondent State authorities make any inquiries from the Petitioner before purchase of the product or with regard to the price of the same. The only confirmation sought by them from the Petitioner was with regard to the genuineness of the products as actually having been supplied by them. The Respondent authorities negotiated directly of their own free will and volition with Respondent No.5 and after a comparative market analysis by report dated 24.12.2011 of the Director, Public Education Directorate, arrived at their own satisfaction to purchase the products of the Petitioner found to be most efficient and cost effective. The purchase orders make it evident that the charge for the value added services were mentioned separately from the price of the software. Two separate agreements were then executed between Respondent No.5 and Respondent authorities on 24.1.2013 and 23.2.2013 respectively. There was no privity of contract between the Petitioner and the Respondent authorities.

13. In (2014) 14 Supreme Court Cases 731 (Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Others) referring to the law in the United States, it has been noticed that the term “debarring” is also used instead of “blacklisting”. In effect, the impugned order blacklists the Petitioner for all times to come as it does not contain any time stipulation. An order of blacklisting has always been considered a very serious matter in so far as trade and commerce is concerned. It has been described as 'civil death' since it virtually leads a

person or organization in business, being prevented from doing business and entering into dealings with others leading to what may be virtual closure of the business or driving it out of business indirectly. In (1975) 1 Supreme Court Cases 70 (M/s. Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and Another), it was observed as follows:-

> "14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.
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> 15. The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The black lists are "instruments of coercion."
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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."

14. The issue for blacklisting again fell for consideration in (2012) 11 Supreme Court Cases 257 (Patel Engineering Limited vs. Union of India and Another) observing as follows:

> "15. It follows from the above judgment in Erusian Equipment case that the decision of the State or its instrumentalities not to deal with certain persons or class of persons on account of the undesirability of entering into the contractual relationship with such persons is called blacklisting. The State can decline to enter into a contractual relationship with a person or a class of persons for a legitimate purpose. The authority of the State to blacklist a person is a necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose, etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary-thereby such a decision can be taken

> for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors."

15. In Kulja Industries Limited (supra), it was also observed as follows:-

> "20. It is also well settled that even though the right of the writ petitioner is in the nature of a contractual right, the manner, the method and the motive behind the decision of the authority of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality. All these considerations that go to determine whether the action is sustainable in law have been sanctified by judicial pronouncements of this Court and are of seminal importance in a system that is committed to the rule of law.
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> 25. Suffice it to say that "debarment" is recognized and often used an an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the "debarment" is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor."

16. The question for consideration in the facts and circumstances of the case is if the Petitioner can be called a deviant supplier or contractor who needed to be disciplined for any acts of omission and commission or any fraudulent misrepresentation etc. If the Petitioner is guilty of the same, then we are only required to go into the question if the Petitioner could be debarred for all times to come.

17. In Gorkha Security Services (supra) the High Court had rejected the plea that the show cause did not specifically refer to the proposed action of blacklisting holding that the Appellant could easily visualize the action proposed by the competent authority including blacklisting. Allowing the appeal relying inter alia upon M/s. Erusian Equipment & Chemicals Ltd (supra) and Patel Engineering Limited (supra) it was held that the show cause

did not specifically mention the proposed penalty of blacklisting and neither was it so apparent from the show cause notice given.

18. The grievance of the Petitioner to our understanding stands on a better footing. There was no privity of contract between the Petitioner and the Respondent State. The Petitioner never made any representation to the authorities and neither did they make any queries from the Petitioner before the purchase so as to justify any inferential conclusion even. The entire exercise of purchase was negotiated exclusively between the Respondent authorities and Respondent No.5. The Respondent authorities were not misled at any point of time as the maximum retail price was mentioned on the packaging of the product which did not include installation charges and annual maintenance contract for one year if the product license was purchased for three years. The latter was mentioned separately in its price component in the purchase order. The only involvement of the Petitioner lay in confirmation that Respondent No.5 as its channel partner was indeed supplying original products in response to a limited query in that regard by the Respondent State.

19. The Petitioner in its reply to the show cause specifically took the stand that at no point of time had the authorities interacted with it and it was not a party to the agreement. That the relationship between the Petitioner, the Distributor and the channel partner was not one of agency but principle to principle basis. That it did not provide any value added services and if they were provided by a Distributor or channel partner and charged separately for the same, the Petitioner had nothing to do with it. The impugned order does not deal with these issues at all. All these were wished away as simple distortion of facts observing that Respondent No.5 was an extended arm of the Petitioner and that in such a case the maximum retail price ought not to

have been mentioned in an exclusive packaging for a particular customer.

20. If the aforesaid was not sufficient to hold the impugned orders to be bad, we further find that the show cause notice was issued to the Petitioner as to why the price difference paid be not recovered from it along with Respondent No.5. The final order is not for recovery of price but one of debarment for which no show cause notice was ever given. In (2001) 6 SCC 260 (Tarlochan Dev Sharma v. State of Punjab) it was observed that the principles of natural justice stand vitiated if the impugned order is founded on grounds at variance with that in the show cause notice as the aggrieved is effectively denied opportunity to defend itself lending perversity to the conclusions.

21. We are constrained to observe that despite there being no privity of contract between the parties, the show cause notice was issued on assumptions and presumptions and the impugned order passed on surmises and conjectures without any consideration of the grounds in the cause shown. This was despite the opportunity granted to the authorities by the Court on the earlier occasion. The impugned order is therefore held to be the result of a complete non-application of mind suffering from patent arbitrariness both on merits and procedure. Perhaps the present was a case where the State may have applied its mind appropriately under the State litigation policy.

22. The impugned orders dated 26.7.2013, 5.8.2013 and 12.11.2014 are set aside in so far as the Petitioner is concerned.

23. The Writ application is allowed.

Sd/-	Sd/-
(Navin Sinha)	(P. Sam Koshy)
CHIEF JUSTICE	**JUDGE**

Priya