

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

Reserved on: 18.06.2020

Date of decision: 6th July, 2020

+ W.P.(C) 10740/2019 & CM Nos. 44399/2019, 47959/2019

DSS IMAGETECH PVT LTDPetitioner

Through: Mr.Jayant Mehta, Mr.Gagan
Kumar, Mr.Rohit Sharma,
Mr.Amit Kaushik & Ms.Payal
Chandra, Advs.

versus

INDIAN COUNCIL OF MEDICAL RESEARCH

..... Respondent

Through: Ms.Ekta Sikri, Mr.Vikalp Mudgal
& Mr.Arun Sanwal, Advs. for
ICMR.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner challenging the order dated 06.08.2019 passed by the Appellate Authority of the respondent dismissing the Appeal filed by the petitioner challenging the order dated 18.04.2019 passed by the Director, National Institute of Nutrition, Indian Council of Medical Research (hereinafter referred to as the 'ICMR').

2. By the order dated 18.04.2019, the Director, National Institute of Nutrition, Hyderabad (hereinafter referred to as the 'NIN'), has invoked the provision and powers conferred on it by the Manual of Procurement of Goods, 2017 (hereinafter referred to as the 'Manual') issued by the Department of Expenditure, Ministry of Finance, Government of India and inflicted a penalty of placing the petitioner on the Holiday List for a

period of one year from the date of the order. As noted hereinabove, by the Impugned Order dated 06.08.2019 passed by the Director General of the ICMR as an Appellate Authority, the Appeal filed by the petitioner challenging the said order has been dismissed.

3. In brief, the facts of the case are that by a Purchase Order dated 13.10.2008, the NIN had placed an order for supply of 'Automated Protein Digester' on M/s Digilab Genomic Solutions Inc (hereinafter referred to as 'Digilab Inc'). The petitioner had acted as an agent of the said M/s Digilab Inc. in the transaction and the Purchase Order records the additional warranties extended by the petitioner during the negotiations held on 21.02.2008 as under:-

“OTHER TERMS AND CONDITIONS:

As per the negotiations held on 21-02-2008 with our Headquarters ICMR, New Delhi the Indian Agent M/s. DSS Imagetech Pvt. Ltd., New Delhi has agreed to provide the following:

- 1. Agreed to provide Three Years comprehensive warranty and two years non comprehensive services for equipment at free of cost.*
- 2. Agreed to provide non-comprehensive annual Maintenance from 6th to 10th years @ 3% per year.*
- 3. Agreed to provide spare parts to maintain the equipment up to 10 years.*
- 4. The firm agreed to give discount of 10% on the price list of all the spare parts up to 10 years.*
- 5. The firm agreed to provide 2 preventive maintenance visits per year and also breakdown visits as and when required.*
- 6. Agreed to submit Performance Bank Guarantee of 10% of the FOB value of the order and which will be retained by the Council till the end of the warranty period.*

7. *Agreed that the duration of warranty period will start after proper installation of the equipment and submitting user satisfactory report.*
8. *The maximum response time of 72 hrs was accepted by the firm.*
9. *Agreed to accept 0.1% of FOB as penalty per week till the warranty period, if the instrument remains in non-working condition for more than 18 days.*
10. *When the equipment is under warranty/comprehensive maintenance, it would be the responsibility of the manufacturer/dealer/agent to procure spare parts and the Institute will not incur any expense on duty, octroi or handling charges.*
11. *The detailed circuit diagram along with trouble shooting procedure and operational manual would be provided to the institute along with the equipment.*
12. *Agreed to provide on site training with foreign trainer to the users.*
13. *The firm also agreed to provide pre installation training for two scientists free of cost.*
14. *The firm agreed provide consumable for 2000 reactions.*
15. *The firm agreed to prepare the dust free room and will provide 2 ton AC.*
16. *The firm agreed to Compaq/Dell laptop with centrino Duo, HDD 80 GB, Intel Process with Window Vista operating software.*
17. *The firm agreed to give additional 5% discount.*
18. *The firm agreed to supply above mentioned equipment at a cost of USD 1,71,350.55 CIF Dibrugarh inclusive of all above mentioned items and conditions.*
19. *All above terms & conditions are applicable for RMRC, Dibrugarh and NIN, Hyderabad."*

4. The order dated 18.04.2019 records that the Protein Digester was supplied on 03.04.2009 and was installed on 09.10.2009. A Technical demonstration of the same was carried out on 15.02.2010. The order records that the Application Demonstration, however, remained pending.

5. Relying upon the additional warranty extended by the petitioner of three years comprehensive warranty and two years of non-comprehensive services for equipment free of cost, the respondent asserted that the failure on part of the petitioner to carry out the application demonstration amounted to a failure to fulfill its contractual obligations of installing the equipment thereby extending the period of warranty. The order further records that in terms of the additional conditions agreed to by the petitioner, the petitioner was to provide a Performance Bank Guarantee of 10% of the FOB value of the order to be retained by the Council till the end of the warranty period. The Performance Bank Guarantee submitted by the petitioner was valid only upto 20.10.2012 and was not extended thereafter in spite of repeated request. This also according to the respondent, constituted a default on part of the petitioner.

6. The respondent, before passing the Impugned Order, had issued a Show Cause Notice dated 15/18.03.2019. The said notice was addressed to M/s Digilab Inc., the foreign principal of the petitioner. A copy of the notice was, however, marked to the petitioner as well. The petitioner replied to the same by its letter dated 05.04.2019. In the reply it was *inter alia* asserted that the petitioner was responsible only for the installation of the aforesaid equipment and not for the application demonstration of the same. As the warranty was to commence from the proper installation of the equipment, which was installed on 09.10.2009, it expired on 10.10.2012. The non-comprehensive services also expired on 10.10.2014. It was only as a gesture of goodwill that the petitioner had offered to show the functionality and operation of the equipment subsequent/subject

to the availability of reagents in the Institute by sending various reminders on 15.12.2016, 22.03.2017 and 20.06.2017, but there was no response from the respondent with regard to the same. It was only on 08.06.2018 that the respondent finally approached the petitioner asking for application demonstration, however, by then the petitioner was no longer the distributor/agent of M/s Digilab Inc. It was further asserted that as the equipment had remained unused for a long time, it was likely to malfunction and required spare parts. The petitioner no longer had any access to these spare parts. The petitioner further stated that it was still ready to show the working of the machinery, however, the same not be treated as an admission of the petitioner that the machinery/equipment had not been properly installed till date or that the warranty period is yet to commence.

7. The reply submitted by the petitioner was considered by the Committee appointed in terms of Clause 3.5.5 of the Manual and the Committee recommended as under:-

- “(a) The firm may be put on a holiday list for a period of one year from the date of order.*
- (b) No purchase or any agreement with M/s DSS may be entered into by NIN with the above firm during the period of holiday list.*
- (c) The information about placing the firm on holiday list may be displayed on the website of NIN, Hyderabad.*
- (d) Caution all other ICMR Institutes/Centres about the incident and advise them to act prudently while dealing with the firm.”*

8. Based on the above recommendation, the Impugned Order dated 18.04.2019 was passed by the Director, NIN.

9. The petitioner filed an appeal against the said order, which was also dismissed by a cryptic order dated 06.08.2019, reproduced hereunder:

“With reference to the subject mentioned above, I am directed to inform you that your appeal has been considered but not found justified. Hence, Director NIN, Hyderabad orders vide letter NIN/ST/12.Aut.Prot.Digester/2019 dated 18.4.2019 stand valid, putting your firm on Holiday List or Temporary Debarment for a period of one year.”

10. The learned counsel for the petitioner submits that the Impugned Orders dated 18.04.2019 and 06.08.2019 are liable to be set aside for having been passed in violation of Principles of Natural Justice. He submits that the Show Cause Notice dated 15/18.03.2019 was issued only to M/s Digilab Inc., the foreign vendor/principal of the petitioner and not to the petitioner itself. Though the petitioner replied to the same as a copy thereof was marked to the petitioner, this cannot be considered as a compliance with the Principles of Natural Justice and the law laid down by the Supreme Court mandating the issuance of a Show Cause Notice before an action of debarment/placing of a Firm on Holiday List is taken by an authority.

11. The learned counsel for the petitioner further submits that the violation of Principles of Nature Justice also occurred as no opportunity

of hearing was granted to the petitioner by the Committee appointed under Clause 3.5.5 of the Manual; by the Director of the respondent before passing the order dated 18.04.2019; and/or by the Director General, as an Appellate Authority, before passing the Impugned Order dated 06.08.2019. In the absence of such hearing, the Impugned Orders are liable to be set aside.

12. The learned counsel for the petitioner further submits that the Impugned Orders, even otherwise do not reflect any application of mind to the reply submitted by the petitioner to the Show Cause Notice. He submits that the Committee proceeded on the assumption that the petitioner was to arrange for the application demonstration. The Impugned Order dated 18.04.2019 after recording the history of the case, gives only the following reasons for its decisions:-

“AND WHEREAS, after careful examination of all the relevant paper including purchase order, show cause notice dated 15/18.03.2019, reply of the firm dated 05.04.2019 and recommendations of the Supplier Discipline Committee, the undersigned has come to the conclusion that the charges leveled against M/s DSS Imagetech Pvt Ltd are proved.”

13. Similar is the position with respect to the Impugned Order dated 06.08.2019, which has been reproduced hereinabove.

14. The learned counsel for the petitioner further submits that even otherwise, the constitution of the Committee to examine the Show Cause Notice and the reply submitted by the petitioner was invalid. He submits that the Director, NIN was the Chairperson of the Committee. In terms

of Clause 3.5.5 of the Manual, the Report of the Committee was to be considered by the Director independently. As the Director was the Chairperson of the Committee, there could not have been an independent application of mind to the Report of the Committee by the “Competent Authority”, which in this case was the Director of the respondent itself.

15. The learned counsel for the petitioner further submits that in terms of Clause 3.5.5 of the Manual, the Show Cause Notice has to be issued by the Committee, however, in the present case the Show Cause Notice was not issued by the Committee but under the instructions of the Director, NIN. The proceedings therefore were vitiated at the inception itself.

16. The learned counsel for the petitioner further submits that in terms of Clause 3.5.1(i) of the Manual the period of debarment is “upto 12 (twelve) months”. Twelve months being the maximum period, the Impugned Orders, even assuming that the allegation against the petitioner stand proved, do not reflect any application of mind on the period of debarment of the petitioner.

17. On merits, the learned counsel for the petitioner submits that equipment in question is only one of the part of a set of four separate machines that are required for carrying out Genomics and Proteomics analysis. He submits that as the other equipments were not available with the respondent, even otherwise, the petitioner was in no position to give the application demonstration at the time of supply of equipment. This aspect is explained in the petition as under:

“6. That at this stage it is pertinent to understand the underlying technology for carrying out Genomics and Proteomics analysis using the advanced technology. Pursuant to the recent technology, it is possible to identify large number of proteins in complex mixtures, to map their cellular and sub-cellular interactions and to investigate their biological activities. Broadly this is referred as proteomics technique. This entire exercise goes through four broad steps (collectively referred as Application), in the sequence mentioned, which can be generally classified as follows:

- a. Aligning proteins of interest in a reference sample using a 2 Dimensional Gel by applying varying amounts of current. The proteins of interest are identified by a Staining procedure to generate comparative images.*
- b. Analysis of stained images, selection of spots and cutting them out from Gel.*
- c. Cutout parts are digested with Protease(s) to produce Peptides.*
- d. Peptides are desalted and analysed by Mass Spectrometers.*

Separate machines are used to perform each of these functions. It is pertinent here to mention here that the output of a process carried out in 1 instrument becomes the starting input for the next instrument.

A copy of a technical paper explaining the aforesaid process is attached and marked as Annexure-P/3.

7. That the Petitioner supplied Automatic Protein Digester which is used to perform function mentioned at (c) above only.”

18. He submits that there is no denial to this assertion in the counter affidavit filed by the respondent and therefore, it is evident that the fault

lay at the end of the respondent itself. The respondent could not have extended the warranty endlessly by its own default.

19. As far as the extension of the Performance Bank Guarantee is concerned, he submits that as the warranty period had expired there is no obligation on the part of the petitioner to extend the Bank Guarantee. Infact, it was for this reason alone that from 2012 to 2018, the respondent never sought the extension of the Bank Guarantee from the petitioner.

20. The learned counsel for the petitioner lastly submits that in the facts of the present case, even otherwise, the order of debarment could not have been passed by the respondent and the same would be liable to be set aside on the ground of being an unreasonable exercise of powers by the respondent. He submits that in terms of Clause 3.5.2 of the Manual, it is only where the supplier is found lacking in performance, which necessarily has to be of a grave nature, that an order of debarment can be passed. Debarment/blacklisting cannot be justified by every breach of contract. He submits that as the defence set up by the petitioner clearly requires an interpretation of the terms of the contract, the respondent could not have become a judge in its own cause to determine such dispute and thereafter visit the petitioner with the penalty as has been done by the Impugned Orders. The respondent cannot circumvent the ordinary process of the law by becoming a judge in its own cause.

21. In support of his submission, he places reliance on the following judgments:

- “1. ***Ace Integrated Solution Ltd. v. Food Corporation of India and Ors.*** 2019 SCC OnLine Del 8422 (Delhi);
2. ***Aneuser Busch Inbev India Limited v. Commissioner (Excise, Entertainment and Luxury Tax) and Ors.*** WP (C) 9602/2019 (Delhi) [MANU/DE/4352/2019];
3. ***Coastal Marine Construction and Engineering Limited and Ors. v. Indian Oil Corporation Ltd. and Ors.*** 2019 SCC OnLine Del 6542 (Delhi);
4. ***Jay Autocomponents Limited v. Energy Efficiency Services Limited and Ors.*** 2019 SCC OnLine Del 7216 (Delhi);
5. ***Jayant Kumar Gosh Outdoor Catering Private Limited v. IRCTC*** WP (C) 36/2020 (Delhi);
6. ***Kulja Industries Ltd. v. Western Telecom Project BSNL*** (2014) 14 SCC 731;
7. ***Gorkha Security Services v. Government (NCT of Delhi) and Ors.*** (2014) 9 SCC 105;
8. ***Kranti Associates Private Limited and Ors. v. Masood Ahmed Khan and Ors.*** (2010) 9 SCC 496 (SC);
9. ***Narayani Nirmani v. State of Bihar and Ors.*** 2012 (4) PLJR 129;
10. ***Roshan Lal Vohra and Ors. v. MCD and Ors.*** 2013 SCC OnLine Del 3105 (Delhi);
11. ***Banwari and Ors. v. Income Tax Officer and Ors.*** 1993 Supp (1) SCC 619;”

22. On the other hand, the learned counsel for the respondent submits that the petitioner was under an obligation to provide the application demonstration of the machinery in question. Until the same was provided, the installation as required in the Purchase Order, could not have been stated to have been completed by the petitioner. In this regard,

she places reliance on the Installation Report dated 09.10.2009 to submit that in the 'REMARKS' column of the said document, it is clearly recorded that the application demonstration is still pending. She further places reliance on the email dated 10.09.2013 to contend that by the said email, the petitioner was clearly warned that the warranty period shall commence only after proper installation of the equipment and submission of a 'Users Satisfactory Report'. The petitioner, however, by its e-mail dated 18.09.2013, informed the respondent that as its Principle, that is Digilab Inc, was facing financial problems, many of its trained personnel had left leaving behind no person to train the personnel of the petitioner. The petitioner undertook to finish the pending installation at its own cost. She submits that therefore, the petitioner cannot be heard to say that the installation was already complete on 09.10.2009 or that it was under no obligation to give the application demonstration.

23. She further places reliance on an email dated 28.04.2014; Service/Complaint Call Report dated 23.05.2014; letter dated 08/13.10.2014; Service/Complaint Call Report dated 09.03.2015, 01.06.2015 and 05.07.2015; letter dated 29.06.2016; and Service Report dated 24.11.2016, to contend that till 2016 there was no dispute between the parties that the warranty period stood extended due to pendency of the application demonstration of the said equipment at the end of the petitioner. It was for this reason that the petitioner was replacing the faulty parts of the equipment without any demure or protest. In fact, by its letters dated 15.12.2016 and 20.06.2017, the petitioner itself volunteered to carry out the application demonstration of the said

equipment. She submits that the denial of the responsibility to carry out the technical demonstration in the reply to the Show Cause Notice and in the present petition is therefore, an afterthought and clearly *mala fide*.

24. On compliance with the Principles of Natural Justice, she submits that before issuing the Show Cause Notice dated 15/18.03.2019 to the petitioner, a letter dated 14.09.2018 was issued to the petitioner informing it of the default in carrying out the application demonstration as also in extending the Performance Bank Guarantee. As the petitioner failed to respond to the same, the Show Cause Notice was issued to the petitioner. She submits that the reply received from the petitioner to the Show Cause Notice was duly placed before the Committee appointed in compliance with the Manual. The Committee duly considered the reply of the petitioner and gave a detailed Report rejecting the explanation of the petitioner. The same was thereafter considered by the Competent Authority as also by the Appellate Authority and again, no merit was found in the explanation given by the petitioner. She submits that in fact, the petitioner has been visited with the minimum penalty as provided in Clause 3.5.1 and 3.5.2 (ii) of the Manual, thereby warranting no interference from this Court.

25. On the question of grant of oral hearing to the petitioner, she places reliance on the decisions of the Supreme Court in ***State Bank of India vs. Jah Developers Private Limited And Others***, (2019) 6 SCC 787; ***Gorkha Security Services vs. Government (NCT of Delhi) And Others***, (2014) 9 SCC 105; and ***Patel Engineering Limited vs. Union of India & Anr.***, (2012) 11 SCC 257, to contend that in a blacklisting case,

once a Show Cause Notice is issued and opportunity to reply is afforded, natural justice is satisfied and it is not necessary to give oral hearing in such cases.

26. Further, placing reliance on the Judgment of the Supreme Court in ***Commissioner of Central Excise, New Delhi vs. Hari Chand Shri Gopal & Ors.***, (2011) 1 SCC 236, she submits that in any case, there has been a substantial compliance by the respondent with the principles of natural justice and this Court would not interfere with the impugned decision merely because some facet of natural justice was not followed by the respondent.

27. As far as the reliance of the petitioner on Clause 3.5.5 of the Manual to contend that the same makes it mandatory for the Competent Authority to grant an oral hearing before passing the order of blacklisting, she submits that as the same has been put in a bracket following the words “adequate opportunity”, they have to be read as mandating only an adequate opportunity to the petitioner to make its representation against the proposed action of blacklisting. In her submission, these words do not, in any manner, modify or extend the said Clause so as to make it mandatory for the Competent Authority to grant an opportunity of oral hearing to the Contractor or to result in vitiation of the order passed without affording such opportunity of oral hearing. In this regard, she places reliance on the judgment of the Supreme Court in ***Dozco India Private Limited v Doosan Infracore Company Limited***, (2011) 6 SCC 179 and of this Court in ***N.G. Sheth vs. CBI & Ors.***, 2008 SCC OnLine Del 798.

28. She submits that in view of the above facts, no interference is called for from this Court with the Impugned Orders.

29. I have considered the submissions made by the learned counsels for the parties. It is a trite law that blacklisting of a Contractor visits the Contractor with civil consequences inasmuch as it casts a slur, attaches a stigma and creates a barrier between the blacklisted person and the State entities in matters of commercial transactions. It has serious adverse consequences for the person/entity blacklisted. In today's world, an order of blacklisting does not confine itself only to the Authority who has blacklisted the Contractor, but has an all-pervasive effect on the Contractor in its dealings with other Government agencies as well. In most tenders, the Contractor has to disclose if it has been blacklisted by any agency and the eligibility criteria excludes persons who have been so blacklisted. As repeatedly held, it in fact amounts to "civil death" of the Contractor.

30. In *Kulja Industries Ltd.* (supra), the Supreme Court held that the power to blacklist the Contractor, whether it be a contract for supply of equipment or for execution of any work whatsoever, is inherent in the party allotting the Contract. There is no need for any such power being specifically conferred by statute or reserved by Contract. But, any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the Principles of Natural Justice, but also on the doctrine of proportionality. A fair hearing to the party being blacklisted, thus becomes an essential precondition for a

proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order must be reasonable, fair and proportionate to the gravity of the offence and is subject to scrutiny by a Writ Court. The Supreme Court further observed as under:-

“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 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.....”

31. In ***Gorkha Security Services*** (supra), the Supreme Court reiterated the requirement of serving the Show Cause Notice before taking any action of blacklisting the Contractor. It further held as under:-

“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 pre-judicially affecting another must be in conformity with the rules of natural justice.

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31. *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 the provisions of NIT.

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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.”

32. In ***Patel Engineering Ltd*** (supra), while reiterating that 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., and that there need not be any statutory grant of such power, the Supreme Court held that the only legal limitation upon the exercise of such an authority is that that State is to act fairly and rationally, without being arbitrary in any way. Such exercise of power has to be examined on the touchstone of; (1) the purpose sought to

be achieved by the impugned decision to blacklist the Contractor; and (2) the adverse effects, the impugned action may have on the rights of the Contractor.

33. In the present case, the issue of blacklisting a Contractor and the procedure to be followed by the respondent is spelled out in its Manual. Clause 3.5.1 gives the grades of debarment; Clause 3.5.2 spells out the performance issues which may justify putting the Contractor on the Holiday list; while Clause 3.5.5 gives the procedure for such debarment. These Clauses are reproduced hereinunder:-

“3.5 Grades of Debarment of Suppliers

3.5.1 Registration of suppliers and their eligibility to participate in Procurement Entity’s procurement is subject to compliance with Code of Integrity for Public Procurement and good performance in contracts. Following grades of debarment from registration and participation in Procuring Entity’s can be considered against delinquent bidders/suppliers:

*(i) **Holiday listing (Temporary debarment or suspension):** In less serious cases, a supplier [including their related entities] may be temporary debarred from the Procuring Entity’s procurements for short periods upto 12 (twelve) months, without the firm’s name being removed from the list of registered vendors;*

*(ii) **Removal from list of registered vendor:** Debarment of a delinquent supplier [including their related entities] for a period of time (one to two years) from the Procuring Entity’s procurements with the removal of name from the list of registered vendors, due to severe deficiencies in performance or other serious transgressions; and*

(iii) *If the firm ceases to exist or is acquired by or merged with another firm, or ceases to operate in the category of requirements for which it is registered;*

(iv) *Bankruptcy or insolvency on the part of the supplier as declared by a court of law; or*

(v) *Banning by Ministry/Department or any other Government agency;*

(vi) *Other than in situations of force majeure, after opening of financial bids, the supplier withdraws from the procurement process or after being declared as successful bidder; (i) withdraws from the process; (ii) fails to enter into a procurement contract; or (iii) fails to provide performance security or any other document or security required in terms of the bidding documents;*

(vii) *If the Central Bureau of Investigation/CVC/C&AG or Vigilance Department of Procuring Entity or any other investigating agency recommends such a course in respect of a case under investigation;*

(viii) *Employs a Government servant within two years of his retirement, who has had business dealing with him in an official capacity before retirement; or*

(viii) *any other ground, based on which the registering authority consider that continuation of registration is not in public interest.*

3.5.2 Holiday Listing {Temporary Debarment – suspension}

Whenever a supplier is found lacking in performance, in case of less frequent and less serious misdemeanors, the suppliers may be put on a holiday listing {temporary debarment} for a period upto 12 (twelve) months after following the debarment procedures mentioned in para 3.5.5 below....

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3.5.5 Debarment Procedure

Punitive actions of various grades of debarment against the suppliers should be approved by a Committee and approved by competent authority at the level of the Deputy HOD in case of holiday listing; HOD in case of removal; and nominated Additional Secretary of the Department (Department of Commerce in case of Country wide debarment) in case of banning. Due to principles of natural justice, it should be treated as a quasi judicial function following principles of natural justice, on lines akin to disciplinary proceedings. The Departments will furnish list of such suppliers who have committed misdemeanors listed in paras above to the Supplier Discipline Committee for considering various grades of debarment. On receipt of information from Departments or suo moto, the Committee should take action to issue a show cause notice to such firms. The Committee may also order an interim debarment (Holiday Listing) during the process considering the severity of demeanour. The supplier should be given adequate opportunity (including an oral hearing by the competent authority) to make representation. If the response to the show cause notice is not satisfactory or not acceptable, such firms should be put on suitable grade of debarment, depending on the severity of the misdemeanor. Appeals would lie at a level higher than the competent authority (Secretary, Ministry of Commerce, in case of Country-wide banning). In case of Debarment from concerned Procuring Entity, the concerned Ministry/Department will maintain such list which will also be displayed on their website. In case of country-wise banning, all Ministries/Department of Government of India must be informed and DGS&D will maintain such list which will also be displayed on the website of DGS&D as well as Central Public Procurement Portal.”

34. A reading of the above Clauses would clearly show that in less serious cases, which are cases where the supplier is found lacking in performance, in case of less frequent and less serious misdemeanors, the supplier may be put on the Holiday list (temporary debarment) for a period of 12 months. The proposal for placing the supplier on Holiday list

is to be examined by a Committee and approved by the Competent Authority. Clause 3.5.5 of the Manual itself states that such proceedings are to be treated as *quasi-judicial* and principles of natural justice “on lines akin to disciplinary proceedings” are to be followed. The supplier has to be given an adequate opportunity, including an oral hearing, by the Competent Authority to make representations. A right to file an appeal is also provided to the supplier.

35. In the present case, the primary dispute on facts between the parties is on whether the petitioner was under an obligation to provide application demonstration of the equipment to the respondent and on its failure to do so, did the period of warranty extend till the impugned decision. Consequent thereto is the issue whether the petitioner has committed a breach of the contract by not extending the Performance Bank Guarantee.

36. As noted hereinabove, the case of the petitioner is that the petitioner was under no obligation to provide application demonstration of the equipment to the respondent and in any case, the failure to do so would not extend the period of warranty. It is further contended that the application demonstration is part of a four-step process/equipments wherein petitioner was to supply only one of these equipments and the remaining equipments were to be acquired by NIN, therefore, in absence of the availability of the other three equipments with the NIN, in any case, demand of application demonstration from the petitioner was unwarranted and should not have been made a ground to place the petitioner on the Holiday list.

37. The Purchase Order dated 13.10.2008 in Clause 7 of the Obligations relatable to the petitioner clearly provides that the duration of warranty period was to start “after proper installation of the equipment and submitting user satisfactory report”. A perusal of the above Clause would clearly show that the petitioner was not only to simply supply the equipment but also properly install the same, and a satisfactory report of its installation was to be given by the respondent. The Installation report dated 09.10.2009 records that though the technical demonstration of the equipment has been given, the application demonstration is pending. Other documents including the service/complaint call report generated till as late as June 2015, and petitioner’s own offer emails dated 15.12.2016 and 20.06.2017, belie the submission of the petitioner that it was under no obligation to provide the application demonstration of the equipment.

38. At the same time, as noted hereinabove, the decision to blacklist a Contractor has a more far-reaching effect and adverse consequence on the Contractor than a mere exercise of a contractual power to claim damages or terminate the Contract. Its effect is all-pervasive and in fact amounts to ‘civil death’ of the Contractor. This Court, in its judgment in ***Coastal Marine Construction and Engineering Limited and Anr. vs. Indian Oil Corporation Ltd. & Ors.***, (2019) SCC OnLine Del 6542, has held that it would be unreasonable and arbitrary to visit every contractor who is in breach of its contractual obligations with a blacklisting order. If a contractor is to be visited with the punitive measure of blacklisting on account of an allegation that he has committed a breach of a Contract, the nature of its conduct must be so deviant or aberrant so as to warrant such

a punitive measure. The conduct must be so reprehensible so as to invite a punitive measure and cannot be resorted to merely on account of *bona fide* controversies relating to contractual matters.

39. Tested on the above touchstone, a few facts in the present case become relevant. As noted hereinabove, the petitioner has acted in the Purchase Order as an agent of Digilab Inc., which is a foreign entity. The Purchase Order is dated 13.10.2008. The equipment was admittedly supplied on 03.04.2009 and installed on 09.10.2009. The technical demonstration of the machine was also carried out by the petitioner on 15.02.2010. It is also not disputed that the equipment in question is part of a process involving four components, wherein the output of one becomes the input of the other. In that four-legged process, the equipment, which has been provided by the petitioner to the respondent, is third in number. Admittedly, the respondent at the time of supply of the above equipment was not in possession of the other three remaining equipments. In fact, one of the other three equipments was purchased by the respondent through M/s Digilab Inc., with the petitioner as its agent, under Purchase Order dated 29.03.2011. It seems that it was for this reason alone that the application demonstration of the machinery remained pending and the respondent, in spite of pendency of the same, did not take any action against the petitioner and in fact, allowed even the Performance Bank Guarantee submitted by the petitioner to lapse on 20.10.2012 and did not demand its renewal till 2018. There is also no explanation regarding why the application demonstration was not demanded from the petitioner when it had made such an offer by its email

dated 15.12.2016 and 20.06.2017. It is evident from the documents placed on record, that it is only by the letter dated 14/17.09.2018 that the respondent for the first time proposed punitive action against the petitioner for its failure to complete the application demonstration and installation of the equipment. This letter is admittedly more than nine years after the supply of the equipment.

40. Tested on the above facts, the decision of the respondent to put the petitioner on Holiday list is clearly unjustified, unreasonable and arbitrary. There is much to be explained by the respondent of its own inaction in the entire transaction. At the end, the dispute between the parties would be one of interpretation of the Contract; default to be attributed to either of the parties; and the consequence thereof, however, by no stretch can it amount to a wanton and deviant breach of the Contract by the petitioner warranting the punitive measure of blacklisting. The exercise of power by the respondent in the present case is, therefore, arbitrary, disproportionate and hence, cannot be sustained.

41. In addition to the above, admittedly, neither the Committee which examined the reply submitted by the petitioner to the Show Cause Notice, nor the Competent Authority and nor the Appellate Authority, gave an opportunity of an oral hearing to the petitioner before taking the impugned action and dismissing the appeal there against. Clause 3.5.5 of the Manual clearly requires the Competent Authority to grant an opportunity of oral hearing to the supplier before taking action of blacklisting such supplier.

42. The reliance of the respondent on the judgment of the Supreme Court in ***Jah Developers*** (supra) to contend that denial of oral hearing would not vitiate the impugned order, cannot be accepted. In the said judgment, the Court was considering the Revised Circular dated 01.07.2015 issued by the Reserve Bank of India on instructions on how the Scheduled Commercial Banks and notified Financial Institutions are to deal with wilful defaulters. Para 3(b) of the Circular provided that the Committee examining the evidence of wilful default should give an opportunity of personal hearing to the borrower, if the Committee feels such an opportunity is necessary. It was in this background the Supreme Court held as under:

*“15. The next question that arises is whether an oral hearing is required under the Revised Circular dated 01-07-2015. We have already seen that the said Circular makes a departure from the earlier Master Circular in that an oral hearing may only be given by the First Committee at the first stage if it is so found necessary. **Given the scheme of the Revised Circular, it is difficult to state that oral hearing is mandatory. It is even more difficult to state that in all cases oral hearings must be given, or else the principles of natural justice are breached.** A number of judgments have held that natural justice is a flexible tool that is used in order that a person or authority arrives at a just result. Such result can be arrived at in many cases without oral hearing but on written representations given by parties, after considering which, a decision is then arrived at. Indeed, in a recent judgment in *Gorkha Security Services v. Govt. (NCT of Delhi) and Ors.*, (2014) 9 SCC 105, this Court has held, in a blacklisting case, that where serious consequences ensue, once a show-cause notice is issued and opportunity to reply is afforded, natural justice is satisfied and it is not necessary to give oral hearing in such cases [see paragraph 20].” (Emphasis supplied)*

43. In *Gorkha Security Services* (supra) and *Patel Engineering Ltd.* (supra), though the Supreme Court has held that there is no inviolable rule that a personal hearing to the affected party must precede the decision of blacklisting, in the facts of the present case where the period of dispute extends to more than nine years and the procedure stipulated by the respondent itself provides for an oral hearing to be granted and equally there being no reason given by the respondent for not granting such an opportunity of oral hearing to the petitioner, in my opinion, there has been a violation of the principles of natural justice vitiating the entire decision making process.

44. Though the learned counsel for the respondent has vehemently submitted that in the present case the explanation given by the petitioner was, on the face of it, unacceptable and therefore, the grant of opportunity of oral hearing to the petitioner would have been a futile exercise, I do not find any merit in the said contention. The Committee in its Report has relied upon various other documents, which did not find mention in the Show Cause Notice, to arrive at its decision. No opportunity of rendering an explanation to the said documents was granted to the petitioner by the Committee. Therefore, in my view, the violation of principles of natural justice is writ large in the present case.

45. Equally, the failure to supply the Committee Report to the petitioner before the decision taken by the Competent Authority; failure to grant an opportunity of hearing by the Competent Authority before taking a decision on the Committee Report; and failure to grant an opportunity of hearing to the petitioner at the appellate stage, would, in

my opinion, again vitiate the Impugned Order on account of failure of the respondent to comply with the principles of natural justice.

46. At the same time, however, I do not agree with the contention of the learned counsel for the petitioner that the impugned decision is also liable to be set aside on ground of there being no proper Show Cause Notice issued to the petitioner. The Show Cause Notice dated 15/18.03.2019, though addressed to M/s Digilab Inc., a copy thereof was marked to the petitioner as well. The notice clearly warned the petitioner that action of putting the petitioner on the Holiday list was also contemplated. Paragraph 8 of the Show Cause Notice in this regard is reproduced hereinbelow:

“8. In view of the above, you are hereby informed that you have failed to fulfil your contractual obligations as purchase order ST/12/AUT.Prot.Digester/Repeat-Order/2008-09, dated 13/15.10.2008 and caused huge loss and inconvenience to ICMR-NIN, Hyderabad. Hence, it is proposed to put your firm and your erstwhile Indian agent on “Holiday” for a period of one year as per the provisions of Manual for Procurement of Goods 2017. Hence, you are directed to submit a reply to the notice explaining reasons as to why you should not be placed on “Holiday” as per the provisions indicated above.”

47. The same, in my opinion, fully complies with the requirement of the Show Cause Notice as stipulated by the Supreme Court in **Gorkha Security Services** (supra). The petitioner, in fact, replied to the same and therefore, cannot now plead lack of Show Cause Notice.

48. In view of the findings given herein above, this Court need not go into the other issues raised by the petitioner.

49. In view of the above, the Impugned Orders dated 18.04.2019 and 06.08.2019 are set aside. This order shall not, however, be read as a conclusive expression of opinion on the question whether the petitioner has, in fact, failed to perform its obligations under the Purchase Order and if so, the consequences thereof. This order is confined only to considering whether in the facts of the case, the decision to put the petitioner on Holiday list was justified or not.

50. The petition is allowed in the above terms. The respondent shall pay a cost of Rs.25,000/- to the petitioner.

NAVIN CHAWLA, J

July 06, 2020



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