

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

Reserved on: 27.08.2020

Date of Decision : 25.09.2020

+ **W.P.(C) 3642/2020 & CM 12985/2020**

RHONPAL BIOTECH PVT. LTD.

..... Petitioner

Through: Mr.Jayant Mehta, Ms.Tejaswi
Shetty, Ms.Anu Shrivastava &
Ms.Vedika Pareek, Advs.

versus

NEW DELHI MUNICIPAL COUNCIL & ORS. Respondents

Through: Ms.Noopur Singhal, Adv. for
Mr.Anil Grover, SC and
Mr.Mishal Vij, Mr.Satish Kumar,
Advs. for R-1.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner challenging the order dated 21.02.2020 passed by the respondent no.2, blacklisting the petitioner from participating in all procurements of the New Delhi Municipal Council (NDMC), New Delhi, for a period of two years from the date of issuance of the said order and further forfeiting the Earnest Money Deposit (EMD) of the petitioner.

2. The respondent no.2 had floated an e-tender dated 23.11.2017 vide tender ID No.2017_NDMC_140709_1/2/3/4 for “*Annual Purchase of Ayurvedic Medicines*” for the year 2017-18. The last date of submission of tender was 18.12.2017.

3. Clause 15 of the terms and conditions of the Tender Notice required the tenderer to hand over two samples of the medicines against each items /medicine group quoted (A1, A2, B1, B2) along with the original/attested copy of the Test Reports issued from the Government approved /NABL Accredited testing laboratory of each item quoted.

4. The petitioner submitted its bid on 18.12.2017, which was the last date of submissions of the bids, along with the samples of the medicines and test reports issued by one Devansh Testing & Research Laboratory Pvt. Ltd.

5. The Technical Bid was opened by the respondents on 18.12.2017 itself, as scheduled.

6. It is the case of the respondents that while scrutinizing the documents in the technical bid and the analytical test reports submitted by various firms, test reports submitted by three firms namely, the petitioner herein, M/s Bhushan Pharmaceuticals (P) Ltd. and M/s ISPA Pharmaceuticals Pvt. Ltd., were found suspicious and thus, to verify their authenticity, the details of the submitted test reports were sent to the corresponding testing laboratories for verification. In response, M/s Devansh Testing & Research Laboratory confirmed that the reports submitted by the petitioner and M/s Bhushan Pharmaceuticals (P) Ltd. were not valid and were not issued by the said laboratory.

7. It is further asserted by the respondents that on receiving the said report from the laboratory, the matter was placed before the Annual Purchase Sub-Committee (APSC) (Ayurvedic), which after reviewing the

facts, unanimously decided to reject the bid submitted by the petitioner. A proposal was also submitted to the Competent Authority for forfeiture of the EMD and the blacklisting of the petitioner.

8. The proposed action was confirmed by the Competent Authority of the respondents and by the letter dated 28.03.2018, the petitioner was blacklisted from participating in any procurement of Ayurvedic Medicines of NDMC and its EMD was also forfeited.

9. The petitioner challenged the above order before this Court by way of a Writ Petition, being WP(C) No.3336/2018 titled, ***Rhonpal Biotech Pvt. Ltd. vs. New Delhi Municipal Council & Anr.***, which was disposed of by this Court vide its order dated 09.04.2018, recording the statement of the learned Standing Counsel appearing for the respondents to the effect that as the said blacklisting order had been passed without giving an opportunity of hearing to the petitioner, the same would be withdrawn, however, reserving the right of the respondents to take appropriate action against the petitioner by issuing a fresh Show Cause Notice and granting an opportunity to the petitioner to submit its explanation.

10. In compliance with the statement made, the respondents withdrew the letter dated 28.03.2018 by their communication dated 24.04.2018 and subsequently issued a Show Cause Notice dated 25.04.2018, calling upon the petitioner to show cause as to why action under Clause 18 of the Notice Inviting Tender be not taken against it.

11. In response to the Show Cause Notice, the petitioner, on 04.05.2018, attended the personal hearing through one Mr.Sunil Kumar

Goel, Director of M/s Bhushan Pharmaceuticals (P) Ltd., and submitted a written reply dated 09.05.2018 to the respondents.

12. The respondents upon considering the reply have passed the Impugned Order, blacklisting the petitioner for a period of two years and forfeiting its EMD.

13. The learned counsel for the petitioner has submitted that the petitioner is a reputed manufacturer and supplier of Ayurvedic Medicines and has been supplying these goods to various public authorities, institutions etc., from last 17 years and has acquired a reputation and goodwill. It has also been successful in various tenders issued by various authorities and had a turnover of approx. Rs.20 crores for the year 2018-

14. He submits that the petitioner, in fact, had in its possession the test reports issued by the ITL Labs Pvt. Ltd., which is a Government approved test laboratory, for the medicines for which the petitioner had submitted its Tender with the respondents. It is the case of the petitioner that one Mr.Rahul Mishra, who was an employee of M/s Bhushan Pharmaceuticals (P) Ltd., submitted the false reports on behalf of the petitioner and it was Mr. Rahul Mishra who, for reasons unknown, had replaced the ITL Lab test reports with the false reports of Devansh Testing Labs. The petitioner on coming to know of the above fact, made a representation to the respondents, on its own volition, vide letter dated 30.03.2018, and on the same day, lodged a complaint with the police against the said Mr.Rahul Mishra for submitting fabricated test reports. He submits that therefore, the petitioner has acted in a most *bona fide* manner and, in fact, stood nothing to gain by submitting false test reports.

15. The learned counsel for the petitioner further submits that in terms of Clause 15 of the Tender Notice, the petitioner had also submitted the samples of the medicines with the respondents. There is no allegation that the said samples on testing were found to be spurious or lacking in quality proclaimed. He submits that therefore, merely because of submission of the false certificates/test reports on behalf of the petitioner, which were submitted unauthorizedly, the petitioner could not have been blacklisted. Such test reports, even otherwise, were not conclusive for determining the quality of the medicines and therefore, the petitioner could not have gained any benefit by submitting false reports, or have won the tender on solely that basis.

16. The learned counsel for the petitioner further submits that in fact, the petitioner had withdrawn its bid on its own and much before the first blacklisting order, on 29.12.2017 itself. At the time of its withdrawal, the technical evaluation of the bids was still ongoing and therefore, no material harm or prejudice was caused to the respondents due to such withdrawal of the bid and by submission of false reports on behalf of the petitioner.

17. Placing reliance on the judgment of the Supreme Court in ***Kulja Industries Ltd. vs. Western Telecom Project BSNL & Ors.***, (2014) 14 SCC 731, he submits that applying the test laid therein, the blacklisting order in the facts of the present case was totally unwarranted, arbitrary and unreasonable.

18. The learned counsel for the petitioner further places reliance on the judgments of the Supreme Court in ***Mahabir Auto Stores & Ors. vs.***

Indian Oil Corporation & Ors., (1990) 3 SCC 752 and ***Oryx Fisheries Pvt. Ltd. vs. Union of India & Ors.***, (2010) 13 SCC 427, to submit that even in matters of blacklisting, the respondent has to act in a non-arbitrary and reasonable manner. He submits that in the present case, keeping in view the fact that the petitioner had withdrawn its bid on its own much prior to the laboratory reports being discovered to be false by the respondent; drawn attention of the respondent to the falsity of the laboratory reports on its own; and filed police report, the action of blacklisting the petitioner was unreasonable and arbitrary.

19. The learned counsel for the petitioner further submits that even otherwise, the Impugned order does not give any reason for rejecting the reply submitted by the petitioner to the respondents against the Show Cause Notice. He submits that the order must itself give reasons for rejecting the reply of the petitioner and the same cannot be later shown from the files of the respondents. In this regard, he places reliance on the judgment of the Supreme Court in ***Mohinder Singh Gill & Anr. vs. Chief Election Commissioner, New Delhi & Ors.*** (1978) 1 SCC 405.

20. He further submits that in fact, by withholding the report of the Vigilance Department on the basis of which the Impugned Order has been passed, the respondents have denied the petitioner an opportunity to defend all the charges made against it, thereby violating the principles of natural justice. In this regard, he places reliance on the judgment of the Supreme Court in ***Kashinath Dikshita vs. Union of India & Ors.*** (1986) 3 SCC 229.

21. The learned counsel for the petitioner further submits that the respondents in the counter affidavit have tried to justify the Impugned Order by alleging connivance between the petitioner and M/s Bhushan Pharmaceuticals (P) Ltd. Such reliance cannot be sustained as no such allegation was made against the petitioner in the Show Cause Notice. He submits that similarly, the submission of the respondents that the act of the petitioner would have jeopardized public health, is unsustainable and an afterthought. He submits that such allegation was raised for the first time in the counter affidavit and does not form part of the Show Cause Notice or even the blacklisting order. He submits that even otherwise, the same is unsubstantiated as it is not alleged against the petitioner that the drug samples submitted by it along with the tender were found to be spurious or of low quality.

22. The learned counsel for the petitioner further submits that even otherwise, the blacklisting of the petitioner for the period of two years is highly excessive and disproportionate. Reiterating his submissions of no loss or prejudice being caused to the respondents and that the petitioner had acted *bona fide*, he submits that the period of ban of two years cannot be sustained. In this regard, he also places reliance on Clause 35 of the Tender Notice to submit that the same, in fact, mentions that where any medicine is found to be sub-standard or spurious or misbranded, the supplier of such medicines would be debarred from participating in the tender for two years for that particular medicine alone. It is only where subsequent samples of the medicines supplied by such supplier are again found to be sub-standard or spurious or misbranded, that the supplier

would be debarred from participating in the tender for all Ayurvedic medicines. He submits that in the present case, the Tender Notice was for a total of 516 drugs. The petitioner had submitted its tender only for 49 drugs and therefore, could have been banned only for these drugs. In any case, the period of two years cannot be sustained inasmuch as there is no allegation that the medicines for which the petitioner had submitted its tender were sub-standard, spurious or misbranded.

23. Placing reliance on the judgment of Supreme Court in ***Kulja Industries (supra)*** and of this Court in ***M/s. Avinash Em Projects Pvt. Ltd. vs. M/s. Gail (India) Ltd.***, 2015 SCC OnLine Del 7135 and ***Coastal Marine Construction and Engineering Ltd. & Anr. vs. Indian Oil Corporation Ltd. & Ors.***, 2019 SCC OnLine Del 6542, he submits that such blacklisting order being totally disproportionate, cannot be sustained.

24. He further submits that even otherwise, the petitioner was granted an oral hearing by Dr. Ranbir Singh, Director (MS), while the Impugned Order has been passed by Dr. Kamlesh Gupta, Director (AYUSH). Placing reliance on the judgment of the Supreme Court in ***Union of India & Ors. vs. Shiv Raj & Ors.***, (2014) 6 SCC 564, he submits that the person/officer who affords the hearing must take the decision, failing which, the order would stand vitiated having been passed in violation of the principles of natural justice.

25. On the other hand, the learned counsel for the respondents submits that in view of the admitted fact of false laboratory certificate being submitted by the petitioner in its tender, the Impugned Order is fully

justified and cannot be interfered with. She submits that the petitioner, in fact, has not acted *bona fide* as claimed. It is the own case of the petitioner that the petitioner had got the tender submitted through Mr.Rahul Mishra, an employee of M/s Bhushan Pharmaceuticals (P) Ltd.. M/s Bhushan Pharmaceuticals (P) Ltd. is a competitor of the petitioner engaged in the same activity and in fact, had participated in the same tender, also using false documents. Clearly, the petitioner on becoming aware of the enquiry initiated by the respondents into the certificates, sought to withdraw its bid by its letter dated 29.12.2017, contending therein that the same was being withdrawn as its drug license was valid till 31.12.2017 and that for addition of new formulation of drugs, the petitioner was to install new plant and machinery and renovate the building structure. The petitioner at the time of the submission of the bid knew that the bid was valid for 90 days and that the period of supplies was one year. The above withdrawal was therefore mala fide and no benefit can be obtained by the petitioner therefrom. Similar is the submission with respect to the letter dated 30.03.2018 and the police complaint filed by the petitioner.

26. She submits that in fact, in the personal hearing, the petitioner was represented by Mr.Sunil Kumar Goel, Director of M/s Bhushan Pharmaceuticals (P) Ltd., thereby clearly proving the connivance of the petitioner with M/s Bhushan Pharmaceuticals (P) Ltd.. In fact, it is also in violation of Clause 3.6 of the Pre-contract Integrity Pact, which prohibits the bidders from colluding with other parties interested in the contract

and are made responsible to maintain safety and confidentiality of their bid documents during bid process.

27. Placing reliance on Clause 5.1 (VII) of the Pre-contract Integrity Pact, she submits that any breach of the terms of the Pact would have resulted in debarment of the bidder for a period ranging from 6 months to a maximum of 5 years. Therefore, the blacklisting of the petitioner for a period of two years only, is reasonable and cannot be termed as disproportionate.

28. The learned counsel for the respondents further submits that in the present case, the Vigilance Department and the Competent Authority have duly considered the reply submitted by the petitioner. The petitioner has in fact played with the lives of the patients and therefore, has been rightly blacklisted for a period of two years. She submits that the decision making process being fair, this Court will not interfere with the same in exercise of its powers of judicial review.

29. The learned counsel for the respondents further submits that as far as the submission of the petitioner regarding a different person, other than the one who had heard the petitioner, passing the order is concerned, the same also cannot be accepted. She submits that in fact for passing such orders, no personal hearing needs to be granted by the respondents, as has been held by the Supreme Court in ***Patel Engineering Ltd. vs. Union of India*** (2012) 11 SCC 257 and by this Court in ***SVOGL Oil Gas vs. Indian Oil Corporation Ltd*** 2016 SCC OnLine Del 3296

30. I have considered the submissions made by the learned counsels for the parties.

31. The tender in question was for Annual Purchase of Ayurvedic Medicines by the respondents. The last date for submission/uploading of the tender documents online was 18.12.2017 up to 2.30 pm. The technical bid was to be opened on the same day at 3.00pm.

32. Interestingly, the copies of the test reports from ITL laboratory placed on record are dated 14.12.2017 and 18.12.2017, that is last date of submission of bids.

33. Clause 15 of the Tender Notice is reproduced hereinbelow:

"15. SUBMISSION OF TENDER SAMPLES:

a) The tenderer is required to hand over the samples personally. Bidder must submit two (2) samples against each item/medicine group quoted (A1, A2, B1, B2) properly labelled & sealed promptly on or before 18.12.2017 upto 2.00 p.m. Failure to do so, it shall entail your quotation being ignored. Samples to be submitted in the Office of the S.M.O I/C, Central AYUSH Medical Stores (CAMS), Palika Health Complex, Dharam Marg, Chanakya Puri, New Delhi.

b) The Firm must submit an original/attested copy of test report (issued from Government approved/NABL Accredited testing lab) of each item quoted along with submitted samples.

c) Samples of Classical (Part A1,A2) and Proprietary medicines (Part B1, B2) should be submitted in separate boxes properly labelled as "Samples for Classical Medicines" and "Samples for Proprietary Medicines" along with the list of medicines.

d) The quantity should be sufficient for testing purpose.

- e) The tenderer shall fill the Performa of 'sample receipt' in triplicate in the format as per Annexure. On receiving the samples, the SMO I/C, Central AYUSH Medical Store will issue receipt in duplicate as per Annexure to the tenderer. The tenderer should retain original with them.
- f) Copy of 'List of Samples submitted' is to be enclosed along with tender documents. Tenders submitted without samples and samples without test reports not considered at all.
- g) In case of proprietary medicines, scientific support in the form of clinical trials & relevant publications on the product in various journals concerned with the quotations accompanied separately along with the samples.
- h) Single drug formulations will not be considered against Part-B category.
- i) Samples sent through post/courier and samples without test reports shall not be accepted & considered at all.
- j) Each Tender Sample shall contain the following information on its label & the label should be CHROME ART PAPER with multi-colour printing of suitable size/at least two colours.
- i. Name of the Firm/manufacturer along with the address.
 - ii. Name of the Drug.
 - iii. Date of manufacture, Date of expiry and batch number (in case of ointment & the same incorporated on tube also).
 - iv. Drug License Number
 - v. Net Quantity/Contents.
 - vi. Reference Text (in case of Part A1, A2 bids)
 - vii. Formula with ingredients.
 - viii. NDMC Tender Sample "NOT FOR SALE"
- k) MRP should not be printed on the tender sample.
- l) Each pair of sealed sample must be labelled with item code/Sl. no. of the drug (Part-A1,A2 & B1, B2) as specified in BOQ.

m) Bidder must specify weight of each Tab/Cap, Brand name & available presentations (Pack sizes) of each medicine intended quote/supply in the 'sample receipt' as well as in technical sheet provided.

n) Firms may take back their samples of 'unapproved drugs' within 45 days from the issue of the rate contract, on surrendering the original copy of receipt and thereafter no claims will be entertained.

o) The approved samples will be retained in the office of the SMO I/c Central AYUSH Medical Store, NDMC, Palika health Complex, Dharam Marg, Chanakya Puri, New Delhi till the expiry of the contract.

p) Please also collect the previous year's samples from the Stores (CAMS) on or before submission of the Tender documents for the current year.

q) **Evaluation of Samples:**

The members of APSC constituted by the competent authority by considering the following criteria will do selection of medicines,

i) Adopting organoleptic methods such as taste, colour, consistency, hardness, brittleness, fineness etc. as per ingredients and composition of the medicine as mentioned in referred classic Book/AFI/API.

ii) Test Report of against each item (batch wise) submitted by the firm.

iii) Scientific support in the form of clinical trials and relevant publications on the product published in various journals (for the medicine manufactured by the concerned firm).

iv) In case of medicines was supplied in the previous year, the reports /complaints/comments received from Physician who were prescribing this medicine will be taken into active consideration, based on these. However, the decision of APSC will be final as to include it or delete it. "

(Emphasis supplied)

34. A reading of the above Clause would clearly show that it was incumbent upon the bidder to submit the test reports issued from a Government approved/NABL accredited testing laboratory for each item quoted along with the samples of the medicines. In fact, Clause 15(q) of the Tender Notice attached importance to the test reports for the evaluation of the samples by the APSC for the selection of the medicines.

35. Clause 18 of the Tender Notice warned the bidders that submission of false, forged or fabricated documents with an intent to win over the tender shall result in the forfeiture of the EMD and blacklisting in addition to the other legal action as deemed fit. The same is quoted herein below:

"xxxxxxx

The tenderer who submits false, forged or fabricated documents or conceals facts with intent to win over the tender, EMD of such tenderer will be forfeited and firm will be liable for blacklisting in addition to legal action as deemed fit."

36. In the present case, there is no dispute that the laboratory reports submitted by the petitioner along with its tender were false and not issued by the laboratory from which they were purported to have been issued. The petitioner was therefore, clearly liable to be proceeded against under Clause 18 of the Tender Notice.

37. The benefit sought to be obtained by the petitioner by its alleged withdrawal from the tender by its letter dated 29.12.2017, also cannot be accepted. The said letter reads as under:

"Reference to the above said we withdraw our tender that we had submitted online. Our drug licence is valid till 31/12/2017. For addition of new formulation of drugs we have to install new plant machinery and renovate of building structure. This is an unavoidable circumstances so that we are not able for manufacturing of ayurvedic medicines.

Kindly grant permission for Tender withdraw."

38. The tender in question was for Annual Purchase of Ayurvedic Medicines. As noted hereinabove, the petitioner, on 18.12.2017, submitted its bid. The petitioner would have known on that day that its licence is expiring on 31.12.2017 or that it wishes to expand its range of production. It is apparent that this letter withdrawing from the bid was not *bona fide* but issued on gaining knowledge of action being contemplated by the respondents. Similar would be the effect of the letter dated 30.03.2018. In any case, it is not for this Court to weigh the effect of such documents once they have been considered by the respondents in their decision making process.

39. Another important circumstance against the petitioner in the present case is its admission that the said tender was submitted by the petitioner through the employee of M/s Bhushan Pharmaceuticals (P) Ltd., which admittedly is a company competing with the petitioner in the tender. Apart from being a violation of Pre-contract Integrity Pact and specifically Clause 3.6 thereof, the same shows lack of *bona fide* on part of the petitioner. The lack of *bona fide* becomes more apparent when the petitioner is represented by the Director of M/s Bhushan Pharmaceuticals

(P) Ltd. in the oral hearing granted by the respondents pursuant to the Show Cause Notice. It is important to note here that M/s Bhushan Pharmaceuticals (P) Ltd. has also been found guilty of submitting false documents in form of lab reports and has been blacklisted for similar period. The petitioner claims that it has also been successful in various tenders issued by various authorities and had a turnover of approx. Rs.20 crores for the year 2018-19. Such a party is not expected to blindly allow an employee of a third party competitor to submit its bid and vital documents.

40. As far as the submission of the learned counsel for the petitioner that the respondents should have got the samples submitted by the petitioner tested and in absence of an allegation of them being spurious, substandard or misbranded, an action of blacklisting should not have been taken against the petitioner, in my opinion, cannot be accepted. As held by the Supreme Court in *Patel Engineering Ltd. (supra)*, the authority of State to blacklist a person is a necessary concomitant to the executive power of the State to carry out the trade or business and making of contracts. The parties submitting a false document, normally cannot insist on the Authority to further carry out an investigation to determine whether such false documents would or would not have had an effect on the tender process. Under the tender document, it was not obligatory on the part of the respondents to have carried out such tests. It must be remembered that the tender in question was for supply of medicines and therefore, even stricter standards need to be adhered to in such tenders. Submission of false laboratory certificates would be a

grave misdemeanor and would clearly fall within the ambit of the test laid down by the Supreme Court in *Kulja Industries (supra)*, wherein it was *inter alia* held as under:-

“25. Suffice it to say that “debarment” is recognized and often used as 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...”

(emphasis supplied)

41. In any case, the Supreme Court in *West Bengal Central School Service Commission and Ors. Vs. Abdul Halim and Ors.* AIR 2019 SC 4504, has reiterated that this Court in exercise of its powers of judicial review does not sit as an Appellate Authority over the decision taken by the respondents or review such decision on merits. The review of this Court is limited to the decision making process undertaken by the respondents. In the present case, the Impugned blacklisting Order has been preceded by a Show Cause notice. The file submitted by the respondents before this Court further reveals that the reply submitted by the petitioner to the Show Cause Notice has been duly considered at various levels of the respondents and thereafter, a decision has been taken to issue the Impugned Order. The personal hearing granted to the petitioner was followed by a written representation from the petitioner, which has been duly considered.

42. As far as the submission of the learned counsel for the petitioner that the order is vitiated as hearing was granted by one officer and the order passed by another, I again find no merit in the same. In the present case, the oral hearing was followed by a detailed written representation of the petitioner. The office file of the respondents shows that the said reply was considered threadbare by the respondents. Principles of natural justice cannot be put in a straight jacket and where no prejudice is shown to have been caused by the failure of the authority to strictly comply with some facet of natural justice, the order passed cannot be upset only on ground of such failure. The Supreme Court in ***Kalinga Mining Corporation Vs. Union of India (UOI) and Ors.***, (2013) 1 SCR 814, and ***Ossein and Gelatine Manufacturers Association of India Vs. Modi Alkalies and Chemicals Limited and Ors.***, AIR 1990 SC 1744, has held that where the officer who passed the order has taken full note of the submissions/objections of the party concerned and no prejudice is shown to have been caused by the order being passed by an officer different from the one who granted oral hearing, the requirements of principles of natural justice would be considered to have been duly met.

43. The Supreme Court in ***Patel Engineering Ltd. (supra)***, has held that there is no inviolable rule that a personal hearing of the affected party must precede such decision of blacklisting. In ***Gorkha Security Services v. Government (NCT of Delhi) & Ors.***, (2014) 9 SCC 105, it was reiterated that it is not even necessary to give an oral hearing to the contractor before passing a blacklisting order. Tested on such parameters, the blacklisting order cannot be held to be vitiated only for an officer,

different from the one who granted the personal hearing, having passed the order, especially where it is seen that all submissions of the contractor have been duly considered and no prejudice is shown to have been caused to the contractor. It is also of some relevance that the personal hearing was attended not by the petitioner but by the Director of M/s Bhushan Pharmaceuticals.

44. In *Union of India & Ors. v. Shiv Raj & Ors. (supra)*, the Supreme Court was considering the right given to a landowner/person interested to be heard on their objection against proposed acquisition of land, under Section 5A of the Land Acquisition Act, 1894. The Court held that where the objections were heard by one Collector but the report was made by another, such procedure was not in strict compliance with the requirements of Section 5-A of the 1894 Act. The said judgment was therefore, dealing with a statutory right to be heard, unlike the present case where, in fact, the law does not mandate grant of a personal hearing.

45. The submission of the petitioner that the impugned order does not give any reasons for rejecting the representation of the petitioner and that such reasons cannot be supplanted by production of the office file, again cannot be accepted. There is no doubt that even an administrative order must contain reasons and that normally such reasons must be communicated to the party affected thereby. The reason for blacklisting the petitioner is the submission of false/fabricated laboratory reports and invocation of Clause 18 of the NIT by the respondent for such default of the petitioner. The petitioner in its reply to the show cause notice, in fact, does not dispute submission of the false laboratory reports but tried to

place the blame on an employee of M/s Bhushan Pharmaceuticals. The reply was not found satisfactory by the respondent. Therefore, the reason for the impugned order is evident from the fair reading of the order itself. Such reasons are not being supplemented by the production of the office file, but it only shows that there was due application of mind to the reply submitted by the petitioner to the show cause notice. The same would not fall foul of the caution advised by the Supreme Court in *Mohinder Singh Gill (supra)*.

46. The submission of the petitioner that due to non-supply of report of the Vigilance Department, the impugned order is vitiated, again cannot be accepted. In the decision making process, opinion and inputs from various departments may be taken. It is not necessary that each of such opinion must be shared with the contractor. The Vigilance Department was not carrying out an inquiry or an investigation into the allegations against the petitioner and its report was not in form of an Inquiry Report or Investigation Report, but was merely an advise for the Competent Authority to take a decision. In fact, the Office File of the respondents itself reflects that the Vigilance Department left the decision to be taken by the Competent Authority, which later took the impugned decision, recording detailed reasons for the same. *Kashinath Dikshita (supra)*, was a case of refusal to supply copies of statements of witnesses recorded at the pre-enquiry stage and the documents produced to the charged employee. The same has no application to the facts of the present case.

47. As far as the period of blacklisting is concerned, Clause 35 of the NIT, so far as is relevant to the present case, is reproduced herein below:-

“35. PENALTY ON DECLARATION OF SUPPLIED PRODUCT AS NOT OF STANDARD QUALITY (SUB-STANDARD) OR MIS-BRANDED OR SPURIOUS:

"Supply should be accompanied by the test report of the batch supplied, declaring it as of Standard Quality from a Government/Govt. approved/NABL drug testing laboratory and the Test report should be as per guideline/protocol as per 'Protocol for testing ASU Medicines' published by PLIM (Pharmacopoeial Laboratory for Indian Medicines, Ghaziabad), Department of AYUSH, MOHFW, GOI and declaring it as of standard quality.

Regular and random testing of the drug will be undertaken at any time during the shelf period from Govt. approved drug laboratory/NABL drug testing laboratory, at the cost of tenderer. If the tenderer fails to pay the said expenses when called upon to do so, NDMC have the right to deduct the same from the tenderers deposits or any outstanding dues of the tenderer in NDMC.

The test report from the Govt. approved lab/NABL drug testing laboratory from where samples are tested by NDMC will be final and binding on the tenderers/bidders.

In case the testing is done in more than one laboratory, the result of any one of them claiming it as sub-standard will be considered for appropriate action even if in other laboratory it is claimed as of standard quality.

i) If any of the products supplied by the tenderer/supplier after sampling (whether partially or wholly used/consumed after supply) is/are subsequently found to be sub-standard or misbranded or spurious, then the cost of such supplies shall be recovered from the balance payments of the tenderer/supplier pertaining to earlier/current/subsequent years, even if, payment for that particular item stands already released. In case the recoverable amount still exceeds, the same shall be deposited by the tenderer/supplier within 30 days from the date of intimation/demand raised by the Council. The tenderer shall not be entitled to any payment whatsoever for such batches of products. Further, the tenderer will lift back the un-consumed quantity of such product at his cost within 15 days from the date of intimation, failing which the Tender inviting authority shall have

the right to destroy the same. The NDMC reserves the right to take any other action against the supplier as may be deemed fit to be taken against such suppliers.

ii) Recovery to the extent of cost of medicines supplied under particular batch declared as not of Standard Quality (Sub-Standard) or Spurious or Misbranded.

iii) Debarment of the concerned supplier from participation in the tender for two years for the particular Ayurvedic medicine declared as not of Standard quality (Sub-Standard) or Spurious or Misbranded.

iv) Debarment of the Supplier from participation in the tender for all Ayurvedic medicines for two years in case of failure of subsequent sample of any Ayurvedic medicines supplied during the same contractual year."

(Emphasis supplied)

48. Clause 35(iii) provides that where, on testing, any medicine supplied is found to be sub-standard or misbranded or spurious, then, *inter alia*, the supplier shall be debarred for "two years for the particular Ayurvedic medicine declared as not of Standard quality (Sub-Standard) or Spurious or Misbranded". Clause 35(iv) further provides that it is only in case of failure of subsequent sample of any Ayurvedic medicine supplied during the same contractual year, that the supplier shall be debarred "from participation in the tender for all Ayurvedic medicines for two years". (Emphasis supplied)

49. In the present case, there is no allegation that the samples of the medicines submitted by the petitioner along with the tender were not of standard quality or sub-standard or spurious or misbranded. It is also not disputed that the tender was for 516 drugs and that the petitioner had

participated in the tender for only 49 drugs. The petitioner also claims to be in possession of test reports certifying the quality of the samples.

50. The Files submitted by the respondents show no application of mind of the Competent Authority to the above factors and especially Clause 35 of the NIT, while ordering blacklisting of the petitioner for “all” procurement processes for a period of two years. Clause 5.1 (VII) of the Pre-contract Integrity Pact gives a discretion to the Competent Authority in case of breach of the Pact to debar the bidder for a period ranging from 6 months to a maximum of 5 years. Such discretion is to be exercised with due application of mind, keeping in view relevant considerations.

51. In *Avinash Em Projects Private Limited (Supra)*, this court dealing with an allegation of the contractor having secured the contract on basis of false documents, while upholding the blacklisting order, observed as under:-

37. The question whether a punitive measure is disproportionate must also be viewed in the context of the standards set by GAIL themselves. In the event a contractor is found to have bribed the officials of GAIL and secured the contract, he would be visited with the maximum penalty of a three year holiday. By applying this standard, the punishment of blacklisting for an indefinite period appears to be, clearly, disproportionate and arbitrary.

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40. There is yet another aspect that needs to be examined. Indisputably, the benefit that a contractor obtains from any fraudulent practice would have a vital bearing on the quantum of punishment that may be imposed on the contractor for such

fraudulent practice. In this case, it is alleged that the petitioner had secured the contracts in question by submitting fabricated statement of accounts. But for such fabricated statement, the petitioner would have been ineligible for being awarded the contracts. The petitioner has produced other documents in response to the show cause notice to point out that the petitioner was enjoying other working facilities from ICICI bank Ltd. at the material time and even if the petitioner did not qualify on the basis of his existing working capital as reflected in the balance sheet, the petitioner would qualify on the basis of the working capital facilities extended to the petitioner by ICICI bank Ltd.. The said documents have been rejected by GAIL as the same had not been submitted at the relevant point of time.

41. In my view, the approach of GAIL in this respect may not be apposite. Although such documents would have no bearing whether petitioner was guilty of alleged misconduct i.e. submission of fabricated documents, the same would be germane to consider the question whether the petitioner had acquired any benefit which he was not otherwise entitled to. And, this would have a bearing on the punitive measure to be imposed. If the working capital facilities extended by ICICI bank Ltd. to the petitioner would enable the petitioner to qualify for the tender then the petitioner would have obtained no benefit which he otherwise was not entitled to.

42. In view of the aforesaid, no interference is called for insofar as blacklisting the petitioner is concerned. However, to the extent that the petitioner has been debarred from all future business with GAIL, the impugned order is set aside. The matter is remanded to GAIL to consider the period of blacklisting afresh in view of the aforesaid observations and in the context of the period as specified in the integrity pact (i.e. minimum of six months to maximum of three years). Pending applications also stand disposed of. No order as to costs.

52. In *Kulja Industries (supra)*, the Supreme Court, where the period of debarment had been stipulated without due application of mind, held as under:-

"27. The next question then is whether this Court ought to itself determine the time period for which the appellant should be blacklisted or remit the matter back to the authority to do so having regard to the attendant facts and circumstances.

28. A remand back to the competent authority has appealed to us to be a more appropriate option than an order by which we may ourselves determine the period for which the appellant would remain blacklisted. We say so for two precise reasons:

28.1 Firstly, because blacklisting is in the nature of penalty the quantum whereof is a matter that rests primarily with the authority competent to impose the same. In the realm of service jurisprudence this Court has no doubt cut short the agony of a delinquent employee in exceptional circumstances to prevent delay and further litigation by modifying the quantum of punishment but such considerations do not apply to a company engaged in a lucrative business like supply of optical fibre/HDPE pipes to BSNL.

28.2 Secondly, because while determining the period for which the blacklisting should be effective the respondent Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor.

29. In the result, we allow this appeal, set aside the order passed by the High Court and allow Writ Petition No.2289 of 2011 filed by the appellant but only to the extent that while the order blacklisting the appellant shall stand affirmed, the period for which such order remains operative shall be determined afresh by the competent authority on the basis of guidelines which the Corporation may formulate for that purpose. The needful shall be done by the Corporation and /or the competent authority expeditiously but not later than six months from today. The parties are left to bear their own costs."

53. As observed by me above, the period of blacklisting the petitioner and whether it has to be only with respect to those Ayurvedic medicines for which the petitioner had participated in the tender, has not been properly considered by the respondents. I therefore, follow the approach guided by the Supreme Court.

54. The impugned order dated 21.02.2020, blacklisting the petitioner is upheld. The respondents shall, however, redetermine the period and whether the same is to operate with respect to all or some of the Ayurvedic medicines, afresh. The needful shall be done by the respondents/competent authority expeditiously but not later than three months from today.

55. The petition is disposed of with the above directions, with no order as to costs.

NAVIN CHAWLA, J

SEPTEMBER 25, 2020/RN