

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.O. No. 65 of 2024

**Shree Durga Industry and anr.
VS
Union of India and ors.**

For the petitioners	:	Mr. Soumya Majumdar, Adv., Mr. Srijib Chakraborty, Adv., Mr. Pankaj Agarwal, Adv., Ms. Champa Pal, Adv., Ms. Muskan Agarwal, Adv.
For the respondents	:	Mr. Dhiraj Trivedi, Ld. DSGI, Ms. Amrita Pandey, Adv.
Hearing concluded on	:	09.02.2024
Judgment on	:	13.02.2024

Sabyasachi Bhattacharyya, J:-

1. The writ petitioners are registered suppliers of the Government e-Market Place (GeM) portal. The petitioner no. 1-Firm participated in an e-auction floated through the GeM by respondent no. 3, the Inspector General, Ftr. Hq. BSF Jodhpur. However, primarily alleging that the petitioners participated in the bid along with a sister/associated/allied concern, an incident was raised and subsequently escalated within the contemplation of the General Terms and Conditions (GTC) on GeM 4.0 (Version 1.13) dated November 29, 2023, read with the GeM Incident Management Policy applicable with

effect from July 1, 2023. Such action has been challenged in the present writ petition.

2. Learned counsel for the petitioners argues that the genesis of the GeM portal is Rule 149 of the General Financial Rules (GFR), 2017. Rule 151 thereof contemplates two types of debarment from bidding. Clauses (i) and (ii) of the said Rule speak about general debarment on conviction of an offence under the Prevention of Corruption Act, 1988 or the Indian Penal Code or any other law for the time being in force for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract.
3. On the other hand, Clause (iii) speaks about limited debarment by the procurement entity with regard to tenders floated by such entity only for a period not exceeding two years. It is argued that the petitioners were not given adequate opportunity to show cause and of hearing before taking the decision of the petitioners being uploaded as a debarred entity.
4. Secondly, it is argued that on merits the petitioner no. 1's alleged sister concern was ineligible even to participate in the concerned tender. Hence, there was no 'participation' as such, which could be construed to be a violation of Clause 29 of the GTC. Clause 29 of the GTC stipulates the Rule of "One Bid Per Bidder". It is submitted that it was a *bona fide* error on the part of the petitioners to have submitted the bids of both the petitioner and the said entity which was disclosed by the petitioners to the respondent no. 3. Hence, the decision to debar the petitioner no. 1 was illegal.

5. On a wider context, learned counsel argues that Clauses 21 and 29 of the GTC are to be quashed, being in contradiction with the GFR itself, which the source of authority of the GeM.
6. It is argued that the GeM is a Special-Purpose Vehicle floated by the Government which operates, monitors and supervises all business transactions on the GeM portal as per defined roles and responsibilities on behalf of the Government, as enumerated in the introduction of the GTC itself. Thus, the GeM is not the Government and does not have any authority to introduce restrictions beyond the GFR, which has been issued by the Ministry of Finance, Department of Expenditure of the Government of India itself.
7. Learned counsel appearing for the respondent no. 3 squarely opposes the allegations and submits that the petitioners were admittedly guilty of violation of Clause 29.
8. It is reiterated by the respondents that the incident was raised and escalated duly and sufficient opportunity of show cause has been given to the petitioners. Learned counsel for the respondents also places reliance upon the concerned provisions of the GTC and submits that it is a part of the GeM Policy. The GeM functions under the aegis of the Government of India and as such has ample authority to initiate the impugned action for debarment.
9. Apart from the above, the respondents have a fundamental objection as to maintainability of the writ petition. In this context, learned counsel relies on Clause 16.2 of the GTC which speaks about arbitration and Clause 16.1 which pertains to prior efforts of

conciliation. In view of the arbitration clause, it is argued that the writ petition is not maintainable.

- 10.** The writ petition has also been challenged on the point of territorial jurisdiction of this Court. Clause 16.2(vii) stipulates that all disputes in connection with or arising out of the contract shall be subject to the exclusive jurisdiction of the Court within the local limits of whose jurisdiction the principal place of business of the Buyer department/organization is located. The respondent no. 3/Buyer is located in Jodhpur, Rajasthan and hence the Calcutta High Court, it is argued, does not have jurisdiction to entertain the writ petition and to decide the same.
- 11.** Clause 17(ii) stipulates that irrespective of the place of delivery, the place of performance or the place of payment under the contract, the contract shall be deemed to have been made at the registered address of the Buyer and/or Primary Buyer.
- 12.** Thus, the contract is deemed to have been made within the territorial jurisdiction of the registered address of the Buyer and the courts therein have exclusive jurisdiction to decide disputes in that regard.
- 13.** Heard learned counsel for the parties. The issue of territorial jurisdiction has two components. The arbitration clause is the first sticking point according to the respondents, the second being the territorial jurisdiction clause.
- 14.** Conspicuously, the word “Contract” has been defined in Clause 2(j) of the GTC to mean the purchase order created/issued by the Buyer on GeM for supply of goods/services in electronic form which includes

scope of supply, delivery instructions and specifications, etc. as ordered by Buyer against such contract besides the subject GTC, STC/ATC as the case may be.

15. Thus, a “contract” can only be contemplated in the context of the GTC when a bidder become successful in a tender process and a contract/purchase order is actually awarded or issued to it or created in its favour by the Buyer. It is noteworthy that both Clauses 16 and 17 of the GTC and their sub-clauses contemplate disputes arising out of or in connection with or relating to such contract. In the present case, no contract has yet been awarded to the petitioners and as such, applicability of either the arbitration clause or the territorial jurisdiction clauses do not come into question at all. The said stage will only be reached if a contract is awarded to a successful Supplier. Hence, the arguments as to territorial jurisdiction and existence of the arbitration clause touching the subject-matter are not tenable in the eye of law. The objections as to maintainability and territorial jurisdiction are thus turned down.
16. Seen from another perspective, the present challenge is not confined to the debarment of the petitioners but also to the legality of Clauses 21 and 29 of the GTC, which is on a wider footing, since it pertains to tenders floated and contract awarded by all Government Ministries and Departments of the Union of India throughout the country. Thus, each and every State and Union Territory of the country is affected by its operation. Hence, a part of the cause of action for such challenge to the Clauses of the GTC floated by the GeM for operations on its

portal arises within the jurisdiction of this Court as well, within the contemplation of Article 226(2) of the Constitution of India, hence, conferring jurisdiction on this Court to entertain and decide the present writ petition.

- 17.** The more basic challenge in the present case is to Clauses 21 and 29. Hence, before going into the merits of the particular case of the petitioners, the said issues are required to be decided since, if the said clauses are struck down, it would automatically have consequences on the private challenge regarding the debarment of the petitioners.
- 18.** There cannot be any doubt that the GFR, 2017 is the source of authority and the genesis of the GeM portal. Rule 149 stipulates that the DGS & D (Directorate of General Supplies & Disposals) or any other agency authorized by the Government will host an online GeM for common used Goods and Services. Thus, the GeM portal, as opposed to the argument of independence of the portal made by the petitioners, is hosted online and run and governed by an authorized agency of the Government of India, either the DGS & D or other such authorized agency.
- 19.** Rule 149 also provides that the procurement of goods and services by Ministries or Departments of the Government will be mandatory for goods and services available on GeM. Hence, the petitioners have a point in arguing that tenders floated by Government Departments and Ministries have to be channelized through the GeM and, in that sense, the GeM monopolizes auctions and contracts floated and awarded by the Government of India and its Ministries and Departments.

- 20.** Rule 160 of the GFR speaks about e-procurement. Clause (i) thereof makes it mandatory for Ministries and Departments to receive all bids through e-procurement portals in respect of all procurements.
- 21.** Rule 150 of the GFR provides for registration of Suppliers for a period between one to three years. Rule 151 speaks about debarment from bidding.
- 22.** A question which has been raised by the writ petitioners is whether the GeM authorities can traverse beyond the provisions of Rule 151 of the GFR. It is to be noted that Rule 151 contemplates only two types of debarment. The first type is stipulated in Clause (i) of Rule 151, which is a general debarment occurring only if the bidder has been convicted of an offence either under the Prevention of Corruption Act, 1988 or under the Indian Penal Code or any other law for the time being in force. The second part has a rider that the conviction has to be for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract. Clause (ii) refers back to Clause (i) and provides that a bidder debarred under sub-section (i) or any successor of the bidder shall not be eligible to participate in a procurement process of any procuring entity for a period not exceeding three years commencing from the date of debarment. The DGS & D will maintain such list which will be displayed on the website as well as the Central Public Procurement Portal.
- 23.** Thus, even the general debarment contemplated in Rule 151, Clauses (i) and (ii) is on the high ground of conviction under the Acts and on

the footing as provided therein. Even such general debarment is limited to an upper limit of three years.

- 24.** On the other hand, Clause (iii) of Rule 151 speaks about limited debarment vis-à-vis the concerned Buyer/procuring entity. The procuring entity may debar a bidder for a period not exceeding two years if the bidder has breached the code of integrity. Clause (iv) provides that a bidder shall not be debarred unless given a reasonable opportunity to represent against such debarment.
- 25.** In the present case, an incident has been raised and escalated in terms of the Incident Management Policy of the GeM which is on a general footing. The petitioners argue that Clauses 21 and 29 go one step beyond Rule 151 and contemplate a general debarment for violation of the GeM terms, which is beyond the specific stipulations of offence in Clauses (i) and (ii) thereof.
- 26.** It is argued that the GeM Policy cannot override the GFR, which is its source of power. The ratio behind the argument is that a debarment from the GeM platform is contemplated in both the impugned Clauses (21 and 29). If a bidder is debarred from participating on the GeM portal, effectively the bidder shall be precluded from participating in all Government tenders, since Rules 149 and 160 restrict the tenders and contracts of all Government Ministries and Departments to be channelized through the GeM portal. Hence, a debarment from participating in the said portal has far-reaching consequences of debarring a bidder not from participating only in tenders floated by the procuring agency concerned but from all Departments and

Ministries of the Government of India. Hence, the debarment thus contemplated is *de hors* Rule 151 and has to be set aside.

27. However, the argument of the petitioners in the above regard has focused totally on Rule 151, whereas Rule 150(iv) of the GFR grants certain additional powers specific to the GeM portal, even over and above the debarment contemplated in Rule 151. It must be construed that Rule 150, which immediately precedes Rule 151, was enacted by the Government of India being fully aware of the implications thereof, which would be, in the light of Rules 149 and 160, to be effectively to debar the bidder-in-question from all Government tenders.

28. Rule 150(iv) is quoted hereunder:

“(iv) Performance and conduct of every registered supplier is to be watched by the concerned Ministry or Department. The registered supplier(s) are liable to be removed from the list of approved suppliers if they fail to abide by the terms and conditions of the registration or fail to supply the goods on time or supply substandard goods or make any false declaration to any Government agency or for any ground which, in the opinion of the Government, is not in public interest.”

29. A scrutiny of the above Clause shows that the registered suppliers can very well be removed from the list of approved suppliers if they fail to abide by the terms and conditions of the registration or fail to supply the goods on time or make false declarations. Rules 21 and 29 do not traverse beyond the said stipulation. Rule 21(i) speaks about administrative actions to be taken by GeM against the Buyer or the Seller, either *suo motu* or on the basis of the platform mechanisms

identified through analytics or on the basis of a complaint or report made to the GeM. Sub-clause (ii) of Clause 21 provides that the seller would be liable for administrative action such as suspension/debarment/removal from the GeM on the ground as stipulated therein. Some of the grounds are of a serious nature and some are restricted to the Prohibited Activities List given in Clause 23.5 of the GTC itself. The list of prohibited activities, inter alia, contemplates serious crimes like cyber crimes or other criminal activities and business malpractices. Sub-clause (xi) of the same stipulates that if any seller has been debarred from GeM then such seller or their authorized seller shall not be permitted to register and offer/sell their products on Gem and/or participate in bids/RA on GeM.

- 30.** Clause 29 of the GTC provides the Rule One Bid Per Bidder. It is well within the authority of the Government/Tender Inviting Authority to stipulate its norms provided those are not unreasonable, arbitrary or discriminatory. One bid per bidder is a well-reasoned concept, in order to prevent cartelization by a particular group or groups of bidders and restrict monopolizing participation in Government tenders by a conniving coterie. On principles of reasonableness, the said stipulation cannot be faulted at all.
- 31.** Both Clauses 21 and 29 come within the general powers conferred on the GeM authorities under rule 150(iv). Hence, it cannot be said that the said Clauses violate the provisions of the GFR, 2017, since debarment under Rule 151 is distinct and different from de-

registration or removal from the list of approved suppliers under Rule 150, although there are certain common grounds in both.

- 32.** Let us now consider the impact of a debarment under Rule 21. Such a debarment is actually a de-registration and consequential removal from the list of approved suppliers of the GeM under Rule 150. Rule 150 speaks about registration of suppliers. Clause (iii) thereof provides that the registration will be for a fixed period between one to three years. Thus, since the registration is itself for a period of a maximum of three years, de-registration or removal from the list has to be confined to an outer limit of three years and cannot be for an indefinite period.
- 33.** The justification of such registration is given in Clause (i) of Rule 150. The registered Suppliers will be approved Suppliers whose names would be published in the list of such approved Suppliers. The said Suppliers would be *prima facie* eligible for consideration for procurement of goods through Limited Tender Enquiry and would be ordinarily exempted from furnishing bid security along with their bids. Hence, three benefits accrue to registered/approved suppliers:
- i. Government Departments or Ministries may consult the list while floating tenders or awarding contracts;
 - ii. The registered suppliers are *prima facie* eligible to participate in contracts floated by such Government entities; and
 - iii. Those suppliers are generally exempted from depositing bid security.

- 34.** Rule 150(i) also provides that the list of such eligible and capable Suppliers will be maintained item-wise, for particular categories of goods and supplies. Thus, the general idea behind such registration is to provide impetus to registered buyers, who have to go through a transparent and formal procedure for getting such registration, which is also enumerated in the Rules under the GFR.
- 35.** Hence, the maximum impact of de-registration, irrespective of Rules 21 and 29 of the GTC of the GeM, is for a period up to three years and cannot exceed such period within the contemplation of Rule 150 of the GFR. Thus, at best, Rules 21 and 29 of the GTC can be read down to the extent that they would operate for an outer limit of three years and/or the period of registration of the de-listed Supplier, whichever is earlier.
- 36.** However, otherwise there is no scope of interference with the same, since Clauses 21 and 29 operate within the general guidelines of Rules 150 and 151 of the GFR, the GFR being the genesis and the source of power of the GeM and its hosts.
- 37.** One other aspect which is required to be considered is that the grounds for administrative action under Rule 21(i) of the GTC is not Supplier-specific but applies equally to Buyers and Sellers and hence, is not discriminatory in that sense.
- 38.** With regard to the procedure contemplated in the GeM and the Incident Management Policy of the GeM, the same is extremely scientific and gives several windows of opportunity to the accused supplier. A rational process flow has been enumerated in the Incident

Management Policy. The process flow envisages the user/procuring entity/stakeholder raising an incident, upon which the supplier has an opportunity to controvert/give reasons. Thereafter, incident may be escalated by the Buyer, upon which the system will send a show-cause notice to the seller only for intimation for action being initiated for enabling/actuating the Buyer-specific debarment on GeM.

- 39.** In response, the seller can only point out discrepancies about details entered by the user raising incident and what is contained in the debarment order. Merits of the debarment order shall not be discussed at that stage. Sub-clause (c) of Clause 2.2(iii) of the Incident Management Policy provides that the debarment will be applicable for that particular Buyer only as per debarment order or for all Buyers on GeM in case of the debarment order is issued by the Department of Expenditure.
- 40.** In the present case, since the Buyer is intending to issue the debarment, it would operate only in respect of the Buyer.
- 41.** Clause 3 of the Incident Management Policy contemplates a process flow for handling incidents on GeM, which provides for mild, serious, severe and grave deviations. Although the process flow for handling severe incidents is the same as mentioned for serious incidents, the consequences differ between the two. The process flow has been indicated above, as stipulated in Clause 2 of the Incident Management Policy and the implications are provided in Clause 3 and its sub-clauses.

42. It is seen from the discussion above that the second phase of show cause, after the incident is escalated by the Buyer, is only on the point of sentencing and not on the merits of the decision to debar.
43. In the present case, the petitioners had shown cause after the incident was initially raised by the respondent no. 3/procuring entity and the same was intimated to the petitioners.
44. The said causes were considered by the procuring entity before it uploaded its decision to escalate the incident.
45. The petitioners' defence was primarily on the ground of certain inconvenience of one of its employees who had conceived, and another employee of the petitioner no. 1 who had admittedly committed a mistake. The third defence that the sister concern of the petitioner no. 1 was not eligible for participation is immaterial, since despite knowing the same, the said entity had also participated along with the petitioner no. 1, in gross violation of Rule 29 of the GTC. The reasons given by the petitioners could very well be labelled as flimsy.
46. In any event, if several views are possible on the same set of facts, there is no occasion for this Court, in judicial review, to issue a prerogative writ interfering with the said decision of the respondent-authorities. Even otherwise, the writ court can only scrutinize the decision-making process and not the validity of the decision itself, although in the present case the decision itself was also quite sound.
47. In the present case, there is no flaw in the decision-making process and, at every stage, while raising the incident and while escalating the same, the petitioners were given opportunity to show cause and such

cause shown by the petitioners was considered by the procuring entity.

- 48.** Hence, there is no scope of interference on merits with such decision of the respondent-Authority.
- 49.** The only thing which remains is that the petitioners have been given a right to show cause on the sentencing part and the petitioners may very well point out the interplay of Clauses 21, 29 of the GTC and Rule 150(iv) of the GFR to the respondent-Authorities. The respondent-Authorities are also required to consider the interplay of the said provisions while taking a final decision to upload the name of the petitioner no. 1 as debarred and removed from the registered list of Suppliers. In the event the penalty is procuring entity-specific, it will be for a period not more than two years; whereas, if the debarment is general, it will be for a period not exceeding three years.
- 50.** In view of the above observations, WPO No. 65 of 2024 is disposed of by declaring that Clauses 21 and 29 of the General Terms and Conditions on GeM 4.0 (Version 1.13) dated November 29, 2023 will be read as conferring authority on the GeM hosts to take administrative action or steps under the said Clauses which would, however, be operative up to an outer limit of three years or the end of the original registration period of the concerned Supplier, whichever is earlier. After such period is over, the concerned Supplier shall be entitled to apply afresh for registration under Rule 150 of the GFR on the GeM portal.

51. Insofar as the particular challenge of the writ petitioners to the action taken by the respondent-Authorities against the same, such challenge is hereby turned down. The respondent-Authorities shall be at liberty to proceed further in the light of the above observations in terms of the provisions of the GTC, read with the Incident Management Policy of the GeM and the General Financial Rules of 2017.
52. There will be no order as to costs.
53. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)