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

Reserved on: 08th July, 2024
Pronounced on: 19th July, 2024

\+ **W.P.(C) 8630/2024 & CM APPL. 35340/2024**

J DUNCAN HEALTHCARE PVT LTD. .....Petitioner

Through: Mr. Vikas Singh, Senior Advocate with Mr. Varun Singh, Ms. Kajal S. Gupta, Ms. Somesa Gupta, Mr. Rohan Chandra, Mr. Ytharth Kumar, Mr. Himanshu Yadav, Ms. Alankriti Bevedi, Ms. Deepika Kalia and Ms. Vasudha, Advocates.

versus

CENTRAL MEDICAL SERVICES SOCIETY .....Respondent

Through: Ms. Aakanksha Kaul, Mr. Aman Sahani, Mr. Satya Sabharwal, Advocates with Ms. Arpita Kumari, Manager (Legal) and Mr. Shivam Pandey.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.

1. The Petitioner, J. Duncan Healthcare Pvt. Ltd., has approached this Court under Article 226 of the Constitution of India alleging that the Respondent, Central Medical Services Society, has arbitrarily blacklisted the company, prohibiting their participation in future tenders issued by the Respondent for a period of two years. The Petitioner contends that this action

was taken without proper justification and lacks a lawful basis, thus necessitating intervention of this Court.

FACTS AND CONTENTIONS

Contentions of the Petitioner:

2. Mr. Vikas Singh, Senior Counsel for Petitioner, has presented the following facts and contentions:

2.1 Petitioner is a manufacturer, supplier and exporter of pharmaceutical products, who bids under Notices Inviting Tenders issued by Respondent. They have emerged as successful bidders on several occasions and various Letters of Award (LOAs) for supply of medicines have been issued in their favour.

2.2 With a view to augment its financial resources, the Petitioner decided to sell 50% of its shares to the erstwhile 'Vivimed Speciality Chemicals Private Limited', now known as 'M/s Mizuna Biosciences Pvt. Ltd.'[1], under Shareholders Agreement dated 08th April, 2023[2].

2.3 In the meantime, the Respondent invited online bids for two tenders, in respect of which the Petitioner was awarded several LOAs. The details of the tenders are as follows[3]:

(a) Tender No. CMSS/PROC/2023-24/NACO/021 dated 27th June 2023 for Procurement of ARV drugs for National AIDS Control Organisation;[4] and,

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[1] "Mizuna"
[2] "Shareholders Agreement"
[3] *Collectively,* "NITs"
[4] "Tender No. 21"

(b) Tender No. CMSS/PROC/2023-24/NTEP/028 dated 30th June 2023 for Procurement of Tablet *Rifapentine* 150MG for National Tuberculosis Elimination Programme[5].

2.4 According to the terms of the LOAs, the Petitioner was required to submit a security deposit amounting to 3% of the total value of each respective LOA. To fulfil this requirement, the Petitioner submitted several Performance Bank Guarantees (PBGs) to the Respondent. An authorized representative of Mizuna proposed that these PBGs could be furnished either by Mizuna or its associate companies, and the same could be adjusted against the payments due from Mizuna to Petitioner for the purchase of shares, as stipulated in the Shareholders Agreement.

2.5 In accordance with Clause 12.1 of the NITs, Petitioner facilitated the issuance of several PBGs on the account of Mizuna. These PBGs – dated 19th September, 2023, 21st September, 2023, 07th December, 2023 and 05th February, 2024 – were submitted to the Respondent in connection with various LOAs. Additionally, Petitioner incurred bank charges amounting to INR 1,06,00,000/-, which were paid to Mizuna for issuance of these PBGs.

2.6 Between October 2023 and June 2024, Respondent issued Purchase Orders (POs) to the Petitioner, outlining specific delivery schedules for the supply of medicines. However, Petitioner encountered several production-related challenges, including unavailability of Active Pharmaceutical Ingredients (APIs), shortages of excipients, and operational disruptions such as the breakdown of critical machinery. These issues necessitated requests for extensions from the Petitioner, which were

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5 "Tender No. 28"

subsequently addressed by the issuance of amended POs and the grant of extensions by Respondent.

2.7 Thereafter, on 04th April, 2024, Respondent issued the first Show Cause Notice (SCN) detailing the repeated delays in supplies on behalf of the Petitioner, despite the extensions granted to them. The notice referenced Clause 18.1 of the NITs, which stipulates potential sanctions for delays in supplier performance, including the possibility of short closing outstanding orders, forfeiting the performance guarantee, and blacklisting the supplier. Petitioner was required to respond by 08th April, 2024, justifying why the unsupplied quantity of Tranche II should not be subject to these sanctions.

2.8 The Petitioner responded to the first SCN on 08th April, 2024, attributing the delays primarily to the Respondent's tardiness in granting extensions. Despite the Petitioner's explanations, the Respondent, through a notice-cum-order dated 29th April, 2024, decided to short close the unsupplied quantity under Tranche II and forfeit the Bank Guarantee (BG) worth INR 12,16,95,056/- in terms of Clause 18.1 of the NITs. Furthermore, Petitioner was directed to continue supplying medicines for Tranches III and IV. In this decision, Respondent overlooked its own contributory delays in granting extensions, which compromised the effectiveness of the extensions provided. By invoking clauses from the tender documents, Respondent penalized the Petitioner for a delay of only 29 days, despite a claimed delay of 77 days.

2.9 Petitioner responded to notice-cum-order dated 29th April, 2024, delineating the schedule deliveries and citing reasons of delay in deliveries. Concurrently, on 01st May, 2024, Petitioner sought the intervention of the Health Secretary through a representation, aiming to prevent the short closure of the contract and highlight the issues faced.

2.10 Upon receiving the order to revoke the PBGs and without any forthcoming responses from either the Respondent or the Health Secretary, Petitioner took proactive steps to safeguard the Respondent's financial interests. To prevent the cascading effects of having PBGs forfeited and anticipating similar actions for other POs, Petitioner transferred a total sum of INR 19,34,83,991/- *via* RTGS to Respondent. This amount covered four PBGs associated with seven POs, significantly exceeding the demanded INR 12,16,95,056/-. This decision was driven by concerns over potential similar sanctions being applied to additional POs under the contract.

2.11 On 9th May, 2024, Respondent issued a second SCN to the Petitioner, following the discovery that the PBGs amounting to INR 19,34,83,991/- were forged. Respondent outlined severe actions in this SCN, including: (a) initiating criminal proceedings against the directors of the Petitioner for submitting forged PBGs; (b) blacklisting the Petitioner in accordance with the Office Memorandum (OM) dated 02nd November, 2021; (c) cancelling contracts that involved the forged PBGs; and (d) forfeiting the security deposit previously transferred by Petitioner on 6th May, 2024.

2.12 In response to the second SCN, the Petitioner, through reply dated 13th May, 2024, expressed their astonishment and concern over the revelation that the PBGs were forged. They detailed their association with Mizuna, who was responsible for obtaining the PBGs, and requested additional time to produce documents proving their good faith and absence of involvement in the forgery. The Petitioner concurrently initiated criminal proceedings against Mizuna for cheating and criminal breach of trust, further demonstrating their intent to rectify the situation and separate themselves from the fraudulent activities.

2.13 On 16th May, 2024, Respondent conducted a personal hearing for the Petitioner, during which they were verbally instructed to prepare a detailed response to the second SCN and to continue the supply of medicines as per existing orders. However, while the Petitioner was preparing this detailed response, the Respondent, acting through its General Manager (Procurement), prematurely issued the impugned order dated 22nd May, 2024[6], whereby the Petitioner was blacklisted for a period of two years on grounds of alleged corrupt practices. Subsequently, through emails dated 06th June, 2024 and 07th June, 2024, Respondent issued cancellation orders for several POs and simultaneously amended others to reflect these cancellations, despite having accepted deliveries under these POs as recently as 30th May, 2024. Moreover, the issuance of these orders of blacklisting and cancellation was paradoxically followed by the issuance of fresh POs in other tenders.

2.14 The crux of the present petition challenges specifically the Blacklisting Order and the subsequent cancellation of the POs. Petitioner does not contest any actions that might be taken by the Respondent concerning delays in supply, acknowledging that such actions, if warranted, should proceed in accordance with the law. However, Petitioner asserts that the Blacklisting Order, based solely on the allegations of submitting forged PBGs—responsibility for which must be attributed to Mizuna—lacks a sound legal basis and therefore cannot be sustained.

2.15 Tender No. 21, which was floated by the Respondent, stipulated that 70% of the supply was to be allocated to the lowest bidder (L-1) and 30% to the second lowest (L-2). When L-2 was requested to supply 30% at the

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[6] "Impugned Order/ Blacklisting Order"

price quoted by L-1, they declined due to a major shortage of API. Subsequently, when the Respondent approached the third (L-3) and fourth (L-4) lowest bidders to match L-1's price, they too declined, citing similar API shortages in both the global and Indian markets. This context establishes that the Respondent was well aware of the global API shortage from the inception of the tender process, and it is this awareness that formed the basis for the extensions granted by them. Thus, at this stage, Respondent cannot credibly use the delay in supply as grounds to justify the blacklisting order, which is demonstrably without legal merit. Respondent's own admissions regarding the API shortage, as reflected in their counter affidavit, reinforce this position.

2.16 Additionally, the allegation of fraud concerning the PBGs cannot be justifiably attributed to the Petitioner. It is important to note that the PBGs were issued by Mizuna, not directly by the Petitioner. This distinction is critical, as the Petitioner was not directly involved in the procurement of the allegedly forged PBGs. The caselaw in ***Khushee Construction v. State of Bihar & Ors.,***[7] ***ASR Dredging Services Private Limited, Represented by its Managing Director v. Chennai Post Trust.***[8] support the principle that fraud cannot be presumed and must be clearly established, a criterion not met in the current scenario.

2.17 The Petitioner cannot be held liable for fraud in the absence of any evidence showing knowledge or intent to deceive, which are essential components of fraud. Fraud entails a deliberate act of deception designed to secure an unfair advantage. In this case, Petitioner had no intent or knowledge to engage in such deceptive practices. Without cogent material substantiating

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[7] 2020 SCC OnLine Pat 1279

[8] 2020 SCC OnLine Mad 623

the claim of fraud, holding the Petitioner responsible is legally untenable. The judgment in ***Khushee Construction (supra)*** supports this position by emphasizing that allegations of fraud must be established beyond mere suspicion or conjecture.

2.18 The Impugned Order is *ultra vires* of the authority vested in the General Manager (Procurement), who issued the blacklisting. According to the OM dated 02nd November, 2021, the General Manager (Procurement) does not possess the competency to debar a contractor. The Respondent's short reply fails to clarify or justify the authority under which the Impugned Order was issued, thus rendering the order procedurally invalid. Reliance in this regard is placed on the judgment of the High Court of Calcutta in ***Anil Barejal Bareja v. Union of India & Ors.,***[9] wherein it was held that actions taken beyond one's designated authority are inherently void and cannot be upheld.

2.19 The Impugned Order issued by the Respondent constitutes a violation of the principles of natural justice, particularly concerning Petitioner's right to a fair hearing. Although, Petitioner was granted time until the 23rd May, 2024, to furnish a detailed response to the second SCN, Respondent pre-emptively blacklisted Petitioner on 22nd May, 2024. This action effectively deprived the Petitioner of the opportunity to present their case, as the decision to blacklist was made without considering the Petitioner's forthcoming response. Consequently, such premature enforcement of the blacklisting renders the Impugned Order procedurally flawed and substantively unjust. Reliance is placed on ***Mekaster Trading***

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[9] 2022 SCC OnLine Cal 1277

Corporation v. Union of India,[10] ***Rama Pandey v. Union of India***[11] ***and Johnson & Johnson v. AIIMS***[12].

2.20 The Respondent has availed services of the Petitioner even after the order of blacklisting, which indicates that the Impugned Order is an arbitrary and unreasonable exercise of power by Respondent. Reliance is placed on ***Highways Engineering Consultant v. NHIDCL & Anr***.[13]

2.21 Respondent, in their counter affidavit, has not demonstrated any financial loss due to submission of forged BGs by Petitioner. Moreover, the Petitioner, on their own accord, had transferred an amount of INR 19,34,83,991 *via* RTGS to Respondent, in order to safeguard the Respondent from suffering any loss. Thus, since no consequential harm was caused, the same cannot form the basis of the Impugned Order.

Contentions of the Respondent:

3. Ms. Aakanksha Kaul, on the other hand, strongly defended the Impugned Order and raised the following contentions:

3.1 It must be presumed that the Petitioner had the knowledge that the PBGs were forged. The tender terms and conditions put all the obligations in this regard on Petitioner.

3.2 Respondent has duly complied with principles of natural justice. They have issued SCNs and afforded full opportunity to Petitioner to present their case. The Impugned Order has been passed after due consideration of all facts and circumstances and the contentions raised by Petitioner.

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[10] (2003) 71 DRJ 376
[11] ILR (2009) SCC OnLine Del 2078
[12] 2021 SCC OnLine Del 4154
[13] 2023 SCC OnLine Del 6807

3.3 Petitioner's reliance on the Central Vigilance Commission Guidelines[14] is misplaced. Respondent may be under a legal obligation to conduct an internal inquiry for non-compliance with CVC Guidelines, however, that does not entitle Petitioner to take benefit of such non-compliance. It is settled law that a party cannot take advantage of its own wrong.

3.4 The order for blacklisting has been passed by the competent authority, which is evident from the perusal of the file maintained by Respondent. The competent authority was the DG & CEO of the Respondent society, who had approved the decision to blacklist the Petitioner. Further, the DG & CEO had also forwarded the reasoning/ noting for the same to the Chairperson of the governing body of Respondent, *viz.* the Health Secretary, Ministry of Health and Family Welfare.

3.5 The acceptance of supplies after the issuance of blacklisting order is not an arbitrary act which would entitle the Petitioner to seek a quashing of Impugned Order purely on this ground.

3.6 Petitioner is even otherwise not in a position to supply the tendered drugs and therefore, the Respondent has every occasion to blacklist the Petitioner.

ANALYSIS AND FINDINGS

4. The NITs in question relate to the procurement of anti-retroviral (ARV) drugs for the National AIDS Control Organization (NACO) and anti-tuberculosis (TB) drugs for the National Tuberculosis Elimination

[14] "CVC Guidelines"

Programme (NTEP). Having been declared the successful bidder, the Petitioner received POs for supply of these drugs. In compliance with the terms of the NIT, the Petitioner furnished PBGs, as detailed in the table below:

Details of the Bid

PO No.	PO Date	Tender No.	Item Name	Order Value (Rs.)	BG Amount (Rs.)
10282300109	09.10.2023	CMSS/PROC/2023-24/NACO/021	Abacavir 600mg + Lamivudine 300mg	13,48,62,423.69	71,28,963/-
10282300110	09.10.2023		Tenofovir 300mg + Lamivudine 300mg	1,64,05,970.51	
10282300115	09.10.2023		Darunavir 600 mg	8,63,63,645.76	
10282300100	03.10.2023		Tenofovir 300mg + Lamivudine 300mg + Dolutegravir 50mg	356,26,08,355.06	12,16,95,056/-
10282300099	03.10.2023			49,38,93,513.04	
10282300155	15.12.2023	CMSS/PROC/2023-24/NTEP/028	Rifapentine 150mg	29,01,71,085.12	87,05,133/-
10282400039	12.02.2024	CMSS/PROC/2023-24/NTEP/042	DSTB-IP (Adult)	186,51,61,283.32	5,59,54,839/-
Total (Rs.)				**644,94,66,276.50/-**	**19,34,83,991/-**

Contractual obligations stipulated in the Notices Inviting Tenders (NITs)

5. The NIT terms and conditions, which deal with delivery requirements, security deposits, and the Respondent's rights in cases of termination or premature closure of the contract, are pertinent to this discussion and are reproduced below:

5.1 Clause 5(vi) of the NITs for both, Tender No. 21 and Tender No. 28, titled *'Forgery/Fraud by bidders/suppliers'*, reads as under:

"5. GENERAL CONDITIONS

…

vi. FORGERY/FRAUD BY BIDDERS/SUPPLIER:

a) ***Genuineness of the papers/documents/certificates/ declaration submitted with bid is the responsibility of the bidder****. Also, the bidder should take utmost care in submitting undertakings/self-declaration/ certificates along with its bid. If at any stage it is found that the papers/ documents/certificates/declaration/undertaking/ self certification submitted by the bidder are false/incorrect/suppressed/ misrepresented the actual fact or are not in order, are forged, manipulated, fabricated or altered, the bid or purchase order issued to the bidder is liable to be cancelled and further necessary action including forfeiture of its EMD/Security Deposit, debarring/blacklisting against the bidder will be taken. Purchaser may also initiate police/legal action and request concerned statutory authority for cancellation of license issued to supplier for tendered items.*

(b) If any fraud, short supply of goods is detected on part of the bidder at any stage, the bid or work order/ Purchase order issued to the bidder is liable to be cancelled and further necessary action against the bidder including debarring/blacklisting will be taken.

(c) In any of above two cases, the CMSS is at liberty to make alternative purchase of the tendered items from other approved suppliers or in the open market or from any other tenderer who might have quoted higher rates, at the risk and the cost of the supplier."

(Emphasis supplied)

5.2 The above provision explicitly stipulates that genuineness of the documents submitted with the bid is the sole responsibility of the bidder, in this case, the Petitioner. This clause places onus on the Petitioner to verify the authenticity of all documents provided during the bidding process. If any documents submitted by the bidder are discovered to be forged or fabricated, the PO is liable to be terminated. This underscores the importance of integrity in the procurement process and the implications of any breach of trust or fraud. In cases where document forgery is identified, the Respondent is also entitled to initiate blacklisting or debarment action against the supplier. Additionally, Respondent is authorized to take legal actions, which may include lodging a police complaint.

5.3 Clause 12.4 of the NITs stipulates that the performance security shall be payable by a bidder as compensation for any loss resulting from the supplier's failure to fulfil its obligations. The said provision is reproduced below:

> *"12. SECURITY DEPOSIT AND AGREEMENT*
>
> *xx ... xx ... xx*
>
> *12.4 The proceeds of the performance security shall be payable to the purchaser as compensation for any loss resulting from the supplier's failure to complete its obligations under the contract."*

5.4 Clause 20 of the NITs grants the Respondent the authority to terminate or short-close the contract, either in whole or in part. These include any contravention of the stipulations under the contract by the supplier or due to non-performance or non-compliance with the contractual terms. In the event of such termination, Respondent is entitled to procure the undelivered tendered goods on terms and in a manner it deems appropriate. Furthermore, the supplier is liable for any excess costs incurred by the purchaser in procurement of such similar goods. The said provision is extracted hereinbelow:

> *"20. DEDUCTION & OTHER PENALTIES ON ACCOUNT OF DELAYS/ DEFAULT/ TERMINATION/ PART CANCELLATION/SHORT CLOSURE:*
>
> *20.2 The CMSS will be at liberty to terminate, without assigning any reasons thereof, the contract either wholly or in part or short closed on 30 days' notice. The Tenderer will not be entitled for any compensation whatsoever in respect of such termination besides forfeiture of Security Deposit and purchaser reserves the right to purchase balance- unsupplied item at the risk and cost of the defaulting vendor.*
>
> *20.3 For infringement of the stipulations of the contract, for non-performance/ compliance of contractual terms or for other justifiable reasons, the contract may be terminated either wholly, or in part or short closed. by the CMSS and the Tenderer shall be liable to pay for all losses sustained by the CMSS in consequence of the termination which may be recovered personally from the Tenderer or from his properties, as per rules besides forfeiture of Security Deposit.*
>
> ***20.3 For infringement of the stipulations of the contract, for non-performance/ compliance of contractual terms or for other justifiable reasons, the contract may be terminated either wholly, or in part or short closed by the CMSS and the Tenderer shall be liable to pay for all losses***

sustained by the CMSS in consequence of the termination which may be recovered personally from the Tenderer or from his properties, as per rules besides forfeiture of Security Deposit.
20.4 In the event of making Alternative Purchase, as specified in in Clause 13(f), Clause 14.2(a), Clause 16.8 and other clauses herein, penalty will be imposed on the supplier. The excess expenditure over and above contracted prices incurred by the CMSS, in making such purchases from any other sources or in the open market or from any other Tenderer who has quoted higher rates and other losses sustained in the process, shall be recovered from the Security Deposit or from any other money due and become due to the supplier and in the event of such amount being insufficient, the balance will be recovered personally from the supplier as per rules.
20.5 In all the above conditions, the decision of the CMSS shall be final and binding."

[Emphasis Supplied]

5.5 Furthermore, Ms. Kaul has drawn attention to the Tender Forwarding Letter dated 13th July, 2023, submitted by the Petitioner at the time along with its bid for Tender No. 28. In the said document, the Petitioner has declared as follows:

"6. I / We hereby certify that all information furnished by our Firm is true & correct and in the event that the information is found to be incorrect/untrue or found violated, then your department/ organization shall without giving any notice or reason therefore or summarily reject the bid or terminate the contract, without prejudice to any other rights or remedy including the forfeiture of the full said earnest money deposit absolutely."

5.6 The aforenoted Tender Forwarding Letter is a fundamental component of the bidding process, carrying substantial implications for the integrity of the procurement process. By submitting this letter, each bidder not only confirms their comprehension of the terms and conditions outlined in the tender document, but also explicitly agrees to abide by them. As evident from the above extract, the Petitioner has specifically stated that any incorrect or untrue information, or any violation of the tender terms, would empower the Respondent department/ organization to reject their bid or terminate the contract. This includes the forfeiture of the earnest money deposit in its entirety, reinforcing the seriousness with which accuracy and honesty are regarded in the tender process.

Supply Delays and Response Measures

6. Following the successful bid by the Petitioner in Tender No. 21, a Long-Term Agreement was executed between Petitioner and Respondent on 29th September, 2023. Under this agreement POs were issued to Petitioner, outlining the quantities, timelines, and conditions for the supply of ARV drugs. A tabular representation of such POs is represented hereunder:

S. No.	Purchase Order	Tendered Item	Tendered Quantity	Date of Issue
1.	10282300115	Darunavir IP 600mg	33,52,626	09.10.2023
2.	10282300109	Abacavir 600 mg + Lamivudine 300mg	86,62,797	09.10.2023
3.	10282300110	Tenofovir 300mg + Lamivudine 300mg	26,73,027	09.10.2023
4.	10282300098	Atazanavir 300mg and Ritonavir 100 mg	6,64,113	03.10.2023
5.	10282300124	Atazanavir 300mg and Ritonavir 100 mg	2,59,83,966	27.10.2023
6.	1028230099	Tenofovir 300mg+Lamivudine 300mg + Dolutegravir 50mg	7,72,28,783	03.10.2023
7.	10282300100	Tenofovir 300mg+Lamivudine 300mg + Dolutegravir 50mg **(TLD)**	55,70,75,362	03.10.2023

7. The POs issued to Petitioner also stipulated the delivery dates for each tranche of the supplies as per tabulation hereunder:

S. No.	Tranche	Quantity (tablets)	Delivery Date
1.	Tranche-I (PDI)	11,14,36,741	Within 90 days from the date of issue of LOA i.e., 06.09.2023

2.	Tranche-II (Non-PDI)	11,14,36,950	Within 91-180 days from the date of issue of LOA i.e., 06.09.2023
3.	Tranche-III (Non-PDI)	16,71,55,158	Within 181-330 days from the date of issue of LOA i.e., 06.09.2023
4.	Tranche-IV (Non-PDI)	16,70,46,513	Within 331-480 days from the date of issue of LOA i.e., 06.09.2023

8. Thus, in accordance with the delivery schedule prescribed under PO No. 10282300100, Petitioner was to complete delivery for Tranche-I and Tranche-II by 05th December, 2023 and 04th March, 2024, respectively. However, on 04th December, 2023, just one day before the scheduled delivery date for Tranche-I of Tenofovir+Lamivudine+Dolutegravir (TLD), Petitioner requested a 30-day extension for delivery *via* email.

9. The Petitioner highlighted several reasons for their delay, including issues pertaining to API sourcing, equipment and manpower related problems as well as the Petitioner's supply commitments under separate tenders/ POs which diverted resources from the production of TLD tablets. However, these reasons were regarded to be unacceptable by Respondent, particularly in light of the critical need for the TLD drug and previous assurances from the Petitioner that the supplies would be completed on time. Several meetings were held to determine the next course of action. The Petitioner committed to delivering substantial quantities of TLD tablets by specific revised dates and assured that there would be no further delays. They requested the Respondent to extend the delivery dates by at least 30 days, while acknowledging that liquidated damages would be applicable.

10. While the reasons provided by the Petitioner highlight several external and internal challenges affecting their ability to meet delivery deadlines, the

obligations under the contract required proactive and timely management of production and supply chain issues. The late communication of these challenges, coupled with the Petitioner's decision to divert production capacity to other contracts, raised concerns about their prioritization and management of contractual obligations. Respondent's expectations for timely delivery are justified given the serious public health implications of delays in the supply of critical medications like TLD.

11. The counter affidavit provides a detailed account of the correspondences exchanged between the parties concerning delays in delivery. These communications indicate that the Petitioner had frequently requested extensions for the delivery dates. Although the Respondent has accommodated some of these requests, such repeated requests extensions and the Petitioner's inability to meet the agreed-upon delivery schedules strongly suggest that Petitioner lacked adequate manufacturing capabilities to fulfil the supply demands of the tenders. This disrupted supply also put at risk the critical health outcomes for patients relying on these medications.

12. In the above circumstances the Respondent issued the first SCN on 04th April, 2024. This SCN highlighted instances of non-compliance and sought an explanation from the Petitioner for the alleged contractual breaches. This communication was predicated on what was deemed a *prima facie* violation of Clause 14.3(a), which pertains to the supplier's obligations to timely supply goods, as well as Clause 18, which details the consequences of failing to meet these contractual obligations. In light of such violations, the Respondent's issuance of the first SCN was, *prima facie,* a justified action founded on contract terms.

<u>The Second Show Cause Notice and Petitioner's Liability for furnishing forged PBGs</u>

13. In view of the contractual breaches, the Respondent issued a letter on 30th April, 2024 to the Bank of India for the encashment of the PBG dated 19th September, 2023 for the sum of INR 12,16,95,056/-. This PBG, as discussed above, was furnished as performance security for the obligations under PO No. 1028230100. The Bank responded on 02nd May, 2024, highlighting several discrepancies in the document and asserting that the BGs in question had not been issued by them. The relevant portion of the said communication is extracted hereinbelow:

> *"(i.) The Bank Guarantee No. BKID4012BG0059132 is not issued by us as the Guarantees issued by our Bank starts with Bank Code and not with BKID as mentioned in your Guarantee No.*
> *(ii.) The officials namely- Mr. R K Jha, Chief Manager, SS No - R5467 and Mr. Samir Bose, Branch Manager, SS No B23918 who have signed the said Bank Guarantee were never posted at our Lindsay Street Branch. Moreover, the signature code of the officials of our Bank is not in the format as mentioned in the Bank Guarantee and also no two post as Chief Manager and Branch Manager exists in our Branch. It appears that the signatories along with the Employee codes are not employees of Bank of India.*
> *(iii). No account in the name of M/S J Duncan Healthcare Private Limited is maintained in our Lindsay Street Branch.*
> *(iv.) We also inform you that the other Bank Guarantee No - BKID4012BG0059143 of Rs 71,28.963.00 has also not been issued by our Bank of India, Lindsay Street Branch."*

14. Somehow, the Petitioner discovered the forgery of PBGs prior to any formal communication of such a finding by the Respondent, and proactively transferred INR 19,34,83,991/- to the Respondent *via* RTGS on 06th May, 2024. The Petitioner contends that this amount, equivalent to the performance security/ the forged PBGs was transferred with an intention to safeguard the Respondent's financial interests and mitigate potential repercussions, including the forfeiture of the PBG.

15. While Petitioner's actions in transferring the funds might appear to be a responsible and proactive measure, the Court remains unconvinced that Petitioner's actions were solely motivated by a desire to protect the Respondent's financial interests or to pre-emptively correct a wrong. The timing of the remittance—following close on the heels of the Bank's confirmation of forgery and before any formal response from the Respondent—suggests a strategic move to mitigate the repercussions that were inevitable once the forgery was unearthed. In any case, the Petitioner's action, while financially compensatory, does not absolve them of the underlying delinquency on account of submission of forged documents.

16. The Court must observe that the public procurement process relies on the honesty and reliability of the documentation provided by bidders. By submitting forged documents, Petitioner compromised the procurement process and violated the contractual terms explicitly prohibiting such actions. The subsequent financial transfer, while potentially mitigating financial damages, does not rectify the breach of contractual trust. Moreover, the forgery of PBGs goes beyond financial repercussions, striking at the heart of contractual integrity. As such, while the Court acknowledges Petitioner's attempt to remedy the financial aspect of the forgery, this does not change the Court's view regarding the gravity of the initial breach and its implications for Petitioner's standing in the present, and potentially other, procurement processes.

17. In response to the discovery of forged PBGs, Respondent issued a second SCN on 09th May, 2024. This notice highlighted the submission of forged or fabricated BGs and outlined potential actions, including the lodging of an FIR against the directors of the Petitioner, further emphasizing the

gravity of the breach. Petitioner contends that they did not engage in any fraudulent practices and were unaware of the BGs being forged. However, the Court finds that the responsibility for ensuring the authenticity of documents lies squarely with the Petitioner. The fact that the PBGs turned out to be forged, regardless of Petitioner's claims of ignorance, underscores a significant lapse in due diligence, and thus, the Petitioner cannot disassociate from this act of fraud by pleading ignorance or shifting blame to third parties such as Mizuna. While the Petitioner may have taken legal actions against Mizuna and its directors for criminal breach of trust and cheating, this does not mitigate their responsibility or avoid contractual consequences of submitting forged documents.

18. The PBG served as a performance security for the Respondent. The genuineness of such a document is foundational, as it supports the trust between contracting parties, ensuring the reliability of contractual enforcement mechanisms. By furnishing forged PBGs the Petitioner has not only breached this trust but also compromised the contractual framework. Accordingly, in terms of Clause 5(vi) of the NITs, the consequences of furnishing forged PBGs must fall on the Petitioner. The Court finds no fault with the Respondent's actions in pursuing strict measures against the Petitioner, including the Impugned Order of debarment. Petitioner's attempt to distance themselves from the forgery does not absolve them of the consequences in view of contractual obligations stipulated in the NIT.

Evaluation of Alleged Violations of Natural Justice

19. The Petitioner contends that the principles of natural justice were violated due to an insufficient opportunity to present their case. They

reference an email dated 21st May, 2024, wherein they requested additional time to submit a comprehensive response. It is contended that the Impugned Order was rendered without awaiting a response, which highlights the Respondent's failure to provide adequate time and opportunity for a detailed representation, thus breaching the fairness required in administrative proceedings.

20. However, the Court is not convinced. The SCN dated 09th May, 2024 clearly communicated the allegations against the Petitioner as well as the potential action of penalty of blacklisting/debarment. This notice provided the Petitioner with an opportunity to respond to the serious allegations concerning the forged PBGs. Indeed, the Petitioner submitted a detailed response on 13th May, 2024, addressing the claims made in the SCN. Subsequently, an in-person hearing was also conducted where the Petitioner was given the opportunity to present their case extensively. During these proceedings, Petitioner reiterated their position that the PBGs were furnished by Mizuna, not themselves. As regards filing of additional response is concerned, the Respondent has clarified that no further response was required from Petitioner beyond what had already been submitted. This point was explicitly communicated to the Petitioner, indicating that the Respondent had sufficient information to proceed with a decision. The Impugned Order was passed after a comprehensive review of the Petitioner's initial response to the SCNs and subsequent discussions during the in-person hearing.

21. The principles of natural justice require that each party be given a fair opportunity to present their case, however, they do not mandate that every request for additional time or responses be granted. Therefore, the Court concludes that the alleged violation of natural justice, as claimed by the

Petitioner, is devoid of merit. The Respondent acted within the scope of required procedural fairness and made a decision based on the comprehensive responses received from Petitioner.

Whether the blacklisting order was issued by a Competent Authority

22. The Petitioner also challenges the Impugned Order as being *ultra vires*, contending that it was issued without proper authorization by the competent authority. This claim centres on the assertion that the order was not passed by the Joint Secretary/Additional Secretary as mandated. In response, the Respondent has elucidated in their counter affidavit that the Blacklisting Order was issued by an authority deemed competent under OM No. F.1/20/2018-PPD dated 02nd November, 2021, which specifies that the Secretary of the Ministry/Department tasked with debarring a firm may delegate this responsibility to an officer at the rank of Joint Secretary/Additional Secretary. Importantly, the OM does not stipulate that every blacklisting decision must be directly signed by such officers, but it does require that a high-ranking official review and approve the decision to ensure the action is considered and justified. The Blacklisting Order in question states explicitly that it was issued with the approval of the competent authority, conforming to the stipulations of the OM. This meets the objective of having a high-ranking official apply careful consideration before proceeding with the action as blacklisting.

23. Additionally, Ms. Kaul has pointed out that the OM dated 02nd November, 2021, delineates that a firm may also be debarred in case of a breach of the code of integrity outlined in Rule 175 of the General Financial Rules, 2017. This Rule specifies that a bidder breaches the Code of Integrity

through any omission or misrepresentation that results in a financial benefit or avoids obligation. The guidelines annexed with the OM elaborate that a bidder may be debarred for up to two years if found to have breached the Code of Integrity. The fact that Petitioner's actions could potentially lead to a financial benefit through the avoidance of contract penalties (due to the submission of forged PBGs) squarely fits the criteria for debarment as outlined.

24. In light of the above, the Court finds that the Blacklisting Order was issued by a duly authorized official within the framework established by the OM and supported by the General Financial Rules. Petitioner's claim that the blacklisting was *ultra vires* lacks substantiation and is therefore rejected as frivolous.

Impact of Accepting Supplies Post-Blacklisting

25. Mr. Vikas Singh also argued that the acceptance of supplies by the Respondent after issuance of the Blacklisting Order demonstrates arbitrariness and unreasonableness, as it effectively invalidates the blacklisting. However, upon careful consideration, the Court finds Mr. Singh's argument to be lacking in merit. As Ms. Kaul rightly points out, the Impugned Order specifically debars the Petitioner from participating in future tenders from 22nd May 2024 till 21st May 2026, whereas the supplies accepted by the Respondent pertain to obligations that were already contractually established prior to the Blacklisting Order. The order dated 29th April, 2024, which short closed Tranche-II of PO No. 10282300100 and forfeited the corresponding PBGs, explicitly directed the continuation of supplies under Tranches III and IV for the supply of TLD under Tender No.

CMSS/PROC/2023-24/NACO/021. Furthermore, the subsequent POs dated 07th June, 2023, for procurement of supplied for the National Vector Hepatitis Control Program (NVHCP) through Tender No. CMSS/PROC/2023-24/NVHCP/049, also falls under an agreement finalized before the blacklisting was issued, with an LOA acceptance date of 01st May, 2024. The acceptance of these supplies by the Respondent does not contravene any legal or contractual prohibitions, as the engagements were initiated and contractually bound prior to the blacklisting.

26. Furthermore, evaluating the circumstances surrounding the acceptance of supplies post-blacklisting, it is also imperative to consider the public interest and health requirements that underpin these procurement activities. Respondent's decision to continue receiving supplies from the Petitioner, especially for critical health programs such as TLD for NACO and supplies for the NVHCP, was guided by the necessity to ensure uninterrupted access to essential medicines. The continuation of these supplies, despite the blacklisting, is a reflection of Respondent's responsibility to prioritize public health outcomes over procedural constraints. This approach is particularly justified given the immediate health needs that could be adversely affected by a sudden cessation of drug supplies, potentially leading to significant public health crises. Thus, the Court holds that Respondent's actions in accepting deliveries from the petitioner after the issuance of the blacklisting order were necessary considering the critical public health considerations involved.

Judicial Review and Scope of Court's Jurisdiction

27. It is also essential to bear in mind the existing jurisprudence relating to the scope of a court's jurisdiction in relation to the subject matter in hand. The

Supreme Court has, time and again, observed that the court, before exercising its power of judicial review to interfere in a contractual matter, must consider whether the process adopted or decision made by the authority is *mala fide*, arbitrary or irrational. The Court is also conscious of the fact that cases involving blacklisting and imposition of penal consequences on a tender/ contract stand on a slightly different footing as they may require a higher degree of fairness in action. Thus, the principles of fairness and equity are especially critical and necessitate a heightened standard of judicial scrutiny.

28. Keeping these principles in mind, the Court does not find the present case to warrant any interference in exercise of its jurisdiction under Article 226 of the Constitution of India. The decision rendered by the Respondent to blacklist the Petitioner has occasioned on account of a contractual breach and an act which shakes the entire foundation of public procurement system. Therefore, Respondent's decision to debar Petitioner from participating in such tender process cannot be said to be *mala fide*, arbitrary or irrational. The decision has been arrived at through a decision-making process which is just, fair and reasonable. All the contentions urged by Petitioner, in the opinion of the Court, do not point to any perversity.

29. In view of the above, the Court does not find any ground to interfere with the Impugned Order, and accordingly, the present petition is dismissed along with pending applications.

SANJEEV NARULA, J

JULY 19, 2024
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