



2024:DHC:6053-DB



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

% Judgment reserved on: 26.07.2024
Judgment delivered on: 14.08.2024

+ LPA 674/2024, C.M.APPL. Nos.42118-20/2024
M/S J DUNCAN HEALTHCARE PVT LTD Appellant

versus

CENTRAL MEDICAL SERVICES SOCIETY Respondent

Advocates who appeared in this case:

For the Appellant : Mr.Vikas Singh, Sr.Advocate with Mr.Varun Singh, Ms.Deepika Kalia, Ms.Kajal S.Gupta, Ms.Vasudha Singh, Ms.Somesa Gupta and Mr.Sudeep Chandra, Advocates.

For the Respondent : Ms.Aakanksha Kaul with Mr.Aman Sahani, Mr.Satya Sabharwal and Mr.Akash Saxena, Advocates.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

TUSHAR RAO GEDELA, J.

1. Present appeal has been preferred under Clause X of the Letters Patent Act, 1866, assailing the judgment dated 19th July, 2024, passed by the learned Single Judge of this Court dismissing the W.P.(C) 8630/2024 titled "*J Duncan Healthcare Pvt. Ltd. vs. Central Medical Services Society*" filed by the appellant, on the ground that the respondent's decision to blacklist the appellant on account of contractual breach and

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to debar the appellant from participating in tender process cannot be said to be arbitrary.

2. The facts germane to the present appeal, shorn of unnecessary details and as culled out from the appeal, are as under:

- a) Appellant claimed to be a manufacturer, supplier and exporter of pharmaceutical products and submitted its bid against various Notice Inviting Tenders (NITs) issued by the respondent. It had emerged as successful bidder on several occasions and various Letters of Award (hereinafter referred to as “LOA”) for the supply of medicines, have been issued in its favour.
- b) With a view to augment its financial resources, the appellant decided to sell 50% of its shares to the erstwhile ‘*Vivimed Specialty Chemicals Private Limited*’, now known as ‘*M/s Mizuna Biosciences Pvt. Ltd*’, under the Shareholders Agreement dated 8th April, 2023.
- c) It is the case of the appellant that due to LOA requirements, the appellant had to make security deposits amounting to 3% of the total value of the respective LOA, necessitating submission of several Performance Bank Guarantees (hereinafter referred to as “PBGs”). The appellant claimed that the Authorized Representative of M/s Mizuna Biosciences offered to issue PBGs in favour of the respondent on behalf of the appellant, as this amount was to be adjusted in the purchase amount for 50% shares of the appellant. Consequently, PBGs dated 19th September, 2023, 21st September, 2023, 7th December, 2023 and 5th February, 2024 were issued by M/s Mizuna Biosciences or

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through its associate company's account to the respondent on behalf of the appellant and the same were duly accepted by the respondent. The appellant stated that it paid a cumulative amount of Rs.1,06,00,000/- to M/s Mizuna Biosciences towards bank charges for the issuance of these PBGs.

- d) The appellant stated that the Purchase Orders (POs) were issued to the appellant between September, 2023 and June, 2024, each with specified delivery schedules divided into tranches. The appellant sought extensions for the supply of medicines in Tranches I and II due to unavailability of APIs, delayed inspection by the respondent, shortage of excipients, production issues, machine breakdowns and festive holidays. The respondent granted these extensions but often with significant delays, effectively reducing the extension periods. The appellant stated that it is an admitted position as per the facts of the case, that against a total extension sought for 67 days, only 25 days were granted by the respondent and apart from PO no. 10282300100, there has been no delay in any other PO by the appellant.
- e) The respondent issued the first Show Cause Notice dated 4th April, 2023, to the appellant detailing repeated delays in supplies and the appellant was asked to submit its reply by 8th April, 2024. Accordingly, the appellant sent its reply on 8th April, 2024, citing delays that were largely attributable to respondent. Subsequently, respondent *vide* Notice-cum-Order dated 29th April, 2024 decided to short close the unsupplied quantity under Tranche II for PO no.10282300100 and to forfeit the PBG worth Rs.



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12,16,95,056/- for two PO's under the same tender, i.e., Tender No. 21. It is the case of the appellant that it was further directed to continue supply of Tranches III and IV.

- f) The appellant stated that having received the order dated 29th April, 2024, to prevent cascading effects of having its PBG forfeited, it transferred a total sum of Rs. 19,34,83,991 to the respondent *via* RTGS against 4 PBGs in lieu of seven (7) POs on 6th May, 2024.
- g) The respondent is stated to have issued second Show Cause Notice dated 9th May, 2024 to the appellant stating that during encashment of appellant's PBGs, it was discovered that the Bank Guarantees amounting to Rs.12,16,95,056/- given on behalf of appellant were forged. The appellant responded to the second Show Cause Notice *vide* reply dated 13th May, 2024, stating that it was equally shocked to discover that said PBGs were forged and accordingly, prayed for fifteen (15) days time to present additional documents to substantiate its *bonafide* intentions and prove that it had no role in submission of forged PBGs while initiating criminal proceedings against M/s Mizuna Biosciences for cheating and criminal breach of trust.
- h) Appellant stated that on 16th May, 2024, respondent afforded a personal hearing to the appellant, during which it was verbally instructed to prepare a detailed response to the second Show Cause Notice and to continue the supply of medicines as per the existing orders. However, while the appellant was preparing this detailed response, the respondent, acting through its General



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Manager (Procurement), prematurely issued the impugned blacklisting order dated 22nd May, 2024, whereby the appellant was blacklisted for a period of two years on the ground of alleged corrupt practices. Subsequently, through emails dated 6th June, 2024 and 7th 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.

- i) Such blacklisting order and subsequent cancellations of POs were challenged by the appellant *vide* W.P.(C) No. 8630/2024. However, the learned Single Judge *vide* impugned order dated 19th July, 2024 dismissed the writ petition. Hence, the present appeal.

CONTENTIONS OF THE APPELLANT :-

3. Mr. Vikas Singh, learned senior counsel appearing on behalf of the appellant fairly admitted that PBGs submitted by the appellant are forged one. He submitted that there are seven purchase orders, out of which, six have been completed on time and there is only one PO which was not supplied on time.

4. Learned senior counsel referred to the judgement of the Patna High Court in ***Khushee Construction vs. State of Bihar & Ors.***, reported as ***2020 SCC OnLine Pat 1279***, to submit that a person can be held guilty of fraud only when there is an intention to deceive. He further submitted that in the present case, the appellant neither had prior knowledge of the fraud nor benefited financially from it and thus, he



submitted that the forged PBGs have caused huge damage to the present and future business prospects of the appellant. He further submitted that M/s Mizuna Biosciences offered to issue PBGs in favour of the respondent on behalf of the appellant, as this amount was to be adjusted in the purchase amount for 50% shares of the appellant. On this, he submitted that the appellant is the victim in the entire situation for a fraud committed by M/s Mizuna Biosciences, its associates, the Bank or its employees as well as of lack of due diligence and adherence to a proper verification process by the respondent.

5. Mr. Singh, learned senior counsel further referred to the impugned blacklisting order dated 22nd May, 2024, to submit that the respondent still availing services of the appellant despite blacklisting, reeks of arbitrary exercise of the power of blacklisting as per the principle enunciated in the case of ***Highways Engineering Consultant vs. NHIDCL & Anr.***, reported as ***2023 SCC OnLine Del 6807***. Thus, he submitted that the punitive measure of blacklisting the appellant on one hand and simultaneously availing its supply under the contract on the other, are inconsistent and cannot stand together.

6. Learned senior counsel contended that the blacklisting order dated 22nd May, 2024, is liable to be set aside as the same does not deal with the defences of the appellant. He relied on the judgements of the Co-ordinate Bench of this Court in ***Mekaster Trading Corporation vs. Union of India***, reported as ***(2003) SCC OnLine Del 794***, ***Rama Pandey vs. Union of India***, reported as ***(2009) SCC OnLine Del 2078*** and ***Johnson & Johnson vs. AIIMS***, reported as ***2021 SCC OnLine Del 4154***, to state that in those cases, it was held that the rule requiring



reasons to be given in support of an order is like the principle of *audi alteram partem*, a basic principle of natural justice, which must be observed in its proper spirit and mere pretence of its compliance would not satisfy the requirements of law and principles of natural justice. In the present case, the blacklisting order did not deal with the contentions of the appellant and none of the defences submitted by the appellant *vide* its reply dated 13th May, 2024, or the representations made by the appellant during its personal hearing dated 16th May, 2024, were considered by the respondent while passing the said order. The same is against the mandate of law as per the judgements relied upon by the appellant. He further submitted that the only remark made in the blacklisting order is that the appellant had indulged in fraudulent practice by submitting fake PBGs to the respondent against the subject contract.

7. Mr. Vikas Singh concluded his arguments by referring to the Central Vigilance Commission's O.M. dated 31st December, 2007, and 4th March, 2016, to submit that *vide* the aforesaid O.M., the CVC had directed that all the Bank Guarantees should be independently verified by the organizations and consequently, it was the responsibility of the respondent to independently verify the PBGs supplied by the appellant. Learned senior counsel further submitted that having not done so at the time of submission itself, the respondent cannot be allowed to blacklist the appellant and prayed that the present appeal be allowed.

CONTENTIONS OF THE RESPONDENT :-

8. Ms. Aakanksha Kaul, learned counsel appearing on behalf of the respondent submitted that the present case is one in which the appellant has unequivocally admitted that the PBGs are fake. According to her,



once it is accepted and admitted that the PBGs in question are fake and forged, the rigours of Clause 5(vi)(a) to 5(vi)(c) of the NIT would become applicable. In this admitted situation, learned counsel submitted that the action of blacklisting the appellant undertaken in terms of the aforesaid clause, cannot be questioned by the appellant.

9. Learned counsel took us through the record to demonstrate that at no stage did the appellant deny the submission of fake PBGs to the respondent. She submitted that though the appellant has placed the blame of furnishing of fake PBGs upon its JV partner, yet, so far as the respondent is concerned, it only identifies the appellant alone. This is for the reason that the bid document was filed by the appellant and the contract was indeed awarded to the appellant. Whether the appellant is a JV partnership or an entity distinct from a JV, is an issue which is absolutely irrelevant to the respondent. She submitted that the furnishing of fake PBGs is a very serious misdemeanor calling for strict action in the nature of debarment/ blacklisting.

10. Learned counsel invited attention to Clause 5(vi)(a) to 5(vi)(c) of the NIT in support of her aforesaid contentions. She submitted that it was the responsibility of the appellant to ensure the genuineness and authenticity of all the documents furnished by it to the respondent. She argued that once the said clause has been admittedly violated, , it is logical that the same would entail a strict action like blacklisting. She submitted that despite such admission, the respondent, not only issued a Show Cause Notice, but also granted an opportunity of a personal hearing to the appellant. It was only thereafter that the impugned order was passed. On that basis, learned counsel submitted that principles of



natural justice have been duly adhered to in the present case. It is further submitted that it is trite that Courts while exercising judicial review would confine themselves to the examination of decision making process rather than the decision itself. In that conspectus, she submitted that the case of the appellant deserves to be dismissed.

11. Ms. Aakanksha Kaul had copiously referred to paragraphs of the impugned judgment to submit that the learned Single Judge had considered in detail, all the issues raised by the appellant and repelled every argument addressed on behalf of it. She reiterated the reasoning rendered by the learned Single Judge in his judgment and prayed that the present appeal be dismissed with exemplary costs.

ANALYSIS AND CONCLUSION :-

12. This Court has heard the arguments of Mr. Vikas Singh, learned senior counsel for the appellant and Ms. Aakanksha Kaul, learned counsel for the respondent, perused the impugned judgement and considered the documents on record.

13. At the outset, we observe from the arguments addressed by the parties that the controversy revolves around the forged PBGs submitted by the appellant and as to whether it was a deliberate act of the appellant entailing debarment/blacklisting for a specified period.

14. On the one hand, appellant claims innocence on the premise that the said PBGs were furnished by its JV partner in lieu of the shares transferred to the said partner and that the appellant had no inkling about the genuineness or otherwise of those PBGs, whereas, on the other hand, respondent asserts that the issue as to which of the JV partners furnished the same is irrelevant since it was the appellant which was awarded the



contract, which stipulated certain conditions in Clause 5(vi)(a) to 5(vi)(c) of the NIT entailing debarment/blacklisting in certain cases of forgery of documents, etc. It would thus be relevant to reproduce Clause 5(vi)(a) to 5(vi)(c) of the NIT hereunder:

"5. GENERAL CONDITIONS

xxx

xxx

xxx

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)

15. A plain and purposive reading of the aforesaid clauses of the NIT indicates that the bidder is under an obligation to maintain the sanctity and genuineness of the documents appended to the bid document and



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those furnished at the time of award of the contract. The reason is discernible. While evaluating the bids of various competing bidders, the respondent would only have the documents appended thereto to assess the eligibility and fulfillment of various other conditions including the financial status and stability of such bidders. Consequent to such evaluation, award of contract too is contingent upon furnishing of legal and valid PBGs. There would indelibly exist some amount of trust that the respondent would expect and repose on the competing bidders. This is more so since the respondent is dealing with public exchequer and is accountable. It is also logical to conclude that on such basis, the respondent would, after finding a bidder successful, award the contract. This would also *ipso facto* subsume within itself, the PBGs. This is for the reason that PBGs provide financial security, promote accountability and mitigate risk for the respondent. Thus, furnishing of PBGs is not a mere formality but intricately intertwined with the tender process and maybe a relevant factor for awarding of a contract. Observing thus, we would proceed with the issues in the present appeal.

16. It is not disputed by the appellant that the PBGs in question were indeed found to be forged and fake documents. It is also not disputed by the appellant that the said PBGs were furnished by its JV partner. It is also not disputed that assuming the same as genuine, respondent accepted the PBGs and awarded the contract to the appellant. It is undisputed that the appellant in pursuance thereto has been executing the contract as stipulated. Though, there is a contest as to the alleged delays in execution of contract etc., yet, we are not concerned with such



dispute, if any, in the present appeal. Suffice it to observe that upon acceptance of the said PBGs, the contract was awarded to the appellant.

17. Mr. Vikas Singh, learned senior counsel, very fairly, did not dispute the factum of fake and forged PBGs. The only argument addressed on this aspect was that the appellant is innocent as the submission of forged PBGs was not in the knowledge of the appellant. Even if this argument is assumed in favour of the appellant, then too, we are unable to agree with the same. The relevance and importance of the PBGs for the award of a contract cannot be underscored. As observed above by us, PBGs provide financial security, promote accountability and mitigate risk for the respondent. Furnishing of PBGs is not a mere formality but intricately intertwined with the tender process and surely is a relevant factor for awarding a contract. It may as well be the final financial and commercial aspect that would crucially decide the award of a contract to the bidder who is found to be successful after the Technical and Financial Bids are evaluated and assessed. In fact, it may well be the furnishing of a legal and valid PBG that may or may not result in the award of the contract. Moreover, the PBG is a document that is kept valid during the entire tenure of the contract and even subsequent too, depending upon the terms of the contract. As such, the relevance and financial impact of PBG cannot be underscored or undermined. In that view of the matter, the argument of learned senior counsel cannot be acceded to.

18. Another relevant and crucial aspect to the above observations would be the provisions of Clause 5(vi)(a) to 5(vi)(c) of the NIT. The Clause mandates a bidder to satisfy itself of the authenticity and



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genuineness of the documents appended not only to the Bid but all such documents etc. furnished even for the award and post award of the contract. Thus, it was incumbent upon the appellant, to satisfy itself of the authenticity and genuineness of the documents, particularly having far-reaching financial implications, before furnishing the same to the respondent. It is apparent and admitted that the PBGs were forged and found to be fake. As a result, the innocence or otherwise of the appellant in the act of forging the PBGs, even if taken at its face value, would not purge it from the act of having actually furnished forged and fake PBGs. The contention that the PBGs were arranged by the JV partner would also be irrelevant so far as the respondent is concerned, since the PBGs in question were furnished to it by the appellant. Resultantly, the violation of Clause 5(vi)(a) to 5(vi)(c) of the NIT is apparent. Thus, this contention would not enure to the benefit of the appellant and is rejected.

19. So far as the submission regarding non-consideration of the reply of the appellant to the Show Cause Notice issued by the respondent before blacklisting is concerned, we find the same to be untenable too, in the facts of the case. This is for the reason that the factum of the PBGs being fake and forged is not doubted by the appellant itself. The question is not whether the appellant itself was involved or complicit in the preparation of such tainted PBGs, but furnishing of the same. This part of the fact is not disputed. The only defence is of innocence. That may not be available to the appellant in view of the stipulation in Clause 5(vi)(a) to 5(vi)(c) of the NIT which mandates that if at any stage of the tender process or execution of the award, documents etc. are found to be forged, fake or fabricated, the said act may entail debarment/blacklisting.

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Having regard to the fact of submission of forged PBGs plainly admitted by the appellant, so far as the action of blacklisting is concerned, nothing much would remain to be considered or determined. It may be another thing to say that the period of blacklisting may be varied, but that is within the jurisdiction of the respondent. *Qua* this submission, we are agreeable with the observation and reasoning of the learned Single Judge in para nos.20 and 21 of the impugned judgement.

20. Learned senior counsel also submitted that despite the purported blacklisting, the respondent has simultaneously directed the appellant to continue with the delivery of medicines in Tranches III & IV which are still being executed, which would indicate that the respondent itself is unsure about the blacklisting. *Qua* this submission, we refer to the observation and reasoning of the learned Single Judge in para no.25 of the impugned judgement. It is noted that supplies of such crucial and lifesaving medicines/drugs are essential in public interest, particularly, health care to which the State is yoked as a Welfare State. Directing stoppage of such essential and life-saving medicines/drugs and opting for tedious and time consuming re-tendering process may not even be an alternative available to the respondent. It is apparent that the decision to continue with the appellant despite blacklisting appears to be prudent and wise, in view of the peculiar facts of the present case. Thus, this argument too fails.

21. Learned senior counsel relied upon the judgement in the case of ***Khushee Constructions (supra)***. We have considered the said judgement and find that the ratio would not be applicable to the facts of the present case. In that case, the petitioner therein had submitted earnest money in



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the form of the certificate of deposit in the post office which was adjusted against the 2% performance security submitted at the time of agreement. While the petitioner therein had commenced execution of the work, it was found that the papers of post office deposit were not genuine on verification. The respondent therein had duly informed the petitioner who submitted papers of fixed deposits in the IDBI bank in lieu of the postal security. The respondent, in that case, had accepted the same as performance security after the verification of those documents confirming their genuineness. After having accepted the IDBI fixed deposit, the respondent issued a Show Cause Notice for cancelling the contract. It was this acceptance of the IDBI fixed deposits in lieu of the postal security that propelled the learned Single Judge to quash such Show Cause Notices and cancellation of the contract. The learned Single Judge had found that the fraud was played by the postal agency and not the petitioner. The Court had, on the basis of estoppel by conduct concluded that once the respondent had accepted the fixed deposits in the IDBI bank after returning the postal security to the petitioner, the subsequent issuance of Show Cause Notice and resultant cancellation would be arbitrary and were quashed. In the present case, though the petitioner had by way of RTGS furnished a sum of Rs.19,34,83,991/- in the apprehension of invocation of the PBGs by the respondent on the allegation of short supply, the same was not accepted by the respondent as replacement of the PBGs. In any case, by that time, the respondent was not aware that the said PBGs were forged. To our mind, this non-acceptance by the respondent makes all the difference between the case decided by the Patna High Court and the present appeal. Moreover, we

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are not aware nor has the learned counsel for the appellant invited our attention to any clause of the tender documents examined by the Patna High Court which is similar to Clause 5(vi)(a) to 5(vi)(c) of the NIT in the present case. Thus, the facts being distinguishable, the said ratio would not be applicable to the present appeal.

22. The appellant has also relied upon the judgement of **Mekaster Trading Corporation** (*supra*). The said case is an authority for the proposition that when a Show Cause Notice is issued, entailing serious civic consequences like blacklisting, the penalty of blacklisting in the impugned order without giving sufficient reasons would amount to violation of principles of natural justice. On these grounds, the order of blacklisting against the petitioner in that case was quashed granting an opportunity to the respondent therein to pass a fresh reasoned order. In the present case, there is no dispute, rather an absolute unequivocal admission of furnishing of fake PBGs. Having admitted to such an act amounting to a violation of Clause 5(vi)(a) to 5(vi)(c) of the NIT, no separate reasons need to be attributed for passing the impugned order. It is trite that facts admitted, particularly akin to one under the provisions of Section 58 of the Indian Evidence Act, 1872, need not be proved. Thus, the aforesaid judgement in the case of **Mekaster** (*supra*) would also not enure to the benefit of the appellant.

23. The appellant had also relied upon the judgment of learned Single Judge of this Court in **Johnson and Johnson Pvt. Ltd.** (*supra*). This case too is similar to the ratio laid down in **Mekaster** (*supra*). In that, the person affected by an adverse order would be entitled to know the reasons for such order. The violation of this principle, according to the



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said judgment, would tantamount to a violation of the principles of natural justice. For the reasons rendered by us in the previous paragraphs, this judgement too would not be applicable to the facts of the present case.

24. Consequently, in view of the aforesaid analysis and findings, we find no reason, much less any cogent reason to interfere with the impugned judgment passed by the learned Single Judge. Resultantly, the present appeal is dismissed without any order as to costs.

25. Pending applications, if any, stand disposed of.

TUSHAR RAO GEDELA, J

ACTING CHIEF JUSTICE

AUGUST 14, 2024/*rl*

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