Before S.J. Vazifdar, CJ & Tejinder Singh Dhindsa, JJ.

M/S ZEE LABORATORIES—*Petitioner*

versus

UNION OF INDIA AND OTHERS—*Respondents*

CWP No. 16444 of 2015

November 20, 2015

Constitution of India, 1950 Art. 226—Writ of Certiorari—Permanent debarment/ Blacklisting—Recommendation of debarment for two years increased to permanent by authority—No opportunity to defend such action—Blacklisting cannot be permanent in nature—Opportunity to defend has to be afforded—Matter remanded.

Held that concededly, a show cause notice/opportunity has not been issued by the competent authority to the petitioner-firm prior to passing of the impugned order……It has been held that not only is blacklisting to be preceded by a show cause notice but to fulfill the requirement of principles of natural justice the show cause notice must meet two parameters viz. (i) the material/grounds are to be stated on which according to the department such action is necessitated and (ii) the particular penalty/action which is proposed to be taken should also be mentioned……. In the eventuality of the competent authority not accepting such recommendations and rather wishing to impose a more stringent penalty, as it has, by passing an order of permanent debarment, it was imperative for a show cause notice contemplating such extreme penalty to be served upon the effected party. Such action and safeguard having not been followed, the penalty cannot sustain. Moreover the competent authority was bound to take a decision himself on the show cause notices after offering the petitioner an opportunity of being heard. The decision cannot be based merely on the said recommendations. The competent authority may or may not accept the recommendations after hearing the petitioner.

(Para 8)

Further held that blacklisting is a punitive measure and has to be commensurate to the acts of commission and omission and other breaches of the terms and conditions under which contracts are allotted. The principle of proportionality has to apply to the decision making process of the competent authority while blacklisting a tenderer…….. In our view the provision with regard to blacklisting will have to be

viewed as an enabling provision and not in the nature of a power to issue blanket orders of debarring a contractor for all times to come.

(Para 9)

Further held that the order of de-barment/blacklisting cannot be for an indefinite period as has been held by the Hon'ble Supreme Court in M/s Kulja Industries Limited Vs. Chief General Manager, W.T. Project B.S.N.L and others, 2013 (13), J.T., 242. The issue with regard to debarment/ blacklisting of the petitioner-firm, as such, would require to be revisited by the respondent authorities.

(Para 10)

Further held that the matter is remanded back to the competent authority i.e. Respondent no.3 for passing of an order afresh as regards de-registration/de-barment of the petitioner-firm in the light of the observations contained in this order. Such exercise of reconsideration and passing a fresh order be completed within a period of two months from the impugned orders dated 2.4.2013 (Annexure P-11) and 11.6.2013 (Annexure P-12) shall be kept in abeyance and would be subject to the fresh order to be passed, as has been directed.

(Para 11)

Sandeep Wadhawan, Advocate
for the petitioner.

J.S. Puri, Addl. A.G., Punjab.

Alok Jain, Advocate with
Kirti Kumar, Advocate for U.O.I.

TEJINDER SINGH DHINDSA, J.

(1) Petitioner is a partnership firm engaged in the manufacture and marketing of pharmaceutical formulations. In the year 2009 it was duly registered with the Directorate General of Health Services, Government of India for supply of Generic and Propriety Products as permitted by the State Licensing Authority i.e. Tablets, Capsules, Parenteral Section, External Preparations and Eye Drops only.

(2) Present petition has been filed seeking a Writ of Certiorari quashing the order dated 2.4.2013 (Annexure P-11), issued by the Chief Medical Officer (AM) Directorate General, Health Services, New Delhi in terms of which the petitioner has been permanently de-registered for supply of all products to the Medical Stores Organization or Government Medical Store Depots under the Ministry of Health and

Family Welfare. Petitioner also seeks quashing of office memorandum dated 11.6.2013 (Annexure P- 12), issued by respondent no.5 which is in the nature of a formal consequential order of de-registration as a follow up to the basic impugned order dated 2.4.2013 (Annexure P-11).

(3) A brief factual matrix that has led to the passing of the impugned orders may be noticed.

(4) The petitioner-firm having responded to a tender inquiry floated by the Medical Stores Organization under the Directorate General of Health Services, Government of India, the respondents accepted and approved a Price Agreement for supply of generic drugs valid for three years w.e.f. 26.5.2009. Such Price Agreement was accepted in relation to six generic drugs and the details of which were as under:-

Sr. No.	VMS No.	Name of the Item	Life	Approved Rate (in Rs.+Vat extra applicable)
1	G18036	Tab Gliplzide 5 mg Metformine 500mg CPT	36 months	0.34/1
2	G06067	Tab Roxythromycin 50 mg CPT	36 months	0.39/1
3	G06068	Tab. Roxythromycin 150 mg CPT	36 months	0.99/1
4	G06165	Tab. Gatifloxacin 400 mg CPT	36 months	1.99/1
5	G06168	Tab. Cefuroxine 250 mg IP	36 months	4.49/1
6	G06169	Tab. Cefuroxine 500 mg IP	36 months	8.49/1

(5) Clause 28 of the terms and conditions of the Price Agreement entered into between the petitioner-firm and the respondent authorities would be relevant to the controversy raised in the instant petition and the same is extracted hereunder:-

> "28. In the event of drugs supplied found substandard in laboratory test, the following action will be taken against the manufacturing and contract holding firms
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> (i) For Category 'B' defects, the manufacturer and contractor will be debarred for supply to MSO of that particular product declared not of standard quality for a period of 3 years.
>
> (ii) If the manufacturer fails in supply of quality medicine of any other drug of standard quality during the next year, his products shall be debarred for supply through MSO and also to the market permanently.
>
> (iii)In regard to category 'A' the supplier should be debarred for the supply of that product for 3 years and for repeated failure of similar nature, the supplier shall be debarred from supply of all products permanently."

(6) On 27.12.2012 a show cause notice was served upon the petitioner-firm stating that Tablet Roxythromycin 150 mg. bearing Batch No.2T-3746 had not been found to be of standard quality with respect to test for dissolution and such defect is a category 'A' defect and as such, a penalty of de-registration for a period of three years or permanently was contemplated. A separate show cause notice dated 10.1.2013 was also issued to the petitioner-firm with regard to Tablet Roxythromycin 50 mg. stating that such drug had also not been found to be of standard quality with respect to dissolution and array test and the same being a category 'A' defect, petitioner was called upon to show cause as to why action as per clause no.28 of the terms and conditions of the Price Agreement be not taken. Vide separate communications dated 25.2.2013 and 25.3.2013 (Annexures P-9 and P-10) respectively and which were issued in relation to the afore-noticed two show cause notices, a recommendation was forwarded to the competent authority i.e. respondent no.3 for debarment of the petitioner-firm for a period of three years. However, in the light of impugned order dated 2.4.2013 (Annexure P-11) respondent no.3 has taken a decision to de-register/debar the petitioner-firm permanently w.e.f. 28.12.2012 in respect of supply of all products. A formal order dated 11.6.2013 at Annexure P-12 has been issued by the Senior Chief Medical Officer (S.A.G.) to ensure implementation of the impugned decision contained in the order dated 2.4.2013.

(7) Learned counsel for the parties have been heard at length.

(8) As we are of the considered view that the issue of de-registration/de-barment of the petitioner-firm permanently requires reconsideration, we need not go into the minute details and the facts that led to the issuance of the show cause notices and initiation of proceedings for de-barment. Suffice it to notice that after service of two separate show cause notices, a penalty of de-registration/de-barment of the petitioner-firm for a period of three years was recommended. The competent authority i.e. the Chief Medical Officer, Directorate General, Health Services, Government of India has not accepted the recommendations but has proceeded to issue the impugned order dated 2.4.2013 (Annexure P-11) imposing the penalty of permanent de-registration/de-barment. Concededly, a show cause notice/opportunity has not been issued by the competent authority to the petitioner-firm prior to passing of the impugned order. Such action would be contrary to the law laid down by the Hon'ble Supreme Court in ***Raghunath Thakur*** versus ***State of Bihar and others***[1] and ***Gorkha Security Services*** versus ***Government of N.C.T of Delhi and others***[2]. It has been held that not only is blacklisting to be preceded by a show cause notice but to fulfill the requirement of principles of natural justice the show cause notice must meet two parameters viz. (i) the material/grounds are to be stated on which according to the department such action is necessitated and (ii) the particular penalty/action which is proposed to be taken should also be mentioned. Adverting to the facts of the present case after service of two show cause notices the recommendation was for imposition of a penalty of de-barment for a period of three years. In the eventuality of the competent authority not accepting such recommendations and rather wishing to impose a more stringent penalty, as it has, by passing an order of permanent de-barment, it was imperative for a show cause notice contemplating such extreme penalty to be served upon the effected party. Such action and safeguard having not been followed, the penalty cannot sustain. Moreover the competent authority was bound to take a decision himself on the show cause notices after offering the petitioner an opportunity of being heard. The decision cannot be based merely on the said recommendations. The competent authority may or may not accept the recommendations after hearing the petitioner.

(9) The impugned order of permanent de-barment is sought to be justified on behalf of the respondent authorities by contending that

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[1] (1989) 1 S.C.C, 229
[2] (2014) 9, S.C.C, 105

since the petitioner-firm had supplied drugs carrying a category 'A' defect and that too on two occasions, clause 28 (iii) of the terms and conditions of the Price Agreement would kick into operation and as such, would result into permanent de-barment/blacklisting. We cannot and do not approve of such mechanical imposition of a drastic penalty of permanent blacklisting. The object of blacklisting may be seen as an effective method to discipline deviant suppliers/contractors. Blacklisting is a punitive measure and has to be commensurate to the acts of commission and omission and other breaches of the terms and conditions under which contracts are allotted. The principle of proportionality has to apply to the decision making process of the competent authority while blacklisting a tenderer. An administrative decision of blacklisting has to contain the element of proportionality and it would be imperative upon the decision maker to strike a balance between the adverse effects of such an order on the interests of the tenderer and the need to adopt punitive measures upon parties guilty of such default keeping in mind the object and purpose it intends to serve. In our view the provision with regard to blacklisting will have to be viewed as an enabling provision and not in the nature of a power to issue blanket orders of debarring a contractor for all times to come. Needless to mention that the question whether to blacklist a supplier/contractor, if at all and for what period would require evaluation in the facts and circumstances of each case.

(10) Even otherwise, the order of de-barment/blacklisting cannot be for an indefinite period as has been held by the Hon'ble Supreme Court in ***M/s Kulja Industries Limited*** versus ***Chief General Manager, W.T. Project B.S.N.L and others***[3]**.** The issue with regard to de-barment/blacklisting of the petitioner-firm, as such, would require to be revisited by the respondent authorities. In taking such view we are fortified by the stand taken by the respondents themselves in the reply filed to the instant petition, wherein it has been stated that in an identical matter pertaining to M/s Ind. Swift Ltd, wherein permanent de-registration had also been directed, the Hon'ble Supreme Court in S.L.P No.15851 of 2012 had advised to revisit the stringent rules of permanent de-registration in the light of the judgement rendered in ***M/s Kulja Industries*** (supra).

(11) In view of the above, the matter is remanded back to the competent authority i.e. Respondent no.3 for passing of an order afresh

[3] 2013 (13), J.T., 242

as regards de-registration/de-barment of the petitioner-firm in the light of the observations contained in this order. Such exercise of reconsideration and passing a fresh order be completed within a period of two months from the date of receipt of a certified copy of this order. In the meanwhile, operation of the impugned orders dated 2.4.2013 (Annexure P-11) and 11.6.2013 (Annexure P-12) shall be kept in abeyance and would be subject to the fresh order to be passed, as has been directed.

(12) Petition is disposed of in the aforesaid terms.

Angel Sharma