
(2020) 01 MP CK 0016

In the Madhya Pradesh High Court

Case No : Arbitration Appeal No. 88 Of 2019

Denis Chem Lab Limited

APPELLANT

Vs

State Of Madhya Pradesh And Another

RESPONDENT

Date of Decision : 06-01-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 37, 43

Citation : (2020) 01 MP CK 0016

Hon'ble Judges : Sujoy Paul, J;Anjuli Palo, J

Bench : Division Bench

Advocate : Brian D'Silve, S.S. Oberai, Shekhar Sharma

Final Decision : Allowed

Judgement

Sujoy Paul, J

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) takes exception to the order dated 04.11.2019 (Annexure A/18) passed by Commercial Court, Bhopal in MJC No.AV-82/2019 whereby the application preferred by the appellant under Section 9 of the said act is disallowed by the Court below.

2. The admitted facts between the parties are that pursuant to a Notice Inviting Tender (NIT) dated 14.08.2013 (Annexure A/1), the appellant submitted his bid for supply of IV Ringarlectate Injections, IV Dextrose with Saline 5% an IV Sodium Chloride and he was awarded the said contract. The appellant supplied the said material which was received by the hospital on 03.03.2015. The appellant received a show cause notice dated 01.08.2015 (Annexure A/3) wherein it is alleged that the appellant supplied two bottles of Dextrose 25% 500 ml for veterinary use. The appellant submitted his reply dated 01.08.2015 (Annexure A/4). He submitted his explanation in the said reply. This reply was followed by another show cause notice dated 04.08.2015 (Annexure A/5) wherein similar allegations were made. The appellant filed reply dated

04.08.2015 (Annexure A/6) which is of similar nature. The appellant received a notice dated 07.08.2015 (Annexure A/7) from the Office of Controller, Food and Drugs Administration calling upon him to produce manufacturing records and other documents. In compliance thereof, the appellant submitted requisite documents on 11.08.2015 (Annexure A/8).

3. The appellant was served with an order dated 12.08.2015 (Annexure A/9) stating therein that since he had supplied the wrong drugs, the contract is terminated and the appellant is barred from participating in any tender process in the State of M.P. for five years. The appellant unsuccessfully challenged this order by preferring an appeal dated 25.08.2015, which was rejected on 11.05.2016 (Annexure A/14). Thereafter, the appellant filed WP. No.9381/16 before this Court. On 02.06.2016, this Court stayed the operation of the order dated 12.08.2015 (Annexure A/9). The said WP was dismissed as withdrawn on 14.12.2016 (Annexure A/16). The appellant was permitted to withdraw the petition to invoke dispute resolution clause in the agreement for the purpose of assailing the order of blacklisting or by invoking other provisions of Arbitration Act. In turn, the appellant filed an application under Section 9 of the Arbitration Act before the Commercial Court, Bhopal on 13.09.2019. The said Court by order dated 04.11.2019 (Annexure A/18) dismissed the said application.

4. Shri Brian D'Silva, learned Senior Counsel assisted by Shri S.S. Oberai, learned counsel urged that; (i) the show cause notices were not in consonance with the principles of natural justice; (ii) the proposed action/blacklisting was not mentioned in the show cause notices. The appellant was shocked and surprised when drastic order of blacklisting was issued; (iii) the 'procedure for blacklisting' as per NIT is not followed by the respondents; (iv) since the blacklisting order has a recurring effect, whenever it became hurdle for the appellant he challenged it before the Court below; and (v) the Court below erred in holding that necessary ingredients for passing an order for granting interim measure were not available. Reliance is placed on 2018 (3) MPLJ 295 (Madhya Pradesh Paschim Kshetra Vidyut Vitran Company Ltd. vs. Serco BPO Pvt. Ltd.), (2014) 9 SCC 105 (Gorkha Security Services vs. Govt. of NCT of Delhi) and 2011 SCC Online Del 3689 (Steel Authority of India Ltd. vs. AMCI PTY Ltd. & Anr.).

5. Per contra, Shri Shekhar Sharma, learned Addl. A.G. opposed the said contention. It is argued that the said writ petition was disposed of on 14.12.2016. The appellant could have availed the remedy under the Arbitration Act with quite promptitude. However, he filed instant application under Section 9 of the Arbitration Act on 16.09.2019 i.e. after a delay of almost three years. From the date of issuance of blacklisting order dated 12.08.2015, it is beyond the period of limitation. He placed heavy reliance on entry 6 and 58 of schedule published under the Limitation Act, which deals with 'first division-suits'. It is urged that under both the entries aforesaid, limitation is three years. The instant application under Section 9 is admittedly filed beyond the period of limitation.

6. Shri Sharma by taking this Court to the show cause notices and the replies

filed by the appellant urged that the appellant in fact admitted his guilt/fault and, therefore, there exists no violation of principles of natural justice. Interestingly, Shri Sharma also placed reliance on the judgment of Supreme Court in Gorkha Security Services (supra). Shri Sharma urged that 'blacklisting procedure' as mentioned in Clause (22) and Annexure XI of NIT was duly followed by the respondents. He placed reliance on (1995) 4 SCC 683 (State of Maharashtra vs. Digambar).

7. No other point is pressed by the parties.

8. We have heard the parties and perused the record.

Jurisdiction of Court below

9. Section 9 of the Arbitration Act enables a party to prefer an application before the Court before or during arbitration proceeding or at any time after making of the arbitral award but before it is enforced in accordance with Section 36. The party may apply to a Court for various purposes envisaged in different clauses mentioned under Sub-section (1) of Section 9 of the said act. Clause (e) reads as under:-

"(e) such other interim measure of protection as may appear to the Court to be just and convenient."

10. This Court in the case of M.P.P.K.V.V. Co.Ltd. (supra) dismissed the appeal preferred by the appellant therein against the order dated 27.02.2016 whereby the respondent's application under Section 9 of the Act was entertained and staying the decision of appellant about blacklisting was stayed by the Court below. Thus, we have no scintilla of doubt that the Court below had jurisdiction to entertain an application seeking stay of an order of blacklisting.

Delay

11. Before dealing with the other contentions, we deem it proper to deal with the objection of Shri Sharma regarding limitation because it goes to the root of the matter. Shri Sharma advanced argument regarding limitation on the strength of Section 43 of the Arbitration Act. Section 43 makes it clear that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceeding in the Court. In furtherance of this, the respondents argued that in the teeth of entry 6 and 58 of the schedule which deals Part II-suits relating to contract, the statutory limitation is of three years and present application under Section 9 is filed beyond the period of statutory limitation.

12. We have considered this argument carefully. This question cropped up for consideration before the Apex Court in (2008) 7 SCC 169 (Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department & Ors.). In Para 38 of this judgment, it was made clear that as Section 9 deals with the applications for interim measures, the question of limitation does not arise. The Delhi High Court in Steel Authority of India Ltd. (supra) held that there is no

statutory bar to exercise of its right by a petitioner under Section 9 of the Act, even if no such right has earlier been pressed either before the Court or before the Arbitral Tribunal. In view of said judgments, the argument of Shri Sharma regarding limitation deserves to be rejected. The judgment of Supreme Court in the case of Digamber (supra) deals with question of delay and latches in a writ petition. In view of specific judgment, in the case of Consolidated Engineering Enterprises (supra) which deals with the question of delay related to Section 9 of Arbitration Act, the judgment of Digamber (supra) pales into insignificance.

13. The Court below declined interference on the ground of delay also. In our considered opinion, the appellant gave justifiable reason in approaching the Court belatedly i.e. when he was prevented from taking part in tenders floated by other states. Thus, in our view, the application of present appellant should not have been thrown to wind by the Court below on the ground of delay.

Regarding Blacklisting

14. Clause 22 of NIT deals with 'blacklisting procedure'. The detailed procedure is mentioned in Annexure XI. The relevant portion of the same reads as under:-

"BLACKLISTING FOR QUALITY FAILURE

3. Each and every batch of drugs/medicines supplied by the suppliers shall be subjected to quality test by the laboratories selected/empaneled by Tender Inviting Authority.

4. The samples are collected from the Stores from each batch of supply of the same drugs and after eliminating the common batch, samples shall be taken in random, decoded and to be sent to the empanelled testing laboratories for testing the quality of drugs.

5. If such sample passes quality test in all respects, ordering authority will instruct its store to issue such items of drugs to various hospitals/Institutions.

6. If the sample fails in quality test and report is received certifying that sample is NOT OF STANDARD QUALITY, one more sample shall be drawn from the same batch and to be sent to Government Laboratory for quality testing.

7. (a) If such sample passes the quality test, the drugs representing the sample shall be qualified for issue to various Directorates/Institutions.

(b) If such sample fails the quality test and on receipt of report from the Government laboratory, the drugs of the batch are not qualified for issue and the supplier shall be informed to take back the drugs supplied in the batch, which failed the quality test, as per the Tender condition and other consequences would follow as per the conditions in the Tender documents.

If two batches of particular items supplied by the supplier fail in test for ASSAY content during the tender period, the particular item of the drug supplied by the supplier shall be blacklisted, after observing the procedure laid down in Para 10

(a).

8. If three batches of particular item supplied by the supplier fails in quality test in parameters mentioned in Pharmacopoeia ASSAY and other than ASSAY content during the tender period, then the particular items shall be blacklisted for the firm after observing the procedure laid down in Para 10(a).

9. In case of any sample in even one batch declared as spurious or adulterated or misbranded by the Government Analyst, the company shall be blacklisted.

10. (a) When on complaint from Drug Inspector during their Test of field sample, that the particular drug has been reported to be of NOT OF STANDARD QUALITY, the issue of available stock of the items will be stopped. Available stock of the product in hospitals will be retrieved. The supplier shall be called upon to explain why the product should not be blacklisted. On receipt of his explanation and scrutiny of record, decision will be taken by the ordering authority to decide the appropriate punishment penalties.

(b) If four batches of particular items supplied by the supplier fails as in Para 10 (a) and reported by the Government Analyst then the particular items shall be blacklisted after observing the procedure laid down Para 10(a)

(c) If the supplier supplied more than one item and 50% of such items, during relevant tender period, fail, then the supplier shall be blacklisted, after observing the procedure laid down Para 10(a)

11. (a) On receipt of report from Govt. Analyst/Drug Testing Laboratory Informing that particular item/Drug is NOT OF STANDARD QUALITY, a notice shall be issued to the supplier calling for explanation within 7 days from the date of notice.

On receipt of explanation from the supplier, the ordering authority may taken appropriate action on merits of the case and impose penalty including the blacklisting of the particular item of the product/supplier.

(b) If the particular item of the drug has been blacklisted according to the procedure stated above, the supplier/s is/are not eligible for participating any of the tenders for the particular item floated for a period of 5 years immediately succeeding the period in which supplies were made to Govt of Madhya Pradesh.

(c) The supplier/s blacklisted according to the procedure stated above, are not eligible for participating any of the tenders floated for a period of 5 years immediately succeeding the period in which supplies were made to Govt. of Madhya Pradesh."

(Emphasis Supplied)

15. In the first notice dated 01.08.2015 (Annexure A/3), it was alleged that the appellant had supplied two bottles, which were for use of treatment of animals. The appellant filed his reply dated 01.08.2015 (Annexure A/4) wherein he

averred as under:-

"There is a gap of 45 days between these two batches production and packing time. Hence we fail to understand how the, DNS batch which was packed 45 days prior to Dextrose 25% Inj. can be mis-packed and that too only 2 bottles in one box. Hence there is could be no chance of mix up of these two products manufacturing or packing in our plant premises.

However we feel that during transportation, one or two products pack corrugated boxes may have been damaged by transporter and transporter person repacked these damaged boxes to secure himself as damaged packs are not accepted by any one. There are chances that at the time of repacking done by him, two bottle of 25% Dextrose Inj. 500 ml be packed in the DNS pack.

(Emphasis Supplied)

16. The same is followed by another show cause notice dated 04.08.2015 (Annexure A/5). Similar allegations are mentioned in this notice also. However, it is noteworthy that in both the notices the proposed action was not mentioned. Putting it differently, the proposed action/nature of punishment/coercive action was not at all mentioned in both the notices. The appellant submitted another reply dated 04.08.2015 (Annexure A/6) wherein he reiterated its previous stand mentioned in the reply dated 01.08.2015. The said notices were followed by the order 12.08.2015 (Annexure A/9). The appellant is de-barred from participating in any tender for a period of five years. The appellant's name is also removed from the list of current suppliers. This, as per appellant's contention, became a hurdle for submitting bid in other states also. The procedure of blacklisting shows that each and every batch of drugs needs to be tested in the laboratory. On receipt of report from the government analyst/drug testing laboratory, if the drug is found to be substandard quality notice needs to be issued to the supplier. The notice needs to mention about proposed action. As noticed in the instant case, in the notice, it was nowhere mentioned regarding proposed action.

17. We have examined both the replies filed by the appellant in juxtaposition to the show cause notices aforesaid and we are clearly unable to persuade ourselves with the argument of Shri Sharma that the stand of appellant mentioned in the reply amounts to admission of guilt. We find no such admission of guilt in the reply. This is trite that admission of party has to be unconditional, unqualified and unequivocal in nature. [See AIR 1961 SC 1070 (Jagdish Prasad Saxena vs. The State of Madhya Bharat (now Madhya Pradesh)), AIR 1967 SC 341 (Basant Singh vs. Janki Singh and Ors.), (1998) 1 SCC 756 (General Court Martial and Ors. vs. Col. Aniltej Singh Dhaliwal) and (2009) 2 SCC 570 (Roop Singh Negi vs. Punjab National Bank and Ors.)] We are of the opinion that the appellant has nowhere admitted the allegations in the reply. Indeed, he clarified that mistake is not on his part although it could be admitted an error on the part of transporter.

18. Pertinently, the Deputy Commissioner (HA) of Government of M.P. issued an

email/instruction to the concerned statutory authority namely Assistant Commissioner, Drugs and Cosmetics Act, 1940 to give his opinion about the supply of bottles in question. The investigation report prepared by Assistant Commissioner is placed on record (Page 118). Relevant portion of the said report reads as under:-

"Looking to the above, the firm has promptly replied to the FDA, Bhopal with required documents as per instruction in their letter through mail as well as sent hard copies as instructed under Rules-78 © of D & C Act-1940 and rules there under and they. During inspection it is found that mixing of two different products (Dextrose Injection IP 25% w/v 500 ml, B. No.150207P003, Mfg. Date:02/2015 NS (Sodium Chloride Injection 0.9% w/v 500 ml), B. No.150202P007, Mfg date:02/2015)) in corrugated box might be happen at distributors level/Storage site, that was not mistake of manufacturing firm. Copies of all above records are submitted for your reference."

(Emphasis Supplied)

A plain reading of this expert report shows that the appellant could make out a strong prima facie case that it was not the mistake of manufacturing firm.

19. It will be apposite to take note of legal journey on the aspect of "Blacklisting". Wade, in Constitutional Fundamentals, 55 (1980) opined that "blacklisting" is "an instrument of oppression which combined both constitutional and legal impropriety. As blacklisting a person in respect of business ventures has civil consequences for the future business of the person concerned, the prevailing judicial view therefore is that the person concerned must be given a hearing before he is blacklisted. In Eurasian Equipment & Co.Ltd. Vs. State of West Bengal (1975) 1 SCC-70), the Apex Court poignantly held that the blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion". Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

20. In Gorkha Security Services (supra), the Apex Court emphasized the need of issuance of specific show cause notices. The show cause notice must spell out necessary factual basis and should also fulfill another requirement i.e. indicate nature of proposed action, if breach on the part of Contractor is alleged.

21. In the instant case, we are satisfied that the laid down procedure for blacklisting was not followed by the respondents. The show cause notices are not founded upon any report of government analyst/drug testing laboratory nor were

pregnant with proposed action. Thus, in our opinion, the appellant could make out a case for passing an appropriate order for grant of interim measure in his favour.

22. The Court below, in our opinion, has committed an error in not examining the judgment of Apex Court in Gorkha Security Services (supra) in proper perspective. Since the show cause notices were not in consonance with the prescribed procedure and judgment of Gorkha Security Services (supra), a clear case for grant of interim measure was made out before the Court below. Resultantly, impugned order of Court below dated 04.11.2019 (Annexure A/18) is set aside. As an interim measure, the implementation of impugned order dated 12.08.2015 (Annexure A/9) and 11.05.2016 (Annexure A/14) to the extent it relates to blacklisting is stayed. The application preferred under Section 9 of the Arbitration Act is allowed.

23. The appeal is allowed. No cost.