

(2020) 07 GUJ CK 0015

In the Gujarat High Court

Case No : R/Special Civil Application No. 7832 Of 2020

M/S Baroda Surgical (India) Pvt. Ltd., Through Its Chairman
And Managing Director

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 06-07-2020

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g), 226
Drugs And Cosmetic Act, 1940 — Section 25

Citation : (2020) 07 GUJ CK 0015

Hon'ble Judges : Ilesh J. Vora, J

Bench : Single Bench

**Advocate : Prakash Jani, Krishal H Patel, Saurin A Mehta, Manisha Lavkumar,
Jyoti Bhatt, Tirthraj Pandya**

Final Decision : Dismissed

Judgement

,,,,

Ilesh J. Vora, J",,,,,

1. Heard Mr. Prakash Jani, learned Senior Counsel assisted by Mr. Saurin Mehta, learned counsel for the petitioners and Ms. Manisha Lavkumar, learned Government Pleader assisted by Mr. Tirthraj Pandya, learned AGP for the respondent",,,,,

no. 2 and Ms. Jyoti Bhatt, learned AGP for respondent no. 1. At the joint request of learned counsel appearing for the parties, matter is taken up for final hearing and is being disposed of finally.",,,,,

2. This petition under Article 226 of the Constitution of India has been filed with following prayers :,,,,

â??para-10 : (A) YOUR LORDSHIPS may be pleased to admit and allow this petition.,,,,,

(B) YOUR LORDSHIPS may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus, or any other appropriate writ, order or direction, quashing and setting aside the impugned Show Cause Notice bearing No." ,,,,

GMSCL/SDI/Show Cause/26030/2020-21 dated 22.06.2020;,,,,

(C) Pending hearing and final disposal of the Petition, YOUR LORDSHIPS may be pleased to stay the implementation, operation and execution of the impugned Show Cause Notice bearing No. HMSCL/SDI/Show Cause/26030/2020-21",,,,

dated 22.06.2020;,,,,

(D) YOUR LORDSHIPS may be pleased to grant ex-parte ad-interim relief in terms of Para 10(C).,,,,

(E) YOUR LORDSHIPS may be pleased to grant such other and further relief/s, as may be deemed fit by this Hon'ble Court, in the interest of justice.â??",,,,

3. The brief facts, relevant for the decision of petition are that," ,,,,

3.1 The petitioner no. 1 is a Private Limited Company registered under the Indian Companies Act, 1956, engaged in the business of manufacturing and distribution of Surgical Dressing items such as Bandages, Gauze etc. since its incorporation",,,,

i.e. 8th November, 1989. The petitioner no. 2 is the Chairman and Managing Director of the Company." ,,,,

3.2 It is the case of the petitioners that they are suppliers to respondent No. 2, Gujarat Medical Services Corporation Limited (hereinafter referred as 'HMSCL'), which is procuring agency of Government of Gujarat, the respondent no. 1. The" ,,,,

respondent no. 2 HMSCL is the procuring agency of Government of Gujarat which procures the drugs, surgical items etc. from different manufacturers and distributors for the supply of the same to the Government Hospitals throughout the" ,,,,

State of Gujarat. The respondent no. 2 HMSCL is the Government of Gujarat undertaking incorporated by the State of Gujarat. ,,,,

3.3 It is the case of the petitioners that in the year 2011-12, the respondent no. 2 had floated the tender bearing No. Tender Enquiry No. CMSO/D-467/RC/10-11 for supply of Bandage Cloth with ISI Mark IS:863:1988. The petitioner company" ,,,,

participated in the bid and was declared as successful bidder for 60% quantity of total order and accordingly, rate contract was awarded on 26.08.2011." ,,,,

3.4 It is the case of the petitioners that on 22.3.2012, the Senior Drug Inspector had collected the samples from Batch No. 49 of Bandage Cloth and same was

sent to Food and Drug Laboratory, Vadodara for testing under the provisions of" ,,,,

Drugs and Cosmetic Act, 1940 (hereinafter referred to as 'the Act' for short). The remaining samples were retained by the Senior Food Inspector, Gandhinagar. The Food and Drug Laboratory, Vadodara in its report dated 17.4.2012" ,,,,

concluded that sample from Batch No. 49 of Bandage Cloth was 'not of standard quality'. The petitioners herein had filed Criminal Misc. Application No. ,,,,

254 of 2012 on 3.5.2012 before the Chief Judicial Magistrate First Class, Gandhinagar under Section 25 of the Act against the report of Vadodara Laboratory with a prayer that sample of Handloom Cotton bandage Cloth drawn by the Senior" ,,,,

Drug Inspector, Gandhinagar be sent for reanalysis to the Central Drugs Laboratory, Calcutta. The court was pleased to sent the sample for reanalysis to the Central Drug Laboratory, Calcutta and after receiving the report, the same by" ,,,,

Central Drug Laboratory, Calcutta in its report held that the sample from Batch no. 49 was not of standard quality as defined under the Act. The Food and Drug Laboratory, Calcutta sent another report dated 24.9.2012, wherein, the sample" ,,,,

from Batch No.49 was shown of 'standard quality' ,,,,

3.5 It is the case of the petitioners that 3rd report dated 24.9.2012 was made available to them from the Chief Judicial Magistrate, Gandhinagar and same was forwarded by the petitioners to respondent no. 2 vide its letter dated 1.6.2013." ,,,,

3.6 It is the case of the petitioners that respondent no.2 GMSCl served a impugned show cause notice dated 22.06.2020. As per the show cause notice, the respondent no. 2 called upon the petitioners to show cause why your firm should not" ,,,,

be debarred / blacklisted for submission of fabricated / false test reports as mentioned. ,,,,

3.7 In view of the aforesaid facts, being aggrieved by and feeling dissatisfied with the action of respondent no. 2, the petitioners have challenged the impugned show cause notice dated 22.6.2020 by way of present petition." ,,,,

4. Mr. Prakash Jani, learned Senior Counsel for the petitioners has submitted that the impugned show cause notice is barred by delay, laches and acquiescence as the alleged act of submission of the test report had occurred in the year 2012" ,,,,

and the notice for the same was issued in the year 2020. Therefore, after 7 years the authority has decided to take action against the petitioners." ,,,,

5. Mr. Prakash Jani, learned Senior Counsel for the petitioners further submits that the impugned show cause notice having been issued without any jurisdiction as nothing is stated in the notice to justify the authority to exercise its power." ,,,,

6. Mr. Prakash Jani, learned Senior Counsel for the petitioners further submits that after submission of reports to the competent court, the Court did not have taken any cognizance for the veracity of the reports and respondent no. 2 has not" ,,,,

challenged the same, which shows that the cause against the petitioners has reached its finality and after the said proceedings, the petitioners had been awarded work contracts from time to time. Thus, the notice has no cause of action as it" ,,,,

was within the knowledge of respondent no. 2 about the veracity of reports. In view of this, the whole procedure initiated by the respondent no. 2 for issuance of show cause notice is without jurisdiction and manifestly arbitrary and therefore," ,,,,

violative of Articles 14 and 19(1)(g) of the Constitution of India.,,,,

7. Mr. Prakash Jani, learned Senior Counsel for the petitioners further submitted that for the product Bandage clothe Batch No. 49, which was declared as sub-standard by the Food & Drug Laboratory, Vadodara, the respondent no. 2 has" ,,,,

recovered the amount of Rs.10,29,105/- as per relevant terms and conditions of the tender. In view of the aforesaid, Mr. Prakash Jani, learned counsel submitted that necessary actions were taken by respondent no. 2 and complied by the" ,,,,

petitioners which shows that the dispute raised in the show cause notice had reached to its finality and no any action as contemplated under the show cause notice required to be taken. In this background, the impugned show cause notice is" ,,,,

arbitrary and having been issued without any cause and jurisdiction, which is required to be quashed and set aside." ,,,,

8. Mr. Prakash Jani, learned Senior Counsel for the petitioners further submitted that the petitioners were participated for the tender floated by the respondent no.2 vide Tender Notice D- 09/2019-2020 and accordingly, the petitioners have" ,,,,

submitted their offer on 30.11.2019 for the three items and they were declared as "L-1" for the same. In view of these facts, the show cause notice pending the process of the tender having been issued at the behest of their rival party, to" ,,,,

restrain the petitioners from participating in the tender process. Therefore, the issuance of the show cause notice at the belated stage deserves to be quashed and set aside." ,,,,

9. Mr. Prakash Jani, learned Senior Counsel for the petitioners further submitted that as the third test report, as referred in the show cause notice having not been obtained by the petitioners nor they have sought from the Central Food & Drug",,,,

Laboratory, Calcutta. Therefore, the allegations made in the show cause notice that the petitioners have submitted fabricated and false report to gain the undue benefits having alleged without any basis thereof.",,,,

10. Mr. Prakash Jani, learned Senior Counsel for the petitioners referring contents and allegations made in the show cause notice submitted that the authority has taken final conclusion about the fact that the petitioners have submitted",,,,

fabricated and false test reports and also decided in the show cause notice that the conduct of the petitioner company is illegal, unethical and is against the terms and conditions of the tender and the same warrants to invoke appropriate penal",,,,

action. In view of these facts, as alleged in the show cause notice, Mr. Prakash Jani, learned Senior Counsel for the petitioners further submitted that the language in the show cause notice is couched in such a manner that no fair and",,,,

reasonable opportunity to defend is made available to the petitioners as the respondent no. 2 with predetermination and pre-judge held guilty for the alleged allegation made in the show cause notice and inviting the reply to the show cause,,,,

notice will be an empty ceremony. In this background, Mr. Prakash Jani, learned Senior Counsel for the petitioners further submitted that the alleged show cause notice is ex- facie illegal, having been issued without following the principles of",,,,

natural justice including the just, fair, reasonable opportunity to defend the allegations made in the show cause notice.",,,,

11. On the aforesaid premise, Mr. Prakash Jani, learned Senior Counsel for the petitioners mainly relied on the decision of Oryx Fisheries Pvt. Ltd. Vs. Union of India and others, reported in 2010(13) SCC 427, the relevant extract para-27 and",,,,

31 is reproduced hereinbelow:,,,,

â??para- 27. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing",,,,

the charge- sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this

instant case, the entire proceeding initiated by the show cause notice gets vitiated by" ,,,,

unfairness and bias and the subsequent proceeding become an idle ceremony.,,,,

para- 31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get, ,,,,

an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that, ,,,,

his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in" ,,,,

a quasi- judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.â?? ,,,,

12. In support of the above submissions, learned counsel for the petitioners has also placed reliance upon the following decisions : " ,,,,

(i) Pravinbhai Mohanbhai Raiyani Vs. State of Gujarat, reported in 2006 (Law Suit) GUJ-573; " ,,,,

(ii) Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District (I) and another, reported in AIR 1961 SC 372; " ,,,,

(iii) The State of Gujarat and another Vs. Nareshbhai Parmar reported in 2012 Law Suit, Gujarat 167; " ,,,,

(iv) Siemens Limited Vs. State of Maharashtra, reported in 2006 (12) SCC 33; " ,,,,

13. On the above grounds, it is prayed by Mr. Prakash Jani, learned Senior Advocate that the impugned show cause notice dated 22.06.2020 is required to be quashed and set aside." ,,,,

14. Per contra, Ms. Manisha Lavkumar, learned Government Pleader appearing for respondent no. 2 submitted that the show cause notice is legal and proper and there is prima-facie conclusion with regard to action which is proposed to be" ,,,,

taken. Referring to the show cause notice, she further submitted that the petitioners have ample opportunity to submit their reply in detail, even they can ask to the documents whatever they want to rely with regard to tender and rate contract." ,,,,

15. Ms. Manisha Lavkumar, learned Government Pleader appearing for respondent no. 2 submitted that prima-facie conclusion made in the show cause notice with a view to give an opportunity to rebut the same and noticee is able to point out",,,,,

that proposed action is not warranted in the given case. She further submits that the purpose for issuance of the show cause notice is for proper inquiry of the alleged test report as referred in the notice. She further submits that department,,,,,

would ready to supply the documents whatever they want for rebuttal of the allegations made in the notice, therefore, for proper inquiry, the department has point out the details which are in the nature of prima-facie conclusion.",,,,,

16. In the aforesaid background, Ms. Manisha Lavkumar, learned Government Pleader appearing for respondent no. 2 has submitted that questioning the validity of the show cause notice at this stage, without filing reply by the petitioners",,,,,

requires no interference by the court and in support this submission, she relied on the decision of Union of India Vs. Coastal Container Transporters Association, reported in 2019 (0) AIJEL-SC-6397, wherein, it was observed that the High",,,,,

Court has committed error in entertaining the writ petition under Article 226 of the Constitution of India, at the stage of show cause notice. On the basis of the above submission, it is prayed that the court may not entertain the petition.",,,,,

17. Ms. Jyoti Bhatt, learned AGP submits that she is adopting the arguments of respondent no. 2 and further submits that the proceedings undertaken by the authority has been rightly initiated on the basis of evidence on record and this court",,,,,

may not interfere at the stage of show cause notice.,,,,,

18. I have heard the learned counsel for the respective parties. Perused the averments made in the petition, contents of the impugned show cause notice and other documents on record.",,,,,

19. In the context of submissions made by learned advocates for the respective parties, the question that arises for consideration is whether this court could exercise jurisdiction under Article 226 of the Constitution of India, in the present case",,,,,

where the challenges against the show cause notice dated 22.6.2020.,,,,,

20. It is settled by series of decisions by Apex Court that ordinarily, no writ lies against the show cause notice as the jurisdiction is discretionary, should not ordinarily be exercised by quashing a show cause notice. However, in exceptional",,,,,

cases, the High Court can quash a show cause notice if it is found to be wholly

without jurisdiction or for some other reason if it is wholly illegal or notice would in flagrant violation of principles of natural justice." , , , ,

21. Looking to the facts of the present case, this Court deem it fit to refer the impugned show cause notice which is set out as under:" , , , ,

No, Name of Drugs, Batch No, "Test Report No. &

Date", Reason

1, "Handloom Cotton

Bandage Cloth

(Non Sterilized)", 49, "Q-2/101/2012

(CMSO) Date-

17/04/2012", "Threads per

dm and Width