

(2018) 06 GAU CK 0119
In the Gauhati High Court
Case No : I.A.(Civil) 1776 of 2018

Union Of India,

APPELLANT

Vs

M/S Sure Safety Solutions Private Limited

RESPONDENT

Date of Decision : 22-06-2018

Acts Referred:

Arbitration & Conciliation Act, 1996 — Section 9
Constitution of India, 1950 — Article 226

Citation : (2018) 06 GAU CK 0119

Hon'ble Judges : ARUP KUMAR GOSWAMI, J

Bench : Single Bench

Advocate : Bala Subramaniam, S.C. Keyal, D.K. Mishra, S. Sarma, J. Deka

Final Decision : Allowed

Judgement

1. Heard Mr. Maninder Singh, learned Additional Solicitor General of India, assisted by Mr. Bala Subramaniam, learned Central Government counsel

as well as Mr. S.C. Keyal, learned Assistant Solicitor General of India, appearing for the applicants in the writ petition. Also heard Mr. D.K. Mishra,

learned senior counsel for the opposite parties.

2. The applicant Nos.1 to 5 are arrayed as respondent Nos.1 to 5, respectively, in the writ petition and the opposite party Nos.1 & 2 are the writ

petitioner Nos.1 & 2, respectively, in the writ petition. The parties will be referred to as referred to in the writ petition.

3. The writ petitioner No.1 is registered as a Micro, Small & Medium Enterprise (MSME) under the National Small Industries Corporation Limited

(NSIC) and the writ petitioner No.2 is one of the Directors of the writ petitioner No.1. Pursuant to a Request For Proposal (RFP) dated 30.04.2016

inviting bids for procurement of 67 pieces of Quadcopter (Day/Night) Medium

Range Equipment out of the Army Commanders Special Financial

Power Fund for the year 2015-16, the petitioner No.1 had submitted its technical as well as commercial bids. Being successful in the techno-

commercial bidding process, the respondent No.4, i.e. the Major General, Artillery, for the respondent No.3, i.e. the General Officer Commanding-in-

Chief, Headquarters, Eastern Command, placed a supply order dated 27.12.2016 for 67 Quadcopters (Day/Night) Medium Range at ` 9,00,000/-

(Rupees Nine Lakhs) per unit with a delivery period of 60(sixty) days from the effective date of supply order. On 15.03.2018, the respondent No.5,

i.e. the Major General, General Staff (SD & WE) Branch, Headquarters, Eastern Command cancelled the supply order on the grounds that the

petitioners committed breach of the supply order by failing to supply the entire quantity of Quadcopters in time and that the Quadcopters that were

supplied had failed to meet the qualitative requirements stated in the supply order. On 16.03.2018, the respondent No.5 issued a notice requiring the

petitioner No.1 to show cause by 30.03.2018 as to why the petitioner No.1 and its allied firms should not be suspended as, prima facie, the petitioner

No.1 had misrepresented the capabilities of the Quadcopters to project the firm as technically qualified when the petitioner No.1 was not meeting the

threshold eligibility.

4. The petitioners had shown cause by reply dated 26.03.2018. Thereafter, by an order dated 09.04.2018, the petitioner No.1 was informed that the

competent authority had found the reply to be devoid of merit and substance and had, accordingly, directed suspension of the petitioner No.1 and its

allied firms for a period of 1(one) year with immediate effect.

5. By order dated 03.05.2018, while issuing notice of motion, returnable on 23.05.2018, this Court had stayed the suspension order dated 09.04.2018 till

the next date fixed. While passing the said order dated 03.05.2018, this Court recorded the submissions of Mr. Mishra and Mr. Keyal as under:-

Mr. Mishra has submitted that penalties in business dealings with entities for both Capital and Revenue Procurement Goods and Services are

governed by guidelines dated 21.11.2016 (Annexure-58) and, in terms of the said guidelines, the competent authority is the Raksha Mantri. Referring

to Clause-C of the said guidelines Mr. Mishra submits that it is only the competent authority who may levy financial penalty and/or suspend/ban

business dealings with entities on one or more grounds as mentioned therein. It is also pointed out by him that there is a procedure prescribed for penal

action under the guidelines and, in the instant case, the said procedure had not been followed. He has submitted that the petitioners had not been

provided with reasonable opportunity of stating their stand as requisite documents had not been furnished to the petitioners. He also contends that

because of the impugned order of suspension dated 09.04.2018, the petitioners have been visited with civil consequences.

Mr. S.C. Keyal, learned Assistant Solicitor General of India has submitted that there is a Defence Procurement Manual, 2006 (for short, 'Defence

Procurement Manual'), which is updated from time to time, and by drawing attention of the court to Clause 3.5 of the Defence Procurement

Manual dealing with 'ban' and 'blacklisting', he contends that ban on business relation with a firm or, ultimately, its blacklisting for its

misconduct or continued poor performance may be imposed, amongst others, by the Procurement Agency and, as action was taken by the

Procurement Agency by taking recourse to the Defence Procurement Manual, the impugned order cannot be faulted with. He has further submitted

that in case of any conflict of any provision of any guidelines with the Defence Procurement Manual, the provisions of the Defence Procurement

Manual will prevail.'

6. The interim order passed on 03.05.2018 was extended on subsequent dates. The respondent Nos.1 to 5 had filed an interlocutory application,

which is registered as I.A. (C) No.1776/2018, praying for deciding the issue of maintainability of the present writ petition on the ground of lack of

territorial jurisdiction as a preliminary issue.

7. The writ petitioners had filed an affidavit to the said application. The respondents had also filed an affidavit-in-opposition to the writ petition.

8. On 01.06.2018, the learned counsel appearing for the parties submitted that it would be appropriate to take up the interlocutory application at the

outset and, accordingly, the interlocutory application was taken up for consideration.

9. Mr. Maninder Singh, learned Additional Solicitor General of India has drawn the attention of the Court to Paragraph-74 of the writ petition to

highlight that the writ petitioners have not assailed the order of cancellation of

the supply order dated 15.03.2018, reserving their right to assail the same by way of an appropriate proceeding at an appropriate forum. In this connection, he has also drawn the attention of the Court to the prayer made in the writ petition. Learned senior counsel submits that knowing fully well that this Court has no territorial jurisdiction to adjudicate the lis in the writ petition, the petitioners had not made any averment stating that this Court has territorial jurisdiction to adjudicate the issue arising in the present writ petition. In this context, he has submitted that in the application filed under Section 9 of the Arbitration & Conciliation Act, 1996, (for short, '1996 Act') filed before the High Court of Calcutta, the petitioners had made categorical averments that part of cause of action had arisen within the jurisdiction of the High Court of Calcutta. It is submitted by him that though not conclusive, lack of assertion that this Court has territorial jurisdiction is nonetheless a relevant factor. He submits that the show cause notice for suspension and the order of suspension were issued from Calcutta and were delivered in the registered Office of the petitioner No.1 at Mumbai. The cause of action is determined by those bundle of facts, which have integral nexus with the lis and viewed in that context, no part of cause of action had arisen within the territorial jurisdiction of this Court qua the order of suspension dated 09.04.2018. It is submitted by him that place of delivery of the Quadcopters at Narangi, Guwahati or holding of Acceptance Test Procedure (ATP) within the jurisdiction of this Court are of no consequence, as cancellation of the supply order is not under challenge. Incidental reference in the suspension order about some events which took place within the territorial jurisdiction of this Court, while dealing with the show cause reply of the petitioners, do not constitute cause of action so far as it relates to the order of suspension, he contends. According to him, there is complete lack of bonafide in filing the writ petition before this Court and the petitioners have abused the process of the Court.

10. By drawing attention of the Court to the order dated 03.05.2018, Mr. Singh submits that while a perusal of the same would go to show that it was asserted by the learned senior counsel for the petitioners that the impugned order of suspension was not passed by the competent authority, the petitioners, however, in the show cause reply dated 26.03.2018 to the show cause notice dated 16.03.2018, had not taken any plea that the show cause

notice was issued by an authority who is not competent to issue such notice. It is submitted that the petitioners are guilty of misrepresenting facts as

they did not deliberately enclose the Frequently Asked Questions (FAQs) on the subject of "Guidelines of the Ministry of Defence for Penalties in

Business Dealings with Entities" dated 21.11.2016 as the same would have demonstrated unequivocally that the respondent No.3 is the competent

authority to impose penal levies and order suspension/ban. It is submitted by him that a conjoint reading of Paragraph-3.5 of the Defence

Procurement Manual, 2006 (Revenue Procurement), (for short, "DPM-2006"), Paragraph 3.5.1 of the Defence Procurement Manual, 2009, (for

short, "DPM2009") and Serial No.29 of the Supplement-2010 to DPM-2009 would go to show that the General Officer Commanding-in-Chief,

Eastern Command, who is the Competent Financial Authority (CFA) as well as the Procurement Agency in the instant case, is authorised to issue the

order of suspension. It is also submitted by him that in any view of the matter, power to blacklist a contractor is inherent in the party allotting the

contract. In this connection, learned senior counsel also draws the attention of the Court to Ministry of Defence Order on Delegation of Financial

Powers to Defence Services-2016 (for short, "DFPDS-2016") dated 06.09.2016. It is submitted by Mr. Singh that a Court of Inquiry was

convened by the CFA on 17.03.2018, amongst others, to find out if irregularities were committed during the procurement proceeding before placing

the supply order as also while conducting the ATPs. It is further submitted that the supply order itself provides for arbitration in respect of any dispute,

disagreement or question arising out of or relating to the supply order and the petitioners had filed an application under Section 9 of the 1996 Act. The

learned senior counsel for the respondents has placed reliance on the decisions of the Supreme Court in the case of ONGC -Vs- Utpal Kumar Basu,

reported in (1994) 4 SCC 711, South East Asia Shipping Co. Limited -Vs- Nav Bharat Enterprises Private Limited, reported in (1996) 3 SCC 443, CBI

Anti Corruption Branch -Vs- Narayan Diwakar, reported in (1999) 4 SCC 656, Sarabjit Kaur -Vs- Union of India, reported in (1999) 9 SCC 29, Union

of India -Vs-Adani Exports Limited, reported in (2002) 1 SCC 567, NTC Limited -Vs- Haribox Swalram, reported in (2004) 9 SCC 786, Alchemist

Limited -Vs- State Bank of Sikkim, reported in (2007) 11 SCC 335, Manohar Lal -Vs- Ugrasen, reported in (2010) 11 SCC 557 and Kulja Industries

Limited -Vs- Western Telecom Project, BSNL, reported in (2014) 14 SCC 731.

11. Mr. Mishra, learned senior counsel for the petitioners submits that the supply order dated 27.12.2016 stipulates that the Quadcopters are to be

delivered to a Unit, namely, 222 ABOD, Narangi, Guwahati, for inspection and acceptance. Accordingly, 67 Quadcopters were delivered on

04.05.2017 at 222 ABOD and the same were duly acknowledged. The first ATP was held at 222 ABOD between 25.05.2017 to 26.06.2017 and only

2(two) Quadcopters with serial Nos.37 and 45, out of 67, were not accepted because of defective day camera. As certain parameters could not be

tested during the first ATP due to restrictions at Borjhar Airport, a second ATP was conducted at Rangia/Tamulpur as well as Jakhama within the

jurisdiction of this Court as well as at Leimakhong within the State of Manipur. The learned senior counsel has submitted that the observations made in

connection with second ATP at Annexure-35 goes to show that while majority of the parameters of the Quadcopters are in compliance to those laid

down therein, only a few variations were noticed during testing. It is also noted therein that the equipment is complex and demands high level of skill in

handling and operation. Deviations from the supply order are minimal as indicated at Paragraph-14 of the report. Without proper training, the

Quadcopters were used causing damage to them. He has submitted that whatever qualitative and quantitative breaches were observed by the ATP

Board was within the jurisdiction of this Court.Â

12. By letter dated 20.01.2018, breaches were required to be cured within the stipulated time-frame of 45(forty five) days failing which it was

indicated that appropriate action would be taken in accordance with the supply order. Assurance was given that all the 67 Quadcopters would be

made available at 222 ABOD, Guwahati by 26.02.2018 but only 30 Quadcopters were made available by 26.02.2018. To substantiate that the

Quadcopters were operated by not trained personnel, he has drawn the attention of the Court to Annexures-5 & 7 of the affidavit-in-opposition of the

respondents. Drawing attention of the Court to the order of suspension dated 09.04.2018, Mr. Mishra submits that in serial No.3(b), the authority

issuing the order of suspension had referred to the defects and deficiencies in the first ATP, which was conducted in Guwahati and, therefore, it

cannot be said that no part of cause of action had arisen within the territorial

jurisdiction of this Court. Mr. Mishra submits that merely because averment was not made in the writ petition that this Court has jurisdiction is of no consequence, more so, under the Gauhati High Court Rules, there is no requirement that a statement has to be made in the writ petition that this Court has territorial jurisdiction to decide the issue raised in the writ petition. Mr. Mishra submits that there is no question of conjoint reading of DPM-2006 with DPM-2009 as after coming into force of DPM-2009 only ongoing cases of procurement in which RFP had been issued could be continued to be regulated by the provisions of DPM-2006. While under Clause 3.5 of DPM-2006, ban for a specific period of time could have been imposed by AHSP/DGQA, Procurement Agency and the MOD, the said provision was deleted in DPM-2009 as would be evident from Clause 3.5.1. He has also drawn the attention of the Court to the guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities dated 21.11.2016, which provide that competent authority for the purpose of these guidelines is Raksha Mantri and under Clause 3(d), it is only the competent authority, i.e. the Raksha Mantri, who can issue an order of suspension of business dealings with an entity for such period as the competent authority may deem fit. Even the FAQs on the guidelines provide that competent authority for suspension/ ban of business dealings with entities is the Raksha Mantri.

13. Mr. Mishra, learned senior counsel for the petitioners has placed reliance on the decisions of the Supreme Court in the case of Navinchandra N. Majithia -Vs- State of Maharashtra & Ors., reported in (2000) 7 SCC 640 and Kusum Ingots & Alloys Limited -Vs- Union of India & Anr., reported in (2004) 6 SCC 254.

14. In reply, drawing attention to DFPDS-2016, Schedule 22, Mr. Singh submits that the General Officer Commanding-in-Chief, Northern and Eastern Commands have special financial powers under Army Commanders Special Financial Powers (ACSPF) and it is the case of the petitioners also that supply order was placed out of Army Commanders Special Financial Powers Fund for the year 2015-16. The FAQ makes it abundantly clear that the CFA has been provided with flexibility to decide the period of ban depending on the nature of each default or non-fulfilment of commitment. He has submitted that CFA is an authority duly empowered by the Government of India

to sanction and approve expenditure from public accounts up to a specified limit in terms of amount of such expenditure and subject to availability of fund. He has also submitted that in DPM-2009, it is provided under Clause 3.5.1 that it was the appropriate authority who is to take action after due consideration of all factors and circumstances of the case and after due notice and significantly, the word employed is not "competent authority" but is "appropriate authority" so as to cover CFAs having authority to sanction expenditure of different limits.

15. I have considered the submissions advanced by the learned senior counsel appearing for the parties and have also perused the materials on record. Submissions as noted above go to show that the learned counsel for the parties had advanced arguments, apart from on maintainability of the writ petition, on the continuance or discontinuance of the interim order in the event this Court holds that this Court has territorial jurisdiction to entertain the writ petition.

16. It will be worthwhile to note that Article 226 of the Constitution, as was originally enacted, had put two-fold limitations on the jurisdiction of High Courts with regard to their territorial jurisdiction. Firstly, the power could be exercised by the High Court throughout the territories in relation to which it exercises jurisdiction. In other words, the first limitation imposed is that the writs issued by the High Court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue writs must be within the territories in relation to which it exercises jurisdiction. It implies that the person or authority must be amenable to the High Court's jurisdiction either by residence or location within its territories. There was no reference to any cause of action and thus, cause of action was a concept which was irrelevant and alien for conferring jurisdiction under Article 226 of the Constitution of India.

17. Article 226 was amended by the Constitution (Fifteenth Amendment) Act, 1963 and after Clause (1), a new Clause, namely, (1-A) was inserted, which read as follows:-

"226.(1-A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which

the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.â??

The effect of such amendment was that accrual of cause of action was made an additional ground for conferring jurisdiction on a High Court

exercising power under Article 226 of the Constitution of India.

18. By the Constitution (Forty-Second Amendment) Act, 1976, Clause (1-A) was renumbered as Clause (2) of Article 226.

19. The expression â??cause of actionâ? has neither been defined in the Constitution nor in the Code of Civil Procedure, 1908. In Stroudâ??s

Judicial Dictionary, a â??cause of actionâ? is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every

fact, if traversed, the plaintiff must prove in order to obtain judgment. In â??words and Phrasesâ? (4th Edition), it is stated that â??cause of actionâ?

in common legal parlance is existence of those facts which give a party a right to judicial interference on his behalf.

20. The judgments cited at the bar go to show that the expression â??cause of actionâ? can be described as a bundle of essential facts necessary for

the plaintiff to prove before he can succeed. It is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief

against the defendant. Cause of action has no relation whatever to the defence which may be set up by the defendant and it also does not depend

upon the character of the relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action, or in other

words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. It must include some act done by the defendant

since in the absence of such an act no cause of action would possibly accrue or would arise.

21. In ONGC -Vs- Utpal Kumar Basu (supra), the Supreme Court held that when neither the Head Office of ONGC was located in Calcutta nor the

execution of contract work was to be carried out in West Bengal, territorial jurisdiction cannot be conferred on the High Court of Calcutta on the

ground that an advertisement had appeared in a daily published from Calcutta, or the petitioner had submitted his bid from Calcutta, or subsequent

representations were made from Calcutta, or fax message as to the final decision

taken by ONGC at New Delhi was received at Calcutta, as none of them constitute an integral part of the cause of action so as to confer territorial jurisdiction on the High Court of Calcutta under Article 226 of the Constitution of India.

22. In *South East Asia Shipping Co. Limited (supra)*, when the admitted position was that the contract was executed in Bombay and performance of the contract was also to be done within the jurisdiction of the Bombay High Court, the Supreme Court held that execution of Bank Guarantee at Delhi and its transmission to Bombay for performance did not constitute a cause of action for filing a suit before the High Court of Delhi.

23. In *CBI Anti Corruption Branch (supra)*, an Indian Administrative Service Officer, while being posted in Arunachal Pradesh, received a wireless message through the Chief Secretary of the State asking him to appear before an Inspector of Central Bureau of Investigation (CBI) in Bombay. The Chief Secretary of Arunachal Pradesh was requested by the Superintendent of Police, CBI, ACB, Bombay. This Court had held that the communication of the wireless message to the officer concerned constituted a part of cause of action for filing the suit and, therefore, the writ petition was maintainable under Article 226 of the Constitution of India. The Supreme Court had held that this Court was clearly in error in deciding the question of jurisdiction in favour of the officer concerned.

24. In *Sarabjit Kaur (supra)*, while noting the absence of an averment to the effect that the High Court of Punjab & Haryana had territorial jurisdiction, the Supreme Court held that the High Court was justified in dismissing the writ petition on the facts of the case.

25. In *Navinchandra N. Majithia (supra)*, the Supreme Court had set aside the judgment of the Bombay High Court which took a view that it did not have territorial jurisdiction on the ground that complaint was filed at Shillong in the State of Meghalaya and the petitioner had prayed for quashing of the said complaint. The Supreme Court held that main factor to be considered while dealing with a question of territorial jurisdiction with reference to a criminal offence is the place where the offence was committed.

26. In *Adani Exports Limited (supra)*, X filed a petition under Article 226 of the Constitution of India before the High Court of Gujarat claiming benefit of the Passport Scheme under the ExiM Policy. The passport was issued and

entries in the passport were made at Chennai and none of the respondents was located within the State of Gujarat.

Reliance placed by the petitioner in support of territorial jurisdiction of the High Court of Gujarat on the grounds that X was carrying on business at Ahmedabad, orders were placed from and executed at Ahmedabad, documents were sent and payments were made at Ahmedabad, credit of duty was claimed for export handled from Ahmedabad, denial of benefit adversely affected X at Ahmedabad and that X had furnished a Bank Guarantee and executed a bond at Ahmedabad were accepted. However, the decision of the High Court was set aside by the Supreme Court holding that facts which have no bearing with the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the Court concerned.

27. In *Kusum Ingots & Alloys Limited (supra)*, the Company which had its Head Office at Mumbai had availed a loan from Bhopal Branch of State Bank of India. The Bank had issued a notice under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). The writ petition having been dismissed by the High Court of Delhi on the ground of lack of territorial jurisdiction, it was urged before the Supreme Court that as the constitutionality of a Parliamentary Legislation was questioned, the High Court of Delhi had the requisite jurisdiction to entertain the writ petition. The Supreme Court rejected the contention ruling that passing of a legislation by itself does not confer any such right to file a writ petition in any Court unless a cause of action arises therefor. It was held that fact which is neither material nor essential nor integral to the dispute would not constitute a part of cause of action within the meaning of Clause (2) of Article 226 of the Constitution.

28. In *NTC Limited (supra)*, the writ petition was filed praying for a writ of mandamus to NTC to produce records relating to withholding of delivery of goods and to deliver the goods as mentioned at Annexure-A upon adjustment of advance payment made by the writ petitioners. A further prayer was made for a direction to the appellants to take a final decision as indicated in the letter dated 24.10.1989. The textile mills of NTC were located at Bombay and the money was to be paid to the mills at Bombay. The decision of the Single Bench of High Court of Calcutta that the Court did not have

territorial jurisdiction was overruled by the Division Bench. The Supreme Court set aside the judgment of the Division Bench holding that the fact that the writ petitioner carried on business at Calcutta or that the reply to the correspondence made was received at Calcutta are not integral part of the cause of action.

29. In Alchemist Limited (supra), State Bank of Sikkim had communicated by a letter dated 20.02.2004 to the writ petitioner Company, having its

Registered Office at Chandigarh, that its offer pursuant to the advertisement dated 21.01.2004 was accepted in principle subject to consideration and

approval of the Government of Sikkim. Subsequently, the Company received a communication at Chandigarh by which the State Bank of Sikkim

informed the writ petitioner Company that it sought to withdraw the communication dated 20.02.2004 as the Government of Sikkim had not approved

the proposal submitted by the Company. The High Court of Punjab & Haryana dismissed the writ petition holding that no cause of action had arisen

within the territorial jurisdiction of the High Court. The Supreme Court held that the judgment of the High Court cannot be faulted with as essential,

integral and material facts so as to constitute a part of cause of action had not arisen within the territorial jurisdiction of High Court of Punjab &

Haryana.

30. Having noticed the authorities cited by the learned senior counsel appearing for the parties on the point of cause of action and territorial jurisdiction

of the High Court, it will now have to be considered whether material, essential or integral part of the cause of action qua the lis had arisen within the

territorial jurisdiction of this Court.

31. Blackâ??s Law Dictionary (Tenth Edition) states that â??lisâ?? means a piece of litigation; a controversy or dispute.

32. In the present case, indubitably, the lis is in connection with the order of suspension dated 09.04.2018. There is categorical assertion in the writ

petition that cancellation order dated 15.03.2018 cancelling the supply order dated 27.12.2016 is not under challenge and prayer made in the writ

petition is also confined to the order of suspension dated 09.04.2018. Till date, the petitioners had not challenged the order of cancellation dated

15.03.2018, though an application under Section 9 of the 1996 Act was filed before the High Court of Calcutta.

33. At this juncture, it will be appropriate to reproduce herein below the notice for suspension in respect of the supply order:-

Notice for suspension in respect of supply order Number PC to MF 120019/4/CI/QUAD/2015-16/G/ARTY dated 27 Dec 2016 for supply of 67

quadcopters.

1. Reference is made to the Supply Order Number PC to MF 120019/4/CI/Quad/2015-16/G/Arty dated 27 Dec 2016 placed in favour of your firm for

supply of 67 Quadcopters (Day/Night) Medium Range, complete with all accessories.

2. The Qualitative Requirement (QR) forming part of the abovementioned Supply order as Appendix A and the Annexures thereto,

categorically laid down the specifications and technical parameters required to be complied by you with respect to the Quadcopters to be supplied by

you.

3. As the Vendor, you were responsible for the quality assurance of the Quadcopters strictly as per the AR forming part of the Supply Order before

supplying the said equipment. However, despite having been given extended time and due opportunity to supply the equipment conforming to the

parameters stipulated in the Supply Order, you failed to supply the equipment conforming to the qualitative requirements. The same has resulted in

cancellation of the said Supply Order vide HQ Eastern Command letter Number 120019/4/CI/Quad/2015-16/SFP Cell/T4 dated 15 Mar 2018.

4. The above equipment was urgently required for enhancing the operational capability, to carry out surveillance and keep strict vigil in the operational

areas. As a Vendor, you ought to have been sensitive to the operational and national security considerations, while discharging your obligation as the

supplier of the security equipment of this sensitive nature. You were expected to show the highest standards of honesty and integrity to ensure that

there are no deficiencies/shortcomings in the qualitative requirements of the above equipment. Your dishonest and fraudulent approach in relation to

qualitative standards of the said equipment has created a void in the surveillance capability, thus jeopardising national security.

5. Further, the circumstances under which your equipment was found compliant with the QR in the RFP and the Supply Order at the TEC stage and

during the joint acceptance testing process initially conducted on receipt of

equipment, despite the equipment having qualitative defects/shortcomings is under investigation by the competent military authority.Â The likelihood of any undue influence on concerned Govt. officials involved in the procurement and testing process, by the Vendor/his agents/his representatives, at all stages of procurement is also under investigation by the said Army authority.Â Â

6. Prima facie your firm has misrepresented the capabilities of your equipment to project your firm as technically qualified when clearly your firm was not meeting the threshold eligibility.Â Accordingly your firm and your allied firms are put to Notice as to why your firm and your allied firms should not be suspended for such deliberate misrepresentation.

7. Your reply to this Notice be submitted by 30 Mar 2018, failing which it shall be assumed that you have nothing to submit in this regard and an appropriate decision shall be taken accordingly.

8. This Notice is required to be acknowledged.

Sd/- illegible

(JV Prasad)

Major General

MGGS (SD & WE)â??

34. A perusal of the same would go to show that in the said notice there is a reference to cancellation of the supply order dated 15.03.2018 for failure to supply the Quadcopters conforming to the qualitative requirements. It also appears therefrom that the Quadcopters were urgently required for enhancing the operational capability to carry out surveillance and strict vigil in the operational areas and failure to meet the qualitative standards had created a void in the surveillance capability compromising and jeopardising national security. All stages of procurement and joint ATP including likelihood of exercise of undue influence by the petitioners/agents upon Government officials involved in the procurement and testing process are under the scanner and are being investigated.Â

35. It will be also necessary to reproduce the reply dated 26.03.2018 submitted by the petitioners to the notice dated 16.03.2018. The same reads as under:-

â??To,

Â Â Â Â Â Â Â Â Major General GS (SD & WE)

Â Â Â Â Â Â Â Â Head Quarters Eastern Command

Â Â Â Â Â Â Â Â Fort William, Hastings, Kolkata - 700021

Subject: Reply to the Show cause notice issued vide your letter

No.120019/4/CI/Quad/2015-16/SFP Cell/T4 dated 16.03.2018.

1. Please refer to your letter No.120019/4/CI/Quad/2015-16/SFP Cell/T4 dated 16.03.2018 vide which we have been asked to show cause why the order for our suspension should not be passed on the alleged grounds as mentioned in the said letter.

2. In this regard, we wish to state that we have duly fulfilled all our obligations under the Supply Order dated 27.12.2016 (hereinafter referred to as the

â??said Supply Orderâ?) by supplying the equipment as per the specifications and technical parameters to be delivered by us under the said Supply

Order. We state that we were duly qualified to participate in the tender process, and the Supply Order was awarded to us only after we were

declared as successful bidders under the techno commercial bidding process undertaken by you.Â We state that we have never misrepresented in

any manner whatsoever in relation to the technical capabilities of the equipment supplied by us under the said Supply Order. We state that after the

initial extensive acceptance test procedure conducted by you, the equipment were put to use extensively in the field without releasing any amount to us

as payable under the said Supply Order.Â The equipment was damaged or destroyed (in part or whole) in the course of usage due to mishandling of

the same by your personnel.Â We had provided all requisite support during this period and our technicians whenever called for visited the locations

and repaired the equipment to make it optimally functional.Â Thereafter, without releasing the amounts due and payable to us under the said Supply

Order, you conducted a second acceptance test procedure on the same equipment which was already used in forward areas and raised some

deficiencies, which are all repairable in nature and we have already demonstrated the same despite you not giving us sufficient time. We have replied

vide our letter No.SSS/EC/66/2017-18 dated 26.03.2018 to your letter No.120019/4/CI/Quad/2015-16/SFP Cell/T4 dated 15.03.2018, by which you

had informed us about the wrongful, bad in law and unilateral decision of cancellation of the Supply Order. As intimated to you vide our letter dated 26.03.2018, despite the wrongful cancellation, we have shown our willingness to amicably resolve the dispute in relation to the Supply Order through the conciliation process specified in the provisions of the Arbitration Clause of the Supply Order. We have always acted in the national interest and are committed to do so.

3. We state that the contents of the said Letter dated 16.03.2018 (hereinafter referred to as "said Letter") are not true, concocted, factually incorrect, baseless and vague and therefore, we refute all such allegations in its entirety. We further state that the alleged inquiry initiated by you to investigate the circumstances under which our equipment was found compliant with the QR as per the RFP and the Supply Order at the TEC stage and during the joint acceptance test procedure initially conducted on receipt of equipment by you, is with ulterior motive to justify the cancellation of the supply order which was done to avoid the liability of payment which you were obliged to make under the Supply Order. We vehemently deny that we have ever used any undue influence of any nature as alleged in the said letter dated 16.03.2018. We have been supplying various equipment to the Indian Army for over a decade and have built up our reputation by adopting honest, fair and transparent norms of business.

4. We state that we had agreed to repair the equipment damaged and/or destroyed due to mishandling by your personnel, free of extra charges, only because of our respect for the Indian Army and prioritising national interest over our outstanding dues, and you had therefore no valid justification to terminate the Supply Order on the alleged ground of non-fulfilment of the terms of the Supply Order by us at this stage when we had already fulfilled our contractual obligations. We further state that despite us demonstrating our willingness to repair the equipment free of cost and address each and every concern expressed by you, the equipment was made available to us for repairing only on 26.02.2018 and therefore the termination of the Supply Order on the alleged ground of failure on our part to perform our obligation under the Supply Order is wrongful and bad in law.

5. We further state that you have failed to provide us with any documents and information basis on which you have called upon us to show cause vide

your letter under reply and for that reason alone, your letter under reply is bad in law and ought to be withdrawn. We therefore state that you have failed to follow the principles of natural justice and any investigation carried out by you without providing us with the said documents and information and any decision taken by you without providing us with reasonable opportunity to meet the case as set out in the letter under reply would be bad in law, illegal, void and non-est. We further state that any action taken by you of suspension as threatened by you in your said letter dated 16.03.2018 without providing us and our affiliates reasonable opportunity of being heard and to put our say before the concerned authority would be bad in law, null and void and non-est.

6. We state that the cancellation of the Supply Order and the act of initiating inquiry under the purported apprehension of use of undue influence is an afterthought to avoid payment of our longstanding dues and for the reasons best known to you.

7. We therefore request you to within 7 days from the receipt hereof provide us with all details and documentation in order to enable us to meet the case effectively. We also request you not to take any steps pursuant to your letter under reply until such time as we have been given an adequate and ample opportunity to meet the allegations set out in your letter under reply.Â

8. We state that what is stated hereinabove is without prejudice to our rights and contentions to seek appropriate remedy under the applicable provisions of law.

9. It is further humbly submitted that keeping in view the circumstances in totality, the decision to cancel the supply order along with the instant show cause notice should be withdrawn with immediate effect.

Yours faithfully

For Sure Safety Solutions Pvt. Ltd.Â??

36. A perusal of the reply submitted by the petitioners goes to show that the petitioners had contested the cancellation of the supply order dated 15.03.2018 as bad in law and it is asserted that such cancellation order was passed to avoid liability of making payment. The allegation of the Quadcopters not meeting the qualitative requirements and exercise of undue influence are denied. Plea is also taken that while issuing the notice dated

equipment which was in use in forward areas.

(g) That the deficiencies raised in the second test procedure were repairable in nature, which has already been demonstrated but sufficient time was not

granted for its repair. (h) That the cancellation of the Supply Order is wrongful, unilateral and bad in law.

(j) That the contents of the Notice for suspension are not true, baseless, factually incorrect and vague and, therefore, refuted.

(k) That the Court of Inquiry has been ordered with ulterior motives to justify the cancellation of the Supply Order, which was done to avoid the liability

of payment.

(l) That the Vendor vehemently denies the use of any undue influence of any nature.

(m) That the Authority failed to provide any document and information, on the basis of which the vendor was called upon to Show Cause, which is bad

in law and ought to be withdrawn.

(n) That any action taken by the Authority for suspension without providing reasonable opportunity of being heard, would be bad in law, null & void and

non est.

(o) The Vendor prayed to provide him all details and documents, in order to enable him to meet the case effectively within seven days and also

requested not to take any steps until the said opportunity has been provided to him.

(p) Lastly the Vendor requests that the decision to cancel the Supply Order along with the said Notice for suspension should be withdrawn.

3. The matter was put up to the competent authority, who after due consideration and deliberation has thus observed:-

(a) With regards to issues enumerated at Paragraph 2(a) to (e), it is brought out that the obligations as per Supply Order were not fulfilled as the

equipment supplied was not conforming to the specifications and the technical parameters stipulated in the QR/Supply Order dated 27 Dec 2016.

(b) With regard to the issues enumerated at Paragraph 2(c) to (e), it is brought out that the defects and the deficiencies were noticed in the first ATP

itself conducted from May to Jun 2017, which were duly notified to the Vendor vide HQ Eastern Command letter No.120019/4/CI/Quad/G/ 162/Arty

dated 12 Jun 2017. It is pertinent to point out that full parameters could not be

tested by the Board of Officers due to geographical constraints, which were intimated to you (the Vendor).¹ However, these problems persisted and despite the so called "repair of the damage" as claimed by the Vendor, the equipment failed to meet the QRs stipulated in the Supply Order when tested by a Joint ATP Board (23 Nov to 09 Dec 2017), which was mutually agreed upon.

(c) With regard to issues enumerated at Paragraph 2(f) to (h), it is brought out that the Joint ATP (23 Nov to 09 Dec 2017) had to be ordered because the equipment had to be tested to verify the performance with respect to complete range of specifications and the technical parameters. It is pertinent to point out that this ATP test was carried out in the presence of the Vendor's representative, where all the defects and shortcomings were noticed in his presence. Further, the Vendor was afforded ample time and opportunity to bring the equipment in conformity to the specifications and the technical parameters specified in the Supply Order, which he failed. Consequently the authorities were left with no option but to cancel the Supply Order.²

(d) With regard to issues enumerated in Paragraph 2(j), your reply is found to be evasive with bland assertions and you have not been able to rebut the contents of the Notice for suspension in any manner.

(e) With regard to issues enumerated in Paragraph 2(k) & (l), it is brought out that the assertions made are wrong and baseless. The procedural infirmities had surfaced with regard to the Vendor clearing the TEC process, whereas, on being tested in Joint ATP (May " Jun 2017) initially and in the Joint ATP (23 Nov to 09 Dec 2017) in the presence of Vendor's representative the equipment, viz Quadcopters supplied, have failed to conform to the specifications and the technical parameters, thereby, creating a serious gap in surveillance capability affecting the operational preparedness. The issue having serious repercussions has been rightly ordered to be investigated by the competent military authority.

(f) With regard to the issues enumerated at Paragraph 2(m) & (n), it is seen that information was provided by Joint ATP (23 Nov to 09 Dec 2017) and the same was conveyed vide this HQ letter dated 20 Jan 2018.³ The Notice for suspension was issued after due deliberation and to provide reasonable opportunity to the Vendor to represent to the competent authority,

his defence. As regards the documents, all the relevant documents, viz RFP, Supply Order, and the details of the qualitative deficiencies are held with the Vendor.

(g) With regard to the issues enumerated in Paragraph 2(o) & (p), it is seen that all the issues raised by the Vendor have been duly considered. The

Vendor has failed to refute the averments contained in the Notice for suspension and no case is made out for withdrawal/cancellation of the Notice

for suspension.

4. Prima facie, your firm has misrepresented the capabilities of your equipment to project your firm as technically qualified, whereas your firm was

clearly not meeting the threshold eligibility. After having given thoughtful consideration to your reply, the competent authority has found the same to

be devoid of merit and substance and has thus directed suspension of your firm and your allied firms for a period of one year with immediate effect.

5. This Order for Suspension is requested to be acknowledged.

Sd/- Illegible

(JV Prasad)

Major General

MGGS (SD & WE)??

38. As noticed earlier, the lis in the writ petition is the validity or otherwise of the order of suspension dated 09.04.2018. The order of suspension was

issued from Kolkata and delivered in Mumbai. The show cause notice dated 16.03.2018 was issued forming a prima

facie opinion that the petitioner No.1 had misrepresented the capabilities of the Quadcopters to project itself as technically qualified when it was

clearly not meeting the threshold eligibility. In the instant writ petition, there is no averment that this Court has territorial jurisdiction for the grounds

stated but absence of such statement, by itself, is not decisive, if otherwise, it is found that this Court has territorial jurisdiction. The learned senior

counsel for the petitioners has submitted that as the Quadcopters were delivered at Narangi, Guwahati for inspection and acceptance and as ATPs

were conducted in respect of the said Quadcopters, wherein some defects were noticed, in places within the territorial jurisdiction of this Court, this

Court has territorial jurisdiction to go into the lis relating to suspension of the

petitioners. Undoubtedly, such facts will be integral, material and essential facts constituting cause of action to confer territorial jurisdiction upon this Court if a challenge is mounted regarding cancellation of the supply order, but the order of cancellation is not in challenge till now. It is another matter whether in view of existence of arbitration clause in the agreement between the parties, the Court would have exercised jurisdiction under Article 226 of the Constitution of India. The petitioners, subsequent to filing of this petition, had filed an application under Section 9 of the 1996 Act before the High Court of Calcutta in connection with the order of cancellation dated 15.03.2018. A perusal of the said application goes to show that there is overlapping of facts in the said application and in the present petition. When the petitioners have, on their own volition, split up the issues of cancellation of supply order and order of suspension, the facts which constitute cause of action for cancellation of the supply order cannot be pressed into service as cause of action for the order of suspension also. Even otherwise, when the foundation of the order of suspension is on the ground of misrepresentation by the petitioners in respect of capabilities of the Quadcopters, place of delivery and their testing, cannot be construed to be integral, material and essential part of cause of action so as to confer territorial jurisdiction on this Court to determine the lis in connection with the order of suspension dated 09.04.2018.

39. In view of the discussions above, it is held that this Court does not have territorial jurisdiction to decide the lis in question. Consequently, it will not be necessary for this Court to consider the other submissions advanced by the learned senior counsel for the parties on the issue as to whether the order of suspension dated 09.04.2018 was issued by the competent authority.

40. The interlocutory application stands allowed.