



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.3453 OF 2024**

Mukand Poly Products & Anr.

..... Petitioners

Vs.

Bharat Petroleum Corporation Ltd. & Anr.

..... Respondents

Shri Pranjit Bhattacharya a/w. Shri Avdhoot Prabhu i/b. Lex Services for the petitioners

Shri Pankaj Sawant, Senior Advocate a/w. Rutu Pawar i/b. Pragnya Legal for respondent No.1 BPCL

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &  
AMIT BORKAR, J.**

**RESERVED ON : OCTOBER 1, 2024**

**PRONOUNCED ON : OCTOBER 8, 2024**

**JUDGMENT (PER : CHIEF JUSTICE)**

**1.** Heard Shri Pranjit Bhattacharya, learned Counsel representing the petitioners and Shri Pankaj Sawant, learned Senior Advocate along with Ms. Rutu Pawar representing the respondent No.1 – Bharat Petroleum Corporation Ltd. (hereinafter referred to as the **BPCL**) and perused the records available before us on this petition.

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**(A) Challenge:**

**2.** This petition under Article 226 of the Constitution of India has been filed assailing the validity of an order dated 8<sup>th</sup> December 2023 passed by respondent No.1 whereby respondent No.1 decided to ban business dealings with the petitioner and its allied agencies and further debarred the petitioner from entering into the contracts with respondent No.1 for a period of one year (period of holiday listing).

Further prayer made in the writ petition is that by an appropriate writ or direction, respondent No.1 may be restrained from taking any action/coercive steps against the petitioner pursuant to the show cause notice dated 21<sup>st</sup> July 2023 and the impugned order of debarring dated 8<sup>th</sup> December 2023.

**(B) Brief facts :**

**3.** Before adverting to the rival contentions made by the learned counsel for the parties in support and opposition of the writ petition, it is essential to note certain facts, which are as under.

**4.** Petitioner No.1 is a partnership firm, registered under the Indian Partnership Act, 1932 and is also an MSME industry

dealing in Polyethylene pipes having its manufacturing unit at Guwahati. Petitioner No. 2 has described himself as one of the partners of petitioner No. 1.

**5.** Respondent No.1 issued notice inviting tender (tender document) for procurement of Polyethylene (MDPE) pipe for BPCL/BGRL CGD Projects. The bid due date for the said tender was 16<sup>th</sup> August 2022 at 15:00 hours. The document specifically provided that the policy to Purchase Preference linked with Local Content (hereinafter referred to as the "**PPLC**") circulated by the Ministry of Petroleum and Natural Gas, Government of India, vide it's circular dated 23<sup>rd</sup> February 2022 shall be applicable to the subject tender. The relevant clause regarding applicability of PPLC policy as provided for in the tender document, is quoted hereunder: -

*"PP-LC (revised) policy as per Circular from MOPNG ref No.FP-20013/2/2017-FP-PNG-Part (1) (E-36682) dated 23.02.2022 shall be applicable for this Domestic Tender. Only Class 1 and Class 2 local suppliers, as defined in PPLC order, shall be eligible to bid for this tender. Purchase preference shall be applicable to Manufacturers classified as Class 1 Local Suppliers."*

**6.** Thus, according to the afore-quoted clause, it was provided by the tender document that only Class 1 and Class 2 local suppliers as defined in PPLC policy shall be eligible to bid for the tender and further that purchase preference shall be available to

the manufacturers classified as Class 1 local suppliers.

**7.** Certain clauses of PPLC policy embodied in the circular dated 23<sup>rd</sup> February, 2022 of the Ministry of Petroleum and Natural Gas, Government of India, are also relevant to be noted. The said PPLC policy is applicable in all public sector undertakings under the Ministry of Petroleum and Natural Gas and has been promulgated in tune with the Make in India (MII) campaign involving oil and gas sector for providing certain incentives for growth of goods and services with Local Contents while implementing Oil and Gas projects in India. Clause 2.3 of the PPCL policy defines "Local Content" to mean amount of value added in India which shall be the total value of the item procured minus the value of imported content in the item concerned as a proportion of the total value in percentage, unless otherwise prescribed by the Nodal Ministry. Clause 2.3 of the PPLC policy is quoted hereunder:

**"2.3 Local Content** hereafter abbreviated to LC means the amount of value added in India which shall, unless otherwise prescribed by the Nodal Ministry, be the total value of the item procured (excluding net domestic indirect taxes) minus the value of imported content in the item (including all customs duties) as a proportion of the total value, in percent."

**8.** As per the said PPLC policy, there are 3 types of suppliers of goods/service provider viz. "Class I local supplier, "Class II

local supplier” and “Non-local supplier”. Clause 2.5 defines “supplier of goods and/or provider of service” to mean a business entity having capability of providing goods and/or service in accordance with the business line and qualification thereof. “Class-I local supplier” has been defined in clause 2.5 to mean a “supplier, whose goods offered for procurement, has Local Content equal to or more than 50%.” “Class-II local supplier” has been defined to mean “a supplier whose goods offered for procurement, has Local Content more than or equal to 20% but less than 50%.” “Non-local supplier” is defined in clause 2.5 of the PPLC Policy as a supplier, whose goods, offered for procurement, has Local Content less than 20%. Clause 2.5 of the PPLC policy is also extracted hereunder:

***“2.5 Supplier*** of goods and/ or provider of service shall be a business entity having capability of providing goods and/ or service in accordance with the business line and qualification thereof and classified as under:

*‘Class-I local supplier’ means a supplier or service provider, whose goods, services or works offered for procurement, has local content equal to or more than 50% as defined under this Policy.*

*‘Class-II local supplier’ means a supplier or service provider whose goods, services or works offered for procurement has local content more than or equal to 20% but less than 50% as defined under this Policy.*

*‘Non-local supplier’ means a supplier or service provider, whose goods, services or works offered for procurement, has local content less than 20% as defined under this policy.”*

9. "Local Content" in goods has been defined in clause 2.9 of PPLC policy which means use of raw materials, design and engineering towards manufacturing, fabrication and finishing of work carried out within the country. Clause 2.9 of the PPLC policy is extracted hereunder:

**"2.9 Local Content (LC) in Goods shall be the use of raw materials, design and engineering towards manufacturing, fabrication and finishing of work carried out within the country."**

10. Annexure-I appended to the tender document contains General Purchase Conditions. As per Clause 41 of the General Purchase Conditions, policy of Holiday Listing was made applicable to the subject tender and to all consequent orders, contracts and purchase orders. Clause 41 of the General Purchase Conditions runs as under:

**"41. POLICY ON HOLIDAY LISTING:**

*The guidelines and procedures for Holiday Listing are available separately in BPCL website and shall be applicable in the context of all tenders floated and consequently all orders/ contracts/ purchase orders. It can be accessed using the following link:*

*<http://bharatpetroleum.in/pdf/holidayslistingpolicyfinal.pdf>.*"

11. Reference by the learned Counsel for the Petitioner, during the course of argument, has also been made to clause 9 of the PPLC policy which makes certain provisions for imposing sanctions on manufacturers not fulfilling the Local Content of goods. Clause 9 of the PPLC policy is quoted hereunder: -

## **"9 Sanction**

*9.1 The Procuring companies shall impose sanction on manufacturers/service providers not fulfilling LC of goods/services in accordance with the value mentioned in certificate of LC.*

*9.2 The sanctions may be in the form of written warning, financial penalty and blacklisting.*

*9.3 In the event that a manufacturer or supplier of goods and/or provider of services does not fulfill his obligation after the expiration of the period specified in such warning, the procuring company can initiate action for blacklisting such manufacturer/ supplier/ service provider.*

*9.4 A manufacturer and/or supplier of goods and/or provider of services who has been awarded the contract after availing Purchase Preference is found to have violated the LC provision, in the execution of the procurement contract of goods and/or services shall be subject to financial penalty specified in clause 9.4.1.*

*9.4.1 The financial penalty shall be over and above the PBG value prescribed in the contract and shall not be more than an amount equal to 10% of the Contract Price."*

**12.** The provision for holiday listing of vendors dealing with respondent No.1 have been given in the policy for holiday listing. Clause 4.1.1 and 4.2.12 of Holiday Listing Policy of BPCL are relevant for consideration of the competing arguments made on behalf of the parties, which are also extracted hereinbelow: -

### **"4. Holiday Listing:**

**4.1** Reasons for Holiday Listing: An Agency may be placed in Holiday List for any one or more of the following circumstances:

**4.1.1** If the Agency, in the context of its dealings with the Corporation:

- a. has indulged in malpractices;*
- b. has submitted fake, false or forged documents /certificates*

- c. *Has substituted materials in lieu of materials supplied by BPCL or has not returned or has unauthorized disposed off materials/documents/drawings/tools or plants or equipments supplied by BPCL.*
- d. *Has deliberately violated and circumvented the provisions of labour laws/regulations/rules, safety norms, environmental norms or other statutory requirements.*
- e. *has deliberately indulged in construction and erection of defective works or supply of defective materials*
- f. *Has not cleared previous dues to BPCL if applicable.*
- g. *Has committed breach of contract or has abandoned the contract.*
- h. *Poor performance of the Agency in one or several contracts;*
- i. *Has not honoured the fax of award/letter of award/Contract/Purchase order after the same is issued by BPCL.*
- j. *Withdraws/revises the bid upward after becoming the L1 bidder.*
- k. *Has parted with, leaked or provided confidential/proprietary information of BPCL to any third party without the prior consent of BPCL."*

**"4.2.12** *Ordinarily the period for which as Agency is Holiday listed should not be less than 1 year (6 months in less serious cases with proper justification) and should not exceed 3 years. However, in extraordinary circumstances as mentioned below, banning of 15 years can be done. The board guidelines for the period of holiday listing based on the circumstances under which they were put on holiday listing is as under:*

<b>S. No.</b>	<b>Reasons for holiday listing</b>	<b>Period of holiday listing</b>
1	<i>Indulged in malpractices resulting in financial loss to the Corporation</i>	15 years
2	<i>Submitted fake, false or forged documents/</i>	3 years



	<i>certificates</i>	
3	<i>has substituted materials in lieu of materials supplied by BPCL or has not returned or has unauthorisedly disposed off materials/ documents/ drawings/ tools or plants or equipments supplied by BCL</i>	<i>15 years</i>
4	<i>Has deliberately violated and circumvented the provisions of labour laws/ regulations/ rules, safety norms, environmental norms or other statutory requirements</i>	<i>3 years</i>
5	<i>has deliberately indulged in construction and erection of defective works or supply of defective materials</i>	<i>3 years</i>
6	<i>has not cleared BPCLs previous dues if applicable</i>	<i>1 year</i>
7	<i>has committed breach of contract or has abandoned the contract</i>	<i>3 years</i>
8	<i>Poor performance of the Agency in one or several contracts</i>	<i>1 year</i>
9	<i>has not honoured the fax of award/ letter of award/ contract/ Purchase order after the same is issued by BPCL</i>	<i>1 year</i>
10	<i>Withdraws/ revises the bid upwards after becoming the L1 bidder</i>	<i>1 year</i>
11	<i>has parted with, leaked or provided confidential/ proprietary information of BPCL to any third party without the prior consent of BPCL</i>	<i>15 years</i>
12	<i>If the Agency is or has become bankrupt, OR is being dissolved OR has resolved to be wound up OR if proceedings for winding up or dissolution has been instituted against the Agency</i>	<i>3 years</i>
13	<i>Transgression of Integrity Pact, which, in the opinion of the Corporation, makes it undesirable to deal with the Agency</i>	<i>3 years</i>

**13.** The petitioner submitted its bid in respect of the subject tender with a declaration of Local Content to be 82.36% by means of a certificate dated 10<sup>th</sup> September, 2022 from a

Chartered Accountant. The said certificate issued by the Chartered Accountant, dated 10<sup>th</sup> September, 2022 submitted by the petitioner with its bid is on record as Exhibit-G appended to the petition. The petitioner qualified in the said tender and a letter of acceptance was issued by respondent No.1 vide letter dated 23<sup>rd</sup> January, 2023 informing the petitioner that its offer was accepted on the terms and conditions of the tender document.

**14.** Pursuant to acceptance of bid of the petitioner, a call of order for procurement of Polyethylene pipes was issued by respondent No.1 on 24<sup>th</sup> January 2023 whereby the petitioner No.1 was required to supply 602 pipes in number, of different diameter. For felicity, this procurement order dated 23<sup>rd</sup> January, 2023 shall be referred hereinafter as Procurement Order-1.

**15.** The petitioner, after receiving the Procurement Order -1, is said to have made supplies of certain polyethylene pipes, however, an email communication dated 22<sup>nd</sup> February, 2023 was sent by the Project Management Consultant, Tractebel, to the petitioner requiring the petitioner to submit all the required

documents to justify meeting the Local Content of 82.36% against the dispatched quantity.

**16.** In response to the said email communication dated 22<sup>nd</sup> February 2023, the petitioner wrote a letter to respondent No.1, dated 1<sup>st</sup> March, 2023 to establish that it had made Local Content declaration. The project Consultant Management, thereafter, vide email dated 3<sup>rd</sup> March, 2023 required the petitioner to provide relevant material test certificates along with Batch numbers, for 206 MT of the content of the pipes procured from local suppliers.

**17.** The petitioner is said to have communicated through emails dated 23<sup>rd</sup> February 2023, 25<sup>th</sup> February 2023 and 3<sup>rd</sup> March 2023 informing the respondent No.1 and the Project Management Consultant that it had not received the billing & shipping address and therefore, the petitioner was unable to dispatch the materials. However, by means of an email dated 3<sup>rd</sup> March 2023, the Project Management Consultant asked the petitioner to hold all the dispatches till petitioner's Local Content documents were verified. Vide another email dated 9<sup>th</sup> March 2023 from the Project Management Consultant, the petitioner

was again directed to hold all dispatches till further advice.

**18.** Lastly; vide email dated 9<sup>th</sup> March 2023 a detailed communication was made to the petitioner wherein it was stated that raw material procured by the petitioner from domestic Polythene pipe manufacturer is sourced from outside India, i.e. UAE and it cannot be considered as Part Local Content. By the said email dated 9<sup>th</sup> March 2023, the Project Management Consultant also informed the petitioner that a recommendation has been made to respondent No.1 that the declaration of meeting the Local Content of 82.36% by the petitioner against the PPLC policy is not inline with Procurement Guidelines issued by the Government of India in the Ministry of Petroleum and Natural Gas. The said email communication dated 9<sup>th</sup> March 2023 is extracted hereinbelow: -

*It is surprising to see your below appended email, wherein you are using such statement that "due to lack of understanding from the BPCL and PMC's side on our justification". We would like to bring into your notice that the declaration submitted by you regarding the local content in not complying to the PPLC policy.*

- 1. Enclosed declaration (Local Content declaration) of Local content submitted by M/s Mukund Poly products wherein bidder has declared meeting the Local content of 82.36% against the dispatched quantity.*
- 2. Enclosed supporting documents (Local Content Docs) submitted by M/s Mukund Poly products wherein it has been established that out of 270 MT raw material ordered 206 MT was procured from M/s Vishakha Pastic pipes Pvt. Ltd., & M/s Veekay Plast who are Indian PE pipe manufacturer.*

3. Further the Raw material sourced by M/s Vishakha Pastic pipes Pvt. Ltd., M/s Veekay Plast is imported and was procured from Borouge (Aby Dhabi-UAE), refer documents enclosed thru link.

4. Kindly refer to enclosed PPLC Policy (PPLC) which has explicitly explained the Determination of Local Content of Goods as below:

## **6. Determination of LC**

### **6.1 LC of goods**

**6.1.1** LC of goods shall be computed on the basis of the cost of domestic components in goods, compared to the whole cost of product.

**6.1.2** The criteria for determination of the local content cost in the goods shall be as follows:

a) in the case of direct component (material), based on country of origin;

b) in the case of manpower, based on INR component.

*In view of above, it is evident that the raw material procured from the domestic PE pipe manufacture is sourced from outside of India i.e. UAE and cannot be considered as Part Local Content. Hence Tractebel recommend BPCL that the declaration of meeting the Local content of 82.36% by M/s Mukund Poly Products against PPLC is not inline with Procurement Guidelines issued by Government of India MOPNG.*

*Kindly submit your explanation to above if any, also until or unless your explanation is justified we will not be able to lift any further material."*

**19.** It was also communicated to the petitioner that the petitioner may submit explanation and unless and until the explanation so submitted by the petitioner was justified, it will not be possible to lift any further material.

**20.** We may also make a reference, at this juncture, to an email dated 11<sup>th</sup> March 2023, made to the Project Management Consultant by the petitioner, wherein it is stated that it is undisputed and is known to all that the raw material used for production of polyethylene pipes is not manufactured in India and therefore, the suppliers have other option of importing the same directly or through Local Agents/Vendors. The petitioner further stated in the said communication that the raw material for manufacture of MDP pipes is not available in India and as such, the "Make in India" clause or any further clause akin to the same is redundant at best. The petitioner also stated by this communication that the incorporation of such a clause in the bid document serves no purpose and its feasibility, giving special circumstances, is flawed at best. The relevant extract of email made by the petitioner to the project proponent, dated 11<sup>th</sup> March 2023 is quoted hereinbelow: -

*"1. Firstly, it is imperative to look at the feasibility of the Make in India ("MII") Clause in the MDPE Pipe Industry. It is common knowledge that the raw material used for production of MDPE Pipes is not manufactured in India and the suppliers have either the option of importing the same directly or through any local agent/vendor for the same. This is undisputed by any party and is known to all players in the industry. In view of the fact that the raw material for manufacture of MDPE Pipes is not available in India, the "MII" Clause or any other clause akin to the same is redundant at best. The incorporation of this clause in the bid document serves no purpose and its feasibility given the subject circumstances is flawed at best."*

**21.** Thus, we may note, at this juncture itself, that the petitioner by the said email communication dated 11<sup>th</sup> March, 2023 had even questioned the existence of clause relating to Local Content in MDP pipes and termed it to be flawed. Despite having participated in the subject tender which clearly provided that PPLC policy where the Local Content in a product has been defined, was applicable. The petitioner, again wrote a letter on 21<sup>st</sup> March 2023 to respondent No.1 stating therein, *inter alia*; that they had come to a conclusion that earlier declaration submitted which depicted 82.36% Local Contents in the pipes to be supplied, was not executable. The letter dated 21<sup>st</sup> March, 2023 also contains a statement of the petitioner that nonetheless, the petitioner still falls under the category of Class-I local supplier, whose offered product contains Local Content equal to or more than 50%. The petitioner, through the said letter also communicated to respondent No.1 that they will only be able to cater the first call up procurement order quantity under PPLC policy on the basis of availability of raw material to meet the requirement of Local Content in the pipes to be supplied as Class-I local supplier.

**22.** Thus, what we notice is that it is not only that the petitioner by its email dated 11<sup>th</sup> March 2023 sent to the Project Management Consultant had questioned the condition relating to Local Content and termed it to be redundant and flawed, but also clearly stated in its communication dated 21<sup>st</sup> March, 2023 that supply of the product with 82.36% Local Content, as per the declaration made by the petitioner at the time of submitting its bid, was not executable. By the said letter dated 21<sup>st</sup> March 2023, the petitioner also communicated that it shall cater the supplies only in terms of the provision which qualifies the petitioner as Class-I local supplier, that is to say, it will be able to supply the subject pipes with the Local Content equal to or more than 50%. In other words, by the said letter dated 21<sup>st</sup> March, 2023, the petitioner, in no uncertain terms, expressed its inability to make supply of the subject pipes with the Local Content of 82.36%. By the said letter dated 21<sup>st</sup> March, 2023 the petitioner also submitted a certificate from a Chartered Accountant depicting the Local Content in the pipes to be supplied by it as 51.45% only as against the Local Content of 82.36% in terms of the declaration made by the petitioner at the time of submitting its bid pursuant to the subject tender.



**23.** On 21<sup>st</sup> July 2023, a show cause notice was issued by respondent No.1 calling upon the petitioner to submit its reply/ explanation as to why the petitioner may not be placed on Holiday Listing and may not be barred from entering into any contract with the BPCL. The said show cause notice stated the grounds on which the intended action of debarment and putting the petitioner on Holiday Listing was proposed. The notice clearly stated that the petitioner had participated in the tender with a declaration of 82.36% Local Content in the offered product and accordingly, it had claimed purchase preference for being Class-I local supplier.

The notice also stated that the petitioner was required to submit a declaration supported by certificate from the Cost Accountant/Statutory Auditor for maintaining the requisite percentage of local product in the product supplied by it in every invoice in order to meet the said requirement and to ensure that the supplies made by the petitioner meet the stipulated Local Content. The show cause notice dated 21<sup>st</sup> July 2023 also stated that the petitioner vide its email dated 21<sup>st</sup> March, 2023 had informed that earlier submitted declaration of 82.36% Local Content was not executable and that the product delivered by

the petitioner had Local Content 51.45%. The show cause notice also informed the petitioner that such an act on its part was tantamount to committing breach of contract having abandoned the contract and thus, entails penal provisions under the Holiday Listing Policy and also penal provisions as contained in the PPLC policy.

**24.** The petitioner responded to the aforesaid show cause notice dated 21<sup>st</sup> July, 2023 vide its letter dated 31<sup>st</sup> July, 2023 and stated, *inter alia*; that according to its interpretation of Local Content criteria, procuring raw material from a local supplier was not the only criteria for determining the Local Content and therefore, a declaration was made by the petitioner at the time of submitting its bid that the product to be supplied by it had 82.36% Local Content. In the reply it was also stated that as per the interpretation of respondent No.1, the Local Content in the goods supplied by the petitioner was 51.45% and thus, the petitioner informed the respondent No.1 its inability to meet 82.36% Local Content criteria. In the reply, it was further stated by the petitioner that on the basis of non-availability of raw material locally to meet the Local Content, the petitioner had informed that it could cater only the first call-up procurement

order quantity under the PPLC policy and that though the petitioner did not meet the requirement of Local Content in its offered product however, the petitioner was fully compliant with Local Content requirement to qualify it as a Class-I supplier. In the reply dated 31<sup>st</sup> July 2023 submitted by the petitioner to the show cause notice, it was also stated that the petitioner did not dispute that a declaration of 82.36% was initially made by the petitioner at the time of submission of the bid on the basis of the petitioner's interpretation of Local Content criteria, however, the petitioner, thereafter, had revised the declaration on the basis of interpretation of respondent No.1 and since revised percentage of Local Content was above 50% and therefore, the petitioner was still able to meet the Local Content requirement as Class-I supplier.

**25.** In sum and substance, in the reply submitted by the petitioner to the show cause notice, the ground taken by it was that even if the declaration by the petitioner during bid submission was that the product offered by it contained 51.45% Local Content, the tender would have been awarded to the petitioner and therefore, the chances of succeeding the tender would have been unaltered and accordingly, in view of the

clarification submitted by the petitioner the outstanding amount against the supplies made by it be released.

**26.** On receipt of the reply submitted by the petitioner and on consideration thereof, the impugned order dated 8<sup>th</sup> December, 2023 banning the business dealings with the petitioner and debarring it from entering into the contracts has been passed, which is under challenge in this petition.

**(C) Arguments made on behalf of the petitioner:**

**27.** Shri Bhattacharya, learned Counsel representing the petitioner, while impeaching the impugned order dated 8<sup>th</sup> December, 2023 has argued that the impugned order has been passed not on the grounds spelt-out in the show cause notice and further that it is in complete violation of policy of Holiday Listing of the vendors.

**28.** It has been argued in this regard that the show cause notice was issued on the ground that the declaration made by the petitioner at the time of submission of bid reflected 82.36% of the Local Content, however, subsequently, the petitioner declared it to be 51.45%, which amounted to breach of contract/abandonment of contract, but once the reply to the

show cause notice was submitted, the ground was altered while passing the impugned order and the reason indicated therein is that the petitioner did not fulfill the supply of total awarded quantity, which resulted in passing of the impugned order on grounds not mentioned in the show cause notice which vitiates the impugned order.

**29.** Shri Bhattacharya has also argued that non-fulfillment of supply of the pipes as per the LOI quantity was never an issue before respondent No.1 and accordingly, the impugned order, since, is based on the said ground, is not liable to be sustained as it is not open to respondent No.1 to open a new case which is not mentioned in the show cause notice. It is further argued on behalf of the petitioner that the petitioner never expressed its inability to supply the balance quantity of the total contract value and hence, the said reason occurring in the impugned order makes the order of debarment illegal and not sustainable.

**30.** The learned counsel for the petitioner has also invoked the doctrine of proportionality to submit that the declaration made by the petitioner regarding the Local Content of its product at the time of participating in the bid was based on its

interpretation of the term “Local Content” for a Class -I supplier, however, for some reason it was mis-interpreted by the petitioner and hence, nothing can be attributed to the petitioner amounting to *mala fide* or misleading the respondent No.1 and accordingly, in absence of any element of *mala fide or* misleading, the impugned order debarring the petitioner from participation in the contracts is highly disproportionate.

**31.** The said submission has been made on behalf of the petitioner in the backdrop of the settled position that blacklisting any firm or company is a drastic action which amounts to almost civil death of a contractor and accordingly any such drastic measure has to be necessarily proportionate to the default of the contractor. His submission is that considering the overall facts, especially, the fact that the first declaration made by the petitioner in respect of the Local Content can be said, at the most, to be based on misinterpretation, blacklisting and debarring the petitioner is not warranted.

**32.** It has also been argued on behalf of the petitioner that even if the Local Content in the product offered by the petitioner is equal to or more than 50%, the petitioner still qualifies as

Class-I local supplier and thus, the petitioner would have been awarded the tender for the reason that it was the only Class-I local supplier who participated in the subject tender and hence, the petitioner cannot be said to have contravened the PPLC policy. Shri Bhattacharya has also attempted to argue that at the most, the petitioner can be said to have contravened the PPLC Policy and there does not exist any contravention of the conditions of tender and therefore, the penalty as envisaged in Clause 9.4 and 9.4.1 of PPLC policy would be attracted in the instant case, which do not permit action of debarment/blacklisting. Drawing our attention to the said clause of PPLC policy, it has been argued that clause 9.4 provides that if a supplier of goods who has been awarded contract availing purchase preference is found to have violated the Local Content provisions, he can be subjected to financial penalty as specified in clause 9.4.1, which provides that the financial penalty shall be over and above the PUG value prescribed in the contract and shall not be more than the amount equal to 10% of the contract price. It is, thus, his submission that even if the case setup by respondent No.1 is found to be tenable, the provisions of clause 9.4 of PPLC policy, at the most, would be attracted, which may

make the petitioner liable for financial penalty and not for such a drastic action as debarment/blacklisting.

**33.** On the aforesaid counts, it has been urged on behalf of the petitioner by Shri Bhattacharya that the impugned order dated 8<sup>th</sup> December 2023 passed by respondent No.1 be quashed and writ petition be allowed.

**(D) Arguments on behalf of the respondent – BPCL:**

**34.** Shri Pankaj Sawant, learned Senior Advocate, opposing the prayers made in the writ petition, has submitted that the entire writ petition is highly misconceived and the facts and circumstances of the present case clearly establish that it is not only that the provisions of the PPLC policy justifying the blacklisting are attracted in this matter, but also that the policy of Holiday Listing of the vendors has been lawfully applied while passing the impugned order.

**35.** It has been argued by Shri Sawant that Clause 9 of PPLC policy does not provide only for imposition of financial penalty but it provides for various counts of sanctions, including blacklisting by the procuring companies in case supplier of the goods does not fulfill the Local Contents of the goods in



accordance with the value mentioned in the certificate of Local Content. Referring to clause 9.1 and 9.2 of PPLC policy, it has been argued on behalf of respondent No.1 that in case supplies of a company are found not fulfilling the Local Content of goods, it may entail various sanctions, which may be in the form of written warning, financial penalty and blacklisting as well. Our attention has also been drawn to clause 4.1.1(g) of the policy for Holiday Listing which provides that the agency in context of its dealings with the Corporation if found to have committed breach of term of the contract or has abandoned the contract, it is liable to be placed on Holiday Listing. He has stated that clause 4.1 provides for the reason on the basis of which agency may be placed on the Holiday Listing, and one of such reasons is breach of contract or abandonment of contract.

**36.** Our attention has also been drawn to clause 4.2.12 of the policy for Holiday Listing wherein the period of Holiday Listing has been prescribed and for breach of contract or abandonment of contract, the period of Holiday Listing prescribed therein is three years. He has, thus, submitted that though the petitioner has clearly been found to have breached/abandoned the contract, however, in place of putting the petitioner in the

Holiday Listing for 3 years, the respondent has provided the period of putting the petitioner on Holiday Listing to be only one year and hence, the impugned order cannot be faulted with on the ground of doctrine of proportionality.

**37.** It is his further submission that the principles of natural justice in this case has been strictly followed inasmuch as that the show cause notice issued to the petitioner, which preceded passing of the impugned order, clearly mentioned the grounds on which action was proposed against the petitioner. He has also argued that the reasons given in the impugned order are germane as they relate to the grounds indicated in the show cause notice and hence, the submissions made by the learned Counsel for the petitioner in this regard are not tenable.

**38.** Shri Sawant has taken us through the contents of the show cause notice and also those of the impugned order and has argued that the impugned order has been passed recording a finding on the issues mentioned in the show cause notice. It has also been argued on behalf of respondent No. 1 that the petitioner does not dispute that in the declaration made by it at the time of participating in the bid, the Local Content in the

offered product was 82.36%, whereas, admittedly, the product being now offered, after the contract, contains Local Content only to the extent of 51.45%. Our attention has also been drawn by Shri Sawant, representing the respondent No. 1 that the petitioner in its email communication dated 11<sup>th</sup> March 2023 has even gone to the extent of terming the Local Content requirement as redundant and further that the same is flawed.

**39.** Referring to the letter dated 21<sup>st</sup> March, 2023 of the petitioner addressed to respondent No. 1, it has been contended by the learned Counsel representing respondent No. 1 that the petitioner himself has stated in the said letter that the work order with 82.36% Local Content is not executable. He has stated that the said letter itself states that the petitioner will not be able to cater the requisite supply of the pipes only with the Local Content of 51.45% and not with the Local Content of 82.36% as per its declaration made at the time of submitting its bid. In his submission, Shri Sawant has, thus, stated that the said letter dated 21<sup>st</sup> March, 2023 is nothing but a clear expression on the part of the petitioner to have abandoned the contract which amounts to breach of contract and thus, in terms of the provisions contained in Clause 9.1 of the PPLC policy read

with clause 4.1.1(g) and 4.1.12 of the policy for Holiday Listing, which form part of the tender document itself, such an act on the part of the petitioner attracted action as has been provided for in the impugned order. It has thus been urged on behalf of respondent No. 1 that the petition be dismissed at its threshold.

**(E) Discussion:**

**40.** It is not in dispute, as is apparent from the Certificate dated 10<sup>th</sup> September 2022 of the Chartered Accountant which was submitted by the petitioner at the time of participation in the bid pursuant to the subject tender, that the petitioner had declared that the pipes offered to be supplied by it contain 82.36% Local Content.

**41.** It is also not in dispute that the pipes supplied by the petitioner pursuant to the procurement order issued by respondent No.1 did not contain Local Content to the extent of 82.36%; rather, it contains only 51.45% Local Content as is apparent from a perusal of the certificate dated 21<sup>st</sup> March 2023 issued by the Chartered Accountant which was enclosed by the petitioner with its letter dated 21<sup>st</sup> March, 2023. From a perusal of the said letter dated 21<sup>st</sup> March, 2023 it is also indisputably

clear that the petitioner had, in no uncertain terms, expressed its inability to execute the contract with supply of the pipes having 82.36% Local Content; rather, the stand taken by the petitioner is that the petitioner will be able to cater the supply pursuant to the procurement order only with 51.45% Local Content.

**42.** The petitioner has even gone to the extent of submitting, as is clear from its communication dated 11<sup>th</sup> March 2023 made to respondent No.1, that because of certain reasons especially because of fact that raw material for manufacturing of MDP pipes is not available in India, the Make in India clause or any other such clause is redundant and further that incorporation of such a clause in the bid document does not serve any purpose. The petitioner has described such a requirement as flawed. Accordingly, from the contents of the letter dated 21<sup>st</sup> March 2023 and email communication dated 11<sup>th</sup> March 2023 there is no dispute that the petitioner is not a possessor of the pipes to be supplied pursuant to the subject tender with Local Content of 82.36%. The pipes possessed by it contains the Local Content to the extent of 51.45% only.

**43.** It is also to be seen that instead abiding by supplying the pipes offered by it with 82.36% Local Content at the time of submission of bid, the petitioner has submitted a revised declaration of the Local Content of its product which in our opinion is impermissible. It was not open to the petitioner to have altered the percentage of Local Content in its product to be supplied for the reason that at the time of submission of its bid pursuant to the subject tender, the declaration made by it depicted the Local Content of 82.36% in the product offered by it. Such an alteration or change in the percentage of Local Content, in our opinion, is not permissible; rather, it not only contravenes the provisions of the tender document but also the provisions of the PPLC policy. The explanation attempted to be given by the learned Counsel for the petitioner for the changed declaration in respect of the Local Content is not tenable.

**44.** In any case, if there has been any ambiguity in the mind of the petitioner as to how the Local Content in its product had to be determined, such clarification ought to have been sought by the petitioner before the tender process was finalized and not thereafter.

**45.** It is true that if the product offered by the petitioner contains 50% or more than 50% Local Content in the product offered by it, it still qualifies as Class-I supplier under the policy, however, that in itself will not be sufficient for the petitioner to take a plea that it has not contravened the contract.

**46.** We may note that once the petitioner expressed its inability to supply the pipes with 82.36% Local Content and has rather stated that it will cater the supplies pursuant to the procurement order with its product having 51.45% Local Content, it will clearly amount to abandoning the contract. Subsequent offer to supply with the altered Local Content in its product and petitioner's inability to make supplies with Local Content of 82.36%, in our opinion, necessarily amounts to breach of contract. The tender was awarded to the petitioner on the basis of declaration made by it at the time of submitting its bid which depicted that the offered product by the petitioner contain 82.36% Local Content and not 51.45%.

**47.** As already noticed above, Clause 4.1 of the General Purchase Conditions clearly provides that guidelines and

procedures for Holiday Listing shall be applicable in the context of the subject tender and all consequential orders/contracts/purchase orders. Accordingly, applicability of the policy for Holiday Listing is not in doubt. Clause 4 of policy for Holiday Listing, as already quoted above, which prescribes the reasons or grounds available for Holiday Listing, states that an agency may be placed on Holiday Listing in anyone or more of the circumstances enumerated therein. Clause 4.1.1 provides that if the agency, in the context of its dealing with respondent No.1, has committed breach of contract or has abandoned the contract, such an act on the part of the agency shall result in the agency being placed in the Holiday List. It is also to be noticed that clause 4.2.12 prescribes period for which an agency can be placed in Holiday List according to which in case any agency is found to have committed breach of contract or to have abandoned the contract, the agency can be placed in the Holiday List for a period of 3 years.

**48.** We may also refer to clause 9 of PPLC policy which provides for sanctions to be imposed by procuring companies on the manufacturers/ service providers not fulfilling all requirements of Local Content of goods/service in accordance



with the value mentioned in the certificate of Local Content. Clause 9.2 provides that sanction may be in different forms, including in the form of written warning or financial penalty or blacklisting. Accordingly, the emphasis by the learned Counsel for the petitioner on clause 9.4 and 9.4.1 to submit that it is a case, at the most, of violation of PPLC policy which entails financial penalty only and not blacklisting, is absolutely untenable. Clause 9.2 of PPLC policy itself provides various forms of sanctions to be imposed by the procuring companies which include blacklisting as well.

**49.** Once the petitioner, in its letter dated 21<sup>st</sup> to March 2023 had unambiguously expressed its inability to execute the work order by stating that such work order is not executable with the product to be supplied with 82.36% Local Content, in our considered opinion, such communication is nothing but abandonment and breach of contract. Submission of the learned counsel for the petitioner that letter dated 21<sup>st</sup> March 2023 should be construed to mean the willingness on the part of the petitioner to cater to the supply as per the procurement orders is based on complete misreading of the contents of the said letter. The intention expressed by the petitioner by the said letter dated

21<sup>st</sup> March 2023 is clear without any ambiguity, according to which the petitioner had expressed its willingness to cater to the procurement order only with supply of its product with 51.45% of the Local Content as per the certificate of the Chartered Accountant dated 21<sup>st</sup> March 2023 enclosed with letter dated 21<sup>st</sup> March 2023 and not with the product having 82.36% Local Content. In this view, such a statement made by the learned Counsel for the petitioner that the communication/letter dated 21<sup>st</sup> March, 2023 should be construed as an expression of willingness of the petitioner to make supply as per the contract, is not acceptable. Supply, as per the contract, could be made only with the product containing 82.36% Local Content which the petitioner has stated in the letter dated 21<sup>st</sup> March, 2023, is not executable. Accordingly, in view of the aforesaid, we have no hesitation to hold that it is a case where the petitioner had committed breach of contract by abandoning the contract in the light of the fact that the petitioner itself has stated that the procurement order with 82.36% Local Content is not executable. Thus, clause 4.1.1 of policy for Holiday Listing of the petitioner is clearly attracted.

**50.** As regards the submission of the learned Counsel for the

petitioner that the action of blacklisting being a drastic act, the doctrine of proportionality needs to be applied while judicially reviewing such measures taken by respondent No.1, we may only state that an administrative action such as the one involved in the present case does attract application of doctrine of proportionality, we may, however in the same breath, also note that clause 4.2.1 prescribes the period of Holiday Listing in case of breach of contract or abandonment of contract to be 3 years, whereas the petitioner has been debarred only for a period of one year. Thus, even applying the doctrine of proportionality, we do not find that the impugned order, in any manner, is disproportionate to the default at the end of the petitioner.

**51.** Submission has also been made by the learned Counsel for the petitioner that the impugned order dated 8<sup>th</sup> December 2023 is not based on the grounds stated in the show cause notice. The said submission, however, is absolutely incorrect and hence, not tenable. The show cause notice clearly mentioned that the declaration made by the petitioner towards the Local Content in the offered product was 82.36% at the time of submission of the bid. The show cause notice also took note of certain communications made by the petitioner wherein it was stated

that the supply of product with 82.36% Local Content was not executable. It also mentioned that in one of its communications the petitioner had stated that its product had the Local Content 51.45% and thus, it would still fall under the category of Class-I local supplier. The notice also clearly stated that the action on the part of the petitioner amounted to abandonment and committing breach of contract for the reasons given therein.

**52.** The impugned order dated 8<sup>th</sup> December 2023 notices the admission made by the petitioner that while at the time of bidding, the petitioner was very sure, based on its interpretation, about the Local Content in the product offered to be 82.36%, however, subsequently, the petitioner realised that the Local Content clause of the policy was capable of another interpretation that is different to what it had declared at the time of submitting its bid. The impugned order, thus, also notices that on account of the aforesaid facts, the petitioner was not able to supply the material as against the procurement order which amounted to breach/abandonment of the contract, accordingly, there is no substance in the submission made on behalf of the petitioner that the impugned order is not based on the grounds disclosed in the show cause notice.

**(F) Conclusion:**

**53.** For the facts narrated and the reasons given above, we are of the opinion that the impugned order dated 8<sup>th</sup> December 2023 does not suffer from any illegality, whatsoever so as to call for any interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

**54.** The petition, thus, lacks merit, which is hereby dismissed.

**55.** However, there will be no order as to costs.

**56.** Interim application, if any, stands disposed of.

**(AMIT BORKAR, J.)**

**(CHIEF JUSTICE)**