

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 31st March, 2011**

+ **WP(C) NO.8261/2010 & CM.No.21250/2010(for stay)**

% **HIMALAYA RESEARCH LAB** **Petitioner**
Through: Ms. Anjana Gusain with Mr. K.C. Sharma, Ms. Pushpa Jhuravey & Mr. C.B. Singh, Advocates.

Versus

MCD **Respondent**
Through: Ms. Maninder Acharya with Mr. Yashish Chandra, Advocates.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 28th September, 2010 of the respondent MCD reiterating / reaffirming the earlier order dated 24th April, 2009 debarring the petitioner for five years from supplying Ayurvedic medicines to the respondent MCD. Notice of

the writ petition and the application for interim relief was issued. It was deemed appropriate to dispose of the writ petition itself rather than dealing with the application for interim relief. The pleadings have been completed and the counsels have been heard.

2. The petitioner a manufacturer of Ayurvedic pharmaceutical formulations and drugs for the last 20 years, has been empanelled in the approved list of contractors of the respondent MCD for supply of the said products. The respondent MCD placed a contract on the petitioner for supply of Ayurvedic medicines mentioned therein for the years 2006 to 2008. The petitioner supplied the medicines for which order was placed under the said contract. After about six months from the said supplies, the respondent MCD claims to have sent samples thereof for testing to Sri Ram Institute of Industrial Research, Delhi and, on the basis of the report of the said test, issued show cause notice dated 23rd January, 2009 to the petitioner. In the said show cause notice it was stated that Sri Ram Institute of Industrial Research has declared the medicines supplied by the petitioner to be “not of standard quality”; the petitioner was thus asked to show cause as to why action as per rules should not be taken against it. The petitioner by its reply dated 30th January, 2009 to the said show cause

notice asked the respondent for particulars as to how the samples were taken and for the copy of the test report. However, the respondent MCD without giving any hearing to the petitioner passed the order dated 24th April, 2009, as aforesaid, debarring the petitioner from supplying ayurvedic medicines for five years.

3. When the representations of the petitioner against the said order did not meet with any success, the petitioner filed WP(C) 11284/2009 in this Court impugning the order dated 24th April, 2009. The said writ petition came up before this Court on 31st August, 2009 when the counsel for the respondent MCD appearing on advance notice, without prejudice to the rights and contentions of the respondent MCD stated that a fresh show cause notice will be issued and a hearing given to the petitioner. On the said statement of the respondent MCD, the order dated 24th April, 2009 debarring the petitioner from supplying medicines was quashed and liberty was given to the respondent MCD to issue fresh show cause notice and pass a speaking order, if necessary, after hearing the petitioner.

4. In pursuance to the above, a show cause notice dated 2nd September, 2009 was served on the petitioner wherein it was stated that the medicines supplied by the petitioner were found “not of standard

quality” by Sri Ram Institute of Industrial Research on test analysis as per their report dated 14th January, 2008; that supply of medicines “not of standard quality” was in contravention of terms and conditions of NIT; keeping in view the seriousness of the matter it was proposed to debar the petitioner for the next five years from tendering with MCD. The petitioner submitted a detailed reply to the said show cause notice. However, the respondent MCD vide its order dated 28th September, 2010 impugned in this petition has reiterated the earlier order of debarring the petitioner *inter alia* on the ground that the medicines are something which deal with the life of the poor people who take the medicines from MCD.

5. It is *inter alia* the contention of the petitioner that the punishment meted out to it is in violation of the terms as to penalty contained in the Notice Inviting Tender (NIT) in pursuance where to the supplies were made by the petitioner to the respondent MCD; that various pleas taken by the petitioner in its reply to the show cause notice have not been dealt with; that Sri Ram Test Laboratory itself had been disqualified by the respondent MCD and no reliance whatsoever can be placed on its report; that in any case the report of the test laboratory did not indicate that the

medicines supplied by the petitioner were not of standard quality; that the requisite procedure had not been followed etc.

6. Before dealing with the contentions of the petitioner on merits, the preliminary objection taken by the counsel for the respondent MCD as to the maintainability of the present petition may be dealt with. It is the plea of the respondent MCD that the NIT containing the terms and conditions of supply provides for arbitration in Clause 17 thereof, making the decision of the Director, Hospital Administration of the MCD as final in all disputes relating to the contract. It is contended that the matter being contractual and the contract itself having provided for dispute resolution, the public law remedy of a writ petition ought not to be entertained. The counsel for the petitioner in this regard as well as otherwise in support of the writ petition relies upon *Chandana Kedia Vs. Union of India* 2010 II AD (Delhi) 757 where a learned Single Judge of this Court upon similar objection in a similar writ petition being taken, held that the existence of alternative remedy by way of arbitration does not prevent this Court from entertaining a writ petition under Article 226 of the Constitution in appropriate cases involving violation of principle of natural justice by the authority whose decision is challenged or when the authority has in

interpreting and applying a clause acted unreasonably and unfairly. Reliance in this regard was placed on *ABL International Ltd. Vs. Export Credit Guarantee Corpn. Of India Ltd* (2004) 3 SCC 553.

7. The counsel for the respondent MCD has been unable to show any reason for not taking the same view as taken in the aforesaid judgments.

8. The NIT containing the terms and conditions of supply of medicines by the petitioner to the respondent MCD under the heading “Action for the drugs declared of substandard quality as per the guidelines of Drug Controller of India” provided that the substandard drugs are of two types i.e., either drugs declared misbranded, adulterated and spurious or drugs declared not of standard quality. The present case is not concerned with the first of the aforesaid types inasmuch as neither in the show cause notice nor in the orders impugned in this petition it is the case of the MCD that the drugs/medicines supplied by the petitioner had been declared misbranded, adulterated and spurious. Be that as it may the “action” provided for drugs declared misbranded, adulterated and spurious also is only of cancelling the contract and recovery of purchase cost from the contractor and destruction of the drugs remaining unconsumed and of debarring that particular item “for the next contract period”. The charge

made and found against the petitioner was of the drugs being not of standard quality. The said defect, under the NIT was further classified in two categories i.e. of minor defects and major defects. The penalty provided for minor defects is of replacing of existing stock and the contractor being asked to make payment for the consumed stock. For major defects the penalty provided is of calling upon the contractor to lift the existing stock, of cancellation of contract for the remaining period, of calling upon the contractor to pay for the supplies and of debarring the contractor “for that item for the remaining period of the contract and for the next contract period”.

9. The contention of the petitioner is that even though the charge against the petitioner was of the medicines supplied by the petitioner being not of standard quality, neither the show cause notice nor the order impugned in the petition records as to whether the said charge fell in the category of minor or major defect. It is further the case of the petitioner that even if the defects was to be presumed to be major, neither has the petitioner been called upon to lift any stock nor has been asked for price thereof. It is yet further the argument of the counsel for the petitioner that even in the case of a major defect (though not charged or established) the

maximum punishment could have been of debarring the petitioner for supplying that particular drug/medicine only for the remaining period of the contract or for the next contract period; the penalty provided is not of debarring the petitioner for making any supplies whatsoever or for five years; that the next contract period could be only from 2008 to 2010 and there is no justification for debarring the petitioner after the year 2010 as is being done.

10. This Court in *Chandana Kedia* (supra) has also held that penalty more than that provided in the contract could not be imposed.

11. The respondent MCD neither in the counter affidavit nor in the course of arguments has been able to explain as to why the show cause notice and the impugned order though claiming the drugs supplied by the petitioner to be not a standard quality, do not further classify whether the said defect fell in the minor or major and as to why and under which provision or right, the petitioner has been debarred for five years from making of supplies, when even for a major defect the maximum penalty of debarring from making supplies of that product only for the next contract period i.e. for the year 2008-2010 only could be imposed.

12. In view of the aforesaid, even though other grounds have also been taken by the petitioner, the aforesaid alone is found sufficient for the petition to succeed.

13. Consequently, the petition is allowed; the impugned order dated 28th September, 2010 of the respondent MCD is hereby set aside/quashed.

I refrain from imposing any costs on the respondent.

**RAJIV SAHAI ENDLAW
(JUDGE)**

March 31, 2011
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