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

\+ W.P.(C) 11531/2019 & CM APPL. 47386/2019

MAHESHWARI PHARMACEUTICALS (INDIA) LIMITED ..... Petitioner

Through Mr. Rajat Aneja, Mr. Bhuvanesh Sehgal, Ms. Chandrika Gupta, Advocates.

versus

GOVERNMENT OF NCT OF DELHI ..... Respondent

Through Mr. Ramesh Singh, SC (GNCTD) with Mr. Gautam Narayan, ASC with Mr. Chirayu Jain, Mr. Ishan Agrawal, Advocates.

\+ W.P.(C) 11534/2019 & CM APPL. 47390/2019

NEW SHAMA LABORATORIES PVT. LTD. ..... Petitioner

Through Mr. Rajat Aneja, Mr. Bhuvanesh Sehgal, Ms. Chandrika Gupta, Advocates.

versus

GOVERNMENT OF NCT OF DELHI ..... Respondent

Through Mr. Ramesh Singh, SC (GNCTD) with Mr. Gautam Narayan, ASC with Mr. Chirayu Jain, Mr. Ishan Agrawal, Advocates.

\+ W.P.(C) 11547/2019 & CM APPL. 47448/2019

MULTANI PHARMACEUTICALS LTD. ..... Petitioner

Through Mr. Arvind K. Nigam, Sr. Advocate with Mr. Bhuvanesh Sehgal, Advocate.

versus

GOVERNMENT OF NCT OF DELHI ..... Respondent

Through Mr. Ramesh Singh, SC (GNCTD) with Mr. Gautam Narayan, ASC with Mr. Chirayu Jain, Mr. Ishan Agrawal, Advocates.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

O R D E R

% **07.11.2019**

1. The present petitions have been placed before this Bench on being received on transfer from another Bench. With the consent of the parties, the matters are taken up for final disposal today itself on account of the urgency expressed by the learned counsel for the parties.

2. Except for specific facts relating to the number of medicines for which each of the petitioners have stated that they were declared as L1, the remaining facts of the cases being more or less similar and the grievance raised being common, the facts of W.P.(C) 11547/2019 are being noticed for deciding all the three petitions.

3. The petitioner, Multani Pharmaceuticals Ltd. has prayed for quashing/setting aside of an office order dated 15.10.2019, passed by the respondent/Directorate of Ayush, GNCTD (for short, 'Ayush') whereunder, the Earnest Money Deposit (for short, 'EMD') to the tune of Rs.40 lakhs deposited by it, at the time of submitting the bid, has been forfeited on the ground of violating the terms and conditions of the tender document and for submitting a false declaration. The petitioner has also prayed for directions to be issued to the respondent/Ayush to take the tender dated 10.05.2019, to its logical conclusion by permitting it to supply the items in which it has been declared as L1 on 28.06.2019. In the alternate, the petitioner has prayed for refund of the bank guarantee for a sum of Rs.40 lakhs, deposited

at the time of participating in the tender dated 10.05.2019 and for quashing of the subsequent tender dated 22.10.2019.

4. The factual matrix first. On 20.09.2018, the respondent/Ayush had floated a tender for a total value purchase of Rs.33 crores for procurement of Ayurvedic and Unani Medicine (Classical and Proprietary) from various Ayurvedic and Unani drug manufacturers, for making supplies to its dispensaries. The EMD was fixed at Rs.66 lakhs. Aggrieved by the fact that the online bids submitted by some bidders could not be retrieved by the respondent/Ayush from its website, a writ petition was filed by M/s. AIMIL Pharmaceutical India Limited (W.P.(C)11277/2018), which was allowed by the Division Bench vide order dated 22.10.2018 and the respondent/Ayush was directed to process the bid of the petitioner therein after taking the assistance of the NIT to extract the documents that were lodged in its website. The order dated 22.10.2018, was impugned by the respondent/Ayush before the Supreme Court in an SLP, which was dismissed. Thereafter, the respondent/Ayush approached the High Court by filing a miscellaneous application in W.P.(C) 11277/2018, seeking leave to withdraw/cancel the entire tender process and proceed to re-tender, in accordance with law. The said application was allowed vide order dated 11.04.2019.

5. Pursuant thereto, the respondent/Ayush issued a fresh tender on 10.05.2019, the total value whereof was reduced from Rs.33 crores to Rs.20 crores, for Ayurvedic (Classical and Proprietary) forms of medicine. This time, the EMD was reduced from Rs.66 lakhs to Rs.40 lakhs.

6. We are informed that the respondent/Ayush received 44 bids in response to the tender dated 10.05.2019, including those of the three petitioners herein. After opening the technical bids on 26.06.2019 and conducting an evaluation, the respondent/Ayush published an Item-wise Comparative Statement and declared the petitioner in W.P.(C) 11547/2019 as L1 for 47 items.

7. Mr. Ramesh Singh, learned counsel for the respondent/Ayush states that in July, 2019, a complaint was received by the Department regarding some misrepresentations made by the petitioner on the prices quoted. After verifying the facts, the respondent/Ayush issued a Memorandum dated 08.08.2019 to the petitioner directing it to submit its valid rate contract with other government/semi-government/autonomous institutions, including approved rates of Ayurvedic medicines that had been quoted by it in the subject tender and the validity of the rate contract. In response to the said Memorandum, the petitioner submitted a reply on 12.08.2019, stating *inter alia* that it was the approved vendors of ESIC, J&K and it enclosed with the said letter, the rate contracts in respect of the aforesaid Departments. This was followed by issuance of a Show-cause Notice dated 23.08.2019 by the respondent/Ayush, which is reproduced hereinbelow for ready reference:-

"SHOW CAUSE NOTICE

WHEREAS, M/s Multani Pharmaceuticals Ltd. submitted its bid for the e-tender ID No. 2019 DAYUS 172253 1 of Directorate of AYUSH, GNCTD for procurement of Ayurvedic medicines.

WHEREAS, M/s Multani Pharmaceuticals Ltd. had submitted a declaration along with tender documents to the effect that "The *rates quoted are not higher than quoted for any other Government Institution" in Annexure B(on Rs.100/- non-judicial stamp paper)*

WHEREAS, on scrutiny of Rate Contract of "Employee's State Insurance Corporation (ESIC)", it has been found that M/s Multani Pharmaceuticals Ltd., has quoted higher rates than ESIC for some items, in the above said tender of Directorate of AYUSH, which is a violation of above mentioned condition.

Now, therefore, M/s Multani Pharmaceuticals Ltd. is directed to explain the reason for such violation and as to why a punitive action should not be initiated against it. The reply should reach this office within seven days of receipt of this notice failing which appropriate action, as per rules/guidelines, shall be initiated against the firm."

8. The petitioner replied to the afore-said Show-cause Notice dated 23.08.2019, vide letter dated 29.08.2019, stating inter alia that it had quoted for over 100 medicines and there is only one medicine of the same pack *(Punchguna Taila)* in which the quoted rate was higher than the rate contract of ESIC, which was sought to be explained as a 'typographical error'. It was also stated by the petitioner that it was willing to supply the captioned medicine at the same rate as was mentioned in the rate contract of the ESIC.

9. Not satisfied by the aforesaid reply, the respondent issued the impugned order dated 15.10.2019, stating as follows: -

"<u>OFFICE ORDER</u>

M/s Multani Pharmaceuticals Ltd. submitted its bid for the e-tender ID No. 2019_DAYUS_172253_1 of Directorate of

AYUSH, GNCTD, for the procurement of Ayurvedic medicines. The said firm had submitted a declaration along with tender documents to the effect that "That rate quoted are not higher than quoted for any other Government Institution" in Annexure-B.

On security of Rate Contract of "Employee's State Insurance Corporation (ESIC)", it has been found that M/s Multani Pharmaceuticals Ltd. has quoted higher rates than ESIC for some items, in the above said tender of Directorate of AYUSH, violate above for explaining the reason for violation. The reply of the same dated 29.08.2019 received from the firm has not been found satisfactory.

Therefore, for violating the terms and conditions of tender document and submitting false declaration (Clause 26 of NIT), the Earnest Money Deposite of M/s Multani Pharmaceuticals Ltd. amounting to Rs. Forty Lakhs Only (Rs.40,00,000/-) is being forfeited."

10. The impugned order is assailed by Mr. Arvind Nigam, learned Senior Advocate on the ground that a mere error on the part of the petitioner in quoting a higher price for one item in the entire list of 100 medicines, wherein it has been declared as L1, cannot be a ground to forfeit the EMD, which even otherwise, as per the terms and conditions of the tender documents, could not have been forfeited by the respondent/Ayush except in specific circumstances spelt out in para- 2 of the said tender. Learned senior counsel further states that the action of the respondent/Ayush of cancelling the tender dated 10.05.2019 and floating a new tender for the same items, is against public policy and an attempt to award the contract to a selective handful.

11. Lastly, it is argued that there has been no concealment/ misrepresentation on the part of the petitioner as sought to be claimed by the respondent/Ayush since the rates quoted by it for the ESIC was for medicines that were to be supplied in the year 2016, whereas para 24 of the tender document containing the "Fall Clause" stipulates that *"the rate quoted by the bidders should not be higher than the rate quoted by him to other Government Institutions/agencies within the Government during the contract period"*. It is contended that since no contract has been awarded by the respondent/Ayush to the petitioner, there is no question of any misrepresentation. It is further submitted on behalf of the petitioner that the rates quoted by it to the respondent/Ayush were in any case not higher than the rates quoted by it to the ESIC for the reason that the rates quoted to the ESIC were in the year 2016, whereas the contract was awarded to the petitioner only in the year 2018, which is valid from 10.05.2018 to 09.05.2020. Therefore, the said rates quoted in the year 2016, cannot be considered as the current rates which can bind down the petitioner during the contract period, as contemplated under para 24 of the present tender.

12. The aforesaid submissions are however strongly refuted by Mr. Ramesh Singh, learned Standing Counsel (Civil), GNCTD and Mr. Narayan, learned Additional Standing Counsel, both of whom assert that the respondent/Ayush was entitled to forfeit the EMD of the petitioner as it had violated the Code of Integrity, declared in para-26 of the tender document, particularly, Clause-(h) thereof, which states as follows:

> *"Making false declaration or providing false information for participation in a tender process or to secure a contract."*

13. It is submitted that the format of the undertaking required to be furnished by the bidders in terms of para 5(iv)4 of the tender document specifically required them to declare that the rates quoted by them were not higher than those quoted for any other government institution. Learned counsel state that what the petitioner has now sought to explain regarding the year in which it had quoted the rates to ESIC, ought to have been furnished in the undertaking filed by it but, for reasons best known to it, that was not done. Instead, an ambiguous statement was made by the petitioner in the undertaking dated 30.05.2019, *"that the rates quoted are not higher than quoted for any other government institution"*. Learned counsel for the respondent/Ayush further state that the petitioner has tried to improve upon its case in the writ petition inasmuch as no such plea was taken by it in the reply dated 29.08.2019, submitted in response to the Show Cause Notice dated 23.08.2019 wherein, the error in the rate of *Panchaguna Taila* was sought to be described as a typographical error. Insofar as the other medicine mentioned in the Item-wise Comparative Statement is concerned i.e., *Smritisagar Ras*, that was quoted at a much higher rate, it is submitted that the petitioner has not even sought to explain why such a high rate was quoted by it.

14. There is weight in the submission made by learned counsel for the respondent/Ayush that the petitioner should have been candid enough to state in the undertaking, that the rates quoted by it were not higher than the rates quoted for any other government institution in the year in question, more so, when it was well aware of the fact that it may have submitted quotations to ESIC in 2016 but the contract was executed with the ESIC in

May, 2018. This would have obviated the scope of any doubt or suspicion. It is also a matter of record that in its reply to this Show Cause Notice, the petitioner had sought to explain that the rate quoted by it for *Punchguna Taila* was an error, but it remained dead silent on the rate that it had quoted for *Smritisagar Ras,* which is more than double of what it had quoted to the ESIC.

15. Coming next to the EMD of the petitioner that has been forfeited by the respondent/Ayush, it is not in dispute that no specific mention was made in the Show Cause Notice dated 23.08.2019 of the nature of punitive action that the respondent/Ayush was contemplating against the respondent. The said Notice simply stated that *"punitive action would be initiated against the petitioners for violation of the terms of the tender and appropriate action shall be initiated as per the rules/guidelines."*

16. Learned counsel for the respondent/Ayush has alluded to the Manual for Procurement of Goods, 2017 adopted by the Department of Expenditure, Ministry of Finance, to state that Ayush has followed the guidelines laid down in the said Manual which states that in case of any fraudulent practice, corrupt practice, coercive practice, anti-competitive practice, conflict of interest or obstructive practice, the punitive provisions can include forfeiture/ encashment of security bid, calling-of of any pre-contract negotiations, rejection and exclusion of bidders from the bid process and so on and so forth. It is contended that though the respondent/Ayush was empowered to take appropriate measures in terms of the said Manual which could have been more than one, including blacklisting the petitioner, it has elected only to forfeit the EMD.

17. Mr. Nigam, learned Senior Advocate points out that the Manual for Procurement of Goods, 2017 sought to be quoted by the respondent/Ayush was not a part of the tender document. He points out that para-26 of the tender that relates to the 'Code of Integrity', concludes by noting that *"if the procuring entity, after giving a reasonable opportunity of being heard, come to the conclusion that the bidder or prospective bidder, as the case may be, has contravened the code of integrity, it may take appropriate measures"*. It is his submission that the term "appropriate measures" used in para-26 has not been elaborated in the tender document and nor was it anywhere stated that the measures contemplated, could be in terms of the Manual for Procurement of Goods, 2017 and therefore, the respondent/ Ayush having failed to spell out the 'appropriate measures', cannot be permitted to rely on the said Manual. Secondly, it is submitted that the Show Cause Notice dated 23.08.2019, did not state anywhere that the respondent/Ayush proposed to forfeit the petitioner's EMD. The notice only referred to *"punitive action/appropriate actions"*, that cannot translate into the forfeiture of the EMD.

18. We find force in the submissions made on behalf of the petitioners that the respondent/Ayush having failed to spell out the consequences of violating the conditions of the tender document in the Show Cause Notice dated 23.08.2019, it could not have forfeited their EMDs. The respondent/Ayush ought to have categorically mentioned in the Notice the nature of punitive action that it was contemplating and state in so many words that it could include forfeiture of the EMD. We state so for the reason that the grounds on which the EMD could have been forfeited have been

categorically stated in para-2 of the tender document and none of the said grounds have been stated in the Show Cause Notice or referred to in the impugned order.

19. In the course of the submissions made by learned counsel for the parties, we have been informed that a fresh tender has already been floated by the respondent/Ayush for procurement of Classical Ayurvedic and Unani medicines for a total purchase value of Rs.12 crores with the EMD fixed at Rs.24 lakhs, for a period of two years. The last date and time for receipt of the online bids has been fixed in the said tender as 13.11.2019 till 01.00 P.M. Learned counsel for all the petitioners state that as all of them propose to participate in the said tender, instead of pressing the prayer for cancellation of the new tender dated 22.10.2019, the petitioners may be permitted to participate in the said tender process and submit their bids but since their EMDs that have been forfeited by the respondent/Ayush, they be directed to retain the said EMDs for appropriate adjustment in the said tender, while refunding the remaining amount.

20. Mr. Singh, states on instructions, that the issue relating to forfeiture of the EMDs may be kept open and the respondent be permitted to issue a fresh Notice to Show Cause to the petitioners for the said purpose and they be directed to file their replies so that a fresh order can be passed. The aforesaid suggestion is acceptable to all the petitioners on the condition that the said proceedings may be made time bound and this time, the petitioners be afforded an opportunity of a personal hearing.

21. Accordingly, the present petitions are partly allowed. The impugned

orders issued by the respondent/Ayush forfeiting the EMDs of petitioners are quashed and set aside. Liberty is granted to the petitioners to participate in the fresh tender floated by the respondent/Ayush. Since the EMDs, subject matter of the tender dated 10.05.2019, are presently retained by the respondent/Ayush, it shall not insist that the petitioners furnish fresh EMDs as required for participating in the tender dated 15.10.2019.

22. The respondent/Ayush shall issue fresh Notices of Show Cause to each of the petitioners, on the aspect of forfeiture of the EMDs, within one week from today, with reasons stated therein for the proposed action. The petitioners shall be entitled to file their replies to the said notices within one week. After granting a personal hearing to the petitioners, if so requested, and upon considering the submissions made in the replies to the Notices to Show Cause, the respondent/Ayush shall pass a speaking order within seven working days from the date of the personal hearing. If aggrieved by the decision that may be taken by the respondent/Ayush, the petitioners shall be entitled to seek legal recourse within two weeks from the date of passing of the said order, during which period, the respondent/Ayush is restrained from taking any coercive steps against them.

23. All the three petitions are disposed of on the above terms, alongwith the pending applications.

HIMA KOHLI, J

ASHA MENON, J

NOVEMBER 07, 2019
MK/ajk/s