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W.P.No.4589 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.02.2023

CORAM

THE HON'BLE MR. JUSTICE C. V. KARTHIKEYAN

Writ Petition No.4589 of 2023

and

Writ Miscellaneous Petition No.4600 of 2023

Biogenetic Drugs Pvt. Ltd.,
No.66, Mathur Vaish Nagar,
Tonk Road, Jaipur – 302 011
Rajasthan Rep. by its
Resident Representative
Mr.S.Isthevan

... Petitioner

Versus

1. State of Tamil Nadu,
Rep. by its Secretary – Health & Family Welfare,
Fort. St.George,
Chennai – 9.

2. The Tamil Nadu Medical Services Corporation Ltd.,
No.417, Pantheon Road, Egmore,
Chennai – 600 008
Rep. by its Managing Director.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, seeking to quash the impugned order bearing Ref.No.010/M(P)/DRUG/TNMSC/2021 dt. 30.12.2022 issued by the 2nd respondent blacklisting the petitioner for a period of two years together with forfeiture of performance security and



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consequently directing the 2nd respondent to permit the petitioner to participate in Tenders floated by the respondents.

For Petitioner : Mr.P.R.Raman, Senior Counsel
For Mr.T.D.Selvan Babu

For R1 : Mr.T.Seenivasan,
Special Government Pleader

For R2 : Mr.Shivakumar (TNMSC)

ORDER

The Writ Petition has been filed in the nature of a Writ of Certiorarified Mandamus, seeking interference with an order of the 2nd respondent/the Managing Director, Tamil Nadu Medical Services Corporation Limited at Chennai, dated 30.12.2022 in Reference No.010/M(P)/DRUG/TNMSC/2021 whereby, the 2nd respondent had taken a decision to blacklist the petitioner for a period of two years and also to forfeit the performance security given by the petitioner herein. The petitioner also seeks that the petitioner may be permitted to participate in any future tender floated by the respondents.

2. Heard, Mr.P.R.Raman, learned Senior Counsel, on behalf of the



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petitioner and also Mr.T.Seenivasan, learned Special Government Pleader, on behalf of the 1st respondent. Mr.Shivakumar for TNMSC on behalf of the 2nd respondent was also present.

3. The petitioner is a SSI unit engaged in the manufacture, sale and distribution of medicinal and pharmaceutical preparations like tablets, capsules, liquid orals and external preparations. They have a factory at Baddi at Himachal Pradesh. They also claim that they have drug licences in Forms 25 and 28 of the Drugs and Cosmetics Act, 1940.

4. The petitioner had participated in a tender, which was floated on 01.12.2021 by the 2nd respondent for supply of two separate drugs namely, Iron and Folic Acid Syrup, IP 100 ml Bottle (Drug Code 804) and Diphenhydramine Oral Solution BP 60 ml Bottle (Drug Code 804). The number of units were 34,28,400 and 10,00,000 respectively out of which, the petitioner was directed to supply 6,85,680 and 6,00,000 respectively. There were time periods within which, the said supply should be done.

5. That information is gauged from the show cause notice, which



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had been issued to the petitioner herein.

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6. In the show cause notice, it had been stated that the due date for supply of the aforementioned two separate drugs were 04.08.2022 and 23.12.2022 respectively.

7. The learned Senior Counsel took advantage of an other column namely, the due date with penalty which was 24.08.2022 and 12.01.2023. It must also be kept in mind that, so far as the oral solution is concerned, there were two separate quantities which had been ordered.

8. It is the specific claim of the petitioner that they had supplied the entire quantity of Iron and Folic Acid Syrup. This factor is mentioned in paragraph 11 of the affidavit. Details have also been given.

9. In the meanwhile, the petitioner was issued with a show cause notice on 13.12.2022. The petitioner was put on notice that they had not supplied the drugs within the time period. It was also stated that if they do not so supply, they would attract the following punishment.



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“19.8 Non-performance of any of the contract conditions and provisions will disqualify a firm from participating in the tender for the next 2 years besides forfeiture of Security deposit.”

10. It is contended by the learned Senior Counsel that the said show cause notice was misplaced by the petitioner herein and therefore a reply was not given.

11. Thereafter, the impugned order came to be passed on 30.12.2022.

12. In the impugned order, the following punishment was imposed on the petitioner herein.

“Hence it is hereby intimated that the firm M/s. Biogenetic Drugs (P) Ltd is blacklisted for a period of two years from the date of this order and the Performance Security of Rs.3,11,098/- paid towards the tender shall be forfeited in accordance with clause 19.8 of the tender conditions.”



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13. A perusal of the clause for non-performance of contract and what was actually imposed, shows that for nonperformance, the petitioner attracts disqualification. But in the impugned order, the petitioner stood blacklisted. This will have serious implications.

14. It would only be appropriate that the petitioner is heard and an opportunity is given to the petitioner to explain his stand. More particularly, since according to the petitioner, the entire quantity of Iron and Folic Acid Syrup had actually been supplied. Even, if the respondents wanted to impose some punishment, then, they should have considered the supply of Iron and Folic Acid Syrup and should have then, noted about the non-supply of the other item, Diphenhydramine Oral Solution and could have imposed a proportional punishment on the petitioner herein. Even before imposing such punishment the petitioner should be afforded with an opportunity of being heard.

15. No doubt, a show cause notice was issued and it was not answered, but that does not mean that the respondents could exceed the power given and instead of forfeiting, blacklist the petitioner. That is



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disproportionate punishment. A judicial review will lie, if the punishment is disproportionate to what could have been reasonably imposed.

16. In *Coimbatore District Central Cooperative Bank Vs. Coimbatore District Central Cooperative Bank Employees Assn. and another*, (2007) 4 SCC 669, the Hon'ble Supreme Court held as follows:

“17. So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the “doctrine of proportionality”.

18. “Proportionality” is a principle where the court is concerned with the process, method or manner in which the decision-maker has ordered his



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priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.

21. The doctrine has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no “pick and choose”, selective applicability of the government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a “sledgehammer to crack a nut”. As has been said many a time; “where paring knife suffices, battle axe is precluded”.

17. In view of all the above ratio laid, and the punishment of blacklisting is disproportionate, I hold that the petitioner should be granted one further opportunity.



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18. It is also informed that the order now impugned is also the subject matter of an Appeal filed by the petitioner herein.

19. In the order impugned, the usage of the word 'blacklisting' alone is set aside.

20. Let the Appeal proceed. The punishment of blacklisting is set aside. This would mean that the petitioner is permitted to participate in any further tenders floated elsewhere or by the respondents herein.

21. The Appellate Authority must consider the explanations given and must pass an appropriate order. Till that time, the petitioner cannot and should not be considered as having been blacklisted.

22. Giving liberty to the petitioner herein to pursue further with the Appellate Authority for all reliefs, the Writ Petition stands disposed of with a further liberty that the petitioner can always come back to this Court if, they have any further grievance against the order of the Appellate Authority. No order as to costs. Consequently, the connected



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miscellaneous petition stands closed.

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Index : Yes/No

Internet : Yes/No

Neutral Citation Case: Yes/No

To:

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C.V.KARTHIKEYAN,J.

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