IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.17889 of 2023

The Punjab Homeopathic Pharmacy and Others Co operative Industrial Society Ltd. (PUNHOM) a co-operative society registered under the Punjab State Co-operative Society Act, 1961 having its registered office and works at Plot No. 154, Hansa Industrial Park, Banwala Road, Dera Bassi, SAS Nagar Mohali, Punjab authorized by the President represented by Raja Mondal, son of Mr. Subal Mondal, male, aged about 30 years, resident of 32 Panchanan Tala Road, P.O. -Sarat Bose Road, P.S.- Rabindra Sarbar, District- Kolkata, West Bengal.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, State of Bihar Public Health Department, 1st Floor, Vikas Bhawan, Bailey Road, Patna, Bihar-800015.
2. State AYUSH Society, Bihar, a society registered under the Societies Registration Act, 1961 and formed under the National Ayush Mission of the Central Government and under the administrative control of the Health Department, Government of Bihar having office at Vikash Bhawan, 3rd Floor, Room No. 347, Patna, Bihar-800015.
3. The Special Secretary Cum- Executive Director, State AYUSH Society, Department of Health, Government of Bihar, Patna.
4. The Under Secretary, Dept. of Health, Govt of Bihar, Patna.
5. The Director of Homeopathy, Govt. of Bihar.
6. The Joint Secretary, National Ayush Mission, New Delhi.
7. The Joint Secretary, Drug Control, New Delhi.

... ... Respondent/s

Appearance :

For the Petitioner/s	:	Mrs. Shilpi Keshri, Advocate
For the State	:	Mr.Md. Khurshid Alam, AAG-12
For the UOI	:	Mrs. Kanak Verma, CGC

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 21-02-2024

The petitioner, a Co-operative industrial society, is aggrieved with the Notice Inviting Tender, (for brevity, the NIT) with Reference No.:- 01-/SASB/DRUGS (Homeopathy)/2023-24, produced as Annexure-1 issued by the State Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy Society, Government of Bihar (for brevity, AYUSH). The NIT has been issued for the selection of an agency for the award of rate contract to supply homeopathy medicines/consumables across the homeopathic clinics/dispensaries of the Government situated in the State of Bihar on door delivery basis. The petitioners are aggrieved by the fact that the directions/guidelines issued by the Ministry of Micro, Small, and Medium Enterprises, (for brevity, the MSME) Government of India has not been incorporated in the aforesaid tender. The petitioner seeks to modify the aforesaid tender and relies on the judgment of the Hon'ble Supreme Court in M/s. Indian Medicines Pharmaceuticals Corporation Ltd. v. Kerala Ayurvedic Co-operative Society Ltd. and Ors. reported in 2023 SCC Online SC 5 dated 03.01.2023 and the decision of the Patna High Court passed in C.W.J.C. No. 23752 of 2019 titled as The Punjab Homeopathic Pharmacy and Ors. v. The State of Bihar and Ors. dated 20.02.2020 produced as Annexure-6 in the writ petition.

2. The learned counsel for the petitioner specifically referred to Annexure-3 issued by the Office of the

Development Commissioner, MSME, and Circular No. 1(2)(1)/2016-MA, dated 10.03.2016. The Public Procurement Policy as evidenced from Annexure 3, is that conditions of prior turnover and prior experience be relaxed with respect to MSME in all public procurement, subject to meeting of quality and technical specifications. The State of Bihar has consistently been flouting these instructions, especially in the purchase of medicines covered under the AYUSH scheme, where there is substantial financial support by the Central Government.

3. The learned Government Advocate on the other hand, argued that the policy, as evident from Annexure 3, is only applicable to Central Government Ministries/Departments and Central Public Sector Undertakings. The State has its own policy, and the decision at Annexure-6 erroneously imported the policy of the Central Government, over and above the relaxations granted by the State Government. It is pointed out that the State had filed an appeal from the aforesaid decision, which was dismissed on default. It is hence contended that the State had not accepted the decision and, in such circumstances, seeks a re-look; insofar as the aforesaid petition is being considered by a Division Bench, which could always look into the sustainability of the judgment of the learned Single Judge.

4. We were first concerned with the writ petition having been filed despite the very same petitioner having raised similar contentions and obtained an order in their favour, the appeal against which stood dismissed; though for default. The learned counsel then would submit that the specific tender, which was the cause of action for the earlier writ petition, was withdrawn by the State Government and in the present case, there is a fresh tender challenged. The petitioner, hence is entitled to maintain the challenge is the contention raised by the learned counsel.

5. In the context of the specific contention raised by the State against the decision at Annexure-6 and the reliance placed by the learned counsel for the petitioner on Annexure-6, we have to look at the reasoning in the aforesaid judgment. When the petitioner seeks for incorporating certain relaxations in the tenders issued by the State AYUSH Society, based on a decision of a learned Single Judge, necessarily this Division Bench would have to look at the sustainability of the reasoning in the decision relied on.

6. Identical contentions were raised by the petitioner herein before the learned Single Judge. The grounds raised in the writ petition, as noticed by the learned Single

Judge, was against the condition in the impugned NIT to have an annual turnover of Rs. 3 crores, the requirement of filing copies of the audited balance-sheet and profit and loss account and the prayer for relaxation in the cost of supply of tender papers, payment of earnest money, waiver of security deposit and prior experience, as also price preference of 15% over the quotation of large-scale units. The learned Single Judge noticed that the Ministry of Health and Family Welfare, Government of India, had launched the National AYUSH Mission, (for brevity, the NAM) to be implemented through States and Union Territories. This was intended at promoting alternative systems of medicine, for which the Central Government is also financially supporting the federating units in the proportion of 60:40. The operating guidelines of the NAM requires 50% of the grant-in-aid to be used for procuring medicines from the Indian Medicines Pharmaceuticals Corporation Ltd. (for brevity, IMPCL) or from public sector undertakings/pharmacies under the State Governments and Co-operatives which manufacture medicines in their own manufacturing units, subject only to the condition that they are compliant of *'good manufacturing practices'*. The remaining grant-in-aid could be used for procuring medicines as per the Essential Drug List (for brevity, EDL) of alternative medicinal systems published by AYUSH.

7. The learned Single Judge observed that the petitioner, claimed to be registered as a small unit under Section 8 of the Micro, Small, and Medium Enterprises Development Act, 2006, (for brevity, the MSMED Act of 2006), possessing a certificate of '*good manufacturing practice*'. The said averment is glaringly absent in the present writ petition, but we would take it as admitted insofar as the observation made by the learned Single Judge. The specific argument of the petitioner before the learned Single Judge was that the petitioner was entitled to an exemption of the turnover requirement provided for small scale units as envisaged under the MSMED Act of 2006 and the Public Procurement Policy, 2012. These relaxations were issued by the Development Commissioner under the Act of 2006 to the Secretaries of the Ministries and Departments of the Government of India under the Government stores purchase programme extending various facilities as sought for by the petitioner, reckoning the meagre financial resources of the SSI units, and to provide them with a level playing field. It was opined that the turnover of units is immaterial since the concern of the buyer is more on the quality and price of the product, and hence the threshold turnover limit

of crores of rupees would result in discrimination.

8. The policy document of 10.03.2016 issued by the Ministry of MSME and the relaxations therein were noticed. The counter affidavit of the State asserted that the policy document dated 10.03.2016 was not at all binding upon the State Government. The Circular issued by the Government of Bihar vide letter no. 675(1) dated 09.09.2013 of the related Store Purchase Policy 2002 issued by the Department of Industries, Government of Bihar, for providing concessions to the industries located in the State of Bihar in the purchase of stores by all Government Departments was emphasized by the Government Advocate. An interim order dated 13.01.2020 held that despite the policy framed by the State of Bihar, it is difficult to countenance a position that when 75% (60% as of now) of the finances were by the Central Government, as grants-in-aid to the State AYUSH society, the Circular of the Central Government would not be binding.

9. The Principal Secretary, Health, was asked to appear before the Court and explain the policy and the dichotomy insofar as refusing to follow a policy implemented by the Central Government, who financially supports the units of the State making such purchases. Looking at the Store

Purchase Preference Policy of 2022 issued by the State Government and the resolution of the Health Department, the Government of Bihar indicated that preference is given to small scale units and units run on a Co-operative basis, which in the policy document of the State is restricted to those industries located within the State and those units located outside the State, but registered with the Commercial Taxes Department, Bihar. The learned Single Judge from the aforesaid two documents found that there is no restriction with respect to according the same privilege of relaxation of certain rules regarding turnover and experience criteria to small units which are not located in the State of Bihar, especially for AYUSH medicines. The purpose of such relaxation was found to be, to nurture the small-scale units and Co-operative societies. It was held that there was no specific rule or regulation with respect to AYUSH medicines in which context, also reckoning the financial contribution of the Central Government, the relaxations applicable under the National AYUSH Mission should be imperatively offered by the State Government/health department.

10. With due respect, we are unable to agree with the said proposition since policy formulation has always been

held to be the exclusive domain of the executive Government and the Courts would not interfere unless there is clear arbitrariness shown. In fact, we do not see any relaxation, in the NIT subject matter of this writ petition, for an industry, a small-scale unit, or a Co-operative society carrying on its activities within the State of Bihar or registered under the State taxes department. The contention of the petitioner is also against not providing relaxations as put forth in the policy guidelines of the Central Government. We have to emphasize that there is no relaxation granted to any entity insofar as we discern from Annexure-1, NIT.

11. The reliance placed, to claim relaxation, is on Annexure 3, which produced a Circular dated 10.03.2016, clause 4 of which is extracted hereinunder :-

> *(4) In exercise of Para 16 of Public Procurement Policy for Micro and Small Enterprises Order 2012, it is clarified that all Central Ministries/Departments/Central Public Sector Undertakings may relax condition of prior turnover and prior experience with respect to Micro and Small Enterprises in all public procurements subject to meeting of quality and technical specifications.*

12. The said policy document applies only to Central Ministries/Departments/Central Public Sector

Undertakings.

13. We are of the opinion that such a policy introduced by the Central Government for procurement of medicines by entities under its direct control cannot regulate the State policy, in the federal system of governance as existing in this Country. True, the Central Government is the major financier insofar as the institutions promoting alternate systems of medicine all over the country. The Central Government definitely could insist upon a condition of such relaxations for the purpose of providing financial aid, on failure of which the aid could also be withdrawn. The Central Government had not thought it fit to provide any such condition for providing financial aid, and in that circumstances, the State and its institutions cannot be insisted upon to follow the policy guidelines issued by the Ministry of the Government of India, applicable only to the institutions under the Government of India. Even if there existed such a condition, then, if the State does not comply with it, necessarily there could be withdrawal of aid, but not an interference by the Courts of law to the policy of the State. We are unable to place any reliance on the

judgment at Annexure-6 and we declare the same to be not good law.

14. Now we come to the contention raised in the writ petition that the decision of the Hon'ble Supreme Court in **M/s. IMPCL** (supra) would aid the contentions raised in the writ petition. The aforesaid decision was in the wake of the State of Uttar Pradesh following the operating guidelines of the NAM, specifically paragraph no. 4(vi)(b), for procuring ayurvedic drugs solely from IMPCL without inviting tenders. The Hon'ble Supreme Court, after discussing the contours of judicial review of government contracts and the requirement for transparency in a tender process issued by a public authority, found the action of the State in procuring medicine only from IMPCL, to the exclusion of other establishments mentioned in paragraph no. 4(vi)(c), to be arbitrary and violative of Article 14 of the Constitution. Paragraph no. 4(vi)(b) of the operating guidelines provided at least 50% of the grand-in-aid to be spent for procuring medicines from **M/s. IMPCL**, a (Central Public Sector Undertaking) or from Public Sector Undertakings, pharmacies under the State Government and Co-operative

manufacturing units, if they have *'good manufacturing practices'* compliance. The binding declaration of the judgment was insofar as requiring the State Governments to invite tenders from the entities mentioned in Paragraph 4(vi)(c), which was stated to be the most transparent and non-arbitrary method of allocation that can be undertaken. It was stipulated that ayurvedic medicines also should be purchased only through a free and transparent procedure such as tenders.

15. We cannot but notice that the decision of the Hon'ble Supreme Court also noticed a Notification of the Ministry of AYUSH dated 02.01.2019 which superseded the Notification dated 07.12.2016. It was noticed that while stipulating that the procurement of medicines is the prerogative of the State Government, the Notification stated that the following guidelines have to be observed:

> *1. Essential drugs have to be procured from the Essential Drugs List (EDL) published by the Ministry of AYUSH.*
>
> *2. At least 50% of the grant-in-aid has to be used to procure medicines from IMPCL or other Central/State PSUs or pharmacies under the State Government and Co-operatives.*

> *3. The remaining grant-in-aid may be used for procuring the medicines from other units that have valid manufacturing licenses; and*
>
> *4. The medicines have to be manufactured in their own manufacturing units and must be Good Manufacturing Practices (GMP) compliant.*

16. The letter of the Union Ministry mandating procurement only from IMPCL stood superseded. Paragraph 4(iv)(b) treats all units mentioned therein on an equal footing and neither creates any gradation amongst such manufacturing units nor creates a monopoly on one or other of such units was the finding of the Hon'ble Supreme Court.

17. We cannot but notice that in **M/s. IMPCL** (supra), applications were filed for intervention by the federation of the AYSUH drug manufacturers, whose members are registered under the MSMED Act of 2016 and are engaged in the manufacture and sale of ayurvedic drugs. One of the arguments of the intervenors was based on public procurement policy as produced at Annexure-3 of the year 2012. It was noticed that the intervention applications seek to enlarge the scope of the Special Leave Petition and seeks stipulation of a minimum percentage of ayurvedic drugs to be procured from

the MSMEs, which was stated to be beyond the scope of the Special Leave Petition. Hence, the specific contention taken up by the MSMEs in the cited decision of the Hon'ble Supreme Court was not entertained by the Hon'ble Court.

18. The learned counsel for the petitioner then referred to Annexure-9, a letter issued by the State AYUSH Society, and the reply of the Advocate of the State AYUSH Mission, both of which speak of compliance with Annexure-6 judgment and the decision of the Hon'ble Supreme Court in **M/s. IMPCL** (supra), according to the learned counsel for the petitioner.

19. We have to immediately notice that Annexure-9 specifically speaks of an appeal having been filed from Annexure-6 judgment. Insofar as compliance of **M/s. IMPCL** (supra), we already noticed the binding declaration as per the operational guidelines and the now extant notification, which concedes the prerogative of the State Governments in procurement of medicines. The MSMED notification relied on by the petitioner, is applicable only to the entities under the Central Government. Further, the petitioner, who asserts

incorporation of benefits to MSMEs in the NIT, have not established its *locus standi* to raise such a claim before this Court, by producing proof of registration under the MSMED Act. It has also not produced the GMP compliance certificate before this Court.

20. There is absolutely no valid ground for entertaining the writ petition and hence, we dismiss the same.

(K. Vinod Chandran, CJ)

(Harish Kumar, J)

aditya/-

AFR/NAFR	
CAV DATE	
Uploading Date	27.02.2024.
Transmission Date	