



W.P.(MD)No.649 of 2021

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 26.06.2024

DELIVERED ON : 18.07.2024

CORAM

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

W.P.(MD)No.649 of 2021

and

W.M.P.(MD)No.542 of 2021

M/s AB Pharma Distributors,
No.211C/84, Chinnasami Pillai Street,
Bethaniyapuram, Madurai-625016,
represented by its Proprietor,
A.Selvapandian.

... Petitioner

Vs.

1.The Director,
Director of Medical & Rural Health
Services (ESI),
DMS Campus,
Teynampet,
Chennai-600 006.

2.The Regional Administrative
Medical Officer(ESI),
Central Medical Stores,
Vinayaga Nagar,
Madurai-625 020.

... Respondents



W.P.(MD)No.649 of 2021

PRAYER : Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus to call for the records relating to the impugned order passed by the first respondent in K.Dis.No.18861/ESI/A1/1/2019, dated 17.09.2020 and to quash the same and direct the first respondent to return the deducted amount of Rs.9,65,005/- to the petitioner within the stipulated time fixed by this Court.

For Petitioner : Mr.S.A.S.Alaudeen

For Respondents : Mr.M.Prakash
Additional Government Pleader

ORDER

The Writ Petition is directed against the order dated 17.09.2020 passed by the first respondent and for direction to the first respondent to return the deducted amount of Rs.9,65,005/- to the petitioner within the stipulated time fixed by this Court.

2. The case of the petitioner is that the petitioner firm is one of the distributors of M/s Mann Pharmaceuticals Limited, Ahmedabad, that the said M/s Mann Pharmaceuticals Limited firm participated and succeeded as L1 in the tender of ESI Corporation Running Rate Contract No.140 for the supply of drugs namely Zidovudine Tab/Cap (Zidovudine 300mg)



W.P.(MD)No.649 of 2021

to the second respondent Institution by an order of the first respondent dated 19.09.2017, that the said M/s Mann Pharmaceuticals Limited submitted a representation dated 04.10.2017 to the first respondent to authorise the petitioner's firm for supply of drugs to the Institution under the control of the first respondent, that the said representation was accepted by the first respondent and issued an order dated 13.10.2017 appointing the petitioner's firm as the distributor for M/s Mann Pharmaceuticals Limited, that the said M/s Mann Pharmaceuticals Limited supplied Zidovudine drug 15,000 quantity for the value of Rs.10,60,605/- to the second respondent in two supply dates, that the first respondent has credited the payment in the petitioner's bank account for the said supply of drugs, that the second respondent without utilising the supply of Zidovudine drugs for more than a year, issued a letter to the petitioner's firm as well as the manufacturer firm dated 04.03.2019, stating that the available quantity of Zidovudine drugs were kept in Central Medical Stores, Madurai having expiry date within the period of six months (09/2019 & 11/2019) and requested for receiving the unutilized drugs and replace the stock kept in Central Medical Stores at once, that the petitioner's firm immediately forwarded the said letter to



W.P.(MD)No.649 of 2021

the M/s Mann Pharmaceuticals Limited, through email and requested them to replace the said drugs, that the second respondent has also issued another letter dated 21.10.2019 reiterating their earlier request for replacing of the drugs and the same was also forwarded to the said firm and on receipt of the same, M/s Mann Pharmaceuticals Limited submitted a letter to the second respondent requesting them to provide time for the replacement of Zidovudine drugs for the reasons that they did not receive the raw materials due to Corona virus in China and the said letter was forwarded by the petitioner's firm to the second respondent by email dated 12.03.2020 and that M/s Mann Pharmaceuticals Limited submitted a letter dated 02.07.2020 to the respondents by giving an undertaking to replace the Zidovudine drugs and also seeking to provide time for the replacement.

3. It is the further case of the petitioner that in the meanwhile the petitioner's firm also obtained distributor order for Running Rate Contract Ayur-7 and supplied Ayurvedic drugs for the value of Rs.10,88,115/- to the ESI Hospital, Thathaneri, Madurai, which is under the control of the first respondent, that the petitioner's firm has then



W.P.(MD)No.649 of 2021

submitted a representation to the first respondent on 18.09.2020 seeking payment, but to the petitioner's shock and surprise, the first respondent has passed the impugned order by ante dated 17.09.2020 deducting the amount of Rs.9,65,009/- for the cost of expired Zidovudine 300mg drugs from the payment of Running Rate Contract Ayur-7, that the deduction of Rs.9,65,009/- from the payment of another Running Rate Contract without giving any notice to the petitioner's firm is illegal, arbitrary and against law, that the petitioner's firm has submitted a representation requesting them to return the amount, but no order has been passed and that therefore, the petitioner was constrained to file the present Writ Petition.

4. The respondents have filed counter affidavit stating that due to non consumption of Tablet Zidovudine used for Anti-Retroviral Infection (HIV/AIDS) treatment only as there are no such patients available in their region and the medicine could not be utilized, that the first respondent has taken necessary action to replace the nearing expiry medicines including Zidovudine 300mg before four months from the date of expiry informing that if the medicine is not replaced on time, the



W.P.(MD)No.649 of 2021

amount may be deducted in the next bill of the firm, that the second respondent has also taken necessary steps to exchange the medicine, vide letter dated 01.10.2018, 15.04.2019 and 10.10.2019, since there is no demand for the tablet Zidovudine 300mg in other ESI Dispensaries, that the second respondent has requested the petitioner to replace the above medicines before expiry and both the manufacturer and the petitioner had sent their undertaking letter for replacing the unconsumed stock of several medicines including the tablet Zidovudine, but the same was not replaced by the petitioner firm as agreed upto to 10.10.2019, that the second respondent has then issued a letter dated 10.10.2019, requesting the first respondent to recover the cost of unutilized/expired tablet Zidovudine 300mg for 14760 stripes at Rs.9,65,009/- and based on the above, a recovery of Rs.9,65,009/- has been made in Ayurvedic medicine bill of the petitioner amounting to Rs.10,88,115/- as there was no outstanding bill to the petitioner, that the recovery was made as per the procedure in vogue so as to avoid the loss of Government money in this regard and that therefore, the action of the respondents 1 and 2 is in order.



W.P.(MD)No.649 of 2021

5. It is not in dispute that M/s Mann Pharmaceuticals Limited was given orders to supply Zidovudine 300mg tablets/capsules to the second respondent centres and authorised the petitioner firm as the distributor of M/s Mann Pharmaceuticals Limited. It is also not in dispute that the said M/s Mann Pharmaceuticals Limited has supplied 15,000/- Zidovudine tablets / capsules in two supply dates for the value of Rs.10,60,605/- and that the said amount was paid to the petitioner firm. It is also not in dispute that the petitioner firm was also authorised to supply Ayur-7 and that the petitioner firm has supplied Ayur-7 Ayurvedic drugs to the value of Rs.10,88,115/-. When the petitioner has sent a representation dated 18.09.2020 demanding payment of Rs.10,88,115/- for the supply of Ayurvedic drugs, the first respondent has passed the impugned order dated 17.09.2020 deducting the amount of Rs.9,65,009/- towards the costs of expired Zidovudine 300mg drugs from the payment of Running Rate Contract Ayur-7. Aggrieved by the impugned order, the petitioner firm has preferred the present petition.

6. The only contention of the respondents is that when the first respondent had taken necessary action to replace the nearing expiry



W.P.(MD)No.649 of 2021

medicines including the tablet Zidovudine 300mg before four months from the date of expiry vide letter dated 05.09.2019 by informing that if the medicine is not replaced on time, the amount may be deducted in the next bill of the firm and that since the petitioner firm has not replaced the expired medicines, despite reminders, they have rightly deducted the amount.

7. The learned Counsel for the petitioner would submit that as per the contract between the parties, the petitioner distributor as well as the manufacturing company have given undertaking to replace the drugs which are found to be not of standard quality, but not for expired drugs. The learned Counsel for the petitioner has produced the instructions issued by the Director General of ESI Corporation, New Delhi to all the Directors of ESI schemes of all states and all Medical Superintendent of ESIC Model Hospitals, wherein, as rightly pointed out by the learned Counsel for the petitioner, there are no terms and conditions for replacing the expired drugs by the new drugs and in the instructions under the head of Testing of Drugs – Quality Control, paragraph Nos.d, e and f in S.No.19 are extracted hereunder:



W.P.(MD)No.649 of 2021

WEB COPY

“(d) If any store/stores supplied against this Rate Contract are found to be not of standard quality on test analysis from approved laboratory and / or on inspection by competent authority, the contractor will be liable to replace the entire quantity or make full payment of entire consignment against the particular invoice irrespective of fact that part or whole of the supplied stores may have been consumed;

(e) If the product is found to be not of standard quality, the cost of testing will be recovered from the supplier.

(f) If the firm fails to replace the batch declared to be not of standard quality or fails to make payment in lieu of that, the firm is liable to be debarred for two years in respect of the one or more or all items in the Rate Contract of the Corporation.”

8. Regarding delivery period, S.No.21 deals with risk purchase, wherein it has been stated that delivery period will be six weeks and if the successful tenderer fails to execute the supply order within the stipulated period penalty of two percent of the value of the order calculated at the contract rate per week or a part of a week will be levied



W.P.(MD)No.649 of 2021

and the maximum penalty for late supply shall not exceed 10% of the total value of the orders.

9. In the approved tenderers list attached to the said instructions, M/s Mann Pharmaceuticals Limited is shown in Sl.No.48. In the case on hand, it is not the case of the respondents that the drugs supplied ie., Zidovudine 300mg tables are not of standard quality. The respondents have also not shown any terms and conditions in the contract mulcting liability on the manufacturer / distributor to take back the expired drugs and replace the same with the new drugs.

10. No doubt, as rightly pointed out by the learned Additional Government Pleader appearing for the respondents, in the subsequent correspondence between them, the petitioner has agreed to replace the expired goods. Even in the affidavit filed in support of the writ petition, the petitioner has specifically stated that they have immediately forwarded the letter of the second respondent to the manufacturer firm requesting them to replace the Zidovudine drug kept in the second respondent's Central Medical Stores, that M/s Mann Pharmaceuticals



W.P.(MD)No.649 of 2021

Limited has also sent a letter requesting the second respondent to provide time for the replacement of Zidovudine drugs for the reasons that they did not receive the raw materials due to Corona issue in China.

11. The learned Counsel for the petitioner would submit that though the same was not in contract, since the respondents have insisted to replace the expired goods, they have given undertaking to replace the expired goods, but at no point of time, they have agreed to pay for the expired goods.

12. As rightly pointed out by the learned Counsel for the petitioner, the first respondent in the counter affidavit has specifically stated that due to non-consumption of Zidovudine tablets which is used for Anti-Retroviral infection (HIV/AIDS) treatment only, as there are no such patients available in their region and the medicine could not be utilised and that further actions were also taken to transfer the unused medicines to the needy institutions, but the medicine was not required by any of the ESI Institutions.



W.P.(MD)No.649 of 2021

13. Considering the above, as rightly contended by the learned Counsel for the petitioner, this Court is also at loss to understand, when there was no demand for the said medicine, why such huge quantity was purchased from the petitioner firm. As already pointed out, they have purchased 15,000 tablets in two instalments.

14. When the above matter was taken up earlier by the then Portfolio Judge on 14.09.2023, considering the submissions made on either side and also the stand of the petitioner and the manufacturing Company's acceptance for replacement, directed the respondents to consider the petitioner's case for replacement and pass orders and place the same before the Court and directed to submit a report on or before 29.09.2023. But admittedly, the respondents have not filed any report. As already pointed out by the learned Counsel for the petitioner, it is not the case of the respondents that the petitioner or the manufacturer has agreed to return the amount for the expired goods. But on the other hand, they have only agreed for replacing the expired drugs.



W.P.(MD)No.649 of 2021

WEB COPY

15. It is pertinent to note that the petitioner was authorised as distributor for five manufacturing companies for the supply of Ayur-7 Ayurvedic drugs as evident from the communication sent by the first respondent to all the concerned firms. But as already pointed out, the petitioner has supplied Zidovudine medicine as distributor of M/s Mann Pharmaceuticals Limited and the said company has no connection whatsoever with the manufacturers of Ayur-7 Ayurvedic drugs. But the first respondent has deducted the amount of Rs.9,65,005/- for the cost of expired Zidovudine 300mg drugs from the payment of Ayur-7 Ayurvedic drugs.

16. Even according to the petitioner, after deducting the amount of Rs.9,65,005/-, the respondents have not even paid the balance amount of Rs.1,02,396/-. The respondents have not offered any reason or explanation for non-payment of the balance amount till now.



W.P.(MD)No.649 of 2021

17. Considering the above facts and circumstances, this court is of the view that the impugned order deducting the amount for expired drugs in the petitioner's bill for Ayurvedic drugs cannot be sustained and the respondents are liable to pay the entire bill amount of Rs.10,88,115/- along with interest at the rate of 6% p.a., from the date of impugned order till the date of payment, but at the same time, the petitioner is also to be directed to replace the Zidovudine expired drugs as agreed by them within a stipulated time as fixed by this Court, if the licence is in force.

17. In the result, the Writ Petition is allowed and the impugned order passed by the first respondent in K.Dis.No.18861/ESI/A1/1/2019, dated 17.09.2020 is hereby quashed. The respondents are directed to make payment of the bill amount of Rs.10,88,115/- for the purchase of Ayur-7 Ayurvedic drugs along with interest at the rate of 6% p.a., from 17.09.2020 till the date of payment within a period of two months from the date of receipt of a copy of this order, failing which, they are liable to pay interest at the rate of 12% p.a. The petitioner is directed to replace the expired drugs within a period of two months from the date of receipt of a copy of this order and in case, if he is not having any licence, the



W.P.(MD)No.649 of 2021

respondents are at liberty to take appropriate proceedings in the manner known to law. Consequently, the connected Miscellaneous Petition is closed. There shall be no order as to costs.

18.07.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
SSL

To

1.The Director,
Director of Medical & Rural Health
Services (ESI),
DMS Campus,
Teynampet,
Chennai-600 006.

2.The Regional Administrative
Medical Officer(ESI),
Central Medical Stores,
Vinayaga Nagar,
Madurai-625 020.



WEB COPY



W.P.(MD)No.649 of 2021

K.MURALI SHANKAR,J.

SSL

PRE-DELIVERY ORDER MADE IN

**W.P.(MD)No.649 of 2021
and
W.M.P.(MD)No.542 of 2021**

18.07.2024