

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.04.2010

CORAM :

THE HONOURABLE MR. JUSTICE K.N.BASHA

Writ Petition No.4858 of 2010
& M.P.No.1 of 2010

Indian Immunologicals Limited,
(A wholly owned subsidiary of the
National Dairy Development Board)
constituted under Central Act 1987
Door No.44 Jubilee Hills Road,
Hyderabad 500 053
represented by the authorized signatory
C.B.Saravana, Regional Incharge, Marketing ... Petitioner

Vs.

1. Tamil Nadu Medical Services Corporation Limited,
417, Second Floor, Pantheon Road,
Chennai - 600 008 represented by its
General Manager
2. The Managing Director (Tender Inviting Authority),
Tamil Nadu Medical Services Corporation Limited,
417, Second Floor, Pantheon Road,
Chennai - 600 008.
3. The Secretary to Government of Tamil Nadu,
Health Department (Chairman of Tamil Nadu,
Medical Service Corporation Limited),
Fort St. George,
Chennai - 600 009.
4. Bharat Biotech International Limited,
Genome Valley,
Shameerpet,
Hyderabad 500 078
represented by its Director
5. Chiron Bhring Waxing Private Limited,
No.501, Shree Amba Shanthi Chambers,
Andheri Korla Road, Andheri East,
Mumbai 400 059 represented by its Director .. Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution
of India praying for a writ of Certiorified Mandamus to call for

the records relating to the communication of the first respondent dated 25.02.2010 in reference No.001/M(P)/TNMSC/DRUG/2009 and quash the same and direct the first and the second respondents to consider the tender submitted by the petitioner with regard to the drug code number 579 Rabies Vaccine Human (cell culture) IP (Intra muscular) on merits.

For Petitioner : Mr.G.Rajagopalan,
Senior Counsel for
M/s.G.R. Associates

For RR- 1 to 3 : Mr.G.Sankaran,
Special Government Pleader

For Respondent -4 : Mr.V.T.Gopalan, Senior Counsel
for Mr.K.Ravindranath

For Respondent-5 : No Appearance

ORDER

By mutual consent, the main petition itself is taken up for final hearing.

2. The challenge in this petition is to the communication issued by the first respondent dated 25.02.2010 in reference No.001/M(P)/TNMSC/DRUG/2009 rejecting the tender of the petitioner for the supply of a drug known as Rabies Vaccine Human (cell culture) IP (Intra muscular).

3.0. The factual background of the case which are necessary for the disposal of this writ petition are as under :

3.1. The petitioner is wholly owned subsidiary of the National Dairy Development Board constituted under the Central Act, 1937 engaged in the manufacture of various kinds of vaccines including Rabies Vaccine Human (cell culture) IP (Intra muscular). The above said vaccine is manufactured by Human Biological Institute, a division of the petitioner.

3.2. The first respondent herein through its Managing Director invited tenders for the supply of drugs and medicines including the above said particular drug Rabies Vaccine Human (cell culture) IP (Intra muscular) as per the notice dated 23.12.2009. The said notice was published in the newspaper. According to the notice, the Licensed Drugs and Medicines Manufacturers having three years market standing and for the drugs Tetanus Toxoid and Anti Rabies Vaccine having atleast one year market standing and holding Good Manufacturing Practice Certificate and Non Conviction Certificates issued by the Drug Control authority can apply. The last date for submission of tender was 22.01.2010 at 11.00 a.m. and the tenders will be opened at 11.30 a.m. on the same day.

3.3. The tender documents contemplated two cover bids, viz., Cover A - Technical bid and Cover B - Price bid and the tender document contains the eligibility criteria and certain terms and conditions.

3.4. The petitioner is having valid license issued by the competent authority, viz., Director of Drug Control and Drug Controller General of India and Director General, Health Services, Ministry of Health and Family Welfare, Government of India and supplies Rabies Vaccine Human (cell culture) IP (Intra muscular) to various state Governments, accordingly, submitted its tender on 22.01.2010 for supply of three drugs, viz., Rabies Vaccine Human (cell culture) IP (Intra muscular) (Drug Code 579), Rabies Vaccine Human (cell culture) IP (intra dermal) (Drug Code 724) and Tetanus Toxoid (absorb) injection IP (Drug code 515). The fourth and fifth respondents are also the tenderers.

3.5. On opening the technical bid on 22.01.2010 and on preliminary scrutiny of the technical bid for the tender for the supply of drugs and medicines for the year 2010-2011, the first respondent stated through the communication dated 22.01.2010 that the details furnished by the petitioner company are found to be generally in order. However, the General Manager of the first respondent intimated to the petitioner as per the said communication that the bid of the petitioner would be subject to further scrutiny.

3.6. On 13.02.2010, the first respondent sent a communication to the petitioner stating that from the scrutinization of the bid documents certain discrepancies/deficiencies have been noticed as indicated in the annexure of the said communication and requested the petitioner to furnish further clarification and documents to the first respondent on or before 17.02.2010. It is made clear in that communication by the first respondent that if no clarification received in the said regard from the petitioner, further decision will be taken on the basis of the bid document on merits. The petitioner sent its clarifications through its communication dated 16.02.2010 with necessary details. After evaluation of the technical bid and the subsequent clarification furnished, the petitioner was shortlisted and called for price bid opening on 26.02.2010 through the communication of the first respondent dated 22.02.2010 to the petitioner.

3.7. Meanwhile, the third respondent said to have received an information through the fourth respondent to the effect that the petitioner had been defaulted in the supply of anti-rabies vaccine to the Kerala State Government in the first quarter of 2007-2008. The said information was verified and confirmed by the first respondent from the Kerala Medical Services Corporation Limited (hereinafter referred to as "KMSCL"), a Government of Kerala Undertaking. The KMSCL sent a letter dated 25.02.2010 stating that the petitioner have not effected supply of the product Anti rabies vaccine for the first quarter of 2007-2008 due to some reasons which were not clear to them.

3.8. On verification and confirmation, as stated above, the first respondent sent the communication dated 25.02.2010 to the petitioner through its General Manager stating that the petitioner is ineligible to participate in the tender for the drug Rabies Vaccine Human (Cell Culture) Inj. Intra Muscular as per clause 2(g) of the tender conditions which contemplates that if there is any default of supply of vaccine in respect of tenders floated by the Central or State Government or any Government undertaking during the past three years, then the tenderer is not eligible to participate in the tender for that particular product as the petitioner have 100% defaulted in the supply of the above said particular drug for the first quarter of 2007-2008 to the Kerala Government which comes within the period of three years prior to the tender. The said communication is under challenge in this petition by the petitioner.

3.9. The case of the petitioner is that they have never committed any default of supply of the particular medicine on their own and they have stopped the supply only due to the non-payment of the dues to them by the Kerala Government. The petitioner has also sent a representation dated 25.02.2010 to that effect. It was also informed in the same communication that the petitioner filed a writ petition in W.P.(C)No.33383 of 2005 before the High Court of Kerala and a learned Single Judge of the High Court of Kerala by order dated 19.09.2007 directed the Kerala Government to pay the dues in installments and against the said order, the petitioner preferred writ appeal and the Division Bench of Kerala High Court by judgment dated 19.03.2008 directed the Kerala Government to pay the dues in single installment.

3.10. It is the further case of the petitioner that before rejecting their tender, they could have been given opportunity to be heard and as such, the first respondent acted arbitrarily in disqualifying them to participate in the tender. It is the further case of the petitioner that by disqualifying the petitioner from participating in the above said tender, the petitioner has been blacklisted and as such, without affording opportunity the respondents 1 to 3 passed the impugned order in violation of principles of natural justice.

3.11. The petitioner had also given a further representation on 01.03.2010 and pointed out that the first respondent could save substantially to the extent of Rs.3.50 Crore if their bid is considered. However, the first respondent sent a communication to the petitioner dated 01.03.2010 and called for negotiations only with regard to Drug code 515 and 724 and did not reply with respect to drug code 579. In view of such circumstances, the petitioner has been constrained to approach this Court challenging the impugned communication dated 25.02.2010.

4.1. The respondents 1 and 2 denying the allegations of the petitioner stated that the disqualification of the petitioner in respect of the particular drug was mainly on the basis of the

attraction of clause 2(g) of the tender conditions. It is further stated that the respondents 1 and 2 have not acted on the information furnished by the fourth respondent, but they have disqualified the petitioner only on the basis of the verification and confirmation from the Kerala Government on receipt of letter from KMSCL dated 25.02.2010. It is also stated in the counter that the petitioner has not been blacklisted and the petitioner have been granted tender in respect of other two medicines. The respondents 1 and 2 further stated that the respondents have not shown any favouritism to the fourth respondent.

4.2. The fourth respondent has also filed a counter affidavit denying the allegations of the petitioner.

5.1. Mr.G.Rajagopalan, learned Senior Counsel for the petitioner, while assailing the impugned order, put forward the following contentions :

(i) In spite of the petitioner being qualified in the technical part under Cover A and in spite of the petitioner having been called for to attend the Cover B - price bid opening to be held on 26.02.2010, all of a sudden, the petitioner received the impugned letter dated 25.02.2010 from the first respondent signed by the General Manager stating that the petitioner company is ineligible to participate in the tender for the Rabies Vaccine Human (cell culture) IP (Intra muscular) as they came to understand that the petitioner firm have 100% defaulted in the supply of the said drug to the Government of Kerala for the year 2006-07 (first quarter of 2007-08) and as such, as per clause 2(g) of the tender condition, the petitioner is ineligible to participate in the tender.

(ii) In the impugned letter dated 25.02.2010 only the tender number has been mentioned in the reference and there is no mention about the basis on which the respondents 1 and 2 took such a decision and no notice was served on the petitioner and no opportunity was given to them to prove their stand that they have not committed any default in the supply of drugs.

(iii) The petitioner denied the allegation of default in supply of the said drugs to the Kerala Government on the same date of communication, i.e., on 25.02.2010 as per their letter stating that there was a contract between the petitioner and the Kerala Government for the year 2002-03 for the supply of drugs and the Kerala Government defaulted the payment and as a result, the petitioner filed a writ petition in the High Court of Kerala in W.P.(C)No.33833 of 2005 and a learned Single Judge of the High Court of Kerala by order dated 19.09.2007 directed the Kerala Government to pay the dues in installments and against the said order, the petitioner preferred writ appeal and the Division Bench of Kerala High Court by judgment dated 19.03.2008 directed the Kerala Government to pay the dues in single installment. Thereafter, the petitioner had also participated in the tender of the Kerala Government for the year 2006-07 and got the contract. Therefore, there was absolutely no default from the petitioner's side and the petitioner is the supplier to the Kerala Government and some other States even as on date and if the petitioner

committed any such default, the Kerala Government could not have given the contract to the petitioner. Another representation was also given by the petitioner on 01.03.2010 seeking the relief of revocation of the impugned letter dated 25.02.2010.

(iv) The tender ought not to have been rejected arbitrarily without issuing notice and without affording any opportunity to the petitioner to disprove that they are not the defaulters in the supply of the said drug.

(v) The disqualification of the petitioner from participating in the tender in respect of a particular drug, viz., Rabies Vaccine Human (cell culture) IP (Intra muscular) would amount to blacklisting the petitioner and as such, the petitioner could have been given an opportunity to explain its position and the impugned order was passed without affording such opportunity to the petitioner and as such, the said order is liable to be set aside on the ground of violation of principles of natural justice.

(vi) The performance certificate dated 27.03.2010 issued by the KMSCL, as produced before this Court by the petitioner, would go to show that the petitioner had supplied the product as per the terms and conditions of the tender for the period 2008-09 and 2009-10 and their performance was satisfactory during that period and without considering all these factors, the respondents 1 and 2 arbitrarily disqualified the petitioner.

(vii) The third respondent, on the representation of the fourth respondent, who is one of the contesting tenderer, to the effect that the petitioner defaulted in supply of Rabies Vaccine Human (cell culture) IP (Intra muscular) during the first quarter of 2007-08, asked the second respondent to disqualify the petitioner herein from participating in the above tender which is totally an illegal one and it goes to show that there is a clear private understanding between the third respondent and the fourth respondent. The direction given by the third respondent clearly shows that the respondents 1 and 2 have not acted on their own, but acted on the directions of the third respondent. The third respondent who is the Principal Secretary to the Government of Tamil Nadu, Health Department, is the Chairman of the TNMSC Limited and he is the appellate authority as per the Act and not tender inviting authority and such being the position, he could not have acted on the representation of the fourth respondent behind the back of the petitioner without affording any opportunity to the petitioner to explain their stand.

(viii) The petitioner, a non-profit organization, was awarded the tender in respect of other medicines as per the letters of the TNMSC Limited dated 23.03.2010, but the respondents 1 and 2 arbitrarily disqualified the petitioner from participating in the tender by rejecting the tender in respect of one vaccine, Rabies Vaccine Human (cell culture) IP (Intra muscular).

(ix) This Court on 10.03.2010 granted interim stay of the impugned order dated 25.02.2010 and the respondents 1 and 2 having not finalized the tender in respect of the particular vaccine, viz., Rabies Vaccine Human (cell culture) IP (Intra muscular), placed orders to the fourth respondent for the supply of 3 lakhs vials of the said vaccine on 31.03.2010 based on old rates which is 40% of the tender quantity. The State Government is already in

possession of enough quantity of vaccine, but they have placed orders, as stated above, and thereby given a go-by to the tender procedure and the object of the tender procedure has been defeated. There is no mention about this order in the counter of the Government and this fact has been suppressed.

(x) The tender inviting authority is the Managing Director of TNMSC Limited/the second respondent herein, but the impugned communication dated 25.02.2010 disqualifying the petitioner for the supply of Rabies Vaccine Human (cell culture) IP (Intra muscular) was signed by the General Manager.

5.2. In support of his contentions, learned Senior Counsel for the petitioner would place reliance on the following decisions :

- (1) E. E. & C. Limited V. State of W.B. reported in AIR 1975 SC 266 ;
- (2) Sterling Computers Limited V. M & N Publications Limited reported in (1993) 1 SCC 445 ; and
- (3) Gulati, V.P. V. The Union of India reported in 1987 WLR 214;

6.1. Mr.G.Sankaran, learned Special Government Pleader, would contend that the respondents 1 to 3 have not merely acted on the representation of the fourth respondent, but the respondent called upon the reports and records from the Kerala Government and after receiving the communication along with some documents from the KMSCL dated 25.02.2010, having satisfied and confirmed the default in supply of the particular drug, Rabies Vaccine Human (cell culture) IP (Intra muscular), to the Kerala Government by the petitioner, sent the impugned order dated 25.02.2010 to the petitioner even before the opening of the Cover B - Price bid disqualifying the petitioner from participating in the tender in respect of the item Rabies Vaccine Human (cell culture) IP (Intra muscular) and as such, the petitioner has not been disqualified straight-away.

6.2. It is submitted by the learned Special Government Pleader that the tender floating/inviting authority is not an quasi-judicial authority to conduct a roving enquiry on the basis of any representation or objection, but on the basis of the representation and on the basis of the confirmation letter and documents received from the KMSCL, the first respondent disqualified the petitioner in respect of one particular vaccine, viz., Rabies Vaccine Human (cell culture) IP (Intra muscular) as per tender condition 2(g) as the default of supply to Kerala Government comes well within the period of three years prior to the tender. The learned Special Government Pleader would further contend that the said rejection or disqualification of the petitioner to participate in the tender only in respect of the particular vaccine would not amount to blacklisting the petitioner by the respondents and the said order is emanated on the basis of the tender condition, i.e., it has flown out of the tender condition or in compliance of the tender condition and as such, the question of giving any opportunity to the petitioner does not arise.

6.3. The learned Special Government Pleader by placing reliance on Sections 8, 10, 11, 25 and 28 of the Act contended that only after passing an order under Section 10 of the Act relating to evaluation and acceptance of tender, the petitioner can approach the appellate authority under Section 11 of the Act. The petitioner cannot approach the appellate authority or the Court at every stage of the tender. The tenderer has no right to approach this Court in the midst of the tender process which is a time bound process and more particularly when the tender is relating to the life saving drugs. It is contended that if the petitioner or other like minded persons are permitted to disturb the tender process in the middle, the entire process would be collapsed and before completing the process contemplated under Section 10 of the Act, no right accrued to anyone much less any tenderer to question the process and as already stated, after crossing the stage of Section 10 the remedy is available under Section 11 of the Act for preferring the appeal. Therefore, it is contended that the very writ petition itself is not maintainable. It is further contended that even assuming that the petitioner is L-1, it is for the tender inviting/floating authority to decide to whom orders can be placed for effective supply of the product, apart from L-1 criteria.

6.4. It is submitted that the contention of the petitioner to the effect that the respondents 1 and 2 have placed orders to the fourth respondent on 31.03.2010 for the supply of 3,00,000 vials of Rabies Vaccine which is 40% of the tender quantity and the same ought not to have been done is not factually correct as the respondents have floated tender for 11,00,000 vials for the year 2009-2010, out of which, orders have been placed only for 7,57,000 during the said period and as such, the said order for the supply of 3,00,000 vials has been placed on 31.03.2010 and the same is well within the tender quantity. It is contended that the respondents are eligible to purchase drugs from registered contractors over and above the prescribed limit as the Act itself provided that the tender inviting authority can go ahead even 25 % over and above the tender quantity.

6.5. Lastly it is submitted that nothing wrong in sending the impugned communication to the petitioner by the General Manager, who is authorized by the second respondent.

6.6. The learned Special Government Pleader would place reliance on the following decisions in support of his contentions :

- (1) ION EXCHANGE WATERLEAU Limited V. The Commissioner, Madurai Municipal Corporation reported in 2008 [3] CTC 675 ;
- (2) Pitchammal V. The Collector, Kanyakumari District reported in 2000 [III] CTC 636 ;
- (3) Tata Cellaluer V. Union of India reported in (1994) 6 SCC 651 ; and
- (4) Union of India V. Tulsiram Patel reported in 1985 (3) SCC 398 ;

7.1. Mr.V.T.Gopalan, learned Senior Counsel for the fourth respondent, submitted that there is a distinction between the exercise of statutory power and the exercise of contractual power ; Statutory power is governed by the statutory prescriptions within the four corners of the Statute and as far as contractual power is concerned, it flows from the terms and conditions of the tender notification and if any person participating in the tender and submitted tender, it would amount to the acceptance of the terms and conditions stipulated therein.

7.2. The learned Senior Counsel would contend that in the course of time, law has developed and not giving the opportunity of hearing per se is not a ground to quash the orders of the authorities and the aggrieved party must prove that how he was prejudiced by such act or otherwise, the court shall refrain from interfering with an order as per "useless formality theory".

7.3. It is contended that the tender itself specifically provided a condition in clause 2(g) of the conditions that if a particular tenderer has defaulted in the supply of vaccines in any of the tenders floated by Central/State Governments or Government institutions during the past 3 years, then he would stand disqualified. As the petitioner was a defaulter to the Kerala Government, the said clause was invoked. While invoking the said clause, the authority can take into account any material that they have come across and they cannot be fettered with by any procedural formalities and anybody can submit a representation to the Government, viz., the Principal Secretary to the Government and the Government has to dispose of such representation. Here once the fourth respondent indicated the order of the Kerala Government to the third respondent, in which, it has been shown that the petitioner is a chronic defaulter in the supply of very vaccine, for which, they offered their bids, the third respondent/Principal Secretary directed the respondents 1 and 2 to verify the same and the respondents 1 & 2 verified the same with the Kerala Government and thereafter, the decision of disqualification was taken. The disqualification of the petitioner herein is not the command of the Principal Secretary, but the command of the tender condition and that too it has been done before opening of price bid. As the petitioner was disqualified from the proceedings earlier, after opening of price bid the fourth respondent stood as L1 and the tender has been decided and formal execution of awarding contract has not done.

7.4. It is further contended that the performance certificate issued by the KMSCL goes to show that the performance of the petitioner for the period 2008-09 and 2009-10 was only satisfactory and not good. In the said certificate, there is no mention about 2007-2008 which is also the relevant period as per tender condition under clause 2(g).

7.5. It is contended that the claim of the petitioner that the default in supply of vaccine is due to non-payment of dues by the

Kerala Government is not acceptable as the non-payment of dues to the petitioner is pertaining to the year 2002-2003 and the petitioner, who is the successful bidder in the tender of the Kerala Government for the year 2006-2007, has not supplied the life saving drugs for the year 2006-2007 (first quarter of 2007-2008), which comes within the condition stipulated by the first respondent in the present tender under clause 2(g). The petitioner firm, which is claimed to be the non-profit Government of India undertaking, cannot take a stand that due to the non-payment of the dues by the Kerala Government, they have defaulted in supply of life-saving drugs and on that ground escape from their responsibility. It is also brought to the notice of this Court that even the petitioner firm earned a profit of nearly Rs.83.77 Crores.

7.6. It is further contended that from the affidavit of the petitioner and the documents produced before this Court, it cannot be stated that the authorities committed any fault in disqualifying the petitioner as the action of the authorities is supported by the documents and to get over from their responsibility, the petitioner took a stand that the action of the authorities amounts to blacklisting, whereas, the authorities only rejected the tender of the petitioner in respect of a particular vaccine which is very much evident from the fact that the petitioner was awarded the tender in respect of some other medicines.

7.7. The learned Senior Counsel for the fourth respondent would place reliance on the communication of the Government of West Bengal, furnished to them on their application submitted under the Right to Information Act and in the said communication, for their query, it is clearly stated that penal action for non supply of drugs would be taken against the petitioner herein in due course as per terms and conditions. From this it is clear that the petitioner had defaulted in supply of Inj. A.R.C. to the Government of West Bengal for the period of 2008-2009.

7.8. Lastly it is submitted by the learned Senior Counsel for the fourth respondent that as there is a requirement for the vaccine, the fourth respondent was awarded with the supply of 3,00,000 vials on 31.03.2010 as per the old rates.

7.9. The learned Senior Counsel for the fourth respondent would place reliance on the following decisions in support of his contentions :

- (1) National Thermal Power Corporation Limited V. Mahesh Duatta reported in 2009 (8) SCC 339 ;
- (2) Divisional Manager, Plantation Division, Andaman & Nicobar Islands V. Munnu Barrick reported in 2005 (2) SCC 237 ;
- (3) Raghunath Thakur V. State of Bihar reported in 1989 (1) SCC 229 ;
- (4) Union of India V. Chajju Ram reported in 2003 (5) SCC 568 ;
- (5) Islamic Academy of Education V. State of Karnataka

reported in 2003 (6) SCC 697 ;
(6) Dr.M.Vennila V. Tamil Nadu Public Service Commission
reported in 2006 (3) CTC 449 ;
(7) Raunaq International Limited V. I.V.R.Construction
Limited reported in (1999) 1 SCC 492 ; and
(8) Air India Limited V. Cochin International Airport
Limited reported in (2000) 2 SCC 617

8. This Court carefully considered the rival contentions put forward by either side and scanned through the entire materials placed by both sides and also perused the counters, reply affidavit to the counters, rejoinder to the reply affidavit, the impugned order and the decisions relied on by both sides.

9. The crux of the question involved in this matter is two fold, viz.,

(i) Whether the first respondent is liable to serve any notice to the petitioner and whether the petitioner is entitled to be heard before the disqualification of the petitioner company as ineligible to participate in the tender in view of attraction of clause 2(g) of the tender conditions ; and

(ii) Whether the disqualification of the petitioner company as ineligible to participate in the tender in respect of the drug Rabies Vaccine Human (cell culture) IP (Intra muscular) would amount to blacklisting of the petitioner ;

10. Let me now consider the first question in respect of serving notice to the petitioner or giving opportunity to the petitioner to be heard before disqualifying the petitioner as ineligible to participate in the tender for a particular drug invoking clause 2(g) of the tender condition.

11. It is pertinent to note that the tender documents pursuant to the notice dated 23.12.2009 for the supply of drugs and medicines to the first respondent/TNMSC Limited for the year 2010-2011 stipulates certain terms and conditions. The eligibility criteria was stipulated as per clause 2 and clause 2(g) of the said terms and conditions of the tender reads hereunder :

"2(g) Similarly if there is any default of supply of vaccines in any of the tenders floated by Central/State Government or Government Institutions (ESI, Railways etc.) during the past three years, then that tenderer is not eligible to participate in the tender for that product."

It is seen that only in view of attraction of the disqualification clause 2(g) of the tender conditions, the petitioner was disqualified and held to be ineligible as the petitioner have 100% defaulted in the supply of Rabies Vaccine Human (cell culture) IP (Intra muscular) to the Government of Kerala for the year 2006-07, i.e., first quarter of 2007-2008. Therefore, it is very clear that the tender itself contains certain specific terms and conditions, and once, the petitioner or any other company or firm is willing to participate in the tender and submitted tender, the same would amount to their acceptance of the terms and conditions stipulated

therein. It is needless to state that the petitioner is well-aware about the said terms and conditions of the tender and in the event of non-compliance of any one of the terms and conditions, the tender submitted by the petitioner is liable to be rejected.

12. It is to be borne in mind by this Court that the tender is in respect of life-saving drug and as such, the larger public interest is involved and therefore, the respondents 1 to 3 are entitled to take all precautions for ensuring prompt supply of the medicines. It is well-settled that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Once the tenderer is found to be ineligible in view of clause 2(g) of the tender condition, as stated above, the first respondent is entitled to reject the tender submitted by the petitioner. The respondents 1 to 3, on information and confirmation from the KMSCL have concluded that the petitioner has committed default in the supply of a particular drug Rabies Vaccine Human (cell culture) IP (Intra muscular) to the Government of Kerala for the year 2006-07, i.e., first quarter of 2007-2008 which comes well within the three years period contemplated as per clause 2(g) of the tender conditions. It is seen that the information regarding the default of supply alleged to have been committed by the petitioner was furnished as per the representation of the fourth respondent enclosing the Government Order issued by the Government of Kerala dated 20.08.2007 and 15.10.2007. The first respondent verified the same from the Kerala Government by calling for a report and the same was received on 25.02.2010 confirming the said default of supply of the particular drug, viz., Rabies Vaccine Human (cell culture) IP (Intra muscular) to KMSCL. Therefore, the respondents 1 to 3 have not merely acted on the representation of the fourth respondent, but verified and confirmed the said default in supply of the particular drug by the petitioner from KMSCL and only thereafter, considering that clause 2(g) of the terms and conditions of the tender is attracted, disqualified the petitioner.

13. It is needless to state that anyone can submit a representation to the respondents 1 to 3 and more particularly the fourth respondent, who is one of the tenderers, can very well bring it to the notice of the respondents 1 to 3 about the alleged default of supply of the above said particular drug to the Kerala Government by the petitioner which attracts the disqualification clause 2(g) of the tender conditions. By no stretch of imagination, it could be stated that there was a prior and private understanding between the third respondent and the fourth respondent merely on the basis of the representation given by the fourth respondent disclosing the alleged default of supply of the above said drug to the Kerala Government. As already pointed out, they have not acted on mere objection and representation of the fourth respondent, but the said information was verified and confirmed by the respondents 1 to 3 and as such, it cannot be stated that the respondents 1 to 3 have shown any favouritism to the fourth respondent by passing the impugned order. Such being the position, the petitioner cannot attribute any motive to the

respondents 1 to 3 for disqualifying the petitioner from participating in the tender.

14. At this juncture, it is to be stated that the respondents 1 to 3 are not expected to conduct a roving enquiry in respect of the representation made by the fourth respondent disclosing the default of supply of the above said drug committed by the petitioner to the Kerala Government by giving notice and hearing to the petitioner. Such procedure is beyond the scope of the tender conditions. It is suffice for the respondents 1 to 3 to verify and confirm the said information from the Kerala Government and accordingly, as already stated, the respondents 1 to 3 verified and confirmed, on receipt of the communication dated 25.02.2010, from the Kerala Government enclosing certain documents referred in the said communication, that the petitioner has committed default in supply of the drug Rabies Vaccine Human (cell culture) IP (Intra muscular) and thereby attracting the disqualification clause of the tender conditions in clause 2(g). Merely because the petitioner disputed the said allegation by sending a letter on the same day, i.e., on 25.02.2010 stating that the default of supply was due to the non-payment of dues to the petitioner by the Kerala Government, the respondents 1 to 3 are not expected to give any opportunity of hearing to the petitioner. The petitioner placed reliance on the order passed by the High Court, Kerala, to substantiate their explanation. A perusal of the Kerala High Court judgment reveals that there was some liability on the part of the Kerala Government to pay dues to the petitioner in respect of the supply of medicine made during the period 2002-03. But the impugned order dated 25.02.2010 and the report of the Kerala Government, as stated above, reveals that the petitioner committed default of supply of the particular drug during the first quarter of 2007-2008 which comes well within the stipulated period of three years as per clause 2(g) of the terms of the tender condition.

15. The performance certificate relied on by the petitioner is also related to the period 2008-2009 and 2009-2010 and not in respect of first quarter of 2007-2008. Though these factors are not relevant to the issue involved in this matter, as the petitioner placed strong reliance, this Court thought it fit to consider the same by giving the above said findings. It is suffice for this Court to state that the respondents 1 to 3 are entitled to choose and select the best tenderer considering the promptness and efficiency of the supply of a particular drug. In order to select the best tenderer, the respondents are entitled to stipulate certain terms and conditions. There is a provision under the Statute, viz., Rule 32 of the Tamil Nadu Transparency in Tenders Rules, 2000 stipulating that the tender inviting authority is entitled and empowered to provide for pre-qualification of tenderers. Rule 32 reads hereunder :

"32. Pre-qualification procedure - (1) The Tender Inviting Authority shall, for reasons to be recorded in writing, provide for pre-qualification of tenderers on the basis of, -

(a) experience and past performance in the execution of similar contracts ;

(b) capabilities of the tenderer with respect to personnel, equipment and construction of manufacturing facilities ;

(c) financial status and capacity.

(2) Only the bids of pre-qualified bidders shall be considered for evaluation."

In view of the above said specific provision, as stated above, the tender inviting authority has rightly prescribed certain terms and conditions and one such condition is clause 2 in respect of eligibility criteria. The tender inviting authority has the right to reject any tender on the ground of non-compliance or attraction of disqualifying clause as in the instant case under clause 2(g) of the condition in respect of eligibility criteria and such exercise of power cannot be considered as an arbitrary power. Therefore, this Court has no hesitation to hold that the respondents 1 to 3 have not acted arbitrarily in passing the impugned order.

16. It is relevant to refer to a decision of the Division Bench of this Court in M.Vasudevan V. C.E.O., Chennai Metropolitan Development Authority reported in AIR 2006 MADRAS 45 has held as hereunder :

"5. An order rejecting tender is not a quasi-judicial order nor is it even an administrative order which affects rights and liabilities. Hence neither reasons have to be given in the said order nor opportunity of hearing has to be given before passing the said order."

17. The Division Bench in the same decision followed the Hon'ble Apex Court's decision in Sterling Computers Limited v. M & N Publication Limited reported in AIR 1996 SC 51, wherein, it was held by the Supreme Court vide paragraph 12 as follows :

"Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bonafide manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive."

18. The Hon'ble Apex Court in Kanhaiya Lal Agrawal V. Union of India reported in AIR 2002 SC 2766 has held as hereunder :

"6. It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could

be ascertained by reference to consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in G.J.Fernandez V. State of Karnataka and others (1990 [2] SCC 488)."

19. This Court is of the considered view that the principle reiterated by the Hon'ble Apex Court in the decision cited supra is squarely applicable to the facts of the instant case as in the case on hand, the respondents 1 to 3 rejected the tender of the petitioner in view of the attraction of the tender condition 2(g) relating to disqualification of the tenderer on the ground of default in supply of the particular drug. In view of such settled position of law, the tender inviting authority is not expected to give any notice or opportunity of hearing to the petitioner.

20. It is also relevant to refer to the principles laid down by the Hon'ble Apex court in a catena of decisions in respect of scope of judicial review in awarding tender.

In Tata Cellular V. Union of India reported in 1994 (6) SCC 651, the Hon'ble Apex Court has considered the scope of judicial review in the case of tender awarded by a public authority. The Hon'ble Apex Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers only with a view to prevent arbitrariness or favouritism. The Hon'ble Apex Court in the same decision held that there are inherent limitations in the exercise of that power of judicial review. The Hon'ble Apex Court by upholding that the right to choose cannot be considered as an arbitrary power set out the following principles:

"1) The modern trend points to judicial restraint in administrative action.

2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm on contract.

5) The Government must have freedom of contract."

21. In Centre for Public Interest Litigation V. Union of India reported in [(2008) 8 SCC 606], the Hon'ble Apex Court has held as follows :

"Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the court is hardly equipped to do so, it would not be desirable

either. Where the selection or rejection is arbitrary, certainly the court would interfere. It is not the function of a Judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator."

The principles laid down by the Hon'ble Apex Court make it crystal clear that the scope of judicial review in the case of tender awarded by a public authority is restricted to prevent arbitrariness or favouritism and use of power for collateral purposes.

22. In view of the reasons stated above, if the impugned order of rejection of tender submitted by the petitioner is considered with the touch stone of the principles laid down by the Hon'ble Apex Court in the decision cited supra, the said order does not suffer from arbitrariness or favouritism as the tender of the petitioner was rejected only as per the attraction of clause 2(g) of the tender condition.

23. Yet another contention of the learned Senior Counsel for the petitioner is that the respondents 1 and 2 having not finalized the tender in respect of Rabies Vaccine Human (cell culture) IP (Intra muscular), placed orders to the fourth respondent for the supply of 3 lakhs vials of the said vaccine on 31.03.2010 based on old rates which is 40% of the tender quantity which would defeat the object of the tender procedure and the same would amount to contempt of the Court as the interim order of stay dated 10.03.2010 was in operation on the date of the said order, i.e., on 31.03.2010. It is seen that placing of order for the supply of 3 lakhs vials on 31.03.2010 is before expiry of the contract period of the tender relating to 2009-2010, but whereas, the rejection of the tender of the petitioner in respect of the same medicine is pertaining to the supply to be made during the year 2010-2011 for which the effective date of commencement of the contract will fall from 01.04.2010 only. Therefore, the contention of the learned Senior Counsel for the petitioner that the placing of orders for supply of 3 lakhs vials on 31.03.2010 by the respondents 1 to 3 to the fourth respondent during the operation of the interim stay granted by this Court would amount to contempt of Court deserves to be rejected.

24. Now coming to the question of rejecting the tender of the petitioner in respect of the said particular drug by disqualifying the petitioner would amount to blacklisting the petitioner, it is to be stated, at the outset, that even as per the admitted version of the petitioner, the tender was rejected only in respect of one vaccine and the petitioner have been awarded with the tender in respect of other medicines. The copies of the letters produced by the petitioner signed by the General Manager of TNMSC Limited dated 23.03.2010 would reveal that the petitioner company have been awarded tender in respect of other medicines. It is pertinent to note that even in respect of the above said single drug, viz., Rabies Vaccine Human (cell culture) IP (Intra muscular), the

tender of the petitioner was rejected only on the ground of attraction of the disqualification clause 2(g) of the eligibility criteria of the tender condition as the petitioner is alleged to have been committed default in the supply of the said particular drug to the Kerala Government which was verified and confirmed by the first respondent from the Kerala Government.

25. It is needless to state that if it is the case of blacklisting, then certainly the petitioner is entitled to be heard and he should have been given opportunity to represent his case before blacklisting the petitioner. The learned Senior Counsel for the petitioner has also rightly placed reliance on the decision of the Hon'ble Apex Court in E.E. & C Limited V. State of W.B. reported in AIR 1975 SC 266 wherein it was held as follows :

"Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist."

26. Mr.V.T.Gopalan, learned Senior Counsel for the fourth respondent has also placed reliance on the decision of the Hon'ble Apex Court in Raghunath Thakur V. State of Bihar reported in (1989) 1 SCC 229. The Hon'ble Apex Court in said decision has held as hereunder :

"4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any prior notice before blacklisting any person. Insofar as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principal of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order insofar as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside. So far as the cancellation of the bid of the appellant is concerned, that is not affected. This order will,

however, not prevent the State Government or the appropriate authorities from taking any future steps for blacklisting the appellant if the Government is so entitled to do in accordance with law, i.e., after giving the appellant due notice and an opportunity of making representation. After hearing the appellant, the State Government will be at liberty to pass any order in accordance with law indicating the reasons therefor. We, however, make it quite clear that we are not expressing any opinion on the correctness of otherwise of the allegations made against the appellant. The appeal is thus disposed of."

(emphasis supplied by this Court)

It is pertinent to note that the Hon'ble Apex Court though set aside a portion of the order relating to blacklisting, not interfered in the order of cancellation of the bid.

27. As far as the case on hand is concerned, the respondents 1 and 2 in the counter also specifically and categorically stated that the petitioner has not been blacklisted and the rejection of the tender of the petitioner is only in respect of a single drug, viz., Rabies Vaccine Human (cell culture) IP (Intra muscular). It is pertinent to note that the second respondent specifically stated in the counter itself as hereunder :

".... the disqualification suffered by the petitioner to participate in the tender will not amount to blacklisting the petitioner. The petitioner has been made ineligible to participate in the particular tender as per the tender condition."

Therefore, by no stretch of imagination, it could be stated that the petitioner has been blacklisted in view of the rejection of its tender for a particular drug, viz., Rabies Vaccine Human (cell culture) IP (Intra muscular) while accepting the tender in respect of other drugs.

28. Therefore, considering in any angle, the impugned order of rejection of the tender does not suffer from infirmity, illegality, favoritism and arbitrariness warranting interference of this Court.

29. For the foregoing reasons, the writ petition fails and the same is liable to be dismissed as devoid of merits and accordingly, the writ petition is hereby dismissed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

To

1. The Secretary to Government of Tamil Nadu,
Health Department (Chairman of Tamil Nadu,
Medical Service Corporation Limited),
Fort St. George,
Chennai - 600 009.
 2. The Managing Director (Tender Inviting Authority),
Tamil Nadu Medical Services Corporation Limited,
417, Second Floor, Pantheon Road,
Chennai - 600 008.
 3. The General Manager,
Tamil Nadu Medical Services Corporation Limited,
417, Second Floor, Pantheon Road,
Chennai - 600 008.
- + 1 cc to M/S.G.R. Associates, Advocate Sr 29451
- + 2 cc to Mr.K.Ravindranath, Advocate Sr 29364

SV (CO)
RH(3.5.10)

ORDER
IN W.P. No.4858 of 2010
& M.P.No.1 of 2010



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