(2012) 08 PAT CK 0029

In the Patna High Court

Case No : CWJC No. 4009 of 2011

Indian Immunologicals Limited APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 31-08-2012

Acts Referred:

Citation : (2013) 2 PLJR 194

Hon'ble Judges : J.N. Singh, J

Bench : Single Bench

Advocate : Naresh Dikshit and Kunal Tiwary, for the Appellant; Girijesh Kumar, for the Respondent

Final Decision : Allowed

Judgement

J.N. Singh, J.—Petitioner is a wholly owned subsidiary of the National Dairy Development Board of India, a body corporate set-up by the Government of India under an Act of Parliament, namely, National Dairy Development Board Act, 1987 (Act 37 of 1987). In this writ application it has challenged a Resolution of the State Government issued by the Animal and Fishery Development Department (in short "the Department"), contained in memo no. 818 dated 23.2.2011 (Annexure-1), by which it has been placed in the blacklist on the ground of non-supply of FMD (Foot and Mouth Diseases) vaccine in terms of the supply order contained in memo no. 64 dated 5.1.2011. Facts, as available on the records of the case, are that a tender notice was issued by the Department, vide Annexure-2, for supply of FMD vaccine, and other vaccines and items, for which last date for submitting tender was 29.7.2010 by 2.00 PM. The notice informed that tenders were to be opened at 2.30 PM on that very day in the office of the Principal Secretary, in which it was essential for the supplier or his authorized representative to be present. Tender notice also mentioned that successful tenderer had to get inscribed on the vials of vaccines "not for sale" and "for Bihar Government use only". It also mentioned that successful tenderer had to enter into agreement within one day.

2. It is not disputed that the petitioner submitted its tender for supply of FMD vaccines. Its tender was opened and it was found the lowest bidder, which was verbally informed to the representative of the petitioner. Case of the petitioner is that thereafter it kept on waiting for formal communication, in the form of a letter of acceptance communicating it to get the agreement executed and to make preparations to start the supply of vaccines immediately as in the tender notice itself it was mentioned that the vaccine had to be supplied by November, 2010. As per its case, after much waiting, it received the letter, contained in memo no. 64 dated 5.1.2011 (Annexure-3), at its Hyderabad office through fax on 7.1.2011, directing it to supply FMD vaccine to the 38 districts of the State by 16.1.2011, as per the quantity mentioned in the said letter. In this letter it was mentioned that petitioner was informed in writing through Department''s letter no. 3940 dated 27.9.2010 that the rate at Rs. 6.49/- per doze of vaccine had been approved which had been accepted by the petitioner also. On receipt of this letter, by letter dated 11.1.2011, vide Annexure-4, it was communicated to the Director, Department of Animal and Fishery Development, Government of Bihar, Patna, on behalf of the petitioner, that it was not possible to supply vaccine on such a short notice, detailed reasons for which were disclosed in the letter itself, as also with regard to its dues with the Government from before. In the letter it was specific mentioned that the vaccine was a biological product and it takes time to prepare it. It was also mentioned, inter alia, that it had already been made clear to the Government that petitioner needed confirmation at least 60 days in advance for supply of vaccine. It was also mentioned that due to delay in confirmation by the respondents, petitioner had committed supply of FMD vaccine to others, including Government of India. Hence, time was sought for in the letter for supply of vaccine, in terms of the order of supply dated 5.1.2011.

3. It appears that this reply on behalf of the petitioner was not considered at the Government level and a show cause notice was issued to it, vide letter contained in memo no. 335 dated 24.1.2011 (Annexure-5), to show cause as to why its earnest money, deposited in the form of bank guarantee, may not be forfeited and its Company may not be placed in the blacklist. Petitioner was asked to respond to this notice, failing which ex parte action was to be taken. On receipt of this notice, a reply was sent on behalf of the petitioner through letter dated 31.1.2011, vide Annexure-6, in which again the circumstances, in detail, were explained. It appears that this show cause was also not considered by the respondents and the impugned Resolution dated 23.2.2011 was issued placing the petitioner in the blacklist with a decision that Department will not enter into any transaction with the petitioner firm henceforth.

4. Learned counsel for the petitioner submitted that even if it was informed verbally to the representative of the petitioner that the tender of the petitioner was lowest, that itself could not be taken as a guarantee that the supply order will be issued in favour of the petitioner. Hence, in spite of knowing all facts, petitioner was not in a position to make supply of such a huge quantity of vaccine without a formal supply order. He also submitted that the rate as per

doze of vaccine was only fixed and communicated to the petitioner by letter dated 27.9.2010. He submitted that, prior to that, the representative of the petitioner had made it clear to the Government officials that it needed at least 60 days time, after receipt of the supply order, for making supply of first batch of vaccine as on all vials it had to be inscribed "not for sale" and "for Bihar Government use only". Petitioner, therefore, could not make supply to the respondents from ready stock. It had to get fresh stock of vials prepared and fill them with vaccine and then only it could make supply. He submitted that the petitioner was not dealing with any individual officer of the State Government in his personal capacity, so that on his oral assurance or commitment or order, supply could be made, nor the petitioner was a private firm that on verbal orders only and without any agreement or at least a written supply order it could act upon. Being wholly owned subsidiary of a statutory authority created by the Government of India, it needed formal supply order and formal documentation of commitment and agreement and thereafter only it could initiate the process of supply of the vaccine. He submitted that the officials of the State Government themselves sat over the matter for almost six months and issued the communication for supply only on 5.1.2011, directing the petitioner to supply the vaccine by 16.1.2011, i.e., barely within 11 days. He submitted that, it was explained in detail in the communication sent to them on 11.1.2011 and thereafter also in the show cause reply dated 31.1.2011 as to why this was not possible. But none of these have been considered by the officials of the Department and petitioner has been put in the blacklist resulting into adverse consequences. In the circumstances, he submitted that the order, putting the petitioner firm in the blacklist, is a result of total non-application of mind by the officials of the Government and hence arbitrary and is therefore fit to be quashed. He submitted that due to this order of blacklisting, petitioner firm has become adversely affected in other States, where it had to move the respective High Courts for interim orders, vide Annexures-7 and 8 with the supplementary affidavit.

5. A counter affidavit has been filed in this case by the respondents sworn by some "Leave Reserve Officer" in the office of respondent no. 3, i.e., Director of the Department. In the counter affidavit it has not been denied that the first formal communication for supply of vaccine issued to the petitioner, after it was found lowest bidder, was the letter dated 5.1.2011, as contained in Annexure-3. But, it has been stated that, since petitioner did not supply the vaccine in time, as fixed in the letter, the show cause notice was issued and, after considering its reply, the impugned order was passed and work order was issued to the 2nd lowest bidder. Only defence, for its action, which has been taken by the respondents in their counter affidavit, is that the petitioner had full knowledge that it was the lowest bidder, from the very day the tender was opened. Hence, "he should have tried to get agreement executed and after getting information petitioner should have ready for supply of vaccines". In respect of the earlier dues of the petitioner the statement made in the counter affidavit is that the

same was pending because of non-receipt of the necessary amount from the Central Government. It is stated that the 2nd lowest bidder, i.e., L-2 bidder, without entering into agreement, in time, supplied the medicines and thus vaccination program could be completed. Hence, it is pleaded that the petitioner''s intention from the beginning was not to supply the medicines in time and it was only interested in payment of its dues.

6. Learned counsel for the respondents also defended the case of the respondents referring to the paragraph of the reply of the petitioner dated 11.1.2011 (Annexure-4) in which it had been mentioned that from the date of tender opening itself petitioner was insisting for payment of its arrears first and hence, he submitted that, in spite of full knowledge of its being successful tenderer, it did not make any effort for supply of vaccine within the time stipulated in the tender notice.

7. It is true that the said paragraph of the said letter of the petitioner dated 11.1.2011 does show that there was insistence on behalf of the petitioner for clearance of its earlier dues. But petitioner cannot be held at fault on account of this insistence. The amount mentioned in the paragraph shows that huge amount, to the tune of almost one and half crore, was due from the State Government towards vaccine supplied in the earlier years. In normal course, the clarification in this regard made in the counter affidavit, that petitioner''s dues were not being cleared on account of non-receipt of required fund under the head from the Central Government, could have been easily conveyed to the petitioner, in response to its letter dated 11.1.2011, with follow-up request to the Central Government for release of the fund immediately. But, in any case, the insistence of the petitioner for payment of its earlier dues, itself cannot exonerate the respondents from the blame that they delayed in issuing a formal supply order for six months and, when they issued the supply order; they gave only 11 days time to the petitioner to make supply. Matter is of contract between the two public authorities. Hence, the required procedure had to be adopted and formal documentation had to be made to complete the award of contract with issue of supply order. There is no denial of the fact that, except for verbally informing the representative of the petitioner on the date of opening of tender, i.e., on 29.7.2010, that the petitioner was lowest bidder, and communicating acceptance of the rate per vial through letter dated 27.9.2010, i.e., almost two months after the tender had been accepted, no formal communication was made to the petitioner to complete the process of agreement and no formal supply order was issued to the petitioner to supply the vaccine till letter dated 5.1.2011 (received on 7.1.2011). Annexure-3 shows that the vaccine was needed in different quantity in the 38 districts of the State. It is a common knowledge that the same had to be delivered in frozen condition and obviously it had to reach the district headquarters by 15.1.2011, and its receipts had to be obtained and submitted in the office of the Director by 16.1.2011. It is not the case of the respondents that this detailed procedure of delivery, district-wise, was ever communicated to the representative of the petitioner earlier, even verbally. Thus,

by no stretch of imagination, it can be accepted that after the representative of the petitioner came to know that its tender was found to be lowest, petitioner was obliged to make preparations for supply of vaccine and/or supply the vaccine without any supply order or agreement.

8. It appears to this Court that, after delay of almost six months on their own part, the officials of the Department, only to complete the formality of exonerating themselves from the liability of proceeding in the contract with the petitioner, issued the supply order dated 5.1.2011 at its Hyderabad office, giving only 11 days time to the petitioner to complete the supply in all the 38 districts in different quantities, and, even in spite of receipt of the request on behalf of the petitioner dated 11.1.2011 for extension of time for supply with detail reasoning for the same, issued show cause notice through memo no. 335 dated 24.1.2011 and, in spite of receipt of the detailed show cause reply dated 31.1.2011 on behalf of the petitioner, passed orders putting the petitioner in blacklist on 23.2.2011. Neither the show cause notice nor the impugned order shows that the letter on behalf of the petitioner dated 11.1.2011 or the show cause reply dated 31.1.2011 was considered in any manner by the officials of the Department.

9. In the counter affidavit it is stated that when the petitioner failed to supply the vaccine within the time stipulated, work order was issued to the 2nd lowest tenderer, i.e., L-2 bidder, who, without entering into agreement, supplied the medicines in time. The hot haste in which, after the delay of six months on their part, action was taken against the petitioner with no reference to its stand in the said letters dated 11.1.2011 and 23.1.2011 and the fact that the 2nd bidder without any agreement made supply within time, if taken together, gives an impression to this Court that everything was not fair in the Department. It appears to this Court I that, at some stage, there was an attempt in the Department to somehow oust the petitioner from the process and induct another tenderer for supply of the said vaccine. The bona fide of the Government officials in the Department gets into cloud in view of the developments in the case as noticed above and appearing from the record which may be a matter of enquiry by an appropriate authority. However, since the authorities of the Government have not been called upon personally to explain their conduct in the matter, this Court refrains from making any further observations on this aspect of the case and leaves it for consideration of appropriate authority of the State Government. The writ application is accordingly allowed. The impugned order, as contained in Annexure-1, by which petitioner firm has been put in the blacklist of the Government of Bihar, together with all its consequences, is quashed.