

(2011) 05 PAT CK 0125
In the Patna High Court
Case No : CWJC No. 3268 of 2011

M/s Maan Pharmaceuticals Ltd. and Another	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 20-05-2011

Acts Referred:

Drugs and Cosmetics Act, 1940 — Section 18A, 23, 24, 25(2), 25(4)

Citation : (2012) 1 PLJR 501

Hon'ble Judges : S.N. Hussain, J

Bench : Single Bench

Advocate : Rajendra Prasad Singh and Rajiv Kumar Singh, for the Appellant; Prashant Pratap State and Mr. K.K. Sinha for the State Health Society, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Hussain, J.—This writ petition has been filed by the petitioner challenging memo dated 2.2.2011 (Annexure-1) by which the Executive Director-cum-Secretary, State Health Society, Bihar (respondent no. 4) blacklisted the petitioner's company for next five years and debarred it from participating in any tender of the State Health Society, Bihar (hereinafter referred to as "the Society", for the sake of brevity) for the said period on the ground that medicines supplied by the petitioner in the district of Buxar pursuant to notice inviting tender dated 20.6.2008 (Drug Tender Round-V) was found to be sub-standard. By the impugned memo, the Society also terminated the agreement which was executed by the parties for supply of different drugs in different Government Hospitals of the State of Bihar pursuant to subsequent notice inviting tender dated 24.1.2009 and 11.10.2009 (Drug Tender Round-VI and Drug Tender Round-VH). The petitioner has also sought relief for restraining the respondents from disturbing the petitioner's company with respect to supply of different medicines pursuant to subsequent notice inviting tender dated 24.1.2009 and 11.10.2009 mentioned above in the Government Hospitals of the

State of Bihar as well as from taking part in the subsequent tender. It is not in dispute that a notice was published by the Society on 20.6.2008 (Annexure-2) inviting tender (Drug Tender Round-V) from eligible pharmaceutical manufacturers for supply of different drugs in various Government Hospitals of Bihar, In response to the said notice, the petitioner-company submitted its technical as well as financial bid alongwith relevant documents within time which was opened by the society as per the procedure and the petitioner company was found eligible and an agreement was executed between the petitioner-company and the respondent-Society and vide letter no. 10049 dated 8.5.2009 (Annexure-3) issued by the said Society all the selected companies, including the petitioner company, were informed about the rate of contract for supply of drugs in the Government Hospitals of the State as well as the terms and conditions.

2. Learned counsel for the petitioner submitted that term of the said supply was till 31st March, 2010 and altogether 24 products of petitioner-company was selected for supply, including Amoxycillin Oral Suspension 125mg/5ml phial, and the petitioner started supplying the said medicines in different Government Hospitals of the State as per the rate mentioned above.

3. Learned counsel for the petitioner further submitted that again on 24.1.2009 (Annexure-4) the Society published notice inviting tender (Drug Tender Round-VI) from eligible pharmaceutical manufacturers for supply of different drugs in Government Hospitals of Bihar and in response thereto the petitioner-company submitted its technical and financial bid alongwith relevant documents within time and when the bids were opened by the Society, petitioner- company was found eligible alongwith others and accordingly an agreement was executed between the petitioner-company and the respondent-Society and vide letter dated 17.2.2010 (Annexure-5) all the companies, including the petitioner-company, were informed about the rate of contract for supply of drugs in the Government Hospitals of the State, whereafter the petitioner company started supplying different medicines in different Government Hospitals as per the rate mentioned in the aforesaid letter. However, vide memo dated 29.7.2010 (Annexure-6), the Society extended the term of supply till 31.8.2010.

4. Learned counsel for the petitioner claimed that on 11.10.2009 (Annexure-7), the Society again published notice inviting tender from eligible pharmaceutical manufacturers for supply of different drugs in Government Hospitals of Bihar and the petitioner filed his application along with relevant documents within time and when the bid was opened by the Society, the petitioner-company alongwith some other companies was found eligible and an agreement was executed between the petitioner- company and the Society and vide letter dated 6.10.2010 (Annexure-8) the petitioner- company alongwith other companies were informed about the rate contract for the supply of drugs in the Government Hospitals of the State and the petitioner started supplying different medicines mentioned therein to the different Government Hospitals as per the rate mentioned.

5. It is evident from the claim of the parties as well as from the materials on

record that on 19.7.2010, the Drug Inspector, Buxar took sample of Amoxycillin Oral Suspension 125mg/5ml phial of five different batches which was supplied by the petitioner-company for Government Hospitals, Buxar and sent it for testing at Central Drugs Laboratory, Kolkata and subsequently on 14.12.2010 (Annexure-9), the authority of the Society informed the petitioner-company that as per the report of the Government Analyst vide letter dated 29.10.2010 (Annexure-12), the product of the petitioner-company was found substandard- The petitioner sent his reply on 22.12.2010 alongwith company's analytical report of the said product and stated that its reports are O.K. and if any quality problem has been found it is due to improper storage condition only. Thereafter, the impugned order dated 2.2.2011 (Annexure-1) was issued by the Executive Director-cum-Secretary of the Society blacklisting the petitioner-company for the next five years and debarring it from participating in any tender of the Society during the said period and also terminating other agreements with the petitioner-company, namely (Drug Tender Round-VI and Drug Tender Round-VII). This order has been challenged by the petitioner in the instant writ petition.

6. Learned counsel for the petitioner challenges the said action of the respondent-Society claiming that at the time of taking sample the Drug Inspector neither intimated the purpose in writing in prescribed form nor he divided the sample into four portions and effectively sealed and gave suitable mark on the sample and had also not allowed the person from whom he took the sample to add his own seal and mark to all or any of the portions so sealed and marked. He further claimed that the Drug Inspector has not restored one portion of sample so divided to the person from whom he took the sample and has not given the test or analysis report to the petitioner-company after receiving the same from the Government Analyst either before issuance of the impugned order or even before issuance of notice.

7. Learned counsel for the petitioner further stated that action of the respondents, apart from being illegal, arbitrary, unwarranted and mala fide was also bad in law as it was violative of the procedure prescribed in Section 23 and Section 24 of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as "the Act" for the sake of brevity). It was also stated that had the said provision been followed by the society, the petitioner-company could have challenged the action before the authority concerned, but the said opportunity was not given to the petitioner violating the specific provision of law. He also averred that the terms and conditions as prescribed by the Society on 6.3.2009 (Annexure-3 series at page-19) was also violated by the authorities of the Society and hence the entire impugned action is bad in law.

8. Learned counsel for the petitioner also challenged the report of Government analyst contained in letter dated 29.10.2010 (Annexure-12) claiming that nothing has been found to be sub-standard as it was not a conclusive report and even according to the opinion of the Government Analyst the sample may be declared sub-standard, whereas on the other hand the same product had been

found of standard quality as per the provisions of the Act and the Rules in the report of CHOKSI LABORATORIES LIMITED dated 10.2.2011 (Annexure-13 series). Hence, he submitted that in such circumstances, check and balance was required, but the authorities of the Society adopted one sided approach contrary to the specific requirements of law.

9. On the other hand, learned counsel for the State of Bihar and its authorities (respondent nos. 1 and 2) contested the claim of the petitioner and submitted that the impugned order dated 2.2.2011 (Annexure-1) itself showed that notice had been earlier given to the petitioner and only thereafter the said order was passed and hence the procedure prescribed in law had been followed. He further submitted, that blacklisting is done on the basis of contractual relationship and is not governed by any statutory rules and there is no statutory rule which required any opportunity of show cause to be given to the contractor before blacklisting him. In this connection, he relied upon a decision of the Supreme Court in case of Grosons Pharmaceuticals (P) Ltd. & Anr. vs. The State of Uttar Pradesh and Ors., reported in 2001(4) PLJR (SC)145.

10. Learned counsel for respondent nos. 1 and 2 also submitted that once the sample is tested at the Central Drugs Laboratory and report as envisaged in S. 25(4) of the Act is produced in court, the conclusiveness mentioned in that sub-section would become incontrovertible. In this connection, he relied upon a decision of the Apex Court in case of Amery Pharmaceuticals and Another vs. State of Rajasthan, reported in AIR 2001 Supreme Court 1303. It is also stated that in the light of the aforesaid facts and circumstances, the report of CHOKSI LABORATORIES LTD. dated 10.2.2011 (Annexure-13) cannot be held to be relevant and the action of the authorities is legal and justified.

11. Learned counsel for the Society and its authorities (respondent nos. 3 and 4) also contested the claim of the petitioner and submitted that as the samples of Amoxycillin Oral Suspension-40ml, 125 mg/5ml were tested and analyzed by the Central Drugs Laboratories, Kolkata, the authenticity of the report cannot be challenged in view of the provision of Section 25(4) of the Act. He also stated that the allegation of the petitioner that report dated 29.10.2010 had not been supplied was not correct as in terms of Section 25(2) read with Section 18A of the Act, the said report was given to the distributor of the petitioner, namely Zenith Drugs at Patna from whom the supply of drugs in question was made to the storage of Civil Surgeon, Buxar and medicines were collected from the storage of Government Hospital in five batches and were sent for testing. He also stated that no copy of sample was to be given to the manufacturers as per any provisions of the Act and the Rules.

12. Learned counsel for respondent nos. 3 and 4 further relied upon notice inviting tender (Annexure-A/2) in which tender condition for financial bid was given, clause (q) of which provides that company found to be supplying sub-standard drugs/items shall be blacklisted and barred from applying for any tender from the State Health Society, Bihar and no supply order will be given to

them. Clause (t) further provides that non-fulfillment of any condition of the contract may lead to disqualification for a period of 5 years for participating in any tender of the Society and it was put on Society's Website for general notice. Hence, he submitted that the petitioner's samples having found to be substandard, the authorities were justified in taking appropriate steps in that regard and in that view of the matter, the Society was fully entitled to choose proper manufacturers and supplier for the drugs required in Government Hospitals of the State of Bihar.

13. From the arguments raised by learned counsel for the parties as well as from the materials on record it is quite apparent that on 19.7.2010, the Drug Inspector of Buxar took samples of Amoxycillin Oral Suspension-40ml, 125 mg/ 5ml of five different batches which were supplied by the petitioner-company in the Government Hospitals of Buxar district and sent it for testing to the Central Drugs Laboratory, Kolkata, whereafter the Central Drugs Laboratory sent its report dated 29.10.2010 (Annexure-12) specifically finding that the sample does not confirm to IP with respect to content of amoxycillin with regards is uneven (not homogeneous suspension) distribution of particles in oral mixture. Hence the sample may be declared as substandard under Drugs & Cosmetics Act & Rule thereunder. In the said report the detail procedure for testing had been fully provided and hence the report, prima facie, appears to be proper and reliable.

14. So far the other report produced by the petitioner dated 2.2.2011 (Annexure-13) obtained from CHOKSI LABORATORIES LIMITED, Vadodara is concerned, it does not prove that the same sample obtained from Buxar was tested by the said Laboratory. Hence, the said report does not inspire any confidence. The law is well settled that once the sample is tested at the Central Drugs Laboratories and report as envisaged in Section 25(4) of the Act is produced in court, the conclusiveness mentioned in that Section would become incontrovertible, more so, when there is no reliable material to controvert the same.

15. So far the question of absence of notice to the petitioner is concerned, it is quite apparent that the Drug Inspector, Buxar informed the Society vide letter dated 3.12.2010 about the report of the Central Drugs Laboratory, Kolkata dated 29.10.2010 (Annexure-12), whereafter the Society vide letter dated 14.12.2010 stopped the use and supply of the said drug and asked show cause from the manufacturer of the said drug, namely Maan Pharmaceutical Limited and the said manufacturer sent his show cause on 22.12,2010, whereafter the entire matter was considered by the authority concerned which found that five samples of the same drug were tested separately by the Central Drug Laboratory, Kolkata and all of them were found to be of sub-standard quality and only then the impugned action was taken. This aspect of the matter is very clear from the impugned order dated 2.2.2011 (Annexure-1) itself. Hence, the petitioner cannot legally raise any objection that the impugned order was passed without any notice to the person concerned.

16. So far the question of lack of opportunity to contest is concerned, when a drug is found to be sub-standard, the main person who is liable to answer is the manufacturer of the said drug and hence the show cause notice having been given to the manufacturer of the contractor was sufficient as per the provisions of law and rules of natural justice. The claim of the petitioner that the authorities have violated the provisions of Sections 23 and 24 of the Act has been fully denied by the respondents. The petitioner had given stances for such violation, but had not proved the same by any valid and reliable material, whereas the respondents have sufficiently denied the same item-wise. Furthermore, the annexures produced by the petitioner themselves, as mentioned above, sufficiently proved that the authorities were conscious about the specific provisions of law which they had followed.

17. Furthermore, so far the question of blacklisting is concerned, the same is based on the contractual relationship between the parties and is not governed by any statutory rules and in such cases only the terms of the contract as well as the rules of natural justice has to be considered as has been held by the Apex Court in case of Grosons Pharmaceuticals (P) Ltd. (supra). The contractual terms with respect to blacklisting is quite apparent from the notice inviting tender (Annexures-A to A/2) of the Society. In clauses (q) and (t) of tender condition of financial bid specifically it had been provided that company found to be supplying sub-standard drugs/items shall be blacklisted and barred from applying for any tender from the State Health Society, Bihar and no further supply order will be given to them and non-fulfillment of any condition of the contract may lead to its disqualification for a period of five years for participating in any tender of the Society. This had also been put on the Website of the Society in general notice. Hence, the terms of contract specifically provided for such action for which proper notice was also given. Hence, principle of natural justice cannot be legally assumed to be in favour of the petitioner especially when in the instant matter the question is with regard to supply of substandard drugs to the Government Hospitals for use of seriously ailing poor people. in the said circumstances, this court does not find any illegality in the action taken by the respondents and accordingly, this writ petition is dismissed.