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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 16th August, 2021

+ W.P.(C) 3977/2021& CM APPLN. 12033/2021 & 12035/2021

M/S BHUSHAN PHARMACEUTICALS PVT. LTD..... Petitioner

versus

NEW DELHI MUNICIPAL COUNCIL & ANR. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Aditya Wadhwa, Ms. Tejaswi Shetty and Mr.Siddharth Sunil, Advocates

For the Respondents : Mr. V.P.Sharma, Addl. Standing Counsel with Mr. Arjun Malik, Assistant Standing Counsel, NDMC

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. The hearing was conducted through video conferencing.
2. Petitioner impugns letter/order of blacklisting dated 21.02.2020 and further seeks a direction to the respondent to refund the earnest money deposit and alternatively prays that the period of blacklisting be reduced or be limited to the drugs in respect of which petitioner had participated in the subject tender.
3. On 23.11.2017, the respondent had invited bids through a tender for supply of ayurvedic medicines. The last date for submission of bid document including physical sample and test report was 12.08.2018;

whereafter technical evaluation of the bid had to take place.

4. It is contended that for testing its medicines, Petitioner had engaged the services of ITL Labs Pvt. Ltd., a laboratory which was accredited by Govt. approved laboratory and which agency petitioner had been using for several years for having its medicines tested.

5. As per the petitioner, the online submission process was commenced on 11.12.2017 and was completed on 18.12.2017. During the process of online submission, earnest money deposit was also furnished.

6. As per the petitioner, the test reports from the ITL Labs Pvt. Ltd., was handed over to its employee – Rahul Mishra for the purposes of submission along with bid.

7. Petitioner alleges that since it was in the process of making structural changes to its factory it withdrew its bid vide letter dated 01.01.2018 at the stage when the technical evaluation was still underway.

8. Petitioner alleges that petitioner was subsequently, on 29.03.2018, informed by its employee – Rahul Mishra that the original test reports from ITL Labs Pvt. Ltd., were not furnished along with the bid document and reports from one Devansh Testing Laboratory had been filed. It is alleged that he informed that the said reports were fake.

9. It is alleged that petitioner thereafter immediately approached the respondent and informed them about the action of Rahul Mishra and furnished original test reports issued by ITL Labs Pvt. Ltd. A criminal

complaint was also filed against Mr. Rahul Mishra.

10. It is alleged that petitioner was issued letter of blacklisting dated 03.04.2018 whereby petitioner was debarred from participating in the procurement of ayurvedic medicines of NDMC and his earnest money deposit were forfeited.

11. Petitioner filed a writ petition impugning order dated 03.04.2018, inter-alia, on the ground of breach of principles of natural justice.

12. By order dated 13.04.2018 in W.P. (C) 3520/2018 this Court directed the respondent to withdraw the blacklisting order.

13. By letter dated 25.04.2018, order dated 28.03.2018 blacklisting the petitioner was withdrawn. Thereafter a fresh show cause notice was issued to the petitioner on 26.04.2018. Hearing was granted to the petitioner, however, after a gap of merely 21 months by the impugned letter/order dated 21.02.2020, petitioner has been blacklisted for a period of two years and the earnest money deposit also forfeited.

14. As per the Petitioner, it holds a licence for manufacture of merely 2441 ayurvedic drugs, out of which 925 are Unani medicines. The subject tender was for 516 drugs, out of which petitioner had merely participated in 45 drugs. As per the Petitioner the revenue that would have been generated from the subject tender was approximately Rs. 7 to 8 lakhs, whereas the annual turnover of the petitioner was over Rs. 20 crores.

15. As per the Petitioner there could be no motive behind the petitioner

submitting false or fabricated test reports. It is contended that even though petitioner had genuine test reports from accredited labs, the disgruntled employee filed fabricated test report to prejudice the petitioner.

16. It is alleged that action in accordance with law has also been taken against the said employee.

17. Learned counsel for the petitioner submits that though petitioner is not at fault, however, keeping in view of the fact that one of the employees of the petitioner committed the misdeed, petitioner would restrict his prayer to reduction of the debarment period to the period already undergone.

18. Learned counsel relies on the decision of the Supreme Court in '*Kulja Industries Ltd. Vs. Western Telecom Project BSNL &Ors.*' (2014) 14 SC 731, wherein the Supreme Court has held that the factors that may influence the debarring officer's decision, inter-alia, include the actual or potential harm or impact that results or may result from the wrong doing, frequency of incidence and duration of wrong doing and whether the contractor has accepted the responsibility for the wrong doing and recognized the seriousness of misconduct.

19. Learned counsel for the respondent per contra contends that the debarment order or the period of punishment does not warrant any interference as admittedly forged and fabricated test reports were submitted. Learned counsel further contends that the petitioner is responsible for all the actions taken by its employees in submission of the bids.

20. Further learned counsel submits that since petitioner has restricted his challenge to the period of debarment, the earnest money deposit forfeited cannot be refunded.

21. Petitioner contends that out of 2441 ayurvedic medicines that petitioner had manufactured, the petitioner had participated for only 45 drugs. The revenue, as per the petitioner, that petitioner would have earned was approximately 7 to 8 lakhs as compared to its turnover of Rs. 23 crores for the relevant year.

22. Petitioner had even, prior to finalization of the tender process, by letter dated 29.12.2017 withdrew from the tender process stating that they had to construct their building and were accordingly unable to produce ayurvedic medicines till construction process is over.

23. Petitioner has also placed on record material to show that it had the requisite reports from the accredited test laboratory i.e ITL Laboratory Pvt. Ltd. as far back as 29.11.2017 much before the date for submission of bids.

24. Petitioner has also placed on record a complaint lodged with the concerned police station against its employee for filing the false report.

25. Further it may be seen that petitioner was initially debarred by letter dated 28.03.2018. Said letter was set aside by this Court by its order dated 13.04.2018. Pursuant to order dated 13.04.2018, the respondent withdrew the order of debarment dated 28.03.2018 by its letter dated 25.04.2018. Thereafter a fresh show cause notice dated 26.04.2018 was issued to the

petitioner.

26. Proceedings on the said show cause notice remained pending for about one year and 10 months and ultimately culminated into the impugned order of blacklisting dated 21.02.2020.

27. Since there was no stay of the debarment order, petitioner continues to be debarred till today. Resultantly, petitioner had undergone debarment for a period of about one month under the first order of debarment dated 28.03.2018 and thereafter for a period of one year six months under the impugned order dated 21.02.2020.

28. Consequently, looked at from that angle, petitioner has already suffered debarment for one year and seven months (19 months) out of the period of 24 months as directed by the impugned order.

29. The guidelines laid down by the Supreme Court in *Kulja Industries Ltd. (supra)* stipulate that the debarring officer, while passing an order of debarment, has to take into account the actual or potential harm or impact of the wrong doing and further the frequency of the incidence or duration of wrong doing.

30. In the present case, there is nothing on record to show that there was any harm occasioned or impact of the wrongdoing on the Respondent or the tender. Further, there is nothing on record to show that petitioner had indulged in any wrong doing in the past either with the respondent or with any other organization.

31. Explanation has explained that the wrong doing was done by a disgruntled employee and the fact that petitioner possessed a valid test report from an accredited lab which was not submitted by the said employee and a false and fabricated test report was furnished.

32. In the facts of the case, petitioner cannot be completely absolved of the misdeeds of its employee. However, in view of the explanations given, I am of the view that in the facts of the present case, the period two years is disproportionate to the conduct of the petitioner.

33. This is coupled with the fact that petitioner did not participate in any tender process with the respondents, after the first order of debarment i.e. after 28.03.2018. In effect petitioner has not participated in of the tenders of the respondent for nearly a period of three years and five months.

34. Accordingly, the impugned order of debarment dated 21.02.2020, in so far as it blacklists the petitioner for a period of two years, is modified to the limited extent that period of debarment of the petitioner shall be from the date of the order dated 21.02.2020 till 16.08.2021.

35. The petition is accordingly allowed in the above terms.

36. Copy of the order be uploaded on the High Court website and be also forwarded to learned counsels through email by the Court Master.

SANJEEV SACHDEVA, J

AUGUST 16, 2021/‘rs’