

M/S. DAFFODILLS PHARMACEUTICALS & ANR.

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v.

STATE OF U.P. & ANR.

(Civil Appeal No. 9417 of 2019)

DECEMBER 13, 2019

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[R. F. NARIMAN AND S. RAVINDRA BHAT, JJ.]

Natural Justice – Opportunity of hearing – Appellant-pharmaceutical supplier had bid for contract to supply various categories of medicines to the Health Department of the State – The State issued order dated 21.08.2015 directing its Medical and Health Department to stop local purchase from the appellant – It was alleged that there was a FIR against the appellant and CBI was inquiring into the same – The pending criminal case amounted to violation of the terms of the tender conditions – Appellant challenged the order dated 21.08.2015 before the High Court – Appellant contended that the criminal case in question was filed against an erstwhile Director, who had ceased to have any connection with the appellant – It was also contended that the decision of the State amounted to blacklisting and that it was issued without notice or pre-decisional hearing – High Court rejected the challenge – On appeal, held: In the instant case, even if one assumes that accused in the pending criminal case was involved and had sought to indulge in objectionable activities, that ipso facto could not have resulted in unilateral action of the kind which the State resorted to against the appellant, which was never granted any opportunity of hearing or a chance to represent against the order dated 21.08.2015 – It is settled that no one can be inflicted with an adverse order, without being afforded a minimum opportunity of hearing and prior intimation of such a move – High Court fell into error in holding that in matters of award of public contracts, the scope of inquiry in Judicial review is limited – Also, the order dated 21.08.2015 debarred the purchase of medicines for an indefinite duration – This action of the State, not to procure indefinitely, on assumption of complicity by appellant was in violation of principles of natural justice – Accordingly, order dated 21.08.2015 quashed – The impugned judgment of the High Court set aside – Contract – Public contract.

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A **Allowing the appeal, the Court**

HELD: 1. The State of U.P. has argued that the impugned order dated 21.08.2015 requiring that no procurement ought to be made from appellant, is neither a blacklisting nor a debarring order, in opinion of this Court, in fact and in reality, that order is nothing but an order or a directive, debarring and preventing the State of U.P. from local purchase of medicines from appellants for an indefinite duration. Unlike a “normal” blacklisting order which has a finite life span (of three or maximum five years), the indefinite directive (which appears to be co-terminus with the lifetime of the criminal case) is facially far more disproportionate than a blacklisting order. Even as on date, it is not clear whether formal charges have been framed against the accused. [Para 13][131-D-E]

2. In the present case, even if one assumes that the accused in the pending criminal case was involved and had sought to indulge in objectionable activities, that *ipso facto* could not have resulted in unilateral action of the kind which the State resorted to- against appellant, which was never granted any opportunity of hearing or a chance to represent against the impugned order. If there is one constant lodestar that lights the judicial horizon in this country, it is this: that no one can be inflicted with an adverse order, without being afforded a minimum opportunity of hearing, and prior intimation of such a move. This principle is too well entrenched in the legal ethos of this country to be ignored, as the state did, in this case. [Para 15][132-E-F]

3. The High Court, in the opinion of this court, fell into error in holding that in matters of award of public contracts, the scope of inquiry in judicial review is limited. Granted, such jurisdiction is extremely circumscribed; no doubt the court had refused to grant relief to appellant against its plea of wrongful rejection of its tender. However, what the impugned judgment clearly overlooks is that the action of the state, not to procure *indefinitely, on an assumption of complicity by appellant*, was in flagrant violation of principles of natural justice. [Para 16][132-G-H; 133-A]

H *Erusian Equipments and Chemicals Ltd. v. State of West Bengal (1975) 1 SCC 70 : [1975] 2 SCR 674;*

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Raghunath Thakur v. State of Bihar & Ors (1989) 1 SCC 229 : [1988] 3 Suppl. SCR 867; *Southern Painters v. Fertilizers & Chemicals Travancore Ltd.*, (1994) Supp 2 SCC 699; *Groscons Pharmaceuticals (P) Ltd. v. State of U.P.*, (2001) 8 SCC 604 : [2001] 2 Suppl. SCR 567; *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* (2006) 11 SCC 548 : [2006] 8 Suppl. SCR 11 – relied on. A B

Case Law Reference

[1975] 2 SCR 674	relied on	Para 14	
[1988] 3 Suppl. SCR 867	relied on	Para 14	C
1994 Supp (2) SCC 699	relied on	Para 14	
[2001] 2 Suppl. SCR 567	relied on	Para 14	
[2006] 8 Suppl. SCR 11	relied on	Para 14	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9417 of 2019. D

From the final Judgment and Order dated 24.04.2017 of the High Court of Judicature at Allahabad in MBN No.8071/2015.

Sibo Sankar Mishra, Adv. for the Appellants. E

Ankit Goel, Harsh Pratap Shahi, Advs. for the Respondents.

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.

1. Leave granted. With consent, all counsel who appeared were heard. F

2. The appellant (hereafter “Daffodills”), a pharmaceutical supplier, is aggrieved by a decision of the Allahabad High Court, rejecting its challenge to an order (dated 21.08.2015) issued by the Principal Secretary, Government of U.P. to its Medical and Health Department, directing it to stop local purchase from the appellant. Daffodills had participated in a tender process, in which the state called for bids from interested parties, willing to supply various categories of pharmaceutical products. The successful bidder was required to supply medicines to various hospitals, under the control of the Medical and Health Department, H

- A U.P. for one year. Daffodills was one amongst 56 bidders; its bid was acceptable to the respondent, i.e. State of U.P.

3. Daffodills was asked to match its previous bid to the Tamil Nadu Service Corporation Ltd. for the year 2015-16, at approved L1 rates, on or before, 29.05.2015 in respect of 14 specified drugs. At the

- B time of bid submission, every tenderer/bidder had to furnish a declaration to the following effect:

C *“Firms should give an affidavit that there is no Court Case/Vigilance Case/CBI Case pending against the firm. All the documents given in the tender are true. If found false/fake the person/firms will have to be accepted by the firm. (Court case means “Criminal Case” against firm/board of Director/Directors/principal stock holder as per relevant law)”.*

It is not disputed that Daffodills furnished the required declaration in terms of the tender.

- D 4. While so, on 21.08.2015, the impugned letter/notice was issued by the Principal Secretary to the Government of U.P. stating that a first information report (FIR) had been lodged against Daffodills alleging that it had committed offences, and that the Central Bureau of Investigation (CBI) was inquiring into the issue. Accordingly, the offices under
E Department of Health was directed to desist and stop all procurements from the appellant, i.e. Daffodills under the following terms:

F *“I am directed to say in the described situation that no more local purchase is to be done till pre order of the government, from the above said firms which are under the investigation of CBI in the NRHM Case, by the hospitals at the rate of contract of DGS&D/ESIC and Tamil Nadu Medical Services Corporation. If medicine is purchased by any hospital in-charge from these firms without approval of the government then strict action would be taken as per rules against him.”*

- G 5. Complaining of arbitrariness on various grounds, (including that the impugned direction not to procure or purchase medicines issued against it, was on a mistaken assumption that a criminal case was pending against it), Daffodills submitted that the criminal case was filed against one Mr. Surender Chaudhary, an erstwhile Director, who had ceased to have any connection with it (i.e. Daffodills) from 22.02.2012. Besides,
H it was argued that the decision not to procure, amounted to blacklisting

and that it was issued without notice or pre-decisional hearing and was consequently liable to be set aside. A

6. In the impugned order, the High Court recalled a previous direction in other proceedings, i.e. Writ Petition No. 3611 (MB)/ 2011 where it had enquired in regard to the execution and implementation of the National Rural Health Mission in regard to utilization of funds released by the Government of India. The impugned order states that in compliance of that order, CBI registered a case for preliminary inquiry and after concluding the investigation filed a charge-sheet in the competent court against Surender Chaudhary, the then Director of Daffodils and other co-accused. B
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7. After noticing Daffodil's contention that Surender Chaudhary ceased to be its Director and also that it was not given opportunity of hearing before the passing of the order, the High Court observed that in matters of contractual disputes relating to policy decisions, the scope of jurisdiction under Article 226 is limited and therefore, it could not be assumed that the action of the State Government was unreasonable or contrary to public interest. Dealing with the complaint of breach of principles of natural justice, the High Court was of the opinion that such principles cannot be placed under a straight-jacket formula and consequently, Daffodills' failure to comply with express terms of the contract and its breach of the terms resulted in the State resorting to recalling its business through various directions to State Agencies. The High Court, therefore, concluded as follows: D
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“32. It is clear that when there is a failure on the part of the contractor to comply with the express terms of the contract and/or to commit breach of the said terms resulting into failure to commence/execute the work or supply the items as per specification as stipulated in the agreement or giving the performance that does not meet the statutory requirements of the contract or the action of the petitioner is reported against the provisions and against the interest of the State, the Department has a right to regulate its business through various directions to State Agencies in which the petitioner has no right to interfere.” F
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8. It is argued on behalf of Daffodills that the impugned decision is erroneous because the High Court overlooked a salient aspect, i.e. H

- A Surender Chaudhary has resigned as Director, way back in 2012. Therefore, his being implicated in the criminal case could not have resulted in an adverse impact on the business of Daffodills, i.e. the appellant. It was argued furthermore that besides an unwarranted and arbitrary action against the company on account of the acts and omissions of its erstwhile Director, the High Court committed an error in overlooking binding
- B decisions of this Court (including *Rastriya Ispat Nigam v. Verma* (2006) 7 SCC 275 and *Kalja Industries v. Western Telecom* (2014) 14 SCC 731), which clearly held that before proposing to pass a blacklisting or debarring orders, the parties had to be given hearing followed by an appropriate reasoned order.
- C 9. It was argued on behalf of the State that the order made by it directing the officials of the Health Department to discontinue procurement, does not amount to a debarring order. It was urged that Surender Chaudhary was acting in the capacity of Director of Daffodills, for which he was charged of various offences by the CBI. These involved
- D fictitious accounts of supply to various individuals and persons in order to obtain procurement orders from the State. The concerned clause 14 clearly stated that a court case means “criminal case” against the firm, Board of Directors or individual Directors. Therefore, the involvement of Surender Chaudhary was close, who was none other than the blood
- E relative of the existing director, the appellant’s contention that the acts of omission and commission did not in any manner affect it, is not sound. Learned counsel submitted that having regard to these facts, the order made by the Principal Secretary (on 21.08.2015) was only a direction to not procure medicines locally from the appellant; it could not be
- F characterized as a debarring or blacklisting order. It was pointed out that the appellant had filed a suit in 2014, seeking a direction not to finalize the tender for which it had bid; furthermore, the order dated 21.08.2015 was made pursuant to the directions of the court. Consequently, the appellant could have no grievance against it.
- G 10. Daffodills had bid for the contract, (as is evident from the factual narration), to supply various categories of medicines to the Health Department of the State of U.P. One of the terms of the tender conditions required each bidder to declare that no criminal case was pending against it. The appellant, Daffodills, had approached the Allahabad High Court, complaining of arbitrariness on account of the State’s decision to reject its bid, by filing a previous Writ Petition No. 35253/ 2015. This was
- H dismissed.

11. The Allahabad High Court held that in the facts and circumstances of the case there was no illegality in exclusion of the petitioner, i.e. Daffodills from the tender for supply of medicines and in fact, debarring procurement from Daffodills was made after the order of the Allahabad High Court dismissing the Writ Petition, challenging the rejection of Daffodil's tender. A

12. Although in the proceedings, it appears that the suit was filed by Daffodills at some stage against the finalization of tender (issued in 2014) it is not clear whether the suit was withdrawn, in the wake of the filing and dismissal of its writ petition in 2015. What is clear, though from the narrative is that before the order of 21.08.2015 was made, no show-cause notice or opportunity was granted to the appellant to represent against the proposed action. B C

13. Although, State of U.P. has argued that the impugned order requiring that no procurement ought to be made from Daffodills, is neither a blacklisting nor a debarring order, in our opinion, in fact and in reality, that order is nothing but an order or a directive, debarring and preventing the State of U.P. from local purchase of medicines from Daffodills for an indefinite duration. Unlike a "normal" blacklisting order which has a finite life span (of three or maximum five years), the indefinite directive (which appears to be co-terminus with the lifetime of the criminal case) is facially far more disproportionate than a blacklisting order. Even as on date, it is not clear whether formal charges have been framed against the accused i.e. Surender Chaudhary. D E

14. The decisions in *Erusian Equipments and Chemicals Ltd. v. State of West Bengal*¹ and *Raghunath Thakur v. State of Bihar & Ors*² as well as later decisions³ have now clarified that before any executive decision maker proposes a drastic adverse action, such as a debarring or blacklisting order, it is necessary that opportunity of hearing and representation against the proposed action is given to the party likely to be affected. This has been stated in unequivocal terms in *Raghunath Thakur (supra)* as follows: F G

¹ 1975 (1) SCC 70

² 1989 (1) SCC 229

³ *Southern Painters v. Fertilizers & Chemicals Travancore Ltd.*, 1994 Supp (2) SCC 699; *Grososn Pharmaceuticals (P) Ltd. v. State of U.P.*, (2001) 8 SCC 604; *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* (2006) 11 SCC 548 H

A “ 20. 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
B concerned should be given an opportunity to represent his
case before he is put on the blacklist.”

In *Southern Painters (supra)* the grievance was with respect to
unilateral deletion of the petitioners’ name from the list of approved
contractors, maintained by the public sector agency. This court held that
C such an action was arbitrary:

“The deletion of the appellant’s name from the list of approved
contractors on the ground that there were some vigilance
report against it, could only be done consistent with and after
due compliance with the principles of natural justice. That
D not having been done, it requires to be held that withholding
of the tender form from the appellant was not justified. In our
opinion, the High Court was not justified in dismissing the
writ petition.”

15. In the present case, even if one assumes that Surender
E Chaudhary, the accused in the pending criminal case was involved and
had sought to indulge in objectionable activities, that *ipso facto* could
not have resulted in unilateral action of the kind which the State resorted
to- against Daffodils, which was never granted any opportunity of hearing
or a chance to represent against the impugned order. If there is one
F constant lodestar that lights the judicial horizon in this country, it is this:
that no one can be inflicted with an adverse order, without being afforded
a minimum opportunity of hearing, and prior intimation of such a move.
This principle is too well entrenched in the legal ethos of this country to
be ignored, as the state did, in this case.

G 16. The High Court, in the opinion of this court, fell into error in
holding that in matters of award of public contracts, the scope of inquiry
in judicial review is limited. Granted, such jurisdiction is extremely
circumscribed; no doubt the court had refused to grant relief to Daffodils
against its plea of wrongful rejection of its tender. However, what the
impugned judgment clearly overlooks is that the action of the state, not
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to procure *indefinitely, on an assumption of complicity by Daffodils,* A
was in flagrant violation of principles of natural justice.

17. Normally, this court would have quashed the Government of U.P.'s decision, and left it to grant a hearing to Daffodils, before taking any action. However, given that the impugned order of debarring (i.e. directive not to procure locally from Daffodills) was made over 4 years and 3 months ago, this court is of the opinion that it would be in the overall interest of justice that appropriate relief is granted. Accordingly, the said order of the Principal Secretary, Government of U.P. directing all concerned departments to desist from resorting to local purchase from the appellant is hereby quashed. The impugned judgment of the High Court is hereby set aside. The appeal is allowed in the above terms. C
No costs.