REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3647 OF 2020
(Arising out of S.L.P (C) No. 6319 of 2020)

VETINDIA PHARMACEUTICALS LIMITED ...APPELLANT(S)

VERSUS

STATE OF UTTAR PRADESH AND ANOTHER ...RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

Leave granted.

2. The appellant is aggrieved by indefinite order of blacklisting dated 08.09.2009. The High Court dismissed the writ petition *in limine,* only on the ground of delay, as having been preferred ten years later.

3. Ms. Shobha Gupta, learned counsel for the appellant, submits that it holds a valid licence under the Drugs and Cosmetics Act, 1940 (hereinafter referred to as 'the Drugs Act') in Form 28 (Rule 76) issued by the Drugs Control Administration, Government of Andhra Pradesh. M/s Palak Pharmaceuticals Private Limited had obtained supplies from the appellant in the

year 2007, and in turn had supplied it to the respondent under a tender notice dated 04.10.2006. The brand name of the medicine was correctly mentioned as “OXY-125”. The composition of the medicine was also correctly mentioned as “Oxytetracycline HCL IP Vet 125 mg”. The generic term “Hcl” was only missing on the label, and it was written as “OXYTETRACYCLINE INJ. I.P. VET” in place of “OXYTETRACYCLINE HCL INJ. I.P. VET”. It was therefore a case of bonafide inadvertent printing error which resulted in misbranding. The product was not substandard or spurious veterinary medicine.

4. The appellant was served with an order of blacklisting dated 08.09.2009 by the Office of Director, Animal Husbandry Department of the respondent referring to the State Analyst report dated 10.10.2008, declaring the batch supplied by the appellant to be of substandard quality (misbranded/not in accordance with Oxytetracycline injection), thus violating clauses 8.12 and 8.23 of the Tender of 2006-07. The appellant informed the respondents that it had never made any supplies to them under the Tender in question. The misbranding referred to was an inadvertent error. The respondents required certain further

clarifications which were furnished on 04.05.2019 but to no outcome. The order of blacklisting is causing great prejudice to the appellant preventing it from participating in similar tenders, the most recent being the rejection by the Government of Rajasthan dated 05.07.2019 for the said reason. No proceedings were taken out by the respondents against the appellant under Sections 23, 25, 26 and 27 of the Drugs Act.

5. The explanation furnished for the delay in the writ petition has not been considered properly. The order of blacklisting being in violation of the principles of natural justice, delay is irrelevant and the cause of action continues because of its indefinite nature and consequences. Learned counsel has relied heavily on ***Gorkha Security Services vs. Government (NCT of Delhi) & Ors.***, (2014) 9 SCC 105, to submit that the show cause notice dated 21.10.2008 did not meet the requirement of the law. She has further relied upon ***M/s Daffodills Pharmaceuticals Ltd. & Anr. vs. State of U.P. & Anr.***, 2019 (17) SCALE 758, where this Court opined that a debarment of approximately four years was sufficient.

6. Shri Ankit Goel, learned counsel for the respondents, submits that the writ petition was rightly dismissed on grounds of gross and inordinate delay of ten years in challenging the order of blacklisting. It was preceded by a show cause notice dated 21.10.2008, and consideration of the reply submitted. The veterinary medicine was misbranded in terms of Section 9 of the Drugs Act, duly supported by the report of the analyst. Any latent defect in the show cause notice has not caused any prejudice to the appellant. The impugned orders therefore merit no interference.

7. We have considered the submissions on behalf of the parties and are satisfied that the writ petition deserves to be allowed for more than one reason.

8. The appellant is a licensed drug manufacturer. The drugs in question have been found to be misbranded and not spurious or adulterated. The appellant took the plea of a bonafide inadvertent printing error on the label, by stating "OXYTETRACYCLINE INJ. I.P. VET" in place of "OXYTETRACYCLINE HCL INJ. I.P. VET". This explanation by the appellant dated 15.11.2008 in reply to the show cause notice

finds no consideration by the respondents at any stage. The appellant initially sought to purse matters with the respondents. On 19.05.2011, the appellant requested the respondents for allowing it to participate in further tenders for 2011-2012. The matter was also subsequently followed up by the appellants in writing with the respondents. On 01.05.2019, the appellant again requested to withdraw the order dated 08.09.2009. The respondents on 03.05.2019 rejected the request of the appellant reiterating violation of clauses 8.12 and 8.23 of the Tender of 2006-07. It however sought certain additional information to consider the representation of the appellant which was submitted on 04.05.2019. The appellant was also debarred from consideration by the State of Rajasthan on 05.07.2019 by reason of the impugned order of blacklisting. In absence of any response thereafter from the respondents, the writ petition came to be instituted.

9. There is no dispute that the injection was not supplied to the respondents by the appellant. Yet the show cause notice dated 21.10.2008 referred to further action in terms of the Tender for supplying misbranded medicine to the respondent.

Furthermore, the show cause notice did not state that action by blacklisting was to be taken, or was under contemplation. It only mentioned appropriate action in accordance with the rules of the Tender. The fact that the terms of the tender may have provided for blacklisting is irrelevant in the facts of the case. In absence of any supply by the appellant, the order of blacklisting dated 08.09.2009 invoking clauses 8.12 and 8.23 of the Tender is a fundamental flaw, vitiating the impugned order on the face of it reflecting non application of mind to the issues involved. Even after the appellant brought this fact to the attention of the respondents, they refused to pay any heed to it. Further, it specifies no duration for the same.

10. ***M/s. Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and another***, (1975) 1 SCC 70, held that there could not be arbitrary blacklisting and that too in violation of the principles of natural justice. In ***Joseph Vilangandan vs. The Executive Engineer, (PWD), Ernakulam and others,*** (1978) 3 SCC 36, this Court was considering a show cause notice as follows:

> "17. ...."You are therefore requested to show cause ... why the work may not be arranged otherwise at your risk and loss, through other agencies *after debarring you as a defaulter*...."
> The crucial words are those that have been underlined (herein in italics). They take their colour from the context. Construed along with the links of the sentence which precede and succeed them, the words "debarring you as a defaulter", could be understood as conveying no more than that an action with reference to the contract in question, only, was under contemplation. There are no words in the notice which could give a clear intimation to the addressee that it was proposed to debar him from taking any contract, whatever, in future under the Department...."

11. The question whether a show cause notice prior to blacklisting mandates express communication why blacklisting be not ordered or was in contemplation of the authorities, this Court in ***Gorkha Security Services*** (supra) held as follows:-

> "27. We are, therefore, of the opinion that it was incumbent on the part of the Department to state in the show-cause notice that the competent authority intended to impose such a penalty of blacklisting, so as to provide adequate and meaningful opportunity to the appellant to show cause against the same. However, we may also add that even if it is not mentioned specifically but from the reading of the show-cause notice, it can be clearly inferred that such an action was proposed, that would fulfil this requirement. In the present case, however, reading of the show-cause notice does not suggest that noticee could find out that such an action could also be

taken. We say so for the reasons that are recorded hereinafter.

28. In the instant case, no doubt the show-cause notice dated 6-2-2013 was served upon the appellant. Relevant portion thereof has already been extracted above (*see* para 5). This show-cause notice is conspicuously silent about the blacklisting action. On the contrary, after stating in detail the nature of alleged defaults and breaches of the agreement committed by the appellant the notice specifically mentions that because of the said defaults the appellant was "as such liable to be levied the cost accordingly". It further says "why the action as mentioned above may not be taken against the firm, besides other action as deemed fit by the competent authority". It follows from the above that main action which the respondents wanted to take was to levy the cost. No doubt, the notice further mentions that the competent authority could take other actions as deemed fit. However, that may not fulfil the requirement of putting the defaulter to the notice that action of blacklisting was also in the mind of the competent authority. Mere existence of Clause 27 in the agreement entered into between the parties, would not suffice the aforesaid mandatory requirement by vaguely mentioning other "actions as deemed fit". As already pointed out above insofar as penalty of blacklisting and forfeiture of earnest money/security deposit is concerned it can be imposed only, "if so warranted". Therefore, without any specific stipulation in this behalf, the respondent could not have imposed the penalty of blacklisting.

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33. When we apply the ratio of the aforesaid judgment to the facts of the present case, it becomes difficult to accept the argument of the learned Additional Solicitor General. In the first instance, we may point out that no such case was set up by the respondents that by omitting to state the proposed action of blacklisting the appellant in the show-cause

> notice, has not caused any prejudice to the appellant. Moreover, had the action of blacklisting being specifically proposed in the show-cause notice, the appellant could have mentioned as to why such extreme penalty is not justified. It could have come out with extenuating circumstances defending such an action even if the defaults were there and the Department was not satisfied with the explanation qua the defaults. It could have even pleaded with the Department not to blacklist the appellant or do it for a lesser period in case the Department still wanted to blacklist the appellant. Therefore, it is not at all acceptable that non-mentioning of proposed blacklisting in the show-cause notice has not caused any prejudice to the appellant. This apart, the extreme nature of such a harsh penalty like blacklisting with severe consequences, would itself amount to causing prejudice to the appellant."

12. If the respondents had expressed their mind in the show cause notice to blacklist, the appellant could have filed an appropriate response to the same. The insistence of the respondents to support the impugned order by reference to the terms of the tender cannot cure the illegality in absence of the appellant being a successful tenderer and supplier. We therefore hold that the order of blacklisting dated 08.09.2009 stands vitiated from the very inception on more than one ground and merits interference.

13. In view of the aforesaid conclusion, there may have been no need to go into the question of the duration of the blacklisting,

but for the arguments addressed before us. An order of blacklisting operates to the prejudice of a commercial person not only *in praesenti* but also puts a taint which attaches far beyond and may well spell the death knell of the organisation/institution for all times to come described as a civil death. The repercussions on the appellant were clearly spelt out by it in the representations as also in the writ petition, including the consequences under the Rajasthan tender, where it stood debarred expressly because of the present impugned order. The possibility always remains that if a proper show cause notice had been given and the reply furnished would have been considered in accordance with law, even if the respondents decided to blacklist the appellant, entirely different considerations may have prevailed in their minds especially with regard to the duration. This court in ***Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and others,*** (2014) 14 SCC 731, despite declining to interfere with an order of blacklisting, but noticing that an order of permanent debarment was unjustified, observed: -

> "28.2. Secondly, because while determining the period for which the blacklisting should be effective

> the respondent Corporation may for the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While it may not be possible to exhaustively enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire confidence in the fairness of the order which the competent authority may pass against a defaulting contractor."

Since the order of blacklisting has been found to be unsustainable by us, and considering the long passage of time, we are not inclined to remand the matter to the authorities. In ***M/s Daffodills Pharmaceuticals*** (supra), relied upon by the appellant, this court has observed that an order of blacklisting beyond 3 years or maximum of 5 years was disproportionate.

14. That brings us to the question of delay. There is no doubt that the High Court in its discretionary jurisdiction may decline to exercise the discretionary writ jurisdiction on ground of delay in approaching the court. But it is only a rule of discretion by exercise of self-restraint evolved by the court in exercise of the discretionary equitable jurisdiction and not a mandatory

requirement that every delayed petition must be dismissed on the ground of delay. The Limitation Act *stricto sensu* does not apply to the writ jurisdiction. The discretion vested in the court under Article 226 of the Constitution therefore has to be a judicious exercise of the discretion after considering all pros and cons of the matter, including the nature of the dispute, the explanation for the delay, whether any third-party rights have intervened etc. The jurisdiction under Article 226 being equitable in nature, questions of proportionality in considering whether the impugned order merits interference or not in exercise of the discretionary jurisdiction will also arise. This Court in ***Basanti Prasad vs. Bihar School Examination Board and others***, (2009) 6 SCC 791**,** after referring to ***Moon Mills Ltd. vs. Industrial Court***, AIR 1967 SC 1450, ***Maharashtra SRTC vs. Balwant Regular Motor Service***, AIR 1969 SC 329 and ***State of M.P. and Others vs. Nandlal Jaiswal and others***, (1986) 4 SCC 566, held that if the delay is properly explained and no third party rights are being affected, the writ court under Article 226 of the Constitution may condone the delay, holding as follows:

> "18. In the normal course, we would not have taken exception to the order passed by the High Court. They are justified in saying that a delinquent employee should not be permitted to revive the stale claim and the High Court in exercise of its discretion would not ordinarily assist the tardy and indolent person. This is the traditional view and is well supported by a plethora of decisions of this Court. This Court also has taken the view that there is no inviolable rule, that, whenever there is delay the Court must refuse to entertain a petition. This Court has stated that the writ court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution may condone the delay in filing the petition, if the delay is satisfactorily explained."

15. The contention of the respondents that they have acted in accordance with the provisions of the Drugs Act pursuant to the report of the analyst for misbranded product under Section 9 is devoid of substance and merits no consideration. It is not the case of the respondents that the procedure prescribed under Sections 23, 25 and 26 of the Drug Act has been followed. The feeble attempt to show compliance with provisions of the Drugs Act by alleged purchase of the samples under Form 14A at Annexure R-5 to the counter affidavit dated 21.07.2008 from an unknown source and date must be rejected outright as an attempt to create evidence where none exists.

16. The aforesaid discussion, therefore, leads us to the conclusion that the writ petition was not barred by unexplained delay as the appellant had been pursuing the matter with the authorities and it is they who sat over it, triggering rejection of appellants tender by the Rajasthan Government on 05.07.2019 leading to the institution of the writ petition on 24.07.2019. The High Court therefore erred in dismissing the writ petition on grounds of delay. The illegality and the disproportionate nature of the order dated 08.09.2009, with no third party rights affected, never engaged the attention of the High Court in judicious exercise of the discretionary equitable jurisdiction. Consequently, the impugned order of the High Court as well as order dated 08.09.2009 of the respondents are set aside, and the appeal is allowed.

.....J.
[R.F. NARIMAN]

.....J.
[NAVIN SINHA]

.....J.
[KRISHNA MURARI]

NEW DELHI
NOVEMBER 06, 2020.