

Centurion Laboratories vs the State of Kerala

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SooperKanoon Citation : sooperkanoon.com/1839829

Court : Kerala

Decided On : Mar-04-2020

Judge : Honourable the Chief Justice Mr.S.Manikumar,Honourable Mr. Justice Shaji P.Chaly

Appeal No. : WA/2462/2019

Appellant : Centurion Laboratories

Respondent : The State of Kerala

Judgement :

'CR'

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR & THE HONOURABLE MR. JUSTICE SHAJI P.CHALY WEDNESDAY, THE 04TH DAY OF MARCH 2020 / 14TH PHALGUNA, 1941 WA.No.2462 OF 2019 AGAINST THE JUDGMENT DATED 19.12.2018 IN WP(C) 30910/2018(K) OF HIGH COURT OF KERALA APPELLANT/PETITIONER:

CENTURION LABORATORIES (DIVISION OF CENTURION REMEDIES PVT.LTD.), PLOT NO.G/5, G/6 AND F/19, BIDC, GORWA, VADODARA,

GUJARAT, PIN-390 016, REPRESENTED BY ITS DIRECTOR, MAHIPAT A.PATEL. BY ADVS. SRI.P.CHANDRASEKHAR SRI.K.K.MOHAMED RAVUF SRI.D.SREEKANTH SHRI. ANOOP KRISHNA RESPONDENTS/RESPONDENTS: 1 THE STATE OF KERALA REPRESENTED BY ADDITIONAL CHIEF SECRETARY TO GOVERNMENT OF KERALA, DEPARTMENT OF HEALTH AND FAMILY WELFARE, SECRETARIAT, THIRUVANANTHAPURAM-695 001. 2 THE KERALA MEDICAL SERVICES CORPORATION LIMITED, THYCAUD P.O., THIRUVANANTHAPURAM, PIN-695 014, REPRESENTED BY ITS MANAGING DIRECTOR. R2 BY ADV. SRI.M.AJAY,STANDING COUNSEL THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 04.03.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: W.A. No. 2462 OF 2019 -2-'CR' Dated this the 4th day of March, 2020.

JUDGMENT

SHAJI P. CHALY, J This writ appeal is filed by the petitioners in W.P.(C) No. 30910 of 2018 challenging the judgment dated 19.12.2018, whereby the learned single Judge dismissed the writ petition, thus upholding the order passed by the Medical Corporation of India blacklisting the appellant on account of the suppression of material facts while submitting the contract in the instant case, which was affirmed by the Government in an appeal preferred by the appellant.

2. Brief material facts for the disposal of the writ appeal are

as follows: Appellant, a pharmaceutical company, submitted its tender for the supply of pharmaceutical drugs to the second respondent. Kerala Medical Services Corporation Ltd. (KMSCL) i.e., the second respondent blacklisted the appellant for the reason that Gujarat Medical Services Corporation (GMSCL) and Haryana Medical Services Corporation (HMSCL) had debarred the appellant from participating in their tenders for three years. GMSCL passed a W.A. No. 2462 OF 2019 -3- debarring order for the reason that the information given by the appellant in respect of one of the drugs for which the appellant had submitted tender was

not in terms of the notice inviting tender. Appellant has a case that it had not produced any forged/fabricated/false documents. However, the said mistake was an inadvertent one. So also, according to the appellant, in the impugned order passed by the Medical Corporation of India, proper reasons are not assigned so as to understand the case put forth against the appellant which prevented the appellant from making appropriate objections to the same. Eventhough the said aspect was pointed out before the State Government, the State Government also overlooked the said contention put forth by the appellant. The learned single Judge, without taking into account the said submission made in the writ petition, has arrived at the

conclusion that the orders passed by the KMSCL and the State

Government were in accordance with law and therefore, no interference as sought for by the appellant was required. It is also submitted that eventhough the appellant has put forth the contentions before the learned single Judge in respect of the proportionality principle on the basis of the blacklisting awarded against the appellant for a period of three years, the learned single W.A. No. 2462 OF 2019 - 4- Judge has not answered the said question, even though a reference in regard to the contention was made in the judgment. It is thus, raising the following grounds that this writ appeal is preferred: i. Order of HMSCL was unauthorised, null and void and therefore had no

legal effect. The petitioners filed appeal before the Hon'ble Supreme Court against the judgments of the High Courts confirming the orders of HMSCL and GMSCL and the same is pending. ii. As on the date of execution of the Contract for the supply of 10 items to the second respondent for the year 2017-2018 order of HMSCL was not in existence. Therefore, there was no suppression or concealment of the said

order while submitting the tender to the second respondent.

iii. The order of GMSCL is not in relation to any product in respect of which

the appellant had entered into contract agreement for supply of drugs to the second respondent for the year 2017-2018. Intention of clause 5.2.7 is not to blacklist/debar a firm based blacklisting/debarring of the firm by another agency in respect of another product. iv. Clause 5.2.7 does not empower the second respondent to terminate the contract based on an order of another agency debarring the firm from participating in the tender. v. Blacklisting is a harsh and drastic measure and should not be resorted to

except where there is cogent and compelling reasons. The debarring order

of GMSCL is not for the reason of submitting any forged/false/fabricated document for stating false data that, too in relation to a product which the appellant had not quoted for supply of drugs to the second respondent. vi. Clause 5.2.7 of the tender condition has no application to the facts of the W.A. No. 2462 OF 2019 -5-

case. vii. The contract is not liable to be cancelled unless the appellant had committed any fraud, misrepresentation or concealment of any material fact. Order of GMSCL and HMSCL were not blacklisting order. It is a debarring order that too for the reason of not giving the correct data while submitting the tender. That was a bona fide mistake committed by the clerk and was only a clerical error. The tender condition 5.2.7 is a condition in terrorem and highly unconscionable. The said clause is unfair and unreasonable apart from oppressive violating the petitioner's fundamental rights under Articles 14, 19 and 21 of the Constitution of India. viii. The bargaining power of the petitioner is far less than that of the Government Corporation and tender condition 5.2.7 is highly oppressive and is vitiated by economic duress and is therefore, void and inoperative. ix. Adverse consequences of premature termination of the contract before resorting to drastic step was not considered.

3. We have heard learned counsel for the appellant, Shri. P.

Chandrasekhar, learned Senior Government Pleader Sri. Aravindakumar Babu T.K. and Sri. M. Ajay, learned Standing Counsel appearing for the Kerala Medical Services Corporation Ltd., and perused the pleadings and documents on record.

4. Respective counsel have addressed the arguments in

accordance with the pleadings put forth by them in the writ appeal and the writ petition. The learned single Judge, after taking into W.A. No. 2462 OF 2019 -6- account respective submissions, has concluded the judgment as follows:

6. I have considered the contentions advanced. The

contentions of the petitioners have been considered by the Government in exercise of its appellate power as provided in the e- tender documents. Clause 5.2.7 of the tender documents produced in W.P(C).No.30910 of 2018 for the year 2017-2018 reads as follows: 5.2.7. Tender should not be submitted for the product/products which has/have been blacklisted by KMSCL during the period of blacklisting. Tender should not be submitted for the product/products which has/have been blacklisted/debarred by any other State/Central Government's organization for reason of quality non compliances, GMP non-compliances, major violations of the Drugs and Cosmetics Act and Rules. Concern/Company which has been blacklisted by Tender Inviting Authority for any reasons or blacklisted/debarred by any State Government or Central Government Organization for the above reasons or for reason of furnishing forged/fabricated/false document should not participate in the tender during the period of blacklisting/debarring. Where a product(s)/supplier is blacklisted in any other state or by a Central Government agency for situations as detailed above occur after the submission/opening of the bid/award of contract, the product(s)/bidder will be liable for blacklisting/ rejection/termination/ cancellation of contract/purchase order/LO1 etc. The product(s)/bidder will be liable for such action in the event of any conviction/initiation of prosecution action under the Drug and Cosmetics Act at any stage after

submission/opening of bid. Clause 6.34.1.2 further provides as follows:
6.34.1.2. Without prejudice to the provision of Clause 2.1.10 of this Tender Document Fraudulent practice means a misrepresentation of facts in order to influence a procurement

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process or the execution of a contract to the detriment of the Tender Inviting Authority, and includes collusive practice among bidders (prior to or after tender submission) designed to establish tender prices at artificial non-competitive levels and to deprive the Tender Inviting Authority of the benefits of free and open competition. Suppression of facts such as blacklisting of the product/bidder elsewhere for reason of failure in quality/conviction under Drugs and Cosmetics Act/submission of fake document will be deemed as fraudulent practices. Making false/incorrect statement will also be treated as fraudulent practice.

7. There is a provision for appeal from an order of

termination or blacklisting or imposition of any other penalty by the tender inviting authority to the State Government which specifically after such enquiry into the matter as is considered necessary and after giving an opportunity of hearing to the petitioner as it thinks fit. It is not now in dispute before me that the petitioner firm itself had been debarred by the Gujarat Medical Services Corporation Limited on 28.12.2016. Learned counsel for the petitioner contends that such debarring was without notice to the petitioner and that Exhibit P17

order of the High Court of Gujarat had resulted in stay of the said

proceedings. However, it is not in dispute before me that the order of blacklisting dated 2.9.2016 was not disclosed by the petitioner while submitting the tender.

8. Clause 2.1.10 of the tender document specifically reads as

follows: 2.1.10. Blacklisting/debarring - the event occurring by the operation of the conditions under which the bidders will be prevented from participating in the future bids of W.A. No. 2462 OF 2019 -8-

Tender Inviting Authority for a period up to 3 years, the period being decided on the basis of number/nature of violations in the tender conditions and the loss/hardship caused/likely to be caused to the Tender Inviting Authority on account of such violations, generally relating to supply of substandard, misbranded, adulterated or spurious or any drugs/products manufactured/imported in contravention of any of the laws of the land and for indulging fraudulent practices or having indulged in fraudulent practices at the time of making the bid or at any time during the validity of the tender or the contract thereof. The term will include, among all other things, making false/misleading declarations statements, presenting false/misleading/fabricated/forged document(s), trying to influence/affect/stall the tender/procurement/payment processes in any way, making false/baseless complaints about other bidders or bids or products or any person/organisation/related to the tender activities etc and such activities as specified in this Tender Document. Blacklisting/debarring etc by other State/Central Government departments/agencies shall also be ground for blacklisting by the TIA. It is stated that a declaration also sought for in the form of an affidavit that the petitioner does not suffer from any disqualification to participate in the tender including blacklisting.

9. In view of the specific clauses in the tender conditions and

the nature of the contract between the parties, which is for supply of medicines including life saving medicines, I am of the opinion that the contentions raised to the effect that a proper enquiry has not been conducted by the appellate authority while deciding the issue cannot be countenanced. In view of the clear provisions at Clauses 2.1.10, 5.2.7 and 6.34.1.2 of the tender documents, I am of the opinion that the

decision taken by the 2nd respondent as upheld by the 1st respondent is perfectly legal and valid. The contention of the

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petitioner that the products for which the debarring was effected by the other Medical Services Corporations were different cannot make any difference, since the petitioner concern itself had been debarred by the said Medical Services Corporations and this fact was willfully suppressed by the petitioner while submitting its tender. The petitioner's contention as to the proportionality of the debarring is also not sustainable, in view of the undertaking given in affidavit by the petitioner that they suffered no disqualifications. In the above view of the matter, the prayers sought for cannot be granted. The writ petitions fail and are dismissed.

5. We have appreciated the rival submissions made across

the Bar and we are of the opinion that learned single Judge has taken into account the relevant provisions of the notice inviting tender in the instant case and has arrived at the conclusions. As per clause 2.1.10 quoted in the judgment, it is clear that if any blacklisting or debarring was done by other State/Central Government departments/agencies, the same shall also be a ground for blacklisting by the tender inviting authority. Admittedly, the appellant has not disclosed about the blacklisting

done by the GMSCL. It was, thereupon, that the blacklisting order

was passed by the KMSCL. Eventhough learned counsel for the appellant has put forth a contention that GMSCL has only debarred the appellant from participating in the tender, KMSCL W.A. No. 2462 OF 2019 -10- has blacklisted the appellant, which, in turn, interferes with the proportionality principle laid down in various judgments of the Apex Court. It is true that eventhough the learned single Judge has taken note of such a contention raised by the appellant while dismissing the writ petition, the question raised so was not answered by the learned single Judge. However, from the counter affidavit filed by the KMSCL, it is quite clear and

evident that the appellant was debarred/blacklisted by Gujarat Medical Services Corporation Ltd. (GMSCL) from, 02.09.2016 - 01.09.2019; Haryana Medical Services Corporation Ltd. (HMSCL) 28.12.2016 - 27.12.2019; Central Medical Service Society (CMSS) 23.02.2018- 22.02,2020; and Rajasthan Medical Services Corporation Ltd. (RMSCL) 31.01.2018-30.01.2021. The contention so raised in the counter affidavit is relevant to context, and paragraph 19 reads thus:

Still further it is seen on a scrutiny of the websites of some other Medical Services Corporations that the petitioner is not only debarred by the GMSCL and the HMSCL, but has also seen disqualified by the Central Medical Service Society (CMSS) under the Central Government and the Rajasthan Medical Services Corporation Limited (RMSCL) for the periods 23.02.2018 to 22.02.2020 and 31.1.2018 to 30.01.2021 respectively. A table showing the debarment/blacklisting against the petitioner Company to the knowledge of the petitioner is as follows:

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Agency	Period	of	debarment/ Re
(GMSCL) Haryana Medical Services Corporation Ltd. fabricated and fraudulent documents	28.12.2016 - 27.12.2019	False, fake,	
Central Medical Service Society (CMSS) document/Information submitted in tender	23.02.2018-22,02,2020	Forge	
Rajasthan Medical Services Corporation Ltd. document (RMSCL)	31.01.2018-30.01.2021	Submission of false	

It is therefore clear that the petitioner is persistent, repetitive practitioner of fraud and misrepresentation not only before the KMSCL but before other Government agencies across the country. The petitioner is thus unworthy of the trust KMSCL expects from its suppliers since the products tendered for are often life saving medicines. From the forgoing circumstances it is clear that the writ petition is devoid of merits, is unsustainable in law and on facts and deserves to be dismissed with costs to the answering respondent and it is so humbly prayed in the

interests of justice in this case.

6. It is also pointed out by the learned counsel for the

appellant that debarring done by the other agencies have already concluded, except the debarring of the RMSCL above, which is up to 30.01.2021, and therefore, a lenient view may be taken and the blacklisting already suffered by the appellant from the date of the blacklisting order upto this date may be treated as the W.A. No. 2462 OF 2019 -12- punishment, and the appellant may be permitted to participate in the future tenders conducted by the KMSCL. Since the appellant has raised the question of proportionality principle, we deem it appropriate to discuss some of the relevant judgments of the Apex Court in that regard.

7. In *Erusaian Equipment & Chemicals Ltd v. State of West Bengal and Another* [(1975) 1 SCC 70], paragraphs 15, 16 & 17 read thus:

15. The blacklisting order does not pertain to any particular

contract. The blacklisting order involves civil consequences. It casts a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are instruments of coercion.

16. In passing an order of blacklisting the government department

acts under what is described as a standardised code. This is a code for internal instruction. The government departments make regular purchases. They maintain list of approved suppliers after taking into account the financial standard of the firm, their capacity and their past performance. The removal from the list is made for various reasons. The grounds on which blacklisting may be ordered are if the proprietor of the firm is convicted by court of law or security considerations to warrant or if there is strong justification for believing that the proprietor or employee of the firm has been guilty of malpractices such as bribery, corruption, fraud, or if the firm continuously refuses to return Government dues or if the firm employs a government servant, dismissed or removed on

account of corruption in a position where he could corrupt government servants. The petitioner was blacklisted on the ground of justification for believing that the firm has been guilty of malpractices such as bribery, corruption, fraud. The petitioners were blacklisted on the ground that there were proceedings pending

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17. The Government is a Government of laws and not of men. It is

true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

8. In *Kulja Industries Limited (M/s) v. Chief General Manager, W.T. Proj.BSNL and Others* [2014(14)SCC 731], it is held in paragraphs 17, 25 & 26 thus:

17. That apart, the power to blacklist a contractor whether the contract

be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because blacklisting simply signifies a business decision by which the party

affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of

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natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court. That apart, the power to blacklist a contractor whether the contract be for supply of material or equipment or for the execution of any other work whatsoever is in our opinion inherent in the party allotting the contract. There is no need for any such power being specifically conferred by statute or reserved by contractor. That is because blacklisting simply signifies a business decision by which the party affected by the breach decides not to enter into any contractual relationship with the party committing the breach. Between two private parties the right to take any such decision is absolute and untrammelled by any constraints whatsoever. The freedom to contract or not to contract is unqualified in the case of private parties. But any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities. This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential precondition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The

order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ court.

25. Suffice it is to say that 'debarment' is recognised and often used

as an effective method for disciplining deviant suppliers/ contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the regulations under which such contracts were allotted. What is notable is that the 'debarment' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.

26. In the case at hand according to the respondent - BSNL, the appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the W.A. No. 2462 OF 2019 -15-

respondent - corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when (a) the appellant is supplying bulk of its manufactured products to the respondent- BSNL and (b) The excess amount received by it has already been paid back.

9. In *Gohil Vishvaraj Hanubhai and Ors. v. State of Gujarat and Ors* [(2017)13 SCC 621], it is held in paragraphs 24 to 27 thus:

24. We are left with the third question-whether the magnitude of the

impugned action is so disproportionate to the mischief sought to be addressed by the respondents that the cancellation of the entire examination process affecting lakhs of candidates cannot be justified on the basis of the doctrine of proportionality.

25. The doctrine of proportionality, its origin and its application both in

the context of legislative and administrative action was considered in some detail by this Court in *Om Kumar and Ors. v. Union of India*, (2001) 2 SCC 386 : 2001 SCC (L&S) 1039]. This Court drew a distinction between administrative action which affects fundamental freedoms [See *Om Kumar v. Union of India*, (2001) 2 SCC 386 at pp. 407-08, paras 52 to 54 : 2001 SCC (L&S) 1039] under Articles 19(1) and 21 and administrative action which is violative of Article 14 of the Constitution of India. This Court held that in the context of the violation of fundamental freedoms: (*Om Kumar case* [See *Om Kumar v. Union of India*, (2001) 2 SCC 386 at pp. 407-08, paras 52 to 54 : 2001 SCC (L&S) 1039] , SCC p. 408, para 54) 54. the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested

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by the courts as a primary reviewing authority and not on the basis of *Wednesbury*[*Associated Provincial Picture Houses Ltd.v.Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] principles. It may be that the courts did not call this proportionality but it really was. This Court, thereafter took note of the fact that the Supreme Court of Israel recognised proportionality as a separate ground in administrative law to be different from unreasonableness.

26. - It is nobody's case before us that the impugned action is violative of

any of the fundamental freedoms of the appellants. We are called upon to examine the proportionality of the administrative action only on the ground of violation of Article 14. It is therefore necessary to examine the principles laid down by this Court in this regard.

27. This Court posed the question in *Om Kumar case*[*Om Kumar v. Union of India*, (2001) 2 SCC 386 : 2001 SCC (L&S) 1039] : (SCC p. 409, para 61) 61. When does the court apply, under Article 14, the proportionality

test as a primary reviewing authority and when does the court apply theWednesbury[Associated Provincial Picture Houses Ltd.v.Wednesbury Corpn., (1948) 1 KB 223 (CA)] rule as a secondary reviewing authority? From the earlier review of basic principles, the answer becomes simple. In fact, we have further guidance in this behalf. and concluded: (SCC pp. 410-11, paras 66-68) 66. It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the

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constitutional courts as primary reviewing courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here the court deals with the merits of the balancing action of the administrator and is, in essence, applying proportionality and is a primary reviewing authority.

67. But where an administrative action is challenged as

arbitrary under Article 14 on the basis of E.P. Royappa v.State of T.N.[E.P. Royappa v.State of T.N., (1974) 4 SCC 3 : 1974 SCC (L&S) 165] (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is rational or reasonable and the test then is the Wednesbury [Associated Provincial Picture Houses Ltd.v.Wednesbury Corpn., (1948) 1 KB 223 (CA)] test.The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be

treated as arbitrary. [In G.B. Mahajan v. Jalgaon Municipal Council [G.B. Mahajan v. Jalgaon Municipal Council, (1991) 3 SCC 91] (SCC at p. 111).] Venkatachaliah, J. (as he then was) pointed out that reasonableness of the administrator under Article 14 in the context of administrative law has to be judged from the standpoint of Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] rules. In Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] (SCC at pp. 679-80), Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P)

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Ltd. v. Union of India, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] (SCC at pp. 691), Supreme Court Employees' Welfare Assn. v. Union of India [Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187 : 1989 SCC (L&S) 569] (SCC at p. 241) and U.P. Financial Corpn. v. Gem Cap (India) (P) Ltd. [U.P. Financial Corpn. v. Gem Cap (India) (P) Ltd., (1993) 2 SCC 299] (SCC at p. 307), while judging whether the administrative action is arbitrary under Article 14 (i.e. otherwise than being discriminatory), this Court has confined itself to a Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] review always.

68. Thus, when administrative action is attacked as

discriminatory under Article 14, the principle of primary review is for the courts by applying proportionality. However, where administrative action is questioned as arbitrary under Article 14, the principle of secondary review based on Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] principles applies.

10. In Modern Dental College and Research Centre v. State of M.P [(2016) 7 SCC 353], it is held in paragraphs 63 to 65 thus:

63. In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. Here comes the concept of proportionality, which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to

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achieve such a purpose are rationally connected to the purpose, and such measures are necessary. This essence of doctrine of proportionality is beautifully captured by Dickson, C.J. of Canada in R.v.Oakes[R.v.Oakes, (1986) 1 SCR 103 (Can SC)] , in the following words (at p. 138): To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutional protected right or freedom Second the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be rationally connected to the objective. Second, the means should impair as little as possible the right or freedom in question Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to

be reasonable and demonstrably justified in a free and democratic society.

64. The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic W.A. No. 2462 OF 2019 -20-

society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests.

65. We may unhesitatingly remark that this doctrine of

proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read clause (1) along with clause (6) thereof. While defining as to what constitutes a reasonable restriction, this Court in a plethora of judgments has held that the expression reasonable restriction seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social

control permitted by any of the clauses (2) to (6). It is held

that the expression reasonable connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public. Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object (see *P.P. Enterprises v. Union of India* [*P.P. Enterprises v. Union of India*, (1982) 2 SCC 33 : 1982 SCC (Cri) 341]). At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the restrictions are imposed or upon abstract considerations (see *Mohd. Hanif Quareshi v. State of Bihar* [*Mohd. Hanif Quareshi v. State of Bihar*,

AIR 1958 SC 731 : 1959 SCR 629]). In *M.R.F. Ltd.v.State of Kerala*[*M.R.F. Ltd.v.State of Kerala*, (1998) 8 SCC 227 : 1999 SCC (L&S) 1] , this Court held that in examining the reasonableness of a statutory provision one has to keep in mind the following factors:

(1) The directive principles of State policy. W.A. No. 2462 OF 2019 -21-

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the

restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or

reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.

11. So much so, the principle was considered by the House of Lords in *R v Secretary of State for the Home Department, ex parte Daly* [(2001) 3 All ER 433]. Paragraphs 26 to 28 reads thus:

26. The explanation of the Master of the Rolls in the first sentence of the

cited passage requires clarification. It is couched in language reminiscent of the traditional Wednesbury ground of review (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[1948] 1 KB 223), and in *W.A. No. 2462 OF 2019 - 22-*

particular the adaptation of that test in terms of heightened scrutiny in cases involving fundamental rights as formulated in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554E-G per Sir Thomas Bingham MR. There is a material difference between the Wednesbury and Smith grounds of review and the approach of proportionality applicable in respect of review where convention rights are at stake.

27. The contours of the principle of proportionality are familiar. In

de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing[1999] 1 AC 69 the Privy Council adopted a three stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective." Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review"

[2000] PL 671; Craig, *Administrative Law*, 4th ed(1999),561-

563;Professor David Feldman,"Proportionality and the Human Rights Act 1998",essay in*The Principle of Proportionality in the Laws of Europe*(1999), pp

117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of W.A. No. 2462 OF 2019 -23-

proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138: "the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national

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security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention." In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued. 28 . The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood[2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in Mahmood, at p 847, para 18, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything.

12. Taking into account the gravity of the mischief or the

impugned action on the part of the appellant, the proportionality principle is to be addressed in a constitutional angle, since any unreasonable restriction in the matter of award of contracts infracts the fundamental rights guaranteed under Articles 14, W.A. No. 2462 OF 2019 -25- 19(1)(g) and 21 of the Constitution of India. True, the doctrine of proportionality is a vital feature and indispensable component of the several of the fundamental rights guaranteed by our Constitution. At the same time, the said doctrine could not be applied unmindful of the salutary principles evolved, basing on Articles 14, 19 and 21 of the Constitution of India. In a situation like the one on hand, we have to bear in mind the rationality, reasonableness, absence of bias, fairness, gravity of the incident, nexus with the object sought to be achieved, the nature of offensive act, public policy, antecedent performance and conduct etc. etc. Therefore, taking into account the conduct of

the appellant as is discussed above, it is a company indulged in successive misrepresentation and fraudulent acts while submitting the tender in the matter of supply of the medical products. Reckoning the facts and figures available on record, we are constrained to hold that the appellant submitted the contract without disclosing the requirements as is necessitated in the notice inviting tender. Therefore, the conduct of the appellant was lacking transparency and discipline, leading to suppression of a material aspect and thereby indulging itself in immoral activities disabling the authority to take a decision applying the principles of W.A. No. 2462 OF 2019 -26- fair play and justice. That apart, the Kerala State Medical Services Corporation is a company owned by the State of Kerala involved in supplying medicines to the Government Hospitals and other allied institutions managed and controlled by the State Government and the people depending on such medical institutions are poor sections of the community, and taking into account the said aspect, it cannot be said that the action of the Corporation blacklisting the appellant for a period of 3 years is disproportionate to the gravity of the mischief or the mal practice employed by the appellant. To view the circumstances in a different angle, such an action was taken by the Corporation with the intention of protecting the larger public interest and welfare of the ordinary, poor and needy people of the community, to avoid any adverse circumstances affecting the interest of the Corporation and also as a deterrent and punitive measure to prevent such conduct in future. Therefore, in our view, no leniency can be extended so far as the supply of medicine is concerned and it should be ensured that it is done by the Contractor in a systematic, transparent and disciplined manner. W.A. No. 2462 OF 2019 -27-

13. We also find that KMSCL as well as the State

Government have taken into account the objections advanced by the appellant and it was verifying the terms and conditions of the tender that the decision was arrived at by the said authorities. Moreover, the appellant has participated in the tender fully knowing well that if any material facts were suppressed by the appellant, the terms and conditions of the notice inviting tender would enable the authorities to proceed against the appellant and blacklist the appellant. Therefore, the appellant is not entitled to turn around and challenge the terms and conditions

contained in the notice inviting tender.

14. Taking into account the aforesaid legal aspects and

since the appellant was debarred by various State as well as Central agencies referred to above, we are of the opinion that, the blacklisting imposed for a period of three years is proportionate to the gravity of the mischief. In that view of the matter, the appellant is not entitled to get any relief on the basis of the proportionality principle also.

15. Therefore, appreciating the rival submissions and the

facts and legal circumstances on record, we do not find any

W.A. No. 2462 OF 2019 -28- legal infirmity in the judgment rendered by the learned single Judge, justifying interference in an intra-court appeal filed under Section 5 of the Kerala High Court Act. Resultantly, writ appeal fails, accordingly it is dismissed. sd/- S. MANIKUMAR, CHIEF JUSTICE. sd/- SHAJI P. CHALY, JUDGE. Rv

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