

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30<sup>TH</sup> DAY OF JANUARY 2017

BEFORE

THE HON'BLE MR. JUSTICE ASHOK B. HINCHIGERI

**W.P.NOS.1792 – 1799 OF 2017 [GM-TEN]**

BETWEEN

1. Johnson & Smith Co.  
B-48, III Stage,  
Peenya Industrial Estate,  
Bangalore – 560 058,  
Represented by its Partner,  
Mr.Ramesh C.  
Bangalore based manufacturer  
Of Pharmaceuticals Products  
Karnataka SSI,  
GMP, License Holder.
2. Prabhat Surgical Cotton Pvt. Ltd.  
148/8, 1<sup>st</sup> Floor,  
Sultanpet Main Road,  
Sultanpet, Bangalore – 560 053,  
Represented by its Managing Director  
Mr.Nagabhusan,  
Manufacturer of Surgical Cotton,  
Bangalore based Pharmaceutical  
Manufacturer, Karnataka SSI,  
GMP, License Holder.
3. Elegant Drugs Pvt. Ltd.  
Pharmaceutical Manufacturers,  
CTS No.122/112, New Cotton Market,  
Hubballi – Dharwad, Karnataka – 580 029,  
Represented by its Authorized Signatory,  
Mr.Bharat Ostwal,  
Hubli based Pharmaceutical Manufacturer  
Karnataka SSI, GMP, License Holder.

4. Pradeep Surgical Dressing Pvt. Ltd.  
No.3A, Sarakki Industrial Estate,  
Bannerghatta Road, JP Nagar  
3<sup>rd</sup> Stage, Bangalore – 560 076,  
Represented by its Director  
Mr.Pradeep Rao,  
Bangalore based Pharmaceutical  
Manufacturer, Karnataka SSI,  
GMP, License Holder.
5. Vijay Agencies,  
No.56, Central street,  
Kumara Park West,  
Bangalore – 560 020,  
Represented by Proprietor,  
Mr.Lalith Kumar Rakhia,  
Bangalore based Importer  
Of Disposable Surgical Products.
6. S.M. Pharmaceuticals,  
Plot No.#37/A2,  
Pillagumpe Industrial Area,  
Hoskote, Bangalore – 562 114,  
Karnataka, represented by its  
Proprietor Mr.A.C.Chandra Kumar,  
Bangalore based Pharmaceutical Manufacturer  
Karnataka SSI, GMP, License Holder.
7. Systochem Laboratories Limited,  
#B-75, Roopnagar Industrial Area,  
Loni, Uttar Pradesh,  
Repressed by authorized signatory,  
Mr.K.D.Ostwal.
8. Deepin Pharmaceuticals Pvt. Ltd.  
Village – Dharwara,  
Post – Kalaria,  
Tehsil Depalpur,  
Dhar Road,  
Indore, represented by its  
Authorized signatory  
Mr.Sunil.

... Petitioners

(By Sri Jayakumar S.Patil, Senior Advocate  
for Sri Omkar Kambi, ADVocate)

AND:

1. Karnataka State Drugs Logistics & Warehousing Society, A Government Of Karnataka Enterprise, No.1, Dr.Siddaiah Puranik Road, Magadi Road, Karnataka Housing Board Colony, Bangalore - 560 079 Represented by its Additional Director.
2. State of Karnataka, Department of Health and Family Welfare, Vidhana Soudha, Bangalore - 560 001, Represented by its Principai Secretary. ... Respondents

(By Smt.M.C.Nagashree, Advocate for R1:  
Smt.Prathima Honnapura, AGA for R2)

These writ petitions are filed under Articles 226 and 227 of the Constitution of India praying to declare that the conditions as per Clause 10 and Clause 15(2) vide Annexure-A10 as being unreasonable, irrational and arbitrary and hence violative of Article 14 in respect of the following tender notifications issued by the R1 vide Annexures A, A1 to A9 and etc.

These writ petitions, coming on for preliminary hearing, this day, the Court made the following:

**ORDER**

The petitioners are all Pharmaceutical Companies engaged in the manufacture, supply and import of various pharmaceutical products. They have called into question the tender notification, dated 19.11.2016 (Annexure-A9) for the supply of drugs, chemicals and miscellaneous items for the year 2016-2017, insofar as it pertains to Clauses 10 and 15.2 of the tender

notification. Clause 10 of the tender notification requires the successful bidder to pay the security deposit amount; earlier it was by way of bank guarantee. The prayer sought by the petitioners is that they be permitted to pay the security deposit in the form of bank guarantee in lieu of demand drafts. Clause 15.2 of the tender document states that all stocks of drugs nearing the date of expiry should be replaced with fresh stocks from the latest batch in case the supplier is informed to do so before the date of expiry.

2. Sri Jayakumar S. Patil, the learned Senior Counsel appearing for Sri Omkar Kambi for the petitioners submits that the small scale industries are not in a position to pay the security deposit amount by way of demand draft. This Court, by its interim order, dated 17.12.2015 in W.P.Nos.55999-56002/2015 (Annexure-D) has already directed the respondent No.1 to receive the tenders accompanied by the bank guarantees payable towards the security deposit amount. Therefore, the respondents are not justified in insisting that the payment of security deposit has to be only by way of demand draft. He

submits that the similar tender notifications issued in the States of Kerala and Gujarat (Annexures – E and E1) provide for the payment of security deposit amount by way of bank guarantee.

3. The learned Senior Counsel submits that Clause 15(1) of the impugned tender notification imposes the additional condition of re-supplying the entire quantity of drugs supplied with 100% shelf-life. It is always open to the respondents to reject the supply of drugs, which do not have adequate shelf-life. He submits that Clause 15(1) of the tender notification would sufficiently meet the requirement. It reads as follows:

**"15. Expiry Date:**

*1. All drugs must indicate the Date of Manufacture and date of Expiry. All drugs must arrive at the purchaser's point with a remaining shelf life of at least 80% (eighty percent) of the total stipulated shelf life of the product. In case, the product supplied is below 80% of shelf life it will be rejected. In case of imported drugs the minimum shelf life, at the time of delivery at purchaser's point, should be at least 70%."*

4. In the wake of the afore-extracted clause, the inclusion of Clause 15(2) is not warranted. It would only lead to wastage of enormous quantity of drugs, besides putting a premium on

the inefficiency in the management of drugs. In a worst case scenario, if the drugs with 100% shelf-life remain unused, they would be returned to the tenderer one day before the date of expiry requiring him to re-supply the entire quantity. This uncertainty maximize risk element for the tenderers and that therefore they would be quoting exorbitant rates, which would not be in the interest of the public also. He relies on the Apex Court's judgment in the case of **RELIANCE ENERGY LTD. AND ANOTHER v. MAHARASHTRA STATE ROAD DEVELOPMENT CORPN. LTD. AND OTHERS** reported in **(2007) 8 SCC 1**, wherein it is held that Article 14 applies to the Government policy and if the policy or act of the Government, even in the contractual matters, fails to satisfy the test of reasonableness, such an act or decision would be unconstitutional. Paragraph No.38 of the said decision read out by the learned Senior Counsel is as follows:

*"38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and*

*discriminatory treatment. It may violate doctrine of "level playing field."*

5. Smt. M.C. Nagashree, the learned counsel for the respondent No.1 submits that the recycling of the drugs when their shelf-life is coming to an end is possible and permissible. She submits that the same is with reduced activation or reduced efficacy of certain components of the drugs. She submits that it is difficult to anticipate what quantity of drugs are required for the people and in which part of the year. Therefore, Clause 15(2) is included in the best interests of the public. She submits that only small quantity of certain types of drugs may not be used.

6. She submits that this Court has clarified in its interim order, dated 17.12.2015 (Annexure-D) that it is a temporary arrangement and that therefore the petitioners cannot demand as a matter of right that they should be permitted to submit the bank guarantee in lieu of demand draft towards the security deposit amount. She submits that the tenderers after depositing some amount in the bank would utilize the bank guarantee for various tenders in different States. She submits that in cases

where the tenderer is black-listed, the security deposit amount has to be forfeited. In such situations, it is difficult to enforce the bank guarantee.

7. In the course of rejoinder, Sri Jayakumar S.Patil, learned Senior Counsel appearing for Sri Omkar Kambi submits that re-processing of drugs is only an exception. Most of the drugs, on attaining the date of expiry, are only to be destroyed.

8. The submissions of the learned counsel have received my thoughtful consideration. The first question that falls for my consideration is whether the prescription that the security deposit amounts be paid in the form of demand draft is bad?

9. To answer this question an advertence has to be made to the relevant Rule. Rule 12(1) of the Karnataka Transparency in Public Procurement Rules, 2000 reads as follows:

*"12. Commercial conditions.- (1) The tender documents shall require all tenderers to pay an earnest money deposit at the rates as per the departmental rules by means of a demand draft, bankers' cheque, specified small savings instruments or where the procuring entity deems fit, irrevocable bank guarantee in a specified form*



*of the department. The tender documents shall clearly state that any tender submitted without the earnest money deposit be summarily rejected.*

10. A perusal of the afore-extracted Rule reveals that the security deposit amount has to be paid by demand draft, bankers' cheque, specified small savings instruments; it can also be given in the form of irrevocable bank guarantee, if the procurement entity permits. The said Rule confers the power on the procurement entity to relax the commercial condition, if it deems fit. It may only ask for an irrevocable bank guarantee but the Rule cannot be interpreted to mean that the tenderer can demand that he be permitted to submit only a bank guarantee in lieu of the demand draft. To be sure of the financial capability of the tenderers, the procurement entity may insist that the security deposit amount has to be paid by way of demand draft. In the case on hand, it is the stand of the respondent No.1 that certain circumstances are such that it is difficult to enforce the bank guarantee.

11. It may be profitable to refer to what the Apex Court has said in the case of **MICHIGAN RUBBER (INDIA) LIMITED**

**v. STATE OF KARNATAKA AND OTHERS** reported in **(2012) 3**

**SCC 216**. Paras 23(c), (d) and (e) of the said decision reads as follows:

*"23. From the above decisions, the following principles emerge:*

*.....*

*(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;*

*(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and*

*(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."*

12. The view of the Hon'ble Supreme Court in the case of

**VILLIANUR IYARKKAI PADUKAPPU MAIYAM v. UNION OF**

**INDIA** reported in **(2009) 7 SCC 561** is re-iterated in the case

of **ARUN KUMAR AGRAWAL v. UNION OF INDIA AND OTHERS** reported in **(2013) 7 SCC 1**. It is held therein that it is not in the domain of the courts and not the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy could have been formulated. Nor are the courts inclined to strike down a policy at the behest of a party, merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to 'trial and error' as long as both trial and error are bona fide and within the limits of the authority.

13. In the instant case, if the procurement entity wants to be sure of the financial stability and capability of the tenderer to supply the drugs in bulk, it does not want to be entangled in the legal proceedings for recovering the amounts due, if any, from the tenderers, the respondents cannot be found fault with. The reliance of the petitioners on the basis of the interim order,

dated 17.12.2015 in W.P.No.55999-56002/2015 does not come to the rescue of the petitioners in any way, as the said interim order itself makes it very clear that it is only a temporary arrangement and subject to further orders.

14. In the case of **AIR INDIA LTD. v. COCHIN INTERNATIONAL AIRPORT LTD. AND OTHERS** reported in **(2000) 2 SCC 617**, the Apex Court has expressed the considered view that the State can fix its terms of invitation to tender and that it is not open to judicial scrutiny.

15. The second question that falls for my consideration is whether Clause 15(2) of the tender notification is bad? The said Clause is extracted hereinbelow:

**"15. Expiry Date:**

.....

*2. All stocks of drugs nearing date of expiry should be replaced with fresh stocks from the latest batch in case the supplier is informed to do so before the date of expiry."*

16. The plain reading of the afore-extracted clause reveals that the drugs which have 100% shelf life at the time of supply can also be returned to the supplier for being replaced by fresh

drugs. The clause creates uncertainty driving the prospective tenderer to offer their rates keeping in view the risk element involved. Taking risks in business may be unavoidable. But the risk element has to be minimized in the contractual matters. Some States appear to have precisely done the same. Because of the uncertainty regarding the quantum of re-supply, the tenderers may charge exorbitant rate. Purchasing the drugs at an exorbitant rate would not be in public interest; besides the return of the drugs for being destroyed just on the eve of their attaining the date of maturity leads to wastage of enormous quantity of drugs. If the respondents evolve a standard schedule for the supply of drugs and for the return of drugs, it may considerably reduce the rate for procuring the drugs. This is possible if the realistic estimates of the required drugs are prepared. The supply of drugs has to be made viable by reducing the chance element in the return and re-supply of the drugs to the extent possible.

17. This does not mean that this Court proposes to quash Clause 15(2) of the tender notification. As repeatedly said by the

Hon'ble Supreme Court, the finalization of the terms of the tender falls within the domain of the executive/experts. The ends of justice would be met by my directing the petitioners to give appropriate representation to the respondent No.1. It is for the respondent No.1 to consider the same depending upon its commercial perception besides public interest. The respondent No.1 is directed to hold the impugned tender process on hold for ten days and take a decision on whether any of the modifications sought by the petitioners deserve to be accepted. The petitioners' suggested modifications may or may not merit acceptance but they merit serious and meaningful consideration at the hands of the respondent No.1.

18. If the respondent No.1 decides to modify any terms and conditions of the impugned tender, it shall immediately issue addendum/corrigendum on website and put it in public domain, because it is the Court's anxiety that if any terms and conditions of the tender are modified, its benefit should not be confined only to those, who have approached this Court.

19. If the respondent No.1 forms the considered view that no change is required to be made in the tender notification, it shall resume the tender process from the stage at which it was interrupted. Further, if the petitioners fail to submit the representation to the respondent No.1 within three days, the benefit of this order shall not remain accrued to them.

20. In the result, the challenge to Clause 10 of the tender notification is negatived. The petitioners have partly succeeded in their challenge to Clause 15(2) of the tender notification that is to the extent indicated hereinabove. I reiterate that it is for the respondent No.1 to take an informed decision in the matter.

21. These petitions are accordingly disposed of. No order as to costs.

**Sd/-  
JUDGE**

VGR/MD/cm