

HON'BLE SRI JUSTICE RAVI CHEEMALAPATI

WRIT PETITION No. 39324 of 2022

ORDER:

This Writ Petition has been filed under Article 226 of the Constitution of India for the following relief:

“..... to issue an appropriate Writ, Order or Direction more particularly one in the nature of Writ of Mandamus declaring the action of respondents in suspending Memo R.C.No.1577546/CPS/2021 dated 01.12.2021 as illegal, arbitrary and against the principles of natural justice and consequently direct the respondent No.2 to immediately release the pending payment of Rs.2,68,12,577/- along with 12% interest from the date of 91 invoices.....”

2. The case of the petitioner, in brief, is that the petitioner is a professionally managed pharma distribution company active since 1996, having its branches at Vijayawada, Visakhapatnam, Kerala and New Delhi. The petitioner has been serving the State of Andhra Pradesh distributing pharma supplies under the State Insurance Medical Services since 2014. The distribution of pharma products under the scheme of Insurance Medical Service involves the following steps.

1. Respondent No.3 invites tenders for the supply of drugs
2. The eligible pharma companies participate in the tender

3. Pursuant to the tender, respondent No.3 releases Central Rate Contract for specific period of time
4. The Chief Direct Demanding officer designate Direct Demanding Officers for the operation of the Rate Contract on its behalf.
5. The said Director Demanding Officers shall sign the supply/ purchase orders in the name of rate contract holders qua pharma companies or its authorized distributors (In the case of distributors after taking an authorization letter from respective pharma companies) and basis on these supply/ purchase orders the required pharma products are distributed in the respective states.
6. The successful bidders qua pharma companies also known as Rate Contract Holders through itself or through their authorized distributors supply the pharma products in respective States under the scheme of Insurance Medical Services. After the supplies are made, the respective pharma company or their distributors raise the invoices for the payments
7. The Direct Demanding Officers after verification of the invoice, release the payments to the pharma company or to their distributors as the case may be.

The petitioner company had supplied the pharma products against 49 purchase orders raised by Direct Demanding Officer to the tune of Rs.1,36,85,699/- in its name for the period between 2016 to 2019. So also the petitioner had also supplied under 42 purchase orders raised in the name of the rate contract holder/ pharma company, for which the petitioner company is authorized distributor, to the tune of 1,31,26,878/- during the above said period.

It is the further case of the petitioner that, the respondent No.2 had released all the payments against the deliveries of pharma products except the ninety one (91) invoices referred to above amounting to Rs.2,68,12,577/-. Since the invoices were pending from 2017 onwards, the petitioner company had been vigorously following up the respondent No.2 for releasing pending payments, by submitting written representations and by sending mails from time to time, but to no avail. Despite pending payments of crores of rupees, the petitioner company has continued to receive purchase orders from Direct Demanding Officers and the supply of pharma products was being made without any stoppage. The supplies were also being accepted by the Direct Demanding Officers qua the recipients of the pharma products as indicated by the Direct Demanding Officers in its purchase orders.

It is the further case of the petitioner that, the respondent No.2 issued a Memo R.C.No.1577546/CPS/2021 dated 01.12.2021 stating that as per the terms and conditions specified in ESIC- Rate Contract, the payments will be made directly to whom the PO's were issued and because of the AG audit objections raised against the distributor bills and as the bills were not issued by the companies the bills cannot be considered for

payment. Therefore, the invoices raised in the name of the distributor/firm/ person/ agent for rate contract supplies which are forwarded to this office are not being considered for payment and the RC firms are requested to submit those bills after making necessary entries on the invoices raised by the Rate Contract firms only for making payments. The aforesaid letter refers to four communications basing which the invoices of the petitioner company have been stopped, viz., (1) As per ESIC Rate Contract Guideline from November, 2019, (2) This office Memo even No.840/CDS/2020 dated 24.02.2020, (3) Lr.No.PAG(AG)/AP/AGG-I/EDIT-III/U-II/21-22/-06 dated 17.05.2021 of Principal Accountant General and (4) Mail dated 25.11.2021 from ESI Corporation, Gunadala, Vijayawada.

It is the further case of the petitioner that, the reasons and references relied by the respondent No.2 in stopping the payment of ninety one (91) invoices of petitioner company is without any reason. The memo referred to in the letter does not have any relation to the ninety one pending invoices of the petitioner company, since the same are prior to 01.11.2019, the date on which the memo was issued. Further, the audit observations of respondent No.4 are vague and without any specific

reference to the applicable Central Rate Contract along with date and its number. Further, the Central Rate Contract terms for the period starting from the year 2016 till 2019 do not have any such condition wherein Rate Contract firms should not engage distributors or payments must not be made to the distributors. Thus, the 2nd respondent has deliberately and in order to conceal his own wrongdoings taken arbitrary and illegal action against the petitioner company by not releasing the payment. The respondent No.2, without giving thoughtful consideration to the obligations of entities and ignoring the fact that the once GST payments are made there is no option under the law to correct or cancel the paid invoices retrospectively and issue fresh invoices in place of such cancelled invoices, in a haste and with a mala fide intention to cause loss to the petitioner company, had issued the impugned memo. Thus, the action of the respondent No.2 in issuing the impugned memo without any approval or permission from the Government is in complete violation of law, principles of natural justice, violating Articles 19(1)(g) and Article 21 of the Constitution of India and contrary to the provisions of law as settled by Hon'ble Supreme Court and High Courts from time to time in similar issues.

The petitioner having no other alternative efficacious remedy, filed this writ petition.

3. The respondent No.2 filed counter affidavit denying the averments of the writ petition, *inter alia* contending that, the cause in the writ petition involves a factual adjudication of, contractual obligations arising out of the purchase orders issued by the 2nd respondent to the petitioner herein under non Rate Contract Category and also payment related obligations arising out of the invoices raised in the name of the petitioner for the stock supplied by certain Rate Contract firms through their authorized distributor i.e. the petitioner under Rate Contract category, which is impermissible in a writ jurisdiction under Article 226 of the Constitution of India. Hence, the instant writ petition is not maintainable. The petitioner has to approach a competent civil Court for any dispute arising in respect of the said purchase orders and the same cannot be gone into a Writ Petition. Further, certain facts which are of vital importance and paramount significance are not stated in the writ petition. The impugned memo itself categorically states that, the bills have to be submitted by the main RC firms for payment. Regarding Rate Contract, the authority competent to make purchases will place purchase orders with the

approved RC agencies as per the list circulated by the 3rd respondent. In case of Non-Rate Contracts, as per the 7th guideline of G.O.Ms.NO.51 dated 09.04.2012 of the Labour Employment Training & Factories (IMS) Department, purchase under non-Rate Contract category shall be procured under Open Tender System (competitive bidding process) by the Director of Insurance Medical Services adopting the procedure prescribed therein.

It is further stated that, the petitioner is the authorized distributor for certain pharmaceutical firms, like Bristol Meyers Squibb India, Med Manor Organics India Pvt.Ltd., Hindustan Antibiotics Limited and Roche Products etc., which are enlisted in the Rate Contract list circulated by the 3rd respondent, to all the officers of ESI including the 2nd respondent. Further, 2nd respondent accepted the supplies from the petitioner and made certain payments to the petitioner between the years 2014-19, towards stock supplied by the certain RC firms through the petitioner, in its capacity as distributor. However, under non-RC Contract, such payment is in violation of existing rules and government guidelines in vogue viz., G.O.Ms.No.51 dated 09.04.2012 of the LET&F (IMS) Department, G.O.Ms.No.258 dated 20.09.2013 read with G.O.Ms.No.40 dated 14.02.2014 of the Finance (TFR.I) Department, Rule III Instruction 7 of AP

Financial Code read with G.O.Ms.No.489 dated 08.12.2008 and Lr.No.U-16/52/2001/Med-III (AP) dated 22.11.2016 of the ESI Corporation, among others.

It is further stated that, the 4th respondent conducted an Audit of the Accounts of the Directorate of Insurance Medical Services, in the month of March 2021 and reported certain findings on the payments made to authorized distributors instead of main RC firms, observing that as ESIC has entered into agreement with RC firms, the payments should invariably be paid to the RC firms on which the purchase order was placed by obtaining original invoices. Further, there are no government rules or ESIC guidelines in force, for making payments to authorized distributors instead of main RC firms. Further, the ESIC guidelines, at guideline no.20, has clearly stipulated that the payment may be made to directly to the RC firm. In such view of the matter, the payments have been stopped to the petitioner, who is seeking payment of bills of an authorized distributor of the above referred RC firms. Further, the then Directors of Insurance Medical Services, who have made payments to the petitioner as authorized distributor, without following the rules or guidelines, were arrested by the Anti Corruption Bureau, A.P., in pursuance of FIR bearing Cr.No.03/RCO-

CIU-ACB/2020 Dated 10.06.2020, on the file of Anti Corruption Bureau P.S., C.I.U., A.P., Vijayawada, for committing financial fraud in the 2nd respondent and the investigation is underway into the said scam.

It is further stated that the 2nd respondent, after observing ESIC guidelines and Government Rules in vogue, pertaining to Rate Contracts, directed all the authorized distributors including the petitioner herein, to re-submit the invoices in the name of the main RC firms, duly replacing the invoices of authorized distributors vide the impugned memo. In so far as the non-RC purchase Orders issued in the name of the petitioner herein, the Government had identified large scale misappropriation of funds, including violation of established procedure for payment and accordingly ordered a Vigilance Investigation into the matter. As per FIR, the payments made to Non-RC companies for the procurement of Drugs, Surgicals, Lab kits and Medical Equipment etc., is a part of massive scam. The petitioner also supplied certain medicines to the respondent in pursuance of Purchase Orders issued on Non-RC basis. In view of the impugned memo, the respondent had stopped payments of all the non-RC companies, pending investigation by ACB. Thus, the payments to the petitioner under non-RC category cannot be processed, until the final report has been filed by the

ACB, as the payment in respect of the same would cause severe loss to public exchequer. In so far as the payments of the stock supplied by the petitioner as authorized distributor on behalf of the RC companies referred to above will be made directly to the RC firms, in view of the ESI RC guidelines, more specifically guideline no.20, as and when the RC firms submit their invoices. The writ petition is devoid of merits. The petitioner, as a distributor on behalf of RC firms, cannot seek payment for the supplies made, in clear violation of ESI guidelines. Hence, prayed to dismiss the writ petition.

4. The 4th respondent filed counter affidavit denying the averments of the petition, inter alia contending that, Office of the DIMS, AP, Vijayawada was audited from 01.03.2021 to 19.03.2021 and the Audit observation is based on the Memo Rc.No.840/CDS/2020 dated 24.02.2020 of DIMS, Memo Rc.No.840/CDS/2020 dated 04.05.2020 of DIMS and ESIC Central Rate Contract No.142 valid from 03.05.2018 to 02.05.2020 submitted by the auditee organization during the audit, which were issued prior to the commencement of audit, a general illustrative list of discrepancies was included in audit observation . Hence, the contention that the action of the DIMS, AP is based on the audit objection is

completely baseless. It is further stated that, as per Comptroller and Audit General's prescribed procedures, the Indian Audit & Accounts Department (IA&AD) follows a procedure of giving opportunity to the authorities of the Executives at various levels to explain their position before audit findings are included in the Audit Report of the C&AG of India. In this process many records/documents such as audit memos, half margins, inspection reports, local audit reports, statement of facts, correspondence made between the audit and auditee organization, draft paragraphs are created. These being subject to change based on the replies of the appropriate authorities and do not reflect the final view of the department/ final conclusions of audit. They cannot also be brought within the scope of the term original documents. Further, Audit observations made by this office is based on various records, documents, correspondence of the auditee unit called the Key Documents. IA & AD is no the originator of such records, documents etc. The Audit Inspection report is the intermittent document that is generated before audit findings are included in the Audit Report which is considered as final document of the department. The Audit Report of C&AG of India presented to the president of India or Governor of a State and duly laid before the houses of Parliament of India, Legislature of

the State concerned in terms of the requirements of Article 151 of the Constitution of India is the final document. The impugned memos were issued by the Director of Insurance Medical Services basing on certain terms and conditions that were already framed by the Employees' State Insurance Corporation wherein guidelines were given to the Insurance Medical Service Department. Department further issued Memos for making payments to the Rate Contract firms only. Audit objection was drawn only after going through this documents. Hence, it is not correct to contend that, the audit objection and inspection report is the basis for the issuance of the memos by the second respondent. In view of the observations of the Hon'ble Supreme Court in ***Centre for Public Interest Litigation and others vs. Union of India*** reported in (2012) 3 SCC 1 and in ***Arun Kumar Agarwal vs. Union of India and others*** reported in (2013) 7 SCC 1, it would not be proper to refer to findings and conclusions contained in Audit Report as the Audit Report is subject to scrutiny of the PAC and Joint Parliamentary Committee. In view of the same it is improper to refer to the audit objections in the Audit Inspection Report to be the basis for issuing impugned memos. The impugned memos were issued by the second respondent basing on the terms and conditions and guidelines

framed by the Employees' State Insurance Corporation (ESIC- 3rd respondent) wherein guidelines were given to the Insurance Medical Service Department. Therefore, prayed to pass appropriate orders, considering the facts and circumstances of the matter and considering the Constitutional Powers vested in the Comptroller and Auditor General of India.

5. The petitioner filed rejoinder to the counter affidavit filed by the second respondent and while denying the averments of the counter affidavit, inter alia contended that, the case of the petitioner is about the impugned memo dated 01.12.2021 issued by the 2nd respondent in violation of Articles 14,19 and 21 of the Constitution of India, which has resulted in the suspension of old payments for the period 2017 to 2019. There is no dispute ever with 2nd respondent relating to purchase orders or supplies of life saving medicines/drugs at any point of time and the 2nd respondent has never before issued any kind of communication or notice to the petitioner prior to 01.12.2021 regarding any dispute or denial of payment towards the supplies of life-saving drugs and the 2nd respondent has been releasing payments regularly to the petitioner as recently as 05.12.2020. Further, the 2nd respondent pursuant to the issuance of

purchase orders to the petitioner received all the medical supplies of life-saving drugs during the period 2017-19 without any objection or dispute in any manner. The 2nd respondent having made payment in the year 2020 also, now, for the first time referred to certain G.O.s and about alleged violations with regard to payments, which is nothing but an afterthought innovation only to deny legal dues to the petitioner and justify the arbitrary action of issuance of the impugned memo. It is improper to refer to the audit objections in the Audit Inspection report to be the basis for issuing the impugned memo. The respondent has clearly admitted that the respondent No.2 had been making payments to the petitioner after availing its services to both RC and non-RC category of supplies of life-saving drugs between the period 2017 to 2019. The Central Rate Contract of 3rd respondent does not prohibit the engagement of agents or distributors of RC firms. Moreover, the agents qua distributors can be engaged by an entity under the law of contracts. Therefore, when a right is provided under the law, it cannot be taken by anyone particularly the executive machinery of the Government. The petitioner is not a named party in the FIR and no investigation or criminal case in whatsoever manner or nature is filed/pending before any authority or Court. The 2nd respondent is

making false accusations against the petitioner with a mala fide intentions of denying the payments that are legally due to the petitioner for a very long time. The demand for fresh invoices for past supplies is not permissible under the Central Goods and Services Tax Act, 2017 (GST Law). The respondent has no locus to seek fresh invoices from the petitioner, more particularly for the supplies made 2 to 4 years ago. The petitioner has supplied the lifesaving medicines to respondent No.2 under RC and Non-RC categories between the years 2017-19 as an authorised distributor on behalf of RC firms. Thus, the action of the 2nd respondent issuing a memo dated 01.12.2021 to the petitioner after 2 to 4 years of receipt of supplies is in clear violation of Articles 14,19 and 21 of the Constitution of India and also in view of several Supreme Court and High Court judgments. Hence, prayed to allow the writ petition.

6. The petitioner also filed rejoinder to the counter affidavit filed by the 4th respondent and while denying the averments of the counter affidavit, inter alia contended that, the Memos submitted by the 2nd respondent clearly state that the directions in those memos would be effective from 1st November, 2019 onwards. All the invoices of the petitioner that have been withheld by the 2nd respondent are prior to the

1st November, 2019 and ought to have been released without any delay. In fact, the 2nd respondent failed to adhere to the terms of the Central Rate Contract that the payments must be released within 4 to 6 weeks of the receipt of supplies, but the auditor completely ignored leading to unjust enrichment by the State. Further with regard to (iii) ESIC Central Rate Contract No.142 valid from 03.05.2018 to 02.05.2020, the 4th respondent failed to take note that the same does not prohibit the engagement of agents qua distributors by manufacturing companies. Further, respondent No.4 has completely ignored point no.10 of the terms and conditions of the purchaser orders, which provides for authorization letters from manufacturing companies to its distributors in the performance of its duties. The 4th respondent has ignored the authorization letters submitted by the petitioner issued to him by the manufacturing companies. The 4th respondent averred in the counter affidavit that the action of the respondent No.2 is based on audit objection to be completely baseless, incorrect and totally false. However, The memo dated 01.12.2021 issued to the petitioner by the 2nd respondent clearly based its impugned action by referring to "audit objections" of respondent No.4. Hence,if the same was completely baseless, the 4th respondent ought to have directed the 2nd

respondent to withdraw the same and got the pending dues released to the petitioner, but he failed to do so. In the instant case, the 2nd respondent has admittedly referred only to the audit inspection report dated 17.05.2021, which is not the final audit report, for issuing an impugned memo dated 01.12.2021, which is illegal even as per the version of the 4th respondent made in the counter affidavit. Hence prayed to allow the writ petition.

7. Heard Ms. Thakur Poornima, learned counsel for the petitioner, learned Government Pleader for Labour for respondent Nos.1 & 2, Sri K.Sangan Naidu, learned counsel for respondent No.3 and Sri K.Swarna Seshu, learned Standing Counsel for IA & AD.

8. The learned counsel for the petitioner, in elaboration would submit that, the audit objections and Audit Inspection Report are said to be based on the Memos dated 24.02.2020 and 04.05.2020, which do not have any relation to the pending invoices of the petitioner, since both the memos clearly state that the directions would be effective from 01.11.2019. Further, ESIC Central Rate Contract Guidelines from November, 2019 does not contain any condition that the payments should

not be released to the distributor firm. Moreover, the audit observations are vague and without any specific reference to the applicable Central Rate Contract along with date and its number and the Rate Contract terms for the period starting from the year 2016 until 2019 do not have any such condition that RC firms should not engage distributors or payment must not be made to the distributors. Besides the same, in the audit inspection report there are no adverse remarks against the petitioner company of any breach of violation of terms and conditions as provided.

The learned counsel for the petitioner would further submit that the petitioner is not a named party in the FIR referred to by the respondents in relation to a massive scam and no investigation or criminal case in whatsoever manner or nature is pending against the petitioner before any Court or authority. Thus, the respondents cannot tag the petitioner with the alleged massive scam covered by the FIR to illegally stop payments.

The learned counsel for the petitioner would further submit that, audit inspection report is only a intermittent document and the audit report can only be considered as a final document and the said final audit report has to be laid before the houses of the Legislature of the State

concerned in the terms of the requirement of Article 151 of the Constitution of India and then only it would become the final document. Thus, issuance of the impugned memo placing reliance on the audit inspection report, which is not a final audit report, is *per se* illegal and unsustainable under law. Issuing the impugned memo suspending the disbursal of payments to the petitioner without any approval or permission from the Government is violative of principles of natural justice and also violative of Articles 19(1)(g) and Article 21 of the Constitution of India. Hence, prayed to allow the writ petition by setting aside the impugned memo and direct the 2nd respondent to release the pending payments to the petitioner.

9. On the other hand, the learned Government Pleader for Labour would submit that, the writ petition since involves a factual adjudication of, contractual obligations arising out of the purchase orders, is not maintainable and the petitioner has to approach competent civil Court. The learned Government Pleader would further submit that, there is an established procedure for procurement of supplies with regard to Rate Contracts and Non-Rate Contracts. The payment of the amount under RC contractor to the distributor and under the Non-RC category is in violation

of the existing rules and government guidelines in vogue and further ESIC guidelines, at Guideline No.20 has clearly stipulated that the payment may be made directly to the RC firm. Further, the 2nd respondent was audited and certain observations were made in the audit report, regarding payments to the authorized distributors instead of RC firms. Hence, the payments have been stopped to the petitioner, directing the petitioner to re-submit the invoices in the name of the main RC firms, duly replacing the invoices of authorized distributors and further duly informing them that the payments would only be made to RC firms and not to the distributors, so far as they relate to Rate Contract Purchase Orders.

The learned Government Pleader for Labour would further submit that, a massive scam involving large scale misappropriation of funds including violation of established procedures for procurement of medical equipment at select rates to benefit few select individuals and firms including the petitioner herein, in respect of was found and a case was registered on the file of Anti Corruption Bureau P.S., CIU, A.P., Vijayawada and investigation is in progress into the said scam and final report is awaited. The payment of the amounts under the invoices covered under

the non-RC Purchase Orders cannot be processed until the final report has been filed by the ACB, AP.

The learned Government Pleader would further submit that the petitioner being a distributor of RC firms cannot seek payment in this writ petition, which is in violation of ESI Guidelines. The impugned memo was issued based on the Rules and established procedure in vogue and there is neither illegality or procedural irregularity in issuing the impugned memo. Hence, prayed to dismiss the writ petition.

10. Sri K.Swarna Seshu, learned standing counsel for IA & AD, in elaboration would submit that, the Audit Inspection Report is based on the earlier Memos dated 24.02.2020 & 04.05.2020 of DIMS, AP issued prior to the commencement of audit by the 2nd respondent basing on the terms and conditions and guidelines framed by ESIC and also the ESIC Central Rate Contract No.142 valid from 03.05.2018 to 02.05.2020. The learned standing counsel would further submit that, in view of the decisions of the Hon'ble Supreme Court reported in (2012) 3 SCC 1 and (2013) 7 SCC 1 it is not proper to refer to findings and conclusions contained in Audit Report as the same is subject to scrutiny of the PAC and Joint Parliamentary

Committee and in view of the same, it is improper to refer to the audit objections in the Audit Inspection Report to be the basis for issuing impugned memos. Hence, prayed to pass appropriate orders.

11. Perusal of the material available on record would indicate that, the petitioner is an authorised distributor of certain pharmaceutical firms like Bristol Meyers Squibb India, Med Manor Organics India Pvt. Ltd., Hindustan Antibiotics Limited and Roche Products etc., which are enlisted in the Rate Contract list circulated by the 3rd respondent to all the officers of ESI including the 2nd respondent.

12. Procurement of pharma products under the scheme of Insurance Medical Services in the State was divided into two categories viz., Rate Contract Category and non-Rate Contract category. There is variation in the established procedure and guidelines for procurement of supplies under these categories.

13. Under the first category i.e. Rate Contract Category, the 3rd respondent invites tenders from the pharmaceutical firms all over India for supplying the drugs, dressings etc., required for the use of ESI Institutions across the country and subsequently finalizes the Rate Contract and after

the finalization of Rate Contract, the third respondent circulates the final Rate Contract list to all the stakeholders of ESI Scheme. Accordingly, the authority competent to make purchases will place purchase orders with the approved RC agencies as per the list circulated by the 3rd respondent.

14. So far as Non-Rate Contracts, there are certain guidelines that are to be followed while procuring the drugs. Guideline No.7 of G.O.Ms.No.51 dated 09.04.2012 of the Labour Employment Training & Factories (IMS) Department states that, with regard to purchase procedures for items under non-Rate Contract category, if it so required, shall be procured under Open Tender System (Competitive bidding process) by the Director or Insurance Medical Services adopting the procedure stipulated therein.

15. There is no dispute that the petitioner had supplied pharma products against the purchase orders raised by Direct Demanding Officer in its name as well as the purchase orders raised in the name of the contract holder/pharma company for which the petitioner company is the authorized distributor for the period between 2016 to 2019. As per the contents of the petitioner, it can be understood that 49 invoices to the

tune of Rs.1,36,85,699/- fall under the category non-Rate Contract purchase orders, while the remaining 42 invoices to the tune of Rs.1,31,26,878/- fall under the category Rate Contract purchase orders.

16. The respondent No.2 issued the impugned Memo whereby the petitioner was informed that the payments should only be made to the RC firm on which the purchase order was placed and not to the distributor and hence resubmit the fresh invoices in the name of RC firm. The petitioner challenged the legality of the said Memo in this writ petition.

17. The impugned memo states as follows:

"With references cited and consequent on receipt of letters from various ESIC Rate Contract Firms, it is informed that the bills have not been submitted by the company name to whom the purchase order was issued. As per terms and conditions specified in ESIC – Rate Contract, the payments will be made directly to whom the PO's were issued and because of the AG audit objections raised against distributor bills and as the above bills were not issued by the companies, the bills cannot be considered for payment.

Therefore, the invoices raised in the name of the distributor/ firm/ person/ agent for rate contract supplies which are forwarded to this office are not being considered for payment and the RC firms are requested to resubmit those bills after making necessary entries on the Invoices raised by the Rate Contract Firms only for making payments."

18. The Impugned memo.R.c.No.1577546/CPS/2021, dated 01.12.2021 refers to four documents. They are – (1) ESIC Rate Contract Guideline from November, 2019, (2) This Office Memo even no.840/CDS/2020 dated 24.02.2020, (3) Lr. No.PAG(AG)/AP/AGG-I/EDIT-III/U-II/21-22/06 dated 17.05.2021 of Principal Accountant General and (4) Mail dated 25.11.2021 from ESI Corporation, Gunadala, Vijayawada. According to the 4th respondent, the audit observations were based on document Nos. 1 to 4 referred in the said memo.

19. As per guideline No.20 of the ESIC Central Rate Contract No.139A for supply of Drugs and Dressings, valid from 12th May, 2016 to 30th April, 2018 only states that the payment for the supply will be made within 4 to 6 weeks (after receipt of the goods) directly by the Direct Demanding Officers or through nominees to whom bills are submitted. Whereas Contract No.144 and 144(A) states that 'payment may be made directly to the firm'. Thus there is no such condition in the above contracts that payments should not be released to distributor firms nor the distributor firms cannot be engaged by Rate Contract Firms.

20. The second document referred to therein is the memo dated 24.02.2020. The said memo contains a direction that the invoices raised in the name of distributor/firm/persons/agent for rate contract supplies which are forwarded to this office with effect from 1st November, 2019 are returned herewith for resubmission after making necessary entries on the invoices raised by Rate Contract Firms only for making payments.

21. However, the 91 invoices referred to in this writ petition are prior to 1st November, 2019 and hence the condition contained in the said memo cannot be made applicable to the subject bills.

22. The other document referred to in the memo is the Letter dated 17.05.2021 of Principal Account General enclosed to the audit Inspection Report. The observation in the Audit Report at para 1(C) reads as under:

"As per the instructions contained in the Rate Contract under payments to the RC firms for the Drugs supplied, the payments should be paid only to the firms. During scrutiny of payments, towards procurement of Drugs and Medicines, it was noticed that payments have been made to authorized distributors instead of firms." As ESIC has entered into agreement with RC firms, payments should invariably be paid to the RC firm on which the purchase order was placed by obtaining original invoices."

23. As rightly contended by the petitioner the above observation is not backed by any ESIC guideline. Further a perusal of the e-tender terms

and Contract terms for the period 2016 to 2019 issued by the 3rd respondent do not have any such condition wherein Rate Contract firms should not engage distributors or payments must not be made to the distributors. As already stated supra, Contract No.144 and 144(A) merely states that 'payment may be made directly to the firm'. This cannot, by any stretch of imagination, be construed to mean that 'payment should only be made directly to the firm'. Thus the audit objection or observation, whatever it may be, is not backed by any established procedure or specific Rule in that regard.

24. Further, the 4th respondent addressed the 2nd respondent vide Letter No.PAG (Audit)/SSAP-06/2020-21/2 dated nil.08.2021 enquiring as to whether authorization letters were obtained from the firms including the petitioner for supply of the drugs and dressing materials and if so, copies be furnished to the audit. The practice of payment of amounts to the authorized distributors on their furnishing authorization letters is not denied by any of the respondents. The contention of the petitioner that in the year 2020 even it was paid likewise is not refuted. Thus, issuing the impugned memo directing the petitioner to resubmit fresh invoices through the RC firms on the ground of audit objections, particularly, when the said

objection is not supported by any guideline, Rule or provision in vogue, is not tenable.

25. In the decision relied on by the learned counsel for the 4th respondent in ***Centre for Public Interest Litigation and others***, the Hon'ble Supreme Court held that CAG's Report was subject to scrutiny of the Public Accounts Committee and the Joint Parliamentary Committee, it would not be proper to refer to findings and conclusions contained therein. parliamentary debates and it is possible that PAC can accept the ministry's objection to the CAG Report or reject the report of the CAG. In ***Arun Kumar Agarwal*** the Hon'ble Supreme Court held that the CAG's Report is always subject to parliamentary debates, and it is possible that PAC can accept the ministry's objection to the CAG Report or reject the report of the CAG.

26. Further, Audit Inspection Report is only a intermittent document of the purpose of including findings in the audit report, which can only be considered as a final document of the department and the said audit report will then be laid before the Legislature of the State in terms of the procedure laid down under Article 151 of the Constitution of India is the

final document. Thus, issuing the impugned memo based on such an intermittent document is *per se* illegal and the respondent No.2 cannot deny payment to the petitioner under the garb of the impugned memo, so far as they relate to Rate Contract purchase orders. The case set up by the petitioner that the RC firms of the petitioner have consented for payment of the amount to the petitioner being their distributor is not disputed by the respondents.

27. Regarding non-Rate Contract purchase orders, as submitted supra, a special procedure is prescribed. The respondent No.2 is alleging massive scam in relation to non-Rate Contract purchase orders. Admittedly, an FIR bearing Cr.No.03/RCO-CIU-ACB/2020, dated 10.06.2020 was registered on the file of the Anti-Corruption Bureau P.S., CIU, A.P., Vijayawada for committing financial fraud in the 2nd respondent and the investigation is underway into the said scam. According to the petitioner, it is not a named party in the above referred FIR and no investigation or criminal case in whatsoever manner or nature is filed/ pending before any authority or Court.

28. However, since a case has been booked and being investigated into, it is not desirable to order payment of the non-Rate Contract Purchase orders and payment under non-RC purchase orders would only be subject to the outcome of the investigation in that criminal case.

29. Regarding maintainability of the writ petition, the same having not only been filed for a direction to the respondent No.2 to clear of the amount covered under the withheld invoices, but also been filed questioning the impugned memo issued by respondent No.2 contrary to the Rules based on the audit objections, the same is maintainable.

30. In view of the above, the writ petition is allowed-in-part setting aside the Impugned Memo. R.c.No.1577546/SM/ DIMS/2022 issued by the 2nd respondent. The 2nd respondent is directed to release pending payment in respect of the Rate Contract Purchase orders within a period of three (03) weeks from the date of receipt of copy of this order.

As sequel thereto, miscellaneous petition, if any, pending shall stand closed. Interim orders, if any, shall stand vacated.

JUSTICE RAVI CHEEMALAPATI

18th July, 2023

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HON'BLE SRI JUSTICE RAVI CHEEMALAPATI

WRIT PETITION No.39324 of 2022

18th July, 2023

RR