IN THE HIGH COURT AT CALCUTTA

(Constitutional Writ Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Krishna Rao

W.P.A. No. 3159 of 2026

Kemecos India Private Limited & Ors.

Vs.

Uttar Pradesh Medical Supplies

Corporation Limited & Ors.

Mr. Kamalesh Bhattacharya
Mr. Ashim Ghosh

Mr. Sujit Bhattacharya
Mr. Ushananda Jana
Mr. Ashok Mazumdar
Mr. Swadin Pan

....For the petitioners.

Mr. Avinash Chandra
Mr. Abhijit Prasad

....For the respondents.

Hearing Concluded On : 06.08.2026

Judgment Delivered On : 27.08.2026

Judgment Uploaded On : 27.08.2026

Krishna Rao, J.:

1. The petitioners have filed the present writ petition for issuance of mandamus upon the respondent authorities particularly the respondent no.2 not to take any action on the basis of the show cause notice dated 31st December, 2025, the order being UPMSC/05/2025-26/1512 dated 29th January, 2026, and for release of payment to the tune of Rs. 1,53,91,742.16/-.

2. The respondent no.1, namely, Uttar Pradesh Medical Supplies Corporation Limited (hereinafter referred to as "UPMSCL") decided to procure Benzyl Benzoate application 25% W/W, 100 ml. bottle and supply the same to various healthcare establishments across all the districts of Uttar Pradesh.

3. For procurement of the Benzyl Benzoate Application 25% W/W 100 ml bottle, the respondent no.2 published an e-tender notice inviting eligible and qualified bidders. The petitioners have participated in the bid process and were selected for supply of Benzyl Benzoate Application 25% W/W, 100 ml bottle in tranches within a period of one year.

4. The petitioners have supplied the Benzyl Benzoate Application 25% W/W, 100 ml bottle having quantity of 1401000 bottles for a value of

Rs. 1,65,38,525/-. As per agreement, the petitioners have also uploaded test reports certified by National Accreditation Board for Testing and Calibration Laboratories (NABL) prior to the delivery of Benzyl Benzoate Application 25% W/W 100 ml bottle since the year 2022 till March, 2025.

5. Mr. Kamalesh Bhattacharya, Learned Advocate, representing the petitioners submits that the respondents did not raise any objection regarding the test reports. The test reports did not depict any result of Biological Tests since 2022 to March, 2025.

6. Mr. Bhattacharya submits that there was no abbreviated term of I.P. incorporated after the name of drugs i.e. Benzyl Benzoate Application I.P.25% W/W 100 ml bottle in terms of Rule 104 of the Drugs Rules, 1945. He submits that I.P. stands for Indian Pharmacopoeia. He submits that Benzyl Benzoate Application 25% W/W 100 ml is a drug in terms of Section 3(b) of the Drugs and Cosmetics Act, 1940, thus the question of I.P. standard does not arise.

7. Mr. Bhattacharya submits that after supply of materials in terms of contract, the petitioners have submitted invoices and made several requests for disburse of the amount but no amount is paid to the petitioners instead the respondent no.2 has issued First Show Cause notice dated 16th July, 2025 to the petitioners by informing the petitioner no.1 that 26 batches of the Benzyl Benzoate Application I.P. 25% W/W 100 ml bottle were found to be not of standard quality. It

was further alleged that based on the feedback given by purported technical experts, the biological tests were found to be of allegedly higher specificity and sensitively and has been giving inconsistent results. He submits that the purported test reports were not carried out in presence of the petitioners.

8. Mr. Bhattacharya submits that the petitioner no.2 has submitted detailed written reply on 21st July, 2025 and clarified that the high standard of the Benzyl Benzoate Application 25% W/W 100 ml bottle supplied and further informed the respondents that not a single complaint was received by the petitioner no.1 from July, 2022 till June, 2025 when the petitioners supplied the said materials to the respondents.

9. Mr. Bhattacharya submits that on 26th August, 2025, the respondents have issued an order upon the petitioner company declaring that *(i)* quantity corresponding to twenty six batches are not of standard shall be deemed as non-supply and flat 20% penalty shall be levied on the value of the corresponding quantity, *(ii)* 0.2% demurrage shall be levied on the value of corresponding quantity and in addition cost for destruction shall be liable to pay *(iii)* the petitioners have been blacklisted for the Drug Benzyl Benzoate Application 25% W/W 100 ml bottle for three years with effect from 26th August, 2025.

10. Mr. Bhattacharya submits that the petitioners have obtained an information under Right to Information Act, 2005, regarding whether

Microbiological test for Benzyl Benzoate Application 25 % W/W 100 ml bottle is required before the Director of State Drugs Control and Research Laboratory, Government of West Bengal and in reply, it is informed that the test parameters of Benzyl Benzoate 25% W/W as per Indian Pharmacopoeia- 2022, Monograph and General Chapter of I.P.2022, namely, "Mircobial Contamination of non-sterile products" does not include any Microbiological tests.

11. Mr. Bhattacharya submits that the activities of empanelled testing laboratories and UPMSCL are not in consonance with Drugs and Cosmetics Rules and official compendiums. He submits that the respondents have issued 2nd show cause notice dated 31st December, 2025, to show cause why the petitioners shall not be debarred from supplying the subject drug for a period of two years. He submits that the petitioners have submitted reply to the show causes notices but without considering the reply submitted by the petitioners, the respondents no. 2 has issued an order of blacking of the petitioners for a period of three years for the Drug Benzyl Benzoate application 25% W/W 100% ml bottle and other punitive steps by allowing only 15 days to recall the drugs of 26 batches declared as not of standard quality by the empanelled testing approved laboratories of the respondents.

12. Mr. Bhattacharya submits that again on 2nd February, 2026, the respondent no. 2 has issued a third show cause notice alleging that the petitioners have not supplied the standard quality of two batches

being Batch Nos. 819 and 808 of Benzyl Benzoate Application 25% W/W 100 ml bottle and on receipt of the said show cause notice, the petitioners have submitted reply to the show cause notice. He submits that second show cause notice was issued without passing a final order on the first show cause notice, and as such the second show cause notice is premature and improper and thus, the order dated 29th January, 2026, has become infructuous. He further submits that issuing the second show cause notice on the same cause of action without passing any order on the first show cause notice, is irregular and actionable and issuing a third show cause notice dated 2nd February, 2026, is also irregular and actionable.

13. Mr. Bhattacharya submits that the respondents' empanelled Laboratories are not accredited for Microbiological testing for the drug Benzyl Benzoate Application 25% W/W 100 ml bottle in terms of Form- 36 read with Rule 150-B of the Drugs and Cosmetics Rules, 1945. He submits that the said laborites are only entitled to do microbiological tests of Schedule C and C(1) Drugs only. He submits that Benzyl Benzoate Application 25% W/W 100 ml bottle is not coming under Schedule C and C/1.

14. It is the contention of the petitioners that the Drug Inspectors are the authority for sampling of drugs in terms of Section 23 of the Drugs and Cosmetics Act read with Rule 51 of Drugs and Cosmetics Rules, 1945, by sending one part of sample to the Government analyst appointed under Section 20 of the said Act and the Government

analyst shall deliver test reports in Form-13 to the Inspector of Drugs within 60 days as per Rule 45 of Drugs and Cosmetics Rules, 1945 but in the present case, the Inspector of Drugs has not taken any samples and the Government analysts did not test or done any analysis.

15. *Per contra,* Mr. Avinash Chandra, Learned Advocate, appearing for the respondents submits that Clause 11(ii) of the tender condition which is an admitted document by the petitioners provides that the samples of all batches of all drugs shall be subjected to confirmatory quality testing as per UPMSCL Quality Policy. Clause 4 of the Quality Policy empowers the UPMSCL to empanel the laboratories for conduct of confirmatory quality testing and Clause 5 provides that in case, no empanelled laboratory of testing of drugs or in case of unavailability of more than two empanelled labs for confirmatory testing or in case of recommendation by Quality Council, the testing may be done by the Government labs.

16. Mr. Chandra submits that Clause 6 of the Quality Policy provides for the method of sample preparation and randomization. For the purpose of executing the liabilities of the Corporation, EAushidhi (Drugs and Vaccine Distribution Management System) has been introduced in the corporation which is centralized automated web-based application dealing in the management of stocks, of various drugs a surgical item, the demands made and its satisfaction. He submits that for the said purpose, the Government of Uttar Pradesh has independently entered

into a Memorandum of Understanding with Center for Development of Advanced Computing (C-DAC), a Scientific Society under the Department of Electronics and Information Technology, Ministry of Communications and Information Technology, Government of India and operation of the said application is beyond the control of the answering respondent.

17. Mr. Chandra submits that in the instant case, the Drug samples were sent for testing to three Laboratories which are licensed by the Licensing Authorities under the provisions of the Drugs and Cosmetics Act, 1945 and Rules and are accredited by National Accreditation Board of Testing and Calibration Laboratories at relevant point of time.

18. Mr. Chandra submits that the system adopted by UPMSCL for masking the identity of the manufacturer and batch number before dispatch of samples to empanelled analytical laboratories is an established quality assurance mechanism intended to ensure impartial, objective and unbiased testing. He submits that at the time of dispatch of samples, the original particulars relating to the manufacturer, manufacturing license number, logo and batch number are intentionally concealed and replaced with a unique confidential identification (Secret Code) through DVDMS portal. The laboratory receives only the coded samples. He submits that the Secret Code is not an anonymous or arbitrary. It is a unique traceable code generated and maintained by DVDMS portal.

19. Mr. Chandra submits that the Indian Pharmacopoeia monograph for the subject drug was in force on the date of manufacture, supply and quality testing. The microbial limit test was not introduced by UPMSCL as an additional or contractual condition. It is an integral requirement of the Indian Pharmacopoeia for the concerned drug. Failure of the supplied batch to comply with the prescribed microbial limit rendered the batch Not of Standard Quality (NSQ). He submits that irrespective of whether the suffix "IP" is expressly mentioned in the tender schedule, every drug having an applicable IP monograph is required to confirm to the standards prescribed therein.

20. The UPMSCL has issued show cause notice to the petitioners on 16th July, 2025, directing the petitioners to explain the followings:

> ***i.*** *why as per condition no. 11(v) of tender the supplied quantity of drug batches- BB-791, BB-793, BB-794, BB-795, BB-796, BB-798, BB-799, BB-802, BB-803, BB-804, BB-810, BB-811, BB-812, BB-816, BB-817, BB-818, BB-826, BB-833, BB-837, BB-838, BB-843, BB-845, BB-853, BB-863, BB-864, BB-865 should not be treated as non-supply and payment of corresponding value should not be deducted.*
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> ***ii.*** *why as per condition no. 11(v) of tender, 20% of the above value should not be taken from Company as penalty for supplying "Not of standard quality drug".*
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> ***iii.*** *why to take back the said drug batches by Company's own arrangement within 30 days of receipt of this notice otherwise after 30 days, 0.2% demurrage shall be levied on the value of corresponding quantity and the stock of said drug shall be destroyed by the UPMSCL and the cost incurred for such destruction would be charged from Company. Available stock of*

above drug batch as per DVDMS portal is attached with this notice.

iv. *why as per condition no. 13 (1) of tender, Company Kemecos India Private Limited should not be blacklisted for drug "Benzyl Benzoate Application: 25% w/w (-) 100 ml Bottle" due to supply of 26 drug batches (Batch no. BB-791, BB-793, BB-794, BB-795, BB-796, BB-798, BB-799, BB-802, BB-803, BB-804, BB-810, BB-811, BB-812, BB-816, BB-817, BB-818, BB-826, BB-833, BB-837, BB-838, BB-843, BB-845, BB-853, BB-863, BB-864 & BB-865) to different District warehouses of UPMSCL."*

21. Condition Nos. 11(v), 11(vi), 11(vii) and 13 of the tender conditions, reads as follows:

"11. QUALITY ASSURANCE

v. *Quantity corresponding to NSQ batch shall be deemed as non-supply and flat 20% penalty shall be levied on the value of corresponding quantity.*

vi. *In case a batch is declared NSQ, the supplier has to take back the corresponding quantity supplied by its own arrangement within 30 days of intimation. Beyond 30 days, 0.2% demurrage charge per day shall be levied on the value of corresponding quantity remaining un-lifted.*

vii. *In case the supplier does not take the stock of NSQ drugs back within 90 days of intimation, then UPMSCL shall be at liberty to destroy the quantity lying at its warehouses. Supplier shall be liable to pay the expenses incurred for such destruction in addition to the demurrage charges applicable.*

vii. *The decision of the Tender Inviting Authority or any officer authorized by him as to the quality of the supplied items shall be final and binding.*

13. DEBARRING & BLACKLISTING

i. *If two batches of any drug supplied by a Company/firm is found not of standard quality, then the Supplier Company/firm shall be blacklisted for that particular drug for a period of three years.*

ii. *If the Supplier fails to execute at least 70% of the order quantity for any particular drug for more than two purchase orders, then the Supplier shall be debarred for supply of that particular drug for a period of two years.*

iii. *lf a Supplier is blacklisted for more than two drugs for quality issues, then the Supplier shall be debarred as whole for a period of three years.*

iv. *The bidder/Supplier who have submitted forged documents in tender or in correspondence to any subsequent communication from UPMSCL shall be declared ineligible to participate in the tenders for a period of 5 years.*

v. *The Supplier shall be blacklisted for a period of 3 years if any of the drugs supplied is declared spurious or adulterated by the regulatory authority.*

vi. *The Supplier shall be blacklisted for 3 years if proved to have manipulated expiry date of the drugs.*

vii. *Goods against orders placed prior to blacklisting/debarring any Supplier shall be received as per normal protocol."*

22. The petitioners have obtained information under Right to Information Act on the issue whether Microbiological test for Benzyl Benzoate Application 25% W/W 100 ml bottle is required before the Director of State Drugs Control and Research Laboratory, Government of West

Bengal. In reply to the said issue, it was informed to the petitioners that the test parameters of Benzyl Benzoate Application 25% W/W 100 ml bottle as per Indian Pharmacopeia-2022, Monograph and General Chapter of I.P. 2022, namely, "Microbial Contamination of non-sterile products" does not include any Microbiological tests.

The UPMSCL by an email dated 27th March, 2026, asked for Clarification on Microbial Limit Test (MLT) Requirement for Benzyl Benzoate Application I.P. 25% W/W and in reply to the said clarification, the Indian Pharmacopoeia Commission clarified that:

> *"The Indian Pharmacopoeia (IP) serves as the official book of standards for drugs in accordance with the Drugs and Cosmetics Act, 1940.*
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> *As Benzyl Benzoate is intended for cutaneous use, you are requested to refer to General Chapter 2.2.9 "Microbial Contamination in Non-sterile Products" (refer pages 56 of IP 2026). Under Table 6 – Acceptance criteria for microbial quality of non-sterile dosages forms, the applicable limits for cutaneous use are as follows:*
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> - *Total Aerobic Count (TAC): 10^2 CFU per g or ml*
> - *Total Fungal Count (TFC): 10^1 CFU per g or ml*
> - *Specified Microorganisms: Staphylococcus aureus and Pseudomonas aeruginosa – Absent in 1 g or 1 ml*
>
> *Accordingly, the above limits shall be applicable to Benzyl Benzoate preparations intended for cutaneous use."*

Chapter 2.2.9. Microbial Contamination in Non-Sterile Products reads as follows:

"Acceptance Criteria for Microbiological Quality of Non-Sterile Pharmaceutical Substances and Non-Sterile Doses Forms."

This provides, acceptance criteria for microbiological quality of non-sterile substances of pharmaceutical use and non-sterile dosage forms, unless otherwise specified in the monograph.

If microorganisms are present in a pharmaceutical preparation, they can reduce or in activate the therapeutic activity of the products or can adversely affect the health of the patients. Hence, pharmaceutical preparations should have low bio-burden and they should not have specified microorganisms, which are harmful.

Microbial examination of non-sterile product is performed according to the methods given above. Acceptance criteria for microbiological, quality of non-sterile substances for pharmaceutical use and non-sterile pharmaceutical products based upon the Total Aerobic Viable Count (TAC) and the Total Fungal Count (TFC) are given in Tables 5 and 6 respectively. Thus, "Microbial Contamination of Non-Sterile Products" does not include any Microbiological test, is contrary to the Indian Pharmacopeia-2022.

23. The petitioners have raised the issue that the activities of the empanelled testing laboratories and UPMSCL are not in consonance with the Drugs and Cosmetics Rules and official compendiums. The

Drugs and Cosmetics Rules, 1945, was amended and various provisions were amended/substituted/added by G.S.R. 223 (E) dated 18th March, 2019. Thereafter, Rules 150B, 150C, 150E of the Drugs Rules, 1945, were substituted with the new provisions and now, the laboratories may be approved, licensed and conduct testing for procurement agencies also. A new Form-39A is inserted. As per Rule 150-E(f) of the Drugs Rules, 1945, the report can be given in Form-39A and thus, it is not necessary that the samples should be collected only by the Government Analyst and reports should be signed only by Government Analyst.

24. The petitioners have raised the issue that the Drug Inspectors play crucial role in sampling of drugs in terms of Section 23 of the Drugs and Cosmetics Act, 1940, read with Rule 51 of the Drugs and Cosmetics Rules, 1945 by sending one part of sample to Government Analyst appointed under Section 20 of the Act and the Government Analyst shall deliver test reports in Form-13 to the Inspector of Drugs within 60 days as per Rule 45 of the Drugs Rules. As per the contention of the petitioners that the test reports of the approved laboratories as empanelled by the respondents are not in accordance with law and have no legal sanctity.

25. The Drugs Rules, 1945, was amended on 15th December, 2020 and in Rule 150 test for procurement agencies were also permitted through independent laboratories and a new Form-39 was introduced of test reports on the request of procurement agencies. In the present case,

tests were conducted as per the provisions of the Drugs and Cosmetics Rules therein. As per modified Quality Policy of UPMSCL which was approved on 13rd Board held on 3rd March, 2022, the samples preparation and randomization was approved. Sub-Clauses (c), (d) and (e) of Clause 6 of modified Quality Policy of UPMSCL, reads as follows:

> *"**6. Sample Preparation & randomization***
>
> ***(c)(i)** Consignee selection of drug batches from all samples received to Quality Control Division of UPMSCL Lucknow Drug warehouse will be done by the headquarter Pharmacist (Quality Control) through DVDMS portal. Quality control division shall wait for 7 days of receipt of first sample of any batch or up to samples of same batch is received from 3 warehouses (Whichever is earliest) for consignee selection and sending sample for testing at empanelled lab.*
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> ***(ii)** If single batch of a drug is supplied to single district drug warehouse then consignee selection of that single batch will be done immediately without waiting for 7 days after "permission of MD, UPMSCL.*
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> ***(D)** All marks of manufacturer's identity including batch number shall be erased/masked for the sample to be sent to empanelled lab & sample shall be sent with system encrypted code, product name & strength.*
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> ***(E)** software system/ DVDMS shall recommend the laboratory to which sample is to be sent based on a randomized logic in consideration with various lab empanelled for respective drug and total sample load balance (cumulative number of samples sent to the labs & total samples pending for testing at the labs at that point of time)."*

26. At the time of dispatch of samples, the original particulars relating to the manufactures, manufacturing license number, logo and batch number are intentionally concealed and replaced with a unique confidential identification within (Secret Code) through DVDMS portal and the laboratory receives only the coded samples. The respondents have disclosed the details of the batch number against each secret code of 26 NSQ declared drugs batches downloaded from DVDMS portal which shows that the respondent authorities have sent the drugs by masking the batch number and by giving a secret code.

27. Considering the above, this Court finds that the drugs supplied by the petitioners to UPMSCL were sent to the laboratories and after receipt of the report from the concerned laboratories, the respondents find that the same were not of standard quality and thus the respondents have issued show cause notice to the petitioners and after considering the reply of the petitioners, the UPMSCL has passed the order dated 26th August, 2025. This Court did not find any illegality in the impugned order.

28. The respondents have raised preliminary objection with regard to maintainability of the writ petition on the ground that Clause 21 of the conditions of contract which provides for resolution of disputes and also raised the point of Territorial Jurisdiction. Clause 21 of the conditions of contract reads as follows:

"21. RESOLUTION OF DISPUTES

> ***1.*** *If dispute or difference of any kind shall arise between the Tender Inviting Authority/ Purchaser and the successful bidder in connection with or relating to the contract, the parties shall make every effort to resolve the same amicably by mutual consultations.)*
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> ***2.*** *If, after thirty (30) days from the commencement of such informal negotiations, the Purchaser and the Supplier have been unable to resolve amicably a Contract dispute, either the Tender Inviting Authority/Purchaser or the successful bidder/Supplier may give notice to the other party of its intention to commence arbitration, as provided by the applicable arbitration procedure and shall be as per the Arbitration and Conciliation Act, 1996,*
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> ***3.*** *In the case of a dispute or difference arising between the Tender Inviting Authority/ Purchaser and a bidder/Supplier relating to any matter arising out of or connected with the contract, such dispute or difference shall be referred to a sole arbitrator as mutually decided by the parties. The fees, if any, for the arbitration including arbitrator fees, if required to be paid before the award is made and published, shall be borne equally by both parties. The Arbitrator's award shall be final and Conclusive.*
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> ***4. Seat of Arbitration:*** *The seat of arbitration shall be at Lucknow, Uttar Pradesh, India. Courts of Lucknow shall have exclusive jurisdiction.*
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> ***5.*** *The language of Arbitration shall be English language and shall be governed, construed in accordance with applicable Indian laws."*

29. There is no denial that the registered office of the petitioners is situated at Kolkata. Letter of Intent (LOI) was issued in favour of the petitioners on 6th November, 2024, which was received by the petitioners at the registered office at Kolkata. After issuance of LOI, the

petitioners have executed an agreement at Kolkata and were also duly notarized before the Notary Public at Kolkata. The petitioners had opened Bank Guarantee for Performance Security at Punjab National Bank at Bosepukur Rajdanga Branch, Kolkata and all correspondences were made by the respondents with the petitioners at the registered address at Kolkata.

30. Considering the above, this Court finds that the preliminary objection and territorial jurisdiction raised by the respondents are not sustainable.

31. In view of the above, **WPA No. 3159 of 2026** is **dismissed**.

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)