
(2011) 06 MP CK 0034

In the Madhya Pradesh High Court

Case No : Writ Petition No. 12573 of 2010

Bharat Biotech International Ltd.

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 24-06-2011

Acts Referred:

Citation : (2011) 4 MPHT 284 : (2011) 4 MPLJ 231

Hon'ble Judges : Sanjay Yadav, J;Ajit Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ajit Singh, J.

By this petition, the petitioner has challenged the acceptance of tender of respondent No. 3 by respondent Nos. 1 and 2 regarding supply of anti-rabies vaccines for the year 2010-11.

The petitioner is a company registered under the Indian Companies Act, 1956 and manufactures drugs and medicines. Respondent No. 1 is the Principal Secretary and respondent No. 2 is the Director of the Public Health and Family Welfare Department of the State Government. Both these respondents control the affairs of the department particularly pertaining to drugs and medicines. Respondent No. 3 Indian Immunologicals Limited is wholly owned subsidiary of the National Dairy Development Board constituted under the Central Act, 1987. It is engaged in the manufacture of various kinds of vaccines and was earlier known as M/s Human Biologicals Institution.

On 20-1-2010 respondent No. 2 floated a tender (Annexure P-3), for the supply of drugs and medicines including anti-rabies vaccines to various medical and health institutions of the Government of Madhya Pradesh for the year 2010-2011. The record reveals that apart from petitioner and respondent No. 3 as many as 87 bidders participated in the tender and a pre-bid meeting was held on 5-2-2010 at Chennai. The tenders were opened on 20-4-2010 by a Tender

Committee comprising of Senior Officers having expertise and experience in the subject. Thereafter, a meeting of the Rate Financial Committee was held on 21-4-2010 under the Chairmanship of Commissioner, Health, State of Madhya Pradesh. The Committee found that the rate quoted by respondent No. 3 for the anti-rabies vaccines was the lowest at Rs. 169.00 and that of petitioner was third lowest at Rs. 199.00. The tender of respondent No. 3 was, therefore, accepted and a work order has been issued in its favour by respondent Nos. 1 and 2. The petitioner has although stated in the petition that the rate quoted by it was second lowest, it however, during the course of argument, admitted that its rate was third lowest.

The petitioner, by referring to Clause 2(g) of the tender document, has averred that since respondent No. 3 was declared a defaulter by the Government of Kerala for the first quarter of 2007-2008 vide order dated 20-8-2007, Annexure P-6, in respect to the supply of anti-rabies vaccines, it was not eligible to participate in the tender For that product. According to the petitioner, respondent Nos. 1 and 2 have, thus, committed an illegality in accepting the tender of a non-eligible respondent No. 3. The petitioner has also submitted that because of the said default even the Tamil Nadu Medical Services Corporation (in short, "TNMSC") declined to consider the tender of respondent No. 3, vide order dated 28-2-2010 (Annexure P-7), for the supply of anti-rabies vaccines. The petitioner has also filed the order dated 30-4-2010 (Annexure P-9), passed by the Single Judge Bench of the Madras High Court dismissing the Writ Petition No. 4858/2010 of respondent No. 3 against the order of TNMSC declining to consider its tender.

Respondent Nos. 1 and 2 in their return have defended their action of accepting the tender of respondent No. 3 on the ground that the rate quoted by it was lowest. Respondent Nos. 1 and 2 have also stated that respondent No. 3 was not disqualified in submitting the tender and the plea of petitioner regarding disqualification of respondent No. 3 cannot be accepted in the writ petition because no such plea was taken by it on 5-2-2010 in the pre-bid meeting. According to respondent Nos. 1 and 2, no relief can even otherwise be granted to the petitioner in this petition because the rate quoted by it was third lowest and not second lowest.

Respondent No. 3 in its separate return has denied that there was any default on its part in supplying vaccines to the Government of Kerala. According to respondent No. 3 it being a subsidiary of the National Dairy Development Board created under a statute supplies drugs and medicines without any profit and since the Government of Kerala did not make the payment as per contract it was constrained to stop the supply of anti-rabies vaccines. Respondent No. 3 has also stated that it filed a writ petition in the High Court of Kerala against the Government of Kerala for not making the payment in which the Government Advocate admitted that payment had not been made due to financial constraint and the learned Single Judge disposed of the writ petition vide judgment dated

19-9-2007 directing the Government of Kerala to pay the admitted dues amounting to Rs. 69,00,000/- (approximately) in six equal by-monthly installments. Respondent No. 3 has further submitted that it was not satisfied with the installment facility granted to the Government of Kerala and, therefore, filed a writ appeal which was allowed by the Division Bench vide judgment dated 19-3-2008 and the Government of Kerala was directed to pay the amount within three months time. Respondent No. 3 has also submitted that in fact the default was on the part of the Government of Kerala and not on its part in executing the contract of purchase and supply of anti-rabies vaccines. According to respondent No. 3, it has even challenged the order of the Single Judge Bench of Madras High Court upholding the order of TNMSC of not considering its tender before the Division Bench and is awaiting decision. Respondent No. 3 has also submitted that it has received fresh work orders for the supply of anti-rabies vaccines not only from the Government of Kerala but also from the Governments of Andhra Pradesh and Gujarat.

The sole question which calls for our consideration is whether respondent No. 3 was a disqualified tenderer on the date when it submitted the Tender.

The relevant Clause 2 (g) of the tender document on which the petitioner has placed reliance reads as under :

2. (g) Similarly, if there is any default of supply of Vaccine in any of the tenders floated by Central/State Government or Government Institutions (ESI, Railways, etc.), during the past 3 years then that tenderer is not eligible to participate in the tender for that product.

A reading of the above quoted clause makes it clear that a tenderer who has committed default in the supply of vaccines in any of the tenders floated by the Central/State Government or Government Institutions, during the past three years, it will not be eligible to participate in the tender for that product. We shall, therefore, examine whether respondent No. 3 defaulted in supplying anti-rabies vaccines in the tender floated by the Government of Kerala.

Order dated 20-8-2007 (Annexure P-6), of the Government of Kerala indicates that respondent No. 3 was 100% defaulter for the first quarter of 2007-2008 in supplying anti-rabies vaccines. Because of this order, TNMSC also vide order dated 25-2-2010 (Annexure P-7) declined to consider the tender of respondent No. 3 for the supply of that product due to identical Clause 2(g). As already mentioned above, respondent No. 3 challenged the order dated 25-2-2010 in Writ Petition No. 4858/2010 before the High Court of Madras which was dismissed by the learned Single Judge, vide judgment dated 30-4-2010. Dissatisfied with the order of learned Single Judge, respondent No. 3 has filed a writ appeal before the Division Bench and is awaiting decision on it.

Respondent No. 3 claims itself to be a non-profit subsidiary of National Dairy Development Board. This averments has not been denied by the petitioner. Respondent No. 3, being a not-profitable concern, is in a position to supply drugs

and medicines at lower rates than other tenderers. The Government of Kerala had accepted the tender of respondent No. 3 for the supply of anti-rabies vaccines because of the lowest rate offered by it. Pursuant to the acceptance of tender, respondent No. 3 made the supply of vaccines but since the Government of Kerala failed to make the payment of vaccines supplied, respondent No. 3 was constrained to stop its further supply. It is in this background the Government of Kerala held respondent No. 3 as defaulter in supplying the vaccines. But the fact remains that in the writ petition filed by respondent No. 3 before the High Court of Kerala, the Government Advocate admitted that payment had not been made due to financial constraint and the Single Bench of the High Court despite this plea vide judgment dated 19-9-2007 directed the Government of Kerala to pay the admitted dues amounting to Rs. 69,28,734/- to respondent No. 3 in six equal by-monthly installments. It is also to be noted that respondent No. 3 was dissatisfied with the benefit of installments granted to the Government of Kerala and, therefore, filed Writ Appeal No. 610/2008 before the Division Bench which was allowed with a direction to the Government of Kerala to pay the amount within three months time. We are of the view that Government of Kerala was under a contractual obligation to make the payment of vaccines supplied but it failed to do so and, therefore, respondent No. 3 was obliged to stop the further supply of the vaccines. Having regard to the circumstances of the case, respondent No. 3 was not a defaulter and a real defaulter was the Government of Kerala.

The learned Senior Counsel for respondent No. 3 has also brought to our notice that even the Kerala Medical Services Corporation (a Government of Kerala Undertaking) also vide notice dated 13-5-2010 (Annexure R-3-2) dismissed a similar complaint made against respondent No. 3 regarding its disqualification on the ground that it defaulted to make supply to the Kerala Government for the first quarter 2007-2008. On reading the notice (Annexure R-3-2), we find that while dismissing the complaint (registered as Complaint No. 27), the Corporation has clearly held that the default in supply was due to nonpayment for the supplies made and the High Court of Kerala had substantiated this stand of respondent No. 3.

In these circumstances, we have no hesitation in holding that respondent No. 3 did not commit any default in supplying the vaccines to the Government of Kerala within the meaning of Clause 2 (g) of the tender document and it was eligible to participate in the tender. For the aforesaid reasons, we are also not impressed with the abovementioned order dated 25-2-2010 of the TNMSC and unable to agree with the judgment dated 30-4-2010 passed by the learned Single Judge of the High Court of Madras.

In the result, the petition fails and is dismissed with costs of Rs. 1,000/- which shall be payable to respondent No. 3.