
(2010) 01 J&K CK 0009
In the Jammu And Kashmir High Court

Centeinal Surgical

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 01-01-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2010) 1 JKJ 93

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Judgement

Sunil Hali, J.—State being the source of enormous wealth and its distribution in the form of licences, jobs, contracts, concessions etc., raises

the possibility of arbitrariness in its decision making while awarding such largesse contracts. Even though, the norms for allotting such contracts and

awarding largesse are defined, it is more often seen that in the decision making process, the State invariably shows the choice for its favourites.

2. The controversy in the present case is somehow related to the decision making process of the State in awarding a rate contract in favour of the

respondent No. 3 on 20th of March'09, which is being questioned by the petitioner in the present petition.

3. In order to understand the controversy raised in this petition, certain facts are required to be noticed which are as under:

Vide Notice Inviting Tender (here-in-after called the Notice) No. 03 of 2008, tenders were invited for supply of Dressing and Suturing material for

the year 2008-09, from the original manufactures/firms who are registered with Health & Medical Education Department of the State. The

eligibility set out in the notice is as under:

9.1. Annual turnover of Rs. 15.00 crores for suturing material of the principal/original manufacturer, duly authenticated by the Income Tax department.

e) Copy of valid Drug manufacturing licence and list of products being manufactured duly authenticated by the competent authority.

f) Latest Sales Tax clearance certificate of the preceding year.

4. One of the condition of the notice was that the supplies made on sample basis shall conform strictly to the approved samples per the

Notice/supply order and the successful tenderer was to supply the material as per the samples approved by the Central Purchase Committee, J &

K.

5. While supplying the tender documents, the check list for the tenderers was also supplied which referred to the various documents required to

accompany the tender document. The tenderers were required to furnish all the documents as indicated in the check list.

6. In pursuance to the notice, the petitioner who is said to have satisfied all the terms and conditions, submitted his tender document furnishing all

the details as were required in terms of the eligibility clause set out in the Notice. The respondent No. 3 is also stated to have submitted his tender.

7. After receipt of tenders from intending tenderers, the Central Purchase Committee of Health and Medical Education Department, prepared a

comparative statement on 1st of Jan'09, and placed the same before the Expert Committee comprising of:

70. Head of the Departments of the concerned medical faculty from Government Medical College, Jammu/Srinagar.

71. Directorate of Health Services Jammu and a representative of Director Industries and Commerce.

8. The Expert Committee after going through the comparative statement submitted its recommendations as under:

In view of the consensus view expressed by all esteemed experts present from various specialties that patient safety is supreme and cannot be

compromised under any circumstances leave alone the consideration of cost. In addition highly favourable past experience of more than two

decades with Johnson & Johnson Sutures, extremely satisfactory results and no adverse report against these sutures from any quarters so far, it is

strongly recommended that all suture material provided by M/s Johnson & Johnson Limited (Ethicon) T 11/25 is approved.

9. The above recommendation of the expert committee along with the comparative statement was placed before the Purchase Committee on 21st

of Jan'09. The Purchase Committee accepted the recommendations of the Expert committee with regard to one item only i.e. Item No. 20 (Catgut)

and regarding other items pertaining to suturing material, the decision was deferred for obtaining written comments from the concerned Head of the

Departments of the medical faculty present in the meeting.

10. It transpires that written comments/remarks were called from the Head of Departments of Surgery, Ophthalmology, Gynaecology,

Orthopaedics and Cardio Thoracic Vascular Surgery, Government Medical College, Jammu/Srinagar. After obtaining the remarks from the

experts, the Purchase Committee held its meeting on 5th of March'09, in which it was held as under:

As per the decision taken in respect of suturing material for the year 2008-09 in the previous meeting of the purchase committee held on

21.01.2009, wherein the items pertaining to suturing materials were kept withheld for further deliberations in the ensuing meeting after obtaining

written comments from the concerned Head of the Departments. It was apprised by the Member Secretary that letter from concerned Head of the

Departments were received including Head of the Department, Surgery, GMC Srinagar, vide No. HOD/SD/5789-91 dated 26.02.2009, Head of

the Department, Ophthalmology, GMC, Jammu vide No. Ophth/Acctt/09/367 dated 5.02.2009, Head of the Department, Ophthalmology, Srinagar

vide No. Opht/402/27.01.2009, Head of Department, CTVS, GMC, Jammu, vide No. CTVS/09/670 dt. 03.02.2009, Head of the

Department/Medical Supdt., Bone & Joint Hospital, Srinagar vide No. BJS/PS/2797 dated 14.02.2009, Head of the Department/Medical

Supdt, Lalla Ded Hospital, Srinagar vide No. GD/1892-93 dated 09.02.2009 and Head of the Department, Gynae & Obst. Vide No.

HOD/Gynae/391 dated 05.02.2009. Keeping in view the remarks/comments of the concerned Head of the Departments and decision of the

expert committee constituted by the Chairman, Purchase Committee constituted for finalization of the Group suturing material for the year 2008-

09, the committee decided to accept the recommendations of the experts for finalization of Suturing Material in favour of M/s Johnson & Johnson

Ltd. The Committee is also of the opinion that before issuing final approval, the representative of firm shall be called for negotiations for discount

on offered rates, if feasible so as to save Govt. Exchequer.

11. As a prelude to the allotment of contract and as discussed above, the representatives of respondent No. 3, were called for negotiation who

agreed to give 1% discount on the quoted rates. As a consequence of this, the contract was allotted in favour of respondent No. 3 and letter of

intent was issued in its favour. The said decision to allot contract was issued in favour of respondent No. 3 keeping in view the over-all safety of

the patients even though the rates quoted by the firm were exorbitant.

12. What emerges from the above decision making process of the respondent-authorities so far as allotment of contract in favour of respondent

No. 3, can be summarized as under:

i/ That all the tenderers satisfied the conditions of eligibility set out in the tender documents and were found eligible for being considered for

allotment of contract;

ii/ That after preparation of comparative statement, the matter was referred to the Expert Committee of doctors who were the Head of the

Departments in various specialties of the Government Medical Colleges, Jammu/ Srinagar, to judge the quality of the material to be supplied;

iii/ That on the basis of the opinion given by the doctors regarding the quality of the material, the contract was allotted to respondent No. 3;

iv/ That while making its assessment regarding the quality of material being supplied by respondent No. 3, comparative analysis of the material of

other tenderers was not taken note of by the Expert Committee;

v/ That while allotting the contract, the individual certificates granted by various doctors in favour of respondent No. 3 were made the basis for

allotment of contract.

13. The admitted facts are that the rates quoted by respondent No. 3 are approximately 40% higher than what have been quoted by the petitioner.

The petitioner's tender has been rejected on the ground that the material supplied by respondent No. 3 is of highest quality and in such a situation,

the allotment in his favour has been done to ensure the patient safety and cost becomes an irrelevant factor.

14. The principle of judicial review would apply to the exercise of contractual powers by governmental bodies in order to prevent arbitrariness or

favouritism. There are inherent limitations in exercise of judicial review. The judicial review in administrative matters has to be balanced between

the administrative discretion to decide the matters of contractual or political in nature and issues of social policy. The object of the policy is the sole

domain of the executive. It is only in the process of implementing its policy, the judicial review is permissible. The judicial power of review is

exercised to rein in any unbridled executive functioning. Such a review is concerned with reviewing not the merits of the decision but the decision

making process itself. While examining the contours of judicial intervention, following things are to be noted by the court as observed by the Apex

Court in the case reported as Tata Cellular Vs. Union of India, :

a/ the decision maker must understand correctly the law that regulates its decision making power;

b/ Irrationality namely unreasonable;

c/ Procedural impropriety.

15. These are the broad principles which have to be taken into consideration while assessing the merits of decision making process by the

executive.

16. In the present case, the decision of the Committee seeking opinion of various doctors regarding the material supplied by respondent No. 3 has

been done without making the comparative analysis of the material supplied by other tenderers. After obtaining the report from the said doctors,

the contract has been allotted in favour of respondent No. 3.

17. The question that is required to be determined is whether in absence of any comparative analysis being made regarding the material supplied by

other tenderers, the contract could be allotted to respondent No. 3, based only on the report of the doctors who had no occasion to assess the

material of other tenderers.

18. The procedure for finalising a contract has two stages i.e., technical and financial bid. In the first stage, the evaluation has to be made on the

basis of technical and commercial considerations. The bidders shortlisted at the first stage would compete in the second stage which, as indicated

above, is the financial bid. The qualification of the bidder who competes for the tender is determined at the first stage which includes his technical

expertise, the quality of the product which he is required to supply. The screening is done at this stage after it is determined that the bidder is

capable of executing the work on the basis of its technical expertise both in terms of capacity to execute the work and supply the goods, the

financial bid is to be considered. This procedure has not been complied with.

19. In the instant case, the petitioner's tender has not been rejected on the ground that his material does not satisfy the requirement/specifications

provided in the tender document but the same has been rejected only on the ground that the material supplied by the private respondent No. 3 is of

better quality. This, however, has been done without making the comparative analysis of the material supplied by other tenderers including the

petitioner. The reference made in this regard to the experts for obtaining their opinion regarding material supplied by the respondent No. 3 alone, in

my view, was not proper for the following reasons:

a/ That when the opinion was sought from the experts, a comparative study of the material supplied by all the tenderers was required to be

submitted to the expert committee;

b/ The dominant factor in allotting the contract to respondent No. 3 was based upon the opinion of the doctors who had no occasion to analyse the

material supplied by the petitioner and other tenderers.

20. This prima-facie is a procedural impropriety committed by the respondent authorities. There is no dispute that the opinion of the experts on the

question of superiority and quality of the product cannot be gone into by this Court but it is also important to see as to whether the opinion framed

by the experts in this regard was reasonable and rationale, which, in my opinion, it is not because as indicated above, the experts have not given

their opinion on the basis of any comparative study made of the material supplied by other tenderers but on the basis of the material supplied by

respondent No. 3 alone.

21. The quality of the material could be judged by only those experts who certify the product to be good. The opinion of the doctors is relatable to

the experience in using this material only. The said material is used for stitching the wounds for which the opinion of the doctors may not be

sufficient to certify its quality. As a matter of fact, while scanning through the certificates given by the different doctors, it is nowhere certified that

the material supplied by the private respondent is better than the one supplied by the petitioner and other tenderers. The certificates so granted are

based upon the personal experience by every doctor, which may vary from doctor to doctor. The whole process of making the allotment on the

basis of these certificates, thus, does not satisfy the Wednesbury principle.

22. It is true that the judgment and discretion in determining the views of the experts is trusted to the persons who are expert in the field and the

court will not take away this right from them nor would interrupt in the due and proper exercise of it. But their conduct in the exercise of this trust

ought to be fair, candid, not arbitrary, capricious or biased.

23. The court is entitled to investigate the action of a local authority with a view to see whether or not, it has taken into consideration the matters

which it ought not to have so considered or conversely has refused to take into account the matter which it ought to have taken into account. Even

though, the authority may have functioned within the four corners of the principles which it was required to consider but it has to be seen as to

whether the conclusion so arrived is unreasonable that no reasonable authority could ever have come to it. A decision of the public authority will be

liable to be quashed or otherwise dealt with by an appropriate order in judicial review where the court comes to a conclusion that the decision is

such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. The term irrationality would mean

unreasonableness. It applies to decisions which are so outrageous in its defiance of logic or of accepted moral standards that no sensible person

who had applied its mind would have arrived at it. This explains the principle which is termed as "irrational". The decision in such a circumstance would

be recorded as unreasonable and open to judicial review.

24. It be further seen that petitioner was allotted contract for supply of suturing material which is branded as M/s Centenial Surgical Suture Ltd, for

the year 2006-07. In pursuance to the tender notice issued in this regard, he submitted his bid. He was directed to submit the samples of Suture

material on 20th of Aug'07, in order to assess the performance of the said material. Petitioner responded to the said communication and submitted

the requisite material for its evaluation in order to get assessed its efficiency and performance. The material supplied by the petitioner came to be

evaluated by the doctors of various hospitals of the State and vide communication dt. 7th of July'07, on the recommendation of the Central

Purchase Committee, Health & Medical Education Department, it was ordered that the petitioner's firm be allotted the contract for supply of

suturing material of Centisorb (polyglyctin-910), Centisilk (black Braided Silk and Centlon (Polyamide). The said allotment was made in favour of

the petitioner's firm only after various doctors had certified the durability and performance of the material supplied to be good.

25. It may be noted that on 20th of Jan'09, Dr Rakesh Saraf, Head of the Department of Surgery, and Dr. Gurjit Singh, Head of Department,

CTVS, Government Medical College, Jammu, had given a certificate that the Suture material used in the said departments is good and satisfactory

and there is no complaint against the said material. These certificates have been issued at that point of time when the present contract was being

finalised. The petitioner has also placed on record along with the supplementary affidavit, the certificates issued by various doctors who have

opined that the suture material supplied by the petitioner was satisfactory. The said certificates have been issued on 24th of Jan'09 and 7th of

Feb'09, by the doctors working in the Surgery departments of the Government Medical College, Srinagar.

26. From the aforementioned discussion, it clearly emerges that the opinion of the doctors regarding the material supplied by the petitioner and the

private respondent is not at variance. Under such circumstances, the procedure adopted by the official respondents in allotting the contract in

favour of private respondent by relying upon the opinion of the said doctors who at one point of time had given their opinion in favour of the

petitioner and at other point of time favoured the private respondent, can be termed as faulty. It was appropriate for the authorities concerned to

have obtained an opinion of the experts who could certify the quality of the material of the petitioner as well as that of private respondent by

making a comparative analysis of both the material and not relied upon the ever-changing opinion of the doctors based upon their personal

experience. Every product which is manufactured requires certification of ISI. Even this aspect of the matter was not taken into consideration while allotting the contract in favour of private respondent. Even otherwise, while giving their opinion, the doctors concerned had to give reasons as to why the material supplied by the petitioner was inferior to that of private respondent. They should have based their opinion taking into consideration the quality of the product used in preparing the said material which has not been done in the present case.

27. It would be important to note that no samples were taken either from the petitioner or the private respondent in pursuance to the tender notice inviting bids for the year 2008. This fact is not being denied by the official respondents. The tender notice along with the check list issued does not require supply of the specimen of the material required to be supplied. The decision, as indicated above, has been taken purely on the opinion of the doctors who as observed above, at one point of time had favoured the product of the petitioner also.

28. From the above, it clearly emerges that the decision of official respondents in allotting the contract in favour of the respondent No. 3 was not proper for the following reasons:

a/ That while seeking opinion from the experts regarding the quality of the material, no comparative analysis was made of the material supplied by the petitioner and other tenderers.

b/ That the decision to seek opinion about the material supplied by respondent No. 3 only was unreasonable, impartial and unequal in its operation as between different classes.

c/ That while relying upon the opinion of various doctors in allotting the contract to respondent No. 3, the opinion of the doctors who had opined about the quality of the material supplied by the petitioner has not been considered thereby rendering the process of allotment of tender in favour of respondent No. 3 not only faulty but also arbitrary.

29. The Apex Court in the case of Tata Cellular (supra), while dealing with the issue regarding the power of the court to intervene in a matter which is exclusively within the domain of the experts has held as under:

What is this charming principle of Wednesbury unreasonableness? Is it a magical formula? In. R.V. Askew (1768) 4 Burr 2186, Lord Mansfield

considered the question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences. They gained greater value two centuries later:

It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practise this profession is

rusted to the College of Physicians; and this Court will not take it from them, nor interrupt them in due and proper exercise of it. But their conduct

in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; nor arbitrary, capricious, or biased, much less,

warped by resentment, or personal dislike.

30. From the above legal position Laid down by the Apex Court, it can be said that the courts will normally not interfere in a matter which is the

exclusive domain of the experts unless the decision taken is arbitrary, unfair or biased. In the present case, it clearly emerges from the record that

the decision making process of the official respondents in allotting the contract to respondent No. 3 is purely a case of pick and choose and can be

termed as unreasonable.

31. Now, after having said so, would the respondent authorities still be within their rights to allot the contract in favour of respondent No. 3, even

though, the rates quoted by him are highly exorbitant.

32. It is not in dispute that the rates quoted by the petitioner are lower than what have been quoted by respondent No. 3. The decision to allot the

contract to the said respondent purely on the basis that material supplied by him is of better quality is required to be examined.

33. The right to refuse the allotment of tender to a lowest tenderer is the prerogative of the State but in doing so, the mandate of Article 14 of the

Constitution have to be kept in view. Undoubtedly, there is no dispute that the State tries to choose the best person for executing a contract and

merely because a tenderer has quoted lower rates would not imply the State to allot the same to him if he does not satisfy the other requirements.

The most important aspect in this respect is as to whether he is completely suited to the job which he is to execute and has necessary financial

soundness to complete the contract. However, if the power is exercised for any collateral purpose, the said exercise of power would be struck

down.

34. Now applying this principle to the present case, it be seen that only distinguishing feature between the petitioner and respondent No. 3 is that the material supplied by the said respondent has been certified to be good by a team of doctors who, as indicated above, had no occasion to assess the material supplied by the petitioner. As already held herein-supra, the process adopted by the official respondents in referring the opinion regarding the quality of the material being supplied by respondent No. 3 was irrational and unreasonable. The sound principles of equality demand that an opinion should have been obtained about the quality of the material supplied by the petitioner and other tenderers also, which has not been done in the present case.

35. It may also be noted that respondent authorities, as indicated above, while rejecting the case of the petitioner have not taken into consideration the opinion of the doctors who have given opinion both in favour of petitioner as also private respondent, and therefore, the said process of making allotment in favour of respondent No. 3 is irrational and arbitrary.

36. The power of the State to reject the lowest tenderer applies only when all things are equal and not when the lowest tenderer fails to satisfy the condition subject to which bids are invited. It is not the case herein that the petitioner was not fulfilling the conditions as Laid down in the tender document. The decision to seek opinion in respect of the material of respondent No. 3 only itself defies the equality clause even in the matter of procedure and as observed above, it is purely a case of pick and choose.

37. The States' power to enter into a contract has inherent limitations as it cannot treat itself like a private individual. The principle of judicial review has to be exercised with circumspect. The Government is the guardian of the finances of the State and it is expected to protect the financial interest of the State. Once it is held that the State while choosing respondent No. 3 has infringed the principles of Article 14 of the Constitution by not according consideration to the petitioner and other tenderers, it cannot be said that it has acted in the interest of public at large. What has been observed in this regard by the Apex Court in the case of Tata Cellular (supra) is being reproduced below:

The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or

favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

38. What emerges from the aforesaid discussion is that if both the tenderers are found satisfying the condition of eligibility and cannot be treated as two different classes, the State is bound to accept the tender of the person who has quoted the lowest rates. By allotting the contract to respondent No. 3 at a rate approximately 40% higher than the rate quoted by the petitioner would be unreasonable and not in the public interest.

39. For the reasons mentioned above, I allow this petition and set aside the order impugned dated 20th of March'09, whereby the contract has been allotted in favour of respondent No. 3 for supply of items in pursuance to Tender Notice 03 of 2008. The official respondents are directed to consider the matter afresh for allotment of rate contract after according consideration to all the tenderers and satisfying itself regarding the quality of the material being supplied. In this regard, the Central Purchase Committee will refer the suturing and other material to be supplied by the tenderers to any Central/State recognized Laboratory/Institute, which would certify about the quality of the material. The respondent authorities after completing the said process may allot the tender keeping in view the rates quoted by each tenderer and the certificate issued by the laboratory/institute concerned regarding the quality of the product. Let this exercise be completed within a period of one month from today. For this period, the respondent authorities are permitted to accept the material at the rates quoted by the petitioner from any tenderer which may include the petitioner as also the private respondent No. 3. Disposed of accordingly along with connected CMPs, if any.