(2011) 02 GUJ CK 0074

In the Gujarat High Court

Case No : Special Civil Application No. 16099 of 2010

Chandan Medical Stores APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 28-02-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 02 GUJ CK 0074

Hon'ble Judges : K.A. Puj, J;D.H. Waghela, J

Bench : Division Bench

Advocate : P.R. Nanavati, for Petitioners 1, for the Appellant; Monali Bhatt, Assistant Government Pleader for Respondent(s) 1 and 4 and Anshin H. Desai, for Respondent 5, for the Respondent

Final Decision : Allowed

Judgement

K.A. Puj, J.—The Petitioner has filed this petition under Article 226 of the Constitution praying for directions to the concerned Respondents to hand over peaceful and vacant possession of the medical store situated in the campus of Civil Hospital, Ahmadabad, as per the letter of acceptance dated 25.8.2010 granted in favour of the Petitioner and to execute necessary contract as per Condition No. 4 of e-tender forthwith.

2. During the pendency of this petition, the Respondents have issued a letter dated 8.2.2011 expressing their desire to go for retendering process and hence the Petitioner has filed Civil Application No. 1889 of 2011 for challenging the said action of the Respondents, which came to be allowed and as per the amended prayer, the Petitioner has prayed for quashing and setting aside the said letter dated 8.2.2011 and thereby permanently restraining the Respondents from going for retendering process.

3. This Court has issued notice on 21.12.2010. On 19.1.2011, Rule was issued. On 20.1.2011 the Court asked the learned Assistant Government Pleader to take

clear instructions as regards the date by which the Respondent No. 5 should vacate the premises and what alternative arrangement can immediately be put into place in public interest. Thereafter, on 25.1.2011, this Court has passed further order recording submissions of the learned Counsel appearing for Respondent No. 5 that the Respondent No. 5 would vacate the premises on or before 4.2.2011.

4. The brief facts giving rise to the present petition are that, on 15.7.2010 the Respondent No. 4 - Medical Superintendent published an advertisement inviting offers from general public through e-tendering. The Petitioner submitted its tender on 24.7.2010. After following due procedure, since offer of the Petitioner was higher amongst all, the same has been accepted and letter of intent/letter of acceptance was issued in favour of the Petitioner by Respondent No. 3 on 5.8.2010, inter alia, prescribing certain terms, and actual possession of the premises of medical store in Civil Hospital campus, Ahmadabad was to be handed over on 5.9.2010 to the Petitioner. Pursuant to the said letter of acceptance the Petitioner fulfilled all the terms and conditions and deposited the required amount.

5. Pursuant to the said letter dated 25.8.2010, since physical possession of the store as promised by concerned Respondent was not given to the Petitioner, the Petitioner wrote letter dated 8.9.2010 and subsequent reminder dated 18.9.2010 requesting the concerned Respondent to hand over vacant and peaceful possession from the Respondent No. 5 as per the contractual terms and to execute necessary contract as per the acceptance letter dated 25.8.2010. The Petitioner also simultaneously attended the office of Chief Minister in the public relation meeting and requested concerned authority, who had issued certain instructions to the concerned Respondents. On 21.10.2010, Respondent No. 3 informed the office of the Chief Minister, inter alia, stating that necessary instructions have been passed on to Superintendent of Civil Hospital to hand over vacant and peaceful possession of the medical store within 7 days from the date of the said letter. Inspite of this letter, peaceful and vacant possession of the medical store was not given to the Petitioner and hence the Petitioner requested the concerned authority vide its letter dated 29.10.2010 to hand over possession of the store to the Petitioner. Instead of complying with the said letter, the Respondent No. 4 addressed a letter to the Respondent No. 3 seeking his guidance as to what further action should be taken pursuant to the request made by the Petitioner to hand over possession of the medical store. The Petitioner, thereafter, moved an application dated 9.9.2010 under Right to Information Act, inter alia, seeking certain information in respect of the tender process undertaken by concerned Respondent, to which the reply dated 1.11.2010 was given informing in detail about the e-tendering process undertaken by the Respondent.

6. After receipt of the said information from RTI Office, the Petitioner once again made several requests to hand over vacant and peaceful possession vide request

letter dated 24.11.2010 and 25.11.2010 to different authorities. In the intervening period the Additional Director issued a letter addressed to the Section Officer, Health & Family Welfare Department, instructing him to take necessary action for handing over vacant and peaceful possession which was followed by another letter dated 6.12.2010. Inspite of repeated efforts made by the Petitioner, since no fruitful result could be achieved, the Petitioner once again approached the Public Relation Officer in the office of the Chief Minister, inter alia, seeking information as to why after so much lapse of time no action has been taken for handing over peaceful and vacant possession to the Petitioner. Pursuant to the said online complaint it was informed that pursuant to the request made by the Respondent No. 5, to allow them to occupy premises and sell medicine, in view of the stock/inventories made, for a period of three months, Respondent No. 5 has been allowed to continue to occupy the premises up to 30.11.2010 with a condition that the Respondent No. 5 has to pay premium at the rate at which the Petitioner has been awarded contract. Even after the period of 30.11.2010 the Respondent No. 5 was occupying the premises and selling medicine without license and the concerned Respondent even after issuance of letter of acceptance in favour of the Petitioner has been stalling process of handing over possession and not allowing the Petitioner to start business at the premises in question and without any reason whatsoever, the Respondent No. 5 was permitted to continue in premises without any authority of law. The Petitioner was, therefore, left with no other alternative but to approach this Court by way of present petition seeking appropriate relief in the matter.

7. After filing of the petition before this Court, since the Respondents have decided to go for retendering process in respect of tender in question the Petitioner has amended the petition and made the prayer challenging the said action of initiation of retendering process.

8. Mr. P.R. Nanavati, learned advocate appearing for the Petitioner, has submitted that the Petitioner stood as the highest offered making offer of Rs. 10,26,000/- towards monthly premium and the said offer was accepted by the Respondents. He has further submitted that the Respondent No. 5, who has been occupying premises in question pursuant to the earlier contract was paying quarterly premium of Rs. 13,61,000/- which comes to Rs. 4,53,600/- p.m. Thus, the offer of the Petitioner is almost two and half times more than the rate of premium paid by the Respondent No. 5. He has further submitted that the Respondent No. 5''s earlier contractual period expired on 27.2.2008. Inspite of that and without floating any tender, their term of contract has been extended for further period of two years up to 27.2.2010 by mutual negotiation by permitting little higher rate of premium than what was agreed pursuant to the earlier term of contract awarded on 28.2.2005. He has further submitted that the Respondent No. 5 had been carrying on business by illegally occupying the premises inspite of the contract period was over under the extended period way back in the month of February, 2010 and was carrying on his business without drug license. He has further submitted that the Respondents, even after letter of acceptance issued in

favour of the Petitioner have been stalling process of handing over possession and the same has been done in an absolutely illegal manner. He has further submitted that concerned Respondents have been acting in connivance with the Respondent No. 5. Not only this, at the behest of the Respondent No. 5 a Regular Civil Suit No. 1925 of 2010 was filed by one Yogi Enterprise in the City Civil Court at Ahmadabad, inter alia, praying for necessary declaration declaring the Petitioner as an incompetent bidder, since the Petitioner did not fulfill the requirement of being registered firm and also sought consequential interim injunction. However, no order was passed by the Civil Court in the said Suit.

9. Mr. Nanavati further submitted that though the tender of the Petitioner was accepted and possession was assured to be handed over on 5.9.2010 the same could not be given to the Petitioner and only after filing of the petition before this Court and when the Respondent No. 5 made the statement before the Court, the premises was vacated by the Respondent. Even thereafter possession was not handed over to the Petitioner and to overreach the process of Court, the concerned Respondents have come out with the story of retendering and by this dubious method the Respondents were keen to oust the Petitioner. He has, therefore, submitted that the whole exercise undertaken by the Respondents in this entire tender process is mala fide and aimed at favoring the Respondent No. 5. He has, therefore, submitted that the Respondents should be directed to hand over possession of the premises in question to the Petitioner and they should be permanently restrained to go for retendering during the subsistence of the present contract period.

10. Mr. Nanavati submitted that there was already a concluded contract in favour of the Petitioner by virtue of letter of acceptance issued in favour of the Petitioner and the Petitioner having paid the requisite amount. He relied on the decision of the Apex Court in the case of Dresser Rand S.A. Vs. BINDAL Agro Chem Ltd. and K.G. Khosla Compressors Ltd., wherein it is held that'' "it is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties." He has, therefore, submitted that there being a concluded contract in favour of the Petitioner there is no reason as to why the possession of the premises should not be handed over to the Petitioner forthwith.

11. The petition was opposed by the Respondents and an affidavit-in-reply was filed on behalf of the Respondent No. 1 on 20.1.2011. A further affidavit-in-reply was filed on 23.2.2011. Based on these two affidavits, Ms. Monali Bhatt, learned Assistant Government Pleader, appearing on behalf of the Respondent Nos. 1 to 4 has submitted that the present petition is required to be dismissed in view of the

fact that no right, much less any fundamental right, of the Petitioner is violated by any action or inaction on the part of the Respondents. She has further submitted that after granting letter of acceptance in favour of the Petitioner on 25.8.2010 the Respondent No. 1 received three complaints regarding procedural lapses in e-tendering process. Pursuant to the said complaints, on 24.12.2010 the Respondent No. 1 directed the Industries Commissioner to inquire with respect to the same. The Industries Commissioner made an inquiry and submitted his report on 10.1.2011 to the Respondent No. 1. As per the said report, there were lapses in e-tendering process. Since there are lapses in the procedure of e-tendering process and the same would vitiate the e-tendering process the retendering was required to be done. She has further submitted that the Respondents have not acted in collusion with the Respondent No. 5. She has further submitted that the Respondent No. 1 had asked the Medical Superintendent, Civil Hospital, Ahmedabad to hand over possession of medical store in question to the Petitioner vide letter dated 23.11.2010. She has further submitted that after due consideration of the report submitted by the Industries Commissioner, the State Government has decided to get retendering process done and by the time the retendering process is finalized the medical store in question would remain closed. She has further submitted that as per the terms and conditions of the tender, Civil Hospital, Ahmadabad reserves right to reject any or all of the tenders without assigning any reason and to go for fresh tender. She has, therefore, submitted that considering the peculiar facts and circumstances and especially inquiry report of the Industries Commissioner, the Respondents are within their powers to take decision for retendering. She has further submitted that the Petitioner has accepted all the terms of the tender and submitted its tender. Once having accepted said terms of the tender it is not now open for the Petitioner to challenge the said decision of retendering. She has, therefore, submitted that the Petitioner is not entitled to any of the prayer as made in the present petition and the petition requires to be dismissed.

12. Mr. Anshin Desai, learned advocate appearing for the Respondent No. 5 submitted that since the premises was already vacated by the Respondent No. 5 he has nothing to say in the matter. He has fully denied all the allegations made against the Respondent No. 5.

13. Having heard the learned Counsel appearing for the parties and having considered their rival submissions in light of the terms and conditions of the tender documents and the materials placed on record, the Court is of the view that the action of the Respondent Nos. 1 to 4 allowing the Respondent No. 5 to occupy the premises in question even after the expiry of term on 27.2.2008 and even after the expiry of the extension period of two years, and subsequent decision of the Respondent authorities of going for a retendering process is absolutely illegal, uncalled for, tainted with mala fide and it amounts to colorable exercise of powers, which requires interference of this Court while exercising its writ jurisdiction under Article 226 of the Constitution of India, despite this being a contractual matter.

14. The facts and circumstances of the case and the reasons, which lead this Court to arrive at the above conclusion are that the earlier contract awarded to the Respondent No. 5 came to an end on 27.2.2008. The concerned Respondent Nos. 1 to 4, being Government authorities, could not have given away the largess of running the medical store in public hospital without undergoing tender process, and appears to have illegally extended the period of occupancy of the premises by the Respondent No. 5 for a further period of two years without disclosing the correct fact as to what amount has been increased by the Respondents. Even after the expiry of the extended period, the Respondent No. 5 was allowed to retain possession of the premises in question till this Court has passed a specific order directing the Respondents to evict the Respondent No. 5 and to get the premises vacated. Even if one compares the amount of premium offered by the Respondent No. 5 with the offer made by the Petitioner the difference is almost two and half times. It is, therefore, clearly established that the State Government has been put to sizable monitory loss during all these years. The Respondent No. 5 has been occupying the premises and continuing business illegally and unauthorized after expiry of the extended period of two years. Not only this, even after the tender process was over and the Petitioner has turned out to be a successful bidder and was promised to be given peaceful vacant possession of the premises on 5.9.2010, the Respondent No. 5, in connivance with the other Government authorities, was able to forestall the process of handing over possession to the Petitioner under one or other pretext.

15. It is also found from the record, more particularly from the affidavit-in-reply filed on behalf of the Respondents, that the Respondent No. 1 had already issued a letter on 23.11.2010 directing the Respondent No. 5 to evict the premises in question forthwith. Even after a letter of acceptance was issued in favour of the Petitioner on 25.8.2010 and the rent offered by the Petitioner was almost two and half times higher then what the Respondent No. 5 was paying, the Respondent No. 5 was allowed to continue on the condition that the Respondent No. 5 shall continue to hold the premises till the proper decision is taken on the subject matter, by paying the rent equivalent to the rent offered by the Petitioner. From the conduct of the Respondents it appears that the Respondent authorities have unduly favoured Respondent No. 5, who at the cost of public exchequer, was allowed to continue in the premises in question.

16. It is also very important to take note of the fact that even after the tender process was over and even after an inquiry was undertaken by the Central Medical Stores Organization (CMSO) pursuant to the complaints received by the Respondents which did not find anything adverse against the Petitioner, only with a view to create an eye-wash and to justify their stand and to see that by all means the Petitioner may be eliminated from getting the contract, a further inquiry was held through the office of Industries Commissioner, pursuant to letter dated 24.12.2010 in respect of the so called complaints received from various bidders, who had participated in the tender process and alleged certain irregularities committed by the Respondent Nos. 1 to 4. If one looks at these

three complaints received by the Respondents, two complaints are of 31.8.2010 and they are made by Shah Medical Stores and Deepak Medical & Provision Stores. Both these complaints are cryptic in nature and they merely contain an allegation that there are certain irregularities in e-tendering evaluation process by the Superintendent''s Office. Except this, nothing more is stated in the said complaints. The third complaint is made by Krishna Medical Agency on 2.11.2010. Pursuant to this complaint, the report was submitted by the Additional Industries Commissioner and nothing adverse was found against the present Petitioner. It is also found from the report of the Additional Industries Commissioner that the complaint received by the Department is against other lower bidders and there was no complaint against the Petitioner nor there was any whisper of allegation made against the Petitioner in the inquiry report. The decision of the Respondent authorities to go for retendering, therefore, clearly smacks of mala fide and the Respondent authorities'' only intention is to see that the Petitioner is eliminated from the process, since the bidder of their choice might not have succeeded in getting the contract.

17. While communicating the decision of the Respondents to go for retendering, it is mentioned that the patients of the Civil Hospital are not likely to be adversely affected in view of the fact that heir needs are catered by the stores outside the Civil Hospital campus. This statement was specifically denied by the Petitioner and it was submitted that the medicines available outside the Civil Hospital campus are not available at subsidized rate and none of the stores outside Civil Hospital campus is running 24 hours. It is also brought to the notice of the Court that no other store is available in the Civil Hospital campus which has retail counter from where patients can buy medicine. It is also brought to the notice of this Court that there is a store known as D-Five which supplies necessary medicines to the Civil Hospital directly for their consumption and it is not a retail counter from where an ordinary patient can buy medicine. It is also alleged that the said D-Five Store is buying medicines from the Respondent No. 5. These facts are not disputed by the Respondents. Under the circumstances, it is found and held that the decision to resort to retendering, even at the cost of temporarily closing the existing public facility is not bona fide and absolutely arbitrary.

18. It is also clear from the letter of acceptance issued on 25.8.2010 in favour of the Petitioner that the terms mentioned therein do communicate the acceptance of the offer and also promise handing over of possession of the premises on 5.9.2010. The only formality left was of entering into formal contract. As held by the Apex Court in the case of Dresser Rand S.A. v. Bindal Agro Chem. Ltd. (Supra), if an intention is evident from the terms of letter of acceptance/intent and detailed contract is to be executed later on, such a letter of acceptance would amount to acceptance of the offer resulting into a concluded contract between the parties.

19. The Petitioner has already deposited an amount of Rs. 15 lacs with the

Respondent authorities. Though the Petitioner has performed its part of obligation, the Respondents have failed to perform their part of promise of handing over peaceful and vacant possession of the premises nor have they executed contract in favour of the Petitioner pursuant to the letter of acceptance. We are, therefore, of the view that, though the present matter is in the realm of contract, the manner in which the unfair practice has been adopted by the Respondents, who are State authorities, the facts of the case calls for interference by this Court in exercise of the writ jurisdiction. We, therefore, set aside the decision of the Respondent authorities of going for retendering and direct them to hand over possession of the premises in question forthwith for full five years period after executing necessary contract in favour of the Petitioner.

20. Since Respondent authorities concerned appears to have abused their authority and the exercise of power by them is found to be far from bona fide and they have denied the Petitioner an opportunity of running the medical store despite its tender having been accepted and since they have illegally and unauthorized favored the Respondent No. 5 even after its term expired long back, they are saddled with cost of Rs. 25,000/- (Rupees Twenty Five Thousand Only). The amount of cost shall be paid to the Petitioner within one month initially by Respondent No. 1 and shall thereafter be recovered from such of the officers under him as may be found to have caused the loss to the public exchequer and the unnecessary litigation.

The petition is allowed with the above directions and rule is made absolute accordingly.