(2004) 06 GAU CK 0046

In the Gauhati High Court

Case No : Writ Petition No''s. 1641, 1826, 2039 and 2268 of 2004

East Line Projects Pvt. Ltd. APPELLANT

Vs

Dr. B. Borooah Cancer Institute and Others RESPONDENT

Date of Decision : 18-06-2004

Acts Referred:

Competition Act, 2002 — Section 1, 54
Constitution of India, 1950 — Article 14, 299

Citation : AIR 2005 Guw 5 : (2005) 1 CTLJ 285 : (2005) GLT 13 Supp

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Advocate : G.N. Sahewalla, J.L. Sarkar, N. Dutta and P.J. Phukan, for the Appellant; H.N. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

P.G. Agarwal, J.—All these writ petitions were heard analogous and disposed of by this common order.

2. All these four writ petitions relate to the establishment of a Pharmacy at Dr. B. Barooah Cancer Institute (hereinafter referred to as the Institute for convenience sake). The Institute floated a tender vide NIT, dated 18-2-2004 for establishment of a Pharmacy at the said Institute to be named as BBCI Pharmacy for the convenience of the patients undergoing treatment at the said Institute. Pursuant to the said/NIT, M/s. New Barman Medicos, petitioner in WP (C) No. 2039/2004; M/s. Becon Drug Distributors, petitioner in WP (C) No. 1826/ 2004 and M/s. Jyotshna Medical, petitioner in WP (C) No. 2268/2004 submitted their tenders. The other petitioner M/s. East Line Projects Pvt. Ltd., did not submit any tender and they have challenged the said tender process on certain grounds to which we will be reverting at a later stage. The Committee of the Institute consisted of seven members (one was absent on the date of the meeting) met and opened the tenders? There were as many as nine tenders and four tenders were rejected in absence of requisite papers. The Committee scrutinized the tenders of the

remaining five and thereafter approved the offer of respondent "M/s. Apollo Pharmaceuticals and accordingly decided to allot the contract of setting up of a Pharmacy to the respondent Apollo Pharmaceuticals Ltd.

3. The grievance of the petitioner past Line Projects Pvt. Ltd. a non-tenderer is that the NIT suffers from vagueness as the institute has not disclosed the size or the area of the Pharmacy and the stipulation fixing the rent at Rs. 30,000/- per month without mentioning the area to be given to the successful tenderer according to the petitioner is vague and uncertain and as such the entire tender process should be quashed. Clauses 15 and 16 of the NIT reads as follows ;-

"15. The Institute will provide adequate space for the Pharmacy including space for storing medicines with adequate facilities for lighting etc. in its new OPD building.

16. The successful tenderer will be required to pay Rs. 30.000/- (Rupees thirty thousand only) per month towards rent for accommodation."

4. We do not find much force in the submission of the petitioner as the Institute has undertaken to provide adequate space for operating the Pharmacy from the Institute premises and as such the non-mentioning of the total space to be allotted is irrelevant. Likewise; it is .submitted that Clause 19 of the, NIT: is also vague;. Clause 19 reads as follows :-

" 19. That the tenderer will be required to quote the minimum percentage of profits on distributor''s price of medicine and other items to be charged separately for (a) Chemotherapy Medicines, (b) General Medicines, and (c) other medical items (like surgical items etc.). However, allotment of the work will be determined mainly on the basis of the prices of Chemotherapy Medicines (Oncology Products)."

5. The learned counsel for the petitioner, Mr. G. N. Sahewalla, has submitted that the medicines were meant for the patients and in the medicines the MRP i.e. the maximum retail price is printed, the distributors price is not known to the customers and as such asking the tenderer to quote the distributors price for allotment of the contract was not proper and it is preventing the genuine tenderers from participating in the process.

6. The learned counsel appearing for the Institute and the learned counsel for the private respondent have challenged the locus of the petitioner stating that as the petitioner did not participate in the tender process and he is no way interested in the same, he cannot challenge the above condition of the NIT. The learned counsel appearing for the Institute, Mr. H. N. Sarma has submitted that the Pharmacy was meant for the poor patients undergoing treatment at the Institute and the Institute desires to provide their medicines at the lowest possible rates; Moreover, the distributors price is known to the concerned persons connected with the distribution/selling of the medicines and as such there was no vagueness as the tender was not meant for the purchasers of

medicines.

7. On consideration of the entire tender documents, we find that the tender documents cannot be called to be a vague one as the Institute offered to provide the required space for the Pharmacy as well as for the storage of medicines and the rent to be charged was also hinted.

8. Mr. N. Dutta, learned Senior Advocate appearing for the petitioner, M/s. New Barman Medicos has challenged the allotment of the contract to the private licensee by referring to Clauses 10 and 19 of the NIT. Clause 10 reads as follows :-

"10. The tenderer should submit their credential along with the tender consisting of the following :-

i. Certificate of previous experience of similar Job.

ii. Certificate regarding financial capacity from Bank concerned.

iii. Drug License issued by the competent authority."

9. Mr. Dutta has submitted that besides the manufacturers there are three categories of persons involved with the distribution/sale of drugs under the Drugs and Cosmetics Act, 1940 and the Drugs and Cosmetics Rules, 1945 (for short the Act and Rules). These three categories of persons are-(1) Stockist, (2) Distributors, and (3) Retailer. As stated, the medicines are transferred to the stockist by the manufacturer and there is a profit margin for the stockist who transfers it to the distributor at a price, which is called distributor''s price. The distributor, thereafter, adding his margin of profit sells it to the retailer, which is called the retailer''s price. The retailer, thereafter, sells the medicines to the consumers at the MRP.

10. Referring to Clause 10 (1) of the NIT and placing emphasis on the words ''experience of similar job'', it is submitted by Mr. N. Dutta that what the Institute was searching for was a retailer as the Pharmacy was required to deal with the consumers and the retailer being the only person to deal with the patients directly, the words ''experience of similar job'' only means the job of a retailer of medicines. It is further stated that considering the difference of price at which the medicines are purchased by the stockist and the retailer, there was no scope for allotment of the contract to the stockist or a distributor as that would have been competition amongst unequals.

11. Mr. Dutta, learned counsel has submitted that in the given set up, the stockist enjoy a dominant position and if he is allowed to compete with the distributor or the retailer, it will amount to abuse of dominant position which will be violative of the provisions of Section 4 of the Competition Act, 2002. The dominant position has been defined under the Competition Act, 2002 as a position of strength enjoyed by an enterprise. Section 4 prohibits the abuse of dominant position by selling goods at a price with a view to reduce competition

or eliminate the competitors.

12. The learned counsel for the Institute on the other hand submits that the provisions of the Competition Act, 2002 do not apply'' in the case of an Institute which is providing yeoman service to the cancer patients and the very purpose of establishing a Pharmacy is to provide medicines at the lowest possible rates as otherwise the cancer medicines /chemotherapy medicines are Costly affair and are generally out of budget for poor patients. The learned counsel has also referred to the object of the Competition Act, 2002, which reads as follows :-

"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto."

13. Considering the avowed object for which the Pharmacy is going to be established, we hold that, the provisions of the Competition Act, 2002 does not apply in the matter of establishment of a Pharmacy or sale of medicines at a Pharmacy to be established by the Institute.

14. It is further submitted that under the Act and the Rules there are two types of licenses issued by the concerned authorities, one is wholesale license and the other is retail license and it is submitted that a persons having wholesale license cannot involve himself in retailing business and a separate retail license is required to open a Pharmacy. The question of license is not of much importance in the present case. As admitted, none of the tenders had the license to open the BBCI Pharmacy at the Institute. The Pharmacy was to be opened in the name and style of BBCI Pharmacy for which a license was required to be taken after the allotment, on the consent and authorization of the Institute only. The question that has been raised is whether the Pharmacy was meant exclusively for the person having experience in retailing of medicines or it was meant for all categories of persons involved In the sale/distribution of medicines. The definition of retail and wholesale license under Rule 2 (a)(g) need not detain us to decide the question. Likewise, reference to Rule 65(4) of the Rules, are also not material to decide the point/question raised.

15. The case of the Institute as stated in Para 4 of their affidavit in opposition (filed in WP (C) No. 1641/2004 and this has been read as their affidavit in opposition in all the cases), is that ''the very object of setting up a pharmacy within the institute is just to render benefit to the poor cancer patient at a much cheaper rate than the market price. It is submitted by the deponent that the writ petitioner by filing this incompetent writ petition, they are playing with the lives of many cancer patient which should be viewed very seriously. The deponent further states, the respondent is not a profit-oriented institution unlike private hospitals and the only motive is to provide cheaper medical service to the cancer

patient including chemotherapy drugs.''

16. Now coming to the question whether the Pharmacy sought to be established by the Institute was exclusively reserved for the retailers and whether the experience of similar job mentioned in the NIT meant experience in retailing of drugs/medicines only, it is submitted on behalf of the Institute that in the NIT stockist or the distributors were not excluded and it was not provided that the Pharmacy is reserved for retail dealers only. The experience mentioned in the NIT was in respect of dealing in drugs/medicines and all the categories of persons were included. When the NIT is silent on the point that the experience required for the job is not of retailing business in drugs only, we find no basis for giving a narrow meaning and holding that the Pharmacy sought to be established was exclusively meant for the retail dealers of drugs. As stated above, the entire efforts were directed towards providing medicines to poor cancer patients at the lowest possible rates and hence if the Select Committee had decided to allot the contract to the stockist for the benefit of the patients, no fault can be found with such decision and it cannot be held to be arbitrary or discriminatory. We do not propose to give a narrow interpretation to the words ''experience of similar job'' by confining to the experience in retailing job only. Admittedly the rates quoted by New Barman Medicos were higher than the respondent Apollo Pharmaceuticals.

17. So far the writ petition filed by Jyotsna Medicals is concerned we find from the proceedings of the meeting that the said firm did not quote their rates on any of the items on distributors price as asked for in the tender notice and as such their offer was not considered.

18. Coming to the writ petition filed by M/s. Becon Drug Distributors, we find that they have quoted 15% less than the distributors price for chemotherapy medicines, 6% less for general medicines and 10% less for other medical items.

19. Mr. J. L. Sarkar learned counsel appearing for the petitioner has, therefore, submitted that the rates quoted by the petitioners were the lowest and as such the contract should have been allotted to them.

20. In this case we find that the tender was opened by the Committee in presence of all the tenderers and at the time of opening the tender, the petitioner Sri Santanu Chakravorty who was present at the meeting informed the members as to what he meant by the quotation of his tender. He has asked for 15%, 6% and 10% profit on distributors price and not discount. The writ petitioner has also put his signature to that effect in the minutes of the meeting. This is admitted by the petitioner in Annexure ''C dated 12-3-2004. The petitioner; however, now claims that he gave his signature without free consent and it was extraneous consideration to the tender process. The committee was, however, of the opinion that the rate quoted by the petitioner Becon Drugs Distributors at 15%, 6% and 10% less than the distributors price is not practically viable and hence rejected the offer. It is submitted that the distributors margin will not come to 15% and as such there is no scope to give 15% discount to the

customers at the distributors price.

21. Mr. J. L. Sarkar, learned counsel for the petitioner on the other hand has produced a copy of the document by way of additional affidavit to show that the distributors who get medicines as bonus that is you pay for one and get two, i.e. if you pay Rs. 100/- for 10 packets of a particular medicines you get another 10 packets as bonus and thus at the price of Rs. 100/- you get 20 packets, the price of each will be Rs. 5/-only and the petitioner, therefore, justifies his offer.

22. We are, however, not convinced with the above submissions. The companies may on occasion give such offer or scheme but admittedly such schemes do not run 365 days a year and in respect of all medicines. In case, such system is prevalent, it is high time for the Govt. to interfere as it amounts to cheating and use of unfair means by deceiving the customers. The distributors are given a particular product at Rs. 10/- or less whereas the MRP of the said product will be beyond Rs. 20/-. The proposed pharmacy at the Institute cannot be allowed to be managed on the basis of such bonus purchases as the pharmacy is required to cater to the needs oif all the patients at all the time and all medicines prescribed are required to be supplied to the customers. The petitioner before us is a literate person and he was not alone in that meeting which was attended by not only the committee members but by other tenderers and out of his own free consent he signed the documents on 10-3-2004. The retraction came after two days on 12-3-2004.

23. The scope and ambit of judicial review permissible in contractual matters was laid down by the Apex Court in a catena of decisions - Tata Cellular Vs. Union of India, and these were reiterated in the case of Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, wherein the Apex Court further observed :-

"12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interefere with administrative policy decisions only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Court cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

As a matter of policy Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The Courts would not Interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the Court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provisions of the terms inviting tenders from firms having a turnover of more than Rs.20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.

24. In view of the aforesaid discussions, we are of the view that there is no infirmity or illegality in the entire tender process. There is transparency in the matter and the decision has been taken by the concerned Authorities in the larger interest of the cancer patients for whom the institute is meant. Accordingly, the writ petitions stand dismissed. No costs.

