(2023) 10 GAU CK 0049

In the Gauhati High Court

Case No : Writ Appeal No. 342, 343 Of 2019

F. Lalremsangi APPELLANT

Vs

State Of Mizoram RESPONDENT

Date of Decision : 16-10-2023

Acts Referred:

Drugs and Cosmetics Rules, 1945 — Rule 61, 61(1), 62

Citation : (2023) 10 GAU CK 0049

Hon'ble Judges : Sandeep Mehta, CJ;Susmita Phukan Khaund, J

Bench : Division Bench

Advocate : D. Saikia, M. Das, N. Sarkar, D. Das, A. Kalita

Final Decision : Dismissed

Judgement

Sandeep Mehta, CJ

1. Heard Mr. D. Saikia, learned senior counsel, assisted by Mr. M. Das, learned counsel for the appellant in Writ Appeal No.342/2019 and Mr. N. Sarkar, learned counsel for the appellant in Writ Appeal No.343/2019. Also heard Mr. D. Das, learned Advocate General, Mizoram, assisted by Mr. A. Kalita, learned Additional Advocate General, Mizoram, appearing for the State respondents.

2. These 2(two) intra-Court writ appeals are directed against the common judgment and final order dated 31.10.2019 passed by the learned Single Bench in WP(C) No.131/2019 and WP(C) No.134/2019, respectively, filed by Smt. F. Lalremsangi, Proprietor of R.R. Pharmacy (appellant in Writ Appeal No.342/2019) and Shri Lalrozara (appellant in Writ Appeal No.343/2019), whereby the decision of the respondent Director, Zoram Medical College to award the contract for running the Pharmacy Canteen at the Zoram Medical College in Falkawn to the respondent No.4 in Writ Appeal No.343/2019, i.e. Dr. C. Zothanmawia, Proprietor of Medicare Pharmacy, pursuant to the Short Tender Notice dated 06.08.2019, was upheld and both the writ petitions were dismissed.

3. The bone of contention inter se between the parties is as to whether the

decision of the respondent tendering authority, i.e. the Director of Zoram Medical College, in awarding the contract to a bidder, who was not having a Drug Licence for the area wherein the College was located, i.e. Falkawn, is valid in the eyes of law or not. A further projection is made by the appellants/writ petitioners that the terms and conditions of the original NIT were tinkered with at the instance of the private respondent with the intervention of the Hon'ble Chief Minister of Mizoram and thus, impugned action suffers from nepotism and is tainted.

4. For better appreciation of the controversy, it would be apt to reproduce the language of the Short Tender Notice dated 6.08.2019 and the relevant conditions forming a part of the terms and documents published along with the Tender Notice:-

Short Tender Notice

A tender for running Pharmacy Canteen has been called for by the State Referral Hospital Falkawn (SRHF) – Zoram Medical College (ZMC) from 17th August, 2019 for a duration of 2 years. Reply to the tender should be made in writing on a plain paper addressed to the Director, ZMC on or before the 9th August, 2019 at 1:00 PM. Tender will be opened at 2:00 PM. Persons submitting their tenders must be present personally or through their representative. The person submitting their tender must mention the price of house rent he is willing to bid.

IPR NO.136

Sd/-

Director

Zoram Medical College

Falkawn : Mizoram”

“Terms and Conditions

1. ……

2. ……

3. The person selected to be the vendor of the Pharmacy Canteen should necessarily have a valid General Drug Licence (Schedule H). One (1) Xerox Copy of the Drug Licence must be enclosed.

4. ……

13. The decision of the ZMC/SRHF Managing Committee will be final on any disputed matter or matters to be settled with regards to the Pharmacy Canteen and cannot be argued.”

5. After receiving bids from all the bidders, a comparative statement was prepared, wherein the bidder R.F. Pharmacy was found to be offering the highest rent, i.e. Rs.1,00,000/-; the bidder Jamajot Enterprise offered Rs.71,000/- per

month as a rent, whereas the bidder R.K. Drug Store offered rent @ Rs.70,000/- per month. The bidder Medicare Pharmacy (respondent No.5 in Writ Appeal No.342/2019 and respondent No.4 in Writ Appeal No.343/2019), to whom the work order was awarded, offered a sum of Rs.60,000/- per month as rent, whereas R.R. Pharmacy (appellant in Writ Appeal No.342/2019) offered rent @ Rs.47,300/- and the appellant R.Z. Pharmacy (Writ Appeal No343/2019) offered rent @ Rs.47,000/- per month. The Drug Licences of all other compliant bidders were for different areas, whereas the Licences held by R.R. Pharmacy (appellant in Writ Appeal No.342/2019) and R.Z. Pharmacy, were issued for premises located in the Falkawn area. The Drug Licence of Medicare Pharmacy, the private respondent was for the Dawrpui area.

6. The private respondent, i.e. the Proprietor of Medicare Pharmacy, seems to have approached the Hon’ble Chief Minister, Mizoram for transfer of its Drug Licence, as is evident from the letter dated 11.09.2019 (Annexure-B to the writ appeals), and acting thereupon, the private respondent was permitted to get its Drug Licence transferred to Falkawn area and thereafter, its bid was accepted and the work order was awarded to such respondent by order dated 20.09.2019. The said order was challenged by way of the captioned writ petitions.

7. The writ petitions preferred by the appellants herein were taken up by the learned Single Judge at the Mizoram Bench and after considering the submissions advanced at bar and the material placed on record, a conclusion was arrived at by the learned Single Judge vide the impugned judgment that as per the terms and conditions of the Tender Notice, there was only a requirement that the bidders should have a valid General Drug Licence (Schedule-H) but there was no such pre-condition in the NIT that the bidders should have an area specific Drug Licence for operating at Falkawn in order to participate in the tender process. Accordingly, the decision of the tendering authority in awarding the contract to run the Pharmacy Canteen to the private respondent was affirmed and both the writ petitions were dismissed by judgment & order dated 31.10.2019, which is assailed in these 2(two) writ petitions.

8. Mr. D. Saikia, learned senior counsel representing the appellant in Writ Appeal No.342/2019, drew the Court’s attention to the terms and conditions annexed with the Tender Notice and to be specific, the Condition No.3 thereof (reproduced supra), and urged that the condition clearly stipulates that the person selected to be a vendor of the Pharmacy Canteen should be possessed of a valid General Drug Licence. As per Mr. Saikia, the said condition would have to be read conveying a clear intent that the Drug Licence should be valid for the area where the Canteen is located, i.e. Falkawn. As per Mr. Saikia, unless the bidder possessed a licence to deal in drugs in Falkawn area, he would not be able to run the Canteen and sell the drugs therein. To bolster this submission, Mr. Saikia drew the Court’s attention to Rule 61 of the Drugs Rules, 1945 and submitted that the private respondent Medicare Pharmacy, after being awarded the contract, got its Drug Licence transferred to the Falkawn area, which gives rise to

a direct inference that the licence held by the said bidder earlier was not a valid one. He thus, urged that the decision of the tendering authority in accepting the bid and awarding the work order to the private respondent, who did not have a valid Drug Licence for trading in the Falkawn area, is illegal, arbitrary and suffers from fraud and nepotism and hence, the decision to award the work order to the private respondent and so also the judgment rendered by the learned Single Judge dismissing the writ petitions deserve to be reversed.

9. Mr. D. Das, learned Advocate General, Mizoram, on the other hand, submitted that there was no requirement in the Tender Notice and the terms and conditions appended thereto that the Drug Licence of the bidders should be area specific, i.e. for the Falkawn area. He urged that there is nothing in the Drugs and Cosmetics Acts and the Rules that a person having a Drug Licence for a particular area cannot offer his bid for a different area. He further contended that as per the Tender Notice and the terms and conditions, the operational period of the Pharmacy Canteen was for 2(two) years to be counted from the date the agreement is signed. He urged that the agreement was signed between the ZMC/ SRHF Management Committee and the successful bidder on 23.09.2019 and thus, by now the operational period under the subject NIT has already come to an end. However, as this Court had passed an interim stay on the impugned judgment vide order dated 04.12.2019, the appellant in Writ Appeal No.343/2019, who was earlier holding the licence for the Canteen, was permitted to operate the Canteen and continues to do so till date.

10. Without prejudice to the above submissions, Mr. Das very fairly submitted that even otherwise, the decision of the tendering authority in awarding the contract to the private respondent Medicare Pharmacy is unjustified and illegal, because the bidder named R.F. Pharmacy had offered a bid amount of Rs.1,00,000/-and 2(two) other bidders, namely, Jamjot Enterprise and R.K. Drug Store, had offered bid amounts of Rs.71,000/- and Rs.70,000/- as monthly rent, respectively. After evaluation of the financial bids, these 3(three) bidders were rated as bidder Nos.H1, H2 and H3, respectively. Thus, there was no reason as to why the bid of the private respondent Medicare Pharmacy, who offered a lower rent amount of Rs.60,000/-, was accepted. Mr. Das submitted that more than 4(four) years have elapsed since the tender process in question was issued and thus, in public interest, it would be apposite to direct that a fresh tender process should be held for allotting the Pharmacy Canteen in question.

11. No one has appeared to argue the matter on behalf of the private respondent, i.e. Medicare Pharmacy, in both the writ appeals.

12. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the impugned judgment and the material available on record.

13. The main thrust of Mr. Saikia, learned senior counsel for the appellant in Writ Appeal No.342/2019 and Mr. Sarkar, learned counsel for the appellant in Writ

Appeal No.343/2019 for assailing the impugned judgment was that for the bids to be considered to be valid, the bidder concerned was essentially required to possess a Drug Licence for operating in the Falkawn area. This submission was based on the provisions contained in Rules 61 and 62 of the Drugs Rules, which read as below:-

“61. Forms of licences to sell drugs.— (1) A licence [to sell, stock, exhibit or offer for sale or distribute] drugs other than those specified in Schedules C, C(1) and X and by retail on restricted licence or by wholesale, shall be issued in Form 20, Form 20A or Form 20B, as the case may be:

Provided that a licence in Form 20A shall be valid for only such drugs as are specified in the licence.

(2) A licence [to sell, stock, exhibit or offer for sale or distribute] drugs specified in Schedules C and C(1) excluding those specified in Schedule X, by retail on restricted licence or by wholesale shall be issued in Form 21, Form 21A or Form 21B, as the case may be:

Provided that a licence in Form 21A shall not be granted for drugs specified in Schedule C and shall be valid for only such Schedule C(1) drugs as are specified in the licence.

(3) A licence [to sell, stock, exhibit or offer for sale or distribute] drugs specified in Schedule X by retail or by wholesale shall be issued in Form 20F or Form 20G as the case may be].

62. Sale at more than one place.— If drugs are sold or stocked for sale at more than one place, separate application shall be made, and a separate licence shall be issued, in respect of each such place:

[Provided that this shall not apply to itinerant vendors who have no specified place of business and who will be licensed to conduct business in a particular area within the jurisdiction of the licensing authority.]”

14. As per Mr. Saikia, the valid Drug Licence would mean a Drug Licence for the area specific and would not include a Drug Licence issued for any other area. Mr. Saikia had thus argued that as the private respondent (Medicare Pharmacy) was having a licence for Dawrpui area, he could not have even applied for the Pharmacy Canteen located in the Falkawn area. Likewise, the bidders, who were rated as H1, H2 and H3, were also not having Drug Licences for the Falkwan area and thus their bids were not technically valid.

15. The relevant forms under which the Drug Licences are issued are Form No.20, Form No.20A and Form No.20B prescribed under Rule 61(1) of the Drugs and Cosmetic Rules, 1945. A common narration in these 3(three) forms, which is relevant and germane to the controversy is reproduced herein below for the sake of ready reference:-

“and to operate a pharmacy on the premises situated at ....

subject to the conditions specified below and to the provisions of the Drugs and Cosmetics Act, 1940 and the rules thereunder."

16. Thus, it is clear that the licences are issued not for an area, i.e. to say for a ward, town, village or a district and rather, the place of business is defined within a premises situated within the particular identifiable area. Consequently, for operating the Pharmacy Canteen at Falkwan, the successful bidder would have either to get the licence transferred to that location or else, a fresh licence would be required for running the Pharmacy Canteen. The successful bidder would, in no situation, be allowed to operate the Pharmacy on strength of the existing Drug Licence, which undoubtedly would be valid for the premises as per the licence conditions. Hence, the terms and conditions of the tender notice requiring the bidders to be holding a valid Drug Licence for Schedule H drugs, has to be read in the context that the bidders should be existing licenced Schedule H drug dealers and based on such licence(s) irrespective of the operational area of the licence, bids could be filed in the subject tender process.

In this regard, we would like to refer to the licence of one Jan Aushadhi Drug Store annexed at Page 73 of the Paper Book of Writ Appeal No.343/2019. The said licence was specifically issued to operate the pharmacy on the premises situated at the State Referral Hospital, Falkawn. Manifestly thus, the dealer having a valid Drug Licence, after being awarded the contract, must have procured a premise specific licence. Hence, we do not find any merit in the contention of Mr. Saikia that a valid/compliant bid could only be filed by a dealer/ person having an existing Drug Licence for the Falkawn area only.

17. The contention of Mr. Saikia that if a dealer is desirous of carrying on drug trade at two different locations, then he has to obtain a licence for more than one place as per Rule 62 of the Drug Rules, 1945, is also not tenable because in the present situation, wherein the aspirants filed their bids to operate the Pharmacy Canteen or a similar facility in a Hospital in expectancy of being successful, could not be expected to possess a Drug Licence for the said location in advance. The valid Drug Licence holders, for any area, were entitled to apply in the tender process and upon being successful, they would either be required to procure a fresh licence for the location in question or to procure a Drug Licence for sale at additional locations, i.e. ZMC Pharmacy Canteen, in terms of Rule 62 of the Drug Rules.

18. Now coming to the submission advanced by Mr. Das regarding the decision of awarding the contract to the private respondent being arbitrary. We fully appreciate and endorse the said stand of the learned Advocate General, Mizoram. As per the comparative statement prepared after assessment of offers of various bidders, which has been annexed at Page 63 of Writ Appeal No.343/2019, it appears that the bidders R.F. Pharmacy; Jamajot Enterprise and R.K. Drug Store offered monthly rent @ Rs.1,00,000/-, Rs.71,000/- and Rs.70,000/, respectively, for operating the Pharmacy Canteen in question. Hence, the decision to award the tender for the Pharmacy Canteen to the private respondent Medicare

Pharmacy, who offered a bid of Rs.60,000/-only, cannot be termed to be justified or lawful by any stretch of imagination. The said decision would definitely result into loss being caused to the public exchequer inasmuch as, the difference in rent between the offer of private respondent Medicare Pharmacy and R.F. Pharmacy was to the tune of Rs.40,000/- per month. Furthermore, no reason has been shown for accepting a lower bid when much higher bids were found compliant.

Hence, the decision of the tendering authority in awarding the work order to the private respondent has to be reversed albeit on different grounds, i.e. as being arbitrary and unreasonable.

19. As an upshot of the discussion made hereinabove, we do not find any infirmity in the decision of the learned Single rejecting the writ petitions by judgment dated 31.10.2019. However, the operative Paragraph 16 of the impugned judgment, whereby the decision to award the work order to the private respondent Medicare Pharmacy was affirmed by holding it to be eligible as per the terms and conditions of the NIT, seems to have been arrived at in ignorance of the material fact that 3(three) other bidders had offered much higher rents in their bids. This material fact seems to have escaped from the notice of the learned Single Judge.

20. As a consequence, the argument/suggestion given by Mr. D. Das, learned Advocate General, Mizoram, deserves to be accepted. Resultantly, the entire tender process initiated by the respondent College on 06.08.2019, is hereby quashed. A fresh tender process shall be undertaken for running the Pharmacy Canteen preferably within a period of 2(two) months from today and the contract in question shall be awarded with strict adherence to the procedure established by law.

21. The appeals are dismissed with the above observations and modifications in the impugned judgment. No order as to costs.