
(2009) 03 DEL CK 0045

In the Delhi High Court

Case No : Writ Petition (Civil) 8746 of 2008

Famy Care Limited and Another

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Citation : (2010) 7 RCR(Civil) 119

Hon'ble Judges : Siddharth Mridul, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : Vikas Dhawan and Abhimanyu Mahajan, for the Appellant; P.P. Malhotra, ASG, Vishnu Sharma and R.S. Mathur, for the Respondent

Judgement

Siddharth Mridul, J.—The challenge in the present writ petition is to the action on the part of the Union of India, Ministry of Health and Family Welfare, Respondent No. 1 herein, in awarding and/or placing the rate contract of the entire quantity of Oral Contraceptive Pills (OCPs) on Indian Drugs and Pharmaceuticals Limited (IDPL), Respondent No. 2 herein, without following the tender process initiated by Respondent No. 1 on the 18th September, 2008.

2. The Petitioners are engaged in the business of manufacturing and supply of family planning products including OCPs and have been supplying these products to the Respondent No. 1 for the last many years.

3. In India, OCPs are distributed under the family welfare programmes by Respondent No. 1, free of cost and/or at substantially subsidized rates. For OCPs, in India almost 85 to 90% of the market is only through the family welfare programmes of Respondent No. 1.

4. The procurement of OCPs by Respondent No. 1 is through open tender, where all companies who fulfill the eligibility criteria are permitted to participate. The Respondent No. 1 had invited tenders for supply of OCPs on 14th March, 2005 and a rate contract was awarded to various parties including the Petitioners herein on the 18th October, 2005 for supply of OCPs which was initially for a

period of two years and was subsequently extended for another year till 17th October, 2008.

5. The Respondent No. 1 received an order No. N23011/16/2005-Supply(HLL) dated the 26th August, 2005 in pursuance of the Cabinet Order No. 36/CM/2005 dated 17th August, 2005, directing Respondent No. 1 to place orders for 55% of the total quantity of, inter alia, OCPs in favour of M/s Hindustan Latex Limited (HLL), a public sector undertaking under the Respondent No. 1. The said Cabinet Order was implemented by the Respondent No. 1.

6. On the 18th September, 2008 the Respondent No. 1 floated an open tender in various newspapers. Under the said tender notice the Respondent No. 1 invited offers to enter into a rate contract for supply of the following items:

S. No.

Items

Unit

Tentative Quantity required during 2008-09.

1.

Condoms

Million Pcs.

663

2.

Oral Contraceptive Pills

Lakh Cycles

275

3.

IUD Cu-T 380A

Lakh Pcs.

25

4.

Emergency Contraceptive Pills

Lakh Packs of 2 Pills

5.5

The date of sale of the tender enquiry documents was from 24th September to 5th November, 2008.

7. The Petitioners who wanted to participate in the tender dated 18th September, 2008 on being unable to download the tender enquiry documents vide their respective letters dated 29th September, 2008 requested Respondent No. 1 to issue tender enquiry documents for the OCPs to the Petitioners. The Respondent No. 1 refused to accept the said pay orders stating that tender documents in respect of the OCPs had not yet been issued by the Department and was likely to be issued shortly.

8. The Petitioners vide their letters dated 22nd October, 2008 and 23rd October 2008 respectively once again requested Respondent No. 1 for issue of the tender documents to enable them to participate in the tender for the OCPs. Subsequent to the aforesaid letter the representatives of the Petitioners met the concerned officials of Respondent No. 1 and were purportedly informed that the date for sale of tender enquiry documents in respect of the OCPs had been extended and as and when the date is finalized the same would be published in the newspapers.

9. In the meantime, M/s IDPL, which is a Central Public Sector Enterprise (CPSE) under the Ministry of Chemicals and Fertilizers, Department of Pharmaceuticals, pointed out to the Respondent No. 1 that, the Government had introduced Purchase Preference Policy for purchase of 102 medicines exclusively from Pharma CPSEs and their subsidiaries, as per the decision of the Union Cabinet communicated vide OM No. 50013/1/2006-SO(PI-IV) dated 7th August, 2006 issued by the Ministry of Chemicals and Fertilizers, and OCPs are listed at serial No. 51 in the updated list of 102 items under the Purchase Preference Policy.

10. The Respondent No. 1 issued an amendment dated 4th November, 2008 to the tender notice for OCPs to the effect that as the tender documents for OCPs had not been issued by the Department, the tender enquiry for OCPs would not be opened on the 5th December, 2008. However, on a visit to Respondent No. 1 on 3rd December, 2008 the Petitioners were informed that the rate contract for the entire quantity i.e. 275 lakhs cycles of OCPs had been placed by Respondent No. 1 on IDPL. The impugned rate contracts, by which the Petitioners are aggrieved, being No. S-140013/4/2008-OP/100 dated 2nd December, 2008 and No. S-12012/37/2008-SUPPLY/MALA-N/IDPL/408 dated 2nd December, 2008, were awarded by Respondent No. 1 to IDPL for supply of 200 lakhs cycles of OCPs (25 lakhs Mala-D and 175 lakhs cycles branded) and 75 lakhs cycles of OCPs (Mala-N) respectively.

11. It was urged by Mr. Vikas Dhawan, Advocate on behalf of the Petitioners that the impugned rate contracts dated 2nd December, 2008 were awarded in flagrant violation of the tender notice dated 18th September, 2008 issued by Respondent No. 1, and are also contrary to the Public Preference Policy followed by Respondent No. 1, and therefore, liable to be set aside.

12. On the other hand it is urged by Mr. P.P. Malhotra, learned Additional Solicitor General, on behalf of Respondent No. 1 that the said Respondent has cancelled the proposed tender notice dated 18th September, 2008 and placed the purchase

order of the OCPs on M/s HLL and M/s IDPL in compliance with the Purchase Preference Policy as formulated by the said Cabinet Order dated 17th August, 2005 culminating in order No. 23011/16/2005-Supply (HLL) dated 26th August, 2005 as well as said OM No. 50013/1/2006-SO(PI-IV) dated 7th August, 2006 mentioned above.

13. Before considering the rival submissions made on behalf of the parties it would be relevant to extract the Cabinet Order dated 17th August, 2005 culminating in order No. 23011/16/2005-Supply (HLL) dated 26th August, 2005 as well as the said OM No. 50013/1/2006-SO(PI-IV) dated 7th August, 2006 setting out the Purchase Preference Policy of the Government. The Cabinet Order dated 17th August, 2005 which culminated in order No. 23011/16/2005-Supply (HLL) dated 26th August, 2005 and has been extended up to the 26th August, 2009 vide Office Memorandum dated 20th November, 2007 reads as follows.

No. N23011/16/2005-Supply(HLL)

Government of India

Ministry of Health & Family Welfare (Department of Health & Family Welfare)

SSM Division

Nirman Bhavan, New Delhi.

Dated the 26/8/2005.

ORDER

Ministry of Health & Family Welfare purchases contraceptives each year by following open tender system for meeting the demand of contraceptives in the States under the National Family Welfare Programme (NFWP). M/S. Hindustan Latex Ltd. (HLL), a PSU under the Ministry of Health & Family Welfare, has been participating in tendering process and has been supplying these contraceptives to Ministry of Health & Family Welfare in pursuance of the competitive bidding and purchase preference as notified by Department of public Enterprises (DPE). However, this process is time taking and supplies invariably get delayed due to the procedures involved. This results in disruption of the supply line leading to stock out situation for nearly 4 to 5 months in the beginning of each financial year.

2. To avoid the stock out situation and disruption in the supplies to the States, a proposal to make M/S. HLL, a captive unit of the Department of Health & Family Welfare was under consideration.

3. It has been decided by the Government that M/S. HLL will supply contraceptives to the Ministry of Health & Family Welfare (National Family Welfare Programme) as under:

(i) The HLL would be a captive unit. The Department would utilize 75% installed capacity of HLL or 75% of the annual procurement of the Ministry from HLL

(based on last two years average) whichever is lower for condoms. In case of contraceptives other than condoms, the reservation for HLL shall be 55%;

(ii) For any on account payment, the Lowest-1 (L-1) rates on which the procurement was made in the previous year would be applicable and final payment shall be made according to new rates (L-1) for contract for that financial year;

(iii) The Ministry would finalize its Rate Contract for procurement of all the quantities within the first six months of the financial year;

(iv) HLL to be placed with orders from the beginning of the year to avoid stock out situation. Orders for private sector could be released only after finalization of rate contract through tendering process;

(v) In case of fear of cartelization or high prices being quoted in the open tender, the Ministry of Health and Family Welfare would be free at its discretion to make a reference to Tariff Commission of Ministry of Commerce & Industry or Cost & Accounts branch of Ministry of Finance;

(vi) The new arrangements would be reviewed after two years of implementation in consultation with the Department of Expenditure.

(B.P. Sharma)

Joint Secretary to the Govt. of India

To

1. PS to Hon"ble Minister of Health & Family Welfare

2. PS to MOS

3. PS to Secretary, (H & FW)

4. PS to SS & DG (NACO)

5. AS & FA 6. AS (DG)

6. AS (J.

7. All Joint Secretaries of MOHFW

8. Cabinet Secretariat

9. Ministry of Finance (Deptt. of Expenditure)

10. M/S. Hindustan Latex Ltd.

14. The Office Memorandum No. 50013/1/2006-SO (PI-IV) reads as follows:

No. 50013/1/2006-SO(PI-IV)

Government of India

Ministry of Chemicals & Fertilizers

Department of Chemicals & Petrochemicals

Shastri Bhavan, New Delhi

7th August, 2006

OFFICE MEMORANDUM

Sub: Purchase Preference Policy (PPP) for products of Pharma Central Public Sector Enterprises (CPSEs) and their subsidiaries

The undersigned is directed to say that Government has decided to grant purchase preference exclusively to Pharma CPSEs and their subsidiaries in respect of 102 medicines manufactured by them. The list of 102 medicines is enclosed. The salient features of PPP are as under:

- i) Purchase Preference Policy (PPP) in respect of a maximum of 102 medicines would be applicable to purchases made by Ministries/Departments, PSUs, Autonomous Bodies, etc. of the Central Government. It would be valid for a period of five years.
- ii) This would also be applicable to purchase of 102 drugs made by State Governments under health programmes which are funded by Government of India. (e.g. purchases under National Rural Health Mission etc.)
- iii) PPP will extend only to Pharma CPSEs and their subsidiaries (i.e. where Pharma CPSEs own 51% or above shareholding).
- iv) It would be applicable to a maximum of 102 medicines. The list of 102 medicines would be reviewed and revised by Department of Chemicals & Petrochemicals as and when required taking care not to include any item reserved for SSI units.
- v) The purchasing Departments/ PSUs/ autonomous bodies etc. of the Central Government may invite limited tenders from Pharma CPSEs and their subsidiaries or purchase directly from them at NPPA certified/notified price with a discount upto 35%.
- vi) The purchasing departments would purchase from Pharma CPSEs and their subsidiaries subject to their meeting Good Manufacturing practices (GMP) norms as per Schedule "M" of the Drugs & Cosmetic Rules. If no Pharma CPSE is forthcoming to supply these 102 medicines, the purchasing departments would be at liberty to purchase from other manufacturers.
- vii) If the Pharma CPSEs or their subsidiaries which have the benefit of PPP, fail to perform as per the purchase order, they would be subject to payment of liquidated damages or any other penalty included in the contract.
- viii) The medicines covered under Drug & Price Control Order (DPCO) would be

supplied at the rates fixed by National Pharmaceuticals Pricing Authority (NPPA) rates minus discount up to 35 per cent.

ix) In case of medicines not covered under DPCO, prices would be got certified from NPPA, only for the limited purpose of supply to Central Government Departments and their Public Sector Undertakings, autonomous bodies etc. On the certified price, Pharma CPSEs and their subsidiaries would provide discount up to 35%.

x) The Purchase Preference Policy (PPP) as contained in Department of Public Enterprises O.M. No. DPE.13(12)/2003-Fin.Vol.II dated 18.7.2005 would not be applicable to Pharma CPSEs.

2. Pharma CPSEs and their subsidiaries would strengthen their marketing capabilities for a larger market share in the open market during the currency of Purchase Preference Policy.

3 All Ministries/Departments are requested to immediately bring the contents of this O.M. to the notice of all concerned officers in the Ministries/Departments, States, CPSEs, Autonomous bodies and other organizations under their administrative control for strictly following the PPP in respect of products of Pharma CPSEs and their subsidiaries.

4. Hindi version will follow.

(S.C. Sharma)

Deputy Secretary to the Government of India

Tele: 23389840

1. All Secretaries of the Ministries/Departments in the Government of India (List enclosed).

2. All Chief Secretaries It is requested that of State Governments. purchase of 102

3. All Principal medicines as per the Secretaries/ Secretaries enclosed list by the Health, State States under Governments. various Central Health Programmes may be made from Pharma CPSEs as per the PPP contained in this O.M.

4. All Financial Advisers of the Ministries/Departments, Government of India (List Enclosed).

5. Chairman, National Pharmaceutical Pricing Authority, (NPPA), New Delhi

6. Managing Director of Pharma PSUs (IDPL, HAL, BCPL, KAPL, RDPL). It is requested that necessary action as required in the matter may be taken immediately.

7. Chief Executives of Public Sector Undertakings/autonomous organizations/ Bodies etc. (List enclosed).

Copy to:

1. The Prime Minister's Office, South Block, New Delhi.
2. Cabinet Secretariat, New Delhi. This has reference to their O.M. No. 31/CM/2006(i) dated 31st July, 2006.
3. Department of Public Enterprises (Shri Priyadarshi Thakur, Secretary) It is requested that contents of this O.M. may specifically be brought to the notice of the Chief Executives of PSUs, autonomous bodies, etc. for strict compliance.
4. PS to Minister (C&F&S).
5. PS to MOS (C&F)
6. PPS to Secretary (C&F)
7. Hindi Section.

(S.C. Sharma)

Deputy Secretary to the Government of India

Tele: 23389840

LIST OF MEDICINES MANUFACTURED BY CPSUs AND APPROVED FOR PURCHASE PREFERENCE.

S. No. ...

PRODUCT'S NAME

CAPSULES 1) ... 2) ...

TABLETS ...

51) Oral Contraceptive Pills (Mala "D" and Mala "N")

...

...

15. From a conspectus of the above it is seen that in the case of contraceptives other than condoms the reservation in favour of HLL was required to be 55%. It is further observed that the balance of 45% orders would be open for the private sector and could be released only after finalization of rate contract through tender process. Further in terms of the policy decision taken by the Union Cabinet, the Purchase Preference Policy would be applicable to purchases of a maximum of 102 medicines and would be valid for a period of five years i.e. up to 6th August, 2011. Furthermore, all Ministries/Departments were requested to immediately bring the contents of the OM No. 50013/1/2006-SO(PI-IV) dated 7th August, 2006 containing the Purchase Preference Policy for 102 medicines to the notice of all concerned officials in the Ministries/Departments, States, CPSEs, autonomous bodies and other organizations under the administrative control for

strictly following the Purchase Preference Policy in respect of Pharma CPSEs and their subsidiaries.

16. In the present writ petition the Petitioners do not challenge the validity of the Purchase Preference Policy of the Government. The Petitioners, however, contend that the list of 102 medicines enumerated in the said Purchase Preference Policy sets out only and specifically Mala-D and Mala-N in the category of OCPs as medicines covered under the said policy. In other words it is the case of the Petitioners that other branded contraceptive pills apart from Mala-D and Mala-N are not covered under the Purchase Preference Policy in favour of Pharma CPSEs and their subsidiaries and as such the Respondent No. 1 could not have placed an order for all the other branded OCPs on IDPL under the said Purchase Preference Policy. On the other hand it was submitted on behalf of Respondent No. 1 that the reference to Mala-D and Mala-N in Serial No. 51 relating to OCPs of the Purchase Preference Policy was only illustrative and not exhaustive and the said Purchase Preference Policy in favour of CPSEs extended to all OCPs. It was urged that the composition of all OCPs is the same. In other words it was urged that although the said Purchase Preference Policy at Serial No. 51 mentions and specifies only Mala-D and Mala-N in the category of OCPs, it is in fact inclusive of all OCPs since the formula of all the OCPs is the same. It was urged that the Purchase Preference Policy completely ousted all private players from selling medicines specified therein.

17. We do not find any force in the submissions made on behalf of Respondent No. 1 for the following reasons. Firstly on a bare reading of Serial No. 51 of the Purchase Preference Policy in respect of OCPs, it is abundantly clear that the brands specified therein are only Mala-D and Mala-N. Therefore, it is evident that the policy was formulated by the Government only with these two brands in mind in respect of OCPs. Resultantly, it is not possible to countenance the submission now made to the effect that the mention of OCPs in Serial No. 51 of the said policy referred to all OCPs and that the mention of Mala-D and Mala-N was only illustrative. In this behalf it is pertinent to refer to the observation of the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , where the following passage was cited with approval:

An executive agency must be rigorously held to the standards by which it professes its action to be judged...

...

The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or

discriminatory.

Consequently, the Respondent No. 1's action in awarding the rate contract for all OCPs to IDPL cannot be permitted. The Respondent No. 1 could only have placed the orders for Mala-D and Mala-N on IDPL in furtherance of the Purchase Preference Policy in relation to 102 medicines. Secondly, even the Purchase Preference Policy relied upon by the Respondent No. 1 clearly postulated that orders could be placed on the private sector once the preference in favour of CPSEs had been exhausted. Therefore, there was no complete ouster of private parties from the purchase of medicines including OCPs and there was only a preference in 102 medicines that had been specifically detailed in the policy itself.

18. That being so, we are of the view that the Rate Contract No. S-140013/4/2008-OP/100 dated 2nd December, 2008 insofar as it awards 175 lakhs cycles of other brands of OCPs, apart from Mala-D to the extent of 25 lakhs cycles, is contrary to the Purchase Preference Policy. Accordingly, we quash the Rate Contract No. S-140013/4/2008-OP/100 dated 2nd December, 2008 awarded by Respondent No. 1 in favour of IDPL, Respondent No. 2 herein, to the extent that it awards 175 lakhs cycles of other OCP brands apart from Mala-D in the above stated quantity of 25 lakhs cycles. The writ petition is partly allowed in the aforesaid terms.

19. In the circumstances of this case there will be no order as to costs.