

(2005) 02 DEL CK 0086

In the Delhi High Court

Case No : WP (C) 18386 of 2004 and CM 13885 of 2004

Gharda Chemicals Limited

APPELLANT

Vs

Central Warehousing Corpn.

RESPONDENT

Date of Decision : 14-02-2005

Acts Referred:

Citation : (2005) 3 BC 33 : (2005) 1 CTLJ 353 : (2005) 118 DLT 159 : (2005) 80 DRJ 542

Hon'ble Judges : S. Ravindra Bhat, J;D.K. Jain, J

Bench : Division Bench

Advocate : H.L. Tiku and Yashmeet Kaur, for the Appellant; K.K. Tyagi, for the Respondent

Final Decision : Allowed

Judgement

D.K. Jain, J.—Rule D.B.

2. With the consent of learned counsel for the parties, the matter is taken up for final disposal.

3. Challenge in this writ petition is to a pre-qualification condition inserted in the Notice Inviting Tender (for short "the NIT") issued by the Central Warehousing Corporation, hereinafter referred to as the CWC, on 10 November 2004 for supply of CWC diary, Chemical and technical equipments, including 8000 Kgs of Deltamethrin 2.5% WP ARC. The challenge to the condition is laid on the ground of arbitrariness, unreasonableness and irrationality. 4. The factual matrix, in brief, is as follows:

4. As noted above, the CWC floated tender dated 10 November 2004 for supply of various items, including the afore-mentioned Chemical for fumigation purposes. The petitioner claims to have learnt about the tender notice on 18 November 2004 from the website of the CWC. Being a major manufacturer of deltamethrin and interested in the supply of the said Chemical, the petitioner approached the respondent for issue of tender documents. One of the grievances

of the petitioner is that though the last date for submission of the bids was 3 December 2004, the tender documents were issued to them only on 29 November 2004 after several visits to their office.

5. The tender documents were purchased by five parties, including the petitioner, who were manufacturing the said Chemical. The bids were, however, submitted only by the following three parties:

1. M/s. Bayer Crop Science India Limited (successful bidder)
2. M/s. Gharda Chemicals Limited (Petitioner)
3. M/s. Hernaba Industries Limited

6. The petitioner is aggrieved by the following eligibility criteria, as contained in the NIT:

""Tenders for Chemical will be accepted only from the licensed technical-grade manufacturers, who are actually manufacturing technical formulation and must be having experience of at least 3 years manufacturing of ISI marked Chemical. Proof of the same must be enclosed with the tender. The parties shall offer the material strictly conforming in the specifications, terms and conditions of the tender enquiry. The tender not conforming strictly to specifications, other terms and conditions of the tender enquiry and incomplete/conditional tender will summarily be rejected as invalid. Further in order to assess manufacturing facilities available with the tenderers, the inspection facilities may be required and to be arranged by the party at the discretion of the Corporation....""

(Highlighted for ready reference)

7. The stand of the petitioner is that the condition of ""at least three years experience of manufacturing ISI marked Chemicals"" has been inserted by the CWC with a collateral motive in order to avoid competitive bidding and to ensure that the tender was awarded to M/s. Bayer Crop Science India Limited, hereafter referred to as "Bayer Crop", who were manufacturing the Chemical, though under different corporate names, since the year 1994 and were making supplies in the past. The petitioner was manufacturing the Chemical since December 2001 and M/s. Hernaba Industries Limited since July 2003. It is alleged that the insertion of pre-qualification condition is aimed at seeing that no other manufacturer, including the petitioner qualifies for the bid as it as bids certification only for the last two years. In support of their plea that the impugned action is to favor Bayer Crop, it is pointed out in the additional affidavit that one M/s. Hoechst Schering Agro Evo Limited was incorporated on 9 March 1994; its name was changed to Agro Evo India Limited on 3 September 1998; on 9 March 2000 the name was changed to Aventis Crop Science India Limited which has now been changed to Bayer Crop with effect from 22 January 2003 and that the tender has again been awarded to Bayer Crop despite the fact that the samples of the same company, under the old corporate name, namely Aventis Crop Science India Limited, had failed in the past.

8. In the reply affidavit filed on behalf of the CWC, while denying that the impugned eligibility criteria is arbitrary or unreasonable, it is stated that the decision to insert the impugned condition in the NIT was taken with a view to ensure quality and consistency of the supply. It is averred that the impugned condition has been incorporated keeping in view three factors, namely:

(i) the problems faced in the past in finalising the tender for purchase of Deltamethrin 2.5% WP;

(ii) the tender notice dated 14 November 2002 issued by the office of the Director General, Medical Health Services, Uttar Pradesh, Lucknow containing similar pre-qualification condition and

(iii) sample failures in the past. It is pointed out that in the last tender enquiry, the offer of rate contract given to the petitioner had to be cancelled because they had failed to produce the bids certificate in their own name. It is, thus, asserted that the decision to incorporate the condition of experience of three years has been taken in public interest, based on past experience and not for any mala fide reasons.

9. Refuting the claim of the CWC that the impugned condition would ensure quality and consistency in supplies, in the rejoinder-affidavit, it is pleaded that the duration/age of holding bids certificate is meaningless because it has no nexus with either the quality assurance or consistency in supplies, particularly when the product to be supplied has to be ISI marked. It is also alleged that though the CWC has withheld the name of the supplier whose sample had failed but being the sole supplier, in all probability, it was Bayer Crop, whose samples had failed despite their possessing bids certificate for more than three years. It is, thus, asserted that the pre-qualification condition imposed by the CWC is arbitrary, unreasonable and against the public interest as it promotes monopoly.

10. Mr. H.L. Tiku, learned Senior counsel appearing for the petitioner, while reiterating that the impugned pre-qualification condition has absolutely no nexus either with the quality assurance or consistency in supplies because even in the absence of such a stipulation, the product to be supplied has to be of ISI certification, has alleged that the impugned condition has been deliberately designed to keep out the manufacturers of the said Chemical, who are otherwise eligible and fully equipped to supply ISI marked product. It is urged that the impugned eligibility criteria is destructive of the need to have a fair competitive tendering process. Learned counsel asserts that since Bayer Crop is the sole company manufacturing the Chemical since 1994, the impugned stipulation is tailored for them. To buttress the argument that the length of holding of a bids certificate is no assurance of the quality of the Chemical ultimately produced and supplied, learned counsel has cited the case of Bayer Crop itself, whose samples had failed despite their holding bids certificate for over ten years. In support of the proposition that all the participants in the tender process should be treated alike and the State or its instrumentalities cannot be permitted to act arbitrarily,

reliance is placed on the decisions of the Supreme Court in *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, and *Rashbihari Panda etc. Vs. State of Orissa*, .

11. Per contra, Mr. Tyagi, learned counsel appearing for the CWC, has submitted that the impugned condition is neither arbitrary nor unreasonable as the same has been introduced only with a view to ensure consistent supply of standard quality Chemicals.

Learned counsel would urge that since the criteria impugned is based upon afore-noted valid and relevant considerations, and being a conscious administrative policy decision, by the CWC, it cannot be struck down on the ""Wednesbury"" principle of unreasonableness. Strong reliance is placed on the decision of the Apex Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, to contend that even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and only in furtherance of public interest. Reliance is also placed on another decision of the Supreme Court in *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, , wherein their Lordships have observed that the court would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias and not because the Court feels that some other terms would have been more preferable.

12. In order to appreciate the rival stands, it would be useful to notice the broad principles which may be borne in mind while exercising the power of judicial review. Article 226 of the Constitution confers on the High Courts a very wide power of judicial review to examine whether the administrative action is valid or not but the Courts are generally slow to interfere in matters relating to administrative functions unless it is shown that the decision is tainted by any vulnerability, such as lack of fairness in procedure; illegality and irrationality. The judicial review is concerned with reviewing not the merits of the decision by an executive authority, but the decision making process itself [See: *Indian Railway Construction Co. Ltd. Vs. Ajay Kumar*, . The scope of judicial review in contractual matters came to be dealt with elaborately by the Apex Court in *Tata Cellular v. Union of India*, (1994) SCC 651 and one of the basic principles of judicial review, culled out therein is:

""5. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.""

13. It was said that though an executive authority must have certain measure of freedom of ""play in the joints"" to take a decision on the administrative side but still such a decision has to be free from arbitrariness, mala fides and

""Wednesbury"" unreasonableness. To elaborate as to what is meant by the principle of ""Wednesbury"" unreasonableness, the Court referred to the following principle summarised in *Tower Hamlets London Borough Council Vs. Chetnik Developments Ltd* (1988) 1 All ER 961:

""The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matter which they ought to take into account. Once that question is answered in favor of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.""

14. Thus, the doctrine of ""Wednesbury unreasonableness"" or irrationality applies to a decision which is such that no authority properly directing itself on the relevant law and acting reasonably could have arrived at.

15. Taking note of the principles evolved in *Tata Cellular (supra)* in *Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, , the Supreme Court observed that public authority even in contractual matters should not have an unfettered discretion and in contracts having commercial elements, even though some extra discretion is to be conceded in such authority. They are bound to follow the norms recognised by Courts while dealing with public property. Their Lordships said that this requirement is necessary to avoid unreasonableness and arbitrary decisions being taken by public authorities, whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution.

16. In the light of the afore-noted broad principles, the question arising for consideration is whether the insertion of the impugned pre-qualification criteria in the NIT can be said to be arbitrary or capricious, irrational or actuated by mala fides, warranting interference in judicial review ?.

17. Having considered the matter in the light of the material on record, including the original files, produced by learned counsel appearing for the CWC, we are of the opinion that the insertion of the pre-qualification condition of ""at least three years"" manufacturing experience of ISI marked Chemical, is irrational and arbitrary and has absolutely no nexus with the stated object, namely, the quality and consistency of supplies, which is sought to be achieved by it.

18. The record shows that on 8 June 2004 the technical division of the CWC suggested the incorporation of the following conditions in the tender enquiry:

""(i) The tenderness for supply of Chemicals should have an experience of at

least 3 years of manufacturing the ISI marked Chemical.

(ii) In order to assess manufacturing facilities available with the tenderness to evaluate their capability, a provision should be made in the tender documents for inspection of the facilities available with the tendered before finalising the tender.""

19. The afore-extracted suggestions were noticed when the proposal for purchase of 8 M. Ton of Deltamethrin for the year 2004-05 was put up for administrative approval. In one of the notes it is recorded that though the said suggestion had been made on 8 June 2004 but in the tender enquiry floated in July 2004, this suggestion was not accepted/included. The record does not reveal further discussion about the need to incorporate the suggested conditions and as to when a final decision in this regard was taken. What emerges from the files is that the decision to insert the impugned pre-qualification condition was based on a noting dated 10 September 2004 wherein it is noted that there was lot of problem last year while finalising the tender for he said Chemical and it was suggested that to ensure quality and consistency, condition of manufacturing and marketing experience may be incorporated. There is no consideration as to why the existing condition of supply of only ISI marked Chemicals was not adequate to ensure the quality of the product and as to how the past three years" experience in manufacturing of ISI marked Chemicals would achieve the desired object. Similarly, there is also no consideration about the relevance of the impugned stipulation in so far as the consistency in supplies is concerned. It is pertinent to note that since the pre-qualification condition of ""at least three years" experience"" is not for ""immediately preceding three years"", a condition in the tender notice issued by the Director General Health Services, UP, one of the stated guiding factors, any manufacturer who had manufactured ISI marked Chemicals for any three years would meet the said criteria, even though he is not manufacturing ISI marred Chemical in the immediately preceding year(s). We are, Therefore, of the view that there is no rational basis for incorporating the impugned pre-qualification condition and in fact it does not sub serve the object for which it has been inserted for the first time.

20. It needs little emphasis that there can be no compromise with the quality of a product to be purchased. So is the importance of consistency in the supplies. But the question for consideration is whether the impugned condition can ensure both. As noted supra, going by the past experience of the CWC, even the samples submitted by a company manufacturing ISI marked Chemicals since 1994 had failed. In our considered opinion, Therefore, the imposition of the impugned condition has no reasonable co-relation with the quality of the Chemical to be supplied, it rather adversely affects the need to have a fair and wide participation in a public tendering process. Admittedly, out of the five manufacturers of the Chemical, only one manufacturer, namely, Bayer Crop, could fulfill the pre-qualification criteria. Significantly, it is the same manufacturer whose sample had failed in the last year.

21. In the light of the afore-noted factual scenario, we have no hesitation in holding that the impugned pre-qualification condition has resulted in eliminating a wider participation and keeps out manufacturers of ISI marked Chemicals, who are otherwise eligible. By inserting the impugned condition of ""at least three years" manufacturing experience of ISI marked Chemical"" the CWC has created a monopoly of only one manufacturer, which is also against an office memorandum issued by the CVC on 17 December 2002 (No.12-02 CTE-6). The said memorandum was issued as a result of certain complaints in regard to discriminatory pre-qualification criteria adopted in tendering processes. Inter-alia, observing that pre-qualification criteria is either not clearly specified or made very stringent/very lax to restrict/facilitate the entry of bidders, the CVC formulated the parameters to be followed. For the sake of ready reference, relevant portion of the circular is extracted below:

""2. The pre-qualification criteria is a yardstick to allow or disallow the firms to participate in the bids. A vaguely defined PQ criteria results in stalling the process of finalizing the contract or award of the contract in a non-transparent manner. It has been noticed that organizations, at times pick up the PQ criteria from some similar work executed in the past, without appropriately amending the different parameters according to the requirements of the present work. Very often it is seen that only contractors known to the officials of the organization and to the Architects are placed on the select list. This system gives considerable scope for malpractices, favoritism and corruption. It is, Therefore, necessary to fix in advance the minimum qualification, experience and number of similar works of a minimum magnitude satisfactorily executed in terms of quality and period of execution.

3. Some of the common irregularities/ lapses observed in this regard are highlighted as under:-

i) For a work with an estimated cost of Rs.15 crores to be completed in two years, the criteria for average turnover in the last 5 years was kept as Rs.15 crores although the amount of work to be executed in one year was only Rs.7.5 crores. The above resulted in pre-qualification of a single firm.

ii) One organization for purchase of Computer hardware kept the criteria for financial annual turn over of Rs.100 crores although the value of purchase was less than Rs.10 crores, resulting in disqualification of reputed computer firms.

Iii) In one case of purchase of Computer hardware, the pre-qualification criteria stipulated was that the firms should have made profit in the last two years and should possess ISO Certification. It resulted in disqualification of reputed vendors including a PSU.

iv) In a work for supply and installation of AC Plant, retendering was resorted to with diluted pre-qualification criteria without adequate justification to favor selection of particular firm.

v) An organization invited tenders for hiring of DG Sets with eligibility of having 3 years experience in supplying D.G. Sets. The cut off dates regarding work experience were not clearly indicated. The above resulted in qualification of firms which had conducted such business for 3 years, some 20 years back. On account of this vague condition, some firms that were currently not even in the business were also qualified.

vi) xxxxxxxxxxxxxxxxxxxxxxxx

4. The above list is illustrative and non exhaustive. While framing the pre-qualification criteria, the end purpose of doing so should be kept in view. The purpose of any selection procedure is to attract the participation of reputed and capable firms with proper track records. The PQ conditions should be exhaustive yet specific. The factors that may be kept in view while framing the PQ Criteria includes the scope and nature of work, experience of firms in the same field and financial soundness of firms

5. xxxxxxxxxxxxxxxxxxxxxxxx 6. It is suggested that these instructions may be circulated amongst the concerned officials of your organization for guidance in fixing pre-qualification criteria. These instructions are also available on CVC's website/[http//cvc.in](http://cvc.in).""

22. The guidelines highlight the fact that the purpose of any selection procedure is to attract the wider participation of reputed and capable firms. It emphasises that while framing any criteria, the scope and nature of work, experience of the firms in the same field and their financial soundness have to be kept in mind. In our view the illustrations given in para 3 of the afore-extracted memorandum, particularly sub para (v), which outlines a situation akin to the one in these proceedings, aptly apply in the instant case. Mercifully, the CWC who is equally bound by these guidelines, has shown ignorance of the memorandum. At the sake of repetition, we may note that the eligibility criteria fixed in the instant case has resulted in disqualifying the remaining four manufacturers of the Chemical. Only one manufacturer, namely, Bayer Crop fulfills the criteria. Therefore, the fixation of the impugned eligibility criteria, without application of mind, is unreasonable, irrational and against the public interest. It has no nexus with the object sought to be achieved, namely quality assurance and consistency in supplies.

23. We are of the considered opinion that the decision of the CWC to insert the impugned pre-qualification criteria, is so unreasonable that having regard to the facts of the case, no reasonable authority could have ever come to and thus, attracting the doctrine of ""Wednesbury"" unreasonableness. We are, Therefore, of the view that it is a fit case where this Court must intervene in the public interest.

24. Consequently, for the foregoing reasons, the writ petition is allowed; the impugned eligibility condition is quashed and the Rule is made absolute. It will, however, be open to the CWC to formulate an appropriate eligibility criteria which

bears nexus with the stated twin objects, they seek to achieve.

25. However, in the circumstances of the case, there shall be no order as to costs.