(2009) 03 DEL CK 0137

In the Delhi High Court

Case No : Writ Petition (C) 6231 of 2008

Ind-Swift Ltd. APPELLANT

Vs

Employee State Insurance Corporation Ltd. and Others RESPONDENT

Date of Decision : 27-03-2009

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2009) 03 DEL CK 0137

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : P.S. Patwalia and Arvind Nayar, for the Appellant; K.P. Mavi, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—Issue Rule. Mr. K.P. Mavi, Advocate waives notice of rule. With consent, the matter was heard finally, for disposal.

2. The petitioner challenges two orders dated 14.2.2008 and 11.8.2008 whereby the ESIC Rate Contract awarded to it was partly cancelled and it was black listed for three years, by the respondents.

3. Briefly the facts are that the petitioner, in response to tenders issued by the respondents on 6.6.2007 for supply of 47 drugs under ESIC Rate Contract No.130 participated in the tender process. It is contended that the petitioner?s application was approved and respondents used to place indents and orders from time to time. While the matter thus stood, on 14.2.2008, the respondents for unknown reasons, cancelled the Rate Contract as far as it pertained to 25 drug items. The petitioner submits that after the cancellation of the contract, a show cause notice was issued on 15.2.2008 stating that it had furnished wrong information regarding date of issue of its manufacturing license, date of marketing of the first batch for certain products quoted etc., which reflected discrepancies. The petitioner submits having furnished satisfactory explanations.

It also states, having, on 25.2.2008 submitted a three years? manufacturing and marketing experience certificate issued by the Drug Controller, Himachal Pradesh which stipulated that the tendered products were being manufactured and marketed by it for more than three years. Other letters too are adverted to in its pleadings.

4. On 14.7.2008, the respondents issued another show cause notice requiring the petitioner to explain why action should not be taken against it in terms of Clause 39(iii) and 43 of the awarded terms and conditions and in accordance with the conditions in Annexure-E. The petitioner replied to this communication on 25.7.2008 stating that the Drug Office had authenticated its certificate for all the 25 concerned products showing that it possessed more than three years experience and also that possibly the Drug Office had not been able to trace and locate some old records.

5. In these circumstances, the respondents ESIC on 11.8.2008 issued the second impugned order effectively black listing the petitioner from participating in the future tender processes for procurement of drugs and dressings for three years from the date of that order. The said order is in the following terms:

M/s. Ind Swift Ltd. has been awarded contract for supply of 42 drugs under ESIC Rate Contract No. 130. The firm has submitted certificate showing three years. manufacturing and marketing experience as per Annexures ? ?A? and ?B? to the Tender Inquiry Form in respect of the 47 items for which they have submitted their tenders. It was found that the period of manufacturing experience from the date of issue of individual drug licenses in respect of 19 drugs is less then 3 years. A Show Cause Notice under letter No. U-25/12/130/2007-Med.V dated 15.2.2008 was issued to the firm to explain as to why action should not be taken against them for not providing information as per terms and conditions of tender inquiry and award of contract for supply of drugs under RC-130. In reply the firm vide their letter dated 2.52.2008 stated that they submitted valid drug manufacturing license issued by the Drug Controller, Himachal Pradesh as per requirements of the tender inquiry. It was also explained that valid manufacturing licenses/drug licenses with current dates were submitted on the basis of requests made to the Drug Controller, Himachal Pradesh for fresh licenses/certificates. The firm also stated that many of the old drug licenses were destroyed in a fire that occurred in their factory at Parwanoo on 6.4.2007. In reply to ESI''s reference to clarify the issue, the Drug Controller and Licensing Authority, Shimla confirmed vide their letter dated 16.52008 that the firm has been manufacturing 9 out of 28 products for the last 3 years while in regard to the remaining 19 products the period of manufacturing since date of issue of license fell short of 3 years. It was thus seen that the firm has provided wrong information in Annexure ? ?A? and ?B? of the Tender Inquiry Form. A further Show Cause Notice dated 14.7.2008 was issued to the firm to explain as to why action should not be taken against them as per terms and conditions No. 3(iii) and warning at Annexure ? ?E? of the Tender Inquiry Form for providing wrong information advising to submit their reply before 29.7.2008. In reply to the said Show Cause Notice the firm stated that there was no shortcomings in the tender submitted by them. The reply was not found satisfactory in view of the aforesaid confirmation by the Drug Controller, Himachal Pradesh.

I have gone through the entire records relating to the issue and find that the firm has failed to fulfill the eligibility condition No. 3(iii) of the terms and conditions of the ESIC Rate Contract No. 130 for supply of Drugs and Dressings. Accordingly in terms of clause 43 and the warning provided under Annexure ? ?E? of the terms and conditions of the said rate contract M/s. Ind Swift Ltd. is black listed and debarred from participation in ESIC Rate Contracts for procurement of drugs and dressings for a period of 3 years from the date of issue of this order.

6. It is contended that the impugned black listing virtually came as a bolt from the blue and was not preceded by any show cause notice or reasonable opportunity. Learned Counsel for the petitioner relied upon the judgments of the Supreme Court reported in Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, , B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, , and Raghunath Thakur Vs. State of Bihar and Others, and submitted that in the absence of a fair hearing and even a show cause notice specifying the grounds proposed for black listing, such action is unsustainable as arbitrary. In Raghunath Thakur (supra), the Supreme Court observed as follows:

But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that black-listing any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order in so far as it directs black-listing of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the black-list in respect of future contracts under the Collector is set aside.

7. The respondents in their return, and through their learned Counsel contend, that since the products required from the petitioner were medical supplies and allied items for use by the human beings, the integrity of the process was such that the extraordinary step for cancellation order was taken on 14.2.2008 pre-empting any danger to human life. The respondent denies that its action with regard to the cancellation of the contract is arbitrary. Learned Counsel stated having regard to the overall circumstances, the petitioner cannot claim the relief it does since the impugned orders were proceeded by proper application of mind.

8. The petitioner impugns two orders; by the first order dated 14.2.2008, the respondents cancelled the contract. It is not in dispute that a part of the contract had been fulfilled in the sense that the petitioner had supplied some items.

However, in respect of other items, the contract was cancelled. This is apparent from the first order of 14.2.2008, which is in the form of an amendment to the existing contract or purchase order; 25 items are shown as deleted. The rationale for this is apparently linked with the second impugned order dated 11.8.2008. The respondents were of the opinion that valid manufacturing license for the concerned drugs was not held by the petitioner. This condition was embodied in Clause 3(iii) of the terms and conditions for governing the Rate Contract. The same reads as follows:

(iii) A certificate from the State Drug Controller concerned that the firm has been manufacturing and marketing the product/products for which the firm has quoted the price, for the last three years except for new drugs. Firm should have three completed years experience of marketing and manufacturing as on date of opening of the tender.

9. The impugned order dated 11.8.2008 proceeds on the assumption that the reply to the show cause notice (dated 15.2.2008 issued after the cancellation order dated 14.2.2008) did not furnish any specific explanation.

10. The Supreme Court in several decisions ? starting from Erusian Equipments (supra) onwards has repeatedly reiterated that black listing or refusing to enter into contracts spells virtual civil death so far as an individual or commercial establishment is concerned. These rulings are that if the State or its agency chooses to take such action in its normal functioning, having regard to the adverse nature of the order, a fair hearing procedure has to be adopted. It has thus been held that a show cause notice should be issued specifying the grounds as well as disclosing the proposed action. This much is clear from following the observations in Raghunath Thakur.s case.

11. In the present case, the respondents concededly did not issue any notice proposing the black listing of the petitioner nor seek its explanation in that regard. In the circumstances, the order of 11.8.2008 cannot be sustained.

12. So far as the question of cancellation of contract is concerned, the Court is of the view that such grievance cannot be gone into in proceedings under Article 226 of the Constitution of India. During the pendency of these proceedings, a statement was recorded on behalf of the petitioner that the black listing order would be subject to its not participating in the tender processes of the ESIC. In the circumstances of this case, the said undertaking shall continue to bind the petitioner; it shall not participate in the tender processes of the ESIC. This is subject to the condition that if the ESIC proposes to black list the petitioner, it shall do so within four weeks from today; the show cause notice shall specify the grounds as well as the period proposed. The petitioner shall reply to the show cause notice within four weeks thereafter. The concerned authority shall pass a reasoned order in case it proposes to confirm the show cause notice and the black listing order within twelve weeks from today.

13. All rights and contentions of the parties are hereby reserved.

The Writ petition is allowed in the above terms.

