

(2017) 03 DEL CK 0032

In the Delhi High Court

Case No : Writ Petition (C) 2801 of 2016 and CM No. 11797 of 2016

J-Amada Remedies

APPELLANT

Vs

Employees State Insurance Corporation

RESPONDENT

Date of Decision : 08-03-2017

Acts Referred:

Citation : (2017) 2 BC 698 : (2017) 239 DLT 65

Hon'ble Judges : Mr. Badar Durrez Ahmed and Mr. Sanjeev Sachdeva, JJ.

Bench : Division Bench

Advocate : Mr. Santosh Kumar with Mr. Rajiv R. Mishra, Advocates, for the Petitioner; Mr. K.P. Mavi with Mr. B.P. Mishra, Advocates, for the Respondent No. 1; Mr. Jasmeet Singh with Ms. Nidhi Mohan Parashar, Advocates, for the Respondent Nos. 2 & 3

Final Decision : Dismissed

Judgement

Sanjeev Sachdeva, J.—The petitioner by the present petition seeks quashing of Clause VII (b) of e-Tender enquiry dated 16.02.2016 and a direction to respondent no. 1 (Employee State Insurance Corporation) to issue a corrigendum and incorporate the terms and conditions as laid down in policy/order dated 23.03.2012 issued by respondent no. 2 (Development Commissioner, Micro, Small & Medium Enterprises) with respect to Micro & Small Enterprises. Further mandamus is sought thereby directing the respondent no. 1 to consider the bid of the petitioner de-hors Clause VII (b) of the e-tender.

2. On 16.02.2016, an e-Tender Enquiry form was issued by respondent no. 1 for DG ESIC rate contract for supply of Ayurvedic drugs.

3. The petitioner impugns Clause VII(b) in the e-tender enquiry, which, inter-alia, requires that Micro & Small Enterprises (MSE for short) firms, quoting for items reserved for exclusive procurement from them should have a minimum annual turnover of Rs. One Crore for Ayurvedic formulations in each of the last three preceding years i.e. 2012-13, 2013-14 and 2014-15 to be eligible for

participation in ESI rate contract.

4. It is contended by the petitioner that the said clause is contrary to the Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012 dated 23.03.2012 (hereinafter referred to as the Procurement Policy, 2012), laid down by the Development Commissioner, Micro, Small & Medium Enterprises.

5. A complaint is stated to have been made by the petitioner to respondent no. 3 for deletion of the said clause. Since the respondents have not deleted the said Clause VII(b), the petitioner has filed the present petition.

6. It is contended that the Procurement Policy, 2012 issued by the Development Commissioner, Micro, Small & Medium Enterprises, Ministry of Micro, Small & Medium Enterprises does not stipulate levy of any pre condition of minimum annual turnover of Rs. One Crore for Ayurvedic formulation in the last three preceding years, as an eligibility condition.

7. It is contended that the Procurement Policy, 2012 mandates procurement of minimum of 20% of total annual purchase of products produced and services rendered by Micro, Small & Medium Enterprises in a period of three years. It is further contended that insertion of the said condition is discriminatory and does not provide a "level playing field" to small scale and micro scale enterprises to participate in the tender process.

8. Per contra, the respondents have contended that the tender was invited for supply of Ayurvedic drugs for use in ESI institutions all over India for a period of two years. It is contended that in the year 2003 a Committee was constituted by the competent authority for formulation of terms and conditions in respect of Ayurvedic Rate Contracts.

9. In the year 2006, the Committee enhanced the turnover clause from Rs. 50 Lakhs to Rs. One Crore and the same clause was incorporated in the Ayurvedic Rate Contract in the year 2009 with the approval of the competent authority and the same clause remained in the Rate Contract floated in the year 2014.

10. The annual turnover clause was enhanced from Rs. One Crore to Rs. Five Crore in Ayurvedic Rate Contract floated in the year 2016, in respect of Pharmaceutical firms but in respect of micro small enterprises minimum the annual turnover was fixed at Rs. One crore. It is contended that the minimum annual turnover clause for procurement of allopathic medicines in DG ESIC rate contract is also Rs. One Crore (for drugs and dressings provided by Micro Small Enterprises firm).

11. It is further contended that the total medical expenditure during 2014-15 was Rs. 2,964.80 crores (approx.) out of which Rs. 366.15 crores was spent on drugs and dressings. Rs. 3,61,66,143 was exclusively spent on purchase of Ayurvedic drugs in Delhi.

12. It is submitted that the condition of annual turnover of Rs. One Crore in last

three years in respect of Micro and Small Enterprises has been fixed to ensure quality of Ayurvedic drugs as well as the financial capacity of the bidder. Further, this has been fixed keeping in view the quantum of medicines needed to be supplied in the next two years by the bidders.

13. It is submitted that keeping in view the spirit of Micro, Small & Medium Enterprises Development Act, 2006, the annual turnover requirement of Micro Small Enterprises has been fixed at Rs. One Crore while the annual turnover for pharmaceutical firms has been kept at Rs. 5 Crores.

14. Further it is contended that concessions have been given to Micro Small Enterprise, in as much as, the tender is free of cost, there is an exemption from payment of earnest money and in tenders, participating MSEs quoting prices within price band of L1 + 15% are to be allowed to supply a portion of requirement by bringing down their price to L1 Price in cases where price is from someone other than from MSE who would be allowed to supply upto 20% of the total tendered value. Further, it is submitted that one drug has been reserved for exclusive procurement from MSEs.

15. It is submitted that the fixation of minimum turnover of Rs. One Crore in the last three years is not discriminatory but has been fixed keeping in mind the quality and capacity of enterprises to supply the drugs.

16. Clause VII (i) (a), (b) and (c) read as under:

"VII. COVER "B" TECHNICAL BID (BOTH ONLINE & HARD COPY):

The tenderer should submit the following certificates/documents for the items tendered in a separate cover superscribed as Cover "B" (Technical Bid). The tender shall be liable to be rejected if following documents are not submitted with the Cover "B" (Technical Bid).

(i) Audited financial statement (including balance sheet and profit & loss account statement along with notes) for the last three years i.e. 2012-13, 2013-14 & 2014-15 certified by the Auditor along with Certificate by Chartered Accountant giving Sales Turn Over in respect of Ayurvedic formulations only for last three years i.e. 2012-13, 2013-14 & 2014-15 described as under:-

(a) Pharmaceutical firms should have a minimum annual turnover of Rs. 5 Crores (Rupees Five Crores) for Ayurvedic formulations in each of the last three preceding financial years i.e. 2012-13, 2013-14 & 2014-15 to be eligible for participation in ESI Rate Contract.

(b) MSE Firms quoting item reserved for exclusive procurement from them (Ref. Terms & Conditions for MSE) should have a minimum annual turnover of Rs.1 crore (Rupees One crore) for Ayurvedic formulations in each of the last three preceding years i.e. 2012-13, 2013-14 & 2014-15 to be eligible for participation in ESI Rate Contract.

(c) MSE firms quoting for drugs other than those exclusively reserved for them

(Ref. Terms & Conditions for MSE) shall have to fulfil the turnover criteria as per clause a) above."

17. Perusal of Clause VII (i) shows that a pharmaceutical firm other than an MSE has to have a minimum turnover of Rs. 5 crore for Ayurvedic medicines for each of the last three preceding financial years. Whereas an MSE firm quoting, items reserved for exclusive procurement for them has to have a minimum turnover of Rs. One Crore for Ayurvedic formulations for each of the three preceding years. However, MSE quoting for drugs other than those exclusively reserved for them have to fulfil the turnover criteria of Rs. 5 Crores in three preceding financial years.

18. Now let us examine the Procurement Policy, 2012. Clause 3 of the Policy relied upon by counsel for the petitioner reads as under:

"3. Mandatory procurement from Micro Small and Enterprises -

(1) Every Central Ministry or Department or Public Sector Undertaking shall set an annual goal of procurement from Micro and Small Enterprises from the financial year 2012-13 and onwards, with the objective of achieving an overall procurement of minimum of 20 per cent, of total annual purchases of products produced and services rendered by Micro and Small Enterprises in a period of three years."

19. A reading of clause 3 of the Procurement Policy, 2012 shows that the requirement for every Central Ministry or Department or Public Sector Undertaking is to set a goal of procurement from MSEs commencing from financial year 2012-13 with the objective of achieving an overall procurement of minimum 20% of total annual purchases of products produced and services rendered by MSEs in a period of three years.

20. Clause 6 of the Procurement Policy, 2012 requires the organization to allow participating MSEs quoting prices within the price band of Price of L1 + 15% to supply a portion of requirement by bringing down their prices to L1 prices and in case of more than one MSE, supply shall be shared proportionately (to tendered quantity).

21. Further clause 10 of the Procurement Policy, 2012 stipulates reduction in the transaction costs of doing business for MSEs by providing them tender sets free of cost, exempting them from payment of earnest money and adopting an e-tender procurement policy to bring in transparency.

22. A reading of the Procurement Policy, 2012 in conjunction with the counter affidavit shows that the respondents have complied with the said order. The respondents have stipulated an item for mandatory purchase from MSEs. The tender stipulates preferences to be given to participating MSEs quoting price L1+ 15%. Provision is made in the tender also for reduction of transaction cost by providing tender sets free of cost and exemption from payment of earnest money.

23. The contention of the petitioner that the pre condition of the turnover of Rs. One Crore in three years could not have been stipulated as no such condition is stipulated in the procurement policy 2012 runs counter to the policy itself. Nowhere in the policy is it laid down that the organisation cannot fix an eligibility condition of turnover. An organization issuing a tender and inviting a bid is always free to stipulate an eligibility condition keeping in view the cost and value of the tender.

24. The respondents have shown that in the last year itself, the expenditure on Ayurvedic medicines itself was over Rs. 3 crores for the State of Delhi. The pre-condition stipulated of annual turnover, has been laid down to ensure quality and ability to perform the contract. An organization inviting a tender is always at liberty to decide the terms and conditions of the tender so long as they are not discriminatory or unreasonable.

25. The turnover criterion has been relaxed for the formulation specifically reserved for the MSEs. The Procurement Policy, 2012 requires an organisation to achieve an overall procurement of minimum of 20 per cent of the total annual purchases of products produced and services rendered by MSEs in a period of three years. The Respondents have reserved one formulation specifically for MSEs and have stipulated the preferential treatment to participating MSEs quoting price within L1+ 15%. The Respondents have also provided for preferential treatment to MSEs by providing reduction in transaction costs. The purpose of the policy as noted above is to achieve overall procurement of minimum of 20 per cent of the total annual purchases. It is not the case of the petitioners that the said purpose is not being fulfilled. The only contention is that the eligibility condition of minimum turnover could not be fixed. That, in our view is not the stipulation of the Procurement Policy, 2012.

26. The Supreme Court, in *Michigan Rubber (India) Limited v. State of Karnataka and Ors.*, (2012) 8 Supreme Court Cases 216, held as under:-

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"" and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

27. The Supreme Court, in *Michigan Rubber (India) Limited (Supra)*, held that in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities. Unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work.

28. The Judgment of the Supreme Court of India relied upon by the Counsel for the Petitioner, in the case of *Reliance Energy Limited & Another v. Maharashtra State Road Development Corporation Limited* (2007) 8 SCC 1, to contend that in Government Contracts, state should provide a level playing field to all bidders, is not applicable in the facts of the present case. The Respondents, have fixed a lower turnover criteria for the MSEs in respect of the formulation specifically reserved for them. The Respondents have also incorporated clauses from the Procurement Policy, 2012 providing for reduction in transaction costs for the MSEs. One formulation has been specifically reserved for the MSEs.

29. Further the Judgment relied upon by the counsel for the petitioner of the Division Bench of the Orissa High Court dated 20.12.2010 in WP(C) 8496/2009 titled *Utkal Pharmaceuticals Manufacturers Association & Anr. v. State of Orissa &*

Others to contend that in similar circumstances the High Court of Orissa had quashed the condition of fixing the turnover criteria at Rs. 10 Crores is also not applicable to the facts of the present case. First of all, in *Utkal Pharmaceuticals (Supra)*, the Commissioner-cum-Secretary, Industries department had taken a decision that the turnover condition of Rs. 10 Crores should be relaxed to Rs. 10 Lakhs, for local MSMEs. Secondly, in *Michigan Rubber (Supra)*, the Supreme Court has held that certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Thirdly, as noticed above, the Respondents, have fixed a lower turnover criteria for the MSEs in respect of the formulation specifically reserved for them.

30. In view of the above, we are of the view that the respondents have acted reasonably and fairly. The decision taken by the respondents cannot be held to be arbitrary or irrational and thus their action of fixing the minimum eligibility condition cannot be faulted. The writ petition is accordingly dismissed leaving the parties to bear their own costs.