
(2010) 02 J&K CK 0032
In the Jammu And Kashmir High Court

Johnson and Johnson Ltd.

APPELLANT

Vs

State of Jammu & Kashmir and Others

RESPONDENT

Date of Decision : 03-02-2010

Acts Referred:

Citation : AIR 2010 J&K 113 : (2010) 2 JKJ 925

Hon'ble Judges : Barin Ghosh, C.J; Mansoor Ahmad Mir, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Admit.
2. Notice of appeal waived by the parties. With consent appeal is heard.
3. Heard learned Senior Counsel appearing in support of the appeal, learned Counsel appearing on behalf of respondent-writ petitioner and learned Advocate General. Perused the records.
4. By the judgment and order under appeal, a writ petition filed by the writ petitioner-respondent has been allowed and thereby awarding of a contract by the State in favour of appellant has been interfered with. Hence the present appeal.
5. The State invited tenders for supply of Bandage and Suturing materials. The tender notice specified that samples of Bandages are to be submitted along with tenders, but did not impose such a condition in respect of tenders for Suturing materials.
6. In the present appeal, we are concerned with the order that was placed for supply of Suturing materials in favour of the appellant after acceptance of its tender.

7. In the writ petition, it was contended that Suturing materials, manufactured and sold by the writ petitioner-respondent, have no complaint as

regards their quality but, surprisingly, the tender submitted by writ petitioner-respondent has not been accepted and, instead, tender submitted by

appellant has been accepted, although, the price offered by respondent- writ petitioner was almost 40% lower than the price offered by appellant.

8. The State contested the writ petitioner by filing an affidavit. It brought to the notice of the Court dealing with the matter that after tenders

submitted by the tenderers were opened, a comparative statement of the tenders was prepared. A copy of that comparative statement has been

produced before us, wherefrom it appears that, apart from the appellant and the respondent writ petitioner, two other tenderers submitted tenders

for supply of Suturing materials. It was brought to the notice of the Court that after such comparative statement was prepared, the same was

placed before a Technical Committee comprising of Doctors in the employment of the State, who had used similar materials and would be using

such materials in future also. It was also brought to the notice of the Court that the said Committee opined that Suturing materials proposed to be

supplied by appellant is time tested and flawless and, accordingly, they recommended in favour of appellant. It was also brought to the notice of

the Court that, after this recommendation of the Technical Committee was received, the Tender Committee did not accept the same, except in

respect of one, and kept the matter pending for further consideration. It was also brought to the notice of the Court that the Tender Committee

then approached the members of the Technical Committee with a request to give in writing their further views in the matter. It was also brought to

the notice of the Court that members of the Technical Committee by six letters in writing gave their views. Upon consideration of such original

opinion given by the Technical Committee and supported by further opinions given in those six letters, the Tender Committee recommended

acceptance of tender of appellant. With the counter affidavit those six letters were not annexed. Those were subsequently brought on record by a

supplementary affidavit. The writ petitioner-respondent dealt with the said supplementary affidavit by a further affidavit. In that affidavit,

respondent-writ petitioner sought to highlight that the opinions expressed in those letters are not adverse to respondent writ petitioner . In respect

of two of those six letters, which mentioned respondent- writ petitioner, in the said further affidavit respondent-writ petitioner merely denied the said letters.

9. When the matter was taken up for final consideration by the learned Single Judge, his Lordship felt that when the price advantage was in favour

of petitioner-respondent, unless a comparison in between the products of the writ petitioner-respondent and appellant is made, in public interest,

the decision to purchase from appellant at a higher price cannot be justified. On that premise, the learned Judge concluded the matter.

10. Before us, the contention of appellant is that the challenge thrown in the writ petition was to the decision and not to the decision making

process. It was submitted that it had not been highlighted at any stage before the Writ Court that the decision making process is vitiated by any

action which is complainable. It was submitted that the decision, as was taken, was supported by materials and it cannot be contended that the

decision cannot be sustained on the basis of materials available for taking the decision. It was lastly contended that, in the matter of purchase of the

subject material, which is used for treatment of human being, there was nothing unjust to place reliance upon the Doctors who have used and are

accustomed to use such materials.

11. The learned Counsel appearing for the respondent writ petitioner submitted that the Technical Committee did not apply its mind to the product

proposed to be supplied by his client. Learned Counsel submitted that a bare perusal of the recommendation of the Technical Committee would

amply demonstrate that there is nothing thereon on the basis whereof one can even imagine that the Technical Committee had considered the

quality of materials proposed to be supplied by his client. Learned Counsel submitted that this lacunae was later on sought to be supplied by those

six letters. Learned Counsel submitted that those six letters were in response to a letter of the Purchase Committee dated January 27, 2009,

whereby the addressees of the said letter were requested to submit their remarks/comments in the backdrop of the recommendation already made

earlier by them in association with others as Technical Committee. Learned Counsel submitted that a bare perusal of these letters would show the

closed mind of the writers of these letters which indicates that in no

circumstances they would try anyone else apart from appellant. Learned Counsel submitted that the make belief process of finalising tender in the backdrop of what has been discussed in these materials would suggest that no prudent person could take a decision, as was ultimately taken.

12. Learned Advocate General appearing on behalf of State submitted that the Chairman of the Tender Committee prudently constituted a Technical Committee. The Technical Committee went into the matter, deliberated upon and made a recommendation. He submitted that though in the recommendation, there is no mention of the product of the petitioner-respondent or of the petitioner-respondent but, having regard to the fact that Technical Committee was apprised of the tenderers, as reflected in the comparative chart, it would suggest that they were considering products of all the four tenderers and amongst them picked up appellant as the proposed suitable supplier. Learned Advocate General submitted that the Tender Committee did not at that stage proceed to accept such recommendation blindly; instead, it asked the experts to give their further views in the matter in writing. Learned Advocate General further submitted that when those views were obtained and it transpired from those views that while everyone is ad idem that there is no complaint pertaining to the products of appellant as used by the experts until then and there are certain dissatisfactions about the products proposed to be supplied by writ petitioner-respondent, keeping in mind public health, the Government decided to buy the best at a little higher price and, accordingly, there is nothing wrong which could be remedied by taking recourse to writ jurisdiction.

13. In reply, learned Senior counsel appearing on behalf of appellant submitted that a look at these six letters would clearly demonstrate that the writers thereof, while expressing their opinion expressed a comparative advantage of the product offered to be supplied by appellant. It was submitted by him that it being not a case pleaded in the writ petition or in any of the pleadings connected therewith, that the mind of the experts, being members of the Technical Committee, was closed, it is now not open for the petitioner-respondent to make any submission in that regard.

Learned Counsel lastly submitted that the tender was for financial year 2008-09 and before the judgment and order under challenge was passed,

almost the entire work under the contract had been executed and, in such view of the matter, the learned Judge, in any case ought not to have interfered with the order placed by the State in the manner his Lordship has done.

14. A Government of a democratic society, while making purchase on behalf of people, has an obligation towards the people to buy the best at the cheapest. The outcome of its action of placing order on a supplier should be deemed in law to be an action based on the principle that the product proposed to be purchased is the best and cheapest. Offers to sell may not be at the same price and products offered for sale may not be of same quality. The Government is therefore required to weigh quality vis-a-vis price.

15. At the same time, a tenderer responding to a Government tender has right of equal and fair treatment at the time of consideration of tenders.

Because his price was cheaper will not show that his such right has been infringed. He would be required to show that not only his price was cheaper, but his quality was also equal. If he fails to show the same, he fails to establish that the Government has deviated from the principle the best at the cheapest , inasmuch as cheaper product of lesser quality is not comparable with an expensive product of better quality.

16. In the event, every parameter of the product intended to be purchased is specified, it becomes easier for comparison of the product proposed

to be sold by diverse tenderers . In its absence, one has to apply its prudence. In the instant case, the product proposed to be purchased is

Suturing material which is nothing but silk or non-silk threads required for stitching human flesh. On the records of this case, no acceptable

specified parameters of the subject material has come. In other words, it has not come on record that these materials have been standardised by

giving standard prescription by an Authority as that of Indian Standard Institution. Not even by the person inviting tender. In the ancient times, hair

on the tail of horses was used as suturing material. Today, there are certain suturing materials which are absorbable, that means it becomes part of

the human body. Science has refined these materials to a great extent. In the absence of any specified standard of these materials, it cannot be said

that a decision taken to have quality of these materials, to be supplied by various tenderers , verified by those who are accustomed to use them on

daily basis in their day to day professional conduct was not a prudent decision. Therefore, constituting a Technical Committee to evaluate efficacy

of the materials proposed to be supplied by different tenderers by a Technical Committee comprising of Surgeons of repute and employed with the

Government for a long period of time, cannot be questioned. The same was also not questioned.

17. The Technical Committee made its recommendation to the Purchase Committee in favour of the products to be supplied by appellant but did

not utter a single word about the products of other three tenderers. In the recommendation, the Committee concluded in favour of appellant by

holding out that they are using the materials of appellant for more than two decades with satisfactory result. With that, they indicated that they are

concerned about patients safety but did not indicate that patients safety would be affected in the event materials proposed to be supplied by other

tenderers, is used on the patients.

18. A look at this recommendation would show that the members of this Committee recommended in favour of appellant in view of the fact that

they are used with appellant and nothing more than that. It further indicates that they do not want to take chance, inasmuch as, patients safety is

involved.

19. However, the Tender Committee did not accept this recommendation, except in respect of one. The recommendation was withheld for further

deliberation. From records, it appears that further deliberation was not intended to be oral, but was to be in writing. Tender Committee,

accordingly, by its letter dated January 27, 2009, required remarks and comments from some of the experts, who were members of the Technical

Committee. Then comes the aforementioned six letters. Writer of one such letter says that I have used the material of appellant only and that is my

justification for supporting the original recommendation. Another writer says that I have used material supplied by appellant and I will not use

material of anyone else, for, I cannot take any chance with human life. Yet another writer says that I would like to use only the time tested materials

with proven results and I have not used any other material till date. These opinions/comments do not inspire any confidence. Writers of these letters

do not want to come out from their shells. They do not want to test the world.

Their windows are shut for ever. However, at the same time two of the writers of those letters have stated that as regards quality, they have received complaints in respect of products other than the products of appellant. One of the said letters signed by three doctors have pointed out various deficiencies in the products of petitioner-respondent used by them.

20. The original recommendation together with these six letters were then considered by the Purchase Committee and, upon such consideration, they accepted the original recommendation of the experts for finalisation of the contract for supply of suturing materials in favour of appellant.

21. The above state of affair clearly demonstrates that there was no lacunae in taking the matter through the process of selection, as was the requirement of law. Learned Counsel appearing in support of the writ petition submitted that one of the members of the Purchase Committee in his own hand has certified that his Department is satisfied with the supplies affected by his client and, accordingly, questioned how could he, while sitting in the Purchase Committee, accept the recommendation of the Technical Committee. This question, on pleadings has not been raised; as a result, the State has not been given an opportunity to give answer to the question. It will not be appropriate on our part to invent such an answer.

The fact remains that the Tender Committee was comprised of several people. Tender Committee was concerned with the economic part of the tender, for, a separate committee had been constituted for the quality part. The Tender Committee was not bound by the recommendation of the Technical Committee. On receipt of the recommendation, the Tender Committee did not accept the same, except for one item. It wanted and obtained further clarification. While it obtained further clarifications, some clarifications came, which were, as aforesaid, of no use, but some were there, which were of some use. The short question is whether on the basis of what was available with the Tender Committee after receipt of the recommendation of the Technical Committee and those six letters, could the Tender Committee take a decision as was taken by it?

22. The materials discussed above, would indicate that it is not a case of absence of any material. All those materials suggested that the quality of materials to be supplied by appellant is without any defect and the said

reputation has been maintained by appellant for a considerable period of time. On the other hand, there is a view that materials of other suppliers, including those of writ petitioner -respondent, used by them do not have such unblemished record. In other words, the materials on record depicted that whereas materials to be supplied by appellant are doubt free, but materials to be supplied by petitioner-respondent and other tenderers are with some tinge of doubt. The Tender Committee, at that stage, could do many a things. One of them could be sending the samples of materials to be supplied by different tenderers to a laboratory, as has been directed by the judgment and order under appeal, but only after specifying standard. They could take assistance of Indian Standard Institution. They could also approach many other bodies in India and abroad. But before a Judicial Review Court, the question is not what they could do, but what they did. It is possible that they could devise a mean for the purpose of making it absolutely doubt free that the quality of materials to be supplied by appellant is better than the quality of the materials to be supplied by respondent writ petitioner. It is also possible that by taking recourse to such device they could bring on record factors which would show that they have done a stupendous work. However, they have not done so. The decision taken by them is based on the aforementioned materials. A Judicial Review Court could pronounce that what they have done could not be done, for, there was no material to support what they have done. For that purpose, it was necessary for the Judicial Review Court to say that none of the opinions contained in the recommendation as well as those six letters hold good. The original recommendation may be ignored, some of those letters may also be ignored but can all of them be ignored? If all of them cannot be ignored, then the conclusion would be that there was some material, on the basis of which the decision as was taken could be taken. If the logical conclusion is that the decision on the materials, as were placed before the Purchase Committee, is one of the plausible decisions, but may not be the perfect or best decision, a Judicial Review Court may not touch the decision.

23. We emphasize that in the matter of purchase of materials by the Government, price is not the one and the only criteria always. At times more important may be quality of the materials proposed to be purchased. In such

situation endeavour should be to buy the best. Having regard to the proposed user of the material to be purchased, the Government may either sacrifice on the price front or on the quality front within the permissible limit. If it proposes to sacrifice on the price front on consideration of that the material proposed to be purchased would be used to treat human being, the decision to do so cannot be said to be unreasonable. The moment an attempt is made to buy the best, it becomes obligatory to find the better. Once it is decided that one is better than the other, if no one else is available, then the better should be adjudged as the best. If better quality of material is the criteria and, if that quality of material can only be supplied by a particular person, the logical conclusion would be that the same being not available from any other source, the price quoted by the supplier of that material is the cheapest price available therefor.

24. In the instant case, having regard to the fact that the materials sought to be purchased are to be used for treatment of human body, great

emphasis was given to find out what was the best available. The materials on record do suggest that while the materials proposed to be supplied by

the appellant, are blemish free and, accordingly, can be safely used for the purpose the same were proposed to be purchased, there is doubt about

the materials to be supplied by others. A decision to award contract at a higher price to get the better or the best material found on consideration

of materials and application of mind, we are of the opinion, cannot be interfered by taking recourse to judicial review.

25. We, accordingly, allow the appeal, set aside the judgment and order under appeal and dismiss the writ petition.

26. We would have awarded some costs in favour of the appellant but we have restrained ourselves from doing so, for, most of the time of the

Court has been taken by the appellant.