
(2016) 07 OHC CK 0004
In the Orissa High Court
Case No : W.P.(C) No.10791 of 2016

M/s. Utkal Pharmaceuticals Manufactures Association	APPELLANT
Vs	
State of Odisha	RESPONDENT

Date of Decision : 25-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 122 CutLT 791

Hon'ble Judges : Vineet Saran, CJ. and B.R. Sarangi, J.

Bench : Division Bench

Advocate : M/s. Ramakanta Mohanty, Sr. Counsel along with A. Mohanty, D. Mohanty, Ms. Sagita Mohanty, Ms. Sumitra Mohanty, D. Varadwaj, T.R. Mohanty and J. Khillar, Advocate, for the Petitioner; M/s B.P. Tripathy, R. Achary and T. Barik, Advocates, for the Opposite

Final Decision : Dismissed

Judgement

Vineet Saran, C.J. - The petitioner is an association of Pharmaceutical Manufactures with the members of the association being Micro and Small Enterprises having registration with the District Industries Centre as a Small Unit, and is covered under the definition of Micro Industries within the meaning of Section 2(h) of the Micro Small and Medium Enterprises Development Act, 2006.

2. The dispute, in the present writ petition, is relating to an tender document issued by opposite party no.2-The Odisha State Medical Corporation Ltd. for supply of drugs and medical consumables for the year 2016-17. The petitioner association is aggrieved by the non-inclusion of the price preference clause to be given to small enterprises, as is provided under the Odisha Procurement Preference Policy for Micro and Small Enterprises, 2015 (for short "Procurement Policy, 2015"). The petitioner association is also aggrieved by the turnover clause, which has been provided for in the tender document, as the same is not contemplated in the Procurement Policy, 2015.

3. We have heard Sri Ramakanta Mohanty, learned Senior Counsel along with Sri Animesh Mohanty for the petitioner association, as well as Sri B.P. Tripathy, learned counsel on behalf of all the opposite parties including opposite party no.2, the Odisha State Medical Corporation Ltd. (for short "Corporation"), for which he has put in appearance. A common counter affidavit on behalf of the State of Odisha as well as the Corporation has been filed and, as such, the stand taken by all the opposite parties is one and the same. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties, this writ petition is being disposed of at the stage of admission.

4. The main thrust of argument of Sri Ramakanta Mohanty, learned Senior Counsel is that there is violation of Procurement Policy, 2015 issued by the State Government which, as contended, would apply to the Corporations where Government's share is 50% or more. In the present case, there is no dispute about the fact that the opposite party Corporation is a wholly owned Government of Odisha Corporation. According to the petitioner, Clause 5.2.6, relating to minimum turnover, and Clause 6.23.4, relating to price preference only with regard to the items in Schedule-B, are contrary to the Procurement Policy, 2015 of the Government and, as such, such clauses deserve to be quashed.

5. Before we delve into the submission of the learned Senior Counsel appearing for the petitioner with regard to the violation of the aforesaid clauses being contrary to the Procurement Policy, 2015 of the State Government, we may first examine the applicability of the said Policy with regard to the e-tender document issued by the opposite party Corporation.

6. Much reliance has been placed by both the sides on Clause-6 of the Procurement Policy, 2015 issued by the State Government, which relates to its applicability. The relevant Clause-6.3 of the said Policy, relating to applicability, is reproduced below :

"6.3. State Government Departments and Agencies under its control means :

6.3.1. Explanation-I : Departments under the Odisha Government Rules of Business, Heads of Department and offices subordinate to them, Boards, Corporations, Development Authorities and Improvement Trusts, Municipalities, Notified Area Councils, Co-operative Bodies and Institutions aided by the State Government and Companies where Government share is 50% or more.

6.3.2. Explanation-II : In order to give effect to the provisions of the paragraph-6.3.1 as above, required incorporation shall be made in the Odisha General Financial Rules (Appendix-6, Rule 96) and the Finance Department will issue required Notification to this effect.

6.3.3. Explanation-III : The procurement under this policy shall not apply for purchases where there are separate procurement guidelines prescribed by State/ National Department & Ministries/international funding agencies."

7. It has been submitted by Sri Mohanty that Clause 6.3.1-Explanation-I makes

it clear that the Corporations, where the Government's share is 50% or more, would be governed by the said Policy. However, Clause 6.3.2-Explanation-II provides that for giving effect to Explanation-I, whereby the Policy is to be made applicable to the State Corporations, the necessary incorporation has to be made in the Odisha General Financial Rules and the Finance Department must issue the required notification to such effect. It is not the case of the parties, that any such notification has been issued by the Finance Department or there is necessary incorporation made in the Odisha General Financial Rules regarding applicability. Explanation-III in Clause 6.3.3 provides that the said Procurement Policy, 2015 shall not apply for purchases, where there are separate procurement guidelines prescribed by the State/National Department and Ministries/International Funding agencies. The latter may not be relevant for the purpose of the present case.

8. What is not disputed is that the opposite party Corporation has its own Procurement Guidelines. The said guidelines provide for turnover clause to the effect that there should not be any minimum turnover requirement for Micro and Small Enterprises participating in procurement process under the policy. The petitioner association does not challenge that the opposite party Corporation has violated any provisions of the Procurement Guidelines issued by the said Corporation. It is only when requisite notification is issued by the Finance Department, that the Procurement Policy 2015 would be made applicable to the particular Corporation. No such notification has yet been issued by the Finance Department. Specific pleadings in this regard have been taken in the counter affidavit that the required incorporation to give effect to Clause 6.3.1 has not been made in the Odisha General Financial Rules, nor the Finance Department has issued any notification to such effect, which have not been replied to by the petitioner association. The Procurement Guidelines of the opposite party Corporation are in consonance with the Odisha General Financial Rules, as has been stated by the opposite party Corporation in its additional affidavit, to which also no specific reply has been given by the petitioner association.

9. The State may have its own Procurement Policy, which came out in the year 2015, but the same would apply to the Government owned Corporations, only when a notification in that regard is issued. In the absence of any such notification having been issued, the Procurement Guidelines of the opposite party Corporation would be applicable, as long as they adhere to the norms of the Odisha General Financial Rules. There is no allegation or averment made in the writ petition that the Procurement Policy is against the Odisha General Financial Rules, or that the same has not been followed.

10. Much emphasis has been laid by Sri Mohanty, learned Senior Counsel on the notification dated 10.06.2015, by which procurement policy of the State Government was issued. It has been contended that the said policy was issued, in order to facilitate the promotion and development of Micro and Small Enterprises, under the exercise of the powers conferred in Section-11 of the

Micro, Small and Medium Enterprises Development Act, 2006 read with Odisha Micro, Small and Medium Enterprises Development Policy, 2009 issued by the Government of Odisha. It is contended that the same having been approved by the State Government on 30.05.2015, it would be applicable to all the Corporations. It has also been submitted that Office Memorandum dated 02.04.2013 (Annexure-8) issued by the Finance Department, Government of Odisha further strengthens the stand of the petitioner that the Procurement Policy, 2015 would be deemed to be part of the Odisha General Financial Rules, as has been stated in paragraph-7 of the said Office Memorandum.

11. A perusal of the Office Memorandum (Annexure-8) would show that the same is applicable for purchase of goods from outside the State. Though it has been argued by Sri Mohanty that para-2 of the said Office Memorandum, relating to price preference system, mentions that the same would be for medium and large industries as well as outside industries, but considering that the Office Memorandum was issued on the subject relating to goods purchased from outside the State, in our view, the same would be made applicable only when there is a specific notification issued by the Finance Department of the Government, and after issuance of Procurement Policy, 2015. No such notification has been placed on record to show that the policy has been made applicable. Even assuming for a moment, that the Office Memorandum dated 02.04.2013 issued by the Finance Department is applicable to the small scale industries within the State of Odisha, yet the same cannot be said to have been issued in terms of the Procurement Policy, 2015 of the State Government, as it is an Office Memorandum issued on 02.04.2013, prior to the said policy.

12. The terms of a contract should be interpreted and their legal effect determinated as a whole. A word, phrase, sentence or a whole clause must be considered along with all the other words by which it is surrounded; and also along with :

- (1) the history and education of the user,
- (2) the nature of the business in hand,
- (3) the purpose of the parties to the transaction, and
- (4) the other relevant circumstances.

The intention of the parties should be collected from the instruments as an entirety. Disproportionate emphasis must not be laid upon a single provision. Word, phrase and clauses should not be isolated, but related to the context and the contractual scheme, as a whole, and given the meaning which accords with the probable intention.

13. In *Western Power Co. of Canada v. Corp. of the Dt. Of Mosqui*, AIR 1934 PC 254, the Privy Council held that the words can, no doubt, be supplied to give effect to the obvious intention or apparent purpose of a contract. But this can only be, if the language taken as a whole in connection with the circumstances

carries with it the meanings sought to be attached. Unexpected intention is of no legal effect. It is not permissible to add words which would result in adding new term not involved in the purpose of the contract.

14. The Apex Court in *Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals Pvt. Ltd.*, (1991) 2 SCC 637, held that construction should subserve the purpose of the enactment and should not defeat it. Construction should be such that no part of the enactment is rendered otiose.

15. In *Modi Co. v. Union of India*, AIR 1969 SC 9, the Apex Court held that the terms of the contract can be expressed or there can be a necessary implication of a term for what has been expressed in the contract. The question therefore, resolves in the ultimate analysis upon the construction of the terms of the contract between the parties. In this connection, it is well established that in constructing such a contract it is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties.

16. In *State of Gujarat (Commissioner of Sales Tax, Ahmedabad) v. Variety Body Builders*, AIR 1976 SC 2108, the Apex Court held that where there is a written agreement, the Court is to find out therefrom the intention of the parties. That intention has to be primarily gathered from the terms and conditions agreed upon by the parties.

17. Applying the principles, discussed above, to the present context, the petitioner association having not been able to satisfy this Court that the Procurement Policy of the State Government issued in the year 2015 would be applicable to the procurement made by the opposite party Corporation, the question of violation of the provisions of the said Procurement Policy in the e-tender document would not arise. As such, in our view, the prayer made in this writ petition does not deserve to be granted.

18. The writ petition is accordingly dismissed. No costs.

Dr. B.R. Sarangi, J. :- I agree.