
(2016) 08 AHC CK 0097
In the Allahabad High Court
Case No : Misc. Bench No. 16167 of 2016

Ornate Labs Pvt. Ltd.

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 19-08-2016

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2016) 5 AILLJ 734

Hon'ble Judges : Amreshwar Pratap Sahi and Dr. Vijay Laxmi, JJ.

Bench : Division Bench

Advocate : Asok Pande and Onkar Nath Pandey, Advocates, for the Petitioner;
C.S.C, for the Respondent

Final Decision : Disposed Off

Judgement

1. This writ petition have been filed by an unsuccessful bidder in relation to the supply of drugs to the respondent Medical Department.
2. The petitioner's bid was found to be ineligible and, therefore, his financial bid has not been considered. The allegation against the petitioner is that the petitioner has filed an incorrect declaration as per condition No.6.6 and has, therefore, given an incorrect information in the undertaking which have been filed by him as per Annexure-5 to the tender document that violates condition No.8 thereof.
3. Sri Asok Pande for the petitioner contends that the petitioner being a bidder with lowest rates, was entitled to participate in the financial bids and consequently, the action of the respondents is discriminatory. To substantiate his submissions, the petitioner has filed supplementary affidavits on 14.07.2016, 20.07.2016, rejoinder affidavit dated 01.08.2016 and 04.08.2016. With the aid of such affidavits, the petitioner has also alleged that the black listed firms namely, M/s. Medipol Pharmaceuticals India Pvt. Ltd., M/s. ZEE Laboratories and M/s. Omega Biotech Limited, have been cleared in their technical bids whereas,

the petitioner in spite of being qualified have been wrongly excluded.

4. It may be put on record that all the above three firms have filed impleadment applications along with their affidavits which are on record. Sri Manish Singh has put in appearance on behalf of M/s. ZEE Laboratories, Sri Sudhanshu Chauhan has put in appearance on behalf of M/s. Medipol Pharmaceuticals India Pvt. Ltd., and Sri Anurag Narain has appeared for M/s. Omega Biotech Ltd. Learned standing counsel has filed a supplementary counter affidavit dated 27.07.2016 and an affidavit dated 01.08.2016 on behalf of the State respondents 1 to 3.

5. In order to appreciate the controversy, it would be appropriate to quote the relevant conditions in the tender documents that have been produced before the Court. The first is the tender notice which contains clause 14 and is extracted hereinunder:-

"14. Firms should give an affidavit that company is not blacklisted and there is no Court Case/Vigilance Case/CBI Case pending against the firm. All the documents given in the tender are true. If found false/fake the person who is giving affidavit is fully responsible. Any action taken against person/firms will be accepted. (Court case means "criminal case" against firm/board of director/directors/principle stock holder as per relevant laws.)"

6. The next relevant conditions are Condition No.6.5 and 6.6 in the instructions to the bidders contained in Section 1 of the tender documents that are extracted hereinunder:-

"6.5 Should not be under conviction for manufacturing/supplying sub-standard drugs or on any other grounds under Drugs & Cosmetics Act or rules framed there under. The firm/company/corporation and any of its Directors/Proprietor/ Partner/authorised signatories should not be convicted/or a criminal case filed against or pending in any court (including CBI courts) of India by any department of the Government under Prevention of Corruption Act or for cheating/defrauding government/embezzlement of Government fund or for any criminal conspiracy in the said.

6.6 Should not be currently blacklisted debarred or deregistered for (a) forgery (b) misrepresentation or (c) supplying "Not of Standard Quality" drugs(s) for which the bid is being submitted by any govt./autonomous body/institution, hospitals in India."

7. As per condition No.7.2, a notarized undertaking has to be given as per Annexure?5, which contains Clause-8 as follows:-

"8. That our firm has not been deregistered or black listed by any govt./ autonomous institution, hospital or body in India for any item which is being quoted here by me in this tender or for participating in bid altogether."

8. The petitioner also filed his undertaking which is Annexure?1 to the writ petition and had sworn Clause-8 as per the aforesaid undertaking. The petitioner

had also admittedly opted for supply of paracetamols which is one of the items under the tender conditions. The petitioner was treated to be disqualified as four batches of the medicine supplied by him were not of standard quality for which the explanation given in the supplementary affidavit dated 20.7.2016 of the petitioner in paragraph-4 thereof, is extracted hereunder:-

"4. That when the petitioners 4 batches were failed and it was informed, the company submitted the reply in which it was mentioned that the improper storage at high temperature may be the main reason of failure of these batches, but no information was received by the petitioner till date as to what action was taken in pursuant to said reply and now he have been disqualified in the technical bid. The true Copy of the Reply dated 06/05/2014 submitted by the company to respondent no.3 is being annexed herewith as Annexure No.SA.2 with the affidavit."

9. The petitioner contends that since it had given a reply to the same, the petitioner could not have been disqualified on the said basis. However, to further improve it's stand, the petitioner in paragraph?8 of the affidavit dated 1.8.2016 has stated as under:-

"8. That the contents of para 9 and 10 of the short counter affidavit is not correct as stated hence denied. It is submitted that the Paracetamol 500 tables of which four batches were found substandard was subject matter of tender no.628 where with respect to black listing only the medicines which are found as spurious or adulterated or misbranded, the company can be black listed. In the petitioners matter his product was found of substandard quality and so the company cannot be black listed. It is submitted that as per the tender conditions of tender no.628, the petitioner's company cannot be black listed for supplying substandard medicines. The annexure no. X of the tender document no.628 provides that if four batches of particulars items supplied by the supplier fails as provided in para 10 (a) and reported by the Government analysis that the particular items shall be black listed after observation the procedure laid down in para 10 (a). It is clear that as per the tender condition of tender no.628 the petitioners Paracetamol tablets can be blacklisted after observing the procedure laid down in para 10 (a) which has not been done till date. In this view of the matter it is clear that only Paracetamol 500 Mg can be black listed that too after observing the procedure which has not been done till date. In the impugned tender though the petitioner initially applied for Paracetamol 500 but later on the withdraw the same. In the impugned tender the petitioner is not applicant of supply of any medicines which have been found sub standard and so his tender cannot be disqualified. The petitioner's case is covered by the circular issued by Central Drugs Standard Controlled Organization. The petitioner's case falls in category B (Grossly substandard drugs) and for which the action to be taken is also described in the said circular, which provide as follows:-

1. Stoppage of further sale and recall of batch of the drugs from the market.

2. Manufacturer to be asked to intimate stock and distribution details etc. of the particular batch.

3. Calling of explanation from the manufacturer.

4. After receipt of explanation or investigation report, if any carried out, further appropriate action may be taken by issuing show cause notices etc. if so required. The true copy of circular/guidelines is being annexed here with as Annexure No.RA3 to this affidavit."

10. On the strength of such averments, the petitioner has come up saying that neither the petitioner can be disqualified nor can be eliminated on such grounds.

11. The second part of the argument of Sri Asok Pande is that the other three firms which have been shortlisted for award of the contract and their financial bids are to be opened are firms which have been blacklisted or their products have been found to be substandard in various other parts of the country for which action have been taken and in spite of having been blacklisted, they are being extended benefits. In view of this, the tender proceedings deserve to be cancelled for which reliance have been placed on the affidavits filed by the petitioner.

12. During the course of the hearing that was continuing, the petitioner filed another affidavit bringing on record the letter dated 21.7.2016 from the Accountant General addressed to the Director General, Medical & Health, Government of Uttar Pradesh which is a D.O. Letter informing him that the companies whose list was appendix along with the said letter have been blacklisted in the other parts of the country and specifically mentions M/s ZEE Laboratories Ltd. Further, an information was sought about the decision taken by the Government in policy matters relating to such information.

13. The learned Chief Standing Counsel has invited the attention of the Court to the supplementary affidavit dated 1.8.2016 filed on behalf of the respondent Nos.1, 2 and 3 and the other affidavit dated 27.7.2016 to contend that this is a matter relating to tender No.753. In the said affidavits, it has been clearly stated that so far as the petitioner is concerned, it was found ineligible as per the letter dated 6.7.2016 as the petitioner had filed a false affidavit giving incorrect information about the status as per Clause 8 of the undertaking. So far as the other firms which have been allowed to be considered as per their financial bids they have not bid for any item for which they have been blacklisted in other parts of the country. Therefore, the stand taken by the petitioner does not appear to be correct.

14. Having heard learned counsel for the parties, what we find is that the assertions of the petitioner in his affidavit dated 01.08.2016 as extracted herein above, categorically admit having filled up the tender for the item of paracetamol tablets about which he did not give the correct information in his affidavit. Thus, the petitioner had actually bid for an item about which he ought to have given

information as per Clause (8) of the notarized undertaking. The information, therefore, was not correct. The petitioner also admits that he later on, withdrew the same. In such circumstances, this amounts to an admission on the part of the petitioner of having made a bid for an item which he himself withdrew on account of the allegations of it being of a substandard quality. This conduct of the petitioner by not disclosing the correct facts was, therefore, a violation of Clause (8) and, therefore, it cannot be said that the respondents have arbitrarily non-suited the petitioner.

15. However, coming to the terms and conditions of Clause (8) what we find is that it is very carefully guarded by mentioning the words, "for any item", in order to disqualify a person. This therefore means, and which is the contention of the other three companies, that since no action has been taken against them for the items for which they have now submitted their tenders, therefore, they cannot be disqualified. We find the aforesaid condition to be not very appropriately worded and this calls for an inquiry and decision by the State Government, the reason being that some material have been brought on record to indicate the involvement of these firms in supply of drugs in other parts of the country where they have been adversely commented upon. The companies have disputed the same in their own way.

16. We are unable to find any rational justification for any suppliers who may have indulged into any such malpractice in the other parts of the country to be eligible to supply medicines, may be not of the same items, within the State of U.P. It is the reputation and conduct of a supplier which calls upon an action and in the instant case, such material was brought on record that may reflect upon the conduct of such suppliers. The State Government should, therefore, re-visit these issues particularly with regard to its policy of such firms having been adversely commented upon in any other parts of the country by adopting a rational policy as this goes to the core issue of the conduct of the drug supplier directly connected with the health of the citizens of the State. The State Government had been informed by the Deputy Accountant General on 21.07.2016 seeking such information which document have been filed along with the rejoinder affidavit as Annexure No.RA-1. The State Government should, therefore, proceed to examine this issue particularly with regard to the terms and conditions of such tenders in order to ensure that the possibility of supply by spurious drug peddlers are prevented.

17. We, therefore, at this stage having found the petitioner to be not eligible, dispose of this writ petition with a direction to the respondent No.1 to re-visit the issue in the light of the observations made herein above to enable the State Government to take an appropriate decision and in the event it is found that any such conditions are not in conformity with the Constitutional goal of ensuring health and safety of our citizens, then an appropriate policy should be framed and accordingly executed at the earliest. The respondent No.1 is also directed to himself examine the transactions which are presently in dispute and pass an

appropriate order within six weeks of the date of presentation of a certified copy of this order before him.