

(2011) 11 KL CK 0019
In the High Court Of Kerala
Case No : W.A. No. 1403 of 2010

Sanse Laboratories Private Ltd. and Others	APPELLANT
Vs	
Alfred Berg and Company and Others	RESPONDENT

Date of Decision : 16-11-2011

Acts Referred:

Citation : (2012) 1 KLJ 275

Hon'ble Judges : K. Vinod Chandran, J; C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Anil D. Nair and Nivedita A. Kamath, for the Appellant; M. Ajay (SC), M. Ramesh Chander, K.A. Sanjeetha and C.K. Sherin (GP), for the Respondent

Judgement

C.N. Ramachandran Nair, J.—Question raised in the connected Writ Appeals and the Writ Petition is one and the same i.e. whether the Government was justified in increasing incentives to local SSI units for supply of medicines from 5% to 10% over competitive bidders. Under Government Orders dated 13/05/2009, price preference given to local SSI units for supply of medicines to Government was 5%. This was part of the tender conditions issued by the Kerala Medical Services Corporation Ltd. (hereinafter referred to as the Corporation for short), 14th respondent in W.A. No. 1403/2010, which is a Company purely owned and controlled by Government of Kerala and engaged in procurement and supply of medicines to Government hospitals. Therefore, up to the financial year 2009-10, price preference given to the SSI units were only 5%. However, after the tenders were invited for purchases for the financial year 2010-11, the Government issued order dated 02/02/2010, which is produced as Ext. P4 in the Writ Petition, increasing the rate of price preference from 5% to 10%. This was questioned by other manufacturers from outside State, who had also participated in tenders. Since the tender conditions were varied after the tenders were submitted, this Court on that ground and also by relying on the earlier Government Order, viz. Ext. P3, vacated Ext.P4 produced in WP(C) No. 5606/2010, against which W.A. No. 1403/2010 is filed. However, under the impugned order, the learned Single

Judge permitted supplies against the contracts awarded prior to the date of the judgment with 10% price preference. So far as subsequent tenders are concerned, the learned Single Judge prohibited giving price preference to SSI units over 5%. It is against this judgment of the learned Single Judge, the local SSI units have filed the two Writ Appeals, wherein the party respondents are outside suppliers, who have successfully opposed Ext. P4 before the learned Single Judge. The issue raised before the learned Single Judge was whether the Corporation is bound by the Government orders on price preference given to SSI units. Ext. P4 order applies for supplies up to 2010-11. However, for the current financial year 2011-12, the Corporation itself through a board resolution offered 10% price preference to SSI units, against which WP(C) No. 20849/2011 is filed by an outside manufacturer.

2. If the reasoning of the learned Single Judge in the judgment impugned in the Writ Appeal is accepted, which is based on Ext. P3 order issued by the Government, then WP(C) No. 20849/2011 filed by the outside manufacturer has to be allowed. If the Corporation's decision to give 10% price preference is vacated, necessarily Ext. P3 Government Order may not apply as such to the Corporation, and the Corporation will have to be directed to reconsider the matter.

3. We have heard learned counsel appearing for the SSI units, learned counsel appearing for outside manufacturers, learned Standing Counsel appearing for the Corporation and also learned Government Pleader appearing for the State.

4. Learned counsel for the appellants contended that the SSI units in all States are enjoying price preference in regard to supply of medicines. He has produced the tenders issued by several States, where the price preference ranges from 10% to 25%. Based on these documents and practices followed by other States, the contention raised by the learned counsel for the appellants is that the 10% price preference given under the revised Government Orders, namely Ext. P4, and the decision of the Corporation to give price preference up to 10% is only reasonable and there is no scope for interference by this Court. Afresh contention raised on behalf of the learned counsel for the SSI units is that they being local manufacturers and suppliers are called upon to pay sales tax under the VAT ranging from 4% to 12.5%, whereas outside suppliers making interstate sales are not contributing any tax to the State Government. This ground of course is not seen raised or considered by the learned Single Judge in the judgment rendered vacating Ext. P4. Learned counsel appearing for outside manufacturers specifically referred to the findings of the learned Single Judge based on Ext. P3, wherein the Government after considering the contentions of all the parties based on a direction issued by this Court in an earlier round of litigation, considered and decided to give price preference only up to 5%. However, the reasoning contained in Ext. P3 and accepted by the learned Single Judge is opposed by the learned counsel for the SSI units.

5. Learned Standing Counsel appearing for the Corporation submitted that the

Corporation is not engaged in trading activities to make profit. On the other hand, it is under the exclusive control of the Government and is engaged in procurement of drugs with the funds provided by the Government and the entire drugs are supplied to Government hospitals free of cost. So much so, the Corporation is not engaged in commercial operations and its purpose & objective is not to make profit.

6. After hearing both sides, we are of the view that the price preference offered by the Corporation which is currently under challenge impacts on Government finance because the advantage or disadvantage in the procurement cost of drugs is directly borne by the Government. Therefore, the Corporation's decision will have to be viewed as if it is rendered by the Government, and so much so, the Corporation enjoys virtually the same freedom as a Government to give incentive to SSI units, keeping at the same time in mind that the objective of the Government as well as the Corporation is to minimise cost of procurement of drugs for supply to poor patients. Outside manufacturers have only challenged the increase in price preference from 5% to 10% and they are not challenging the incentives fixed at 5% by the Government under earlier orders and made applicable while awarding contracts to SSI units. So much so, it is admitted by outside manufacturers themselves that SSI units are a different class of suppliers different from them and are entitled to certain incentives. So much so, the question to be considered is whether the increase from 5% to 10% is justified whether it be done by the Government or by the Corporation following the guidelines or decisions of the Government in this regard. There cannot be any controversy that incentives to SSI units so far as the same is in accordance with law, is within the realm of the Government and the Government Corporation, and it is not for any Court to decide what incentive or preference SSI units should be given over others. On going through Ext. P3, which is the basis of the impugned judgment, what we notice is the reasoning stated in Ext. P3 is not very significant because as of now, the Corporation itself has decided to give 10% price preference to SSI units in Kerala over outside suppliers. For the current year, based on the incentive offered by the Corporation under the tender conditions, supply orders have been issued and there are only 4 more months left for the financial year for making supplies in terms of the orders issued by the Corporation. We do not find any justification to interfere with the supply orders being executed by the parties.

7. Therefore, the only question now left to be considered is whether the Corporation should be permitted to continue price preference being given to SSI units at 10%. There is nothing to indicate that the decision taken by the Corporation and incorporated in current year's tender conditions is a decision to apply for subsequent years or whether the Corporation proposes to change the price preference for the next year and for years to come.

8. In view of our findings above what requires to be done by us probably is to give some suggestions to the Corporation in regard to the price preference if at

all proposed, from next year onwards. Since SSI units are a class different from large scale manufacturers which have high level of automation in manufacturing and packing, it is certainly for the Corporation to consider what kind of incentives have to be granted to SSI units in the State. In this regard, they should certainly take into account other incentives under various schemes made available to SSI units in the State such as industrial subsidy, concessional power tariff, tax/duty exemption etc. Probably they can reckon the incentives offered by other States to SSI units in those States. Here again what we feel is that varying rates of price preference can be provided to SSI units within the State and in relation to outside SSI units over large scale manufacturers when tenders are invited from SSI units inside and from outside Kerala and from large scale manufacturers. For example, even if a price preference of 10% is maintained between SSI units in Kerala and large scale manufacturers, probably between the Kerala SSI units and the outside SSI units, the price preference can be retained at 5%. The Corporation and the Government even while considering incentives should keep in mind to lower the cost for procurement so that maximum quantity of drugs could be purchased for distribution to poor people with the funds sanctioned by the Government. The Corporation should also keep in mind that any price war between large scale manufacturers and SSI units will lead to closure of SSI units. Therefore, we dispose of these Writ Appeals by setting aside the judgment of the learned Single Judge and dispose of the Writ Petition by directing the Corporation to consider price preference for next year on a rationale basis keeping in mind the views expressed by us as above also.

These Writ Appeals and the Writ Petition are disposed of as above.