
(2016) 09 SC CK 0042

In the Supreme Court Of India

Case No : Civil Appeal No. 8461 of 2016 (Arising out of S.L.P. (C) No. 14337 of 2016)

Shobikaa Impex Pvt. Ltd.

APPELLANT

Vs

Central Medical Services Society

RESPONDENT

Date of Decision : 20-09-2016

Acts Referred:

Contract Act, 1872 — Section 20

Insecticides Act, 1968 — Section 9(3B)

Citation : (2016) 6 AllWC 6277 : (2016) 3 ApexCourtJudgments(SC) 750 : (2016) 12 JT 199 : (2016) 7 MLJ 527 : (2016) 4 RCRCivil 499 : (2016) 5 RecentApexJudgments(RAJ) 470 : (2016) 9 Scale 62

Hon'ble Judges : Dipak Misra and C. Nagappan, JJ.

Bench : Division Bench

Advocate : Vikash Singh, Senior Advocate, Sriram Krishna, Ms. Udit Singh, Advocates, for the Appellant; Ms. Pinky Anand, ASG, Atulesh Kumar, S. Wasim A. Qadri, D.S. Mahra, Rishikant Singh, Ms. Kritika Sachdeva, Shadman Ali, Dharmendra Kumar Sinha, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, J.—The instant appeal, by special leave, has been filed questioning the justifiability of the judgment and order dated 10.05.2016 passed by the High Court of Delhi at New Delhi in W.P.(C) No.1994 of 2016 whereby the Division Bench has declined to interfere with the decision taken by the respondents to treat the bid submitted by the appellants as non-compliant with the conditions of Invitation for Bids (IFB) which resulted in dismissal of the writ petition and the application for clarification.

2. The appellant No.1 is a company incorporated under the Companies Act, 1956 and the appellant No.2 is a proprietorship concern and its authorized agent is a director of the said company. The appellant-company commenced manufacture of its insecticide product, Long Lasting Insecticide Net ("LLIN"). The World Health Organization Pesticides Evaluation Scheme (WHOPES) is the global body for

monitoring, evaluating and approving LLIN brands, for without the said recommendation LLIN cannot be sold in the market. It is averred that WHOPEs conducts very stringent tests at three levels before it gives recommendation to a product, which includes laboratory test, wash effective test and bio-efficacy field trial test, and due to rigorousness of the test, only handful of LLINs have been recommended by WHOPEs and the appellants' product that is DURANET®; is one of them. The appellant No.1 was issued a license to manufacture insecticide on 08.01.2014 under the Insecticides Rules, 1971 (for short, "the Rules") and also allowed for carrying on wholesale dealing and storage for sale. The license granted in favour of the appellant was renewed from time to time and it was valid till 31.12.2015.

3. As the facts as have been unrolled, the appellant No.2 vide application No. 45295 applied for provisional registration for the insecticides product, i.e., Alphacypermethrin Incorporated Long Lasting Mosquito Bed Net (commercial name being DURANET®;) to the Central Insecticide Board (CIB) as per Section 9(3B) of the Insecticide Act, 1968 (for short, "the Act"). The Registration Committee of (CIB) in its 354TH meeting dated 31.03.2015 approved LLIN, that is, DURANET®; for provisional registration under Section 9(3B) of the Act for Public Health Programmes. We shall refer to the said decision of the CIBRC at the relevant stage.

4. The first respondent floated a tender, i.e., CMSS/PROC/NVBDCP/2015-16/006 for procurement of 1 crore LLIN under National Vector Borne Disease Control Project. Section 1 of CIB pertained to Instructions to Bidders. Para 4 dealt with eligibility. Paragraph 5 provided for listing of the documents establishing conformity of goods and services to bidding documents. Paragraph 6 specified qualifications of the bidder. Paragraph 6(A) dealt with manufacturer bidders. After the Instructions to Bidders were issued incorporating various clauses including ones which have been referred to hereinabove, Amendment No. 3 to the bid document was made on 28.09.2015. The clause contained in 6.1(A)(d)6 in Section 1 of the Instructions to Bidders was amended. The initial paragraph 6.1(A)(d)6 read as follows:-

"6. The LLINs offered by the Bidders must be registered with Central Insecticide Board (CIB) of India under Insecticide Act 1968. The documentary evidence to establish these shall be submitted along with the bid."

5. The amended clause stipulated as under:-

"The LLINs offered by the Bidders must be registered with Central Insecticide Board (CIB) of India under Insecticide Act 1968. The certificate of registration issued by the CIB shall be submitted along with the bid or should be at the latest provided at the time of tender opening. The bids not accompanied with the CIB registration certificate on the date and time of opening of tender (technical bid) shall be held as non-responsive."

6. At this junction, the narrative requires to travel to the past. The application for

grant of provisional registration that was submitted by the appellant No.2, a decision was taken by CIBRC on 31.03.2015. The relevant part of the said decision which has been emphatically pressed into service by the appellants, reads as follows:-

"Consideration of an application of M/s Shobikaa Impex, Karur, T.N. for grant of registration for indigenous manufacture of Alphacypermethrin Incorporated Long Lasting Mosquito Bed Net (LLIN) 0.55% w/w under section 9(3B) of the Insecticides Act 1968.

The agenda was deliberated in detail and Committee approved provisional registration u/s 9(3B) for public health programmes, subject to the outcome of the court case having W.P. No. 8408/2015 & W.P. No. 8409/2015 before the Hon"ble High Court of Judicature at Madras. The Committee further decided that the case be sent to DAC for according permission for commercialization during provisional registration."

[Emphasis Supplied]

7. The appellant No.1 felt grieved, for in spite of the fact a decision was taken, the registration certificate was not made available and further the amendment in Instructions to Bidders had come which was unacceptable in law. Therefore, it invoked the jurisdiction of the High Court in WP(C) No. 9694 of 2015, which vide order dated 14.10.2015, while issuing notice, directed that the bid of the writ petitioners shall not be rejected merely on the ground that it had not been able to produce the registration certificate. On 19.10.2015, the first respondent communicated to the appellants that the direction of the High Court shall be complied with and the bid shall be processed in a transparent and fair manner. It was also communicated that a letter had been written to the Director, CIB regarding the latest status of registration and the CIB had also been informed in the same communication regarding the case being renotified on 30.10.2015.

8. As the factual narration would reveal, on 27.10.2015 the appellants had applied for renewal of license for manufacturing insecticides for product DURANET® under Rule 9 of the Rules framed under the Act. Certain communications took place between the appellants and the respondent No.1 with regard to clarification of the bid conditions. The High Court directed the appellant to implead CIBRC as a party and it also directed the said authority to file an affidavit. During the pendency of writ petition, CIBRC issued the registration certificate on 21.12.2015. The certificate was issued in favour of Shobikaa Impex, the appellant No.2 herein. The High Court vide order dated 20.01.2016 disposed of the Writ Petition (C) 9694/2015 recording as follows:-

"An affidavit has been filed on behalf of respondent No.4 dated 23.12.2015 wherein it is categorically stated that as per the decision of the Registration Committee taken in its 354th meeting held on 31.03.2015, M/s Shobikaa Impex, Karur is registered under Section 9(3B) of the Insecticide Act, 1968 with the Central Insecticides Board and Registration Committee vide Registration No.

CIR-1802/2015(354) - Alphacypermthrin Incorporated Long Lasting Mosquito Bed Net 0.55% w/w-04, dated 21.12.2015 which is valid for two years i.e. upto 20.12.2017, for indigenous manufacture. A certificate has also been issued by the said Board in respect of the said insecticides in favour of M/s Shobikaa Impex. A copy of the same has been placed on record as Annexure A-1 to CM No.1402/2016.

In view of these clarifications, the respondent No.1 can go ahead with the subject tender.

The writ petition stands disposed of in the above terms"

9. After the Writ Petition (C) 9694/2015 was disposed of, respondent No.1 constituted a sub-Committee for evaluation of the technical bid and the said sub-Committee found that the appellant No.1 was not having CIB registration certificate in its name as categorically required in Amendment No.3 dated 28.09.2015, and further the certificate was not produced at the time of submission of the bid, and accordingly treated the bid as not acceptable being non-compliant. At this juncture, the appellant No.1 moved a clarification application of the order dated 20.01.2016 passed in Writ Petition (C) 9694/2015 before the High Court. In the meantime, the licensing authority renewed the license for manufacturing of the insecticide of the appellant No.1 pursuant to application for renewal dated 27.10.2015 and, on 17.02.2016, the sub-Committee recommended to place the order for the insecticide product with M/s Vestergaard Group SA at the total value of US\$30,407,886. The appellant No.1 entered into correspondence with the respondent No.1 but as nothing fruitful ensued, it approached the High Court in Writ Petition (C) No. 1994 of 2016.

10. On a perusal of the order of the High Court, it is noticeable that it has referred to the unamended clause 6.1(A) (d)6 of the Instructions to Bidders. The stand of the appellants before the High Court was that its product was duly registered with CIB as per meeting dated 31.03.2015 and, therefore, the decision of respondents was totally unsustainable. The High Court took note of the amendment brought into the clause which we have reproduced hereinbefore. It referred to its earlier order passed in Writ Petition (C) 9694/2015 and took note of the fact that prayer was made for issue of a writ of mandamus to the respondents to consider its bid without insistence on production of registration certificate and also quashing of the Amendment No.3, but no such relief was granted. It further referred to the stand with regard to grant of certificate in favour of appellant No.2 therein but observed that it had no relevance. The Division Bench of the High Court, as we find, has been persuaded by the non-compliance of the condition as incorporated by amendment to FIB. The observations of the High Court read as follows:-

"13. The contention of the respondent is that the bid of the petitioners is non-responsive in view of the mandatory clause 6.1(A)(d) 6 (as amended by Amendment no.3) which stipulates that the certificate of registration issued by

CIB is to be submitted along with the bid or latest be provided at the time of tender opening. The bids not accompanied with the CIB certificate at the time of tender opening are to be held as non-responsive."

And again:-

"15. In the present case, the bid submission and opening date admittedly was 14.10.2015. Though the contention of the petitioner is that as on the date they were registered, the certificate of registration was not available with them. Admittedly, the certificate of registration has been issued only on 21.12.2015. On the bid opening date i.e., 14.10.2015, the petitioners did not possess the registration certificate. They clearly do not satisfy the qualifying condition. Even if it were be assumed that the product of the petitioner was registered as on the said date, as the meeting of the CIB had already been held, still it does not help the case of the petitioners as, the petitioners clearly do not conform to Clause 6.1(A) (d) 6 i.e. submission of the certificate of registration along with bid or latest by the bid opening date. Clearly, the bid of the petitioners is non-compliant and is to be held as non-responsive."

11. Being of this view, the High Court dismissed the Writ Petition.

12. We have heard Mr. Vikas Singh, learned senior counsel appearing for the appellants and Ms. Pinky Anand, learned Additional Solicitor General for respondent Nos.1 to 3. None has entered appearance on behalf of the respondent No.4.

13. It is submitted by Mr. Singh, learned senior counsel that when CIBRC had decided to grant the registration certificate and it has put it on the website, it is to be deemed that the certificate had been granted on that date and, therefore, the High Court has erred in treating the bid as non-compliant or non-responsive. It is his further submission that the respondent No.1 has amended the Instructions to Bidders with the sole intention to favour the respondent No.4 as it was the singular bidder and hence, the entire action of the respondents suffers from gross arbitrariness that violates Article 14 of the Constitution.

14. Ms. Pinky Anand, learned Additional Solicitor General, per contra, contends that the amendment was brought into existence to clarify the position as it was a tender of a different nature. She would contend that the registration certificate did not belong to the appellant No.1 but to the appellant No.2 and appellant No.2 had given authorization to appellant No.1 to use the domestic registration of the insecticide product DURANET®; and that did not satisfy the requirement as stipulated in the instructions to bidders. Learned counsel submits that the provisions of the Act do not contain any provision for authorization by one person to another to use its registration. In any way, submits Ms. Pinky Anand, the appellant No.1 had not submitted the requisite registration certificate at the time of submission of the bid and, in that backdrop, the opinion expressed of the High Court cannot be regarded as fallacious. It is also her submission that even the appellant No.1 could not have been a bidder as per clause 5.4 of the tender

conditions. That apart, it is urged that the 4th respondent was not the only bidder but there were six bidders and the amendment was thought of to have clarity which was in public interest.

15. It is noteworthy that the Act has been brought into force to regulate the import, manufacture, sale, transport, distribution and use of insecticides with a view to prevent risk to human beings or animals, and for matters connected therewith. Section 3(e) defines "insecticide" which is as follows"-

"Insecticides" means-

- (i) Any substance specified in the Schedule; or
- (ii) Such other substances (including fungicides and weedicides) as the Central Government may, after consultation with the Board, by notification in the Official Gazette, include in the Schedule from time to time; or
- (iii) Any preparation containing any one or more of such substances;"

16. The competent authority has issued the Schedule which relates to lists of insecticides. Section 4 deals with constitution of the Central Insecticides Board and role of the Board. Section 9 deals with registration of insecticides. Sub-section (3) and Section (3B) of Section 9 being relevant are reproduced below:-

"(3) On receipt of any such application for the registration of an insecticide, the Committee may, after such enquiry as it deems fit and after satisfying itself that the insecticide to which the application relates conforms to the claims made by the importer or by the manufacturer, as the case may be, as regards the efficacy of the insecticide and its safety to human beings and animals, register[on such conditions as may be specified by it] and on payment of such fee as may be prescribed, the insecticide, allot a registration number thereto and issue a certificate of registration in token thereof within a period of twelve months from the date of receipt of the application:

Provided that the Committee may, if it is unable within the said period to arrive at a decision on the basis of the materials placed before it, extend the period by a further period not exceeding six months:

Provided further that if the Committee is of opinion that the precautions claimed by the applicant as being sufficient to ensure safety to human beings or animals are not such as can be easily observed or that notwithstanding the observance of such precautions the use of the insecticide involves serious risk to human beings or animals, it may refuse to register the insecticide.

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(3B) Where the Registration Committee is of opinion that the insecticide is being introduced for the first time in India, it may, pending nay enquiry, register it provisionally for a period of two years on such conditions as may be specified by it."

17. Section 10 provides for appeal against non-registration or cancellation. Section 11 confers power of revision of Central Government. The scheme of the Act, as we find, deals with the procedure in detail.

18. Rule 9 of the Rules deals with licenses to manufacture insecticides. The said Rule is extracted below:-

"9. Licenses to manufacture insecticides:

1. Application for the grant of renewal of a license to manufacture any insecticide shall be made in Form III or Form IV, as the case may be to the licensing officer and shall be accompanied by a fee of rupees fifty for every insecticide for which the license is applied, subject to a maximum of rupees five hundred.

2. If an insecticide is proposed to be manufactured at more than one place, separate applications shall be made and separate licenses shall be issued in respect of every such place.

3. A license to manufacture insecticides shall be issued in Form V and shall be subject to the following conditions namely;

i. The license and any certificate of renewal shall be kept on the approved premises and shall be produced for inspection at the request of an Insecticide Inspector appointed under the Act or any other officer or authority authorized by the licensing officer.

ii. Any change in the expert staff named in the license shall forthwith be reported to the licensing officer.

iii. If the licensee wants to undertake during the currency of the license to manufacture for sale of additional insecticides, he shall apply to the licensing officer for the necessary endorsement in the license on payment of the prescribed fee for every category of insecticides.

iv. An application for the renewal of a license shall be made as laid down in Rule 11.

v. The licensee shall comply with the provisions of the Act and the rules made there under for the time being in force.

vi. The Licensee shall obtain ISI Mark Certificate from Bureau of Indian Standard within three months of the commence of the manufacture.

vii. No Insecticides shall be sold or distributed without ISI Mark Certification.

4. (A) Licensing officer may after giving reasonable opportunity of being heard, to the applicant, refuse to grant any license.

(4-A) No license to manufacture an insecticide shall be granted unless the licensing officer is satisfied that necessary plant and machinery, safety devices and first-aid facilities etc., exist in the premises where the insecticide is proposed

to be manufactured.

5. A fee of rupees five shall be paid for a duplicate copy of a license issued under this rule, if the original is defaced, damaged or lost."

19. The provisions of the Act and the Rules, as it seems to us, constitute a complete code in itself. In this context, we have to see the nature of the decision taken by the Registration Committee of CIB which dealt with the application of appellant No.2 under Section 9(3B) of the Act and approved for provisional registration. We have already reproduced the said decision. The decision stated that it was to be sent to DAC (Department of Agriculture & Co-operation) for according permission for commercialization during provisional registration. In this context, clauses 5.4 and 5.4.1 of Instructions to Bidders become significant. They read as follows:-

"5.4 The Goods to be supplied under the Contract shall be registered with the relevant authority in the supplier's and Purchaser's country. The bidder should submit a copy of the Registration Certificate with its bid as indicated below:

(1) a copy of the Registration Certificate of the Goods for use in the Purchaser's country issued by Central Insecticides Board (CIB).

Note: Bidders are requested to inquire in advance about the registration requirements and procedures in order to avoid any delays due to involvement of various government agencies. Purchaser shall not be responsible for any delay on this account.

5.4.1 The purchaser shall at times cooperate with the successful Bidder to facilitate the registration process within the Purchaser's country to the extent possible. The agency and contact person able to provide additional information about the requirements for registration can be obtained from the website: www.cibrc.nic.in."

20. On a reading of the said clauses, it is graphically clear that the goods to be supplied under the contract has to be registered with the authority for the supplier and purchasers' benefit. Mr. Singh has emphasized on clause 5.4.1 to highlight that the purchaser is under obligation to co-operate with the successful bidder to facilitate the registration process within the purchaser's country to the extent possible. Ms. Pinky Anand would submit that the said clause is meant for generally helping the potential bidders by providing them with name, address and contact persons of various agencies involved in the registration process but it not meant to create an impediment for the owner to put a definite date by which time the registration has to be submitted at the time of submission of the tender.

21. The thrust of the matter is whether the decision by the Registration Committee by itself can be regarded as grant of registration certificate. It is luminescent that its decision to grant registration certificate is subject to conditions. Apart from that, it had not granted any certificate but only a decision was taken. There is a clear distinction between a decision taken and the decision

acted upon or given effect to. Therefore, the appellant cannot claim benefit of the said decision. The appellants cannot lay stress on clause 5.4.1 to avail the benefit of treating itself as a responsive bidder. As far as Instructions to Bidders is concerned, the initial clause was that the bidder must be registered under CIB under the Act and the documentary evidence in this regard shall be submitted along with the bid. Amendment elaborating the same postulates that the registration certificate shall be submitted along with the bid at the time of opening of the tender and if it is not done, the bid shall be held as non-responsive. A submission is advanced by the first respondent that it is a clarificatory condition. As we have already opined, decision by the Registration Committee of CIB to provisionally approve registration does not amount to registration by itself with the CIB. So the condition, as such, was not satisfied under the unamended stipulation. The amended clause only provides about the consequence thereof. It can be stated without any shadow of doubt that even if clause 6 would not have been amended, the first respondent, on the ground of non-production of the registration certificate, would have been legally justified to reject the bid. It is an essential condition incorporated in the Instructions to Bidders. In this context, we may profitably refer to the authority in *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others*, (2006) 11 SCC 548 where a two-Judge Bench, after referring to series of judgments has culled out the following principles:-

- "(i) if there are essential conditions, the same must be adhered to;
- (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- (vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint."

22. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and another*, (2005) 6 SCC 138, it has been held that the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

23. In *Jagdish Mandal v. State of Orissa and others*, (2007) 14 SCC 517, it has been ruled that when the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

24. In *Union of India and another v. International Trading Co. and another*, (2003) 5 SCC 437, it has been held that 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. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. It has been further opined that the meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case.

25. In *Jespar I. Slong v. State of Meghalaya and others*, (2004) 11 SCC 485, this Court stated that fixation of a value of the tender is entirely within the purview of the executive and 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.

26. Keeping in view the aforesaid authorities, we have to consider whether the High Court has fallen into error by not interfering with the grant of contract in favour of the fourth respondent. As the factual analysis would reveal, the appellant No.1 had not filed an application for grant of registration. It was appellant No.2 who had filed it. Be that as it may, the decision dated 31.03.2015 was taken by the Registration Committee of CIB to approve the registration

subject to the condition DAC granting permission for commercialization. That apart, the decision taken by the concerned authority, even if it is put on the website, despite the astute submission of Mr. Singh, would not tantamount to grant of registration certificate. The amendment was made, as we perceive, to clarify the position. We have already stated, even if the amendment was not brought in, the first respondent would have been in a position, by applying objective standards, to treat the appellants' bid as non-responsive and non-compliant. The use of the word "must" adds a great degree of certainty to the same; it is a requisite parameter as thought of by the respondent No.1. The tender was floated for purchase which is needed for the nation. The first respondent along with respondent Nos.2 and 3 were taking immense precaution. In such a circumstance, needless to emphasize, public interest is involved. It cannot succumb to private interest. The action on the part of the respondent Nos.1 to 3 cannot be regarded as arbitrary or unreasonable. By no stretch of imagination it can be construed to be an act which is not bonafide or to have been done to favour the fourth respondent. Nothing has been pleaded that the fourth respondent is not eligible or qualified. In our considered opinion, the essential condition of tender being not met with, the tenderer, the appellants herein, were ineligible and the tender was non-responsive. That apart, the amendment was applicable to all. Additionally, the High Court in the first round of litigation had not held that the registration certificate granted on 31.03.2015 would enure to the benefit of the writ petitioners from the date of the decision of the registration authority, and it had rightly not said so. Judged from any angle, we do not perceive any substance in the grounds raised in this appeal.

27. Consequently, the appeal, being devoid of merit, stands dismissed. There shall be no order as to costs.