

(2012) 09 DEL CK 0155

In the Delhi High Court

Case No : Writ Petition (C) 4647 of 2012

Sumitomo Chemical India Pvt. Ltd.

APPELLANT

Vs

HLL Lifecare Ltd. and Others

RESPONDENT

Date of Decision : 24-09-2012

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2012) 09 DEL CK 0155

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Akhil Sibal with Mr. Deepak Khurana, Mr. Pradeep and Ms. Aditi Sharma, for the Appellant; Parag P. Tripathi Instructed by Mr. Pragyan Sharma, Rupesh Gupta, Siddhartha, Advocates for R-1, Mr. Neeraj Chaudhari, Advocate for UOI, Ms. Mini Pushkarna, Advocate for MCD with Mr. S. Tyagi, Advocate for R-3 to R-5, Mr. Rajiv Nayar Instructed by Ms. Kanika Agnihotri, Vaibhav Agnihotri and Mr. Karan Minocha, Advocates for R-6, for the Respondent

Judgement

Pradeep Nandrajog, J.—The first respondent, HLL Lifecare Ltd. is an agency nominated by the erstwhile Municipal Corporation of Delhi (MCD), which now stands trifurcated into : (i) North Delhi Municipal Corporation, (ii) South Delhi Municipal Corporation, and (iii) East Delhi Municipal Corporation, to procure biolarvicide i.e. *Bacillus thuringiensis* var *israelensis*. And as we were made to understand, the biolarvicide can be either an "Aqueous Solution" or a "Whetable Powder" i.e. it could be either in liquid form or in solid form. The issue pertains to the Qualification Criteria stipulated by respondents No. 1 to 5, while publishing the Notice Inviting Tender; requiring offers to be made as per tender documents, and we highlight that respondent No. 2 is the Ministry of Health and Family Welfare, Government of India and respondents No. 3 to 5 are the three Municipal Corporations in Delhi. Respondent No. 6 is a private party, which admittedly would be the sole bidder technically qualified as per the Notice Inviting Tender; notwithstanding the fact that respondent No. 1 has yet not published the list of tenderers who have qualified. But, parties conceded that as per the Qualification

Criteria prescribed, the petitioner would not qualify as an eligible bidder and so would none else except respondent No. 6.

2. The Qualification Criteria, as per the Notice Inviting Tender, reads as under:-

Qualification Criteria (QC)

(Refer to clause 7 of ITB & Clauses 4 & 5 of SCC)

1. The bidder must declare whether they are quoting as a manufacturer or as the authorized agent of the manufacturer.

a. If the bidder is participating as a manufacturer of the product, they should furnish

i. Valid manufacturing license for manufacturing this product on the date of bid opening.

ii. Valid CIB registration on certification on the date of bid opening.

b. If the bidder is participating as an authorized agent on behalf of manufacturer they should submit

i. Valid manufacturing license of the manufacturer on whose behalf the bidder is participating as authorized agent.

ii. Valid CIB registration certification of the agent on the date of bid opening for importing and marketing.

iii. Manufacturer's authorization certificate as per the format given in section VIII. The credentials of a person signing this authorization letter shall be enclosed (board of resolution under common seal of company)

2. Deleted.

3. The bidder must have received and successfully executed the supply order in India to the extent of minimum 25% of the quantity of Bti (AS)/Bti (WP) {as detailed in Technical Specifications (Section VI)} indicated in Schedule of Requirements (Section V) in any one year during the last three years prior to the date of tender opening viz 28.06.2012 (first year from 28.06.2012 to 29.06.2011, 2nd year from 28.06.2011 to 29.06.2010 and 3rd year from 28.06.2010 to 29.06.2009). In support of this, data on past performance should be submitted as per proforma in Section VIII. Supplies made to Whole Sale stockiest, Distributors, Own Agents, Sister Company will not be considered for counting 25% performance.

4. Deleted.

Note:

The Bidders may please note that their bids will be rejected if they fail to comply with the Qualification Criteria as above.

3. Before noting what is alleged to be offending in the Qualifying Criteria, we note that the petitioner had earlier on filed a writ petition which was registered as WP(C) No. 3787/2010 on the same subject, which was disposed of by a Division Bench of this Court vide order dated June 27, 2012. Noting the stand taken by learned counsel for respondent No. 1 that the said writ petition would be treated as a representation to it and a decision would be taken. We highlight that the writ petition was filed by the petitioner as it had learnt about the tender specifications and had made a representation to respondent No. 1 that the Qualification Criteria was wrongly drawn up by ignoring material facts which were relevant to the decision. It is not a case where the petitioner has participated in the tendering process and has thereafter raised a grievance.

4. The decision taken by respondent No. 1 is to stand-by the Qualification Criteria. The decision finds a reflection in the minutes dated June 11, 2012, annexed as Annexure P-2 to the instant writ petition.

5. Thus, at the outset we may note and reject the argument advanced by learned counsel for the respondents that the instant writ petition is liable to be dismissed as barred by res judicata; for the reason the earlier writ petition was not decided on merits. On the contrary, the decision taken, vide order dated June 27, 2012 was that the said writ petition would be treated as a representation and a decision taken by respondent No. 1. The decision taken, as reflected in the minutes dated June 11, 2012, which we find precedes the date of the order dated June 27, 2012, if required to be treated as the decision which would satisfy the order dated June 27, 2012, would be a fresh cause of action accruing to the petitioner; and alternatively, if the stand taken by the respondents is that the said decision preceded the order dated June 27, 2012, then the reason for the writ petition to be maintainable would be that the respondents did not inform the Court that they had already taken a decision and thereby misleading the Court to dispose of the earlier writ petition, thereby requiring it to be held that the petitioner is entitled to a decision on merits.

6. Under the National Vector Borne Disease Control Program, partly funded by the Government of India, biolarvicide has been decided to be used as a substitute for chemicals to eradicate various species of mosquitoes while still in the larval stage all over India. All Governmental and Municipal Bodies concerned with Municipal Hygiene and Control/Eradication of Mosquitoes, have been mandated by the Government of India, as per Office Order No. 7-10/2009-10-NVVDGP(UMS)/Gen. Corp. dated April 01, 2010 that only larvicides and adulticides approved by Technical Advisory Committee and registered with Central Insecticide Board, list enclosed therewith, would be used to eradicate mosquito larvae. Two biolarvicides as noted in paragraph 1 above have been listed as approved.

7. The tender in question invites bids for supply of either 2,32,000 litres of *Bacillus thuringiensis* var *israelensis* (Bti)(AS) or 290 MT *Bacillus thuringiensis* var *israelensis* (Bti)(WP); and for the benefit of the reader of our opinion, we

may highlight that "AS" stands for "Aqueous Solution" and "WP" stands for "Whettable Powder".

8. The grievance of the writ petitioner is to the stipulation vide Note No. 3 in the Qualification Criteria; not in its entirety, but, only the last sentence thereof: "Supplies made to Wholesale Stockists, Distributors, Own Agents, Sister Company will not be considered for counting 25% performance." It is urged that a wholesome exclusion of supplies made to Wholesale Stockists, Distributors, Own Agents, Sister Company without taking into account further end use sales made by them is arbitrary on account of excluding a matter which is relevant to be considered while settling the terms of the tender.

9. As per the petitioner, to lay down a Qualification Criteria is within the right of the buyer or its procurement agency, for the reason, evaluation of tender bids is a fairly complex and cost consuming process; a person, be it a private individual or a public body, intending to purchase a commodity would certainly be entitled to prescribe Qualification Criteria so that financial bids of only those are evaluated who fulfil the Qualification Criteria. The petitioner further concedes that many factors would constitute the basket of a Qualification Criteria, and would highlight that one factor could be the capacity of the intending supplier to be able to supply the tendered quantity. In other words, a procurer/buyer of a product would be entitled to lay down a condition pertaining to a Qualification Criteria, which would encompass a relevant factor pertaining to the capacity of a tenderer to supply the goods. For if, a person not having the requisite capacity and infrastructure, if given the contract, is likely to default. Damages may not be an adequate compensation. In the instant case, the biolarvicide has to be used by Municipal Agencies to eradicate mosquito menace and thus we wonder : What could be the measure of damages which the Corporations can claim, if there is default in supply of the biolarvicide if a mosquito menace results in an epidemic situation, where citizens of Delhi suffer either from dengue or malaria. The petitioner, thus, rightly concedes, the right of respondent No. 1 to specify a Qualification Criteria pertaining to the capacity of the tenderers to supply the biolarvicide. The petitioner also concedes that there could be various methodologies adopted to determine the capacity of a tenderer; for example : the licensed capacity. The petitioner concedes that past performance can also be adopted as a criterion to test the capacity of a tenderer.

10. A perusal of the Qualification Criteria, vide Note-3 brings out that pertaining to the capacity of the tenderer, respondents No. 1 to 5 have chosen to adopt the criteria of past performance. 25% of the tendered quantity being successfully executed in India in any one of the three prior years to the date of tender opening is the criteria prescribed.

11. So far, the parties are not at variance with each other.

12. The variance is : While considering the past performance, to 100% exclude supplies made by manufacturers to Wholesale Stockists, Distributors, Own

Agents and Sister Concerns. Even in this area of dispute, the petitioner carves out a small area of dispute, by conceding that it would be rational and reasonable to exclude sales made to Wholesale Stockists, Distributors, Own Agents and Sister Concerns provided there are no further end use sales made by them.

13. The petitioner asserts that the criterion adopted by the respondents i.e. past performance, no doubt is a good criteria, but the wholesome exclusion, as above, is unreasonable on account of the same ignoring the fact that it is end use sale which matters while determining a capacity to supply. The petitioner asserts that the condition is so designed so as to ensure that a single bidder i.e. respondent No. 6 survives. Not that the petitioner says that a tender condition which results in a sole bidder being left would be unreasonable, but would assert the petitioner, that insofar it is practicable to do so and if the object of the tender is achieved, terms of a tender pertaining to Qualification Criteria should be so framed that the purpose is achieved and at the same time a single bidder surviving is abjured.

14. The contention of the petitioner was that in today's complex world of marketing, where various marketing strategies are adopted by companies; and there being no uniform marketing strategy by a company, for the reason regional requirements may warrant different sales and marketing strategies to be adopted, it would be unreasonable to exclude supplies made by manufacturers to Wholesale Stockists, Distributors, Own Agents and Sister Concerns in a wholesome manner, ignoring further end user sales effected by the Wholesale Stockists, Distributors, Own Agents and Sister Concerns. To put it pithily, learned counsel for the petitioner submitted that the object/purpose of a past performance sale is to test the manufacturing/supply capacity of a tenderer. Keeping in view the possibility of puffed up sales, for which puffing up the Wholesale Stockists, Distributors, Own Agents and Sister Concerns may co-operate with a manufacturer by fabricating documents, which may be difficult to detect or the process of detection may be cumbersome; and keeping in view that in business, sales and purchases have to be effected time-bound, it may be reasonable, surely not irrational, not to take into account supplies made to Wholesale Stockists, Distributors, Own Agents and Sister Concerns; but to exclude supplies made by them to end users, with proof of sale to end users would be unreasonable because of it ignoring a relevant fact which has to be kept in mind while taking the decision. It was urged that the purpose of the tender condition was to test the capacity of the bidders in relation to supplies made in the past and thus any condition which excluded a supply to the end user, whatever be the channel through which the goods flowed to the end user, would be unreasonable.

15. The petitioner is opposed by the respondents by urging that in the field of contract and in particular to a tender condition, the Executive has an unfettered discretion to choose the best alternative available, and as long as a condition of the alternative available was not unreasonable i.e. irrational, irrationality being of

a kind as is commonly understood as *Wednesbury's Unreasonableness*", merely because an alternative was better, would not render what was adopted as being unreasonable. Courts would not enter the domain of the Executive; and would leave it to the Executive decision. It was thus urged that the tender condition was sacrosanct.

16. To be fair to learned senior counsel for the respondents they did concede that there was a valid point urged by the petitioner; but trivialize the same as a mere valid point by highlighting that as per recognized principles of law pertaining to judicial review with respect to tenders, the argument of a viewpoint being valid or a better viewpoint was neither here nor there; as long as the tender condition passed the test of reasonableness on the anvil of *Wednesbury's Unreasonableness* principle.

17. Learned counsel for the parties had cited decisions, for and against, all of which related to tender stipulations, and were at pains to draw our attention to words and phrases used in the decisions.

18. We are not noting the said decision because we do not intend to make a catalogue. But would simply highlight that on the subject of discretion, in the context of reasonableness and unreasonableness, in prescribing the specifications in the conditions of a tender, the word "fair" finds a liberal sprinkling in the phrases used; and we record that any analysis of the decisions, with reference to the use of the word "fair" would be a fairy tale analysis if we have to opine as to which opinion is the "fairest of them all".

19. Let us trace the roots to the basics i.e. the seed.

20. In today's environment, with scams and scandals galore, we think, if the past precedents permit and we are able to inform ourselves with the logic of the past, the issue of reasonableness in Executive decisions impacting finances of the State needs to be culled out with precision. But we caution ourselves of not being overzealous to carve out new contours of unreasonableness.

21. The first approximation, loosely said, to a definition of Administrative Law is to say: That it is the law relating to the control of governmental power. As a second approximation, loosely said, Administrative Law would be the body of general principles which govern the exercise of powers and duties by public authorities.

22. What gives unity to the varied facets of Administrative Law, is the quest for administrative justice. One connecting thread which runs throughout, in the quest for administrative justice, is that the public must be able to rely on the law to ensure that administrative power is used in a way conformable to the public idea of fair dealing and good administration.

23. The public debate in the newspapers and media channels would reveal that the more the power which government wields, the more sensitive is the public opinion to any kind of abuse or unfairness in the exercise of that power.

24. Whereas appellate power is conventionally exercised to determine: Whether the decision appealed against is right or wrong; the judicial review power, in the domain of administrative law, is concerned not with right or wrong but whether the decision making process is lawful or unlawful. But in actual practice, one finds that the distinction between the "merits" and "legality" is not so rigid in practice. The Courts are repeatedly drawn into passing judgments on the merits of the actions of public authorities, and this is the reason why perhaps, Courts are exposed to the charge that they are exceeding their constitutional function.

25. But unless the Courts are prepared to act boldly, they can afford only feeble protection against administrative wrong doing.

26. The ultra-virus doctrine, enables the Court to exercise judicial review over administrative decisions, but the doctrine is not confined to cases of excess of power; it embraces: abuse of power : as where something is done unjustifiably, for a wrong reason or by a wrong procedure.

27. It is a cardinal axiom that every power has a legal limit, however wide the language of the power may be. And when a power is vested, it is intended to be used fairly and with due consideration of rights and interests adversely affected.

28. It is true that administration and governance, be it by way of exercising statutory power or administrative power would require a discretion to be vested in the decision maker, for the reason, future is unknown and problems may be encountered which were not conceived of. Thus, it can safely be said that discretion is an element of every power. It is for this reason that this power i.e. of discretion, must find in its exercise, a reasonableness with the duty.

29. In the 16th Century, in the decision popularly known as *Rooke's Case* (1598) 5 Co. Rep. 99b, legal concept of discretion was characteristically explained as:-

For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, talis discretion discretionem confundit.

30. Coke C.J., in an opinion expressed in the year 1609, had the following to say on discretion:-

for as by the authority of Littleton, discretio est discernere per legem, quid sit justum, that is to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion.

31. In the opinion reported as (1995) A.C. 578 *Roberts V. Hopwood*, Lord Wrenbury, on an issue which revolved around reasonableness, observed:-

A person whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his

reason, ascertain and follow the course which reason directs. He must act reasonably.

32. Discretion necessarily implies good faith in discharging the duty; there is always a perspective within which a discretion is intended to operate, and any clear departure from its lines or objects, in our opinion, would be just as objectionable as fraud or corruption.

33. While defining the standard of reasonableness the Courts must tread cautiously. Judges must resist the temptation to draw the bounds too tightly, merely according to their own opinion and must strive to apply objective standards, which leaves to the deciding authority the full range of choices which law is presumed to have intended. This would mean that a decision which is within the confines of reasonableness would not invite a further look into its merits on the subject whether something else is more reasonable.

34. Judges have used different words and expressions while speaking of reasonableness and unreasonableness, and the most celebrated decision which is considered the locus classicus is the one reported as (1948) 1 K.B. 223 "Associated Provincial Picture Houses Ltd Vs. Wednesbury Corporation". (And the principle laid down therein is popularly known as "The Principle of Wednesbury's Unreasonableness") and in our opinion misunderstood to mean that it must be so shocking to the judicial conscience, that the Judge must faint crying: "Oh My God. It is outrageous. It defies my sense of logic". Only then would the decision be unreasonable.

35. This is not so. In Wednesbury Corporation's case the passage written by Lord Greene M.R. which is cited as laying down the principle of unreasonableness reads (at page 229) as under:-

It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short V. Poole Corporation* (1926) Ch. 66 gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

36. A perusal of the passage would reveal that the learned Judge has clearly

opined that in the exercise of discretion the word unreasonable is used in a comprehensive sense and has thereafter explained that it would encompass: (i) A general description of things that must not be done; (ii) The requirement to direct oneself properly in law while exercising discretion by drawing ones attention to the matters which one is bound to consider; and (iii) To exclude from consideration matters which are irrelevant to what has to be considered. Listing the three, the learned Judge has clearly written: "If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably". Thereafter, using the word "similarly", the learned Judge has highlighted that something done so absurdly that no sensible person could ever dream that it lay within the powers of the authority, would also be a situation of unreasonableness.

37. Unfortunately, the former part of the passage has often been ignored, and it is only the latter part which has been highlighted in some judgments, thereby giving an impression that the Wednesburys Principle of Unreasonableness would only be when while exercising discretion the decision is shockingly arbitrary. This narrow reading of the opinion of Lord Greene M.R. runs clearly contrary to what the learned Judge has written in the preceding part of the paragraph and the principle of unreasonableness to be found in Administrative Law. The decision brings out that the genus "Unreasonableness" embraces many species, one of which is gross absurdity of the kind that no reasonable person could ever dream that it lay within the power of the decision maker. To wit, condition No. 3 of the Qualification Criteria may be used as an example. As per the said condition the criteria prescribed is that the bidder must have received and successfully executed the supply order in India to the extent of minimum 25% of the tender quantity in any one year during the last three years prior to the date of the tender viz. first year from 28.06.2012 to 29.06.2011, 2nd year from 28.06.2011 to 29.06.2010 and 3rd year from 28.06.2010 to 29.06.2009; and suffice would it be to state that it would be grossly unreasonable to express the three years prior by writing 2012-11, 2011-10 and 2010-09. It is akin to a man walking in the wrong direction and retracing his steps back by walking backward. Such behaviors where the man retraces his steps walking backwards would be shockingly absurd and irrational.

38. Let us note the expressions noted by us in the foregoing paragraphs: (i) Conformable to the public's ideas of fair dealing; (ii) When a power is vested it is intended to be used fairly and with due consideration of rights and interests adversely affected; (iii) Discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion; (iv) Use of his reason, ascertain and follow the course which reason directs; (v) A person entrusted with discretion must, so to speak, direct himself properly in law; (vi) He must call his own attention to the matters which he is bound to consider and exclude matters which are irrelevant to what he has to consider.

39. All these expressions embrace the idea of fair dealing.

40. Thus, we could evolve a simple test on the subject of unreasonableness. It

would be: If a fact or a circumstance does not fairly and reasonably relate to the subject of the decision, and it being factored in the decision, or vice versa, the decision would be unreasonable. Thus, the exercise of discretion which results in the decision would be unreasonable.

41. It has to be for the reason that the test of reasonableness is : The criteria of the discretion must have a reasonable nexus with the object of the discretion. If the nexus between the criteria of the discretion and the object of the discretion snaps, the exercise of discretion would be unreasonable.

42. In the decision reported as (2005) 5 SCC 287 Monarch Infrastructure Pvt. Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation & Ors. in Para 11 it was observed:-

Broadly stated, the Courts would not interfere with the matter of administrative action or changes made therein, unless the government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala-fide.

43. A Division Bench of this Court, in the decision reported as Gharda Chemicals Limited Vs. Central Warehousing Corpn., held a pre-qualification condition having no nexus with the stated object to be unreasonable and hence quashed the same in the Notice Inviting Tender.

44. We have thus been able to identify, at least two past precedents, on the subject of administrative action which speaks of the nexus of the policy adopted with the object it seeks to achieve; a principle of law which students of the Constitutional Law normally associate with Article 14 of the Constitution of India in the context of reasonable classification.

45. Reverting to the facts of the instant case, we highlight that the tender in question requires the Performance Statement to be filed as per proforma annexed and requires: "Attach a certificate from the Purchaser/Consignee in the format-A attached."

46. Format-A reads as under:-

Certified that M/s. _____ (name and address of the bidder) supplied us _____ (indicate quantity) of _____ (indicate name of the goods) against our order No. _____ dated _____ (please indicate order No. and date as figuring in the Performance Statement). The goods were supplied over to us and accepted by us on _____ (indicate date) to our entire satisfaction. A copy of contract is enclosed.

47. Undisputedly, the guidelines framed by the Government of India, which we find having a reflection in the instant tender documents, and for that matter even under other tender documents, filed by way of comparison and have been collectively annexed as Annexure-H (Collectively) (pages 422 - 626 of the writ record) would reveal that where a person other than manufacturer submits a bid for the product in question i.e. biolarvicide, manufacturing license and

certification from the authorities concerned have to be enclosed. In other words, the proof of end user certificate, where sales of the product in question are made through Wholesale Stockists Distributors, Own Agents and Sister Concerns is with reference to material purity whereof needs no investigation. We emphasize by referring back to paragraph 3 above, where we have quoted the terms of the Quality Criteria and would highlight that the terms thereof bring out as above noted in the preceding paragraph. Sub-para (b) of Term 1 reads:-

b. If the bidder is participating as an authorized agent on behalf of manufacturer they should submit

i. Valid manufacturing license of the manufacturer on whose behalf the bidder is participating as authorized agent.

ii. Valid CIB registration certification of the agent on the date of bid opening for importing and marketing.

iii. Manufacturer's authorization certificate as per the format given in section VIII. The credentials of a person signing this authorization letter shall be enclosed (board of resolution under common seal of company).

48. Thus, with reference to past performance, whenever persons other than manufacturers have effected end use sales, at the time of obtaining supply orders these persons had to submit valid manufacturing licence of the manufacturer as also a valid CIB registration certificate and additionally the manufacturer's authorization certificate. Thus, for the product in question, end use sales are always with reference to the source of the manufacture, and if we may say no person who is not a manufacturer can sell the product to an end user without documentary proof of linkage with the manufacturer. The reason is obvious. The product is a biolarvicide, manufacture and sale whereof can only be in accordance with the list registered by the Central Insecticide Board.

49. What is the object of inviting bids by way of tenders?

50. If they relate to supply of goods, obviously to get the goods at the most competitive rates.

51. When would there be a competition?

52. If there are more than one players.

53. Of the many objects to invite offers by publishing Notice Inviting Tenders, one object is to have a plurality of players so that a choice can be made of the most competitive bidder. Thus, notwithstanding it not being unreasonable or irrational to have a single bidder, an endeavor ought to be made to settle the terms on which bids are invited, to ensure that a single bidder does not remain in the fray. The object of inviting offers i.e. having plurality of players should be attempted to be achieved. We caution. We do not intend to say : Must be achieved. Thus, of the many factors, one factor which has to be kept in mind while settling the terms of a Notice Inviting Tender is to try and ensure, insofar it

is possible, that the conditions are not so stringent that a single bidder is left to compete. A single bidder competing would be anti thesis of competition.

54. In relation to a Qualifying Criteria which relates to the manufacturing capacity or the supplying capacity of the tenderer, if past performance principle is to be adopted, all relevant factors pertaining to past performance must be kept in view and must be accounted for and should find a reflection in the Qualifying Criteria, otherwise the same would foul the dictum: "He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider" in the opinion of Lord Greene M.R. in *Wednesbury Corporation's* case. Such a decision would run contrary to the public idea of fair dealing and good administration and to accept to the contrary would permit insidious decisions, masquerading as discretions, abusing power to settle tender conditions to exclude fair competition. It would be a case of colourable glosses and pretences and would be the crooked cord of private opinion, which the vulgar call discretion.

55. To exclude wholesomely sales made in the past by Wholesale Stockists, Distributors, Own Agents and Sister Concerns, in the case of the instant goods, is clearly arbitrary and negates fair dealing and good administration, because the purpose of past performance is to test the ability of the bidder to effect the supplies as per the tender; there may be a good reason to begin by excluding sales to Wholesale Stockists, Distributors, Own Agents and Sister Concerns on account of the possibility of manipulation, but the wholesome exclusion by even excluding further end use sales defeats the object of the purpose. We need not reaffirm by relisting the submissions made by the learned counsel for the petitioner which we have noted in para 14 above. We adopt them as our reasoning. It has to be kept in mind that a contra-reasoning would result in a single bidder i.e. respondent No. 6 left to compete.

56. We issue a note of caution. Our conclusion aforesaid is based on the analysis of the peculiar facts of this case pertaining to the sale of biolarvicide and the linkage which we have found when persons other than manufacturers sell biolarvicide, the linkage being to the manufacturer and in said context finding a relevant fact i.e. the end user sale being ignored and thus the discretion being exercised unreasonably.

57. We conclude by quashing the last line of Note-3 of the Qualifying Criteria i.e. the sentence : "Supplies made to Whole Sale stockiest, Distributors, Own Agents, Sister Company will not be considered for counting 25% performance."

58. Since we cannot legislate, we are not directing the respondents to modify the sentence to read: "Supplies made to Whole Sale stockiest, Distributors, Own Agents, Sister Company other than to end users will not be considered for counting 25% performance".

59. The respondents would be free to suitably amend the term in the tender keeping in view our present decision. The further course pertaining to the

purchase would be chartered by respondent No. 1 as per the present decision and if need be by extending the date for further bids to be submitted in terms of the amended "Qualification Criteria".

60. Noting that different Municipalities, in the various cities in India, all of whom are acting under the National Vector Borne Disease Control Program and are substantially funded by the Government of India are having different criteria pertaining to Qualification Criteria, which is evidenced from Annexure-H (Collectively) filed along with the writ petition, we would recommend to the second respondent to try and build consensus on uniform conditions in the tenders floated by different Municipalities while purchasing biolarvicide. No costs.