

Inducare Pharma Private Limited vs Chief Executive Officer, Zila ... on 1 November, 2023

2023:BHC-AS:32948-DB

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11762 OF 2023

Inducare Pharma Pvt. Ltd.
A private limited company
incorporated under the
Provisions of the Companies Act,1956
having its corporate office at
803, Kumar Surabhi, Pune-Satara Road,
Swargate, Pune - 411009

..... Petitioner

Vs.

1 Chief Executive Officer,
Zilla Parishad, Ratnagiri
Dr. Babasaheb Ambedkar Bhavan
Malnaka, Ratnagiri - 415612

2 State of Maharashtra
Mantralaya, Madam Cama Road,
Hutatma Rajguru Square,
Nariman Point,
Mumbai - 400032.

..... Respondents

Mr. V. P. Sawant, Senior Advocate with Mr.Nikhil Patil I/b.
Mr. Veerdhaval Kakade for the Petitioner

Mr. Abhay Khandeparkar, Senior Advocate a/w. Mr. A. V.
Pawaskar for Respondent No.1.

Mr. M. M. Pabale, AGP for Respondent No.2 - State

CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.

RESERVED ON : OCTOBER 27, 2023
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JUDGMENT (PER : CHIEF JUSTICE)

1. Heard Mr. V. P. Sawant, learned Senior Advocate representing the Petitioner, Mr. Abhay Khandeparkar, learned Senior Advocate representing Respondent No.1 and Mr. M. M. Pabale, learned AGP representing Respondent No.2 - State of Maharashtra.

2. By means of this Writ Petition, the Petitioner, who is a Company and is engaged in producing wide range of ayurvedic medicines, cosmetics and nutraceuticals, assails the validity of tender condition No.8 of the e-tender No.1/2023-24 published on 22nd August 2023 inviting bids for supply of Micro-Nutrients Supplements Granules (hereinafter referred to as the 'Granules') in Ratnagiri District at Anganwadis to be administered to children between 3 to 6 years of age and also to pregnant and lactating women. The e-tender floated is a tender for rate contract and has invited bids for determining the rate of supply of item-wise invoice.

3. The impugned tender condition No.8 with its English translation is quoted below:

11762.23-wp.docx "8- fufonk/kkjdkl fufonsrhy lkfgR;kae/khy lw=kauqlkj loZ ?kVd vl.kkjs lw{e iks"kd rRokaps iwjd xzWU;qYl mRiknu 'kkldh; foHkkaxkl xr rhu o"kkZr ,dw.k fdeku :- 150 y{k ewY;kpk lek/kkudkj d iqjoBk dsY;kpk vuqHko vl.ks vko';d vkgs-lnj vuqHko n'kZo.kkjs iqjoBk vkns'kkae;/s iqjoBk dj.;kr vkysY;k lkfgR;kaps ri'khy] jDde o vkfFkZd o"kZ ;k ckchapk lekos'k vl.ks vko';d vkgs- 1/4v'kh bZ&fufoknk o iqjoBk vkns'k] tj ejkBh fdaok baxzth O;frfjDr vU; Hkk"ksr vLY;kl ;k nLr,sotkaps ejkBh fdaok baxzth Lo;alk{kkafr vuqokn eqG nLr,sotkalkscr viyksM dj.ks vko';d vkgs-1/2"

"8. The bidder must have experience of successful supply of micro-nutrient supplement granules having all ingredients in the formulae of the tender products to the Government Department of value of not less than a total Rs.150 lacs in the last three years. The supply orders indicating such experience must mention details of the products supplied, the value of supplies and financial year in which the supplies were made (if e-tender or supply order is in any language other than Marathi or English, then a self attested Marathi translation must be uploaded along with the original documents)."

4. Facts in brief, which are essential for proper adjudication of the issues in this Writ Petition are noted below.

5. On 18th July 2023, the Chief Executive Officer, Zilla Parishad, Ratnagiri - Respondent No.1 published e-tender for supply of Granules. It is stated that the Petitioner wrote a letter to Respondent No.1 raising certain objections to the impugned tender condition No.8. It is further stated that on 24 th July 11762.23-wp.docx 2023, a pre-bid meeting was held and the objections raised by the Petitioner in respect of the impugned tender condition No.8 were rejected. Technical bid was opened on 14 th August 2023 and out of four participating tenderers, only one tenderer viz. M/s.Pharmaveda India Pvt. Ltd. was found to be technically eligible. Since only one bidder had technically qualified, on 18 th August 2023, the e-tender published on 18 th July 2023 was cancelled and it was further decided by Respondent No.1 that tender shall be re-invited in terms of the provisions contained in Clause 4.4.3.1(c) of the Government Resolution dated 1 st December 2016.

6. The e-tender was accordingly republished on 22 nd August 2023. The Petitioner, along with other tenderers also submitted its bid pursuant to the e-tender notice dated 22nd August 2023. As per the submission of the learned Senior Advocate for the Petitioner, the Petitioner wrote a letter on 22 nd August 2023 to Respondent No.1 and raised objection to the impugned tender condition No.8 and made a request to relax the same. It is also stated in the Writ Petition that again on 4th September 2023 the Petitioner wrote a letter to Respondent No.1 reiterating its request to relax tender condition No.8. It is further stated by 11762.23-wp.docx the Petitioner that in the pre bid meeting held on 4 th September 2023, the objections raised by the Petitioner were rejected by Respondent No.1.

7. Before the tender process could be finalized, a corrigendum was published by Respondent No.1 on 5th September 2023 extending the last date of submission of bids from 5 th September 2023 to 14th September 2023 with the further information that bids shall be opened on 15th September 2023 at 4.00 p.m.

8. It is to be noticed that the instant Writ Petition was filed by the Petitioner on 15th September 2023 i.e. after the last date of submission of the bid which was 14 th September 2023. It is also worthwhile to note at this juncture itself that the instant Writ Petition challenging the tender conditions has been filed by the Petitioner though it has participated in the bid process pursuant to the e-tender notice in question.

9. Shri Khandeparkar, learned Senior Advocate representing Respondent No.1 has, apart from making submissions in opposition to the merit of the claim of the Petitioner, also vehemently argued that this Writ Petition ought not to be entertained by the Court for the reason that it is settled principle of law that one who participates in the tender process cannot be 11762.23-wp.docx permitted to challenge the conditions of the tender. His submission is that the Petitioner having participated in the tender process pursuant to the e-tender notice in question is non-suited to institute the proceedings of this Writ Petition wherein a challenge has been made to the tender condition published along with notice inviting tenders, by Respondent No.1.

10. Shri V. P. Sawant, learned Senior Advocate representing the Petitioner however, has strongly refuted the aforesaid objection raised by Shri Khandeparkar, learned Senior Advocate representing Respondent No.1, regarding maintainability of the Writ Petition and has submitted that as a matter

of fact in view of the law laid down by a Division Bench of this Court in the case of Gypsum Structural India Pvt. Ltd. Vs. Brihanumbai Municipal Corporation and Others,¹ for challenging a tender condition, the Petitioner would not have locus standi unless he had participated in the tender process. He has also placed reliance on another judgment of Calcutta High Court in the case of Subir Ghosh Vs. State of West Bengal and Others². Shri Sawant, learned Senior Advocate has submitted, inter alia, that 1 2023 SCC OnLine Bom 683 2 2020 SCC OnLine Cal 2213 11762.23-wp.docx the impugned tender condition is nothing but an endeavour on behalf of Respondent No.1 to create a monopoly and that it scuttles the competitive bid process. He has further argued that the very purpose of inviting bids is to ensure that there is competition in the matter of allotment of Government largesse and impugned tender condition not only confines the competition but it, in fact, is arbitrary, unreasonable and without any rationale. He has also argued that the impugned tender condition runs foul to clause 4.4.1.2 of the Government Resolution dated 1st December 2016 which clearly stipulates that objection of selective process is to attract reputed and competent agencies and that the purchasing office shall not mention any such requirement due to which only limited bidders will take part in the purchase process and discriminating in nature.

11. It has further been argued on behalf of the Petitioner that the impugned tender condition No.8 is tailor-made to suit some particular supplier and to prevent participation of the Petitioner. It has also been argued that the impugned tender condition does not have any nexus with the object sought to be achieved by floating the e-tender in question. Shri Sawant, learned Senior 11762.23-wp.docx Advocate has also submitted that in the tender notices for supply of Granules published by other Zilla Parishads, such as Nashik Zilla Parishad and Aurangabad Zilla Parishad, no such condition was stipulated. Further contention of the learned Senior Advocate for the Petitioner is that Respondent No.1 is an instrumentality of the State and thus, it carries an obligation to act fairly and reasonably as per the requirements of Article 14 of the Constitution of India and since in this case the impugned tender condition is absolutely arbitrary and unreasonable, it is violative of Article 14 of the Constitution of India.

12. As observed above, Shri Khandeparkar, learned Senior Advocate representing Respondent No.1, has vehemently opposed the Writ Petition by submitting that the Petitioner having participated in the bid process cannot be permitted to challenge the bid condition. In support of his submission, reliance has been placed by Shri Khandeparkar, learned Senior Advocate on various judgments. He has relied upon the judgment of this Court in the case of Paldewar Prashant Agro Tech Pvt. Ltd. through its Director Sow. Nagalaxmi Prashant Padewar Vs. Government of Maharashtra 11762.23-wp.docx through its Secretary and Another³ wherein it has been clearly held that having participated in the tender process, it will not be open for the party to challenge the terms and conditions of the tender. Reliance has also been placed on the judgment of the Hon'ble Supreme Court in the case of Tata Cellular Vs. Union of India⁴ wherein it has been held that in such matters it is the duty of the Court to confine itself to the issues, (i) whether the decision making authority exceeded its powers, and (ii) whether the decision making authority committed an error of law or it has misused its powers or has committed breach of rules of natural justice or has reached a decision which no reasonable Tribunal would have reached. Shri Khandeparkar, learned Senior Advocate has also categorically submitted that framing of tender condition lies in the realm of the authority who has floated the tender and unless and until the tender conditions are absolutely arbitrary or contrary

to any statutory provisions or have been tailored made to favour any individual, this Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, will not interfere to unsettle such a tender condition. Shri Khandeparkar, learned Senior Advocate has placed heavy 3 2021 SCC OnLine Bom 9078 4 1994 (6) SCC 651 11762.23-wp.docx reliance on the judgment of the Hon'ble Supreme Court in the case of Michigan Rubber (India) Ltd. Vs. State of Karnataka and Ors.5, wherein it has been held, inter alia, that in the matter of formulating conditions of tender document and awarding a contract, greater latitude is required to be conceded to the authority floating the tender unless the tendering authority is found to have acted maliciously.

13. During the course of arguments, the judgment in the case of Meerut Development Authority Vs. Association of Management Studies and Anr.6 has also been cited to buttress the submission that the tender conditions are not open to judicial scrutiny unless action of tendering authority is found to be malicious and is misuse of any statutory power and further that if in a petition under Article 226 of the Constitution of India any interference in a contractual matter is called upon, the Court should be concerned only with the manner in which the decision is taken and that it cannot examine details of the terms of contract entered into by public bodies or State.

14. Shri Khandeparkar, learned Senior Advocate has also 5 (2012) 8 SCC 216 6 (2009) 6 SCC 171 11762.23-wp.docx refuted the claim of the Petitioner on merits by submitting that as per its own admission, the Petitioner is not eligible for qualifying in tender, as it does not fulfill condition No.8. It has also been argued that the Petitioner does not have required license as per the tender condition i.e. license to manufacture Granules for pregnant and lactating women and for young children aged between 3 to 6 years. It has also been argued that clause 4.4.1.2 of Maharashtra State Procurement Rules embodied in Government Resolution dated 1 st December 2016 mandates the prior experience of like nature as one of the pre- qualification criterion. According to him, the minimum qualification for the bidder, experience and number of works successfully completed of like nature are required to be fixed to ensure quality and timely completion of work. Respondent No.1 categorically denies that the technical bid of the Petitioner has been opened and scrutinized as alleged by the Petitioner. Further submission on behalf of Respondent No.1 is that the tender notice was published for supply of granules for pregnant and lactating women and for young children aged between 3 to 6 years under a particular food category, manufacturing of which is governed by the Food Safety and Standards (Health 11762.23-wp.docx Supplements, Nutraceuticals, Food for Special Dietary Use, Food for Special Medical Purpose, Functional Food and Navel Food) Regulations, 2016 issued vide Gazette Notification dated 23 rd December 2016 which is superseded by a Direction dated 29 th March 2022 under the provisions of the Food Safety and Standards Act 2006. Respondent No.1, in its Affidavit-in-Reply to the Rejoinder affidavit has also stated that the product offered by the Petitioner viz. Shatgandha Granules does not have the same ingredients as the tendered product, as per WHO UNICEF formula. It is also the case of Respondent No.1, as argued by Shri Khandeparkar, learned Senior Advocate, that by issuing the tender process, bids were invited for supply of "granules" and not "powder" and that the tender was called for in respect of the micro-nutrients "granules" and not for "powder", whereas the Petitioner produces "powder" and not "granules".

15. Thus, Shri Khandeparkar, learned Senior Advocate has argued that even on merits the Petitioner does not have any cause as even the product offered by it does not meet the requirement of the item to be supplied in terms of the tender notice in question.

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16. Having heard learned Counsel for the parties and having perused the documents available on record before us on this petition, we are of the opinion that the issue, as to whether the product offered by the Petitioner meets the requirement of Respondent No.1 or not, is not an issue which needs consideration in this petition. The challenge in the Writ Petition is confined to condition No.8 of the tender notice which requires the bidder to have experience of supplying micro-nutrients supplements granules to Government Departments of a value of not less than 150 lacs in last three years.

17. On the basis of the pleadings available on record and the submissions made by the learned Senior Advocates for the parties, the issue which emerges for our consideration and which is primarily required to be answered by us in this case is as to whether Petitioner having participated in the tender process can challenge the tender condition?

18. It is well settled principle of law that in the matter of formulating tender conditions greater latitude has to be given to the State authorities and unless any action of the authorities is found to be malicious or amounts to misuse of its statutory 11762.23-wp.docx powers, interference of the Court is not warranted. In this regard, reference may be had to the judgment of the Hon'ble Supreme Court in the case of Michigan Rubber (India) Ltd. (supra). The Hon'ble Supreme Court in the said case, after discussing the earlier judgments has evolved principles on which interference in such matters is permissible by this Court in writ jurisdiction. Paragraph 23 of the said judgment extracted hereinbelow:

23. From the above decisions, the following principles emerge:

(a) 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. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) 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.

If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is 11762.23-wp.docx not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

19. In Meerut Development Authority (supra) the Apex Court has clearly held that there exists a clear distinction between appellate power and the judicial review. Any action by the authorities, in the contractual matters, could be judged and tested on the anvil of Article 14 of the Constitution of India and further that Court is concerned with the decision making process and not the decision itself. It has further been held in this case that the Court cannot examine details of the terms of the contract entered into between public bodies and the State and that there exist inherent limitations on scope of any such scrutiny by the Courts.

20. Having regard to the well established principle of law as noted above, it is needless to observe that there is a very limited scope of judicial scrutiny in contractual matters especially in a 11762.23-wp.docx challenge to a tender condition which is stipulated by the tendering authority.

21. We now proceed to consider, as to whether the Petitioner could challenge the tender condition after having participated in the tender process. This Court in the case of Paldewar Prashant Agro Tech Pvt. (supra) has clearly held that a party will not be entitled to challenge the tender condition after participating in the tender process and further that having participated in the tender process it will not be open for the Petitioner to challenge the terms and conditions of the tender. Paragraph No.3 of the said judgment is extracted hereinbelow:

"3. We have considered the submissions. As far as the challenge to the condition of possessing experience in transportation of food grains is concerned, the petitioner will not be entitled to challenge the same after participating in the tender process. Having participated in the tender process, it will not be open for the petitioner to challenge the terms and conditions of the tender process. The present petitioner was also a petitioner in Writ Petition No.750 of 2021 and as such the said judgment would bind the petitioner."

22. This Court, yet, in another judgment in the case of Sai Agencies, Jalna Vs. State of Maharashtra & Ors. 7 has clearly held that the bidder who has participated in the tender process 7 2021 SCC OnLine Bom 13960 11762.23-wp.docx cannot turn around and challenge the terms and conditions of the tender and in such a situation, tender conditions are immune from the judicial review. Paragraph 41(2) of the said judgment runs as under:

41.(2) Validity Petitioner has challenged the validity of condition No.3 of said Tender. Petitioner states that this condition restricts the successful bidder from getting more than one work with respect to work Nos.1 to 9 of said tender. After examining the material on record, we find that condition No.3 was applicable to tender Nos.1 to 9 and those tenders were cancelled by respondent No.2 in its meeting dated 20th August, 2019. Thereafter, petitioner submitted tender for tender work Nos.10 to 14. It indicates that petitioner was aware about cancellation of tender Nos.1 to 9.

The petitioner has suppressed this fact. Even otherwise, it is well settled law that a bidder who has participated in a tender cannot turn around and challenge the terms and conditions of the tender and Tender conditions are immune from judicial review."

23. Thus, it is settled proposition of law that a tenderer having participated in the tender process cannot be permitted to challenge the tender condition. Reliance placed by the learned Senior Advocate for the Petitioner on the judgment of this Court in the case of Gypsum Structural India Pvt. Ltd. (supra) and the judgment of the Calcutta High Court in the case of Subir Ghosh (supra) is of no avail to the Petitioner. In Gypsum Structural India Pvt. Ltd. (supra) challenge to the tender 11762.23-wp.docx condition was not accepted by this Court on merits. This Court, after discussing the issue on merit at length found that the Court would not interfere with the opinion of the tender floating authority in respect of the technology to be used for execution of the work by assigning the reason and that the Court is not an expert in the field and further that the decision of the tender floating authority in that case was based on opinion of experts. It has further been observed by this Court, in the peculiar facts of the said case, that having participated in the pre-bid meeting the Petitioner in the said case chose to stay away from the tender process and thus did not participate in the tender process and thus the Petitioner was held to be stranger to the tender process. The Court also found that it was not that the Petitioner in the said case could not procure the necessary material/technology and that it could have procured the requisite technology from available sources and then could have participated in the tender process. It is in the background of these facts that this Court held that the Petitioner in the said case was stranger to the tender process and in such a situation he could not be permitted to question the tender process. The Court has clearly observed that the Petitioner in the said case 11762.23-wp.docx without being an applicant to the tender process could not maintain the writ petition "in the peculiar facts and circumstances of the case".

24. So far as the reliance placed by the learned Senior Advocate representing the Petitioner on the judgment of the Calcutta High Court in the Case of Subir Ghosh (supra) is concerned, we may observe that in the said case it has been held that it is possible that the prospective bidder may find any tender condition to be unfair or illegal and he could challenge the same but such challenge has to be before the time to put in the bids is closed. In the instant case, admittedly, the Writ Petition was filed challenging the impugned condition No.8 after the last date of submission of the tender and hence we are of the opinion that the judgment of the Calcutta High Court in the case of Subir Ghosh (supra) is distinguishable on facts and thus, does not have any application to the present case.

25. For the reasons given above, we are of the considered opinion that the present Writ Petition ought not to be entertained since the Petitioner has challenged the tender condition after submitting its bid pursuant to the tender notice in question.

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26. Even on merits, what we find is that the impugned tender condition only requires that the tenderer should possess experience of three years of supply of the granules to the Government Departments of value not less than Rs.150 lacs in last three years. Such a condition, in our opinion, can be formulated not only to ensure the capacity of the tenderer to make requisite quantum of supply but also to ensure that it has experience of having successfully made supplies to the Government Departments. So far as the contention of the learned Senior Advocate for the Petitioner that the condition of having experience of Government supply has been formulated for the first time in the State of Maharashtra is concerned, we accept submission made by Mr.Khandeparkar, learned Senior Advocate representing Respondent No.1 that such condition does not stipulate that such supply should be only to the Government Departments of State of Maharashtra. In other States such supplies have been required for quite some time. Shri Khandeparkar, learned Senior Advocate has stated that the experience of supplying the granules to other State Governments would also qualify. We find force in what has been submitted by Mr.Khandeparkar, learned Senior Advocate and 11762.23-wp.docx thus, the submission made in this behalf by the learned Senior Advocate for the Petitioner merits rejection, which is hereby rejected.

27. As already observed above, it is the authority floating the tender, which is the best judge of not only the nature of work to be executed but also of the conditions which are to be stipulated and formulated for ensuring supply of requisite item which are necessarily dependent on the requisite capacity of the tenderer to make supplies. Necessary experience is one of the yardsticks to measure and evaluate the capacity and hence in our considered opinion, it was open to Respondent No.1 to have stipulated the impugned condition No.8, which does not suffer from any illegality so as to call for any interference by the Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

28. In view of the discussions made and the reasons given above, we do not find any merit in the Writ Petition, which is hereby dismissed. However, there will be no order as to costs.

(ARIF S. DOCTOR, J)

(CHIEF JUSTICE)