

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 17267/2006

Date of Judgment: 11th April, 2008.

GODREJ SARA LEE LTD. Petitioner
Through : Mr. Rajeev K. Virmani, Adv. with
Mr. Rajeev M. Roy, Adv.

versus

UOI & ORS. Respondents
Through : Mr. Rajeeve Mehra, Adv. with
Ms.Rachitta Priyanka, Adv. for
Respondent No.1
Dr. Vijay Veer & Dr. D.K. Dubey,
DRDE, DRDO, Gwalior
Mr. Kaushal Kumar, Mr. Vinod
Kumar and Lt. Col. A.K. Sharma,
DGST.
Mr. Akhil Sibal, Mr. Pradeep
Chhindra, Ms. Sai Sabnis, Adv. for
Respondent No.5

CORAM:

HON'BLE MR. JUSTICE T.S.THAKUR

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed
to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

T.S.THAKUR,J

The petitioner claims to be a leading manufacturer of hygiene products and mosquito repellents which it sells not only in the open market but even to the country's military and paramilitary forces. In response to a tender inquiry issued by the Directorate General of Supplies and Transport, New Delhi, the petitioner submitted its tender for supply of what is called "Diethyl Phenyl Acetaminde" (DEPA) in Isopropanol 50% (formulation) and was found to be the

lowest tenderer for the same. Since, however, the petitioner was not a registered manufacturer, only 20% of the supplies was reserved for it. This was in keeping with the provisions of para 3(c) of the terms and conditions regulating the supply which is in the following words:

“3(c) In case, offer of unregistered manufacturer is lower than the registered manufacturer and is commercially and technically acceptable, order for qty upto 20% shall be reserved for unregistered manufacturer if his rates are lower than the L-1 registered firm subject to their favourable capacity verification and approval of advance sample by DGQA or his authorised representative. The balance 80% quantity may be considered for placement of order on registered firm as L-1 manufacturer. In case, there is no technically acceptable offer from registered manufacturer, the balance 80% quantity may also be considered for placement on the unregistered L-1 manufacturer after successful execution of initial order for 20% quantity. In case of Limited Tender Enquiry (LTE), order for placement of 100% qty shall be placed on lowest acceptable offer of PSUs.”

2. One of the grievances which the petitioner has made in the present writ petition is that although 20% of the supplies in terms of the above stipulation had to be allotted to the petitioner, no orders for making the supplies were being placed with it. That aspect need not, however, detain us for long keeping in view the statement made by the respondents that a supply order for 20% of the supplies of DEPA 50% formulation shall be placed with the petitioner subject to the product offered by it being sample tested by the appropriate authority. Based on the said statement we had on 15th January, 2008 while reserving pronouncement of orders in the writ petition issued the following directions:

“Heard. The pronouncement of the order is reserved.

2. Learned counsel for the respondents agree that in so far as supply of 50% DEPA for the year 2006-07 is concerned, 20% of the total supplies remain to be undertaken while 80% of the said supplies have already been assigned to M/s Alkyl

Amines, Mumbai. It is further submitted by Mr. Mehra that the said balance 20% have been reserved for the petitioner subject to its capacity verification and advance testing of samples of the product. He submits on instructions that the capacity verification of the petitioner's unit which is established in the State of Meghalaya has to be undertaken by the Senior Quality Assurance Establishment, Kolkata which is under the direct control of Director General Quality Assurance, Delhi. For testing advance samples, Mr. Mehra submits on instructions that the petitioner shall have to give five samples of 5 Litre each of its product(in the containers of 1 Litre or 5 Litre as the case may be) to CQA(M), Kanpur. He submits that if the petitioner submits the samples, the same shall be got tested immediately and depending upon the result thereof, orders for the supply of the balance 20% of DEPA 50% lotion placed with the petitioner.

3. In the circumstances, therefore, and pending the pronouncement of orders in the main petition, we direct the DGQA, Delhi to have the petitioner's capacity verified through the concerned agency expeditiously and without any loss of time. We further direct that the petitioner shall be free to submit 5 samples of 5 Litre each (in the containers of 1 Litre or 5 Litre as the case may be) to CQA (M), Kanpur. The respondents shall then have the samples tested and an appropriate decision taken at the appropriate level for placement of orders for supply of DEPA 50% lotion with the petitioner, if the parameters, namely, capacity verification and advance testing of samples are found in favour of the petitioner. Order dasti under the signatures of the court master."

3. The above order, in our opinion, sufficiently redresses the petitioner's grievance insofar as the supply of 20% balance quantity of DEPA 50% formulation is concerned. All that we need to add is that the direction given by our order dated 15th January, 2008 shall be treated to be a part and parcel of this judgment. It follows that upon the twin requirements of capacity verification and testing of advance samples for the product being satisfied by the petitioner, the respondents shall take steps to place orders for the supply of the requisite quantity of DEPA 50% (formulation), with the petitioner.

4. Insofar as the petitioner's grievance regarding the supply of

DEPA 20% spray for the year 2006-07 is concerned, it was argued that even when the petitioner was the lowest tenderer, supply order was not placed with it. Although, Mr. Virmani, counsel for the petitioner made a feeble attempt to contend that the respondents had tried to frustrate the interim order of this Court dated 30th November, 2006 by placing repeat orders on respondent No.5 against the tender for the year 2005-06, the said submission was not pursued by him further. The fact of the matter is that on account of orders placed by the Directorate General for DEPA 20% Spray against the contract for the year 2005-06, the Directorate General has secured sufficient quantities of the said medicine to meet the anticipated requirement for the year 2006-07 also. This implies that the grievance of the petitioner qua the supplies for the year 2006-07 survives only insofar as 20% of the balance supply of DEPA 50% lotion is concerned which grievance stands redressed by the order already made by this Court on 15th January, 2008.

5. The only other grievance which the petitioner has made in this writ petition relates to the conditions stipulated in the addendum to the tender inquiry for supply to be made in the year 2007-08 of DEPA 20% Spray and DEPA 50% lotion. Addendum dated 3rd November, 2006 issued to the tender notice contained the following important stipulation regarding transfer of technology from DRDE, DRDO.

“For DEPA 20% Spray & DEPA 50% only: All tenderers desirous to participate in the tender process are required to get Transfer of Technology (TOT) from DRDE, DRDO, Jhansi Road, Gwalior. Tender Enquiry for these items will only be issued to the firms on production of TOT to DDST, Delhi Area, Delhi Cantt. Those firms who have applied for TOT from the specified authorities, however, have not been able to obtain the TOT at the time of purchase of tenders would be issued with Provisional Tenders pending obtaining of TOT on production of documentary evidence in support of their claim. In the absence of TOT, their bids will

be treated as technically invalid and the status of the firm on the date of tender opening will be treated as final. The prospective tenderers are advised to get in touch with DRDE, DRDO, Gwalior for obtaining TOT and specification for the above items. All other terms and conditions of the original tender notice shall remain unchanged”

6. It is common ground that the petitioner has not applied for or secured the transfer of technology stipulated in the addendum extracted above. It is, on that account, rendered ineligible for submitting any tender for the supply required by the Directorate General of Supplies and Transport for the year 2007-08. The petitioner, however, assails the said stipulation on two precise grounds. Firstly, it is contended that the patent granted in favour of DRDE for DEPA 20% Spray and DEPA 50% Lotion had expired by efflux of time thereby entitling every manufacturer to undertake manufacture and marketing of the said product without any legal impediment or compulsion of obtaining a Transfer of Technology. Secondly, it is argued that there was nothing unique about the formulation which the DRDE, DRDO claims to have evolved so as to require a license/transfer of technology from it before the manufacturers are permitted to submit their tenders.

7. On behalf of the respondents, it was per contra argued by M/s. Mehra and Sibal that the expiry of the patent by efflux of time was wholly inconsequential to the question whether the respondents can insist on a Transfer of Technology from them so long as the formulation and the specifications of the product which the DRDE, DRDO had evolved was unique or at least different from the formulation under which the petitioner was manufacturing its products. It was contended by them that the DRDE, DRDO had a secret know-how that has led to the development of a DEPA

formulation which is efficacious and safe in different climatic conditions of this country and which provides protection to the soldiers from mosquito bites. This technology has been, according to the respondents, perfected after conducting several laboratory and field trials including human trials under the supervision of the Director General Armed Forces Medical Services, the highest technical authority on the subject. The inventor does not, it was contended, require a patent so long as he can give a transfer of technology of his secret know-how to any one interested in the same. Reliance was, in that connection, placed upon "Local Rules of Technology Transfer in Asia". It was submitted that enough time had been given to the petitioner to approach the DRDE, DRDO to obtain a transfer of technology which would then entitle the petitioner to manufacture and market the products as per formulations/specifications evolved by the former and also to compete for marketing the supplies to the Army. The petitioner had, however, deliberately avoided to obtain a Transfer of Technology and thus, failed to acquire a qualification that was a condition of eligibility in the context of the proposed supplies. It was argued that if the Indian Army had, with the assistance of its own specialized agency, developed a formulation which was, in its opinion the most suited for its military and paramilitary forces, there was no illegality or unfairness in the army insisting upon supplies being made only as per the said formulations and those wishing to make such supply obtaining the necessary Transfer of Technology from the agency that possessed the secret know-how.

8. We have given our anxious consideration to the submissions made at the bar and perused the record. The short question that falls

for consideration is whether the respondent/authorities can insist on Transfer of Technology from DRDO as a condition precedent for the manufacturer being treated eligible for making the required supplies. The answer to the said question would, in turn, depend upon whether the formulation is in any way unique or at least different from the one which the petitioner is presently using for the manufacture of its products. If the formulation which the DRDO has evolved, allegedly after conducting various tests and trials, is indeed unique or at least different from the formulation/specification under which petitioner manufactures its products, it would be open to the respondents to argue that the party offering to make supply must possess the technology for the preparation of the product. That technology, it can insist, can be transferred only when the party concerned applies to the authority who holds the secret know-how and who alone can license its manufacturer by transferring the know-how as to the components, formulae and techniques involved in the same. The position may have been different, if the agency that has the technology, was unwilling to share the same with other parties thereby dis-entitling such parties from entering the competitive field not only for manufacture of the product but also for its marketing or supply to the Armed Forces. The respondents have, however, at no stage declined to offer the Transfer of Technology to the petitioner. On the contrary their case is that the petitioner has, despite opportunity, deliberately omitted to seek any such transfer. The petitioner ostensibly believes that its formulation is as effective as the one evolved by the DRDO and the one it would not require adoption of the said formulation to qualify for making the supplies. In a petition seeking judicial review of a tender process, this Court cannot

authoritatively determine the rival claims which the parties may make as to the efficacy of their respective preparations. As to which of the two preparations is more effective as a mosquito repellent is a matter that only extensive tests and trials by scientists and users can determine. We must, in fairness to Mr. Virmani, mention that he did not call upon us to judicially determine the efficacy of the petitioners preparations vis-a-vis that of the respondents. All that Mr. Virmain contended before us was that DEPA 20% and DEPA 50% contained components that were freely available in the market. Mr. Virmani argued that the components of its product DEPA 20% are as under:

Ingredient	%
DEPA 20% v/v in IPA	74.00
Perfume	01.00

LPG	25.00
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Total	100.00
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9. A perusal of the said compilation would show that the petitioner manufactures its products using three distinct components namely DEPA 20% v/v in IPA, Perfume & LPG in ratio of 74%, 1% and 25% respectively. A perusal of the work instructions for the product would reveal that while DEPA 20% is used with IPA and perfume, the IPA and perfume are of 100% purity. DEPA 20% used in the manufacture of the product is with 99.24% purity. The method of manufacture has also been set out in the form of a flow chart by the petitioner. This information when compared with the specifications and the formula

which the DRDO has evolved would show that there is considerable difference not only in terms of the inputs that go into the preparation of the product which the army requires for its personnel but also the method by which the said product is prepared. We cannot, for obvious reasons, enlist the salient features that distinguish the two preparations in terms of the method of manufacture or the composition of the product. Any such exercise is bound to result in a public disclosure of what is, according to the DRDO, a secret formula evolved by it which it is ready to share with only those willing to approach it for the transfer of the technology. Suffice it to say that there is a significant difference in the formula which the petitioner, on the one hand and respondent/DRDO on the other, use for manufacture of their respective products. Such being the position, the DRDO is entitled to argue, as indeed it has, that its product is custom-made for the Armed forces no matter any one, who seeks a Transfer of Technology from it, would be entitled not only to make supplies to the Army but also market the product within and outside the country. In that view, therefore, the requirement of obtaining a transfer of technology from the DRDO cannot be said to be irrelevant or arbitrary nor can it be said that the said requirement has been stipulated to benefit only the chosen few manufacturers of the product. It was and continues to be open to the petitioner to seek a proper transfer of a technology from the DRDO and thus, acquire the qualification prescribed by the Directorate General for making of the supply of the said product which must conform to the specifications and the formula that has been prepared by the DRDO on the basis of extensive tests and experiments. Such being the position, we see no reason to interfere with the ongoing tender process insofar as the same insists

on the Transfer of Technology from the DRDO as a condition of eligibility for the manufacturers to submit their tenders in response to the tender inquiry issued by the Directorate General of Supplies of Transport.

10. In the result, this petition succeeds but only in part and to the extent that the respondents shall, in keeping with our order dated 15th January, 2008, have the capacity of the petitioner verified and its sample tested and upon the tests and verification report going in its favour place an order for the supply of balance of DEPA 50% Lotion from the petitioner. Insofar as the petitioner's grievance against tender inquiry for the year 2007-08 and the Transfer of Technology as a condition of eligibility is concerned, the writ petition fails and is dismissed but in the circumstances without any order as to costs.

T.S.THAKUR,J

ARUNA SURESH, J

APRIL 11, 2008
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