

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

+ W.P.(C) 6015/2007

Date of Decision: 7th January, 2008

KISHAN CHAND & SONS Petitioner
Through: Mr. S.C. Singhal, adv.

versus

GOVT. OF NCT OF DELHI & ANR Respondent
Through: Ms. Zubeda Begum, Adv. for GNCT
with Ms. Iram Majid, Adv.

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

Per Thakur, J (Oral)

Lok Nayak Jai Prakash Hospital in Delhi is one of the largest hospitals in Asia. The number of persons treated in the hospital both as indoor and outdoor patients is, therefore, understandably very large and the requirement of surgical equipments and other materials like bandages proportionately higher. These equipments, in particular, bandages of different types are, in the usual course, procured by the Central Procurement Agency (CPA) and supplied to the hospitals in Delhi. In the event of a shortfall of such supplies by the Central Procurement Agency, the hospital authorities are empowered to make purchases after following the requisite formalities and processing the papers through the Purchase Committee appointed for the purpose.

2. For the year 2006-2007, the hospital felt the need for

purchasing surgical bandages and accordingly initiated the process of procuring the same through the Purchase Committee constituted for the purpose. The Purchase Committee appears to have initially fixed an annual turnover of Rs.10 crores as a condition of eligibility for any manufacturer of such bandages to submit a tender. It is common ground that in response to the tenders invited on that condition of eligibility, only two quotations were received thereby forcing the purchase committee to reduce the turnover from Rs.10 crores to Rs.5 crores. A fresh tender notice was on that basis floated by the Medical Superintendent of the hospital which was published in four leading newspapers in their issue dated 27th July, 2007. The notice invited sealed tenders for the purchase of the equipment mentioned in the same including surgical dressing in the prescribed format of a tender document which, according to the tender notice, could be purchased on a cash payment of Rs.500/- from the procurement Section of the hospital between 27th July, 2007 and 16th August, 2007 upto 2 p.m. The tender notice required sealed tender to be dropped in the box prescribed for the same placed in the purchase section of the Procurement Cell up to 2 p.m. on 17th August, 2007 which would then be opened on 17th August, 2007 at 3 p.m. in presence of the tenderers

3. The petitioner is a manufacturer of surgical dressings and claims to be making some supplies to the hospital mentioned above on the basis of a limited tender floated for that purpose. It has, in the present writ petition, challenged the stipulation contained in the tender notice requiring the manufacturers to have a turnover of Rs.5 crores as a condition of eligibility on the ground that the same is totally illogical, irrational and arbitrary. A writ of certiorari quashing the tender notice and the condition of annual turnover with a

mandamus to respondent No. 2 to call fresh tenders without the mandatory condition of turnover has, therefore, been prayed for in the present petition.

4. In response to the show cause notice issued by this Court, the respondents have appeared and contested the writ petition by filing a counter affidavit. According to the respondents, the stipulation regarding annual turnover of the manufacturer is neither arbitrary nor irrational as alleged by the petitioner. It is, on the contrary, intended to ensure that only manufacturers of good financial standing stay as players in the ongoing process and that the person eventually emerging successful as the lowest tenderer is in a position, on account of his large turnover, to make uninterrupted supply of the material required by the hospital. According to the respondents, the need for fixing a higher turnover had been felt by the Purchase Committee on the basis of the past experience in which sub-standard and spurious materials had been supplied and the supplies eventually given up by the chosen contractor on account of his inability to meet the demands. The respondents argue that the present is not a case where this court could interfere in exercise of its powers of judicial review with either the conditions of the tender notice or the ongoing process of issue of a supply order in favour of the successful tenderer.

5. Appearing for the petitioner, Mr. Singhal strenuously argued that the conditions regarding annual turnover of Rs.5 crores was wholly irrelevant to the question of the capacity of the tenderer to make the supplies. He urged that the petitioner was, even with a limited turnover, making supplies to the hospital on the basis of limited tenders issued by it on account of the failure of the supplies from the Central Procurement Agency and the contractors chosen for

making the supply. The ability of the petitioner to make the supplies did not depend, argued Mr. Singhal, upon his total annual turnover fixing an irrationally and unreasonably higher benchmark as a condition of eligibility. The condition was, according to the learned counsel, arbitrary and violative of the Equality Clause contained in Article 14 of the Constitution.

6. Mr. Singhal further contended that the Central Procurement Agency which is the main procuring agency for supplying equipment including surgical bandages to Government Hospitals in Delhi had itself fixed a lower turnover of Rs.2 crores which clearly showed that the higher limit of Rs.5 crores fixed by the Purchase Committee in the instant case was unjustified.

7. On behalf of the respondents Ms. Zubeda Begum, on the other hand, argued that the writ petition was liable to be dismissed on the ground of unexplained delay and laches. She contended that the last date for the purchase of the tender document was 16th August, 2007 upto 2 p.m.. The petitioner had not, according to the learned counsel, purchased any tender document till 16th August, 2007 which, according to her, meant that he had lost the right to compete for the allotment of the supplies in question not by reason of any arbitrary or unreasonable stipulation in the same but by his own inaction and indolence. She further submitted that the scope of judicial review did not extend to finding fault with the conditions of the tender notice unless the conditions were found by the Court to be totally arbitrary or discriminatory in nature. There was, however, neither any arbitrariness nor any irrationality or perversity in the conditions of eligibility stipulated by the respondents for the supply in question. On the contrary, the higher turnover of Rs.5 crores per annum was

intended to achieve the object of standard material being supplied and the supplies remaining uninterrupted. There was, in that view, a direct nexus between the turnover of the manufacturers and their ability to make the supplies. Reliance was placed by Ms. Zubeda Begum upon the decisions of the Supreme Court in ***Directorate of Education & Ors. V.s Educomp Datamatics Ltd. & Ors. 2004(3) Scale 111 and Global Energy Ltd. & Anr. V.s M/s Adani Exports Ltd. & Ors. 2005(4) Scale 551.***

8. We have given our careful consideration to the submissions made at the bar and perused the record. The Writ petition filed by the petitioner is indeed belated. As rightly pointed out by Mrs. Zubeda Begum, the tender notice was issued as early as on 27th July, 2007 with a specific stipulation to the effect that intended tenderers could purchase the tender document up to 16th August, 2007 till 2p.m. It is not in dispute that the petitioner neither approached the authorities for the purchase of the tender document nor did the petitioner file any petition challenging the condition of eligibility as stipulated in the tender notice till 17th August, 2007 by which time the last date for purchase of the tender document had already expired. Mr. Singhal's argument that the petitioner had, during the intervening period, submitted a representation to the Medical Superintendent of the hospital for reconsideration of the stipulation regarding annual turnover of the manufacturer has not impressed us. A reading of the said representation produced as annexure P-7 to the writ petition would show that the representation was not filed by the petitioner but by one of the parties intending to participate in the tender process. That is evident even from the petitioner's assertion made in para 13 of the writ petition which reads as under:-

"That in the above said circumstances the petitioner and other similarly situated persons brought this fact to the notice of the respondent no. 2 and requested him to amend the condition, but to no avail. One of the participants has even written a letter to the Medical Superintendent and the copy of such letter is annexed as ANNEXURE P-7 to the present writ petition, but the Medical Superintendent neither replied the said letter nor amended the said condition and is bent upon opening the tender on 17th August, 2007 at 3:30 p.m. The Schedule of the tender is as below:-

Sale of the tender from 27.07.2007 to 16.08.2007 upto to 2PM.

Tender Box sealing on 17.08.2007 at 2PM.

Tender box opening on 17.08.2007 at 3PM

Main envelope and prequalification BI opening on 17.08.2007 at 3:30 PM.

Cost of Tender: Rs. 300 (Five hundred only)

[emphasis supplied]

9. It is evident from the above that the representation upon which the petitioner has sought to place reliance in order to explain his inaction in the matter was not filed by the petitioner but by some other party.

10. Mr. Singhal next argued that the representation was filed by one of his distributors. It is interesting to note that the representation, Annexure P-7, does not indicate the name of the party who has filed the same, it is signed by one Mr. Daksh Khulbe as proprietor but the name of the concern of which Mr. Khulbe claims to be the proprietor is not available either in the representation or anywhere else on the record. Even Mr. Singhal was unable to give us the name of the concern which according to him was the distributor of the petitioner. Suffice it to say that the explanation sought to be advanced on behalf of the petitioner for its inaction between 27th July, 2007 till 17th August, 2007 when he filed the present petition does not inspire confidence. The petitioner appears to have remained on the fence, lost the opportunity to enter the competitive process by his own

inaction and indolence thereby dis-entitling him to make any grievance against the condition of eligibility stipulated in the tender document.

11. Even otherwise the scope of judicial review in matters involving challenge to the tender conditions is very limited. The nature and scope of judicial review has been the subject matter of a long line of decisions rendered by the Supreme Court including the two decisions referred by Ms. Zubeda Begum. In ***Directorate of Education & Ors. V.s Educomp Datamatics Ltd. & Ors. 2004(3) Scale 111*** the Apex Court has unequivocally ruled out any interference with the terms of tender notice unless it is shown that the same are either arbitrary or discriminatory or actuated by malice. Just because the tender conditions may appear to the Court to be a little more stringent than what would in its opinion be reasonable is not a ground for the Court to interfere with the same. The following passage from the said decision sets the entire controversy to rest as to the scope of judicial review.

“12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.” (emphasis supplied)

12. To the same effect is the decision of the Supreme Court in Global Energy's Case (Supra).

13. Coming then to the facts of the instant case, we do not think that the stipulation that the manufacturer must have a turnover of Rs.5 crores per annum in order to make him eligible to submit his tender can be said to be arbitrary, irrational, perverse or malafide. The said condition has a direct nexus with the standard of the material to be supplied as also the ability of the supplier to maintain supplies on a continuous uninterrupted basis. It is common ground that the total value of the supplies which the hospital proposes to receive over the year is around Rs.2 crores. Under the circumstances, the requirement that the tenderer must have a turnover of Rs.5 crores annually cannot be said to be unreasonably or unfairly high so as to be described as discriminatory, arbitrary or malafide.

14. So also the question whether the Purchase Committee was justified in fixing a higher turnover as a condition of eligibility in comparison to the one fixed by the CPA, we need only say that the two agencies are entitled to stipulate two different standards depending upon their own perceptions. Just because CPA has fixed a lower turnover as a condition of eligibility may not necessarily imply that the hospital must follow suit and fix a similar lower turnover. As a matter of fact, while the CPA may be justified in fixing a lower turnover, the hospital may not be. We say so because after the CPA's failure to provide the required material to the hospital, the hospital had no option but to arrange the essentials from a private source by floating tenders on its own. If the supply from the private source also for any reason failed, there would be utter chaos in the hospital to the grave detriment of the patients admitted to the same. The hospital

was, therefore, entitled to act on the safer side by fixing a higher turnover as a condition of eligibility to make sure that the supplier chosen by it does not fail in making the supply and that the supplies are of standard quality.

15. Similarly the fact that the petitioner is making certain supplies to the hospital on the basis of limited tenders does not lend any support to the challenge to the validity of the conditions of eligibility. The petitioner, if found eligible and entrusted with the supply on the basis of limited tender, is perfectly within its rights to do so just as it may be entitled to participate in any other tender process where it is eligible to do so in accordance with the condition of eligibility fixed for the same.

16. In the result, we see no reason to interfere with the ongoing process aimed at fixing a proper contract for supply of the required material. The conditions of eligibility prescribed do not, in our opinion, suffer from any arbitrariness or perversity. There is no merit in this petition which fails and is hereby dismissed but in the circumstances without any order as to costs. Interim orders shall stand vacated.

T.S. THAKUR,J

ARUNA SURESH, J

JANUARY 07, 2008
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