

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: 28th November, 2011

+ W.P.(C) No.7982/2011

SERUM INSTITUTE OF INDIA LTD. Petitioner
Through: Mr.Neeraj Kishan Kaul, Sr.Advocate with
Mr.Ashish Wad, Advocate

versus

UOI & ANR. Respondents
Through: Mr.A.S.Chandhiok, ASG with Ms.Sapna
Chauhan and Mr.Gurpreet S.Parwarda,
Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P. GARG

PRADEEP NANDRAJOG, J.

1. As the rupee hits yet another low against the dollar; and trades at ₹53/- to \$1; with the projected forecast that by the end of the current fiscal year the rupee would be trading at ₹55/- to \$1, it is expected that every penny would be fought for. Instant writ petition tells one such story.

2. The story commenced when in March 2011 the first respondent published a notice inviting tender. Offers were invited for supply of 367.93 lakh dose of BCG vaccines. The petitioner submitted an offer quoting a price of ₹28.60 per dose of BCG vaccine and as per the offer clearly stated that VAT as applicable from time to time would be charged extra. The second respondent also submitted an offer quoting likewise i.e. the unit price per dose of BCG vaccine at ₹28.60 and clearly stated that VAT as applicable would be charged.

3. Petitioner's manufacturing unit is situated in the State of Maharashtra, where with effect from 1.4.2000, VAT chargeable on BCG vaccines was increased from 4% to 5%. Thus, when petitioner submitted its offer, the price payable if the offer was accepted would be ₹28.60 + 5% VAT for each dose of BCG vaccine. Respondent No. 2's manufacturing unit is situated in the State of Tamil Nadu and when it submitted its offer the VAT chargeable in said State was 4% and thus the price payable if said offer was accepted would be ₹28.60 + 4% VAT for each dose of BCG vaccine. Respondent No.1 opened the price bids on 8.4.2011 and it needs hardly a guess as to whose offer was accepted. It had to be the offer of respondent No.2. Not much intelligence is needed to guess correctly. The gross price payable by respondent No.1 would be less if it accepted the offer of respondent No.2. Thus the offer of respondent No.2 was accepted.

4. As per the notice inviting tenders, the 367.93 lakh dose of BCG vaccine had to be supplied within the currency of the calendar year i.e. up to 31.12.2011, which date was subsequently extended to the end of the fiscal year i.e. 31.3.2012. It was thus a case of respondent No.2 making a standing offer binding itself to supply 367.93 lakh dose of BCG vaccines requiring requisition by the offeree but within the date for which the standing offer would bind the second respondent as per its offer.

5. The petitioner never questioned at that stage as to why was the standing offer of respondent No.2 accepted and not the offer made by it.

6. Proceeding with the story, on 29.7.2011, the first respondent placed the first indent requiring the second respondent to supply 61.32 lakh dose of BCG vaccines. An event of some significance had occurred in between. Effective from 11.7.2011, the State of Tamil Nadu increased the VAT on BCG vaccines from 4% to 5% and thus as per the indent dated 29.7.2011, the price payable by the first respondent to the second respondent was ₹28.60 + 5% VAT for each dose of BCG vaccine i.e. the same price which was quoted by the petitioner. But, it needs to be told, being integral and relevant to the story, that the second respondent agreed to bear the extra 1% VAT and thus as per the supply effected by the second respondent the first respondent continued to be the beneficiary of a less gross price being paid. It paid ₹28.60 per dose of BCG vaccine + 4% VAT thereon and the second respondent bore the extra burden of 1% VAT.

7. On learning that VAT had been increased on BCG vaccines in the State of Tamil Nadu from 4% to 5% with effect from 11.7.2001, on 27.8.2011 the petitioner wrote a letter to the first respondent informing that in view of said fact that the price quoted by it had come at par with the price quoted by the second respondent; and thus the petitioner sought the matter to be reviewed and its offer to be accepted. Little did the petitioner realize that the second respondent was absorbing the 1% hike in the VAT chargeable.

8. On 2.9.2011 the first respondent placed the second indent upon the second respondent requiring further 138 lakh doses of BCG vaccines to be supplied. At that stage the petitioner collected extra ammunition and fired the same at

the respondents. It alleged that Rule 160 of the General Financial Rules 2005 were violated by the first respondent, in that, past performance being required to be considered as per the said Rules was alleged to be ignored. The petitioner also started raising issues on the quality of the BCG vaccines manufactured by the second respondent with respect to the seeds available with the said respondent to manufacture BCG vaccines.

9. Since the first respondent paid no heed to the shrill cries of the petitioner, instant writ petition was filed and during arguments two submissions were urged:-

(i) That a manufacturer has no control on the VAT chargeable on its product and thus the criteria adopted by the first respondent to determine the lowest bid with reference to the ex-factory price + VAT chargeable was arbitrary; for it was urged that this would amount to discrimination on the reason that a fact not within the control of a party could not be used against the party.

(ii) That acceptance of the offer submitted by the second respondent was not a contract where a definite quantity stood contracted to be supplied. It was a case of a standing offer and acceptance of the tender did not convert the offer into a binding contract. In the legal sense, it was urged that each act of requisition by the offeree i.e. the respondent No.1 would be an individual act of acceptance which would create a separate contract and thus since within the validity period during which supplies had to be effected, VAT got increased in the State of Tamil Nadu from 4% to 5%, the offer of the petitioner came at par with that of the second

respondent and keeping in view Rule 160 of the General Financial Rules 2005, since the past performance of the petitioner was better and there was adverse material qua the seed from which the second respondent was manufacturing BCG vaccine, as a State the first respondent was obliged to place the indent for further quantities upon the petitioner.

10. Business requires total freedom to decide and take action in the best interest of business. Profit is the aim of every business and therefore when a State conducts business it must have all the freedom to do so. If shackled by strict principles of judicial control over administrative action, it may become impossible for a State to conduct business as it needs to be conducted. But since, in the field of contract, unless regulated by a Statute, a State enters into a contract in exercise of its executive power, State action in matters pertaining to contract have been included within the purview of judicial review. However, the evolution of law in this area has to be understood and applied with a rule of caution i.e. the State must have the freedom to conduct business as business needs to be conducted.

11. Article 14 of the Constitution of India guarantees protection against arbitrary State action and mandates that the State shall not deny to any person the equality before the law. In the locus classicus on the subject i.e. the decision reported as AIR 1979 SC 1628 Ramanna Dayaram Shetty Vs. /AA/ the principles of reasonableness, rationality and non-arbitrariness as projected under Article 14 of the Constitution of India; being the characteristic of every State action, whether it be under the authority of law or in exercise of the executive

power of the State were recognized. The public law character of actions of the State against an individual in matters pertaining to contract, on specific being a contract for tenancy, was highlighted in the decision reported as AIR 1989 SC 1642 Dwarka Dass Marfatia & Sons Vs. Board of Trustees of the Port of Bombay. A post contractual dispute, as was the case in Dwarka Dass Marfatia's decision, was considered by the Supreme Court in the decision reported as AIR 1990 SC 1031 Mahavir Auto Vs. Indian Oil Corporation & Ors. Pithily put, the decisions bring out that the principles of constitutional morality in terms of a State action being fair, just, non-arbitrary and informed by reason at every stage of State action binds the State.

12. Guided by the principle aforesaid, it assumes importance that it would be certainly relevant when the Government makes a purchase as to what would be flowing out from the coffers of the Government. The individual problems or handicaps faced by those who offer is irrelevant. In the instant case, the offer made by respondent No.2, upon acceptance would have required the Government to pay ₹28.60 per dose of BCG vaccine + 4% VAT and if offer made by the petitioner was accepted the outflow would be ₹28.60 + 5% VAT on each dose of BCG vaccine. Business efficacy is the principle on which reasonableness of State action has to be tested. Thus, the emotive argument that the petitioner had no control on the VAT charged by the State of Maharashtra is sans a legal foundation for the relevance thereof. To accept the said argument would mean that it would be impossible for the Government to lay down principles of comparative price

neutralization and justify the decision to prefer one offer over the other. For example, a unit situated in an area where tax exemption is available makes an offer and the gross price payable by the purchaser is less. Others raise the issue that the net price quoted by them is low. They plead that the fortuitous circumstance of their having their manufacturing units in States where tax is paid cannot handicap them. The first party responds by saying that it is enjoying a tax holiday because it has set up the unit in a backward area and thus the cost borne by it to manufacture the goods is higher. It further responds by informing that whereas electricity tariff in the State where it has set up the unit is say ₹6/- per unit and that the electricity tariff in the State where the rival party has set up its unit is ₹4/- per unit. Is it the obligation of the State to get involved in these nitty gritty details? In the field of contract, the answer has to be an emphatic 'No'. The reason is obvious. When the State does business, it has all the freedom which every businessman should have i.e. if the State is purchasing goods, it would be good business prudent decision to accept the offer where the outflow for purchase of goods is the least.

13. On the issue of it being a case of a standing offer and concluded contracts coming into being at every stage when indent was placed, requiring as pleaded by the petitioner, the Government to constantly monitor the changed scenario during the period of the validity of the standing offer, the answer has to be once again in the negative. The reason is the extension of the same principle of constitutional morality i.e. fairness and non-arbitrariness in the State action. If the action of the State where a bargain is concluded, whether by

way of a concluded contract or by way of a standing offer requiring contractual obligations coming into being with each indent being placed, is fair and reasonable, subsequent events which were unforeseen would not make the action unreasonable. If the argument advanced by the petitioner is accepted it would mean that pertaining to standing offers the jural relationship would be under a constant glaze of the Courts and suffice would it be to state that Courts are loath to constantly supervise an executory contract; a standing offer would be akin to an executory contract.

14. But, in the instant case, said legal position need not be even debated for the reason when VAT was enhanced in the State of Tamil Nadu from 4% to 5%, the second respondent bore the extra burden, a fact which is not in dispute, and thus vis-à-vis the price quoted by the petitioner, the net outflow from the first respondent to the second respondent, continued to be less.

15. Before concluding we may note that during the pendency of the writ petition, the first respondent wrote to the petitioner on 17.11.2011 that if it was prepared to supply the vaccines @ ₹28.60 + 4% VAT per dose and bring its offer at par with that of the second respondent, the Government was prepared to place an indent upon the petitioner. The petitioner wrote back the same day i.e. on 17.11.2011 that since the matter was subjudiced, they would take up the matter after the writ petition filed is decided. It is apparent that the petitioner wants to eat a cake and take one too. When hearing was deferred on 16.11.2011 to 18.11.2011, it was so done because Sh.Amarjit Singh Chandhiok learned ASG

indicated that the quantity being large, the first respondent could probably satisfy the claim by the petitioner and had made known that if the petitioner agreed to supply the vaccine at the same gross rate to the Government as was flowing out of the coffers of the Government pertaining to the supplies effected by the second respondent, an offer could be made to the petitioner in said terms. The Government stood by what was stated by the learned ASG in Court, but the petitioner, for reasons best known to it, tried to play it smart. Thus, we simply note, but turn down the argument of the petitioner that the Government be directed to stand by its offer dated 17.11.2011. We decline to pass any such direction inasmuch as acceptance of offers is in the realm of a contract. As per the letter dated 17.11.2011, acceptance was solicited by 3:00 PM on the same day. The petitioner received the offer and responded by 3:00 PM the same day. It did not accept the offer.

16. We dismiss the writ petition and since a commercial dispute was litigated, as per practice followed by this Court to recompense the opposite party as far as possible actual litigation expenses, we burden cost upon the petitioner in sum of ₹50,000/- to be paid to the first respondent.

(PRADEEP NANDRAJOG)
JUDGE

(S.P.GARG)
JUDGE

NOVEMBER 28, 2011
mm