



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.14938 OF 2023

M/s. Pharmaveda (I) Pvt. Ltd.
Having its registered office at
B-4, Kamdar Shopping Center,
Tejpal Road, Opposite Railway
Station, Vile Parle East, Mumbai
400 057.

.. Petitioner

Versus

1. Chief Executive Officer,
Zilla Parishad Nandurbar,
Devmogra, Nandurbar,
Maharashtra 425412
2. Narmada Enterprises,
At Shirpurwade Mala,
Post Shirpurwade,
Near Jaikheda Road,
Baglan, Dist. Nashik,
Maharashtra Pin 423204
3. Shree Enterprises,
12 Saikurpa, Ganchi Nagar
Bus Stop, Dhule Road,
Nandurbar City, Dist. Nandurbar,
Maharashtra 425412
4. State of Maharashtra
Mantralaya, Madam Cama Road,
Hutatma Rajguru Square,
Nariman Point,
Mumbai 400 032.

.. Respondents

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Mr. A. S. Khandeparkar, Senior Counsel a/w Mr. Sujay Gawade, Advocate
i/b Mr. R. R. Karpe, Advocate for petitioner.
Mr. P. S. Patil, Advocate for respondent No.1.

Mr. V. D. Sapkal, Senior Counsel i/b Mr. S. R. Sapkal, Advocate for respondent No.2.

Mr. V. M. Jaware, AGP for respondent No.4.

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**CORAM : SMT. VIBHA KANKANWADI AND
S. G. CHAPALGAONKAR, JJ.**

**RESERVED ON : JANUARY 08, 2024.
PRONOUNCED ON : JANUARY 18, 2024.**

JUDGMENT (Per Smt. Vibha Kankanwadi, J) :-

. Rule. Rule made returnable forthwith. Heard learned Advocates for the appearing parties finally by consent.

2. The petitioner is challenging its disqualification in the technical bid as well as the acceptance of technical bid of respondent Nos.2 and 3 by respondent No.1.

3. The petitioner is the manufacturer of specialty food products including the product under the food category 13.5 Dietetic Foods/Foods for Special Dietary Use. It is a company registered under the Companies Act. Respondent No.1 had invited bids for supply of multi-micronutrient supplement granules to children in the age group of 3 to 6 years at Anganwadi centers in tribal areas as well as micronutrient supplement granules to pregnant and lactating mothers in Nandurbar district. The action on behalf of respondent No.1 in declaring that the petitioner does not qualify at the time of technical bid and respondent Nos.2 and 3 are

qualified, has been challenged on following grounds :-

(1) The act is illegal and contravening the procurement rules of Maharashtra government.

(2) Though the petitioner had uploaded all the documents, they were not properly evaluated and the documents which were to be uploaded by respondent Nos.2 and 3 were not visible or that facility was disabled. Thus, no transparency has been ensured.

(3) Bid of respondent Nos.2 and 3 ought to have been rejected as they were not qualifying or complying with the tender terms and conditions.

(3A) Respondent Nos.2 and 3 do not have any basic licence to manufacture or sell the tender products issued from Indian Food Regulator, namely, FSSAI, which was seen by the petitioner after search on the official website of FSSAI.

(3B) Udyam certificate of respondent No.2 gives different activity as major activity of respondent No.2 i.e. trading, that too not in food articles.

(3C) Respondent No.2 uploaded document claiming exemption in payment of EMD which was wrong.

(3D) Respondent Nos.2 and 3 do not have past experience of supply of micronutrient supplement granules.

(3E) The GST documents are not proper.

(4) Respondent No.1 had failed to appreciate that the subject matter involves health of young children and pregnant and lactating mothers and, therefore, ought not to have accepted the deviations from the terms and conditions, rather ought to have followed them scrupulously and, therefore, the petitioner has prayed for issuance of writ against respondent No.1 for quashing his decision in holding respondent Nos.2 and 3 qualified for the technical and then to the final bid. Petitioner prays for issuance of writ as against respondent No.1 directing him to accept the petitioner's bid, as the petitioner complies with all the terms and conditions.

4. The respondents have not filed say, but tendered the documents across the bar at the time of submissions.
5. Heard learned Senior Counsel Mr. A. S. Khandeparkar instructed by learned Advocate Mr. R. R. Karpe for the petitioner, learned Advocate Mr. P. S. Patil for respondent No.1, learned Senior Counsel Mr. V. D. Sapkal instructed by Mr. S. R. Sapkal for respondent No.2 and learned AGP Mr. V. M. Jaware for respondent No.4 – State.
6. Learned Senior Counsel Mr. A. S. Khandeparkar instructed by learned Advocate Mr. R. R. Karpe for the petitioner has taken us through all the documents produced by the petitioner and especially, the schedule of the tender, terms and conditions and the documents submitted by the respondents, which were downloaded from the other websites and he has

specifically stated that the facility of viewing the documents of respondent Nos.2 and 3 from the portal which was provided by respondent No.1 was disabled. By pointing out the technical bid scrutiny chart, he submitted that except the column stating that whether the terms and conditions have been fulfilled or not in respect of all the conditions i.e. condition Nos.1 to 14 and 16, the petitioner has been held to be qualified. That means, the petitioner had uploaded all the documents by complying with the requirements, still it is held that the petitioner has not complied with the terms and conditions of the tender. He pointed out term Nos.8 and 9 of the tender, which reads thus :-

“८) निविदाधारकाने पुरवठा करावयाच्या साहित्याचा एक नमुना व त्यासोबत उद्योग ऊर्जा व कामगार विभाग, मंत्रालय मुंबई यांचेकडील शा.नि. दिनांक १ डिसेंबर २०१६ मध्ये नमुद एन.ए. बी.एल प्रमाणित प्रयोगशाळेच्या तपासणी अहवालाची प्रत निविदा भरण्याच्या अंतिम तारखेपर्यंत कार्यालयीन कामाचे दिवशी सकाळी ११.०० ते सायंकाळी ०५.०० वाजेपर्यंत महिला व बाल विकास विभाग, जिल्हा परिषद नंदुरबार येथे प्रत्यक्ष सादर करणे बंधनकारक राहिल. सादर केलेला नमुना आवश्यकतेनुसार शासन मान्यता प्राप्त एन.ए.बी.एल. प्रयोगशाळेतून तपासणी करण्याचे अधिकार मा. मुख्य कार्यकारी अधिकारी, जि. प. नंदुरबार यांना राहतील.

९) निविदेतील साहित्याचे प्रयोगशाळा नमुना तपासणी फी साठी रक्कम डिमांड—ड्राफ्ट द्वारे, प्रति नमुना रु.१४,०००/— प्रमाणे, जिल्हा कार्यक्रम अधिकारी (मबावि), जिल्हा परिषद नंदुरबार या

नावाने काढून महिला व बाल विकास विभाग, जिल्हा परिषद नंदुरबार येथे समक्ष सादर करावे.”

English translation of the above-said term Nos.8 and 9 is as under :-

“8. A sample of the materials to be supplied by the tenderer along with a copy of the NABL certified laboratory inspection report mentioned in the Government Resolution dated 1st December, 2016 of Department of Industries, Energy and Labour, Ministry of Mumbai by 11.00 a.m. in the morning to 05.00 p.m. in the evening on office working days till the last date of submission of tender. It will be mandatory to submit in person at Women and Child Development Department, Zilla Parishad, Nandurbar. The Chief Executive Officer, Zilla Parishad, Nandurbar reserves the right to examine the submitted sample from a Government approved NABL laboratory as required.

9. The amount for laboratory sample examination fee of tender materials through Demand Draft Rs.14,000/- per sample, drawn in the name of District Program Officer (Women and Child Development Department), Zilla Parishad, Nandurbar, presented personally to the Women and Child Development Department, Zilla Parishad, Nandurbar.”

(Translated by Senior Translator and Interpreter,
High Court of Bombay, Bench at Aurangabad)

7. He submitted that the petitioner had complied with term No.9 and given the demand draft of Rs.28,000/- in respect of two samples. He further pointed out that in fact the tender that was floated was the third tender, as the earlier two tender notices could not be taken to the logical

end. In the second tender, the petitioner was the only bidder who was held eligible at the technical bid and, therefore, the entire process was required to be cancelled. The sample which was given and the testing report was with respondent No.1. Under the said circumstance, it was not necessary for the petitioner to submit the sample once again. Respondent No.1 was requested to utilize the same, as the validity/shelf life of the said product, that was tested earlier as per the certificate issued by the lab, was to expire in February, 2024. Under the said circumstance, it ought to have been held by respondent No.1 that the petitioner qualifies.

8. Learned Senior Counsel for the petitioner has then taken us through the documents of respondent Nos.2 and 3 and submitted that both of them are not the manufacturers, whereas the petitioner is the manufacturer. The licence of the petitioner has been pointed out and it is then stated that the GST registration in respect of respondent No.2 stands in the name of Narmada Earth Movers and the effective date of registration is 10.10.2018. In is in a different name and this has been taken by the petitioner from the website of GST. Respondent No.2 does not stand to the specifications in respect of food category. The Udyam Registration Certificate of respondent No.2 shows that the main business of respondent No.2 is in furniture and the Udyam Registration Certificate of respondent No.3 shows that the main business of respondent No.3 is in retail trade, except of motor vehicles and

motorcycles, then retail sale of foods in specialized stores. It is submitted that since the documents were not uploaded or they were not visible, the petitioner's right to see the documents of the respondents has been withheld unnecessarily by respondent No.1. It might be with some *mala fide* intention also to allow those persons to comply with the requirements of the tender.

9. Learned Senior Counsel relied on many decisions of either this Court or Hon'ble Supreme Court mainly on the point that when the High Court should interfere in the tender process under its writ jurisdiction. We are taking note of those decisions, which are as follows :-

(i) **Michigan Rubber (India) Limited Vs. State of Karnataka and others, (2012) 8 Supreme Court Cases 2016.**

(ii) **Siemens Aktiengesellschaft and Siemens Limited Vs. Delhi Metro Rail Corporation Limited and others, (2014) 11 SCC 288.**

(iii) **Elektron Lighting Systems Private Limited and Another Vs. Shah Investments Financial Developments and Consultants Private Limited and others, (2015) 15 SCC 137.**

(iv) **P. Gopinath Reddy Vs. State of Maharashtra, Through Department of Urban Development, Mantralaya, Mumbai and others, [2018 SCC OnLine Bom. 210 : (2018) 2 AIR Bom. R 586]**

(v) Shri. Milan Dhibar Vs. Indian Oil Corporation Limited and Ors., decided by Calcutta High Court in WPA No.28643 of 2022 on 22.12.2022.

(vi) Hitech Audio Systems Pvt. Ltd. Vs. State of Maharashtra Through Principal Secretary Ministry of Public Works Department and others, 2016 SCC OnLine Bom. 2660 : (2016) 3 Bom. CR 552.

(vii) Inducare Pharma Pvt. Ltd. Vs. Chief Executive Officer Zilla Parishad Ratnagiri and another, decided by this Court at Principal Seat in Writ Petition No.11762 of 2023 on 01.11.2023.

(viii) Macpower CNC Machines Limited Vs. Union of India, Through Development Commissioner, Ministry of Micro Small and Medium Enterprises (MSME), [2020 SCC OnLine Del 1801].

(ix) Reliable Facilities Services Private Limited and Another Vs. Chittaranjan National Cancer Institute and Others, [2022 SCC OnLine Cal 2850].

(x) Kirvan Vendsol Pvt. Ltd. Vs. The state of Maharashtra and Ors., decided by this Court in Writ Petition No.1436 of 2023 on 03.02.2023.

10. In Hitech Audio Systems Pvt. Ltd. (Supra), this Court has reiterated the importance of transparency. When it was found by this Court in the facts and circumstances of the said case that the State itself and particularly the Department of Public Works was not serious in adhering to the terms

and conditions of the tender, it was observed that the High Court can interfere, as the departure from the terms and conditions was marked without producing material to justify such deviation. On the basis of this decision, it was pointed out on behalf of the petitioner that here also as the tender documents of respondent Nos.2 and 3 were not visible, it appears that the action on the part of respondent No.1 lack transparency and the deviation from its own policy to adhere to all the conditions as are found in the Government Resolution dated 01.12.2016.

11. When the documents were tendered across the bar, time was given to the learned Senior Counsel for the petitioner to go through those documents and make submissions. It was then pointed out that respondent No.2 is claiming to be the agent or supplier and the manufacturer is one Nutra Healthcare Pvt. Ltd. By pointing out that the licence is only for the experts, respondent No.2 cannot be allowed to participate. He, therefore, canvassed that the bid of the petitioner is strong and the petitioner ought to have been held to be qualified.

12. Per contra, the learned Advocate for respondent No.1 and learned Senior Counsel Mr. V. D. Sapkal instructed by Mr. S. R. Sapkal for respondent No.2 had taken us through the documents filed by respondent No.2. It was denied that the facility to view the documents of each other was disabled by respondent No.1. Though a complaint was filed on behalf

of the petitioner, it appears that it was answered on 22.12.2023 and it is orally submitted by respondent No.1 that the delay was due to not coming across such complaint application, as it was on the portal. It has been stated on behalf of respondent Nos.1 and 2 that respondent No.2 is not the manufacturer, but the supplier, who can participate in the tender process. Only condition is that the documents of the manufacturer with whom he would enter into the agreement or if the manufacturer gives letter of authorization, then to place the said on the website along with other documents. Accordingly, the letter of authorization of Nutra Healthcare Pvt. Ltd. was uploaded. Licence of Nutra Healthcare and the lab testing of the sample was also uploaded. The GST Registration stands in the name of respondent No.2 and company by name Narmada Earth Movers might be a different company or sister company. The Udyam Registration Certificate of respondent No.2 also shows that it is authorized retail seller of pharmaceutical and medical goods, cosmetic and toilet articles in specialized stores. All the documents uploaded by in all five bidders were considered and scrutinized by respondent No.1 and the Committee. Therefore, the bidder No.1 i.e. petitioner, bidder Nos.4 and 5 were declared not eligible. The petitioner had not submitted the sample as required under the tender condition. Even if it is accepted that the said sample was given by the petitioner when the earlier tender i.e. similar was floated, but that entire process has been cancelled and, therefore, the said sample could not

have been put to use once again. A fresh sample was necessarily to be tendered when a fresh tender was floated. When the petitioner himself has been declared not qualified, he cannot raise questions in respect of the decision of respondent No.1 to hold respondent Nos.2 and 3 as qualified.

13. Learned Senior Counsel for respondent No.2 relied on the decision in **M/s. N.G. Products Limited Vs. M/s. Vinod Kumar Jain and others, [2022 LiveLaw (SC) 302]** and submitted that this Court should be slow in refraining or interfering with the tender process.

14. As aforesaid, the petition is on two counts, firstly to challenge the petitioners own disqualification and secondly, to challenge the qualification of respondent Nos.2 and 3. We would like to rely on the observations from the recent decision by the Hon'ble Supreme Court in **M/s. N.G. Products Limited (Supra)**, in which the earlier decisions have been taken note of and it has been observed that :-

“23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The

approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a *mala fide* manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the state and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which they present-day Governments are expected to work.”

15. We are aware of the decision in **Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517**, wherein Hon’ble Supreme Court has held that :-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality; unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if

a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil Court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

16. Thus, taking into consideration the well settled law on this point, we have limited scope. We are to see whether the petitioner has demonstrated firstly that the petitioner was eligible, as it had complied with all the tender requirements, then only we can go to the second aspect i.e. challenge by the petitioner to the decision of respondent No.1 to qualify respondent Nos.2 and 3 in the technical bid, otherwise the course is open to the petitioner as aforesaid in **M/s. N.G. Projects Limited (Supra)** and **Jagdish Mandal (Supra)**.

17. The petitioner has been disqualified mainly on the ground that he had not supplied the sample as required under condition No.8. The petitioner is coming with the case that in the earlier bid, he had supplied the sample as well as the lab testing report, in which it was indicated that the validity of the said certificate was till February, 2024. It was the request of the petitioner to use the said sample and the certificate. Of course, the said certificate was again uploaded in the present tender process, but the sample was not handed over, though the fees were paid as per condition No.9. We are conscious about the fact that in any tender there would be compulsory terms and conditions and there would be some additional conditions which may not be termed as compulsory, but the fulfillment of the same would add to the qualification of a bidder. The terminology that has been used in term No.8 would show that it was a compulsory term, that

means it should have been adhered to. As per the schedule, the time to submit samples was from 10.00 a.m. of 09.10.2023 to 5.00 p.m. of 14.10.2023. When it was a fresh tender and there was absolutely no stipulation or interpretation of term in the present tender that if any person would have taken part in the earlier tenders, then he can use the documents tendered at that time in the fresh process also; in that event, it was expected that fresh sample should have been given along with a fresh certificate from the lab regarding the testing of such samples. In other words, the tender conditions do not support the interpretation tried to be put by the petitioner that the petitioner was justified in interpreting that since the shelf life and validity of the certificate was till February, 2024 and the sample was with respondent No.1, respondent No.1 could have, in his own discretion, accepted the request of the petitioner. In fact, if this step would have been taken by respondent No.1, it would have been unjust to the other bidders. It is not on record as to whether all of the bidders in the present round had also taken part in the earlier occasions. If the present bidders had taken part for the first time, then it was expected in the competition that everything should be fresh. It could also be simply put in a way that even if all the earlier tender conditions were fulfilled by the petitioner on the earlier occasion, those tenders were cancelled. Cancellation had given full stop to everything and, therefore, use of any document or even a sample cannot be justified. We do not find any

illegality, error, *mala fide* or arbitrariness on the part of respondent No.1 in disqualifying the petitioner in the technical bid on the said count.

18. When we have arrived at the conclusion that the disqualification of petitioner was justified, it is not necessary for us to consider the other challenge by the petitioner. Unsuccessful bidder cannot be allowed to challenge the qualification of other bidders. Under the said circumstance, the petition fails. No case is made out for the exercise of constitutional powers by this Court and, therefore, the writ petition stands dismissed.

19. Interim relief granted thus stands vacated.

20. Rule stands discharged.

[S. G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

LATER ON :-

After the pronouncement of Judgment, learned Advocate for the petitioner prays for continuation of the interim order granted earlier.

In view of the fact that we have already arrived at the conclusion that the petitioner was not eligible and the fact that the matter is tender matter where even Hon'ble Supreme Court says that such work should not

be stayed which are of the public interest, we do not find that any case is made out for continuation of the interim order. Oral prayer stands rejected.

[S. G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm