THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA & THE STATE OF ANDHRA PRADESH

* * * *

WRIT PETITION Nos.17912 and 25140 of 2015

BETWEEN

M/s. Cyano Pharma (P) Limited and another.

... PETITIONERS

AND

The State of Telangana, Rep. by its Principal Secretary, Health, Medical and Family Welfare Department, Secretariat, Hyderabad and another.

...RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: 31.08.2015

THE HON'BLE SRI JUSTICE VILAS V. AFZULPURKAR

1.	Whether Reporters of Local newspapers may be allowed to see the Judgments?	No
2.	Whether the copies of judgment may be marked to Law Reporters/Journals?	No
3.	Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment?	No

ORDER:

The writ petitions are directed against the action of the second respondent in not considering the tenders of the respective petitioners and their respective bids submitted in response to the tender notice No.4/TSMSIDC/Medicines/2015-2016 dated 20.02.2014.

2. The aforesaid tender was floated inviting open competitive bids for procurement of general medicines on rate contract for the years 2015-2016 on behalf of the first respondent. The petitioners were found not qualified by the second respondent for different reasons. However, the question involved including the interpretation of the terms of the tender, being same, these writ petitions were heard together.

WP.No.17912 of 2015:

3. The petitioner company is stated to have been established in 1965 and is stated to be a leading manufacturer of generic, patent, ayurvedic and allopathic formulations and deals with all kinds of drugs, medicines, mixtures, tonics, tablets, pills, capsules, injections, ointments etc. including export thereof to various countries. It is also stated that the petitioner is an ISO certified company by International Certification Services and is also registered with the Ministry of Defence and has to its credits several certificates of appreciation from several countries in the world.

4. In response to the tender notice of the second respondent, bids were invited on electronic platform and bidders were requires to register and submit their bids online. The bidders were also required to scan and upload the documents as per the check list and the attested copies of the uploaded scanned documents were to be submitted offline on or before 25.03.2015. The said date, however, was extended after the amendment to the tender

conditions was made and explained to all the bidders in the pre-bid meeting held on 07.03.2015. So far as petitioner is concerned, in the pre-bid meeting, the second respondent, *inter alia*, added new list of documents to be uploaded online and offline viz. submitting of non-conviction certificate from the concerned Directorate of Drug Control and Administration; relevant clause under Sl.No.7 of pre qualification criteria mentions as follows:

> "**7**. Following are not eligible to participate in the tender:
> (a) …
> (b) Bidders who are convicted in the last three years (from bid calling date). The bidders must produce non-conviction certificate from the concerned DCA."

5. Petitioner states that he has submitted the bid together with the required documents online before the stipulated date. However, it was not clear to the petitioner as to whether the non-conviction certificate is required to be submitted online or offline and in view of that,

the petitioner submitted the said certificate offline before the stipulated date on 09.04.2015. However, the preliminary technical evaluation committee rejected the petitioner's bid on the ground that "*NCC not submitted online. Thus not considered*". Petitioner states that it has already submitted a representation dated 15.06.2015 but since its bid is not being considered, the present writ petition was filed on 18.06.2015.

<u>WP.No.25140 of 2015</u>:

6. Petitioner firm states that it is a leading partnership firm carrying on business of manufacturing generic and allopathic formulations and is duly promoted for manufacture of specific drugs and medicines including injections and also exports its manufactured medicines. So far as the petitioner herein is concerned,

the pre qualification criteria, as per the tender document, is as follows:

> "The bidder should have minimum annual turnover of Rs.2.50 Crores for MSMEs located in the Telangana State and
> Rs.10 Crores for other Bidders during each of Three financial years 2011-2012, 2012-2013 and 2013-2014. Evidence of turnover should

> be supported by a certificate from a Chartered Accountant."

7. The date for submission of tender including hard copies was extended by the second respondent up to 09.04.2015 by 3.00 PM. Petitioner submits that it had submitted the bids online together with all the attested copies, uploaded the documents and to the extent of above requirement of certification by a Chartered Accountant, petitioner states that due to non-availability of Chartered Accountant on 07.04.2015, petitioner submitted the certificate on turnover without signature of the Chartered Accountant online. However, the said certificate was issued by the Chartered Accountant on 08.04.2015, which was submitted by the petitioner offline. Petitioner, therefore, states that it had complied with the conditions required except that the signed certificate by the Chartered Accountant was submitted offline but before the stipulated date 09.04.2015. The preliminary technical evaluation committee, however, rejected the petitioner's bid on the ground "*Turnover not certified by registered Chartered Accountant*". Petitioner states that he filed representations immediately on 22.05.2015, 23.05.2015 and 10.06.2015 and ultimately, questions the rejection of its bid by this writ petition, which was filed on 10.08.2015.

8. WP.No.17912 of 2015 came up for admission on 19.06.2015, when I had passed the following order:

> "The grievance of the petitioner is that his bid is not being considered only on the ground that Non-Conviction Certificate has not been furnished online. Prima facie, looking at the tender conditions, no such condition of submission of such document online is found and the petitioner claims that he has already submitted required documents offline.
>
> Learned Standing Counsel for the respondents shall get instructions and file his counter. Since prima facie, exclusion of the petitioner for consideration of financial bid is found contrary to the tender conditions, the tenders in question shall not be finalized pending further orders.
>
> List on 26.06.2015 in the motion list."

9. WP.No.25140 of 2015 came up for admission on 11.08.2015 wherein

also I had the following order:

> "The issue involved in this Writ Petition is similar to W.P.No.17192 of 2015.
>
> Hence, issue notice before admission.
>
> Learned Government Pleader for Medical and Health takes notice for respondent No.1.
>
> Mr. Appayya Sharma takes notice for respondent No.2.
>
> List this Writ Petition along with W.P.No.17192 of 2015 on 17.08.2015 in Motion List."

10. I have heard learned senior counsel for the petitioner in WP.No.17912 of 2015; learned counsel for the petitioner in WP.No.25140 of 2015 and Mr. Appayya Sarma, learned standing counsel for the second respondent in both the writ petitions.

Separate counter affidavit with vacate stay petition is filed by the second respondent in WP.No.17912 of 2015 and counter affidavit with similar contentions is also filed in WP.No.25140 of 2015.

11. In support of WP.No.17912 of 2015, learned senior counsel for the petitioner pointed out that the pre qualification criteria under clause 7(b) merely required non-conviction certificate from the DCA to be filed without specifying as to whether it was to be filed online or offline. Learned senior counsel pointed out that the tender form prescribed various forms P1 to P6 required to be filled up by each tenderer and forms T1 to T4 required to be filled up in the form of check list for the documents submitted online along with documents submitted along with the bid. Learned senior counsel states that there is no controversy that all the documents to be submitted in T1 to T4 and information to be submitted in P1 to P6 is required to be submitted online and that has been furnished by the petitioner. However, to the extent of non-conviction certificate, learned senior counsel states that there is no such clause in the forms T1 to T4 and for the first time, a clarification was issued under the pre-bid criteria under item 36 and relevant portion is as follows:

> "List of the documents to be uploaded in online and offline:

1) Relevant documents in support of Pre-Qualification Criteria from Sl.No.1 to 8 and documents as per Form T3 should be submitted through online.
2) Documents as mentioned in Form T4 should be submitted through offline."

12. Learned senior counsel would, therefore, submit that since there was no clarity with regard submission of non-conversion certificate online, the petitioner submitted the same offline but well within the time. Learned senior counsel also points out that under Section E of the tender document, the bidding procedure is stipulated.

Sub-clause 3 of Clause E.3 of Section E of the tender document dealing with the technical bid states as follows:

> "3. List of documents to be scanned and attached to Online Bid are listed in Form T-3"

Learned senior counsel submits that items 1 to 6 in Form T3 does not cover non-conviction certificate and in fact, T4 provides that three documents listed therein are to be submitted offline.

13. Learned senior counsel would contend that the aforesaid forms read with clarification issued in the pre-bid meeting held on 07.03.2015 would show that non-conviction certificate can be submitted offline as it is not included in form T3. Thus, learned senior counsel would submit that even assuming that the requirement of submission of non-conversion certificate online was not fulfilled by the petitioner on account of the said bonafide mistake, the second respondent could have treated the same as a minor irregularity and waived the said requirement in terms of Section H of the tender document prescribing standard procedure for opening and evaluation of bids. Specific reliance is placed clause 2(3) of clause H.2 dealing with general guidelines for bid opening and evaluation, thereof, reads as under:

> "**2. Preliminary examination of Bids**
>
> …
>
> 3. TS MSIDC may waive any minor informality, nonconformity or irregularity in a bid which does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking

of any bidder.
…"

14. Learned senior counsel, therefore, submits that since the price bid quoted by the petitioner online is unaltered, the ground that non-conviction certificate is submitted by the petitioner offline instead of online cannot be stated to be material and fundamental infirmity as to reject the petitioner's bid. Learned senior counsel contend that the said rejection is clearly arbitrary and against public interest, as the second respondent ought to have scrutinized the tender of the petitioner and treating it is as valid ought to have opened the price bid of the petitioner so as to get the best price. Reliance is placed by the learned senior counsel on few decisions of the Supreme Court, reference to which would be made hereinafter.

15. So far as petitioner in WP.No.25140 of 2015 is concerned, learned counsel would contend that the petitioner had submitted the certificate of the Chartered Accountant with respect to turnover online without the signature of the CA, as he was not available on 07.04.2015 but the said certificate duly singed by the CA was submitted offline on 08.04.2015. Thus, since the petitioner has duly submitted the certificate before the stipulated date, there is no reason for the second respondent to reject the said bid. Learned counsel also placed reliance upon clause 2(3) of Section H of the tender document extracted above.

16. Learned standing counsel for the second respondent, on the contrary, submits that all the bidders including petitioners were fully aware of the tender called for on E-Procurement platform where bits as well as supporting documents were required to be submitted online. Learned standing counsel also points out that more than a month before the last date, the pre-bid meeting of all the tenderers was called for on 07.03.2015 and several aspects relating to the doubts of the tenderers were clarified as is evident from the minutes of the pre-bid meeting. Learned standing counsel submits that both the petitioners were aware that the certificate of CA as well

as

non-conviction certificate was required to be submitted online and points para 3(I) of the affidavit of the petitioner in WP.No.17912 of 2015 wherein petitioner states that due to oversight he did not upload the supporting non-conversion certificate online and the petitioner in WP.No.25140 of 2015 was also conscious that certificate of CA is required to be submitted online and he has, admittedly submitted the said certificate without signature of the CA.

17. Learned standing counsel would strongly repel the submission of the petitioners that there was ambiguity as to whether the documents are to be submitted online or offline. It is also contended that the second respondent received 130 bids out of which 97 were found qualified and 33 bids including the bids of the petitioners were rejected on the pre qualification criteria for the bids being not in conformity with the requirement of tender conditions. Learned standing counsel submits that the price bids of the qualified tenderers were already opened on 17.06.2015 i.e. even before this Court took up the writ petitions at the admission stage and both the writ petitions having been filed after opening of the price bids, the writ petitions deserve to be dismissed as infructuous. Learned standing counsel also points out that out of the list of 513 medicines to be procured, the bid of the petitioner in WP.No.17192 of 2015 is only for 19 medicines whereas the petitioner in WP.No.25140 of 2015 has hardly bid for 4 or 5 medicines.

18. Learned standing counsel has filed additional counter affidavit pointing out the aforesaid to contend that overwhelming public interest requires that the tender is finalized as early as possible,

as the Government is not able to provide medicines to the State wide hospitals and as such, interim order also deserves to be vacated. Learned standing counsel also placed reliance upon decisions of the Supreme Court, reference to which will be made hereinafter.

19. On the facts and circumstances of the case, the scope of interference

in matters of this nature under the power of this Court for judicial review is limited and legal position in this respect is supplied by the earliest decision of the Supreme Court in **G.J. FERNANDEZ v. STATE OF KARNATAKA**[1]. The aforesaid decision considers the

pre-conditions of eligibility in a tender into essential conditions and non-essential conditions. Para 15 of the decision is appropriate to be extracted hereunder:

> "15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the N.I.T., it is open to the K.P.C. to decline to consider the party for the contract and if a party comes to Court saying that the K.P.C. should be stopped from doing so, the Court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the K.P.C. cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the K.P.C. made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these situations is present here. Sri Vaidhyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to Court with any such grievance. The question, then, is whether the course adopted by the K.P.C. has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxations of the time schedule in the case of one party does affect even such a person in the sense that he would

otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana's case (supra) will be readily applied by Courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, M.C.C. is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the M.C.C. and in the K.P.C. going in for a choice of the better on the merits. The appellant had no doubt also urged that the M.C.C. had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant visa-vis M.C.C. are, however, a matter for the K.P.C. (counselled by the T.C.E.) to decide and not for the Courts. We were, therefore, rightly not called upon to go into this question."

20. Learned senior counsel for the petitioner placed reliance upon the aforesaid decision in **G.J. FERNANDEZ's** case (1 supra) apart from the decision of the Supreme Court in **PODDAR STEEL CORPORATION v. GANESH ENIGNEERING WORKS**[2] and paras 6 and 8 thereof are relevant wherein the ratio of **G.J. FERNANDEZ's** case (1 supra) was reiterated, as under:

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the Clause No. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in GJ Fernandez v. State of Karnataka [(1990) 2 SCC 488] a case dealing with tenders. Although not in an

> entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.
>
> 8. In the instant case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender Committee took the abundant caution by a further verification from the bank. In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of Clause 6, specially when it was in its interest of not to reject the said bid which was the highest. We, therefore, set aside the impugned judgment and dismiss the writ petition of the respondent No. 1 filed before the High Court. The appeal is accordingly allowed with costs through out."

21. Another decision of the Supreme Court in **INDIAN RAILWAY CATERING AND TOURISM CORPORATION LIMITED v. DOSHON VEOLIA WATER SOLUTIONS (P) LIMITED**[3] is also relied upon by the learned senior counsel wherein also the principle culled out is evident from the portion of para 18, as under:

> "18. … The language of Clauses (i) and (ii) of the Note quoted above is clear that the prices quoted are to be lump sum inclusive of all duties and taxes etc. and the vendor should indicate total excise duty amount included in the prices for plants and equipments. The Note does not indicate the consequences that will follow if the vendor does not indicate the total excise duty amount included in the prices for plants and equipments. The Note does not say that if the vendor does not indicate the total excise duty amount included in the prices for plants and equipments, the offer of the vendor "shall" be rejected. In the absence of any mention of the consequence of rejection of the offer for not indicating the total excise duty amount in rupees included in the price of plants and equipments in the tender documents, the High Court could not have held that Ion Exchange

had committed breach of an essential term or condition of the tender notification or the tender format. For this conclusion, we are again supported by the decision in Kanhaiya Lal Agrawal v. Union of India and Ors. (supra) in which this Court relying on G.J. Fernandez v. State of Karnataka (1990) 2 SCC 488 held:

> Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non- fulfillment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term.

Hence, if on the recommendation of the Tender Committee, the Accepting Authority did not find the deviation from Clause (ii) of the Note by Ion Exchange very material and has accepted the offer of Ion Exchange, the Division Bench of the High Court could not have held that Ion Exchange committed a breach of an essential term by not mentioning the excise duty amount in rupees in its offer."

22. Learned standing counsel for the second respondent placed reliance upon a decision of the Supreme Court in **MICHIGAN RUBBER (INDIA) LIMITED v. STATE OF KARNATKA**[4] Learned counsel placed strong reliance upon paras 23 and 24, which are extracted hereunder:

"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 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 fundamental right to carry on business with the Government.
>
> 24. 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"; and
>
> (ii) Whether the public interest is affected?
>
> If the answers to the above questions are in negative, then there should be no interference under Article 226."

23. In view of the above, however, the decision relied upon by the learned standing counsel is not relevant for the purpose of answering the question posed in these writ petitions and in fact, the said decision is an authority for the proposition that the authority calling for tender is entitled to set conditions of eligibility in the tender and the scope of interference by the Court with regard to tender conditions is very restricted and limited and that the Court would not interfere because it fells that some other terms in the tender would have been fairer, better and more wiser. In the present case, none of the tender conditions are questioned and the petitioners merely contend that minor irregularity in non-submission of a particular document online deserves to be waived when the said document is, admittedly, furnished offline.

24. The decisions relied upon by the learned senior counsel for the petitioner clearly hold that non-essential or collateral conditions of tender cannot be treated as on par with essential conditions.
In the present case, in my view, the said ratio would apply, particularly, in view of the power available with the second respondent to ignore the minor

deviation, minor non-conformity or irregularity, which does not constitute material deviation and such waiver would not affect the relative ranking of any bidder, as provided under clause 2(3) of Section H of the tender document, extracted above.

The aforesaid conclusion, in my view, would also advance the public interest, as the second respondent would be in a position to consider the price bids offered by the petitioners in both the writ petitioners along with other successful tenderers and would be able to procure the medicines at the best possible price. Since the price bids of the petitioners are not yet opened, the same can always be opened and considered on competitive basis along with the price bids of other qualified bidders without causing any prejudice to the relative ranking of any bidder in terms of clause 2(3) of Section H, referred to above.

25. Keeping in view the public interest of achieving the best possible price for the second respondent, in my view, therefore, no prejudice would be caused to any of the bidders whose price bid is opened, if the price bids of the petitioners herein are also opened and considered on competitive basis by the second respondent. Consequently,

the impugned rejections of the bids of the petitioners are set aside and there shall be a direction to the second respondent to open the price bids of the respective petitioner, consider them along with the price bids of other qualified bidders on competitive basis and proceed to finalize the tender, in accordance with law, at the earliest.

The writ petitions are accordingly allowed. As a sequel,

the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

VILAS V. AFZULPURKAR, J

August 31, 2015
DSK

[1] (1990 2 SCC 488

[2] (1991) 3 SCC 273

[3] (2010) 13 SCC 364

[4] (2012) 8 SCC 216