

THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

W.P.NO.29078 OF 2016

ORDER

Heard the learned counsel for the petitioner and the learned Additional Advocate General for respondents 1 to 3 – Nizam's Institute of Medical Sciences, Hyderabad (NIMS).

2. The 2nd respondent – NIMS, is an instrumentality of the State under Article 12 of the Constitution of India. It issued tender notification in Rc. No.SGS / 482/SO5 / 2016 / RC dated 25.1.2016 inviting the eligible manufacturers / authorised distributors / authorised dealers for supply of Drugs and Therapeutics, Lab and General items and surgical and nursing items to NIMS for a period of one year under rate contract.

3. In the affidavit filed in support of the writ petition it is stated that the petitioner - firm is a dealer of medical, lab, general and surgical nursing stores items, manufactured by M/s Lotus Surgical Pvt. Ltd. Pursuant to the said tender notification dated 25.1.2016, the petitioner – firm, which has been supplying the said items to NIMS for the last eight years and continue to supply even as on the date, participated in the tender process, complying all the required conditions. The Technical Evaluation Committee notified its decision on 10.08.2016 disqualifying the petitioner – firm in the technical evaluation for supply of suture material. Aggrieved by the same, the present writ petition has been filed.

4. Counter affidavit has been filed on behalf of respondents 2 and 3. In the counter affidavit it is stated that the petitioner has quoted various items

including the suture materials in tender application. The Technical Evaluation Committee evaluated the quality of suture materials of all the bidders including the petitioner, which are qualified in commercial document verification. The Technical Evaluation Committee of the respondent – Institute is headed by Prof Ch. Ram Reddy, Head of the Department of Urology, who is expert in Renal Transplants, Prof. Bheerappa, Head of the Department of Surgical Gastroenterology, who is expert in Liver Transplants, Prof. P.Chandrasekhar, Head of the Department of Orthopaedics, who is the expert of replacement of Knee Caps, Dr. Amaresh Rao, Cardiothoracic surgeon, Dr. M.Vijaya Saradhi, Neurosurgeon and Dr. G.V.S. Murthy, Superintendent, Osmania General Hospital, as the members. The said committee members, who are experts in the relevant field for over twenty years, evaluated the suture material, keeping in view the following points viz., (a) the experiences of the surgeons while using suture materials; (b) Tensile strength of suture material; (c) 1:1 ratio between needle and the suture material, (d) consistency of suture material in each batch (e) puncture site, while doing vital anatomises and (f) suitability for the major transplants.

5. It is further stated that the petitioner has been supplying the suture material to the respondent – Institute for the last eight years and the Surgeons while suturing the operated area, found that the suture material supplied by the petitioner have broken. The same was also brought to the notice of the petitioner and he replaced the material with another batch. Thus the petitioner is aware of the defect of the supplies made by him.

6. It is further stated that the respondent – Institute, which is a super speciality hospital, is rendering services to the people of States of Telangana, Andhra Pradesh and neighbouring states. The Institute has been conducting around 20,000 surgeries per annum including Liver, Heart and Renal Transplants. Therefore, endeavour of the respondent institute is to see the best quality of treatment is provided to the patients. The quality of treatment is based on skill of the surgeon and the usage to the patients. It is the choice of the surgeons to choose the best quality of surgical items including the suture materials and the rate is not a criteria in selecting the best quality. It is further stated that the petitioner is qualified for eleven other items and the disqualification of the petitioner by the Technical Evaluation Committee for supply of suture material is not *mala fide*. With these averments, as the Technical Evaluation Committee has disqualified the petitioner in technical bid, the same cannot be interfered with. Accordingly the writ petition is sought to be dismissed.

7. The petitioner also filed reply denying the averments made in the counter affidavit.

8. The leaned counsel for the petitioner submitted that the petitioner has been supplying the suture material for the last eight years to the respondent – Institute, without any complaint and the price quoted by the unofficial respondents 4 to 6 would be three to four times higher than that the price quoted by the petitioners. He submitted that the petitioner – firm has been supplying for the last eight years without any complaint. Learned counsel stated that the petitioner is denying the averments made in the counter affidavit with regard to

supply of inferior quality and that no communication has been issued to the petitioner in this regard seeking explanation. Therefore it has to be presumed that there are no quality issues. Hence, he submitted that when the petitioner has been supplying all these years and when there is no complaint from any quarter with regard to quality of suture material, the decision of the Technical Evaluation Committee, disqualifying the petitioner from supply of suture material, without any proper reasoning, is arbitrary and violative of Articles 14, 19 and 21 of the Constitution of India. Therefore, sought this court to interfere with the same in exercise of power of judicial review under Article 226 of the Constitution of India.

9. On the other hand, the learned Additional Advocate General appearing for the respondent – Institute, while reiterating the averments made in the counter affidavit, contended that the committee comprising of experts who are having vast experience in the relevant field, after technically evaluating the quality of suture material based on the guidelines, which are mentioned in the counter affidavit, disqualified the petitioner in the technical bid. Therefore, this court under the writ jurisdiction cannot review the same and direct the authorities to consider the tender of the petitioner. Relying on Clause 2(g) and 5(G) of the Tender Schedule dated 25.1.2016, he submitted that the technical evaluation done by the Institute would be final and the Director of the Institute also reserves the right to reject the tenders or to accept the tenders without assigning any reasons. He stated that the petitioner has participated pursuant to the tender notification and some of his quoted items have been qualified in the technical bid. However, he cannot attribute any arbitrariness or *mala fides* on the part of the

expert committee. As the expert committee, disqualified the petitioner, such decision of the expert committee in tendering process, is not open to judicial review. In support of these contentions, the learned counsel relied on the judgment of the Apex Court in **JAGDISH MANDAL v. STATE OF ORISSA**¹. With these submissions, the learned counsel seeks to dismiss the writ petition.

10. In view of the above averments and the rival contentions, the issue that arises for my consideration is; whether the impugned action of disqualifying the petitioner in the technical bid for supply of suture material, warrants any interference of this court under Article 226 of the Constitution of India?

11. Before advertng to the above contentions, it is necessary to note the law laid down by Apex Court in JAGDISHMANDAL v. STATE OF ORISSA (1 supra) relied on by the learned Advocate General, wherein the Apex Court held that interference in tender or contractual matters in exercise of power of judicial review is permissible to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether the choice or decision is made “lawfully” and not to check whether the choice or decision is “sound”. The Apex Court further held that the court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself (1) whether the process adopted or decision made is mala fide or intended to favour someone; or (ii) whether the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it; or (iii) whether it affected the public interest. If the answers are in the negative, there should be no interference under Article 226 of the Constitution of India. The relevant

¹ (2007)14 SCC 517

portion of the judgment at paragraph No.22 is extracted as under for better appreciation:

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether the choice or decision is made “lawfully” and not check whether the 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. 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 some;

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.. . .”

12. In the light of the law laid down by Apex Court, I would like to examine whether the petitioner could make out any case of arbitrariness, irrationality, unreasonableness, bias and mala fides on the part of the committee in disqualifying it in the technical bid.

13. From the material on record it could be seen that the case of the petitioner is that it has been supplying the suture material manufactured by M/s Lotus Surgical Pvt. Ltd to the respondent – Institute for the past eight years and is also continuing to supply till date. The same has been admitted by the respondent – Institute in the counter affidavit. Further the said manufacturer is also having all the required certificates, which are on record, issued by the reputed International Quality Certificate Institutes. It is also exporting its products to foreign countries.

14. However, the learned Additional Advocate General appearing for the respondent – Institute sought to contend that the surgeons have noticed while suturing the operated area, that the suture material supplied by the petitioner have broken and the same was also brought to the notice of the petitioner and the petitioner replaced the same with another batch. Therefore, in the interest of the patients and to extend best treatment to them with quality material, the Institute is interested to choose the best updated technically proven items. The expert committee having evaluated the suture material supplied by all the bidders, disqualified some of the bidders and the petitioner is one among them and hence no mala fides can be attributed to the committee, and the decision of the technical expert committee cannot be interfered with by the court under writ jurisdiction. As already noted above, the allegation that the petitioner earlier has supplied inferior quality of suture material has been denied by the writ petitioner.

15. The reasons for disqualifying the tender of the petitioner in the technical bid, are not forthcoming. As stated above, the petitioner continues to supply the said material manufactured by M/s Lotus Surgical Pvt. Ltd., till date. The reason sought to be projected by the respondent – Institute in the counter affidavit appears to be the quality issue of suture material supplied by the petitioner manufactured by M/s Lotus Surgicals Pvt. Ltd.

16. Taking into consideration the vehement contention of the learned Additional Advocate General that the suture material supplied by the petitioner manufactured by M/s Lotus Surgicals Pvt. Ltd., was found defective and hence the expert committee may have disqualified the petitioner, at this stage, this court

adjourned the matter yesterday to produce the record to show that any point of time during surgeries any of the doctor pointed the quality of the sutures; any complaint received which is communicated to the petitioner and despite the same, the petitioner continued to supplied the same material of inferior quality. The respondents failed to produce any of the communications sent to the writ petitioner in all these eight years regarding any complaint of inferior quality supplied by the petitioner. They also failed to produce any of the complaint made to the institute by any of the doctor. Therefore, the statement of the learned Advocate General in this regard that the expert committee may have disqualified the petitioner on quality issue, is not supported by any material.

17. In view of the facts and circumstances, I am of the considered view that such disqualification amounts to arbitrariness and unreasonableness on the part of the Committee and is liable to be interfered with under Article 226 of the Constitution of India. The issue framed is answered in the affirmative.

18. The writ petitioner along with the writ petition filed WPMP No.36002 of 2016 in W.P.No.29078 of 2016 sought for a direction to respondents 1 to 3 to open the financial bid of the writ petitioner for the items manufactured by M/s Lotus Surgicals Pvt. Ltd. Along with the financial bids of respondents 4 to 6 and consequently to consider the lower bidder or in the alternative to stay all further proceedings.

19. In the counter affidavit filed by the respondent – Institute, it is stated that the financial bids of the qualified tenderers in the technical evaluation are opened by the price bid committee on 13.8.2016 and however the respondent –

Institute has not finalized and the selection process is going on for selection of L1, L2 and L3 suppliers.

20. Accordingly, I hereby declare the petitioner qualified for technical bid and his financial bid shall be opened and if found eligible, further steps shall be taken as per the tender schedule.

21. The writ petition is disposed of accordingly. No costs.

22. Miscellaneous petitions pending if any, shall stand closed.

AVS

15—09—2016

