

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

Judgment reserved on: 18th March, 2016

Judgment delivered on: 10th May, 2016

+ **W.P.(C) 1994/2016**

M/S SHOBIKAA IMPEX PRIVATE LIMITED & ANR..... Petitioners

versus

CENTRAL MEDICAL SERVICES SOCIETY & ORS..... Respondents

and

+ **CM No. 4965/2016 in W.P.(C) 9694/2015**

M/S SHOBIKAA IMPEX PRIVATE LIMITED Petitioner

versus

CENTRAL MEDICAL SERVICES SOCIETY & ORS..... Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Vikas Singh, Senior Advocate with Mr Sriram Krishna and
Mr Arindam Dey, Advocates.

For the Respondents: Mr Ripu Daman Bhardwaj, Central Government Standing
Counsel with Mr T.P.Singh, Advocate for R-2 & 3/Union of
India.
Mr S.N.Parashar, Advocate for R-4.

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

J U D G M E N T

SANJEEV SACHDEVA, J

1. The petitioner has filed the present petition seeking quashing of decisions of the sub-committee of the Respondent no. 1, i.e., Central Medical Services Society (CMSS), Ministry of Health & Family Welfare dated 03.02.2016, 10.02.2016 and 17.02.2016 and any other decision rejecting the bid of the petitioner no. 1 as non-responsive and for a direction to consider the bid of the petitioner as responsive.

2. The respondent no. 1 (CMSS) had issued an Invitation for bid for procurement of Long Lasting Insecticides Treated Nets (LLIN's). The clause in issue of the said tender is clause 6.1(A) (d) 6 of the instructions to bidder. The said clause as originally stipulated reads as under:-

“6. The LLINs offered by the Bidders must be registered with Central Insecticide Board (CIB) of India under Insecticide Act 1968. The documentary evidence to establish these shall be submitted along with the bid.”

3. The case of the petitioner is that the product of the petitioner is duly registered with the CIB. It is contended that the same was registered in the meeting held on 31.03.2015.

4. On 28.09.2015 an amendment was carried out to Clause 6.1(A)(d) 6 (though erroneously recorded as Clause 6.1(A)(d) 5). The amendment reads as under:-

5	Section 1, ITB clause 6.1(A)(d) 5	<i>The LLINs offered by the Bidders must be registered with Central Insecticide Board (CIB) of India under Insecticide Act 1968. The documentary evidence to establish these shall be submitted along with the bid.</i>	<i>The LLINs offered by the Bidders must be registered with Central Insecticide Board (CIB) of India under Insecticide Act 1968. The certificate of registration issued by the CIB shall be submitted along with the bid or should be at the latest provided at the time of tender opening. The bids not accompanied with the CIB registration certificate on the date and time of opening of tender (technical bid) shall be held as non-responsive.</i>
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5. The Amendment carried out on 28.09.2015 mandated that not only LLIN's offered by the bidders must be registered with the CIB but the certificate of registration should be submitted along with the bid or should be at least provided at the time of tender opening. The amendment clarified that the bids not accompanied with the CIB

registration certificate on the date and time of opening of the tender (technical bid) shall be held to be non-responsive.

6. The petitioner on 13.10.2015 had filed a writ petition before this Hon'ble Court being WP(C) No. 9694/2015 seeking a direction to the respondent no. 1 to consider the petitioner's bid without insisting on the production of registration certificate at the time of submission or opening of the bid. The Amendment No. 3 in so far as it amended paragraph 6.1(A)(d) 6 was also challenged.

7. On 14.10.2015 in the said writ petition, this Court had directed issuance of notice and further directed that in the meantime that the petitioners' bid shall not be rejected merely on the ground that the petitioner has not been able to produce the registration certificate. At the time of filing of the first Writ Petition, the petitioner did not have the registration certificate from CIB though it contended that the registration had been approved in the meeting of 31.03.2015. During pendency of the said writ petition, on 21.12.2015, the registration certificate was issued by CIB.

8. On 20.01.2016, this Court disposed of W.P.(C) No. 9694/2015 by the following order:-

*“An affidavit has been filed on behalf of
respondent No.4 dated 23.12.2015 wherein it is*

categorically stated that as per the decision of the Registration Committee taken in its 354th meeting held on 31.03.2015, M/s Shobikaa Impex, Karur is registered under Section 9(3 B) of the Insecticide Act, 1968 with the Central Insecticides Board and Registration Committee vide Registration No. CIR-1802/2015(354) - Alphacypermethrin Incorporated Long Lasting Mosquito Bed Net 0.55% w/w-04, dated 21.12.2015 which is valid for two years i.e. upto 20.12.2017, for indigenous manufacture. A certificate has also been issued by the said Board in respect of the said insecticides in favour of M/s Shobikaa Impex. A copy of the same has been placed on record as Annexure A-1 to CM No.1402/2016.

In view of these clarifications, the respondent No.1 can go ahead with the subject tender.

The writ petition stands disposed of in the above terms.

All the pending applications also stand disposed of

Dasti under the signatures of the Court Master.”

9. We may note that even though the petitioners had prayed in W.P.(C) No. 9694/2015 for a mandamus to the respondents to consider the petitioners' bid without insistence on production of registration certificate and had sought quashing of the Amendment No. 3, no such relief was granted by this Court vide its order dated 20.01.2016.

10. An application for clarification and modification of order dated 20.01.2016 has been filed in W.P.(C) No. 9694/2015 in CM No. 4965/2016. The clarification sought is only to the extent that the order does not specify the brand name of the product Duranet LLIN which is registered with the CIB being offered by the bidder as per the bid document. It is further contended in the said application that though the registration is in the name of Petitioner No. 2 – Shobikaa Impex, a proprietorship concern, the Petitioner No. 1 – Shobikaa Impex Pvt. Ltd. is the bidder. Clarification is sought that the insecticide product DURANET offered by the petitioner in the tender is duly registered as per the tender requirement and to consider the bid of the petitioner for further evaluation.

11. The application seeks a clarification that the brand name of the product is not mentioned in the order which is allegedly causing confusion as the registration is in favour of the Petitioner No. 2 and bidder is Petitioner No. 1.

12. These averments in the said application do not have any bearing on the present petition, in as much as, the tender envisages two categories of bidders; one being the manufacturer bidders and other being non-manufacturer bidders. It is contended by the petitioners that though the registration is in favour of Petitioner No. 2, the product

offered is being manufactured by Petitioner No. 1 under an arrangement with Petitioner No. 2.

13. The contention of the respondent is that the bid of the petitioners is non-responsive in view of the mandatory clause 6.1(A)(d) 6 (as amended by Amendment no. 3) which stipulates that the certificate of registration issued by CIB is to be submitted along with the bid or latest be provided at the time of tender opening. The bids not accompanied with the CIB certificate at the time of tender opening are to be held as non-responsive.

14. The Supreme Court in *Michigan Rubber (India) Limited Vs. State of Karnataka and Ors.: (2012) 8 Supreme Court Cases 216* held as under:-

“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 the 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 the 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 a 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 the negative, then there should be no interference under Article 226.”

15. In the present case, the bid submission and opening date admittedly was 14.10.2015. Though the contention of the petitioner is that as on that date they were registered, the certificate of registration was not available with them. Admittedly, the certificate of registration has been issued only on 21.12.2015. On the bid opening date i.e. 14.10.2015, the petitioners did not possess the registration certificate. They clearly do not satisfy the qualifying condition. Even if it were be assumed that the product of the petitioner was registered as on the said date, as the meeting of the CIB had already been held, still it does not help the case of the petitioners as, the petitioners clearly do not conform to Clause 6.1(A) (d) 6 i.e. submission of the certificate of registration along with the bid or latest by the bid opening date. Clearly, the bid of the petitioners is non-compliant and is to be held as non-responsive.

16. As held by the Supreme Court in **Michigan Rubber (India) Limited (Supra)** 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 the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted. 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.

17. In view of the above, we are of the view that the respondents have acted reasonably and fairly. The decision taken by the respondents cannot be held to be arbitrary or irrational and thus their action of holding the bid of the petitioners as non responsive for non production of the registration certificate and non conformity to Clause 6.1(A) (d) 6, cannot be faulted. The writ petition is accordingly dismissed leaving the parties to bear their own costs.

CM No. 4965/2016 in W.P.(C) No. 9694/2015

18. As noted hereinabove, the clarification sought is only to the extent that the order does not specify the brand name of the product Duranet LLIN which is registered with the CIB being offered by the bidder as per the bid document. It is further contended in the said

application that though the registration is in the name of Petitioner No. 2 – Shobikaa Impex, a proprietorship concern, the Petitioner No. 1 – Shobikaa Impex Pvt. Ltd. is the bidder. Clarification is sought that the insecticide product DURANET offered by the petitioner in the tender is duly registered as per the tender requirement and to consider the bid of the petitioner for further evaluation.

19. Since we have already held that the bid of the petitioners was non-complaint, as they did not satisfy the qualifying condition of submission of the registration certificate with their bid, the clarification sought in the present application is of no consequence for the subject tender. We are leaving this issue open. The application is disposed of as infructuous.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

May 10, 2016

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