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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 04/09/2019****Judgment Delivered on : 12 /09/2019****Writ Petition (C) No. 3056 of 2019**

M/s UFLEX Ltd., A-1, Sector 60 Noida-201301 (Uttar Pradesh), Having Its Corporate Office at A-108, Sector 4, Noida and Having Its Regd. Office at 305, 3 Floor, Bhanot Corner, Pamposh Enclave, Greater Kailash, New Delhi - 110048, Through its duly constituted signatory authority and attorney Anupam Chaturvedi, S/o Late Shri C.D. Chaturvedi, presently working as a Senior Manager (Legal Corporate) R/o - 37B, Dhawalgiri Apartment Sector- 11, Noida, 2013011, Uttar Pradesh.

---- Petitioner**Versus**

1. State of Chhattisgarh, through its Secretary, Department of Excise, Mahanadi Bhawan, Atal Nagar, District Raipur, Chhattisgarh.
2. Commissioner Excise/tender Inviting Authority, Excise Department, Vanijyakar-Gst Bhawan, Naya Raipur, District Raipur, Chhattisgarh.
3. M/s Holostik India Limited Rep. by its Director, (C- 117, Sector-2, Noida- 201301 (Uttar Pradesh) India.
4. Alpha Lasertek India Plot No. E-50, Site-4, Sector-31, Kasna Industrial Area, Greater Noida, District Gautam Budha Nagar, Uttar Pradesh- 201308.
5. Prizm Holography & Security Films Private Limited, H-14, Site-IV, Road No.9, UPSIDC Kasana, Greater Noida- 201308, Uttar Pradesh.

---- Respondent

For Petitioner	:	Shri V. Shekhar, Senior Advocate with Shri Arun K. Sinha and Shri Ashutosh Pandey, Advocates.
For Respondent/State	:	Shri Siddharth Dubey, Deputy Government Advocate

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, J

C.A.V. Judgment

Per P.R. Ramachandra Menon, Chief Justice

1. Loss of opportunity for participating in Annexure P/1 tender floated by the Respondent State for supply of Holograms by virtue of a conscious barrier placed as condition No. 11 of Annexure P/3 forming part of the tender conditions/instructions to the tenderers, virtually preventing the prospective bidders, "if they are currently supplying Security Holograms for affixation on liquor bottles in any adjacent (neighbouring) States touching the border of the Chhattisgarh State", is put to challenge in this writ petition, seeking the said condition to be declared as illegal and arbitrary and to set aside the same, simultaneously praying to have the tender cancelled.

2. The facts and sequence are as given below:

(i) The Petitioner is stated as a Company incorporated under the relevant provisions of the Companies Act, 1956 and is one of the major suppliers of Security Holograms to various States and authorities in India, currently effecting supplies to the State of Madhya Pradesh, Andhra Pradesh, Jammu & Kashmir and Telangana. It is pointed out that the Petitioner is having a broad financial base and is the only company of its nature which has been listed in Stock Exchange.

(ii) It is stated that Annexure P/1 tender notification was issued by the 2nd Respondent on 17.07.2019 inviting bids from qualified hands and the last date for submission was stipulated as 22.08.2019 by 3:00 pm. The bids were to be furnished separately as 'technical bid' and 'price bid', respectively and the technical bid was to be opened on 22.08.2019 at 3:30 pm.

(iii) Grievance of the Petitioner is that by virtue of the adverse stipulation under Condition No. 11 of Annexure-3 as aforesaid, the Petitioner was virtually prevented from participating in the tender, being the existing supplier in one of the neighbouring States. It is further pointed out that, out of the 9 parties who purchased the tender forms from the 2nd Respondent-Excise Department, only 8 tenders were submitted; out of which 5 bids have been rejected. The Respondents Nos. 3 to 5 came to be qualified in the technical bid. The contention of the Petitioner is that 'Condition No. 11' was incorporated as part of the tender conditions only with an intent to oust the Petitioner whose credentials are the best in the lot, so as to award the work/contract to the party of choice of the Respondent Nos. 1 and 2. It is contended that the course pursued by the Respondents No. 1 and 2 is absolutely without any rationale and the clause under challenge is arbitrary and discriminatory in all respects, which is liable to be interdicted by this Court.

3. We heard Shri V. Shekhar, the learned Senior Counsel representing the Petitioner, at length.

4. The learned Senior Counsel submits that Holograms are purchased and affixed mainly to meet two purposes, firstly; to protect the revenue of the State, and secondly; to see that no spurious liquor is let to be brought in and caused to be marketed or consumed. It is asserted that it was only because of the stipulation by way of clause No. 11 of Annexure-3 conditions, that the Petitioner could not participate in the tender, though, the Petitioner happens to be the largest supplier of Holograms in India. It is pointed out that that there was no such condition, as now contained in clause 11 of Annexure P/1, in the earlier years nor is there any such stipulation in the tenders being floated by such other States, with reference to the boundaries of the State. Even in the case of the 1st Respondent/State of Chhattisgarh, no such stipulation was there in the previous tender notified in the year 2016, in which the Petitioner had also participated, though unfortunately could not succeed in the price-bid.

5. Challenge against the impugned clause is mainly pointing out that (i) there is no level playing field; (ii) the condition is so irrational that there is no nexus to the object to be achieved; (iii) no materials are there to suggest any instance of pilferage having occurred; (iv) the State only wants to promote monopoly, with intent to award the contract to the party of their choice, and further; (v) the course and proceedings are hit by *Wednesbury's* principles of reasonableness. Reliance is sought to be placed on the verdict

rendered by the Apex Court in ***Reliance Energy Ltd. & Another v. Maharashtra State Road Development Corpn. Ltd. & Others***, [(2007) 8 SCC 1, paragraphs 36, 37 and 39] and also in ***Om Kumar & Others v. Union of India***, [(2001) 2 SCC 386, paragraphs 51 to 55, 59 and 66 to 68].

6. The learned Senior Counsel submits that the condition put to challenge in the writ petition is virtually tailor-made, to extend undue favours to some parties already identified by the Respondents No. 1 and 2 and hence the Petitioner seeks for a direction to produce the relevant files to have scrutiny by this Court. It is also pointed out that the matter might not be considered with reference to the limited scope as to the prejudice caused to the Petitioner, but with reference to the 'larger public interest' involved, adding that the Petitioner has always stood above board in all transactions and that no black mark is there, anywhere in the track record so far.

7. Shri Siddharth Dubey, the learned Deputy Government Advocate representing the State/Respondents No. 1 and 2 submits that the Petitioner, admittedly having not chosen to participate in the tender proceedings, is not justified in approaching this Court by filing the writ petition after opening of the technical bid. There is absolutely no basis for the contention that the Petitioner was virtually prevented from participating in the bid only because of the stipulation under 'clause 11' to Annexure-III. Clause 11 has been incorporated with a specific purpose to ensure that no spurious liquor is caused to be brought in from the neighbouring States. It is stated that when the same party is supplying Holograms in the neighbouring States, the chance

for pilferage/infiltration are more. It was accordingly that a policy decision was taken which is given effect to as part of the tender conditions and this in no way affects the rights and interest of any party concerned. It is also pointed out that there are no specific pleadings as to when and how the Petitioner was prevented from participating in the tender process or procuring the tender form and in approaching this Court well within time. It is stated that the stipulation contained in the terms and conditions of the tender that "**late tenders, incomplete tenders and those not in conformity with the tender specifications will not be entertained**" cannot be cited as the hurdle placed in this regard; which only points to a subsequent process after submission of the tender and it nowhere mentions that tender forms will not be issued to anybody.

8. There cannot be any dispute with regard to the law laid down by the Apex Court in **Reliance Energy Ltd.** (*supra*) as to the necessity to provide and set a 'level playing field' in the matter of Government contracts. Scrutiny may have to be made based on the submission made by the learned Senior Counsel with reference to the *Wednesbury's* principle of reasonableness, as discussed in **Om Kumar & Others** (*supra*), though the subject matter involved therein was in connection with service jurisprudence. However, the question is whether an in-depth analysis is to be made in this case, the petitioner having failed to participate in the bid and for not having approached this Court on time, seeking for appropriate reliefs to cause their

tender also to be submitted and considered, notwithstanding the stipulation contained in clause 11 of the tender instructions as stated in Annexure-III.

9. According to the counsel representing the State, the stipulation that the 'existing suppliers of the neighbouring States will not be considered as eligible' was incorporated to see that no spurious liquor is caused to be transported or brought within the State using the Holograms supplied by such suppliers in the neighbouring States. However, the position, if misuse of the Holograms occurs due to some or the other reason within the State or on the part of the supplier identified by the State, is not satisfactorily explained. Similarly, in respect to the query raised by the Court as to whether denial of entry to participate in the process by eligible hands who satisfy all other requirements was to be the appropriate solution, no proper or satisfactory answer is offered. If the chance to have misuse of Holograms supplied in the neighbouring States was to be the real problem, the Court also asked the Government counsel to explain why an appropriate stipulation could not be incorporated in the tender that, if the successful bidder happened to be a supplier in the neighbouring State as well, Holograms to be supplied within the State had to be modified with separate mark of identification by way of 'colour code' or impregnation of such other identifiable marks, in contrast with the Holograms supplied in the neighbouring States; the answer to which is silence.

10. This Court is aware that the matter is coming up for the first time and necessary instructions may have to be obtained by the learned

Government Counsel from the Respondent-Department or such other experts to make appropriate submissions in his regard. The purpose of any tender is to throw open the field to all the eligible participants who are otherwise qualified and to promote competition and to get the best available bid from the lots. It is not for this Court to examine the correctness of the policy decision taken by the Respondents No. 1 and 2, but the Court can, of course, subject the sanctity of the relevant clause contained in the Tender Conditions to scrutiny, to see whether it is arbitrary or not and if it is incorporated with a conscious design to oust the others concerned from the field, so as to confine the selection to somebody of choice, with a pre-conceived mind. However, as mentioned already, the question is whether such an exercise should be pursued by this Court in the present writ petition filed by a party who admittedly did not participate in the proceedings and had not approached this Court on time. A detailed scrutiny or enquiry may be thought about after giving a chance for the State/Department to put forth their version, in an appropriate case, if it is put to challenge by an actually aggrieved party on sustainable grounds, if any, or in such other matter, if any public interest is involved and established.

11. In the instant case, the learned Senior Counsel for the Petitioner submits that there is no delay on the part of the Petitioner in approaching this Court, as the last date for submitting the bid was on 22.8.2019; whereas the writ petition was prepared on 27.08.2019 and it was filed on the next date, virtually taking only 5 days in finalising the proceedings. But the fact remains

that the tender notification was issued by the Respondent No. 2 on 17.07.2019 stipulating that the last date for procuring the tender forms would be 21.08.2019; that the tender had to be submitted by 3 pm on the next date and that the technical bid would be opened at 3:30 pm on 22.08.2019 itself. Admittedly, there was a total period of '35 days' for the Petitioner to have acted upon the cause and to have approached this Court well before the last date for submission of the bid, if the Petitioner were prevented from procuring the tender form or submitting the same, challenging the disputed condition (clause 11). The Petitioner has not given any such particulars in the writ petition to the effect that he had made any earnest attempt to obtain tender form from the 2nd Respondent; that it was denied to be given to the Petitioner with reference to the disputed tender condition or that the Petitioner's bid was not accepted. So also, no materials have been brought about, as to the steps taken to furnish the EMD or to meet such other requirements in connection with the tender. Virtually, the Petitioner was simply sleeping over the issue, after notification of the tender issued on 17.08.2019, till 27.08.2019, the date on which the writ petition was prepared/filed. In short, there is absolutely no plea in the writ petition that the Petitioner had sought for issuance of tender form or that it was denied by the 2nd Respondent, merely for the reason that the Petitioner was the existing supplier of Holograms in neighbouring State. The stipulation in the tender conditions, that "**late tenders, incomplete tenders and those not in conformity with the tender specifications will not be entertained**" never stood in the way of the Petitioner in obtaining the tender form or in submitting the same, as the question of rejection because of

the disqualification mentioned at 'clause 11' of the Tender Conditions could only be a subsequent event.

12. In the above circumstances, we find that the Petitioner woke up from the slumber only after 35 days, during which period the tender notification was well alive on the website to be acted upon. The Petitioner chose to approach this Court airing the grievance for the first time only after opening of the technical bids. This persuades us to hold that no further scrutiny does require to be made by this Court with regard to the alleged *malafides* or as to the rationality of 'clause 11' of the Tender Conditions; with regard to which we do not express any opinion and leave it open, to be dealt with in appropriate case, at appropriate time, in accordance with law. We only make it clear that this is not a fit case for interference, the Petitioner having failed to respond to the tender notification and approach this Court on time. The discretionary jurisdiction of this Court is not to extend aid and support to those who were sleeping on arm chair, unmindful of their rights and liberties.

The writ petition fails. It is accordingly dismissed.

Sd/-
(P.R. Ramachandra Menon)
CHIEF JUSTICE

Sd/-
(Parth Prateem Sahu)
JUDGE