IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.23752 of 2019

The Punjab Homoeopathic Pharmacy and Others Co-Operative Industrial Society Ltd, a co-operative society registered under the Punjab State Co-operative Society Act, 1961, having its registered office and works at Plot No. 154, Hansa Industrial Park, Banwala Road, Dera Bassi, SAS Nagar Mohali, Punjab authorized by the President represented by Raja Mondal, son of Mr. Subal Mondal, male, aged about 30 years, resident of 32 Panchanan Tala Road, P.O.- Sarat Bose Road, P.S.- Rabindra Sarbar, District- Kolkata,West Bengal.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Health Department, 1st Floor, Vikas Bhawan, Bailey Road, Patna, Bihar- 800015.
2. State AYUSH Society, Bihar, a society registered under the Societies Registration Act, 1961 and formed under the National Ayush Mission of the Central Government and under the administrative control of the Health Department, Government of Bihar having office at Vikash Bhawan, 3rd Floor, Room No. 347, Patna, Bihar- 800015.
3. Executive Director, State AYUSH Society, Bihar having office at Vikash Bhawan, 3rd Floor, Room No. 347, Patna, Bihar- 800015.
4. Director Homeopathy, Health Department, Govt. of Bihar, Patna, Bihar.
5. Joint Secretary to Government of India, Ministry of Ayush, Government of India, AYUSH Bhawan, B- Block, GPO Complex, INA, New Delhi- 110023.
6. The Principal Secretary, Ministry of Finance, Department of Expenditure, Government of India, having office at North Block, New Delhi- 110001.
7. Union of India through the Joint Secretary to Government of India, Ministry of Ayush, Government of India, AYUSH Bhawan, B- Block, GPO Complex, INA, New Delhi- 110023.

... ... Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Ms. Shilpi Keshri, Advocate Mr. Anand Vardhan, Advocate
For the Respondent/s	:	Mr. Aditya Nath Jha, AC to SC-18

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date : 20-02-2020

The petitioner, which is a registered Co-operative Society, registered under the Punjab State Co-operative Societies Act, 1961 and is engaged in manufacturing and sale of various types of homeopathic medicines, having a manufacturing unit in Punjab, has approached this Court for a direction to the respondent Nos. 2 and 3 to proceed strictly in accordance with law and recall/cancel the offending provisions in the Tender Reference No. SASB-Drugs/1-19 dated 22.08.2019 which requires a tenderer, for being eligible for participating in such tender to have an annual turnover of rupees three crores and that they would be under an obligation to file copies of audited balance sheet and profit and loss account/income and expenditure statement showing such turnover as also for ensuring that the tender papers are furnished to such co-operative and small scale units free of cost, relaxation of the requirement of payment of earnest money and waiver of security deposit up to the monetary limit for which such unit is registered and the price preference up to 15 % over the quotation given by large scale units.

The prayer in the instant petition is also for giving relaxation with respect to prior experience in such procurement.

It has been submitted that the Ministry of Health and Family Welfare, Government of India in the department of Ayush has launched "National Ayush Mission" (NAM) to be implemented through States/Union Territories with an objective to promote alternative medical systems and making the availability of the raw materials for such drugs sustainable.

According to the scheme of NAM, the financial obligation is to be shared by the Central Government and the federating units in a proportion of 60:40. Under the aforesaid scheme (NAM), operational guidelines have also been issued which provide for 50 % of the grant-in-aid provided to be used for procuring medicines from Indian Medicines Pharmaceutical Corporation Limited (a central/public sector undertaking) or from public sector undertakings/pharmacies under the State Governments and co-operatives which manufacture medicines in their own manufacturing units and are "good manufacturing practices" compliant, keeping in view the need for ensuring quality of Ayush drugs and medicines. The remaining grant-in-aid provided under the mission could be used for procuring medicines as per Essential Drug List (EDL) of alternative medicinal system published by the Department of Ayush, Government of India from other good manufacturing practices compliant units having valid manufacturing licenses.

Be it noted that the petitioner/company claims to be registered as a small unit under Section 8 of Micro, Small and Medium Enterprises Development Act, 2006 and is also possessed of a certificate of "good manufacturing practice" of homeopathic drugs as defined in schedule M(1) of the Drugs & Cosmetic Rules, 1945 by the Drug Control Administration, Government of Punjab.

The subject NIT dated 22.08.2019 which has been floated for procurement of essential drugs and medicines mandates an initial earnest money deposit of rupees five lakhs and according to clause 4(k) of the terms and conditions of the tender, the eligibility criteria has been fixed at minimum annual turnover of rupees three crores per year for consecutive three financial years from 2015-18.

The submission on behalf of the petitioner/company is that it has wrongly not provided for any exemption of such turnover requirement for small scale units as provided for and envisaged by the Micro, Small and Medium Enterprises Development Act, 2006 and Public Procurement Policy, 2012.

It has further been submitted that in view of Circular dated 29th July, 2013 by the Development Commissioner, MSME, EP & M Division, Government of India which has been brought on record as Annexure-8, all the Secretaries of the Ministries and the departments of Government of India have been signalled that under the government stores purchase programme, Government of India has been extending various facilities like issue of tender papers free of cost, exemption from payment of earnest money, waiver of security deposit up to a limit and price preference to SSI units registered with NSIC.

The aforesaid communication dated 29.07.2003 further indicates that the aforenoted provisions have been made because the financial resources of the SSI units are limited and it becomes very difficult for them to participate in more than one tender at a time floated by any government department/PSU as this will block their limited capital for long.

It was reiterated that the primary issue of concern for a buyer is the quality and price of the product. The turnover is immaterial and putting an eligibility condition of minimum turnover with a threshold of crores of rupees in the tenders is discriminative of the

SSI units.

A co-operation therefore was sought/solicited in extending the marketing support to SSI units in the emerging competitive environment.

A request therefore was made to all the Secretaries of the ministries of the Government of India to impress upon the purchasing departments and agencies working under their control to ensure that SSI units registered with NSIC are extended the facilities referred to above. Copy for similar action and compliance was also sent to the Chief Secretaries of all the State Governments and Union Territories.

The petitioner has also brought to the notice of the Court the policy circular dated 10th of March, 2016 issued by the Ministry of Micro Small and Medium Enterprises, Government of India, directing for relaxation of norms for start-ups and micro and small enterprises in public procurement regarding prior experience and prior turnover criteria. The aforesaid circular has been issued under the approval of the Union Minister of Micro Small and Medium Enterprises.

Pursuant to the aforesaid circular, it has been pointed out, the Ministry of Finance, Government of India has issued a manual for procurement of goods in the year 2017 incorporating the aforesaid circular for giving relaxation to small scale industries with respect to turnover and prior experience criteria.

On the aforesaid grounds, the subject N.I.T has been questioned as it does not provide for any such relaxation referred to above for small scale units like the petitioner.

It has also been urged that for the purposes of consideration of relaxation to Co-operatives/Co-operative Societies, there is no distinction between Co-operatives under the Government and other Co-operative organizations under the laws governing the Co-operative Societies.

On the other hand, the learned counsel for the respondent has drawn the attention of this Court to paragraph Nos. 9, 10, 11 and 12 of the counter affidavit which reads as follows:-

> *"9. That, the circular dated 10th March, 2016 upon which the petitioner is relying upon is completely irrelevant in the present case and will not be taken into consideration at any point of time as it is deliberately cited to delay the important tender procedure which related to various forms of medicines.*
>
> *10. That the aforesaid circular F. No. 1(2)(1)/2014-MA Part & Policy Circular No. 1(2)(1)/2016-MA both dated 10th March, 2016 is not at all binding upon state governments as it is clearly mentioned and marked only to central government PSU and other bodies of the Central Governments and after observing the cover page of the said circular it will be clear that no copy of the circular was ever marked or sent to any State Government whatsoever.*
>
> *11. That the para 4 of the aforesaid circular dated 10th March, 2016 itself clears all confusion in which it is*

clearly mentioned that the circular is specifically binding only to "all Central Ministries/Departments/Central Public Sector Undertakings" and nowhere even a single word has been uttered in connection to the State Governments and hence it cannot be binding upon the State Government at any point of time.

12. That in this context for relaxation to the new bidders, Govt. of Bihar has already issued a Circular vide letter No.675(1) dated 09.09.2013 and related store purchase policy 2002 issued by Depot of Industry Govt. of Bihar, Para 2 clearly Mention that "concessions shall be given with immediate effect to the industry located in the State of Bihar in purchase of stores by all Govt. Department's."

This Court, on perusal of the aforenoted paragraphs of the counter affidavit observed as follows on 13.01.2020

"There appears to be prima facie dichotomy between the stand taken by the State Government in its Health Department and the circular of the Central Government which inter alia provides for preferential

treatment of such cooperatives/small units in terms of the technical requirement for which they are to be responsive for being selected. The logic and rationale behind giving such preferential treatment is that unless such concessions are given to start-up companies, their funds would be held up in any one or two of such tenders which will prevent any further proliferation/growth of their financial health.

It is this aspect which has led to the formulation of the circular entitling such small industries/cooperative units to get tender papers free of cost and exemption from other mandatory requirements for other bidders.

The supplementary counter affidavit seems to have completely forshaken the aforesaid rationale.

Assuming but not admitting the fact that the circular of the Bihar Government for giving preference in matters of purchase of medicines and equipments and its peripherals has to be given to units located in Bihar, it is limited only to purchase of medicines.

Even if the petitioner/company is

ultimately not chosen as successful bidder, it is difficult to countenance a position where in the event of 75%, (60% in the corrent figure) of the finances being met by the Central Governments grants-in-aid to the State AYUSH Society, the circular of the Central Government would not be binding.

For the aforesaid reason, this Court sees no rationale in the stand taken by the deponent in the supplementary counter affidavit.

Under the aforesaid circumstances, this Court would require the presence of the Principal Secretary, Health in order to explain to the Court the reason for not providing such benefits to the petitioner and similarly situated micro/small units/cooperative units in consonance with the policy for development of AYUSH education and administration of the alternative modes of medicines.

The Principal Secretary, Health will appear before this Court at 11:00 O' clock on 20th of January, 2020.

List this case on 20th of January, 2020 within first five cases.

This Court has also taken note of a

communication made by the Director of Homeopathy which is also part of AYUSH to the Executive Director- cum-Special Secretary, Health Department in reference to the present writ petition that in the purchase committee constituted by the AYUSH Directorate, the Director of Homeopathy who is the senior most officer has not been made a member which has resulted in the purchase committee of AYUSH society to be left absolutely uninformed about the potent drugs of AYUSH.

Under the aforesaid circumstances, the letter dated 06.01.2020, which has been shown to this Court and a copy of which has been taken on record, makes a request to the Executive Director-cum-Special Secretary, Health Department to consider the claim of the petitioner.

What has further engaged the attention of this Court is that the prayer is not for choosing the petitioner as a concessionaire but for considering the case of the petitioner by not insisting upon the technical requirement of having experience of three years or providing balance sheet *for the past experience and for deposit of security deposit/earnest money. The ultimate selection is in the hands of the authority which has issued the tender but bypassing such circulars of the Central Government even when 75% of the funding is by the Central Government, the decision/stand of the State Government requires to be explained to this Court."*

Pursuant to the order dated 13.01.2020, referred to above, the Principal Secretary, Health appeared before this Court and explained that the policy with respect to purchase of medicines is governed by the specific resolution of the Government of Bihar and in particular, he has referred to the Store Purchase Policy of the Government of Bihar as also the resolution of the government contained in Memo No. 675(1) dated 09.09.2013 whereby it has been decided to provide for relaxation of the technical requirements only to the manufacturing units/ companies located in the State of Bihar.

A perusal of the resolution of the Health

Department, Government of Bihar regarding purchase of medicines and medical peripherals which are governed by the Drugs & Cosmetic Act, 1945 contained in Memo No. 675(1) dated 09.09.2013 referred to above discloses that in view of a decision of the High Court of Patna in C.W.J.C. No. 3851 of 2009 dated 25.11.2009, a Committee of Chief Secretary and Principal Secretaries of the Health and Industries Department was constituted for formulating a policy for giving preference to local manufacturers of medicines.

The aforesaid Committee resolved that the requirement of turnover and audited annual report with respect to units located in the State of Bihar shall be relaxed.

The other conditions which would be applicable to other units not located in the State of Bihar shall also not apply to local units.

The resolution, referred to above, is in *pari materia* similar to the Central Government's resolution for giving preference to small scale units and units run on co-operative basis.

What is noticeable is that this resolution is with respect to purchase of medicines and medical equipments in general medicines and does not specify about Ayush medicines.

Apart from this, a perusal of Store Purchase Preference Policy of 2002 also indicates that the preference policy was promulgated for promoting and nurturing cottage and small industries which were found to have been contributing significantly to the national and State economies by providing enormous employment opportunities to people.

On the patterns of the national and other State Governments' policy, the Government of Bihar also, way back in the year 1956, directed all the State controlled bodies to accord priority and price preference in government purchases of stores manufactured by cottage and small industries located within the State.

The Store Purchase Preference Policy of 2002 clearly spells out that in order to obviate any loss to local industries arising out of tax differences prevailing in other States as well as to ensure uniform tax compliance in all the tenders called by each government department, there shall be a mandatory provision that units located in Bihar or corporate offices, local agents/authorized dealers of manufacturing units located outside the State and registered with the Commercial Taxes Department, Bihar only can participate.

From the perusal of the aforesaid two documents brought on record by way of supplementary counter affidavit, it clearly transpires is that there is no restriction with respect to according the same privilege of relaxation of certain rules regarding turnover and experience criteria to small units which are not located in the State of Bihar, especially for Ayush medicines.

The purpose of relaxation is to nurture the small scale units and Co-operative Societies. In the absence of any specific rules/regulations with respect to Ayush medicines and taking into account the fact that under the National Ayush Mission, there is a significant financial contribution of the Central Government which has resolved to give certain preference to small scale units, it becomes imperative for the State Government/Health Department of the Government of Bihar also to accord such privilege to such small scale units manufacturing Ayush drugs.

Allowing a small scale unit not located in the State of Bihar to participate in the tender by giving such relaxations to it does not mean that it would necessarily be to the detriment of local units.

All that the relaxation of such terms aim at is to accept them as technically viable. Whether such non-local units shall be chosen as a concessionaire would depend on other factors and which decision shall be of the concerned authorities.

Allowing such units to remain technically responsive in matters of choosing the agency for supply of medicines only enlarges the pool of such suppliers/manufacturers to chose from, which would not in any manner damage or prejudice the prospects of local units.

While saying so, this Court has taken note of the fact that the resolution of 2013, referred to above, is with respect to purchase of general medicines and not Ayush medicines and that a significant contribution is of the Central Government which insists for such preference to SSI/Co-operative units having good manufacturing practice certificate.

For the aforesaid reasons, this Court directs that the petitioner ought not to be insisted upon for any turnover or experience requirement and on that account, the petitioner should not be held to be technically unresponsive. Whether the petitioner shall be chosen as the successful agent will depend on several other factors but only on those counts viz. turnover and experience criteria under Clause 2(K) of the tender paper be not taken into account for holding the petitioner as technically unresponsive.

The writ petition stands disposed off accordingly.

(Ashutosh Kumar, J)

Shageer/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	20/02/2020
Transmission Date	N/A