

NAFR

HIGH COURT OF CHHATTISGARH BILASPUR**Order reserved on 09.03.2020****Order delivered on 26.06.2020****Writ Petition (C) No.376 of 2020**

M/s Sat Guru Oxygen Company through its partner Shri Ashok Kumar Jha having its registered office at Sirgitti Industrial Area, Sector B, Plot Number 8A, Bilaspur, Chhattisgarh

---- Petitioner**Versus**

1. State of Chhattisgarh through the Secretary, Department of Health and Family Welfare, Mahanadi Bhawan, Naya Raipur, Chhattisgarh 492001
2. Director, Directorate of Health and Family Welfare, Indrawati Bhawan, Naya Raipur, Chhattisgarh 492001
3. Chhattisgarh Institute of Medical Sciences (CIMS) through its Dean, Sardar Vallabh Bhai Patel Hospital, Bilaspur Chhattisgarh 495001
4. Dean, Chhattisgarh Institute of Medical Sciences (CIMS), Sardar Vallabh Bhai Patel Hospital, Bilaspur Chhattisgarh 495001
5. Medical Superintendent, Chhattisgarh Institute of Medical Sciences (CIMS), Sardar Vallabh Bhai Patel Hospital, Bilaspur Chhattisgarh 495001
6. M/s Shree Balaji Gases having its registered office at Plot Number 31, Sector A, Industrial Area Sirgitti, Bilaspur Chhattisgarh

---- Respondents

For Petitioner	: Shri Abhyuday Singh, Advocate
For Respondents/State	: Shri Vikram Sharma, Dy. Govt. Advocate
For Respondent No.6	: Shri Awadh Tripathi, Advocate

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

C A V Order

Per Parth Prateem Sahu, Judge

1. The Petitioner in this petition has questioned the action of the office of Respondent No.5 whereby vide letter dated 14.12.2019 (Annexure P/1) proceeding of tender No.5863 dated 09.09.2019 has been cancelled.

2. Facts of the case in nutshell are that, Respondent No.3 floated a tender bearing No.5863 dated 09.09.2019 (Annexure P/2) for supply of medical gas for the year 2019-20. The Petitioner, a partnership firm engaged in the manufacturing and supply of medical grade gases, participated in the aforementioned tender proceeding by submitting its bid. In the aforementioned tender proceeding, apart from the Petitioner, two other tenderers, namely, M/s Arpan Gases and M/s Shree Balaji Gases have submitted the tender form. The office of Respondent No.5 issued a letter dated 14.12.2019 mentioning therein that tender proceeding of the tender No.5863 dated 09.09.2019 has been cancelled vide Annexure P/1. Issuance of Annexure P/1 cancelling the tender proceeding made the Petitioner to approach this Court by filing writ petition.

3. The Petitioner in the writ petition has pleaded about extending undue benefit and accommodating Respondent No.6 by not cancelling its tender document, even though, there is non-compliance of more than one terms and conditions of the tender

document. Upon asking for the copy of documents submitted by Respondent No.6 under Right to Information Act, 2005 (hereinafter referred to as 'RTI'), Respondents No.1 to 5 have not supplied the copies of the documents under the RTI within the prescribed period, but the same has been supplied to the Petitioner after long lapse of time. The Petitioner as also one another bidder (Arpan Gases) were technically qualified, but even then, their price bids were not opened, which shows the bias and arbitrary act on the part of Respondents No.1 to 5 and also showing leniency towards the Respondent No.6. It was further pleaded that the action on the part of Respondents No.1 to 5 to cancel the entire tender proceeding is with ulterior motive. In view of aforementioned pleadings amongst others, the Petitioner has sought for following relief(s) :

“10.1 It is prayed that this Hon'ble Court may kindly be pleased to call the entire records of the case.

10.2 It is prayed that this Hon'ble Court may kindly be pleased to issue an appropriate writ quashing the cancellation order dated 14.12.2019.

10.3 It is prayed that this Hon'ble Court may kindly be pleased to issue an appropriate writ directing Respondents to open the price bid of the qualified bidders, as per the NIT.

10.4 It is prayed that this Hon'ble Court may kindly be pleased to issue an appropriate writ directing the Respondents to proceed with the NIT number 5863

dated 09.09.2019 as per the conditions of the NIT and as per the provisions of relevant law, without any bias and arbitrariness.

10.5 It is prayed that this Hon'ble Court kindly be pleased to issue an appropriate writ directing the Respondents to black list the Respondent No.6 from all future tenders for providing false documents under the NIT.

10.6 Any other relief, which this Hon'ble Court, may deem fit and proper, in the facts and circumstances of the case.”

4. Respondents No.1 to 5/State submitted its reply to the writ petition supported by an affidavit of Dr. K.N. Choudhary, Associate Professor, Department of Surgery, CIMS, Bilaspur. They have pleaded in their reply that after submission of tender documents on the last date i.e. 14.10.2019 when technical bids were opened, the Petitioner sought for time to submit the affidavit, which was required to be enclosed along with the tender document under Clause-7 of the Notice Inviting Tender (hereinafter referred to 'NIT'), as the same was not forming part of the tender document submitted by the Petitioner as well as by another bidder i.e. Arpan Gases. Upon considering the request made by the Petitioner along with representative of Arpan Gases, Respondents No.1 to 5 have granted time to submit the affidavit and rescheduled the date as 15.10.2019 instead of 14.10.2019.

5. The representative of Respondent No.6 also sought time to

submit documents which was also considered by the employer and rescheduled the date to 18.10.2019. During meeting all the tenderers started making allegations against each other. The Purchase Committee looking to the situation sent the documents of technical bid to the Drug Controlling Officer for his opinion. The Drug Controlling Officer responded stating therein that it will be proper for Purchase Committee to take decision considering technical grounds. Petitioner and other bidder namely Arpan Gases started mounting pressure over Purchase Committee to get the Respondent No.6 disqualified and also made allegations against committee which was recorded in minutes of the meeting and sent the same to the Medical Superintendent for examining the entire process. The Purchase Committee acted in transparent manner. The Petitioner and Arpan Gases took time and opportunity to make good the defaults of technical bid by getting extension of time and when the same opportunity of rectifying the defect was afforded to Respondent No.6, Petitioner and other bidder started making hue and cry only to oust the Petitioner. The allegation of favoring Respondent No.6 is baseless and false.

6. It was also pleaded that subsequently, a fresh tender has been floated after cancellation of tender No.5863 dated 09.09.2019 and last date for submission of tender form is 13.03.2020 (Annexure R/3).

7. Shri Abhyuday Singh, learned counsel for the Petitioner submits that the act of cancellation of entire tender proceeding even

when two technically qualified bidders were present/available, is arbitrary act of Respondents No.1 to 5 with malafide intention. It is contended that Respondents No.1 to 5 wanted to favour Respondent No.6 and extended time to cure the defect as found upon opening of the technical bid, which is not permissible. Respondents No.1 to 5 have extended time even after objection raised by the Petitioner and one Arpan Gases, which clearly shows the malafide intention of Respondents No.1 to 5 by extending undue benefit in favour of Respondent No.6. It is further submitted that after holding Respondent No.6 to be disqualified from participating in the tender proceeding, the bids of Petitioner and one Arpan Gases ought to have considered in the tender proceeding as the successful and technically qualified bids for opening of the price bids of the two tenderers, but Respondents No.1 to 5 in a very arbitrary manner, have cancelled the entire tender proceeding with ulterior motive. It is further argued that Respondent No.6 has not submitted the required document as per the terms of the NIT and even after moving an application under the RTI within time, Respondents No.1 to 5 have not supplied the document submitted by Respondent No.6 but supplied information only after first appeal and lapse of 90 days, after passing an order of cancellation of tender proceedings dated 14.12.2019 (Annexure P/1). The action on the part of Respondents No.1 to 5 is arbitrary, with bias and cancelling of the tender proceeding is on the behest of Respondent No.6 and not for a valid reason. He placed reliance on the verdict passed by this Court in **Writ Petition (C) No.2614 of 2016 decided on 31.01.2017** parties

being **Ashish Kedia v. State of Chhattisgarh and Another.**

8. Per contra, Shri Vikram Sharma, learned Deputy Government Advocate for the State/Respondents No.1 to 5 submits that the allegation levelled by the Petitioner is baseless and is not having its legs to stand. The Petitioner himself and one Arpan Gases have further sought time to cure the defect, which was granted to them by extending time and during that period, they have submitted affidavit which was one of the essential requirements of tender condition. Without affidavit, technical bid submitted by the Petitioner and one Arpan Gases was to be rejected. The Respondent Authorities in the same manner have accepted the request of Respondent No.6 and permitted him also to cure the defect of tender document as pointed out by the Tender Evaluation Committee and there is no act of bias or extending undue benefit to Respondent No.6. The Petitioner made hue and cry after giving time to Respondent No.6 for curing the defect and looking to the objection and the manner, in which, the Petitioner acted before the Authorities, entire documents submitted by the respective parties have been forwarded to Drug Controlling Officer and till opinion of Drug Controlling Officer is received, the price bids were not opened. The Purchase Committee looking to the nature of objection, finding it that if Respondent No.6 is declared as technically disqualified, then only two tenderers i.e. the Petitioner and one Arpan Gases will remain in the field. It is further contended that the Petitioner and Arpan Gases are inter-connected/inter-linked as Arpan Gases is an authorized dealer of Petitioner. It is argued on the part of the State that it is the practice and procedure of

Respondents No.1 to 5 that the tender proceeding is concluded after opening of the price bids only when there is three technically qualified bidders or more to have more competitive rates keeping in mind the interest of the State Government. The Petitioner and other bidder levelled baseless allegations against Purchase Committee in meeting. It is contended that the fresh tender has already been floated, of which, the last date for obtaining the tender form/document was 27.02.2020 and last date for submission of tender document is 13.03.2020 and on the same day, the tender documents submitted by the tenderers will be opened. The Petitioner can very well participate in the tender proceeding.

9. We have heard learned counsel appearing for the respective parties and perused the documents available on record.

10. The Petitioner along with the writ petition has filed a copy of the NIT (Annexure P/2). As per Clause-6 of the NIT, tenderers are required to submit two separate envelopes one for technical bid and other for price bid, of which the envelope of technical bid will be opened first. Clause-7 of the NIT mentions that tenderers are required to submit notarized affidavit on Rs.10/- stamp paper by giving undertaking that they will not be paid additional amount for transportation, labour, loading, unloading, etc. Clause-24 of the NIT mentions that after opening of the envelopes, the tenderers will not be permitted to cure the clerical and typographical error and their bids will be rejected. Clause-27 further mentions that the Purchase Committee is having the right to cancel the entire tender proceeding

at any stage.

11. Now coming to the facts of the case as placed on record by the respective parties, Respondents No.1 to 5 in their pleadings at paragraph-5 have specifically pleaded that upon opening of the technical bid of the tenderers, it was found that the affidavit as required under Clause-7 of the NIT was not attached along with the tender document of the Petitioner and also of Arpan Gases and they were given time till 2.00 PM of 15.10.2019 for curing the defect and accordingly, the date and time for further proceeding of the tender was re-scheduled. This pleading of Respondents No.1 to 5 in paragraph-5 has not been contradicted by the Petitioner by filing any rejoinder, which means that the pleadings of fact as mentioned in paragraph-5 of the reply submitted by Respondents No.1 to 5 is admitted by the Petitioner.

12. From reading of contents of Clause-7 of the NIT, it appears that submission of the affidavit has been made mandatory. Admittedly, the Petitioner has not submitted an affidavit along with the tender document submitted by him on the last date i.e. 14.10.2019. In view of Clause-24 of the NIT, once tender document is submitted, none of the tenderers will be permitted to cure even the typographical or clerical error and their bids are liable to be rejected. Whereas in this case, it is the case that Petitioner was permitted to file additional document, which as per the terms of the NIT was not permissible.

13. So far as the ground raised by learned counsel for the

Petitioner that entire tender proceeding has been cancelled only to extend undue benefit to Respondent No.6, which shows bias and arbitrary action on the part of Respondents No.1 to 5 is concerned, in paragraph-5 of the reply filed by Respondents No.1 to 5, they have specifically pleaded that as the Petitioner and Arpan Gases were permitted to cure the defect by filing an affidavit and Respondent No.6 was also permitted some time on his prayer to cure the defect, the Petitioner and Respondent No.6 have not been treated differently, but both of them were treated equally. Even if some extra time granted to Respondent No.6 that, itself will not make the action of Respondents No.1 to 5 to be with malafide intention and bias, particularly, when it is the Petitioner who has been granted time to cure the defect of his tender document first.

14. In the instant case, the Petitioner in support of his pleadings of bias and malafide intention has only argued that the documents submitted by Respondent No.6 were not supplied to him under RTI immediately after filing of an application, but it has been supplied with delay and that too, after cancellation of the tender proceeding. Mere pleading that the Authorities have acted in malafide manner and bias itself is not sufficient, but some high degree proof is required from the persons alleging against the Authorities. No material of such nature is placed on record.

15. So far as the case law relied upon by the Petitioner is concerned, the said case is on different facts. In that case, the tender proceeding was cancelled and fresh tender was issued and

in the fresh tender, one of the Clause of experience has been withdrawn. In that case, the learned Judges have considered that in the first round, one tenderer out of nine was found to be technically qualified and instead of awarding him, it was decided to float a fresh tender. The Court opined that there can be a justifiable reason to float fresh tender but the ground of only one technically qualified bidder, even in subsequent tender proceedings, cannot be the ground for cancellation of second tender proceeding. The learned Judges have taken seriously the fact of removing the experience clause in the subsequent NIT and in that circumstances passed the order.

16. The facts of the case before us are slightly different. In the case at hand, the Petitioner himself admitted that he was not technically qualified as per the terms of the tender document initially, as he has not submitted affidavit as required under Clause 7 of NIT. Looking to the fact and circumstances of the case, particularly, looking to the fact that two allegedly qualified tenderers were initially not qualified for non submission of affidavit, and defect is cured on extension of time granted to them and are inter-related being one of the tenderers is authorized dealer of the Petitioner. Respondents have taken a decision to cancel the entire tender proceeding.

17. The Hon'ble Supreme Court in the matter of **Tata Cellular v. Union of India** reported in **(1994) 6 SCC 651** has held as under :-

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in

order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. *Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State.* The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

94. The principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the *invitation to tender*

cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

2. Whether the selection is vitiated by arbitrariness?"

18. Further the Hon'ble Supreme Court in the matter of **Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and others** reported in **(2015) 13 SCC 233** has held as

under :-

“22. When competing claims are private interest versus public interest, then in the case of disposal of public property the question would be whether the right of the person, who has earned the right to the public property in a public auction, is to be preferred over the right of the public in ensuring that valuable public assets were not disposed of except for a fair price and in a fair and transparent manner. Whether this court should, in judicial review, sit in judgment over the decision of a public body which is of the view that it need not go further ahead with the tender process. It is true if such a decision is taken without any reasons to support it or mere *ipsi dixit* it would be arbitrary. In this case there are reasons. The High Court analysed the reasons and has taken the view that those reasons are valid. In our view in matters particularly to the disposal of valuable assets by the State when the State seeks to explore the possibility of getting higher price (*sic*).”

19. The Hon'ble Supreme Court has held that the Court should normally keep restrain in interfering with the tender proceedings. The Hon'ble Supreme Court further held that the larger public interest has to be kept in mind for interfering or refusing to interfere in tender proceedings. If the facts of the case in hand are looked into in the light of the law laid down by Hon'ble Supreme Court, total three tenderers have participated in the tender proceeding, namely,

M/s Sat Guru Oxygen Company, M/s Arpan Gases and M/s Shree Balaji Gases, out of which, one Arpan Gases is an authorized distributor of the Petitioner. There is specific pleading by the Respondent-State in their reply. During course of argument, learned counsel for the Petitioner has admitted this fact. If only two participants are permitted as the qualified bidders, then, there are chances of not getting competitive rates, which may be loss to the public exchequer. If larger public interest is to be considered, then the interest, particularly, the financial interest of the State is not to be ignored. When more tenderers will participate in the tender proceeding, there can be chances of healthy competitive rates. Person quoting the lowest rate, will be successful bidder is definitely a concern for the employer floating the tender. It is a case where tender proceeding has been cancelled before opening of the price bid and no person or bidder has been adversely affected and rates quoted by tenderers are not known to any of them. The Government is required to be given free hand in realm of business.

20. If the tender proceeding initiated by Respondents No.1 to 5 is considered strictly in accordance with terms and conditions of the NIT, the Petitioner himself become disqualified for non-submission of the notarized affidavit as per Clause-7 of the NIT. As the Petitioner became disqualified, in our considered opinion, the Petitioner is not entitled for the relief Nos.10.2, 10.3 and 10.4. In the facts and circumstances of the case as the tender proceeding itself is cancelled, no contract was awarded in favour of Respondent No.6, this Court in writ jurisdiction will not consider the grounds raised and

submission made, to issue any direction as sought for by the Petitioner in relief No.10.5.

21. During pendency of the writ petition itself, Respondents No.1 to 5 have floated fresh tender, last date of getting the tender document was 27.02.2020 and considering the facts and circumstances of the case, the Petitioner was permitted to participate in the fresh tender proceeding vide order dated 27.02.2020. No prejudice is caused to the Petitioner as he can still participate in the fresh tender proceeding initiated by Respondents.

22. For the foregoing reasons, we do not find any tenable ground to interfere with the action of the office of Respondent No.5 and issuance of order dated 14.12.2019 (Annexure P/1). The petition being devoid of any substance, is liable to be and is hereby dismissed.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge