NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR
WPC No.2150 of 2020

- Rhonpal Biotech Pvt. Ltd., through the Manager Gaurav Singh, G-1019, DSIDC, Industrial Complex, Narela, Delhi 110040.

---- Petitioner

Versus

- Chhattisgarh Medical Services Corporation Limited Through Managing Director, Chhattisgarh Housing Board Commercial Complex (North West Corner), Sector-27, Atal Nagar, New Raipur 492018.

---- Respondent

For Petitioner	:	Mr. HB Agrawal, Sr. Advocate assisted by Mr Pankaj Agrawal & Ms. P. Yadav, Advocates
For Respondent	:	Mr. Animesh Tiwari, Advocate

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

Order on Board

Per Parth Prateem Sahu, J

19.11.2020

1. Petitioner by this petition is challenging decision dated 27.8.2020 taken by the respondent whereby the petitioner has been declared 'to be not eligible' for further participation in Tender Ref. No.03/ Ayur- Patent/CGMSC/drugs/2019-20 dated 01.06.2019 and further non-consideration of representation submitted by petitioner on 4.9.2020.

2. Facts of the case relevant for disposal of this petition are that the respondents have floated on-line tender Ref. No.03/ Ayur- patent/ CGMSC/drugs/2019-20 dated 1.6.2019. Tender is a rate contract tender for supply of different items mentioned therein. This tender was a three envelopes tender system i.e. Cover-A, B & C. Cover-A deals with technical evaluation of

interested bidders and along with other documents a bidder is required to submit the documents in particular showing his / her eligibility criteria. Under Cover-B a bidder is required to submit list of items for which bid is quoted, drug license, product permission, power-point presentation, documents of HSN No. & GST percentage. Under Cover-C price bid with break-up is required to be submitted. Last date for on-line submission of bid was 8.7.2019. Amendment Notification dated 26.6.2019 was issued by respondent amending certain clauses of the tender document dated 1.6.2019 including last date of online submission of bids which was extended from 8.7.2019 to 18.7.2019. Clause 2.1 (ii) at Page No.5 of tender document was amended and it is mentioned that in respect of average annual turnover for the last three years financial years i.e. 2016-17, 2017-18 & 2018-19, provisional audit report for financial year 2018-19 shall be considered with a note that audit report for the year 2018-19 need be submitted on 15.10.2019. Cover-B was opened on 27.8.2020, stated to be uploaded on 2.9.2020, in which petitioner has been shown to be not eligible. This made the petitioner to file representation on 4.9.2020 and thereafter this writ petition with following reliefs:-

> “10.1.That, the Hon'ble Court may kindly be pleased to allow the petition by declaring Annexure P-7 i.e. result of Cover 'B', showing petitioner “not eligible” due to non-filing of audit report, the action of respondent in not considering Annexure P-8 and P-9 i.e. submission of audit report before opening cover 'C' i.e. financial bid held to be illegal and opening of cover 'C' i.e. without calling claims and objections and not giving

> opportunity of hearing to the petitioner be held to be illegal and be quashed.
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> 10.2 Cost of petition be awarded and
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> 10.3 Any other relief or direction which the Hon'ble Court may deems fit, be also awarded."

3. Mr. H.B. Agrawal, learned Senior Counsel for the petitioner submits that respondents after opening of Cover-A of the petitioner along with other bidders have declared the petitioner to be eligible vide Annexure P-6. Upon opening of Cover-B, the petitioner has been held to be not eligible on the ground that audit report for the financial year 2018-19 has not been submitted on due date. Requirement of submission of audit report is under Cover-A for which the petitioner has been declared to be eligible after evaluating all the facts, circumstances and documents placed on record by the petitioner. He further contended that respondent if for any reason wanted some additional documents then the respondent could have intimated and asked from the petitioner to submit additional required documents but the same has not been intimated or informed on the part of the respondent. The petitioner has already submitted provisional audit report which was finalized by a Chartered Accountant and according to which the petitioner fulfills the eligibility criteria as prescribed under the tender notification. The petitioner could not have been declared ineligible upon taking technical plea that the petitioner has not submitted audit report as required. Referring to representation dated 4.9.2020, it is submitted by Mr. Agrawal that the petitioner has taken a very specific ground that the said

document is not required to be filed, hence not filed, however, the same has been placed on record along with representation dated 4.9.2020. Action of the respondent authorities in not considering the representation is an arbitrary exercise on the part of the respondent. Respondent authorities ought to have given opportunity to the petitioner by seeking clarification and explanation or asking the petitioner to submit the documents. He further submits that tender proceeding is yet to be finalized. As it is a rate contract tender, the petitioner's financial bid may also be opened to have competitive rates. He lastly contended that the respondent has not considered and decided the representation submitted by the petitioner on 4.9.2020 & 5.9.2020 and in a very haste manner Cover-C containing financial bid of other bidders were opened.

4. Per contra, Mr. Animesh Tiwari, learned counsel representing respondent submits that in the tender notification itself there is specific mention of the requirement under the eligibility criteria for submission of documents showing average turnover in the last three financial years i.e. 2016-17, 2017-18 & 2018-19 along with other relevant documents. Under the requirement of Cover-A, there is specific mention of sub-clause (i) that other documents for establishing eligibility of bidder are to be submitted. He further argued that looking to the situation and period during which proceedings have been initiated, the respondent has given relaxation to the bidders by issuing amendment notification on 26.6.2019 (Annexure P-4), amending some of the terms and conditions of subject tender

including last date of on-line submission of subject tender document i.e. from 8.7.2019 to 18.7.2019. In respect of annual turnover for the last three years, it has been mentioned that provisional audit report for the financial year 2018-19 shall be considered. It is pointed out that under Sr. No.2 of the amendment notification a note has been appended wherein it is specifically mentioned that audit report for the year 2018-19 need to be submitted on 15.10.2019. There is further clarification that if tenderer/bidder does not submit documents within stipulated date and time then the firm will be disqualified. Referring to representation dated 4.9.2020 submitted by the petitioner, learned counsel points out that the petitioner himself accepted that the petitioner could not be able to place on record the final audit report of the financial year 2018-19 within the stipulated date i.e. 15.10.2019, and it is mentioned that on 4.9.2020 they are submitting audit report. There is non-compliance of the terms and conditions of subject tender document, hence the respondent has rightly arrived at a conclusion that the petitioner has not been found eligible. He further submits that the summary sheet of Cover-A referred by the petitioner as Annexure P-6 showing it to be eligible is provisional and it was subject to submission of audit report on 15.10.2019. Upon opening of Cover-B it was found that the petitioner has not submitted audit report of financially year 2018-19 as per amended terms and conditions. The petitioner cannot take benefit of his own mistake. He submits that the petition lacks merit and is liable to be dismissed.

5. We have heard learned counsel for the parties and perused the documents annexed along with pleadings.

6. Perusal of Annexure P-2 would show that the respondent has on-line issued subject tender for supply of medicines to the Chhattisgarh Medical Services Corporation Ltd. As per schedule of dates, starting date of on-line bid submission was 6.6.2019, pre-bid meeting was to be held on 18.6.2019, last date for submission of tender document was 8.7.2019 and opening of tender Cover-A (EMD) was on 9.7.2019. As per eligibility criteria (for Cover-A) under Clause 2.1 (ii) there is specific mention regarding submission of proof of average annual turnover, which is to be certified copy of audited accounts by Chartered Accountant. Under the requirements of Cover-A clause i.e. under sub-clause (i) of Clause (5) - “The Tender Process”, it is mentioned that other documents for establishing eligibility of bidder. Eligibility criteria for Cover-A has been given in Clause 2.1 of the tender document. Respondent thereafter issued amendment notification, which is at Page No.92 of writ petition, wherein last date of submission of tender document was extended from 8.7.2019 to 18.7.2019. In Clause 2 of the amendment notification dated 26.6.2019 there is mention that for annual turn over of last three financial years, provisional audit report for the financial year 2018-19 shall be considered and just below it under note it is mentioned in very specific terms that audit report for the year 2018-19, 3CA- 3CB or 3CB - 3CD (which is applied) need to be

submitted report on dated 15.10.2019. Relevant portion of amended notification is extracted below;-

> “2. Page No.5;
> 2.1 (ii) Annual Turnover for the last three financial years 2016-17, 2017-18, 2018-19 (Provisional audit report for financial year 2018-19 shall be considered.).
> Note: Audit report for year 2019-19 3CA- 3CB or 3CB - 3CD (which is applied) need to be submitted report on dated 15th October. (If the tenderer does not submit the documents at the stipulated date, then the firm will be disqualified.)

Further there is very specific mentions that if a tenderer does not submit documents at the stipulated date then firm will be disqualified. In the amended notification itself there is a specific and very clear mention that the audit report of the year 2018-19 need be submitted till 15.10.2019. Admittedly, the petitioner had submitted audit report of the financial year 2018-19 on 4.9.2020. The audit report of last three financial years is one of the mandatory requirement under the tender notification to fulfill eligibility criteria. In the amendment notification itself the respondent has very clearly mentioned that provisional audit report for the year 2018-19 shall be accepted and accordingly respondent has accepted provisional audit report submitted along with tender document and the petitioner has been held to be provisionally eligible. Submission of learned Senior Counsel for petitioner that once petitioner has been declared to be eligible by the respondent for Cover-A and under which there is requirement of submission of audit report of last three financial years, therefore, respondent authorities in subsequent proceeding of opening of Cover-B could not have declared the petitioner to be ineligible, does not appeal to this Court. Issuance of tender document for supply of medicines is a commercial and business transaction between the respondents and the bidders. When once all the terms and conditions have been mentioned in the tender document and tender notifications even by issuing amendment notification then it is incumbent upon the bidders to comply with all the terms and conditions and to submit required and necessary documents as mentioned therein within stipulated date and time. The petitioner cannot opt and choose to submit documents as per his own, but bidders are required to submit documents and proceedings in the manner as provided in the tender notification. In **Central Coalfields Limited & anr Vs. SLL-SML-(Joint Venture Consortium) & ors** reported in **(2016) 8 SCC 622** the Hon'ble Supreme Court has held thus;-

> “52. There is a wholesome principle that the courts have been following for a very long time and which was articulated in Nazir Ahmed v. King Emperor[14] namely: (SCC Online PC)
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> > “........where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.
>
> There is a no valid reason to give up this salutary principle or not to apply it *mutatis mutandis* to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial contracts, where there is stiff competition. It must follow from the application of the principle laid down in *Nazir Ahmad*[14] that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.”

7. Hon’ble Supreme Court in case of **Silppi Constructions Contractors Vs Union of India and another etc** (SLP Nos.13802-13805 of 2019) held thus:

> “20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. It two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity...........”

8. It is not the case of the petitioner that the petitioner has complied with all the terms and conditions by submitting necessary required documents at the time of submission of tender document or within prescribed date i.e. 15.10.2019, as mentioned in tender notification, rather there is admission on the part of petitioner under Annexure P-8 that since the petitioner has submitted provisional audit report at the time of submitting e-tender, therefore, on qualifying Cover-A, he did not submit audit report because it was a part of Cover A and not Cover B. However, only on declaration of result of Cover-B on 27.8.2020, which was uploaded on 2.9.2020, declaring the petitioner 'not eligible' for Cover-B, the petitioner submitted the same.

9. From the aforementioned letter/representation dated 4.9.2020 of the petitioner itself it is apparent that the petitioner while making representation had not mentioned the contents of amendment notification in Clause 2.1 (ii) at Page No.5 on 26.6.2019. Amendment notification has been issued much prior to the last date of submission of tender document, more so in the said amendment notification last date of submission of tender itself was extended for about 10 days. Submission of learned Senior Counsel for the petitioner that respondent has not asked for or demanded the audit report of the financial year 2018-19 is not sustainable because once respondent has specifically mentioned in the tender notification by way of amendment that the bidders are required to submit audit report of the financial year 2018-19 by 15.10.2019 and that failure to submit audit report will lead to disqualification. If for any reason the petitioner failed to understand the requirement under the tender document / amendment notification then he may blame to himself for his own mistake and not the respondent. In the writ petition filed under Article 226 of the Constitution of India, this Court has very limited jurisdiction to consider whether decision making process of the authority is correct or not. Hon'ble Supreme Court in the matter of **Sterling Computers Ltd. Vs. M&N Publications Ltd.** reported in **(1993) 1 SCC 445** has considered the scope of interference in tender matters and jurisdiction of the Courts while exercising power of judicial review and held thus:-

> "18.While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the 'decision making process'. In this connection reference may be made to the case of Chief Constable of the North Wales Police v. Evans, [1982] 3 All ER 141, where it was said that
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> > 'The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."
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> By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, Chief Constable of the North Wales Police v. Evans (supra), the Courts can certainly examine whether 'decision making process" was reasonable, rational not arbitrary and violative of Article 14 of the Constitution."

10. Further, in case of **Tata Cellular v. Union of India** reported in **(1994) 6 SCC 651** has laid down the grounds on which the Court can exercise power of judicial review. Para-77 of the said judgment is reproduced below;-

> "77. The duty of the court is to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision making authority exceeded its powers?
> 2. Committed an error of law,
> 3. committed a breach of the rules of natural justice,
> 4. reached a decision which no reasonable tribunal would have reached or,
> 5. abused its powers.
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> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
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> (i) Illegality : This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

(ii)Irrationality, namely, Wednsebury unreasonableness.
(iii) Procedural impropriety.
The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. vs. Secretary of State for the Home Department, ex Brind, (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, 'consider whether something has gone wrong of a nature and degree which requires its intervention'".

11. Hon'ble Supreme Court in the case of **Michigan Rubber (India) Ltd., Vs State of Karnataka and Others** reported in (2012) 8 SCC 216 has held thus:

> "23.From the above decisions, the following principles emerge:
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> (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) xxxxxxxx
> (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 tendering authority is found to be malicious and a misuse of its statHoutory powers, interference by Courts is not warranted;
> (d) xxxxxxxx
> (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 fundamental right to carry on business with the Government."

12. Hon'ble Supreme Court in **Kalinga Mining Corporation vs. Union of India & ors** reported in **(2013) 5 SCC 252** has held thus;-

“62.It is by now well settled that judicial review of the administrative action/quasi judicial orders passed by the Government is limited only to correcting the errors of law or fundamental procedural requirements which may lead to manifest injustice. When the conclusions of the authority are based on evidence, the same cannot be re-appreciated by the court in exercise of its powers of judicial review. The court does not exercise the powers of an appellate court in exercise of its powers of judicial review. It is only in cases where either findings recorded by the administrative/quasi judicial authority are based on no evidence or are so perverse that no reasonable person would have reached such a conclusion on the basis of the material available that the court would be justified to interfere in the decision. The scope of judicial review is limited to the decision making process and not to the decision itself, even if the same appears to be erroneous.

63.This Court in the case of Tata Cellular Vs. Union of India[30] upon detailed consideration of the parameters within which judicial review could be exercised, has culled out the following principles :

> “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 favouritism. 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.
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> * * * *
>
> 77. The duty of the court is to confine itself to the question of legality. Its concern should be:
>
> 1. Whether a decision-making authority exceeded its powers ?

2. committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

ii) Irrationality, namely, Wednesbury unreasonableness.

iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

The aforesaid judgment has been followed again and again. It was clearly observed in the said judgment that where the Court comes to the conclusion that the administrative decision is arbitrary, it must interfere. However, the Court can not function as an appellate authority substituting the judgment for that of the administrator."

13. In view of the aforementioned law laid down by Hon'ble Supreme Court, if the facts of case in hand are considered, it is clear that the petitioner has admitted that audit report of financial year 2018-19 has been submitted on 4.9.2020 and the petitioner has taken a very casual defence, which is contrary to the amendment notification dated 26.6.2019, that there was no requirement to file the said document. Scope of judicial review is limited to decision making process and not to decision itself even if the same appears to be erroneous. The Court cannot

function as an appellate authority subsisting its own judgment for that of the Administrator. In case at hand, the decision making process at the end of respondent cannot be said to be erroneous.

14. In view of the above discussions, we do not find any illegality or irregularity in the decision making process of respondents. Writ petition being devoid of any substance is liable to be dismissed and it is hereby dismissed. No order as to costs.

Sd/-	Sd/-
(P.R. Ramachandra Menon)	(Parth Prateem Sahu)
Chief Justice	Judge

roshan/-