

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 19.10.2020

Judgment Delivered on : 20.10.2020

WPC No. 2153 of 2020

- Bhushan Pharmaceuticals Pvt Ltd. having its Registered Office at 39/23, Lane No. 15, Sameypur, Delhi 110042. Through its authorized representative, Rajiv Kumar, Post - Manager, aged about 51 Years, S/o Lt. Shri Pradeep Narayan Prasad, R/o C-1/159, 3rd Floor, Sector -II, Rohini, Delhi 110085.

---- Petitioner

Versus

1. State of Chhattisgarh through Secretary, Department of Health and Family Welfare) Mantralaya, Mahanadi Bhavan, Atal Nagar, Raipur Chhattisgarh.
2. Chhattisgarh Medical Services Corporation Limited through its Managing Director North West Commercial Complex, Sector 27, Atal Nagar, Chhattisgarh.

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For Petitioner	:	Shri Kishore Bhaduri, Advocate
For Respondent No.1	:	Shri Sudeep Agrawal, Deputy Advocate General
For Respondent No.2	:	Shri Animesh Tiwari, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice

Hon'ble Shri Parth Prateem Sahu, Judge

CAV JUDGMENT

Per P. R. Ramachandra Menon, Chief Justice

1. The challenge raised by the Petitioner-Company is against the rejection of the technical bid of the Petitioner for non-submission of the audit report / balance sheets.

2. The crux of the contentions raised is that the Petitioner had submitted copies of the relevant reports/documents by 'hand delivery' on 10.10.2019 in respect of the supply of medicines in the Ayurveda segment as well as Unani segment. When the Respondent-Corporation has accepted the said documents and has issued the work order in respect of supply of Unani medicines, the bids in respect of the supply of Ayurveda medicines have been rejected, taking a paradoxical stand that no documents have been submitted by the Petitioner. Hence the challenge.
3. Heard Mr. Kishore Bhaduri, the learned counsel appearing for the Petitioner as well as Mr. Animesh Tiwari, the learned counsel appearing for the Respondent-Corporation; besides Mr. Sudeep Agrawal, the learned Deputy Advocate General for the Respondent-State.
4. The factual matrix reveals that the 2nd Respondent-Corporation had issued Annexures-P/2 and P/3 Notice Inviting Tenders on 01.06.2019 for supply of Ayurveda Drugs (Classical) and Ayurveda Drugs (Patent) respectively. Similar tenders were there in respect of supply of Unani Medicines as well (both Classical and Patent). It is pointed out that there was some amendment / corrigendum to the Notifications vide Annexures-P/4 and P/5; by virtue of which, the bidders were made eligible to submit the provisional audit reports in respect of the year 2018-19 with liberty to have the final audit report submitted on or before 15.10.2019. It was insisted that the Average Annual Turnover for the three years i.e. 2016-17, 2017-18 and 2018-19 should be furnished in the format given in

Annexure-P/5 duly certified by the Chartered Accountant. It is the case of the Petitioner that the Petitioner had submitted the bids in conformity with the tender notification in three different covers : Cover-A : EMD, tender fee and pre-qualification, Cover-B : Technical Bid and Cover-C : Price Bid. It is contended that the Petitioner has submitted all the relevant documents including the provisional audit report for the year 2018-19 within the stipulated time and had furnished the certified copy of the final audit report for the year 2018-19 on 10.10.2019 in respect of both the tenders. It is pointed out that it was after submission of the final audit report as above, that the Petitioner was declared as qualified in respect of Cover – A on 25.10.2019 for continuing to participate in the tender process. According to the Petitioner, the Petitioner was shocked to find on 02.09.2020 that the impugned orders were issued in respect of Cover – B holding that the Petitioner has been found 'not eligible', for the reason that the Petitioner had not submitted audit reports in respect of the supply of Ayurveda Medicines (both Classical and Patent); whereas the bids submitted by the Petitioner in respect of supply of Unani Medicines (both Classical and Patent) were accepted and the work was awarded to the Petitioner. This made the Petitioner to rush to the Respondent-Corporation by filing a representation, pointing out the facts and figures and requesting to consider the financial bid of the Petitioner submitted for supply of Ayurveda Medicines (both Classical and Patent) based on the very same documents submitted already and acted upon by the Respondent-Corporation for awarding the contract for supply of Unani Medicines (both Classical and Patent). As nothing has turned out

positive, the Petitioner is stated as constrained to move this Court by filing this writ petition with the following prayers :

“10.1. That the Hon'ble Court may kindly be pleased to set-aside the Impugned Orders dated 02.09.2020 passed by the Respondent No. 2 in tenders being Tender Ref. No.:03/ AYUR – CLASSICAL / CGMSC / DRUGS / 2019-20, dated 01.06.2019 and Tender Ref No.03/ Ayur-Patent/ CGMSC/Drugs/2019-20 Dated 01.06.2019.

10.2 That this Hon'ble Court may be pleased quash and set aside the opening of the financial bid by the Respondent in tender no. Tender Ref, No. 03/AYUR-CLASSICAL/CGMSC/DRUGS/2019-20 and tender Ref. No.03/Ayur-Patent/CGMSC/Drugs/2019-20.

10.3 That, this Hon'ble Court may be pleased to quash and set aside the cover BB letter issued in Tender Ref. No. 03/AYUR-CLASSICAL/CGMSC/DRUGS/2019-20 and Tender Ref. No.03/Ayur-Patent/CGMSC/Drugs/2019-20 to the extent that it finds the petitioner in eligible for further participation in the tender process.

10.4 That, this Hon'ble Court may be pleased to direct the Respondent to consider the petitioner's bid in Tender Ref. No.03/AYUR-CLASSICAL/CGMSC/DRUGS/2019-20 and Tender Ref. No.03/Ayur-Patent/CGMSC/Drugs/2019-20 and reopen the financial bids for the same.

10.5 That, the Hon'ble Court may kindly be pleased to grant any other relief[s] / order[s] / direction [s] in favour of petitioner, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case, in the interest of justice.

10.6 Cost of the petition.”

5. When the matter came for consideration before this Court on 18.09.2020, the learned counsel for the Respondent-Corporation submitted that the Petitioner-Company had not submitted the documents as required in the tender notification, either directly or otherwise, in respect of the tenders in question i.e. Ayurvedic Medicines (both Classical and Patent). It was

also pointed out that the supply of Unani Medicines was under a different tender and as such, the documents submitted in respect of the same could not be sought to be relied on to build up the case of the Petitioner in respect of supply of Ayurvedic Medicines (both Classical and Patent) under different tenders. This was sought to be rebutted by the learned counsel for the Petitioner with reference to Annexure-P/9, as to submission of the documents 'by hand'; which bears the entry number in the Inward Register as '6939' with date and seal of the Respondent-Corporation affixed on 10.10.2019. But, on going through the contents of Annexure-P/9, it was found by this Court that the submission of the documents vide Annexure-P/9 was with reference to 'two particular tenders' mentioned therein. It was felt necessary to ascertain whether the submission of the documents by the Petitioner was only in respect of the tender for supply of the 'Unani Medicines' or such other tenders and whether the Petitioner had submitted the documents in respect of the relevant tenders involved in the writ petition as well (Ayurvedic Medicines). Accordingly, the 2nd Respondent-Corporation was directed to file a statement, supported with an affidavit as to the facts and figures.

6. Pursuant to the said order, the 2nd Respondent-Corporation has filed return dated 30.09.2020, asserting that the Petitioner had not submitted the documents as required in the tender Notifications in respect of the tenders involved herein i.e. Ayurveda Medicines (both Classical and Patent). It was asserted that Annexure-P/9 is a fabricated document insofar as the Entry No. '6939' of the Inward Register was actually in respect of a letter received from "M/s. Hitesh Suryavanshi Bilaspur" and

not from the Petitioner. It was also brought to the notice of this Court that there was a manipulated entry between Entry No. '6939' and '6940' showing it as "6939A", as if it were in respect of the documents received from the Petitioner. A copy of the relevant page of the 'Inward Register' is produced as Annexure R-2/1.

7. On coming across the aforesaid 'false entry' in the 'Inward Register', an enquiry was initiated against the staff / officers of the Respondent-Corporation by constituting an Enquiry Committee vide Annexure R-2/2 vide order dated 17.09.2020. It is also pointed out that the tender for supply of 'Unani Medicines' was entirely different and hence the documents in connection with the said tender cannot be sought to be relied on by the Petitioner with reference to the different tenders for supply of 'Ayurveda Medicines'; more so when the service provider - 'MJunction' was a separate entity and not under the control of the Respondent-Corporation and was not made a party to the writ petition.
8. When the matter came for further consideration on 07.10.2020, it was submitted by the learned counsel for the Petitioner that all the documents required for different tenders in respect of 'Ayurveda' as well as 'Unani' Medicines were submitted on one go, by hand delivery, against proper receipt on 10.10.2019. But, the learned counsel for the Respondent-Corporation submitted that the tender floated in respect of 'Unani' Medicines was cancelled in August 2019 for administrative reasons and after making necessary changes, it was reissued 'online' on 09.09.2020. The Petitioner very much participated in the said process and submitted the documents "online", which was considered and the supply order was

awarded to the Petitioner. We recorded the submissions made from both the sides and the following order was passed on 07.10.2020 :

“With reference to the pleadings brought on record, the learned counsel appearing for the Petitioner submits that the Petitioner was originally declared eligible as per Annexures P/10 and P/11. Based on the documents submitted by the Petitioner in terms of the tender, it was much later that the Petitioner was stated as not eligible vide Annexure P/1, which is put to challenge herein and this is stated as arbitrary exercise of power to oust the Petitioner.

The version of the 2nd Respondent is that the last date for submission of the documents was stipulated as 15.10.2019, but the documents were not submitted by the Petitioner. Annexure P/9 covering letter bearing the seal of the Respondent/Corporation showing the invoice delivery acceptance No. '6939' dated 10.10.2019 is stated as a concocted document. The enquiry revealed that Sl. No. 6939 was never in respect of any transaction with the Petitioner, but in respect of 'Hitesh Suryavanshi Bilaspur'. At the same time, it is noted that, there is interpolation of another serial number immediately below of Sl. No. 6939, as Sl. No. “6939A” showing the name of the Petitioner, leading to a detailed enquiry as to how the 'mischief' has taken place and as to the employees of the 2nd Respondent who are responsible for the same, which is stated as going on.

The learned counsel for the Petitioner submits that all the documents required for the different tenders in respect of 'Ayurveda' as well as 'Unani' Medicines were submitted on one go, by hand delivery, against the receipt.

The learned counsel for the 2nd Respondent submits that the entry in respect of Classical Unani Medicines were cancelled in August 2019 and later, after making necessary changes, it was reissued on 09.09.2019. The Petitioner participated in the said online process and submitted the documents “online”, which was considered and the work was awarded to the Petitioner. This being the position, the version of the Petitioner that the same documents submitted already in respect of the 'Unani' drugs should have been considered by the 2nd Respondent for the tender in respect of the Ayurvedic Classical/Patent drugs is not correct or sustainable.

It is worthwhile to note the contents of Annexure P/9 at page 207. Obviously, the documents stated as submitted alongwith the said covering letter dated 08.10.2019 are only in respect of 'Ayur Classical' and 'Ayur Patent' at Sl. No. 7 and 10 of the bid copies (page 37) and it does not refer to anything with regard to the tender for Unani Medicines.

The learned counsel for the Petitioner seeks for time to verify the position and to produce the proof with regard to submission of documents in respect of 'Unani tenders', which was stated as submitted by hand, alongwith similar documents submitted vide Annexure P/9; obtaining the acknowledgment as to its receipt.

Shri Animesh Tiwari, the learned counsel representing the 2nd Respondent/ Corporation submits that, because of the proceedings filed before this Court, much delay and hardships have been caused, as procurement and supply of Medicines has to be ensured without interruption and hence seeks to have an early listing of the case.

The 2nd Respondent/Corporation shall make available the 'Inward Register' so as to meet the submission made by the learned counsel appearing for the Petitioner that the documents in respect of 'Unani' tender, which were also submitted in "one go", alongwith the documents submitted for 'Ayur' tender vide Annexure P/9 on the same day i.e. on 10.10.2019. This is more so, since the learned counsel for the 2nd Respondent has made a submission to the effect that the last date for submission of the tender for 'Unani Medicines' was on 04.10.2019 and that all the documents submitted by the Petitioner alongwith the bids online, before the said date, were considered and it was awarded to the Petitioner.

List this matter for further consideration on 13.10.2020."

9. Pursuant to above order, the original Inward Register has been produced by the 2nd Respondent, which was noted in the order dated 13.10.2020. As observed in the order dated 07.10.2020, Annexure-P/9 produced by the Petitioner to substantiate that the documents were submitted by 'hand delivery' on 10.10.2019, in fact referred only to the two tenders in respect of "Ayurveda – Classical and Ayurveda – Patent" and it did not

mention anything w.r.t. the 'Unani Medicines'. The learned counsel for the Petitioner sought for time to verify the position and to produce the proof with regard to the submission of documents in respect of 'Unani' tenders which was stated as submitted by hand alongwith similar documents submitted vide Annexure P/9, obtaining the acknowledgement as to its receipt. On 15.10.2020, the learned counsel for the Petitioner conceded before this Court, with reference to the order passed by this Court on 07.10.2020, that no similar document as in the nature of Annexure P/9 in connection with the submission of the audit report and such other things pertaining to the tender related to 'Unani Medicines' could be traced out. Time was sought for to file an affidavit. Now, a scanned copy of an affidavit sworn to by a Director of the Petitioner Company, alongwith the covering memo dated 14.10.2020 of the counsel for the Petitioner (stating that the original affidavit / documents are in transit) has been filed. The said affidavit states that the documents in respect of 'Unani Medicines' were also submitted along with the documents in respect of Ayurvedic Medicines (as involved in Annexure P/9), however admitting that the document similar to Annexure P/9 as to submission of 'Unani' tenders is not available. Paragraphs 8 and 11 of the said affidavit, to the above effect, are extracted below:

“8. Thereafter, on 10.10.2019, the Petitioner Company, through its agent, submitted a hardcopies of the Final Audit Reports for the year 2018-2019 under form 3CA-3BD or 3CB-3CD to the concerned officers of the Respondent stationed at the Respondent's office in Raipur, Chhattisgarh at one go for all tenders namely, i) Ayur-Patent Tender; ii) Ayur-Classical Tender' iii) Unani-Patent Tender and iv) Unani-Classical (Revised) Tender. Though strictly the Petitioner was not required to submit the final audit report for the Unani-Classical (Revised) Tender as no such

amendment was issued, it as a matter of abundant caution, submitted the final audited reports jointly for Unani-Patent Tender and Unani-Classical (Revised) Tender through a common letter. It may be noted that the Petitioner's agent was provided with an acknowledging letter indicating due receipt of such reports.

11. However, upon perusal of the files maintained by the Petitioner Company at its office in New Delhi, it has come to my attention that the document/letter on which the Respondent's official gave an acknowledgement for the receipt of the Final Audit Reports for year 2018-2019 submitted by Petitioner's agent on 10.10.2019 for Unani-Patent Tender and Unani-Classical (Revised) Tender is not available in the records maintained by the Petitioner Company. I submit that at present, we are unable to trace the said document/letter.”

10. It is the further case of the Petitioner, as stated in paragraph 12 of the affidavit, that the final audit report in respect of supply of 'Unani Medicines' was not part of the documents uploaded online, but it was after considering the final audit report submitted separately, that the work was awarded to the Petitioner, in respect of supply of 'Unani Medicines'. The said final audit report is stated as part of the file of the Petitioner available in the office of the Respondent / Corporation, which in fact was submitted alongwith Annexure P/9 on 10.10.2019, by hand delivery.
11. Mr. Kishore Bhaduri, the learned for the Petitioner submits that the course and proceedings pursued by the Respondent / Corporation are not correct or sustainable and it is only with intend to oust the Petitioner from the field, denying opportunity to participate in the bid and that too, raising hyper-technical reasons. Reliance is sought to be placed on the law declared by the Apex Court in ***Poddar Steel Corporation vs. Ganesh Engineering Works and Others*** reported in (1993) 3 SCC 273 {paragraphs 5 and 6} and ***Rashmi Metaliks Limited and Another vs.***

Kolkata Metropolitan Development Authority and Others reported in **(2013) 10 SCC 95** {paragraphs 17 onwards}.

12. Mr. Animesh Tiwari, the learned counsel appearing for the 2nd Respondent / Corporation submits that Annexure A/4 proceeding is only a 'general list' of the various tenders and it is not a common tender notification showing different items for supply. In respect of supply for different Medicines, separate tender notifications have been issued. One such tender notification has been produced by the Petitioner alongwith the 'affidavit' of the Director for supply of the particular type of Medicines *i.e.* 'Unani-Classical' and 'Unani-Patent'. This being the position, it was obligatory for the parties to submit documents in respect of each tender for which the bidder was desirous of participating in the process and the documents stated as submitted in respect of one tender cannot be called for or verified by the Corporation to assess the merit or credentials in respect of such other tenders.
13. As noted already, the point to be considered is whether the “decision making process” pursued by the Respondent / Corporation is correct or sustainable and whether there is any element of arbitrariness or malafide act in the alleged denial of opportunity to the Petitioner by disqualifying the Petitioner. There is no dispute with regard to the relevant clauses in the tender notification and as to the burden to submit the documents concerned. Initially, the case of the Petitioner was that the documents in respect of the tenders for 'Ayurveda' and 'Unani' Medicines were the same, which was submitted as per Annexure P/9; receipt of which stands

acknowledged as per the 'inward entry and seal' of the Respondent / Corporation. Having accepted the said documents in respect of supply of 'Unani Medicines' (which stands awarded to the Petitioner), it was not correct or proper for the Respondent / Corporation to have disqualified the Petitioner in respect of the supply of 'Ayurveda Medicines', holding that the Petitioner had not submitted the documents. The said contention was put to scrutiny by this Court, when it was noted that Annexure P/9 only referred to supply of 'Ayurvedic Medicines'. The submission of the Respondent / Corporation was recorded to the effect that the earlier tender in respect of supply of 'Unani Medicines' was cancelled in August 2019 and reissued in September 2019 and further that the bids submitted by the Petitioner 'online' in respect of 'Unani Medicines' were accepted and the work order in respect of 'Unani Medicines' was awarded to the Petitioner, which is virtually to the effect that the documents in respect of 'Unani Medicines' were not furnished alongwith Annexure P/10 by hand delivery in "one go". It was at this juncture, that the learned counsel for the Petitioner asserted that the documents in respect of 'Unani Medicines' were also submitted on the very same day i.e. 10.10.2019 under a separate covering letter like Annexure P/9, against proper receipt. Time was sought for to produce the said document, which was granted by this Court. Now, the Petitioner has come forward stating in the affidavit dated 14.10.2020 filed by one of the Directors that the documents in respect of 'Unani' tenders were also submitted on 10.10.2019 by 'hand delivery' against proper receipt, but the said document is not traceable, as not available in the file.

14. We have gone through the original 'Inward Register' produced by the Respondent / Corporation. We find that the version of the Respondent / Corporation that the entry No. 6939 pertains to 'Hitesh Suryavanshi Bilaspur' and not to the Petitioner is correct and as such, Annexure P/9 is not liable to be taken as a valid and reliable document. Similarly, the entry as to the alleged receipt of the proceedings from the Petitioner is interpolated between the entries '6939' and '6940', as '6939A' - which is cited as the documents submitted by the Petitioner in respect of supply of 'Ayurveda Medicines'. When the Petitioner contends that similar documents were submitted in respect of the 'Unani Medicines' by the 'hand delivery' on the same day *i.e.* 10.10.2019 against proper receipt, there has to be similar entry in the 'Inward Register' in respect of the documents submitted in respect of the tender for supply of 'Unani Medicines', as it is stated as submitted under a separate covering letter. Obviously, no such entry is there in the 'Inward Register'. To say the least, the Petitioner has taken a somersault and has not substantiated the case before this Court as to the submission of the relevant documents in respect of the tenders (Ayurveda – Classical & Patent) in question. This being the position, it is not a fit case to invoke the discretionary jurisdiction of this Court to extend any relief to the Petitioner, particularly, in view of the limited scope of scrutiny in contract matters, by virtue of the settled position of law. As it stands so, we are of the view that the judicial precedents sought to be relied on by the Petitioner with reference to minor / technical defects are quite out of context and not applicable herein.

15. Yet another important aspect to be noted is that the writ petition has been filed by the Petitioner Company, stated as authorized through Mr. Rajiv Kumar holding the post of 'Manager'. But the affidavit dated 04.09.2020 sworn by him only says that he is the 'Manager' of the Petitioner-Company and is fully conversant with the facts and circumstances of the case; adding that the proceedings have been drafted by the counsel as per his instruction and further that the contents are true and correct to the best of his personal knowledge and belief. In other words, neither the writ petition nor the affidavit as aforesaid does say that the signatory to the affidavit is duly authorized by the Company. At the same time, it is to be noted that new affidavit dated 14.10.2020 filed by one of Directors of the Company has been sworn by one "Meenakshi Bansal", claiming that she is authorized to file the proceedings. Who is actually authorized; whether both the persons are authorized and if so, how, are matters of concern. It is well-known that Company is a legal entity, who can sue and be sued on its own, as per the provisions of Companies Act. The authorization to be given, as envisaged in the statute, shall be by way of resolution. Whether any such resolution was passed and if so, on what date and such other relevant particulars are not revealed from the materials on record. That apart, the proceedings do not bear the 'Seal' of the Company (Company having perpetual seal as per the relevant provisions of law). The only seal affixed is that of the 'authorized signatory', for the Petitioner Company. In the said circumstance, it cannot but be said that the present writ petition is not liable to be regarded as properly instituted by the Company and hence is not liable to be acted upon.

16. In the above circumstance, we do not find any scope to interfere with the 'decision making process' pursued by the Respondent-Corporation. Interference is declined and the writ petition stands dismissed.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

Chandra