NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 2210 of 2020

- Cipco Pharmaceuticals, through its Authorized Signatory, Manish Agrawal, S/o Jaiprakash Agrawal, aged about 36 Years, R/o 1-B, Jaishree Merline Vihar, Devendra Nagar, Raipur (CG)

---- Petitioner

Versus

1. State of Chhattisgarh, through Secretary, Health & Family Welfare Department, Mahanadi Bhawan, Nawa Raipur, District Raipur, Chhattisgarh.
2. Chhattisgarh Medical Services Corporation, through its Managing Director, Chhattisgarh Medical Services Corporation, North West Commercial Complex, Sector-27, Atal Nagar, Raipur (CG)

---- Respondents

For Petitioner	:	Mr. CJK Rao, Advocate
For Respondent No.1	:	Mr. Vikram Sharma, Dy. Government Advocate
For Respondent No.2	:	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

18.11.2020

1. Petitioner, which is said to be a pharmaceutical company engaged in the business of manufacturing & marketing of drugs/medicines, has filed this petition challenging the final summary sheet of Cover-A dated 28.8.2020 (Annexure P-1) declaring the petitioner ineligible for Drug Codes D212, D203, D232, D333, D61M, D268, D395, 113, D233, D6 on the ground that the petitioner failed to submit duly renewed product

permission.

2. Facts of the case, in brief, are that respondent No.2 floated Tender Notification bearing No.71/CGMSC/ Drug & Medicine/ 2020-21 dated 06.5.2020 for rate contract of drugs and medicines. Tender document was uploaded in the official website of respondent No.2 on 8.5.2020. Date of pre-bid meeting was 18.05.2020 at 12.00 noon. Last date for submission of tender was 8.6.2020 upto 5.00 p.m. As per tender document, the bidders were required to submit two separate envelopes i.e. 'Cover-A for technical bid' and 'Cover-B for price bid'. Under the Schedule of Requirement (Annexure II) of tender document, name and code of drugs/items required by respondents have specifically been mentioned. Petitioner along with other tenderers submitted his bid. Upon opening of Cover-A submitted by bidders and preparation of final summary sheet, the petitioner has been declared ineligible for Drug Code D212, D203, D232, D333, D61M, D268, D395, 113, D233, D6 due to non-submission of license and product permission. Feeling aggrieved therewith the petitioner has preferred this petition before this Court with following relief:-

> “10.1. Call for the entire records pertaining to the present case.
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> 10.2. Issue a writ of certiorari & quash and set aside the impugned Final Summary Sheet of Cover-A dated 28.08.2020 (Annexure P/1) declaring the petitioner to be “Not Eligible / Ineligible”.
>
> 10.3 Issue a writ of mandamus directing the respondent authority to consider the objections raised by the petitioner and to further consider the clarification submitted by the petitioner to the objection raised.

> 10.4. Issue a writ of mandamus directing the respondent authority to treat the petitioner as 'Eligible' and permit/allow the petitioner to participate in the Tender process.
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> 10.5 Issue a writ of mandamus directing the respondent authority to consider the candidature of the petitioner and its Bid for the award of the Tender Contract.
>
> 10.6 Grant of cost of the petition to the petitioner."

3. In the writ petition it is pleaded that the petitioner is engaged in the manufacturing and marketing of drugs as per license issued in Form 25 & 28 by the competent Licensing Authority, Food & Drug Administration. License issued in favor of petitioner was initially valid for a period of five years from 28.12.2012 to 27.12.2017. Prior to expiry of validity of said license, petitioner submitted an application on 19.12.2017 along with requisite fee for its renewal. The Food and Drugs Administration Department, Madhya Pradesh issued a certificate specifying and clarifying that license in question be deemed to be valid for a further period of five years i.e. upto 27.12.2022. This certificate has been issued twice i.e. on 30.12.2019 & 6.7.2020. Manufacturing and Marketing Certificate was also issued showing validity of license upto 27.12.2022 for the products mentioned therein. Upon calling objection by respondents on 10.7.2020, the petitioner submitted clarification through e-mail clarifying that office of the Controller, Food & Drugs Administration Madhya Pradesh has issued certificates on 30.12.2019 & 6.7.2020 respectively mentioning that the holder of drug manufacturing license No.25/7/89 in Form No.25 and license No.28/7/89 in Form No.28 has deposited license retention fee and as such, license is deemed to be valid for a

further period of five years i.e. upto 27.12.2022. The GMP Certificate issued by the Licensing Authority also mentions that the manufacturing license in Form Nos.25 & 28 is valid upto 27.12.2022 The GMP certificate has also been issued shown to be valid upto 27.12.2022. However, the respondent Corporation authorities without considering aforementioned documents annexed along with tender document of petitioner, while preparing Final Summary Sheet has declared the petitioner to be ineligible for the drugs mentioned against the name of petitioner. Manufacturing license has been renewed upto 27.12.2022 in respect of all the drugs mentioned therein, which is evident from the Manufacturing Marketing Certificate issued by the competent authority, therefore, declaration of petitioner to be ineligible for the drugs mentioned in the final summary sheet is illegal, arbitrary and not sustainable in law.

4. Respondent No.2 submitted reply to writ petition pleading therein that respondent No.2 is established under the Department of Health and Welfare, State Government of Chhattisgarh to procure, test, store and supply all kinds and varieties of generic drugs/medicines, suture & surgical items to various medical colleges, District Hospitals, Community Health Centres and Primary Health Centres situated within the State of Chhattisgarh. Respondent No.2 also deals in procurement, distribution, installation, maintenance of all types of medical equipments and instruments. As per tender document, the bidders were required to submit their bid in two separate envelopes, one for technical bid and another for price bid. As

per requirement of tender document, the bidders were also required to submit specific document to qualify for further tender process. Clause-4 of the tender document prescribes for submission of Notary attested photocopies of manufacturing license; certificate of renewal/current validity certificate; product permit duly approved by the Licensing Authority for all quoted product items and drug code (CGMSC) should mandatorily be highlighted in product permit. The petitioner has not fulfilled the condition mentioned and specified in Clause 4 (iii) of the Check-list. The Tender Evaluation Committee found that product permission submitted by petitioner for certain drugs is invalid as the same has already been expired way back in the year 2017. License/product permission in respect of Drug codes mentioned in the Final Summary Sheet against the name of petitioner has already been expired in the year 2017, however, the petitioner has been permitted to participate in the further tender process in respect of drugs for which the petitioner submitted valid product permission. The petitioner has not submitted required mandatory document i.e. valid product permission duly approved by the Licensing Authority, hence the petitioner is not entitled for any relief as claimed in writ petition.

5. Petitioner filed rejoinder to the reply filed by respondent No.2 annexing a copy of certificate issued in the shape of letter dated 19.10.2020 as Annexure RJ-1 to show that office of the Controller, Food & Drugs Administration Madhya Pradesh had issued product permit in favour of the petitioner for 12 items

mentioned therein, which is valid for five years i.e upto 27.12.2022.

6. Mr. CJK Rao, learned counsel representing the petitioner submits that action on the part of respondent No.2 in declaring the petitioner ineligible is *per se* illegal and arbitrary. He submits that respondent No.2 had not considered the documents in its true perspective. The petitioner has submitted an application for retention of license along with license fee before the expiry of license i.e. on 19.12.2017, whereas the license was to be expired on 27.12.2017. The Competent Authority has issued certificate on 30.12.2019 & 6.7.2020 (Annexure P-5 & P-6) mentioning that the license in Form -28 dated is deemed to be valid for a period of five years i.e. upto 27.11.2022, but respondent No.2 has not taken into consideration the said fact and illegally declared the petitioner ineligible for participating in tender process for some products. He submits that when once Licensing Authority has certified that petitioner is having manufacturing license and product permit in the above manufacturing license valid upto 27.12.2022, action of respondent No.2 in declaring petitioner to be ineligible for drug codes in question for want of duly renewed product permission is illegal and arbitrary. Once it is certified that petitioner's license shall be deemed to be renewed for a further period of five years i.e. upto 27.11.2022, then it ought to have been considered and accepted that product permission in respect of all products mentioned in the license, which was valid upto 27.12.2017, has been granted to the

petitioner. It was further contended that even after bringing to the knowledge of the respondent authorities with regard to the purpose of issuance of certificate (Annexure P-5 & P-6) showing renewal of license for a further period of five years, the respondent authorities have not amended/modified the Final Summary Sheet of Cover-A, which shows that the respondent authorities are having hand-in-gloves with certain individuals and issuance of notice inviting tender is merely an empty formality. Action of respondent No.2 is arbitrary and with intent to provide undue advantage to some of the bidders of their choice.

7. Mr. Tiwari, learned counsel appearing on behalf of respondent No.2 Corporation submits that submissions made by learned counsel for the petitioner are not correct in the given facts and circumstances of the case. There is specific mention in the Check-list (Annexure-I) of the tender document that a bidder for the purpose of technical qualification is required to submit notarized photocopies of all the documents like manufacturing license, certificate of renewal/current validity certificate, product permit duly approved by the Licensing Authority for all quoted products and items quoted & drug code (CGMSC) should mandatorily be highlighted in product permit. Petitioner has not submitted the product permit duly approved by the Licensing Authority for all quoted products. Respondent No.2 had permitted the petitioner to participate in the tender proceeding for the drug codes for which product permit duly approved by the Licensing Authority was submitted. Hence, the petitioner

cannot be permitted to raise a ground of malafide. Petitioner except raising a plea in cassual manner of malafide and giving undue advantage to some of the bidders, has not brought on record any other material to prove the same. He further points out that as per document Annexure RJ-1, the product permit has been issued by the Licensing Authority only with respect to 12 items that too on 19.10.2020, whereas last date for submission of tender document was 8.6.2020. Respondent No.2 taking note of the terms and conditions mentioned in the tender document has evaluated the bids submitted by respective bidders strictly in accordance with law. In absence of any product permit issued by the Licensing Authority, respondent No. 2 is perfectly justified in declaring the petitioner ineligible for supply of drugs mentioned in final summary sheet dated 28.8.2020.

8. We have heard learned counsel for the parties and perused the documents enclosed by respective parties in support of their pleadings.

9. Perusal of the tender notification would show that under Clause 1.4 the bidders were cautioned that bids devoid of proper documents or inadequate documents will be rejected and the bids of only those bidders will be considered who have furnished all the required documents for each of the product quoted. Under Clause 2.1 of the tender document it is specifically mentioned that the tender is two-cover bid system consisting of 'Cover-A Technical Bid' and 'Cover-B Price Bid'.

Clause 5.1 of the tender document prescribes requirement of Cover-A, according to which, a tenderer is required to submit vendor registration e-certificate; copy of RTGS/FDR/BG receipt for submission of tender processing fee with UTR No. etc. This clause further prescribes that if original copy is not available, notarized copies of drug license and retention letter duly approved by the Licensing Authority as also approved product license should be uploaded, however, the bidder will be required to produce original documents for verification as and when demanded. This clause further prescribes that the items quoted & drug code (CGMSC) should mandatory be highlighted, if the drug code is not found highlighted in the license and product permission, then it will not be considered for further processing. Relevant part of Clause 5.1 reads as follows;-

> "The Bidder should upload valid Manufacturing License / loan license (Original copy of Drug license & Renewal Certificate to be scanned & uploaded only; in case original copy is not available, Notarized copies of Drug license & Retention Letter (Certificate to be scanned & uploaded) duly approved by the Licensing Authority. As well as approved product license of the bidder. The items quoted & drug code (CGMSC) should Mandatory be **HIGHLIGHTED;** drug code as mentioned in tender document should be indicated. If the products quoted are not found highlighted in the copy of license and product permission submitted then it will not be considered for further processing. Original documents should be produced when demanded for verification."

Similar condition is incorporated in Annexure-I of the check-list for the manufacturer/importer and authorized distributor, which is extracted below;-

> “4. Notary attested photocopies of;
>
> i. Manufacturing license
>
> ii. certificate of renewal/ current validity certificate;
>
> iii product permit duly approved by the Licensing Authority for all quoted product
>
> items quoted and drug code (CGMSC) should mandatorily be highlighted in product permit;”

Annexure II is the 'Schedule of Requirement' which prescribes the code, name, strength and unit of as many as 80 drugs/items to be procured by respondent No.2-Corporation under tender in question.

10. Admittedly, license bearing No.25/7/89, which was initially issued in favour of petitioner, was valid upto 27.12.2017, as is evident from Annexure P-3 (Page Nos.133 to 140). The petitioner himself has placed on record copy of list of products under License No.25/7/89 (Page No.131 & 132 of writ petition) and from perusal of which it is clear that the Licensing Authority has validated the license/extended the period of license not for all products but only for the products which are mentioned in the list. Perusal of list of products (Page No.131 of petition) would show that it was digitally signed on 1.3.2019, whereas list of products at Page No.132 has been digitally signed on 25.5.2020. The documents placed on record by the petitioner along with rejoinder as Annexure RJ-1 would further make it clear that the license, which was valid upto 27.12.2017, has been deemed to be valid for a period of five years i.e. upto 27.12.2022, but the letter/certificate issued on 19.10.2020 (Annexure RJ-1) certifies only 12 items and not all the items as shown in the license of petitioner which was valid upto

27.12.2017. This document has been issued only on 19.10.2020, whereas last date for submission of bid along with all necessary and essential documents was 8.6.2020.

11. True it is that the petitioner submitted application for retention of license along with requisite fee much prior to expiry of his license, but fact remains that the Controller, Food and Drugs Administration Madhya Pradesh has not authorized petitioner for all the products/ items mentioned in license No.25/7/89, which was valid upto 27.12.2017. The petitioner has not submitted required product permission along with copy of license highlighting drug code for which bid was submitted by him i.e. license and product permission. The petitioner has simply submitted documents Annexure P-5 & P-6 showing that license issued in favour of petitioner is deemed to be valid for a further period of five years i.e. upto 27.12.2022, but from this document it cannot be ascertained as to which drug has been permitted under the license for manufacture or distribution in favour of the petitioner. More so, when from the documents annexed along with writ petition and rejoinder itself it is appearing that product permission has been granted by the authority concerned for different products at different points of time under the said license.

12. In the proceedings under Article 226 of the Constitution of India, in tender matter what is required to be looked into is the decision making process and not correctness of the decision. Hon'ble Supreme Court in the matter 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.
>
> Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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, 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'".

13. 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:
>
> (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 statutory 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."

14. Hon'ble Supreme Court in its another decision rendered in **Silppi Constructions Contractors Vs Union of India and another et**c (SLP Nos.13802-13805 of 2019) held thus:

> "20. The essence of the law laid down in the judgements 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....."

15. In the case at hand, in the tender document itself it is very specifically and clearly mentioned that bidders are required to submit copy of license and product permission, the drug code

should be mandatorily highlighted in the license and product permission. But, the petitioner failed to comply with the aforementioned requirement as he has not placed on record copy of license and product permission highlighting drug code of the drugs for which petitioner is held ineligible in the tender proceeding.

16. As regards the ground of malafide, the petitioner in his pleading has pleaded that action of respondent in declaring petitioner to be not eligible is with malafide, but failed to substantiate the same by placing cogent and clinching material on record. The Hon'ble Supreme Court in the matter of **Ajit Kumar Nag Vs. General Manager (PJ) Indian Oil Corporation Ltd. Haldia & ors** reported in **(2005) 7 SCC 764** has held that burden of proving malafide is on the person making allegation only and held thus :-

> “56. ..... It is well-settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy" [vide E.P. Royappa v. State of T. N., (1974) 4 SCC 3]. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high decree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra, (1976) 1 SCC 800 (SCC p.802, para 2); “It (mala fide) is the last refuge of a losing litigant”.

17. In the above facts and circumstances, particularly the fact that requirement prescribed under Sr. No.4 of the Schedule of Requirement (Annexure I) of the tender document has not been complied with by the petitioner, as all the drug codes for which petitioner submitted bid, product permission of competent

authority, highlighting the drug codes in the said document (product permission) participated for is not submitted. The items for which drug code is highlighted by the petitioner in product permission, petitioner was held to be eligible.

18. We do not find any infirmity or arbitrariness in the decision making process of respondent No.2 declaring the petitioner to be ineligible for certain drugs for which he has not placed on record product permission duly issued by the Licensing Authority.

19. In the result, the petition being meritless is liable to be and is hereby dismissed. No order as to costs.

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

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-