

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 17471 OF 2022

In the matter of an application under Article 226 of the
Constitution of India.

AFR

M/s Kamala Agencies Petitioner

-Versus-

State of Odisha and another Opp. Parties

For Petitioner : Mr. Pitambar Acharya, Sr. Advocate
appearing along with
Mr. S.S. Tripathy, Advocate

For Opp. Parties : Mr. P.P. Mohanty,
Additional Government Advocate
[O.P.No.1]

Mr. A.K. Parija, Sr. Advocate
appearing along with
M/s P.K. Muduli, C.K. Rout and
S.C. Choudhury, Advocates.
[O.P.No.2]

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
HONOURABLE MR. JUSTICE SANJAY KUMAR MISHRA**

Date of hearing: 01.08.2022: Date of judgment: 11.08.2022

DR. B.R. SARANGI, J. The Petitioner, which is a registered Proprietorship Firm, by means of this Writ Petition seeks to quash Clause-5.2 of the Tender Call Notice bearing Bid Reference No.OSMCL/2022-23/DRUGS-VETERINARY/14 dated 20.06.2022 under Annexure-7, and to issue direction to the Opposite Parties to allow it to participate in the tender process for the year 2022-23.

2. The factual matrix of the case, in a nutshell, is that Petitioner, being a registered Dealer, Whole-seller, Supplier and Distributor of veterinary drugs, medicines, vaccines, chemicals, veterinary instruments and equipments having valid registration and permission from the State as well as Central Government Authorities, has been supplying the items, as mentioned above, to various Government/Semi-Government Organizations as well as PSUs for the last 15 years at a highly competitive price. The Petitioner is the prime Distributor of veterinary items of reputed international companies like Cadila Healthcare Limited, Zydus and Boehringer Ingelheim etc.

2.1 The Director, Animal Husbandry and Veterinary Services, issued Tender Call Notice for supply of veterinary drugs/medicines and vaccines for the years 2015-16, 2017-18 and 2019-20 fixing the eligibility criteria that the tenderer should be a Manufacturer or authorized Distributor or authorized Dealer having valid registration of the product, along with three years experience in supplying veterinary drugs/medicines, vaccines, instruments and equipments of its own manufacturing or of reputed Manufacturers of national level to Government/Semi-Government, PSUs, UNO agencies. In the Tender Call Notice for the years 2017-18 and 2019-20, mention had been made that tenderer's annual business turn-over in supplying veterinary drugs/medicines, vaccines, instruments and equipments should be Rs.5 crores for preceding three years. The Petitioner, having satisfied the condition stipulated in the tender documents, participated in the tender process and came out successful for the year 2015-16, 2017-18 and 2019-20 and consequentially bilateral agreements were

duly executed with the Petitioner and on the basis of purchase orders issued, it had carried on supplying the required items.

2.2 The Director, Animal Husbandry and Veterinary Services, invited tender for supply of veterinary drugs/medicines and vaccines for the year 2020-21, vide Bid Reference No. DAHVS/2020-21/Veterinary Drugs/01 dated 04.12.2020. But the Distributors, like the Petitioner, who were otherwise allowed to participate in the process of bid in the preceding years, were restricted from participating in the tender process. Subsequently, vide letter dated 24.03.2021, the tender for the year 2020-21 was cancelled on the ground that certain procedural lapses were observed in the said tender process by the Departmental Tender Committee. As a consequence thereof, for the year 2020-21, as the agreement with the Petitioner for the year 2019-20 was still subsisting, vide letter dated 05.07.2021, indent for supply of medicines,

vaccines, instruments and equipments was placed by the Directorate of Animal Husbandry and Veterinary Services.

2.3 Deviation to the earlier practice, the tender for supply of veterinary items like veterinary drugs/medicines and vaccines needed for animal health care Institutions of Odisha for the year 2021-22, vide letter dated 18.05.2021, Opposite Party No.1 directed that the tender shall be invited by Opposite Party No.2-Odisha State Medical Corporation Limited (OSMCL), instead of Director, Animal Husbandry and Veterinary Services. Accordingly, Opposite Party No.2 invited the tender vide Bid Reference No.OSMCL/2021-22/DRUGS-VETERINARY/29 dated 06.08.2021 for supply of veterinary items for the year 2021-22, in which the Distributors/Suppliers were excluded from participating in the tender process in order to create monopoly for the Manufacturers and Importers. The same was challenged in W.P.(C) No. 30953 of 2021 and this Court, vide Order dated 30.09.2021, passed the following order:

“W.P. (C) No.30953 of 2021 & I.A. No.14249 of 2021

1. *This matter is taken up through hybrid mode.*
2. *Heard Mr.Pitambar Acharya, learned Senior Counsel for the petitioner and Mr. P.P. Mohanty, learned Addl. Government Advocate. On our request, Mr. B.P.Tripathy, learned counsel has also participated in the matter which is listed under ‘fresh admission’ category on behalf of Odisha State Medical Corporation Ltd.*
3. *Keeping in view the ratio decided in the cases of Chitaranjan Mishra v. State of Odisha and others reported in 2016 (II) OLR 735 and Jagruti Welfare Organization, Bhubaneswar, represented through its Secretary, Smruti Ranjan Panda v. State of Odisha and another reported in (2017) 124 CLT 1041, we are of the opinion that the petitioner’s contention that the decision taken by the Orissa Medical Corporation to exclude the authorized distributor from bidding process amounts to exclusion of medicines manufactured by foreign medicine companies who do not have any manufacturing facilities in Odisha or in India.*
4. *So, we direct Mr. Acharya, learned Senior Counsel to serve an advance copy of the brief on Mr. B.P.Tripathy, a panel counsel for Odisha State Medical Corporation Ltd. who shall take instruction in the matter. If the Corporation wants to engage any other counsel, it may do so and the said counsel will appear before the Court on the next date.*
5. *List this matter on 07.10.2021.*
6. *We also direct Mr. B.P.Tripathy, learned panel counsel for the Corporation to instruct the Medical Corporation not to finalize the tender process pursuant to Annexure-8 till the next date.*
7. *We hope and trust that the Medical Corporation will come up with instructions on the next date so that the interim application can be disposed of.*

8. Urgent certified copy of this order be granted as per rules.”

When the matter was listed on 25.04.2022, this Court passed the following order:-

“This matter is taken up through hybrid mode.

2. Mr. P. Acharya, learned Senior Advocate appearing for the petitioner contended that Section-III, Tender Schedule of the Notice Inviting Bid dated 06.08.2021, indicates that the validity of the bid is 180 days from the last date of bid submission. As such, the period of 180 days, has already been over and by efflux of time, the writ petition has become infructuous.

3. Mr. A.K. Parija, learned Advocate General contended that the since bid was for the period 2021-22, pursuant to the NIT, he wants to obtain instruction what can be done pursuant to the present tender.

4. On his request, call this matter tomorrow (26.04.2022).

5. Interim order passed earlier shall continue till next date.”

Thereafter, on 26.04.2022, this Court passed the following order:

“This matter is taken up through hybrid mode.

2. Heard Mr. Pitambar Acharya, learned Senior Advocate for the petitioner, Mr. P.P.Mohanty, learned Addl. Government Advocate for the State-opposite parties, and Mr. Ashok Parija, learned Senior Advocate along with Mr. P.K.Muduli, learned counsel for opp. party No.5.

3. The petitioner files this writ petition with a prayer to struck down clause 5.2 of the tender bearing bid reference no. OSMCL/2021-22/ DRUGS Veterinary/29 dated 06.08.2021 and further prayed for direction to allow it to participate in the tender process for the year 2021-22.

4. Mr. Pitambar Acharya, learned Senior Advocate for the petitioner and Mr. Ashok Parija, learned Senior Advocate for opposite party no.5 contended that, the period of auction for the year 2021-22 has already been over, by efflux of time and, as such, the writ petition has become infructuous.

5. In view of the above, the writ petition is disposed of, as infructuous”.

2.4 On 20.06.2022, Opposite Party No.2 issued Notice Inviting Tender bearing Bid Reference No.OSMCL/2022-23/Drugs-Veterinary/14 for supply of veterinary items for the year 2022-23. The schedule of tender reads as under:-

Sl.No.	Particulars	Date and Time	
1.	Date & Time of release of bid	20/06/2022, 3 PM	
2.	Date & time for submission of queries by E-Mail id- drugsosmcl@gov.in	23/06/2022, up to 5:00 PM	
3.	Date & Time of Online bid submission	Start Date & Time	End Date & Time
		29/06/2022, 3 PM	19/07/2022, 6.00 PM
4.	Date & time for	Start Date &	End Date &

	<i>submission of Tender Documents, Tender Document Fee of tender document</i>	<i>Time</i> 20/07/2022, 10AM	<i>Time</i> 27/07/2022, 11.00 AM
5.	<i>Date & time of online Technical bid opening</i>	27/07/2022, 11:30 AM	
6.	<i>Date of opening of Price Bid</i>	<i>To be informed to the qualified bidders</i>	

2.5 The Tender Call Notice contains the identical arbitrary pre-qualification criteria, as contained in the Tender Call Notice for the year 2021-22, in which the Distributors were specifically barred from participating in the tender process. As such, the Distributors/Suppliers having been excluded from participating in the tender process, it has been confined to only Manufacturers and Importers. Thereby, it would create monopoly, as Opposite Party No.2 has shown favour to a class of people. By excluding the Distributors and keeping them out of the tender process, since it will provide monopolistic trade rights to the Manufacturers and Importers, challenging such exclusion, the Petitioner has approached this Court in the present Writ Petition.

3. Mr. Pitambar Acharya, learned Senior Counsel appearing along with Mr. S.S. Tripathy, learned Counsel for the Petitioner, contended that the Petitioner, being a Distributor of medicines, earlier participated in the tender for the years 2015-16, 2017-18 and 2019-20, and was continuing the supply of drugs to the Opposite Parties. But for the tender invited for the year 2020-21, the Tendering Authority introduced a Clause excluding the Distributors from participating in the tender process, which was challenged by it in W.P.(C) No. 30953 of 2021 and in the said Writ Petition this Court passed interim orders. However, subsequently, after expiry of the period of Tender, the Writ Petition became infructuous and disposed of as such. Therefore, question of exclusion of Distributor was not considered and decided in the said Writ Petition and, as such, again in the year 2022-23, the very same condition has been incorporated in Clause-5.2 of the tender document debarring the Distributors from participating in the tender process. It is contended that such exclusion of Distributors from the arena of

participating in the tender process is arbitrary, illegal, contrary to the provisions of law and, as such, without having any rationale behind it and in a capricious manner, the Petitioner has been debarred from participating in the tender process in order to create monopoly for the Manufacturers and Importers. As such, such exclusion of Distributors also suffers from nepotism and favoritism in favour of a class of people, i.e., Manufacturers and Importers. Thereby, the same is unreasonable and tainted with mala fide and is against the public policy. It is further contended the terms and conditions under Clause-5.2 cannot be sustained in the eye of law, as it is the settled principle that a section of business cannot be excluded in order to favour another class. Therefore, any administrative decision would be regarded as unreasonable, if it is partial or unequal in its operation between two different classes. It is further contended that procuring veterinary items from Manufacturers/Direct Importers will also not be at the larger public interest, as they will be deprived from

availing the medicines from the Companies of international repute. In the past, there have been instances where it has been observed that there were glaring irregularities on the part of local Manufacturers/Direct Importers in supply of veterinary items, which is evident from the acts of Opposite Party No.2 in blacklisting as many as 35 Manufacturers for not providing standard quality of veterinary items. These Companies have been blacklisted in a span of around four months. Thus, it is contended that the action of the Authorities is arbitrary, unreasonable and contrary to the provisions of law, as well as violative of Articles 14, 19(1)(g), 21 and Article 300-A of the Constitution of India.

3.1 It is further contended that in the recent tender, Opposite Party No.2 has also allowed the authorized Distributors to participate in the tender process, so far it relates to Tender Call Notice bearing No.OSMCL/2022-23/EQP-CARDIAC CARE/04(Annexure-10), Tender Call Notice bearing Bid Reference No.

OSMCL/2022-23/ORTHO-INSTRUMENTS/03 (Annexure-11) and Tender Call Notice vide Bid Reference No. OSMCL/ 2022-23/ EQP-RADIOTHERAPY QA-AHPGIC/02 (Annexure-12). From these tender documents, it is made clear that just like Importers, the authorized Distributors are also eligible to participate in the tender process. It is further contended that on perusal of Clauses-6.25.4 and 6.25.5 of the Tender Notice vide Annexure-7, it would be evident that where in one hand Opposite Party No.2 on its discretion reserves right to allow the successful bidder to assign the contract in favour of some other person, on the other hand it has not allowed the authorized Distributors from participating in the tender process in the pretext of keeping middleman at bay. It is further contended that though the apex Court, as well as this Court in catena of decisions have held that the scope of interference by way of Judicial Review is very limited in a tender process/Government contract, but in the case where the Authorities have acted in a manner which is arbitrary, unreasonable and discriminatory, to limit the scope of

competition to a chosen few by eliminating the potential bidders from arena of competition, the same can be subjected to Judicial Review. It is further contended that the apex Court, as well as this Court time and again held that any decision, be it a simply administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so, then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution of India.

To substantiate his contention, Mr. Pitambar Acharya, learned Senior Counsel, has relied upon the judgments of the apex Court as well this Court in the cases of ***Tata Cellular v. Union of India***, (1994) 6 SCC 651; ***Jagdish Mandal v. State of Orissa***, (2007) 14 SCC 517; ***Jagruti Welfare Organization v. State of Odisha***, 2017 SCC OnLine Ori 485; ***Ajay Kumar Jain v. State of Odisha***, 2017 SCC OnLine Ori 473; ***Union of India v. Dinesh Engineering Corporation***, (2001) 8 SCC 491;

UNION of India v. International Trading Co., (2003) 5 SCC 437; **Sterling Computer Limited v. M/s. M & N Publications Limited**, (1993) 1 SCC 445; **Tapan Jena v. State of Orissa**, 2011 SCC OnLine Ori 403; **Reliance Energy Limited v. Maharashtra State Road Development Corporation Limited**, (2007) 8 SCC 1 and **Chittaranjan Mishra v. State of Odisha**, 2016 (II) OLR 735.

4. Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. P.K. Muduli, learned Counsel for Opposite Party No.2, has emphatically submitted that for the larger public interest, in the year 2020, the Director, Animal Husbandry and Veterinary Services, took a conscious decision to adopt the procurement policy with due approval of the State that the Opposite Party No.2- OSMCL to procure the veterinary drugs/ medicines etc. directly from the Manufacturers/ Direct Importers and to exclude the authorized Distributors/Suppliers from participation to get the “best product at the best price”.

After such decision, Director, Animal Husbandry and Veterinary Services, vide letter dated 20.11.2020, submitted the tender documents for supply of veterinary drugs/medicines and vaccines for approval of the Fisheries and Animal Resources Development Department, which was duly approved and communicated to the Director, Animal Husbandry and Veterinary Services on 26.11.2020. Pursuant to such conscious decision, the Notice Inviting Bid was issued by the Director, Animal Husbandry and Veterinary Services on 04.12.2020 containing similar Clause-5.2, which was not challenged by the Petitioner. It is further contended that in the year 2021, Opposite Party No.1, in a larger public interest, took a policy decision with due approval of the State Government to procure veterinary medicines through the Opposite Party No.2-OSMCL. The decision of the State Government to authorize Opposite Party No.2 to procure veterinary medicines is to ensure transparency and to obtain high quality medicines to livestock farmers of the State.

4.1 It is further contended that Opposite Party No.2 had already taken steps so far as procurement of human Allopathic and Homeopathic Medicines are concerned. Therefore, the policy decision of the State Government is intended to bring in transformation to procurement processes by bringing in transparency and accountability in procurement matters and for enabling quality of medicines procured. Therefore, as per the policy of the State Government, Opposite Party No.2 shall procure the medicines directly from the Manufacturers/Direct Importers and not from any middlemen like authorized Suppliers/Distributors etc. Accordingly, by letter dated 17.05.2021, Opposite Party No.1, authorized Opposite Party No.2 to procure the veterinary medicines/drugs and vaccines, hospital instruments/equipments/ consumables on behalf of Opposite Party No.1. Consequentially, Director, Animal Husbandry and Veterinary Services, vide letter dated 04.06.2021, requested Opposite Party No.2 to procure the veterinary medicines/drugs/vaccines and instrument etc.

Therefore, it is contended that exclusion of participation of Distributors will no way destroy the level playing field and, as such, the action of the Authority cannot be considered to be arbitrary, illegal and contrary to the provisions of law. Rather, procurement of medicines directly from the Manufacturers/Direct Importer is to get the “best product at the best price”, which is in larger public interest.

4.2 It is further contended that so far as the letters issued by different foreign Companies are concerned, the same have lost their validities since long. It is further contended that the tenders for the years 2015-16, 2017-18 and 2019-20 were floated by the Director, Animal Husbandry and Veterinary Services and, as such, there was no prohibition that once the tender conditions are prescribed, same cannot be changed. Therefore, for the year 2020, with the approval of the Government in F&ARD Department, the authorized Distributors and Suppliers were excluded from participation only to

procure medicines directly from the Manufacturers/Direct Importers to get the “best product at the best price”, which has not been challenged by the Petitioner. Though similar clauses are incorporated under Clause-5.2, pursuant to notice inviting tender dated 04.12.2020, the Petitioner had never challenged the same. Rather, the Petitioner challenged the present Tender Call Notice dated 20.06.2022. But the bid of the year 2020 was cancelled due to some procedural defects. It is contended that incorporating similar clause, when tender was issued for the year 2021-2022, the Petitioner challenged the same, wherein interim orders were passed. But the question of validity of Clause-5.2 could not be adjudicated, as the said Writ Petition had become infructuous by efflux of time. It is contended that incorporation of the said clause confining to Manufacturers/Importers is to ensure quality products at the best price which is in accordance with the procurement guidelines of Opposite Party No.2. Quality of drugs is of prime concern and is in larger public interest.

Therefore, participation of Manufacturers/Direct Importers is well justified and, thereby, middlemen like Distributors/ Suppliers/ Agents/ C&F Agents/C&A Agents have been kept out of consideration to get “best product at best price” being prime consideration. Thus, the same cannot be said to be illegal and arbitrary, as the realm of contract is within the jurisdiction of Tendering Authority and in exercise of power under Judicial Review, the same cannot be interfered with by this Court, as has been held by the apex Court, as well as this Court.

4.3 It is further contended that selection of bidder through a process of open competition is not creating any monopoly in favour of any bidder. The procurement drugs from only Manufacturers/Direct Importers ensure quality products. All the medical items being procured by Opposite Party No.2 for free distribution at the Govt. Health Care Facilities under Government’s Flagship Scheme of “Niramaya” are procured only from Manufacturers/Direct Importers. Quality of items like

drugs is of prime concern. It is further contended that over a period of six years since Opposite Party No.2 started its operation, procurement of drugs has been made from more than 1000 approved Suppliers/Manufacturers, of which only 32 have been blacklisted on quality ground, which is less than 5% of the total nos. of Suppliers over a period of six years. Therefore, incorporation of Clause-5.2 cannot be said to be arbitrary, unreasonable and contrary to the provisions of law, as the same has been done for larger interest of the public, pursuant to the conscious decision taken by the State for procurement of medicines directly from Manufacturers/Importers to get “best product at the best price”.

To substantiate his contention, Mr. A.K. Parija, learned Senior Counsel, has relied upon the judgments of the apex Court in the cases of **Tata Cellular v. Union of India**, (1994) 6 SCC 651; **Directorate of Education v. Educomp Datamatics Ltd**, (2004) 4 SCC 19;

Association of Registration Plates v Union of India, (2005) 1 SCC 679; **Shimnit Utsch India Private Ltd. v. West Bengal Transport Infrastructure Development Corporation Limited**, (2010) 6 SCC 303; **Michigan Rubber (India) Limited v. State of Karnataka**, (2012) 8 SCC 303; **Montecarlo Limited v. National Thermal Power Corporation Limited**, (2016) 15 SCC 272; **Afcons Infrastructure Ltd. v. Nagpur Metro Rail**, (2016) 16 SCC 818; **Reliance Telecom Ltd. v. Union of India**, (2017) 4 SCC 269; **Municipal Corporation, Ujjain v. BVG India**, (2018) 5 SCC 462; **Caretel Infotech v. Hindustan Petroleum Corporation Ltd.** (2019) 14 SCC 81; **Silppi Constructions Contractors v. Union of India**, (2020) 16 SCC 489; **Uflex Ltd v. Government of Tamil Nadu**, (2022) 1 SCC 165; **Balaji Ventures Pvt Ltd v. Maharashtra State Power Generation Company Ltd**, [Special Leave to Appeal (C) No. 1616 of 2022 decided on 11.02.2022]; **Jindal Steel & Power Limited v. Odisha Coal and Power Limited**, [W.P.(C) No. 4687 of 2017 decided on 14.09.2017]; **Utkal Supplies v. Maa**

Kanak Durga, 2021 SCC OnLine SC 301; **Jagdish Mandal v. State of Orissa**, (2007) 14 SCC 517; **M/s Mohapatra Binders v. State of Odisha**, 2017 SCC OnLine Ori 32 and **Associated Provincial Picture Houses Limited v. Wednesbury Corporation**, [1948] 1 KB 223.

5. This Court heard Mr. Pitambar Acharya, learned Senior Counsel appearing along with Mr. S.S. Tripathy, learned Counsel for the Petitioner, Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for State-Opposite Party No.1, and Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. P.K. Muduli, learned Counsel for Opposite Party No.2 by hybrid mode and perused the record. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, this Writ Petition is being disposed of finally at the stage of admission.

6. Before delving into the merits of the case itself, relevant provisions of the e-tender documents for supply

of veterinary items on rate contract basis for a period of one year from the date of approval of tender, vide Bid Reference No.OSMCL/2022-23/DRUGS-VETERINARY/14 dated 20.06.2022 issued by OSMCL, a Government of Odisha Enterprises, are extracted hereunder:

“NOTICE INVITING BID

**Odisha State Medical Corporation Limited
(OSMCL)**

**In front of Ram Mandir, Convent Square, Unit – III,
Bhubaneswar -751 001**

Tel. : (0674) 2380950, **Website :** www.osmcl.nic.in , **Email :** drugs-osmcl@gov.in Bid Ref. No.: OSMCL/2022-23/DRUGS-VETERINARY/14 Date: 20/06/2022

Online Bids through e-Tender portal (<https://tendersodisha.gov.in>) are invited from eligible bidders for **supply of Veterinary Items as per the particulars mentioned below:**

Sl. No.	Particulars	Date and Time	
1.	Date & time of release of bid	20/06 /2022, 3 PM	
2.	Date & time for submission of queries by E-Mail id - drugs-osmcl@gov.in	23/06/2022, up to 5:00 PM	
3.	Date & time of Online bid submission	Start Date & Time	End Date & Time
		29/06 /2022, 3 PM	19/07/2022, 6.00 PM
4.	Date & time for submission of Tender Documents	Start Date & Time	End Date & Time
		20/07 /2022, 10 AM	27/07 /2022, 11.00 AM
5.	Date & time of online Technical bid opening	27/07/2022, 11:30 AM	
6.	Date of opening of Price Bid	To be informed to the qualified bidders	

The bid document with all information relating to the bidding process including cost of bid document, Prequalification criteria and terms & conditions are available in the websites: www.osmcl.nic.in and <https://tendersodisha.gov.in> The Authority reserves the right to accept / reject any part thereof or all the bids without assigning any reason thereof.

SD/-

Managing Director OSMC Ltd., Odisha

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SECTION V
SPECIAL CONDITIONS OF CONTRACT
5.1 Time Limits Prescribed

<u>Sl. No.</u>	<u>Activity</u>	<u>Time Limit</u>
5.1.1	<i>Delivery period</i>	70(Seventy) days from date of issue of Supply Order.
5.1.2	<i>Submission of Performance Security.</i>	15 days from the date of issue of Letter of Intent.
5.1.3	<i>Time for making payments by Tender Inviting Authority</i>	<i>The payment will be completed within 60 days from the date of delivery of the last consignment/successful delivery of the supplied item or batch(s).</i>

5.2 Pre qualification of Bidders:

5.2.1. Bidder shall only be a manufacturer having valid **own manufacturing license/loan/ license with product endorsement or direct importer holding valid import license** with product

registration certificate issued by the Drugs Controller General of India.

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5.2.4 Distributors / Supplier / Agents / C&F Agents / C & A Agents are not eligible to participate in the tender on behalf of any company.

5.2.5 Bidder (manufacturer/importer) shall have minimum turnover as per **Section IV** Column No.7 in each of the year for last 3(three) financial years in India.

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6.25.4 Assignment: - The Successful bidder shall not assign, either in whole or in part, its contractual duties, responsibilities and obligations to perform the contract, except with the Tender Authority's prior written permission.

6.25.5 Sub Contracts:- The Successful bidder shall not sub contract the execution of the contract. Such action, if done without the knowledge of the Tender Inviting Authority prior to the entering of the contract, shall not relive the Successful bidder from any of its liability or obligation under the terms and conditions of the contract.

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Clause-6.29 – **Quality Testing**

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Clause-6.32 – **Corrupt or Fraudulent Practices**

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Clause- 6.34- **Resolution of Disputes**

6.34.1 If dispute or difference of any kind shall arise between the Tender Inviting Authority and the successful bidder in connection with or relating to

the contract, the parties shall make every to resolve the same amicable by mutual consultations.

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Clause- 6.39 – **Termination of Contract.**”

7. In view of the aforementioned clauses incorporated in the e-tender document vide Annexure-7 dated 20.06.2022, it is to be considered-

“Whether exclusion of Distributors/ Suppliers/ Agents/ C&F Agents/ C&A Agents, as provided in Clause-5.2.4 mentioned in the impugned Notice Inviting Tender, declaring them not eligible to participate in the tender on behalf of any company, can be construed to be justified or not.”

8. Admittedly, the Petitioner is a registered Proprietorship Firm and Distributor of medicines and medical equipments. In the present case, where the expression used as “Distributor”, it includes Distributors/ Suppliers/ Agents/ C&F Agents/ C&A Agents, as provided in Clause-5.2.4 of the Notice Inviting Tender.

9. The word 'Distributor' is understood in commerce as an agent or one who distributes goods to consumers.

10. While considering Section 4(c) of Central Excises and Salt Act, 1944, the Bombay High Court in (1982 Tax LR 2869 (Bom.) held that "Distributor" is a person, who distributes goods of the Manufacturer to consumers and in so doing, acts for and on behalf of the Manufacturer and an Agent of the Manufacturer.

11 While considering Para-2(e) of Drugs (Price Control) Order, 1995, in **Nor Nordisk India Pvt. Ltd v. State of Karnataka**, AIR 2006(NOC) 862(Kant.), it has been held that the term 'Distributor' under Para 2(e) of the Order includes an Importer.

12. In **Union of India v. Ashok Leyland Ltd.**, 1987 (30) ELT 281, it has been held that the term 'Distributor' is understood as an Agent or one who distributed goods to consumers. Such Agent who acts for and on behalf of a Manufacturer, earns a commission; if

the Manufacturer makes sales directly he will be obliged to give what is ordinarily understood as an overriding commission to the Distributor.

13. Taking into consideration the meaning attached to the word 'Distributor', as discussed above, there is no iota of doubt that Distributor is an Agent or one who distributes the goods to consumer and acts for and on behalf of the Manufacturer and earns commission.

14. Referring to Para-2.1 of the Drugs (Price Control) Order, 1995 in ***Union of India v. Ranbaxy Laboratories Ltd.***, (2008) 7 SCC 502, the apex Court held that 'MANUFACTURE' in relation to any drug, includes any process or part of a process for making, altering, finishing, packing, labelling, breaking or otherwise treating or adapting any drug with a view to its sale and distribution, but does not include the compounding or dispensing of any drug or the packing of any drug in the ordinary course of retail business and 'to Manufacturer' shall be construed accordingly.

15. While considering SRO 1729/93 issued under Section 10 of the Kerala General Sales Tax Act (15 of 1963), as referred in **MRF Ltd. v. CST.**, (2006) 8 SCC 702, the apex Court held that 'MANUFACTURE' shall mean the use of raw materials and production of goods commercially different from the raw materials used but shall not include mere packing of goods, polishing, cleaning grading, drying blending or mixing different varieties of the same goods, sawing, garbling, processing one form of goods into another form of the same goods by mixing with chemicals or gas, fumigation or any other process applied for preserving the goods; in good condition or easy transportation. The process of producing desiccated coconut out of coconut shall be deemed to be 'Manufacturer' for the purpose of the said Notification.

16. While considering Section 2(27) of the Rajasthan Sales Tax Act, 1994, in **Kumar Motors v. CST**, (2007) 4 SCC 140, it has been held that

‘MANUFACTURER’ includes every processing of goods which bring into existence a commercially different and distinct commodity, but shall not include such processing as may be notified by the State Government.

17. While considering S.2(e-1) of U.P Trade Act, 1948, in **Sonebhadra Fuels v. Commr., Trade tax, Sale Tax Tribunal**, (2006) 7 SCC 322, the apex Court held that ‘MANUFACTURER’ means producing, making, mining, collecting, extracting , altering, ornamenting , finishing or otherwise processing, treating or adapting any goods; but does not include such Manufactures or manufacturing process as may be prescribed.

18. While considering Section 2 (14-A) of Karnataka Agricultural Marketing (Regulations) Act(27 of 1966) in **ITC Ltd. v. State of Karnataka**, AIR 2005 Kant 330, it has been held that ‘IMPORTER’ means a person who imports or causes goods to be imported on his own account or as an agent for another person from outside the market area into a market area for the purpose of

selling, processing, and manufacturing or for any other purpose except for one's own domestic consumption ,but shall not include a public carrier.

19. While considering Section 2(26) of the Customs Act (52 of 1962), in **Sitaram Rajgarhia v CC, 1997 (90) ELT 472(T)**, it has been held that Importer is the person who holds himself out to be an Importer. If the Invoice and the Bill of entry are in the name of the Appellant and entire risk of goods is also shown to be that of the Appellant, he is liable to be treated as the Importer for demanding the duty. The Appellant cannot plead that the ultimate buyer, for whom the goods were imported, should be treated as the Importer.

20. Similarly, while considering Section 2(26) of the Customs Act (52 of 1962), in **Associated Cement Companies Ltd. v. Commr. of Customs**, (2001) 4 SCC 593, it has been held that the word 'Importer' occurring in S. 2(26) of the Act includes owner of the goods.

21. Taking into consideration the meaning of the words 'Manufacturer' and 'Importer', as mentioned above, to whom the privilege has been given in the impugned Notification for supply of medicines, has justification because they are producing medicines and also in some cases are importing medicines by maintaining the qualities and rate intact. Therefore, the Tendering Authority is well justified in putting Clause-5.2.1 in the Tender Notice, that the Bidder shall only be a Manufacturer having valid own Manufacturing License/Loan License with product endorsement or Direct Importer holding valid import license with product registration certificate issued by the Drugs Controller General of India. The expression used "the Manufacturer having own manufacturing license/loan license" in Clause-5.2.1, if taken into consideration, then in that case the provisions contained in Drugs and Cosmetics Act, 1940 (for short "Act, 1940"), which is a Central Act and which provides comprehensive procedure to regulate the import, manufacture, distribution and sale of drugs

and cosmetics, are to be gone into. Section-33 of the Act, 1940 empowers the Central Government to formulate Rules regarding manufacture, sale and distribution of drugs, more specifically contained in Chapter-IV of the Act, 1940. The Act, 1940 authorizes four different entities to manufacture, sale, distribute and to otherwise deal with drugs as defined in Section 3(b) of the Act, 1940. The Act, 1940 recognizes four categories of entities, such as, (i) Manufacturer (ii) Importers, (iii) Distributors and (iv) Loan licensee. The Act, 1940 and Rules framed thereunder styled as the Drug Rules, 1945 (earlier known as the Drugs and Cosmetic Rules, 1945 and subsequently styled as Drug Rules, 1945 after the amendment vide G.S.R. 769(E) dated 15.12.2020), hereinafter referred to as “Drugs Rules”, lays down comprehensive procedure for grant of license to deal with drugs. Under the Scheme of the Act, 1940 a Manufacturer and a Distributor are intricately related to each other. The drug manufactured by a Manufacturer, get exposure to the market through a Distributor. The drugs manufactured by a reputed

manufacturing Company, may not be accessible to the consumers in the absence of a Distributor. A Manufacturer necessarily therefore, gets exposed to the market through a Distributor. Therefore, a Distributor plays a key and pivotal role to make the products of a branded manufacturing Company available to the open market for the purpose of use by the ultimate beneficiaries.

22. The reason for exclusion of such Distributor and inclusion of Manufacturer/Importer, as assigned by the Opposite Parties, is to get “best product at the best price”, as pleaded in Paragraph-8 of the Counter Affidavit filed by Opposite Party No.2 on 19.07.2022, which reads thus:-

“8. As stated earlier, for the larger public interest, the Director, DAHVS has taken a conscious decision with the approval of the Government in F& ARD Department in the year 2020 to exclude the Authorized Distributors / Suppliers from participation and only to procure medicines directly from the Manufacturers/ Direct Importers to get the “best product at the best price”. Accordingly, the Notice Inviting Bid was issued by the Director, Directorate of Animal Husbandry and Veterinary Services on

04.12.2020 containing similar Clause-5.2 of Notice Inviting Bid dated 20.06.2022 which was never challenged by the Petitioner.”

(emphasis supplied).

If that be the reason, how exclusion of Distributors from the arena of bid would suffice the object sought to be achieved by the State, has not been indicated. Rather, by participation of a Distributor in the bid, if it can give “best product at the best price” matching with the offer of the Manufacturers/Importers, then in that case, its offer cannot and could not have been excluded by the State. Since the State and its instrumentality or enterprises invited the tender with an objective of fetching “best product at the best price”, if there will be larger participation, then it can achieve its objectives in a better manner. As such, it cannot be said that it would be against the larger public interest. Section 3(f) of the Act, 1940, which deals with ‘Manufacturer’, reads as under:

“Section 3(f)- *“Manufacture” in relation to any drug or cosmetic includes any process or part of process for making, altering ornamenting , finishing, packing, labelling, breaking up or otherwise treating or adopting any drug or cosmetic with a view to its sale or distribution but does not include the*

compounding or dispensing of any drug, or the packing of any drug or cosmetic, in the ordinary course of retail business; and “to manufacturer” shall be construed accordingly;”

An entity, which is engaged in the business of manufacturing of drugs and termed as Manufacturer, needs to obtain a license under Rule-76 of the Drug Rules, which reads as under:

*“Rule 76: A license to manufacturer for sale or for distribution of drugs specified in Schedules C and C (1) other than Large Volume Parenterals, Sera and Vaccines and Recombinant DNA (r-DNA) derived drugs, drugs specified in Part X-B and Schedule X shall be issued in Form 28 and a license to manufacturer for sale or distribution of drugs specified under Schedules C and C (1) other than Large Volume Parenterals, Sera and Vaccines and Recombinant DNA(r-DNA) derived drugs, drugs specified in Part X-B and Schedule X shall be issued in Form 28-B. A license to manufacturer for sale or for distribution of Large Volume Parenterals, Sera and Vaccines and Recombinant DNA (r-DNA) derived drugs shall be issued in Form 28-D. Before a license in Form-28 or Form 28-B or Form 28-D is granted, [***], the following condition shall be complied with by the applicant”*

23. Therefore, a “Manufacturer” who holds a valid license under Rule-76 is competent to appoint a “Distributor” under law. If the Distributor can quote the price of product less than the price quoted by Manufacturer and provides the same goods from the

Manufacturer, it cannot be justified to deprive it of participating in the tender process. Section-3(g) of the Act, 1940 has also defined the term import. The Importer is also obliged to apply for a license in Form-10 & 10A under Rule-23 of the Drugs Rules, which reads as under:

“Rule 23: Import Licenses - An import license in Form 10 shall be required for import of drugs, excluding those specified in Schedule X, and an import license in Form 10-A shall be required for the import of drugs specified in Schedule X.”

24. Similarly, the third category, i.e., the Distributor, which term finds place in Rule-59 of the Drugs Rules, reads as under:

“Rule 59(2) Application for the grant of license to sell, stock, exhibit or offer for sale or distribute drugs , other than those included in Schedule X, Shall be made in Form 19 accompanied by a fee of rupees one thousand and five hundred or in Form 19-A accompanied by a fee of rupees five hundred, as the case may be or in the case of drugs included in Schedule X shall be made in Form 19-C accompanied by a fee of rupees five hundred, to the licensing authority.”

25. The above Rules make it clear that application for grant of license to sale, stock, exhibit or offer for sale or distribute drugs, other than those included in Schedule-X, shall be made in Form-19-A to 19-C to the

Licensing Authority. Therefore, if the provisions of law prescribes that a Manufacturer, Importer and Distributor can carry on their business having valid license under the provisions of the Act, 1940 and the Drugs Rules, 1945 and they are being granted such license by the Competent Authority, in that case inclusion of two categories, namely, 'Manufacturer' and 'Importer' and exclusion of other category, namely, 'Distributor' from participating in the tender, has no rationale behind it. As such, Clause-5.2.1, which has been incorporated under Section-V of the Special Conditions of Contract, provides that a Manufacturer shall have a valid own Manufacturing License/Loan License, which has been explained in Rule-75-A of the Drugs Rules, which reads thus:

"Rule 75-A. Loan Licenses. (1) Applications for the grant of loan licenses to manufacture for sale or for distribution of drugs specified in Schedule C and C(1) excluding those specified in Part X-B and Schedule X shall be made in Form 27-A to the licensing authority and shall be made up to ten items for each category of drugs referred to in Schedule M relating to pharmaceuticals products and Schedule M-III relating to medical devices and in-vitro diagnostics and shall be accompanied by a license fee of rupees six thousand and an inspection fee of rupees one thousand and five hundred for every inspection.

Explanation- For the purpose of this rule a loan license means a license which a licensing authority may issue to an applicant who intends to avail the manufacturing facilities owned by a licensee owned by a licensee in Form 28."

26 There is no iota of doubt that in accordance with Section-33 of the Act 1940, Drugs Rules have been framed, which is equally binding on all the Authorities. Therefore, issuance of bid restricting it to three categories, namely, Manufacturer, Loan Lincensee and Importer, by eliminating the Authorized Distributor of a licensed Manufacturer, who also holds a license to distribute such products under the Act, cannot be said to be well justified and the reason assigned therefor is to fetch "best product at the best price", has no basis at all. The reason being, even a Distributor can provide the "best product at the best price" after procuring from the Manufacturers or Importers. Therefore, elimination of Distributors from the arena of competition is arbitrary, unreasonable, unfair, and cuts at the root of the sacrosanct constitutional principles enshrined in Articles 14, 19(1)(g) read with

Article 21 of the Constitution of India and, as such, it is against the concept of “free play and fair play” and also goes against the Principles of “level playing field”. The exclusion and/or elimination of Distributors of branded manufacturing Companies from the arena of a free bid, is certainly against the larger public interest and the animal resources of the State would be deprived of getting the benefits of the branded drugs manufactured by the reputed manufacturing Companies globally.

27. The further contention of Opposite Party No.2 is that the Distributor is a middleman and therefore, they have excluded such category of persons and they want to procure medicines or allied products directly from the Manufacturer/Loan Licensee or Importers, which is greater interest of the State to get “best product at the best price”.

28. In **Black Law Dictionary** ‘Middleman’ has been defined as follows:

“Middleman – One who merely brings parties together in order to enable them to make their own contract.

An agent between two parties: an intermediary who performs the office of a broker or factor between seller and buyer, producer and consumer, landowner and tenant, etc.

One who has been employed as an agent by a principal and who has employed a sub-agent under him by authority of the principal, either express or implied.”

29. In **P. Ramanatha Aiyar’s** Advanced Law Lexicon, the word ‘Middleman’ has been defined as follows:-

“Middleman. A person employed to bring two or more parties together; the parties, when they meet, do their own negotiating and make their own bargains; an agent who merely brings the parties to the sale together, and upon whom does not devolve the duty of negotiating for either, and who may contract for and receive commissions from both.

Intermediary, usually a wholesaler retailer or broker, who acts as an agent between a buyer and a seller. Middlemen tend to push up prices by adding their own profit margin to the difference between the buying and selling prices, and it may therefore be in the interests of the buyer and seller to cut out the middleman (as, for example, in mail order).”

30. In **Watson Law Lexicon**, it has been defined that ‘Middleman’, an intermediary between wholesale

merchants and retail dealers; a Distributor from producer to consumer.

31. If the meaning attached to the word 'middleman', as explained above, would be taken into consideration, the Distributor can never be termed as middleman, as the middleman is someone who merely brings parties together in order to enable them to make their own contracts.

32. Therefore, elimination of the Distributors to be a bidder, pursuant to Clause-5.2.4, declaring them as not "eligible" cannot have any justification even if they are discharging obligation for and on behalf of the Manufacturer/Loan Licensee/Importers as per the provisions of the Act 1940 and the Rules framed thereunder with the prime consideration is to fetch "best product at the best price". Thereby, being a Distributor, if the Petitioner can fetch the same, it cannot be said that inclusion of Distributor is against the larger public interest.

33. As it appears from the record, for the year 2015-16, tender was invited by the Director, Animal Husbandry and Veterinary Services, fixing following eligibility criteria:

“Eligibility:

1. The tenderer should be a Manufacturer or Authorised Distributor or Authorised Agency or Authorised representative having valid registration.”

34. Similarly, for the year 2017-18, eligibility criteria was fixed to the following effect:

“Eligibility:

A.1 *The tenderer should be a Manufacturer or Authorised Distributor or Authorised Dealers having valid registration of the product.”*

35. For the year 2019-20, eligibility criteria was fixed to the following effect:

“ Eligibility:

A.1 The tenderer should be a Manufacturer or Authorised Distributor or Authorised Dealers having valid registration of the product.”

36. For all the years, i.e., 2015-16, 2017-18 and 2019-20, the Petitioner was L1 bidder and work orders

were issued in its favour and, as such, it has carried out its responsibility in terms of the agreement. For the year 2020-21, due to procedural lapses, the tender for that year was cancelled by the Director, Animal Husbandry and Veterinary Services at the instance of the Tendering Authority. But for the year 2021-22, in place of Director, Animal Husbandry, Opposite Party No.2 issued a bid, Clause-5.2 of which reads as under:-

“5.2 *Prequalification of Bidders*

5.2.1 *Bidder shall only be a manufacturer having valid own manufacturing license/loan license with product endorsement or direct importer holding valid import license with product registration certificate issued by the Drugs Controller General of India .*

5.2.4 *Distributors/Suppliers/ Agents/ C&F Agents/C&A Agents are not eligible to participate in the tender on behalf of any company.*”

37. Incorporation of Clause-5.2.4 in the bid document was challenged before this Court in W.P.(C) No. 30953 of 2021 and this Court at the outset, by realizing the fact preliminarily that exclusion of Distributor from the arena of participating in the bid was not justified, passed interim order. But the said Writ Petition was disposed of as infructuous, vide Order dated 26.04.2022,

since the period was already over. For this year, i.e., for the year 2022-23, similar condition has been put, as mentioned above, excluding the Distributors from participating in the bid giving way only to the Manufacturers/Importers/Loan Licensee. But fact remains, for the year 2022-23, the very same Opposite Party No.2 had issued the tender for supply of medical instruments to various hospitals of the State wherein the authorized Manufacturers and Importers were allowed to participate in the tender process excluding the Distributors. But for supply of veterinary medicines such exclusion has been made, which is arbitrary, unreasonable and contrary to the provisions of law.

38. Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. P.K. Muduli, learned Counsel for Opposite Party No.2, placed on record the e-tender documents for supply of drugs and medical consumables (Group-II) for the year 2021-22 for human consumption, wherein similar condition has been put in Section-V of

Special Conditions of Contract incorporating the very same Clauses-5.2.1 and 5.2.4 under Clause-5.2, which read as under:-

“5.2 Pre qualification of Bidders:

5.2.1 Bidder shall only be a manufacturer having valid own manufacturing license/loan license with product endorsement or direct importer holding valid import license with product registration certificate issued by the Drugs Controller General of India.

xxx xxx xxx

5.2.4. Distributors/ Suppliers/ Agents/ C&F Agents/ C & A Agents are not eligible to participate in the tender on behalf of any company.”

39. Similarly, for the year 2022-23, the very same clauses are incorporated for supply of drugs and medical consumables (Group-I) for human consumption, which read as under:

“5.2 Pre qualification of Bidders:

5.2.1 Bidder shall only be a manufacturer having valid own manufacturing license/loan license with product endorsement or direct importer holding valid import license with product registration certificate issued by the Drugs Controller General of India.

xxxx

xxx

xxxx

5.2.4. *Distributors/ Suppliers/ Agents/ C &F Agents/ C & A Agents are not eligible to participate in the tender on behalf of any company.”*

40. Therefore, it is contended that for supply of drugs and medical consumables for human consumption for the years 2021-22 and 2022-23, if such a clause has been incorporated and on that basis the tender process is continuing, incorporation of such a clause for supply of veterinary items for the year 2022-23 cannot be said to be arbitrary, unreasonable and contrary to the provisions of law. It is contended that none of the Distributors had challenged such condition put in the e-tender document for supply of drugs and medical consumables Group-II for the year 2021-22 and Group-I for supply of drugs for year 2022-23 for human consumption. Therefore, *ipso facto* it cannot be said that it is not sacrosanct and unjustified and, as such, keeping that in view the present bid has been issued inviting tenders.

41. But merely because one wrong was committed, that cannot be a ground to commit another wrong,

meaning thereby, if there was exclusion of Distributors, so far as supply of human medicines are concerned, that itself cannot be a ground to exclude the Distributors, those who have come to the Court being aggrieved by incorporation of such clause for supply of veterinary medicines. To be more specific, due to insertion of such Clause in the present tender the Petitioner, who is a Distributor, being aggrieved by the action of the Authority, has approached this Court by filing the present Writ Petition. Therefore, the Opposite Parties are estopped from taking the plea that since in other tender documents such condition was not available, that is why the same Clause is not available in the present tender. Thereby, non-inclusion of Distributors to participate in the bid is not justified and its reasonableness is required to be tested with the touchstone of Article 14 of the Constitution of India.

42. The contention raised by Mr. A.K. Parija, learned Senior Counsel appearing along with Mr. P.K.

Muduli, learned Counsel for Opposite Party No.2 that the term introduced to the tender document is a policy decision of the Authority and, as such, the State is entitled to change its policy. Therefore, on the basis of “Wednesbury Principle of Reasonableness”, if the Tendering Authority has acted bonafidely, the Court, in exercise of power under judicial review, cannot interfere with the terms and conditions of the tender documents. To refute such contention, it can be said that if the condition stipulated in the tender documents is arbitrary, unreasonable and contrary to the provisions of law, even if it forms part of a policy decision, the Court cannot sit as a mute spectator and give a rubber stamp to such arbitrary and unreasonable action of the Tendering Authority. Rather, the condition stipulated in the tender document can be tested with the touchstone of reasonableness, as enshrined under Article 14 of the Constitution of India, in exercise of the power under judicial review, which is permissible under law.

43. Furthermore, on examination of the provisions of Clauses-6.25.4 and 6.25.5, as mentioned above, it is ample clear that the successful bidder shall not assign, either in whole or in part, its contractual duties, responsibilities and obligations to perform the contract, except with the Tender Inviting Authority's prior written permission, and further, if it is done without the knowledge of the Tender Inviting Authority prior to entering into the contract, then it is liable for consequence thereof. It is of relevance to note, by way of clarification in reply to the Rejoinder Affidavit, it has been mentioned that in view of Clause-5.2.4 of impugned Notice Inviting Bid, Opposite Party No.2 will not allow the assignment or sub-contract in favour of Distributors/ Suppliers/ Agents/ C&F Agents/ C&A Agents with the help of either Clause-6.25.4 or Clause-6.25.5, if any request is made by any successful bidder. Assignment/Sub-contract, if any, will only be in favour of Manufacturer/Direct Importer and not otherwise which is prohibited by the Notice

Inviting Bid. As such, incorporation of such Clause does not reflect the same.

44. A Supplementary Affidavit has been filed on 28.07.2022 bringing to the notice of the Court putting such restriction pursuant to bid dated 06.08.2021, that 47 Manufacturers and 3 Importers have participated in the bid, which was the subject matter of challenge in W.P.(C) No. 30953 of 2021. Even pursuant to the present bid dated 20.06.2022, 54 bidders have participated and after detailed technical evaluation by the experts, the Manufacturers and Importers who have participated in the tender process can be known. On the other hand, it has also been brought to the notice of the Court, by filing Annexure-A to the Supplementary Affidavit, the number of bidders participated in the tender for procurement of veterinary medicines and vaccines by the Directorate of AH & VS, Odisha, for the period from 2015-16 to 2019-20. The same is extracted hereunder:

“ANNEXURE-A

Information on participation of Bidders/Manufacturers/ Authorized Distributors in Tender for procurement of Veterinary Medicines & Vaccines by the Directorate of AH & VS, Odisha, Cuttack.

sl. No.	Year	Name of the Item	No. of Bidders participated in the tender		
			Manufacturer	Authorised Distributor	Total participants in the Bid
1	2015-16	Medicine/ Vaccine	04	02	06
2	2016-17	FMD Vaccine	02	Nil	02
3		Theileriosis & Brucellosis Vaccine	01	Nil	01
4	2017-18	Medicines & Vaccine	04	02	06
5	2018-19	NIL			
6	2019-20	Medicine & Vaccines	02	02	04

45. The reasons for participation of less number of Manufacturers or Authorized Distributors in the bid is well known to the Authorities, because they had fixed the highest price turn over of Rs.5 crores to become eligible to participate in the bid, whereas in the present bid a Manufacturer having Rs.3 lakhs turn over can participate.

Therefore, reduction of turnover criteria from Rs.5 crores to Rs.3 lakhs in case of Manufacturers, certainly has led to submission of bids in highest number. But that *ipso facto* cannot preclude a Distributor from participating in the process of bid. It may so happen, with Rs.3 lakhs of turnover a large number of Distributors could have participated in the bid. Therefore, reliance placed on Annexure-A to the reply to the Supplementary Affidavit indicating that less number of participation was there, cannot have any justification.

46. Both the sides have cited plethora of judgments of this Court as well as of the apex Court laying down the Principle of Judicial Review in contractual matters and also the scope of the Court to interfere in such matter.

47. In ***Tata Cellular v. Union of India, (1994) 6 SCC 651***, the apex Court held that it shall always be the endeavor of the Government to prevent arbitrariness or favoritism. At Paragraphs 70, 71 and 81(2), the apex Court observed as follows:-

“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.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

81 (2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in R. v. Bernet London Borough Council, ex p Johnson the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down.”

At the same time, the Principle of Judicial Review has been summarized in Paragrpah-94 of the said Judgment, which reads as follows:-

“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.”

At Paragraphs-151 and 154 of the said Judgment, the apex Court also observed as follows:-

“151. In the above two cases, we are obliged to interfere on the ground of arbitrariness and violation of the principle of natural justice confining ourselves to the doctrine of judicial restraint, however, by the application of permissible parameters to set right the decision-making process.

154. In view of the foregoing, we thus reach the conclusion that Bharati Cellular could not claim the experience of Talkland. This conclusion has come to be arrived at on the basis of the parameters we have set out in relation to the scope of judicial review. We may reiterate that it is not our intention to substitute our opinion to that of the experts. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly this Court would interfere.”

48. The sum and substance of the Principle laid down by the apex Court in the aforementioned case is that in exercise of power under Judicial Review, the Court cannot substitute its opinion to that of experts and also cannot sit as a Court of Appeal, but will review the manner in which the decision is made and also held the Government must have freedom of contract. The decision must not only be tested by the application of “*Wednesbury Principle of Reasonableness*” but must be free from

arbitrariness not affected by bias or actuated by *mala fides*. Consequently, where the selection or rejection is arbitrary, then certainly the Court would interfere. Therefore, with the touchstone of Article 14, 19 (1)(g) and 21 of the Constitution of India, if the scrutiny of fact and law will be taken into consideration and if the Court comes to a conclusion that there is arbitrary, unreasonable exercise of power tainted with *mala fide* and bias, in that case, the Court has got the power to interfere with the same.

49. In ***Radha Krishna Agarwal v. State of Bihar***, AIR 1977 SC 1496, the apex Court held as follows:-

“In case any right conferred on the citizens which is sought to be interfered, such action is subject to article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of article 14 of the Constitution. If a Governmental action even in the

matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the right of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non- discrimination in the type of the transactions and nature of the dealing.”

50. Similar view has also been taken by the apex Court in ***Mahabir Auto Stores v. Indian Oil Corporation Ltd.***, AIR 1990 SC 1031, ***Priya Gupta v State of Chhattisgarh***, AIR 2012 SC 2413, ***Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority***, (2013) 10 SCC 95, ***Kulja Industries Limited v. Chief Gen. Manager, W.T. Proj. BSNL***, AIR 2014 SC 9, ***Powai Panchsheel Co-operative Housing Society v. M.H.A.D.A.***, (2019) 2 SCC 294.

51. In ***In re: Special Reference No.1 of 2012***, (2012) 10 SCC 1: AIR 2013 SC (Civ) 209: 2012 AIR SCW 6194, the apex Court observed as follows:

“It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uniformed by reason may be questioned as arbitrary in proceedings under article 226 or article 32 of the Constitution.

52. Similarly, in ***S.G.Jaisinghani v. Union of India***, AIR 1967 SC 1427, the Constitution Bench of the apex Court observed as under :-

“In the context it is important to emphasise that absence or arbitrary power is the first essence of the rule of law, upon which our whole Constitutional System is based. In a system governed by rule of law, discretion, when conferred upon Executive Authorities, must be confined within the clearly defined limits. Rule of law, from this point of view, means that the decision should be made by the application of known principles and rules and in general such decision should be predictable and the citizen should know where he is, if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.”

53. In ***Ramana Dayarama Shetty v. International Airports Authority of India***, AIR 1979 SC 1628, the apex court observed that every action of the executive Government must be informed by reasons and

should be free from arbitrariness. That is the very essence of rule of law and its bare minimum requirement. Thus, the decision taken in an arbitrary manner contradicts the principle of legitimate expectation and the plea of legitimate expectation relates to **procedural fairness** in decision making and forms part of the rule of non-arbitrariness as denial of administrative fairness is Constitutional anathema.

54. In view of the aforementioned principle laid down by the apex Court, there is no iota of doubt that if there is no reasonable exercise of power by the Authority and more so, if the arbitrary and unreasonable exercise of power based on bias and *mala fide*, the Court has every jurisdiction to interfere with the same in exercise of Power under Article 226 of the Constitution of India.

55. The expression “reasonable” means: rational, i.e. based on reasons; not excessive or immoderate; something conformable or agreeable to reasons; having

regard to the facts of a particular case; something within the limits or reasons.

56. In **R.K.Garg v. Union of India**, AIR 1981 SC 2138, the apex Court, while dealing with the expression “reasonable”, have observed as under:-

“The action is called ‘reasonable’ which an informed, intelligent, just minded civilized man would rationally favour. The concept of ‘reasonableness’ does not exclude notions of morality and ethics.”

57. In **Bishambhar Dayal Chandra Mohan v. State of Uttarpradesh**, AIR 1982 SC 33, the apex Court held the word “reasonable” implies intelligence, care and deliberation with, as a course, which reason dictates.

58. The Courts have interpreted reasonableness as a facet of equality. Hence, every State action should be informed by reasonableness.

59. In **M.P. Gangadharan v. State of Kerala**, (2006) 6 SCC 162 : AIR 2006 SC 2360, the apex Court observed that the constitutional requirement for judging

the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix obtaining in each case. It cannot be put in a straight-jacket formula. Before an action is struck down, the Court must be satisfied that a case has been made out for exercise of power of judicial review.

60. In ***Style (Dress Land) v. Union Territory, Chandigarh***, (1999) 7 SCC 89 : AIR 1999 SC 3678, the apex Court observed that in the absence of Rules, the action of the Government is required to be fair and reasonable.

61. In ***LIC of India v. Consumer Education & Research Centre***, (1995) 5 SCC 482 : AIR 1995 SC 1811, the apex Court observed that in the sphere of contractual relations the State, its instrumentalities, Public Authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner, i.e. fair, just and equitable, after taking objectively all the relevant options into

consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision.

62. In **Jagdish Mandal** (supra), at Paragraph-22, the apex Court observed as follows:-

“Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up

public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.”

63. In **Dinesh Engineering Corporation** (supra), the apex Court held that in Contractual matter like the Government Contract, the Public Authority needs to be rational and reasonable in their decision making process.

At Paragraph-16, it has been held as follows:-

“16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with the EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while we are told the Railways are making purchases without any tender on a proprietary basis only from the EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of

non- application of mind, hence, it has to be quashed as has been done by the High Court.”

64. In **Ajay Kumar Jain** (supra), the apex Court at Paragraphs-23, 24, 25 and 26, observed as follows:-

“23. In the case of Union of India Vs. International Trading Co., reported in (2003) 5 SCC 437, Hon'ble Supreme Court at paragraph-23 has held as under:

"23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interest of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country....." (emphasis supplied)

24. In the case at hand, by the restriction imposed at the pre-bid stage, the right of the potential bidders, who are otherwise eligible to participate in the tender process, is being arbitrarily infringed. It

certainly curtails the reasonable expectation of the intending eligible bidders to participate in the bidding process.

25. In the case of *Association of Registration Plates Vs. Union of India and others*, reported in (2005) 1 SCC 679, Hon'ble Supreme Court at paragraph-43 held as under:

"43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work, [Article 14](#) of the Constitution prohibits the government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim fundamental right to carry on business with the government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on government in its dealings with tenderers and contractors. (emphasis supplied)

26. No purpose can certainly be served in nipping the contractors, who are otherwise eligible, at the threshold. There cannot be any fair competition, as there would be lesser participants, which is certainly detrimental to the public interest."

65. In **Sterling Computers** (supra), the apex Court at Paragraphs 18 and 19 observed as follows:-

"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

'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."

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.

19. *If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the Courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court amounts to encroachment on the exclusive right of the executive to take such decision."*

66. In **Reliance Energy** (supra), the apex Court at

Paragraphs 36, 37, 38 and 39 observed as follows:-

“36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of *I.R. Coelho vs. State of Tamil Nadu* 7 (2007) 2 SCC 1, Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of

parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

37. In *Union of India and another vs. International Trading Co. and another* - (2003) 5 SCC 437, the Division Bench of this Court speaking through Pasayat, J. had held :

"14. It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see

whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness."

38 When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

39. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India and others* -(2006) 10 SCC 1, the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above

"certainty" is an important aspect of rule of law. In the case of Reliance Airport Developers (supra), the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks had different stages. Objectivity was thus provided."

67. In **Chittaranjan Mishra** (supra), in which one of us (Dr. Justice B.R. Sarangi) was the Author of the Judgment, this Court, at Paragraph-16, observed as follows:-

"16. In S.S. Company mentioned supra, on which reliance has been placed so far as locus standi of the petitioner is concerned, 'it has been held that if the tenderer did not satisfy the eligibility criteria, even in terms of the unamended clause, and consequently its tender was rejected thereunder, it could not assail the amendment made in the relevant clause in terms whereof it again failed to qualify. But, this is not a case where the petitioner had participated in the tender, rather by putting the conditions by enhancing the EMD and solvency amount, the petitioner has been precluded from participating in the tender itself. So far as the previous years tender conditions are concerned, such conditions were not there and, admittedly, in respect of other distribution systems, namely, PDS and SMP, such stringent conditions have not been put by the State authority and, consequentially, there was fair participation of the bidders in view of the terms and conditions mentioned in the previous years. But, by putting conditions, so far as EMD, solvency certificate and security deposits are concerned, the petitioner being outstayed from the tender and in order to favour group of persons such stipulations have been made, it amounts to arbitrary and unreasonable exercise of powers. Consequentially, the petitioner has been discriminated and mala fide the benefit

has been extended to such people. Thereby, the petitioner has got every locus to assail such terms and conditions. Therefore, the judgment referred to supra has no application to the present case.”

In the said case, this Court, referring to **Michigan Rubber (India) Limited v. State of Karnataka and others**, (2012) 8 SCC 216, **Tata Cellular; Dinesh Engineering** (supra), **S.S. and Company v. Orissa Mining Corporation Limited**, (2008) 5 SCC 772 interfered with the Tender Call Notice dated 29.02.2016, so far as it relates to the conditions for enhancement of Security Deposits, EMD and Solvency Certificate, being arbitrary, unreasonable, discriminatory and *mala fide* and, thereby, quashed the same.

68. In **Jagruti Welfare Organization** (supra), this Court in Paragraphs 28, 29 and 37 observed as follows:-

“28 Admittedly, pursuant to the notice inviting tender (for short 'NIT'), four bidders had submitted their bids. Out of four bidders, two, namely, M/s. M.E. Infra Project Pvt. Ltd., Mumbai and M/s. Jyoti Build Tech. Pvt. Ltd., Lucknow could not deposit the EMD of Rs.60.00 lakh. Thus, the competition was reduced to two competitive bidders, namely, M/s. Global Waste Management Cell Pvt. Ltd., Mumbai

and M/s. SRP Clean Enviro Engineers Pvt. Ltd., Banagalore. Both the aforesaid bidders have quoted exorbitantly high price, which is more than double/triple of what is being paid to RMKY at present. As has been discussed while answering Issue No. 2, CMC could not satisfactorily explain the reasonable nexus between the escalation in financial eligibility criteria and the object to be achieved, that is the scope of work.

29. Cumulative assessment of the discussions made above, it can safely be concluded that the action of the CMC in escalating the financial eligibility criteria as per Clause 4.2 (a) of the tender call notice is nothing but to eliminate the potential bidders like the petitioner. Participation of only two bidders suggests that there was no fair competition at all. CMC has every right to incorporate stringent condition in the tender call notice. But the same must have a reasonable nexus with the object to be achieved and more importantly, it must allow a fair competition giving scope to the potential bidders to compete. As observed by Hon'ble Apex Court in the case of Ram & Shyam Company (supra) at para-18, it has been held as follows:

"18.And at any rate disposal of the state property in public interest must be by such method as would grant an opportunity to the public at large to participate in it, the State reserving to itself the right to dispose it of as best subserve the public weal."

37. On a cumulative assessment of the case law, it can be safely concluded that the Court does not act as an appellate authority, but merely reviews the manner in which the administrative decision is taken. The Court does not have expertise to correct the administrative decision because it will amount to substituting its own decision without any necessary expertise which itself may be fallible. The scope of interference/judicial review is very limited and can be made in the case where the authorities have acted in a manner which is arbitrary, unreasonable, discriminatory and with mala fide intention to limit the scope of competition to a chosen few by

eliminating the potential bidders from arena of competition and/or the decision so taken is against the public interest.”

69. Therefore, in view of the settled principles of law, as discussed above, there is absolutely no bar to interfere with the tender process, unless it satisfies the tests of arbitrariness, unreasonableness, discrimination, *mala fide* and bias, in exercise of power under Judicial Review under Article 226 of the Constitution of India.

70. In ***Associated Provincial Picture Houses Limited v. Wednesbury Corporation***, [1948] 1 KB 223, while considering the case of unreasonableness, the Bench considered the case of discretion and it was clarified that a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those Rules, he may truly be said, and often is said, to be acting “unreasonably.” In another sense it is

taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another. Simultaneously, while dealing with Public Interest, where it has been held that when he refers to the public interest, it must have been proper and legitimate thing which the Authority ought to have taken in mind. Certainly, he does not suggest anywhere that the Court is entitled to set up its view of the public interest against the view of the local Authority. Therefore, the power of the Court to interfere in each case is not as an Appellate Authority to override the decision of the Local Authority, but as a Judicial Authority, which is concerned and concerned only, to see whether the Local Authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

71. In ***Municipal Corporation*** (supra), the apex Court, with regard to the purpose of Judicial Review, held that the Court is not to check whether the decision is

sound. If *bona fide* and in public interest, the Court will not interfere in exercise of power of Judicial Review, even if there is procedural lacuna.

72. In view of the above judicial pronouncements, this Court, in exercise of the power of Judicial Review, intends to interfere so far as it relates to exclusion of Distributors from participating in the tender process, but not with the decision making process. By not including Distributors to have a fair selection and fair participation with an object sought to be achieved, i.e. “best product at the best price”, the Tendering Authority has acted arbitrarily, unreasonably and *malafidely* with a reasonable bias, so that the competition can only be confined to the Manufacturers, Importers and Loan Licensees. If for procurement of equipments, opportunity was given to the Distributors/ Suppliers/ Agents/ C&F Agents / C&A Agents for procurement of veterinary medicines no valid and justifiable reason has been shown to exclude them from participating in the bid. The only

reason has been shown that so far as human medicine is concerned, though such clause of exclusion of Distributors was provided, but the same was not challenged. But fact remains, there was no such occasion on the part of the Petitioner to challenge the same as he is not a license holder for the said medicines. Merely because such exclusion clause was made available for procurement of human medicine, that *ipso facto* cannot disentitle the Petitioner to challenge such exclusion clause for procurement of veterinary medicines. Therefore, on both the counts, the reason assigned for excluding the Distributors/ Suppliers/ Agents/ C&F Agents / C&A Agents under Clause-5.2.4 cannot be accepted.

73. In view of the law laid down by the apex Court in ***Shimnit Utsch India*** (supra), no doubt the discretion lies with the Authority to make a change in the Policy, but that change of the Policy should be within the touch stone of reasonableness. If such change does not satisfy the

reasonableness, then in that case, the Policy can be construed as arbitrary, contrary to the provisions of law and the said Policy should be interfered with by the Court.

74. Referring to **Director of Education, Montecarlo Ltd.** and **Afcons Infrastructure Ltd.** (supra), the apex Court has time and again held that the Authority is the best Judge of the tender conditions. It is not open for the Court to see whether the conditions prescribed in earlier tender were better and, as such, the Government must have a free hand and a reasonable play in the joints and the same cannot be struck down because it is felt that some other condition may have been more fair, wiser or logical. As such, the Authority of the document is the best person to understand and appreciate the requirement and interpret the document. The author may have a different interpretation, which is not acceptable to the Court, but that itself is not the reason to interfere with the interpretation. The owners

should always have the freedom to provide the eligibility criteria unless it is found to be arbitrary, malafide or tailor-made. With regard to this proposition of law laid down by the apex Court, there is no dispute at all. Rather, this should be in conformity with the requirement of Articles 14 and 19 (1)(g) of the Constitution. As such, the apex Court have observed the same taking into consideration the provisions enshrined under Articles 14 and 19 (1)(g) of the Constitution.

75. In **Silppi Constructions** (supra), the apex Court held that the Court is normally loathe to interfere in contractual matters unless a clear cut case of arbitrariness or mala fides or bias or irrationality is made out.

76. Keeping in view the law laid down by the apex Court and applying the same to the present context, this Court is of the considered view that the Petitioner has made out a case for interference, while there is exclusion of one class of people from participating in the bid,

namely, Distributors/ Suppliers/ Agents/ C&F Agents/ C&A Agents, as mentioned in Clause-5.2.4 of the Special Conditions of Contract. The reason for their exclusion is tell tale to fetch “best product at the best price”. If the Distributors can satisfy the reason assigned, there is no justification not to allow them to participate in the bid itself.

77. In **Caretel Infotech** (supra), the apex Court observed that the object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties. This is not the case here and as such, the Petitioner cannot be considered to be an unsuccessful party. Rather, by excluding the Distributors/ Suppliers/ Agents/ C & F Agents / C & A Agents from participating in the bid to have a larger competition and confining to a group of persons, namely, Manufactures, Importers and Loan Licensees, the tender invited by Opposite Party No.2 cannot sustain in the eye of law.

78. It is argued with vehemence that when larger public interest is involved, in that case the judicial intervention in the matter of contract involving the State instrumentality in exercise of power of Judicial Review will not be permitted to protect the private interest. In the present case, rather for the greater public interest and for the larger participation in the bid, instead of confining the tender to a particular group, namely, Manufacturer, Importers and Loan Licensees, the Tendering Authority should have included the Distributors/ Supplier/ Agents/ C & F Agents / C & A Agents, who could have provided “best product at the best price”. Opposite Party No.2 has misconstrued this fact and acted arbitrarily and unreasonably, which cannot sustain in the eye of law.

79. Much reliance has been placed alleging that no protection to private interest even if some defect is found in the decision making process. The question of decision making process starts by invitation of tender and in inviting tender, if there is exclusion of a particular group,

namely, Distributors/ Suppliers/ Agents/ C & F Agents / C & A Agents and, as such, the decision making process has not yet began, in that case, the question of so called alleged protection of private interest does not arise. Rather, it is for the larger public interest, the opportunity of participating in the tender should have been given to all classes of People to fetch “best product at the best price”. Initially, Director of Animal Husbandry and Veterinary Services was issuing the tender and as per the requirement, the State Government has changed the Policy to procure Veterinary Medicines through Opposite Party No.2, to which the Petitioner has no grievance and he has never assailed such change of Policy. Rather, the Petitioner only assails the exclusion of Distributors from the arena of participating in the tender, as the same is arbitrary, irrational, unreasonable, discriminatory, malafide, bias and affects the public interest.

80. Therefore, exclusion of Distributors/ Suppliers/ Agents/ C & F Agents / C & A Agents under

Clause-5.2.4 pursuant to the Notice Inviting Bid dated 20.06.2022 vide Annexure-7 is arbitrary, irrational, unreasonable, discriminatory, malafide, bias and affects the public interest.

81. It is worthwhile to mention here that while entertaining this Writ Petition on 15.07.2022, since learned Counsel for Opposite Party No.2 had entered appearance, in course of hearing, it was brought to the notice of this Court that pursuant to impugned Tender Notice, as per Clause-5.2.1, 54 bidders belonging to Manufacturer, ★ Importer and Loan Licensee have participated and, as such, larger participation has been made, even excluding Distributors/ Supplier/ Agents/ C & F Agents / C & A Agents. Therefore, this Court, instead of passing any interim order, instructed learned Counsel appearing for the Opposite Parties, not to take any final decision till the matter is finally heard and disposed of, to which unequivocal statement was made that since the Court is hearing the matter, no final decision will be

taken by the Tendering Authority. As such, no 3rd party interest has been created till now, in view of the undertaking and commitment made by learned Counsel for the Opposite Parties.

82. Considering the matter- both factually and legally- Clause-5.2.4 of the Bid Ref. No. OSMCL/2022-23/DRUGS-VETERINARY/14 dated 20.06.2022, excluding the Distributors/ Suppliers/ Agents/ C&F Agents / C&A Agents from participating in the Tender, cannot sustain, as the same is arbitrary, irrational, unreasonable, discriminatory, malafide, bias and affects the public interest and also violates Articles 14, 19 (1)(g), 21 and 300-A of the Constitution of India. Accordingly, the same is liable to be quashed and is hereby quashed. Consequentially, any follow up action taken pursuant to the Notice Inviting Bid, vide Bid Ref. No. OSMCL/ 2022-23/ DRUGS – VETERINARY / 14 dated 20.06.2022 in Annexure-7 is also hereby quashed. The Opposite Parties are hereby directed for issuance of fresh tender

excluding Clause-5.2.4 by giving opportunity to all the classes of bidders, namely, Manufacturers/ Importers/ Loan Licensees/ Distributors/ Suppliers/ Agents/ C&F Agents / C&A Agents.

83. In the result, the Writ Petition is allowed. However, there shall be no order as to costs.

S.K. MISHRA, J.

I agree.

.....
DR. B.R. SARANGI,
JUDGE

.....
S. K. MISHRA,
JUDGE

Orissa High Court, Cuttack
The 11th August, 2022, Arun/Ashok/GDS