



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 04.07.2022
% **Judgment delivered on: 12.07.2022**

+ **W.P.(C) 9508/2022 and CM APPL. 28376/2022**

TRIVENI HEALTHCURE PRIVATE LTD Petitioner

Through: Mr. Gaurav Bahl, Mr. Tarun Sharma,
Mr. Tushar Datta, Advocates.

versus

GOVT OF NCT OF DELHI & ANR. Respondent

Through: Mr. Anuj Aggarwal, Additional
Standing Counsel for GNCTD with
Ms. Ayushi Bansal, Mr. Sanyam Suri,
Ms. Aishwarya Sharma, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SATISH CHANDRA SHARMA, C.J.

1. The petitioner before this Court is a Private Limited Company incorporated in the Companies Act, 1956 and is registered as a Start-up Company vide registration Certificate issued by Department of Promotion of Industry and Internal Trade dated 24.07.2020. The petitioner has filed the present petition being aggrieved by the inaction on the part of the respondents in providing relaxation for the Start-ups in terms of the policies and circulars issued by the Government of India from time to time.

2. The petitioner's contention is that Rajiv Gandhi Super Speciality Hospital is an autonomous institute under the Government of National



Capital Territory of Delhi (hereinafter referred as GNCTD) and has issued tenders dated 12.04.2022 for procurement of Stents, Grafts, Valves for Cardiology Department and the details of tenders issued by respondent No. 2 are as under.

“(a) 2022_RGSSH_220415_1, Rate Contract of cardiology consumables (Part-1)

(b) 2022_RGSSH_220436_1, Rate Contract of cardiology consumables (Part-2)”

3. The petitioner’s contention is that the Central Government in order to promote the Start-up and MSME entities came up with a policy i.e. Start-up India initiative in 2016, and, accordingly, executive instructions were issued through circulars to various Ministries for granting relaxation to the Start-up entities and MSME Enterprises with regard to past performance, bid security and turnover, only with an aim and object to promote the new talent and to ensure that they are also able to participate in the competition. The Executive Instructions dated 10.03.2016 have been brought to the notice of this Court.

4. The petitioner further stated that the GNCTD has also framed a policy for promoting Start-up and MSME in 2019, and the same has been brought into force with effect from 05.05.2022.

5. The petitioner’s contentions that all other Hospitals like All India Institute of Medical Sciences and GB Pant Hospital – which are also Government Hospitals, have issued tenders for procurement granting relaxations for Start-ups and MSMEs with regard to turnover, past performance and bid security. However, the respondent No.2 has not granted any such relaxation to Start-up/ MSMEs arbitrarily without any



reason.

6. The petitioner being aggrieved by non-grant of relaxations protested the matter during the pre-bid meeting which was held on 20.04.2022, and the petitioner was informed that no relaxation in respect of Annual Turnover Certificate, Past Experience and EMD/Bid security for Start-up Registered Company shall be given. The petitioner's contention is that non-grant of relaxation is clearly arbitral and violative of Articles 14 and 19(1)(g) of the Constitution of India, and the petitioner has been denied level playing field.

7. The petitioner further stated that the representation was submitted on 07.06.2022, however, no response has been received, and, therefore, the petitioner has been left with no other choice except to approach this Court in the matter.

8. The petitioner has raised various grounds in this Court, and has stated that refusal to grant relaxation to the Start-up for turnover, past performance, bid security is against the Start-up policy of respondent No.1 as well as against the Start-up policy of Government of India, and hence it is violative of Articles 14 and 19(1)(g) of the Constitution of India.

9. The petitioner raised another grievance stating that the GNCTD has failed to exercise due supervision upon respondent No.2 – GB Pant Hospital, in the matter of public procurement through the process of tender, and the failure on the part of the respondent No.1 in respect of non-grant of exemptions/ relaxations has caused serious prejudice to the rights of the petitioner as guaranteed under the Constitution of India.

10. The petitioner's further contention is that the respondents have acted in completely unfair manner by issuing NIT, and by not including relaxations in respect of Start-up/ MSMEs.



11. The petitioner's further contention is that the administrative action taken in the matter deserves to be reviewed by this Court on the ground of illegality, irrationality and procedural impropriety, as the respondents have acted in complete arbitrariness, and the conduct of the respondents is detrimental to the interest of the petitioner and other Start-ups. It is also stated that the action of the respondents is violative of the executive instructions, guidelines & circulars issued from time to time by the Government of India as well as by the respondent No.1 – Government of NCT of Delhi, therefore, the respondents be directed to permit the petitioner to participate in the tender process without insisting upon certain terms and conditions keeping in view the relaxations that are provided to Start-ups and MSMEs.

12. The petitioner has raised other grounds also, and the fact remains that the petitioner before this Court is aggrieved by non-grant of the relaxations in the matter of past performance, bid security amount and turnover for Start-ups/ MSMEs. The petitioner has prayed for the following reliefs.

“(a) issue an appropriate writ, Order or direction in the nature of mandamus or any other writ, Order or direction, directing the Respondent No.2 to allow the relaxation of past performance, Bid security amount, turnover for Start-up/MSME in order to enable them to participate in the tender emanating from Tender No (1) 2022_RGSSH_220415_1, Rate Contract of cardiology consumables (Part-1) (b) 2022_RGSSH_220436_1, Rate Contract of cardiology consumables (Part-2) for procurement of Consumable items for Cardiology Department and for supply of Stents, Grafts and Valves for Cardiology Department; and/or

(b) Issue a Writ of certiorari or any other appropriate Writ or order directing the Respondents to ensure that the Respondent No.2 being an instrumentality of the State acts in a fair, non-



arbitrary and just manner and to desist in any manner from acting against the interest of the Petitioner; and

(c) issue a Writ of certiorari or any other appropriate Writ or order directing the Respondent No.2 restraining if from acting in any manner derogatory to the said Constitution of India and violating the provision of article 14 and 19(1)(g) of Constitution of India; and

(d) issue a Writ of certiorari or any other appropriate Writ or order directing the Respondents to ensure that the provisions of the Article 14 and 19(1)(g) are implemented and not to resile from the same to cause prejudice to the interest of the Petitioner; and ”

13. A detailed and exhaustive reply has been filed on behalf of the respondent No.2 – Rajiv Gandhi Super Speciality Hospital, and the respondent has admitted the issuance of tender notice.

14. It has been stated that two tenders have been issued for procurement of Consumable items for Cardiology Department and for supply of Stents, Grafts and Valves on 12.04.2022; and a corrigendum was also issued on 03.06.2022 clarifying that “*no relaxation in annual turnover certificate, past performance and EMD/ Bid security for Start Up Registered Company shall be given*”.

15. It has been further stated that the arguments of the petitioner in respect of Office Memorandum dated 20.09.2016 are misplaced. The Office Memorandum dated 20.09.2016 issued by the Procurement Policy Division, Department of Expenditure, Ministry of Finance with the subject “*Relaxation of Norms for Startups Medium Enterprises in Public Procurement regarding Prior Expereince – Prior Turnover cirteria*”, are subjected to certain terms and conditions and in respect of procurement of items relating to public safety, health, critical security operations and



equipment, the Procurement Department can certainly prefer the vendors having prior experience rather than giving order to new entities. It has been further stated that in respect of such procurements where adequate justification exists, the procuring entities may not relax the criteria of prior experience/ turnover for the Start-ups and the same provisions finds in the Office Memorandum dated 20.09.2016. It has been further stated that the Office Memorandum dated 20.09.2016 allows the respondent No.2 not to relax the criteria for prior experience/ turnover for the Start-ups provided it is for procurement of items relating to public safety and health.

16. It has been further contended that the consumables required by the Cardiology Department for treating patients with heart diseases evidently fall under the category of items related to public safety and health.

17. It has also been brought to the notice of this Court that in the respondent No.2 Hospital, as many as 218 patients have lost their lives post heart treatments/ surgeries, and the death rate was abnormally high and, therefore, keeping in mind the issue of patient-care, safety and their overall welfare while undergoing such risky medical procedures, the respondent No.2 deemed it appropriate for not providing any relaxation for Start-ups and MSMEs in terms of the criteria of prior experience and annual turnover.

18. It has also been argued before this Court that the petitioner before this Court is not a manufacturer. The petitioner is merely a trader/ supplier.

19. The respondents have also placed reliance upon the exemption clause dealing with EMD in respect of Government E-Market Place, and the contention is that even in respect of Government E-Market Place, the exemption in respect of EMD is available for manufacturers of goods and service providers for services. The traders are excluded from the purview of



the Government policy.

20. The respondents have further stated that petitioner being a trader, working in the '*Health-Care and Lifesciences*' industry and '*Medical Devices/ Biomedical*' sector, is not eligible to seek EMD exemption as traders are specifically excluded from the purview of any such benefit as per the policy.

21. The respondents have also placed heavy reliance on Circular bearing No. 1(2)(1)/2016-MA dated 10.03.2016, and the contention of the respondents is that in the Circular dated 10.03.2016, it has been stated that the Central Ministries/ Departments/ Central Public Sector Undertakings may relax condition of prior turnover and prior experience in respect of MSMEs, and the word '*may*' clarifies that it is not mandatory to provide relaxation to Start-ups/ MSMEs. Reliance has been placed upon a judgment delivered in the case of ***Rajender Mohan Rana & Ors. Vs. Prem Prakash Chaudhary & Ors.*** in LPA No. 554/2011 in respect of interpretation of the words '*may*' and '*shall*'.

22. The respondents have further stated that the Start-up Policy of NCT of Delhi, 2019 is not applicable to the petitioner Firm as Clause 4.3 of the said Policy aims to recognize Start-ups which are working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation, and, therefore, as the petitioner firm does not fall within the definition of recognized Start-ups as defined under Clause 4.3 of the Start-up Policy of NCT of Delhi, 2019, the question of granting exemption to the petitioner does not arise.

23. In respect of examples given by the petitioner relating to All India



Institute of Medical Sciences and GB Pant Hospital, it has been stated that the tender floating authority is having the sole discretion to frame the terms and conditions of the tender document, and the petitioner cannot claim relaxation as a matter of right specially keeping in view the peculiar facts and circumstances of the large number of deaths which took place relating to heart patients in the GB Pant Hospital.

24. The respondents have further stated that the safety of the patients is the prime concern of the Hospital, and keeping in mind the unfortunate past history pertaining to Cardiology Department, they have not granted any relaxation to any Start-ups and MSME in terms of the criteria of prior experience, annual turnover and EMD.

25. A prayer has been made for dismissal of the writ-petition.

26. Heard learned counsel for the parties and perused the record. The undisputed facts of the case reflect that two tenders were issued on 12.04.2022 by the Rajiv Gandhi Super Speciality Hospital for procurement of Stents, Grafts, Valves for Cardiology Department as under:

“(a) 2022_RGSSH_220415_1, Rate Contract of cardiology consumables (Part-1)

(b) 2022_RGSSH_220436_1, Rate Contract of cardiology consumables (Part-2)”

27. The petitioner is aggrieved by non-grant of relaxation in the matter of past performance, bid security amount and turnover for Start-ups/ MSMEs.

28. The Central Government in order to promote Start-ups and MSME Entities floated Start-up India Initiative in the year 2016, and various executive instructions were issued from time to time granting relaxations to the Start-up Entities and MSMEs with regard to past performance, bid



security and turnover in order to ensure that new talent is promoted in the new competition. A Circular was issued on 10.03.2016 by Government of India, Ministry of Micro Small and Medium Enterprises granting relaxation under the Start-up India Initiative on 10.03.2016 and the same is reproduced as under:

*“Government of India
Ministry of Micro, Small & Medium Enterprises
O/o the Development Commissioner (MSME)
Nirman Bhavan, A-Wing, 7th Floor
Maulana Azad Road,
New Delhi-110108
Tel. 011-23061091
Fax No. 011-23060536*

*Policy Circular No. 1(2)(1)/2016-MA Dt. 10th March
2016*

*To
All Central Ministries/Departments/CPSUs/All Concerned*

***Subject: Relaxation of Norms for Startups and
Micro & Small Enterprises in Public
Procurement on Prior Experience – Prior
Turnover Criteria.***

1) The Government of India has notified Public Procurement Policy for Micro and Small Enterprises (MSEs) Order 2012 with effect from 1st April, 2012 and 20% procurement from Micro & Small Enterprises of the total procurement by Central Ministries/Departments/CPUs has become mandatory with effect from 1st April, 2015.

(2) The Government of India has announced 'Startup India' initiative for creating a conducive environment for Startups in India.



(3) The Startups are normally Micro and Small Enterprises which may not have a track record. These will have technical capability to deliver the goods and services as per prescribed technical & quality specifications, and may not be able to meet the qualification criterion relating to prior experience-prior turnover.

(4) In exercise of Para 16 of Public Procurement Policy for Micro and Small Enterprises Order 2012, it is clarified that all Central Ministries/Departments/ Central Public Sector Undertakings may relax condition of prior turnover and prior experience with respect to Micro and Small Enterprises in all public procurements subject to meeting of quality and technical specifications .

(5) This issues with the approval of Union Minister of Micro, Small and Medium Enterprises.

-sd-

(Surendra Nath Tripathi)

*Additional Secretary & Development Commissioner-MSME
Ministry of Micro, Small & Medium Enterprises.”*

29. The Government of India, Ministry of Finance, Depart of Expenditure (Procurement Policy Division) issued another executive instruction dated 20.09.2016 again in the matter of grant of relaxations for Start-ups. The Notification dated 20.09.2016 is reproduced as under:

“No.DPE/7(4)/2017-Fin.

Government of India

Ministry of Heavy Industries & Public Enterprises

Department of Public Enterprises

***Public Enterprises Bhawan
Block No.14, CGO Complex
Lodhi Road, New
Delhi -110003***



OFFICE MEMORANDUM

Subject: - Relaxation of Norms for Startups Medium Enterprises in Public Procurement Regarding Prior Experience – Prior Turnover criteria-reg.

The undersigned is directed to enclose herewith a copy of the O.M. No F. 20/2/2014-PPD(Pt.) dated 20th September, 2016 along with a copy of OM bearing the same number dated 25th July, 2016 (with enclosure) on the above subject issued by Ministry of Finance, Department of Expenditure (Procurement Policy Division). All Ministries/ Departments concerned are advised to direct their CPSEs to follow the directions mentioned therein for implementation.

2. *This issues with the approval of Secretary, DPE.*

-sd-
(Kalyani Mishra)
Director
Tel. 24362061”

30. It is also noteworthy to mention that earlier also Circulars were issued from time to time in the matter of grant of relaxations to Start-ups/MSMEs.

31. The aforesaid policy decision/ executive instruction empowers the Procuring Department to relax certain conditions in respect of experience/ turnover for Start-ups. It categorically provides “ *all Central Ministries/ Departments may relax condition of prior turnover and prior experience with respect to MSME in all public procurements subject to meeting of quality and technical specifications*”.

32. The executive instruction does not make it mandatory for any establishment to relax the condition in respect of turnover and prior experience/ EMD as the word “*may*” has been used in the policy Circular dated 10.03.2016.

33. It is true that Government of India as well as the GNCTD under its



NCT of Delhi, 2019 Policy promotes the Start-ups. However, in certain fields past experience, and other qualifications cannot be relaxed specially in the field of health care.

34. The present case relates to procurement of Stents, Grafts, Valves for Cardiology Department. In the Rajiv Gandhi Super Speciality Hospital, there was an abnormally high rate of deaths in respect of heart patients. In less than one year period, 218 patients lost their lives, and in that drop-back in order to ensure supply of quality products/ quality implants from experience persons – only because element of human life was involved, the criteria in respect of Start-ups and MSMEs have not been relaxed.

35. This Court – keeping in view the executive instructions dated 10.03.2016 and 16.09.2016, is of the view that non-grant of relaxation in Annual Turnover, past experience and EMD/ bid security amount for Start-ups/ MSMEs, is certainly not an unreasonable restriction keeping in view the peculiar nature of work i.e. supply of Stents and other implants especially keeping in view the death rate in the Hospital.

36. The petitioner cannot compare the earlier tenders in respect of other hospitals for simple reason that there was no such exorbitant hike in the death rates in any other hospitals, and it has also been brought to the notice of this Court, while matter was being argued, that even writ petition has been filed in respect of the alarming hike in the deaths which have taken place in respect of heart patients in Rajiv Gandhi Super Speciality Hospital.

37. Another important aspect of the case is that the Start-up policy of NCT of Delhi, 2019 is not applicable to the petitioner's firm as the petitioner is only a supplier/ trader. The policy framed by the GNCTD aims to



recognize Start-ups which are working towards innovation, development or improvement of products or processes or services or or if it is a scalable business model with a high potential of employment generation or wealth creation. The petitioner is merely a trader who has to supply goods, and no innovation of any kind is involved in so-called Start-up of the petitioner, and, therefore, this Court does not find any reason to interfere with the tender conditions.

38. Framing of tender condition is the sole discretion of the authority who has floated the tender, and unless and until the tender conditions are arbitrary, or are contrary to any statutory provisions, or having tailored made to favour any individual, the question of interference by this Court does not arise. The petitioner has not been able to establish violation of any right. The safety of the patients is of paramount importance, and, therefore, the respondent Hospital has rightly not at all granted any relaxation to the Start-ups and MSMEs in the peculiar facts and circumstances of the case.

39. The writ petition is, accordingly, dismissed leaving the parties to bear their respective costs.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SUBRAMONIUM PRASAD)
JUDGE

JULY 12, 2022

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