



Neutral Citation Number : 2023:DHC:4532

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

Date of decision: 22nd MAY, 2023

IN THE MATTER OF:

+ **W.P.(C) 6902/2023 & CM APPLs. 26910/2023, 26911/2023**

FRESENIUS MEDICAL CARE PRIVATE LIMITED

..... Petitioner

Through: Mr. Rajshekhar Rao, Sr. Advocate
with Mr. Gauhar Mirza, Ms. Hiral
Gupta, Ms. Anand, Mr. Nishant Doshi
and Mr. Shiv Sharma, Advocates.

versus

UNION OF INDIA & ANR.

..... Respondent

Through: Ms. Nidhi Raman, CGSC with Mr.
Hardik Bedi, GP and Mr. Zubin
Singh, Advocates.
Mr. Arjun Singh Bhati, Advocate for
R-2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. *Vide* the present Writ Petition the Petitioner seeks to challenge the award of e-tender, bearing No. Q/DPA-III/231/01/2022, dated 29.07.2023 (*hereinafter referred to as 'the tender in question'*) to the Respondent No.2 on the ground that the award of e-tender to the Respondent No.2 is illegal and contrary to the terms of e-Tender.

2. Respondent No.1 herein/ Union of India through Ministry of External Affairs issued the tender in question for supply of 200 Dialysis Machines
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with 60 RO Systems to the Embassy of India at Kathmandu, Nepal. It is stated that the Petitioner herein along with Respondent No.2 and one other entity participated in the tender and Respondent No.2 was declared as L1 bidder and awarded the tender to it.

3. The Petitioner seeks to challenge the award of the tender in question to the Respondent No.2 on the ground that the tendering authority has completely ignored the fact that the certificates submitted by Respondent No.2 are defective. It is stated that Respondent No.2 has given false and invalid certificates of the products supplied by it to Respondent No.1. It is stated that the Petitioner has given sufficient material to demonstrate that Respondent No.2 ought not be given tender as it has given expired certificate for the dialysis machine, invalid certificate for the RO system by an unrecognized notified body. It is stated that despite being aware of the fact that the certificates given by Respondent No.2 are in complete violation of the terms of the tender, Respondent No.1 has awarded the tender to the Respondent No.2. It is further stated that the award of tender to Respondent No.2 will affect the credibility and name of the country.

4. Learned Counsel for Petitioner has drawn the attention of this Court to the Schedule of requirements, specification and allied details. Learned Counsel for the Petitioner has stated that the Respondent No.2 has not complied with the specifications. He states that the equipments which have been supplied by Respondent No.2 are not properly certified by the competent authority.

5. *Per contra*, learned Counsel appearing for Respondent No.1 states that queries have been made to the Respondent No.2 regarding the equipments as to whether the equipments conforms to the requisite standard
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or not. It is submitted that the Respondent No.2 has given a proper certificate from the equipment manufacturer. Learned Counsel for Respondent No.2 has also taken this Court through various certificates issued by appropriate agencies to show that the equipments which are to be supplied by Respondent No.2 have proper and valid certificates. He has taken this Court through certificate dated 29.07.2021 to show that the certificate is valid from 01.08.021 to 31.07.2024. He has also taken this Court through an ISO certificate issued by ESCPL which has been accredited by NABCB to issue ISO certificate showing that the equipments manufactured by Respondent No.2 are ISO compliant.

6. Heard the Counsel for the parties at length and perused the certificates and material on record.

7. Before awarding the tender to Respondent No.2, the Union of India has satisfied itself regarding the equipments and only after satisfying itself that the equipments have a valid certificate and are of good quality, it has decided to send these equipments to Nepal. Other than the mere *ipse dixit* of the Petitioner that proper certificates have not been given by Respondent No.2, no concrete material has been supplied by the Petitioner to demonstrate that the decision of Union of India in awarding the tender to the Respondent No.2 is *mala fide* and has been done so only to favour Respondent No.2.

8. The scope of judicial review in contractual matters has been examined by the Apex Court in a number of judgments, including Tata Cellular v. Union of India, (1994) 6 SCC 651, Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492, Jagdish Mandal v. State of Orissa (2007) 14 SCC 517, Michigan Rubber (India) Ltd. v. State of Karnataka W.P.(C) 6902/2023

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(2012) 8 SCC 216, Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., **2016 (16) SCC 818**, Silippi Constructions Contractors v. Union of India, **2019 SCC OnLine SC 1133**, N.G. Projects Ltd. v. Vinod Kumar Jain, **(2022) 6 SCC 127**, etc. and the following principles have emerged:

- a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose.
 - b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited.
 - c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted.
 - d) 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.
 - e) If the State or its instrumentalities act reasonably, fairly and in
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public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government. (Refer: Maa Binda Express Carrier v. North-East Frontier Railway, (2014) 3 SCC 760)

9. In all the judgments involving judicial review in the matter of tender, the Court has always posed two questions to itself, namely, (i) Whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached’; and (ii) Whether the public interest is affected; and has held that if the answers to these questions are in the negative, then there should be no interference by the Court under Article 226 of the Constitution of India.

10. In view of the material supplied by Respondent No.2 and the statement of Respondent No.1 that that Government has taken all the precautions which are necessary to ascertain the validity of certificates and equipments supplied by Respondent No.2 and that the Government has satisfied itself that the equipments supplied by Respondent No.2 are of good quality. In view of the fact that no concrete material has been brought on record by the Petitioner to show that the tender in question was awarded to the Respondent No.2 only to favour Respondent No.2 or that the process adopted by Respondent No.1 is *mala fide* or whether public interest would suffer in awarding the tender to Respondent No.2, this Court is not inclined

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to interfere with the decision of the Union of India in awarding the tender to Respondent No.2.

11. Accordingly, the Writ Petition is dismissed, along with the pending applications, if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

MAY 22, 2023

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