# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# NAGPUR BENCH, NAGPUR

## WRIT PETITION NO. 1416/2024

(LEBEN LIFE SCIENCES, AKOLA **VERSUS** THE STATE OF MAHARASHTRA & OTHERS)

| *Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders.* | *Court's or Judge's order* |
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Mrs. R.S. Sirpurkar, counsel for the petitioner.
Shri D.V. Chauhan, Senior Counsel and Government Pleader with Ms N.P. Mehta, Additional Government Pleader for the respondent nos.1 and 2.
Shri S.V. Sohoni, counsel for the respondent nos.3 and 4

**CORAM : NITIN W. SAMBRE AND ABHAY J. MANTRI, JJ.**
**DATE : SEPTEMBER 20, 2024**

**P. C.**

Petitioner-Leben Life Sciences, Akola (for short, 'the petitioner-Company') has approached this Court with following prayers:-

(1) Quash and set aside the impugned Tender dated 12.12024 issued by the respondent no.3 Chief Executive Officer, Chandrapur and 4 District Health Officer and Civil Surgeon, Chancrapur to the extent of its onerous and arbitrary conditions Clause No.16 prescribed therein; (Annexure-I and Annexure-IV);

(2) Quash and set aside the order dated 20.2.2024 issued by the respondent no.3 Chief Executive Officer, Chandrapur, disqualifying the petitioner and grant exemption to the petitioner for the reasons stated in the petition; (Annexure-VII).

2. The facts necessary for deciding the writ petition are as under:-

The petitioner-Company is into the business of manufacturing and sale of medicines, consumables and surgical equipments. The business is catered by the petitioner-Company with the aid of around 524 employees. The respondent nos.3 and 4 have invited the bids for supply of medicines (Allopathic), surgical equipments, consumables and disposables *vide* tender notice dated January 12, 2024. The said tender notice succeeded with a pre-bid meeting in which an objection was raised by the petitioner-Company as regards heavy turnover eligibility criteria including exemption on account of the participants being MSMEs and Start-Ups. It has claimed that it being a MSME entity, it is entitled for exemption and has sought for preference for being a manufacturer in the State of Maharashtra. Accordingly, a corrigendum came to be issued on January 25, 2024 to the effect that the experience for supply of medicines, surgical equipments, consumables and disposables for Government/Semi Government and Undertakings or any Government Institute was reduced from Rupees Fourteen Crores to Rupees Ten Crores. Accordingly, the petitioner-Company was informed *vide* communication dated February 15, 2024 by the respondent no.4 that it has to fulfil the criteria of experience certificate of Rupees Ten Crores and since the petitioner-Company is a Start-Up having more than five years experience, relaxation to the said condition would not apply. The said communication of the respondent no.4

was resisted by the petitioner-Company through reply dated February 17, 2024 reiterating its stand of it being a MSME Start-Up having exemption from five years criteria and annual turnover of supply. Its bid was rejected on February 20, 2024 on the ground that the condition of experience certificate for supply of medicines, surgical equipments, consumables and disposables for Government/ Semi Government/Undertakings or any Government Institute amounting to Rupees Ten Crores was not fulfilled. This has led to the petitioner-Company preferring the present writ petition questioning the decision of not only the rejection of its bid *vide* order dated February 20, 2024 but also the tender dated January 12, 2024 issued by the respondent nos.3 and 4 to the extent of putting the parties like the petitioner-Company to the onerous and arbitrary condition viz. Clause 16 of the Tender Conditions (Annexure-I) and the Corrigendum (Annexure-IV).

3. Mrs. R.S. Sirpurkar, learned counsel for the petitioner-Company would submit that the petitioner-Company has submitted all the documents enumerated in the tender document and on the basis of the said documents, it was deemed to be qualified for last year *viz.* 2022 in the tender floated by the respondent no. 3 dated November 10, 2022 owing to being a MSME Start-up. She would further urge that as per the Policy Circular no.1(2)(1)/2016-MA dated March 10, 2016 issued by the Ministry of Micro, Small & Medium Enterprises, it is clarified that all Central Ministries/ Departments/Central Public Sector Undertakings may relax

condition of prior turnover and prior experience with regard to MSMEs in all public procurements subject to meeting of quality and technical specifications as the Start-ups are normally Micro and Small Enterprises which may not have a track record. Our attention is further invited by the counsel for the petitioner-Company to Clause 3.1.2.9 of the Government Resolution dated December 01, 2016 whereby the Start-up entities established in the State of Maharashtra are exempted from the condition of experience and annual turnover up to 5 years from the date of registration as per the rules laid down by the Department of Industrial Policy and Promotion of the Central Government.

So as to substantiate the claim of being a Start-up, our attention is invited to the definition of 'Start-up' as provided by the Ministry of Commerce and Industry by the notification dated February 19, 2019 which reads thus:

> "*Definitions*
> *1. In this notification, --*
> *(a) An entity shall be considered as a Startup:*
> *(i) Upto a period of ten years from the date of incorporation/registration, if it is incorporated as a private limited company (as defined in the Companies Act, 2013) or registered as partnership firm (registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in India.*
> *(ii) Turnover of the entity for any of the financial years since incorporation/ registration has not exceeded one hundred crore rupees.*

> *(iii) Entity is 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.*
>
> *Provided that an entity formed by splitting up or reconstruction of an existing business shall not be considered as a 'Startup'.*
>
> *Explanation-*
>
> *An entity shall cease to be a Startup on completion of ten years from the date of its incorporation/registration or if its turnover for any previous year exceeds one hundred crore rupees.*"

It is urged that the petitioner-Company satisfies all the requirements as mentioned hereinabove and therefore the benefit of being a Start-up should be given to it.

4. According to the counsel for the petitioner-Company, the requirement of annual turnover from the participants as a tender condition is onerous and the same has been held as onerous by this Court in **Writ Petition No. 6701/2023** [*Vama Pharma, Nagpur Versus State of Maharashtra & Others*] decided on October 04, 2023. Even the Manual for Procurement of Goods issued by the Ministry of Finance, Department of Expenditure whereby the procedure is prescribed for regulating the criteria of eligibility to be incorporated in the tender documents by the Government of India does not prescribe requirement of any turnover from the participants. That being so, it is prayed that the writ petition is entitled to be allowed.

5. *Per contra*, Shri S.V. Sohoni, learned counsel for the respondent nos.3 and 4, would strenuously support the impugned order and the tender conditions particularly Clause 16. He has submitted that by the communication dated February 15, 2024 an opportunity was given to the participants including the petitioner-Company to clear their shortfalls by submitting the requisite documents as per the tender conditions, but the petitioner-Company has failed to do so. He would urge that the guidelines laid down in the Government Resolution dated December 01, 2016 have been duly followed by the respondent nos.3 and 4 while floating the said tender. So as to substantiate the said contention, our attention is invited to the letter dated October 09, 2023 issued by the Deputy Director of Health Services, Nagpur thereby granting technical sanction to the proposal submitted for floating the tender. It is categorically mentioned in the said letter that material should be purchased strictly by following the terms and conditions mentioned in the Government Resolution dated December 01, 2016. Our attention is further invited to the Government Resolutions dated October 05, 2023 and July 26, 2017, both issued by the Public Health Department, State of Maharashtra which mandates abiding by the conditions mentioned in the Government Resolution dated December 01, 2016 while purchasing the medicines. It is claimed that the petitioner-Company does not satisfy the requirement as laid down in Clause 3.1.2.9 of the

aforesaid Government Resolution as from the registration certificate it can be seen that the date of incorporation of the petitioner-Company is June 17, 2016 and therefore, on the date of submission of the bid, it had completed more than 7 years as against 5 years criteria prescribed by the aforesaid Government Resolution. Further, even it is having a turnover exceeding Rupees Twenty Five Crores for last three years.

6. The counsel for the respondent nos. 3 and 4 would also submit that the petitioner-Company has participated in the tender process and it is now well settled that if a bidder participates in the tender process and fails, then the tender conditions cannot be challenged as has been held in **Writ Petition No.135/2022** [*Rite Water Solutions (I) (Pvt.) Ltd. & Another Versus The Divisional Commissioner & Others*] decided on April 06, 2022 and *Sharad Keshao Ghonge Verus State of Maharashtra & Others* [**2006 (2) Mh.L.J 356**]. It is also claimed that the work orders are already issued on March 11, 2024 to the eight bidders who have qualified in the technical bid.

7. Shri. D.V. Chauhan, learned Senior Advocate and Government Pleader representing the State Government would support the claim of the respondent nos. 3 and 4 and has sought for dismissal of the writ petition. He would urge that the Government of India maintains a website which permits the Start-ups to have registration to be recognised as a Start-up. It

enables all the States to upload their respective policies regarding the Start-ups on the said website. Therefore, the claim of petitioner-Company of getting relaxation being a Start-up would still be governed by the policy individually framed by the State of Maharashtra. The Department of Skill Development and Entrepreneurship, Government of Maharashtra framed its own policy named "Maharashtra State Innovative Startup Policy, 2018". The said policy was implemented by the State Government through the Government Resolution dated February 05, 2018. Our attention is invited to the definition of Startup provided in the aforesaid policy which reads as under:-

> *"An entity will be considered as Startup:*
> *If it is incorporated as a private limited company (as defined in the Companies Act, 2013) or registered as a partnership firm(registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in Maharashtra and*
> *Up to seven years from the date of its incorporation/registration; however, in case of Start-ups in the biotechnology sector, the period shall be up to ten years from the date of its incorporation/registration. If its turnover for any of the financial years since incorporation/registration has not exceeded INR 25 crores; and*
> *If it is 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 or wealth creation.*

*Provided that such entity is not formed by splitting up, or reconstruction, of a business already in existence. Provided also that an entity shall cease to be a start-up if its turnover for the previous financial years has exceeded INR 25 crores or it has completed 7 years and for biotechnology start-ups 10 years from the date of incorporation/registration.*
*Along with promoting start-ups across various sectors, GoM lays special emphasis on the start-ups in the social sector which includes but not restricted to education, skill development, health, clean energy, water sanitisation and conservation, waste management, agriculture, food security, financial inclusion."*

However, it is claimed that when it comes to the procedure for procurement, the same is dealt with by the procedure established by the Department of Industry, Energy and Labour, Government of Maharashtra. The aforesaid procedure binds all the departments in the State of Maharashtra who would undertake an activity of procurement of any item/ product. The petitioner-Company has suppressed the Government Resolution dated December 01, 2016 and it has only placed the partial resolution. The preface of the resolution itself indicates that the Government/Semi Government departments, Corporations, Government Undertakings, Nagar Parishads, etc. are required to follow the initial document titled as Manual of office procedure for purchase of store by the Government Department, 1978.

8. According to the learned Senior Counsel and Government Pleader, the formulation of procedure for procurement being within the absolute domain of the Procurement Department, the Tendering Authority rightly approached the Procurement Department while taking technical sanction but it is for the Department of Industries, Energy and Labour to prescribe the procedure for procurement including facilities to Start-ups. Our attention is also invited by the learned Government Pleader to the Office Memorandums dated September 20, 2016 and November 08, 2016. He also emphasised that no prohibition has been put by the Central Government on any of the State Governments from publishing its own policy for the Start-ups and the document published by the Procurement Department would be applicable and not the notification dated February 19, 2019 issued by the Ministry of Commerce and Industry of the Central Government. So as to substantiate the contentions, the learned Government Pleader has placed reliance on the judgment of the Telangana High Court in *I Scientific Techsolutions Labs Versus State of Telangana* [**2022 SCC OnLine TS 3398**] which lays down that the circular/office memorandum issued by the Central Government would not govern the States. Therein, it is held that if a company is seeking exemption under the Start-up Policy for the State of Telangana, then it has to follow the norms set up by the Government of Telangana for Start-ups for public procurement. A reliance is also placed on the judgment of the Delhi High Court in *Triveni Healthcure Private Limited Versus State (NCT of Delhi)*

[**(2022) 4 High Court Cases (Del) 537**] wherein it is held that since the process of procurement of medical equipments is critical, in order to ensure supply of quality products from experienced persons, the criteria in respect of Start-ups cannot be relaxed.

9. We have appreciated the aforesaid contentions.

10. It appears that the tender in question contains the criteria in accordance with the Government Resolution dated December 01, 2016 which was directed to be strictly adhered to by the order of the Deputy Director of Health Services as reflected in the communication dated October 09, 2023. The Government Resolutions dated October 05, 2023 and July 26, 2017 mandate that the conditions mentioned in the Government Resolution dated December 01, 2016 in the matter of procurement-purchase of the medicines are required to be included. Clause 3.1.2.9 of the said Government Resolution deals with the promotional support to be given to the Start-Ups. It contemplates that the 'Unit' whose annual turnover for any Financial Year has not exceeded more than Rupees Twenty Five Crores, it can be considered as a Start-Up Unit. The petitioner-Company has produced on record the Certificate of its Incorporation alongwith the Certificate of Recognition as a Start-Up for a period from January 19, 2022 to June 16, 2026. The date of incorporation of the petitioner-Company is June 17, 2016 and it has commenced the production/business on January 03, 2021. The petitioner-Company in this background i.e. being MSME registered

sought exemption from deposit of the tender fee and earnest money deposit amount. Considering that the petitioner-Company was already granted exemption from June 17, 2016 to June 18, 2021, it was not granted exemption for not satisfying Condition No.16 of the tender notice. The petitioner-Company has drawn support from the notification dated February 19, 2019 issued by the Ministry of Commerce and Industries so as to claim that it has to be considered as a Start-Up from the date of its incorporation for a period of ten years as it is incorporated as a 'Private Limited Company'. It is further claimed that it is to be considered as a Start-Up for the reason that its turnover is not exceeding Rupees One Hundred Crores for any of the past Financial Year.

11. Since as per the Government Resolutions dated December 01, 2016 and July 26, 2017 the petitioner-Company does not fit into the requirement of a Start-up as defined under Clause 3.1.2.9 of the Government Resolution dated December 01, 2016 because it has completed more than seven years from the date of its incorporation, it was held to be disqualified. Similarly, the turnover of the petitioner-Company exceeded Rupees Twenty Five Crores for the last five years and as such it was found to be not satisfying the prescribed criteria of having turnover of less than Rupees Twenty Five Crores.

12. No doubt, at the request of the petitioner-Company, the requirement of the Experience Certificate of Rupees Fourteen Crores per year for the period of last three years has been relaxed and the same was reduced to Rupees Ten Crores per year for the period of last three years *vide* Corrigendum dated January 25, 2024. Apart from above, the fact remains that the petitioner-Company cannot question the tender conditions as it is for the Tendering Authorities to decided as to which tender condition it can insert in the tender notice unless the tender condition is opposed to the public policy or has been inserted with a biased intention. Support can be drawn from the judgment of the Apex Court in *Datta Sakharam Kothule & Others Versus State of Maharashtra & Others* [**2020(4) Mh.L.J. 710**]. The fact remains that the petitioner-Company has unsuccessfully tried to participate in the tender process and was eventually disqualified. Once having participated unsuccessfully, it is not open for the petitioner-Company to question the tender conditions.

13. The learned Government Pleader has rightly invited our attention to the policy of the State Government which is titled as Maharashtra State Innovative Start-up Policy, 2018 as reflected in the Government Resolution dated February 04, 2018. The fact remains that the conditions incorporated in the tender which define Start-up are admittedly not satisfied by the petitioner-Company as it intended to give a go-by to the definition of the 'Start-up' as notified by the Central Government. The fact remains that the

tender in question is floated and financed by the State Government. Apart from above, once it is held that the petitioner-Company could not be considered a 'Start-up' having completed more than seven years from the date of incorporation and its turnover has also exceeded Rupees Twenty Five Crores for last three Financial Years, the petitioner-Company can be said to be rightly disqualified. As such, what can be inferred from the conduct of the petitioner-Company that it having accepted the tender conditions tried to participate in the tender process and it is only after disqualification, it has proceeded to question the tender process. Such conduct of the petitioner-Company would amount to acquiescence as initially it had the intention to participate in the tender process and thereafter having suffered disqualification has proceeded to question the tender condition.

14. The fact remains that in the case in hand, the State Government, irrespective of the policy framed by the Central Government dated February 17, 2016, has independently framed its policy on the issue of registration as a Start-up. We have already observed that the policy of the State Government is not satisfied by the petitioner-Company and the policy framed by the Central Government would not govern the present tender process, particularly when the directions issued by the State Government are occupying the field.

15. For the aforesaid reasons, we are not inclined to exercise the extraordinary writ jurisdiction in the matter as the petitioner-Company has failed to make out the case on merits. As such, the writ petition fails. The same stands dismissed. In the facts of the case, there would be no order as to costs.

**(ABHAY J. MANTRI, J.)** **(NITIN W. SAMBRE, J.)**

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