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

+ **W.P.(C) 12013/2023**

M/S BAJAJ HEALTHCARE LTD

..... Petitioner

Through: Mr. Virag Gupta, Mr. Vishal Arun
Mishra and Mr. Umang Mangal,
Advocates

versus

UNION OF INDIA AND ANR.

..... Respondent

Through: Mr. Vikram Jetly, CGSC with Ms.
Shreya Jetly, Advocate for R-1
Mr. Brijesh Kumar Tamber, Mr.
Yashu Rustagi and Mr. Vinay Singh
Bish, Advocate for R-2

Date of Decision: 28th February, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, ACJ: (ORAL)

1. The present writ petition has been filed under Articles 226 and 227 of the Constitution of India seeking striking down of the provisions of the Corrigendum(s) dated 02nd March, 2023 and 15th May, 2023 issued in E-Tender No. 154 to 158.
2. The Respondent No.2 i.e., Employee State Insurance Corporation ('ESIC') issued an online E-Tender Enquiry form, for rate contract, no. 154-



158 dated 14th February, 2023 ('Tender'), inviting bids for supply of various medicines for use of ESIC Hospitals all over India, wherein Clause 7.I.'a' to 'e' prescribed the pre-qualification turnover criteria with respect to turnover from scheduled drugs. The said relevant clause reads as under:

"7. TURNOVER CRITERIA

I. Turnover for scheduled drugs

a. Annual turnover of Participating Pharmaceutical firm in each of the last three preceding financial years (2019-20, 2020-21 & 2021-22) should be the total turnover of all its pharmaceuticals products

Example:

If Drug A has X turnover, Drug B has Y turnover and Drug C has Z turnover (as mentioned in drug schedule).

S No.	Name of the Drugs Quoted	<u>Annual Turnover of the firm for the last three preceding years (2019-20, 2020-21 & 2021-22) should be equal or more than the itemwise turnover listed in the drug schedule.</u>
1	A, B & C	$X+Y+Z$
2	A & B	$X+Y$
3	B & C	$Y+Z$
4	C	Z

b. Participating Pharmaceutical Firms will have to submit audited financial statement by registered Chartered Accountant for last three preceding financial years (i.e. 2019-20, 2020-21 & 2021-22) in support of the annual turnover.

c. Fifty Percent or more of the annual turnover shall be from the trading of the drugs in open market (including export data) i.e. exclusive of supply to ESI/ Government Departments and 3rd Party Sale. A certificate from the



Chartered Accountant (With UDIN no.) with reference to sale in the open market/ sale to the third party should be submitted. (Annexure TS)

d. Group turnover (other than drugs and their formulations) will not be considered for determining the eligibility and such tenders will be rejected summarily.

e. Please fill Annexure TO.”

3. The Respondent No.2 vide the Corrigendum dated 02nd March, 2023 ('first Corrigendum') clarified the turnover criteria stipulated at Clauses 7.I. 'a' and 'c' of the said Tender.
4. The Petitioner issued a legal notice dated 17th March, 2023 requesting for the withdrawal of the turnover conditions as stipulated in the first Corrigendum.
5. Subsequently, the Respondent No.2 issued another corrigendum dated 15th May, 2023 ('second Corrigendum') amending Clauses 7.I. 'a' and 'c'.
6. The Petitioner issued legal notices dated 26th May, 2023 and 03rd July, 2023 requesting Respondent No.2 to withdraw the turnover conditions as entailed in both first and second Corrigendums.
7. The present writ petition has been filed by the Petitioner in September, 2023 seeking striking down of the modifications carried out by first and second Corrigendums as well as challenging the original value based turnover criteria stipulated in Clause 7.I 'a' and 'c'.

Arguments of the Petitioner

8. Learned counsel for the Petitioner states that the changes brought about by way of the two Corrigendum(s) to Clause 7.I. 'a' and 'c' are arbitrary, mischievous and against the interest of the employees of ESIC.
- 8.1. He states that the amendment to Clause 7.I. 'c' which stipulates excluding the supply to Government Departments and ESIC is indicative of



the fact that Respondent No. 2 is seeking to restrict the competition. He states that exclusion of the value of supply made to Government Departments and ESIC is arbitrary and the said value should be permitted to be taken into consideration for calculation of turnover.

8.2. He states that since the Petitioner and similarly placed bidders manufacture drugs which satisfy the quality parameters set down by Food & Drug Administration, India ('FDA') under the extant rule and the manufacturing units undergo rigorous audits and inspections by FDA Authorities, imposition of a pre-qualification criteria which is based on the financial capacity is arbitrary.

8.3. He states that Petitioner is an Active Pharmaceutical Ingredient ('API')/bulk drug manufacturer, who has inhouse capability to manufacture formulations and is therefore, equally if not more competent to supply medicines to Respondent No. 2. He states however, the existing turnover based criteria at Clause 7.I 'a' and 'c' favours the traders or middlemen over the manufacturers. He states that this pre-qualification criteria which fails to prefer manufacturers is therefore arbitrary.

8.4. He states that the exclusion of API/bulk drugs from being considered from the turnover requirement in Clause 7.I. 'c' is an attempt to exclude bidders like the Petitioner who have the manufacturing capacity. He states that limiting the turnover requirement to be limited to drug formulations alone is illogical. He states that this lack of preference to the manufacturer is against the Government policy to promote local manufacturing for affordable medicines.

8.5. He states that a tender term, which does not favour the manufacturer of the drug is against the interest of the beneficiaries of ESIC. He states that



drug supplied by a bidder who is a manufacturer would ensure better quality drugs.

8.6. He states that the original unamended Tender Clauses dated 14th February, 2023, permitted inclusion of the supplies made to the Government agencies while computing the turnover. He states that the first and second Corrigendums have unreasonably restricted the criteria for computation of turnover to 'drug formulations' alone.

8.7. He states that the elimination of the Petitioner and like bidders will result in higher cost of the drugs.

Arguments of the Respondent No.2

9. In reply, learned counsel for Respondent No. 2 states that first Corrigendum was issued in view of the pre-bid enquiries received from the prospective bidders. He states that the amendment carried out by the first Corrigendum to Clause 7.I. 'c' was clarificatory in nature. He states that as per Clause 7.I. 'c' the bidder had to submit a certificate of the Chartered Accountant in the format of 'Annexure TS', which contains five entries. He states that the Tender Committee elaborated entry nos. 3 and 4 by the first Corrigendum.

9.1. He states that thereafter, the Petitioner herein made representations dated 06th March, 2023, 15th March, 2023 and 17th March, 2023 against the prescription of 50% turnover from trading of drugs in open market on the plea that the said criteria disabled the Petitioner and similarly placed bidders from competing in the Tender. He states that considering the representation of the Petitioner herein so as to increase the competition base, the Tender Committee amended Clauses 7.I. 'a' and 'c' as well as clarified entry no. 1 of 'Annexure TS'. He states that as per the Respondent No.2, the concerns



of the Petitioner were duly addressed with the issuance of the second Corrigendum. He states that the Respondent No. 2 made appropriate changes to the turnover criteria so as to increase wider participation. He states that the Tender terms are reasonable and apply uniformly to all the prospective bidders.

9.2. He states that similar turnover criteria has been stipulated in the Tender enquiry issued by All India Institute of Medical Sciences ('AIIMS') and Clause 11 (b) and (c) therein is similar.

9.3. He states that the present writ petition is not bonafide as it is aimed at stalling the Tender process. He states that the goods supplied by the Petitioner, in past, has been categorized as 'NSQ', i.e., Not of Standard Quality. He states that the Petitioner was issued NSQ twice with respect to the goods supplied by it to the ESIC in the previous bid. He states that this material fact has not been disclosed in the petition.

9.4. He states that lastly the Tender enquiry stands closed and any interference by the Court at this stage will set at naught the entire tender process. He states that Petitioner has participated in e-Tender enquiry nos. 155 and 157; and the Petitioner has been found eligible for enquiry no. 155 by the Technical Evaluation Committee and held ineligible for e-Tender enquiry no. 157. He states that the decision of the Technical Evaluation Committee holding the Petitioner ineligible for Tender enquiry no. 157 has not been impugned and therefore, this petition cannot be entertained.

Analysis and Findings

10. We have heard the learned counsel for the parties and perused the record.



11. The Petitioner herein has challenged the eligibility criteria set out in Clause 7.I. 'a' and 'c' of the Tender as amended by the first and second Corrigendums. The terms of the Tender require the prospective bidder to satisfy the turnover criteria for scheduled drugs as per the conditions set out in Clause 7.I and the details of the turnover are to be set out in the format given as per 'Annexure TS' annexed with the Tender.

12. The first and second Corrigendums make changes to the Clause 7.I 'a' and 'c' with corresponding changes to the format given at Annexure TS. The final Clause 7.I. 'a' and 'c' as amended by the second Corrigendum as well as the final format of Annexure TS reads as under, the amendments have been highlighted in bold:

S.No.	Clause No.	Content as per Tender Enquiry dated 14.02.2023/ Corrigendum dated 02.03.2023	Amended Clause post the 2 nd Corrigendum be read as under:
1.	7.I.a	Annual turnover of Participating Pharmaceutical firm in each of the last three preceding financial years (2019- 20, 2020-21 & 2021-22) should be the total turnover of all its Pharmaceutical Products (Active Pharmaceutical Ingredients or Bulk Drugs & Drug formulations only).	Annual turnover of Participating Pharmaceutical 2019- firm in each of the last three preceding financial years (2019- 20, 2020- 21 & 2021- 22) should be the total turnover of all its Pharmaceutical Products for Drug formulations only (excluding sale of Active Pharmaceutical Ingredients or Bulk Drugs)
2.	7.I.c	Fifty Percent or more of the annual turnover shall be from the trading in open market, including export data, from drug formulations only	Twenty Five Percent or more of the annual turnover shall be from the trading in open market, including export data, from drug formulations only (excluding sale of Active Pharmaceutical



		<i>(excluding sale of Active Pharmaceutical Ingredients or Bulk Drugs) i.e. exclusive of supply to ESI/ Government Departments and 3rd Party Sale.</i> <i>A certificate from the Chartered Accountant (With UDIN no.) with reference to sale in market/ sale to third party should be submitted. (Annexure TS).</i>	<i>Ingredients or Bulk Drugs) i.e. exclusive of supply to ESI/ Government Departments and 3rd Party Sale.</i> <i>A certificate from the Chartered Accountant (With UDIN no.) with reference to sale in the open market/ sale to the third party should be submitted. (Annexure TS)</i>
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Format of Annexure TS

<i>S.No.</i>	<i>Particulars</i>
<i>1</i>	<i>Annual Turnover from Pharmaceutical Products for Drug formulations only (excluding sale of Active Pharmaceutical Ingredients or Bulk Drugs)</i>
<i>2</i>	<i>Sale from Govt. Institution/ ESIC etc.</i>
<i>3</i>	<i>Sale From open Market: Sale from drug formulations only (excluding sale of Active Pharmaceutical Ingredients or Bulk Drugs)</i>
<i>4</i>	<i>Sale from Export: Sale from drug formulations only (excluding sale of Active Pharmaceutical Ingredients or Bulk Drugs)</i>
<i>5</i>	<i>Sale from Third Party (Manufacturing drugs for other firms/ Private Institutions)</i>

13. Before opining on the contentions of the Petitioner, it would be instructive to refer to the judgments of the Supreme Court, which reiterate that interference by the Constitutional Courts in pre-qualification criteria should be done exceptionally; and, only when the Court comes to the conclusion that overwhelming public interest is at stake and the Petitioner proves to the satisfaction of the Court that the terms are arbitrary or discriminatory or actuated by malice. In this regard, it would be relevant to refer to the principles laid down by the Supreme Court in landmark case of ***Tata Cellular v. Union of India***¹, which read as under:

“94. The principles deducible from the above are:

¹ (1994) 6 SCC 651.



(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.....”*

(Emphasis supplied)

14. Similarly, in ***Balaji Ventures Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd.***², the Supreme Court observed as under:

“9. Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As

² (2022) SCC OnLine SC 1967



per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.

.....
11. In the case of *Montecarlo Limited v. National Thermal Power Corporation Limited*, (2016) 15 SCC 272, it is observed and held that the tender inviting authority is the best person to understand and appreciate its requirement and tender documents, so long as there are no mala fides/arbitrariness etc. It is further observed and held that the Government must have freedom of contract and such action can be tested by applying Wednesbury principle and also examining whether it suffers from arbitrariness or bias or mala fides."

(Emphasis supplied)

15. In the case of *Uflex Ltd. v. State of T.N.*³, it has been observed by the Supreme Court as under:

"42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in *Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651]* and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.

.....
47. Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate. The prohibition arising from only a limited company being permitted to participate was again addressed by the corrigendum

³ (2022) 1 SCC 165



permitting LLPs to participate. If entities like Kumbhat and Alpha want to participate they must take some necessary actions. Alpha is already an LLP. Kumbhat cannot insist that it will continue to be a partnership alone and, thus, that partnerships must necessarily be allowed to participate.”

(Emphasis supplied)

16. Lastly, it would be appropriate to refer to the decision of the Supreme Court in *Directorate of Education v. Educomp Datamatics Ltd.*⁴, wherein, the Supreme Court observed as under:

“..... Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.”

(Emphasis supplied)

17. The Respondent No.2 has stated that the second Corrigendum was issued in view of the representations made by the Petitioner and in fact, Clause 7.I. ‘c’ has been admittedly relaxed to address the concerns of a bidder, who is a manufacturer, as highlighted by the Petitioner, so as to enable a wider participation and enable bidders such as the Petitioner to participate in the Tender. The Petitioner has indeed participated thereafter, and has been found eligible for Tender enquiry no. 155.

18. The primary objection of the Petitioner is the exclusion of sale of ‘API’ from the annual turnover under Clause 7.I. ‘a’ and ‘c’. The Petitioner has, however, been unable to justify its demand for inclusion of sale of API for calculating turnover, in its grounds or in its oral arguments. Admittedly,

⁴ (2004) 4 SCC 19



the impugned Tender is for supply of medicines for use of ESIC Hospitals and not for supply of API. In the absence of any justification, we are of the considered opinion that the Petitioner has been unable to satisfy this Court that the clarification excluding API is neither arbitrary nor malafide.

19. The modification sought by the Petitioner is only for the private interest of the Petitioner so as to enhance its eligibility and fails to espouse any public purpose, sought to be achieved by the said modification. Therefore, no public interest sought to be served by seeking the said modification.

20. The Petitioner has failed to show that the eligibility criteria as settled by the modified Clauses 7.I 'a' and 'c' is not in the interest of ESIC. In fact, the reasons which weighed with the Tender Committee while issuing the first Corrigendum has been set out in the counter affidavit and it reasonably justifies the exclusion of API from the turnover. The justification reads as under:

*“10.Committee also took into cognizance into the fact that **ESIC is a procuring entity and procures drug formulation for its beneficiaries and not API. The robustness and market presence of the Participating pharmaceutical firms with respect to supplies of medicines to ESI units should be ascertained through its trading of drug formulations and their market presence.**”*

21. In the light of the analysis of above, we are of the considered opinion that the Respondent No.2 by issuing the first and second Corrigendums in response to pre-bid enquiries has exhibited its bonafide in clarifying and modifying the Tender terms to enable wider participation. The action of the Respondent No.2 in modifying the terms belies the contention of the Petitioner of arbitrariness. The Respondent No.2 has appropriately justified



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and explained the rationale for exclusion of API from the computation of the annual turnover. Therefore, this Court is not inclined to interfere in the Tender conditions.

22. With these observations, the petition is dismissed along with pending applications, if any.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 28, 2024/hp/sk