



2024:DHC:8681-DB



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

+ **W.P.(C) 15465/2024 & CM APPLs. 64890-64891/2024**

R K GUPTA

.....Petitioner

Through: **Mr. Rakesh Chaudhary, Advocate**

versus

UNION OF INDIA AND ORS.

.....Respondents

Through: **Mr. Ankur Mittal, CGSC with Ms. Pinky Pawar, GP and Ms. Ikshita Parihar, Advocates for UOI.**

Date of Decision: 07th November, 2024

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

MANMOHAN, CJ : (ORAL)

1. Present petition has been filed challenging the condition 21(a) forming part of quality assurance plan document attached with bid document bearing no. GEM/2024/B/5420219 dated 1st October, 2024 (“subject tender”).
2. Learned counsel for the petitioner states that on 1st October, 2024, respondent No.2 floated the subject tender for procurement of Diethyl Phenyl Acetamide (“DEPA”) based products for the Indian Armed Forces thereby seeking the procurement of 6,00,000 units of DEPA 20 and 1,50,000 units of DEPA 50. He states that Clause 21 of the subject tender provides

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that the bidder must be a ToT (“Transfer of Technologies”) holder from respondent No.3.

3. He states that DEPA is a well known insecticide and mosquito repellent used worldwide and the same has been recognized by the Insecticide Act, 1968.

4. He states that respondent No. 3/Defence Research and Development Establishment (“DRDE”), Gwalior claims to have developed some technology for DEPA 20 and DEPA 50 and it offers these formulations to the manufacturers through ToT by executing MoUs with manufacturers and till date only four firms have been granted these ToTs. However, according to him, there cannot be any such technology as the formulation of these products is so generic that no novelty can be claimed for these formulations as they are manufactured by various firms and companies.

5. He states that through the process adopted by respondents, the subject tender has been converted to a closed tender and the participation has been restricted only to the firms which are ToT holders from respondent No.3. He states that the impugned condition has deprived the Petitioner from participating in the tender and earning his livelihood through fair and legal means.

6. *Per contra*, learned counsel for respondent states that the issue raised in the present writ petition is squarely covered by the judgment of this Court in **Godrej Sara Lee Ltd. vs. UOI & Ors., W.P.(C) 17267/2006 dated 11th April, 2008**. The relevant portion of the said judgment is reproduced hereinbelow:-

“8. We have given our anxious consideration to the submissions made at the bar and perused the record. The short question that falls for consideration is whether the respondent/authorities can insist Transfer of



Technology from DRDO as a condition precedent for the manufacturer being treated eligible for making the required supplies. The answer to the said question would, in turn, depend upon whether the formulation is in any way unique or at least different from the one which the petitioner is presently using for the manufacture of its products. If the formulation which the DRDO has evolved, allegedly after conducting various tests and trials, is indeed unique or at least different from the formulation/specification under which petitioner manufactures its products, it would be open to the respondents to argue that the party offering to make supply must possess the technology for the preparation of the product. That technology, it can insist, can be transferred only when the party concerned applies to the authority who holds the secret know-how and who alone can license its manufacturer by transferring the know-how as to the components, formulae and techniques involved in the same. The position may have been different, if the agency that has the technology, was unwilling to share the same with other parties thereby dis-entitling such parties from entering the competitive field not only for manufacture of the product but also for its marketing or supply to the Armed Forces. The respondents have, however, at no stage declined to offer the Transfer of Technology to the petitioner. On the contrary their case is that the petitioner has, despite opportunity, deliberately omitted to seek any such transfer. The petitioner ostensibly believes that its formulation is as effective as the one evolved by the DRDO and the one it would not require adoption of the said formulation to qualify for making the supplies. In a petition seeking judicial review of a tender process, this Court cannot authoritatively determine the rival claims which the parties may take as to the efficacy of their respective preparations. As to which of the two preparations is more effective as a mosquito repellent is a matter that only extensive tests and trials by scientists and users can determine. We must, in fairness to Mr. Virmani, mention that he did not call upon us to judicially determine the efficacy of the petitioners preparations vis-a-vis that of the respondents. All that Mr. Virmain contended before us was that DEPA 20% and DEPA 50% contained components that were freely available in the market. Mr. Virmani argued that the components of its product DEPA 20% are as under:

<i>Ingredient</i>	<i>%</i>
<i>DEPA 20% v/v in IPA</i>	<i>74.00</i>
<i>Perfume</i>	<i>01.00</i>

<i>LPG</i>	<i>25.00</i>
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<i>Total</i>	<i>100.00</i>
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9. A perusal of the said compilation would show that the petitioner manufactures its products using three distinct components namely DEPA 20% v/v in IPA, Perfume & LPG in ratio of 74%, 1% and 25% respectively. A perusal of the work instructions for the product would reveal that while DEPA 20% is used with IPA and perfume, the IPA and perfume are of 100% purity. DEPA 20% used in the manufacture of the product is with 99.24% purity. The method of manufacture has also been set out in the form of a flow chart by the petitioner. This information when compared with the specifications and the formula which the DRDO has evolved would show that there is considerable difference not only in terms of the inputs that go into the preparation of the product which the army requires for its personnel but also the method by which the said product is prepared. We cannot, for obvious reasons, enlist the salient features that distinguish the two preparations in terms of the method of manufacture or the composition of the product. Any such exercise is bound to result in a public disclosure of what is, according to the DRDO, a secret formula evolved by it which it is ready to share with only those willing to approach it for the transfer of the technology. Suffice it to say that there is a significant difference in the formula which the petitioner, on the one hand and respondent/DRDO on the other, use for manufacture of their respective products. Such being the position, the DRDO is entitled to argue, as indeed it has, that its product is custom-made for the Armed forces no matter any one, who seeks a Transfer of Technology from it, would be entitled not only to make supplies to the Army but also market the product within and outside the country. In that view, therefore, the requirement of obtaining a transfer of technology from the DRDO cannot be said to be irrelevant or arbitrary nor can it be said that the said requirement has been stipulated to benefit only the chosen few manufacturers of the product. It was and continues to be open to the petitioner to seek a proper transfer of a technology from the DRDO and thus, acquire the qualification prescribed by the Directorate General for making of the supply of the said product which must conform to the specifications and the formula that has been prepared by the DRDO on the basis of extensive tests and experiments. Such being the position, we see no reason to interfere with the ongoing tender process insofar as the same insists on the Transfer of Technology from the DRDO as a condition of eligibility for the manufacturers to submit their tenders in response to the tender inquiry issued by the Directorate General of Supplies of Transport.

10. In the result, this petition succeeds but only in part and to the extent that the respondents shall, in keeping with our order dated 15th January, 2008, have the capacity of the petitioner verified and its sample tested and upon the tests and verification report going in its favour place an order



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for the supply of balance of DEPA 50% Lotion from the petitioner. Insofar as the petitioner's grievance against tender inquiry for the year 2007-08 and the Transfer of Technology as a condition of eligibility is concerned, the writ petition fails and is dismissed but in the circumstances without any order as to costs."

7. We are of the opinion that the matter in issue is squarely covered by the aforesaid judgment against the petitioner. Accordingly, the present writ petition and pending applications are dismissed.

MANMOHAN, CJ

TUSHAR RAO GEDELA, J

NOVEMBER 7, 2024

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