

Rubychem Laboratories, Lucknow Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Aug-31-1989

Reported in : AIR1990All124

Judge : U.C. Srivastava and ;S.H.A. Raza, JJ.

Acts : [Constitution of India](#) - Articles 14 and 226

Appeal No. : Writ Pent. No. 2693 of 89

Appellant : Rubychem Laboratories, Lucknow

Respondent : State of U.P. and Others

Advocate for Def. : C.S.C.

Advocate for Pet/Ap. : S.K. Kalia and ;G.R. Chabra, Advs.

Judgement :

ORDER

1. The non-acceptance of petitioner's lower tender for cough syrup and acceptance of higher tender of opposite party No. 6 for supply of cough syrup mentioned at items 70 and 71 of tender notice has brought the petitioner a manufacturing small unit of medicines duly registered and approved by Drug Controller before this court. The Government order dated 30th March 1989, approving the tender of opposite party No. 16 is in pursuance of tender notice

dated 1-9-89 though not filed by the petitioner was produced. The complaint of petitioner is that it is because of the act of favouritism and manoeuvring of the Director General of Medical and Public Welfare U. P. who was to retire after two months and has now retired. The tender notice was couched in such a language so that all the manufacturers small and big may be eliminated and have been so eliminated. He being a person in authority obviously was to succeed and succeeded in accepting the higher tender of opposite party No. 6 for higher amount who having supplied a sub-standard medicine was disqualified for any supply in the year in question and its tender was not accompanied by certain sales and income-tax certificate as per condition of tender notice which was not accepted a few months earlier on the representation of the petitioner has been so accepted against the norms and rules giving him edge over other which could not be done in previous year viz. the addition of Eucalyptus oil in his syrup. According to the petitioner Eucalyptus oil is only a flavouring agent and not an active ingredient in cough and syrup which are and have been approved without it medicinally and the inclusion of the same in the syrup of opposite party No. 6 is only by way of flavour and not medicinally being defective from what point of view is as much as in pharmacopoeia on which parties also the minimum use is .06 mmt. while in the formula of opposite party No. 6 it is .002 ml. only which is a negligible quantity as against the prescribed limit and thus its inclusion is only by way of flavouring agent. The petitioner's challenge, that none of the cough syrup prepared by various approved manufacturing companies use this oil, has not been met by the State Government which did not file any counter affidavit and even Dr. K. P. Gupta, the then Director of Medical and Public Health U. P. (since retired) also has filed a counter affidavit has not said anything to the company but the opposite party No. 6 has wrongly denied this assertion of the petitioner without naming a single company or syrup using the Eucalyptus oil as an ingredient in it.

2. From the affidavit on record it appears that the Government has laid down certain norms and formation of committee for purchase of medicines there is a Drug Samacha Committee consisting of 12 members and headed by Director General for approving the unit of drugs prepared to be purchased for public hospitals and to add and delete any new formulation in public interest. There is a Central Purchase Committee consisting of 11 members, all officials mostly of the

Department of Medical and Public Health and headed by the Director General which finalizes quantity and rate contracts. When the purchase exceeds 25 lacs the High Power Committee at the Governmental level is to approve the tender which was done in the instant case and syrup at No. 71 alone was accepted. For the year in question viz. 1987-88 the tender lists were approved by the Central Purchase Committee and the tenders for the year were floated. The said committee adopted the tender list approved in 1987-88 for the purchase of drugs for the year 1987-88 and it appears that the same was done un-animously as has been alleged by the petitioner which is evident from the report of Dr. G. P. Gupta, Professor and Head of Pharmo-cology K. G. Medical College, Lucknow who was member of the Committee and whose report to the Government referred to. In his representation the petitioner stated that difference in formula is very slight and for purpose of efficacy of the two should be considered identical and that ingredients in the formula of the petitioner were more in quantity and as such the cost of the production of the said product is higher.

3. The then Director in his affidavit has stated that it is the function of the Drug Controller to see the formulation and same does not fall within the ambit of Central Purchase Committee or Samichha Samiti to sanction or supplement any formulation. It is thus clear that in the preparation of list of approved drugs or medicine which are to find place in tender list is not prepared by the Samichha Samiti or Purchase Committee. It goes before it after being prepared obviously from the directorate in which ingredient of medicines, prepared to be taken is also purchased and the same was purchased in tender drug list which was placed before the Purchase Committee which cannot be done without the association or approval of Director of Medical and Public Health. The said committees are to consider for approval of the approved medicine or drugs of specification as sent before it. In 1988-89 the petitioner's quotation was lower than that of opposite party No. 6 but it was rejected by the committee. The petitioner represented against the same before the Government which was accepted and the purchase of said cough syrup of opposite party No. 6 for that year was dropped. Again for 1988-89 the committee accepted the higher tender of same formulation of opposite party No. 6 which included Eucalyptus oil .002 mm. per 5 mm against which the petitioner represented which was allowed and the tender of opposite

party No. 6 was not allowed. This time the petitioner's representation against the higher tender of opposite party No. 6 of the same formulation with no change in the strength of Eucalyptus oil was rejected wherefore the instant writ petition was filed, for the year in question cough syrup of opposite party No. 6 which was duly approved by the Drug Controller containing Eucalyptus oil though not even the minimum extent required for medicinal purpose alone was before the Purchase Committee and it fulfilled the formulation mentioned in the tender notice viz. .002 ml only less than minimum prescribed in pharmacopoeia relied on by opposite party No. 2 and there was no reason for not accepting the said tender of one which alone contained a particular ingredient up to a particular strength only. It is to be noticed that Purchase Committee and High Committee approved the same may it be that it alone fulfilled the requirement of specification mentioned in tender notice though it did not contain the minimal strength required prescribed for medicinal use.

4. In the writ petition the petitioner had stated that he subsequently also offered to supply the cough syrup flavoured with Eucalyptus oil by adding .002 ml. in each 5 ml. litre of the syrup but without result. According to it in the preceding year the difference in the rates quoted by him and by respondent No. 6 for supplying the same item of drug was Rs. 38.45 lakh but this item was ignored and High Power Committee accepted the cough syrup of opposite party in huge quantity at higher rate.

5. It is correct that one of the medicines, referred to earlier, supplied by the opposite party No. 6 was found to be substandard by C. D. R. I. on the report of which opposite party No. 6 has placed reliance in respect of medicine in question but has questioned the propriety and correctness of the report in respect of medicine found to be substandard. In view of G. O. of 1982 only one particular medicine was not to be purchased but the same does not affect the purchase of other medicine. Regarding criminal case the opposite party No. 6 has stated that the same was result of some political clash and writ petition in respect of said case is still pending. The opposite party No. 6 has denied that because of his influence upon the Joint Secretary Medical and Health, who recently issued show cause notice, has been transferred, favour was shown to opposite party No. 5. In respect

of violation of condition No. 29(b) IV and V of the tender, the tenders were required to enclose a copy of the sales tax registration & Income Tax Clearance Certificate but the opposite party No. 6 did not do so and even did not comply with the said G. O. dated 7-12-1988. Regarding the tenders to file latest assessment of Sales Tax and Income-tax affidavit that they have paid off their sale and Income-tax dues the opposite party No. 6 has given a vague reply. The standard was complete in all respect and the authorities after satisfying themselves accepted the tender. Although there is no specific denial of the non-attachment of Income-tax and Sales Tax Clearance certificate but the affidavit was there that is the same has been paid and in case any amount is due the same shall be paid out. The State Govt. felt satisfied with the same petitioners' tender was also defective in as much as cough syrup did not contain the necessary ingredient.

6. The question for decision is whether the non-acceptance of the petitioner's lower tender for cough syrup and acceptance of higher tender of opposite party No. 6 was against the condition of the notice and Government Order and it was arbitrarily done in order to favour him and due to this act other manufacturers were eliminated in submitting their tenders and the opposite party had also supplied sub-standard medicines, and ultimately Director General of Medical & Health managed the favour to opposite party No. 6. On behalf of the petitioner it was stated that it was arbitrarily accepted, ignoring his tender and representation. In *Ramana Daya Ram Shetty v. The International Airport Authority of India*, AIR 1979 SC 1628 it has been observed that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or grants other forms of largess, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power of discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or the cases, the action of the Government would be liable to be struck down, unless it can be shown by the Govt. that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or

discriminatory.

7. It was further observed that Art. 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory, it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Art. 14 and it must character in every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or not which is rational and non-discriminatory.

8. In *Kasturi Lal v. State of Jammu and Kashmir*, (1980) 4 SCC 1 : (AIR 1980 SC 1992) it was observed, 'where any Government action fails to satisfy the test of reasonableness and public interest discussed above is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless, of course, there are other considerations which render it unreasonable and in public interest to do so'.

9. In *Harminder Singh Arora v. Union of India and others* (1966) 3 Supreme Court Cases it has been held that once Government decided to award contract on the basis of bid by tender, it must abide by the terms of the tender. In absence of any policy, award of contract to a Government undertaking by granting price preference and rejecting the most suitable offer of a private contract in contravention of terms of the tender, held, arbitrary, capricious and violative of Art. 14 of the [Constitution of India](#).

10. Learned counsel for the opposite party relied on the judgment of this court of one writ petition bearing the writ petn. No. 5174 of 1982, i.e. M/s. Artee Minerals v. State of U. P., decided by a Division Bench delivered on 16-3-83: (reported in AIR 1983 All 416) in which it has been held that the selection of opposite parties has been justified on the basis that they were firms having their factories in the State of Uttar Pradesh to which preferential treatment could be given in order to boost up State industry. The provisions of the Financial Handbooks were also relied upon to reinforce the argument that preferential treatment could be given to State industry. The said ease has got no applicability to the facts and circumstances of this case in which there is no question of choice between the preferential treatment to the products of factories run by State and those by private entrepreneurs.

11. In the instant case so far as Purchase Committee and High Power Committee are concerned they have accepted the tender of the opposite party No. 6 the syrup of which alone was in accordance with the specification, mentioned in the tender notice. The action of purchase committee and High Power Committee cannot be said to be arbitrary or discriminatory. These committees could not have changed the specification or ingredients which were to be included in the syrup which came within the arena of eligibility but they could have certainly considered whether the tender of opposite party No. 6 fulfills all the requirements. If not whether the conditions which were not complied with could have been waived and its rigour be doubted. If it could have been done for one, it could have been done for other also. But the specification is the choice of which the Director General of Medical and Health had if not full say but greater say, in fact, the choice is the foundation of the controversy. It may be that petitioner's syrup may be equally efficacious but if the Selection Committee preferred one which has anti bacterial properties and gives a good flavour so that patients may take it easily, this Court cannot sit in judgment over, the same and as an expert body. Hence it cannot be said that there was an element of favour for opposite party for which there is no material on record. As such that by itself will be no ground for interference more so when the petitioner has not claimed any relief against the same. The acceptance of the same cannot be said to be arbitrary or discriminatory. The petitioner had offered to supply the syrup with Eucalyptus oil which was not only a flavouring agent but is an expectorant and has bacteriostatic properties which is evident from annexure 6 to

this writ petition and was for medicinal purpose but it was done subsequently and acceptance of other tender on this ground cannot be revoked. The contention of the opposite party that the petitioner thereafter realized that this syrup will be more acceptable to the patients that is why they also offered the same is without substance. This court in proceedings under Art. 226 of the [Constitution of India](#) cannot enter into choice of a particular medicine containing particular ingredients and cannot act as expert or substitute its opinion in place that of committee which includes expert or also have first hand and deep knowledge in medicine or medicinal products. The Income tax and Sales Tax clearance certificate though not filed was substituted by an affidavit with an undertaking that although there is no dues but in case dues are found the same will be paid. The condition as it is though has not been pleaded in literal sense but substantial compliance is there for not fully complying the terms of the condition which does not go to the root of the matter. As such a writ under article 226 of the [Constitution of India](#) cannot be issued for invalidating the grant of contract. It was for the committees to accept or reject the same and the High Power Committee and Purchase Committees were satisfied with the same. No interference in the same is possible more so in the absence of an allegation that it in any way prejudiced anyone or affected the grant of contract itself and in case the tender of opposite party No. 6 to be rejected on this ground, it will automatically go in favour of the petitioner. But the petitioner had also submitted representation against the rejection of the tender on the ground of eligibility and favour shown to opposite No. 6 by the Central Purchase Committee before the State Government on 20th February, 1989 (annexure 4 to this writ petition). The High Power Committee or the State Government finalized the tender on 30th March, 1989. It appears that no specific orders on the representation of the petitioner were passed.

12. In view of what has been said above, the writ petition is liable to be dismissed and is accordingly dismissed with the direction that it will be open to State Government to consider the petitioners representations and to act in accordance with its decision. There will be no order as to costs. The interim order, if any, is discharged.

13. Petition dismissed

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