

**IN THE HIGH COURT OF TELANGANA AT HYDERABAD****W.P. No. 34167 of 2023****Between:**

M/s Sri Venkata Ramana Medical and General Stores

... Petitioner

And

Employees State Insurance Corporation and another

... Respondents

**JUDGMENT PRONOUNCED ON: 26.02.2024****THE HON'BLE MRS JUSTICE SUREPALLI NANDA**

1. Whether Reporters of Local newspapers : Yes  
may be allowed to see the Judgment?
2. Whether the copies of judgment may be : Yes  
marked to Law Reporters/Journals?
3. Whether Their Lordships wish to : Yes  
see the fair copy of the Judgment?

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**SUREPALLI NANDA, J**

**THE HON'BLE MRS JUSTICE SUREPALLI NANDA****W.P. No. 34167 of 2023****% 26.02.2024****Between:**

# M/s Sri Venkata Ramana Medical and General Stores

..... Petitioner

**And**

\$ Employees State Insurance Corporation and another

... Respondents

**< Gist:****> Head Note:**

!Counsel for the Petitioner: Mr.N.Sridhar Reddy

^ counsel for respondent No.1: Mr.Muppu Ravinder Reddy

^Counsel for respondent No.2: Mrs.P.Vijayalakshmi

**? Cases Referred:**

1. (1979) 3 SCC 489
2. (1991) 3 SCC 273
3. (2007) 14 SCC 517

**THE HON'BLE MRS JUSTICE SUREPALLI NANDA****W.P. No. 34167 of 2023****ORDER:**

**Heard Learned Counsel Mr. N. Sridhar Reddy appearing on behalf of the Petitioner, Mr. Muppu Ravinder Reddy appearing on behalf of 1<sup>st</sup> Respondent and Mrs. P. Vijayalakshmi on behalf of Respondent No.2.**

**2. The Petitioner approached the Court seeking prayer as under :**

"To issue Writ of Mandamus or any other appropriate writ/writs declaring the actions of 1<sup>st</sup> respondent in qualifying the 2<sup>nd</sup> respondent in technical bid and opening his financial, and also seeking to award the contract for empanelment of local chemist for purchase of drugs required by the ESIC Hospital and College for the patients, pursuant to Tender Document issued vide Tender Enquiry No.799-U-16/A/Local chemist/2023-24 dated 24.08.2023, Bid No.GEM/2023/B/3902528, dated 04.09.2023 has wholly illegal, arbitrary and without jurisdiction and consequentially directing the first respondent to disqualify the 2<sup>nd</sup> respondent and empanel the petitioner herein as their local chemist for the supply of drugs required by them Award costs."

**3. The case of the Petitioner as per the averments made in the affidavit filed in support of the present writ petition is as follows :**

a) The Petitioner herein is a registered Propriety Firm and conducts Wholesale and Retail business in supply of Medical, Surgical and Consumables, established in the year 2007 and has been doing business in the said field since then. The 1<sup>st</sup> Respondent had called for bids for supply of non-anti cancer drugs, anti cancer drugs, Vaccines, Inj, Immunoglobulins Inj, Human Albumin and for local chemist empanelment vide Proceedings No. Tender Enquiry No. 799-U-16/A/Local Chemist/2023-24, dated 24.08.2023. As per the tender conditions the bid has to be filed Online in the Government e-Market place (GEM Portal) Bid No.GEM/2023/B/3902528, dated 04.09.2023 according to which the last date for filing of the Bid was 14.09.2023 at 16.00 hours. The date of opening of the Bid was also 14.09.2023 at 16.30 hours. In so far as the prerequisite criteria is concerned as per the Bid document, the minimum average annual turnover of the bidder for the last 3 (three) years shall be Rs.200 lakhs and the Original

Equipment Manufacturer (OEM) average annual turnover for the last 3 years shall be Rs.800 lakhs and the bidder shall have minimum experience of 3 years. The Petitioner and the 2<sup>nd</sup> Respondent participated in the said tender notification. The details of the Technical Evaluation undertaken by the 1<sup>st</sup> Respondent declared the Petitioner as Qualified and 2<sup>nd</sup> Respondent as disqualified. Later on, the 2<sup>nd</sup> respondent was made qualified in the technical bid and was placed as L3. It is the specific case of the Petitioner that the 2<sup>nd</sup> Respondent had not submitted all the documents in time and was disqualified in the technical evaluation and had submitted the documents at a later stage which were considered by the 1<sup>st</sup> Respondent and the Petitioner was later declared as successful bidder considering the documents submitted by the 2<sup>nd</sup> Respondent at a later date.

**b)** Thereafter, as per the GEM web portal the petitioner was placed as L1 and the 2<sup>nd</sup> respondent as L3. Thus, the petitioner has approached the first respondent to invite the petitioner for entering into the agreement as per the tender result. However, the 2<sup>nd</sup> respondent was invited to sign the contract. Hence, the process of entering into contract with

the 2<sup>nd</sup> respondent, who has been qualified in the technical bid as L3, by the 1<sup>st</sup> respondent is wholly illegal. Thus, aggrieved by action of the 1<sup>st</sup> respondent, the present writ petition is filed.

**4. The learned Counsel appearing on behalf of the Petitioner mainly puts forth the following submissions :**

**a) On 18-12-2023 when the present writ petition came up for admission the Learned Counsel appearing on behalf of the 1<sup>st</sup> Respondent on instructions from 1<sup>st</sup> Respondent has specifically informed the Court that the 2<sup>nd</sup> Respondent has been disqualified in the subject tender and also black listed. The said statement is in fact part of the docket order dated 18.12.2022 in the present W.P.No.34167 of 2023.**

**b) The 2<sup>nd</sup> Respondent having been declared disqualified cannot be entrusted with work and the 1<sup>st</sup> Respondent cannot proceed and enter into an agreement with the 2<sup>nd</sup> Respondent.**

**c) The 2<sup>nd</sup> Respondent having been disqualified in the technical evaluation cannot be later declared as**

qualified and the same amounts to favouritism of the 1<sup>st</sup> Respondent in favour of the 2<sup>nd</sup> Respondent.

d) The 1<sup>st</sup> Respondent has gone beyond the scope of the tender conditions.

e) The 1<sup>st</sup> Respondent ought not have considered the documents submitted by the 2<sup>nd</sup> Respondent at a later date.

f) The action of the 1<sup>st</sup> Respondent in declaring the 2<sup>nd</sup> Respondent as qualified at the later date having declared the 2<sup>nd</sup> Respondent disqualified on 01.12.2023 and having declared the Petitioner and another tenderer by name M/s. Sai Pharmacy as qualified.

g) On 16.12.2023 a communication is received by the Petitioner declaring the 2<sup>nd</sup> Respondent as qualified in the technical bid and the 1<sup>st</sup> Respondent thus failed to act in a fair and transparent manner since admittedly the 2<sup>nd</sup> Respondent had been disqualified on 01.12.2023 and as per tender notification no person can be permitted to file any documents after the bid

**end time i.e., 14.09.2023 at 16.00 hours since the said date is the last date for the filing of bid.**

**h) The Learned Counsel appearing on behalf of the Petitioner in support of the said submissions placed reliance in order dated 12.12.2023 passed by the High Court of Calcutta in Saheli Nandi vs. Union of India & Others and Judgment dated 02.05.2017 in KKSP – Oliner JV vs. Delhi Jai Board and Another in support of his submissions and contended that the Petitioner is entitled for the relief as prayed for.**

**5) Counter affidavit has been filed by the 1<sup>st</sup> Respondent and the relevant para 5, clause (b) and (c) of the said counter affidavit is extracted hereunder :**

"5. I submit that the petitioner had suppressed the material facts and had misconstrued the tender procedure and filed the above writ petition. The respondent herein would submit the facts and the circumstances which are been suppressed by the petitioner hereunder.

(b)That the petitioner herein, respondent No.2 herein and Sai Pharma had submitted its bids through the GeM Portal. Upon such submission the respondent No.1 Medical Hospital had technically evaluated the said bids,



in such bids the respondent No.2 has submitted documents mentioned in the tender notification such as office allotment orders, the time of evaluation of technical bid. The respondent No.1 Medical Hospital asked office order along with the indent orders regarding supply of medicine. The respondent No.2 has submitted the same hence, declared as a successful bidder. **It is needless to add that the respondent No.2 was disqualified in the technical evaluation but not blacklisted in the bid.**

(c) That the respondent No.1 is the statutory authority had followed due procedure in inviting the tenders for the Local Chemist for purchase of drugs. **Further the respondent No.1 had evaluated the bids as per the terms and conditions of the tender notification, and the respondent No.2 stood as the successful bidder by quoting the highest discounts in the Drugs.**

6) **Counter affidavit has been filed by the 2<sup>nd</sup> Respondent and the relevant paras 3 and 7 read as under :**

"3. At the outset, the present writ petition filed by the Petitioner herein is not maintainable, neither under law nor on the facts of the case. That this Respondent had also participated in the tender Date 04.09.2023 vide Bid No. GEM/2023/B/3902528 and had submitted all the

necessary documents during the bid. **That the Respondent No.1 during the technical evaluation had disqualified the 2<sup>nd</sup> Respondent for non-submission of previous purchase orders,** while giving an opportunity of 48 hours for giving the clarifications and to submit the necessary documents. **That this Respondent upon noticing the said objection had found that the Respondent No.1 had disqualified it,** for which this Respondent had clarified the said objection while submitting the necessary previous purchase orders. The Respondent No.1 upon considering the said clarification and Purchase orders had qualified this Respondent for the Financial Bid. **Thus this Respondent stood successful bidder as L-3 in the said tender.** In fact, the GEM portal clearly mentioned that after the technical evaluation, the disqualified bids were uploaded in the tender portal and given an opportunity to give their representations within 48/24 hours to buyers decision of normal or shorter bids if they feel that their tender were wrongly disqualified in the representation/challenge, rejection, option obligation, challenge rejection option in the participated, bid list page. Hence, there is no arbitrariness in granting the tender in favour of this Respondent. Hence, Writ Petition is liable to be dismissed on this ground alone.

7. In reply to para 6 of the affidavit annexed to the writ petition, the petitioner admitted that after the technical evaluation the qualified and disqualified bidders were

uploaded in the Tender Portal and given an opportunity to give their representations (within 48/24hrs of buyers decision for normal/shorter bids) if they feel that their tenders were wrongly disqualified in the (representation/challenge Rejection option available on the participated bid list page. In view of the said tender GeM portal this respondent had submitted all required documents along with the representation within time specified. Hence, there is nothing arbitrary or illegal.

**7) Para 4 of the Reply Affidavit filed by the Petitioner reads as under:**

"4. I submit that a person who is declared as disqualified in the technical evaluation cannot be qualified thereafter by considering the documents which were submitted at a later date. It may be true that the 2nd Respondent has participated and was successful in many tenders which are stated in the Counter Affidavit **but that itself does not give them any scope or chance to submit the documents at a later date in the present case, more so after declaring as disqualified in the technical evaluation. It is further submitted that it is also false to state that in the financial bid, the 2nd Respondent was the lowest bidder. It is submitted that admittedly the 2nd Respondent was placed as L-3 which shows that they have bid the highest amount and not the lowest.**

**DISCUSSION AND CONCLUSION :**

8. A bare perusal of the material document i.e. Annexure-V pertaining to Tender Terms and Conditions filed by the Petitioner in support of the present writ petition and in particular Clause 15 reads as under :

**Clause 15 : DOCUMENTS REQUIRED**

**The Contractor (Local Chemist) will have to submit the following documents along with the Tender :**

- i) Valid drug license for retail chemists as per Drugs and Cosmetics Act.
- ii) No conviction Certificate from State Drug Controller that there is no case pending under the drugs and cosmetics Act and Rules there under as well as under Drug Price Control Order against the firm during the last 5 year. No conviction Certificate should be of the recent calendar year.
- iii) Valid Trade License.
- iv) GST registration certificate.
- v) Mandate Form for e-payment purposes.
- vi) Audited Annual Turnover of Rs. 2 crores or more duly certified by Chartered Accountant along with profit and loss account and income & expenditure statement of the firm for the last three years.

9. The bid details read as under :

**Bid End Date / Time – 14.09.2023 – 16.00.00**

**Bid Opening Date / Time – 14.09.2023 - 16.30.00**

10. The Apex Court in the judgment reported in (1979) 3 SCC 489 in Ramana Dayaram Shetty vs. International Airport Authority of India clearly observed that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given their necessary significance.

11. The Apex Court in the judgment reported in Bakshi Security and Personnel Services (Private) Limited vs. Devkishan Computed (Private) Limited reported in (1991) 3 SCC 273 observed that law is settled that an essential condition of a tender has to be strictly complied with.

12. In the Apex Court judgment dated 11.12.2006 in Jagdish Mandal vs. State of Orissa reported in (2007) 14 SCC 517 it is observed as under :

“Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial

review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision is relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousand and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power

of judicial review, should pose to itself the following questions:

- (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";

- ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.' "

13. A bare perusal of the relevant portion of the Apex Court judgement extracted above, clearly indicates that a tender process can be interdicted in judicial review when the process adopted or decision made by the Authority is mala fide or intended to favour someone. This Court opines that the present case falls under

**Clause (i) of the Apex Court judgement extracted above.**

14. A bare perusal of para 7 of the affidavit filed by the Petitioner in support of the present writ petition indicates that the web portal communication dated 16.12.2023 received by the Petitioner clearly and categorically stated that the Petitioner stood as L1, M/s. Sai Pharmacy stood as L2 and the 2<sup>nd</sup> Respondent herein stood as L3. The counter affidavit filed by the 2<sup>nd</sup> respondent also at para 3 clearly indicates that the 2<sup>nd</sup> respondent stood as L3 in the tender (referred to and extracted above). The counter affidavit filed by the 1<sup>st</sup> Respondent however, at para 5 clause (c) (referred to and extracted above) **clearly states that the 2<sup>nd</sup> Respondent stood as the successful bidder by quoting the highest discounts in the drugs which is factually incorrect.**

15. Clause 15 of Annexure-V of the tender terms and conditions clearly indicates that the contractor (local chemist) will have to submit certain documents



specified there under in the said Clause 15 along with the tender and the same is an essential condition of the tender which has to be strictly complied with. Admittedly even as per the counter of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein on 01.12.2023 the 2<sup>nd</sup> Respondent had been declared as disqualified by the 1<sup>st</sup> Respondent. Even as per the tender notification it is borne on record that no person can be permitted to file any documents after the bid end time i.e., 14.09.2023 – 16.00 hours, and it is also stipulated in the tender conditions that all the bidders are requested to participate the tenders online through the website <https://gem.gov.in> and further that there was no need of submitting the hard copy of the bid. In the present case the same had not been admittedly followed by the 2<sup>nd</sup> Respondent.

16. This Court opines that the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heart beat of fair play and the Respondents herein are bound to act validly and not whimsically for any ulterior purpose.

**the Respondents cannot give a goby to their own tender conditions more so when Clause 15 of Annexure-V of Tender Terms and Conditions clearly stipulates that the contractor (local chemist) will have to submit certain documents as stipulated in the said Clause along with the Tender which admittedly had not been followed by the 2<sup>nd</sup> Respondent and it is admitted in the counter filed by the Official Respondent No.1 that the 2<sup>nd</sup> Respondent had been disqualified at the first instance on 01.12.2023, but subsequently however, the 2<sup>nd</sup> Respondent had been declared as qualified in the Technical Bid when the Tender Notification clearly stipulated Bid End Date/Time as 14.09.2023 – 16.00.00 and the Bid Opening Date/Time as 14.09.2023 – 16.30.00. Though the Docket Order of this Court dated 18.12.2023 clearly brought on record the submission of the Learned Counsel who appeared on behalf of the Respondent No.1 on 18.12.2023, that the Respondent No.2 had been disqualified and blacklisted and therefore the grant of relief as prayed for by the Petitioner in the present writ petition at the said stage**

i.e., as on 18.12.2023, was unwarranted but however, the counter affidavit filed by the 1<sup>st</sup> Respondent on 10.01.2024 curiously is silent with regard to the said representation of the Learned Counsel who appeared on behalf of the 1<sup>st</sup> Respondent before the Court on 18.12.2023, but however, an affidavit has been filed by the Junior Counsel representing the learned Standing Counsel appearing on behalf of the 1<sup>st</sup> Respondent on 30.01.2024 that due to miscommunication it was represented that the 2<sup>nd</sup> Respondent had been black listed and in the said affidavit also it is clearly admitted that the 2<sup>nd</sup> Respondent was disqualified in the Technical Bid.

17. This Court opines that in the present case an essential tender condition which had to be strictly complied with had not been complied and the 1<sup>st</sup> Respondent admittedly would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case would amount to perversity in the understanding or

**application of the terms of the tender conditions and the same warrants interference by this Court.**

**18. Taking into consideration the above said facts and circumstances and duly considering the averments made in the counter affidavit filed by the 1<sup>st</sup> Respondent in particular para 5 (b) and (c) (referred to and extracted above) and duly considering that the action of the 1<sup>st</sup> Respondent is irrational, mala fide and is intended to favour the 2<sup>nd</sup> Respondent and hence the same is opposed to rule of law and duly considering the law laid down by the Apex Court in Jagdish Mandal vs. State of Orissa, reported in (2007) 14 SCC 517, (referred to and extracted above) the writ petition is allowed as prayed for.**

Miscellaneous petitions, if any, pending shall stand closed.

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**SUREPALLI NANDA, J**

Dated: 26.02.2024

Note: L.R. copy to be marked

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