

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

Date of decision: 02nd SEPTEMBER, 2022

IN THE MATTER OF:

+ **W.P.(C) 3270/2022 & CM APPL. 9516/2022**

M/S VERVE HUMAN CARE LABORATORIES Petitioner

Through: Mr. Kirti Uppal, Sr. Advocate with
Mr. Rohit Goyal and Ms. Riya Gulati,
Advocates.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Vikram Jetly, CGSC with Ms.
Shreya Jetly, Advocate for R-1 and
R-2.
Ms. Aakanksha Kaul, Mr. Manek
Singh and Mr. Aman Sahani,
Advocates for Respondent/CMSS.

+ **W.P.(C) 3357/2022 & CM APPLs. 9810/2022, 9811/2022,
10103/2022**

M/S MAAN PHARMACEUTICALS LTD. Petitioner

Through: Mr. Deepak Jain, Mr. Pradeep K. B.,
Ms. Jaspreet Aulakh and Mr.
Tanpreet Gulati, Advocates.

versus

CENTRAL MEDICAL SERVICES SOCIETY (CMSS) & ANR.

..... Respondents

Through: Ms. Aakanksha Kaul, Mr. Manek
Singh and Mr. Aman Sahani,
Advocates for Respondent/CMSS.
Mr. Kirtiman Singh, CGSC with Mr.
Waize Ali Noor and Mr. Madhav

Bajaj, Advocates for R-2/UOI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant writ petitions have been filed primarily seeking, *inter alia*, the quashing of Tender No. CMSS/PROC/2021-22/NACO/034 published on 15.02.2022 and floated by the Respondent – Central Medical Services Society (*hereinafter referred to as 'CMSS'*), an autonomous society of the Ministry of Health and Family Welfare, and for the finalization of Tender No. CMSS/PROC/2021-22/NACO/011 dated 27.09.2021 in favour of the Petitioners herein. The said tenders pertain to the procurement of Buprenorphine 2 mg and 0.4 mg.

2. The facts, in brief, leading to the instant petitions are as under:

- a) It is stated that on 14.08.2020, CMSS floated Tender No. CMSS/PROC/2020-22/NACO/009 (*hereinafter referred to as "Tender No.1"*) for procurement of Benzathine Penicillin, Lopinavir 100 mg + Ritonavir 25 mg for year 2020 to 2022 and Buprenorphine 2 mg (2020-2021). Tender No.1 enumerated the following eligibility criteria:

“(g) Tenderer should have supplied 50% of the quoted quantity of same or similar items during the last three financial years. Bidder should submit Purchase order copies and certificate duly issued by statutory auditor of the company on his letter head by certifying the quantities manufactured and marketed in trade, export, open market, sold to government institutions, private

bodies etc. and the marketed quantities are not less than at least 50% of the quoted/similar item.

Similar item is defined as below:

For Sch I. – quoted/any Kit of NACO

For Sch. II- quoted/any ARV Drugs

For Sch. III- quoted/any tablet of NACO”

- b) It is stated that Tender No.1 was cancelled by CMSS, and thereafter, a second tender, being Tender No. CMSS/PROC/2020-21/NACO/023 (*hereinafter referred to as “Tender No.2”*) was floated for procurement of Buprenorphine 2 mg. It is stated that M/s Consen Pharma Ltd. and M/s Centurion Laboratories Pvt. Ltd., who had been declared as L-1 and L-2 bidders, were found to have submitted forged and fabricated documents, and in view of the same, CMSS cancelled Tender No.2 and did not proceed with the said bid. However, no action was taken by CMSS against the entities alleged to have submitted forged documents.
- c) It is stated that on 27.09.2021, a third bid, being Tender No. CMSS/PROC/2021-22/NACO/011 (*hereinafter referred to as “Tender No.3”*) was floated by CMSS for procurement of Buprenorphine 2 mg and 0.4 mg. One of the criteria for eligibility is as follows:

“(g) Tenderer should have supplied 50% of the quoted quantity of same or similar items during the last three financial years. Bidder should submit Purchase order copies and certificate duly issued by statutory auditor of the company on his letter head by certifying the quantities manufactured and marketed in trade, export, open market, sold to government institutions,

private bodies etc. and the marketed quantities are not less than at least 50% of the quoted/similar item. Similar item is defined as below: For Sch. I- quoted/any tablet of NACO”

- d) It is stated that the Petitioners herein were found to be successful bidders with the Petitioner in W.P.(C) 3357/2022 being the L-1 bidder and having to supply 70% of the required drug, and the Petitioner in W.P.(C) 3270/2022 being the L-2 bidder and having to supply 30% of the drug. It has been stated by the Petitioners that negotiations took place and that an agreement had already been reached to reduce the cost of the items by 1.5% in both the strengths of the drug.
- e) It is stated that the Petitioners, in February 2022, were informed that the Tender No.3 had been cancelled, without any notice to the qualified bidders, and that a fresh tender, bearing Tender No. CMSS/PROC/2021-22/NACO/034 (*hereinafter referred to as “Tender No.4”*), had been issued by CMSS. Furthermore, it is stated that the eligibility criteria pertaining to prior supply experience of bidders had also been relaxed. The criteria in Tender No.4 is reproduced as under:

“(g) Tenderer should have supplied 25% of the quoted quantity of same or similar items during the last three financial years. Bidder should submit Purchase order copies and certificate duly issued by statutory auditor of the company on his letter head by certifying the quantities manufactured and marketed in trade, export, open market, sold to government institutions, private bodies etc. and the marketed quantities are not less than atleast 25% of the quoted/similar item. Similar item is defined as below: For Sch. I and Sch. II - ANY TABLET

LISTED UNDER NDPS ACT. (NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT 1985)”

f) Aggrieved by the cancellation of Tender No.3 and issuance of Tender No.4, the Petitioners have approached this Court by way of the instant writ petitions.

3. Mr. Kirti Uppal, learned Senior Counsel appearing for Petitioner in W.P.(C) 3270/2022, submits that the Petitioner is a company which engages in provision of essential narcotic products for the care of critically ill patients. He states that with regard to Tender No.2, the Petitioner had completed all the requisite formalities that would render it eligible, however, when the price bid of the said tender was opened, M/s Consern Pharma Ltd. was declared as L-1 and M/s Centurion Laboratories Pvt. Ltd. was declared as L-2. He states that it was found that the two entities who had been declared as L-1 and L-2 had submitted forged and fabricated documents with regard to the stability data, manufacturing and expiry dates, etc., and the Petitioner sent mails to CMSS to intimate the manipulation of content in the documents done by the two bidders. Consequently, Tender No.2 was cancelled, however, no action had been taken by CMSS against the two bidders.

4. Mr. Uppal then submits that when Tender No.3 was published, only three bidders participated in the same, including the Petitioners herein. The third bidder, one M/s Rusan Pharma Ltd., was rejected for technical reasons. The Petitioner in W.P.(C) 3357/2022 was declared as L-1 and was required to supply 70% of the required drug, and the Petitioner in W.P.(C) 3270/2022, being an MSME, was declared as L-2 and was required to supply 30% of the Buprenorphine 0.4 mg. The learned Senior Counsel then

submits that negotiations had already started between both the Petitioners and that they were in the process of arranging things for the supply of the drugs to CMSS. He then states that, without any information provided to the Petitioners, CMSS went ahead to cancel Tender No.3 and floated Tender No.4 with a relaxed eligibility criteria.

5. Mr. Uppal argues that the floating of Tender No.4 was illegal and unlawful, and it should be quashed on the ground of being bad in law. He further states that as no reason had been assigned for the cancellation of Tender No.3, it raises the suspicion that CMSS is involved in foul play which can be exemplified by the relaxed eligibility criteria. He states that the constant cancelling and reissuing of the tenders only demonstrates that CMSS might be hand-in-glove with entities that they wish to favour or accommodate. He further brings to the notice of the Court the fact that the price of the both the Petitioners is now public and it can be matched by other bidders, thereby placing the Petitioners at a disadvantage.

6. The learned Senior Counsel has brought to the attention of this Court an Order passed by the Kerala High Court in Centurion Laboratories (Division of Centurion Remedies Pvt. Ltd.) v. State of Kerala, 2020 SCC OnLine Ker 1860, to state that one of the two bidders who had submitted the forged and fabricated documents, had been involved in a similar case and the High Court had found them guilty of having submitted false and fabricated documents. On that premise, the blacklisting of M/s Centurion Laboratories Pvt. Ltd. had been upheld. He states that a transparent and thorough inquiry should be undertaken into the complaints made by the Petitioner against the bidders.

7. Mr. Deepak Jain, learned Counsel for Petitioner in W.P.(C) 3357/2022, submits that the Petitioner had been found to be a successful L-1

bidder in Tender No.3 and was supposed to supply 70% of the drugs. He states that pursuant to being declared as L-1, the Petitioner and CMSS conducted negotiations wherein the Petitioner agreed to reduce the costs of the items by 1.5% in both the strengths. *Vide* representation dated 07.01.2022, the Petitioner intimated its intention to offer a discount of 1.5% in both the strengths, revising the rate of Buprenorphine 2 mg to Rs. 5.32/- + GST, and Rs. 2.67/- per tablet + GST for Buprenorphine 0.4 mg. He states that there was a legitimate expectation on the part of the Petitioner of being awarded Tender No. 3 and this expectation has been breached by CMSS.

8. The learned Counsel submits that the issuance of Tender No.4 has been done with *mala fide* intentions as is demonstrated by the relaxation of the eligibility criteria without any justification and basis. He states that this relaxation is being done to allow disqualified, blacklisted and previously ineligible bidders to participate and provide the tendered drug. He draws the attention of this Court to clarifications sought by bidders in the pre-bid meeting held on 01.10.2021 regarding the eligibility criteria as per which it was categorically directed that the tenderer should have supplied 50% of the quoted quantity of same or similar items during the last three financial years. A table has been presented by the learned Counsel exhibiting the said deviations in the criteria; the same is reproduced as under:

S No	TENDER NO. 09 Published Date: 14.08.2020 TENDER-1	TENDER NO. 23 Published Date: 11.12.2020 TENDER-2	TENDER NO. 11 Published Date: 27.09.2021 TENDER-3	TENDER NO. 34 Published Date: 15.02.2020 TENDER-4																								
4. ELIGIBILITY CRITERIA																												
1.	(a) Only Class -1 local supplier shall be eligible for participation. Bids from Class- 1 local supplier (MSE/NON MSE) as defined in DPIIT Order No. P-45021/2/2017- PP (BE- II) dated 4.06.2020 i.r.o public procurement (preference to make in India) shall be accepted. Bids from firms/vendors other than Class- 1 local supplier (MSE/NON MSE) shall be summarily rejected.	(a) Only Class -1 local suppliers shall be eligible for participation. Bids from Class- 1 local supplier (SE/NON-MSE) as defined in DPIIT Order No. P-45021/2/2017- PP (BE- II) dated 4.06.2020 i.r.o public procurement (preference to make in India) shall be accepted.	(a) Only Class -1and Class - 2 local suppliers shall be eligible for participation. Bids from Class -1and Class - 2 local suppliers (MSE/NON-MSE) as defined in DPIIT Order No. P-45021/2/2017- PP (BE- II) dated 4.06.2020 i.r.o public procurement (preference to make in India) shall be accepted	(a) Only Class- 1 local supplier, Class- II local suppliers shall be eligible for participation. Bids from the supplier (MSE/Non-MSE) as defined in the Department of Pharmaceuticals under Ministry of Chemicals and Fertilizers order no F.No 31026/36/2016-MD dated 16.02.2021 shall be accepted.																								
2.	(d) Average Annual turnover for Tenderers in the last two years i.e. 2017-18 and 2018-19 shall not be less than the following: <table border="1" data-bbox="443 1368 660 1491"> <thead> <tr> <th>Schedule</th> <th>Amount (in Rs.)</th> </tr> </thead> <tbody> <tr> <td>I</td> <td>10,00,000</td> </tr> <tr> <td>II</td> <td>2,50,00,000</td> </tr> <tr> <td>III</td> <td>4,80,00,000</td> </tr> </tbody> </table>	Schedule	Amount (in Rs.)	I	10,00,000	II	2,50,00,000	III	4,80,00,000	(d) Average Annual turnover for Tenderers in the last two years i.e. 2017-18 and 2018-19 shall not be less than the following: <table border="1" data-bbox="679 1368 890 1451"> <thead> <tr> <th>Schedule</th> <th>Amount (in Rs.)</th> </tr> </thead> <tbody> <tr> <td>I</td> <td>4,80,00,000</td> </tr> </tbody> </table>	Schedule	Amount (in Rs.)	I	4,80,00,000	(d) Average Annual turnover for Tenderers in the last two years i.e. 2018-19 and 2019-20 shall not be less than the following: <table border="1" data-bbox="911 1352 1161 1503"> <thead> <tr> <th>Schedule</th> <th>Amount (in Rs.)</th> </tr> </thead> <tbody> <tr> <td>I</td> <td>4,80,00,000</td> </tr> <tr> <td>II</td> <td>40,00,000</td> </tr> </tbody> </table> The turnover benchmark will not apply to Micro and Small Enterprises (MSE).	Schedule	Amount (in Rs.)	I	4,80,00,000	II	40,00,000	(d) Average Annual turnover for Tenderers in the last two years i.e. 2018-19 and 2019-20 shall not be less than the following: <table border="1" data-bbox="1198 1375 1471 1498"> <thead> <tr> <th>Schedule</th> <th>Amount (in Rs.)</th> </tr> </thead> <tbody> <tr> <td>I</td> <td>4,80,00,000</td> </tr> <tr> <td>II</td> <td>40,00,000</td> </tr> </tbody> </table> The turnover benchmark will not apply to Micro and Small Enterprises (MSE).	Schedule	Amount (in Rs.)	I	4,80,00,000	II	40,00,000
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ANNEXURE -1

S No	TENDER NO. 09 Published Date: 14.08.2020 TENDER-1	TENDER NO. 23 Published Date: 11.12.2020 TENDER-2	TENDER NO. 11 Published Date: 27.09.2021 TENDER-3	TENDER NO. 34 Published Date: 15.02.2020 TENDER-4																																																								
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9. Mr. Jain argues that not finalising Tender No.3 and cancelling the same without providing any reason significantly affects the financial interest not only of the Petitioners, but also negatively affects the society at large due to the vulnerability of the said drug. He further relies upon Clause 7.5.11 in the Manual for Procurement of Goods 2017 issued by the Government of India, Ministry of Finance, to state that the Respondents have failed to follow the directions stipulated in the said manual when it comes to cancellation of a tender and/or reissuance of the same. He concludes his submissions by arguing that the actions of CMSS are arbitrary, irrational and illegal, and therefore, require the interference of this Court.

10. *Per contra*, Ms. Aakansha Kaul, learned Counsel appearing for CMSS, at the outset, relies upon Bharat Coking Coal Ltd. and Ors. v. AMR Dev Prabha and Ors., and Uflex Limited v. Government of Tamil Nadu and Ors., (2022) 1 SCC 165, to submit that the scope of interference of Constitutional Courts in matters of administrative decision-making, particularly related to tender, is extremely limited. She states that the reason for issuing a fresh tender, being Tender No.4, was to ensure greater participation and competition, and that this *bona fide* intention of CMSS is manifest from a perusal of the internal files and records of the Respondent. Ms. Kaul points out to a file noting dated 08.02.2022 to further submit that despite negotiation with the Petitioners herein, the rates for Buprenorphine 2 mg were found to be non-competitive and were higher than the Last Purchase Price (LPP) by +56.47% and +265.75%, and that another bidder had been approached and that they were willing to participate with aggressive rates. On account of this, the decision had been taken to reissue the tender.

11. Ms. Kaul submits that at least three different Government Agencies have purchased Buprenorphine (2 mg) in the month of February 2022 at prices/rates lower than the ones quoted by the Petitioners herein. She relies upon purchase orders dated 02.02.2022, 15.02.2022, and 10.12.2021, issued by the Directorate of Health Services, Government of NCT of Delhi, Delhi State AIDS Control Society, Government of NCT of Delhi, and Haryana Medical Services Corporation Limited (Government of Haryana Undertaking), respectively. She states that these purchase orders are more recent than the ones relied upon by the Petitioners and are for much larger quantities.

12. The learned Counsel for CMSS states that the eligibility criteria regarding the supply of 50% of the quoted quantity of same or similar items (i.e. for Schedule 1 and Schedule 2-Tablet Buprenorphine 0.4 mg and 2 mg and tablet or Buprenorphine + Naloxone 0.4/0.1 mg and 2.0/0.5 mg) during the last three financial years was relaxed to 25% of the quoted quantity of same or similar items (i.e. for Schedule 1 and Schedule 2- any tablet listed under the Narcotic Drugs and Psychotropic Substances Act, 1985). She states that this was in view of how only three bidders had participated in Tender No.3, with the third bidder being rejected on account of technical reasons, and that the relaxation in the criteria was to ensure wider participation/competition in the tender process. Ms. Kaul argues that the Petitioners are attempting to create a cartel by restraining CMSS from even considering the purchase of drugs from any other entity.

13. Ms. Kaul submits that though there is a discernible reason for cancelling Tender No.3, however, as per Clause 11.3 of the tender document, the purchaser reserves the right to reject, accept any bid, or annul the bidding process and reject all bids, at any time prior to award of contract,

without assigning any reason whatsoever. She states that CMSS was not only not obligated to assign any reason for the cancellation of Tender No.3, but it also had no duty to inform the Petitioners about the same; reasons would only be given to the Court, if required. She relies upon Silppi Constructions Contractors v. Union of India and Anr., (2020) 16 SCC 489, to submit that while rejecting the tender, the person or the authority inviting the tenders is not required to give reasons as the same would lead to the commercial activities of the State coming to a grinding halt.

14. Inasmuch as taking action against the errant bidders, Ms. Kaul submits that the issue has been escalated with the CDSCO and that the recommendation of the Committee, which was inquiring into the complaints raised against the two bidders, was to cancel Tender No.2 and float a fresh tender with revised specifications. She states that no action has been taken against the two bidders on account of the fact that Tender No.2 was cancelled, however, furnishing of false and fabricated documents would lead to the disqualification of a bidder from participating in further tenders. Ms. Kaul further informs this Court that neither of the two bidders participated in Tender No.3, and that, as per the Order dated 28.02.2022 rendered by this Court in the instant matter, in the event that the two bidders participate in Tender No.4, CMSS shall carry out an investigation/inquiry into the allegations and take action in terms of the tender conditions, including Clause 5(vi) of the tender document. Furthermore, she states that the Petitioners cannot be aggrieved by Tender No.2 because they did not succeed in Tender No.2.

15. In Rejoinder, the learned Senior Counsel appearing for the Petitioner in W.P.(C) 3270/2022 submits that the decision of CMSS to issue a fresh tender is arbitrary and *malafide*, and that the reasoning provided by CMSS

that the decision was taken on account of the exorbitant prices/rate quoted by the Petitioners is false. He states that CMSS has falsely alleged that three different government agencies have purchased Buprenorphine (2mg) in the month of February 2022 at prices/rates lower than the rates quoted by the Petitioners herein. Mr. Uppal further raises the contention that CMSS has failed to take any action against the erring bidders who had submitted false and fabricated documents in Tender No.2, and that this goes against their own terms and conditions stipulated in their tenders. He states that the actions of the bidders should be investigated by the Narcotics Control Bureau and the Central Narcotic Bureau.

16. Mr. Uppal submits that *vide* Order dated 28.02.2022 in the instant matter, this Court had directed the Respondents to place on record the purchase order wherein the Respondents had allegedly procured the same drugs at rates higher than the negotiated rates. He states that the Respondents have failed to do so and have only placed on record the purchase order of one manufacturer and of only a single drug. He further states that no other price discovery or evaluation has been conducted by the Respondents, and that no document has been placed on record to support the averment that the prices quoted by the Petitioners are +56.47% and +265.75% higher. The learned Senior Counsel also contends that the eligibility criterion for participating in Tender No.4 was also relaxed without any justifiable reason.

17. Heard Mr. Kirti Uppal, learned Senior Counsel for Petitioner in W.P.(C) 3270/2022, Mr. Deepak Jain, learned Counsel appearing for Petitioner in W.P.(C) 3357/2022, and Ms. Aakansha Kaul, learned Counsel appearing CMSS, and perused the material on record.

18. The judicial principles pertaining to the scope of judicial review in contractual matters, especially those relating to tenders, have been delineated time and again, and are well settled. The Supreme Court has consistently stressed upon how 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. In Shobikaa Impex Private Limited and Anr. v. Central medical Services Society and Ors., (2016) 16 SCC 233, the Supreme Court had relied upon various decisions on this aspect and stated the following:

“19. In this context, we may profitably refer to the authority in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] where a two-Judge Bench, after referring to a series of judgments has culled out the following principles: (SCC pp. 571-72, para 66)

“(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance

with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.”

20. *In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. [Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138] , it has been held that (SCC p. 148, para 15) the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in*

furtherance of public interest and not merely on the making out of a legal point.

21. *In Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , it has been ruled that: (SCC p. 531, para 22)*

“22. ... 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 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.”

22. *In Union of India v. International Trading Co. [Union of India v. International Trading Co., (2003) 5 SCC 437] , it has been held that: (SCC p. 445, para 15)*

“15. ... The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose.”

It has been further opined that: (SCC p. 445, para 15)

“15. ... The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case.”

23. *In Jespar I. Slong v. State of Meghalaya [Jespar I. Slong v. State of Meghalaya, (2004) 11 SCC 485] , this Court stated that: (SCC p. 494, para 17)*

“17. ... fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable.””

19. The scope of judicial review in tenders has been reiterated in Bharat Coking Coal Ltd. v. AMR Dev Prabha, (2020) 16 SCC 759, wherein it has been noted that principles of equity and natural justice stay at a distance, and that the tenderer or contractor with a grievance can always seek damages in a Civil Court [See also Uflex Ltd. v. State of Tamil Nadu (supra)]. It was further stated that 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. The relevant paragraphs of said Judgement are reproduced as under:

“28. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness.

[Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106; Siemens Aktiengesellschaft & Siemens Ltd. v. DMRC, (2014) 11 SCC 288] Phrased differently, the courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. [Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617] However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).

29. *This position of law has been succinctly summed up in Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] , where it was famously opined that: (SCC pp. 677-78, para 77)*

“77. ... Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that

regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury [Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] unreasonableness.

(iii) Procedural impropriety.”

30. But merely because the accusations made are against the State or its instrumentalities does not mean that an aggrieved person can bypass established civil adjudicatory processes and directly seek writ relief. In determining whether to exercise their discretion, the writ courts ought not only confine themselves to the identity of the opposite party but also to the nature of the dispute and of the relief prayed for. Thus, although every wrong has a remedy, depending upon the nature of the wrong there would be different forums for redress.

31. In cases where a constitutional right is infringed, writs would ordinarily be the appropriate remedy. In tender matters, such can be either when a party seeks to hold the State to its duty of treating all persons equally or prohibit it from acting arbitrarily; or when executive actions or legislative instruments are challenged for being in contravention to the freedom of carrying on trade and commerce. However, writs are impermissible when the allegation is solely with regard to violation of a contractual right or duty. Hence, the persons seeking writ relief must also actively satisfy the Court that the right it is seeking is one in public law, and not merely contractual. In doing so, a balance is maintained between the need for commercial freedom and the very real possibility of collusion, illegality and squandering of public resources.

32. Such a proposition has been noticed by this Court even earlier in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

“22. 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 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 thousands and millions and may increase the project cost manifold.”

33. Such conscious restraint is also necessary because judicial intervention by itself has effects of time and money, which if unchecked would have problematic ramifications on the State's ability to enter into contracts and trade with private entities. Further, it is not desirable or practicable for courts to review the thousands of contracts entered into by executive authorities every day. Courts also must be cognizant that often-a-times the private interest of a few can clash with public interest of the masses, and hence a requirement to demonstrate effect on "public interest" has been evolved by this Court. [Jagdish Manda v. State of Orissa, (2007) 14 SCC 517, para 22]

34. It is thus imperative that in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of freedom under Article 19(1)(g), public interest too is demonstrated before remedy is sought. Although the threshold for the latter need not be high, but it is nevertheless essential to prevent bypassing of civil courts and use of constitutional avenues for enforcement of contractual obligations."

20. In N.G. Projects Limited v. Vinod Kumar Jain and Ors., (2022) 6 SCC 127, while examining whether the challenge of the Respondent No.1 therein to the finding of the Technical Evaluation Committee that its bid was unresponsive, the Supreme Court observed that the Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and that any contract of public service should not be interfered with lightly. Moreover, the Supreme Court cautioned all High Courts to not issue any interim order that had the potential of derailing the entire process of services meant for larger public good. These observations of the Supreme Court can be read as under:

“23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.

26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone.

27. We also find that multiple layers of exercise of jurisdiction also delay the final adjudication challenging the grant of tender. Therefore, it would be open to the High Courts or the Hon'ble Chief Justice to entrust these petitions to a Division Bench of the High Court, which would avoid at least hearing by one of the forums.”

21. In view of the aforesaid judgements, it can be ascertained that the scope of judicial review in matters of government contracts is limited and can only be exercised if there is patent unreasonableness, irregularity, irrationality or illegality in the decision-making process of the authority which places public interest at large at a risk. In the absence of such circumstances, Courts should normally exercise judicial restraint while deliberating upon such contractual matters so as to not generate problematic ramifications affecting the State's ability to enter into contracts and trade with private entities.

22. In the matter before this Court, it has been stated that Tender No.1 had been issued on 14.08.2020, however, the same did not materialize. Tender No.2 was then floated on 11.12.2020, and two bidders, i.e. M/s Consern Pharma Ltd. and M/s Centurion Laboratories Pvt. Ltd. were declared as the successful bidders. However, it was found that the documents submitted by these entities had been forged and fabricated, and the Petitioners sent in representations to CMSS to raise the issue. Consequently, Tender No.2 was cancelled and Tender No.3 was floated. For Tender No.3, there were three bidders, including the Petitioners herein. However, the third bidder was rejected on technical reasons, and being responsive bids, the Petitioners herein were declared as L-1 and L-2 bidders. Subsequently, negotiations were conducted between the Petitioners and

CMSS for reduction in the quoted rates. However, without intimating the Petitioners or assigning reasons, Tender No.3 was cancelled as well and, thereafter, Tender No.4 was floated.

23. The Petitioners have contended that the cancellation of Tender No.3 without informing the Petitioners or without providing reasons goes against Clause 7.5.11 in the Manual for Procurement of Goods 2017 issued by the Government of India, Ministry of Finance. On the other hand, it is the contention of CMSS that the prices quoted by the Petitioners were too exorbitant and that despite negotiation, the rates were still high by +56.47% and +265.75%. In these circumstances, it cannot be said that the decision of CMSS to cancel Tender No.3 and to float Tender No.4 with deviation in the eligibility requirements is unreasonable or irrational. Taking into consideration the fact that the said decision was solely taken to ensure greater participation and better rates for the drugs, this Court does not intend to exercise its jurisdiction to interfere in the decision of the authority. Furthermore, Clause 11.3 of the tender document categorically states that *“the purchaser reserves the right to accept or reject any bid, and to annul the bidding process and reject all bids, at any time prior to award of contract without assigning any reason whatsoever and without thereby incurring any liability to the affected bidder or bidders on the grounds of purchaser’s action”*. In view of this, CMSS was well within its right to cancel Tender No.3 and was not obligated to assign any reason or intimate the cancellation to the Petitioners.

24. The Petitioners have laid emphasis on the nature of the drug sought to be supplied and have informed this Court about the importance of the same. It has been stated Buprenorphine is an Opioid Partial Agonist and it is mainly prescribed by psychiatrists to patients who are addicted to opioid

drugs. It is also prescribed to patients suffering from critical ailments in a bid to relieve pain. Considering the fact that it is a scheduled drug under the Narcotic Drugs and Psychotropic Substances Act, 1985, its manufacturing, distribution, sale and consumption are controlled. Keeping in view the vulnerability of the drug, the Petitioners have stated that the eligibility criteria could not have been relaxed to state that bidders would have to have previously supplied 25% of the quoted quantity of same or similar items (i.e. *for Schedule 1 and Schedule 2- any tablet listed under the Narcotic Drugs and Psychotropic Substances Act, 1985*) in the past three financial years. The aforementioned submission of the Petitioners does not hold any water. It is settled law that the authority that authors the tender document is the best person to understand and appreciate its requirements, and the Court should not sit like a Court of Appeal over the appropriate authority and must realise that the authority floating the tender is the best judge of its requirements [Refer to M/s Agmatel India Pvt. Ltd. v. M/s Resoursys Telecom &Ors., 2022 SCC OnLine SC 113, and Silppi Constructions Contractors v. Union of India (supra)]. It was only after due negotiation with the Petitioners that CMSS had arrived at the conclusion that the rates quoted by the Petitioners remained exorbitant and that only two responsive bids had been received for Tender No.3. In view of this, a well-considered decision had been taken to relax the eligibility criteria and re-float the tender in order to maximise participation in furtherance of public interest. This Court does not find the said decision to be so illegal, arbitrary or unreasonable that it may warrant the interference by way of judicial review.

25. It has further been submitted by the Petitioners that pursuant to the Petitioners having been declared as successful bidders, a legitimate expectation had been created that the Petitioners were required to fulfil their

end of the contract and that process for procuring the drugs was already underway. Consequently, the sudden cancellation of Tender No.3 has led to the Petitioners incurring financial damage. This submission of the Petitioners cannot be accepted and the remedy of the Petitioners does not lie before this Court, but before a Civil Court for recovery of the alleged damages.

26. The doctrine of legitimate expectation is subsumed by Article 14 of the Constitution of India as the State and all of its instrumentalities are duty-bound to ensure that their actions are fair and are far from arbitrary. However, whether the expectation of the claimant is reasonable or legitimate in the context is a question of facts in each case. Whenever this question surfaces, it is incumbent upon the Courts to determine the same not in accordance with the claimant's perception, but in larger public interest wherein other more important considerations may outweigh what otherwise would have been the legitimate expectation of the claimant. A *bona fide* decision of an authority can be said to satisfy the requirement of non-arbitrariness and withstand judicial scrutiny.

27. In the case of Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries, (1993) 1 SCC 71, the Appellant's decision to not accept the bid of the highest tender had been challenged, and the Supreme Court expounded upon the doctrine of legitimate expectation and when the same would become an enforceable right. The relevant portion of the said Judgement is as follows:

“7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no

unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public

authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.

9. In Council of Civil Service Unions v. Minister for the Civil Service [1985 AC 374 : (1984) 3 All ER 935 (HL)] the House of Lords indicated the extent to which the legitimate expectation interfaces with exercise of discretionary power. The impugned action was upheld as reasonable, made on due consideration of all relevant factors including the legitimate expectation of the applicant, wherein the considerations of national security were found to outweigh that which otherwise would have been the reasonable expectation of the applicant. Lord Scarman pointed out that “the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter”. Again in Preston, in re [1985 AC 835 : (1985) 2 All ER 327] it was stated by Lord Scarman that “the principle of fairness has an important place in the law of judicial review” and “unfairness in the purported exercise of a power can be such that it is an abuse or excess of power”. These decisions of the House of Lords give a similar indication of the significance of the doctrine of legitimate expectation. Shri A.K. Sen referred to Shanti Vijay and Co. v. Princess Fatima Fouzia [(1979) 4 SCC 602 : (1980) 1 SCR 459] which holds that court should interfere where discretionary power is not exercised reasonably and in good faith.”

28. In the instant case, the decision taken by CMSS to cancel Tender No.3 was that the rates quoted by the Petitioners were higher than the LPP, even after negotiation. A perusal of the noting dated 08.02.2022 reveals that another bidder had been approached and they were willing to participate in the said tender with aggressive rates. Accordingly, approval for reissuance

of the tender was sought to maximise participation, and this approval was granted which led to Tender No.4 being floated. In the considered opinion of this Court, the reasoning provided for the cancellation of Tender No.3 is justifiable and withstands judicial scrutiny. Furthermore, as has already been discussed above, the scope of interference in contractual matters is restricted, and a writ petition under Article 226 of the Constitution of India may lie if the contractual dispute has a public law element. However, the proper remedy of a party complaining of breach of contract and incurrence of damages lies before a Civil Court. The Petitioners, in this context, cannot claim damages or even a vested right being created in the name of a legitimate expectation.

29. During the course of proceedings, CMSS produced the original record pertaining to Tender No.2. Attention was drawn by the learned Counsel for CMSS to the minutes of meeting of the concerned Committee held on 16.02.2021 that indicate that the Committee found substance in the complaints made against M/s Consern Pharma Ltd. as well as M/s Centurion Laboratories Pvt. Ltd., and decided to escalate the issue with the Central Drugs Standard Control Organisation (CDSCO), cancel Tender No.2 and float a fresh tender with revised specifications. The learned Counsel appearing CMSS further submitted that no further inquiry/investigation had been undertaken against the two bidders in view of the fact that the tender had been cancelled. She stated that, in any case, the furnishing of false and fabricated documents by the bidder would disqualify them from participating in future tenders. This Court does not deem it fit to render a decision in this regard as action, if any, against the errant bidders is to be taken by the concerned authority and it is not within the realm of jurisdiction of this Court to give directions on the same.

30. In view of the aforesaid observations, this Court is of the opinion that the instant matter is such that it does not warrant the interference of this Court under its writ jurisdiction. This Court, therefore, directs for the tender process with respect to Tender No.4 to continue and for the Respondents to finalise the same in accordance with law.

31. Accordingly, the writ petitions are dismissed, along with the pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

SEPTEMBER 02, 2022

Rahul

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