

(2016) 06 PAT CK 0054

PATNA HIGH COURT

Case No: Civil Writ Jurisdiction Case No. 729 of 2015

Mukesh Kumar Roy

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: June 22, 2016**Citation:** (2016) 4 PLJR 783**Hon'ble Judges:** Mr. Ahsanuddin Amanullah, J.**Bench:** Single Bench

Advocate: Mr. Ashok Kumar Singh with Mr. Lalan Kumar Singh, Advocates, for the Petitioner; Mr. Tuhin Shankar with Mr. Siddharth Shankar Pandey, Advocates, for the Respondent No. 6; Mr. A.B. Sinha, SC 19 with Ms. Kalpana, AC to SC 19, for the State; Mr. Binay Kumar

Final Decision: Allowed

Judgement

Mr. Ahsanuddin Amanullah, J. - Heard learned counsel for the parties.

2. The present writ application has been filed against the grant of license by the respondent All India Institute of Medical Sciences, Phulwarisharif, Patna (hereinafter referred to as the "Institute") to respondent no. 6 to set up Chemist shop in the Institute.

3. The brief facts of the case are that a Notice Inviting Tender (NIT) was invited by the Institute for setting up a Chemist shop in the Department of Pharmacy Institute on 16.04.2014. Pursuant to the same, nine firms were selected for proceeding with the opening of the technical bid including the petitioner and the respondent no. 6. It appears that finally the respondent no. 6 was the successful bidder and accordingly letter was issued to him on 14.07.2014. In the pre-bid meeting after realising certain anomaly corrigendum was issued on 10.05.2014 by which certain amendments were brought and the offer was extended to proprietor firm also. Further, the minimum turnover was also reduced from Rs. 2 crores to Rs. 1 crore as the drug supplier during the last three years from the initial stipulation of retail Chemist during the

last three years. The petitioner filed an application before the Competent Authority on 18.08.2014 pointing out the irregularity in the grant of such license to the respondent no. 6. However, pursuant to a legal notice sent to the Institute on 03.09.2014, a clarification was given that the respondent no. 6 also has the requisite experience of five years in business.

4. Learned counsel for the petitioner submitted that without going into the other aspects, he is restricting the challenge purely on legal issues inasmuch as the respondent no. 6 was inherently incompetent to even apply pursuant to the NIT on the ground that he did not have the requisite experience of five years in the similar business. It is submitted that the firm was granted drug license only on 27.05.2010 and thus the experience was not even of four years which made him ineligible to apply pursuant to the tender notice where the requirement was having experience of being in similar business for the last five years. It is submitted that the respondent no. 6 thus could not have been given the advantage of a different firm as the respondent no. 6 being a firm has an independent identity. Learned counsel submits that though he has not raised the matter in the main writ application but from the counter affidavit filed on behalf of respondent no. 6 itself, it would be apparent that even the procedure relating to the financial bid has not been followed inasmuch as it was required that the lowest bidder of the generic medicine and the branded medicine if different, the negotiation will be done with both the bidders who offer the maximum discount for each of the category of the items. It is submitted that from the chart relating to all the nine bidders, the respondent no. 6 was the lowest bidder offering the maximum discount in branded items whereas M/s Medicine Palace offered the maximum discount on generic drug and on this account also clearly the Institute has shown undue favour to the respondent no. 6.

5. Learned counsel for the respondent no. 6 submitted that the contention of learned counsel for the petitioner is not tenable for the reason that the proprietor of respondent no. 6 firm had worked for M/s Balajee Enterprises from November, 2007 to 30th April, 2010 and thereafter started his own firm in the name and style of respondent no. 6 i.e, M/s Shree Umiya Enterprises. It was submitted that the proprietor of respondent no. 6 firm, thus, had ample experience in the relevant trade with respect to sale and supplies of medicines as M/s Balajee Enterprises was also involved in the business of sale of medicines, drugs and surgical items, sutures, capital equipment and its consumables etc. from 11.10.2004. Learned counsel submitted that the experience of last five years in similar business was thus fulfilled and the respondent no. 6 was not ineligible on that account. Learned counsel relied on a decision of the Hon"ble Supreme Court in the case of Directorate of Education v. Educomp Datamatics Ltd. AIR 2004 SC 1962 for the proposition that the terms of invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must have a free hand in setting the terms of the tender. He further relied upon a decision of the Gauhati High Court in the case of East Line Projects Pvt. Ltd. v. Dr. B. Borooah Cancer Institute AIR 2005 Gauhati 5 for

the proposition that experience of similar job in NIT cannot be given narrow meaning.

6. Learned counsel for the petitioner, by way of reply, submitted that the so called experience certificate granted by M/s Balaji Enterprises to the proprietor of respondent no. 6 firm is only to the extent that he was associated with the firm from 10th November, 2007 to 30th April, 2010 which would be clear from the certificate dated 30.04.2010 issued by the said M/s Balajee Enterprises, copy of which has been annexed in the counter affidavit filed on behalf of respondent no. 6. It is submitted that the same, in no way, fulfils the criteria of the respondent no. 6 firm being involved in similar business for the last five years and providing the same service. It is further submitted that as the proprietor of respondent no. 6 firm, namely Amarnath Pandey, was born on 25th February, 1992, his association with M/s Balajee Enterprises from 10th November, 2007 could not have been in any substantive capacity as he was about 15 ♦ years old only. It was, thus, submitted that the conditions and terms of the NIT have to be strictly adhered to and there can be no deviation from the same as it would vitiate the entire process and would amount to there being an uneven playing field. It was further submitted that the eligibility criteria is a basic essential criteria relating to five years experience and thus the respondent no. 6 clearly not fulfilling the said criteria, was ineligible from the very beginning and the ultimate settlement of the shop in question with him is nothing but fraud and patently illegal which deserves to be set aside.

7. Having considered the rival contentions, though the Court has been addressed by learned counsel on other aspects also, but for the purposes of deciding the present writ application, in the considered opinion of the Court, the basic issue revolves as to whether the respondent no. 6 fulfils the eligibility criteria of being in similar business for the last five years and providing the same service to Central/State Government/Reputed Private Hospitals or Autonomous Body. From the documents brought on record and as admitted by learned counsel for the respondent no. 6 himself, his firm itself was granted license to sell, stock or offer for sale or distribute by wholesale drugs other than those specified in Schedules C, C (1) and X only with effect from 27.05.2010. Thus, for filling up the NIT in question in the year 2014, he was ineligible to fill up the tender. It would be relevant to quote the relevant conditions of the NIT dated 16.04.2014 as amended by corrigendum dated 10.05.2014 which is as under:

"All India Institute of Medical Sciences, Patna (AIIMS Patna) invites bids from reputed, experienced and financially sound Companies/Firms/Agencies/Proprietorship Firms for setting up of chemist shop for Department of Pharmacy of the Institute. Those who are in the similar business for the last five years and providing the same service to Central/State Govt./Reputed Private Hospitals or autonomous bodies may send their bids both Technical and Commercial in sealed envelopes."

8. The certificate dated 30.04.2010 issued by M/s Balajee Enterprises in favour of the proprietor of respondent no. 6 firm is also quoted herein below for ready reference:

"Date 30/04/2010

To whom it may concern

I, Om Prakash Pandey, sole proprietor of M/S BALAJEE ENTERPRISES, Vachaspati Nagar, Mahendru, Patna-800006, certify that we are enterprise in the Business for Sell of Medicine, Drugs & Surgical Items, Sutures, Capital Equipment and its consumables etc. from 11.10.2004 and Mr. Amarnath Pandey S/O Late Ram Badan Pandey was associated with this firm from 10th November, 2007 to 30th April, 2010 and he started his own subsidiary firm in the name of M/S SHREE UMIYA ENTERPRISES situated at 503, Saboo Complex, Exhibition Road, Patna-800001."

9. Upon going through the eligibility criteria, of being in similar business for the last five years and providing the same service, would, but necessarily, mean that the firm which is applying, has the said experience. In the present case, even if it can be assumed, for the sake of argument, that the proprietor of respondent no. 6 firm i.e., Amarnath Pandey may have gained similar experience in another firm, but from the language of the certificate issued by M/s Balajee Enterprises dated 30.04.2010, it is apparent that he was only associated with the said firm from 10th November, 2007 to 30th April, 2010. Neither the capacity in which Amarnath Pandey was associated nor the area of his work having been specified, shall not be of any help to the proprietor of respondent no. 6 firm to fall back and rely on such experience in M/s Balajee Enterprises. Further, the fact that the date of birth of Amarnath Pandey is 25th February, 1992 would clearly indicate that he was associated with M/s Balajee Enterprises at the age of 15♦ years. Thus, without commenting on the value of such certificate issued by M/s Balajee Enterprises in favour of Amarnath Pandey, this Court has no hesitation to hold that such certificate shall not amount to the proprietor of respondent no. 6 firm being involved in similar business for the last five years and providing the same service. The Court, equally, has no hesitation to hold that the eligibility criteria of being in similar business for the last five years and providing the same service is an essential condition of the NIT and the respondent no. 6 does not fulfil the same as on the date of consideration. The courts have time and again held that there has to be strict adherence to the conditions/standards mentioned in the NIT and that conditions of the bid have to be complied with. In this context, reference may be made to the decision of a Division Bench of this Court in the case of M/s B.B.Q. Construction v. State of Bihar 2015 (1) PLJR 480 where the Court has held to the following effect:

"68. To sum up, one can say that there can be no doubt that an authority, issuing tender, shall, ordinarily, be treated bound to give effect to every terms and conditions mentioned in the NIT and is not entitled to waive or deviate. Nonetheless the terms and condition, incorporated in an NIT, can be divided into two categories,

namely, (i) essential or mandatory and (ii) directory or ancillary. So far as the essential term or condition is concerned, the same shall be enforced with all rigidity. The authorities, in a case of compliance of essential condition, cannot deviate from the condition or cannot refuse to insist upon strict compliance.-----"

10. Similarly, in another decision of a Division Bench of this Court in the case of M/s Indian Oil Corporation Limited v. Raj Kumar Jha 2012 (2) PLJR 783, the Court has held that "once the standard is set out in the advertisement, the Corporation has to adhere to the said standard without any variation. In case, the Corporation allows any alteration the same will amount to subjective approach which is frowned upon by the Courts time and again. To remain objective the Corporation is required to adhere to the standards mentioned in the advertisement."

11. In another decision of a Division bench of this Court in the case of M/s Continental Pump and Motors Ltd. Gaziabad v. State of Bihar AIR 1995 Patna 183, the Court has held that the bidder not fulfilling the required condition cannot avail of experience and expertise of its foreign collaborator, meaning thereby, that the experience has to be of the firm concerned, which in the present case, is admittedly lacking.

12. The decision relied upon by learned counsel for the respondent no. 6 in the case of East Line Projects Pvt. Ltd. (supra) is not applicable to the facts and circumstances of the present case in the said case the interpretation was that the experience mentioned in the NIT was in respect of dealing in drugs/medicines and all the categories of persons were included and when the NIT was silent on the point that the experience required for the job is not of retailing business in drugs only, the Court held that it should not be given a narrow meaning that the Pharmacy sought to be established was exclusively meant for the retail dealers of drugs as the entire effort was directed towards providing medicines to poor cancer patients at the lowest possible rates. The eligibility was explained but not waived. In the present case, the Court having held that the certificate of M/s Balajee Enterprises in favour of the proprietor of respondent no. 6 firm is of no help as it does not disclose anything with regard to nature of the work or association and the proprietor of respondent no. 6 firm being only about 15 years of age, there is no similarity with the decision referred by learned counsel for the respondent no. 6. As far as the decision in the case of Directorate of Education (supra) is concerned, the same related with the terms of invitation of tender, which in the present case is never in dispute as the terms of the NIT have only been interpreted by the Court for the purposes of determining as to whether the eligibility criteria fixed by the Institute itself, both in the first NIT and the corrigendum, were fulfilled by the respondent no. 6 or not.

13. In view of the discussions made herein above, the Court comes to the inescapable conclusion that the grant of license for chemist shop in favour of the respondent no. 6 cannot be sustained, being contrary to the terms and conditions of

eligibility of the NIT and, thus, not being in accordance with law. Accordingly, the same is set aside. The Institute is directed to carry out the whole exercise afresh on the basis of the tenders received pursuant to the NIT dated 16.04.2014 and corrigendum dated 10.05.2014, from among the eligible tenderers treating the respondent no. 6 to be disqualified and ineligible ab initio. The said process be completed within four weeks from the date of production of a copy of this order upon the respondents no. 2, 3 and 4. In view of the shop by respondent no. 6 being in operation, in order to avoid inconvenience to the public at large, the respondent no. 6 shall be permitted to continue with the shop till alternate arrangements are made in terms of the order, but not beyond the time limit fixed by the Court. The Court would further like to caution the respondents no. 2, 3 and 4 that they shall strictly comply with the directions of settling the chemist shop in the premises of the Institute and granting license of fresh shop within the timeframe fixed by the Court. The Court would also like to record that the NIT neither provides for any discretion for grant of relaxation by the Institute nor the Institute has taken the stand that the same has been done. Thus, when the tender of respondent no. 6 was not fit for even consideration due to non-fulfilment of the eligibility criteria of experience, clearly the award of license for the chemist shop to the respondent no. 6 by the Institute is patently illegal and arbitrary and cannot be sustained, moreso such eligibility criteria relating to experience for the last five years is a sort of pre qualification, which, in the opinion of the Court, is a mandatory condition which the respondent no. 6 clearly does not fulfil. Thus, in view of the law laid down by the Court in the cases of M/s B.B.Q. Construction (supra), M/s Indian Oil Corporation Limited (supra) and M/s Continental Pump and Motors Ltd. Gaziabad (supra), there was no discretion with the Institute but to reject the tender of respondent no. 6 at the very threshold, which, not having been done, is clearly an abuse of authority by the concerned respondents and a fraud on the system.

14. The writ petition stands allowed in the aforesaid terms.