Before S.J. Vazifdar, CJ & Harinder Singh Sidhu, J.

VENKATESHWARA MAHILA AUDYOGIK UTPADAK SAHAKARI SANSTHA MARYADIT, UDGIR—*Petitioner*

versus

UNION OF INDIA AND OTHERS—*Respondents*

CA-CWP No.10 of 2017

August 28, 2017

Constitution of India, 1950—Art. 141 & 299—National Food Security Act, 2013—S.39, National Food Security Rules, 2017—Rl. 9—Maharashtra Cooperative Societies Act, 1960— Supply of nutritive supplements and other food items to government agencies under the Integrated Child Development Services Scheme operated by the Women and Child Development Department—Challenge to provisions of tender inviting private contractors for supply of nutrition in Anganwadis under the Rajiv Gandhi Scheme for Empowerment of adolescent girls (SABLA), Haryana Women and Child Development Department—Held, such a provision is contrary to the provisions of the Supreme Court directions in (Peoples' Union for Civil Liberties v. Union of India and others, 2004)—Engagement must be beneficial for the purpose and ought not to be to the prejudice of the State—If the rate offered by self help groups is low and does not meet the eligibility criteria, the provisions of the Supreme Court order may be resorted to—The authorities are at a liberty to proceed according to the Supreme Court judgment and stipulate any eligibility criteria in regards to financial worth so long the same are not arbitrary or irrational—Fresh tender be called.

Held that, the submission is well founded. Paragraph-3 of the order of the Supreme Court expressly provides that contractors shall not be used for the supply of nutrition in Anganwadis. The judgment of the Supreme Court is clear. It clearly provides that "*the contractors shall not be used for supply of nutrition in Anganwadis … …*". The word "contractors" is not qualified. It is not restricted. It does not refer only to distributors/middlemen/traders/suppliers. The respondents have not sought a modification from the Supreme Court.

(Para 8)

Further held that, it is not the respondents' case that self help groups were not available. The respondents have not furnished any

explanation for not engaging self help groups. The engagement indeed must be beneficial to the purpose, meaningful and ought not to be to the prejudice of the State. For instance, if the rate offered by such groups is unconscionably low or if they do not meet the eligibility criteria the proviso may be resorted to. The only contention before us, however, is based on the said legal opinion which we are with respect unable to agree with and, in any event, not concerned.

(Para 12)

Further held that, on 28.07.2017 when the matter was kept for pronouncement, Mr. Balyan, on instructions from respondent Nos.2 and 3, contended that the present tenders are not invited under the provisions of the Food Security Act or the rules there under. The material for which the tender was issued is for adolescent girls who do not fall within the ambit of the Act or the rules.

(Para 16)

Further held that, the challenge to clause C(11) is, however, not well founded. It is for the party inviting tenders to stipulate the eligibility criteria so long as the same is not arbitrary or irrational. It is not for the court to substitute its view as to what the eligibility criteria ought to be. Stipulating the quantum of net worth cannot be said to be irrational or irrelevant. For instance, a creditor would be concerned with the net worth of the party in the event of it having a claim against that party. Moreover, the net worth of a party also often reflects upon its ability to execute a contract efficiently. This is especially so in the case of a financial crunch. It would normally be easier for a party with a higher net worth to be able to tide over financial difficulties than a party with a lower net worth.

(Para 19)

Further held that, we have upheld the validity of the term requiring a party to have a prescribed net worth. The initial net worth prescribed was Rs.8 crores which was thereafter reduced by the first corrigendum to Rs.6 crores. Absent anything else, this petition would not have been maintainable by the petitioners for they would, in any event, be ineligible to participate in the tender process as their net worth is less than even Rs.6 crores.

(Para 21)

Further held that, it is apparent that the present tender process was contrary to the directions of the Supreme Court in the said order and judgment dated 07.10.2004. Respondent Nos.2 and 3 would have

to undertake the tender process afresh keeping in mind the aforesaid directions of the Supreme Court.

(Para 22)

Devan Chauhan, Advocate
Vivek Sethi, Advocate and
Sumeet Bodalkar, Advocate
for the petitioner

Pankaj Jain, Senior Panel
Counsel for UOI.

Deepak Balyan, Addl. Advocate General, Haryana.

S.J. VAZIFDAR, CHIEF JUSTICE (ORAL)

(1) The parties in the appeal and in the writ petition arethe same and are also arrayed in the same manner. Respondent no.1–the Union of India has in fact supported the petitioner. RespondentNo.2 is the State of Haryana and respondent No.3 is the Director, Department of Women & Child Development, Government of Haryana.

(2) The appeal – CA-CWP No.10 of 2017 is against the order of the learned single Judge dismissing the petitioner's writpetition i.e. CWP-COM No.129 of 2017. The writ petition - CWPNo.11676 of 2017 was filed before the Division Bench directly. The petitioner filed CWP-COM No.129 of 2017 before the learned single Judge challenging clauses C(5), C(11) and E(11) of a tender document and sought an order setting aside the entire tender document along with its undated Corrigendum No.1 (Annexure P-9).The writ petition filed before the Division Bench also seeks an order setting aside the tender document along with its undated Corrigendum No.3 (Annexure P-3).

(3) As the parties are the same and the challenge is to the same tender it is convenient to consolidate the challenges and todeal with the appeal and the writ petition by this common order and judgment. As the appellant had filed the petition before the learned single Judge and the petition before us, we will for convenience refer to the appellant as the petitioner. The reference to the respondents in the judgment will be to respondent Nos.2 and3.

(4) The petitioner is a co-operative society in corporate and registered under the Maharashtra Cooperative Societies Act,1960. It is a Mahila Sanstha engaged in the supply of supplementary nutrition food and food-grains, pulses and other food items to Government and

Government appointed agencies including the Anganwadi Centres under the Integrated Child Development Services Scheme (ICDSS) operated by the Women & Child Development Department in the State of Maharashtra. It had a total turnover of over Rs.55crores for the financial years 2013-14 and 2014-15.

(5) The respondents issued a tender inviting online bids for procuring ready-to-eat fortified food required under the Rajiv Gandhi Scheme for Empowerment of Adolescent Girls (SABLA) Haryana Women & Child Development Department. The petitioner has challenged the following provisions of the tender document:-

> "C) Specific terms and conditions/Eligibility criteria:
>
> …. ….. ……. ……..… ……..…… ..…….. ……..… ……..…. ..…….. ……. ….. …….
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> 5. The bidder should be manufacturers of tendered/similar item being offered for supply and submit relevant documents for the same. …. ….. ……. ……..… ……..…… ..…….. ……..… ……..…. ..…….. ……. ….. …….
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> 11. The present net worth of the participating firm should be Rs.8.00 Crore certified by CA/Bank. …. ….. ……. ……..… ……..…… ..…….. ……..… ……..…. ..…….. ……. ….. …….
>
> E. OTHER TERMS AND CONDITIONS: 11. The offer without prescribed earnest Money, tender Fee & E-Service fee is liable to be summarily rejected. The deficiency in the remaining documents and tender requirement can be made subject to the decision by Director, Women & Child Development, Haryana, Panchkula."

(6) The challenge to clause C(5) is founded on a judgment of the Supreme Court in ***People's Union for Civil Liberties*** versus ***Union of India and Ors.***[1],the provisions of the National Food Security Act, 2013 and rule 9of the rules made there under. The Supreme Court considered the fifth report of the Commissioners which was divided into three parts. Part-I dealt with Integrated Child Development Services. Part-II and Part-III contained a summary of the findings and there commendations, respectively. The Supreme Court noted, inter alia, the following background relating to the matter:-

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[1] (2004) 12 SCC 104

> "ICDS, as noticed in the Order dated 29.4.2004, is perhaps the largest of all the food and supplementation programmes in the world that was initiated in the year 1975 with the following objects as per the document prepared by Planning Commission:-
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> "1. To improve the health and nutrition status of children 0-6 years by providing supplementary food and by coordinating with State health departments to ensure delivery of required health inputs;
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> 2. To provide conditions necessary for pre-school children's psychological and social development through early stimulation and education;
>
> 3. To provide pregnant and lactating women with food supplements; 4. To enhance the mother's ability to provide proper child care through health and nutrition education;
>
> 5. To achieve effective coordination of policy and implementation among the various departments to promote child development."

Food is supplied to the children through the Anganwadi Centres. Mr. Deven Chauhan, the learned counsel appearing onbehalf of the petitioner, relied upon the following directions ofthe Supreme Court which was stated to be "for present":-

> "3. The contractors shall not be used for supply of nutrition in Anganwadis and preferably ICDS funds shall be spent by making use of village communities, self-help groups and Mahila Mandals for buying of grains and preparation of meals."

(7) It was not and indeed cannot be disputed that the petitioner being a Mahila Mandal falls within the ambit of this direction. The petitioner's submission, supported by the learned counsel for the Union of India, is that the respondents permitted parties including the contractors to participate in the tender process contrary to the above directions of the Supreme Court. According to him, contractors are not entitled to and have been specifically prohibited from being used for the supply of food. The present tender process is precisely for that, namely, for the supply of nutrition in Angan wadis. The tender process does not even grant any preference to the institutions, such as, Mahila Mandals, referred to in the direction, namely, village communities, self

help groups and Mahila Mandals for buying grains and preparation of meals.

(8) The submission is well founded. Paragraph-3 of the orderof the Supreme Court expressly provides that contractors shall not be used for the supply of nutrition in Anganwadis.

The judgment of the Supreme Court is clear. It clearly provides that "the contractors shall not be used for supply of nutrition in Anganwadis …… … …". The word "contractors" is not qualified. It is not restricted. It does not refer only to distributors/middlemen /traders/suppliers. The respondents have not sought a modification from the Supreme Court.

(9) Respondent Nos.2 and 3, i.e., State of Haryana and the Director, Department of Women & Child Development, Government of Haryana, have sought to justify their decision to permit contractors only in view of an opinion of a Law Officer of the Union of India to the effect that the word "contractors" in the order of the Supreme Court referred only to distributors/middlemen/traders/suppliers for the supply of food under the scheme.

(10) The opinion may be useful in indicating that the decision of the respondents to permit contractors was taken bonafide and that, in any event, there were no mala fides on their part but no more. The petitioner has not questioned the respondents' bona fides. It has merely challenged a term in the tender document as being contrary to the judgment of the Supreme Court.

(11) We mean no disrespect to the learned Law Officer or for that matter to any member of the profession who furnishes an opinion when we say that an opinion ought not to be relied upon in a Court including for the purpose of interpreting a legal provisionor the terms of a document. The Court must interpret the same uninfluenced by any opinion.

(12) It is not the respondents' case that self help groups were not available. The respondents have not furnished any explanation for not engaging self help groups. The engagement indeed must be beneficial to the purpose, meaningful and ought not to be to the prejudice of the State. For instance, if the rate offered by such groups is unconscionably low or if they do not meet the eligibility criteria the proviso may be resorted to. The only contention before us, however, is based on the said legal opinion which we are with respect unable to agree with and, in any event, not concerned.

(13) The respondents then relied upon the said instructions issued by the Government of India dated 09.05.2012 which provide inter alia as under:-

> "It is hereby clarified that bonafide manufacturer, who fulfils the norms and standard laid down in the policy of the Government of India dated 24.2.2009 and direction issued by the Hon'ble Supreme Court on 19.8.2011 can also be considered for the supply of micro nutrient fortified food. Reiterating the Supreme Court orders on this issue, it is advisable that the State Governments/Union Territories should get the Nutritious Food prepared/manufactured by only competent and capable groups or entries, who comply with the stipulations as laid down under the Revised Norms, irrespective of whether these are Self Help Groups, Mahila Mandals, Village Community or a Manufacturer and strictly adherence to."

(14) The above directions are contrary to the orders of the Supreme Court. The official respondents have not furnished any reason for deviating from the directions of the Supreme Court.They justify their stand solely on the basis of the said opinion.

(15) It is, therefore not necessary to consider the submission both on behalf of the petitioner as well as on behalf of the respondent No.1 - Union of India that these instructions ceased to operate in view of rule 9 of the Supplementary Nutrition (under the Integrated Child Development Services Scheme) Rules, 2017 made in exercise of powers conferred by section 39 of the National Food Security Act, 2013. Rule 9 reads as under:-

> "9. Responsibility to monitor and review arrangement for supplementary nutrition. – The respective State Governments and Union territory Administrations, and the Monitoring and Review Committees at the National, State, District, Block and Anganwadi levels, constituted by the Central Government in the Ministry of Women and Child Development from time to time, shall be responsible to monitor and review the status of arrangement for Supplementary Nutrition, convergence with the line departments to ensure water and sanitation facilities, ensure regular functioning of anganwadi centres, ensure regular supply of Supplementary Nutrition at anganwadi centres

> without disruptions and use of iodised or iron fortified iodised salts, ensure monitoring and supervision visits by officials at different levels as per norms, method of delivery of supplementary food at anganwadi centres, engagement of Self Help Groups, ensure supply and quality of Supplementary Nutrition through them and all other issues relating to the above, as per their roles defined in the guidelines issued by the Central Government in the Ministry of Women and Child Development from time to time.
>
> Provided that till the engagement of Self Help Groups, the supply of Supplementary Nutrition shall be ensured from such other sources or approved agencies in terms of the existing rules and regulations notified by the Central Government and the State Governments or Union Territory Administrations." (emphasis supplied)

They contend that Rule 9, therefore, requires the engagement of self-help groups to ensure supply and quality of supplementary nutrition through them. The proviso entitles the authorities to arrange supplies only till the engagement of self help groups. The tender process ought to have been an exercise to implement rule 9 by ensuring the procurement of the material through self help groups.

(16) On 28.07.2017 when the matter was kept for pronouncement, Mr. Balyan, on instructions from respondent Nos.2and 3, contended that the present tenders are not invited under the provisions of the Food Security Act or the rules there under. The material for which the tender was issued is for adolescent girls who do not fall within the ambit of the Act or the rules.

This submission even if well founded does not carry the respondents' case any further for, in that event, the directions issued by the Supreme Court in the order and judgment dated07.10.2004 would continue to operate. The judgment refers to further directions issued by an earlier judgment and order dated 29.04.2004 that the Anganwadi Centres shall supply nutritious food/supplements also to adolescent girls. The directions issued bythe Supreme Court in the order dated 07.10.2004, therefore, would also apply in respect to the supply of nutrition for the benefit of adolescent girls.

(17) The challenge to paragraph C(5) is, therefore, upheld.

(18) The challenge to paragraph-1 of the undated Corrigendum1 must also succeed for the same reason as the challenge to clauseC(5) of

the tender document in so far as it includes parties otherthan those mentioned in the said direction of the Supreme Court.

(19) The challenge to clause C(11) is, however, not well founded. It is for the party inviting tenders to stipulate thee ligibility criteria so long as the same is not arbitrary or irrational. It is not for the court to substitute its view as to what the eligibility criteria ought to be. Stipulating the quantum of net worth cannot be said to be irrational or irrelevant. For instance, a creditor would be concerned with the net worth of the party in the event of it having a claim against that party. Moreover, the net worth of a party also often reflects upon its ability to execute a contract efficiently. This is especially so in the case of a financial crunch. It would normally be easier for a party with a higher net worth to be able to tide over financial difficulties than a party with a lower net worth. Absent any thing else, the greater the net worth the higher the possibility of raising finance. The challenge to clause C(11), therefore, is not well founded. The learned Judge, therefore, rightly rejected the challenge to clause C(11). Indeed, considering what was argued before the learned Judge, the judgment cannot be faulted. However, in the petition filed directly before the Division Bench and in the appeal, the other contentions pleaded in the petition were also raised. The respondents had an opportunity of dealing with the same and the Union of India also supported the petitioner.

(20) This brings us to the challenge to the undatedCorrigendum-3 in so far as it requires the bidders to submit audited balance-sheets along with a certificate from the Chartered Accountant for the last 10 years. Corrigendum – 3 was issued only this year. It may not be possible for a party to comply with this condition for no fault of the party. The respondents do not appear to have taken into consideration the fact that sections 149 and153A of the Income Tax Act requiring the balance-sheets to be preserved for ten years came into force only with effect from01.04.2017. Prior thereto, assessees were liable to preserve the balance-sheets only for seven years. Such a clause could then be availed of only by assessees who fortuitously preserved their balance sheets without any requirement to do so in law. This is nota rational requirement. It was not suggested that balance sheets of the past seven years would not suffice to judge the bidders ability to perform the contract if awarded.

(21) We have upheld the validity of the term requiring a party to have a prescribed net worth. The initial net worth prescribed was Rs.8 crores which was thereafter reduced by the first corrigendum to Rs.6

crores. Absent anything else, this petition would not have been maintainable by the petitioners for they would, in any event, be ineligible to participate in the tender process as their net worth is less than even Rs.6 crores. The petitioner, however, has successfully challenged the validity of clause C(5). This would exclude several parties i.e. the contractors and manufacturers. There is a possibility, therefore, that the respondents would reconsider the prescribed net worth keeping in mind the limitation on the parties entitled to participate viz. self help groups, Mahila Mandals, etc. in the tender process and the mandate of the Supreme Court to give such parties preference. At this stage of the judgment which was being dictated in open Court on 26.07.2017, we adjourned the matter to today to enable the respondents to take instructions as to whether if the tenders are restricted to the parties stipulated in the judgment of the Supreme Court they would alter the term of eligibility regarding the required net worth. Mr. Balyan stated that respondentNos.2 and 3 are not in a position to take a decision in this regard at this stage.

(22) It is apparent that the present tender process was contrary to the directions of the Supreme Court in the said order and judgment dated 07.10.2004. Respondent Nos.2 and 3 would have to undertake the tender process afresh keeping in mind the aforesaid directions of the Supreme Court. We make it clear that the terms of eligibility are left to respondent Nos.2 and 3 who invited the tenders. For instance, they may continue to stipulate net worth of a particular value as a term of eligibility. Further, it will befor respondent Nos.2 and 3 to consider the relevant aspects such as the financial aspect and from the view of quality of material to be supplied as to whether the tender process can proceed only by restricting the same to the parties mentioned in the said directions of the Supreme Court or whether there are exceptional circumstances compelling them to deviate from the same for, as rightly pointed out by Mr. Balyan, the said direction expressly prefaces the requirement of funds being spent by making use of the parties mentioned therein for buying of grains and preparation of meals with the word “preferably”. We do not express any opinion in this regard.

(23) We have been assured that the supply of food is not going to be affected in any manner whatsoever on account of fresh tenders being invited.

(24) As we noted earlier, the judgment of the learned single Judge cannot be faulted. The only contention that appears to have been raised before the learned single Judge was the challenge to clause

C(11). The learned Judge rightly rejected the challenge. The only reason we must set aside the judgment is on account of the other submissions raised by the parties which have also been pleaded in both the writ petitions. Further, the Union of India also supported the petitioner.

(25) In these circumstances, the order and judgment of the learned single Judge is set aside and the tender process is quashed. The respondents are directed to undertake a fresh tender process in accordance with law and in view of the judgment of the Supreme Court. The appeal and both the writ petitions are disposed of in the above terms.

Payel Mehta