



GAHC010110412020

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3230/2020

MRIGANKA SHARMA AND 7 ORS.
S/O SRI JUGANANDA SHARMA, R/O WARD NO. 2, NAZIRA PIN-785685, AND
PROPRIETOR OF SAROJ MEDICAL STORES, LAKWA ONGC COLONY,
SIVASAGAR

2: JUGANDA SHARMA
S/O LT. SARBANANDA SHARMA
R/O WARD NO. 2
NAZIRA
PIN785685
AND THE PROPRIETOR OF M/S S.M. MEDICAL STORES
NEW APNA BAZAAR
ONGC COLONY
NAZIRA
SIVASAGAR

3: PALASH JYOTI SHARMA
S/O LT. KESHAB SHARMA
R/O NAZIRA
SIVSAGAR
PIN785685 AND PROPRIETOR OF M/S K.G. MEDICAL STORES
SIVASAGAR

4: GUNA GIVINDA GOGOI
S/O SRI RATNESWAR GOGOI
R/O NAZIRA
NOMATI PIN785685 AND PROPRIETOR OF M/S NEW ASSAM MEDICAL
STORES
NAZIRA TOWN
WARD NO. 5
SIVASAGAR

5: SHIVRATAN KARNANI
S/O LT. SURAJMAL KARNANI



R/O WARD NO 5
NAZIRA TOWN PIN 785685 AND PROPRIETOR OF M/S KARNANI MEDICAL
NAZIRA TOWN
SIVASAGAR

6: RAJU MOHAN
S/O LT. A. MOHAN R/O K.P.M. CHARIALI
SIVASAGAR
PIN-785640 AND PROPRIETOR OF M/S BHARALI MEDICAL STORE
K.P.M. CHARIALI
SIVASAGAR

7: GAUTAM PAUL
S/O LT. DHIRENDRA CHANDRA PAUL
R/O WARD NO. 9
MAIN ROAD
NAZIRA TOWN
SIVASAGAR
AND AUTHORIZED PARTNER OF NAZIRA MEDICAL STORES
WARD NO. 9
MAIN ROAD
NAZIRA TOWN
SIVASAGAR

8: JAYANTA BARAT
S/O SRI AGHOR BARAT
R/O WARD NO. 6
TEMPLE ROAD
SIVASAGAR PIN-785640
AND AUTHORIZED PARTNER OF RADHA RANI PHARMACY
TEMPLE ROAD
SIVASAGAR
PIN-78564

VERSUS

THE OIL AND NATURAL GAS CORPORATION AND ANR.
A CORPORATION REGISTERED UNDER THE COMPANIES ACT, 1956, AND
HAVING ITS REGD. OFFICES AT PANDIT DEEN DAYAL UPADHYAYA URJA
BHAVAN, 5 NELSON MANDELA MARG, VASANT KUNJ, NEW DELHI- 110070
AND REP. BY ITS CHAIRMAN /MANAGING DIRECTOR

2:THE GROUP GENERAL MANAGER (MM)
ONGC
ASSAM ASSET
MATERIALS MANAGEMENT DEPTT. CENTRAL STORES
SIVASAGAR
PIN-78564



Advocate for the Petitioner : MR. M K CHOUDHURY

Advocate for the Respondent : SC, OIL

Linked Case : WP(C)/3079/2020

PRABAL SHARMA AND 3 ORS.
S/O SRI TANKESWAR SHARMA
R/O B.P. CHALIA ROAD
MELACKAR
PIN-785640 AND AUTHORIZED PARTNER OF BORTHAKUR MEDICAL
STORES
SIVASAGAR

2: SANJAY AGARWALLA
S/O SRI KESHAR DEV AGARWALLA
R/O HOSPITAL ROAD
SIVASAGAR
PIN-785640
AND THE PROPRIETOR OF M/S A.K. MEDICAL HALL
SIVASAGAR

3: ASHOKA KEDIA
S/O LT. BHAGWAN DAS KEDIA
R/O STATION CHARALI
SIVASAGAR PIN-785640 AND THE PROPRIETOR OF M/S KEDIA MEDICAL
HALL
SIVASAGAR

4: MANISH GATTANI
S/O SRI MAL CHAND GATTANI
R/O HOSPITAL ROAD
SIVASAGAR
PIN-785640 AND AUTHORIZED PARTNER OF M/S DRUGS EMPORIUM
SIVASAGAR
VERSUS

THE OIL AND NATURAL GAS CORPORATION LTD. AND ANR.
A CORPORATION REGISTERED UNDER THE COMPANIES ACT
1956
AND HAVING ITS REGISTERED OFFICES AT PANDIT DEEN DAYAL
UPADHYAYA URJA BHAVAN



5 NELSON MANDELA MARG
VASANT KUNJ
NEW DELHI-110070 AND REP. BY ITS CHAIRMAN/MANAGING DIRECTOR.

2:THE GROUP GENERAL MANAGER (MM)
ONGC
ASSAM ASSET
MATERIALS MANAGEMENT DEPTT. CENTRAL STORES
SIVASAGAR
PIN-785640

Advocate for : MR. M K CHOUDHURY
Advocate for : MR G N SAHEWALLA appearing for THE OIL AND NATURAL GAS
CORPORATION LTD. AND ANR.

BEFORE

THE HON'BLE MR JUSTICE PRASANTA KUMAR DEKA

For the Petitioner : Mr. MK Choudhury, Sr. Advocate
Mr. A Barkataki, Advocate.

For the respondents : Mr. GN Sahewalla, Sr. Advocate
Ms. S Senapati, Advocate

Date of hearing : 20.01.2021
Date of Judgment/ Order : 02.03.2021

JUDGMENT & ORDER (CAV)

Heard Mr. MK Choudhury, learned Senior counsel assisted by Mr. A Barkataki, learned counsel for the petitioners in both the writ petitions. Also heard Mr. GN Sahewalla, learned Senior counsel assisted by Ms. S Senapati, learned standing counsel for the respondent ONGC.

2. The petitioners are businessmen and proprietors/ partners in the respective firms which deal in supply/ distribution and sale of medicine in Sivasagar district. They have good

business relations with the respondent ONGC. They filed these writ petitions challenging inter-alia the tender notice dated 27.07.2020 issued by the respondent ONGC vide Tender No. R16GC20003 inviting online bid / tender for empanelment of retail chain pharmacies/ chemist shops for supply of medicines and consumables against credit notes. The last date of bid submission and opening of techno-Commercial (up-priced) bids was initially fixed on 17.08.2020. The petitioners contended that they have been discriminated and denied a level playing field by imposing restrictive eligibility conditions of having 20 numbers of retail pharmacy outlet and 30 numbers of pharmacists on roll while the scope of work remained the same.

3. Mr. Choudhury referred to the earlier e-tender being No. SVS/MM/MSD/Retail Medicines/(08) R11MC17012 calling for bids from entities interested in being empanelled as Pharmacies/ retail outlet shops at Sivasagar inside ONGC hospital premises (1 no.), Sivasagar Town (5 nos.), Nazira inside ONGC colony (1 no.), Nazira Town (4 nos.), Lakwa (1 no.), Geleky (1 No.) for period of three years. The petitioners being eligible and already having undertaken similar contracts with the ONGC earlier participated in the said e-tender and were successful in the technical bid. The petitioners entered into contracts with the ONGC by signing contract agreements for various location and as per the terms of the contracts the existing contracts are going to expire on 12.04.2021. The ONGC issued a fresh tender which is the subject matter in these writ petitions but insertion of certain eligibility criteria for prospective bidders it is doubted that the entire process as well as intention of the respondent ONGC is in order to oust the petitioners being local suppliers of medicine/ owners of pharmacies.

4. The bid evaluation criteria as per the impugned tender are stipulated in clause B.1.2 indicating the eligibility and experience of the bidder. As per the said criteria B.1.2.1(a)-I(i) the bidder should have at least owned twenty operating pharmacy outlets and as per criteria B.1.2.1(a)-I(ii) the bidder should also have at least thirty pharmacists on their roll with valid licenses issued by state pharmacy council/ Indian Pharmacy council under Pharmacy Act 1948 or other relevant Acts. Clause B.2.6.0 stipulates the criteria for ascertaining financial

capability. The turnover of bidder must be Rs. 9,08,19,500/- (Rupees nine crores, eight lakhs, nineteen thousand and five hundred) or more and the said turnover is to be considered for evaluation shall be the average turnover of the last two years. The net worth of bidder must be Rs. 2,72,45,850/- (Rupees two crores seventy two lakhs forty five thousand eight hundred fifty) or more and the said net worth shall be based on the latest audited consolidated annual financial statements of the bidder with all its subsidiaries. The petitioners are mainly aggrieved on the said two stipulations.

5. The scope of the impugned tender is for empanelment of retail chain pharmacy for three years for ONGC's Assam Asset. The scope of work is in respect of ONGC hospital at Sibasagar, ONGC dispensary at Nazira, Lakwa and DSA Geleky. Comparing the said scope of work Mr. Choudhury referred the earlier e-tender being No. SVS/MM/MSD/Retail Medicines/(08) / 2017-18 wherein the scope of work was in respect of empanelment of pharmacists/ retail outlet, supply of medicine etc for a period of three years for Sibasagar inside ONGC hospital premises at Sibasagar (1 no.), Sibasagar Town (5 nos.), Nazira inside ONGC colony (1 no.), Nazira Town, (4 nos.) Lakwa (1 no.) and Geleky (1 no.). In the earlier tender the security deposit/ performance security required to be submitted by the successful bidder was stipulated on 12.2 % of the estimated annualized contract value. The total value as against the outlet at six locations came to Rs. 91,50,000/-. The impugned tender stipulates security deposit on 12.2 % of the annual contract value of Rs. 54,49,17,000/- which is the tender value for three years. The location of the outlet had already been mentioned hereinabove. The scope of work is similar to the tender wherein petitioners participated and was successful under the said e-tender SVS/MM/MSD/Retail Medicines/(08) R11MC17012. The discount clause in the earlier e-tender as stipulated under clause 11.4 was minimum 14% over the MRP for medicine and 25% over the MRP for other hospital related material/ consumables, failing which their bids were supposed to be rejected. In the impugned tender under clause 'C' which stipulates price valuation criteria, it is mandatory that the bidder must offer 18% discount on MRP of medicine and 14% discount on MRP respectively on medicine and medical consumables failing which the prospective bidder's bid shall be rejected.

6. Referring to the affidavit-in-opposition filed by the respondent Nos. 1 and 2, it is submitted by Mr. Choudhury that as per the resolution in the Executive Committee meeting of ONGC held on 09.12.2014 it was decided for retail procurement of medicine in metros and other big cities introducing the concept of empanelling chain pharmacies . Again the said policy was decided to be applied in the metros as per the meeting of the Executive Committee held on 17.12.2016 and thereafter in the 522nd meeting of the Executive Committee dated 21.02.2019 and its corrigendum dated 13.05.2019 decided to empanel chain pharmacies across all work centers of the ONGC. The said policy decision remained same even in the 537th Executive Committee meeting held on 02.01.2020 and 03.01.2020 i.e. applying only in Metros and big cities but not places like Sivasagar, Nazira, Geleky etc. Disputing the estimated tender value of Rs. 54,49,17,000/- for three years as without any basis it is the contention of Mr. Choudhury that those are inflated amount with an intent to confine the bidding process to the corporate houses only. He has specifically disputed that the running contract value with the petitioners which were awarded to 13 suppliers for different locations as per the earlier tender had gone upto Rs. 36 Crores as totally false and baseless.

7. Mr. Choudhury specifically submits that this court has the jurisdiction to examine exercising the scope of judicial review the decision taken by the respondent ONGC in introducing those clauses in the impugned tender inasmuch the decisions are taken with malafide intention in order to deprive the rights of the writ petitioners and the prospective local bidders. In support of the said submission Mr. Choudhury relies ***Union of India and Others vs. Dinesh Engineering Corporation and Another reported in (2001) 8 SCC 491, Michigan Rubber (India) Limited vs. State of Karnataka and Other reported in (2012) 8 SCC 216 and in Chatradhar Das & Ors. vs. State of Assam & Ors. reported in (2020) 1 GLT 645.***

8. Mr. Sahewalla, learned Senior counsel countering the submission of Mr. Choudhury referred to the policy decisions mentioned in the affidavit-in-opposition. In support of the said policy decisions Mr. Sahewalla referred to the advantage in introducing the retail chain

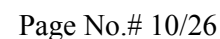
pharmacy system over the prevailing system like dispensing of medicines directly to the beneficiaries of ONGC over the counters with guaranteed supplies of medicines of quality and price assurance, probability of getting higher discounts over the MRP's of medicines and medical consumables with single source of supplies and considerable reduction in administrative hassles of processing the bills. There are instances of cheating and forgery of bills by some vendors i.e. medicine suppliers which had come to the notice of the Management of the ONGC under the present practice followed. Supporting the bidding value criteria stipulated in clause B.1.2 of the impugned tender, Mr. Sahewalla submits that the quality of service as regards availability of drugs, timings of outlets, etc. were found not upto the mark and as such the requirement of 30 pharmacists on the rolls with valid licenses is justified in the backdrop of 12 hours operations for 4 counters, 24 hours round the clock operation etc. The requirement of at least 20 owned operational pharmacy outlets is introduced for ensuring that the bidder is equipped with adequate experience and expertise of handling such a network.

9. It is further submitted that a regular hospital is in operation at Sibasagar with 57 bedded in-patient facility along with an out-patient department (OPD). The said hospital handles 700 cases daily. Supporting the tender conditions further it is submitted by Mr. Sahewalla that under the retail chain pharmacy system only one agency shall operate at Sibasagar hospital and dispensaries at Nazira, Lakwa and Geleky so as to ensure uniformity of service quality at all such locations. The estimated tender value of Rs. 54,49,17,000/- for three years is based on the past trend of consumption of medicines and consumables. Accordingly, the amount for earnest money deposit/ performance bond etc. were worked out based on estimated value stated in the tender as per ONGC's policy for invitation of tenders, which is uniformly applicable for all the work centers of ONGC. The eligibility criteria prescribed in the impugned tender are laid down so as to serve the best interest of the beneficiaries. It is specifically denied that the bid evaluation criteria were set out in order to oust the writ petitioners from participating in the tender process. The retail chain pharmacy system is not only functioning in the metros but successfully functioning at Dehradun centre of the ONGC which is similar to that of Sibasagar centre where the ONGC runs its own

hospital. The criteria set out in the impugned tender are approved by the competent authority of ONGC at the Corporate Office, New Delhi and the ONGC, Assam Asset only implementing the directions of the Management of ONGC on PAN India basis throughout ONGC.

10. Raising specific bar in interfering with the policy decision it is submitted by Mr. Sahewalla that there is no specific violation of Article 14 of the Constitution of India inasmuch as the petitioners have failed to point out any arbitrariness nor unreasonableness. The fixation of value of the tender is entirely within the purview of the executive and the courts have no right to interfere in this process except for striking down such action once it is stood to be arbitrary or un-reasonable. The law is settled that in formulating conditions of tender document and awarding a contract latitude is required to be considered to the said executive unless it is found to be malicious or misuse of its statutory power. It is also stated that certain pre-conditions for tender have to be laid down to ensure that the contractor has the capacity and resource and successfully execute the work. In support of the said contention Mr. Sahewalla relies the decision in ***BSN Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and Others reported in (2006) 11 SCC 548, Shimnit Utsch India Private Limited and Another vs. West Bengal Transport Infrastructure Development Corporation Limited and Others reported in (2010) 6 SCC 303, Indian Railway Catering and Tourism Corporation Limited vs. Indian Railway Major and Minor Caterers Association and Others reported in (2011) 12 SCC 792, Union of India and Others vs. JD Suryavanshi reported in (2011) 13 SCC 167, Jayanta Kumar Bhattacharjee vs Union of India and Ors. reported in (2012) 5 GLT 91 and Michigan Rubber (India) Limited vs. State of Karnataka and Others reported in (2012) 8 SCC 216.***

11. I have heard the learned counsel for the parties. The impugned NIT i.e. e tender No. R-16 GC20003 was dated 27.07.2020. The closing date and time for submission of the bid was fixed at 14.00 hours of 17.08.2020, opening of techno commercial bid on 15.00 hours on 17.08.2020 and last date of submission of physical documents was fixed at 14.00 hours of 17.08.2020. Upon motion, the petitioners were allowed to submit their bids within 26.08.2020 in WP(C) 3230/2020 and 14.08.2020 in WP(C) 3079/2020. The security deposit/ performance



“ *B.1.2 Eligibility and experience of the bidder:-*

1. Turnover of Bidders: Rs. 9,08,19,500/- (Rupees nine crores, eight lakhs, nineteen thousand and five hundred only) or more.

2. *Net-worth of Bidder: Rs. 2,72,45,850/- (Rupees two crores, seventy two lakhs, forty five thousand eight hundred and fifty only) or more.*

The turnover of bidders to be considered for evaluation shall be the average turnover of the last two years as brought out at note (iv) below.

Subject to provisions under second paragraph of Note (i)-a, Net-worth shall be based on the latest Audited Consolidated Annual Financial Statements of the bidder with all its subsidiaries.

In case of Two Bid System, in the un-priced bid, the bidder will submit a 'certificate of compliance (as per format attached at Annexure D relevant to Annexure IV to the effect that the financial parameters of the bidder are equal to or more than required value as applicable. In case the information contained in the 'certificate of compliance,' is found to be incorrect later on after opening of price bids, then their bids will be rejected in case the bidder is not actually meeting the required financial criteria."

12. On the earlier occasion the respondent ONGC invited e-bid under two bid systems for empanelment of pharmacy/ retail outlet for supply of medicines and other related hospital materials at Sibasagar, Nazira, Lakwa and Geleky for a period of three years for ONGC Assam Asset. The closing date and opening date was on 05.01.2018. The scope of the tender on the earlier occasion wherein the petitioners participated is reproduced hereinbelow:

3	Description	Empanelment of pharmacies/ retail outlets for supply of medicines and other hospital related materials/ consumables at Sivasagar, Nazira, Lakwa & Geleky for a period of 03 (three) years for ONGC Assam Asset at the following locations:
	Locations	No. of outlets
	Sivasagar inside ONGC Hospital premises	1 (one)
	Sivasagar Town	5 (five)
	Nazira inside ONGC Colony	1 (one)
	Nazira Town	4 (four)

		Lakwa	1 (one)
		Geleky	1 (one)

13. The security deposit/ performance security is also reproduced hereinbelow:

12	Security deposit/ performance security/performance bank guarantee	<p>Required to be submitted by the successful bidder(s)</p> <p>(i) Amount: 12.2 % of the estimated annualized contract value.</p> <p>a. INR 54,90,000/- for Sivasagar insider Hospital premises.</p> <p>b. INR 10,98,000/- for Sivasagar Town</p> <p>c. INR 14,64,000/- for Nazira inside ONGC Colony</p> <p>d. INR 3,66,000/- for Nazira Town</p> <p>e. INR 4,39,200/- for Lakwa</p> <p>f. INR 2,92,800/- for Geleky.</p> <p>(ii) Validity: 60 days beyond contract period.</p>
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14. The impugned NIT dated 27.07.2020 is also for empanelment of retail chain pharmacy for three years for ONGC Assam asset and as hereinabove stated security deposit/ performance bond is 12.2 % of the annual contract value (estimated) at Rs. 54,49,17,000/- for three years. The Scope of the work in the impugned NIT is reproduced hereinbelow:

“1. The Contractor shall open, maintain and operate outlets for medicine and medical consumables at the following locations:

- (i) ONGC Hospital, Sivasagar, Assam*
- (ii) ONGC Dispensary, Nazira, Dist- Sivasagar, Assam*
- (iii) ONGC Dispensary, Lakwa, Dist-Charaideo, Assam*
- (iv) DSA Geleky, Dist-Sivasagar, Assam”*

15. Mr. Choudhury wanted to project that the scope of work remained same as the one mentioned in the earlier NIT in which the petitioners participated and reproduced hereinabove and as there are no changes in the scope of the work the stipulation of the aforesaid clauses in the impugned NIT is with an intention to oust the participation of the petitioners making ways for corporate houses to participate. This submission is countered by Mr. Sahewalla as referred hereinabove. It is submitted that the proposed retail chain pharmacy system has some advantage over the prevailing system and to that effect Mr. Sahewalla reiterated the statements in the affidavit-in-opposition of the respondents that in the retail chain pharmacy system medicines are being dispensed to the beneficiaries of the ONGC with guaranteed supply of medicine of quality alongwith price assurance. Further introduction of the present retail chain pharmacy system would check cheating and forgery of bills by some vendors i.e. medicine suppliers/ dealers which came to the notice of the management of ONGC and in support of the said submission he also reiterated the statement made in the affidavit-in-opposition of respondents.

16. The respondent ONGC being the instrumentality of the Government if it chooses to deal with any person must be in conformity with the law without any voidness as referred in Article 13 of the Constitution of India. Clause 6 of the Article 19 of the Constitution does not prevent the State from making any law protecting the interest of the general public and imposing reasonable restriction on the exercises of the right conferred under Article 19(1)(g) and / or to prescribe professional technical qualification for carrying on in occupation, trade or business. The term “reasonable” cannot be defined but the same must be examined on the factual matrix which varies from one case to another. For the said purpose the court has to look into the nature of the right alleged to have been infringed and the underlying purpose of

imposing such restriction. It is also the duty cast on the court to consider the intent of the instrumentality or the Government for removal of any hindrances sought to be removed by the alleged infringement of the right of the petitioners. In order to give a finding the court must consider the nature of business involved wherein the petitioners alleged such infringement of right. The court is also bound to consider the larger public interest sought to be followed as a consequence of the infringement of the right alleged by the petitioners. The restriction must bear reasonable relation with the object what to be achieved by introducing the impugned conditions which otherwise is not required in a general tender involving the business in which the petitioners are involved. The court ought to have strike out a balance before holding that such infringement of the right of the petitioners are violative of Article 19(1)(g) of Constitution of India.

17. Both the learned counsel relied ***Michigan Rubber (India) Limited Vs. State of Karnataka and Others reported in (2012) 8 SCC 216 (Supra)*** wherein the Hon'ble Apex Court relying the ratio laid down in ***Jagdish Mandal vs. State of Orissa and Others reported in (2007) 14 SCC 517*** held as follows:

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essences and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the 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. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tender, in those circumstances, the interference by courts is very limited;

© In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the

work; and

(e) if the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. 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"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

18. Mr. Sahewalla contended that the scope of judicial review is too limited moreso in respect of policy making and to that effect relied **Census Commissioner and Others Vs. R Krishnamurthy reported in (2015) 2 SCC 796** wherein the Hon'ble Apex Court accepted the ratio laid down by the Apex Court in various decision and amongst them the following is reproduced hereinbelow:

"30. In *Premium Granites v State of T.N*, while dealing with the power of the courts in interfering with the policy decision, the court has ruled that: (SCC P.715, para 54).

"54. It is not the domain of the court to embark upon uncharted ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy could be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right."

31. In *MP Oil Extraction v State of MP*, a two Judge Bench opined that (SCC p611, para 41)

"41.The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State."

32. *In State of MP v Narmada Bachao Andolan*, after referring to the *State of Punjab v. Ram Lubhaya Bagga*, the court ruled thus (SCC pp. 670-71, para 36)

“36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (see Ram Singh Vijay Pal Singh v. state of UP, Villianur Iyarkkai Padukappu Maiyam v. Union of India and State of Kerala v. Peoples Union for Civil Liberties.)”

19. Relying ***Jayanta Kumar Bhattacharjee vs Union of India and Ors. reported in (2012) 5 GLT 91*** (supra), it is submitted by Mr. Sahewalla that the award of contract is essentially a commercial transaction and the authority calling for the tender is the best judge and it is not open for the court to say whether the condition prescribed in the tender on consideration could have been improved and made fairer. He also relied ***Union of India and Others vs. JD Suryavanshi reported in (2011) 13 SCC 167*** (supra) and submits that the scope of judicial review of Governmental policy is not similar as an appellate authority examining the correctness, suitability and appropriateness of a policy nor courts are the advisors to the executive of matters of policy which the executives are entitled to submit. The only scope under judicial review when examining the policy of Government is to see whether it violates the fundamental right of the citizens or it oppose to the provision of the Constitution. Court cannot interfere with the policy either on the ground that it is erroneous or on the ground that better alternative is available.

20. The said submission in respect of the scope of judicial review and its scope is elaborated by Mr. Choudhury relying ***Union of India and Others vs. Dinesh Engineering Corporation and Another reported in (2001) 8 SCC 491*** which is reproduced hereinbelow:

“12..... On behalf of the appellants, it has been very seriously contended before us that the decision vide letter dated 23.10.1992 being in the nature of a policy decision, it is not open to courts to interfere since policies are normally formulated by experts on the subjects and the courts not being in a position to step into the shoes of the experts, cannot interfere with such policy matters. There is no doubt that this

Court has held in more than one case that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. It is with this limited object if we scrutinise the policy reflected in the letter dated 23.10.1992, it is seen that the Railways took the decision to create a monopoly on proprietary basis on EDC on the ground that the spares required by it for replacement in the governors used by the Railways required a high degree of sophistication, complexity and precision, and in the background of the fact that there was no party other than EDC which could supply such spares. There can be no doubt that an equipment of the nature of a spare part of a governor which is used to control the speed in a diesel locomotive should be a quality product which can adhere to the strict scrutiny/standards of the Railways, but then the pertinent question is : has the Board taken into consideration the availability or non-availability of such characteristics in the spare parts supplied by the writ petitioner or, for that matter, was the Board alive to the fact that like EDC the writ petitioner was also supplying the spare parts as the replacement parts for the GE governors for the last over 17 years to the various Divisions of the Railways. A perusal of the letter dated 23.10.1992 does not show that the Board was either aware of the existence of the writ petitioner or its capacity or otherwise to supply the spare parts required by the Railways for replacement in the governors used by it, an ignorance which is fatal to its policy decision. Any decision be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an arbitrary decision. If it is so then be it a policy decision or otherwise, it will be violative of the mandate of [Article 14](#) of the Constitution.”

21. Relying the same decision, Mr. Choudhury submits that any decision be it a simple administrative decision or a policy decision, if taken without considering the relevant fact can only be termed as an arbitrary decision even it be a policy decision or otherwise it will be violative of Article 14 of the Constitution. Accordingly, as per his submission if the decision is arbitrary this court can enter even if the decision pertains to a policy matter.

22. The petitioners are presently carrying on business with the respondent ONGC. On the basis of the clauses referred hereinabove stipulated in the impugned NIT the petitioners complained in the writ petitions that the intent in introducing the said stipulations are in order to oust them thereby leaving only a special class of persons in the field to participate in the

tender process. On the other hand the concept of introducing the chain pharmacy system replacing the existing practice is also required to be considered. The respondent ONGC in its 459th Executive Committee meeting held on 09.12.2014 introduced retail procurement for medicines from reputed pharmacy chains in the Metros and other big cities where pharmacy chains were operating. The existing system of providing medicines not available in-house on credit through empanelled chemists on Health Information System generated prescription was allowed to continue i.e. the existing one in ONGC's Assam asset. The concept of chain pharmacy as per the 459th EC Meeting held on 09.12.2014 and the methodology was suggested for all Metros and other cities of ONGC work centres on uniform basis subject to availability of such chains which is relevant.

23. The Executive Committee in its corrigendum dated 13.05.2019 to the 522nd meeting dated 21.02.2019 directed for empanelment of reputed pharmacy chain across all work centres to dispense medicines. There was no consideration by the Executive Committee as to the availability of pharmacy chain across all work centres like the one under Assam asset. But in order to attract such pharmacy chain from other places it was decided to relax the condition of performance Bank Guarantee. The said resolution is extracted hereinbelow:

“EC further directed that reputed pharmacy chain be empanelled across all work centres to dispense medicines and the condition of performance Bank Guarantee be waived off if the same is restricting the participation of vendor. EC also directed to present an update on experience of purchase of medicine through pharmacy brands in terms of beneficiary experience, savings etc.”

Similar directives were issued in the 537th Executive Committee meeting held on 02.01.2020 and 03.01.2020.

24. The introduction of waiver of performance Bank Guarantee in order to attract the vendor itself indicates that the Executive Committee is fully aware that pharmacy chains are too scant leaving aside a few. So the pharmacy chains already under contract with the respondent ONGC are anticipated to participate in the various NITs including the impugned one across all the work centres irrespective of Metro, big cities and even a small town like

Sivasagar, Galeky, Nazira etc. This would result in monopolizing the contract under the instrumentality of the Government distributing the largesse to a few selected person or entity. This is not the intent of Article 19(1)(g) of the Constitution of India.

25. Whether on the basis of the aforesaid policy decision of the ONGC the tender conditions under challenge can be said to be reasonable. The respondent ONGC issued NIT for empanelment of pharmacies/ retail outlets for supply of medicines and other Hospital related materials/ consumables at Sivasagar, Nazira, Lakwa and Galeky for a period of three years earlier as hereinabove stated wherein some of the petitioners participated and upon successful till date they are continuing with the contracts. The detailed comparison of the scope of works in both the NITs is extracted hereinbelow:

Scope of work (earlier one)	Scope or works (soW) (impugned one)
<p>1. Agency at their retail counter will provide genuine medicines and other hospital related materials/ consumables only to ONGC, CISF Employee & eligible beneficiaries against prescribed indent (Local Purchase Slip) duly issued & signed by authorised doctors and pharmacists of ONGC Health Services (Whose specimen signatures will be made available with the agency only) at Sivasagar, Nazira, Lakwa & Galeky.</p> <p>Medical section will issue separate indent (Local Purchase Slip) for medicine and separate indent (Local Purchase Slip) for other hospital related materials/ consumables.</p> <p>2. The agency will prepare indent wise (Local Purchase Slip) bill in quadruplicate (14 nos.) indicating there in the manufacturer name, batch no. (linked with master invoice of parent company, if required) & expiry date for each medicine and each other hospital related material/ consumable separately. This bill should contain copy of indent (Local Purchase Slip) issued to patient by Medical Section, duly signed by the receiver of the medicine/ other hospital related material/ consumable on the indent as acknowledgement of receipt of the same.</p> <p>3. In case indented medicines and other hospital related materials/ consumables are not</p>	<p>1. The CONTRACTOR shall open, maintain and operate outlets for medicine and medical consumables at the following locations:</p> <p>(i) ONGC Hospital, Sivasagar, Assam</p> <p>(ii) ONGC Dispensary, Nazira, Dist- Sivasagar, Assam</p> <p>(iii) ONGC Dispensary, Lakwa, Dist-Charaideo, Assam</p> <p>(iv) DSA Galeky, Dist- Sivasagar, Assam</p> <p>2. ONGC will provide 600 sq. ft. (approx) of covered space at ONGC Dispensary, Nazira; around 100 sq. ft each of covered space at Lakwa and Galeky. CONTRACTOR shall arrange proper refrigeration, air conditioning & cold chain provision and utilize the space in a professional like manner for storage of medicines and other related materials. Adequate space shall be provided for visitors and for computerized billing area. Dispensing of medicine should be done by qualified Pharmacists (having diploma/ degree in pharmacy).</p> <p>3. There should be 5 (five) to 6 (six) medicine dispensing counters at ONGC Hospital, Sivasagar with provision for fast forward/ emergency medicine dispensing counter. 2 (Two) to 3 (three)</p> <p>Such counters should be provided at ONGC Dispensary, Nazira. One such counter shall be provided each at Lakwa Dispensary and Galeky DSA. Each counter shall be equipped with separate computerized billing system on real time basis to minimize the waiting time for beneficiaries in getting</p>

<p>available in stock, the same will be arranged from other sources & supplied within 48 hours by the agency.</p> <p>4. Patient/ employee should be given medicine against the prescribed indent (Local Purchase Slip) only after he/ she has duly signed it.</p> <p>5. Agency should be able to provide 24 hours services, whenever the need arises.</p> <p>6. For the outlets inside the Sivasagar and Nazira Colonies, Agency should pay monthly rental to Estate Section, Assam Asset, ONGC, Premises and the electrical charges at actual in case they are selected. The successful bidder has to install the separate meter at the time of mobilization.</p> <p>7. Medicines and other hospital related materials/ consumable will be required to be issued on a retail purchase slip duly signed and stamped by the authorised signatory. To check the authenticity of the signature of the doctor issuing the prescription will be the sole responsibility of the Contractor. ONGC will not pay any compensation for sale of medicines against the prescription issued by an authorised person.</p>	<p>the medicines etc. the counters shall have the facility of displaying the token number of the patient for smooth disbursement of medicine. The counters should have bar coding facility and latest version computer machines installed with proper pharmacy operating module software.</p> <p>All the counters should be manned by qualified pharmacist's identity with valid license should be displayed at the counters. Pharmacist at the dispensing counter should be well behaved and should deal with the beneficiaries with good etiquettes. In case of a complaint against a pharmacist, ONGC shall ask the CONTRACTOR to replace such pharmacist and the CONTRACTOR shall have to replace such pharmacist within 24 hrs. of such limitation.</p> <p>4. The CONTRACTOR shall operate the retail pharmacy counters (other than emergency counters) from 8 am to 8 pm, 6 days in a week in ONGC Hospital Sivasagar, Nazira Dispensary and Lakwa Dispensary. However, the CONTRACTOR shall operate at least one outlet on ONGC Hospital Sivasagar, Nazira Dispensary and Lakwa Dispensary on 24 hour basis throughout the year which will be functional during holidays and festivals. For DSA Galeky, the CONTRACTOR shall operate the counters from 8 am to 8 pm every day, seven days a week. For emergency purpose at DSA Geleky, medicines to be made available as and when required.</p>
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26. From the aforesaid comparison there is no such marked difference. A specific mention is made in the impugned NIT that there should be 5 (five) to 6 (six) medicine dispensing counters at ONGC Hospital, Sivasagar with provision for fast forward/ emergency medicine dispensing counter. Similar counters were also prescribed earlier within the scope of work at ONGC Dispensary, Nazira, Lakwa and Galeky but with lesser number of counters. In the earlier NIT as stipulated within the scope of work, 24 hours services were required. 48 hours time was granted in case medicines and other hospital related materials/ consumables were not available in stock for arranging from other sources by the successful agency. Even if the chain pharmacy is introduced but non availability of medicine would necessarily require time to supply by the chain pharmacy as the said concept does not exist at Sivasagar or any other

places within the scope of work. No doubt the respondent ONGC wanted to provide better services to its employees but no convincing grounds are shown for introducing the chain pharmacy system at the cost of local prospective small time businessmen in the distribution/ selling of medicines. The affidavit-in-opposition is totally silent in respect of the benefits gained or going to be gained after introduction of the concept of chain pharmacy vis-à-vis the existing system followed. Merely in order to check the fraudulent practice that too without any convincing evidence under the Assam asset cannot be a ground to support the practice of monopolization even in the process of tender. If it is permitted the concept of "tender and the process of evaluation" stands vitiated.

27. Article 19(1)(g) of the Constitution of India enshrines the concept of "level playing field". This concept gives an arena for competition amongst the equally placed competitors. Instead of providing space for competition to the competitors if decisions by the Executive Committee of the respondent ONGC resulted in unequal and discriminatory treatment it would violate the said concept of "level playing field". The local businessmen have an aspiration for growth and a fundamental right to earn their livelihood through the practice of trade of selling / supplying medicines etc. Respondent ONGC is bound to look and protect the said right of the local businessmen inasmuch as they are also the citizens of this country and their fundamental rights stand protected by the Constitution.

28. Mr. Choudhury, learned Senior counsel for the petitioners submits that the earnest money deposit/ bid security in the earlier tender and the performance bank guarantee to be submitted by the successful bidder was Rs. 12.2 % of the estimated annualized value which comes to Rs. 54,90,000 for Sibasagar inside hospital premises, Rs. 10,98,000/- for Sibasagar Town, Rs. 14,64,000 for Nazira ONGC colony, Rs. 3,66,000/- for Nazira Town etc. but in the fresh tender which is impugned, the earnest money deposit is fixed at Rs. 49,75,000/- and the security deposit/ performance bond is stipulated as 12.2% of the annual contract value i.e. Rs. 2,21,59,958 the estimated tender value being Rs. 54,49,17,000/- In the bid evaluation criteria B.1.2.1(a)/1(iv) the bidder is required to execute at least one such contract of similar nature which the petitioners does not possess and for the same cannot participate in the tender process. Further it is submitted that so far as the estimated three years annualized

value is concerned as stated in clause 5(A) (e) of Annexure III (B) special conditions of contract although the estimated tender value is shown as Rs. 54,49,17,000/- , it is also stated that the estimated value is indicative only and no minimum guaranteed business is assured.

29. In response, Mr. Sahewalla states that under the retail chain pharmacy system, only one agency shall operate at Sivasagar Hospital and the dispensaries at Nazira, Lakwa & Galeky so as to ensure uniformity of service quality at all such locations. The estimated tender value of Rs. 54,49,17,000/- is for three years which is based on past trend of consumption of medicines and consumables. Accordingly, the amount for earnest money deposit/ bid bond and the security deposit/ performance bond were worked out based on estimated value put to tender as per ONGC's policy for invitation of tenders which is uniformly applicable for all the work centres of ONGC. It is further submitted that the running contract presently awarded to a total 13 number of suppliers (retail chemists) for different locations and the contract value of all these respective contracts add upto Rs. 36 Crores, although the individual contract value is less.

30. I have given due consideration to the submissions made by the learned counsel. In the earlier tender wherein the petitioners participated and were successful, the estimated annualized contract value in all the centres if taken up together comes to an amount of Rs. 91,50,000/- On the other hand the EMD/ bid security/ bid bond (bank guarantee amount) were i) INR 10,98,000/- for Sivasagar, ii) INR 3,51,360/- for Nazira, iii) INR 2,63,520/- for Lakwa and iv) INR 1,75,680/- for Galeky. On the other hand the successful bidders were required to deposit the performance bank guarantee etc an amount of 12.2% of the estimated annualized contract value which is extracted hereinbelow

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12	Security performance Performance Guarantee	Deposit/ security/ Bank	Required to be submitted by the successful bidder(s). (i) Amount 12.2% of the estimated annualized contract
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		<p>value.</p> <p>a) INR 54,90,000/- for Sivasagar inside Hospital premises.</p> <p>b) INR 10,98,000/- for Sivasagar Town</p> <p>c) INR 14,64,000/- for Nazira inside ONGC Colony</p> <p>d) INR 3,66,000/- for Nazira Town</p> <p>e) INR 4,39,200/- for Lakwa</p> <p>f) INR 2,92,800/- for Galeky</p>
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31. The EMD/ bid bond in the impugned tender is Rs. 49,75,000/- and security deposit/ performance bond to be deposited by the successful bidders is 12.2% of the annual contract value, the estimated tender value for three years being Rs. 54,49,17,000/-. From the aforesaid figures there is no dispute that the business and/ or turnover of medicines which was assessed in the year 2018 at the time of issuance of the earlier NIT had grown up. But, it is not believable that the estimated tender value for three years had gone up from Rs. 91,50,000/- (the summation of the estimated annualized contract value as shown in the earlier tender) to the annual value of Rs. $(54,49,17,000 \div 3) = \text{Rs.} 18,16,39,000/-$. This projection must have some basis more so when the respondent ONGC on its own protected itself by stipulating in the NIT that the said figure is indicative only without any minimum guaranteed business. As there is no convincing materials placed on record I am convinced to hold that the inflation of the three years estimate to Rs. 54,49,17,000/- as the tender value has no basis but with an ulterior motive to oust the present petitioners. There are no reasons brought on record by the respondent ONGC nor the manner of projection. There is no averment in the affidavit by ONGC that there were expansion of its business necessitating it to project the said tender value nor anything new coming up requiring such projection.

32. From the aforesaid discussion it can be concluded that the respondent ONGC failed to consider that there does not exist any chain pharmacy at Sibasagar or any of the locations within the scope of work nor under ONGC's Assam asset. The annualized turnover is also not supported by any believable document wherefrom it can be inferred that the projection in the impugned tender is the proper projection within the scope of work of the impugned tender. It is clear from the policy decision referred hereinabove that the respondent ONGC is on the move to monopolise the tender process by introducing the chain pharmacy system at the cost of the various businessmen dealing with business of medicines under the ONGC's Assam Asset. There is a specific violation of Article 14 inasmuch as the criteria referred by the respondents in this writ petition cannot withstand the test of reasonableness and accordingly in my considered opinion introduction of the said impugned clauses are unconstitutional. In ***Reliance Energy Ltd. and Another vs. Maharashtra State Road Development Corpn, Ltd. and others reported in (2007) 8 SCC*** the Apex Court held as follows:

"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. [Article 14](#) of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like [Article 21](#) of the Constitution. The said [Article 21](#) refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho vs. State of T. N., [Articles 21/14](#) are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing [Article 19\(1\)\(g\)](#) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When [Article 19\(1\)\(g\)](#) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in [Article 19\(1\)\(g\)](#) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied

in [Article 19\(1\)\(g\)](#). Time has come, therefore, to say that [Article 14](#) which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with [Article 21](#) which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith, commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. [Article 14](#) applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."

33. The respondent ONGC is operating within the location mentioned in the impugned tender since long. The local people had to sacrifice their land for the operation to be carried out by ONGC while exploration for petroleum and natural gas is being carried out. The persons within the said locations are eking out their livelihood having business relation with respondent ONGC by rendering various services through their business. On the basis of the said business the persons within the vicinity of the said locations are maintaining their families and themselves and if Article 21 of the Constitution refers to "right to life" it includes opportunity and Article 21/14 are the heart of the chapter of fundamental right covering various aspect of life as held hereinabove in Reliance Energy Ltd. and Another (Supra). The "level playing field" is also important concept within Article 19(1)(g) of the Constitution. If the aforesaid ratio is taken into consideration and search for an answer against the question whether the process adopted by the respondent ONGC is arbitrary the same is yes. Moreover no public interest would be subserved by the said restrictive stipulations in the impugned NIT inasmuch as the respondent failed to show the deficiencies going to be removed in that regard and cropped up in the present practice followed. In my considered view the stipulations referred hereinabove more specifically Clauses B. I.2 (eligibility and experience of the bidder) in totality are required to be held as unconstitutional on the ground that the intent in introducing the said criteria is to oust a category of businessmen without any reasonable grounds which cannot be permitted by this court. The ONGC cannot make any policy decision without considering the local situation prevailing within its various working places including Assam asset. The chain pharmacy system was originally taken as a policy decision of the ONGC to introduce only in the work places in the metros and large cities. The



said concept was of the year 2014 and within a period of six years the location in the impugned NIT cannot be held to transform from the status of small town to a metro in order to apply the said policy conceived in the year 2014.

34. Accordingly these writ petitions are allowed thereby setting aside and quashing tender notice No. R16GC20003 dated 27.07.2020 and further held that bid evaluation criteria under clauses B.1.2.1 (a)1(i) and B.1.2.1 (a) 1(ii), B.1.2.1(a)-(iv) of the said tender is arbitrary, discriminatory and violative of the fundamental and Constitutional rights of the petitioner. Interim order stands vacated.

JUDGE

Comparing Assistant