


**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Civil First Appeal No. 339/2020

1. The Rajasthan Medical Services Corporation Ltd., Rhstdp Block Swasthya Bhawan Through Its Executive Director, Rajasthan Medical Services Corporation Ltd., Jaipur.
2. The Managing Director, Rajasthan Medical Services Corporation Ltd., Rhstdp Block Swasthya Bhawan, Tilak Marg, Jaipur (Rajasthan).

----Appellants

Versus

M/s Bal Pharma Ltd., Corporate Office At 5Th Floor, Lakshminarayan Complex, 10/1, Palace Road, Bangalore-560052 (Karnataka) Through General Manager- Internal Audit Shri Ravindra Kumar Kothari, S/o Late Shri A.r. Kothari

----Respondent

Connected With

D.B. Civil First Appeal No. 650/2019

M/s Bal Pharma Limited, Corporate Office 5Th Floor, Laxminarayan Complex, 10/1, Palace Road, Bangalore-560 052 (Karnataka) Through General Manager Internal Audit Shri Ravindra Kumar Kothari S/o Late Shri A.r. Kothari

----Appellant

Versus

1. Rajasthan Chikitsa Sewa Nigam, Jaipur Through Executive Director (Quality Control) D-Block, Swasthya Bhawan, Tilak Marg, Jaipur Rajasthan
2. Managing Director, Rajasthan Chikitsa Sewa Nigam, Jaipur, D-Block, Swasthya Bhawan, Tilak Marg, Jaipur Rajasthan

----Respondents

For Appellant(s) : Mr.Gunjan Pathak with
Ms.Ishita Rawat and
Mr.Aditya Bohra

For Respondent(s) : Dr.Prakash Chandra Jain with
Mr.Roshan Vishwakarma

HON'BLE MR. JUSTICE AVNEESH JHINGAN
HON'BLE MR. JUSTICE BHUWAN GOYAL

Judgment

Reserved on: **28/04/2025**

Pronounced on: **05/05/2025**

AVNEESH JHINGAN, J

1. These two appeals are being decided by common order as the facts and issues involved are similar. For convenience, the facts are being taken from D.B.Civil First Appeal No.339/2020.

2. The appeal (D.B. Civil First Appeal No. 339/2020) under Section 13 of the Commercial Courts Act, 2015 is directed against the judgment and decree dated 20.05.2019 passed by the Commercial Court No.2, Jaipur Metropolitan decreeing the suit of M/s Bal Pharma Limited- respondent-plaintiff (hereinafter referred to as 'respondent').

2.1 The appeal (D.B. Civil First Appeal No. 650/2019) is filed by the respondent raising a grievance that the suit was decreed but no cost has been awarded.

3. The relevant facts are that the appellants-defendants (herein after referred to as 'appellants') invited E-bids for supply of medicines in the year 2013-14. In pursuance to the bidding, respondent was L1 and contract dated 12.08.2013 was entered into by the parties. The respondent furnished a performance bank guarantee to the tune of Rs.10,16,794/-. A purchase order dated 27.08.2013 was placed on respondent for supply of eighty eight lacs and fifty thousand units of Omeprazole within sixty days. On 02.09.2013, the respondent sent E-mail to the appellants showing inability to execute the purchase order due to unavoidable/technical reason. The appellants exercising right

under clause 13 (9) made alternative arrangements of purchase on risk and cost of the respondent. The differential amount was recovered from the respondent by en-cashing performance bank guarantee and adjusting balance amount from subsequent purchase order. The suit filed by the respondent for recovery and declaration was decreed, hence, the present appeal.

4. Learned counsel for the appellants contends that respondent had not opted out as per the conditions stipulated in clause 9 (5) (g). The argument is that for opting out the only condition was that the purchase order exceeded production capacity as declared in the bid document and there would be delay in executing it.

4.1 Learned counsel relies upon decision of the Supreme Court in case of **Agmatel India Private Limited vs. ResourSYS Telecom And Ors.** reported in **(2022) 5 SCC 362** to argue that interpretation of author of tender document should prevail if it is in consonance with language of the tender document.

5. Learned counsel for the respondent submits that purchase order was returned within seven days from the date of the order and conditions under clause 9(5)(g) were complied with. It is argued that before expiry of sixty days to supply medicines, the appellants made purchase from the open market. In the alternative, it is argued that medicines were not purchased from L2 & L3 but from open market on exorbitant rate.

6. Before proceeding further, it would be relevant to quote clause 9 (5) (g) and 13(9):

“Clause 9 (5) (g)

*The supplier upon receipt of the purchase order
deems that the purchase order exceeds the production*

capacity declared in the bid documents and the delay would occur in executing the order, shall inform the RMSC immediately without loss of time and the purchase orders shall be returned within 7 days from the dates of the order, failing which the supplier is estopped from disputing the imposition of liquidated damages, fine for the delayed supply.

Clause 13(9)

If Bidder fails to execute the supply within the stipulated time, the ordering authority is at liberty to make alternative purchase of the items of drugs and medicines for which the purchase orders have been from any other sources or in the open market or from any Bidder who might have quoted higher rates at the risk and the cost of the supplier and in such cases the Ordering Authority/Bid inviting authority has every right to recover the cost and impose penalty as mentioned in Clause 19, apart from terminating the contract for the default."

7. It is an admitted fact that apart from the circumstances mentioned in clause 9(5) (g), the supplier cannot return purchase order. The requisites of clause 9(5) (g) are:

- (i) that purchase order exceeds the production capacity as declared in the bid document;
- (ii) that information of return of purchase order is to be given within seven days from the date of the order.

8. In case the purchase order is not returned in compliance of clause 9 (5) (g) and on failure of supplier to supply medicines within the specified time the appellants were at liberty to make alternative purchase from other bidders or from the open market,

at the risk and cost of the supplier. The appellants exercised the right under clause 13 (9).

9. It would be relevant to reproduce contents of E-mail sent by the respondent:-

"As per condition given in tender document, we would like to inform you that we unable to execute above said order due to some unavoidable/technical reason. We regret and feel sorry for the inconvenience occurred due to non-supply."

9.1. The respondent showed inability to execute the purchase order due to unavoidable/technical reason. Albeit, the information was sent within seven days from the date of the purchase order.

10. The language of clause 9 (5) (g) is clear that only reason available for returning the purchase order is that the purchase order exceeds production capacity as declared in the bid document but this was not the reason mentioned in the E-mail sent by respondent.

11. It may be noted that it is not the case of the respondent even before this Court that the purchase order was beyond production capacity as declared in the bid document.

12. The matter needs to be considered from another angle. The schedule attached to NIT gave a list of drugs to be supplied with specification and estimated quantity to be supplied. The purchase order was to supply eighty eight lacs and fifty thousand capsules whereas, estimated quantity as made in the schedule was six crore seventy three lacs. In other words, the purchase order was approximately 15% of the estimated tender quantity as mentioned in the schedule.

13. The Supreme Court in *Agmatel India Private Limited (supra)* reiterated the earlier decision in case of *Galaxy Transport Agencies vs. New J.K. Roadways, Fleet Owners & Transport Contractors* reported in (2021) 16 SCC 808 wherein it was held:

“**25.** This Court referred to various decisions on the subject and stated the legal principles as follows :

14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818, this Court held:

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

14. The contention that purchases made before expiry of sixty days is noted to be rejected. The sixty days period would have come into operation if the respondent had to supply medicines as per purchase order. Whereas, on the seventh day from the date of

purchase order it was returned. Once the appellants came to the conclusion that return of the purchase order was not in consonance of clause 9 (5) (g), the appellants were at liberty under clause 13 (9) to make alternative purchases at the risk and cost of the respondent.

15. The contention that purchases were not made from L2 & L3 but from open market at double price, deserves rejection. The Commercial Court after appreciating the evidence adduced recorded finding that purchases were made from government approved supplier with whom there was rate contract.

16. Another angle is that the respondent cannot rely upon the rates quoted by L2 & L3 to argue that purchase should have been made at those rates as bidden by L2 & L3. After being unsuccessful in bidding, the rates quoted by L2 & L3 can neither be yardstick for determining the purchase price nor L2 & L3 are bound by the rates quoted in the tender. Moreover, the word used in clause 13(9) is 'or' meaning thereby that the appellants could have made purchase from any other source or from open market or from any other bidder who might have quoted higher rates. There was no requirement of making purchases only from L2 & L3.

17. For the reasons mentioned above, the appeal No.339/2020 is allowed. The impugned judgment and decree dated 20.05.2019 is quashed. In view of quashing of judgment and decree dated 20.05.2019, the appeal No.650/2019 for allowing of costs while allowing the suit is dismissed.

(BHUWAN GOYAL),J

(AVNEESH JHINGAN),J