MUNASINGHE
V.
DR. JOE FERNANDO AND OTHERS

SUPREME COURT.
FERNANDO, J.
DHEERARATNE, J. AND
WIJETUNGA, J.
S.C.APPLICATION NO. 365/93.
NOVEMBER 21 AND DECEMBER 06, 1994.

Fundamental Rights - Discrimination - Constitution, Article 12(1) - Tender procedure - Validity of tender procedure when there is only one potential bidder.

A Cabinet appointed Tender Board called for bids for the supply of 25 metric tonnes of Lambda-Cyhalothrin 10% water dispersible powder, an insecticide for use in the Anti - Malaria Campaign of the Ministry of Health. The 6th Respondent, Imperial Chemical Industries (plc) a company incorporated in the United Kingdom ICI was the only tenderer. The Petitioner, who is the accredited agent in Sri Lanka of Chemagri International Inc. a company incorporated under the laws of the State of Florida, and carrying on business *inter alia* as a supplier of anti-malarial insecticides filed this application complaining that the invitation for bids was an infringement and that the proposed award of the tender to the 6th respondent was an imminent infringement of its fundamental right under Article 12(1) of the Constitution.

The grounds set up were:

(1) All other comparable anti-malarial insecticides were excluded from the tender without due cause.

(2) Only the 6th Respondent and its nominees and agents were able to tender for Lambda-Cyhalothrin because it was a patented product, and that even the tender specifications were tailored to suit the packing requirements of the 6th Respondent by asking for supply in units of 62.5 grams.

Held:

(1) In calling for bids the Respondents did not exclude all other anti-malarial insecticides and 62.5 gram packs were specified for convenience of use as this was the quantity required for one tank charge and obviated the necessity of measuring out the quantities in the field.

(2) The selection of Lambda-Cyhalothrin was after a village scale trial. WHO had approval Lambda-Cyhalothrin and this approval was sufficient for village scale' testing and purchase although the 'hut test' had been done before the WHO approval. There was no impropriety in the hut test.

(The testing process involves two stages: First, the insecticide is subjected to a "hut" test, using a hut specially built for the purpose. If the results are promising then a "village scale" trial is conducted by spraying the insecticide on selected samples of houses in a highly malarial area).

Observations proved that Lambda-Cyhalothrin was more effective because there was an unacceptable degree of resistance to Malathion (which had superseded DDT).

(3) The petitioner failed to establish that the selection of Lambda-Cyhalothrin powder was flawed or arbitrary or discriminatory.

(4) The bids were invited using the generic name of the active ingredient as 10% Lambda-Cyhalothrin water dispersible powder.

(5) ICI or associate companies had patents in about 22 countries, but not in Sri Lanka, in respect of

(a) cyhalothrin which was the starting material with which Lambda-Cyhalothrin was produced.

(b) two processes for making Lambda-Cyhalothrin and

(c) lambda-Cyhalothrin itself.

ICI had a much more valuable but secret and unpublished process for making Lambda-Cyhalothrin but enjoyed no patent protection for it.

(6) The petition failed to establish that there was a legal obstacle - though undoubtedly there were serious practical difficulties - in the way of any person, not associated with ICI, submitting a bid.

(7) Bids had been invited from "formulators" namely firms or organisations which were engaged in making the finished product; not from "manufacturers" (i.e. producers of the active ingredient), or dealers in the finished product. Formulators were required to submit their certificates of quality: one from the manufacturer as to the quality of the active ingredient which he supplied to the formulator and the other from the formulator as to the quality of the finished product.

Only two ICI associate companies were in fact able to tender. However the fact that there can be only one qualified tenderer does not mean that there is a denial of equality to other persons, for the reason that such persons are not qualified and so they are not in the same class. It is true that the sole qualified person thereby enjoys a monopoly, but that only means that he belongs to a class which consists of one person (and, in this case, which was properly constituted). Since the impugned act dealt with the entire class, there was no discrimination among members of the class. And, where as in this case, the right is reserved to annul the bidding process and to reject all bids, it is possible to avert any financial loss which would result from accepting an unduly high bid submitted by a lone tenderer.

(8) The situation in which there is only one potential supplier is not in any way comparable to the situations in which FR 799(2) permits a deviation from normal tender procedures. Resort to tender procedure would not thwart the purpose of getting the product and would have the advantage of openness. The quality of the product would be the same whether it is obtained through public tender or private negotiation. There was no good reason here to deviate from tender procedures.

Cases referred to :

1. *Ceylon Paper Sacks v. JEDB* - SC 220/92A SCM 2.7.93
2. *Tatty de Silva, v. Atukorale* [1993]1 Sr LR 283
3. *Jayawardena v. Dharmaratna* (1951) 54 NLR 424
4. *Julius v. Bishop of Oxford* (1880) 5 AC 214

APPLICATION for relief for infringement of fundamental rights guaranteed by Article 12(1) of the Constitution.

*L.C.Seneviratne P.C.*with *D.N.Thurairajah, Prasanna Jayawardena*, and *S.D.Yogendra* for the Petitioner.

Douglas Premaratne P.C., A.S.G. with *Chanaka de Silva S.C.*for 1st to 5th Respondents.

H.L.de Silva P.C. with *Romesh de Silva P.C.* and *Harsha Amerasekera* for the 6th respondent.

Cur.adv.vult.

January 31,1995.
FERNANDO, J.

By a notice dated 18.6.93, published on 21.6.93, a Cabinet-appointed tender board consisting of the 1st to 3rd Respondents (who were the Secretary, Ministry of Health, State Secretary, Ministry of Ports and Shipping, and the Deputy Director, National Planning Division) called for bids for the supply of 25 metric tonnes of "Lambda-Cyhalothrin 10% water dispersible powder", an insecticide for use in the Anti-Malaria Campaign of the Ministry of Health. The 6th Respondent, Imperial Chemical Industries (plc) a company incorporated in the United Kingdom ("ICI"), was the only tenderer; its offer was at the rate of US$ 70 per kilogram. The Petitioner, who is the accredited agent in Sri Lanka of Chemagri International Inc, a company incorporated under the laws of the State of Florida, and carrying on business *inter alia* as a supplier of anti-malarial insecticides, filed this application under Article 126 complaining that the invitation for bids was an infringement, and that the proposed award of the tender to the 6th Respondent was an imminent infringement, of its fundamental right under Article 12(1).

The Petition referred to two aspects of this alleged infringement. Firstly, it was averred that all other comparable anti-malarial insecticides were excluded from the tender without due cause; and secondly, that only the 6th Respondent and its nominees and agents were able to tender for Lambda-Cyhalothrin, because it was patented product, and that even the tender specifications were tailored to suit the packing requirements of the 6th Respondent, by asking for supply in units of 62.5 grams.

Notices were published in the newspapers in June 1993 calling for tenders as follows:

16.6.93	Malathion	:	600 metric tonnes
21.6.93	Fenitrothion	:	150 metric tonnes
21.6.93	Lambda-Cyhalothrin	:	25 metric tonnes

It would be unreal to consider the disputed tender in isolation; it is clear that in calling for bids the Respondents did not exclude all other anti-malarial insecticides.

The Respondents have averred, and the Petitioner has not denied, that 62.5 gram packs were specified, for convenience of use, because this was the quantity required for one tank charge, and it was difficult for staff to measure such small quantities accurately in the field; and that there was a similar specification in regard to Fenitrothion.

Thus I need consider only the following submissions made by Mr.L.C.Seneviratne, P.C., on behalf of the Petitioner:

1.the tests conducted prior to the decision to select Lambda-Cyhalothrin powder for use in the Anti-Malaria Campaign were seriously flawed; that decision was unfairly favourable to the 6th Respondent, and therefore discriminatory; and hence the tender process, based on that decision, was vitiated by the same defect;

2. even if that decision had been properly made, yet Lambda-Cyhalothrin powder was a product which could only have been supplied by one supplier (or with its permission); hence competitive tenders, which are of the very essence of the tender process, were not possible, and resort to the tender procedure tended to create a monopoly; in those circumstances resort to the tender process was in violation of Article 12(1); and

3. the only proper course of action, was to have obtained authority from the Cabinet, under Financial Regulation 799(2), to negotiate with and to purchase direct from that particular supplier.

Most of the facts are not in dispute. Different insecticides have been used, from time to time, to control the malaria mosquito. Since the malaria mosquito acquires, with time, immunity or resistance to any insecticide, such changes are inevitable. Originally, DDT was used with great success, but had to give way in the late 1970's to Malathion. Apart from other factors - such as cost, pilferage for agricultural use, inadequate supervision, poor public acceptance, and the like - in some areas, by 1990, a problem of declining effectiveness had arisen. Accordingly there was already a need for alternatives. Even otherwise, it was only prudent to be ready with alternatives for use in such an eventuality. The practice followed was to test WHO-registered insecticides under local conditions, using material provided by the manufacturers

or their local agents, at their cost. Three other insecticides had been tested, including Lambda-Cyhalothrin and Fenitrothion; two more were in the process of being tested; and a hut trial had been conducted in respect of yet another, but a village scale trial had not been carried out due to lack of interest on the part of the manufacturer.

During this period, the problem was especially serious in the North-Western Province, which had about 40% of the reported malaria cases, Kurunegala being the District with the highest number of cases. Thus it became necessary to conduct tests in the Kurunegala and Puttalam Districts, and thereafter to obtain supplies by late September 1993, to be used by October-November when the incidence of malaria began its seasonal rise.

The testing process involves two stages. First, the insecticide is subjected to a "hut" test, using a hut specially built for the purpose. If the results are promising, then a "village scale" trial is conducted, in which the insecticide is sprayed on selected samples of houses in a highly malarial area. According to the 4th Respondent, the Director of the Anti-Malaria Campaign, in the latter test "the impact on the population upto a maximum of one year is observed"; and since "the complete testing of a new insecticide in the country takes around 1 1/2 to 2 years" it is impossible to wait until all available insecticides are tested before a final decision to introduce a new insecticide is taken.

Mr.Seneviratne submitted that these tests could only have been done with insecticides approved by the WHO. Although I do not think that the WHO approvals were mandatory, I have no doubt that it was both proper and prudent to follow the WHO recommendations. He contended that Lambda-Cyhalothrin had not been approved by the WHO at the time it was used for the "hut" test, and that this vitiated the test. In regard to the "village scale" test done in 1992, it is clear that by August 1991 the WHO had issued an interim specification approving Lambda-Cyhalothrin, and Mr. Seneviratne did not dispute that this constituted a sufficient approval, both for "village scale" testing and for purchase; thus there was no shortcoming, on account of any lack of WHO approval, when the "village scale" test was done in 1992. The documents produced in this case do not show when the interim specification was issued, and so we do not know whether it came into force

only after the "hut" test was done. There is also no material to support Mr. Seneviratne's contention that it was contrary to WHO-guidelines, or otherwise improper, to conduct the "hut" test without Lambda-Cyhalothrin having been approved. Indeed, in August 1991 Anti-Malaria operations in Sri Lanka were reviewed by a WHO External Evaluation Team, which referred to the then ongoing experimental "hut" tests with Lambda-Cyhalothrin, and recommended "Village Scale" trials with Lambda-Cyhalothrin; its report does not suggest that the "hut" tests had been conducted without any necessary WHO approval of Lambda-Cyhalothrin. The Petitioner has failed to establish that there was any impropriety in the "hut" test.

Mr. Seneviratne contended that the "Village Scale" test was not conducted for the requisite period of time. This test was carried out in the Kurunegala District, and involved trials of Lambda-Cyhalothrin and Malathion in two distinct villages with similar populations. The recommended period of spraying for Lambda-Cyhalothrin was once in six months, and for Malathion, once in three months. Both villages were studied from January to November 1992, and statistics were maintained for that period. Lambda-Cyhalothrin was sprayed in April, and October, in one village while Malathion was sprayed in April, July and October in the other. The report submitted by the Entomologist of the Anti-Malaria Campaign showed that Lambda-Cyhalothrin was much more effective both in reducing the number of malaria cases as well as in controlling the mosquito itself.

Relying on the averment in the affidavit of the 4th Respondent, that "the impact on the population upto a maximum of one year is observed", Mr. Seneviratne urged that no conclusion could have been drawn from the test until the impact of the second spraying of Lambda-Cyhalothrin had been observed for a period of about an year; alternatively, he argued, that the 4th Respondent should have waited, at least, for one year after the first spraying of Lambda-Cyhalothrin (i.e. for about six months after the second). On this basis he claimed that the report which was submitted by the Entomologist in January 1993 had been hastily prepared, with the intention of favouring the 6th Respondent's product. I find myself quite unable to agree with this interpretation of the 4th Respondent's affidavit. Observing the impact on the population for an year does not mean studying the situtaion for one year after

spraying; on the contrary, it indicates that the main purpose of the test was to ascertain and compare the position both before and after spraying. Insofar as Lambda-Cyhalothrin was concerned, an eleven month period of observation revealed that Lambda-Cyhalothrin was effective, for six months after spraying, in reducing the numbers of both malaria cases and mosquitoes. The 4th Respondent's affidavit thus does not support Mr. Seneviratne's contention at all. It only meant that the "village" test should take approximately twelve months, and consequently that it would take 1 1/2 to 2 years to do both the hut test and the village scale test. Whether or not a longer period was desirable, or a more rigorous test was possible, I am unable to say as the available material consists only of the 4th Respondent's affidavit. I hold that there was no flaw in regard to the test.

Kurunegala being a District which had previously been treated with Malathion, this test did not prove that Lambda-Cyhalothrin was intrinsically superior to Malathion; however, it strongly supported a conclusion that there was already an unacceptable degree of resistance to Malathion, which made Lambda-Cyhalothrin a better alternative in the circumstances. At the same time, Fenitrothion was selected for use in the Puttalam District, and tenders were called for both insecticides in June 1993.

I therefore hold that the Petitioner has failed to establish that the selection of Lambda-Cyhalothrin powder was flawed, or arbitrary, or discriminatory.

I turn now to Mr. Seneviratne's second contention that the tender procedure should not have been resorted to. What was tested was a powder formulated with Lambda-Cyhalothrin by ICI, and sold under the brand name "ICON". However, the product for which bids were invited was not "ICON"; instead the product was described (using the generic name of the active ingredient) as "10% Lambda-Cyhalothrin water dispersible powder". It is common ground that this meant that the finished product should consist, as to 10%, of the active ingredient, Lambda-Cyhalothrin, the remaining 90% consisting of other substances which would make it a water dispersible powder, having specified properties.

It is necessary to consider the Petitioner's submission as to the extent of the 6th Respondent's patent rights. The Petitioner submitted two affidavits from its expert, and the 6th Respondent one. Ultimately, there was no dispute that ICI or associate companies had patents in about 22 countries, but not in Sri Lanka, in respect of (a) Cyhalothrin which was the starting material with which Lambda-Cyhalothrin was produced, (b) two processes for making Lambda-Cyhalothrin from Cyhalothrin, and (c) Lambda-Cyhalothrin itself. Further, ICI had a much more efficient and valuable process, which was secret and unpublished, for making Lambda-Cyhalothrin, but enjoyed no patent protection for it. The Petitioner's expert further stated that there was no published information as to the nature of the formulation previously tested in Sri Lanka (i.e. "ICON"), and that it was not possible for a competitor (in the short period of three months between invitation for bids and supply) to develop a formulation having a comparable analysis and properties, since this involved substances and processes which were not published; however, the formulation itself was not patented; this was not disputed. He further claimed that "while an active ingredient is still subject to patent protection the patentee generally does not make it available, except under special agreements to preferred licensees . . but instead makes it available only as formulated material", and that "in any country where there is a patent in force on the active ingredient, it is generally not permissible for an unlicensed third party .... to formulate that compound into a formulation". These assertions suggest that patent protection would indirectly extend to formulation as well. However, the first of these claims is an unproved assertion of fact, particularly in relation to Lambda-Cyhalothrin, and it is not suggested that the patent laws prevent a third party acquiring the active ingredient in the market. The second is a statement of (foreign) law, unsupported by even a reference to any legal text; and I doubt whether the protection conferred by a patent extends so far as to prevent a third party using the patented product to make another product.

The Petitioner has failed to establish that there was a legal obstacle - though undoubtedly there were serious practical difficulties-in the way of any person, not associated with ICI, submitting a bid.

This was not all. Bids had been invited from " formulators", namely firms or organisations which engaged in making the finished product;

not from "manufacturers" (i.e. producers of the active ingredient), or dealers in the finished product. Formulators were required to furnish two certificates of quality: one from the manufacturer as to the quality of the active ingredients which he supplied to the formulator, and another from the formulator as to the quality of the finished product. Obviously, this would have further restricted the number of persons able to tender. Mr.Seneviratne referred to an extract from the Farm Chemicals Handbook, 1992 (which he said was an authoritative publication in regard to pesticides) according to which there were only two formulators of LC powder, under the names "ICON" and "KARATE": both were ICI associate companies. He also referred to a Korean company, but this turned out not to be a formulator.

On the material placed before us, I hold that only two ICI associate companies were in fact able to tender. In such circumstances, Mr.Seneviratne submitted, competitive tenders were not possible, and resort to tender procedure was in violation of Article 12(1), citing my dissent in *Ceylon Paper Sacks v. J.E.D.B.*,[1]. However, in that case I did not hold that resort to tender procedure was in violation of Article 12(1), but, on the contrary, that in the process of evaluating the tenders there had been a breach of the Financial Regulations, which resulted in a violation of Article 12(1). Independently of the Financial Regulations, the fact that there can be only one qualified tenderer does not mean that there is a denial of equality to other persons, for the reason that such persons are not qualified and so they are not in the same class. It is true that the sole qualified person thereby enjoys monopoly, but that only means that he belongs to a class which consists of one person (and, in this case, which was properly constituted). Since the impugned act dealt with the entire class, there was no discrimination among members of the class. And where, as in this case, the right is reserved to annul the bidding process and to reject all bids, it is possible to avert any financial loss which would result from accepting an unduly high bid submitted by a lone tenderer.

Mr.Seneviratne's alternative submission was based on the "Guidelines and Checklist for Tender", dated 17.8.90, issued by the Secretary to the President, in order "to ensure competitiveness and to inspire confidence in the public with regard to the fairness and equitability of Government decisions on tenders"; it was pointed out that the Fi-

nancial Regulations had been framed "to engender the widest possible competition in all tenders and to secure the most competitive prices/ rates", and that "the specifications should be designed so as to make the tender as competitive as possible and should neither preclude nor favour any particular tenderer or tenderers". As I observed in *Ceylon Paper Sacks v J.E.D.B.*, (*supra*) this document does not purport to be issued by virtue of any legislative or executive authority, and cannot add to or vary the provisions of the Financial Regulations. Mr.Seneviratne relied on FR 799(2), which provides:

> " (2) General authority for deviation from procedures prescribed for Stores and Supplies. - (a) In urgent and exceptional circumstances, when real and appreciable injury would be caused to the activities of the Department by delay in following normal procedures for obtaining stores and supplies, or when the normal procedures are inappropriate to the type of articles required and the provisions of F.RR 794 to 796 are also inadequate to meet the contingency, the authorities mentioned in (1) above, may, within the limits prescribed, authorize deviation from the procedures prescribed for the procurement of stores provided the reasons therefor are explicitly recorded in writing."

It is clear that there are two distinct situations in which FR 799(2) permits a deviation from normal tender procedures. The first relates to circumstances which are "urgent and exceptional", in which serious loss or prejudice will be caused by reason of the time taken in following tender procedures. It was not suggested that there was any such situation in the present case, and it was clear that the insecticide could be obtained well in time despite following tender precedures.

The question for determination, therefore, is whether the second condition was satisfied - that normal tender procedures were "inappropriate to the type of article required"; and, if so, whether it was mandatory for the appropriate authority (here, the Cabinet of Ministers) to permit a deviation from public tender procedures by authorising private negotiations. (Admittedly, the provisions of FR 794 to FR 796 were inapplicable.) It seems to me that there may well be situations in which the appropriate authority is obliged to authorise a deviation. One example would be where special equipment is required to combat terror-

ism, crime or smuggling, but calling for tenders may result in publicity which would enable defensive measures to be taken, which would significantly reduce the usefulness of such equipment; in such cases even though the tender process would ensure the best quality and price, the very purpose of getting the goods would be thwarted by the publicity attendant on the tender procedure. Again, there are commodities the prices of which fluctuate considerably, for various reasons; for such commodities, it may be that a "spot" price for a contract, to be concluded at once, would be more favourable than a bid which is open for acceptance for several days or even weeks. There may be other articles for which there is, at any given time, an established price - whether determined by some internationally recognised institution, or by local price control. In all such cases, there is much to be said for the view that normal tender procedures are "inappropriate" having regard to the articles required.

In the examples I have considered resort to public tenders would thwart the purpose of getting the product, or would not secure the best product at the most favourable price; accordingly, private negotiations would seem to be preferable, and, I will assume, may perhaps even be mandatory.

The situation in which there is only one potential supplier is not in any way comparable. Resort to tender precedure would not thwart the purpose of getting the product; and would have the advantage of openness. The quality of the product would be the same whether it is obtained through public tender or private negotiation. In regard to price, there is no reason to assume that a supplier who enjoys a monopoly would quote a higher price at a public tender than in private negotations; and in any event, if he does quote an unduly high price, his bid can be rejected and the apropriate authority can thereafter be requested to authorise a deviation.

But even assuming that the second condition in FR 799(2) is satisfied where there is only one potential supplier, yet it does not follow that it is mandatory to authorise deviation from tender procedures - for it is a settled rule of interpretation that "may" in a statute confers a discretion, and will only exceptionally be held to be mandatory (Maxwell, Interpretation of Statutes,12th edition, p 234). It will be held to be

mandatory only if there is good reason, as for instance if the context so requires, or if the purpose of the statute will not otherwise be achieved (as in Tatty de Silva v. Atukorala,[2]; see also Jayawardena v. Dharmaratne[3]).

"May" is like the words " it shall be lawful", which

> " ..... confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty , and make it the duty of the persons in whom the power is reposed, to exercise that power when called upon to do so. . . . . .,

and in relation to FR 799(2), I would add, to exercise the power when it is shown that "usual procedures are inappropriate"-

> ". . . . And the words 'it shall be lawful' being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise his power, to show in the circumstances of the case something which,according to the principles I have mentioned, creates this obligation." (Julius v Bishop of Oxford.[4])

The matters I have referred to in the preceding paragraphs show that there is no good reason to displace tender procedures. I hold that it was not mandatory to deviate from tender procedures.

I have not overlooked Mr.Seneviratne's submission that, because tender procedures were resorted to, a higher price (US $70 per kilogram) had to be paid than the market price of US $52.50 per kilogram. Apart from a passing reference in an unsigned and undated document there was no satisfactory evidence of the market price in mid-1993. The allegation that the 6th Respondent's bid was too high cannot therefore be made the basis for challenging the decision to call for tenders.

Mr.H.L.de Silva submitted in reply that in any event the Petitioner had no *locus standi* to question the decision to resort to tender procedures, because whether it was by public tender or private negotiation the Petitioner was not qualified to make an offer, and was therefore not in the same class; whichever option was selected, the Petitioner's right was not affected. As the petition fails on the merits, it is unnecessary to decide this question of status.

The Petitioner's application fails, and is dismissed with costs in a sum of Rs.3,000/- payable to the 6th Respondent.

DHEERARATNE, J. – I agree.

WIJETUNGA, J. – I agree.

Application dismissed.