(2018) 08 MAN CK 0002

In the Manipur High Court

Case No : Writ Petition (c) No. 882, 933 Of 2017, 545 Of 2018

Amppta And Others APPELLANT

Vs

Indian Oil Corporation And Others RESPONDENT

Date of Decision : 25-08-2018

Acts Referred:
Constitution Of India, 1950 — Article 13, 14, 19(1)(g), 21, 226

Citation : (2018) 08 MAN CK 0002

Hon'ble Judges : Kh. Nobin Singh, J

Bench : Single Bench

Advocate : H.S. Paonam, G. Pushpa, L. Shashibhushan, N. Ibotombi, A. Rommel, S. Nepolean

Final Decision : Allowed

Judgement

Kh. Nobin Singh, J

[1] Heard Shri H.S. Paonam, learned Senior Advocate assisted by Smt. G. Pushpa, learned Advocate appearing for the petitioner association; Mr. L. Shashibhushan, learned Advocate for the IOC Ltd; Shri N. Ibotombi, learned Senior Advocate assisted by Shri A. Rommel, learned Advocate for the private respondent and Shri S. Nepolean, learned Government Advocate for the State respondents.

[2] Since the above writ petitions have arisen out of a similar set of facts, the same are being disposed of by this common judgment and order.

WP(C) No. 882 of 2017

[3.1] The validity & correctness of the NIT dated 10/11/2017 issued by the Deputy General Manager, IOC, (OPS), Guwahati, India Oil Corporation inviting tenders "for Road Transportation of Bulk Petroleum Products- White Oil" is under challenge in this writ petition.

[3.2] The facts and circumstances as narrated in the writ petition, are that the petitioner association is a society registered under the Manipur Societies Registration Act, 1989 and consists of about 50 members who are facing a common grievance on account of the issuance of the said NIT. It was initially formed in the year 1981-82 by the transporters of POL products and its members are the owners of Tank Trucks/ Oil Tankers (hereinafter referred to as "the TTs") who have been rendering their services for bridging input in respect of Petrol, Kerosene and Diesel oil in the State of Manipur from the other States. The nature of bridging input of the POL in the State has been amidst great inconvenience, as the State has been facing grave problems of frequent bandhs and economic blockades, because of which TTs had to take, sometimes, NH-37 and in addition thereto, there were many incidents in which many drivers were either killed or injured rendering them handicapped and many TTs were put to flame. Keeping in mind the peculiar circumstances obtaining in the State of Manipur, the IOC Ltd. used to issue NIT for the State of Manipur only in respect of TTs with a carrying capacity of 12 KL for a total of 534 TTs with the condition that the bidders will have to offer minimum three TTs, out of which one should be owned by him/ it.

[3.3] Deviating from the earlier practice and procedure, the NIT dated 10/11/2017 was issued by the General Manager, IOC (OPS), Guwahati inviting tenders "for Road Transportation of Bulk Petroleum Products-White Oil" for three locations, namely (i) Tinsukia/ Digboi Terminal; (ii) Dimapur Depot and (iii) Malom Depot, Imphal. As per the scope of work, the NIT invited tenders in respect of 11 to 12 KL for 247 TTs as compared to earlier tender for 534 TTs and 18 KL and above up to 40 KL for 336 TTs with the aim and object to oust or negate the service of the State TT owners and to attract/ please the outside POL businessmen only. Being aggrieved by the said NIT, the instant writ petition has been filed on the following grounds:

(a) The NIT was issued with a view to oust the members of the petitioners association who have rendered their services despite they being exposed to various threats, frequent landslides and meeting illegal road taxes imposed by various underground organizations. However, they have been rendered ineligible to compete with the outsiders in the tender, as many of them do not own two TTs registered in their names;

(b) The rate fixed by the IOC Ltd. in the NIT is unreasonable, as the same had been fixed at a rate lower than the one fixed in the year 2013-14 completely ignoring the escalation of price/ cost with respect to maintenance of vehicle; salary of the driver/ handyman and essential items;

(c) In the NIT, the security deposit was increased to Rs. 5,00,000/-from Rs. 3,00,000/- although the rate quotation was decreased from that of the previous year within an average range between - 12% and -14% without considering the increasing cost factor due to GST;

(d) The bidders will have to offer minimum three TTs, out of which two will be owned by him/ it deviating from the earlier eligibility criteria whereby the bidders will have to offer minimum three TTs, out of which he/ it will own at least one TT. The members of the petitioner association have been rendered incapacitated as most of them do have only one TT registered in their names. In order to make them eligible, the members of the petitioner association are required to purchase at least one more TT costing about 20 to 25 lakhs in a short period of time;

(e) The Retail Outlet Dealers (hereinafter referred to as "the ROs") under EOI (Expression of Interest) performance clause as reflected at page No. 5 of 98 of the NIT is also quite offensive to the petitioner association as the NIT allowed the ROs to participate in the tender. As on date, there are about 101 TTs under EOI and allowing them to participate in the NIT amounts to granting double benefits/ chances to them and a number of 110 TTs belonging to the General Transporters will have to remain idle or wasted without their being utilized. This amounts to unequal treatment meted out to the members of the petitioner association;

(f) The NIT invited tenders from TT owners having a capacity of 21 to 40 KL for 334 Oil Tankers but since none of the local transporters own such vehicle as the registration thereof is not possible in Manipur, the offer is un-favourable to the transporters from the State of Manipur. The TTs having capacity of 24 KL and 29 KL were introduced only during February 2017 to June, 2017 by way of gateway notice. The introduction of 21 KL to 40 KL in the NIT with different rates, for the first time in the State of Manipur, affects the level playing field;

(g) Deviations in the NIT, from that of the earlier one, have been made without taking into account the situation prevailing in the State but with the aid and advice of the Assam based Transporter Association. The IOC Ltd. has completely overlooked the sacrificial services rendered by the members of the petitioner association during natural as well as manmade crisis when there is scarcity of petrol in the State of Manipur.

[4] After the NIT having been issued by the IOC Ltd., the petitioner association submitted various representations after representations for considering the areas where the petitioner association has been facing problems during their transportation of bulk POL and also requested for reconsideration of the NIT dated 10/11/2017 issued by the IOC Ltd. The grievance faced by the members of the petitioner association was also made known to the State Government which has also written a letter dated 26/10/2016 to the Executive Director, IOC, Noonmati, Guwahati keeping in mind the case/ grievance of the petitioner association. of Manipur and therefore, the same is not local friendly NIT. It was issued with an ill-intention to oust the local transporters from the business of transportation of POL which is violative of the provisions of the Article 21 of the Constitution of India.

[5] An affidavit-in-opposition has been filed on behalf of the respondent Nos.1 to 3 wherein the averments made in the writ petition as regards the inconvenience and hardship faced by the contractors and their crew members due to bandhs, economic blockade and natural calamities, have not been denied. But it has been

stated that the IOC Ltd. is a corporate engaged in the processing and manufacturing of different varieties of petroleum products which are made available to the consumer through its dealers and agents to whom such products are delivered by the authorized transporters as per terms and conditions. The IOC Ltd., after a detail study and taking into account various factors, decided to have a uniform terms and conditions throughout the country with certain deviations according to the local need of the regions and in particular, with respect to minimum trucks to be offered and security deposit. The 11 POL locations have been reduced to three clusters for administrative convenience. Previously, the rate of transportation was fixed through a process of negotiation with the transporters but before the NIT being issued, a high level committee after considering all cost factors viz. depreciation, fuel consumption, minimum wages to driver, maintenance, administrative expenses etc., fixed the rate and the rate fixed in respect of Manipur is the highest in the NE region. With regard to number of TTs to be offered, a transporter can offer 10% of the total TT requirement as per all India format but in respect of North-East region, a transporter can officer 5% thereof. If the transporters quote the same rate, the seniority shall be decided based on the number of TTs owned by them whereas in respect of North-East, the preference will be given to the fleet with less average age because of road condition. Even though the existing contracts having expired, the same is under extension but the petitioner association has been making undue demands for modification of the NIT. The averment that respondent No.4 has banned registration of vehicles which weighs more that 25,000 kg of GVW, has been denied and it has been stated that in the present fleet of Imphal base transporters, there are many transporters having 18, KL, 19 KL, 20KL, 24 KL 29 KL etc. The present NIT was floated after deliberations with the petitioner association to accommodate possible modifications but it resorted to strike to cut-off the fuel line and not to allow finalizing the contract. The categorization of the TTs into two, may be for the first time, has been done but in the previous tender, since there was no restriction as to the carrying capacity from 11 KL and above, the question of affecting level playing field does not arise. Moreover, there is no question of giving double benefits to the retail outlet dealers, as all the requirements applicable to general transporter, have to be fulfilled by them as well.

W.P.(C) No. 933 of 2017

[6.1] By the instant writ petition, the petitioners have prayed for issuing a writ of certiorari or any other appropriate writ to quash and set aside the NIT dated 10/11/2017 issued by the Deputy General Manager, IOC (OPS), Guwahati, Indian Oil Corporation for tender "for Road Transportation of Bulk Petroleum-While Oil".

[6.2] The petitioners are the transporters of POL products for bridging input of POL products in the State of Manipur and have been engaged by the IOC Ltd. as transporters of POL products for the last many years. Being aggrieved by the issuance of the NIT dated 10/11/2017, the instant writ petition has been filed by the petitioners on the ground that the NIT is against the prevailing law and order problems in the State of Manipur and the NIT has been issued against the public policy obtaining in the State of Manipur.

[6.3] Due to poor conditions of the National Highways which connect the State of Manipur with the other States, the Chief Engineer, Wing-I of the PWD, Manipur vide its letter dated 4/5/2002 informed the Commissioner (Transport), Government of Manipur that the maximum unladen bearing capacity of vehicles on NH-39 Maram-Moreh Section and NH-150 from Yaingangpokpi to Churachandpur be taken as 15.00 M.T. which is equivalent to 20 KL with respect to the POL tankers. The NIT invited tenders for 336 TTs having a carrying capacity of 18 KL and above up to 40 KL which is in total contradiction of the law which is prevailing in the State of Manipur, although the NIT may have been floated by the IOC Ltd. as per the All India Pattern and the same cannot be applied in toto in the State of Manipur. In the State of Manipur, the TTs which have a carrying capacity of more than 20 KL are not allowed to be registered. There is no rational behind the fixation of rate schedule in the NIT by the IOC Ltd. The rate presently offered by the IOC Ltd may be the base rate of the POL products but the conditions of the NIT clearly provide as under:-

"IOC shall offer "Estimated POL transportation rate" for the above four items and tenderers to quote only one percentage within (+/-) 10% of the offered estimated transportation rate. The tenderers quoting beyond (+/-) 10% of the estimated transportation rates shall be treated as disqualified and their tender shall be rejected."

The base rate offered by the IOC Ltd. in the present NIT is lower than the existing rate offered in respect of the tender floated in the year 2011 and 2013, which is still continuing. The NIT creates a class amongst the un-equals attracting the principles of class legislation as enshrined under Article 14 of the Constitution of India. The ROs who are under the contract with the IOC Ltd. as per the EOI tender (Expression of Interest), have been given a priority over the general transporters as they can participate in the instant tender as per the NIT by way of invoking the EOI tender clause. The NIT has unreasonably deviated from all the practice and procedures which are followed in the State of Manipur without considering the element of public policy as well as without keeping in mind the prevailing law and order problems in the State of Manipur. The NIT has 3 (three) clusters (cluster 1: for Lumding Missmari and Vairangte; cluster 2: for Betkuchi, Bongaingaon, Dharmanagar, Ramnagar Numaligarh and cluster 3: for Road Transportation of Bulk Petroleum Products-White Oil and the tender is called for 3 (three) locations, namely (i) Tinsukia/ Digboi Terminal; (ii) Dimapur Depot and (iii) Malom Depot, Imphal. The tenders with respect to the other 2 (two) locations, Tinsukia/ Digboi and Dimapur are only for very limited tankers as compared to the Malom Depot, Imphal. The tender in respect of Malom Depot is the location for those who were not successful in the cluster 1 and cluster 2 tenders and therefore, the general transporters of the State of Manipur have a very slim chance for being successful in the NIT as per the terms and conditions provided in the impugned NIT. As per the scope of work, the NIT invited tenders for TTs with a carrying capacity of 11 to 12 KL with the requirement of only 247 TTs as compared to the earlier 534 TTs. In the present NIT, the IOC Ltd. notified for TTs with a carrying capacity of 18 KL and above upto 40 KL with the requirement of 336 TTs with the aim and object to oust or negate the continuing/ ongoing service of the general transporters of the State and only to attract/ please the outsider POL transporters.

[6.4] In short, the case of the petitioners is that the present NIT is against the prevailing law and order situation in the State of Manipur and also is against the public policy taken by the State Government and therefore, the same is liable to be set aside. The rate offered by the IOC Ltd. is very unreasonable and irrational, because of which the petitioners are not able to participate in the NIT. While in the case of transportation of bulk LPG, the States in the North-East are brought under one cluster, the same principle has not been followed in respect of POL. The rate offered in respect of LPG is quite reasonable as compared to POL. As the condition of road in respect of NH-2 is still not improved as is evident from photographs, the NIT is rendered unworkable. Pursuant to the court's order dated 21-12-2017 passed in PIL No.46 of 2015, the Director, Transport, Government of Manipur addressed a letter dated 04-01-2018 to the IOC Ltd. informing about the restriction of maximum tonnage permissible with 25 tons including the weight of the vehicle imposed by it.

[7] The stand of the IOC Ltd. is that at the time of publication of the NIT, there was no such restriction as to the tonnage on the road running in the State of Manipur except Imphal-Jiribam Road. Out of total requirement of 583 TTs, the total offer received is 711, out of which 34 TTs are having a carrying capacity of 24 KL and above. In view of the decision of the Government imposing temporary restriction on transportation upto 25 MT on NH-2 vide Notification dated 04-01-2018, the IOC Ltd. will suitably take up with successful bidder (if any) who have offered TTs having a carrying capacity of more than 20 KL to replace/ modify their TTs with TTs upto 20 KL for compliance of Government regulation. The NIT for bulk petroleum products cannot be equated with that of the NIT for transportation of bulk LPG because the safety considerations on handling, storage and transportation are different and moreover, they are different products.

States in the country are categorized into five clusters but it is not mandatory or obligatory on the part of the IOC Ltd. to have a separate or joint NIT and it depends upon the administrative convenience.

W.P. (C) No. 545 of 2018

[8.1] By this instant writ petition, the petitioner has prayed for issuing a writ of certiorari or any other appropriate writ to quash and set aside the e-mail dated 12/6/2018 under the subject "Offer for acceptance of L1 rate" when the NIT under Tender ID: 2017-NEISO-64145-1 is pending for finalisation.

[8.2] The petitioner is a transporter of POL products under various contracts for transportation of POL products issued by the IOC Ltd. from time to time since 1984. The petitioner is at present carrying on his business of transporting POL products under the existing contract of the IOC. The petitioner has participated in the existing transportation of POL contract by way of engaging 8 (eight) number of his owned/ attached TTs. The petitioner is one of the petitioners in the writ petition being WP(C) No. 933 of 2017.

[8.3] The IOC Ltd. issued NIT dated 10/11/2017 and being aggrieved by the conditions/ criteria stipulated therein, the petitioner and many others filed various writ petitions. The main ground taken in the said writ petitions is the nature of bridging input of the POL products in the State of Manipur which has been amidst great inconveniences as it has been facing grave problems as a result of frequent bandhs, various forms of blockades including the worst economic blockade imposed by various organizations of the inhabitants in the 2 (two) National Highways. The NIT has decreased the offered rates to the tune of 27% from the existing rate; has allowed induction of TTs beyond 20 KL in spite of the restriction imposed by the Transport Department, Government of Manipur; has granted double benefits to ROs participated in the EOI tender and many other unreasonable criteria/ conditions were inducted in the NIT. In the case of LPG tender which is also an e-tender issued by the IOC Ltd. in the month of February, it offered its rate by way of increasing from the existing rate. In the e-tender for transportation of LPG within the State of Manipur, the NIT provides a reasonable special clause for preferring the local transporters as against the outside transporters. There is no such clause in the NIT dated 10/11/2017 for transportation of POL products in spite of the fact that both the items, LPG and petroleum products, are listed in the essential commodities list under the relevant Act and the LPG tender has limited the capacity up to 12 MT. While the said writ petitions are pending, the IOC Ltd. has sent email dated 8/4/2018 to some of the transporters or bidders who are at L1 aiming towards finalization of their controversial NIT to which none of the L1 bidders or the transporters has given a reply and the same was brought to the notice of the Court. The NIT has invited tender for 583 TTs for the transportation of POL products in the State of Manipur. It has come to the knowledge of the local transporters that about 300 and above TTs from outside transporters who are not State bound transporters and quoted at L1 rate have been accepted by the IOC and in respect of the remaining, the IOC is ready to finalize from the local transporters who are agreeing to accept the rates at L1. In the event of the NIT being finalized as desired by the IOC Ltd., more than 300 TTs belonging to the local transporters would remain off-road being unable to utilise them any other business.

[9] Before coming to the facts of the present cases, this court deems it appropriate to re-visit the principles laid down by the Hon'ble Supreme Court in matters relating to award of contract. In Tata Cellular Vs. Union of India, (1994)

6 SCC 651 wherein two main issues-one, relating to the scope of judicial review and two, relating to selection being vitiated by arbitrariness, which are relevant for the cases also, were considered and decided by the Hon?ble Supreme Court. In matters relating to contracts wherein one of the parties is the public authority, the question to be asked is, have the guidelines been laid down, if so laid down, have they been observed? The Hon?ble Supreme Court, after referring to its earlier decisions, summarised the principles which are the broad grounds subject to addition of further grounds in course of time. The Hon?ble Supreme Court held:

"69. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender:

1. It must be unconditional.

2. Must be made at the proper place.

3. Must conform to the terms of obligation.

4. Must be made at the proper time.

5. Must be made in the proper form.

6. The person by whom the tender is made must be able and willing to perform his obligations.

7. There must be reasonable opportunity for inspection.

8. Tender must be made to the proper person.

9. It must be of full amount.

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

88. We may now look at some of the pronouncements of this Court including the authorities cited by Mr Ashoke Sen. Fasih Chaudhary v. Director General, Doordarshan was a case in which the Court was concerned with the award of a contract for show of sponsored TV serial. At p. 92 in paragraphs 5 and 6 it was held thus:

"It is well settled that there should be fair play in action in a situation like the present one, as was observed by this Court in Ram & Shyam Co. v. State of Haryana. It is also well settled that the authorities like Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism. See the observations of this Court in Haji T.M. Hassan Rawther v. Kerala Financial Corpn. While, as mentioned hereinbefore, fair play in action in matters like the present one is an essential requirement, similarly, however, "free play in the joints? is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere as the present one. Judged from that standpoint of view, though all the proposals might not have been considered strictly in accordance with order of precedence, it appears that these were considered fairly, reasonably, objectively and without any malice or ill-will."

94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure".

In Air India Ltd. Vs. Cochin International Airport Ltd. & ors., reported in (2000) 2

SCC 617 wherein it has been held that the law relating to award of a contract has been settled by the Hon?ble Supreme Court, the relevant para 7 of which is as under:

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India, Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, CCE v. Dunlop India Ltd., Tata Cellular v. Union of India, Ramniklal N. Bhutta v. State of Maharashtra and Raunaq International Ltd. v. I.V.R. Construction Ltd. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

In Jagdish Mandal Vs. State of Orissa, reported in (2007) 14 SCC 517, the decision in Tata Cellular case (supra) was referred to and relied upon with the following observations:

"This Court also noted that there are inherent limitations in the exercise of power of judicial review of contractual powers. This Court also observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be applied. This Court held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14."

In Maa Binda Express Carrier Vs. North-East Frontier Railway, reported in (2014)

3 SCC 760, the Hon?ble Supreme Court has held that the submission of tender is no more than making an offer which the State or its agencies are under no obligation to accept and the bidders in the tender cannot insist that their tenders should be accepted simply because a given tender is the highest or the lowest. It has further been held that the only enforceable right that a bidder has, is to examine by the court whether the aggrieved party has been treated unfairly or discriminated against to the detriment of the public interest. In Rishi Kiran Logistics Private Ltd. Vs. Board of Trustees of Kandla Port Trust & anr., reported in (2015) 13 SCC 233, the decision of the Hon?ble Supreme Court in Tata Cellular Case (supra), has been followed with the observation that a lucid enunciation on the scope of judicial review of administrative action, that too in tender matters can be found therein.

[10] From the aforesaid decisions, it is seen that the law, as regards the matters relating to award of contracts involving a public authority, is no longer res integra. There is no need of multiplying the decisions rendered by the Hon?ble Supreme Court in this regard and suffice it to say that the court's power of judicial review of administrative action is limited to the extent indicated in the decisions mentioned hereinabove. But an exception has been carved out that though a decision relating a matter of contract is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. The principles of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. In other words, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. Article 14 of the Constitution beinganathema to any malafide, unreasonable and arbitrary action of the Government or its instrumentalists, strikes at their roots.

[11] It has been submitted by Shri H.S. Paonam, the learned Senior Advocate appearing for the petitioners that there are many circumstances/ points on the basis of which the NIT can be said to be unreasonable, discriminatory and arbitrary and therefore, it can be quashed and set aside by this court. According to him, while floating the NIT, those circumstances/ points have not been taken into account by the IOC Ltd., some of which are as under:

(a) The members of the petitioner association and the petitioners in the connected matters are the owners of TTs and they have been rendering their services for bridging input in respect of Petrol, Kerosene and Diesel oil in the State of Manipur from other States despite great inconveniences being faced by them due to problems of frequent bandhs and economic blockades. They are rendering their services in respect of 11/ 12 KL for a total of 534 TTs pursuant to the earlier NIT wherein the condition was that the bidders were to offer minimum three TTs, out of which one should be owned by him/ it. As per the NIT dated 10/11/2017, one of the conditions is that the bidders will have to offer three TTs, out of which two shall be owned by him/ it. As per the scope of work, the NIT invited tenders in respect of 11 to 12 KL for 247 TTs as compared to earlier tender for 534 TTs and 18 KL and above upto 40 KL for 336 TTs with the aim and object to oust or negate the service of the State TT owners and to attract/ please the outside POL. In view of the change in the conditions, many of the existing transporters who own only one TT are not eligible and they will have to buy one more TT, in order to make themselves eligible for the tender and moreover, time was too short for them to buy a TT costing about Rs.20-25 lakhs;

(b) The rate fixed by the IOC Ltd. in the present NIT is lower than the one offered in the previous NIT of 2013 and is similar to the one offered in the year 2011 and while fixing the rate, the IOC Ltd. has not taken into account certain factors like increase in the price of essential commodities, diesel, salary of the driver/ handyman, payment of illegal taxes prevailing in the State etc. and moreover, it is much lower than the Manipur State Rate fixed by the PWD, Manipur;

(c) The NIT provides for granting extra benefit to the ROs by allowing their TTs already offered under the EOI (Expression of interest) contract to be counted for being eligible by way of having three TTs. In other words, they can participate in the NIT as general transporters subject to fulfilling other criteria. The TTs inducted under the EOI are to transport POL products from the Malom Depot to meet the requirement of their ROs;

(d) The NIT makes two kinds of competitors-one, having TTs with a carrying capacity of 11KL/ 12 KL and two, having TTs with a carrying capacity of 18KL and above upto 40 KL. So far as Manipur is concerned, vehicles having a capacity of more than 25000 GVW are not registered because of certain restrictions imposed by the authority and all TTs as referred to in WP(C) No.933 of 2017 are the ones registered in Assam & Nagaland. The restrictions provide no equal opportunity and equal level play field amongst the bidders. The provision in the NIT which permits induction of TTs beyond 20 KL and upto 40 KL, is against the public policy for the reason that as per the restriction imposed by the State Government vide Notification dated 04-01-2018, the tonnage limit is 25 MT;

(e) The above circumstances make it very clear that the doctrine of "level playing field" has been violated by the IOC Ltd. for the reason that equal opportunity is not given to all and the ROs and the transporters who own TTs with a carrying capacity of 20 KL and above have been given preference.

[12] After having considered the aforesaid circumstances as a whole, the contention of the learned counsel appearing for the petitioners that the doctrine of "level playing field' has been violated, appears to be correct. In Reliance Energy Ltd. & anr. Vs. Maharashtra State Road Development Corporation Ltd. & ors., (2007) 8 SCC 1, the Hon'ble Supreme Court held:

"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 v. 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 equality placed competitors are allowed to bid so as to subserve the large public interest. "Globalisation", 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 result 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 13 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 aforestated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "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."

It is an undeniable fact that the members of the petitioner association and other petitioners are presently rendering service of transportation of POL products under the existing terms and conditions of the contract, of which one being that they should offer three TTs out of which one should be owned by them. In the present NIT, the said condition has been modified to the extent that out of three TTs, two should be owned by them with the result that many of the existing transporters have become ineligible, unless they buy one more TT costing about Rs.20-25 lakhs and that too, within a month so as to make them eligible for participating in the tender. The justification of modifying the term is not reflected in the affidavit filed on behalf of the IOC Ltd. and in other words, the reason as to why the modification has become necessary in the present NIT is not forthcoming.

The modification is only in respect of the requirement of ownership of, at least, two TTs by a bidder and it has nothing to do with the number of TTs required for participating in the tender and therefore, it is not clear as to how the modification will help the IOC Ltd. in the enhancement of its performance towards fulfillment of its objectives. The rationale behind the modification is not known to the public. It will definitely help the IOC Ltd. in eliminating some of the existing transporters thereby leading to discrimination. The rate of transportation has been admittedly reduced from the existing rate fixed in respect of the tender floated in the year 2013 and it may be noted that the rate is normally to be increased, from time to time, keeping in mind the escalation of cost of essential commodities. This allegation is not denied by the IOC Ltd. and all that it has submitted, is that the rate in respect of tender, 2013 was fixed through a complex process of negotiation and that the present rate has been fixed by a High Level Committee and moreover, the rate of transportation in respect of Manipur is higher than the one fixed for other North Eastern States. The rate of transportation in respect of POL products has not been fixed in the same manner as has been done in respect of LPG even though the IOC Ltd. has floated tenders, at about the same time, in respect thereof. Although the POL and LPG are different products, there is hardly any difference as regards the transportation in the sense that similar and special care is to be taken in respect thereof and the national highways through which they are to be transported, remain the same. The rate appears to have been fixed taking into account the interest of the transporters having TTs with a carrying capacity of 20 KL and above upto 40 KL, although the rate fixed for them is slightly lower than that of the others, for the reason that one trip of TTs with a carrying capacity of 20 KL and above upto 40 KL is equivalent to two/ three trips of the TTs with a carrying capacity of 11/12 KL. In terms of profit, a transporter having TTs with a carrying capacity of 20 KL and above will be in a better footing. The contention of the petitioner association and others is that while fixing the rate, the IOC Ltd. has not taken into account many relevant factors including the rate prevailing in the State of Manipur in respect of many other goods like fertilizer, cement, rice etc. This contention appears to have some merit. It is true that the IOC Ltd. is not bound by the rate prevailing in Manipur in respect of the aforesaid goods but it is definitely a relevant factor to be taken note by it because the condition of the NH-2 remains the same for all concerned. To bring any good from outside the State of Manipur, the NH-2 or NH-37 is the only highway which is, in fact, a lifeline common for all. Since special care is to be taken while transporting the POL products or LPG, its transportation rate is to be fixed normally higher than that of others. This exercise appears to have not been done by the IOC Ltd. at the time of determining the present rate which is unreasonable. The ROs who are under the EOI contract with the IOC Ltd., have been allowed to participate in the tender with their TTs to be counted for being eligible in the tender. Over and above, in the present NIT, the bidders have been categorised into two groups-one, having a carrying capacity of 11/12 KL and two, having a carrying capacity of 20KL and above upto 40 KL. Many of the members of the petitioner association and other petitioners own TTs with a carrying capacity of about 11/12 KL and to make themselves eligible to participate in the tender in respect of TTs with a carrying capacity of 20 KL and above upto 40 KL, they need to have new

TTs which is almost impossible for them in such a short time. It can never be said that these two groups are placed at par and are similarly situated, in so far as the tender in respect of TTs with a carrying capacity of 20 KL and above is concerned. In the present NIT, the number of TTs with a carrying capacity of 11/12 KL is concerned, it has been reduced to 247 TTs from the existing 534 TTs. Moreover, the tender with respect to TTs with a carrying capacity of 20 KL and above, is opposed to public policy because restriction has been imposed to prevent plying of vehicles beyond the permissible limit of 25 MT on NH-2. The NH-2 is meant for all and requires to be maintained properly so as not to cause any inconvenience to the general public and no persons including the IOC Ltd. can be allowed to damage it by permitting them to carry heavy weights beyond permissible limit. The stand of the IOC Ltd. is that at the time of issuing the NIT, there was no such restriction. The IOC Ltd. may be right to that extent but it may be noted that as back as in the year 2002 itself, there was a restriction as regards the maximum unladen weight of the vehicles to be taken as 15 MT. It may further be noted that such a restriction was imposed keeping in mind the condition of the NH-2 which is of paramount importance. As on date, the restriction imposed on tonnage pursuant to this court's order dated 21-12-2017 is 25 MT and if one looks at the condition of NH-2, the restriction is not likely to be lifted by this court in the next few years. Leaving aside the restriction for a moment, what needs to be noted, is the condition of NH-2. The standard and quality to be maintained in the National Highways, may have been specified by the concerned authority which can be understood by the expert only but the bad condition of the NH-2 is visible with the necked eyes of the common people who are using it daily. The difference of standard and quality being maintained by the concerned authority on the NH-2 and other national highways in other States like Assam, Bengal, Orissa etc, is quite evident which requires no opinion of the expert. Even the National Highway running from Guwahati to Shillong is far better than that of NH-2. The NH-2 is so bad that one is reminded of a saying in Manipur "one has to walk or drive on NH-2 by searching a road thereon" meaning thereby that the road is completely broken with full of potholes and remains only in name. The average speed at which one has to drive on NH-2 is about 25-30 km/per hour which is unheard of in respect of other national highways in the country. In the PIL being PIL No.46 of 2015, this court is seized with the matter relating to maintenance of NH-2 and NH-37 and during the course of proceedings, it has been found by this court that during the last some years, the condition of NH-2 was so bad that there is no guarantee that it will be improved as a motorable road in the next three years. As has been contended by the counsel appearing for the construction company in the said PIL, initially there were six sinking zones on NH-2 but it has gone, by then, upto twenty-one sinking zones. Whether the NH-2 can still be said to be a national highway, is a question being asked amongst the general public. The work being undertaken on NH-2, at present, is for repairing and maintenance to be completed in three years commencing probably from the year, 2017. The number of heavy vehicles plying on NH-2 daily which is in thousands and the quality control being maintained thereon do not match each other. Mere filling up potholes on NH-2 will not suffice. What is said by the authority concerned about NH-2 and there in the paper is different from the ground reality. The distance between Imphal and Mao is about 108 km and the ground reality is that while the repairing is being undertaken in one part namely a distance of few kilometers, the other part will remain broken causing inconvenience and nuisance to the general public and vice verse. It is good that the general public do live with patience being fed up with the false assurance given by the Government. The condition of NH-2 obtaining as on 10-11-2017 in the ground, has not been taken into account properly by the IOC Ltd. while taking the decision to have TTs of 20 KL and above upto 40 KL from now onwards. Such a decision taken by the IOC Ltd. with respect to TTs having a carrying capacity of 20 KL and above upto 40 KL is unreasonable and is opposed to public policy. It is common knowledge on the part of the general public that it takes about four hour by car to reach Mao from Imphal and therefore, it can be easily imagined what could have happened to the TTs carrying heavy loads while plying on NH-2.

[13] Relying upon the decision rendered by the Hon'ble Supreme Court in Global Energy Ltd & anr. Vs. Adani Exports Ltd and ors., (2005) 4 SCC 534, Shri L. Sashubhusan, the learned counsel appearing for the IOC Ltd. has submitted that the principle is well settled that the terms of the invitation to tender are not open to judicial review and the court cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. He has placed further reliance in Meerut Development Authority Vs. Association of Management Studies & anr., (2009) 6 SCC 171, the Hon'ble Supreme Court held:

"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process."

It is clear from these decisions also that the terms of the tender cannot be open to judicial review but in cases where it is established that the terms are so tailor-made to suit the convenience of any particular

person with a view to eliminate other participating in the bidding process.

In other words, the law laid down therein is not different from that of the one laid down in Tata Cellular case and it will have application to the facts and circumstances of the present cases in favour of the petitioners, rather than in favour of the IOC Ltd. If such terms and conditions as aforesaid, are prescribed in normal course, for the first time, in respect of a tender, it will be all right but it is not so in the present cases where changes have been made in the terms and conditions making many of the existing transporters ineligible for participating in the tender. It may be noted that in the NIT, only the transporters who own TTs specially designed to carry POL products, can participate in it subject to the terms and conditions mentioned therein and no transporter who owns only an ordinary truck, cannot participate in it and in other words, the offer is limited to only a group of transporters and therefore, equal opportunity is to be given to all belonging to this group by applying the doctrine of "level playing field". Moreover, a transporter who owns a TT with a carrying capacity of 12 KL cannot participate in the tender in respect of TTs with a carrying capacity of 20 KL and above. The IOC Ltd. being an institution or a government instrumentalist, has to act fairly and reasonably. It being a legal entity has no heart and soul and is manned by the officials and the staff and its decisions are taken by them. The object behind the tender is to find out transporters who could transport POL products to the locations in accordance with its specifications. It will make no difference to the IOC Ltd. whether POL products are transported by the transporter-A or transported-B and in other words, it will make no difference whether POL products are transported by TTs with a carrying capacity of 11/12 KL or 20 KL and above as long as its objectives are fulfilled and achieved in its endeavour to bring the POL products to the public. The decision of the IOC Ltd. to induct TTs with a carrying capacity of 20 KL and above on NH-2 is unreasonable in the facts and circumstances of the present cases as stated hereinabove and therefore, instead of having TTs with a carrying capacity of 20 KL and above, the IOC Ltd. could have thought of increasing the number of TTs with a carrying capacity of 12 KL. Having heard the learned counsels appearing for the parties, this court is of the view that the cumulative effect of the aforesaid circumstances is to eliminate many of the existing transporters including the members of the petitioner association and other petitioners who own TTs with a carrying capacity of about 11/12 KL and to provide an advantage to the ROs and other transporters who own TTs with a carrying capacity of 20 KL and above. This is unfair and arbitrary even in terms of the decisions relied upon by the counsel appearing for the IOC Ltd. The members of the petitioner association and other petitioners are put to disadvantage being violative of the doctrine of "level playing field". Over and above, Article 14 mandates that all equals be treated equally and un-equals cannot be treated equally. Merely because the IOC Ltd. is fed up with the attitude of the petitioner association making undue demands, that does not mean that the IOC Ltd. ought to act contrary to the provisions of the Article 14, 19 and 21 of the Constitution of India. It is within the power of the IOC Ltd. to take action against any transporter in accordance with the terms and conditions contained in the contract.

[14] For the reasons stated hereinabove, the instant writ petitions being WP(C) No.882 of 2017; WP(C) No.933 of 2017 and WP(C) No. 545 of 2018 are allowed and consequently, the NIT dated 10-11-2017 and the e-mail dated 12-06-2018

are quashed and set aside with no order as to costs. However, it is open to the IOC Ltd. to float a new NIT keeping in mind the observations made hereinabove.

