(1997) 11 MAD CK 0044

In the Madras High Court

Indital Construction Machinery Ltd. APPELLANT

Vs

Union of India (UOI) and Another RESPONDENT

Date of Decision : 03-11-1997

Acts Referred:

Citation : (1998) 1 MLJ 565

Hon'ble Judges : E. Padmanabhan, J

Bench : Division Bench

Judgement

E. Padmanabhan, J.—The petitioner prays for the issue of a writ of declaration declaring that the condition imposed by the respondents 2

and 3 in the contract Form Tender dated 11.9.1997 in Ref. E. (M)EE/CHER/F 57 in Schedule ''A'' special conditions of Tender for supply

condition I sub Clause (iii) that the Tenderer should have manufacturer and supplied 25 Nos. of similar machines during the last 5 years as arbitrary

and imposes an unreasonable restriction on the petitioner and violative and ultra vires of the Constitution and issue other appropriate relief.

2. The Tuticorin Port Trust invited tenders for the purchase of one No. Top Lift Truck Reach Staker with adjustable spreader to handle containers

weighing 35T/40t respectively. The petitioner purchased the tender schedule from the 3rd respondent. In terms of the special conditions on tender

for supply, certain conditions have been imposed by the respondents 2 and 3. Admittedly, the petitioner herein do not possess the stipulated

prequalifications for submitting the tender.

3. The petitioner challenges the stipulation or conditions prescribed in the qualification to take part in tender. The relevant portion of the tender

condition reads thus:

(i) The equipment offered should be of internationally proven model of reputed manufacturer and known for their reliability. (ii) The tenderer should

have after sales service facility in India.

(iii) The tenderer should have manufactured and supplied 25 Nos. of similar machines during the last 5 years.

(iv) In case of foreign manufacturer/supplier, in addition to satisfying the above three conditions atleast 5 Nos. of similar machines should have been

supplied and working satisfactorily in India.

The offers which do not satisfy the above conditions will not be considered.

4. Of the above conditions, the petitioner is aggrieved by the stipulation No. 3 by which the respondents have stipulated specifically that the

tenderer should have manufactured and supplied 25 numbers of similar machines during the last five years. This stipulation is being challenged as

unconstitutional and arbitrary. In my considered view, such contention is not tenable.

5. The learned Counsel for the petitioner suggests that there is no manufacturer in India who could satisfy this stipulation and the petitioner is the

sole manu-facturer of Top Lift Truck with adjustable spreader to handle containers at any rate India and he had not so far supplied 25 numbers of

similar machines and his supply is very less. As such it is apprehended that the petitioner''s tender would be rejected at the threshold and it will not

be considered, though the rate the petitioner may quote will be far less than others.

6. The condition No. 3 which reads thus:

The tenderer should have manufactured and supplied 25 Nos. of similar machines during the last 5 years.

cannot be said to be arbitrary and it applies to all the tenderers. If a particular tenderer has not satisfied the stipulation contained in Schedule A. the

tender shall not be considered at all and it cannot be said that such stipulation is violative of Article 14 of the Constitution.

7. The Port Trust has got the authority to stipulate the conditions and also the qualifications of the tenderers as according to them, the machine they

supply should be prescribed standard, viz., the top Lift Truck/Reach Staker with adjustable spreader to handle containers, weighing not less than

35T. This stipulation cannot be said to arbitrary or illegal or unwarranted.

8. When the stipulations have been made clear and when there being no deviation it cannot be said that the stipulation is arbitrary.

9. In Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, : it has been held that it is open to the authorities to stipulate

conditions which they may choose depending upon the requirement of prescribed standards and such eligibility cannot be said to be arbitrary. The

Apex Court has held thus:

Now there can be no doubt that what para. (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every

person submittings a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered IInd

class hotel or restaurant and he must have atleast 5 years'' experience as such and if he did not satisfy this condition of eligibility, his tender would

not be eligible for consideration. This was the standard or norm of eligibility laid down by the 1st respondent and since the 4th respondent did not

satisfy this standard or norm, it was not Competent to the 1st respondent to entertain the tender of the 4th respondents. It is a well settled rule of

administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must

scrupulously observe those standards on pain of invalidation of an act in violation of them.

The Apex Court also observed that as follows:

This rule also flows directly from the doctrine of quality embodied in Article 14. It is now well settled as a result of the decisions of this Court in

E.P. Royappa Vs. State of Tamil Nadu and Another, , Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, that Article 14 strikes at

arbitrariness in state action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on

some rational and relevant principle which is nondiscriminatory; it must not be guided by any extraneous or irrelevant consideration, because that

would be denial of equality. The prin-ciple of reasonableness and rationality which is legally as well as philosophically an essential el-ement of

equality or non-arbitrariness is projected by Article 14 and it must characterise every state action, whether it be under authority of law or in

exercise of executive power without making of law. The state cannot, therefore, act arbitrarily in entering into relationship, contractual or other-

wise with a third party, but its action must con-form to some standard or norm which is rational and nondiscriminatory... "" ""... A citizen has a right

to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful callingï¿½. It is true that neither the

petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or

quotations for the purchase of the goods. It must therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that

though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for

entering into such relationship and discriminate between persons similarly circumstance, but it must act in conformity with some standard or

principle which meets the test of reasonableness and nondiscrimination and any departure from such standard or principle would be invalid unless it

can be supported or justified on some rational and nondis-criminatory ground.

10. The learned Counsel contends that the conditions of bid qualification requirements for the tender are wholly arbitrary and are violative of

Article 14 of the Constitution. The condition imposed by the respondent is neither required nor bona fide as it would exclude others and the very

offer of the petitioners be a competitive, will be excluded.

11. In this respect, it has to be pointed out that Govindasamy, J. in Veerappa Chettiar v. Steel Authority of India Ltd. 1992 W.L.R. 587, as per

the ear-lier pronouncement of Apex Court which will be useful.

12. In Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another,

, it has been held thus:

This burden is a heavy one and it has to be dis-charged to the satisfaction of the court by proper and adequate material. The court cannot lightly

assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of

policy considerations which must necessarily weigh with the Government in taking action and therefore the court would not strike down

governmental action as invalid on this ground, un-less it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied it would be the Constitution to invalidate the Governmental action. This is one of the most important functions of the court and also one of

the most essential for preservation of the rule of law. It is imperative in a democracy governed by the rule of law that Governmental action must be

within the limits of the law and if there is any transgression, the court must be ready to condemn it. It is a matter of historical experi-ence that there

is a tendency in every government to assume more and more powers and since it is not an uncommon phenomenon in some countries that the

legislative check is getting diluted, it is left to the court as the only other reviewing authority under the Constitution to be increasingly vigilant to

ensure observance with the rule of law and in this task, the court must not flinch or falter. It may be pointed out that this ground of invalidity,

namely, that the governmental action is un-reasonable or lacking in the quality of public interest, is different from that of mala fides though it may, in

a given case, furnish evidence of mala fides.

13. this Court holds that the condition imposed by the respondent could be said to be unreasonable or arbitrary or they have been introduced only

with a view to exclude the existing contractors to knock away the tenders.

14. In Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others, , the Apex Court had

analysed the law relating to judicial review of administrative action and held thus:

In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have

been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into

the commercial field and giant pub-lic sector undertakings have grown up, the stake of the public exchequer is also large, justifying larger social

audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of

rejection of highest offers. That very often involves long stakes and availability of reasons for action; disciplines public conduct and improves the

culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropri-ate cases both

by the administrative superior and by the judicial process. The submission of Mr. Dwivedi, therefore, commends itself to our acceptance, namely that when highest offers of the type in question are rejected reasons sufficient to indicate the stand of the appropriate authority should be made

available ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so.

15. The conditions imposed will apply to every one of the tenderers and the petitioner cannot imagine or assume that there could be no tenderers

who can satisfy the eligibility criteria stipulated by the respondents. It is only the experience and the difficulty which the respondents have faced all

these years have made them to stipulate the eligibility criteria for submitting the tenders.

16. In Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , the Apex Court held thus:

It is well settled that every action of the state or an instrumentality of the state in exercise of its executive power. must be informed by reason. In

appropriate cases, actions uniformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 22 of the Constitution.

Re-liance in this connection may be placed on the observations of this Court in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, .

It appears to us, at the outset, that in the facts and circumstances of the case, the respondent-company IOC is an organ of the State or an

instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the

Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercise of

power. Therefore, the action of the State organ under Article 14 can be checked. See: Radhakrishna Agarwal and Others Vs. State of Bihar and

Others, , but Article 14 of the Constitution cannot and has not been construed as a chapter for judicial review of State action after the contract has

been entered into, to call upon the State to account for its actions in its manifold activities by standing reasons for such actions. In a situation of this

nature certain activities of the respondent company which constituted state under Article 12 of the Constitution may be in certain circumstances in

entering or not entering into contracts and must be reasonable and taken only Upon lawful and relevant consideration, it depends upon facts and

circumstances of a par-ticular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful

and relevant grounds of public interest. Where their is arbitrariness in state action of this type of entering or not entering into contracts, Article 14

springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be

informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly, dealings, it should meet the test of

Article 14 of the Constitution. If a Governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of

reasonableness, the same would be unreasonable. In this connection, reference may be made to E.P. Royappa Vs. State of Tamil Nadu and

Another, , Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, ,

Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , and also Dwarkadas Marfatia and Sons Vs. Board of Trustees

of the Port of Bombay, . It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice

are part of the rule of law applicable in situation or action by state instrumentality in dealing with citi-zens in a situation like the present one Even

though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering

into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and

nondiscrimination in the type of the transactions and nature of the dealing as in the present case.

The existence of the power of judicial review however depends upon the nature (of) and the right involved in the facts and circumstances of the

particular case. It is well settled mat there can be ''malice in law'' Existence of such ''malice in law'' is part of the critical apparatus of a particular

action in administrative law. Indeed ''malice in law'' is part of the dimension of the rule of rel-evance and reason as well as the rule of fair play in

action.

16. The principles enunciated by the Apex Court in no way supports the petitioner''s case and the plea of ''malice'' could not be made out or

substantiated.

17. In law, nothing prevents the respondents, a statutory body, to prescribe the qualification for tenderers which qualification have got relevancy

with respect to suitability and performance of the contract and the eligibility criteria or the parameters prescribed by the respondents is relevant and

has a bearing on the mag-nitude and volume of the Top Lift Truck Reach Staker with adjustable spreader to handle containers.

18. In Writ Petition No. 12761 of 1977, this Court has held thus:

In Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , the Apex Court held thus:

Now, obviously where a corporation is an instrumentality or agency of Government it would, in the exercise of its power or discretion, be subject

to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by government which we have discussed

above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or other-wise,

and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some

principle which meets the test of reason and relevance. In Kasturi Lal Lakshmi Reddy, etc. v. The State of Jammu and Kashmir and Anr. AIR

1990 S.C. 1992, it has been held at page 1999 thus:

The discretion of the Government has been held to be not unlimited in that the Government cannot give largess in its arbitrary discretion or at its

sweet will or on such terms as it chooses in its absolute discretion. There are two limitations imposed by law which structure and control the

discretion of the Government in this behalf. The first is in regard to the terms on which largess may be granted and the other. In regard to the

persons who may be recipients of such largess. In S. Balakrishnan v. State of Tamil Nadu and (mother AIR 1990 Mad. 159, an identical question

was considered by Bakthavatsalam, J. The learned Judge has held thus:

Learned Counsel for the petitioner contends that the conditions are onerous and the unemployed graduate like the petitioner cannot be asked to

comply with such conditions and only monies people can take part in the auction if the conditions are to be complied with. I am unable to agree

with the contentions raised by the learned Counsel for the petitioner. It is purely a matter of contract with the Government and it is for the

contracting parties to decide about the conditions and only if the petitioner is able to satisfy the conditions, he can take part in the auction. The

petitioner cannot compel the state to have certain conditions which will be advantageous to him. I do not see anything wrong in conditions Nos. 2

and 3 stated supra. These conditions are published in the auction notice so that the entire amount will come to the public revenue as soon as the

auction is over before the contract is executed. As such, I am not inclined to entertain this writ petition. It is open to the state to impose any

conditions for conducting auction and it is settled law that this Court cannot interfere in such matters. The arguments that the petitioner is an

unemployed gradu-ate and he will not be able to take part in the auction because of these conditions, is not a ground to entertain a petition under

Article 226. There is no merit in this writ and accordingly it will stand dismissed.

19. Thus, this Court will not interfere with the eligibility condition that is prescribed by the respondents 2 and 3 as it is within the specialised

knowledge and it is for them to fix the eligibility condition for the tenderers. This is the law as laid down by the Apex Court in the decision in

Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , already referred to.

20. In the circumstances, there are no merits in this writ petition and it is dismissed. Consequently, W.M.P. Nos. 25967 and 25968 of 1977 are all

dis-missed.