

(2001) 10 OHC CK 0024
In the Orissa High Court
Case No : OJC No. 10,303 of 2001

Maa Mangala Construction, Paradip

APPELLANT

Vs

Indian Oil Corporation Ltd. and Another

RESPONDENT

Date of Decision : 09-10-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Employees State Insurance Act, 1948 — Section 40

Citation : (2001) 2 OLR 600

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : B. Routray, A.K. Baral, D.K. Mohapatra, B. Rout, P.K. Dash and B.B. Routray, for the Appellant; Sanjit Mohanty, N.C. Sahoo, S.P. Panda, S. Patnaik and R.R. Swain, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanty, J.—The petitioner calls in question, the requirement of possessing an E.S.I. Registration Code, as an eligibility condition for participation in the tender, invited by the Indian Oil Corporation Ltd. on the ground that such a condition is illegal and inoperative and with an oblique motive.

2. The fact in brief is that, the petitioner "Maa Mangala Construction" is a proprietorship concern engaged in civil contract works and general order supplier, at Paradip in the district of Jagatsinghpur. It claims experience of having executed various works under Hindustan Petroleum Corporation as well as the opposite party, Indian Oil Corporation, two public sector undertakings and at the moment undertaking "Hose Handling Work" under the opposite party-Corporation by virtue of the work order dated 15.3.2001, a copy of which is Annexure-4 to this petition.

3. The opposite party No. 1. Indian Oil Corporation Ltd. (hereinafter called "IOC") has invited tender for Hose Handling Work contract for its Tanker/Barges at Paradip Port vide Tender Call Notice, a copy of which is Annexure-1. One of

the eligibility conditions amongst others under Clause (c) of the Minimum Qualifying Requirement was that, the tenderer should possess valid P.F. and E.S.I. Code and parties, who have applied for these Codes and expect to get within 15 days from the last date of opening of the tender may quote. According to the petitioner, it was qualified in all respect in terms of the Tender Call Notice, except possessing an E.S.I. Code, which is legally not permissible nor required to be possessed under the Employees State Insurance Act (hereinafter called "the E.S.I. Act"). The petitioner claims that fixation of such a condition as one of the minimum qualifying requirements, is illegal, unreasonable and invalid, since such an E.S.I. Code is neither required under the E.S.I. Act nor it has any reasonable nexus with the object sought to be achieved by the I.O.C., inasmuch as for the self-same work "Hose Handling" which the petitioner is now handling as a contractor under the same I.O.C., a tenderer was not required to possess an E.S.I. Code as is being insisted upon now. It is further stated that in view of the letter of the I.O.C. requiring the petitioner to obtain the E.S.I. Code, it did make an application to the E.S.I. Corporation, but the Corporation in its letter dated 6.7.2001, a copy of which is Annexure-3, has intimated the opposite party I.O.C., that separate Code number is not required in respect of an immediate employer/contractor, in view of Section 2(9) read with Sections 40 and 41 of the E.S.I. Act. Further the E.S.I. Corporation with regard to the similar work under the Hindustan Petroleum Corporation, intimated the petitioner that it may comply with the provision of the Act under the Code allotted to M/s. H.P.C.L. which is responsible as the principal employer in respect of all employees as per Section 40 of the E.S.I. Act. It is alleged that, the other tenderers like K.B. Das and Sons have also no E.S.I. registration number since it is impermissible and not otherwise required under law. In the circumstances, the petitioner has prayed for declaring Clause 7 of the check list in Annexure-1 the NIT (which corresponds to Clause-c of Minimum Qualifying Requirement in Annexure-B/1) as illegal and inoperative and thus prayer is made for directing the opposite parties 1 and 2 to consider the tender of the petitioner along with other valid tenders.

4. The opposite parties 1 and 2 have filed their joint counter affidavit, denying and controverting the claim of the petitioner. It is the stand of these opposite parties, that the Indian Oil Corporation Ltd. is a Government of India undertaking and for operation of its terminals, retail outlets, it had issued notice inviting tender. The minimum qualifying requirements/ condition of tenders are decided by the Tender Committee and such requirements/conditions are applicable to all the tenders issued throughout the country. In view of Clause-c of the minimum qualifying requirement in the NIT. Annexure-B/1 and Clause-8 thereof the tenderer who does not possess valid E.S.I. number Code or any tenderer who is not expected to obtain the same within 15 days of the date of opening of tender, is not eligible and his tender shall not be considered. The petitioner being fully aware of the minimum qualifying requirement, having submitted his offer, and being unsuccessful cannot be allowed to challenge a term in the tender. It is stated that a term in the tender call notice is solely within the domain of the

competent authority inviting tender and such term and condition is within the realm of contract and being an administrative decision based on the requirement of the issuing authority is not assailable in law nor can be subject to judicial scrutiny. The petitioner having not furnished the E.S.I. Code number in spite of letter dated 1.8.2001, his tender is liable to be rejected by the Tender Committee.

5. Mr. B. Roulray, learned Counsel for the petitioner reiterating the stand taken in the writ petition, submitted that in view of the specific provisions in Section 2(9) read with Section 40 and Section 41 of the E.S.I. Act, allotment of a separate Code number is not required of an immediate employer or a contractor inasmuch as in view of the letter of the E.S.I. Corporation in Annexure-3 addressed to opposite party No. 2, that employees employed by or through an immediate employer/contractor are also employees of the principal employer under the E.S.I. Act. requiring to pay the contribution in view of Section 40 of the E.S.I. Act. no registration or E.S.I. Code is required of an immediate employer like the petitioner and as such, incorporation or stipulation of such requirement in the notice inviting tender as a minimum eligibility clause is illegal, unreasonable and only to deprive the petitioner and all such tenderers from competing for award of the work under tender. Further, in absence of a reasonable cause or purpose to be achieved by the owner, stipulating such a requirement from the tenderers, is invalid in law and liable to be struck down.

6. Mr. Sanjit Mohanty, learned Senior Advocate, appearing for the opposite parties controverting the submissions made by the learned Counsel for the petitioner however submitted that, the petitioner is working as a Hose Handling Contractor, under the opposite parties for a period of six months from 16.3.2001 to 15.9.2001 vide Annexure-4, and while working as such, there was no requirement for submission of E.S.I. Code and in that context the letter under Annexure-3 was issued by the E.S.I. Corporation. But since before one is engaged as a contractor, at the time when he submits a tender for consideration, he is a tenderer only and is required to fulfil the eligibility criteria in order to be eligible for consideration by the Tender Committee. The terms of the tender is in the realm of contract and solely within the domain of the authority inviting tender and as such terms are not subject to judicial scrutiny. Terms in a tender call notice are based upon the requirements on commercial consideration and cannot be assailed to suit the necessity or convenience of an individual. It is argued that Section 1(5) of the E.S.I. Act provides for applicability of the Act to establishments or class of establishments i.e. industrial, commercial, agricultural or otherwise and Section 2A provides for registration of establishments while Section 39 requires contribution payable by both employer and the employees. Regulation 10-B of the E.S.I. (General Regulation), 1950 provides for registration of establishment by submitting declaration and 10(d) provides for allotment of employer registration Code. In view of such provision, it is not an impossible task of obtaining an E.S.I. Code nor does it violate any provision of the Act, inasmuch as possessing an E.S.I. Code being a term in the tender as a minimum qualifying requirement it is beyond judicial review. The learned Counsel further submitted

that Sections 2(9), 40 and 41 of the E.S.I. Act suggest that the principal employer can deduct the E.S.I. contribution from the contractor, but the said provisions do not prohibit the contractor to register his establishment separately and obtain Code number as required and, therefore, such a condition in the tender notice is neither arbitrary nor violates Article 14 of the Constitution, but for the avowed purpose and object of the latter, effective, independent and direct compliance of the provisions of the E.S.I. Act instead of through I.O.C. The contractor in that event would be accountable to the E.S.I. authorities and reduce the burden of the I.O.C. The learned Counsel has referred to certain decisions of the Apex Court in support of his contentions which shall be dealt with at the appropriate time.

7. In view of the pleadings of the parties and the submissions made at the bar, the question that calls for determination is whether, the condition in the tender call notice that the tenderer should possess valid E.S.I. Code is unreasonable, unfair or violates any provision by the E.S.I. Act and, as such, should be struck down. It is also to be determined as to whether an establishment like that of the petitioner-contractor's establishment needs and can obtain an E.S.I. Code.

8. In order to appreciate the contentions raised, a few relevant provisions of the Employees State Insurance Act, 1945 (hereinafter called "the E.S.I. Act") may be gone into. The Act is a beneficial legislation providing for certain benefits to employees in case of sickness, maternity and employment injuries and for certain other matters in relation thereof. Section 39 of the Act provides for payment of contribution of employers and employees at the rate specified in the 1st Schedule of the Act.

Sub-section (9) of Section 2 defines an employee as follows :

"Section 2(9) "employees" means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

(i) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or,

(ii) who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work carried on in or incidental to the purpose of the factory or establishment; or

(iii) whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service;

[and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch

thereof or with the purpose of raw materials for, or the distribution or sale of the products of, the factory or establishment (or any person engaged as an apprentice, not being an apprentice engaged under the Apprentice Act, 1961 (52 of 1961), or under the standing orders of the establishment; but does not include)]

(a) any member of (the Indian) naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed (such wages as may be prescribed by the Central Government) a month;

Provided that an employee whose wages including remuneration for overtime work exceed (such wages as may be prescribed by the Central Government) a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period)."

Section 2A of the Act is with regard to the registration of factories and establishment and according to that every factory or establishment to which this Act applies shall be registered within such time and in such manner as may be specified in the Regulation made in that behalf. Immediate employer in relation to employees employed by or through him has been defined under Sub-section 13 of Section 2, to mean a person, who has undertaken the execution, on the premises, of a factory or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the factory or establishment of the principal employer or is preliminary to the work of the factory or establishment of the principal employer or is preliminary to work carried on in, or incidental to the purpose of any such factory or establishment and includes a person by whom the services of an employee, who has entered to a contract or service with him one temporarily lent or hire to the principal employer which includes a contractor. Section 2(13-A) defines an "insurable employment" to mean "employment" in a factory or establishment to which this Act applies, but the establishment has not been defined. Sub-section (17) of Section 2 has defined a principal employer as under:

"Section 2(17) "principal employer" means-

(i) in a factory the owner or occupier of the factory and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948). the person so named;

(ii) in any establishment under the control of any department of any Government in India, the authority appointed by such Government in this behalf or where no authority is so appointed the Head of the Department;

(iii) in any other establishment, any person responsible for the supervision and control of the establishment."

Chapter IV of the E.S.I. Act is in relation to contribution to the E.S.I. Fund. u/s 38 thereof subject to the provision of this Act, all employees in factories or establishments to which E.S.I. Act applies, shall be insured in the manner provided under the Act. Section 39 provides that the contribution payable in respect of an employee shall comprise employees' contribution and the employer's contribution, which shall be, paid to the Corporation, under Sub-section (5) of Section 39 of Clause (a) if any contribution payable is not paid by the principal employer on the due date, he shall be liable for simple interest "12% per annum or as may be prescribed and under Clause (b), it can be recovered as an arrear of land revenue or under Sections 45-C to 45-1 of the Act.

Section 40 of the Act provides for payment of contribution in the first instance by the principal employer which may be quoted hereunder for ready reference :

"40. Principal employer to pay contributions in first instance--(1) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.

(2) Notwithstanding anything contained in any other enactment but subject to the provisions of this Act and the regulations, if any, made thereunder, the principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's "contribution by deduction from his wages and not otherwise :

Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable, or in excess of the sum representing the employee's contribution for the period.

(3) Notwithstanding any contract to the contrary neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.

(4) Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted.

(5) The principal employer shall bear the expenses of remitting the contributions to the Corporation."

Section 41 specifically empowers a principal employer, who has paid the contribution, in respect of an employee employed by or through an immediate employer, to recover the amount of contribution from such immediate employer either by deduction from any amount payable to him under any contract or as a due payable by the immediate employer. The immediate employer is required to maintain register of employees employed by or through him as provided in the Regulation and submit it to the Principal employer before settlement of any

amount payable under Sub-section (1), in view of Sub-section (1 -A) of Section 41 and the immediate employer shall be entitled to recover the employees' contribution for the employees employed by or through him. The contribution is to be paid in the method prescribed u/s 43 of the Act. Section 44 of the Act requires both the principal employer and the immediate employer to furnish returns and maintain registers, etc. in accordance with the Regulations.

9. Now to sum up "contribution" payable to the E.S.I. Corporation, as defined under Subsection (4) of Section 2 of the E.S.I. Act, is the sum of money payable by the principal employer in respect of an employee which includes the amount payable by or on behalf of an employee also. If the amount is not paid by the principal employer within the due date, it may carry simple interest. The Principal employer is obliged and required u/s 40 of the Act to pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employee's contribution and the employer's contribution and also has to bear the expenses for remitting the contribution to the Corporation. In cases, where the principal employer pays the contribution in respect of an employee, employed by or through an immediate employer, he is entitled to recover the amount of contribution so paid from the immediate employer either by deduction from any amount payable by him by the principal employer under any contract or as adebt payable by the immediate employer is required to maintain a register of employees employed by or through him and submit the same to the principal employer before the settlement of any amount payable under Sub-section (1), inasmuch as under Sub-section (2), the immediate employer is entitled to recover contribution from the employees employed by or through him by deduction from wages as contemplated under Sub-section (2) of Section 44. Section 44 of the Act requires every principal and immediate employers to submit to the Corporation or to such officers of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf. On a combined reading of the aforesaid provisions of the Act, there cannot be any manner of doubt that it is the principal employer, who is required to first make payment of the contribution for both employers as well as employees to the E.S.I. Corporation, which he can adjust or deduct from the bill of the immediate employer. Whether an immediate employer as in case of the petitioner is required to or is eligible to be registered under the E.S.I. Act loses its significance in view of the aforesaid provisions of the E.S.I. Act since in any event, once a contractor is engaged by the principal employer to execute any work on its behalf, it is the principal employer's mandatory responsibility under the Act to first make payment of the contribution. The contention of the learned Counsel for the opposite parties that the requirement of the tenderers to possess the E.S.I. Code is with the purpose and object of better, effective, independent and direct compliance of the provisions of the Act including payment of contribution by the establishment of the contractor instead of or through the

Indian Oil Corporation is misconceived in law, inasmuch as, it cannot be the purpose in view of the provisions of the Act which vests the responsibility on the principal employer to make payment of the contribution and such responsibility is not with the immediate employer.

10. The question now arises is as to whether, in view of the mandatory provisions of the E.S.I. Act, which cast a duty on the principal employer to make payment of the E.S.I. contribution to the Corporation, whether, the requirement of the tenderers like the petitioner to have an E.S.I. registration can be said to have any reasonable nexus with the purpose to be achieved by stipulating such a clause. The contention of the petitioner is that the possession of an E.S.I. registration by the tenderer/contractor like the petitioner is of no avail in view of the requirement of law, such a clause in the tender as an eligibility condition is unreasonable and without any purpose to oust the petitioner from consideration has considerable force. In view of the fact that whether the immediate employer has a registration or no registration, it is the responsibility of the principal employer to first make payment in accordance with the provisions of Section 40(1) of the Act, the intention of the opposite parties insisting for E.S.I. registration is of no consequence and can be held to be discriminatory and unreasonable.

11. Law is well settled that Article 14 strikes at arbitrariness in State action and ensures fairness and equity of treatment. It requires that State action must not be arbitrary, but must be based on some rational and relevant principle, which is non-discriminatory, it must not be guided by any extraneous or irrelevant consideration since that would be denial of equality. The principle of reasonableness and rationality, which is legally as well as essentially an element of equity or non-arbitrariness is directed by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power. The State cannot act arbitrarily in entering into a contractual relationship with third party. Its action must conform to some standard or norm which is rational and non-discriminatory. Law is equally well settled that while exercising the writ power the High Court is to find out whether the decision making process has proceeded on the basis of principle of law, reasonableness and the principle of natural justice was duly complied with, whether the action of the State or the public authority was done in safeguarding and with due regard to the public interest, whether the State or the public authority granted equal treatment and made a fairplay in the whole of the transaction, whether the State or the public authority acted mala fide in dealing with the subject and whether deviation, if any, made is illegal or irregular. In *Monark Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Ors.* V (2000) SLT 244: (2000) SCC 287, the Apex Court held that judicial decisions in the matter of tender process and award of contract show that while public interest is paramount there should be no arbitrariness in the matter of contract and all participants in the tender process should be treated alike. It has been laid that the Government is free to enter into any contract with citizens but the Court may

interfere where it acts arbitrarily or contrary to public interest. The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situated. It has been specifically laid down that the Court would not interfere in the matter or administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, the Hon'ble Supreme Court held that the Court cannot interfere with the decision, but it can interfere in the decision making process on grounds of mala fides, arbitrariness or unreasonableness. The learned Counsel for the opposite party, Corporation has referred to the decision of the Apex Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, in support of his contention that a term in the tender notice or an eligibility condition fixed therein is not subject to judicial scrutiny and the Court could not interfere in such a matter. But, however, a conspectus of the decision of the Apex Court discussed in the foregoing paragraphs has authoritatively laid down that a term in the tender notice or an eligibility condition stipulated therein is not subject to judicial scrutiny, but the Court will certainly step in where the action is arbitrary or discriminatory if the policy adopted has no nexus with the object it seeks to achieve or is mala fide. The Court is to find out whether the decision making process has proceeded on the basis of the principle of law, reasonableness and the principle of natural justice was duly complied with, whether the action of the State or the public authority was done in safeguarding and with due regard in the public interest and as to whether the State or the public authority granted equal treatment and made a fair play in the way of transaction.

12. Now coming back to the present case at hand, the petitioner admittedly was entrusted with the very same nature and type of work "Hose Handling for loading and unloading of different types of products" by the opposite party-Indian Oil Corporation for the preceding period 15.3.2001 to 15.9.2001 by work order dated 15.3.2001 as evident from Annexure-4. But in the notice inviting tender, nor thereafter, the Indian Oil Corporation did require the tenderers to show possession of an E.S.I. Code as in this year. The opposite party-Indian Oil Corporation for the first time has introduced such a clause for holding an E.S.I. Code number as an eligibility condition for every tenderer which according to the counter filed and as submitted by the learned Senior Counsel, was for the purpose of effective, independent and direct compliance of the provisions of E.S.I. Act by the tenderers/contractors and for payment of E.S.I. contribution by the establishment of the contractor directly. According to the opposite party-Corporation, it would reduce the burden of collecting the contribution of the contractor and its employees and the burden of deposit it with the E.S.I. authorities. The plea taken and the contention raised are wholly misconceived in law and, on facts, in view of the clear mandate enshrined in the E.S.I. Act. Section 40 of the E.S.I. Act as quoted and discussed earlier, requires a principal

employer to pay the E.S.I, contribution both of the employees as well as of the immediate employer at the first instance in respect of every employee, whether employed directly by him or by or through an immediate employer. The principal employer, who is required to pay such contribution in respect of employees and of the immediate employer, is authorised u/s 41 of the Act to realise the same, either by deduction from amount payable by him to the immediate employer under the contract or as a debt. The immediate employer is also required under Sub-section (1-A) to maintain a register of its employee as provided in the Regulation and submit the same to the principal employer before the settlement of any amount payable under Sub-section (1) thereof.

13. In view of the specific provision of law as discussed, requiring the principal employer at the first instance to make payment of the E.S.I. contribution payable by the immediate employer like the contractor, there is no room for doubt that once the opposite party - Indian Oil Corporation appoints and/or engages a contractor to undertake or handle any work on its behalf like the present work, it becomes the legal obligation and responsibility of the Indian Oil Corporation. Principal employer to make payment of such E.S.I. dues of the contractor recoverable by way of deduction from the dues of the contractor, whether or not it (the contractor) holds and possesses an E.S.I. Code. In such view of the matter, the stand taken by the opposite party-Corporation that the reason and purpose for introducing the eligibility clause for the tenderers to be in possession of the H.S.I. Registration was to avoid and reduce the burden of complying with the statutory requirement of the E.S.I. Act in making payment of the E.S.I. Contribution for and on behalf of the contractor directly responsible for such payment to the E.S.I. Corporation, is misconceived in law and against the spirit and intent of the statute, hence unreasonable and without any nexus with the purpose it seeks to achieve. An additional affidavit annexing the E.S.I. Registration Certificate of M/s. K.B. Das and Sons one of the tenderers has been filed by the opposite party, Indian Oil Corporation and it is contended that the eligibility condition for obtaining E.S.I. Code is neither illegal nor it is impossible under law for a contractor/tenderer to obtain the same. The learned Counsel for the petitioner, in reply, has submitted that the E.S.I. Registration of M/s. K.B. Das and Sons is of Calcutta and it is not known in what circumstances, such a certificate has been granted inasmuch as none of the tenderers from Orissa has obtained such a certificate from E.S.I. Corporation, Orissa, since in view of the stand of E.S.I. Corporation, Orissa, as in Annexures-3 and 5, the contractor is to operate under the Code of the Principal Employer. It was further submitted that the work in question being at Paradip in the State of Orissa, the Employees' State Insurance Registration is required to be obtained and payment of contribution is to be made in the State, if any. Be that as it may, this question would not detain us since the basic question is not as to whether such a registration can be obtained by a contractor, but as to whether, such a registration would at all be required for the purpose of which the condition is laid, in view of the provisions of the E.S.I. Act, applicable to the present case.

14. In such view of the matter, the purpose and/or intent of introducing "possession of an E.S.I. Registration Code" as an eligibility condition for participating in the tender was to avoid the unnecessary burden of complying with the requirements of E.S.I. Act on behalf of the contractor and to see that the contractor, directly and independently, is made accountable and comply with the provisions of E.S.I. Act, having been held to be misconceived in law and against the spirit of the statute, the stipulation in the Tender Call Notice, requiring possession of E.S.I. Code number from the tenderers as an eligibility condition, has to be held as illegal and inoperative, being based on irrelevant consideration and without any reasonable purpose.

15. In the result, the writ petition is allowed and the opposite parties are directed to consider the tender papers submitted by the petitioner as well as other such tenders on its own merit without insisting on production of E.S.I. Registration Code. However, in the facts and circumstances of the case, there shall be no order as to costs.