
(1999) 12 GUJ CK 0031

In the Gujarat High Court

Case No : Special Civil Application No. 1821 of 1999

Murti Enterprises

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 30-12-1999

Acts Referred:

Citation : (2000) 3 GLR 850

Hon'ble Judges : M.S. Shah, J

Bench : Single Bench

Advocate : N.D. Nanavati and Nanavati and Nanavati, for the Appellant; U.A. Trivedi, AGP for Respondent No. 1, J.R. Nanavati and H.S. Munshaw for Respondent No. 3 and P.M. Thakkar and Navin K. Pahwa, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—This petition under Article 226 of the Constitution raises an important question about the eligibility for participation in tenders invited by a public body called Gujarat Water Supply and Sewerage Board constituted under the provisions of the Gujarat Water Supply and Sewerage Board Act qua supply of hand pumps, in so far as the eligibility has been confined to Gujarat based manufacturers.

2. The facts leading to filing of the petition, as averred by the petitioner, are as under :-

2.1 Petitioner No. 1 is a partnership firm engaged in the business of manufacturing hand pumps and its spare parts since last 20 years and has its manufacturing unit at Wazirpur, New Delhi. Petitioner No. 2 is a partner of petitioner No.1-firm. For the sake of convenience, the petitioner firm shall be referred to as "the petitioners". The petitioners have been supplying hand pumps and parts thereof to the State of Gujarat, State of Maharashtra, State of Madhya Pradesh and State of Uttar Pradesh for the last about 20 years.

2.2 On 25.2.1999, the Gujarat Water Supply and Sewerage Board (hereinafter

referred to as "the Board" or "the respondent Board") placed orders with the petitioners for supply of 1800 hand pump sets and parts thereof worth Rs. 22 lacs and in compliance thereof, the petitioners supplied the hand pumps till 31.3.1999. In the meantime, on 1.3.1999 the respondent Board issued a public notice (Annexure "A") inviting commercial-cum-technical bids for fixing annual rate contract for supply of India Mark-II Deep Well hand pumps complete sets. Condition No. 1 in the tender papers stipulated as under :-

"1. Eligibility for bidding : Only Gujarat Based manufacturers shall be eligible to compete in this Bid."

The last date for receiving the tenders from the bidders was fixed on 9.3.1999 which was extended till 12.3.1999 and 15.3.1999 was fixed as the date for opening the tenders.

2.3 On 12.3.1999 the petitioner-firm, which is not having any manufacturing unit in Gujarat, filed the present petition challenging the aforesaid condition regarding eligibility on various grounds which are, inter alia, as under :-

(i) There is no manufacturing units situated in the State of Gujarat which are having in-house Galvanizing and Electroplating facilities within their factory premises which is a heart of the hand pump and at present the Gujarat based industries are importing such facilities from the other States. Hence, the respondents have not applied their mind to the aforesaid aspect.

(ii) Because of the impugned condition, the respondent board will have to pay much higher price (15% more) to the Small Scale Industries situate in the State of Gujarat as compared to the price payable to the industries situate outside the State of Gujarat.

(iii) The petitioners have the fundamental right to do business throughout India and are entitled to participate and bid in any of the bids and the impugned condition is, therefore, violative of the petitioners' fundamental right and the condition is also unreasonable. The impugned condition is, therefore, violative of the petitioners' rights under Articles 14, 19, 298 and 300 of the Constitution.

3. On 12.3.1999, the Court passed the following operative order after issuing notice and after recording reasons :-

"In the facts and circumstances of this case, it is ordered that, in the meanwhile, if at all the respondents proceed to open the tenders in question on 15th March 1999, the same shall not be finalized and it will be indicated to the respective bidders also that even the opening of these tenders will be subject to the further orders which may be passed by this Court."

4. In response to the notice of admission of the petition, affidavit in reply dated 5.4.1999 came to be filed by Mr HM Patel, Executive Engineer (Mech.) on behalf of the respondent board. It is stated therein that the main function of the Board is to provide water supply in the State of Gujarat through different schemes

including schemes for supply of water in the remote areas. The respondent-Board is putting up bores in remote, tribal and hilly areas and also provides hand pumps for lifting the water from the underground bores. The Board purchases hand pumps from the manufacturers approved by the Bureau of Indian Standards (ISI). Till 1997, there was no local manufacturer in the State of Gujarat having ISI certification and hence, the Board was entering into contracts by inviting offers and tenders from qualified manufacturers. In 1997, a local manufacturer approved by the Bureau of Indian Standard commenced manufacturing hand pumps. Another manufacturer in Gujarat came to be granted approval and licence by the ISI for manufacturing hand pumps in September, 1998 and the third local manufacturer came to be granted such licence in January, 1999.

It is further the case of the respondent-Board that the State of Gujarat evolved a policy to encourage local manufacturers, small scale industries and issued Government Resolution dated 22.4.1993 (Annexure "A") for purchasing specified items from such small scale local manufacturers and hand pump was one of such specified items. Thereafter, the State Government issued another resolution dated 23.9.1997 (Annexure "C") in order to encourage small scale industries as well as cottage industries and in the said Government Resolution also hand pumps and its spare parts were specified in the schedule of items reserved for small scale industries in Gujarat. The respondent Board is under the administrative control and supervision of the State Government and all such resolutions are also applicable to the respondent Board. Hence, once there were three units available within the State of Gujarat, who are manufacturing hand pumps and spare parts, the Board considered that there would be healthy competition. Accordingly, the eligibility condition was imposed while issuing the advertisement on 22.2.1999 inviting tenders for supplying hand pump sets. Now when the Gujarat based small scale manufactures of hand pumps are available, the respondent Board has taken the impugned decision to invite tenders only from Gujarat based small scale units in consonance with the State Government policy. The respondent-Board has taken a decision to purchase approximately 10,000 hand pumps costing Rs.4.00 Crores and the same are to be installed throughout the State of Gujarat and more particularly in the remote, tribal and hilly areas so that the acute problem of water supply in remote, tribal and hilly areas is solved to certain extent. The Board has put up construction of bores in such areas costing Rs.20,000/per bore and as soon as the hand pumps are installed such bores would be in operation.

5. Affidavit in rejoinder dated 3.5.1999 came to be filed on behalf of the petitioners for reiterating that even after filing of the present petition, the respondent-Board has placed a further order with the petitioner to supply 800 sets of India Mark-II hand pumps. This fact would indicate that the petitioner is eligible and qualified supplier as the petitioner possesses ISI (Indian Standard of Institute), DGS&D (Director General Supplies & Disposals), NSIC (National Small Industrial Corporation) and UNICEF certification as per the prevailing rules. The

petitioner firm is also a Small Scale Industry registered with the Directorate of Industries, Delhi and reliance is placed on the SSI registration certificate dated 3.5.1983 (Annexure III to the rejoinder affidavit). It is further contended that the Purchase Policy contained in the Government Resolutions of 1993 and 1997 gives the benefit of price preference to local manufacturers but even to give such benefit it is necessary and essential to have the price list of other suppliers in other States so as to give an idea of the lowest bidder from amongst the outsiders and that comparison of price preference can be given only after inviting tenders from all including the bidders from outside Gujarat. It is contended that even in the Government Resolution dated 19.12.1997, amending the Purchase Policy of 1997, there is no total ban on the manufacturers situated outside Gujarat even for submitting their bids. Additional affidavit in rejoinder came to be filed on 7.5.1999 for pointing out that even after filing of the petition in May, 1999, the respondent-Board invited tenders for supplying Extra Deep Well hand pump complete sets by 12.5.1999 and that in the said tender notice or tender papers there was no condition restricting the eligibility to Gujarat based manufacturers. It is, therefore, submitted that the respondent-Board having corrected the mistake in the second tender of May, 1999, the mistake committed by them in the tender notice issued in February, 1999 is required to be corrected. The averments are also made to the effect that in May, 1999 also supply orders for 2000 sets of India Mark-II hand pumps have been placed by the respondent-Board with the petitioner.

6. Since an ex-parte ad-interim relief granted on 12.3.1999 continued, the respondent-Board filed Civil Application No. 7276 of 1999 for vacating the ex-parte ad-interim relief. When the said application came up for hearing before this Court, after hearing the learned counsel for the parties including the learned counsel for one of the local manufacturers (Respondent No. 6), the ex-parte order dated 12.3.1999 was modified on 30.8.1999. In the said order, it was noted that about 8900 hand pump sets were purchased during pendency of the petition from the petitioner and other outside manufacturers and that another 10000 hand pumps were still required to be purchased. This Court, therefore, considered that even if the petition were to be allowed, in view of the Purchase Policy of 1997, not more than 50% hand pump sets could be purchased from outsiders if the local manufacturers were prepared to match their price. This Court, therefore, permitted the respondent-Board to purchase 50% of the hand pumps required by the respondent-Board till December, 1999 (i.e 9500) from local manufacturers at a rate not higher than Rs.3657.50 per one unit of complete hand pump set plus the sales tax payable thereon. It was clarified that this arrangement shall be subject to the result of the petition and the purchase orders shall specifically state so. This upper limit on the rate was fixed in view of the fact that it was at this rate that the Board was purchasing hand pumps after the ex-parte order dated 12.3.1999 was passed by this Court. By the above interim order dated 30.8.1999, this Court further directed the Board to invite tenders without confining eligibility to the local manufacturers within the State.

The tenders were to be opened but were not to be finalized until further orders. It was further clarified that local manufacturers within the State as well as outside the State were also eligible to submit their tenders in response to such notice. It was also clarified that this Court did not express any opinion on the merits of the controversy involved in this petition and that the terms and conditions imposed by the interim order were for the purpose of making available before the Court material so as to enable the Court to effectively adjudicate the issues involved in the petition.

7. Pursuant to the aforesaid interim order, the respondent Board invited tenders for hand pumps in question and the tenders were opened on 2.11.1999. The rates quoted by the manufacturers from Gujarat, three in number, and the lowest rates quoted by the four lowest manufacturers from outside the State are as under :-

Name of the Party	Price Bid for Normal	Price Bid for Telescopic	Price Bid for India Mark-II	Price Bid for India Mark-II with stand
Basic	Total	Basic	Total	Manufacturers from Gujarat :

Hi-tech Machineries,	3499.00	3638.96	3549.00	3742.96	Ahmedabad
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Roadtech Equip.	3465.00	3604.64	3485.00	3625.44	Pvt.Ltd., Mehsana
Ankur Engg.	3527.00	3528.00	3565.00	3709.00	Co.Pvt.Ltd., Rajkot
Manufacturers from outside the State:					
Murti Enterprises,	2890.00	3168.99	3030.00	3318.37	Delhi
Bharat Enterprises,	2889.00	3179.00	2899.00	3190.00	New Delhi.
K.P. Group,	3123.00	3163.00	3198.00	3238.00	Ghaziabad.
Deepwell Pump & Engg.	2870.00	3245.00	2980.00	3366.00	Co.Pvt.Ltd., New Delhi.

(The aforesaid figures in the column "total" include basic rate, loading, unloading, freight and stacking charges and sales tax and also include discount where offered.)

8. At the hearing of this petition, the learned counsel for the petitioner firm raised the following contentions :-

(i) But for the fact that the petitioner is having his office and manufacturing unit outside the State of Gujarat, the petitioner is fully eligible to submit his tender form and get the contract for supplying hand pumps to the respondent-Board. Confining the eligibility for submitting tenders only to manufacturers in the State of Gujarat was violative of the petitioner's rights under Articles 301 to 304 of the Constitution of India as there was no law passed by the Parliament to impose any restriction on the inter State trade and commerce.

(ii) Even if such restrictions could be imposed by any executive order, in view of the policy of the State Government as contained in the Government Resolution dated 23.9.1997, there is no absolute prohibition against outside manufacturers competing, but if the local manufacturers are prepared to match the lowest rates quoted by the outside manufacturers, the outside manufacturers cannot be given

more than 50% of the quantities required and if the local manufacturers are prepared to give commodities in adequate number upto balance 50%.

(iii) In the alternative, the interpretation placed by the respondents on the aforesaid resolution so as to exclude the hand pumps from the aforesaid purchase policy is also violative of Articles 14 and 19 of the Constitution.

9. On the other hand, Mr JR Nanavati, learned counsel for the respondent-Board, Mr UA Trivedi, learned AGP for the State Government and Mr P.M. Thakker, learned counsel for respondent No. 6 have vehemently opposed the petition and have submitted as under :-

(i) Articles 301 to 304 contain a prohibition against fiscal barriers. There is no fiscal barrier involved in this case as the State Government has not imposed any additional or higher tax on the manufacturers supplying goods from outside the State. All that the respondent Board is doing is to exercise its freedom of choice by choosing local manufacturers.

(ii) The Government Resolution dated 23.9.1997 specifically provides that hand pumps are placed in Schedule B i.e. Schedule showing items which are reserved for the manufacturers in Gujarat and, therefore, there was no question of applying the purchase policy contained in the aforesaid resolution.

(iii) It is a matter of policy for the State Government and the respondent Board to decide as to which items should be purchased from the local manufacturers and for which items the new purchase policy should be applied.

(iv) There are many other States like Maharashtra, Madhya Pradesh, Tamil Nadu and Andhra Pradesh which have adopted a similar policy of purchasing certain material only from local manufacturers.

10. In support of the first contention founded on Articles 301 to 304 of the Constitution, the learned counsel for the petitioner has relied on the decision of the Apex Court in *Shri Digvijay Cement Co., etc. Vs. State of Rajasthan and others etc.*, .

11. On the other hand, Mr JR Nanavati, learned counsel for the respondent Board has submitted that the contention urged on behalf of the petitioners is misconceived. All that Articles 301 to 304 prohibit is fiscal barriers. Neither the State Government nor the respondent Board has imposed any fiscal barrier. No additional tax or charge is levied from outside manufacturers. Since hand pumps are small items which are required by the respondent Board for catering to the demand of the local populace for supply of water through ground resources, the respondent board has full freedom to choose local manufacturers. It is not that the State Government or the respondent Board has prohibited the petitioner or any other person from outside the State from selling their hand pumps to any party in the State of Gujarat. It is open to the petitioners to sell their hand pumps to any other party in the State of Gujarat. Hence, the petitioners' right to carry on their business under Article 19(1)(g) of the Constitution is not impaired

nor is their right to inter State trade and commerce conferred by Articles 301 to 304 violated. In support of this contention, the learned counsel has relied on the decisions in *Krishnan Kakkanth Vs. Government of Kerala and others*, , AIR 1990 SC 820, 1996(1) SCC 39, 1993(3) SCC 499 (pg. 513), *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, (pg.489).

12. As regards the aforesaid contention based on Articles 301 to 304 of the Constitution, it appears to the Court that the respondents are right in contending that all that Articles 301 to 304 prohibit is imposition of fiscal barriers and that the petitioner is not prohibited from carrying on their business within the State of Gujarat. The State Legislature or the State Government have not levied any additional sales tax or any other tax which could result into discrimination against outside manufacturers vis-a-vis manufacturers within the State of Gujarat.

The decision in *Digvijay Cement Company (Supra)* pertained to the discrimination made by the State of Rajasthan under the Sales Tax Act and, therefore, the said case was pertaining to a fiscal barrier. The principles enunciated by the Apex Court in *Krishnan Kakkanth Vs. Government of Kerala and others*, , AIR 1990 SC 820, etc. are too clear to require any elaborate discussion. The first contention urged on behalf of the petitioners is, therefore, rejected.

13. As far as the second contention urged on behalf of the petitioners is concerned, it is true that the hand pumps and their spare parts are placed at Sr.No. 34 in Schedule "B" of the Government Resolution dated 23.9.1997 which schedule contains the items reserved for small scale industries within the State of Gujarat. The principal controversy in this petition has, therefore, been the interpretation of the said Government Resolution and also the question whether inclusion of hand pumps and its spare parts in the list of items reserved for local manufacturers is arbitrary.

14. Before dealing with the rival contentions, it is necessary to refer to the object underlying the Resolution and the relevant clauses thereof contained in the body of the Resolution. The object of the Resolution, as stated therein, is two fold - one is to encourage small scale industries, cottage industries and tiny industries set up by educated unemployed and the institutions run by the Khadi Gram Udyog Bhavan. The other object is to enable various Government departments and Corporations to purchase quality goods at reasonable and competitive rates.

Clause (1) of the resolution provides for exemption from payment of price for the tender forms and from giving Earnest Money Deposits (EMD) subject to certain conditions. Similarly clause (2) of the resolution provides for concessional rate of security deposit, i.e. security deposit at the rate of 3% as against the normal security deposit at the rate of 5%, provided the purchase is of more than Rs.2 lacs. If the purchase is less than Rs.2 lacs, there shall be no security deposit.

Clause (3) of the resolution is more important and the same, as translated, reads

as under :-

"3. Price preference to small, cottage and tiny industries : The small, cottage and tiny industries in the State shall be entitled to get the price preference for a period of 5 years from the date of permanent registration, meaning thereby if the party quoting lowest rate is not a small, cottage or tiny industry from within the State of Gujarat, the party quoting lowest rates amongst the small, cottage or tiny industries within the State of Gujarat shall be given 10% price preference. Such price preference shall be available even if the small/cottage/tiny industries submit their tenders through Gujarat Small Industries Corporation or Gujarat Rural Marketing Corporation.

However, the small/cottage industries shall not be entitled to get such price preference against the small scale units within the State which have completed five years from the date of permanent registration. During the period of eligibility, if the unit is transferred, there is change in the management or for any other reason if the new permanent registration number is obtained, the period of eligibility shall be counted only from the date of the original registration."

The learned AGP has pointed out that by Government Resolution dated 19.12.1997, there is a modification in this clause which provides for amendment to clause (3) in the following terms :-

"The small/cottage/tiny units within the State shall be entitled to get the price preference permanently without any limitation about the period commencing from the date of permanent registration, that is to say, if the unit quoting the lowest rate is not a small/cottage/tiny unit from amongst the State of Gujarat, the unit from Gujarat quoting the lowest rate shall be given 10% price difference. The benefit of such price preference shall also be given where the tenders are submitted by the small/cottage industries through Gujarat Small Industries Corporation or through Gujarat Rural Marketing Corporation."

Addition of cement to Schedule E as per the aforesaid resolution dated 19.12.1997 has nothing to do with the subject matter of the present petition.

Clause (4) provides for quality based price preference. If the goods supplied by a manufacturer bear ISI, ISO or similar other quality mark, the manufacturer will be given 5% price preference without any time limit about the eligibility period, but in cases where it is compulsory to have such quality marks according to the relevant laws or regulations, such price preference shall be given. Similarly if the rates are invited for articles bearing such marks, such price preference of additional 5% shall not be given. Sub-clause (2) of Clause (4) further provides that in any case no price preference shall be given in excess of 15%.

Clause (5) is another important clause. The same, as translated, is reproduced as under :-

"5. Price matching :- (a) If the unit quoting lowest rates is from outside the State, the units from within the State having quoted lowest rates should be

called for negotiations for the purpose of price comparison. For price matching net price shall be taken into account. In such a case, a comparative statement shall be prepared as per the Finance Department Circular dated 2.5.1962 and Circular dated 30.1.1971.

(b) If the unit from within the State quoting lowest rate is prepared to match the rate offered by unit from outside the State quoting lowest rate and is also prepared to abide by similar terms and conditions, 50% of the order shall be given to the unit from within the State quoting the lowest rate.

(c) If the unit from within the State quoting lowest rate is not prepared for such price comparison, 50% of the purchase order shall be given to the unit from within the State quoting the next lowest rate subject to the terms and conditions which are accepted by the unit outside the State.

(d) If the units from within the State are not in a position to supply 50% of the required quantity as stated in clauses (b) and (c) above, the order for such 50% quantity shall be placed with the three units from within the State quoting the lowest rates subject to the terms and conditions agreed to by the unit from outside the State and quoting the lowest rate.

Clause (6) provides that Schedules A, B, C, D & E were prepared with the appropriate titles and items and were enclosed with the Resolution.

Clause (7) of the Resolution gives the order preference to Gujarat Small Industries Corporation and Gujarat Rural Marketing Corporation. This clause has nothing to do with the subject matter of the present petition.

Clause (8) of the Resolution provides for purchases worth less than Rs.2 lacs without inviting tenders. If the items are purchased from a specified Government or semi-Government agencies or Institutions like the institutions for the blind or institution for the deaf and dumb, etc. The said clause has also nothing to do with the subject matter of the present petition.

Clause (9) provides for exemption from reservation which, as translated, reads as under :-

"Schedules A, B, C, D & E include items which are reserved for small/cottage/tiny industries within the State, but if on account of such reservation there is any difficulty for procuring good quality articles or if on account of absence of better competition, if there is any difficulty in obtaining three offers or if any question arises, the concerned department shall have to obtain exemption from reservation from the Secretaries" Purchase Committee and the Committee shall take decision on the question whether exemption should be granted from the reservation."

Clause (10) provides for implementation which, as translated, reads as under :-

"10. Implementation:- All the departments/offices of the State Government and Boards/Corporations shall faithfully carry out the policy/instructions contained in

this resolution. In case of breach of any such instructions, the Industries Commissioner shall verify and submit his report to the concerned department of the State Government. In such a case, the decision of the Industries & Mines Department shall be final and binding."

Schedule A contains a list of 147 items reserved for small industries. Schedule B consisting of 90 items makes reservation of such items for small scale industries within the State of Gujarat. Schedule C contains the list of items where the percentage of goods reserved for small scale industries within the State is 70%. Schedule D consists of a list of 30 items which are reserved for cottage industries. Schedule E consists of the items where the articles to be purchased from the industries within the State is fixed at 70%.

15. Now a bare perusal of the aforesaid Resolution makes it clear that the object of the new purchase policy as contained in the Government Resolution dated 23.9.1997 was not merely to encourage the local manufacturers having small/cottage/tiny units. That was certainly one of the objects, but the other equally important object was to enable the Government Department/Boards and Corporations to procure goods at reasonable and competitive rates and, therefore, the contention raised by the petitioner about the arbitrariness in inclusion of the item of hand pumps in schedule B is required to be examined in light of the aforesaid objects. A perusal of the 90 items included in Schedule B (which provides for reservation of these 90 items for small scale industries within the State of Gujarat) would indicate that none of the items are such which would normally be expected to be purchased in large quantities running into scores of thousands of them for amounts running into crores of rupees. The items are air compressors, aluminium utensils, small boxes, buckets, bags, chappels and sandals, cotton garments, household utensils, dust bins, geometry and compass box, gum strips, umbrellas, steel cupboards, woollen hosiery, etc.

16. Fully aware that in a given case the concerned department/board/Corporation might have to go for exemption from the aforesaid reservation policy for local manufacturers, the State Government provided in Clause 9 of the resolution liberty to approach the Secretaries' Purchase Committee. The clause does not confine it to a situation where good quality articles cannot be purchased on account of the reservation or nor does it confine the exemption to a situation where three comparative rates are not available. That is only an illustration to show absence of better competition. Whether there is better or healthy competition or not can be better illustrated by looking to the facts in each case. Clause (9) also covers any other situation where it would be open to the concerned department/board/corporation to approach the Secretaries' Purchase Committee.

17. Coming to the facts of the present case, although the hand pump is placed in Schedule B (Item No. 34), looking to the fact that the number of hand pumps required to be purchased by the respondent-Board in the current financial year i.e. from 1.4.1999 to 31.3.2000 runs into more than 20,000 and considering the

rates offered by the local manufacturers within the State and the outside manufactures (quoted in para 7 hereinabove), it is clear that the respondent board has acted contrary to public interest in confining the eligibility criteria for submitting tenders for the purchase of hand pumps to local manufacturers within the State. Schedule B to the Government Resolution dated 23.9.1997 apparently consists of items which would not ordinarily be required in a larger number running into tens of thousands. They are items (a few of which are quoted in para 15 above) which a man of ordinary prudence purchasing scores or a few hundreds of articles would prefer to purchase from the local supplier within the State. An ordinary builder or a Company engaged in the construction business may purchase a few hand pumps for their members/allottees. A co-operative society of farmers may also purchase a few such hand pumps. The Gujarat State Water Supply and Sewerage Board cannot be compared with such private entities. The jurisdiction of the Board extends all over the State and is engaged in the Herculean task of providing drinking water to thousands of villages all over the State. Considering that the number of hand pumps to be purchased in a single year is more than 20,000 and the difference in the rates offered by the outside manufactures and the local manufacturers is in the range of Rs.400 to Rs.500 per hand set, the amount works out to about Rs. 1 Crore. This only pertains to the period from April to December, 1999. Since the respondent Board is now required to purchase more hand pumps in the months of January to May, 2000, when the water scarcity will be much more aggravated, the loss to the public exchequer would be much more, if the eligibility is confined to local manufacturers. The affidavits filed on behalf of the State Government and the respondent Board do not at all refer to the said aspect nor they have filed any affidavits after the tenders were opened on 2.11.1999 and the rates were placed before the Court at the final hearing of this petition, nor the affidavits filed on behalf of the State Government or the respondent Board deal with the averments made in para 4.4 of the petition that there are no manufacturing units in the State of Gujarat which are having in-house galvanizing and electroplating facilities which is the heart of the hand pump within their factory premises and at present such industries are importing from other States. This specific averment is not disputed in the affidavits filed on behalf of the respondent authorities. Under the circumstances, there is all the more reason to treat the decision of the respondent authorities not to permit the manufacturers from outside the State for submitting tenders for the supply of hand pump sets as arbitrary and violative of Article 14 of the Constitution. As observed by the Apex Court in *Tata Cellular Vs. Union of India*, - "In all these cases (of judicial review of administrative action) the test to be adopted is that the Court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

This principle should also take care of the contention on behalf of the respondents that the Court does not sit in appeal over the decision of the respondent-Board to choose a local manufacturer. Indeed the fault lies with the

respondent-Board in not taking into consideration the material aspect that when the number of hand pump sets to be purchased is more than 20,000 in a year, for obtaining competitive rates, the Board could have gone for inviting tenders from manufacturers from outside Gujarat also. Consequently, the decision to confine eligibility to Gujarat based manufacturers was, therefore, clearly vitiated by non-consideration of this important relevant factor.

18. The reliance placed by the respondents on the decisions of other States like Maharashtra, Madhya Pradesh, Andhra Pradesh and Tamil Nadu is misconceived as the Court is not pronouncing on the general power of the Government to give preference to the local manufacturers. The decision of the State of Maharashtra as contained in its decision dated 19.8.1985 produced at the hearing of this petition merely provides for priority or preference to the local manufactures and not total exclusion of the outside manufacturers. This will be clear from the following paragraphs in the decision of the State of Maharashtra :-

"Whenever various Government, Semi Government organizations purchase A.C. pressure pipes using tender notice procedures, the industry elements available in Maharashtra and participated in the tender calls should be given priority while placing orders depending upon their production capacity. While placing these orders, small scale industries should be considered first and then medium and large scale industries should be taken into account.

In case, the prices of organizations outside Maharashtra are lower than organizations in Maharashtra and if it is allowed by the purchase department, the orders should be placed with the organizations in Maharashtra at these lower prices. Concerned organizations should be contacted before deciding on such tenders."

(- this presupposes offers being made by outside manufacturers)

The decision of the Government of Tamil Nadu in its circular dated 8.2.1985 produced at the hearing of this petition merely states that all the Government departments and public bodies should invariably place orders for their requirements of asbestos pressure pipes only with Tamil Nadu Cements Corporation Ltd. Such decision cannot, therefore, be said to be applicable to the case at hand where the hand pumps are sought to be purchased from private manufacturers within the State. As already stated above, whether the decision to purchase articles from local manufacturers of a particular item in a given case is arbitrary or not would depend on the facts and circumstances of each case, nature of articles, number of articles, the total amount involved etc. and there cannot be any hard and fast rule or any straight jacket formula which can be laid down for all situations and for all States.

ORDER

19. In view of the above discussion, this petition is allowed. Condition No. 1 of tender form at Annexure "A" confining the eligibility to only the Gujarat based

manufacturers is held to be arbitrary and violative of Article 14 of the Constitution. The respondents are restrained from processing or finalizing the tenders received by the respondent-Board pursuant to the said tender notice at Annexure "A". The respondent-Board is directed to process the tenders opened on 2.11.1999 which were invited pursuant to the interim order dated 30.8.1999 passed by this Court in the present petition and to proceed further for awarding contracts on the basis that the manufacturers outside the State of Gujarat as well as the manufacturers within the State of Gujarat are eligible to get the contract for the supply of hand pump sets as per the new purchase policy contained in the body of the Government Resolution dated 23.9.1997 (except clause 6) as amended from time to time till 2.11.1999.

It will be open to the respondent-Board to consider whether the purchases of hand pumps made during pendency of this petition should be governed as per the directions contained in this judgment.

At this stage, Mr Pahwa, learned counsel for respondent No. 6 prays for stay of operation of this judgment for some time in order to enable his client to have further recourse in accordance with law.

The learned counsel for the petitioners opposes the request. The learned counsel for the respondent-Board also opposes the request on the ground that the Board is required to urgently purchase the hand pumps for installation in scarcity areas in the State of Gujarat and that a large number of such pumps are required to be purchased immediately.

In view of the above submissions, the request made on behalf of respondent No. 6 is rejected.