

(1999) 03 GAU CK 0021
In the Gauhati High Court
Case No : Civil Rule No. 3659 of 1998

North Eastern Fire and Security Services	APPELLANT
Vs	
O.N.G.C. Ltd. and Others	RESPONDENT

Date of Decision : 19-03-1999

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1999) 1 GLT 592

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : G.N. Sahewalia, A.K. Goswami and A. Talukdar, for the Appellant;
P.K. Choudhury, G.K. Dutta and B. Dutta, for the Respondent

Judgement

D.N. Chowdhury, J.—The subject-matter requiring adjudication in this proceeding pertains to eligibility to offer bids against a Notice Inviting Tender, which had arisen on the following circumstances.

2. The Respondents/Oil & Natural Gas Corporation Ltd. (ONGCL in short) issued notice inviting sealed tenders for supply of, amongst others, Aqueous Film Forming Foam (hereinafter referred to as AFFF) 3% (IS: 4989 Part-II) for 15,000 litres. It was indicated in the said Notice Inviting Tender that non-transferable bidding document would be available in the office between 1400 hours to 1600 hours on any working day from 1.7.98 upto one day prior to the date of closing of bid on payment of the requisite tender fee. The closing date and time for receipt of tenders was fixed at 1400 hours on 31.7.98 and the opening date and time of the tenders was fixed at 1500 hours on 3.8.98. In terms of the Notice Inviting Tender (NTT for short), the Petitioner submitted an application for procurement of 15,000 AFFF 3% V/V Concentrate as per IS 4989-Pt II-ISI Marked which was issued to the Petitioner on payment of the tender fee. The Bidding Document inter-alia contained the technical criteria and under clause 3.1 of the Technical Criteria, it was stated as follows:

3.1 The bid should be submitted by the original manufacturer only.

Naturally, the Petitioner not being an original manufacturer, was not in a position to offer bid and, therefore, it moved this Court questioning the legitimacy of the above criteria.

3. The Petitioner contended that the above condition put by the Respondents/Corporation is not only arbitrary and irrational, but it has also adversely affected the livelihood of the Petitioner. The Petitioner contended that it is a Small Scale Industry registered with the Government of Assam and is the sole distributor of SAFEX which is a reputed manufacturer of all types of ISI Marked End TAC approved fire and safety equipment. That the Petitioner along with other like persons, on a number of occasions, were selected for supply of various fire fighting equipments and had successfully executed the contracts. That the impugned condition under clause 3.1 of the Technical Criteria prescribed in the Bidding Document seriously jeopardized the livelihood of the Petitioner in a most illegal fashion which requires intervention from this Court.

4. Mr. G.N. Sahewalla, learned Counsel for the Petitioner, submitted that the Respondent/Corporation no doubt had the power and authority to determine the criteria for submitting tender, but such authority however must confine to the canons of legitimacy. Whatever is not reasonable is arbitrary and unfair, is also violative of the Article 14 of the Constitution of India, submitted Mr. Sahewalla. Mr. A.K. Goswami, learned Counsel, supplementing the argument of Mr. Sahewalla, the learned Counsel for the Petitioner, referred to various tender notices of earlier occasions and submitted that the authority on earlier occasions allowed both, the original manufacturer as well as the authorised dealers/distributors/sole selling agents backed by original manufacturers, to supply the necessary articles provided such backing-up was valid and current, and therefore, there cannot be any valid and lawful justification to exclude the dealers/distributors agents etc.

5. The Respondents submitted their affidavit and disputed the claim of the Petitioner. The Respondents stated that the rationale behind the shift of its policy confirming the bidding to the original manufacturers is for attaining the highest standards of public safety and to counter major catastrophes which took place earlier. According to the Respondents, the real object behind introducing clause 3.1 as a technical criteria in the Bidding Document was/is public interest and safety and security of all concerned. The Respondents referred to a number of fire accidents which resulted in loss of lives and properties. That the fire equipments/materials for fighting fires unless are very effective, genuine and of the highest standard, are not capable enough to fight fires of great magnitude thereby exposing the lives and properties of all concerned including the general public from hazards of explanations, etc. The Respondents referred to some of the accidents that took place in recent times. In this context, the Respondents referred to a circular bearing No. FAN/97-98/AMR dated 10th February, 1998, issued by the Oil Industry Safety Directorate, Govt. of India, Ministry of Petroleum and Natural Gas, New Delhi, which specifically suggested that fire

fighting equipments/materials should be procured from manufacturers of repute with proven record and that specifications of the materials/equipments should be in accordance with national and international standards. And considering all the aforesaid aspects of the matter, the Respondents incorporated clause 3.1 as a condition (technical criteria) confining the submission of bids for supply of such equipments/materials to the original manufacturers only. The Respondents further disputed the earlier performance/execution of contracts by the Petitioner, however, since those are not material in deciding this case, I refrain from making any comment thereon.

6. The basic question before this Court for adjudication is as to the legitimacy and nationality of incorporating clause 3.1 under Technical Criteria of Bidding Document for supply of the materials-in-question. By the above clause, the Respondents/Corporation limited the bidding only to the original manufacturers of the materials-in-question. The Respondents are the buyers of the goods who use those goods/materials in their establishments; naturally, they are entitled to determine the eligibility criteria. There cannot be any cut and right formula for determination of such policy. The concerned authority is to be allowed to determine its policy without following any rigid formula; at the same time, the question of legitimate expectancy of the parties also cannot be over-ruled. But to what extent the principle of legitimate expectancy will prevail over the policy decision, will also differ from case to case. By incorporating clause 3.1 in the Technical Criteria, the Respondents limited the bidders only to the manufacturers of the goods/articles-in-question; other than the manufacturers, all are excluded from bidding. The reason assigned for it by the Respondents, as indicated, is the safety of the establishment and safety of the public, i.e., in public interest. As mentioned earlier, it is open to the policy makers to adhere to its own policy. In such decision making process, as alluded earlier, one must be allowed to have a free play to adjust to the new situation.

7. Under the Constitutional scheme, Judicial Review is ingrained. The Constitutional Courts are charged with the power of judicial review to protect and preserve the rule of law and to see that the authorities act within the limit set out by law without abusing or misusing the discretion conferred on it. Rule of law does not countenance unfettered discretion. Discretion is to be exercised in accordance with law as well as the accepted norms. In the decision making process, the authority must take relevant considerations overlooking irrelevant considerations. An honest and bonafide decision will also be subject to judicial review if the decision making process is influenced by extraneous and irrelevant consideration *Padfield v. Minister of Agriculture* (1968) ACC 997; *Breen v. Amalgamated Engineering Union* (1971) 2 QB 175; *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1977) ACC 1014.

8. In the area of the exercise of judicial review, care must be taken as regards the extent of the province of the discretion. Within the legal parameter, the

decision maker is to be given a free hand of its own choice. If the authority exceeds the bounds set out by law, it acts unlawfully - what is called in legal parlance as ultra vires. It is the area where the Court is to act with caution and circumspection by applying an objective standard leaving to the decision maker a free hand of choice authorised on it by law. When the decision is within the legal framework, it is not the function of the Court to go ahead to the merits of the decision and judge on its own standard. As observed by Warrington LJ, in *Short v. Poole Corporation* in (1926) (91) Chn 66 -. "with the question whether a particular policy is wise or foolish, the Court is not concerned, it can only interfere if to pursue it is beyond the powers of the Authority."

9. The margin of appreciation may differ from authority to authority, the facts situations and the gravity of the subject-matter. One cannot overlook the want of complete information, feedback and resources of the Court in determining the quality of the goods sought to be purchased. In this area, the resources of the Courts are inadequate for substituting its own discretion for that of an authority which is confided with the discretion. The Courts are no doubt the ultimate Judges of what is lawful and what is not but "there are certain question which the Courts are ill equipped to decide" - *Summer LJ in Roberts v. Hopwood* (1925) ACC 578.

10. The Courts in judicial review can intervene in a matter of policy decision only when such policy decision is contrary to the Constitutional mandate or in contravention of the Statutory provisions or so unreasonable that no reasonable person properly instructed in law can adhere to or follow such policy. The Respondents in this case disclose that keeping in mind all these considerations, the Corporation had to depart from its earlier policy decision. The considerations which impelled the Respondents/corporation to change its earlier policy per se cannot be said to be irrelevant considerations or devoid of any rationality. The Respondents have earlier experienced the catastrophic accidents/incidents and, therefore, they sought to depart from its earlier policy. These are assessments made by the Respondents in which area this Court is not armed with the requisite resources to reach a contrary conclusion in the fact situations. This Court is not in a position to substitute its own opinion for that of the Respondents like that in an appeal. In the facts and circumstances of the case, therefore, it cannot be said that the decision of the Respondents to exclude persons other than the original manufacturers of the goods/materials-in-question has no nexus with the object sought to be achieved.

11. For the foregoing reasons, I do not find any merit in this petition. The petition is accordingly dismissed. However, there shall be no order as to costs.

12. The interim order dated 30.7.98, stands vacated.