

(2022) 06 TEL CK 0008
In the Telangana High Court
Case No : Writ Petition No. 18632 Of 2022

Praksash Singh

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 06-06-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2022) 06 TEL CK 0008

Hon'ble Judges : Dr. G. Radha Rani, J

Bench : Single Bench

Advocate : R Sushanth Reddy

Final Decision : Dismissed

Judgement

1. This writ petition is filed by the petitioner challenging the action of the 2nd respondent in not permitting the petitioner to participate in the Notice inviting e-Tender bearing Tender No.SRCC/PT/003/TAPSO/2022-23 on the basis of the booking receipt of the respective category of the trucks obtained from the authorized dealer as illegal, arbitrary and unconstitutional and consequentially to direct the respondent to permit the petitioner to participate in the tender on the basis of booking receipt.

2. Heard the learned counsel for the petitioner Sri R.Sushanth Reddy and learned standing counsel for the respondent No.2/Indane Oil Corporation Limited (IOCL) Sri Dominic Fernandez.

3. Learned counsel for the petitioner submitted that the respondent No.2 invited tenders for award of contract for transportation of Indane LPG cylinders in vertical position on unit rate basis, from Kondapally bottling plant to locations within and outside the States of Telangana and Andhra Pradesh for a period of 3 years. The respondent No.2/Corporation was the manufacturer of Indane LPG gas cylinders. The said gas cylinders were distributed across the States of Telangana and Andhra Pradesh from Kondapally Bottling Plant. The distributors of

the said cylinders attached to Kondapally Bottling Plant had an option to either opt to use their own trucks for the transport of the cylinders from the bottling plant to the warehouse or use the trucks provided by respondent No.2/ Corporation. The respondent No.2/Corporation had invited for Expression of Interest from the existing distributors attached to Kondapalli Bottling Plant for own load transportation on unit rate basis and the instant tender is floated for the award of contract for transportation to regular distributors. The unit rate basis under the expression of interest was to be fixed on the basis of L-1 rates arrived at in the instant tender. The purpose of both the tenders were the same and they were intertwined.

4. As per clause-I pre-qualification criteria, the bidders were required to provide the self-attested copy of the RC book or Invoice and temporary registration certificates for new trucks. The bidder would also provide an affidavit in case the bidder was willing to use attached truck (Trucks that were not in the name of the bidder). In other words, the bidder should own a truck as on the date of submission of the bids to meet the pre-qualification criteria. The petitioner was a tenderer who was willing to participate in the instant tender process but the petitioner did not have a truck of his own or an attached truck to participate in the tender process. The petitioner was willing to procure a truck of his own and was ready to provide a booking slip to prove his bonafides. The period of contract under clause 10 of the Notice inviting e-Tender did not specify the commencement date of the period of contract. The above clause would show that the date of commencement of the contract was either from the date of placement of the LOI or as advised by the State Office of Indane Oil Corporation (IOC). If the petitioner purchased the truck, the same would be lying idle from the date of submission of the bid till the date of placement of LOI or the date advised by the State office of the IOC. Since the said truck could only be used for the transportation of cylinders, the same could not be used for any other purpose by the petitioner. The same would cause severe financial loss to the petitioner would not be financially viable. The expression of interest which was flouted for the existing distributors attached to Kondapally Bottling Plant for own load transportation also stipulated the condition for the ownership of the vehicle at the time of submission of expression of interest and in the pre-bid meeting dated 12.07.2021 when the said problem of the idling of the truck was brought to the notice of the 2nd respondent, the distributors were permitted to participate in the EOI on the basis of submission of booking receipt of the respective category of the trucks obtained from the authorized dealer of the trucks. The conditions of the said EOI and the instant tender were same. As such, no prejudice would be caused if the petitioner was permitted to participate in the tender process basing on the booking receipt and prayed to allow the petition.

5. The 2nd respondent filed counter affidavit. The learned standing counsel for 2nd respondent submitted that e-Tender for packed LPG transportation was an open tender to all public. The bidders who were interested and who were agreeable to the tender terms and conditions only would participate and they

were assessed strictly in terms of the tender terms and conditions, whereas the EOI flouted during July, 2021 was not open to general public and was meant only for specified Indane Distributors who were attached to IOC Kondapally, LPG plant, to facilitate interested distributors to induct their trucks to enable them to uplift their own load requirements subject to meeting the requisite eligibility criteria mentioned therein. The EOI did not have any official bid except that they would be required to accept the LI rates finalized subsequently through public tender for the Kondapalli Plant from general transporters. Apart from bidders offering ready trucks, the bidders were also given an opportunity to apply with temporary registration certificate so that they would be having an option to build the body/cages and other accessories after receipt of the LOI, if required. Taking into account the lead time involved in Distributors ultimately placing the truck for their own requirement in the new contract, facility of offering trucks with booking slip was extended to the willing distributors with payment of Rs.50,000/-. No EMD was required to be paid by the general transporters/bidders against the present tender. Both EOI and transportation tender guidelines and conditions were not the same, as could be seen from EMD clause. The petitioner was seeking change of tender terms and conditions to suit his personal benefit. As it was open public e-tender, those who would fulfill the pre-qualification criteria could only offer their trucks against the tender. The Corporation policy of EOI for distributors and public tender for general transporters was prepared based on different yardsticks on all India basis and not comparable. Hence, the petitioner's request for extending the same facility could not be accepted to and relied upon the judgments of the Hon'ble Apex Court in *Michigan Rubber (India) Limited v. State of Karnataka* (2012) 8 SCC 216, *Jagdish Mandal v. State of Orissa* 2017 14 SCC 517 and *Arun Kumar Agarwal v. Union of India* (2013) 7 SCC 1.

6. An implead petition was also filed by the persons who purchased new trucks and were participating in the tender, opposing the petition filed by the writ petitioner on the ground that as they had already invested in trucks, it would cause a grave loss to them if the petitioner was permitted to participate in the bid basing on the booking receipt which would have an unfair advantage over them.

7. Perused the record.

8. On a perusal of the pre-qualification criteria mentioned in the tender document at clause (1), it lays down the prequalification criteria to participate in the bid as follows:

"1. OWNERSHIP:

The bidder should upload the self-attested copies of RC books or invoice and temporary registration certificates for new trucks of all offered trucks (owned + attached) of capacity as defined in the scope of work above, out of which the bidder must OWN at least ONE truck in their name. If the bidder does not have minimum one OWN truck, then the bid of such bidder will not be considered."

As per clause 2 : In case year of manufacturing or month & year of manufacturing is not mentioned in the RC Book then the month & year of manufacture will be established from the copy of original invoice of quoted trucks. In case Original Sale invoice is not available, then the month & year of manufacturing will be established from the copy of Certificate issued by Manufacturer, in case the manufacturing date cannot be established from any of the documents then the relevant quoted truck will be rejected.

9. Thus, the tender provides for a tender evaluation criteria under which there is a ranking criteria wherein the ranking is based on the age of the truck, which will be determined by the month and year of manufacturing which will be found in the sales invoice and /or the registration certificate and/ or in the temporary registration certificate. The said condition is prescribed in the pre-qualification criteria under 1 (2) age of trucks.

10. The contention of the learned counsel for the petitioner was that the 2nd respondent allowed the distributors to participate in the expression of interest basing on the booking receipt, but imposed condition in public tender for general transporters to own the truck as on the date of the submission of the bids to meet the pre-qualification criteria and the said imposition of condition was arbitrary and unconstitutional. The contention of the learned standing counsel for the 2nd respondent was that the corporation policy for distributors and general transporters was based on different yard sticks and was not comparable. He demonstrated the same vide a table in his counter as to how they both were distinguishable.

Sl.

No.

EOI for Distributors

Public Tender for General Transporters

1.

Trucks inducted will be utilized for INDANE Distributors for their own load purposes only. In case there is no fund deposited by the Distributor and or there is no Indent/requirement, then the Distributor truck will NOT be utilized and will be idle. Monthly running mileage will be lesser and

therefore lesser income earned.

Trucks inducted by General Transporters will be utilized for sending it to any Distributors/s attached to the Plant. Thereby not much of idling of Transporters' trucks. For Transporters' trucks, running mileage will be slightly better when compared to Distributors' own trucks and thereby the earnings will

be more.

2.

Not more than 2 or 3 trucks (depending upon their daily load requirements), Distributors can offer/get allotment of trucks in the EOI.

Maximum of 10% in the total NIT requirements of trucks can be allotted to the Transporters under both Smaller capacity (342 cylinders) and bigger capacity (525 cylinders) trucks.

3.

As per eligibility and requirements, few Distributors will be restricted to offer higher capacity trucks only.

No restriction for Transporters. They can offer any capacity trucks in the Tender.

4.

In view of expected time delay and lead time required in the finalization of the Contract, Distributors can also offer new trucks with Booking slip, but with EMD of Rs.50,000/- per truck. Forfeiture of EMD in case of failure on the part of Distributor in inducting trucks and will NOT be entitled to offer induct trucks in the

entire period of contract.

NO EMD is payable by the Transporter presently for any truck being offered in the tender and opportunity available for offering new trucks with Temporary Registration/Invoice of the chassis also, apart from Ready trucks.

5.

EOI participation is restricted only to those INDANE Distributors who are attached to concerned LPG Plant and

taking their loads generally.

This NIT/E-Tender is open to General public/Transporter on all India basis and No restrictions, as long as they meet the

PQC.

6.

INDANE Distributors (selected through different process) continue to be Distributors for IOCL for indefinite period and offering of trucks through EOI for own load purpose is a part of facility extended for ensuring timely delivering of cylinders for customer satisfaction and improving market

share.

Transporters are only for the particular/specific tender period and the binding ends on the expiry of the Contract/extended Contract for that particular LPG

Plant in which they are attached.

11. Learned counsel for the respondent No. 2 also relied upon the judgment of the High Court of Judicature at Madras in Writ Petition Nos.315, 316, 3066 and 3818 of 2016 in T. Vijaya Sekar v. Union of India and Indian Oil Corporation Limited decided on 25.04.2016 on the same issue. It was held that:

"26. The main grievance of the petitioners insofar as IOCL is concerned, is that the terms and conditions of the tender do not provide equality and fair play among the participants in the tender. There is a clear discrimination between the truck operators and the distributors since they are given undue preference and there is a clear favoritism for the distributors in such a way that the trucks offered by the distributors alone are given preference and awarded contract. Insofar as BPCL is concerned, the grievance of the petitioners is that BPCL has sought for Expression of Interest from its distributors and allotted the contract by nomination on the basis of the EOI (Expression of Interest) received, and thus, the tender allowing the distributors to offer trucks to lift their own load requirements based on EOI is clearly arbitrary, discriminatory and irrational."

"27. Inasmuch as the petroleum products are essential commodity and breakdown of its supply chain has the potential to create law and order situation, it is the prime concern of the Corporations to provide an effective mechanism for transportation of LPG cylinders to every nook and corner of the State. According to the respondents/Corporations, the tender conditions are framed as per the laid down guidelines and their requirement and if the distributors are permitted to lift their own load requirements, the liability of the Corporations would be minimized and the main object for awarding the contracts to the distributors is to avoid frequent strikes by loading and unloading labourers engaged by the transporters, who used to put unreasonable demands and breakdown the supply of essential commodity of LPG to the general public at large and also to prevent the pilferage of LPG cylinders. Hence, by way of entrusting the distributors who are having their own trucks in uplifting their loads, the Corporation will not face any of the above said issues. Therefore, keeping in view of this object, the Corporations have given preference in favour of the distributors, which in my considered opinion, would not amount to either clear discrimination or favoritism to the distributors as contended by the petitioners and that there is absolutely no mala fide intention on the part of the Corporations in their administrative action in awarding the contract to the distributors. Further, by way of this, the supply of LPG cylinders to the consumers, would lead to smooth functioning without there being any disturbance thereof. In fact, every distributor has to necessarily compete with other distributors who are participating in the bid and in order to get the contract, he has to quote L1 rate and the bids get finalized only at lowest rates first and the distributors who quotes lowest rates, only will get benefit. Otherwise, if requirement of trucks are not fulfilled from lowest quoted bidders, no benefits will be extended to the distributors and they would be treated as normal transporters. Therefore, there is nothing unreasonable in giving

preference to the distributors by the Corporations by way of their administrative action, which in my considered opinion, does not suffer from unreasonableness, bias and mala fide, warranting interference of this Court. In such view of the matter, no judicial review of such administrative action is required.”

12. The Hon’ble Apex Court in Jagdish Mandal’s case (2017 14 SCC 517 supra) held as under:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

13. In Michigan Rubber (India) Limited’s case ((2012) 8 SCC 216 supra), after considering all the judgments with regard to the nature and scope of judicial

review in matters relating to tender conditions the Hon'ble Apex Court stated the principles as follows :

From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

14. Hence, the above judgments of the Hon'ble Apex Court, would show that the scope of the judicial review by the Court in contractual matters is very limited and unless malafides and arbitrariness was shown, the Court could not interfere with the administrative action. Considering that the distributors and general transporters are not standing on the same footing and allowing the petitioner to participate in the public tender basing on the booking receipt would give him an unfair advantage over the other prospective bidders who had already invested in trucks and would put them to grave loss and altering the terms of tender conditions after initiation of the bid would amount to change in the rules of the game after the game started and would cause prejudice to other bidders and unnecessary hardship to them, it is considered fit to dismiss the Writ Petition.

16. Hence, the Writ Petition is dismissed. In view of the dismissal of the writ petition, it is considered not necessary to allow the implead petition. No order as to costs.

Miscellaneous Petitions pending, if any, shall stand closed.