(1982) 09 MP CK 0002

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 51 of 1982

Sat Prakash Mehra APPELLANT

Vs

State of M.P. and another RESPONDENT

Date of Decision : 24-09-1982

Acts Referred:

Constitution of India, 1950 — Article 226
Monopolies and Restrictive Trade Practices Act, 1969 — Section 33(1)(b)

Citation : (1984) JLJ 251 : (1984) MPLJ 318

Hon'ble Judges : U.N. Bhachawat, J;R.C. Shrivastava, J

Bench : Division Bench

Advocate : R.D. Jain, for the Appellant; M.A. Shah, Deputy Govt. Advocate for State, for the Respondent

Final Decision : Allowed

Judgement

U.N. Bhachawat, J.

This is a petition under Article 226 of the Constitution of India, whereby the petitioner seeks the issuance of a writ, direction or order as follows:

(i) A direction be issued to the non-petitioners for removing the condition of purchase of hand pumps after inspection by crown agent thereby allowing the petitioner to make supplies like other traders dealing in this business.

(ii) The non-petitioner be directed to purchase deep well hand pumps without any unreasonable condition.

The petitioner is the proprietor of a manufacturing concern M/s Kapil Udyog, Gwalior. It is a Small Scale Industry Unit manufacturing hand pumps and is registered as such with the District Industries Centre, Government of Madhya Pradesh vide the registration certificate No. 6617 dated the 26th November 1981 (Annexure P-1 to the petition). It also holds a licence for the manufacture of hand pumps from the Indian Standards. Institution under (The Indian) Standards Institution (Certification Marks) Act, 1952 (Act XXXVI of 1952) (for short, hereinafter referred to as ''the Act XXXVI of 1952''), being number CM/ L-1013317, which has been operative since 16th December 1981 (see Annexure P-4 dated 3rd February 1981) and, as such, entitled to the use of ISI and ISS marks on the goods manufactured by it.

The Engineer-in-Chief, Public Health Engineering Department, Madhya Pradesh, Bhopal invited tenders vide tender notice dated 22nd September 1981 for the supply of deep well hand pumps (India Mark II type). This tender notice was also notified in the ''Dainik Bhaskar'' dated 17th October 1981. The relevant term (hereinafter referred to as ''the impugned condition'') of the tender notice is extracted hereinbelow:

*** *** ***

"Sealed tenders on Form ''I'' are invited by the undersigned from UNICEF approved manufacturers for the supply of deep well hand pumps (India Mark-II Type) conforming to relevant I.S.S."

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"Each hand pump supplied should be approved by the agency appointed by UNICEF for the purpose. At present M/s Crown Agents are the authorised agents of UNICEF who do this job on behalf of and on instruction from UNICEF.

Those manufacturers who are in the process of getting their hand pump manufacture approved by UNICEF may tender but their tender will he considered only if their factory is approved and certified to be capable of manufacturing according to UNICEF quality control before date of opening of tender."

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(Extracted from the copy of the tender notice filed on behalf of the respondent-State during the course of the arguments under copy to the petitioner.) The last date for opening the tender was at 3 P.M. on 18th November 1981.

The petitioner has filed the present petition challenging the validity of the condition, extracted hereinabove in para. 3 of this order, on the following grounds:

(i) The impugned condition cannot be imposed with reference to the petitioner''s industry, inasmuch as it is a Small Scale Industry, duly approved and registered with the Madhya Pradesh Laghu Udyog Nigam and licensed under Act No. XXXVI of 1952.

(ii) The imposition of the impugned condition is in violation of the provisions of Act No. XXXVI of 1952, as the trade mark ISI and/or ISS is a conclusive guarantee and certification regarding the standard of quality of the goods manufactured by the petitioner.

(iii) The impugned condition does, in effect, restrict the trade activity of the petitioner and create a monopoly in favour of the Crown Agents, violating section

33(1)(b) of the Monopolies and Restrictive Trade Practices Act, 1969, (for short, hereinafter referred to as ''the Anti-Monopolies Act''), resulting in the ruination of the petitioner''s Small Scale Industry, whereas the policy of the Government is to give impetus to Small Scale Industries, and for this purpose, under clause 96 of section 1 of Chapter 6 of the M.P. Financial Code Vol. 1, Rule 14 of the Rules for the supply of articles for the Public Service (Store Rules) and. Instructions for the guidance of officers, who are required to make purchases of stores (for short, hereinafter referred to as ''the Store Rules''), has been made.

The respondent-State has resisted the contentions and the claim of the petitioner. While controverting the material allegations of the petition, inter alia, it has been contended by the respondent that at the relevant time, i.e. upto the date fixed for the opening of the tender, the petitioner did not hold a licence under Act No. XXXVI of 1952; and this Act does not in any manner create a restriction on the power of the State Government or any of its departments of further inspection by any expert agency before purchasing the articles for its use. The impugned condition has been imposed after a due deliberation in the public interest for the purpose of quality control in the light of the past experience about the purchase of deep well hand pumps for the purpose of Rural Water Supply Programme. The Crown Agency''s services are utilised for the purpose of inspection of the hand pumps to be purchased for quality satisfaction, as that is an agency nominated by the international organisation-UNICEF. It is also pleaded that the impugned condition is a general condition applicable to all the tenderers and is not meant particularly for the petitioner. The object and purpose behind the imposition of this condition is to have quality articles answering the requirement of the Rural Water Supply Programme and, as such, is in public interest. It is neither arbitrary nor capricious.

The arguments of the Learned Counsel for the parties in support of the rival contentions in view of their being inter-linked inextricably with each other, can be dealt with under one question, i.e., whether the impugned condition is violative of Article 14 of the Constitution; the provision of Act XXXVI of 1952 and section 33(b) of the Anti-Monopolies Act.

Article 14 of the Constitution enacts a general rule as to equality before the law--a necessary corollary to the highest concept of the rule of law embedded and enshrined in our Constitution. In this sense, any act-- executive or legislative of the Government, which is a naked arbitrary exercise of the power, intrinsically contains the seeds of inequality and would, thus, be hit by this Article. Therefore, to invoke Article 14, for holding a particular act or action to be invalid thereunder, two essential conditions are to be looked into, viz., (i) does it admit of the possibility of any real and substantial discrimination and (ii) does it impinge on the fundamental right guaranteed by the Constitution. It is on the touch-stone of these conditions that the validity of the act or action in question has to be judged.

Ere we dwell upon the question further, it would be advisable to point out that it is an undisputed position that the impugned condition is applicable equally to all the tenderers and not that it is restricted to the petitioner alone. As a sequel to this undisputed factual position, it can be said without any fear of contradiction, that the impugned condition cannot be held to suffer from the vice of discrimination.

We now proceed to consider as to whether the impugned condition is arbitrary or capricious. For a better comprehension of the point, we deem it advisable to set out hereinbelow the relevant excerpts from the return of the State, which indicate the circumstances and object relating to the imposition of the impugned condition:

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"In July 1979 a National Conference was held at Madurai, sponsored by Central Government/UNICEF on deep well hand pumps and stress was laid on quality control of hand pumps for success of the tube well programme."

*** *** ***

"The respondent has accepted this recommendation and approach has been towards direction of procuring quality pumps. For this, pre-supply inspection at works of supplier has been stressed by the respondent."

*** *** ***

"M/s Crown Agents are internationally reputed inspection agents appointed by UNICEF to have a rigid quality control of hand pumps so that they strictly conform to the ISS.

Prior to 79, ordinary hand pumps were being used, which required frequent repairs, which adversely affected the rural water supply programme.

The Government of India and UNICEF after joint efforts evolved India Mark II hand pump which in itself is of better and rigid design. In national conference of Madurai held in 79, the representatives of Government of India, UNICEF and States participated and stress was laid that since the success of tube well programme mainly depends on the quality of hand pumps, the same should be purchased from approved manufacturers after pre-inspection by proper inspecting authority. It was recommended that the States could avail of the services of Crown Agents, inspection experts, whose inspection charges are borne by UNICEF.

UNICEF on whose instructions the Crown Agents act, have provided great assistance to the rural water supply programme of the nation in the form of providing drilling machines, hand pumps (made in India itself) free of cost."

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"The department''s interest is only to get the best quality pumps rigidly conforming to the ISS, and if the pumps of M/s Kapil Udyog are really of the required quality they will pass the quality control tests of Crown Agents also as provided in the advertisement and notice inviting tender."

*** *** ***

"It is further stated that UNICEF and Crown Agents are exercising the quality control comparatively since long time and have approved about 20 suppliers in the country including all reputed manufacturers like Richardson & Crudas (A.G.O.I. undertaking) etc.

ISI has approved only 3 manufacturers recently which are having small capacities. This indicates that Crown Agents have been in the field of quality control of hand pumps since longer time with due recognition and there should he no objection if a pre-supply inspection by Crown Agents is insisted upon by the purchaser."

*** *** ***

"The respondent No. 1 wants quality hand pumps and to get these, proper inspection before supply is essential. There is no question of any monopoly because various units, spread all over India including S.S.I. units from Madhya Pradesh, are manufacturing quality hand pumps and there is no infringement of any law or rule or constitution, because the right of rural and other public to get good schemes executed with good quality hand pumps is more important than the right of petitioner whose solid motive is to pass on his goods for his profit and existence."

*** *** ***

"There is no question of registration with Crown Agents or creating monopoly or restriction of trade. Crown Agents are only inspecting agents. The purchaser has right to inspect the materials through the agency of his choice. As other firms have got their factory and material inspected through Crown Agents, even in M.P. also, this firm (M/s Kapil Udyog) could also do the same."

*** *** ***

"The non-petitioners had imposed the condition of inspection for quality aspect in the larger public interest of rural areas and are not bound to look after the interest of petitioner alone.

There is no question of registration with Crown Agents, it being only an inspection agency.

No restriction has been imposed but a condition of inspection to procure quality pump is put, which is as per purchase rules. This will not give undue advantage to others, but whosoever can give quality pumps, can offer the same. Other S.S.I. units like Adroit Industries of M.P., Jabalpur have already got the clearance and M/s Kapil Udyog could also do so."

We also think it advisable to extract hereinbelow the relevant excerpts of the proceedings and recommendations of the National Conference on Hand Pumps held at Madurai in July 1979, regarding inspection and quality control of hand pumps, from annexure-I to the return, which support the averments made in the return.

*** *** ***

SESSION III--WEDNESDAY, July 11, 1979.

*** *** ***

"Following the presentation of status papers by respective State Governments, special papers were presented on the ''Maintenance: Experience of Handpumps'' in the districts of Pudukottai, Tiruchirapalli and Madurai (synopsis of two reports in Appendix V). The papers presented studies of areas under monitoring and observation, with special reference to the maintenance, structure, costing, general nature of repairs, identifying noticed areas of fault/breakages in the India Mark II pumps under observation and suggestions for modifications and improvements to the existing pump design.

Hand pumps and Quality Control.

One of the aims of the National Conference was to emphasise the need for quality control as a prerequisite for the successful operation of the hand pump programme. Mr. G.R. Hale, Regional Engineer, Crown Agent, Bangalore, addressed the Conference on ''Hand pumps'' and Quality Control'' and the inspection procedure for the India Mark II hand pump (full text in Appendix VI).

The findings and experience of Crown Agent indicate that the India Mark II is currently the best quality hand pump available, and it would be a mistake to relax quality control in the production of these pumps. Although a great deal of emphasis has been placed on the manufacture of these pumps in accordance with ISI standards, these standards only serve to indicate the specified requirements of materials. The assembly of ISI certified products must still be passed by quality control inspectors, and to this end, Crown Agents is prepared to assist the State PHE Engineers for training and formation of state inspection teams.

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The above excerpts go to show that the predominant object in imposing the impugned condition was to achieve deep well hand pumps of better quality answering the requirements for a successful operation of the Rural Water Supply Programme. It is pertinent here to state that the averments in the return are supported by an affidavit, and there is no counter-affidavit controverting these averments. Hence, there is no reason to disbelieve them. The averments extracted above from the return go to show that the imposition of the impugned condition, for the purpose of quality control, is after a due deliberation in the light of the past experience, and the agency, employed for the purpose of inspecting and certifying the quality, is an expert agency nominated by the international organisation--UNICEF. It is not that any private individual has been picked up at the whim and desire of any Governmental authority. In other words, there is a host of good reasons, which weighed with the State Government in formulating the impugned condition for the purpose of securing good quality goods. It is not an act of blurred perspicacity; but a well considered act with a perspicuous object of getting good quality goods in the public interest.

11A. The upshot of the foregoing discussion is that it does not appeal to reason to hold that the decision of the State Government in imposing the impugned condition in the tender notice is unfair, capricious or arbitrary and outrages the fundamental right of equality under Article 14 of the Constitution. We are satisfied that the impugned condition has been imposed after taking into consideration the benefit to, and the needs of the public in general for good quality deep well hand pumps for the success of Rural Water Supply programme, and that it does not violate Article 14 of the Constitution. It would be relevant to mention that during the course of his arguments, so far it relates to the Constitutional provision, the Learned Counsel for the petitioner had confined his arguments to the contention that the impugned condition was hit by Article 14 of the Constitution, and did not submit that it outrages any other Article of the Constitution. Learned Counsel for the petitioner had in support of his argument relied on the authorities of the Supreme Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and State of Kerala v. Dr. K.V. Gopalakrishnan AIR 1980 SC 1230. With regard to the principle capsulised in these decisions, there can be no debate, that the discretion of the Government is not unlimited in the matter of grant of largess, i.e., the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. The action of the Government has to be based on standards that are not arbitrary or unauthorised, and also that it cannot evolve any scheme which gives rise to a monopoly in the trade to certain traders, and single out other traders by giving a discriminatory treatment. These authorities do not advance the contention of the Learned Counsel, as we have already held that the imposition of the impugned condition is neither an arbitrary nor a capricious or whimsical act of the State Government. It has imposed the impugned condition in the public interest. The Government has a right to change its policy from time to time according to the demands of the time and situation, and in the public interest. In this respect, we will quote with advantage the observation of their Lordships of the Supreme Court in State of Uttar Pradesh and Others Vs. Vijay Bahadur Singh and Others, :

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It cannot be disputed that the Government has the right to change its policy from time to time, according to the demands of the time and situation and in the public interest.

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On the point of clarity and to avoid any obfuscation, we would like to mention here that while dealing with the question of unconstitutionality of the impugned condition hereinabove, we have not taken into account the provisions of Act No. XXXVI of 1952 and the Anti-Monopolies Act, which we are going to deal with just hereinafter.

We now advert to Act No. XXXVI of 1952. The statement of objects and reasons of this Act, set out hereinbelow, speaks for itself, that this Act is enacted with the object of promoting the quality of the Indian goods and for that purpose it authorises the use of particular marks under this Act by a manufacturer, licensed under this Act, which may serve more than ordinary assurance to a purchaser that certain standards of quality have been met in the manufacture of the articles bearing those trade marks:

Statement of Objects and Reasons.

As a prerequisite to the establishment of a healthy trade, both internal and external, standardisation of products in respect of quality, which would compare very favourably with the established makes of foreign products, is essential and needs no emphasis. With this object in view the Government of India in the Department of Industries and Supplies in their Resolution No. 1 Std. (4)/45, dated the 3rd September, 1946, set up the Indian Standards Institution with inter alia the following functions :

(a) to prepare and promote the general adoption of standards on national and international basis,

(b) to promote standardisation, quality control and simplification in industry,

(c) to provide for registration of standardisation marks applicable to products, commodities, etc.,

(d) to provide Or arrange facilities for the examination and testing of commodities, etc.

The Indian Standards Institution have drawn up or are now finalising the Indian Standards Specifications for most of the commodities and manufactured articles which figure in our export trade with overseas countries, and also in the home markets.

The Certification Mark is a convenient measure to secure standardisation of commodities and is in use in many progressive countries, such as the U.K., France, etc. As defined in the Trade Marks Act, it is a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic, from goods not so certified. The underlying idea is to convey this assurance to the purchaser that the goods or services so certified have been inspected, tested, and certified by some agency of competence and that they may be purchased with more than ordinary assurance that certain standards of quality have been met. (Emphasis supplied).

This Act No. XXXVI of 1952 has been enacted by the Parliament in exercise of its powers under Item No. 49 of List 1 of Schedule VII of the Constitution, which reads thus:

List 1--Union List.

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Patents, inventions and designs; copyright; trade-marks and merchandise marks.

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The above Item, as also the objects and reasons, extracted in paragraph 13 above, clearly bear out that Act No. XXXVI of 1952 has nothing to do with the trade activity of the State Government or the Union Government, or, at any rate, with the policy in the matter of purchase of articles by the Government. The Learned Counsel for the petitioner submitted that this Act lays down the procedure, for inspection of the articles manufactured, and the certification for the use of the trade marks recognised under this Act by the manufacturer licensed under this Act, tantamounts to creating an embargo on the power of the Government in employing an agency extraneous to this Act for the purpose of checking up the quality of the goods manufactured by a manufacturer licensed under this Act. In this connection, the Learned Counsel made a specific reference to sections 3 and 6 of Act No. XXXVI of 1952 and argued that the combined reading of the provisions of these two Sections makes it clear that the Act provides for a quality control of the articles manufactured by a manufacturer licensed under it and, therefore, it has necessarily to be inferred that tacitly the Act provides that the Government should not employ a mode other than the one provided under this Act for quality control.

Sections 3 and 6 of Act No. XXXVI of 1952 read as under:

3. Powers and duties of the Institution.--The Institution may exercise such powers and perform such duties as may be assigned to it by or under this Act, and, in particular, such powers include power to--

(a) establish and publish, in such manner as may be prescribed, the Indian Standard in relation to any article or process;

(aa) recognise as an Indian Standard, in such manner as may be prescribed, any standard established by any other Institution in India or elsewhere, in relation to any article or process;

(b) specify a Standard Mark to be called the Indian Standards Institution Certification Mark, which shall be of such design and contain such particulars as may be prescribed to represent a particular Indian Standard;

(c) grant, renew, suspend or cancel, in such manner as may be'' prescribed, a licence for the use of the Standard Mark;

(d) levy such fees for the grant or renewal of any licence as may fee prescribed;

(e) Make such inspection and take such samples of any material or substance as may be necessary to see whether any article or process in relation to which the Standard Mark has been used conforms to the Indian Standard or whether the Standard'' Mark has been improperly used in relation to any article or process with or without licence;

(f) do such other acts as may be prescribed.

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Prohibition of use of certain names, etc.

No person shall, except in such cases and under such conditions as may be prescribed- use without the previous permission of the Institution,--

(a) any name which so nearly resembles the name of the Indian Standards Institution as to deceive or likely to deceive the public or which contains the expression "Indian Standard" or any abbreviation thereof; or

(b) any mark or trade mark in relation to any article or process containing the expression "Indian Standard" or "Indian Standard Specification" or any abbreviation of such expressions.

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It is difficult to cull out the prohibition from the aforesaid sections, suggested by the Learned Counsel for the petitioner, on the power of the Government to utilise an expert agency of its choice for checking up the quality of the goods intended to be purchased by it. Though these provisions and the other provisions of Act No. XXXVI of 1952 do provide for the maintenance of the standard laid down by the Institution established under this Act, so that the purchasers, purchasing the goods bearing the trade marks provided under the Act, may feel assured that they are certain standard quality goods, it does not mean that the State Government like an ordinary intending purchaser cannot further check it for satisfying itself as to whether those goods are of the quality which would answer its requirement of the purpose for which they are to be purchased. It is a general rule that an intending purchaser would satisfy himself regarding the quality of goods before purchase, and unless there is some specific law, rule or regulation to the contrary, no exception can be made from this general rule in case of Government. It would be pertinent at this stage to point out that section 10 of Act No. XXXVI of 1952, which, so far as relevant, is set out hereinbelow, provides that the Central Government is competent to appoint any outside authority also in the manner provided in it for the purposes of the Act, and it cannot be gainsaid that promotion of quality is a purpose of the Act. We may make it clear that we have referred section 10 not to mean that ''Crown Agent'' is an authority appointed under that section. Our purpose and idea behind referring this section is just to indicate that even Act No. XXXVI of 1952 itself provides for an agency in the matter of quality control other than the Institution established under it:

10. Power to authorise the competent authority.--(1) The Central Government may, in consultation with the Institution, by notification in any Official Gazette, direct that any power exercisable by the Institution under this Act shall, in relation to such matters and subject to such conditions as may be specified in the direction, be exercisable also by such authority or such organisation as may be specified in the notification (hereinafter referred to as the "competent authority").

(2) For avoidance of doubts, it is hereby declared that the Central Government may, by a like notification, withdraw the powers delegated to a competent authority under sub-section (1).

As a sequel to the foregoing discussion, we hold that we are unable to accept the argument of the Learned Counsel for the petitioner, that the imposition of the impugned condition is violative of the provisions of Act No. XXXVI of 1952, or is in derogation thereof, or defeats any of its provisions.

We now turn to the consideration of the provisions of the Anti-Monopolies Act. Section 33(1)(b), which has been relied on by the Learned Counsel for the petitioner, reads as under:

33. Registrable agreements relating to restrictive trade practices.--

(1) Any agreement relating to a restrictive trade practice falling within one or more of the following categories shall be subject to registration in accordance with the provisions of this Chapter, namely:

(a) *** *** ***

(b) any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

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The very reading of the above section exposes the hollowness of the contention. It only provides that an agreement falling under clause (b) of section 33 (1) requires registration in accordance with the provisions of its Chapter V. It is not the case here that the imposition of the impugned condition is under an agreement as defined in section 2(a) of the Anti-Monopolies Act and that agreement, though required to be registered, having not been registered, is not enforceable and, therefore, the impugned condition is invalid. This apart, the impugned condition does not say that the State Government cannot purchase the goods manufactured by the petitioner, so as to create a monopoly in favour of some other trader, or to restrict the trade activity of the petitioner in the matter of supply of goods manufactured by him. The State Government had invited tenders from all; the impugned condition was made applicable to all the intending tenderers and, as we have already held above, it was imposed by the Government for satisfying itself with regard to the quality of the goods to answer the purpose for which they wanted the goods. In this setting of the facts, it is difficult to read that the impugned condition, in any way, restricts the trade activity of the petitioner so as to attract the provisions of the Anti-Monopolies Act. The argument of the Learned Counsel for the petitioner has, therefore, to be repelled and is, accordingly, repelled.

We now come to R. 14 of the ''Store Rules''. It reads as under :-

Rule 14 and its note may be substituted by the following: ''Rule 14.'' Articles included in Annexure ''B'' which is subject to revision from time to time, produced or manufactured by Small Scale Industries of Madhya Pradesh registered as such with Director of Industries, for concerned articles shall be purchased through the M.P. Laghu Udyog Nigam Ltd., only at the rates fixed by them. No tenders for purchase of such articles shall be called by the competent authority separately.

Learned Counsel for the petitioner was unable to point out as to how the aforesaid Rule has been violated in the issuance of the tender notice under consideration. The Learned Counsel had half-heartedly argued that this Rule provides for giving an impetus to Small Scale Industries and the impugned condition has the effect of defeating that object. This argument of the Learned Counsel is stated merely to be rejected, as we cannot read anything in the tender notice which outrages the object and purpose of this Rule. The relevant excerpts of the return extracted by us in para. 9 of this Order clearly mention that the State Government is prepared to purchase the articles manufactured by the petitioner, provided they answer the requirements of the tender conditions. These conditions, as we have already stated hereinabove, apply to all Small Scale Industries and is in public interest.

In the light of the foregoing discussion, we are of the firm view that this petition does not merit to be allowed and is, accordingly, dismissed. However, in the facts and circumstances of the case, we direct the parties to bear their own costs, as incurred. Counsel''s fee Rs. 200.

The amount of security deposit shall be refunded to the petitioner.

