IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2015

Date of Reserving the Orders	Date of Pronouncing the Orders
27.02.2015	04.03.2015

CORAM

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P. Nos. 5229 & 5230 of 2015

W.P.No.5229 of 2015

1. Sakthi Gas Agency
   Rep., by its Partner K.Mahendran,
   180/1, Manickavasagar Colony,
   Karur Bye Pass Road,
   Erode - 638 002.

2. Gugan Indane Gas Agency,
   Rep., by its Proprietor S.Rajendran,
   85/8, Perundurai Road,
   Kumalan Kuttai,
   Erode District - 638 011.

3. Sheela Indane Gas Service,
   Rep., by its Proprietrix C.Jayasheela,
   298/3, Vivekananthar Salai,
   Narayana Valasu,
   Nasiyanur Road,
   Erode - 638 011.

4. Raja Indance Gas Agencies,
   Rep., by its Proprietor Ko.Sadasivam,
   79, Ingur Road,
   Chennimalai,
   Erode District - 638 051.

5. Sri Natarajan Indance Gas Agency,
Rep., by its Proprietrix Latha Selvaraj,
Behind Corporation Bus Depot,
T.R.R., Nagar,
Gobichettipalayam,
Erode District - 638 476. ... Petitioners

Vs

1. Union of India
Rep., by its Secretary to Govt., of India,
Ministry of Petroleum & Natural Gas,
Government of India, Shastri Bhavan,
Dr.Rajendra Prasad Road,
New Delhi - 110 001.

2. State Level Coordinator,
IOCL, BPCL & HPCL Tamil Nadu
& Puducherry (UT)
Indian Oil Corporation Ltd.,
Indian Oil Bhavan,
Nungambakkam, Chennai - 600 034.

3. M/s.Indian Oil Corporation Ltd.,
Rep., by its Chairman,
3079/3, Saduiq Nagar,
JB Tito Marg,
New Delhi - 110 049. ... Respondents

W.P.No.5230 of 2015

1. Rajalakshmi Agencies,
Rep., by its Proprietor R.Gnana Vadivel Kumaran,
108, Nethaji Bypass Road,
Dharmapuri - 636 701.

2. Erode Gas Agency,
Rep., by its Proprietor N.S.Thangaraju,
65/143, Sampath Nagar,
Erode District - 638 011.

3. C.P., Indane Gas,
Rep., by its Proprietor E.Manonmani,
1139, South Udayar Palayam,
Attur - 636 102.

4. RKM Indane Gas Service,
   Rep., by its Proprietor M.Shanmugam
   358, 359, Near Old Bus Stand,
   Bhavani,
   Erode District.

5. Avanthi Indane Gas Service
   Rep., by its Proprietor R.Senthil Kumar,
   7/2, vinayagar Koil first Street,
   Poondurai Road,
   Nadarmedu,
   Erode - 638 002.

6. Harisuryaa Indane Gas Agency,
   Rep., by its Proprietor A.Ramesh,
   1, Kumaran Nagar,
   Modakurichi,
   Erode - 638 104.

7. Sri Velavan Indane Gas Agency,
   Rep., by its Proprietor A.Shanthi,
   113, Main Road, Sulthapet,
   Paramathivelur, Namakkal District - 638 182.

8. Baby Indane Gas Service,
   Rep., by its Proprietor V.Punitha,
   3, City Garden,
   Near Old Bus Stand, Kodumudi,
   Erode District - 638 151.

9. Saranya Gas Service,
   Rep., by its Proprietor S.Valarmathi,
   135/96, Thiruchengode Main Road,
   Pramathy Post, Paramathy Velur,
   Namakkal District.

10. Bala Gas Agency,
   Rep., by its Proprietor K.Shankar,
   599 - H/A&B, Indane Complex,
   Near New Bus Stand,
   Bhavani,
   Erode District - 638 301.

11.Sri Bhagavathi Indane Gas Agency,
Rep., by its proprietor K.Ravindran,
4/93/2, Rasipuram Main Road,
Vennandur, Namakkal District.

12.Kalaimagal Gas Service,
Rep., by its Proprietor P.Saravana Kumar,
58, Sathy Road, Veerappanchatram,
Erode District - 638 004.

13.Annai Cauvery Gas,
Rep., by its Proprietor T.Prabhu Amirtharaj,
158-A, Thiruchengode Main Road,
Pallipalayam,
Namakkal District - 638 006.

14.Venus Indane Gas Service,
Rep., by its Proprietor P.Kumar,
20/10A, Katchery Street,
Velur Road, Thiruchengode,
Namakkal District - 637 211 ... Petitioners

Vs

1. Union of India
Rep., by its Secretary to Govt., of India,
Ministry of Petroleum & Natural Gas,
Government of India, Shastri Bhavan,
Dr.Rajendra Prasad Road,
New Delhi - 110 001.

2. State Level Coordinator,
IOCL, BPCL & HPCL Tamil Nadu
& Puducherry (UT)
Indian Oil Corporation Ltd.,
Indian Oil Bhavan,
Nungambakkam, Chennai - 600 034.

3. M/s.Indian Oil Corporation Ltd.,
Rep., by its Chairman,
3079/3, Saduiq Nagar,
JB Tito Marg,
New Delhi - 110 049. ... Respondents

Prayer in W.P.No.5229 of 2015 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorarified Mandamus, to call for the impugned tender notification of the second respondent in TNSO/LPG-O/PT-09/TPT/2014-15, for Erode Bottling Plant dated 03.12.2014, more particularly clause 5.2(ii) regarding the calculation of age of the trucks offered by the tenderers and quash the same and further direct the respondents herein to give special preference to existing distributors owning trucks as offered in other Bottling Plants in Tamil Nadu.

Prayer in W.P.No.5230 of 2015 :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorarified Mandamus, to call for the impugned tender notification of the third respondent in TNSO/LPG-O/PT-09/TPT/2014-15, for Erode Bottling Plant dated 03.12.2014, more particularly clause 5.2(ii) regarding the calculation of age of the trucks offered by the tenderers and quash the same and further direct the respondents herein to give special preference to existing distributors owning trucks as offered in other Bottling Plants in Tamil Nadu.

For petitioner : Mr.M.Vallinayagam Sr. Counsel for
Mr.K.Rajendra Prasad in
W.P.No.5229 of 2015

Mr.T.Mohan
for Mr.K.Rajendra Prasad in
W.P.No.5230 of 2015

For Respondents : Mr.M.Ravindran Senior Counsel
for Mr.V.Anantha Natarajan

C O M M O N   O R D E R

The petitioners who are distributors of LPG Cylinders, have filed these Writ Petitions for issuance of a Writ of Certiorarified Mandamus, to quash clause 5.2(ii) of the tender notification issued by the third respondent, dated 03.12.2014 and to direct the respondents to give special preference to existing distributors owning Trucks as offered in other Bottling Plants in Tamil Nadu.

2. Heard Mr. M.Vallinayagam, learned Senior counsel assisted by Mr.K.Rajendra Prasad, and Mr.T.Mohan, learned counsel appearing for the petitioners and Mr.M.Ravindran learned Senior counsel assisted by Mr.V.Anantha Natarajan, learned counsel appearing for the respondents.

3.The petitioners would state that they are authorised Distributors of LPG Cylinders under the respondent Corporation and have been carrying on Distributorship effectively and they are aggrieved by the tender condition refusing to give preference to the existing distributors owning Trucks for transportation of LPG cylinders in the notification published by the respondent. In terms of the tender notification, all persons owning atleast one Truck in their name, which is capable of transportation of LPG cylinders, are entitled to apply for the tender. The age of the Truck should not be more than 12 years as on the closing date of the tender i.e., 05.01.2015, upto 11 hours.

4. Further, the petitioner would state that earlier the respondent Corporation specifically incorporated a clause in the tender notification giving preference to existing distributors owning Trucks over other tenderers. It is stated that this preferential clause is based on a policy that the distributors, who have secured dealership for the distribution of LPG cylinders to consumers have a mandatory obligation to supply cylinders at all times and the process cannot be stopped or affected on account of strike by Truck owners. Therefore, it is submitted that the Corporation took a policy decision to give preference to distributors, who own Trucks in their name, capable of transporting LPG cylinders. Further, it is submitted that as existing distributors, they are given relaxation in the Earnest Money Deposit (EMD) and Security Deposit and they are required to pay only to Rs.10,000/- and Rs.50,000/- respectively, when other commercial transporters are required to pay Rs.50,000/- and Rs.7,50,000/- respectively. In this regard, the petitioner referred to clause 1.28 of the Tender Notification for the year 2012-13 and clause 1.29 of the Tender Notification for the year 2011-12. The petitioners would further state that the preferential clause, which was in-existence in the previous tender notification was subject matter of challenge before the Kerala High Court in the case of Parumala Transport vs. Indian Oil Corporation Ltd., in W.P.(C). No.2266 of 2012,(G), dated 23.02.2012 and the validity of the said preferential clause was upheld by the Kerala High Court. Therefore, it is submitted that the omission of the preferential clause in the present tender is unreasonable and contrary to the earlier policy decision, which was taken by the respondents. Further grievance of the petitioner is that with regard to the evaluation of the age of the Trucks, when similar rates are quoted for more than one tenderer, in this regard clause 5.2(ii) of the tender condition has been referred to and it is submitted that the process of calculation of average age of Trucks is incorrect and the same is not found in the earlier tender conditions.

5. The learned counsels appearing for the petitioner after elaborately referring to the factual position, the relevant clauses in the tender notification, submitted that there is no legal basis for introducing clause 5.2(ii), where a person owning more than one Truck and one new Truck cannot be placed on par with person owning two old Trucks of two years. Further, it is submitted that the distributors who are owning Trucks only for transporting LPG cylinders cannot be equated by the other transporters owning Trucks for commercial purposes. Further, it is submitted that when there is a concession granted to the Distributors in the amount paid towards EMD and Security Deposit, there should have been a preference to the distributors even in the calculation of the age of the Truck. Therefore, it is submitted that clause 5.2(ii) is liable to be struck down. In the affidavit filed in support of the Writ Petition, it is submitted that all the petitioners participated in the tender process and they believed that they will be given preference over other transporters in the tender process and the results after opening the bids were not uploaded in the official website of the second respondent and the petitioners were unaware about the results.

6. The learned Senior counsel by referring to the decision of the Kerala High Court submitted that the respondent Corporation took a stand before the Kerala High Court that it is their experience over the past years that distribution of LPG cylinders are disrupted often because of strike by workers of Truck owners, which can be contained to a great extent if the distributors, who themselves have special interest to see that the transportation from the bottling plants to go to their godowns are not disrupted, since they are the persons on whom the responsibility to see that the gas cylinders reach the ultimate consumers without disruption in supplies lies. It is submitted that this contention raised by the respondent Corporation was accepted by the Kerala High Court and the preference given to the distributors was upheld. Therefore, it is submitted that there is no reason to deviate from the said preference, which was granted. Further, the Senior learned counsel submitted that the earlier policy was formulated after thorough examination of all the relevant factors and unless there are strong and cogent reasons to deviate from the same, the respondents are expected to follow their earlier policy. In support of his contentions, the learned Senior counsel placed reliance on the decision of this Court in the case of Sri Navajevan Transports and Ors., vs. Indian Oil Corporation Ltd., in W.P.Nos.32166 of 2012, etc., dated 01.03.2013, held that the preferential treatment has a meaning to ensure uninterrupted supply in the public interest, RO Dealers/Direct Customers and the petitioners are not equals and therefore, there is no question of

offending Article 14 of the Constitution of India. With the above submissions, the learned counsels prayed for quashing the relevant clauses in the tender notification.

7. Mr.M.Ravindran, learned Senior counsel appearing for the respondent Corporation submitted that the tender notification was published on 03.12.2014 and the date of opening of credential bids was on 05.01.2015 at 11.30 hours and the date on which, the contract has to be started is 01.03.2015 and it is submitted that the tenders have been opened and Letter of Intents have been issued to the tenderers on 17.02.2015. Copies of a few of such orders were produced before this Court. It is submitted that the Writ Petitions itself were filed only on 26.02.2015, by then the entire tender process has been concluded and Letter of Intents have been issued and as such the prayer sought for has become infructuous. Further, it is submitted that the tender notification issued by the respondent Corporation is a commercial transaction and it is well open to the respondent to fix the terms and conditions and merely because for the earlier years, there were preferential conditions for LPG distributors and merely because the same were modified in the present tender by itself would not render the tender notification as arbitrary or illegal. Further, it is submitted that concessions have been granted even in the impugned tender notification, wherein distributors are required to pay lesser amount of EMD and Security Deposit and in this regard, reference was made to clause 4.1 and 5.5 (i) of the Tender Notification. Further, it is submitted that the Hon'ble Division Bench of the Punjab and Haryana High Court in the case of Vishal Sharma vs. Union of India & Ors., in CWP No.21361 of 2011, dated 08.08.2012, have rejected the challenge made to the tender conditions by following the various decisions of the Hon'ble Supreme Court. It is submitted that the decision of this Court in the case of Sri Navajevan Transports and Ors., (supra), was followed by the Karnataka High court in the case of Shri Chennakeshava Transport vs. The Indian Oil Corporation Ltd., in W.P.Nos.1813 of 2013 etc., dated 26.04.2013 and the Writ Petitions challenging various clauses in the tender document was rejected.

8. In reply, the learned Senior counsel for the petitioner submitted that the Writ Petitions were filed well in advance and till the date of filing the Writ Petition, the list of successful tenderers was not uploaded in the website of the respondent and therefore, the petitioners cannot be non-suited on the ground that they have filed the Writ Petitions after participating in the tender.

9. Heard the learned counsels appearing for the parties and perused the materials placed on record.

10. It is to be noted that the tender notification was published on 03.12.2014. Admittedly, the petitioners have downloaded the tender applications and they were well aware of all the conditions contained therein. The petitioners submitted their tender documents before the cut off date namely 05.01.2015. Therefore, it is deemed that the petitioners have accepted the tender conditions as such and have submitted their bids agreeing to the terms specified therein. In such circumstances, it has to be necessarily held that the petitioners are estopped from questioning the tender conditions after having submitted their bids on 05.01.2015, when the Writ Petitions were filed only on 26.02.2015. Hence, the prayer sought for is liable to be rejected on this ground itself.

11. The petitioners would contend that the preferential condition, which was in-existence in the previous tender notification has been dispensed with in the impugned tender and the same is arbitrary and unreasonable.

12. It is settled legal position that though one of the contracting parties is the Government or a Government undertaking organisation that by itself will not make the contract a statutory contract and the impugned tender notification and the works to be allotted are commercial transactions. The Hon'ble Supreme Court while pointing out the limit of judicial review in these matters held that the Court will examine the decision making process and not the decision itself. That the Court will test the matter by applying the Wednesbury principle of reasonableness and to examine as to whether the decision making process was free from arbitrariness, not affected by bias or actuated by malafide. Admittedly, the petitioners have not alleged any bias or malafide on the respondents.

13. The only issue pointed out to state that the decision of the respondent is arbitrary, is by contending that the preferential clause which was existing in the earlier tender notification could not have been deleted in the impugned tender notification. In my view such deletion by itself will not make the impugned tender as being arbitrary, as each tender notification is in individual exercise and the respondent Corporation are the best persons to exercise discretion in the manner in which the tenders have to be invited. Equally settled is the legal principle that the Government must have freedom to contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere [Tata Cellular vs. UOI reported in (1994) 6 SCC 651].

14. Further, it has to be pointed out that the impugned tender notification also provides for certain preferential treatment for their distributors. This is clear from clause No.4.1, by which an Indane Distributor, who has offered a Truck is required to pay lesser EMD and Security Deposit compared to that of a non-distributor tenderer. Similarly clause 5.5(i) also gives its first preference to Indane Distributor in order of their ranking. Thus, it cannot be stated that the distributors have been left in a lurch, but the distinction between Distributor tenderers and other tenderers continuous to be maintained in the impugned tender notification in exercise of the discretion power of the respondent Corporation. It may be true that in the earlier round of litigation both before this Court and the Kerala High Court, the preferential clause in the earlier tender which was put to challenge and the preference was upheld, that by itself cannot be a mitigating factor to state that the respondent cannot review their policy or revise the terms and conditions of tender.

15. As pointed out earlier each tender is an individual contract and a deviation from the past condition by itself cannot render a fresh tender as being arbitrary or unreasonable. In any event, the tenders were opened on 05.01.2015 and Letter of Intents have been issued on 17.02.2015. It is submitted by the learned Senior counsel appearing for the respondent Corporation that the contract has to commence from 01.03.2015 and the present Writ Petitions appear to be a belated attempt by the distributors to set at naught the impugned tender, much after the entire tender process was concluded. Hence, no grounds have been made out to grant the relief sought for.

Accordingly, the Writ Petitions fail and they are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst. Registrar

/true copy/

Sub Asst. Registrar.

PBN

To

1. The Secretary to Govt., of India,
   Ministry of Petroleum & Natural Gas,
   Government of India, Shastri Bhavan,
   Dr.Rajendra Prasad Road,
   New Delhi - 110 001.

2. State Level Coordinator,
   IOCL, BPCL & HPCL Tamil Nadu
   & Puducherry (UT)
   Indian Oil Corporation Ltd.,
   Indian Oil Bhavan,
   Nungambakkam, Chennai - 600 034.

3. The Chairman,
   M/s.Indian Oil Corporation Ltd.,
   3079/3, Saduiq Nagar,
   JB Tito Marg,
   New Delhi - 110 049.

+1cc to M/s.V.Anatha Natarajan, Advocate, S.R.No.12403

W.P. Nos. 5229 & 5230 of 2015

RJ(CO)
CA(10/03/2015)