IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.04.2016
Date of Verdict : 25.04.2016

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH

W.P.Nos.315, 316, 3066 and 3818 of 2016

W.P.No.315 of 2016:

T.Vijaya Sekar ... Petitioner

Vs.

1. Union of India,
rep. by its Secretary,
Ministry of Petroleum and Natural Gas,
Government of India,
Shastri Bhavan,
New Delhi-110 001.

2. Indian Oil Corporation Limited,
represented by its Managing Director,
Corporate Office,
3079/3, JB Tito Marg,
Sadiq Nagar, New Delhi-110 049.

3. The Deputy General Manager (Contract Cell),
Indian Oil Corporation Limited
(Marketing Division),
8th Level, Indian Oil Bhavan,
No.139, Nungambakkam High Road,
Chennai-600 034. ... Respondents

Prayer W.P.315 of 2016: Writ petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorarified mandamus, to call for the records pertaining to Clause 13 and 15 in General Instructions to Bidders / GITB and Clause 5.(v) in Special Instructions to Bidders / SITB of the Tender Notification issued by the 3rd respondent in Tender No.RCC/SR/TNSO/PT/36/15-16 for Transportation of Indane LPG Cylinders in vertical position on unit rate basis Ex-Chengalpet LPG Bottling Plant and quash the same and consequently direct the respondents 2 and 3 herein to conduct the tender by selecting and ensuring equitable utilization of trucks for transportation from the Bottling Plant to the sales depots irrespective of the distributor or transporter category.

For Petitioner : Mr.G.Arul Murugan

For Respondents:: Mr.Ravindran, S.C. for
M/s.V.Anantha Natrajan-R2&R3

W.P.No.316 of 2016:

M/s. Sri Lakshmi Transport
Service Rep. by Managing Partner K.Kavitha
No.1/34 Nadu Theru Tho. Jedarpalayam
Namagiripet Via Rasipuram Taluk-637406
Namakkal District. ... Petitioner

versus

1 Indian Oil Corporation Limited
Represented by its Managing Director
Corporate Office 3079/3 JB Tito Marg
Sadiq Nagar New Delhi-110049.

2 The Deputy General Manager
(Contract Cell) Indian Oil Corporation
Limited (Marketing Division) 8th Level
Indian Oil Bhavan No.139
Nungambakkam High
Road Chennai-34. ..Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorarified mandamus, to call for the records pertaining to Corrigendum to Tender ID:2015_SROTN_26563_1 in respect of tender notification issued by the 2nd respondent in Tender No. RCC/SR/TNSO/ PT/36/15-16 in so far as extending the last date for submission of tender quash the same and consequently direct the respondents herein only to evaluate the tenders filed with invoices of trucks prior to 29.12.2015 which is the last date for submission as per original notification.

For Petitioner : Mr.G.Arul Murugan

For Respondents:: Mr.Ravindran, SC for
M/s.V.Anantha Natrajan-R1 & R2

W.P.No.3066 of 2016:

T.Vijaya Sekar .. Petitioner

Versus

1 Union of India
Represented by its Secretary Ministry of Petroleum and Natural Gas Government of India Shastri Bhavan New Delhi-110001.

2 Indian Oil Corporation Limited
Represented by its Managing Director
Corporate Office 3079/3 JB Tito Marg
Sadiq Nagar New Delhi-110049.

3 The Deputy General Manager
(Contract Cell) Indian Oil Corporation Limited (Marketing Division) 8th Level
Indian Oil Bhavan No.139
Nungambakkam High
Road Chennai-34. ..Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorarified mandamus, to call for the records pertaining to Clause 13 and 15 in General Instructions to Bidders / GITB and Clause 5 (v) in Special Instructions to Bidders / SITB of the Tender Notification issued by the 3rd respondent in Tender No. RCC/SR/TNSO/ PT/48/15-16 for Transportation of Indane LPG Cylinders in vertical position on unit rate basis Ex Coimbatore LPG Bottling Plant and quash the same and consequently direct the respondents 2 and 3 herein to conduct the tender by selecting and ensuring equitable utilization of trucks for transportation from the Bottling Plant to the sales depots irrespective of the distributor or transporter category.

For Petitioner : Mr.G.Arul Murugan

For Respondents:: Mr. A.Kumaraguru, CGSC for R1
Mr.Ravindran, SC for
M/s.V.Anantha Natrajan-R2&R3

W.P.No.3818 of 2016:
S.Hari Bhaskar .. Petitioner

versus

1 Union of India
Represented by its Secretary Ministry of Petroleum and Natural Gas Government of India Shastri Bhavan New Delhi-110 001

2 Bharat Petroleum Corporation Limited Represented by its Managing Director Bharat Bhavan 4 & 6 Currimbhoy Road Ballard Estate Mumbai-400 001

3 The Regional LPG Manager
(South) Bharat Petroleum Corporation
Limited No.1 Ranganathan Gardens 11th
Main Road Anna Nagar West
Chennai-600 040 ... Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorarified mandamus, to call for the records pertaining to the order of the 3rd respondent vide Circular No.BPCL/LPG/PKD/SR/2015-16/03/Coimbatore dated 26.03.2015 and the tender notification issued by the 3rd respondent in Tender NIT NO.BPCL/LPG/PKD/SR/2015-16/03/ Coimbatore for transportation of BPCL packed LPG Cylinders Ex/To BPCL LPG Filling Plant Coimbatore and quash the same in so far as restricting the areas of Tender in Proforma-I and issuing indents for the remaining areas without tender based on EOI and consequently direct the respondents 2 and 3 herein to conduct the tender and award contract only by calling for public tender for all the arrears for transportation of Cylinders from the Bottling Plant to the sales depots, irrespective of the distributor or transporter category.

For Petitioner : Mr.G.Arul Murugan

For Respondents: : Mr. A.Kumaraguru, CGSC for R1
Mr.Mr.M.Vijayan, SC for
M/s.King & Patridge-R2&R3

COMMON ORDER

Writ Petitions in W.P.Nos.315 and 3066 of 2016 have been filed by the President of M/s.LPG Cylinder Lorry Owners Association, challenging the Tender Notification issued by the 3rd respondent in Tender No.RCC/SR/TNSO/PT/36/15-16 for transportation of Indane LPG Cylinders in vertical position on unit rate basis Ex-Chengalpet LPG Bottling Plant and consequently, direct the 2nd and 3rd respondents to conduct the tender by selecting and ensuring equitable utilization of trucks for transportation from Bottling Plant to the sales depots, irrespective of the distributor or transporter category.

2. Writ Petition in W.P.No.316 of 2016 has been filed by M/s.Sri Lakshmi Transport Service, challenging the Corrigendum to the Tender ID:2015_SROTN_26563_1 in respect of tender notification issued by the 2nd respondent bearing No. RCC/SR/TNSO/ PT/36/15-16 in so far as extending the last date for submission of tenders.

3. The above said three writ petitions have been filed as against the Indian Oil Corporation Limited and others, whereas, the Writ Petition in W.P.No.3818 of 2016 has been filed by the individual, S.Hari Bhaskar as against the Bharat Petroleum Corporation Limited and others, challenging the tender notification NO.BPCL/LPG/PKD/ SR/2015-16/03/ Coimbatore for transportation of BPCL packed LPG Cylinders Ex/To BPCL LPG Filling Plant Coimbatore, insofar as restricting the areas of Tender in Proforma-I and issuing indents for the remaining areas without tender based on EOI and consequently prayed to direct the respondents 2 and 3 herein to conduct the tender and award contract only by calling for public tender for all the areas for transportation of Cylinders from the Bottling Plant to the sales depots, irrespective of the distributor or transporter category.

4. Since issues involved in all these writ petitions are interlinked to each other, these Writ Petitions are taken up together and disposed of by way of this common order.

5. The facts, in brief, necessary for disposal of the writ petitions, are culled out as under:

6. For the purpose of distributing the filled in LPG cylinders to the customers, the Indian Oil Corporation appoints distributors in respective areas. The distributors will place orders for the required cylinders with the IOCL plants and after allotment, they receive the cylinders from their godowns and thereafter, distribute them to their customers and for this, the distributors will be paid commission for delivery of each cylinder. For transportation of Indane LPG Cylinders in vertical position on unit rate basis Ex Chengalpet LPG Bottling plant, the 3rd respondent issued a Tender notification bearing No.RCC/SR/TNSO/PT/36/15-16, inviting the Electronic bids (e-tender) under Two-Bid system, viz., Technical-Bid with commercial terms and Price-Bid from bona fide bidders. The said tender is initially for a period of three years, with a provision of two yearly extension of one year each at the same rate, as such, the total period is for 5 years.

7. The grievance of the petitioner 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 in the tender. The distributors 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. The tender conditions giving higher leverage in the tender in favour of the distributors is in clear violation of the Central Vigilance Commission (CVC) guidelines and various decisions of the Hon'ble Supreme Court. The CVC vide Office order No.23/7/07, dated 5.7.2007 has

instructed to observe transparency and fairness in all aspects of decision making governing tenders and award of contracts. The Circular makes it clear that awarding of contracts must be on the basis of tender and not by nomination.

8. According to the petitioners, in spite of the instructions given by the CVC, the condition mentioned in Clause 13 of the tender allows the distributors to offer trucks to lift their own load requirements and thus clearly discriminating the other tenderers, viz., transporters from competing with the distributors. The slab rates have been specified in the contracts and the distributors are interested to offer trucks only for the shortest distance loads that are profitable to them and the other long distance loads within the slab rate which are generally loss making are operated by the transporters which is clearly arbitrary, discriminatory and irrational. In the transportation of LPG cylinders, there are profitable sectors, break even sectors and loss making sectors. The rates are fixed for each slab, for example, 0 kms to 100 kms, same slab rate is fixed. The vehicles plying 0 to 35 kms will be profitable, 36 to 70 kms will be break even and 71 to 100 kms will be loss making. As per clause 13 of the tender, choice is given to the distributor to take their own load. As such all the distributors who are having their godown/sales office within 0 to 35 kms from the petroleum outlet will participate in the tender and bag the contract. The distributors whose godown/sales office are falling from 70 kms to 100 kms will not participate in the tender and necessarily the transporters will be plying the loss making loads. Likewise, in the next slab rate, distributor will offer vehicles for 100 kms to 135 kms and will not opt for other areas in the same slab rate. Therefore, according to the petitioner, in the name of public tender, the distributors are given contract to transport cylinders for particular locations. In the public tender, all the tenderers must be evenly placed and the work should be allotted evenly for all the vehicles irrespective of the distances without any discrimination between the distributor vehicles and the transporter vehicles. The distributors who are already enjoying the benefits from the oil companies are given preference and awarded contract which is arbitrary and opposed to the policy of enjoying dual benefits from the government by the same party. Further, Clause 15 of the tender conditions, allows the distributor to form consortium with other distributors and the same will affect the opportunity of the transporters completely.

9. It is further stated that in the pre-bid meeting conducted by the 3rd respondent on 11.12.2015, the petitioner submitted a detailed representation to the respondents on 11.12.2015 pointing out various aspects that were against the interest of the transporters in the tender conditions and

requested to rectify the above discrepancies and issue clarification thereof. However, the said representation was not considered. But the petitioner was assured that their objection will be suitably considered, but instead of considering the representation, the 3rd respondent has issued a Corrigendum in Tender ID : 2015_SROTN_26563_1, by extending the last date of submission of tender from 29.12.2015 to 05.01.2016 and postponing the opening of technical bid to 06.01.2016 without any reasons. Hence, the writ petition.

10. So far as the facts of the writ petition in W.P.No.3818 of 2016 are concerned, they are almost identical to the facts of the above said writ petitions. The only difference is, in the impugned notification issued by the IOCL, preference was given to the distributors in the notification itself, whereas, the BPCL has called for EOI (Expression of Interest) from its distributors who are willing to transport the cylinders for their outlets and after obtaining the same, has issued impugned notification, calling for the tenders for transportation of BPCL packed LPG Cylinders Ex/to BPCL LPG filling Plant Coimbatore, from the LPG Truck operators in a Two-Bid system by bringing some of the areas in the tender and allotting the other areas to the distributors by nomination on the basis of the EOI (Expression of Interest) received from them. The grievance of the petitioner is that the impugned tender allowing the distributors to offer trucks to lift their own load requirements based on EOI is clear discrimination, arbitrary and irrational since the said tender will be only for the remaining areas for which, the distributors may not express their interest. Challenging the said tender notification, the present writ petition has been filed.

11. As regards the writ petitions filed against IOCL, the learned counsel appearing for the petitioners would contend that the terms and conditions of the impugned tender notification allow the distributors to offer trucks to lift their own load requirements and thereby they do not provide equality and fair play among the participants in the tender as there is a clear discrimination between the distributors and transporters in such a way that the trucks offered by the distributors alone are given preference and awarded the contract. He pointed out that since the rates are fixed for each slab, i.e. from 0 kms to 100 kms, the distributors who are having their godown/sales office within 0 to 35 kms from the IOCL outlet, will participate in the tender and bag the contract as it is profitable for them, whereas, the distributors, who are having their godown/sales office between 70 to 100 kms, will not participate and even if they bag the contract, it is loss making for them. Hence, the transporters will get only the loss making areas. Therefore, the learned counsel would contend that by way of impugned notification, giving priority to the distributors in

a tender for transportation of cylinders, is clear discrimination, arbitrary and irrational. In this regard, the learned counsel has invited attention of this Court to Clause 13 and 15 of the terms and conditions of the impugned tender notification issued by the IOCL, which read as under:

> "13. LPG distributors may offer trucks (any number of Trucks i.e. one or more) as per requirement for their own supplies only and all such trucks should be owned by the LPG distributor."
>
> Distributor has to match the established offered L-1 rate for all the earmarked trucks for his own requirement at the first instance. The trucks offered by any Indane distributor beyond his own requirement shall be treated at par with other tenderer as per his original ranking.
>
> Such truck/s shall not be utilized for any other Distributor/load and markets.
>
> In case, truck of Indane Distributor (availing priority preference in induction at L-1 rate for his own requirement and concessional Security Deposit) is withdrawn or non-operational due to any reason and distributor has also offered additional trucks for other than his own requirement (at par with other tenderer), such trucks (equivalent number) shall be utilized for own load transportation at L-1 rate.
>
> In case Distributor is not willing to match the established offered L- 1 rate at the first instance, he will be treated at par with other tenderers as per his original ranking. No priority of induction of trucks and Concessional Security Deposit shall be considered for such Distributors.
>
> Trucks earmarked for own load transportation at L-1 rate shall have to submit Concessional Security Deposit. However if a Distributor offers trucks more than own requirement, the Security Deposit at par with other tenderers shall be taken from the Distributor."
>
> "15. "LPG distributor, who owns truck/s and has part utilization of offered truck/s considering own supplies, can form consortium with only one or two other IOC LPG distributors , who are not having trucks and in that event specific terms mentioned in this tender document shall be applicable. Distributor attached to one market or distributor having one customer code in Corporation's SAP Master data will be treated as one entity and any distributor attached to multiple markets or having different customer codes in SAP Master data will be

treated as a separate entity irrespective of the common name & style of distributorship . One distributor can at most be a part of only one consortium".

12. Thus, the learned counsel would submit that by virtue of the above said Clauses, the distributors are allowed to select their own loads, which leads to favouritism. He would further submit that as per Clause 5.3 (c) of the General Conditions of tender, the age of the vehicle accounts for evaluation of the price bid and the date of invoice of the truck is materialistic in deciding the bid and therefore, the transporter has to necessarily take delivery of a new truck and participate in the tender to be successful, whereas, a distributor will file a tender with a 14 year old truck and get selected without any evaluation of the bid as the preference is given for own load by undue preference, which is arbitrary and violation of Article 14 of the Constitution.

13. The learned counsel further submit that the 3rd respondent being a public sector undertaking, must ensure fairness and transparency in the matter of tenders and they should not favour the distributors by incorporating the clauses to suit their convenience. In a public tender, all the participants of the tender should be equally placed and there must be a level playing field. The clauses in the tender shall not be arbitrary and lead to favouritism to a class of tenderers. He pointed out that in the impugned tender, already 15% of the vehicles have been reserved for ST category, 20% for MSE category and likewise, after reserving 42.5% of the vehicles under the reserved category, only the balance 57.5% of the vehicles are brought for tender in open category and while so, the 3rd respondent, by way of impugned tender notification, gave preference to the distributors to select the area of operation of their choice, which is clear discrimination, capricious and leading to favouritism.

14. As regards the impugned notification issued by the BPCL, the learned counsel appearing for the petitioner would submit that the BPCL is awarding the contract to the distributors through nomination on the basis of expression of interest (EOI), which would allow the distributors to offer trucks to lift their own load requirements based on their EOI. He pointed out that there are 114 outlets attached to Coimbatore plant from where, the LPG cylinders are supplied, now after allotting 51 outlets to the distributors on their EOI, only the balance 63 outlets have been published in the tender. Therefore, according to the learned counsel, the contract for 51 outlets were directly awarded to the distributors without participating in the tender. A distributor who is offering a 13 year old vehicle and also a distributor without even a vehicle, is awarded with the contract

directly merely based on EOI and as such, there is no competition for him, but whereas, a transporter in order to succeed in the tender for the areas published, has to offer a new truck and compete with others for getting the contract since the date of invoice of truck is taken for evaluation as per the terms of the tender. As such, 63 areas published in the tender will be plying with new trucks offered by the transporters having participated in the tender and the balance 51 areas will be plying even with 13 year old trucks as they are directly nominated and awarded contract without tender. Thus, there is clear discrimination in the tender between the distributor and transporter. Therefore, the said tender notification is liable to be set aside.

15. In support of his submissions, the learned counsel relied upon the following decisions, viz.,

a) "JC Decaux Advertising India Pvt.Ltd. versus Times Innovative Media Ltd., and others" reported in (2014) 15 SCC 458, wherein, the Hon'ble Supreme Court quashed the tender by nomination as inter se auction between the parties was conducted in court for awarding contract.

b) "Noida Enterpreneurs Association versus Noida and others" reported in (2011) 6 SCC 508, wherein, the Hon'ble Supreme Court has held that awarding of contract by auction is considered to be one of the fair methods. It has been held as under in para 24 and 25:

> "24. ... "In fact, awarding such work cannot be termed as an `addition' or `additional work' because the work is worth Rs.1 crore more than the amount of original contract. In such a fact-situation, even if there had been no financial loss to the Greater NOIDA, indisputably, the additional work for such a huge amount had been awarded without following the procedure prescribed in law. More so, there is nothing on record to show as to whether the said contractor M/s Anil Kumar & Co. was eligible to carry out the contract worth Rs.6.50 crores. Awarding the contract under the garb of so-called extension, amounts to doing something indirectly which may not be permissible to do directly. Admittedly, such a course of action is not permissible in law.
>
> "22. It is a settled proposition of law that whatever is prohibited by law to be done, cannot legally be affected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud", which means" "whenever a thing is prohibited, it is prohibited whether done directly or indirectly". (See:Swantraj & Ors. v. State of Maharashtra, AIR 1974 SC 517; Commissioner of Central Excise, Pondicherry v. ACER India Ltd.,

(2004) 8 SCC 173; and Sant Lal Gupta & Ors. v. Modern Co-operative Group Housing Society Ltd. & Ors., JT (2010) 11 SC 273)."

16. Relying upon the above, the learned counsel would submit that in the present case, by way of impugned notifications, preference is given to the distributors and the contract is awarded to the distributors based on their EOI without even participating in the tender and therefore, such a course of action is not permissible in law and liable to be quashed.

17. On the other hand, the learned senior counsel appearing for the respondents, by filing a detailed counter affidavit, would contend that the clauses of the terms and conditions of the tender are not discriminatory and that as channel partners of IOCL, it provides certain facilities to its distributors in the interest of smooth delivery of the essential commodity to the general public. He pointed out that the tender conditions are framed as per the guidelines and requirement of Corporation. The liability on the Corporation is minimized in case of distributors owning trucks and taking loads in their trucks. The effects during any strike by loading and unloading labourers who normally are engaged by transporters, are felt maximum. The loading and unloading always put some unreasonable demands, which ultimately affect the plant production leading to dry out and backlog in the markets and also pilferage in LPG cylinders of transporters cannot be avoided and the situation becomes very conflicting due to the blame on transporters and distributors. To address the above issues, Corporation has taken conscience decision to give preference to distributors having their own trucks for uplifting their own loads. By this, the Corporation will not face any loading and unloading issues of distributor's trucks as loading and unloading will be their responsibility and also, in case of pilferage, concerned distributor will be held responsible. The preference of giving priority to distributors having requirement of own loads in own trucks has been kept from the business interest of the Corporation and there is no price preference given to anybody. The entire tender condition is transparent including the conditions therein and there is no scope for anybody to get back door entry. The distributors can offer trucks for uplifting their own load requirement and if he quotes L1 rate in the first instance, his truck will be inducted for uplifting own load irrespective of the number of bidders who have quoted L1 rate. In this tender, distributors from different location (short and long) have participated. The tender always gets finalized at lowest rate 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. The Price band + 10% has been given in the tender to dissuade

any bidders to quote unreasonable rates and backing out after finzlization of tender and this is applicable for all bidders. Therefore, the learned counsel would contend that the conditions of the tender are transparent and clearly within the purview of the business intention and there is no violation as contended by the petitioners.

18. The learned senior counsel for the respondents also contended that the writ petition filed by the association, is not maintainable since the association has no fundamental right under the Constitution. In this regard, he relied upon a decision reported in "(1995) 1 SCC 85 (Mahinder Kumar Gupta and others versus Union India, Ministry of Petroleum and Natural Gas), wherein, the Hon'ble Supreme Court has held that the association cannot file a writ petition as it has no fundamental right under Article 32 of the Constitution. Apart from this, the learned counsel for the respondents, on merits, would contend that giving preference to the distributors will not amount to any discrimination. He relied upon a decision reported in "(1999) 2 LW 134 (M/s.Jaganathan & Sekar versus M/s.Indian Oil Corporation Ltd.)" and submitted that there is nothing unreasonable in giving preference to its distributors by the Corporation for the purpose of transportation of LPG cylinders to the consumers. With these contentions, the learned counsel for the respondents sought for dismissal of the writ petitions.

19. Mr.M.Vijayan, learned senior counsel appearing for the respondents would submit that Expression of Interest (EOI) was sought for from the distributors, who would like to uplift their own requirement through their own trucks and the distributors would be offered the Bench Mark Rate published in the tender or weighted average of the negotiated rate, whichever is lower. After identifying the Express of Interest from the distributors, public tender would be floated for the balance requirement of trucks for cylinder transportation. The policy of seeking Expression of Interest from the dealer was adopted by BPCL primarily to protect the distribution of the essential commodity like LPG which is in the interest of the customers and public at large. In the past, it was observed that the transporters used to make cartelization and seek undue advantage leading to strikes and bandhs, jeopardizing the distribution of LPG. The distributors who put their trucks, would help to maintain uninterrupted supplies which benefit the end customers. Since the distributors are paid either the bench mark rate or weighted average of the negotiated rate, whichever is lower, it ensures that the distributors do not enjoy any unfair price advantage. He would also submit that in fact, absolutely there is no arbitrariness and the transporter is trying to avoid the

competition in order to make unjust enrichment. He pointed out that the distributors and transporters are two different categories, while the distributors are permitted to uplift their own requirement, they cannot transport for other dealers, whereas, the transporter can transport the cylinders for the dealers who are not willing to uplift their requirement. With these contentions, the learned senior counsel sought for dismissal of the writ petitions.

20. Heard the learned senior counsel for the petitioners and the respondents and perused the entire materials available on record.

21. Though very many contentions have been raised by the learned counsel on behalf of the petitioners on the ground of discrimination, however, this Court cannot conduct any roving enquiry on the factual aspects in writ proceedings under Article 226 of the Constitution. However, having regard to the submissions made on either side, this Court is of the view that it would be suffice to decide the following issues.

i) Whether a Writ Petition filed by the Association is maintainable?

ii) Whether this Court can review administration action of the respondents in calling for the tenders?

22. With regard to the first issue, the learned senior counsel appearing for the respondents would submit that the writ petition filed by the association, is not maintainable since it has no fundamental right under the Constitution. In this regard, he relied upon the following decisions, viz.,

a) "(1995) 1 SCC 85 (Mahinder Kumar Gupta and others versus Union India, Ministry of Petroleum and Natural Gas), wherein, it has been held as under in para 6:

> "6. Under these circumstances, we find no arbitrariness or unjustness in prescription of the guidelines for the eligibility criteria. The second writ petition stands liable to be dismissed on the sole ground that the Association cannot file a writ petition as it has no fundamental right under Article 32 of the Constitution. One of the petitioners/appellants has claimed as having partnership, but the details thereof have not been given. We, therefore, dismiss the appeal as well as the writ petitions with costs quantified at Rs 20,000 each."

b) "2005 Writ L.R.321 (Formation of Indian Network Marketing Association versus M/s.Apple FMCG Marketing Pvt.Ltd. and others)", wherein, the Division Bench of this Court, has held as under in para 8 to 11:

> "8. No doubt, the law has developed since the above decision was given by the Allahabad High Court in the year 1951, yet it must be reiterated that the development in the law relating to locus standi in writ petitions only carved out some exceptions to the main rule which has been stated correctly by the Allahabad High Court, and it is not that this main rule itself has been totally abolished. Exceptions remain exceptions, and do not become the main rule. Hence, we must reiterate that ordinarily a writ petition can only be filed by a person who is personally aggrieved.
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> "9. In Vinoy Kumar Vs. State of U.P., AIR 2001 SC 1739 the Supreme Court observed (vide paragraph-2):-
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> > "Para-2: Generally speaking, a person shall have no locus standi to file a writ petition if he is not personally affected by the impugned order or his fundamental rights have neither been directly or substantially invaded nor is there any imminent danger of such rights being invaded or his acquired interests have been violated ignoring the applicable rules. The relief under Article 226 of the Constitution is based on the existence of a right in favour of the person invoking the jurisdiction. The exception to the general rule is only in cases where the writ applied for is a writ of habeas corpus or quo warranto or filed in public interest. It is a matter of prudence, that the Court confines the exercise of writ jurisdiction to cases where legal wrong or legal injuries caused to a particular person or his fundamental rights are violated, and not to entertain cases of individual wrong or injury at the instance of third party where there is an effective legal aid organization which can take care of such cases. Even in cases filed in public interest, the Court can exercise the writ jurisdiction at the instance of a third party only when it is shown that the legal wrong or legal injury or illegal burden is threatened and such person or determined class of persons is, by reason or poverty,

helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief (emphasis supplied)."

"10. In State of Orissa Vs. Ram Chandra Dev & Another, AIR 1964 SC 685 the Supreme Court observed (vide paragraph - 8):-

"But though the jurisdiction of the High Court under Article 226 is wide in that sense, the concluding words of the article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Article 226".

"11. Similarly, in Gadde Venkateswara Rao Vs. Government of Andhra Pradesh, AIR 1966 SC 828 (vide paragraph- 8) the Supreme Court observed:-

"The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself (emphasis supplied), though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified".

"12. In Sand Carrier's Owners' Union and Others Vs. Board of Trustees for the Port of Calcutta, AIR 1990 Cal 176 it was observed by the Calcutta High Court that "a Public Interest Litigation can be moved, where persons concerned for whose benefit it is moved are socially and educationally backward, and Public Interest Litigation is also maintainable in cases such as environmental pollution, etc."

However, it was also observed:-

"The members of such association may be affected by a common order and may have common grievance, but for the purpose of enforcing the rights of the members, writ petition at the instance of such association is not maintainable".

Accordingly, the Calcutta High Court dismissed the writ petition filed by the Owners' Union.

23. From the above decisions, it could be seen that even if a member of an association gets affected by a common order and has a common grievance, for the purpose of enforcing the rights of the members, a writ petition at the instance of such association is not maintainable. Therefore, on this ground alone, the writ petitions are liable to be dismissed.

24. As regards the next issue, it is the submission of the learned counsel for the petitioners that there is clear discrimination in giving preference only to the distributors as even without their participation in the tender, they would be awarded contract, whereas, the transporters are not given any such preference, but they have to necessarily compete in the tender and become successful in order to get the contract. He has drawn the attention of this Court to the various clauses referred to in the tender notification. On the other hand, it is the reply of the learned senior counsel appearing for the respondents that absolutely there is no discrimination at all since the distributors are concerned, they are permitted to offer their trucks to lift their own load requirements.

25. At the outset, it is to be noted that inviting of tenders on the part of respondents/BPCL/IOCL for transportation of LPG cylinders is purely a contractual affair and the scope of judicial review in contractual matters is very limited. In fact, the award of contract is essentially a commercial transaction involving considerations and decisions which are commercial. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. Dealing with the scope of interference under Article 226 of the Constitution of India, the Honble Apex Court held in "Jagdish Mandal Vs. State of Orissa" reported in (2007) 14 SCC 517 that 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 or irrational that the Court can say that the decision is such that no responsible authority acting reasonably and under law could have reached such decision;
>
> ii) Whether public interest is affected. If the answers are in negative, no interference under Article 226 of the Constitution is warranted.

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.

28. In this regard, it would be appropriate to refer the following decisions, viz.,

a) "(1999) 2 LW 134 (M/s.Jaganathan & Sekar versus M/s.Indian Oil Corporation Ltd.)", this Court, in the matter of giving priority to the Resellers by the Corporation, has held as under:

> "3. In the first place, this is a matter regarding the tenders, in which normally this Court does not interfere particularly in its jurisdiction under Article 226 of the Constitution of India, unless there is something extremely unreasonable with the tender condition. Wednesbury's test of reasonableness has already been adopted by the Supreme Court in its celebrated judgment (Tata Cellular v. Union of India) where the Supreme Court has explained reasonableness of Lender conditions according to that test. In the light of present facts, it cannot be said that a preference given by the Corporation in favour of its retailers and resellers is grossly unreasonable in any manner. In fact, the concerned retailers and resellers have already their agreements regarding the retailing service of the distribution with the Corporation and as such they are the persons who would always be available to the resident for being controlled. The transport of the L.P.G. Cylinders has a direct nexus with the consumer services. In order to better the consumer services, if the Corporation requires the persons whose working style was already known and on whom they have a direct control, though in different ways, there is nothing unreasonable about it. Similarly, nothing can be said about the condition of the waiver and the Earnest Money Deposit. In fact, via agreements executed by the retailers and the distributors with the Corporation, the Corporation would always be having substantial deposits of the retailers and the distributors. Therefore, the exemption granted to them can be well understood. In view of this, the writ petition has no merits and must be dismissed and it is dismissed."

b) "2012 (4) TNLJ 308 (Civil) (Vijay Roadlines Prop.S.Thukaram and others versus Indian Oil Corporation, New Delhi)", this Court has reiterated the decisions regarding the scope of interference by the Courts in matter of contractual matters, in para 18 as under:

"18. The action of the respondents in inviting tender is purely a contractual affair. The scope of interference by the Courts in contractual matters has already been settled by the Honourable Supreme Court in very many decisions.

(a) In (1994) 6 SCC 651 (Tata Cellular v. Union of India) in paragraph 94 the Supreme Court held thus,

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of 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. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

(b) In (1999) 1 SCC 492 (Raunaq International Ltd. v. I.V.R.Construction Ltd) the Supreme Court reiterated the said principle and held that the writ Court would not be justified in interfering with the commercial transaction in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the transaction is mala fide.

(c) In (2000) 2 SCC 617 (Air India Ltd. v. Cochin International Airport Ltd.) the Supreme Court held that the award of contract is essential in commercial transaction, which involves commercial consideration and results in commercial decision. In para 7 it is further held,

"7. .... The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. ...."

(d) In (2007) 14 SCC 517 (Jagdish Mandal v. State of Orissa) in paragraph 22 it is held thus,

"22. .... 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."

c) In W.P.Nos.32166 to 32171 of 2012, etc., this Court, by order, dated 01.02.2013, has held as under:

"14. I find force in the submissions made on the side of the learned counsel appearing for the respondents. Insofar as the petitioners who have filed the writ petitions praying for writ of Declaration are concerned, I am of the view that they have no locus standi to file these writ petitions now and they are estopped from questioning the tender conditions as arbitrary, not followed properly, etc., that too, after participation in the tender process and failing to get the contract. The petitioners after having read and understood the tender conditions and signed and sealed each page of the tender document, cannot challenge the same after participation and failing to get the contract. Further 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. RO Dealers/Direct Customers are already under the control of the first respondent Corporation and the same is not the case of the petitioners who are just transporters. Therefore, it is reasonable classification and the question of discriminatory treatment does not arise. Identical question arose for consideration in a similar case filed before the High Court of Punjab and Haryana in CWP No.21361/2011 (cited supra) with regard to the preferential treatment given to RO Dealer/Direct Customers and the challenge made by the non-RO Dealers after participation in the tender. After analysing the matter in detail, a Division Bench of that Court held that the petitioners could not challenge the tender conditions after participation and failure to get the contract and the preferential treatment given to RO Dealers/direct customers is not discriminatory violating Article 14 of the Constitution of India. I am in respectful agreement with the decision of the Division Bench of that Court."

d) In W.A.Nos.310 and 311 of 2007, by order, dated 12.04.2007, this Court has held as under:

"7. It is well settled now that the Courts can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by the Supreme Court in "Tata Cellular versus Union of India (1994(6) SCC 651). After examining the entire case law, the following principles have been deduced (SCC pp.687-88 para 94):

"94.(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it

will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

29. A reading of the above cited decisions would explicitly show that the scope of the judicial review by the Court in the matters of contractual matters by exercising its inherent power, is very limited and unless it is mala fide and there is arbitrariness, the Court cannot interfere with the administrative action. So far as the distributors are concerned, they can lift only their loads according to their requirement and not for other distributors. Hence, giving preference to the distributors cannot be taken as discriminatory as it has nexus to the object to be achieved. In the present case, the object of the Corporations is to see that the supply of essential commodity of LPG to their customers should be reached without hindrance from any quarter. Therefore, in order to better the consumer services, if the Corporation gives preference to their distributors by way of tenders, there is nothing unreasonable about it and this Court cannot sit as a Court of appeal under Article 226 and substitute its decision in the matter of administrative action of the Corporations. Accordingly, the issue is answered.

30. Having regard to the above discussion and the issues raised in these writ petitions having been dealt with and the contentions of petitioners having been rebuffed, the Writ Petitions are dismissed as being devoid of merit. No costs.

Consequently, connected WMPs if any, are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

suk

To

1. The Secretary, Union of India,
Ministry of Petroleum and Natural Gas,
Government of India,
Shastri Bhavan,
New Delhi-110 001.

+ 4 ccs to Mr.G. Arulmurugan, Advocate Sr.25954
+ 1 cc to Mr.V. Anantha Natarajan, Advocate Sr.26058
+ 1 cc to Mr.King & Partridge, Advocate SR.25628

W.P.Nos.315, 316, 3066
and 3818 of 2016

GJ II(CO)
Eu 11.05.16