IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

**WRIT PETITION NO.634 OF 2018**
**WITH**
**INTERVENTION APPLICATION NO.01 OF 2018**
**WITH**
**INTERVENTION APPLICATION NO.02 OF 2018**

Jitesh Wadhwa and Others ...Petitioners
vs.
Indian Oil Corporation Limited and Others ...Respondents

Mr. P.K. Dhakephalkar, Senior Advocate a/w. Mr. S.V.Marne i/b.Ashok Purohit & Co., for the Petitioners
Mr. Janak Dwarkadas, Senior Advocate a/w. Mr. Chirag Modi, Mr. Ashok Purohit, Ms. Raveena Yadav i/b. M/s. Ashok Purohit & Co., for Respondent Nos. 1 to 3.
Mr. Atul Damle, Senior Advocate a/w. Mr. P.Y. Shankar, for the Applicants.

JUDGMENT RESERVED ON : 5th APRIL, 2018

JUDGMENT PRONOUNCED ON : **9th APRIL, 2018**

CORAM : **SHANTANU KEMKAR &**
**MAKARAND KARNIK, JJ.**

**JUDGMENT:** (Per Shantanu Kemkar, J.)

. The Petitioners are transporters engaged in the business of transportation of Bulk LPG by road through Tank Trucks (in short "TTs") registered in the State of Gujarat. They have filed this Petition under Article 226 of the Constitution of India challenging the condition of the notices inviting E-Tenders for Bulk LPG Transportation contract by road for each of the State in the country by which “preference” has been provided to the bidders “who have registered their TTs in the State for which the tender is floated” over the TTs registered in other States.

2. According to the Petitioners in past the Respondents used to float E-Tenders region wise by dividing the entire country into 5 regions without there being any restriction on the bidders to bid for any of the regions. However, for the first time, the Respondents have floated State-wise tenders with the aforesaid stipulation. The Petitioners averred that the condition of preference to be given to the State registered TTs while evaluating the tender, is wholly arbitrary and unreasonable as it will put the Petitioners having TTs registered in a particular State in an advantageous position irrespective of age of their vehicles. They alleged that such a condition is violative of their fundamental right to carry on business fairly in all parts of the country. The Petitioners have expressed apprehension that such condition of granting preference to State registered TTs would throw several transporters out of business. It is also the case of the Petitioners that maximum number of 'loading Plants' for loading of LPGs are located in the State of Gujarat. Consequently, maximum number of TTs are

owned and registered in the State of Gujarat. It has been averred by the Petitioners that on account of tax benefit being granted for the trucks if registered in the State of Nagaland, large number of TTs were registered at Nagaland and now on account of impugned condition the truck owners will have to get their trucks registered at various States causing huge financial burden on them. It is also the case of the Petitioners that from the tender document, it is impossible to find out as to from where the Petitioners would get chance of accepting its bid even upon transferring their TTs in a particular State. The Petitioners alleges that since there is no nexus of impugned condition with the object which is sought to be achieved by the Respondents, the said condition is liable to be set aside. Placing reliance on Section 46 of the Motor Vehicles Act, 1988 (for short "the Act") the Petitioners contend that giving preference only on the ground of registration of TTs to the State in question is violative of Section 46 of the Act which provides that motor vehicle registered in any State shall not require to be registered elsewhere in India and that certificate of registration in support of such vehicle shall be effective throughout India.

3. The Respondents have filed reply and have justified the

impugned condition by stating that the condition of preference to be given to TTs of a particular State will generate local employment and benefit local talent in transportation process. It will lead to overall equitable development of countries' resources and will remove developmental imbalance within different States of the country which is one of the avowed object of the instrumentality of the State. According to the Respondents, the present tender gives an opportunity to all strata of the society and participants in the tender and this would avoid monopolies being created by some cash rich transporters, who are concentrated in particular State only. It has been stated that the Respondents after reviewing and considering the loading source wise availability of product (Bulk LPG) & loading capacity of TTs, the number of LPG Bottling plants in the State and their requirement, the round trip distance between source and destination and the time taken to cover the distance considering the allowable speed limits as per Government Notification in various routes and after considering detention/ idling time at both ends i.e. loading & unloading were of the view that it would be beneficial for oil companies to have State wise TTs.

4. The Respondents have further stated that, there were

several instances in the past where representations were made by the transport contractors in respect of allocation of TTs on the ground that some TTs were given a longer route as compared to others and hence, such TTs were able to generate more income as compared to the others, and now such complaints as a result of State wise tender would substantially reduce. Further due to State-wise tender, the TTs will be consignee based and hence, there will be better control on planning of TTs and equitable distribution of remuneration per TTs. This will benefit all transport contractors particularly the small transport contractors. According to the Respondents, by having State registered trucks, intra-states and inter-state movement will be taken care of immediately without any dependency on transporters to change the registration of TTs at a later date and as per the demand of these Respondents. This movement of intra-states by State registered TTs is a requirement as per the Act. According to the Respondents, the new State wise tender would be beneficial to several small and new entrepreneurs and give them an opportunity to engage in business and participate in the growth of the country. It will generate employment opportunity to new and small entrepreneurs all across the country and it will not be restricted to any particular region as was the past experience of these Respondents with the previous tenders. This would also be in consonance with the social objectives of these Respondents as they are public sector undertakings and are obliged to provide opportunities of employment and growth to all sections of the society and to all the States across the country. It is stated that as more entrepreneurs will participate in the Bulk LPG transportation contracts on account of it being now State wise, it will encourage healthy competition and eliminate likely chances of cartel formation. Also, it will increase operational efficiency and ease of undertaking transportation of Bulk LPG by adopting State-wise tender as compared to the earlier region wise tenders.

5. It has been further stated by the Respondents that terms and conditions of the Bulk LPG transportation more particularly giving preference to the State TTs are prescribed by the Respondents keeping in mind the nature of the contract, the operations of these Respondents and the difficulties and issues faced therein. It is the case of the Respondents that they are entitled to formulate the tender conditions which are proper and suitable to their business needs operations and business efficacy

as also the nature of the contracts and the surrounding ground realities in relation to the Bulk LPG transportation both intra-states as well as inter-state. It has been stated that there is no arbitrariness or malafides or any misuse by the Respondent of its powers or position in issuing state-wise tenders and that the entire action of the Respondents is fair, reasonable and in the larger public interest particularly since it is to encourage wider participation of new and small entrepreneurs in the Bulk LPG transportation business.

6. Mr. Damle, learned Senior Counsel for the Applicants of Civil Applications/Intervention Applications submits that the Applicants are small transporters having a single TT and intends to participate in their personal capacity for the first time in tender for transportation of Bulk LPGs issued by the Respondents. According to him, E-tender ensures fair opportunity to all the transporters registered in respective States to bid for tenders. The impugned tender condition states that the State registered TTs shall be given preference, however, such preference is not blanket preference but specially to get all bids on floor rates and the same shall be limited to the requirement of particular State for those transporters whose

bids are received at floor rates which means that for a particular State, preference shall be given to only required number of trucks in a particular State. He also submits that after considering the representations from the various association of transporters, the Respondents have issued the corrigendum dated 16th February, 2018 and by the said corrigendum, the Respondents have struck balance between States having greater number of TTs to be deployed and indicated as per terms of contract by the Respondents. It is stated that almost two months time is given to the transporters to register their excess trucks in the States having less trucks and large number of transporters have already transferred the trucks after obtaining NOCs from the originally registered States. He in the circumstances, supported the stand taken by the Respondents and submitted that the impugned condition is most reasonable and gives fair opportunity even to the small transporters to participate in the tender process.

7. Mr. Dhakephalkar, learned Senior Counsel for the Petitioners submits that the impugned condition is arbitrary, irrational, unreasonable and wholly irrelevant to the object which the Respondents seek to achieve. He therefore contends that the

condition of giving "preference" to State registered TTs over the other State registered TTs is liable to be set aside and in support of his contention he has placed reliance on the judgment passed by the Hon'ble Supreme Court in the case of **Tata Cellular vs. Union of India**[1]. He referred to Para 113 of the Judgment in which the Supreme Court deduced the principles which are to be taken into consideration while dealing with the Government contract matters.

> *The principles are :-*
> *(1) The modem 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*

1. AIR 1996 SUPREME COURT 11

*administrative burden on the administration and lead to increased and unbudgeted expenditure.*

8. Mr. Dhakephalkar, learned Senior Counsel for the Petitioners has emphasized on clause 5 of the said principles which provides that the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides. According to him, impugned condition being wholly arbitrary and unreasonable, this Court has got jurisdiction to interfere into it. He submits that the explanation offered by the Respondents in reply to justify the said condition runs contrary to the other conditions of the tender document.

9. Mr. Janak Dwarkadas, learned Senior Counsel for the Respondents in reply has argued that the impugned condition cannot be said to be arbitrary or unreasonable. He placed reliance on the judgment of the Supreme Court in the case of **Michigan Rubber (India) Limited vs. State of Karnataka and Others[2],** in which the Hon'ble Supreme Court has carved out the scope of Court's interference in the Government contracts and auctions. He has placed reliance on Paragraph Nos. 23 and 24 of the said

2. (2012) 8 Supreme Court Cases 216

judgment which read thus:

> *23. From the above decisions, the following principles emerge:*
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> *(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*
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> *(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;*
>
> *(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;*
>
> *(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and*

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

*24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:*

*(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached; and (ii) Whether the public interest is affected.*

10. Considered the submissions made by the learned Senior Counsel for the parties. Perused the pleadings of the parties. We have also considered the judgments relied by the learned Senior Counsel for the parties.

11. For deciding the issue involved in this Petition, we feel it profitable to refer few more judgments including the judgment in the case of **Air India Limited vs. Kochin International Airport Limited**[3] in which the Supreme Court has held that the award of a

3 2000(2) SCC 617.

contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. 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. (emphasis supplied). Similarly, in the case of **Directorate Of Education & Ors vs Educomp Datamatics Ltd**[4] the Supreme Court has held that, the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. The Courts can scrutinize the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. (emphasis supplied)

12. Having considered the submissions made by the learned counsel for the parties, the pleadings and the law laid down by the Supreme Court in the cases referred above, we are of

4 2000(4) SCC 19.

the considered view that no case is made out to invoke jurisdiction of this Court vide Article 226 of the Constitution of India. The impugned tender condition does not suffer from any arbitrariness, malafide and the same cannot be said to be discriminatory or actuated by bias. We find that by incorporating the impugned condition, Respondents intend to encourage more entrepreneurs and to generate employment opportunities in all the States across the country by participating in the award of Bulk LPG transportation contracts, so as to have healthy competition and less likelihood of formation of cartel. The Respondents, on the basis of their past experience that only few large transport contractors in a particular region with a large fleet of TTs, would engage in the business and their behaviour was akin to cartel formation and make unreasonable demands have thought it fit to incorporate the impugned condition. Moreover, in order to take better acquainted and equipped transporters with local eco-system and the operating conditions the Respondents have decided to give preference to the State registered TTs. Thus, in order to ensure better utilization of TTs and lesser operational issues, the Respondents have decided to award State-wise contract by providing preference to the State registered TTs. Such attempt and incorporation of the condition to that effect by the Respondents cannot be attacked on the ground that the condition is unreasonable or that it will not achieve the object sought to be achieved. It is not in dispute that by putting the condition, the Petitioners have not been debarred from participating in the tender process, as the tender conditions makes it open for the other State transporters to participate and if the requirement of a particular State is not fulfilling, then the contractors from other States will be awarded contract of transportation of Bulk LPGs. We also find that the Respondents are not curtailing any of the Petitioners' right to bid but are giving fair and reasonable opportunities to all concerned however only a preference has been provided to the State registered TTs. Therefore, we are of the considered view that there is nothing arbitrary or illegal in giving preference to State registered TTs. In these circumstances, we are of the view that incorporating such condition will not destroy the object of floating the tender. The Respondents have stated that as per the data available with them, there are about 20000 registered TTs in India, whereas their requirement is for about 24000 TTs all across India. In the circumstances, the Respondents tried to explain that in fact the demand of TTs is more than the present TTs and the apprehension of the Petitioners to the effect that they have no chance to get the contract is wholly misconceived.

13. Having regard to what has been stated above, we are of the view that the Petitioners are having full opportunity to participate in the tender and since they have already been given option by the Respondents by issuing corrigendum to get their vehicle transferred to a particular State, merely because it would cause financial burden or inconvenience to the Petitioners, it cannot be said to be valid ground to hold that the impugned condition is arbitrary, irrational or unreasonable. In view of the law laid down by the Supreme Court, the Respondents have to be given greater latitude in formulating the conditions of tender. In the absence of the condition being arbitrary or unreasonable no judicial interference is warranted. Merely because, the Petitioners feel that the condition in the past was more fair, wiser or logical, that by itself cannot be a ground to strike down the impugned condition which otherwise in our opinion appears to be just, reasonable and gives fair chance to all the transport operators to compete including the small transporters of different States and which encourage the State-wise employment opportunities.

14. Keeping in view the aforesaid, we do not find any ground so as to interfere into the impugned condition.

15. As a result, the Petition fails and is hereby dismissed.

16. At this stage, it has been requested on behalf of the Petitioners that time to submit the bid be extended. Mr. Dwarkadas, learned Senior Counsel for the Respondents on instruction submits that the Respondents will extend the date of bid submission up to 20$^{th}$ April, 2018 without prejudice to their rights and contentions. We record the said statement.

17. No orders as to the costs.

18. In view of above, the Intervention Applications are disposed of.

**(MAKARAND KARNIK, J.)** **(SHANTANU KEMKAR, J.)**