

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

WRIT PETITION NO. 3836 OF 2024

Shahbaz Mumtaz Khan

Age : 34 years, Occ: Business

Residing at : Khan Manzil, 4 Star Family
Trust Compound, Marol Naka Chimatpada,
Andheri East, Mumbai – 400059.

... Petitioner

Versus

1. Indian Oil Corporation Ltd.

Company Registered under the Companies Act, 1956

Having its registered office at Indian Oil

Bhavan, G-9, All Yavar Jang Marg

Bandra (E), Mumbai 400051.

2. Divisional Retail Sales Head

1st Floor Sarjan Plaza 100

Dr. Annie Besant Road,

Worli, Mumbai – 400018

3. Ashok Sawant

Assistant Public Information Officer

& Deputy General Manager (LPG-OPS)

Indian Oil Corporation Limited

G-Block, Bandra Kurla Complex,

Bandra East, C-33, Avenue 3, Mumbai 400051.

4. Shri Anirban Ghosh

Appellate Authority & Executive Director &

State Head, Maharashtra State Office

Indian Oil Corporation Ltd. (Mktg Division)

Indian Oil Bhavan, Plot No. C-33, G Block

Bandra Kurla Complex, Bandra (E)

Mumbai – 400051

5. Union of India

Through Ministry of Petroleum and Natural Gas

6. State of Maharashtra
Through Department of Revenue
7. Shri Abhinav Shobit
B-307, Aayushi Building,
J.B. Nagar, Andheri East,
Mumbai – 400059.

.... Respondents

Dr. Abhinav Chandrachud a/w Mr.Rahul Tripathi, Mr.Ashish Dubey,
Mr.Darshan Patankar, for the Petitioner.
Ms.Kritika Sethi a/w Ms.Vasundhara Dhar, for the Respondents No. 1 to
4.
Ms.Nazia Sheikh, AGP for Respondents No. 1 to 6 – State.

**CORAM : ALOK ARADHE, CJ &
M.S.KARNIK, J.**

**RESERVED ON : 25th MARCH, 2025
PRONOUNCED ON : 2nd APRIL, 2025**

JUDGMENT [PER M.S.KARNIK, J.] :

1. This writ petition under Article 226 of the Constitution of India challenges a policy of the respondent no. 1- Indian Oil Corporation Limited ('IOCL', for short) to decide tie breakers in tenders. The challenge is that the clause prescribing the criteria that the younger candidate being preferred over the older candidate in case of tie is discriminatory under Article 14 of the Constitution.

2. The IOCL for selection of service providers for retail outlet, on

09th May 2022 issued a brochure. Clause 7.2.1 (b) provides that “in the event of tie between two candidates, the applicant who is younger in age shall get preference over the other/(s).”. An advertisement was published by IOCL inviting applications for service provider at retail outlets on 07th November 2023. The petitioner submitted its application to IOCL on 05th December 2023. The merit list was declared by IOCL on 19th February 2024. The petitioner and respondent no. 7 both scored a total 92.8 marks. However, respondent no. 7 was placed at rank 1 while the petitioner was placed at rank 2.

3. The petitioner by his email dated 23rd February 2024 asked respondents the reason he was given a second rank. The service contract was awarded to respondent no. 7. This petition was filed on 24th April 2024. In the affidavit filed by IOCL, the reason put forth is that the petitioner is 34 years old while respondent no. 7 is 28 years old and hence in terms of clause 7.2.1 (b) of the brochure dated 09th May 2022, respondent no. 7 was preferred.

4. We have heard the submission of learned counsel for the petitioner and respondents. We have perused the materials on record, the pleadings, affidavit-in-replies filed by the IOCL as well as respondent no. 7.

5. The contention of the learned counsel for the IOCL is that the petitioner cannot challenge the condition of tender after participating in the bidding process. No doubt, the tender conditions did prescribe in terms of clause 7.2.1(b) of IOCL policy that when there is a tie between the candidates, the applicant who is younger in age is preferred over the other. So far as the tender document is concerned, clause 7.2.1 which deals with Empanelment in case of tie needs to be extracted.

“Empanelment in case of tie:

a) In case of-tie, a candidate getting higher marks in following two parameters, put together, will get preference over other/s.

S.r No.	Parameter
1.	Capability to provide finance
2.	Personal interview

b) In case of tie on parameters given above, the applicant who is younger in age shall get preference over other/s.

c) In case of tie on parameters a & b (Finance, Interview & Age) above, the applicant who gets higher marks in Educational qualification shall get preference over other/s.

d) The above will also apply for selection of DGR nominees.”

6. The petitioner participated in the tender after fully knowing about the tender terms and without protest. The question is whether at this juncture, it is open for the petitioner to challenge the constitutionality of the terms of the selection brochure, which according to learned counsel

for respondents, is belated. It is well settled proposition of law that a tenderer having participated in the tender process cannot be permitted to challenge the tender condition. If any authority is needed in support of this proposition, we may refer the decision of this Court in ¹**Inducare Pharma Pvt. Ltd. Vs. Chief Executive Officer.**

7. It is also relevant to refer to clause 5 of the brochure which lays down the selection criteria and guidelines for evaluation. The parameters prescribed are thus :

Parameter	Maximum Marks
i. Age (completed years) • For age 21 years to 35 years – 25 marks • For age above 36 years to 50 years – 21 marks • For age above 50 years to 60 years – 17 marks	25

8. The petitioner is 34 years of age and the respondent no. 7 is 28 years old. Thus, as they fall in the age bracket of 21-35 years, they are entitled to 25 marks. The brochure provides that in case of tie, on parameters given above, the applicant who is younger in age shall get preference over others.

9. Before we proceed to deal with the submissions, we must bear in

¹ Writ Petition No. 11762 of 2023 decided on 01st December 2023.

mind the principles laid down by the Supreme Court concerning judicial review of contractual matters. The reference to the decision in ²**Uflex Limited Vs. Government of State of Tamil Nadu & others** provides a valuable insight. Their Lordships observed that judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that the Supreme Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice to have a stay at a distance. A tenderer or contractor with a grievance can always seek damages in a civil court and thus, “attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. In paragraph 4, the Supreme Court observed thus:

“4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law

² (2022) 1 SCC 165.

would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in *Michigan Rubber v. State of Karnataka* (2012) 8 SCC 216 as under:

“23. From the above decisions, the following principles emerge:

- (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
- (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
- (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
- (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
- (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

10. Learned counsel for the petitioner alleges discrimination on the basis of the immutable characteristic, in the present case, age, over which the petitioner has no control. The submission is that the petitioner as well as respondent no. 7 fall within the same age bracket of 21-35 years for which they have been awarded 25 marks. As there was a tie between the petitioner and the respondent no. 7, further classification is sought to be made on the basis of age, in that respondent

no. 7 who is younger in age is preferred over the petitioner. The question is whether such a condition can be challenged at a tie breaker stage, the petitioner having participated in the tender process and whether such classification on the basis of age is rational.

11. Learned counsel for IOCL was at pains to point out that for handling the operations of the retail outlet, a younger person is more suited considering the arduous nature of work to be discharged of the outlet and hence the criteria is founded on some justifiable basis which cannot be said to be irrational. The concurring opinion of Her Ladyship Indu Malhotra J. in ³**Navtej Singh Johar and ors. Vs. Union of India** expressed on the aspect of immutable status in paragraph 638.3 relied by learned counsel for the petitioner is extracted below:

“638.3 In an article titled “Reading Swaraj into Article 15: A New Deal For All Minorities”²⁵, Tarunabh Khaitan notes that the underlying commonality between the grounds specified in Article 15 is based on the ideas of ‘immutable status’ and ‘fundamental choice’. He refers to the following quote by John Gardener to provide context to the aforesaid commonality:

“Discrimination on the basis of our immutable status tends to deny us [an autonomous] life. Its result is that our further choices are constrained not mainly by our own choices, but by the choices of others. Because these choices of others are based on our immutable status, our own choices can make no difference to them. And discrimination on the ground of fundamental choices can be wrongful by the same token. To lead an autonomous life we need an adequate range of valuable options throughout that life.... there are some particular valuable options that each of us should have irrespective of our other choices. Where a particular choice is a choice between valuable options which ought to be available to people whatever else they may choose, it is a fundamental choice. Where there is

³ (2018) 10 SCC 1.

discrimination against people based on their fundamental choices it tends to skew those choices by making one or more of the valuable options from which they must choose more painful or burdensome than others.”

(emphasis supplied)

Race, caste, sex, and place of birth are aspects over which a person has no control, ergo they are immutable. On the other hand, religion is a fundamental choice of a person. Discrimination based on any of these grounds would undermine an individual’s personal autonomy.”

12. It is thus held that discrimination on the basis of the immutable characteristics like race, caste, sex and place of birth i.e. the aspects for which a person has no control, is unconstitutional. There is no mention of age as an immutable characteristic in the same way as race, caste, sex and place of birth.

13. An immutable characteristic is any physical attribute perceived as unchangeable, entrenched and innate. We did not come across any decision of the Supreme Court whether a person’s age is an immutable characteristic. However, there are decisions dealing with matters relating to age discrimination. In our opinion, these decisions can be relied with profit in resolving the controversy involved and hence we do not address the contention as regards age being an immutable characteristic argued by learned counsel for the petitioner. The High Court of Delhi in ⁴**Commissioner, M.C.D Vs. Shashi & Ors.** was considering a question whether the petitioner can be discriminated

4 2009 SCC OnLine Del 2779

against equally placed candidate merely on the basis of age. The answer of the Delhi High Court was in the negative. Paragraphs 9 to 13 are relevant which read thus :

“9. Article 14 of the Constitution provides for equal treatment before the law and equal protection of the laws to all persons within the territory of India and Article 16(1) of the Constitution provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Yet, discrimination between two equally placed persons is permissible if there is a reasonable classification and that reasonable classification is based on an intelligible differentia. Article 16(2) of the Constitution provides that no citizen shall be discriminated against on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. There is no specific prohibition against discrimination on the basis of age. In other words, if there is age discrimination, the person discriminated against is entitled to rely only on Article 14 of the Constitution and demand equal treatment, while the State would have to show that the classification is reasonable and is based on intelligible differentia.

10. As far as the present case is concerned, Respondent No. 1 has clearly made out a case of age discrimination in as much as the admitted position is that even though the advertisement for recruitment related to all eligible persons between age group of 18 and 30 years, the Petitioner sought to limit the application of the advertisement to only those persons who were within the age group of 28 to 30 years.

11. The reason given by the Petitioner for the age discrimination is two-fold, namely, that the number of applications received was overwhelming and, therefore, some shortlisting criteria had to be adopted and, secondly, persons who are senior in age would lose an opportunity of employment if they were not selected while those who were younger could avail of similar opportunities later in life. We are of the opinion that neither of these reasons put forth by the Petitioner falls within the acceptable limits of Article 14 of the Constitution.

12. Subject to constitutionally permissible reservations, every endeavour must be made by the State to employ or engage the most qualified or the most meritorious persons. In doing so, the State may fix shortlisting criteria on the basis of educational qualifications or experience or marks obtained in an examination or an interview or any other criterion which enables the most competent person to be selected. Unfortunately, age has nothing to do either with merit or competence. Wisdom may be an attribute of age, but not merit or competence.

13. There is not even an iota of material to suggest, nor indeed has anything been pointed out by learned Counsel for the Petitioner, that merely because an applicant falls within the age group of 28 to 30 years he is better qualified as a teacher than a person falling in the age group of 18 to 27 years. It is not the case of the Petitioner that persons in the age group of 28 to 30 years are either better qualified educationally or have more experience or are in any manner more meritorious or competent than the applicants falling within the age group of 18 to 27 years solely because of their age. It seems to us that the Petitioner has literally picked the age group of 28 to 30 years out of the hat (as it were) without any reference to any logical or empirical basis.”

14. The object sought to be achieved in the present case obviously is to select an applicant who is best suited to run the retail outlet. We do not see any logic or rationality in the criteria adopted by IOCL that person younger in age within the age group of 21-35 years classified in the same group for the purpose of evaluation should get preference over the others within that group in case of a tie. In ⁵**The State of West Bengal Vs. Anwar Ali Sarkar** the Constitution Bench of the Supreme Court laid down that classification must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be attained and cannot be made arbitrarily and without any substantial basis. It was observed that classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics and does not mean herding together of certain person and classes arbitrarily. In this context, the Constitution Bench observed that the legislature may fix the age at

5 (1952) 1 SCC 1

which persons shall be deemed competent to contract between themselves. We find such classification being made in several other instances such as the voting age or the age of juvenility or the age of superannuation. In these cases there is some rational basis for the age criteria.

15. In the present case, there is no challenge to the award of different marks for different age groups. We however do not find any rationality in giving preference to a person younger in age within the same group in case of a tie having no relation to object sought to be achieved. We find that the criteria of preference to a person younger in age within the same group for the purpose of tie breaker is arbitrary and discriminatory. The argument of learned counsel for the respondents that the person younger in age within the same group is better suited to conduct the retail outlet needs to be outrightly rejected. In a given case, age may be a relevant criteria. There is no justifiable reason placed on record in the present case for adopting this criteria for the purpose of tie breaker. Learned counsel for the IOCL assumes as a matter of fact that a person younger in age is more fit, agile and healthier than the one who is older within the same group. IOCL has already made a classification based on age for the purpose of awarding marks. Further sub-classification for the purpose of

tie breaker amounts to treating equals unequally and hence this condition falls foul of Article 14 of the Constitution.

16. It is interesting to note that clause 7.2.1(c) extracted hereinbefore says that in case of tie on parameters (a) & (b) [Finance, interview and age], the applicant who gets higher marks in Educational qualification shall get preference over other/s. Let us deal with the objection of learned counsel for the IOCL that the petitioner having participated in the tender is estopped from challenging the clause. Learned counsel for IOCL submitted that the petitioner cannot approbate and reprobate at the same time having accepted the classification based on age for the purpose of awarding the marks, but has objection when it comes to classification on the basis of age in case of tie breaker. The petitioner and the respondent no. 7 are similar situate in the sense that they fall within the same age group for the purpose of parameters fixed for awarding marks. The challenge to the said parameters is not the scope of this petition. However, the challenge to the criteria providing tie breaker is not something the applicant can think of while participating in the process. It is only when the situation arises can there be a challenge.

17. It is not the case of the petitioner that the action of the IOCL is

malafide or conditions are tailor made to suit the requirement of a particular bidder but simply that clause 7.2.1 (b) is arbitrary as violative of Article 14. To allow IOCL to proceed on the basis of clause 7.2.1 (b), despite noticing the discriminatory nature of the criteria only on the ground that the petitioner has participated in the tender process, is something we are not prepared to accept. We are therefore inclined to interfere at this stage, especially in a case where the essential conditions of tender are not under challenge post participation by the petitioner, but it is the criteria fixed for tie breaker which is under challenge.

18. The petition is accordingly allowed. We hold condition no. 7.2.1(b) of the brochure as violative of Article 14 of the Constitution of India and is accordingly struck down.

19. We make it clear that it is open for the IOCL to prescribe a suitable criteria for a tie breaker before proceeding further with the empanelment. No order as to costs.

(M.S.KARNIK, J.)

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(CHIEF JUSTICE)