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**(2020) 07 MP CK 0177**

**Madhya Pradesh High Court (Indore Bench)**

**Case No:** Writ Petition No. 8826 Of 2020

Bharti Engineering.

APPELLANT

Vs

Union Of India & Others

RESPONDENT

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**Date of Decision:** July 2, 2020

**Acts Referred:**

- Constitution Of India, 1950 - Article 13(3), 14, 19, 21, 226

**Hon'ble Judges:** S. C. Sharma, J; Vivek Rusia, J

**Bench:** Division Bench

**Advocate:** Vivek Dalal, H.Y. Mehta

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### **Judgement**

Vivek Rusia, J

1. The petitioner has filed the present petition being aggrieved by eligibility condition No.2 of NIT No.EL/2020-2021/01 dated 1.6.2020 issued by

Ratlam Division of Western Railway for Comprehensive Maintenance Contract (CMC) of Cummins make of DG Sets (500 VKVA) along with its

accessories of Power Cars including operation and manning of EOG Power Cars ( in short "CMC") for one year. which debars the petitioner to

participate in the tender process.

2. The petitioner is a partnership firm having registration No.03/27/03/00197/14 is being engaged in the business of maintenance of generator in

various divisions of Indian Railways and also doing similar nature of work for various departments. The details of the work of comprehensive

maintenance of Power Car which have been awarded to the petitioner vide various tenders in the last five years are given in Para 5.4 of the writ

petition and according to the petitioner, all the works are being carried successfully.

3. Respondent No.2 has floated tender No.EL/2020-2021/01 dated 1.6.2020 for CMC with the estimated cost of the work is Rs.3,47,88,312.85. The validity of the offer is 45 days and the tender closing date was 30.6.2020.

4. The petitioner is aggrieved by condition No.2 of the NIT which is reproduced below :

“2. The bidder should be in the approved sources of 500 KVA DA set per latest RDSO's vendor directory or their authorized dealer.

OR

The bidder should be the OEM of the approved make for engine as repair maintenance as per latest RDSO's vendor directory or their authorized dealer.”

According to the petitioner, by the aforesaid condition, the respondents have confined to the bidders who are either vendor or Original Equipment

Manufacturer (OEM) of the approved make for Engine and due to which, small and medium enterprises like the petitioner have been debarred from

participating the tender process. According to the petitioner, South Central Railways, Secunderabad Division has floated tender dated 10.6.2020 for

the similar CMC work in which no such condition has been imposed and all the tenderers who have executed similar nature of work and turnover of

150% of the tender value had participated in the process. According to the petitioner, such a tailormade condition in the NIT inviting bids from only

two or three companies in India viz. Kirloskar, Cummins, and Crompton Greaves being OEM to participate in the tender process is arbitrary and

unreasonable. This will result in zero competition. The petitioner has previously been awarded 13 tenders which are in progress, but all of a sudden,

the respondents have imposed such an unreasonable condition in an arbitrary manner which is nothing but violative of Articles 14, 19 and 21 of the

Constitution of India, hence, impugned tender be quashed with a direction to the respondents to float a fresh tender by permitting all the bidders who

have taken the work of manufacturing/rebuilding/rehabilitation/repair/maintenance of Diesel Engine or alternative or both, etc. along with OEM and its

authorised dealers

5. Contesting respondents No.2 and 3 have filed the return by submitting that Railway Board has issued a letter dated 8.1.2019 by which all the

concerned PCME's of Zonal Railways have been authorised to decide the eligibility criteria in the NIT of need-based maintenance contract of DG Set

depending upon local conditions without compromising the quality of maintenance. It is further submitted that General Manager of Western Railway

issued verbal instructions on 13.6.2019 that the work of AMC to be given to OEM of the diesel engine one to one case. The respondents emphasised

that as per the letter of the Railway Board, the tender in question dated 1.6.2020 is valid and proper because the maintenance of DG Set is a highly

technical task that requires highly technical product specifications. It is further submitted that other Railway Divisions are also following the same

conditions for awarding the contract of maintenance by OEM. In support of its contention, the respondents have filed copies of the contract executed

by North East Frontier Railway, Tinsukia Division; South East Central Railway, Durg; and East Coast Railway Carriage Repair Workshop,

Mancheshwar, Bhubaneswar. According to the respondents, the quality work and availability of the original spare parts of the equipment are easily

available with OEM. It is in the interest of Railways that the equipments are maintained properly by trained employees of OEM without compromising

the quality of maintenance. Respondents have placed the reliance on the decision of Apex Court in the case of Monarch Infrastructure (P) Ltd. V/s.

Commissioner : AIR 2000 SC 2272; and Kanyiya Lal Agrawal V/s. Union of India : AIR 2002 SC 276,6 in which the apex Court has deprecated the

interference by the High Court in the contractual matters/tender matters and held that the interference by the Courts in the case of tender must only

be in cases of arbitrariness, or contrary to the public interest. The respondents have specifically denied any arbitrariness or unreasonableness or mala

fide on their part by putting such Condition No.2 in the tender, hence prayed for dismissal of the writ petition.

6. We have heard the learned counsel for the parties and perused the material available on record.

7. Undisputedly, for the first time, the respondents have inserted Condition No.2 in the NIT issued for CMC. The petitioner is already executing

number of similar nature of work for the last five years in various Railways Divisions without fulfilling such conditions. Even, in NIT dated 10.6.2020

floated by South Central Railway, Secunderabad Division, there is no such condition that the work should be awarded only to OEM or the authorised dealer. The nature of work of the present NIT as well as nature of work in NIT issued by South Central Railway, Secunderabad is same, but no such condition is there and all the tenderers who have executed similar nature of work and have a turnover of 150% of tender value are eligible to participate in the tender process.

8. The sole contention of the respondents is that the Railway Board has approved the instructions by reiterating that the eligibility criteria of the need-based contract of DG sets should be decided by the concerned PEME's of Zonal Railways depending upon local conditions without compromising the quality of maintenance. The respondents have only enclosed a copy of the communication dated 8.1.2019 written by the Director, Elect. Engg. (G), Railway Board to all Principal Chief Mechanical Engineers, but the Board's letter dated 28.3.2018 which has reference in it has not been produced before this Court. In all fairness, the respondents ought to have produced the said letter of the Board which was enclosed by the Director, Elect. Engg. along with a letter dated 8.1.2019. It is not clear before us as to whether the Railway Board has specifically directed all the Zonal Railways to issue a contract of maintenance of DG Sets only to OEM or its authorised dealers. The respondents have not produced any material to show as to what are the local conditions in the Zonal Railways which requires maintenance of DG Sets only by the OEM or authorised dealers. The respondents have stated in the return that if the DG Sets are installed of a good company and if the maintenance is done by other vendor has not up to the mark quality or vendor having not registered technical staff or the vendor is not having genuine original parts, then the maintenance will be difficult. The respondents have not produced any material before this Court that any such problem has ever been faced by the Railways by giving the contract to non-OEM or authorised dealers like petitioner. Only based on apprehension, the respondents have put such a tailor-made condition in the NIT to debar the small/medium enterprises from participation in the NIT. In our considered view, such an action on the part of the respondents is unreasonable and

amounts to debarring the lower category of contractors especially micro, small and medium enterprises would enable the big fish to eat small fish,

therefore, the same is unsustainable and suffers from arbitrariness.

9. We are conscious about the limitation of judicial interference by the High Court in tender/government contracts matter. In the case of Tata

Cellular V/s. Union of India : (1994) 6 SCC 651, Hon'ble the Apex Court emphasized the need to find the right balance between administrative

discretion to decide matters on the one hand and the need to remedy any unfairness on the other and observed:

“(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.

(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 or quasi- administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should 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.”

10. In the case of Raunag International Ltd. V/s. IVR Construction Ltd & others : (1999) 1 SCC 49, again the Apex Court reiterated the

principle governing the process of judicial review and held that the Writ Court would not be justified in interfering with commercial transactions 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.

11. In the case of Reliance Airport Developers (P) Ltd. V/s. Airports Authority of India & others : (2006) 10 SCC , the Apex Court held that

while judicial review cannot be denied in contractual matters or matters in which the Government exercises its contractual powers, such review is intended to prevent arbitrariness and must be exercised in the larger public interest.

12. In the case of *Sterling Computers Ltd. V/s. M & N Publication Ltd.* : (1993) 1 SCC 445 the Supreme Court of India held that power of

judicial review in respect of contracts entered into on behalf of the State primarily involves the examination of the question whether there was any

infirmity in the decision-making process if such process was reasonable, rational and non-arbitrary, the Court would not interfere with the decision.

13. In the decision of the Supreme Court of India in *Master Marine Services (P) Ltd. V/s. Metcalfe & Hodgkinson (P) Ltd. & others.* : (2005) 6

SCC 138 following tests for judicial interference in exercise of power of judicial review of administrative action have been laid down:

The High Court before interfering in tender or contractual matters in the exercise of power of judicial review should keep the following questions in mind :

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

(ii) 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.'

(iii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.â€

14. In the case of *Erusian Equipment & Chemicals Ltd. v. State of W.B.*, (1975) 1 SCC 70 Hon'ble the Apex Court has held as under:-

14. The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling.

15. In the case of *Food Corporation of India v. Kamdhenu Cattle Feed Industries*, (1993) 1 SCC 71, Hon'ble the Apex Court has held as under:-

7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness

is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to

act fairly and to adopt a procedure which is "fairplay in action". Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due

weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount

to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the

ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by

judicial review.

16. In the case of Union of India v. Tulsiram Patel, (1985) 3 SCC 398 : 1985 SCC (L&S) 672 Hon'ble the Apex Court has held as under:-

90. Article 14 contains a guarantee of equality before the law to all persons and a protection to them against discrimination by any law. Sub-clause (a) of clause (3) of

Article 13 defines law as follows:

"law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law.

What Article 14 forbids is discrimination by law, that is, treating persons similarly circumstanced differently or treating those not similarly circumstanced in the same

way or, as has been pithily put, treating equals as unequals and unequals as equals. Article 14 prohibits hostile classification by law and is directed against

discriminatory class legislation. The propositions deducible from decisions of this Court on this point have been set out in the form of thirteen propositions in the

judgment of Chandrachud, C.J., in *In re Special Courts Bill, 1978*. The first of these propositions which describes the nature of the two parts of Article 14 has been extracted earlier. We are not concerned in these appeals and writ petitions with the other propositions set out in that judgment. In early days, this Court was concerned with discriminatory and hostile class legislation and it was to this aspect of Article 14 that its attention was directed. As fresh thinking began to take place on the scope and ambit of Article 14, new dimensions to this guarantee of equality before the law and of the equal protection of the laws emerged and were recognized by this Court. It was realized that to treat one person differently from another when there was no rational basis for doing so would be arbitrary and thus discriminatory. Arbitrariness can take many forms and shapes but whatever form or shape it takes, it is nonetheless discrimination. It also became apparent that to treat a person or a class of persons unfairly would be an arbitrary act amounting to discrimination forbidden by Article 14. Similarly, this Court, recognized that to treat a person in violation of the principles of natural justice would amount to arbitrary and discriminatory treatment and would violate the guarantee given by Article

114.

17. In view of the foregoing discussion and keeping in the aforesaid verdict of the Apex Court, we find that condition no 2 being discriminatory and the result of an arbitrary action of the respondent no.2 and 3 is not liable to be sustained, hence this petition deserves to be and is hereby allowed, and impugned Condition No.2 in NIT dated 1.6.2020 is hereby quashed the petitioner is also permitted to participate in the tender process.

No order as to costs.

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