

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

OWP No.1181/2012, CMA No. 1638/2012.

Date of decision: 06 .08.2014

M/S Chaman Lal and anr. V Indian Oil Corporation Ltd. and ors.

Coram:

HON'BLE MR. JUSTICE BANSI LAL BHAT-JUDGE

Appearing counsel:

For petitioner(s): Mr. Pranav Kohli, Advocate

For respondent(s): Mr. R.Koul, Advocate

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| (i) Whether to be reported in
Press, Journal/Media: | Yes/No |
| (ii) Whether to be reported in
Journal/Digest: | Yes/No |
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In this petition, filed under Article 226 of Constitution of India read with Section 103 of the Constitution of Jammu and Kashmir, petitioners seek the following reliefs.

- (i) Writ of Certiorari seeking quashment of the allotments of contracts as Road Transport of Bulk Petroleum Products in violation of Reservation Clause of the NIT bearing No. PSO/OPS/POL PT/MS-

HSD/Bulk/2012-01 dated 10th April,
20112

- (ii) Mandamus commanding upon the respondents to adhere to the reservation clause and allocate 15% in the allotment to the reserved categories in both 12KL and 18/20KL Tank Trucks.
- (iii) Mandamus commanding upon the respondents to include and carry forward the quota of the reserved categories of the previous year of 2008 in the year of 2012 in the contract for the Road Transportation of Bulk Petroleum product notified vide NIT bearing No. PSO/OPS/POL/PT/MS-HSD/Bulk/2012-01 dated 10th April, 2012.
- (iv) Prohibition restraining the respondents from proceeding with Additional Requirement notified on 19.07.2012 for

both 12KL capacity Tank Trucks and 18/20KL capacity tank trucks without adhering to the reservation Clause.

Petitioners are the proprietorship concerns and Shri Chaman Lal and Shri Rajesh Kumar are the sole proprietors. The proprietors deal in transportation and claim to have undertaken various carriage contracts with Indian Oil Corporation Limited and other Government Authorities/Bodies. Both the petitioners belong to the reserved category. Petitioner No.1 operates fleet of trucks of the carrying capacity of 12KL as also 18/20KL.

Respondent No.2 issued the Notification inviting tenders (for Brevity 'NIT') dated 10th April, 2012 inviting tenders under two bid system from Tank Truck Owners for award of contracts for road transportation of Bulk Petroleum products w.e.f. 01.06.2012 to various stations as per the requirement notified for each location. Petitioners participated in the process for various

stations by submitting its tender for the Tank Trucks (for Brevity 'TTs') under reserved category. Bids were submitted on 10.04.2012 and opened alongwith the bids submitted by the other bidders on the same day. Petitioners duly qualified in their tenders. Work orders under the 12KL TTs under reserved category came to be allotted in their favour. However, in the 20 KL TTs, 18 number 20KL TTs were allotted, though the requirement was notified only in regard to 10. The NIT contains a provision for reservation in favour of the reserved categories in terms whereof respondents were under an obligation to allocate 15% of the quota in the allotment of Tank Trucks in favour of the reserved categories. Moreover, unfilled quota of the previous year for the unreserved category had to be carried forward to the next tender also and offered to SC/ST candidates. Subsequently, respondents notified on 19th July, 2012 the requirement of additional Tank Trucks for the allocation of

transportation of the contract under 12 KL capacity TTs as also 18/20 KL capacity, TTs. However, respondents did not carry forward the unfilled quota of reserved category from the previous tender year 2008, thereby violating clause IV of the General terms and conditions. Petitioners who belong to reserved category are aggrieved of the same and assail the same through the medium of instant writ petition.

Respondents 1 to 3 have filed objections contesting the petition on the ground that petitioners have no vested or even any accrued right to the award of contract. It is pleaded that the respondents have followed a fair, methodical and transparent system of awarding the contract. The tender process is guided by the policies and principles/guidelines of the Indian Oil Corporation. All terms and conditions including the eligibility criteria and all techno commercial conditions of the tender and evaluation/selection criteria were incorporated in the tender

document. Tenders were evaluated strictly as per the terms and condition and policy guidelines of the Corporation. The tenders for road transportation of Bulk Petroleum Produce were opened on 10.04.2012. The POL transport tender was issued under two bid system, i.e technical bid and price bid. As per Clause B-1 of the evaluation criteria first the technical bid is opened on the scheduled date and is evaluated. Price bid of only technically qualified tenderers' based on technical evaluation is opened on a notified date. The requirement of 18/20 KL TTs was only 10. In the first sub ranking Tank trucks offered by RO Dealer, 22 nos of 20 KL capacity TTs were inducted and the selection was completed. Thus, tenders having 18/20 KL TTs could not be considered. It is pleaded that 22 number of 20 KL capacity TTs were selected in accordance with the terms and conditions of the tender. Insofar as the tender for the year 2008 is concerned, it is pleaded that no distinction was

made between 12 KL capacity and 20 KL capacity TTs. All the TTs that were offered by tenderers were selected. Thus, TTs of a particular capacity could not be segregated for working out any percentage out of total number of TTs. The additional Tank truck requirement in terms of Notice dated 19.07.2012 was in regard to 12 KL capacity of TTs and 20 KL capacity TTs could be considered by the corporation only in the event of non-availability of 12 KL capacity TTs. In such event, 20 KL capacity TTs were first to be offered to reserved category tenderers.

In the supplementary affidavit, petitioner- Rajesh Kumar has stated that the terms and conditions in the tender document renders imperative upon the respondents to award 15% of the Tank Trucks out of the total notified number of Tank Trucks on overall basis. It is pleaded that only the qualified bidder belonging to reserved category was entitled to award of contracts under the reserved category. It is

further pleaded that the respondents failed to allot contract for 18/20 KL capacity TTs by ignoring the mandatory reservation Clause in the NIT. The respondents did not carry forward the unfilled quota to the next tender for being offered to candidates of reserved category. It is stated that for the year 2008, the minimum quota for the reserved category remained unfilled and had to be carried forward for the year 2012-2014 contract. It is further pleaded that the contract could be awarded to RO Dealer/Direct Customer in accordance with the preference Clause of NIT only for their own load requirement and a preferred RO Dealer is entitled to only transport petroleum products from the depot to the respective petrol pump.

In the instant case the allotment of contract to the RO Dealers is not for the transportation of their own supplies. The retail dealers are being permitted to transport the product from Jammu depot to Zewan Depot at Srinagar. It is further

stated that the retail outlet dealers are entitled to preference only after the quota for reserved category stands satisfied.

Respondents have filled reply to the supplementary affidavit, wherein they have reiterated the pleas raised in their objections. It is stated that as per the tender documents the requirement of 18/20 KL TTs was only 10 and in the first sub-ranking Tank Trucks of 20KL capacity offered by the dealers including SC/ST dealers were selected and the selection was completed. Thus tenderers remaining in the list below having 18/20 KL TTs could not be considered. Petitioners fall under General Category and are not entitled to preferential treatment available in favour of RO Dealers/Direct Customers of the respondent-corporation. Once the Tank trucks of 20KL capacity offered by RO Dealers were inducted and the selection was completed, petitioners figuring in the list below that capacity could not

be considered. It is further stated that Jammu Depot is the mother Depot for all retail outlet dealers/direct customers of Kashmir valley and Srinagar Depot is only a buffer stock depot for exigencies, like sudden closure of Jammu-Srinagar Highway. The TTs meant for own use of the retail outlet dealers/direct customers are dispatched to them only Ex-Srinagar and not for any general supplies.

8. Learned counsel for the petitioners submits that petitioners seek enforcement/compliance of the reservation clause of NIT. It is pointed out that petitioners have not assailed the NIT, but only seek adherence to its terms and conditions in giving effect to the reservation clause. It is submitted that quota reservation for reserved categories could not be allotted to RO Dealers/Direct Customers and any unfilled quota had to be carried forward to the next contract. It is further submitted that Clause 12 in the NIT supersedes all other Clauses which are

subservient to the provisions engrafted in this Clause. Per contra, learned counsel for the respondents submits that the allotment process has been completed and the allottees have not been arrayed as parties to the petition. Thus, the petition is not maintainable. It is pointed out that there is no category-wise reservation and first preference is given to Retail Outlet Dealers. Once the requirement of supplies of Tank Trucks is fulfilled by RO Dealers, reservation Clause cannot be enforced. It is further pointed out that the petitioners have participated in other categories and have been awarded contracts.

Heard and considered.

Inviting of tenders on the part of respondent-IOC for transportation of Bulk Petroleum Products is purely a contractual affair and the scope of judicial review in contractual matters is very limited. The Hon'ble Apex Court has laid down parameters of judicial review in contractual matters involving government or a

Public Authority in a catena of judgments. It was held in "**Tata Cellular vs. Union of India**" reported in AIR 1996 Supreme Court 11:-

- (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.”***

In “***Raunaq International Limited Vs. IVR Construction Limited***” reported in (1999) 1

SCC 492, the Hon’ble Apex Court reiterated the above principles and held that the writ Court would not be justified in interfering with the commercial transaction involving State as a party except where substantial public interest is involved or where the transaction is mala fide.

In “***Air India Limited vs. Kochhi International Airport***” the Hon’ble Apex Court held that 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 Hon'ble 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.

Reiterating the same principles, the Hon'ble Apex Court held in Meerut Development

Authority vs. Association of Management Studies reported in AIR 2009 SC 2894 that the tender is an offer to the intending tenderers to notify their acceptance. The terms of invitation of tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

It would thus appear that the invitation to tender being in the realm of contract, the power of judicial review is exercised to scrutinize the terms of invitation of tender only in cases of mala fides or arbitrariness in the process of evaluation of bids and determination of eligibility of the bidders. It is also manifestly clear that the Court will not strike down the terms of the tenders merely because it is pointed out that earlier terms of the contract were fairer to the petitioners.

Bearing in mind the scope of interference in contractual matters, it being manifestly clear that the invitation to tender is in the realm of contract and it is not open to interfere with the

commercial transaction concerning the State except where public interest is involved or that the transaction is mala fide, it would be appropriate to examine the conditions in the tender document called in question through the medium of instant petition to determine whether the process adopted by respondents is mala fide or arbitrary.

Insofar as allotment of work orders under 12 KL TTs is concerned, petitioners claim to have been allotted work orders for the same in the reserved category. Thus they have no grouse on that score. They are, however, aggrieved of allotment made in regard to 20 KL TTs on the ground that Clause (v) of the NIT as also Clause (iv) of General Terms and Conditions makes provisions of reservation of 15% provided they fulfil all tender conditions. According to petitioners, respondents are under an obligation to allot 15% of the quota in the allotment of TTs for reserved category and carry forward the

unfilled quota of previous year for reserved category to the next tender. Petitioners' case is that the quota of reserved category for the year 2008 remained unfilled and had to be carried forward to tender year of 2012, but respondents procured 24 numbers of 20 KL TTs and not even a single work order was allotted to the category persons. Thus the petitioners lay claim to the allotment of work orders for requirement of additional TTs to the members¹⁴ of reserved category to fulfil overall reservation of 15%. Respondents, on the other hand pointed out that under Clause 10(a) and (b) of the General terms and conditions of the tender, IOC reserves the right to give preference to award transport contract to their RO Dealers/ Direct Customers for transporting their own load requirement subject to their acceptance of L-1 rates offered by the Company at the first instance. It also reserves the right to induct additional TTs from RO Dealers/Direct Customers for their own

supplies. In the first sub-ranking of TTs offered by RO Dealers, 22 numbers of 20 KL capacity TTs were inducted and the selection was completed. Thus the tenders remaining in the list which were for capacity below 20 KL TTs could not be considered.

Since the petroleum products are essential commodity and breakdown of its supply chain has the potential to create law and order situation, an effective mechanism has to be provided for transportation of Petroleum Products to every nook and corner of the State. This is in tune with the commitment of IOC-the National Oil Company. IOC has reserved the right to give preference to award transport contract to its RO Dealers/Direct Customers. The RO Dealers/Direct Customers are having long term contracts with the IOC for distribution and sale of Petroleum Products and to make the Petroleum Products available to

consumers. IOC is having control over RO Dealers/Direct Customers. If RO Dealers/Direct Customers are not complying with the terms of contract, IOC can deal with them as they are already having a long term contract with the IOC as Petroleum Products distributors. On the other hand, general tenderers are not under the control of IOC and the IOC is not in a commanding position to enforce the terms of the contract. The classification between the RO Dealers/Direct Customers and general tenderers for purposes of supplying trucks for transportation of Petroleum products is thus based on an intelligible differentia, the object sought to be achieved being the uninterrupted supply of Petroleum Products for the benefit of consumers. Reservation Clause cannot be given effect to score march over the preference available in favour of RO Dealers/Direct Customers. The reservation

Clause will have effect only when the requirement of supply of TTs is not met by the RO Dealers/Direct Customers. Allegations of discrimination and arbitrariness on this score, in the instance case, being unfounded, are rejected.

In view of the above, this petition is found to be without any merit and same is, accordingly, dismissed.

*(Bansi Lal Bhat)
Judge*

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