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Smart Chip Ltd. and anr. Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Oct-03-2002

Reported in : AIR2003All80

Judge : M. Katju and ;Rakesh Tiwari, JJ.

Acts : [Motor Vehicles Act, 1988](#) - Sections 41, 41(3), 41(5), 64 and 65; Central Motor Vehicles Rules, 1989 - Rules 2 and 81; Central Government Motor Vehicles (Amendment) Rules, 2002; [Constitution of India](#) - Articles 14, 19(1) and 226

Appeal No. : C.M.W.P. Nos. 21933 and 23584 of 2002

Appellant : Smart Chip Ltd. and anr.

Respondent : State of U.P. and ors.

Advocate for Def. : Vijay Sinha, ;N.K. Verma and ;V.B. Singh, Advs. and ;Standing Counsel

Advocate for Pet/Ap. : D.K. Singh, ;R. Srinivasan, ;Dwivedi S.C., ;Raju Ramchandran and ;S.C. Budhwar, Advs.

Judgement :

M. Katju, J.

1. This writ petition and the connected writ petition No. 21933 of 2002 are being disposed off by a common judgment.
2. This writ petition illustrates how the new technology which has changed the word in recent years has entered our law Courts.
3. The petitioner has prayed for a writ of certiorari to quash the tender dated 1-5-2002 issued by the respondents, copy of which is Annexure-6 to the writ petition, and for a mandamus to the respondents directing them to consider all the bids of the tenders who qualify the condition as mentioned in the tender Clause 2.21 and thereafter evaluate the technical bids of those who qualify in the technical specifications as provided in the guidelines dated 17-10-2001 issued by the Ministry of Road Transport and Highways, Government of India (hereinafter referred to as 'Morth') and to abide by the terms and conditions, directions and guidelines issued by the MORTH.
4. Heard Sri Raju Ramchandran. and Sri S.C. Budhwar learned Senior Advocates for the petitioner, and Sri V.B. Singh, learned Senior Advocate for the impleaded respondent Zodiac.com Solutions Pvt. Ltd. and learned Standing Counsel for the State Government.
5. The petitioner is a limited liability company registered in Bombay having its administrative office at Delhi, The petitioner No. 1 carries on the business of Smart Card integration projects for transport and allied sectors. It is alleged in paragraph 1 of the writ petition that the petitioner No. 1 is one of the prominent and successful companies in providing the requisite technological and other inputs in ensuring the provision of Smart Card system for transport sector, and is capable to promote vehicle management and its implementation for being utilized for the safe and sound running of the transport administration through out the country. In paragraph 2 of the writ petition it is alleged that the petitioner No. 1 has successfully carried out the project of having driving licences on Smart Card in the State of Gujarat, Driving licences, registration certificate for transport vehicles and permits in the State of Madhya Pradesh, and social security Smart Card-cum-driving licence in Goa.

6. In paragraph 3 of the writ petition it is alleged that in June 2000 the Ministry of Surface Transport (as it was then known) in collaboration with the National Information Centre and Smart Card Applications Forum of India (SCAFI) organized an all India conference. The theme of the conference was induction of information technology in the Road Transport Sector. The conference recommended that in order to speed up induction of information technology it is necessary to standardize various, functions and technologies. This is vital because the Motor Vehicles Act under which these tasks are performed is a central Act which needs to be followed uniformly throughout the country. The Government of India. Ministry of Surface Transport constituted an Apex group to consider the various issues relating to induction of information technology in the road transport sector. The Apex group was to consider the recommendations of various technical aspects for the above purpose and to make recommendations for the same. The Apex group submitted its report dated 11-1-2001 to the Government of India. The Apex group studied the options of the three technologies available for use in transport sector for the whole country viz. (i) Microprocessor based (chip) Technological, (ii) Integrated Circuit memory and (iii) optical memory.

7. After evaluation of the three technologies the Committee recommended as under :

'Microprocessor technology provides a technology which is much more secure and can have in built function which can help provide effective security to the stored data. The memory based cards, where the security functions are not embedded in the card and are handled through an external device, thus splitting the security elements in the chain, makes it more vulnerable as compared to microprocessor based Smart Card. It is due to this reason that the application requiring the secure transaction like course use this technology.'

8. The Committee also noted that the Microprocessor based card could store in the range of 8 KB at this point of time although 32 KB seems to be in the pipeline. It was also noted that the requirement of the information for vehicle registration is only 1 KB. The Apex group recommended that the use of microprocessor chip in the plastic card would become essential for the registration card for transport

vehicles. The Apex group also provided technical specifications and standardized formats to be adopted by all the States.

9. On 31-1-2001 a letter was sent enclosing therewith the recommendations of the Apex group by the Secretary of MORTH. Government of India to the Chief Secretaries of all States to the effect that the use of Smart Cards was necessary to develop a data system which would be tamper proof and to prevent leakage of revenue. It was also suggested that the driving licences, registration certification and permits for commercial motor vehicles should be on Smart Card having microprocessor chip. In the aforesaid letter it was also stated that the use of Smart Cards would become meaningful only if they are readable throughout the country, It was therefore necessary that a uniform format and standardized software be adopted by the Transport Departments of all States, so that the information to be held on the Smart Card would be capable of being interpreted throughout the country, and in order to achieve this objective formats have been standardized and common specifications to be adopted by all the States have been arrived at. It was also pointed out that the Apex Committee which arrived at the standardized formats and the specifications had recommended that the Smart Card should have a microprocessor chip of 4 KB capacity. The use of Smart Cards imply that the data have to be stored at a central location and the same information in respect of a particular vehicle, holder of the driving licence, or permit is stored in the card which is readable throughout the country. It was also stated that the States were free to choose the business model, but the technical specifications provided along with the letter based on the recommendations of the Apex group must be followed. Keeping in mind the inter-operability and non-proprietary use of technology it was proposed that the operating system to be for Smart Cards should be from the open domain and non-proprietary ones offered by the vendors. This was to ensure that the future developments could be done by different Independent agencies for induction of information technology. True copy of the letter dated 31-1-2002 along with the recommendation is Annexure P-1 to the writ petition. The thrust of the guidelines was therefore to achieve the objective of

(1) Uniformity throughout the country (2) Readability of the card throughout the country

(3) Inter-operability and

(4) Non-proprietary use of the technology to ensure the future indigenous development by different independent agencies.

10. In paragraph 10 of the writ petition it is alleged that after issuance of the guidelines dated 31-1-2001 various States such as Kerala, West Bengal, Madhya Pradesh, Rajasthan, Delhi, Maharashtra, U. P. etc. came out with advertisements inviting bids for computerization and introduction of information technology in the transport sector. Because of lack of precise understanding of the technological aspects by the State Transport Departments some tenders were in contradiction with the thrust of the above guidelines, and the same would have hampered the objective of uniformity and interoperability throughout the country. To remove the technical misunderstanding among the Transport Department of the States, the MORTH on 17-10-2001 issued version-2 guidelines defining technical specifications in detail for all tenders to be invited. These guidelines provide clear guidance to the State Governments to implement the information technology in the State to achieve the objective of uniformity and inter operability throughout the country. This new operating system has been named as SCOSTA [Smart Card Operating System for Transport Application).

11. In paragraph 11 of the writ petition it is alleged that these guidelines make it abundantly clear that while states are free to choose business models, the technical specification given in the guidelines have to be strictly adhered to. The revised guidelines further provide that if the offer meets the specification given, the offer should not be discarded. It is alleged that if a tenderer has bid for a card having 4 KB capacity chip, his offer cannot be discarded by the State Government. True copy of the revised guideline version 2 is Annexure P-2 to the writ petition.

12. In paragraph 12 to 15 of the writ petition mention has been made of the action taken by the other State Governments e.g. Gujarat, West Bengal. Kerala and Rajasthan. Litigation is pending in some of these States. A writ petition was also filed in Delhi High Court being Civil Misc. Petition No. 1391 of 2001 Smart Chip Ltd. v. Government of NCT, Delhi which was dismissed in September 2002.

13. In paragraph 16 of the writ petition it is alleged that on 3-5-2002 the Government of U.P. issued an advertisement inviting bids for preparation of vehicular Smart Card for motor vehicles at all transport offices in U.P. This Card had to include various details which are referred to in the said paragraph. The contract is offered for fifteen years to be reviewed after every five years. All bids were to be accompanied by an earnest money deposit of Rs. Ten lacs in the form of crossed demand draft. The eligibility criteria to bid was that the bidder should have strong financial backing with minimum annual turnover of Rs. 10 crores. In paragraph 17 of the writ petition it is alleged that the tender and its implementation are stated to be in accordance with the guidelines issued by MORTH, and hence if an offer meets the specifications given in the guidelines of 17-10-2001, the same should not have been rejected outright.

14. In paragraphs 18 and 19 of the writ petition it is alleged that the tender for Smart Card is in violation of the MORTH guidelines as it envisages a Smart Card having both Microprocessor Chip as well as an Optical Strip in the same card. True copy of the tender dated 3-5-2002 is Annexure P-6 to the writ petition.

15. In paragraph 20 of the writ petition it is alleged that the Secretary, Government of India, MORTH wrote a letter dated 8-5-2002 to the Chief Secretary, U.P. Government stating that common standardized software specification have been formulated and circulated to all the States in the country, but the tender floated by the Transport Department of U.P. does not conform to the standardized software circulated by the MORTH. This would lead to non-operable environment for such Smart Card based document and also have a potential to create the problem of vendor dependence in future. Hence a direction was given to recall the tender immediately. True copy of the letter dated 8-5-2002 is Annexure P-7 to the writ petition.

16. In paragraph 21 to 24 of the writ petition it is stated that the petitioner wrote a letter dated 14-5-2002 (vide Annexure P-8 to the writ petition) to the Transport Commissioner, U.P. pointing out various anomalies in the Tender document, and seeking certain clarifications and additional information to enable it to submit a detailed bid. The petitioner did not receive any clarification from the Transport

Commissioner. However, the petitioner submitted its bid claiming to be the most experienced company in India for implementing similar projects in various states. The petitioner also annexed a letter with their bid pointing out therein that the Smart Optical Card is a non-standard card which is not governed by any single ISO standard. Further it was alleged that the standard is not, in accordance with the guidelines issued by the MORTH. It was further pointed out that under the guidelines an offer should not be discarded if it meets the specifications provided therein, and the Smart Card should be SCOSTA complainant. It was also pointed out that the Transport Departments of Kerala and West Bengal which also invited similar bids for Smart Optical Cards, after issuance of the version 2 Guidelines have cancelled their tenders. It was further alleged that the tender defeated the objective of inter-operability throughout the country and non-proprietary and open domain use of the technology to ensure future indigenous development by independent agencies. True copy of the letter dated 21-5-2002 is Annexure P-9 to the writ petition.

17. In paragraph 25 of the writ petition it is alleged that the tender makes it mandatory that the Smart Card should have an optical strip media, which is not compliant to SCOSTA.

18. In paragraph 26 of the writ petition it is alleged that the tenders have been opened in 21-5-2001 but the petitioner's tender has not been opened. It is alleged that this is arbitrary and in violation of Article 14 of the Constitution.

19. In paragraph 27 of the writ petition it is alleged that the technology for optical card is proprietary of one Drexier Technology Corporation of USA which is the sole patent rights holder worldwide. A profile of the Drexier Technology Corporation of USA is Annexure P-10 to the writ petition. The Laser Card System Corporation is a 100 subsidiary of Drexier Technology Corporation, and is the selling arm worldwide of the said technology. In paragraph 28 of the writ petition it is alleged that the optical card as well as the software required for reading an optical data card is patented by Drexier Technology Corporation. True copy of the printout with respect to some of the patents of Drexier Technology Corporation is Annexure P-11 to the writ petition. It is alleged that since every aspect of the card is patented

by USA. no future indigenous development by independent agencies can be carried out as envisaged under the guidelines. It is also contended that there is no non-proprietary use of the technology and the operating system of the optical card is not from open domain and hence the tender is in violation of the MORTH guidelines.

20. In paragraph 29 of the writ petition it is alleged that Laser Card Corporation, a 100 subsidiary company of Drexier Technology Corporation, patent holder of Smart Optical Card Technology in USA. distributes its products to the end-users through Sole Value Added Resellers System in the territory defined/allotted to Value Added Reseller. It is alleged that the system of distribution of products fully patented as per the US Patent Law and WTO Agreement is bound to create 100 vendor dependence of the States and therefore create a monopoly in favour of such sole selling agents. This will be against the public interest and the thrust of the guidelines of the MORTH.

21. In paragraph 31 of the petition it is alleged that 4-KB capacity Microprocessor Card is more than sufficient for the Transport Sector. No additional information can be put except what is provided under the Motor Vehicles Rules. Hence it is alleged that the requirement of having an optical strip is otiose and it would serve no other purpose than to make the public bear higher cost, as the optical cards are more expensive than the Smart Card having only MicroprocessorChip. It is alleged that the Optical Strip in the card is to gust and reduce the competition in a mala fide manner and to create a monopoly in favour of such sole selling agents in violation of MORTH guidelines and the Motor Vehicles Act and Rules made thereunder. In paragraph 33 of the writ petition it is alleged that the lowest bidder is a private limited company having only two subscribers, as is evident from the Memorandum and Articles of Association having ten shares each for a face value of Rs. 10/-only. The authorised capital of the company is shown as Rs. One Lac divided into 1000 equity shares of Rs. 10/- each. The company was incorporated only on 29-3-2000. It is alleged that the petitioner made an inspection in the ROC, Delhi on 28-5-2002 and did not find any annual returns having been filed and registered. Since the company is only two years old which has not filed annual returns it has no financial backing having annual turnover of Rs. ten crores. The contract of such a

magnitude in favour of a two-year-old private limited company having no experience in implementing similar projects anywhere in the country would lead to a fiasco and the same would be against the public interest.

22. In paragraph 34 of the writ petition it is stated that the bids were to be examined in three stages: (1) first the cover containing EMD (earnest money deposit) would be opened, (ii) if the EMD (earnest money deposit) is found in proper form then the cover containing technical bid would be opened and (iii) if the above two conditions are satisfied the commercial bid of those bidders would be opened. The petitioner submitted that non-opening of the cover containing EMD is as good as stopping the most qualified persons from participating in the tender process, and is mala fide and illegal.

23. A counter-affidavit has been filed on behalf of the respondent No. 2. In paragraph 2 of the same it is stated that the Government of U.P., Transport Department invited bids for the preparation of Vehicular Smart Card based on the guidelines of MORTH. Bids were invited on 1-5-2002 through website and through newspapers dated 3-5-2002. The last date for accepting the bid was 21-5-2002.

24. In paragraph 9 of the counter-affidavit it is stated that before inviting the bids the department had made a study of the preparation of the Vehicular Smart Card for, vehicle registration certification which was then being prepared in the State of Gujarat. For this purpose a two member team was sent on 26/27-12-2001 to the State of Gujarat. The team submitted its report regarding the functioning and supported the utility of the optical strip in the card. For finalizing the tender conditions and specifications the Government constituted a high level committee under the Chairmanship of the Transport Commissioner, U.P. The committee along with other tender requirements also considered the inclusion of optical strip in the card. The Tender committee found that the inclusion of optical strip does not effect the requirement in the MORTH for the following reasons.

(1) The vehicular Smart Card will have sufficient space to accommodate the Visual Inspection Zone requirement.

(2) The machine readable zone requirement will be taken care of by inclusion of 4 MB Microprocessor Chip, which is also the minimum technical specification defined in the MORTH guidelines.

(3) All the functions will be as per the guidelines of the MORTH.

(4) So far as the technical specifications are concerned they were defined for the microprocessor chip, handheld terminals and other requirements mentioned, in MORTH guidelines.

25. In paragraph 12 of the counter affidavit it is stated that the decision to have Optical Strip on the Vehicular Smart Card was based on the facts that the Department needed some more information to be kept on the Vehicular Smart Card i.e. status of surrender, history of the vehicle and its owners, etc. Moreover, as per point No. 6 of the MORTH guidelines dated 17-10-2001 the transport Department was free to have more information. The Memory Strip was to supplement the microprocessor Chip. The Vehicular Smart Card was to be issued for a minimum period of ten years and the additional requirement of the memory was for the reason that further information to be kept may build up only in the next year, and ten years period is too large a period. In Gujarat Optical memory based Smart Card was already in use, and the under Secretary MORTH, Government of India has filed an affidavit on 11-5-2001 in Delhi High Court confirming that inclusion of Optical Strip was as per the recommendations of the Apex Committee. True copy of the said affidavit is Annexure C.A. 2 to the counter-affidavit. Moreover, the Secretary, MORTH in his letter dated 31-1-2001 stated 'if however, any State wants to have a larger capacity card or desires to use other technologies, they could do so, but that would be in addition to the 4 Kilo Byte Microprocessor Chip on the Card.' True copy of the letter dated 31-1-2001 is Annexure C.A. 3 to the counter -affidavit.

26. In paragraph 13 of the counter-affidavit it is stated that the tender conditions and specifications of the Vehicular Smart Card were finalized after proper deliberation among the Tender Committee members. True copy of the tender document is Annexure P-6 to the writ petition. Seven bid offers were received and the bid of the petitioner was one of them. According to the tender document

Section II Clause 2.1, the bidders were asked to put only three sealed envelopes in one big sealed envelop. The first sealed envelop was for earnest money deposit, the second was for technical bid and the third was for commercial bid. This was as per Clause 2.1.1, of the Tender Document. It was stated in that clause that the covers should be deposited in the defined manner otherwise the bid will be rejected. Seven bids were received on 21-5-2002 and were opened on the same day in the presence of all the tenderers. Three bid offers were found to be in order for getting the technical bids opened and evaluated. Technical bids of all the three bidders were examined and all the three were found technically acceptable. The financial bids of all these three bidders were opened on 22-5-2002 in presence of these three bidders and the lowest bidder was recommended to the Government for acceptance. True copy of the recommendation of the Tender Committee dated 22-5-2002 is Annexure CA-4 to the counter-affidavit.

27. In paragraph 16 of the counter-affidavit it is stated that on 24-5-2002 the Government gave its acceptance in favour of the lowest bidder and the bidder was accordingly informed. True copy of the letter of acceptance and the communication made to the lowest bidder are Annexure CA 5 and CA 6 to the counter-affidavit. It can be seen from Annexure C.A. 4 that the lowest bidder is Zodiac com, the newly impleaded respondent. However, subsequently, the finalization of the tender was withheld by the interim order dated 21-5-2002 of this Court in connected writ petition No. 21933 of 2002.

28. In paragraph 19 of the counter-affidavit it is stated that the assertion of the petitioner that the additional requirement of Optical strip through tender notice is in violation of the MORTH guidelines is not correct. It was left open to the States to have larger capacity Smart Cards with other technology in addition to the above 4 KB Microprocessor Chip. Clause 6 of chapter 4 of the MORTH guidelines dated 17-10-2001 makes this clear. In paragraph 20 of the counter affidavit it is stated that the State of Gujarat, Maharashtra and Delhi have also introduced Smart Card with optical memory strip.

29. In paragraph 21 of the writ petition it is stated that the Drexier Corporation has patented the optical technology. However, this technology once patented can be

made available from alternative sources. Hence it is denied that the technology is proprietary.

30. In paragraph 23 of the counter-affidavit it is stated that the memory strip was also recommended to support the microprocessor based storing system.

31. In paragraph 27 of the counter affidavit it is stated that the bid of the petitioner was not valid as it was found that apart from three envelopes there was an additional six page document enclosed, which was against the tender conditions. Moreover the petitioner has reserved his right to submit a revised commercial offer, and thus his bid was conditional. In paragraph 44 of the counter affidavit it is stated that the petitioner has taken exception to short listing a two-year-old firm with no experience of similar type of project. In reply it is stated that the Department has made provision also for a new firm as per Clause 2-12-1 page 9 of the tender document. So far as experience of similar type of project is concerned, the Department has required this experience only when the rates offered by two firms happens to be same, and this is mentioned in the tender document. In paragraph 47 of the counter-affidavit it is stated that ISO standard has been defined for chip as well as optical strip in the guidelines of MORTH dated 31-1-2001.

32. A counter-affidavit has also been filed by the newly impleaded respondent No. 3 M/s. Zodiac.Com Solutions Pvt. Ltd. In paragraph 5 of the same it is stated that the petitioner's performance in M.P. was very bad and hence a show cause notice was issued to it vide Annexure CA-1. In paragraph 7 it is stated that the National Informatics Centre is a department of the Ministry of Information Technology, Government of India, the main body, with whose consultation and collaboration the guidelines dated 31-1-2001 and 17-10-2001 were formulated. The officials of NIC have also actively participated and interacted with the State Government when the tender conditions were formulated and finalized. In paragraph 8 it is stated that the recommendation of the Apex Committee of 11-1-2001 were circulated by MORTH through letter dated 31-1-2001 in which a clear mention has been made that the standardized format for Smart Card which should have microprocessor chip up to 4 KB has been arrived at, and if any State wants to have larger capacity Card it

may go ahead and can use other technologies in addition to 4 KB microprocessor chip. Thus it is alleged that the minimum requirement of the Smart Card is 4 KB capacity, but additional requirement can be included in the Smart Card by the State Government through use of other technologies depending on the requirement of the State.

33. In this connection a letter dated 18-5-2001 (Annexure C.A. 5) from the Secretary of Government of India, MORTH to the Principal Secretary of Gujarat is relevant. This letter states that the additional optical memory options are not mandatory. It also states that there is no bar to any State for opting for additional features over and above the minimum prescribed standards. In paragraph 20 it is stated that the optical memory strip technology is non-proprietary in nature and in the tender in question the interoperability and the readability through Smart card has been taken care of.

34. In paragraph 21 it is stated that the petitioner's bid was conditional and hence was illegal. In paragraph 22 it is stated that the Drexier Technology has initially invented the optical card technology but has sold the technology to a large number of players in the market who are manufacturing the same. True copy of such authority is Annexure-CA7. In paragraph 24 it is stated that the balance sheet of respondent No. 3 has been filed in which turnover in excess of Rs. 10 crores has been shown in the last two years 2000-01 and 2001-02. Thus this is over Rs. 10 crores as required. There is no bar that the company which has only two years standing cannot apply for the contract.

35. Rejoinder affidavits have been filed to both the counter-affidavits and we have perused the same.

36. In the rejoinder affidavit in reply to the counter-affidavit of respondent Nos. 1 and 2 it has been stated in paragraph IV that so far as the registration of a motor vehicle is concerned it is the absolute power of the Central Government to prescribe the form of the certificate of registration, its particulars, the information which it should contain, and also the manner in which it is to be issued by the registering authority. It is stated that the State Government has no power in this connection, in other words, the State Government cannot add or delete the

information and particulars prescribed by the Central Government under the Motor Vehicles Act and Rules. The certificate of registration has to be issued in the form prescribed by the Central Government. It has also been stated in the rejoinder affidavit that while under the proviso to Rule 81 of the Motor Vehicles Rules the fee prescribed for Smart Card is Rs. 200/-, but in the tender the fee is mentioned as Rs. 440/- which is against the statutory mandate. It is alleged that no vehicle owner can be asked to pay more than Rs. 200/- for having registration certificate on the Smart Card in view of the Motor Vehicles Rules. It is further stated that the Rule 48 has been amended and a new form 23-A has been added along with form 23 in the Motor Vehicles Rules. This new form provides for the certificate of registration in electronic medium as Smart Card. The amended rule only provides for Smart Card and no other card or a card having optical strip. It is alleged that the rules provide for only one machine readable zone and therefore, a card which has two machine readable zones is not contemplated under the Rules. It is further alleged that the amending rules have defined the Smart Card in a specific and categorical manner which rules out any other card, if any other combination other than single chip microprocessor mounted on a plastic card and the dimension of the card having specified in ISO 7816 specifications. It is alleged that the State Government cannot issue a certificate of registration on a card which has both microprocessor chip as well as optical strip as this would provide more information than that contained in form 3 according to the amended rules. It is alleged that the tender document issued by the respondent is not only in violation of the guidelines issued by the MORTH but it is also in contravention of the Motor Vehicles Act and Rules. It is alleged in paragraph 5 of the rejoinder affidavit that by making provision for optical memory strip in the Vehicular Smart Card along with 4-KB microprocessor chip the respondent has violated the core and fundamental requirement that the technology of the card should be non-proprietary and should be from open domain.

37. In paragraph 6 it is alleged that Drexler Technology Corporation, USA appoints sole value added Reseller for specified territory and it is a monopoly technology. Hence it is against the public interest and in violation of Article 19(1)(g) of the Constitution. It is alleged that the State cannot create monopoly in favour of the individual company, and therefore the requirement of having 1.5-MB optical

memory strip in the Smart Card is nothing but an attempt to create a monopoly. It is alleged in paragraph 8 that the whole exercise of finalizing the tender conditions and inviting bids has been done with a view to award a huge project to a pre-determined tenderer. In paragraph 9 it is stated that the Gujarat High Court has stayed the tender. In Gujarat also the sole value added Reseller had given the work of issuing registration certificate on Smart Optical Card. Against that decision a writ petition is pending in Gujarat High Court wherein a challenge has been made on the ground that the technology of Smart Optical Card is proprietary of one M/s. Drexier Technology Corporation and is non-interoperable and not from the open domain and future indigenous development is not possible. In paragraph 12 it is stated that the mechanically propelled vehicles fall under entry 35 of List III, Schedule 7 of the [Constitution of India](#). The Motor Vehicles Act is a central legislation and the State Government has no power with regard to the manner, mode, contents and forms and fee of the registration certificate as well as driving licence. It is submitted that the State Government cannot charge more fee than what is prescribed under the rules, nor can it alter the form or the information which are to be recorded in such form of registration certificate and driving licence. It is alleged that the tender has awarded to a predetermined bidder which is a front company set up by the sole value added Reseller of Drexier Technology Corporation. Hence it is alleged in paragraph 14 that the whole exercise is mala fide, arbitrary and colourful exercise of power with the intention to award the contract to a chosen, predetermined bidder.

38. In paragraph 21 it is stated that in Maharashtra a tender was invited even before the first guidelines were issued and the same was done by the State of Gujarat as stated in paragraph 11 of the rejoinder affidavit, However, the final contract has not been signed. In paragraph 41 it is stated that the State Government cannot create a monopoly in favour of a predetermined, chosen bidder.

39. We have also perused the rejoinder affidavit of the petitioner in reply to the counter affidavit of the respondent No. 3. Broadly the same allegations have been made in this rejoinder affidavit, which have been made in the first rejoinder affidavit,

40. We have carefully considered the submissions of the learned counsels for the parties. Before dealing with the same, however, we may refer to certain relevant provisions in the Motor Vehicles Act and Rules.

Section 41 of the Motor Vehicles Act 1988 states

'41. Registration, how to be made.--(1) An application by or on behalf of the owner of a motor vehicle for registration shall be in such form and shall be accompanied by such documents. Particulars and Information and shall be made within such period as may be prescribed by the Central Government :

Provided that where a motor vehicle is jointly owned by more persons than one, the application shall made by one of them on behalf of all the owners and such applicant shall be deemed to be the owner of the motor vehicle for the purposes of this Act.

(2) An application referred to in Sub-section (1) shall be accompanied by such fee as may be prescribed by the Central Government.

(3) The registering authority shall issue to the owner of a motor vehicle registered by it a certificate of registration in such form and containing such particulars and information and in such manner as may be prescribed by the Central Government.

.....

(8) An application by or on behalf of the owner of a motor vehicle, other than a transport vehicle, for the renewal of a certificate of registration shall be made within such period and in such form, containing such particulars and information as may be prescribed by the Central Government.

(9) An application referred to in Sub-section (8) shall be accompanied by such fee as may be prescribed by the Central Government.'

41. A perusal of Section 41 makes it clear that so far as registration of motor vehicle is concerned, it is the absolute and exclusive power of the Central Government to prescribe be the form of the application, document and particulars, information, etc. The Central Government is also empowered to prescribe the form

of the certificate of registration and particulars and information of the registration certificate and the manner in which the certificate of registration is to be issued by the Registering Authority to the power of a motor vehicle registered by it. The State Government has absolutely no power so far as the particulars and information and manner of the certificate of registration or fee to be charged for issuing the registration certificate.

42. Section 64 of the Motor Vehicle Act empowers the Central Government to make rules providing inter alia.'

'(b) the form in which the certificate of registration shall be made and the particulars and information it shall contain and the manner in which it shall contain and the manner in which it shall be issued under Sub-section (3) of Section 41;

(e) the period within which and the form in which the application shall be made and the particulars and information it shall contain under Sub-section (8) of Section 41.'

43. Section 43 of the Central Motor Vehicle Act empowers the State Government to make rules for the purpose of carrying into effect the provisions of Chapter IV other than the matter specified in Section 64.

44. Section 65 read with Section 64 makes it clear that the State Government has no power in relation to the matters pertaining to the registration or issuance of certificate of registration. All aspects relating to registration of motor vehicles and issuance of registration certificate are within the exclusive domain of the powers of the Central Government. In other words, the State Government cannot add, delete, alter or change the information, contents, manner and form of the registration certificate. The State Government cannot issue registration contrary to the rules framed by the Central Government. The State Government is also not empowered to charge a fee more than what is prescribed by the Central Government under Rules.

45. The Motor Vehicles Rules, 1989 framed by the Central Government prescribed the form of the application under Rule 47, the form the registration certificate under Rule 48 and the fee to be charged for issuance of the certificate of registration

under Rule 81. Form 23 is prescribed for issuing the registration certificate on paper.

46. The above rules were amended by the Government of India vide gazette notification dated 31-5-2002. The draft of the proposed amendment of the Rules was published in the Central Government gazette on 15-1-2002 inviting objection or suggestions from all persons likely to be affected thereby. After considering the objection and suggestions the final amended rules, called the Central Government Motor Vehicles (Third Amendment) Rules, 2002 was published in the Gazette of India on 31-5-2002 as stated above.

47. It is not necessary to mention all the amendments made by the Third Amendment Rules. However, we may refer to the relevant amendments.

Rule 2(s) of the Third Amendment Rule states :

"Smart Card' means a device capable of storing data and executing commands, which is a single chip microprocessor, mounted on a plastic card and the dimensions of the card and chip as specified in ISO-7816 specifications as may be amended from time to time.'

48. Rule 7 of the Third Amendment Rules has amended Rule 81 of the Motor Vehicles Rules by inserting in the Table in the note the following proviso :

'Provided that in case for any purpose referred to in serial Nos. 4, 5, 6, 8, 9, and 10 of this Table is issued on any Smart Card, an additional amount of fee of rupees two hundred shall be charged for such card.'

49. The Third Amendment Rules prescribed a new form vis Form 23-A for certificate or registration in electronic medium as Smart Card.

The said Form 23-A is as follows ;

FORM 23-A (see Rule 48)

CERTIFICATE OR REGISTRATION (IN ELECTRONIC MEDIUM AS SMART CARD, ETC.)

Particulars to be printed on the Visual Inspection Zone of Smart Card :

Contents of Visual Inspection Zone Certificate of Registration

1. Name of State Transport Department

2. Card Serial Number

3. Vehicle Registration Number

4. ' Registration Date (In dd-mm-yyy)

5. Owner's Details :--

5.1 Name

5.2 Son/Wife/Daughter of

5.3 Address; Current Postal Address 6. Vehicle's Details :--

6.1 Name of Manufacturer with Make

6.2 Colour

6.3 Fuel

6.4 Vehicle Class G.5 Body Type

6.6 Seating Capacity

6.7 Standing Capacity

6.8 Date of Manufacture (In-mm-yyyy)

6.9 Unladen Weight

6.10 Cubic Capacity

6.11 When Base

- 6.12 Number of cylinders
7. Tax paid Upped (In-mm-yyyy)
8. Registration Validity (in dd-mm-yyyy)
9. Signature of Issuing Authority
10. Identification of Issuing Authority Contents of Machine Readable Zone
11. Chip Serial Number
12. Owner Serial (No. of this the ownership has changed)
13. Tax Date (Date of validity of Tax): dd-mm-yyyy
14. Registration validity (In dd-mm-yyyy)
15. Hypothecation of Details :--
 - 15.1 Name of Financer
 - 15.2 Address of Financer
 - 15.3 Hypothecated From (in dd-mm-yyyy)
 - 15.4 Hypthecated Upped (in dd-mm-yyyy)
16. NOG Details :--(Future Use)
 - 16.1. NOC Number
 - 16.2 State to (Code only)
 - 16.3 RTO to
 - 16.4 NCRB Clearance Number
 - 16.5 NOC Issue Date (In dd-mm-yyyy)-
17. Insurance Details :--(Future Use)

17.1 Name of Company

17.2 Convernote Policy Number

17.3 Type of Insurance

17.4 Validity Up to (In dd-mm-yyyy)

18. Pollution Under Control Details :--(Future Use)

18.1 Checking Centre (Code only)

18.2 Validity Up to (In dd-mm-yyyy)

19. Tax Payment Details :--Amount

Exemption/Receipt Number Payment Date (In dd-mm-yyyy) Valid From (In dd-mm-yyyy) Valid up to (In dd-mm-yyyy) Exemption (Y/N)

20. Fitness Details :--

Validity (In dd-mm-yyyy) Inspecting Officer Location

21. Additional Information in respect of Transport Vehicle :--

Gross Vehicle Weight (In Kgs.) Number, Description and Size of tyres Registered Axle Weight Number of Semi Trailers

22. Challan Details :--Challan Number

Accused Person (O-Owner, D-Driver, C-Conductor)Section (Code Only)

Challaning Officer

Location

Date and Time (In dd-mm-yyyy/hh:mm)

Disposing Authority. (R-RTO, C- Court)

Disposal Date (In dd-mm-yy)

Penalty

Receipt Number

23. Permit Details :

Permit Number

Type of Permit

Validity From (In dd-mm-yyyy)

Validity Up to (In dd-mm-yyyy)

Area of Operation

Route From

Route up to

Stage 1

Stage 2

Stage 3

24. Permit Actions :--

Action Code SUR/SUS/CAN

From Date (In-dd-mm-yyyy)

Up to Date (In dd-mm-yyyy)

Reason

25. All India Tourist Permit Details :--

From Date (In-dd-mm-yyyy)

UP to date (In-dd-mm-yyyy)

26. Authorisation Details :--

State (Code Only)

Authorisation Number

Validity From (In-dd-mm-yyyy)

Validity Up to (In-dd-mm-yyyy)

Bank Draft Amount

Bank Draft Number

Bank (Code Only)

Branch

Bank Draft Issue date (In-dd-mm-yyyy)

27. Counter Signature Details :--

Authorizing Office

Validity From (In-dd-mm-yyyy)

Validity Up to (In-dd-mm-yyyy)

Route From

Route UP to

Stage--1

Stage-2

Stage-3

50. We have quoted the entire text of Form 23-A which has been added by the Third Amendment Rules in order to show that all aspects of the registration certificate in electronic medium have been specified in great detail in the said form which prescribes the particulars to be printed on the visual inspection zone of the Smart Card and the contents of the machine readable zone.

51. We are of the opinion that in view of the Third Amendment Rules which were published in the Gazette of India dated 31-5-2001, no State Government can insist that a certificate of registration must be issued on a Card which has both microprocessor chip as well as optical chip because such certificate of registration would be in contravention to the Third Amendment Rules as referred to above and hence would not be a valid certificate.

52. It is well settled in law that executive instructions cannot override a statutory rule. According to the theory of the eminent jurist Kelsen (The Pure Theory of Law), every legal system has a hierarchy of laws and in this hierarchy the bigger law will prevail over law (see Kelsen's 'The General Theory of Law and State').

53. In the Indian legal system the hierarchy is as follows :

1. The Constitution
2. Statutory law, which may be either parliamentary or State legislature law.
3. Delegated legislation, which may in the form of Rules, regulations etc. made under the statute.
4. Executive orders or Government instructions.

54. According to Kelsen, if there is a conflict between a higher law and a lower law, then the higher law must prevail. The Third Amendment Rules published on 31-5-2002 amounts to delegated legislation as they have been made under the Motor Vehicles Act, Hence they belong to the third layer in the above hierarchy. The MORTH guidelines as made by the Central Government, as well as the tender conditions as made by the State Government, are both executive instructions and

hence belong to the fourth layer in the hierarchy. Hence if there is any conflict between the Third Amendment Rules on the one hand, and MORTH guidelines or the tender conditions on the other, the latter will have to be declared as void and to no affect. There are many decisions of the Supreme Court to the effect that Government Orders cannot override the statutory rules and will be ultra vires if they are in conflict with the statutory rules, vide Union of India, v. Madras Telephone SC & ST Social Welfare Association : (2000)9SCC71 Shish Ram v. State of H.P. : (1996)10SCC166 etc. The executive instructions must yield to the statutory rules.

55. No doubt the Secretary MORTH, Government of India in his letter dated 31-1-2002 stated that if any State wants to have larger capacity card or desires to have other technology they could do so. However, in our opinion, the MORTH guidelines are only executive instructions and cannot override the Third Amendment Rules, which have statutory force. Hence the above guidelines of MORTH that a State can have larger capacity Card or use other technology if it so desires is Illegal and ultra vires the Rules. The Third Amendment Rules do not permit a larger capacity Card or use of other technology. If the Central Government wishes to permit larger capacity card or use of other technology in addition to the microprocessor chip then the Motor Vehicles Rules have to be amended. No such amendment has been made in the Motor Vehicles Rules, and hence the above direction of MORTH in its letter, dated 31-1-2001 is in our opinion ultra vires.

56. Similarly the condition in the tender that the Card is to be given for Rs. 440/- is against the proviso to Rule 18 which prescribes additional fee of Rs. 200/- only and not Rs. 440/-.

57. In our opinion no State Government can prescribe a format for tender or Smart Card and charge a fee which is contrary to the rules. In our opinion the State Government does not have any power to prescribe the form, manner and content of information of the registration certificate or the fee to be charged for issuing registration certification of a motor vehicle, since the Central Govt. has already done so in the Motor Vehicles Rules. The State Government by issuing a tender

cannot prescribe the form contents of information, and fee contrary to the Rules.

58. Learned counsel for the respondents has submitted that the Third Amendment Rules was published in the gazette on 31-5-2002 and has no retrospective effect. In this connection it may be mentioned that the draft rules were published in the gazette on 15-1-2002 as stated above inviting suggestions and objections from all persons likely to be affected as required by Section 212(1) of the Motor Vehicles Act 1988. Hence at the time the State Government issued the tender document dated 3-5-2002 the finalization of the Rules was very much in contemplation. Despite this it appears that the State Government insisted on rushing through the tender process. In fact that Secretary to the Government of India, MORTH had cautioned the Chief Secretary of the State by the letter dated 8-5-2002 to recall the tender, vide paragraph 20 and Annexure P-7 to the writ petition. This letter dated 8-5-2002 of the Secretary of Government of India, MORTH has specifically stated that with a view to Interoperable environment of Smart Card for driving licence and registration certificate throughout the country common standardized software specifications have been formulated and circulated to all the States in the country but it was brought to the knowledge of the Secretary MORTH, Government of India that a tender has been floated by the Transport Department of U.P. , the technical specifications of which do not conform to the standardized software circulated by the Central Government, Ministry of Road Transport. This may lead to non operable environment for such Smart Card based documents and also have potential to create the problem of vendor dependence in the future. The Secretary MORTH requested the Chief Secretary of the State Government to intervene in the matter so that in the event of the tender specifications being not in conformity with the software specifications circulated, the same is recalled immediately.

59. It appears that despite clear instructions of the Secretary Government of India to the U.P. Government the latter went ahead with the tender process.

60. In our opinion even if the tender process had been completed prior to 31-5-2002, no right has accrued to the respondent No. 3 to get the contract because under Article 299 of the Constitution no contract has been entered into between

the State Government and the respondent No. 3.

61. Article 299(1) of the [Constitution of India](#) states :

'All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by President, or by the Government of the State, as the case may be, and all such contracts and all assurance of property made in the exercise of that power shall be executed on behalf of the President or the Government by such persons and in such manners as he may direct or authorised.'

62. Since no contract has been executed between the State Government and the respondent No. 3 in accordance with Article 229 of the Constitution no right has accrued in his favour merely by acceptance of the tender. Moreover, after the coming force of the Third Amendment Rules w.e.f. 31-5-2002 no State Government can issue a registration certificate in violation of the rules, as the rules have superseded any guidelines, whether issued by the MORTH or by the State Government. The finalisation of the tender itself does not vest any indent feasible right in favour of the selected tenderer as the issuance of the certificate of registration would be in violation of the statutory rules. The Third Amendment rules prescribe the requirement of a Smart Card and the State Government is not empowered to prescribe something which is not contemplated under the Rules framed by the Central Government.]

63. Rule 2 (s) of the Third Amendment Rules confined the Smart Card to a single chip microprocessor, mounted on a plastic card and the dimensions of the card and chip are as specified in ISO 7816 specifications, as may be amended from time to time. Hence in our opinion the rules 'do not lay down merely a minimum requirement' but they lay down 'the only requirement' and these rules do not leave any scope for the State Government to provide for any other technology in addition to the Smart Card, i.e. microprocessor chip based technology. We are also of the opinion that the entire scheme of the [Motor Vehicles Act, 1988](#) particularly Sections 41(3), 41(5), 64 and 65 and the Third Amendment Rules to the Motor Vehicles Rules, particularly Rule 2(s), 48, 81 and Form 23-A must be viewed in the context of the freedom of trade, commerce and intercourse under Article 301 of

the Constitution. This Court will adopt an interpretation which furthers this uniformity which must flow as a necessary corollary to this constitutional provision. Such a view would make the Smart Card operable throughout the country instead of having different kinds of Smart Card in different States. In our opinion there must be a single kind of Smart Card for the whole of India, and not different cards for different States as that would be in violation of the Motor Vehicles Act and Rules, and would be against the principle of inter operability. There are about 20 States in India, and if each State has its own kind of Smart Card there would be confusion.

64. It has been submitted by the respondents that the optical chip is necessary because the complete history of the vehicle would be available in it, and it is for this reason that the optical strip has been incorporated in the tender conditions. In our opinion Form 23-A which has been prescribed under the Third Amendment Rules in the Smart Card based, registration certificate takes into account the complete history of the motor vehicles as well as the details of surrender and challans etc. which is available in the microprocessor chip. We have already reproduced the entire text of Form 23-A in this judgment to show that it goes into great details and provides for all the data regarding the vehicles which may be required. The history of owners as well as the details of the surrenders and challans is available on the microprocessor chip as part of the requirement of Form 23-A. Hence the argument of the respondents that for additional information i.e. details of the owner and surrender challans, provision for optical strip has to be made in the conditions is repelled by a mere perusal of Form 23-A.

65. It appears to us that the whole purpose of the tender conditions prepared by the U.P. Government was to benefit a predetermined party viz. the respondent No. 3 which is the sole value added reseller of Drexler Technology or Corporation, USA which has got propriety and sole patent right for the optical technology worldwide. In our opinion, the whole effort of the State Government was to benefit the respondent No. 3 which alone has been given the right to use the monopoly technology of Drexler Technology Corporation. Thus a monopoly right is sought to be created by the State Government and this goes against the public interest. Grant of monopoly right by the Government is ordinarily unconstitutional, being

violative of Articles 14 and 19(1)(g) of the Constitution, vide *State of Rajasthan v. Mohan Lal Vyas* : AIR 1971 SC2068 , *Rashid Ahmed v. Municipal Board, Kairana* : [1950]1SCR566 , *Hamid Raza v. State of M.P.* : AIR 1960 SC994 , *Rasbihari v. State of Orissa* : [1969]3SCR374 , etc.

66. It may be pointed out that Article 19(1)(g) of the Constitution which gives right to carry on any occupation, trade or business has been given only to citizens and not to persons, Some of the fundamental rights e.g. Article 14 have been conferred on all per-sons, whereas some other fundamental rights have been conferred by the [Constitution of India](#) only on citizens. The fact that the [Constitution of India](#) has conferred the fundamental right to carry on any occupation, trade or business only on citizens and not non-citizens means that the Founding Fathers of the Constitution wanted to protect and encourage the Indian business class viz-a-vis the foreign business class. Hence, the grant of the contract in question to a patent holder of a foreign corporation goes against the spirit of Article 19(1)(g) and the tender conditions appear to be directed to create monopoly in favour of respondent No. 3 which alone has the technology of optical strip granted by the Drexler Corporation U.S.A. In fact there can be no competitive bidder in the present tender because only one party has the optical strip technology, namely, the respondent No. 3. We cannot approve of such kind of non-competitive grant of contract. In fact it will hamper growth of indigenous technology in the field.

67. Learned counsel for the respondent No. 3 has submitted that the petitioners contract was defective and hence it could not be considered. In our opinion the petitioner had only made certain enquiries about the tender and there could be no objection to such enquiries. Moreover, putting an extra paper in the tender bid cannot be treated as making it a conditional bid. The petitioner had in fact submitted a bank draft of Rs. ten lacs and his tender should have been considered. At any event this is a technical plea and cannot detract from our power under Article 226 of the Constitution to strike down the action of the State Government which is in our opinion was clearly illegal and was designed to give a contract to a predetermined tenderer.

68. As regards the judgment of the Delhi High Court in writ petition No. 1391 of 2001, copy of which has been shown to us we are in agreement with paragraph 9 of the said judgment which states that the registration of motor vehicles and/or other requirements laid down in the Central Motor Vehicles Rules as amended by the Third Amendment Rules must strictly be complied with. In fact this is the view we have also taken in this judgment, namely, that the Third Amendment to the Motor Vehicles Rules have to be complied with even though the tender may have been invited before the Third Amendment Rules 2002 came into force. However, with great respect to the Delhi High Court, we are not in agreement with paragraph 10 of the judgment where it has stated 'There cannot be any doubt whatsoever that the first respondent having regard to the requirement of registration of vehicle is entitled to lay down higher criteria than those in the rules. The requirement stated in the rules are minimum.'

69. In our opinion, the requirement in the rules are both minimum as well as maximum. In other words, there can be no deviation from the Motor Vehicles Rules by Government orders or Executive instructions. Both the MORTH guidelines as well as the tender document Annexure P6 to the writ petition are only executive instructions, and to the extent that they deviate from the Motor Vehicles Act as well as the Motor Vehicles Rules as amended by the Third Amendment Rules, 2002 are invalid. Hence we cannot agree with the Delhi High Court in this regard.

70. No doubt the petitioner before the Delhi High Court is the same petitioner as in writ petition No. 23584 of 2002 M/s. Smart Chip Limited before us. However, in opinion, the judgment of the Delhi Court will not operate as res judicata for two reasons. Firstly, there are two petitioners before us. In the second petition being writ petition No. 21933 of 2002, Cyber Infotec is the petitioner which was not the petitioner before the Delhi High Court. Hence by no stretch of imagination can it be said that writ petition No. 21933 of 2002 is barred by res judicata. Secondly, in our opinion, even writ petition No. 23584 of 2002 is not barred by res judicata because in fact the Delhi High Court in paragraph 9 of its judgment has taken the same view which we have taken in this judgment, namely, that the Third Amendment Rules must be complied with for grant of registration certificate. As regards the

observations of the Delhi High Court in paragraph 10 of its judgment that the respondents can lay down higher criteria than those in the rules, we have already pointed out that the criteria laid down by the Secretary, MORTH, Government of India in his letter dated 31-1-2002 is only an executive instruction and is not a statutory rule. This aspect has been totally overlooked by the Delhi High Court. In fact the observation made by the Delhi High Court that 'the requirement stated in the rules are minimum' overlooks the fact that the MORTH guidelines are not rules at all but they are only executive instructions. These guidelines are subordinate to the Motor Vehicles Rules and to the extent that they are inconsistent with the rules they become ultra vires .

71. As regards the Gujarat High Court judgment we have seen its order dated 24-9-2002 in special civil application No. 1981 of 2002 with civil application No. 1349 of 2002 Mahendra Dave v. State of Gujarat. This writ petition was dismissed as infructuous by the Gujarat High Court and hence it has no relevance now.

72. The writ petitions are therefore allowed. The impugned tender document Annexure P6 to the writ petition, the tender bid of the respondent No. 3, as well as its acceptance, are quashed. A mandamus is issued to the respondents readvertise the contract in the light of the observations made in this judgment and the Motor Vehicles Act and Rules as amended, and not in accordance with the tender document which is Annexure P-6 to the writ petition. There will be no order as to costs.

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