

Thomson-csf and ors. Vs. National Airport Authority of India and ors.

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Court : Delhi

Decided On : Mar-19-1993

Reported in : AIR1993Delhi252; 1993(26)DRJ210

Judge : G.C. Mittal and; A.D. Singh, JJ.

Acts : [Constitution of India](#) - Articles 14 and 226

Appeal No. : Civil Writ Petition No. 385 of 1993

Appellant : Thomson-csf and ors.

Respondent : National Airport Authority of India and ors.

Advocate for Pet/Ap. : A.H. Desai,; P.H. Parekh,; Jai Munim,;

Judgement :

Anil Dev Singh, J.

(1) By this writ petition the petitioners, inter alia, 63 seek a writ injuncting. first respondent National Airport Authority, (for short' NAA') from granting the contract for modernisation of Air Traffic services and other connected facilities at Delhi and Bombay Airports to the third respondent Raytheon Incorporated.

(2) Though the petition is still at the admission stage parties have filed detailed pleadings and documents and have addressed arguments at length.

(3) In order to appreciate the controversy raised in the petition, it will be necessary to give relevant facts, which are as under:

(4) Naa prepared a scheme for modernisation of Air Traffic Control Services at Bombay and Delhi Airports with the avowed purpose of installing sophisticated state of art radar, navigation, automation and communication equipment and for providing services so as to raise the capacity of the aforesaid airports from the present level of ten aircraft moments, per hour to forty aircraft moments per hour and other connected facilities. On clearance of the scheme in June,1990 by the Cabinet Committee of Economic Affairs, detailed tender documents were prepared and eventually the first respondent by a public notice dated January 24, 1991 invited global tenders for the installation of the aforesaid equipment and for providing services required for modernisation of air traffic control system at Bombay and Delhi Airports on turn key basis. According to the notice, the offerers were required to give their bids in four parts, namely, Part I: Pre-qualification bid Part II : Technical bid. Part III: Commercial bid. Part IV: Financial bid.

(5) The first petitioner, Thomson-CSF, and Sofreavia S.A., Consortium of French companies (for short 'Consortium') and the third respondent Raytheon Incorporated, an American Company, submitted their tenders on June 25,1991. Alenia, yet another foreign enterprise also submitted its bid.

(6) On August 21, 1990, the Board of first respondent appointed a Tender Committee to examine the various bids. In this task it was assisted by a Technical Committee. The pre-qualification bids of the bidders were opened on June 26, 1991 and all of them were found to meet the pre-qualification criteria. On July 29,1991 the technical bids were opened and the same were evaluated and analysed by the Technical Committee, which was in turn assisted by sub-committees, the members whereof were chosen from amongst the officers of the first respondent having expert knowledge of similar systems.

(7) Since certain clarifications were required from the tenderers, an opportunity was given to them to present their respective cases on system and equipment proposed to be supplied to the first respondent. On consideration of the tenders and the presentations made by the tenderers, the Technical Committee

recommended the short-listing of the Consortium and Raytheon. Thereafter the Tender Committee appointed an External Committee, comprising of Prof. P.V. Indiresan, Director Iit Delhi, Gr. Capt. R.S. Sivaswamy, retired General Manager Hal, Hyderabad and Chairman National Radar Council and working group on Radars and on Navigational Aids and Shri V.Ramasubramaniam, Retired Deputy Director General, Dgca, to look into the technical evaluation. The external experts carried out the evaluation and submitted their report. As a result of the evaluation carried out by the external experts and the Technical Committee, only Consortium and Raytheon were short-listed.

(8) On April 28, 1992 the financial bids of the Consortium and the third respondent were opened. They were also called for contract finalisation negotiations. After detailed discussions, both were called upon to submit their final offers in the prescribed form before July 10, 1992. On receipt of the revised and final offers they were opened on July 31, 1992. It appears that the consortium having lost the race to the third respondent and the first petitioner having come to know about the decision of the Naa to award the contract to the third respondent filed the present writ petition on the grounds, inter alia, that the consortium was not treated fairly and the decision to award the contract in favor of the third respondent was arbitrary and actuated by fraud and mala fides.

(9) The respondents by our order dated January 21, 1993 were directed to show cause why rule nisi be not issued. Pursuant to the notice the respondents appeared and only the first and third respondents filed their replies.

(10) On the application of Sofreavia S.A. it was imp leaded as a party-respondent to the writ petition. Mr.Sanghi. learned counsel for Sofreavia S.A. made an oral prayer before us that Sofreavia may be transposed as a co-petitioner in the writ petition. This was not objected to by the parties and accordingly Sofreavia S.A. was allowed to be transposed as the third petitioner, the first petitioner, as already noticed, being Thomson C.F, and second petitioner being an employee of the first petitioner.

(11) MR.DESAI and Mr.Sanghi, learned counsel, appearing for the petitioners submitted that the third respondent was wrongly short-listed as it had taken

exception to the five clauses relating to conditions of eligibility, namely, performance guarantee, penalty/liquidated damages, force majeure, warranty/guarantee and arbitration. They also contended that the consortium was not treated fairly in as much as terms of the tender document relating to project time schedule, training and central workshop have been allowed to be deviated by third respondent while no such opportunity was given to the petitioners. Besides it was contended that (here has been an error in calculation of adjusted net present value of the price offered by the Consortium. They further submitted that the first respondent acted arbitrarily in deciding to grant the contract in favor of the third respondent. In so far as the question of fraud is concerned, it was submitted that they do not have any specific instances of fraud to cite but the exercise of power by the first respondent in favor of the third respondent amounts to fraud on statute. According to them award of contract discloses complete lack of probity and fair play in action.

(12) On die oilier hand, Mr.Venugopal. learned counsel appearing for the respondent raised a preliminary objection to the maintainability of the writ petition. His submission was that the first and the third petitioners being foreign companies, were not entitled to the protection of fundamental right conferred by Article 19(l)(g) of the [Constitution of India](#). According to the learned counsel since the petitioners do not have any right to carry on trade in India they are not entitled to invoke Article 14 either, as they would have to fall back upon Article 19(l)(g) for establishing a right.

(13) At the outset it is necessary to note that the first respondent had invited global tenders for the work in question. It is also not disputed that the first respondent had given out that it would consider the bids on their merits. Having invited the tenders from all over the world and having taken the position that the tenders would be considered on their respective merits, the question which falls for our consideration is whether the first respondent can ask us to throw out the writ petition on the aforesaid ground without examining the allegations of the petitioners that the decision of the first respondent to grant the contract in favor of the third respondent is arbitrary and also in breach of the mandate of the Article 14 of the Constitution as the decision is unfair, unjust and unreasonable.

(14) Article 14 of the Constitution embodies the principles of equality before law and equal protection of laws. The protective umbrella of the equality clause is available to all persons. While the fundamental rights conferred by Articles 15,16,19, and 29 can be invoked by citizens alone, rights created by Article 14 by its terms are guaranteed to the individual or person. thereforee Article 14 of the Constitution can be invoked by an individual irrespective of the fact that he is a foreigner or a citizen or an alien or it is an artificial person.

(15) Like a citizen, a foreigner is also entitled to avail the personal rights which are enshrined in Article 14 of the Constitution. In *Basheshar Nath v. Commissioner of Income-tax, Delhi and Rajasthan* and another 1959 Sc 149, the Supreme. Court laid down that the benefit of Article 14 is not limited to citizens alone but is also available to any person within the territory of India.

(16) The first respondent did not dispute the applicability of Article 14 to any person, weedier a foreigner or a citizen, within the territory of India, but its contention was that under Article 19(1)(g), the first and third petitioners have no fundamental right to carry on any trade,business or profession in this country and the plea of die petitioners under Article 14 of the constitution cannot be considered by itself and they will have to fall back upon die fundamental right guaranteed by Article 19(l)(g) of the Constitution. For this submission Mr.Venugopal sought sustenance from die die decision of the Supreme Court in *Indo China Steam Navigation Co. Ltd. Vs . Jasjit Singh, Additional Collector of Customs Calcutta and others* : 1964 CriLJ234 and relied upon the following observations of the court:

'THERE is one more point which must be mentioned before we part with this appeal. Mr. Choudhary attempted to argue that if means read was not regarded as an essential element of S.52A. the said section would be ultra virus Articles 14,19 and 31 and as such, unconstitutional and invalid. We do not propose to consider the merits of this argument, because the appellant is not only a company, but also a foreign company,and as such, is not entitled to claim the benefits of Article 19. It is only citizens of India who have been guaranteed the right to freedom enshrined in the said article. If that is so, the plea under Article 31(1) as well asunder Article 14 cannot be sustained for the simple reason that in supporting the said two pleas,

inevitably the appellant has to fall back upon the fundamental right guaranteed by Article 19(1)(g).'

(17) This decision has no application to the present matter. In the above case the ship of the appellant, which was a foreign company, was confiscated by custom authorities under Section 167 (12A) read with Section 183 of the Customs Act, 1878 for violation of Section 52A thereof as large quantities of contraband namely, gold bars were discovered from the ship. The argument based on Article 14 was that if Section 52A contravenes Article 19(1)(f), it may be open to a citizen of India to contend that his vessel cannot be confiscated even if it had violated the provisions of Section 52A and this would result in discrimination. Thus claim to inequality was based on application of Article 19(1)(f) to the citizen and non-application thereof to a foreigner. The court, therefore, while negating the argument held that inequality was the necessary quence of the fact that Article 19 is confined to citizens alone and so the plea that Article 14 is contravened also must take in Article 19 if it had to succeed. In this regard it was observed as follows:

'IT may be that if Section 52A contravenes Article 19(1)(f), a citizen of India may contend that his vessel cannot be confiscated even if it has contravened S.52A, and in that sense, there would be inequality between the citizen and the foreigner, but that inequality is the necessary consequence of the basic fact that Art. 19 is confined to' citizens of India, and so, the plea that Art, 14 is contravened also must take in Article 19 if it has to succeed. The plain truth is that certain rights guaranteed to the citizens of India under Article 19 are not available to foreigners and pleas which may successfully be raised by the citizens on the strength of the said rights guaranteed under Article 19 would, therefore, not be available to foreigners.'

(18) It is significant to note that in the present case Article 14 is being invoked by the petitioners without falling back upon Article 19(1)(g).

(19) In order to appreciate whether Article 14 as pleaded in the instant case is available to the first and third petitioners to challenge the decision of the Naa, it would be necessary to refer to the various nuances of Article 14 of the Constitution.

(20) Article 14 prohibits hostile discrimination of any person by the State. It is well settled that Article 14 ensures that the State metes out just, fair and reasonable treatment within the territory of India to every individual. It inhibits the State from acting arbitrarily since arbitrariness is anti-thesis of equality and comes into play whenever the exercise of power by the State or its instrumentality is contaminated by arbitrariness and mala fides. Absence of arbitrary exercise of power is the first essential rule upon which the foundation of Article 14 rests. Therefore, discretion when conferred on an executive authority must be contained within clearly defined limits, and the decision must not be inspired by humor, whim or caprice but is required to be informed by reason, which must proceed on the principles of equality, justice, fair play and application of known principles and rules and in general such a decision should be predictable. Besides the authority must act in furtherance of national interest, which should be the paramount consideration in matters affecting the country and large sections of the society.

(21) The State therefore cannot act arbitrarily, capriciously and unreasonably in any sphere of its activities, whether in the contractual field or otherwise. If it transgresses the limits of Article 14, it will be on pain of invalidation of its action. The decision of the State to grant a contract in favor of a party must conform to the norms and standards flowing from Article 14.

(22) In this country, there is no place for blind judicial deference to the action of the Executive in matters relating to grant of contracts or largess. The Supreme Court in several decisions has laid down the tests which a grant of the contract by the State in favor of a party must satisfy.

(23) In *Erusian Equipment and Chemicals Ltd. Vs . State of West Bengal and another*, : [1975]2SCR674 , the court while dealing with the question of invalidity of action of the Government in black listing a contractor without giving him an opportunity of hearing, also dealt with the larger question of the manner in which contracts by the State need to be awarded. In this regard it held as follows:

'It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the

Government which is trading with the public and the democratic form of Government demands quality and absence of arbitrariness and discrimination in such transactions. Holifield treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure.'

(24) Again in *Ramana Dayaram Shetty vs . The International Airport Authority of India and others*, : (1979)ILLJ217SC , the Court drawing support from the proposition laid down in *M/s. Erusian Equipment and Chemicals Ltd. (Supra)*, observed as under:-

'THIS proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licenses, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.'

(25) At another place in *Ramana Dayaram Shetty (Supra)* the court while dealing with the following observations of Hidayatullah, J. (as His Lordship then was) in *C.K. Achutan Vs . The State of Kerala and others*, : AIR 1959 SC490 : 'There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfill contracts which they wish

to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14 because the choice of the person to fulfill a particular contract must be left to the Government' clarified that the choice of a person to fulfill the contract must be dictated by public interest and must be reasoned and a principled one. This is what the court said.

'Obviously what Court meant to say was that merely because one person is chosen in preference to another, it does not follow that there is a violation of Article 14, because the Government must necessarily be entitled to make a choice. But that does not mean that the choice be arbitrary or fanciful. The choice must be dictated by public interest and must not be unreasoned or unprincipled.

(26) IN' Shri Sachidanand Pandey and another Vs . The State of West of Bengal & others, : [1987]2SCR223 , the court after considering number of decisions on the subject, digested the propositions in the following refrain:

'On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established: State-owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration'.

(27) The same principles were applied in M/s. G.J.Fernandez vs . State of Kamataka and others, : [1990]1SCR229 , wherein it was held as follows: 'Should the Mcc have been denied altogether the right to tender for the contract consequent on the delay in submitting this document is the second question that arises for consideration. Sri Parasaran, for the appellant would have us answer this question in the affirmative on the principle enunciated by Frankfurter.J. and approved by this court in Ramana Dayaram Shetty Vs . The International Airport authority of India. : (1979)1ILLJ217SC . Bhagwati, J. (as bids Lordship then was) formulated in the following words a principle which has since been applied by this court in a number of cases(at pp 1635 and 165.0-51 of AIR). 'It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an Act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in Vitarelli v. Seaton (1959) 359 Us

535: 3 Law Ed 1012, where the learned Judge said: 'An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword'

(28) This court accepted the rule as valid and applicable in India in *A.S.Ahluwalia V. Punjab* : (1975)ILLJ228SC and in subsequent decision given in *Sukhdev Vs . Bhagatram* : (1975)ILLJ399SC , Mathew J. quoted the above referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article 14, does not rest merely on that Article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's Administrative Law 4th Edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law.'

(29) In the recent judgment of the Supreme Court in *Sterling Computers Limited Vs . M/s. M. & N. Publications Ltd.* : AIR 1996 SC51 it has been reiterated that the decisions of the authorities regarding award of contracts in respect of properties belonging to the State must be tested in the light of Article 14 of the Constitution and in this regard it held as under: 'But in normal course some rules must exist to regulate the selection of persons for awarding contracts. In such matters always a defense cannot be entertained that contract has been awarded without observing the well settled norms and rules prescribed, on basis of the doctrine of 'executive necessity' the norms and procedures prescribed by Government and indicated by Courts have to be more strictly followed while awarding contracts which have

along with a commercial element a public purpose as in the present case. The publication of directories by the MTNL is not just a commercial venture: the primary object is to provide service to the people. The action or the procedures adopted by the authorities which can be held to be State within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the State can be judged and tested in the light of Article 14 of the Constitution, is settled by the judgments of this court in the cases of *Roman Dayaram Shetty V. The International Airport Authority of India*, : (1979)1ILLJ217SC ; *M/s. KasturiLal Lakshmi Reddy vs. The State of Jammu and Kashmir*, Air 1980 Sc 1192; *Fertilizer Corporation Kamagar Union (Regd.) Sindri, v. Union of India*, Air 1981 Sc 344; *Ram and Shyam Company vs. State of Haryana*, : AIR 1985 SC1147 ; *Haji T.M.Hasan Rawther vs. Kerala Financial Corporation*, : [1988]1SCR1079 , *Mahabir Auto Stores vs. Indian Oil Corporation*, : [1990]1SCR818 and *Kumari Shrilekha Vidyarthi vs. State of U.P.* : AIR 1991 SC537 . It has been said by this court: 'It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot for example give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so'. xxxxxxxxxxxx The cases aforesaid on which reliance was placed on behalf of the appellants, have also reiterated that once the State decides to grant any right or privilege to others, then there is no escape from the rigour of Article 14; the executive does not have an absolute discretion, certain precepts and principles have to be followed, the public interest being the paramount consideration. It has also been pointed out that for securing the public interest one of the methods recognised is to invite tenders affording opportunity to submit offers for consideration in any objective manner. However, there may be cases where in the special facts and circumstances and due to compelling reasons which must stand the test on Article 14 of the Constitution, departure of the aforesaid rule can be made'.

(30) The following decisions of the Supreme Court are also to the same effect:
1.Haji T. M.Hassan Rawther v. Kerala Financial Corporation : [1988]1SCR1079 .

2M/s. Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay : [1989]2SCR751 . 3.Mahabir Auto Store and others v. Indian Oil Corporation and others, Jt 1990(1)SC363. 4.Jaswant Singh v. State of Punjab : AIR 1991 SC385 .

(31) Thus the following dos and don'ts necessary to be followed under Article 14 by the State or its instrumentalities may be safely culled out from the afore mentioned decisions: 1. It directs the State to eschew arbitrariness and follow rules of fair play and natural justice. 2.Nothing should be done by the State which gives an appearance of bias, jobbery, affection, ill will and nepotism. 3 Decisions of the State must be informed by reason, based on reasonable, relevant and rational considerations. 4. State must act in national interest. 5.State must follow the norms set by it unless there are good reasons to depart from the same. 6.The actions of the State must be bona fide, clean and honest.

(32) These duties of the State towards an individual correspondingly arms the latter with rights. The rights and duties which are enshrined in Article 14 and unravelled by the courts from time to time are ever expanding to carry out its purpose, which is a part of the grand apparatus to enforce rule of law. Its ennobling influence and moral grandeur has enriched our polity.

(33) In fact this article is a kaleidoscope of rights and restrictions in which each of them is a reflection of the equality clause.

(34) Since the aforesaid rights and duties are all comprehended in Article 14 of the Constitution there is no need to fall back upon Article 19(l)(g) as it will not be necessary in case it is established that the action of the first respondent suffers from the vice of arbitrariness or unfairness, especially when the parties were invited by the respondent on the clear understanding that the tenders would be considered on their merits, thus raising a legitimate expectation on this count. Even otherwise it is legitimate to expect that the authority will act fairly.

(35) Recognising the principle of legitimate expectation the Supreme Court in Food Corporation of India v. M/s.Kamdhenu Cattle Feed Industries : AIR 1993 SC1601 held that State action must satisfy the test of non-arbitrariness. Due observance of this principle as a part of .good administration raises a reasonable

or legitimate expectation in every person to be treated fairly in his inter-action with the State and its instrumentalities. In this regard the court observed as follows: ' 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 instances 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. The mere reasonable or legitimate expectation of acitizen, in such a situation may not itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non- arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent.'

(36) Nearly a decade ago, in Attorney General of Hong Kong v. Ng Yuen Shiu (1983) 2 Ac 629 the Privy Council quashed a deportation order on the ground that the Government of Hong Kong had declared that certain illegal immigrants who were liable to deportation, would be interviewed individually and treated on their merits in each case but the immigration authorities merely allowed the immigrant to answer questions without being given an opportunity to put his own case. This was a case where the administration failed to implement its promise and the Privy council held that when a public authority promises to follow a certain procedure, it

is in the interest of good administration that it should act fairly and implement its promises so long as implementation does not conflict with statutory provisions.

(37) In the present case the Consortium was entitled to legitimately expect that their bid would be fairly considered on its merits. The access to the court will not be denied to them for making a grievance that they were not treated fairly and the merits of their bid were disregarded by the first respondent and it also failed to give due weight and consideration to their reasonable and legitimate expectation, which resulted in arbitrariness. The decision of the respondent to allot the contract to the third respondent is open to 'judicial scrutiny not for testing the merits of the inter-se bids but for being judged and tested in the light of Article 14.

(38) It will be a strange logic to suggest that discretion of the State cannot be controlled by judicial review in case of a contract where competing parties are foreigners even though the Constitution does not inhibit, the scrutiny by the court, rather the position is that any executive action can be called in question in a court of law on the ground that the action is wanting in quality of reasonableness and lacking in element of fairness and public interest.

(39) It is trite saying that when citizens are the bidders the grant of contract to one must be in public interest and in conformity with various aspects of Article 14, there is no reason why the same criteria may not be applied with equal vigour, where bidders are foreigners. In latter case grant of a contract or argues to one may not merely affect the competing parties but may also affect the entire country if the same is given in disregard of national interest and standards and norms laid down in Article 14 of the Constitution. Let us examine a case of two competing parties vying for a contract, one being a foreigner and the other being an Indian. In the event of the contract being granted to a foreigner, the Indian party indubitably can challenge the grant when the contract contravenes Article 14. Now for the reverse case where the contract is won by an Indian party, can it be justifiably contended that the foreigner, who was in the run, will not be able to challenge the same though the action of the authority suffered from vice of arbitrariness. In the latter case there is no reason why the court should not use judicial review to scrutinise the action to see whether it is inconformity with Article 14 or falls foul of

it. Access to the court in all circumstances should be available. Courts cannot tolerate a less exacting standard of judicial review in case of a contract where a foreigner is a competing party. Rights whether of a citizen or a foreigner conferred by Article 14 of the Constitution cannot be swept away except by a cataclysm. Consortium thereforee can ask the Court to see whether the action of the first respondent measures up to the various dimensions of Article 14 and demolish it if it falls short of the same. The various principles referred heretofore, also form part of the administrative law and can stand independently even dehors Article 14 of the Constitution.

(40) The Supreme Court in *M/s.G.J.Fernandez (Supra)* while dealing with this aspect observed as follows: 'It may be noted that this rule, though supportable also as emanation from Article 14 does not rest merely on that Article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is staled at pages 540-41 in Prof. Wade's *Administrative Law* 4th Edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law.'

(41) thereforee, judicially evolved principles of the Administrative Law can be resorted to without recourse to Article 14 or for that matter Article 19 of the Constitution to knock out an act of the executive which is made arbitrarily and on irrelevant considerations. The Consortium can also avail of these principles to call in question the decision of the first respondent.

(42) There has always been a current of opinion to the effect that there should be a universal standard of treatment of individuals whether nationals or foreigners. Article 7 of the United Nations Declaration of Human Rights, 1948 declares that all persons are equal before law and are entitled without any discrimination to equal protection of laws. Again Article 14 of the International Covenant on Civil and

Political Rights 1966 states, inter alia, that all persons shall be equal before the courts and tribunals.

(43) Having regard to the foregoing, we overrule the preliminary objection. We however hasten to add that we should not be understood to be laying down that the State should be unmindful of the national interest in case of grant of contracts to foreigners: In such contracts national interest has to be given primacy. Acting within the bounds of reasonableness it may be legitimate for the State to take into consideration national priorities and considered trade and foreign policies for awarding contracts to foreigner. Having rejected the preliminary objection we proceed to examine the question, whether the grant of the contract to the third respondent violates Article 14 or any of the rules of Administrative Law as indicated above.

(44) Both Mr. Desai and Mr. Sanghi, learned counsel for the petitioners, submitted that the first respondent by accepting the offer of the third respondent has treated the Consortium unfairly and unevenly in as much as the requirements of certain terms of the tender document have been waived in favor of the third respondent thereby giving the said respondent advantage in price, which was not made available to their clients. Elaborating the point the learned counsel submitted that in spite of the fact that the third respondent in its offer had deviated from the tender document relating to Project Time Schedule and training, its bid has been accepted.

(45) RE. Project Time Schedule: 'Time schedule as specified in clause 2.8.3 shall be maintained but the commission of the total system after trial should not be later than 30 months after signing the contract'.

(46) The Consortium catered for this clause in the following manner: 'The site acceptance test for two airports shall be completed not later than 30 months from the effective date of the contract provided that all works under NAA's responsibility have been performed in compliance with the time schedule in connection therewith'.

(47) On the other hand the third respondent provided for the aforesaid clause as under: 'Time schedule specified in clause 2.8.3 shall be maintained but the commissioning of total system after trial shall not be later than 36 months after signing of the contract'. As would be seen from the above both the parties did provide for the said clause but the same was not in conformity with the prescribed form. While the Consortium offered to conduct site acceptance test within 30 months from the effective date of the contract, the third respondent specifically stipulated for the commissioning of the total system after trial within 36 months of the signing of the contract.

(48) According to Mr. Desai, the site acceptance test is synonymous with the commissioning. This however, was not acceptable to the respondents. Mr. Venugopal for the first respondent submitted that site acceptance is a stage prior to the commissioning of the total system. According to him, site acceptance is a method of testing and adjusting the individual system which is a stage anterior to the commissioning of the total system. It is not disputed that the first petitioner executed the work in Ireland at Cork, Shannon and Dublin Airports. The site acceptance test at Cork Trial Centre was performed from October 31, 1990 to November 1, 1990 but thereafter commissioning took two years and the project was completed in the year 1992. Again at Shannon the site acceptance test was performed by the first petitioner from December 3, 1990 to December 6, 1990 and the commissioning of the system was achieved in 1992. Similarly at Dublin Control Centre, the site acceptance test was performed from October 15, 1990 to October 25, 1990 and the commissioning took place in 1992.

(49) As is apparent from the execution of the contract in Ireland, it cannot be said that the first respondent was wrong in urging that the site acceptance test has to be conducted before the actual commissioning of the system.

(50) The question whether site acceptance test is the final stage envisaged in the contract document or not is a technical matter and has to be best left to the experts whose special knowledge in the field equips them to take a decision in the matter. In case the Consortium was willing to execute the work within the stipulated period of time, there was no reason why it did not use the words

prescribed in clause 2.8.4 of the tender document for its offer. The stand taken by the first respondent that the commissioning of the project in all respects takes place after considerable length of time from the date of site acceptance test does not call for interference as there is nothing to suggest that the first respondent has not interpreted the clause in a fair and bona fide manner.

(51) In this connection it will be profitable to refer to the following observations of the Supreme Court in G.J.Fernandez case (Supra): 'If a party has been consistently and bona fide interpreting the standard prescribed by it in a particular manner, we do not think this court should interfere though it may be inclined to read or construe the conditions differently, we are, therefore, of the opinion that the High Court was right in declining to interfere'.

(52) Comparing now both the offers, one by Raytheon to complete the commissioning of total system within 36 months of the signing of the contract and the other by the Consortium to complete the site acceptance test not later than 30 months from the effective date of the contract subject to all works under the responsibility of the first respondent to be performed in compliance with the time schedule in connection therewith, we find that Phereas Raytheon has specifically undertaken to commission the total system within 36 months after signing of the contract, no such specific stipulation with regard to time of dimensioning of the total system is found in clause 2.8.4 of Consortium's tender.

(53) If the work at Ireland was to serve as an illustration, one could legitimately conclude that the offer made by the Consortium would fall short of the requirement as envisaged in clause 2.8.4 of the tender document as it does not fix the time for total commissioning of system except for fixing the time for conducting the Site Acceptance Test. Since the Consortium has itself not adhered to clause 2.8.4 of the General Conditions of the tender document by not making an offer in conformity therewith, we do not see how it can make a grievance about the offer of the third respondent and its acceptance by the first respondent.

(54) Learned counsel for the petitioners also contended that the bar chart submitted by along with the tender shows that the petitioners have undertaken to execute the with the completion of the site acceptance test. It is not the case of the

petitioners that chart has not been considered by the authorities. What weight must be attached to it, is not for us to determine. These matters are in the domain of the experts. We cannot doubt the wisdom of the decision of first respondent in proceeding on the basis that the site acceptance test is a stage prior to the commissioning of the total system.

(55) Learned counsel for the petitioners submitted that according to the bid of the Consortium the training of the personnel of the first respondent was to be at the bidder's facility but in case of Raytheon this is not so. On the other hand, it was contended by Mr. Venugopal and Mr. Ramaswami that Raytheon would also be giving training to the said personnel at third respondent's facilities in USA. They invited our attention to price adjustment bid filed at the contract finalisation stage, wherein provision has been made for imparting institutional training at both Delhi and USA. Thus we find no force in this contention of the learned counsel for the petitioners. RE.: Bid Guarantee

(56) Mr. Desai also argued that the bid guarantee furnished by the third respondent was not in conformity with clause 9.1. It was also urged that the letter of the third respondent accompanying the submission of the bid was also not in the prescribed form.

(57) A perusal of the guarantee furnished by the third respondent shows that the bid guarantee furnished by the third respondent is an irrevocable one, though format is different than the one prescribed by the tender document. We have also gone through the aforesaid letter submitted by the third respondent and Find that it substantially complies with the conditions prescribed in the tender document.

(58) Learned counsel for the petitioners then submitted that the tender of the third respondent should have been rejected at the threshold as the third respondent had taken exception to all the five clauses mentioned in clause 27.3.8 of Part-3 of the Instruction bidders (hereinafter called the 'IB') contained in the tender document. Clause 27.3.8 of the IB reads as under:; 'Bidders taking exception to the following clauses of General Conditions of contract will not be short-listed. a) Performance Guarantee. b) Penalty. c) Force Majeure d) Warranty/Guarantee, e) Arbitration.'

(59) It is not disputed that the third respondent did not omit any one of the aforesaid clauses from its tender. It, however, while providing for each of the five clauses made certain deviations. According to the learned counsel for the petitioners, the third respondent could not make any variation while providing for the said clauses in its offer. In order to appreciate the submission of the learned counsel for the petitioners relating to construction of the aforesaid clause, it is necessary to refer to certain other clauses as well of the tender document so as to derive the meaning and import of the term 'exception' occurring in clause 27.3.8..

(60) Clause 1.3 of the Ib advises the bidders to submit offers based strictly on the terms and conditions including Qualitative Requirements for equipment container in the Tender Document without stipulating any deviations. It further provides that Naa, reserves the right to evaluate quotations containing deviations, having financial implications after adding the cost for such deviations as determined by NAA. It also postulates that if deviations become unavoidable, the bidders may give details of the deviations Along with financial implication on total price.

(61) Clause 27.2.2.3 of I.B. gives the meaning of the term ' partially complying'. The said clause reads as under: 'This means that the contractual condition, characteristic or perform- ance requirement can be met by the offer subject to certain qualifications. These qualifications must be stated in full.'

(62) Again Clause 27.2.4 provides that the bidders should comply with the conditions of the tender document as non compliance will be an important factor in the evaluation criteria.

(63) A reading of the above clauses would show that normally the bidders should submit their offers in accordance with the terms and conditions of the tender document without resorting to deviations and variations. Naa, however, is not precluded from evaluating quotations containing deviations. If deviations become unavoidable the bidders are required to give details of such deviations with financial implications on total price of their offers. When contractual condition, characteristic or performance requirement can be met by the offer subject to certain qualifications, the same are required to be stated in full. thereforee, there is no absolute bar in giving an offer subject to certain deviations. But these will be

taken into consideration in the evaluation of the offer. It is significant that clause 27.3.8 uses the word 'exception' and not 'deviation'. It appears to us that the use of the word 'exception' in this clause was deliberate. The implication is clear that the term has been used not in the sense of a deviation. If the intention was to prohibit even deviations, clause 27.3.8 of Ib would have specifically provided for it and in that event the clause would have been couched somewhat in the following manner: 'The bidders Making Deviations to the following clauses of General Conditions of Contract will not be short-listed.....'

(64) Having regard to the aforesaid discussion we are of the opinion that the context in which the word 'exception' has been used in clause 27.3.8 means total or virtual omission or exclusion but does not mean deviations as the tender document permits the latter to be resorted to by the bidders while making their offers.

(65) This is how in fact the tender document has been understood by both the Consortium and Raytheon as also by NAA. It is not denied that when the parties were asked to submit their best offers, Thomson CSF. gave the revised offer, modifying its original offer of June 25, 1991 by making certain variations and deviations from the said five clauses as contained in the tender documents. The first respondent has also proceeded on the footing that the parties cannot omit the said clauses from their tenders but in case they resort to deviations, it is not precluded from evaluating their quotations. We do not find any element of arbitrariness in this reasoning. As already pointed out, in G.J. Fermedez case (Supra) it has been held that if the party has bona fide construed the standards prescribed by it in a particular manner, the court should not interfere though it may be inclined to read or construe the conditions differently. It was also laid down that deviations from the guidelines may be permitted, if they do not result in arbitrariness and discrimination or result in substantial prejudice or injustice to any of the parties involved or to public interest in general. Even if we were to hold that the third respondent's tender did not conform to the instructions contained in the tender document, no case has been made out by the petitioners of prejudice and discrimination or injury to public interest in so far as the question of alleged non-conformity of the tender of the third respondent with clause 27.3.8 is concerned.

(66) It is not open to the Consortium to urge that the bid of the Raytheon should have been rejected at the threshold for deviating from the guidelines especially when the former had also proposed modifications to its original offer of June 25, 1991, which were in the nature of deviations from the said five clauses. Even otherwise the offer of the third respondent could not be rejected at the threshold. According to clause 1.4 of the IB, bids are to be submitted in four parts. Clause 27.3.8, which provides that the bidders shall not take exception to the aforesaid clauses, falls in Part III. All these conditions are applicable to the commercial bid, which is opened after the opening of the pre-qualification and technical bids. thereforee there was no question to reject the offer of the third respondent at the threshold stage.

(67) Moreover, neither the departure made by the said petitioners nor by the third respondent from the said clauses of the tender document has kept them out of the race. As already seen only two parties were left in the fray. In case the tender of one of the parties had been rejected on the ground of deviations it would not have been in public interest. Rejection of the tender of one of the parties would have resulted in no competition what soever. This would not have been in public interest as the sole party would have been in a position to dictate its terms. It may also be mentioned that at the contract finalisation stage the third respondent brought its offer in line with the requirements of all the five clauses. It is also of signifiante that the petitioners did not challenge the short-listing of the third respondent but waited till the end when the entire process of evaluation of the bids was over and after having participated at every stage of the selection process including contract finalisation stage.

(68) Having regard to the above we do not find any merit in the submission of the learned counsel for the petitioners that the tender of the third respondent should have been rejected at the threshold on the ground that it had taken exception to all the five clauses mentioned in clause 27.3.8 of IB. RE: Evaluation Of The BIDS:

(69) We have been taken through the recommendations of the Empowered Committee from which it is manifest that the Committee recommended that the offer of the third respondent be accepted and the commercial offers received after

July 10,1992 should not be considered for the purpose of evaluation but the commitments made by the third respondent after July 10, 1992 should be insisted upon for further negotiations with the said party while awarding the contract to it. Our attention has also been drawn to a comparative statement accompanying the Empowered Committee report from which it appears that after each and every relevant factor was taken into consideration, it was found that the revised bid of the third respondent was lower than that of the Consortium.

(70) Evaluation of the bid had been committed to the judgment of the experts. What is best should be left to the discernible eye of those who have special knowledge and expertise in this behalf. The wisdom of any choice may be disputed or condemned but it is only the arbitrary exercise of power by the authority which can be struck down. Attempt of Mr.Desai to establish mistake by a long drawn process of reasoning on points,where there may be at best two opinions about the matter will not amount to arbitrary exercise of power,when the authority chooses to prefer one opinion over the other. The process of evaluation of the bids was open and extremely fair. At the stage of evaluation of the technical bid,tenderers were provided an opportunity to make technical presentation before the Committee. At the end of the presentation the bidders were asked to indicate prices of the additional items needed to make each one of their proposals complete including that of the petitioners'. As already pointed out the Technical Committee was assisted by number of sub groups which comprised of officers of the first respondent with expert knowledge of similar systems. A method was evolved where sub-groups evaluating the various systems offered by the bidders did not come to know of the relative weightage given to each system by the other sub groups. After taking into consideration the evaluation made by the. Sub committees, the Technical Committee came to the conclusion that the bid offered by the third respondent was technically superior to the bid offer of Consortium by 4.22%

(71) Thereafter parts Iii and Iv of the bids were compared and it was found that the comparison was impossible as both Consortium and Raytheon had not submitted their bids in the prescribed format as provided in the tender documents. Contract Finalisation stage discussions were held between the parties and they were asked

to submit their best offers as per revised formats.

(72) Thus it will be seen that there is nothing wrong in the procedure adopted for evaluation of the bids. Equal opportunity was given to both the parties. The grievance of learned counsel for the petitioners that the third respondent did not quote for Depot spares at Bombay and Delhi and the correct discount factor to arrive at the adjusted net price value of the prices offered by Consortium has not been taken into account while arriving at intense value of the prices offered by the Consortium and Raytheon, does not seem to be real. We have perused the report of the Empowered Committee and we find that it prepared a comparative statement of the two bids and factors including spares, loading factor and discount factor were taken into consideration. It is not for the court to subject the decision of the authority to a microscopic test. After taking into consideration all the relevant aspects, of the matter, the Empowered Committee clearly came to a finding that the offer of Raytheon was cheaper of the two.

(73) It may also be noted that at the contract finalisation stage, it was pointed out to the third respondent that against item 4.3.2 spares for three years had not been offered. The said respondent at that stage stated that that U.S. dollars 3,98,000, viz price of the spares, be added to its bid. Despite inclusion of this amount in the bid of the third respondent it still worked out to be lower than that of the petitioner.

(74) As regards the discount factor, according to the first respondent discount rate for Us dollars alone was taken into consideration and not discount factor for French Franc for the reason that under clause 25.5 of the IB.bidders were to quote only in Us dollars. It was also pointed out that the supplies from Canada and U.K. would also stand converted in to Us dollars and the same discount rate was applicable. These are all matters which were. to be determined by the Empowered Committee and there is nothing arbitrary in applying the discount factor which had been applied in evaluating the bids. It was also pointed out that even if the discount factor, loading factor, and training grant are taken into account in the manner suggested by the petitioners the prices offered by it would still be higher than that of Raytheon.

(75) In view of the reasons mentioned above we Find no merit in the writ petition. Accordingly, the writ petition must fail and is dismissed. There will be no order as to costs.

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