

CASE NO.:
Appeal (civil) 5624 of 1994

PETITIONER:
UNION OF INDIA & ORS.

Vs.

RESPONDENT:
DINESH ENGINEERING CORPN. & ANR.

DATE OF JUDGMENT: 18/09/2001

BENCH:
N. Santosh Hegde & S N Phukan

JUDGMENT:

(With CA No.5625/1994)
J U D G M E N T

SANTOSH HEGDE, J.

These appeals are preferred against the judgment and order dated 15.10.1993 passed by the High Court of Judicature at Allahabad in Civil Miscellaneous Writ Petition No.12355/93 filed by the first respondent herein. The brief facts necessary for disposal of the appeals are as follow :

The respondent - M/s. Dinesh Engineering Corporation - (hereinafter referred to as 'the writ petitioner') claims to manufacture certain spare parts of GE governors used by the Indian Railways to control the speed in diesel locomotives. It is stated that originally the diesel governor was manufactured only by M/s. General Electric Company of the United States of America ('GE' for short) and till the year 1974, the same was being imported as also its spare parts. Thereafter, while stopping the import of governors in regard to the spare parts required for replacement in the governors manufactured by General Electric Co., the Railways were approaching the local manufacturers.

On 9.12.1991, it is stated that a tender was floated by the Controller of Stores, Diesel Locomotive Works, Varanasi, for supply of certain items of spare parts for use in GE governors. It is stated that only the writ petitioner responded to the tender but its tender was not considered nor was it rejected till 23.10.1992 on which date the writ petitioner received a letter from the Director, Mechanical Engineering (Tr.), Diesel Locomotive Works, Varanasi, wherein it was informed that the Railway Board had reviewed the policy of purchase of GE-EDC governor spares in the context of sophistication, complexity and high degree of precision associated with governors. Consequently, its tender was not acceptable to the Railways.

Challenging this decision of the Railways both in regard to the policy purported to have been adopted by the Board as

also the rejection of its tender, the writ petitioner moved the High Court seeking a writ in the nature of mandamus commanding the respondents in the writ petition to finalise the offer of the writ petitioner regarding the tender and also for issuance of a writ of certiorari quashing the letter dated 23.10.1992 written by the Director, Mechanical Engineering (Tr.) in regard to purchase of spare parts.

The High Court in the impugned order came to the conclusion that on the basis of the material placed before it that the writ petitioner was manufacturing spare parts for GE governors and was supplying the same to various Divisions of the Indian Railways who had found it to be satisfactory and, in regard to which, as a matter of fact, some of these Divisions had also issued certificates of efficiency and appreciation. It also accepted the plea of the writ petitioner that the spare parts supplied by it were certified to have given satisfactory service by various Divisions of the Railways like the Central Railways etc., and held that the writ petitioner was the sole competitor to M/s. Engineering Devices & Controls (EDC) for the supply of spare parts in regard to GE-governors. It also held that the policy put forth by railways in its letter dated 23.10.1992 amounted to creating a monopoly in favour of EDC and the same was wholly arbitrary and discriminatory. It also rejected the contention of the Railways that the tender notice dated 9.12.1991 was rejected because the same was not in conformity with the terms of the tender. The High Court also rejected the contention of the Railways based on Clause 16 of the Guidelines which gave a unilateral right to the Railways to reject the tender without assigning any reason. On the above basis, the High Court while allowing the writ petition held the orders of the Railways dated 14.7.1993 i.e. rejecting the tender of the writ petitioner and the letter dated 23.10.1992 reflecting the policy of the Railways in regard to purchase of spare parts for the governors were quashed.

As stated above, it is against this judgment that these appeals have been preferred before this Court. It is to be noted that this Court having stayed the operation of the impugned judgment of the High Court, in the normal course, these appeals could have been disposed of as having become infructuous, but the appellant contended that the issue involved in these appeals is of substantial importance to the Railways and in view of the observations of this Court while granting 'leave' in these appeals, irrespective of the final outcome of the impugned tender in the original writ petition, the question involved requires consideration by this Court.

It is to be noted that this Court while granting 'leave' on 12.8.1994 observed : "Since this is a matter which can be decided on the present set of paper books, no printing is necessary. The matter is otherwise urgent and requires settling so that the Railways should know how to deal with the matter of the kind. This may be listed in the month of November, 1994 subject to the pleasure of my Lord the Chief Justice. Liberty to mention, if necessary."

As things would have it, though the matter was listed for hearing starting from 24.1.1995, for various reasons mentioned in the concerned orders the matter was not taken up for hearing until the same reached the stage of hearing this day before us. Therefore, we have considered it appropriate to decide these

appeals on their merits.

Mr. P.P. Malhotra and Mr. T.L.V. Iyer, learned senior counsel appearing for the appellants in these appeals, strenuously contended that the respondent was a small-time supplier of spare parts and did not have the necessary expertise and infrastructure for the manufacture of required sophisticated spare parts, therefore, keeping in mind the necessity to have genuine spare parts required for this sophisticated equipment, the Railways after taking into consideration all the aspects of the matter, had taken a policy decision as reflected in its letter dated 23.10.1992 and this being a policy decision, the High Court ought not to have interfered with the said decision. It was also contended on behalf of the appellants that the Railways had the right to choose the supplier of spares bearing in mind the quality of the goods it wanted to purchase. It is contended that such right of the Railways becomes all the more important in the purchase of sophisticated items like spare parts to the governors which plays a very important role in maintaining safety in the movement of locomotives. It was also contended that the High Court was in error in coming to the conclusion that the policy was an afterthought or that it would create a monopoly in favour of EDC. It was pointed out that in the letter reflecting the policy, it is clearly pointed out that the Board had decided to make purchases of these spare parts and meet future needs of governors from the EDC only till such time as other persons capable of developing such equipment as well as spare parts to the satisfaction of the Railways were available. Therefore, this temporary creation of monopoly, if any, would not be either unreasonable or arbitrary. According to the appellants, the writ petitioner does not have the requisite expertise nor the capacity to manufacture a governor or its genuine spare parts, hence, the High Court ought not to have passed the impugned order.

In regard to the rejection of the offer made by the writ petitioner pursuant to the tender notification, it is stated that the Railways had called for tenders for supply of 98 items which were required as spare parts for the governors while the writ petitioner had quoted only for 36 items, hence, the offer was not in conformity with the requirement of the tender. It is also contended that the writ petitioner had not submitted any drawings or specifications and had also not offered any warranty for the working of the equipment. In such a situation, it was not obligatory on the part of the Railways to have accepted the tender. Further, the appellants placing reliance upon certain correspondence between the Railways and the writ petitioner also pointed out that the writ petitioner was not in a position to manufacture the governors as per the requirement of the Railways for want of necessary infrastructure. Based on these grounds the appellant contends that it is safer to place orders for the spare parts of the governors with an original manufacturer of governors, and since EDC alone has been manufacturing governors which are compatible to the GE governors already in use with the Railways, there was nothing unreasonable or arbitrary in placing orders with the EDC for purchase of spare parts also till such time as some other parties are ready to make similar supplies.

Mr. M.D. Adkar, learned counsel appearing for the writ petitioner, seriously challenged the contentions advanced on behalf of the appellants and supported the judgment of the High Court. He contended that the policy put forth by the appellants was only an excuse not to accept the offer made by the writ petitioner for supply of spare parts to the GE governors which it

has been supplying to the Railways for the last over 17 years to their satisfaction. He also contended that the policy in question was put forward only for creating a monopoly in favour of the EDC and since EDC is not the original manufacturer of GE governors as they have been manufacturing only their own governors they cannot be treated as spare parts' suppliers of original equipment. Negating the contention of the appellants that the writ petitioner lacked the expertise or the infrastructure to either manufacture the governors or spare parts for the governors, he pointed out that the writ petitioner has been registered as a supplier of governor drives including mounting and linkage under Item 1029 of the Registration of Firms for items procured by Railways, and relied upon the document reflecting this position which was produced along with his counter affidavit before this Court. He also contended that he has been supplying spare parts to the governors used by the Railways for the last over 17 years and pointed out that various Divisions of the Indian Railways e.g. Western Railway, Southern Railway, South-Central Railway and also Northern Railway have issued the registration certificates to the said effect. He contended that between the period 1979 and 1993, the writ petitioner had supplied spare parts for governors to the Railways worth more than 2 crores of rupees, therefore, the contention of the appellants that the writ petitioner does not have the necessary expertise or the infrastructure to produce the spare parts for the GE-governors, cannot be countenanced.

In the backdrop of the arguments addressed before us and bearing in mind the findings of the High Court, we will now discuss the two issues which arise for our consideration. We will first take up the question of policy put forth by the appellant as per its letter dated 23.10.1992. For this purpose, it is necessary for us to reproduce in verbatim the relevant part of that letter which reads as follows :

"Board have reviewed the policy on procurement of CE/EDC Governor spares in the context of the sophistication, complexity and high degree of precision associated with the governor. Keeping in view the need to assure their reliable and quality performance, it has been decided that :-

(i) GE/EDC Governor spares should be procured on proprietary basis from M/s Engineering Devices and Controls Pvt. Ltd. (EDC) who are the original equipment manufacturers the supplies from whom will be supported by guarantees/warranties :

(ii) DLW should intensify its efforts to develop alternative sources for manufacturing of complete governors which is fully inter-changeable and matches in performance with the GE type Governor so as to generate competition;

(iii) The procurement of GE/EDC Governor spares on proprietary basis from M/s. EDC would be reviewed once alternative factory sources of supply of these Governors become

available.

This issues with the concurrence of the Finance Directorate."

A perusal of the said letter shows that the Board adopted this policy keeping in mind the need to assure reliability and quality performance of the governors and its spare parts in the context of sophistication, complexity and high degree of precision associated with governors. It is in this background that in para (i) the letter states that the spares should be procured on proprietary basis from EDC. This policy proceeds on the hypothesis that there is no other supplier in the country who is competent enough to supply the spares required for the governors used by the Indian Railways without taking into consideration the fact that the writ petitioner has been supplying these spare parts for the last over 17 years to various Divisions of the Indian Railways which fact has been established by the writ petitioner from the material produced both before the High Court and this Court and which fact has been accepted by the High Court. This clearly establishes the fact that the decision of the Board as found in the letter dated 23.10.1992 suffers from the vice of non-application of mind. On behalf of the appellants, it has been very seriously contended before us that the decision vide letter dated 23.10.1992 being in the nature of a policy decision, it is not open to courts to interfere since policies are normally formulated by experts on the subjects and the courts not being in a position to step into the shoes of the experts, cannot interfere with such policy matters. There is no doubt that this Court has held in more than one case that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since these policy matters are taken based on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. But then this does not mean that the courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record. It is with this limited object if we scrutinise the policy reflected in the letter dated 23.10.1992, it is seen that the Railways took the decision to create a monopoly on proprietary basis on EDC on the ground that the spares required by it for replacement in the governors used by the Railways required a high degree of sophistication, complexity and precision, and in the background of the fact that there was no party other than EDC which could supply such spares. There can be no doubt that an equipment of the nature of a spare part of a governor which is used to control the speed in a diesel locomotive should be a quality product which can adhere to the strict scrutiny/standards of the Railways, but then the pertinent question is : has the Board taken into consideration the availability or non-availability of such characteristics in the spare parts supplied by the writ petitioner or, for that matter, was the Board alive to the fact that like EDC the writ petitioner was also supplying the spare parts as the replacement parts for the GE governors for the last over 17 years to the various Divisions of the Railways. A perusal of the letter dated 23.10.1992 does not show that the Board was either aware of the existence of the writ petitioner or its capacity or otherwise to supply the spare parts required by the Railways for replacement in the governors used by it, an ignorance which is fatal to its policy decision. Any decision be it a simple administrative decision or a policy decision, if taken without considering the relevant facts, can only be termed as an

arbitrary decision. If it is so then be it a policy decision or otherwise, it will be violative of the mandate of Article 14 of the Constitution.

It is next contended that EDC is admittedly manufacturing complete governors by itself and the same being compatible to the GE-governors in use with the Railways, EDC should be considered as the supplier of spares for the original equipment. Therefore, it is always safer to buy spare-parts from an original equipment manufacturer than from a manufacturer of only a spare-part. This argument would have been an acceptable argument if EDC was manufacturing GE-governors itself. It is an admitted case that EDC manufactures its own governors and not GE-governors nor are they licensed to manufacture GE-governors. All and any/sundry governors' manufacturer cannot be treated as a manufacturer of original equipment for the supply of spares for GE-governors. The status of EDC vis-à-vis the writ petitioner will be the same in regard to the supply of spares to GE-governors. This observation of ours does not of course amount to giving a certificate of approval to the writ petitioner as to the spare parts manufactured by it or that it is compatible with the GE-governors. That is a matter to be decided by the experts but suffice it to say that the writ petitioner cannot be excluded from consideration for the supply of spare parts to the GE-governors on the sole ground that it does not manufacture governors by itself.

Here it is to be noted that substantial number of governors used in the locomotives of the Indian Railways are those manufactured by GE, therefore, the requirements of spare parts are also substantial for replacement in these governors. Hence, the Board ought not to have created a monopoly in favour of the EDC. It is, however, open to the Railways if it comes to the genuine conclusion that the spare parts manufactured by the writ petitioner are not acceptable on the ground of sophistication, complexity and high degree of precision then certainly it is for the Railways or for that matter if the terms of offer are not acceptable for justifiable reasons, it will be open to the Railways to reject the offer of the writ petitioner. But then, none of the above form the basis for creating a monopoly in favour of the EDC. As held by the High Court, that creation of this monopoly in favour of the EDC is unreasonable and arbitrary with which we agree.

Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer. No such ground has been taken when the writ petitioner's tender was rejected. Therefore, we agree with the High Court that it is not open to the Railways to rely upon this clause in the Guidelines to reject any or every offer that may be made by the writ petitioner while responding to a tender that may be called for supply of spare parts by the Railways. Mr. Iyer, learned senior counsel appearing for the EDC, drew our attention to a judgment of this Court in Sterling

Computers Ltd. etc. v. M/s. M & N Publications Ltd. & Ors.
(1993 1 SCC 445) which has held :

"Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with the EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while we are told the Railways are making purchases without any tender on a proprietary basis only from the EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court.

As stated above, so far as the tender dated 9.12.1991 is concerned, the same has become infructuous by passage of time, hence, the relief granted in this regard by the High Court has also become infructuous. However, we are in agreement with the High Court that the Board cannot purchase the spare parts under a proprietary basis from the EDC without calling for tenders and considering the offers received on merits.

For the reasons stated above, we hereby direct that to meet the future requirements of the Railways in regard to the spares for governors to be used in the diesel locomotives are concerned, same shall be purchased by a public tender and offers so received shall be considered on their merits without reference to the policy referred to in the letter dated 23.10.1992. Accordingly, these appeals fail and the same are hereby dismissed. No costs.

.....J.
(N. Santosh Hegde)

September 18, 2001.

.....J.
(S N Phukan)

1

20

JUDIS