

**SUPREME COURT OF INDIA**

Shimnit Utsch India Pvt.Ltd.

Vs.

W.B. Tpt.Infrastructure Dev.Cor.Ltd.

C.A.No.... of 2010

(R. V. Raveendran, R. M. Lodha and C.K. Prasad JJ.)

12.05.2010

**JUDGEMENT**

**R.M. LODHA, J.**

1. Leave granted.

2. Of the two appeals by special leave, one has been preferred by Shimnit Utsch India Private Limited (for short, 'Shimnit') being aggrieved by the judgment dated June 27, 2006 of the Calcutta High Court whereby the Division Bench dismissed their appeal and affirmed the order dated February 20, 2006 of the Single Judge dismissing their writ petition and the other at the instance of M/s Tonnjes Eastern Security Technologies Private Limited (for short, 'Tonnjes') challenging the order dated March 23, 2010 whereby the Division Bench of Orissa High Court dismissed their writ petition.

## The Issue

3. The common question that arises for consideration in the two appeals is, whether after decision of this Court in *Association of Registration Plates v. Union of India and Ors.* wherein the conditions provided for experience in the field of registration plates in the foreign countries and a minimum annual turnover from such business were upheld as essential conditions in the Notices Inviting Tenders (NIT) for award of contract for manufacture and supply of High Security Registration Plates (HSRP) for motor vehicles, it is necessary for the State Governments to continue with these conditions or it is permissible for them to do away with such conditions.

1 (2005) 1 SCC 679 Factual and legal background in *Association of Registration Plates*

4. The Motor Vehicles Act, 1988 (for short, '1988 Act') came into force on July 1, 1989. Chapter - IV thereof deals with registration of motor vehicles as defined in Section 2(28). Sub-section (6) of Section 41 provides that the registering authority shall assign to the vehicle, for display thereon, a distinguishing mark (registration mark) consisting of one of the groups of such of those letters and followed by such letters and figures as are allotted to the State by the Central Government from time to time by notification in the Official Gazette. Pursuant thereto a Notification came to be issued by the Central Government on July 1, 1989 allocating group of letters to various States. The Central Motor Vehicles Rules, 1989 [for short, '1989 Rules') were framed by the Central Government in exercise of its powers under Section 64 and other relevant provisions of 1988 Act. Rule 50 of 1989 Rules provides for form and manner of display of registration marks on the motor vehicles. The said Rule 50 has been amended from time to time and new system of HSRP thereunder is now to come into effect from June 1, 2010.

5. Under sub-section (3) of Section 109 of 1988 Act, the Central Government issued Motor Vehicles (New High Security Registration Plates) Order, 2001 (for short, 'Order, 2001'). On October 16, 2001, the Central Government further issued Motor Vehicles [New High Security Registration Plates (Amendment)] Order, 2001 (for short, 'Amendment Order, 2001'). Amendment Order, 2001 provided for certain standards in respect of the new system of HSRP for motor vehicles and the process used by a manufacturer or vendor for manufacturing or supplying such plates.

6. On March 6, 2002, a communication laying down guidelines for incorporating necessary conditions in the NIT to be issued by the various States and Union Territories (UTs) was circulated by the Central Government to all States and UTs. The guidelines, inter alia, provided; (i) the tender document would specify whether the appointment of the vendor is for the whole State or for certain parts; (ii) the tender document would specify the terms of the bank guarantee; (iii) the tender document would require a report back on certain aspects on 'a periodic and regular basis' and (iv) the bidder must furnish proof of past experience/expertise in this area or proof of the same with the collaborator. By further communication dated June 14, 2002 the aforementioned NIT guidelines were

modified by the Central Government and it was suggested that the bidders may be asked to provide details about the experience/capability of its collaborator to the satisfaction of the State authorities. By another communication dated November 13, 2002, the Central Government clarified to the States and UTs that the guidelines are suggestive in nature and left the discretion to the States and UTs in the matter of issuing NIT but reiterated security concern.

7. In the light of the guidelines suggested by the Central Government, several States/UTs issued NIT which, inter alia, included conditions, namely, (i) experience in the field of registration plates i.e., bidder should be working at least in five countries for licence plates and in a minimum of three countries with licence plates having security features worldwide; (ii) the bidder must have had a minimum annual turnover equivalent to INR 30 crores immediately preceding last year; at least 25% of this turnover must be from the licence plate business and (iii) the contract will be for a period of 15 years.

8. The NIT containing the aforementioned conditions issued by several States led to filing of writ petitions before various High Courts. Few writ petitions were filed directly before this Court. Since the controversy was common, writ petitions filed before High Courts were transferred to this Court and taken up along with writ petition filed by Association of Registration Plates<sup>1</sup>. It was argued on behalf of the petitioners before this Court that these conditions in NIT have been tailored to favour companies having foreign collaboration and aimed at excluding indigenous manufacturers from the tender process; there are not more than one or two companies that could satisfy the stringent eligibility conditions laid down in NIT;

Indian manufacturers are fully competent to be involved for the implementation of the scheme of HSRP but the condition concerning experience in foreign countries has obviated any chance of their participating in the bidding process; fixing high turnover from such business is only for the purpose of advancing the business interest of a group of companies having foreign links and support and that it is impossible for any indigenous manufacturer of security plates to have a turnover of approximately 12.5 crores from the HSRP which are sought to be introduced in India for the first time and the implementation of the project has not yet started in any of the States.

9. The States who had issued NIT defended the impugned tender conditions before this Court. Insofar as the State of West Bengal is concerned, a counter affidavit was filed through West Bengal Transport Infrastructure Development Corporation Ltd. (WBTIDCL). It was stated in the counter affidavit that impugned conditions in NIT are intended to achieve the high objective of public safety involved in the implementation of HSRP. The relevant averments in the counter affidavit are reproduced below :

"..... The State Governments realizing the importance of the project came out with various conditions in the Tender which are primarily related to seeing the experience and the capacity of the

manufacturer to undertake such a huge task concerning the manufacturing and supply of HSRPs in the State.

The State Government therefore came out with conditions to insure that the manufacturer who supplied the HSRPs in the State is not fly-by-night operator but is personally experienced enough and capable enough to carry out such an activity.....

.....The power therefore is wide enough to include aspects, which may not have been provided specifically elsewhere in the Act. The Central Government is well within its powers to prescribe the fact that the State Government has the power to select the manufacturer of HSRPs as it is State Government which understood its specific requirements and needs and has to be satisfied about the competence of the manufacturer that whom it has to work jointly in order to ensure that the objective behind the HSRPs scheme is not deviated. In the absence of such a provision the whole scheme of HSRPs which means towards achieving public safety and security by ensuring that there is issuing control and supervision of HSRPs by the State Government will get deviated.

.....The State under the Tender wishes to choose a person who is already worked in connection with HSRPs rather than chose a person who merely claims that it can deliver. Surely in a project of such a large scale concerning public safety and security the State cannot be justified to employ the hit and trial method.

.....The objective by no means can be lost of or given an improper degree of attention. The objective is to ensure highest levels of public safety and security established in the wake of the uncertain times that people are subject to these days. Consequently, the introduction of HSRPs mandates adherence to highest standards both in supply of manufacturing quality of products, required supply of the quantity of the project and above al mandates coordination with the State will have the general control and supervision over the issuance of these number plates. The fact is mentioned are by no means exhaustive but are only given to illustrate the basis tenets of the whole business of HSRPs. The State Government by no means can adopt a hit and trial method in a project of such a vast nature.

It has been no necessarily ensured that the manufacturer is selected by a fair, competitive and transparent means of selection, which is the Tender process. The selection necessarily has to happen amongst the TAC holders. The State Government has to be satisfied to the extent to leaving no scope of doubt with regard to the expertise and capability of the selected manufacturer of HSRPs the State Government has to be satisfied that the company concerned will be able to meet the requirement both on the qualitative and quantitative basis and in bare commercial terms the company chosen is the best company amongst the TAC holders. The scheme envisages constant cooperation and coordination amongst the supplier and the State.

Any brake at any point of time in the system as envisaged will deviate the objective which is sought to be achieved. It is in this background that the challenge/grievances of the petitioner must be viewed."

#### Decision in Association of Registration Plates

10. This Court dismissed the entire group of writ petitions on November 30, 2004. The tender conditions relating to experience in foreign countries, prescribed percentage of turnover from such business and term of 15 years were not held to be arbitrary, discriminatory or mala fide; rather these conditions were held in public interest. This Court observed :

7 The State as an implementing authority has to ensure that the scheme of HSRPs is effectively implemented.

Keeping in view the enormous work involved in switching over to new plates within two years for existing vehicles, resort to "trial-and-error" method would prove hazardous.

7 The State Government's right to get the right and most competent person cannot be questioned.

7 The State Government has to eliminate manufacturers who have developed recently just to enter into the new field.

7 The insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood.

7 The terms and conditions in NITs are so formulated to enable the State to adjudge the capability of a particular tenderer who can provide a fail-safe and sustainable delivery capacity.

7 Only such tenderer has to be selected who can take responsibility for marketing, servicing and providing continuously the specified plates for vehicles in large numbers, firstly in the initial two years, and annually in the next 13 years.

7 Capacity and capability are the two most relevant criteria for framing suitable conditions of any notices inviting tenders and the conditions of experience and turnover incorporated as essential conditions are to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations, which, looking to the magnitude of the job, requires huge investment qualitatively and quantitatively.

Facts post 30.11.2004 (A) West Bengal

11. After the decision of this Court in Association of Registration Plates<sup>1</sup> on November 30, 2004, the Government of West Bengal evaluated the bids already submitted in accordance with the NIT and the bid of Shimnit was cleared at the prequalification stage. One M/s. Promuk Hoffman International Ltd., ('Promuk' for short) was also declared qualified. Shimnit challenged the prequalification of Promuk by filing a writ petition (468/2005) before Calcutta High Court on the ground that they did not have requisite international experience. On March 11, 2005, the Single Judge of Calcutta High Court by an interim order stayed the finalization of tender.

12. On April 27, 2005, however, the Government of West Bengal (Transport Department) issued a Notification canceling its NIT for supply and fitment of HSRP for motor vehicles issued earlier. The said Notification reads as follows :

"Government of West Bengal Transport Department Writers' Building No. 2672 WT/3M-56/2003 PL III Dated 27.04.2005 NOTIFICATION WHEREAS Notice Inviting Tender (NIT) was issued and published in various newspapers on 03.07.2003 & 04.7.2003 respectively, fixing 06.08.2003 as the last date for submission of such Tender papers for supply and fitment of High Security Registration Plates for Motor Vehicles, by the West Bengal Transport Infrastructure Development Corporation Limited (A Government of West Bengal Undertaking) on behalf of the Government of West Bengal under instructions from the Transport Department;

AND WHEREAS only 4 (four) nos. of Bidders participated in the said tender process which was subsequently stayed as per orders of the Hon'ble Supreme Court in Writ Petition (Civil) No. 41 of 2003 and the other connected cases;

AND WHEREAS the Hon'ble Supreme Court of India by an order dated 30.11.2004 disposed of the said Writ Petition (Civil) No. 41 of 2003 and other connected cases with certain observations, holding inter alia, that the concerned State Governments are legally competent to determine the terms and conditions for implementation of the scheme for High Security Registration Plates for Motor Vehicles in conformity with the provisions of the Motor Vehicles Act, 1989 and Rules framed thereunder;

AND WHEREAS the Technical Bids submitted by those Bidders could not yet be processed, evaluated and finalized and whereas due to such non-evaluation of the Technical Bids the Financial Bids as submitted by those Bidders could not also be opened.

AND WHEREAS it has come to the notice of the State Government that subsequent to issue of the said NIT a considerable number of Manufactures of such High Security Registration Plates have obtained the requisite Type Approval Certificates from the Institution approved by the Central Government as per provisions of the Motor Vehicles Act, 1989 and Rules framed thereunder;

AND WHEREAS due passage of time and consequent change in the relevant field due to coming up of a very good number of duly approved manufacturers as aforesaid and keeping in view the observations of the Hon'ble Supreme Court of India in Writ Petition (Civil) No. 41 of 2003 and other connected cases as stated hereinabove, the Governor deems it fit that in greater public interest and also in the interest of public safety & security the terms and conditions of the said Notice Inviting Tenders (NIT) for supply and fitment of High Security Registration Plates for Motor Vehicles be reviewed and determined afresh.

NOW, THEREFORE, the Governor is pleased to direct that the entire tender process so far followed pursuant to the aforesaid Notice Inviting Tenders (NIT) for supply and fitment of High Security Registration Plates for Motor Vehicles as issued by the West Bengal Transport Infrastructure Development Corporation Limited on behalf of the State Government be cancelled and fresh process for inviting such bids be commenced after due determination of the terms and conditions thereof in the light of what has been stated herein above. The Governor is further pleased to direct that the Bidders (four numbers) who had participated in the previous tender process to be initiated hereafter, if they so desire and the Earnest Money Deposit (EMD) made by them be returned forthwith.

This order shall come into effect immediately.

By Order of the Governor.

Sd/- Sumantra Choudhury, Principal Secretary, to the Government of West Bengal."

13. Shimnit was also informed by WBTIDCL vide communication dated April 27, 2005 that the bidding process in terms of earlier NIT has been cancelled and requested them to collect the refund of their earnest money.

14. On October 4, 2005, a fresh NIT (hereinafter referred to as 'second NIT') came to be issued by WBTIDCL for manufacture and supply of HSRP, inter alia, to the following effect :

"BID FOR NOTICE INVITING BIDS FOR HIGH SECURITY REGISTRATION PLATES The Transport Department, Government of West Bengal has decided to implement through WBTIDC Ltd. the revised Rule 50 of Central Motor Vehicle Rules, 1989 as modified by the Government of India, Ministry of Roads, Transport and Highway vide Notification issued from time to time for implementation of High Security Registration for all existing registered vehicles and also new vehicles to be registered in West Bengal for a period of 10 years.

Now, on behalf of the Transport Department, Government of West Bengal, The Managing Director/West Bengal Transport Infrastructure Development Corporation Limited (WBTIDC), invites bids for selection of eligible bidders having Type Approval from authorized agencies of Government of India and adequate financial resources to undertake the production of High Security Regulation Plates in conformity with the specifications. A panel of Bidders will be finally selected to implement and operate in two designated zones of the States on Build, Operate and Transport (BOT) basis.

The intending Bidders which may be single firm, Joint Venture or a Consortium should have in addition to above a minimum annual average Turnover of Rs. 50 crores and net worth of Rs. 20 crores as per audit balance sheet of 2003-04.

Bid documents containing detail scope of work and other terms and conditions may be purchased from the office of the Managing Director, WBTIDC, between 04.10.2005 and 20.10.2005 both days inclusive during office hours, but excluding holidays, by paying a non-refundable cost of the same amount of Rs. 50,000/- (Rupees Fifty Thousand only) for each set of two copies of Bid Documents, in the form of Demand Draft drawn in favour of "West Bengal Transport Infrastructure Development Corporation Ltd." payable in Kolkata.

Bid must be accompanied with the Earnest Money Deposit (EMD) of Rs. 25,00,000/- (Rupees Twenty five lacs only) in the form as specified in bid documents. No exemption certificate in this regard will be accepted.

Bids completed in all respect must be submitted in a sealed cover super scribed Bid for HSRP, WB at the office of the Managing Director, WBTIDC Ltd. on or before 14.00 hrs on 14.11.2005 and will be opened as per schedule indicated in the Bid Document. In case the date of receiving the Bids

happens to be a holiday, bids will be received on the next working day.

WBTIDC Ltd. reserves the right to reject any or all bids or annual bidding process without assigning any reason, thereof....."

15. In the second NIT, clauses pertaining to experience in the foreign countries and the minimum prescribed turnover from such business were done away with; the period was also reduced from 15 years to 10 years.

16. Pursuant to the second NIT, Shimnit submitted its tender on November 21, 2005 and simultaneously filed a writ petition before Calcutta High Court challenging the conditions of second NIT, principally on the ground that the essential conditions pertaining to experience in foreign countries and the prescribed turnover from such business having been approved by the Supreme Court could not have been done away with.

Shimnit also prayed for interim order during the pendency of writ petition. The controversy relating thereto reached this Court and by an order dated January 5, 2006, this Court while disposing of SLPs directed that the interim order that contract shall not be awarded until further orders will continue to operate till the matter is decided by the Single Judge. The Single Judge by his judgment dated February 20, 2006 dismissed Shimnit's writ petition. An intra court appeal was preferred by Shimnit before the Division Bench in which the interim order of status quo was passed. The Division Bench ultimately dismissed the intra court appeal vide judgment dated June 27, 2006 giving rise to the present appeal by special leave.

(B) Orissa

17. On April 11, 2007, the Government of Orissa issued NIT inviting bids for the manufacture and supply of HSRP in respect of the existing motor vehicles and the vehicles to be registered in the State of Orissa. The eligibility criteria provided therein did not contain conditions like experience in the foreign countries and minimum prescribed turnover from the said business, although, the tender document did lay down that bidder should have experience of working in the field of HSRP having used the security features as mentioned in Rule 50 of 1989 Rules.

18. After issuance of NIT dated April 11, 2007, Tonnjes submitted representations to the Government of Orissa on May 9, 2007 and May 15, 2007 requesting for amendment/modification of the tender conditions so as to bring it in conformity with the conditions approved by this Court in

Association of Registration Plates<sup>1</sup>.

19. On May 16, 2007, a Corrigendum-III was issued by the Transport Commissioner-cum-Chairman, State Transport Authority, Government of Orissa extending the due date beyond May 24, 2007. It is the case of Tonnjes that no further steps were taken by the Government of Orissa in pursuance of the said NIT.

20. On July 6, 2009, a fresh NIT was issued by the Government of Orissa for manufacture, distribution and affixation of HSRP at a Build Own Operate (BOO) basis.

Tonnjes again made a representation to the Government of Orissa for bringing the terms and conditions of the fresh NIT in conformity with the decision of this Court in Association of Registration Plates<sup>1</sup>. When nothing was heard from the Government of Orissa, Tonnjes filed a writ petition before the Orissa High Court for quashing that NIT. The High Court, by way of an interim order, directed that the bids pursuant to the said NIT may be permitted to be filed by the bidders as per the tender rules but no further action shall be taken without leave of the Court.

21. The Division Bench of the Orissa High Court heard the arguments and by its judgment dated March 23, 2010 dismissed the writ petition filed by Tonnjes.

Writ Petition (PIL) by Maninderjit Singh Bitta

22. One Maninderjit Singh Bitta filed a writ petition before this Court in public interest seeking implementation of the judgment by this Court in Association of Registration Plates<sup>1</sup>. It was urged that though in the aforesaid judgment norms were fixed and the desirability of having HSRP has been highlighted but nothing concrete has been done by the States and UTs. This Court disposed of writ petition on May 8, 2008 and gave time of six months to States and UTs to take decision as to whether there is need for giving effect to the amended Rule 50 and the scheme of HSRP and the modalities to be followed.

23. Maninderjit Singh Bitta filed an Interlocutory Application No. 5 before this Court seeking clarification of the order dated May 8, 2008. The said application was disposed of by this Court on May 5, 2009 by the following order :

"It is made clear that there was no discretion given to the States/UTs not to give effect to the amended Rule 50 and the claim of HSRP and the modalities to be followed. It is stated by learned

counsel for the petitioner that in some cases no action has been taken by the concerned States and the UTs within the period of six months as was given. Needless to say that if same is the position, the directions shall be carried out immediately and not later than three months from today."

24. On August 26, 2009, the Government of India, Ministry of Road Transport and Highways addressed a letter to the States and UTs requesting them to take all necessary steps for implementation of HSRP scheme by the end of 2009. In the said letter the Government of India brought to the notice of the States and UTs the order of this Court dated May 5, 2009 and also informed them to keep in view the judgment of this Court in Association of Registration Plates<sup>1</sup>.

25. On September 11, 2009, a further letter was sent by the Government of India to the States and UTs informing them that a committee has been constituted by the Ministry to review the progress of implementation of HSRP and other related issues. The States and UTs were requested to implement the scheme of HSRP as early as possible.

26. On behalf of Union of India, few applications came to be filed (I.A. Nos. 6-9) before this Court in disposed of writ petition no. 510 of 2005 (Maninderjit Singh Bitta) for extension of time to ensure compliance with the directions contained in order dated May 5, 2009. These applications were disposed of by this Court on December 15, 2009 by extending time upto May 31, 2010.

#### Contentions

27. Mr. F.S. Nariman, learned senior counsel appearing for Shimnit submitted that in Association of Registration Plates<sup>1</sup>, after considering the scheme of HSRP including the guidelines issued by the Central Government and the conditions in the NIT pertaining to experience in the foreign countries and the turnover from the said business, this Court held that these are essential conditions of the tender aimed to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations keeping in view the magnitude of the job and the huge investment required in the project. He submitted that these conditions having got the seal of approval from this Court could not have been done away with in second NIT and if for any reason the State Government thought of cancelling the first NIT and decided to issue fresh NIT dispensing with the conditions of experience in foreign countries and prescribed minimum turn over from such business, they ought to have approached this Court for an appropriate direction. Mr. F.S. Nariman submitted that in Association of Registration Plates, the case pertaining to the State of West Bengal was treated as a lead case and the State of West Bengal vehemently defended the conditions in the first NIT before this Court and now doing away with essential conditions in the second NIT flies in the face of the law laid down by this Court. Learned senior counsel submitted that it was unfortunate that the State of West Bengal did not consider itself bound by the law of land declared by the highest Court of the country in a decision to which it was a party. He also contended that the second NIT was designed to favour some of the bidders and was clearly mala fide as the Shimnit

had challenged the prequalification of Promuk by filing a writ petition before the Calcutta High Court and an interim order was passed therein by the Single Judge staying the finalization of tender. He, thus, submitted that the High Court was not correct in dismissing Shimnit's writ petition.

28. Mr. R.F. Nariman, learned senior counsel for Tonnjes adopted the arguments of Mr. F.S. Nariman and also invited our attention to the fact that as of now, except West Bengal and Orissa, all other States have followed the essential conditions approved by this Court in the case of Association of Registration Plates in the NIT.

29. On the other hand, Mr. S. Ganesh, learned senior counsel appearing for State of West Bengal and Mr. L. Nageshwar Rao, learned senior counsel for State of Orissa submitted that the conditions in the NIT issued by these two States respectively are in the public interest and do not violate constitutional or any other provision of law. They submitted that the whole idea of not having the experience in the foreign countries and the prescribed turnover from the said business is to make available HSRP of the specifications as notified to the motor vehicles in these States at reasonable rates without in any manner compromising on safety, security, quality or sustainable delivery capacity. Mr. S. Ganesh extensively read the reasoning given by the Division Bench of the Calcutta High Court in the impugned order and submitted that no interference was called for in that order.

30. Mr. F.S. Nariman, learned senior counsel, in rejoinder vehemently contended that the judgment of this Court in Association of Registration Plates<sup>1</sup> must be read as read by this Court subsequently in Maninderjit Singh Bitta's case. He would contend that acquisition of Type of Approval Certificates (TAC) does not mean that such manufacturers are commercially competent to manufacture HSRP as TAC have limited efficacy. Learned senior counsel also submitted that if public interest could be served by the fulfillment of conditions in first NIT, then how by deleting these essential conditions, public interest could be achieved.

Tenders, Government contracts and change in policy :

Judicial Review

31. Before we refer to some of the important decisions of this Court dealing with the aspects of judicial review in the matters of government contracts, tenders and change in policy, it is appropriate to notice the observations made in a couple of English decisions and one Australian case on judicial review in the matters of change in administrative policy.

32. In *Hughes v. Deptt. of Health and Social Security*<sup>2</sup>, Lord Diplock, J. said:

"....Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government....."

2 1985 AC 776

33. In *Attorney-General for the State of New South Wales v. Quin*<sup>3</sup>, Mason C.J. (majority view, Australian High Court) observed :

"Once this is accepted, I am unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, in relation to the appointment of magistrates, so long as the new policy is one that falls within the ambit of the relevant duty or discretion, as in this case the new policy unquestionably does. The Executive cannot by representation or promise disable itself from; or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power....."

34. In *R. v. Secretary of State for Transport, Ex parte Richmond upon Thames London Borough Council & Ors.*<sup>4</sup> while laying down that the *Wednesbury* reasonableness test alone was applicable for finding out if the change from one policy to another was justified, Laws, J. stated :

"The court is not the Judge of the merits of the decision- maker's policy. ... the public authority in question is the Judge of the issue whether 'overriding public interest' justifies such a change in policy.... But this is no more than to assert that a change in policy, like any 3 1990 64 ALJR 327 4 (1994) 1 All E.R. 577 discretionary decision by a public authority, must not transgress *Wednesbury* principles....."

35. Now, we consider the decisions of this Court. In *Mohd. Fida Karim and Anr. v. State of Bihar & Ors.*<sup>5</sup>, while dealing with a case of change in Government policy for licence under Bihar Excise Act, this Court held thus :

".....The new policy of adopting the method of auction- cum-tender is certainly a change of policy. The reason for change of policy given by the Government is that it realised that making settlement

for five years would give rise to monopolistic tendency, which will not be in public interest, at the same time the interest of revenue was not fully protected in the former policy. This clearly goes to show that the Government wanted to adopt a new policy in public interest to be made applicable from the year 1991-92. Learned Counsel appearing on behalf of the State of Bihar submitted in clear terms that the earlier policy was wrong and the Government realised its mistake and thus adopted a new policy to augment its revenue and to avoid monopolistic tendency. We do not find anything wrong in taking such view by the State Government and to change its policy considering the same to be in public interest....."

36. This Court in *Sterling Computers Limited v. M/s. M & N Publications Limited & Ors.*<sup>6</sup>, while dealing with judicial review in a matter relating to publication of telephone directories of Mahanagar Telephone Nigam Limited (a 5 (1992) 2 SCC 631 6 (1993) 1 SCC 445 Government of India Undertaking) made the following observations :

"12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. 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."

37. In the case of *Tata Cellular v. Union of India*<sup>7</sup>, a three-Judge Bench of this Court extensively considered the English decisions as well as the previous decisions of this Court in the matter of judicial review and scope relating to government contracts and tenders and deduced the legal principles in paragraph 94 of the report thus :

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract.

In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness 7 (1994) 6 SCC 651 (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

38. That the award of a contract, whether it is by private party or by a public body or the State is essentially a commercial transaction was highlighted by this Court in *Raunaq International Ltd. v. I.V.R. Construction Ltd. & Ors.*<sup>8</sup> In that case, this Court spelt out the following considerations that weigh in making a commercial decision :

"(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications.

When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

8 (1999) 1 SCC 492 (6) time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services."

39. Again in the case of Punjab Communications Ltd. v. Union of India & Ors.<sup>9</sup>, a two-Judge Bench of this Court elaborately examined the principles of legitimate expectation and a change in policy by the Government. While dealing with second question formulated by the Court viz., whether if essentially the Government decided to fund the proposed contract for Eastern U.P. from its own resources, it was permissible for the Government to change its policy into one for providing telephones for rural areas in the entire country and whether 'legitimate expectation' of the appellant in regard to the earlier notification required the Court to direct that a notification for Eastern U.P. should be continued, this Court held in paragraph 45 of the report thus :

"45. It will be noticed that at one stage when the ADB loan lapsed, the Government took a decision to go ahead with the project on its own funds. But later it thought that the scheme regarding telephones in rural areas must cover not only the villages in Eastern U.P. but also in other backward rural areas in other States.

9 (1999) 4 SCC 727 The statistics given in the counter-affidavits of the Union of India to which we have already referred, show that there are other States in the country where the percentage of telephones is far less than what it is in Eastern U.P. The said facts are the reason for the change in the policy of the Government and for giving up the notification calling for bids for Eastern U.P. Such a change in policy cannot, in our opinion, be said to be irrational or perverse according to Wednesbury principles. In the circumstances, on the basis of the clear principles laid down in *ex p Hargreaves* and *ex p Unilever*, the Wednesbury principle of irrationality or perversity is not attracted and the revised policy cannot be said to be in such gross violation of any substantive legitimate

expectation of the appellant which warrants interference in judicial review proceedings."

40. In the case of *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation & Ors.*<sup>10</sup>, this Court was concerned with the question relating to NIT issued by Ulhasnagar Municipal Corporation for appointment of agents for collection of octroi and revision of terms and conditions thereof. This Court held :

".....The High Court had directed the commencement of a new tender process subject to such terms and conditions, which will be prescribed by the Municipal Corporation. New terms and conditions have been prescribed apparently bearing in mind the nature of contract, which is only collection of octroi as an agent and depositing the same with the Corporation. In addition, earnest money and the performance of bank guarantee are insisted upon; collection of octroi has to be made on day-to-day basis and payment must be made on a weekly basis entailing, in case of default, 10 (2000) 5 SCC 287 cancellation of the contract. We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best judge. We do not think that we should intercede to restore status quo ante the conditions arising in clauses 6(a) and 6(b) of the Tender Booklet and the bid offered much earlier by Konark Infrastructure (P) Ltd. should be accepted, for it filed a writ petition, which was allowed with a direction for calling for fresh tenders....."

41. In *Union of India and Anr. v. International Trading Co. and Anr.*<sup>11</sup>, this Court held that non-renewal of permit by the Government to a private party on ground of change in its policy cannot be faulted if such change is founded on Wednesbury reasonableness and is otherwise not arbitrary, irrational and perverse. It was held :

"22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil 11 (2003) 5 SCC 437 sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country."

42. In the case of Directorate of Education and Ors. v. Educomp Datamatics Ltd. and Ors.<sup>12</sup>, this Court, inter alia, applied the principles enunciated in Tata Cellular<sup>7</sup> and Monarch Infrastructure (P) Ltd.<sup>10</sup> and held as follows :

"12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

43. In Bannari Amman Sugars Ltd. v. Commercial Tax Officer & Ors.<sup>13</sup>, this Court was concerned with the question 12 (2004) 4 SCC 19 13 (2005) 1 SCC 625 relating to withdrawal of benefits extended to appellant therein as subsidy and it was held :

".....We find no substance in the plea that before a policy decision is taken to amend or alter the promise indicated in any particular notification, the beneficiary was to be granted an opportunity of hearing. Such a plea is clearly unsustainable. While taking policy decision, the Government is not required to hear the persons who have been granted the benefit which is sought to be withdrawn."

44. In Global Energy Limited & Anr. v. Adani Exports Ltd. and Ors.<sup>14</sup>, this Court reiterated the principles that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

45. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. & Anr.<sup>15</sup>, the legal position highlighted in Tata Cellular<sup>7</sup> was reiterated in the following words :

"12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

The court does not have the expertise to correct the administrative decision. If a review of the administrative 14 (2005) 4 SCC 435 15 (2005) 6 SCC 138 decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

### Our View

46. In the light of the afore-noticed legal position, we shall now examine whether judicial intervention is called for in NIT issued by the State of West Bengal and State of Orissa for manufacture and supply of HSRP. Insofar as State of West Bengal is concerned, the first NIT was issued in the month of July, 2003 fixing August 6, 2003 as the last date for submission of tender papers. Pursuant thereto, four bidders participated.

The finalization of the tender process could not take place because of interim order passed by this Court in Association of Registration Plates<sup>1</sup> and other connected cases. These cases were decided by this Court on November 30, 2004. Of the four bidders, who initially participated in the tender process, one withdrew and as regards Promuk, an objection was raised by Shimnit about their eligibility. Shimnit approached Calcutta High Court and obtained an interim order from the Single Judge that tender process shall not be finalized. As a matter of fact, due to litigation no substantial progress took place for two years in finalization of process for which NIT was issued in July, 2003 and practically two bidders in the entire tender process remained in fray. In interregnum, considerable number of indigenous manufacturers obtained the requisite TAC from the approved institutions as per the provisions of 1988 Act and thereby acquired capacity and ability to manufacture HSRP. In the backdrop of these reasons, the State Government seemed to have formed an opinion that by increasing competition, greater public interest could be achieved and, accordingly, decided to cancel first NIT and issued second NIT doing away with conditions like experience in foreign countries and prescribed minimum turnover from that business. Whether State Government could have changed terms of NIT despite the judgment of this Court in Association of Registration Plates<sup>1</sup>? Once a particular matter relating to conditions in NIT has been finally decided by the highest Court, the State Government, which was party to the litigation, ought to have proceeded accordingly but, in a case such as the present one, where the circumstances changed in some material respects as aforenoticed, departure from the earlier policy cannot be held to be legally flawed, particularly when there is no challenge to the changed policy reflected in second NIT on the ground of Wednesbury reasonableness or principle of legitimate expectation or arbitrariness or irrationality. In considering whether there has been a change of circumstances sufficient to justify departure from the previous stance, the Division Bench of Calcutta High Court recorded a finding

that reasons stated by the State Government for departure from the conditions in the first NIT did exist and accepted the contention of the State Government that by increasing the area of competition, greater public interest would be sub-served because of financial implications. We have no justifiable reason to take a view different from the High Court insofar as correctness of these reasons is concerned. The courts have repeatedly held that government policy can be changed with changing circumstances and only on the ground of change, such policy will not be vitiated. The government has a discretion to adopt a different policy or alter or change its policy calculated to serve public interest and make it more effective. Choice in the balancing of the pros and cons relevant to the change in policy lies with the authority. But like any discretion exercisable by the government or public authority, change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.

47. In *Association of Registration Plates*<sup>1</sup>, this Court while dealing with the challenge to the conditions with regard to experience in foreign countries and prescribed minimum turnover from that business observed that these conditions have been framed in the NIT to ensure that the manufacturer selected would be technically and financially competent to fulfill the contractual obligations and to eliminate fly-by-night operators and that the insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. While maintaining the State Government's right to get the right and most competent person, it was held that in the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of HSRP, greater latitude is required to be conceded to the State authorities and unless the action of tendering authority is found to be malicious and a misuse of statutory powers, tender conditions are unassailable. On the contentions advanced, this Court examined the impugned conditions and did not find any fault and overruled all objections raised by the petitioners therein in challenge to these conditions. This Court has neither laid down as an absolute proposition that manufacturer of HSRP must have the foreign experience and a particular financial capacity to fulfill the contractual obligations nor it has been held that these conditions must necessarily be insisted upon in the NIT. The judgment of this Court in *Association of Registration Plates*<sup>1</sup> cannot be read as prescribing the conditions in NIT for manufacture and supply of HSRP. Rather this Court examined legality and justification of the impugned conditions within the permissible parameters of judicial review and recognized the right of the States in formulating tender conditions. In our opinion, there is no justification in denying the State authorities latitude for departure from the conditions of the NIT that came up for consideration before this Court in larger public interest to broaden the base of competitive bidding due to lapse of time and substantial increase in the number of persons having TAC from the approved institutes without compromising on the quality and specifications of HSRP as set out in Rule 50, Order 2001 and Amendment Order, 2001.

48. Mr. F.S. Nariman, learned senior counsel heavily relied upon a decision of this Court in *S. Nagaraj & Ors. v. State of Karnataka & Anr.*<sup>16</sup> and submitted that the decision of this Court in *Association of Registration Plates*<sup>1</sup> was binding on all States and the said judgment has to be enforced and obeyed strictly and any deviation from those conditions by the States on their own is impermissible.

49. In *S. Nagaraj & Ors.*<sup>16</sup>, this Court observed as follows :

"Was it so? Could the Government take up this stand? Law on the binding effect of an order passed by a court of law is well settled. Nor there can be any conflict of opinion that if an order had been passed by a court which had jurisdiction to pass it then the error or 16 1993 Suppl. (4) SCC 595 mistake in the order can be got corrected by a higher court or by an application for clarification, modification or recall of the order and not by ignoring the order by any authority actively or passively or disobeying it expressly or impliedly. Even if the order has been improperly obtained the authorities cannot assume on themselves the role of substituting it or clarifying and modifying it as they consider proper. In Halsbury's Laws of England (Fourth Edn., Vol. 9, p. 35, para 55) the law on orders improperly obtained is stated thus:

"The opinion has been expressed that the fact that an order ought not to have been made is not a sufficient excuse for disobeying it, that disobedience to it constitutes a contempt, and that the party aggrieved should apply to the court for relief from compliance with the order."

Any order passed by a court of law, more so by the higher courts and especially this Court whose decisions are declarations of law are not only entitled to respect but are binding and have to be enforced and obeyed strictly. No court much less an authority howsoever high can ignore it. Any doubt or ambiguity can be removed by the court which passed the order and not by an authority according to its own understanding."

50. The statement of law expounded in *S. Nagaraj*<sup>16</sup> is beyond question. As noticed above, in the case of *Association of Registration Plates*<sup>1</sup>, this Court did not find any fault with the controversial conditions in the NIT and overruled all objections raised by the petitioners therein in challenge to those conditions.

The impugned conditions of NIT in that group of cases were not held to be arbitrary, discriminatory or irrational nor amounted to creation of any monopoly as alleged. The declaration of law by this Court in *Association of Registration Plates*<sup>1</sup> is that in the matter of formulating conditions for a contract of the nature of ensuring supply of HSRP, greater latitude needs to be accorded to the State authorities. We find it difficult to hold that by virtue of that judgment the impugned conditions were frozen for all times to come and the States were obliged to persist with these conditions and could not alter them in larger interest of the public. In our view, the decision of this Court in *Association of Registration Plates*<sup>1</sup> did not create any impediment for the States to alter or modify the conditions in the NIT if the circumstances changed in material respects by lapse of time.

51. In the PIL filed by Maninderjit Singh Bitta, it was prayed that the States and UTs be directed to

implement the judgment of this Court in Association of Registration Plates1 .

This Court disposed of the writ petition on May 8, 2008 by observing, 'we feel it would be in the interest of all concerned if the States and Union Territories take definite decision as to whether there is need for giving effect to the amended Rule 50 and the scheme of HSRP and the modalities to be followed'. It was further observed that while taking the decision, the aspects highlighted by this Court in Association of Registration Plates1 shall be kept in view. After disposal of the PIL, the petitioner therein filed I.A. No. 5 for clarification of the order dated May 8, 2008 and this Court while disposing of the said I.A. on May 5, 2009 clarified that there was no discretion given to the States/UTs not to give effect to the amended Rule 50 and the claim of HSRP and the modalities to be followed. Thereafter, I.A. was filed by the Central Government on September 17, 2009 before this Court for extension of time wherein the following statement was made:

"The primary reason for non implementation of the scheme has been the challenges to certain conditions of the tender floated by various States. The issues such as experience in foreign countries, minimum net worth and turnover with a certain prescribed percentage of turn over from number plate business in the immediately preceding last three years and long term contract to a single vendor for the entire State had been the subject matter of WP(C) No. 41 of 2003--Association of Court in the judgment dated 30th November, 2004, laid to rest all such issues by holding that all such conditions were essential and mandatory conditions of the HSRP tender to ensure that the vendors selected by the States would be technically and financially competent to fulfill the contractual obligations which looking to the magnitude of the job requires huge investment qualitatively and quantitatively."

By order dated December 15, 2009, this Court extended the time for implementation of HSRP upto May 31, 2010. None of these orders holds that while implementing the new system of HSRP, States and UTs are bound to incorporate the conditions of foreign experience and minimum turnover from that business.

The statement made by the Central Government in its application as aforementioned only reflected the reason for non- implementation of HSRP scheme. As a matter of fact, the Central Government has clarified the position in its communication with the States/UTs that draft tender conditions circulated by them are only suggestive. Be that as it may. The decision of this Court in Maninderjit Singh Bitta and the subsequently clarificatory order therein are hardly relevant and do not help the case of the appellants.

52. It is important to notice that the bids pursuant to the second NIT have been evaluated by WBTIDCL and we have been informed that the lowest bid per HSRP unit for a vehicle is Rs. 469/- while the offer made by Shimnit (appellant) is of about Rs. 1200/-. Such a huge difference in the rate per HSRP unit shows that the action of the State Government in doing away with the conditions

of experience in foreign countries and prescribed turnover from such business has been in larger public interest without compromising on safety, security and quality or sustainable capacity.

53. Mr. F.S. Nariman, learned senior counsel contended that cancellation of first NIT and issuance of second NIT by the Government of West Bengal was actuated with malafides as Shimnit had challenged the pre-qualification of Promuk by filing a writ petition before the Calcutta High Court wherein an interim order also came to be passed. We are not impressed by this submission at all and it is noted to be rejected. There is no material much less substantial material to infer any malafides. Merely because Shimnit challenged the pre-qualification of Promuk before Calcutta High Court, it could hardly lead to an inference of malafides.

54. It is true that the State or its tendering authority is bound to give effect to essential conditions of eligibility stated in a tender document and is not entitled to waive such conditions but that does not take away its administrative discretion to cancel the entire tender process in public interest provided such action is not actuated with ulterior motive or is otherwise not vitiated by any vice of arbitrariness or irrationality or in violation of some statutory provisions. It is always open to the State to give effect to new policy which it wished to pursue keeping in view 'overriding public interest' and subject to principles of *Wednesbury* reasonableness. The judgment of Guwahati High Court in *Real Mazon India Ltd. v. State of Assam and Ors.*<sup>17</sup> was also pressed into service by the appellants. In that case, the corrigenda dated December 26, 2006, January 6, 2007 and January 16, 2007 issued by the State of Assam deleting the conditions of experience, expertise and exposure of the bidders in the manufacture and supply of HSRP were challenged.

Guwahati High Court quashed the impugned corrigenda. We are unable to approve the judgment of the Guwahati High Court in *Real Mazon India Ltd.*<sup>17</sup> for the reasons given above.

55. As regards the State of Orissa, it is an admitted position that it issued NIT for the first time on April 11, 2007 inviting bids for the manufacture and supply of HSRP in respect of the existing motor vehicles and vehicles to be registered in the State of Orissa. The said NIT was not taken to logical conclusion and a fresh NIT was issued on July 6, 2009 on BOO 17 2008 (1) GLT 1020 basis. In that NIT, inter alia, eligibility criteria has been provided that bidder should have experience of working in the field of HSRP having used the security features as mentioned in Rule 50 of 1989 Rules. However, NIT does not insist on conditions like experience in the foreign countries and minimum prescribed turnover from the said business. In what we have already discussed above, no case for judicial review or intervention in the said NIT is made out.

56. For the foregoing reasons, both appeals must fail and are dismissed with no order as to cost.