

# **Smith Detection Asia Pacific Pte. Ltd. vs Electronics Corporation Of India Ltd. ... on 23 March, 2004**

**Equivalent citations: 2004(2)ALD878, 2004(3)ALT305**

**Author: R. Subhash Reddy**

**Bench: R. Subhash Reddy**

ORDER

R. Subhash Reddy, J.

1. The Government of India's decision to implement a pilot project for installation of electronic truck/container scanning systems, in Jawaharlal Nehru Port Trust, Navi Mumbai for use by the customs authorities, led to filing of this writ petition. The petitioner-Smiths Detection Asia Pacific Pte Limited which is having its parent company in Germany, engaged in the business of scanning systems filed this writ petition seeking a writ of mandamus, certiorified mandamus or declaration, declaring:

(a) That the memorandum of I understanding dated 11-8-2003 between the second respondent - Union of India and the first respondent - Electronics Corporation of India Limited (hereinafter referred to as "ECIL") and all consequential steps taken pursuant thereto, including the purchase order ECIL/SSD/R-6216/N/1176 dated 28-8-2003 issued by the first respondent in favour of the fifth respondent and any other purchase order issued by the first respondent in favour of the fifth respondent pursuant to the memorandum of understanding dated 11-8-2003, as illegal and contrary to law;

(b) To call for the records of the memorandum of understanding dated 11-8-2003 between the first respondent and the second respondent and quash the said memorandum of understanding dated 11-8-2003 as well as all consequential acts, steps, orders and contracts including the purchase order ECIL/SSD/R-6216/N/1176 dated 28-8-2003 issued by the first respondent in favour of the fifth respondent and any other purchase order or contracts issued by the first respondent in favour of the fifth respondent and set aside and/or cancel the said or any other contract/contracts for the supply and installation of any container scanner systems between the first respondent, second respondent and the fifth respondent; and

(c) To direct the first respondent and/ or the second respondent to invite fresh bids through global tender for awarding contracts for supply of container scanners at any

or all the ports in India.

2. Necessary facts in brief are as follows:

3. The Government of India has decided to acquire truck/container, scanning systems by deploying state of the art scanning technologies. A committee of Secretaries to the Government of India chaired by the Cabinet Secretary, Government of India, decided to entrust the task of procuring scanning systems and the associate technologies to a public sector undertaking, considering the sensitiveness of the project and security threats faced by the nation. Ultimately ECIL and the Bharat Electronics Limited were identified and both companies were required to make presentations/proposals. Noticing adequate expertise with the ECIL with regard to the technologies involved in X ray and gamma scanning systems to maximize value addition and assume substantial indigenization and in the process to ensure possession of critical technologies by the country, the Government of India designated ECIL as the lead agency and decided to go for two pilot projects immediately, one for seaport and another for airport to start with apart from the third pilot project to cater to the requirements of intelligence bureau. ECIL submitted its techno commercial proposal dated 28-3-2003 to the Ministry of Finance for implementation of electronic truck/container scanning systems at Jawaharlal Nehru Port, Navi Mumbai and the same was accepted by the Ministry of Finance and the memorandum of understanding was entered into on 11-8-2003 between the Directorate of Preventive Operations, Ministry of Finance, Government of India and the ECIL. The scope of supply as per the said memorandum of understanding relates to (1) supply, installation and commissioning of high energy X-ray (relocatable version) RAPISCAN system type 2213R - one number consisting of the following subsystems:

- (a) 6 MeV liner accelerator
- (b) Image detectors
- (c) Detector controller
- (d) Scan engine
- (e) Alarms
- (f) Cabling
- (g) Electric hydraulic drive conveyance
- (h) Shield doors
- (i) X SC - S ray system controller
- (j) Computer system

(k) CCTV system

(l) PA and intercom system

(m) PLCs and interfacing

4. The second item relates to supply, installation and commissioning of mobile gamma ray system-RAPISCAN type 4200 GaRDS - one number consisting of the following sub-systems:

(a) Modified vehicle chassis

(b) Imaging detector array consisting of 368 detectors in L shape.

(c) Imaging detector boom

(d) Source boom

(e) 1.0 curie cobalt60 isotopic source

(f) Isotopic source cask

(g) Operator display work station

(h) Scan engine

5. Pursuant to the said understanding, first respondent - ECIL has placed purchase order dated 28-8-2003 with the fifth respondent company - Rapiscan Security Products which is a California based company, for supply of the above systems.

6. The petitioner questions, on several grounds, the memorandum of understanding entered into by the second respondent -Government of India with the first respondent-ECIL and the consequential purchase order placed by ECIL with the fifth respondent for supply of the above said scanning systems. It is the case of the petitioner that along with its parent company it is a global leader engaged in providing cargo inspection systems with 50 years of experience and had installed such systems in several countries across the world. Petitioner company promoted by Smiths Detection Asia Pacific Pte Limited, Singapore is having its branch office in India and obtained approval from the Reserve Bank of India and is a wholly owned subsidiary of Smiths Germany, It challenges the memorandum of understanding and the consequential purchase order mainly on the grounds that the container scanners are high sensitive scanners which are used to scan ingredients of the containers which arrive at the ports and other different places and the first respondent - ECIL, without any concern for the importance and sensitivity of the contract, in a mala fide and arbitrary method and without even issuing a notice inviting tenders, has awarded the contract for supply of two container scanners worth approximately Rs. 25 crores to the fifth respondent company, It is the case of the petitioner that the fourth respondent, is a joint venture company of the first and fifth

respondents and in that view of the matter the first respondent company has preferred to award the contract to the fifth respondent, without issuing notice inviting tenders and as such the same is arbitrary and unreasonable. It is also the case of the petitioner that the second respondent - Union of India and the first respondent - ECIL, being an instrumentality of the State are bound to act in fair and transparent manner in awarding commercial contract and action of the first and second respondents, is wholly unjustified and is contrary to well recognized mode of awarding contract. As such it is the case of the petitioner that said action of the first and second respondents is in violation of the fundamental right guaranteed under Article 14 of the Constitution of India. It is further the case of the petitioner that the award of contract to the fifth respondent clearly smacks of bias, arbitrariness and favouritism by the first respondent and is against public interest, since the procedure was subverted to benefit fifth respondent. It is also further stated that the former Managing Director of the first respondent is one of the Directors in the fourth respondent joint venture company. So it is the case of the petitioner that the said decision is against public interest and unreasonable, irrational and is also in violation of Article 14 of the Constitution of India.

7. Respondents have countered the challenge by filing separate counter-affidavits. Second respondent - Union of India has countered the challenge by stating that the petitioner is a foreign company and is claiming right under Article 14 of the Constitution on the ground of arbitrariness and discrimination. It is the case of the second respondent that the petitioner being a foreign company cannot claim any fundamental rights in India either to do business with the Government or to challenge the action of the Government on the anvil of Article 14 of the Constitution. Further it is the case of the Government that the invitation of tenders for award of the contract is not sine qua non for the award of the Government contract. In any case it is their case that the petitioner is not a manufacturer of gamma ray scanning systems nor they have installed any 9 MeV relocatable scanning systems which are the two items approved by the Government basing on the requirement with reference to Customs Department in particular and recommended by experts after conducting extensive studies and undertaking inspections. As such, there is no basis for challenge by the petitioner. It is stated that the ultimate requirement of the Government of India with reference to various international seaports, airports and the quantum of movement of cargo in the country would be several scanners in course of near future. Therefore, Government of India has been very cautious not to order for the total requirement of the day, but to order only two scanners of the description set out above as pilot projects and to see the efficacy of those systems in their actual working to find out whether the systems now selected would be suitable to Indian requirements as projected. It is their case that number of meetings of the committee of secretaries are held in this behalf, and the various expert reports given clearly show that this is a matter where the experts in the country have to assess the various systems and to arrive at a decision. As the scanners are required for the purpose of checking principally the smuggling of contraband goods and to see that goods imported are in accordance with the manifests filed by the importers, it is important not only to control and regulate the economic activity of imports and exports but also to address the security concern of the nation. It is their further case that the first respondent is an agent and instrumentality of the State which has entered into a joint venture with the fifth respondent and the said joint venture company is the fourth respondent. As such, it is their stand that the memorandum of understanding virtually tantamount to State taking its assistance in whom the State has confidence going by the best track record and there is nothing illegal in the same. It is further the case of the second respondent that

the placement of order with the fifth respondent also stipulates the ultimate transfer of technology in congruence with the current line of research in the country and with the available resources including sensitive radio active materials so that these machines/ scanners can in course of time be manufactured in India and that the foreign dependency is eliminated which will be in the national interest. The said memorandum of understanding in question is defended by the Government by further stating that before entering into it, serious deliberations at the highest level were held taking all relevant factors into account and there is no flaw in the decision to question the same on the ground of violation of Article 14 of the Constitution. It is therefore the case of the second respondent that the decision taken is in public and national interest and it is not open to a foreign company like the petitioner to challenge the same. Ultimately it is stated that the decision of the Government is to have technology transfer and to have such types of scanners manufactured in our country itself and inasmuch as the fifth respondent is manufacturer of all the required technologies and agreed to transfer such technology, purchase order is placed on the fifth respondent company.

8. In similar lines the first respondent - ECIL also defended the challenge stating that it awarded the contract pursuant to memorandum of understanding dated 11-8-2003 and the said contract is purely a commercial contract and it placed the purchase order pursuant thereto with the fifth respondent-Rapiscan Security Products, California, USA on 28-9-2003. It is further stated that the technologies that are proposed to be obtained by ECIL are for and on behalf of the Government of India but not for ECIL and the ECIL is not the end user of the said technologies. It is further the case of ECIL that it being a unit under Department of Atomic Energy and having close research and development association with BARC has got varied experience in this field and can satisfy all safety related issues involved in the proposed project. It is its case that it is giving a very high impetus on the electronic security systems development and deployment and one such glaring fact is its on going execution of security systems for the prestigious Parliament house. In addition, it is the lead company looking after the security suggested design for the most sensitive nuclear power plants. ECIL values the importance of security systems and the container security systems as one of its products in stand alone/integrated approaches. It is its further case that department of customs projected their functional requirements for the systems for electronically inspecting a sizeable percentage of containers being transited through the Jawaharlal Nehru Port Trust aimed at manifest verification and detection of contraband. This can be effectively achieved by either using combination of x-ray system and mobile gamma systems and according to them it would take care of the two important parameters of through-put and penetration apart from providing flexibility. It is also stated that extensive studies were conducted to identify commercially available technologies used in container scanning system manufactured by leading suppliers in the world including that of the petitioner and ultimately it was found that the fifth respondent is the only company which is possessing and offering all the three scanning technologies i.e., high energy x-ray, gamma and thermal/fast neutron analysis. It is also stated that Rapiscan being a joint venture partner to ECIL with whom transfer of technology has been successful over the past 10 years, it also agreed to transfer technology and allow ECIL to indigenize and use the said sub systems for integration in the forthcoming supplies. Besides, Rapiscan also assured ECIL that it would buy back critical components like linear accelerator and gamma source and cask once they are developed by BARC/ ECIL. It is its case that the availability of such indigenous technology of important inputs would protect the country from threat of non-supplies and sanctions for various reasons, political or

otherwise by other countries. It is also stated that pursuant to entering into memorandum of understanding on 11-8-2003 for installation and commissioning of Rapiscan systems of high energy x-ray and gamma ray systems, ECIL has received 20% of the contract price from the Ministry of Finance on 13-8-2003. Thereafter it released purchase order on 29-8-2003 to the fifth respondent - Rapiscan. Rapiscan invited officials of ECIL to inspect the systems manufactured by it at their factory in USA and the officials of the ECIL have visited Rapiscan factory and accepted the system manufactured by them. It is further stated that Rapiscan by their communication dated 10-10-2003 certified that the staff from the Indian Customs Department visited Rapiscan factory for training from 6-10-2003 to 10-10-2003 and the Rapiscan dispatched the goods from USA to India by their communication dated 21-10-2003 and consequently ECIL released further 20% of the advance to Rapiscan on 21-10-2003. It is further the case of the ECIL that Rapiscan is the only company which is possessing all the required technologies and made similar supplies to various countries which are working very well to the satisfaction of the customers. With regard to the price it is stated that the ECIL has verified the value of the order received by Rapiscan and is convinced that the price offered by Rapiscan is reasonable and the same is reflected in their quotation to Government. It also opposed the challenge on the ground that the petitioner which is not possessing all the required technologies which are required by Government of India, cannot question the decision placing purchase order on the fifth respondent only on the ground that global tenders were not invited. Ultimately it is its case that this is a pilot project and decision was taken by threadbare discussions at Ministry level and consequently considering their techno commercial proposals and accepting the same the Government has entered into MOU and pursuant thereto purchase order was placed for supply and installation of required technologies. It has specifically denied any favouritism, arbitrariness in the process and specifically denied the allegation that the erstwhile Managing Director of the first respondent is one of the directors of the fourth respondent company.

9. Fourth respondent has also filed a separate counter-affidavit denying the allegation that erstwhile Managing Director of the first respondent is not on the board of directors of the fourth respondent.

10. Fifth respondent has filed counter-affidavit specifically denying the allegation of mala fide in placing purchase on it. It is stated that the petitioner is motivated to file this writ petition because of personal vendetta against it. It is further stated that the petitioner does not have the capacity to supply the systems in question.

11. With reference to the above said averments it is submitted by Sri P. Chidambaram, learned Senior Counsel appearing for the petitioner - company that the action of the second respondent in entering into MOU with the first respondent to purchase the security scanning systems without issuing notice inviting tenders is illegal and arbitrary and it is submitted by the learned Senior Counsel that the second respondent dealing with public largesse has no unfettered discretion to enter into MOU with the first respondent to place the order with the fifth respondent for purchase of scanning systems, without inviting global tenders. It is submitted by the learned Senior Counsel that the contract is only for the purpose of supply and one need not be manufacturer and the fifth respondent is chosen arbitrarily by the first respondent only to favour the said company, in view of their relation in the fourth respondent. As such learned Senior Counsel submits that it is not a bona fide transaction and the order is placed on the fifth respondent for an exorbitant price and the MOU

entered into is a tailor made one for placing order on the fifth respondent. Learned Senior Counsel submits that the said action of the first and second respondents is contrary to several judgments on the question rendered by the Apex Court and the said action is illegal, arbitrary and in violation of rights guaranteed under Article 14 of the Constitution.

12. Sri L. Nageswara Rao, learned senior Counsel appearing on behalf of the first respondent firstly contended that this Court has no jurisdiction to entertain the writ petition for the reason that the cause of action has not arisen in the State of Andhra Pradesh and therefore this writ petition has to be dismissed for want of jurisdiction. He submits that the MOU entered into by the second respondent is consequent to their policy to indigenize the technology for manufacturing these scanning systems for future requirements. Therefore such a policy decision is not amenable to judicial review. It is further submitted by the learned Counsel that considering the facts that ECIL is taking up the technology transfer and indigenization of these linac and gamma based systems in India as per the Government directives, the MOU was entered into empowering the ECIL to place purchase order only for the present pilot projects. It is further submitted by the learned Counsel that the first respondent is associated with fifth respondent from 3-1-1995 and also formed joint venture under the name and style of ECIL Rapiscan. As such it is submitted that they have good working relationship with Rapiscan and also has a successful technology transfer arrangement with Rapiscan over the last about 9 years. Ultimately it is submitted that the primary aim and objective in procuring the scanners is to indigenize the sensitive technologies involved and to commence production within the country, without depending upon any foreign organization which fifth respondent is fulfilling already. As such it is submitted by learned Counsel that there is no arbitrariness involved in entering into MOU and placing purchase order with the fifth respondent.

13. Sri V.T. Gopalan, learned Additional Solicitor General appearing for the second respondent submits that the petitioner is a foreign company and hence it has no fundamental right to carry on any occupation, trade or business under Article 19(1)(g) and as such it is not entitled to invoke Article 14 to question the MOU on the ground that it is arbitrary and illegal. Learned Counsel submits that merely because an approval is obtained from the Reserve Bank of India to start a branch office in India the same will not improve the case of the petitioner inasmuch the Reserve Bank of India has not granted permission to it for purpose of carrying on or entering into contract over the subject-matter in issue and the plea of the petitioner is to be rejected in limine as it cannot seek enforcement of fundamental rights. It is submitted by the learned Counsel that the issue to acquire scanning systems got momentum on the representation of the Deputy Chief Minister of Maharashtra complaining to the Hon'ble Union Minister for Home seeking provision of facility to check container cargo in view of imminent threat of smuggling RDX/explosives through containers. He submitted that in view of the said representation to acquire the required container scanning systems, a team was constituted to prepare a project report. The petitioner herein also coming to know of such proposal submitted its offer. It is submitted that the offer of the petitioner was also considered in the project report which inter alia reported that the gamma ray technology which is the new technology is cheaper to maintain and has longer life. It is further submitted that the report mentioned about the demonstrations given by the petitioner and also others with respect to different technology systems available in the world. The Central Board of Excise and Customs in its meeting reviewed various options. Ultimately the Finance Ministry has approved in principle for

inclusion of the proposal in the X Plan to acquire the container scanners. It is submitted that finally it was decided that as a pilot project, two scanners would be required for Nav Sheva Port - one 9 MeV relocatable scanning system and the other mobile gamma ray scanner. It is submitted by the learned Counsel that inasmuch as fifth respondent, has all the three technologies available including the required technologies as per MOU, and as it has already been collaborating with the first respondent in a joint venture company and also agreed to transfer technology to ECIL who would ultimately commence indigenous production of such critical products in furtherance of the policy, the MOU is entered into with the first respondent to acquire the said technology from the fifth respondent company. It is further submitted by the learned Counsel that the procurement for future requirements is subject to successful commissioning of pilot projects. Lastly it is submitted by the learned Counsel that the whole matter has received the utmost consideration and application of mind on every aspect of transaction including the non-calling of tenders at all levels of its decision making. Thus there is no flaw in the decision making process. Learned Counsel submits that though general rule might be to call for tenders but in view of the sensitivity attached and as per the policy notified by the Government and in view of the arrangement for transfer of technology, MOU is entered into with the first respondent to acquire the scanning systems.

14. The learned Senior Counsel appearing for the petitioner as well as the respondents have relied on several judgments of the Apex Court in support of their pleas. Inasmuch as many of the judgments have been referred to in common, by both the parties, I refer to the judgments a little latter.

15. Having regard to the above submissions and challenge in the writ petition the questions which emerge for consideration are:

- (1) Whether this Court has no territorial jurisdiction to entertain this writ petition?
- (2) Whether the petitioner has no locus standi being a foreign company to canvass before this Court the violation of Article 14 of the Constitution of India, in award of contract by the first respondent to the fifth respondent?
- (3) Whether the decision of the Government of India to enter into MOU with ECIL to acquire the scanning systems and the decision of the ECIL to place purchase order on the fifth respondent without issuing notice inviting tenders is arbitrary, illegal and in violation of Article 14 of the Constitution?
- (4) Whether the action of the first and second respondents in entering into MOU to purchase container scanners from the fifth respondent is mala fide and against public interest?

16. In this connection I refer to some of the judgments of the apex Court which have bearing on the issue involved in the present writ petition.



17. Though the contention is raised by Sri L. Nageswara Rao, learned Senior Counsel on behalf of the first respondent that no cause of action has arisen in the territorial jurisdiction of the Andhra Pradesh High Court, and therefore there is no jurisdiction in this Court to entertain this writ petition, but no serious argument is advanced on this aspect. However, it is to be seen that originally the writ petition was filed in Delhi High Court and it was opposed on the ground that Delhi High Court did not have territorial jurisdiction because the decision to place the order was taken by ECIL whose registered office is in Hyderabad. At that point of time, writ petitioner was not aware of the memorandum of understanding dated 11-8-2003. As such the petitioner withdrew the writ petition on 13-10-2003 and subsequently filed the same in this Court on 14-10-2003. In terms of the amended writ prayer the petitioner has questioned the memorandum of understanding entered into by the Directorate of Preventive Operations, Ministry of Finance, Government of India and Electronics Corporation of India Limited, Hyderabad. Petitioner also questioned the subsequent purchase order issued by the ECIL on 28-8-2003 pursuant to the MOU. As the said MOU is entered into by Government of India with ECIL whose registered office is in Hyderabad and further in view of the fact that the purchase order is also questioned which was issued by the ECIL from Hyderabad, it is not open for the respondents to plead that no cause of action has arisen in the territorial jurisdiction of this Court, more particularly, when the purchase order was issued from Andhra Pradesh i.e., from the headquarters of ECIL in Hyderabad with whom MOU was entered into by the Government of India. In view of the clear language envisaged in Article 226(2) of the Constitution of India it is not open for the first respondent to contend that no jurisdiction lies in this Court to entertain the petition filed under Article 226. Therefore, I am of the clear opinion that this Court has jurisdiction to entertain this writ petition and the contention of the first respondent is liable to be rejected and is hereby rejected.

18. Sri V.T. Gopalan, learned Senior Counsel advanced the contention on behalf of the second respondent to the effect that the petitioner being a foreign company, cannot claim any right under Article 14 of the Constitution of India. It is his contention that the right available to a person under Article 14 cannot be considered in abstract and such a right to complain of arbitrariness or discrimination must be founded on some other right and he further contended that when there is no right in the petitioner under Article 19 to carry on business with the Government of India, it cannot claim any right under Article 14 on the ground that the decision of the Government of India is unfair, arbitrary and unreasonable. The learned Senior Counsel relied on the judgment of the Apex Court in ., in which the apex Court has decided the status and rights of foreigners in India with reference to Article 21 of the Constitution. In the said judgment the Apex Court has held thus:

36. The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.

34. Article 19 of the Constitution confers certain fundamental rights of freedom on the citizens of India, among them, the right "to move freely throughout the territory of India" and "to reside and settle in any part of India" subject only to laws that impose reasonable restrictions on the exercise of those rights in the interests of the

general public or for the protection of the interests of any Scheduled Tribe. No correspondent rights are given to foreigners. All that is guaranteed to them is protection to life and liberty in accordance with the laws of the land. This is conferred by Article 21 which is in the following terms:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

19. The learned Counsel further relied on *Anwar v. The State of J&K*, in which the apex Court has held that the rights guaranteed under Article 19 are not available to a foreigner in India while holding that the rights guaranteed under Articles 20 to 22 are available to a foreigner in India. He also relied on the judgment of the Apex Court in *Louis De Raedt v. Union of India*, in which the Apex Court has held that fundamental rights envisaged under the Constitution of India available to a foreigner are confined to Article 21 and do not include the right to reside and settle in this country as envisaged under Article 19(1)(e) which is available only to citizens of this country. The learned Senior Counsel appearing for the petitioner Sri P. Chidambaram has answered submitting that the said issue is not *res Integra* and he relied upon the judgments of the apex Court in *STC of India Ltd v. CTO*, AIR 1963 SC 1811 and *Chairman, Railway Board v. Chandrima Das*. In *Chandrima Das*, the Apex Court has clearly held that the fundamental rights guaranteed under Part III of the Constitution are available to all the citizens but a few of them are also available to persons. It held that while Article 14 which guarantees equality before law and equal protection of laws, within the territory of India is applicable to 'a person' which would also include the citizens of the country and non-citizens and Article 15 speaks only of citizens and it is specifically provided therein that there shall be no discrimination against any citizen on the ground only of religion, race, caste, sex, place of birth or any of them. So in the said judgment the apex Court has clearly considered the rights guaranteed to persons in contra distinction to rights available to citizens. In the said judgment the Supreme Court has held:

27. Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the fundamental rights is contained in Part III of the Constitution. The purpose of this Part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the Government at the Centre or in the State.

20. In view of the said judgments, even in absence of any right under Article 19 conferred on the petitioner, who is a non-citizen, it can question the actions of the Government and the governmental authorities by invoking Article 14 since the right under Article 14 is available to all 'persons'. Hence, the contention of the learned Counsel for the second respondent cannot be accepted and is hereby rejected.

21. Coming to the merits of the case, in the case of *R.D. Shetty v. International Airport Authority*, while dealing with the contractual obligations of the State the Apex Court has held that the State

cannot act arbitrarily at its sweet will like a private individual and its action must be in conformity with the standard or norm which is not arbitrary, irrational and irrelevant. It further held that the State cannot therefore act arbitrarily in entering into relationship contractual or otherwise with a third party. Its action must conform to certain standard or norm which is rational and non-discriminatory. In the case of *Kasturi Lal Lakshmi Reddy v. State of J&K*, the Apex Court while holding that the State in giving contract of resin to the second respondent therein acted in accordance with its policy of industrialization of the State, further held that the Government can accept a package scheme offered by an individual which serves public interest. In the said judgment the apex Court has further held that the benefit to the State is not to be judged by the monetary benefit only but the totality of the benefit to the State and the public against the entire set of facts and circumstances of the case is to be considered. In the said judgment the Apex Court has further held that there is always a presumption that Government's action is reasonable and is in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is heavy and it has to be discharged to the satisfaction of the Court by proper and adequate material and the Courts cannot lightly assume that the action taken by the Government is unreasonable or without public interest. In *Sachidanand Pandey v. State of W.B.*, (1987) 2 SCC 295, while dealing with public interest litigation questioning the decision of the State of West Bengal in leasing out part of the zoo land to the Taj group of hotels, the Supreme Court has held, with regard to the propriety of private negotiations with the Taj group by the State Government that it is not to be dealt with at the absolute discretion of the executive and further observing that certain precepts and principles have to be observed it held that one of the methods of securing public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. The Supreme Court also held that though it is ordinary rule but it is not an invariable rule and there may be situations where there are compelling reasons necessitating departure from the rule but the reasons for departure must be rational and should not be suggestive of discrimination. With reference to the facts and circumstances in that case the Supreme Court has held that the Government of West Bengal was perfectly justified in entering into negotiations with Taj group of hotels instead of inviting tenders. In the case of *Shrilekha Vidyarthi v. State of U.P.*, while dealing with a case relating to termination of persons holding posts of public nature such as District Government Counsel the Apex Court has held thus:

29. It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of Governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See *Ramana Dayuaram Shetty v. International Airport Authority of India*, and *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir*, ). In *Col. AS. Sangwan v. Union of India*, 1980 Supp SCC 559 while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasised as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirements of every State action qualifying for its validity on this touchstone, irrespective of the field of activity

of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose.

33. No doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. The scope of judicial review is limited as indicated in *Dwarkadas Marfatia* case to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or the lack of it or the desirability of a better alternative is not within the permissible scope of judicial review in such cases. It is not for the Courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case. As indicated by Diplock, L.J., in *Council of Civil Service Unions v. Minister for the Civil Service*, (1984) 3 All ER 935 the power of judicial review is limited to the grounds of illegality, irrationality and procedural impropriety. In the case of arbitrariness, the defect of irrationality is obvious.

39. No doubt, it is for the person alleging arbitrariness who has to prove it. This can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repel the attack by disclosing the material and reasons which led to the action being taken in order to show that it was an informed decision which was reasonable. If after a prima facie case of arbitrariness is made out, the State is unable to show that the decision is an informed action which is reasonable, then State action must perish as arbitrary.

22. In the case of *Sterling Computers Ltd. v. M&N Publications Ltd.*, , the Apex Court has held that contracts are legally binding commitments and they commit the authority which they may be held to be a State within the meaning of Article 12. Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations, which it ought not to have taken into account, the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. The Supreme Court further held that in award of public contracts for securing public interest one of the methods recognized is to invite tenders affording opportunity to submit offers for consideration in an objective manner. However, there may be cases where in the special facts and circumstances and

due to compelling reasons which must stand the test of Article 14, departure of the aforesaid rule can be made. In the case of *Tata Cellular Ltd. v. Union of India*, (1994) 6 SCC 651, the apex Court while holding that the Court cannot interfere with the Government's freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter, held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. Further the Apex Court has held that there are inherent limitations in exercise of that power of judicial review by the Courts. While holding that the right to choose cannot be considered to be an arbitrary exercise of power the Apex Court observed that there is no question of infringement of any fundamental rights as guaranteed under Article 14, if the government tries to get the best person or the best quotation. In the case of *G.D. Zalani v. Union of India*, (1995) Supp 2 SCC 512, while dealing with acquisition of advanced technology by Government of India company for improvement of its production the Supreme Court held thus:

34. We must reiterate that this was not a simple case of granting of lease of a Government company, in which case the Court would have been justified in insisting upon the authorities following a fair method consistent with Article 14, i.e., by calling for tenders. We agree that while selling public property or granting its lease, the normal method is auction or calling for tenders so that all intending purchasers/lesser should have an equal opportunity of submitting their bids/tenders. Even there, there may be exceptional situations where adopting such a course may not be insisted upon. Be that as it may, the case here is altogether different. HAL was trying to improve not only the quantum of production but also its quality and for that purpose looking for an appropriate partner. They went in for the best. It must be remembered that this technology is not there for the mere asking of it. All the leading drug companies keep their processes and technology a guarded secret. Being businessmen, they like to derive maximum profit for themselves. It is ultimately a matter of bargain. In such cases, all that need be ensured is that the Government or the authority, as the case may be, has acted fairly and has arrived at the best available arrangement in the circumstances.

23. In the case of *Air India Ltd v. Cochin International Airport Ltd.* , the Supreme Court has held:

.... The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. ...But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under

Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

24. In *Netai Bag and Ors. v. State of W.B. and Ors.*, , the Supreme Court held thus:

20. The Government is entitled to make pragmatic adjustments and policy decision which may be necessary or called for under the prevalent peculiar circumstances. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or wiser or more scientific or logical.

25. The learned Counsel for the respondents also referred to a judgment of the Division Bench of the Madras High Court in *United Labour Federation rep. by its General Secretary v. Union of India Rep. by Secretary to Government*, 2002 (1) MLJ 257 (DB), wherein it is held that "unlike private contracts, public contracts of the works relating to Government and governmental corporations should ordinarily be awarded by inviting tenders or public auction i.e., with a view to give opportunity to all eligible candidates to compete and also to fetch competitive price to the Government and the Governmental Corporations. Such process also ensures transparency but that may not be possible in all types of works relating to Government or its Corporations. There may be circumstances to make an exception to the normal rule of tender/auction method. But the validity of such exemption/exceptions has to be considered in the context of facts of each case.

26. With regard to the present case it is very clear that Government of India considered that terrorists and insurgents are using medium of cargo containers for transporting arms, ammunition and other material for their activities. Considering the specific reports of transport of large consignment of arms from Jammu and Kashmir to further parts of the country and more particularly to Delhi and the need to check and arrest procurement of arms, ammunition, etc., by the anti-national activists, Government has considered that the existing manual arrangement for checking cargo containers and vehicles is grossly inadequate for detecting the sealed material. In the light of the above, it was considered that it is necessary to install electronic systems to check cargo containers and the vehicles for detection of arms and other contraband. The said issue was discussed by the committee of secretaries in the meeting as early as on 13-6-2002 which was chaired by the cabinet secretary. The said committee also discussed the need for the co-ordinated action for the purchase of hardware and services in an efficient and cost effective manner since different ministries/departments at the Central and State levels like Customs, Civil Aviation, Railways, Road Transport, State Police, etc., require such facility. The committee also noticed the element of urgency associated with the need for such electronic system in view of the heightened security threats. In that context there was a decision of the meeting of the secretaries that best international agency on the electronic scanning of cargo containers and vehicles should be studied for its utility in our country. The said committee also thought that it would help if the technical specifications of such scanners are standardized and domestically manufactured preferably by BEL and ECIL. With

reference to the said meeting and also on the ground to speed up the process, there was also a decision to procure through a single department of Government/agency and taking into account the activities of the Government owned corporation i.e., the first respondent - ECIL, the said job was entrusted to it and on submission of techno commercial proposal by the said corporation and also in view of the fact that ultimate object is to indigenise the systems and transfer of technology, etc., they have entered into an agreement by way of MOU to acquire the said products from the fifth respondent company. It is evident from the various material papers and the records that the said decision is taken after due deliberations at various stages and the decision to purchase from the fifth respondent company as projected by the first respondent were accepted on the ground that the said company possesses all the required technologies for implementation of the project. It may be a fact that there is no such condition imposed of manufacturing and the MOU is to supply but in view of the implementation of the policy for transfer of technology, manufacturing aspect is rightly taken into consideration while entering into MOU with the first respondent to acquire scanning systems from the fifth respondent. A perusal of the file also discloses that extensive studies were conducted to identify commercially available technologies used in container scanning systems by various companies including that of the Heman System Private Limited, Germany. Further the Government has entrusted the job to a corporation owned by it which is engaged in similar kind of business in India. In that view of the matter and in view of the expertise possessed by the ECIL it has submitted its techno commercial proposals which are also further scanned by the Government at various levels and ultimately it was decided to purchase the said two scanning systems in furtherance of the pilot project from the fifth respondent company. The said purchases cannot be viewed in isolation. The said aspect has to be considered with reference to policy of the Government for transfer of technology. Inasmuch as the required technology is possessed by the fifth respondent the decision of the Government not going for open tenders cannot be said to be illegal, arbitrary and unreasonable. Applying the principles laid down in various judgments of the Supreme Court referred to above, there are valid and cogent reasons for not inviting global tenders but to purchase these two systems for implementation of the pilot projects by entering into MOU with first respondent and to place purchase order for the required systems on the fifth respondent company. Even with reference to the case of the petitioner that merely because they have joint stakes in fourth respondent company, first respondent has preferred to purchase from the fifth respondent has no legs to stand. Inasmuch as the transaction is not for a purchase simpliciter and in view of the policy decision for transfer of technology it is to be noticed that the first respondent which is a State owned corporation has good working relationship with the Rapiscan and has a successful technology transfer arrangement over the last 9 years as stated in the counter-affidavit. The primary aim and object in procuring the scanners from the fifth respondent is to indigenise the sensitive technologies involved and to commence production within the country without depending upon foreign organizations, and therefore no fault can be found with the action of the respondents in placing the order with the fifth respondent. Added to that, studies have revealed that the available technologies are only available with the fifth respondent and after preliminary studies made with regard to the various companies occupied in the field of required technology across the world, decision was taken. As such, it cannot be said that the fifth respondent was just being picked up and it is not without any valid reason. In that view of the matter also there is no scope to challenge the transaction on account of sufferance of public interest. The various judgments of the Apex Court referred to by me above lead to an unequivocal conclusion that while selling public property or for distribution of State largesse the

normal method is calling for or inviting tenders so that all intending purchasers/lessees/grantees would have an equal opportunity of submitting their bids/ tenders, but even exceptions are well recognized. However, in every case adopting such course may not be insisted upon. In the present case it is not a case of distribution of largesse alone but the decision is for acquisition of technologies coupled with the policy decision of the Government to indigenize the scanning systems for future requirements. Floating of tenders may not be the only requirement in the circumstances. In that view of the matter it cannot be said that the action of the respondents in deciding to acquire without issuing notice inviting tenders is arbitrary and unreasonable. Even with reference to further decision to purchase from the fifth respondent also it cannot be said to be against public interest. In fact the public interest is well served in view of the decision of the Government to expedite steps in view of the heightened security threat and also policy to indigenize for future requirements and it is not in dispute that the fifth respondent possessed all the requirements of the system technologies. In that view of the matter also no lapse can be found in the decision making process of the Government in entering into MOU and to purchase from the fifth respondent to the extent of these pilot requirements. Though it is pointed out by the learned Counsel for the petitioner Sri P. Chidambaram that MOU is not only for placement of orders on the fifth respondent with regard to these pilot projects but also covers future projects, but from a reading of the provision under 2.4 of the MOU it is clear that the future requirement is subject to consideration by the CVEC. As such there is no final decision taken with respect to placing of order for future requirements.

27. For the foregoing reasons, I am of the considered opinion that the decision of the Government in entering into MOU is neither arbitrary nor unreasonable one nor is taken in violation of Article 14 of the Constitution. I am also of the view that no public interest would suffer in the process of implementation of the policy to acquire the container scanners from the fifth respondent company.

28. For the foregoing reasons, the writ petition is devoid of merits and is accordingly dismissed.