

PETITIONER:  
RAMANA DAYARAM SHETTY

Vs.

RESPONDENT:  
THE INTERNATIONAL AIRPORT AUTHORITY OF INDIA AND ORS.

DATE OF JUDGMENT 04/05/1979

BENCH:  
BHAGWATI, P.N.  
BENCH:  
BHAGWATI, P.N.  
TULZAPURKAR, V.D.  
PATHAK, R.S.

CITATION:  
1979 AIR 1628                      1979 SCR (3)1014  
1979 SCC (3) 489  
CITATOR INFO :

R            1980 SC 840 (15,16,20)  
F            1980 SC1992 (10)  
F            1980 SC2147 (63)  
R            1981 SC 212 (18,31,32,34,36,37,38,39,41,42)  
E&R        1981 SC 487 (8,9,16)  
R            1981 SC1694 (5)  
R            1981 SC2001 (6,7)  
MV          1982 SC1325 (12)  
R            1983 SC 130 (16)  
R            1983 SC 624 (8)  
F            1983 SC 848 (11)  
R            1983 SC1235 (8)  
R            1984 SC 363 (22)  
D            1984 SC 415 (6)  
F            1984 SC 541 (13)  
R            1984 SC 657 (16)  
R            1984 SC1420 (5)  
F            1985 SC1147 (12)  
RF          1986 SC 180 (41)  
RF          1986 SC 872 (71)  
RF          1986 SC1035 (12)  
RF          1986 SC1370 (10)  
RF          1986 SC1527 (12,19,23)  
R            1986 SC1571 (52,54,69,105)  
E&R        1987 SC 251 (23)  
E            1987 SC1080 (12,TO,17,26,28,29,30)  
R            1987 SC1109 (30,35,36)  
RF          1988 SC 157 (8,9,10)  
RF          1988 SC 268 (30)  
R            1988 SC 469 (7,8,10,TO,12)  
APL        1989 SC 88 (7)  
D            1989 SC1031 (12)  
D            1989 SC1076 (11,19,20)  
F            1989 SC1629 (13,14)  
F            1989 SC1642 (25,27)  
D            1989 SC2138 (64,100)  
RF          1990 SC1277 (46)  
RF          1990 SC1480 (29)  
R            1991 SC 101 (237,257,263)  
RF          1991 SC 537 (29)  
RF          1991 SC1153 (12)  
RF          1991 SC1173 (5)  
D            1991 SC1579 (6)  
RF          1992 SC 1 (133)

RF 1992 SC 76 (2)  
F 1992 SC1858 (19)

## ACT:

International Airport Authority Act 1971-Whether an instrumentality of State-Authority called for tenders for a job-If could accept a tender not conforming to conditions in notice.

Administrative law-Statutory body-When an instrumentality of State.

## HEADNOTE:

The first respondent, by a public notice, invited tenders for putting up and running a second class restaurant and two snack bars at the International Air port, Bombay. the notice stated in Paragraph (1) that sealed tenders in the prescribed form were invited from registered second class hoteliers having at least five years' experience for putting up and running a second class restaurant and two snack bars at the Bombay Airport for a period of three years Paragraph (8) stated that acceptance of the tender would rest with the Airport Director who does not bind himself to accept any tender and reserves to himself the right to reject all or any of the tenders received without assigning any reasons therefor.

out of the six tenders received only the tender of the 4th respondents was complete and offered the highest amount as licence fee. All the other tenders were rejected because they were incomplete.

Since the fourth respondents did not satisfy the description of "registered second class hoteliers having at least 5 years' experience" prescribed in para graph (1) of the tender notice, the 1st respondent called upon the fourth respondents to produce documentary evidence whether they were registered second class hotliers having at least 5 years' experience. The fourth respondents stated once again that they had considerable experience of catering for various reputed commercial houses, clubs, messes and banks and that they had Eating Houses Catering Establishment (Canteen) Licence. Satisfied with the information given by the fourth respondents, the first respondent accepted their tender on the terms and conditions set out in its letter.

The appellant filed a writ petition before the High Court challenging the decision of the first respondent in accepting the tender of the fourth respondents. But it was rejected.

In appeal to this Court it was contended on behalf of the appellants that (1) the first respondent which is a public authority was bound to give effect to the most important condition of eligibility and acceptance of the tender by the first respondent was in violation of the standard or norm of eligibility set up by the first respondent and (2) had the appellant known that non-fulfilment of the condition of eligibility would be no bar for considering a tender he too would have competed for obtaining the contract.

1015

The fourth respondents, on the other hand, contended that the requirement A that the tenderer must be a registered second grade hotlier was meaningless because the grading is given by the Bombay City Municipal Corporation only to hotels or restaurants and not to persons running

them and, therefore there could be no second grade hotlier; (2) the notice setting out the conditions of eligibility having had no statutory force, even if there was a departure from the standard or norm of eligibility, it was not justiciable and the first respondent was competent to give the contract to anyone it thought fit; and (3) the 1 Airport Authority reserved to itself the right to reject all or any of the tenders without assigning any reasons and, therefore, it was competent to it to reject all the tenders or negotiate with any person it considered fit to enter into a contract.

^

HELD: The action of the first respondent in accepting the tender of the fourth respondents, who did not satisfy the standard or norm, was clearly discriminatory since it excluded other persons similarly situate from tendering for the contract and it was arbitrary and without reason. Acceptance of the tender was invalid as being violative of the equality clause of the Constitution as also of administrative law inhibiting arbitrary action. [1056C]

(a) What paragraph ( 1 ) of the notice required was that only a person running a registered second class hotel or restaurant and having at least 5 years' experience as such should be eligible to submit the tender. The test of 1) eligibility laid down in this paragraph was an objective test and not a subjective one. If a person submitting the tender did not have atleast five years' experience of running a second class hotel, he was eligible to submit the tender and it would not avail him to say that though he did not satisfy this condition he was otherwise capable of running a second class restaurant and therefore should be considered. This was in fact how the first respondent understood this condition of eligibility. The first respondent did not regard this requirement as meaningless or unnecessary and wanted to be satisfied that the fourth respondents had fulfilled this requirement. The fourth respondents were neither running a second grade hotel or restaurant nor did they have five years' experience of running such a hotel or restaurant. Therefore the fourth respondents did not satisfy the condition of eligibility laid down in paragraph(1) of the notice. [1028 B-H]

(b) It is not possible to justify the action of the first respondent on the ground that it could have achieved the same result by rejecting all the tenders and entering into direct negotiations with the fourth respondents. Although there was no statutory or administrative rule requiring the first respondent to give a contract only by inviting tenders and that on the terms of paragraph 8 of the tender notice, it was not bound to accept any tender, the first respondent did not reject the tenders outright and enter into direct negotiation with the fourth respondents for awarding the contract. The process of awarding a contract by inviting tenders was not terminated or abandoned by the first respondent by rejecting all the tenders but in furtherance of the process the tender of the fourth respondents was accepted by the first respondent. Nor was the contract given to the fourth respondents as a result of direct negotiations. [1029 D-G]

2(a) Today with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of

1016

the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic

justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, there is substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found. It is unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege. [1031 F-H]

(b) Today the Government, in a welfare State? is the regulator and dispenser of special services and provider of a large number of benefits. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds: leases, licences, contracts and so forth. With the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, it cannot be said that they do not enjoy any legal protection nor can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure. [1032 E-H]

(c) The law has not been slow to recognize the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognized as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. [1033 C-D]

Viterolli v. Saton 359 U.S. 535: 3 Law Ed. (Second Series) 1012, Erusian Equipment and Chemicals Ltd. v. State of West Bengal, [1975] 2 SCR. 674 referred to.

(d) Therefore, where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess. the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in

any particular case or cases, the action of the Government would be liable to be struck

1017

down. unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was non-irrational, unreasonable or discriminatory. [1034 F-H]

(e) The Government which represents the executive authority of the State may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of JURIDICAL persons to carry out its functions. With the advent of the welfare state the civil service, which traditionally carried out functions of Government through natural persons, was found inadequate to handle the new tasks of specialised and highly technical character. To fill the gap it became necessary to forge a new instrumentality or administrative device for handling these new problems and that is done by public corporations which has become the third arm of the Government. They are regarded as agencies of the Government. In pursuance of the industrial policy resolution of the Government of India corporations were created by the Government for setting up and management of public enterprises and carrying out public function. The corporations so created, acting as instrumentality or agency of Government, would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself though in the eye of law they would be distinct and independent legal entities. It Government. acting,, through its officers is subject to certain constitutional and public law. limitations, it must follow a fortiori that Government, though the instrumentality or agency of corporations, should equally be subject to the same limitations. But the question is how to determine whether a corporation is acting is instrumentality or agency of Government. [1035A-C, F-H]

3(a) The factors for determining whether a corporation has become an instrumentality or agency of the Government are: does the State give (my financial assistance and if so that is the magnitude of such assistance? Is there any control of the management and policies of the corporation by the State, and what is the nature and extent of such control? Does the corporation enjoy any State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions? It is not possible to particularise all the relevant factors but no single factor will yield a satisfactory answer, to the question and the court will have to consider the cumulative. effect of these various factors and establish it by its decision on the basis of a particularised enquiry into facts and circumstances of each case. [1041 B-E]

(b) Sukhudev v. Bhagatram [1975] 3 S.C.R. 619 at 658 explained, Kerr v. Eneck Pratt Free Library, 149 F. 2d 212, Jackson v. Metropolitan Edison Co. 419 U.S. 345, 42 L.ed. 2d 477, Evans v. Newton 382 U.S. 296; 15 L.ed. 2d 373, Pfizer v. Ministry of Health [1964] 1 Ch. 614, New York v. United State 326 U.S. 572, Cf. Helvering v. Gerhardt 304 U.S. 405 426, 427 referred to.

(c) Where a corporation is an instrumentality or agency of Government it would be subject to some constitutional or public law limitations ns Government. The rule inhibiting arbitrary action by Government must apply equally where such corporation is dealing with the public and it cannot act arbitrarily and c into relationship with any person it likes at its sweet will. Its action must be in conformity with

some principles which meets the test of reason and relevance. [1041 H]

9-409 SC1/79

1018

Rajasthan Electricity Board v. Mohan Lal [1967] 3 S.C.R. 377, and Sukhdev v. Bhagatram [1975] 3 S.C.R. 619 at 658 followed.

Praga Tools Corporation v. C.A. Imanuel (1969) 3 S.C.R. 773, Heavy Engineering Mazdoor Union v. State of Bihar [1969] 3 S.C.R. 995, S. L. Aggarwal v. General Manager, Hindustan Steel Limited [1970] 3 SCR 363, Sarbhajit Tewari v Union of India & Ors. [1975] 1 SCC 485; held inapplicable.

(d) It is well established that Art. 14 requires That action must not be arbitrary and must be based on some rational and relevant principle which is non-discriminatory. It must not be guided by extraneous or irrelevant considerations. The State cannot act arbitrarily in enter into relationship, contractual or otherwise, with a third party. Its action must conform to some standard or norm which is rational and non-discriminatory. [1042 C]

E. P. Rayappa v. State of Tamil Nadu [1974] 2 SCR 348, Maneka Gandhi v. Union of India [1978] 2 S.C.R. 621, Rashbihari Panda v. State of Orissa [1969] 3 S.C.R. 374, C. K. Achuthan v. State of Kerala [1959] S.C.R. 78, referred to,

Trilochan Mishra v. State of orissa & ors. [1971] 3 S.C.R. 153, State of Orissa v. Harinarayan Jaiswal & ors. [1972] 2 S.C.R. 36, Rajasthan Electricity Board v. Mohan Lal [1967] 3 S.C.R. 377, Praga Tools Corporation Dv. c. A. Imanuel [1969] 3 S.C.R. 773, Heavy Engineering Mazdoor Union v. State of Bihar [1969] 3 SCR, 995, S. L. Aggarwal v. General Manager Hindustan Steel Limited [1970] 3 SCR. 363, Sarbhajit Tewari v. Union of India & ors. [1975] 1 SCC 485, held in applicable.

4(a) The International Airport Authority Act, 1971 empowers the Central Government to constitute an authority called the International Air port Authority. The salient features of the Act are: the Anthority, which is a body corporate having perpetual succession and a common seal, consists of a Chairman and certain other Members who are appointed by the Central Government. The Central Government has power to terminate the appointment or to remove a member from the Board of the Authority. Although the Authority has no share capital of its own, capital needed by it for carrying out its functions is provided wholly by the Central Government. All non-recurring, expenditure Incurred by the Central Government for or in connection with the purposes of the airports upto the appointed date and declared to be capital expenditure by the Central Government shall be treated as capital provided by the Central Government to the first respondent and all sums of money due to the Central Government in relation to the airports immediately before the appointed date shall] be deemed to be due to the first respondent. The functions, which until the appointed date were being carried out by the General Government, were Transferred to the Airport Athority by virtue of s. 16. The first respondent, according to s. 20, should pay the balance of its annual net profits to the Central Government after making provision for reserve funds, bad and doubtful debts, depreciation in assets and so on. The first respondent, under s. 21, has to submit for the approval of the Central Government a statement of the programme of its activities during the forthcoming financial year. Its accounts are audited by the Comptroller and Auditor General and the accounts Shall be forwarded to the Central Government. The

first respondent is required to submit an account of its activities during a financial year and this report is laid before the Houses of Parliament by the Central Government. The Central Government has power to divest the first respondent temporarily from

1019

the management of any airport and direct it to entrust such management to any other person. Power is conferred under s. 34 on the Central Government to supersede the first respondent under certain specified circumstances. Section 35 gives power to the Central Government to give directions in writing to the Airport Authority on questions of policy and the Airport Authority is bound by such directions. Section 37 empowers the Airport Authority to make regulations. Section 39 provides that contravention of any regulation made by the Airport Authority is punishable. [1052B-1054C]

(b) A conspectus of the provisions of the Act clearly shows that every test laid down by this Court in deciding whether a statutory authority comes within the purview of Art. 12 of the constitution is satisfied in the case of the first respondent. They leave no room for doubt that it is an instrumentality or agency of the Central Government and falls within the definition of State. Therefore, having regard both to the constitutional mandate of Art. 14 and the judicially evolved rule of administrative law, the first respondent was not entitled to act arbitrarily in accepting the tender of the fourth respondents but was bound to conform to the standard or norm laid down in paragraph I of the notice inviting tenders. The standard or norm laid down by the notice was reasonable and non-discriminatory and once it is found that such a standard or norm is laid down, the first respondent was not entitled to depart from it and award the contract to the fourth respondents who did not satisfy the condition of eligibility prescribed by standard or norm. If none of the tenderers satisfied the condition the first respondent could have rejected the tender and invited fresh tenders on the basis of less stringent standard or norm, but it could not depart from the prescribed standard or norm. [1055 E-A]

(c) In the instant case the appellant had no real interest in the result of the litigation. There can be no doubt that the litigation was commenced by the appellant not with a view to protect his own interest, but had been put up by others for depriving the fourth respondents of the benefit of the contract secured by them. The Writ Petition was filed more than five months after the acceptance of the tender and the position would have been different had the appellant filed it immediately after the acceptance of the tender. The fourth respondents have incurred a large expenditure in making necessary arrangements under the bona fide belief that their tender had been legally and validly accepted. It would be most inequitable to set aside the contract at the instance of the appellant.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 895 of 1978.

Appeal by Special Leave from the Judgment and order dated 23-1-1978 of the High Court at Bombay in Appeal No. 234/77 arising out of Misc. Petition No. 1582/77.

Ashok H. Desai, Y. S. Chitale, Jai Chinai, P. G. Gokhale and . R. Agarwal for the Appellant. II

G. B. Pai, o. c. Mathur and D. N. Mishra for Respondent

No. 1.

1020

F.S. Nariman, R. H. Dhebar, S. K. Dholakia, H H. Yagnik and . V. Desai for Respondent No. 4.

The Judgment of the Court was delivered by

BHAGWATI, J.-This appeal by special leave raises interesting questions of law in the area of public law. What are the constitutional obligations on the State when it takes action in exercise of its statutory or executive power? Is the State entitled to deal with its property in and manner it likes or award a contract to any person it chooses without any constitutional limitations upon it? What are the parameters of its statutory or executive power in the matter of awarding a contract or dealing with its property ? The questions fell in the sphere of both administrative law and constitutional law and they assume special significance in a modern welfare State which is committed to egalitarian values and dedicated to the rule of law. But these questions cannot be decided in the abstract. They can be determined only against the back-ground of facts and hence we shall proceed to State the facts giving rise to the appeal.

On or about 3rd January, 1977 a notice inviting tenders for putting up and running a second class restaurant and two Snack bars at the International Airport Bombay was issued by the 1st respondent which is a corporate body constituted under the International Airport Authority Act, 43 of 1971. The notice stated in the clearest terms in paragraph (1) that "Sealed tenders in the prescribed form are here by invited from Registered IInd Class Hoteliers having at least 5 years' experience for putting up and running a IInd Class Restaurant and two Snack bars at this Airport for a period of 3 years". The latest point of time upto which the tenders could be submitted to the 1st respondent was stipulated in Paragraph 7 of the notice to be 12 p.m. On 25th January, 1977 and it was provided that the tenders would be opened on the same date at 12.30 hours. Paragraph (8) of the notice made it clear that "the acceptance of the tender will rest with the Airport Director who does not bind himself to accept any tender and reserves to himself the right to reject all or ally of the tenders received without assigning any reasons therefore " There were six tenders received by the 1st respondent in response to the notice and one of them was from the 4th respondents of offering a licence fee of Rs. 6666.66 per month, and the others were from Cafe Mahim, Central Catering Service, one A. S. Irani, Cafe Seaside and Care Excelsior offering progressively decreasing licence fee very much lower than that offered by the 4th respondents. The tenders were opened in the

1021

office of the Airport Director at 12.30 p.m. On 25th January, 1977 and at that time the 4th respondents were represented by their sole proprietor Kumaria. A. S. Irani was present on behalf of himself, Cafe Mahim, Cafe Seaside and Cafe Excelsior and there was one representative of Central Catering Service. The tenders of Cafe Mahim, Central Catering Service, Cafe Seaside and Cafe Excelsior were not complete since they were not accompanied by the respective income tax certificates, affidavits of immovable property and solvency certificates, as required by cl. (9) of the terms and conditions of the tender form. The tenders of A. S. Irani was also not complete as it was not accompanied by an affidavit of immovable property held by him and solvency certificates. The only tender which was complete and fully complied with the terms and conditions of the tender form



was that of the 4th respondents and the offer contained in that tender was also the highest amongst all the tenders. Now it is necessary to point out at this stage that while submitting their tender the 4th respondents had pointed out in their letter dated 24th January, 1977 addressed to the Airport Director that they had 10 years' experience in catering to reputed commercial houses, training centres, banks and factories and that they were also doing considerable outdoor catering work for various institutions. This letter showed that the 4th respondents had experience only of running canteens and not restaurants and it appeared that they did not satisfy the description of "registered IInd Class Hotelier having at least 5 years' experience" as set out in paragraph (1) of the notice inviting tenders. The Airport officer, therefore, by his letter dated 15th February, 1977 requested the 4th respondents to inform by return of post whether they were a "registered IInd Class Hotelier having at least 5 years experience" and to produce documentary evidence in this respect within 7 days. The 4th respondents pointed out to the Airport officer by their letter dated 22nd February, 1977 that they had, in addition to what was set out in their earlier letter dated 24th January, 1977, experience of running canteens for Phillips India Ltd. and Indian oil Corporation and moreover, they held Eating House Licence granted by the Bombay Municipal Corporation since 1973 and had thus experience of 10 years in the catering line. It appears that before this letter of the 4th respondents could reach Airport officer, another letter dated 22nd February, 1977 was addressed by the Airport officer once again requesting the 4th respondents to produce documentary evidence to show if they were "a registered IInd Class Hotelier having at least 5 years experience". The 4th respondents thereupon addressed another letter dated 26th February, 1977 to the Director pointing out that they had considerable experience of catering for various reputed commercial houses,

1022

clubs, messes and banks and They also held an Eating House Catering Establishment (Canteen) Licence as also a licence issued under the Prevention of Food Adulteration Act. The 4th respondents stated that their sole proprietor Kumaria had started his career in catering line in the year 1962 at Hotel Janpath, Delhi and gradually risen to his present position and that he had accordingly "experience equivalent to that of a IInd Class or even 1st Class hotelier." This position was reiterated by the 4th respondents in a further letter dated 3rd March, 1977 addressed to the Director. This information given by the 4th respondents appeared to satisfy the 1st respondent and by a letter dated 19th April, 1977 the 1st respondent accepted the tender of the 4th respondents on the terms and conditions set out in that letter. The 4th respondents accepted these terms and conditions by their letter dated 23rd April, 1977 and deposited with the 1st respondent by way of security a sum of Rs. 39,999.96 in the form of fixed Deposit Receipts in favour of the 1st respondent and paid to the 1st respondent a sum of Rs. 6666.66 representing licence fee for one month and other amounts representing water, electricity and conservancy charges. The 4th respondents thereafter executed and handed over to the 1st respondent an agreement in the form attached to the tender on 1st May, 1977. The 4th respondents also got prepared furniture, counters and showcases as also uniforms for the staff, purchased inter alia deep freezers, water coolers, electrical appliances,

icecream cabinets, espresso coffee machines, crockery, cutlery and other articles and things and also engaged the necessary staff for the purpose of running the restaurant and the two Snack bars But the Ist respondent could not hand over possession of the requisite sites to the 4th respondents, since A. S. Irani was running his restaurant and snack bars on these sites under a previous contract with the 1<sup>st</sup> respondent and though that contract had come to an end, A. S. Irani did not deliver possession of these sites to the Ist respondent. The 4th respondents repeatedly requested the 1st respondent and the Airport Director who is the 2nd respondent in the appeal, to hand over possession of the sites and pointed out to the that the 4th respondents were incurring losses by reason of delay in delivery of possession, but on account of the intransigence of A. S. Irani the Ist respondent could not arrange to hand over possession of the sites to the 4th respondents.

Meanwhile one K. S, Irani who owned Cafe Excelsior filed Suit No. 6544 of 1977 in the City Civil Court, Bombay against the respondents challenging the decision of the Ist respondent to accept the tender of the 4th respondents and took out a notice of motion for restraining the 1<sup>st</sup> respondent from taking any further steps pursuant to 1023

the acceptance of the tender. K. S. Irani obtained an ad-interim injunction against the respondents but after hearing the respondents, the City Civil Court vacated the ad-interim injunction and dismissed the notice of motion by an order dated 10th october, 1977. An appeal was preferred by K. S. Irani against this order, but the appeal was dismissed by the High Court on 19th october, 1977. Immediately thereafter, on the same day, the Ist respondent handed over possession of two, sites to the 4th respondents and the 4th respondents proceeded to set up snack bars on the two sites and started business of catering at the two snack bars. These two sites handed over to the 4th respondents were different from the sites occupied by A.S. Irani, because A. S. Irani refused to vacate the sites in his occupation. So far as the site for the restaurant was concerned, the Ist respondent could not hand over the possession of it to the 4th respondents presumably because there was no other appropriate site available other than the one occupied by A. S. Irani. Since A. S. Irani refused to hand over possession of the sites occupied by him to the Ist respondent, even though his contract had come to an end, and continued to carry on the business of running the restaurant and the snack bars on these sites, the Ist respondent was constrained to file suit No. 8032 of 1977 against A. S. Irani in the City Civil Court at Bombay and in that suit, an injunction was obtained by the 1st respondent restraining A. S. Irani from running or conducting the restaurant and the snack bars or from entering the premises save and except for winding up the restaurant and the snack bars. A. S. Irani preferred an appeal against the order granting the injunction, but the appeal was rejected and ultimately a petition for special leave to appeal to this Court was also turned down on 31st July, 1978.

This was, however, not to be the end of the travails of the 4th respondents. for, as soon as the appeal preferred by K. S. Irani against the order dismissing his notice of motion was rejected by the High Court on 19th October, 1977, A. S. Irani filed another suit being suit No. 8161 of 1977 in the City Civil Court, Bombay on 24th October, 1977 seeking mandatory injunction for removal of the two snack bars put up by the 4th respondents. This was one more attempt by A.

S. Irani to prevent the 4th respondents from obtaining the benefit of the contract awarded to them by the 1st respondent. He, however, did not succeed in obtaining ad-interim injunction and we are told that the notice of motion taken out by him is still pending in the City Civil Court.

It will thus be seen that A. S. Irani failed in his attempts to prevent the 4th respondents from obtaining the contract and enjoying its

1024

benefit. The 4th respondents put up two snack bars on the sites provided by the 1st respondent and started running the two snack bars from 19th October, 1977. The restaurant however, could not be put up on account of the inability of the 1st respondent to provide appropriate site to the 4th respondents and, therefore, the licence fee for the two snack bars had to be settled and it was fixed at Rs. 4,500/- per month by mutual agreement between the parties. But it seems that the 4th respondents were not destined to be left in peace to run the two snack bars and soon after the dismissal of the appeal of A. S. Irani on 19th October, 1977 and the failure of A. S. Irani to obtain an ad-interim mandatory injunction in the suit filed by him against the 1st and the 4th respondents, the appellant filed writ petition No. 1582 of 1977 in the High Court of Bombay challenging the decision of the 1st respondent to accept the tender of the 4th respondents. The writ petition was moved before a Single Judge of the High Court on 8th November, 1977 after giving prior notice to the respondent and after hearing the parties, the learned Single Judge summarily rejected the writ petition. The appellant preferred an appeal to the Division Bench of the High Court against the order rejecting the writ petition and on notice being issued by the Division Bench, the 1st and the 4th respondents filed their respective affidavits in reply showing cause against the admission of the appeal. The Division Bench after considering the affidavits and hearing the parties rejected the appeal in limine on 21st February, 1978. The appellant thereupon filed a petition for special leave to appeal to this Court and since it was felt that the questions raised in the appeal were of seminal importance, this Court granted special leave and decided to hear the appeal at an early date after giving a further opportunity to the parties to file their respective affidavits. That is how the appeal has now come before us for final hearing with full and adequate material placed before us on behalf of both the parties.

The main contention urged on behalf of the appellant was that in paragraph (1) of the notice inviting tenders the 1st respondent had stipulated a condition of eligibility by providing that a person submitting a tender must be a "registered IInd class Hotelier having at least 5 years experience." This was a condition of eligibility to be satisfied by every person submitting a tender and if in case of any person, this condition was not satisfied, his tender was ineligible for being considered. The 1st respondent, being a State within the meaning of Art. 12 of the Constitution or in any event a public authority, was bound to give effect to the condition of eligibility set up by it and was not entitled to depart from it at its own sweet will

1025

without rational justification. The 4th respondents had experience of catering only in canteens and did not have 5 years' experience of running a IInd class hotel or restaurant and hence they did not satisfy the condition of eligibility and yet the 1st respondent accepted the tender submitted by them. This was clearly in violation of the

standard or norm of eligibility set up by the 1 respondent and the action of the 1st respondent in accepting the tender of the 4th respondents was clearly invalid. Such a departure from the standard or norm of eligibility had the effect of denying equal opportunity to the appellant and others of submitting their tenders and being considered for entering into contract for putting up and running the restaurant and two snack bars. The appellant too was not a registered 2nd class hotelier with 5 years' experience and was in the same position as the 4th respondents vis-a-vis this condition of eligibility and he also could have submitted his tender and entered the field of consideration for award of the contract, but he did not do so because of this condition of eligibility which he admittedly did not satisfy. The action of the 1st respondent in accepting the tender of the 4th respondents had, therefore the effect of denying him equality of opportunity in the matter of consideration for award of the contract and hence it was unconstitutional as being in violation of the equality clause. This contention of the appellant was sought to be met by a threefold argument on behalf of the 1st and the 4th Respondents. The first head of the argument was that grading is given by the E Bombay City Municipal Corporation only to hotels or restaurants and not persons running them and hence there can be a 2nd grade hotel or restaurant but not a 2nd grade hotelier and the requirement in paragraph (1) of the notice that a tenderer must be a registered 2nd grade hotelier was therefore a meaningless requirement and it could not be regarded as laying down any condition of eligibility. It was also urged that in any event what paragraph ( ) of the notice required was not that a person tendering must have 5 years' experience of running a 2nd grade hotel, but he should have sufficient experience to be able to run a 2nd grade hotel and the 4th respondents were fully qualified in this respect since they had over 10 years' experience in catering to canteens of well known companies, clubs and banks. It was further contended in the alternative that paragraph (8) of the notice clearly provided that the acceptance of the tender- would rest with the Airport Director who did not bind himself to accept any tender and reserved to himself the right to reject all or any of the tenders without assigning any reasons therefor and it was, therefore, competent to the 1st respondent to reject all the tenders and to negotiate with any person it considered fit to enter

1026

into a contract and this is in effect and substance what the 1st respondent did when he accepted the tender of the 4th respondents. The second head of argument was that paragraph (1) of the notice setting out the condition of eligibility had no statutory force nor was it issued under any administrative rules and, therefore, even if there was any departure from the standard or norm of eligibility set out in that paragraph, it was not justiciable and did not furnish any cause of action to the appellant. It was competent to the 1st respondent to give the contract to any one it thought fit and it was not bound by the standard or norm of eligibility set out in paragraph (1) of the notice. It was submitted that in any event the appellant had no right to complain that the 1st respondent had given the contract to the 4th respondents in breach of the condition of eligibility laid down in paragraph (1) of the notice. And lastly, under the third head of argument, it was submitted on behalf. Of the 1st and the 4th respondents that in any view of the matter, the writ petition of the appellant was

liable to be rejected in the exercise of its discretion by the Court, since the appellant had no real interest but was merely a nominee of A. S. Irani who had been putting up one person after another to start litigation with a view to preventing the award of the contract to the 4th respondents. The appellant was also guilty of laches and delay in filing the writ petition and the High Court was justified in rejecting the writ petition in limine particularly in view of the fact that during the period between the date of acceptance of the tender and the date of filing of the writ petition, the 4th respondents had spent an aggregate sum of about Rs. 1,25,000/- in making arrangements for putting up the restaurant and two snack bars. These were the rival contentions urged on behalf of the parties and we shall now proceed to discuss them in the order in which we have set them out.

Now it is clear from paragraph (1) of the notice that tenders were invited only from "registered 2nd Class hoteliers having at least 5 years' experience". It is only if a person was a registered 2nd Class hotelier having at least 5 years' experience that he could, on the terms of paragraph (1) of the notice, submit a tender. Paragraph (1) of the notice prescribed a condition of eligibility which had to be satisfied by every person submitting a tender and if, in a given case, a person submitting a tender did not satisfy this condition, his tender was not eligible to be considered. Now it is true that the terms and conditions of the tender form did not prescribe that the tenderer must be a registered IInd Class hotelier having at least 5 years' experience nor was any such stipulation to be found in the form c f the agreement

1027

annexed to the tender but the notice inviting tenders published in the newspapers clearly stipulated that tenders may be submitted only by registered IInd Class hoteliers having at least 5 years' experience and this tender notice was also included amongst the documents handed over to prospective tenderers when they applied for tender forms. Now the question is, what is the meaning of the expression "registered IInd Class hotelier", what category of persons fall within the meaning of this description? This is a necessary enquiry in order to determine whether the 4th respondents were eligible to submit a tender. It is clear from the affidavits and indeed there was no dispute about it that different grades are given by the Bombay City Municipal Corporation to hotels and restaurants and, therefore, there may be a registered IInd Class Hotel but no such grades are given to persons running hotels and restaurants and hence it would be inappropriate to speak of a person as a registered IInd Class hotelier. But on that account would it be right to reject the expression "registered IInd Class hotelier" as meaningless and deprive paragraph (1) of the notice of any meaning and effect. We do not think such a view would be justified by any canon of construction. It is a well settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the

words used by the author of the document meaningless and futile or reduce silence any part of the document and make it altogether inapplicable. Now, here the expression used in paragraph (1) of the notice was "registered IInd Class hotelier" and there can be no doubt that by using, this expression the Ist respondent intended to delineate a certain category of persons who alone should be eligible to submit a tender. The Ist respondent was not acting aimlessly or insensibly in insisting upon this requirement nor was it indulging, in a meaningless and futile exercise. It had a definite purpose in view when it laid down this condition of eligibility in paragraph (1) of the notice. It is true that the phraseology used by the Ist respondent to express its intention was rather inapt but it is obvious from the context that the expression "registered IInd Class hotelier" was loosely used to denote a person conducting or running a IInd Class hotel or restaurant. It may be ungrammatical but it does not offend common-sense to describe a  
1028

person running a registered IInd grade hotel as a registered IInd grade hotelier. This meaning is quite reasonable and does not do any violence to the language and makes sense of the provision contained in paragraph (1) of the notice. We must, in the circumstances, hold that, on a proper construction, what paragraph (1) of the notice required was that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five years' experience of running a IInd Class hotel or restaurant. The test of eligibility laid down was an objective test and not a subjective one. What the condition of eligibility required was that the person submitting a tender must have 5 years' experience of running a II Class hotel, as this would ensure by an objective test that he was capable of running a II Class restaurant and it should not be left to the Ist respondent to decide in its subjective discretion that the person tendering was capable of running such a restaurant. If therefore, a person submitting a tender did not have at least 5 years' experience of running a II Class hotel, he was not eligible to submit the tender and it would not avail him to say that though he did not satisfy this condition, he was otherwise capable of running a IInd Class restaurant and should, therefore, be considered. This was in fact how the 1st respondent itself understood this condition of eligibility. When the 4th respondents submitted their tender along with Their Letter dated 24th January, 1977, it appeared from the documents submitted by the 4th respondents that they did not have 5 years' experience of running a II Class restaurant. The 1st respondent by its letter dated 15th February 1977 required the 4th respondents to produce documentary evidence to show that they were "registered II Class hotelier having at least 5 years' experience." The 1st respondent did not regard this requirement of eligibility as meaningless or unnecessary and wanted to be satisfied that the 4th respondent did fulfil this requirement. Now, unfortunately for the 4th respondents, they had over 10 years' experience of running restaurants but at the date when they submitted their tender, they cannot run a II grade hotel or restaurant nor did they have 5 years' experience of running such a hotel or restaurant. Even if the experience of the 4th respondents in the catering line were taken into account from 1962 onwards, it would not cover a total period of more than 4 years 2

months so far as catering experience in 11nd Grade hotels and restaurants is concerned. The 4th respondents thus did not satisfy the condition of eligibility laid down in paragraph (1) of the notice and in fact this was implidely conceded by

1029

the 4th respondents in their letter dated 26th February, 1977 where A they stated that they had "experience equivalent to that of a 2nd class or even 1st class hotelier." The 4th respondents were, accordingly, not eligible for submitting a tender and the action of the 1st respondent in accepting their tender was in contravention of paragraph (1) of the notice.

It was suggested on behalf of the 1st and the 4th respondents that there was nothing wrong in the 1st respondent giving the contract to the 4th respondents since it was competent to the 1st respondent to reject all the tenders received by it and to negotiate directly with The 4th respondents for giving them the contract and it made no difference that instead of following this procedure, which perhaps might have resulted in the 4th respondents offering a smaller licence fee and the 1st respondent suffering a loss in the process, true 1st respondent accepted The tender of the 4th respondents. We do not think there is any force in this argument. It is true that there was no statutory or administrative rule requiring the 1st respondent to give a contract only by inviting tenders and hence the 1st respondent was entitled to reject all the tenders and, subject to the constitutional norm laid down in Art 14, negotiate directly for entering into a contract. Paragraph (8) of the notice also made it clear that the 1st respondent was not bound to accept any tender and could reject all the tenders received by it. But here the 1st respondent did not reject the tenders outright and enter into direct negotiations with the 4th respondents for awarding the contract. The process of awarding a contract by inviting tenders was not terminated or abandoned by the 1st respondent by rejecting all the tenders but in furtherance of the process, the tender of the 4th respondents was accepted by the 1st respondent. The contract was not given to the 4th respondents as a result of direct negotiations. Tenders were invited and out of the tenders received, the one submitted by the 4th respondents was accepted and the contract was given to them. It is, therefore not possible to justify the action of the 1st respondent on the ground that the 1st respondent could have achieved the same result by rejecting all the tenders and entering into direct negotiations with the 4th respondents.

That takes us to the next question whether the acceptance of the tender of the 4th respondents was invalid and liable to be set aside at the instance of the appellant. It was contended on behalf GI the 1st and the 4th respondents that the appellant had no locus to maintain the writ petition since no tender was submitted by him and he was a mere stranger. The argument was that if the appellant

1030

did not enter the field of competition by submitting a tender, what did it matter to him whose tender was accepted; what grievance could he have if the tender of the 4th respondents was wrongly accepted. A person whose tender was rejected might very well complain that the tender of someone else was wrongly accepted, but it was submitted, how could a person who never tendered and who was at no time in the field, put forward such a complaint? This argument, in our opinion, is mis-conceived and cannot be sustained for a

moment. The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of the 4th respondents, but that he was differentially treated and denied equality of opportunity with the 4th respondents in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as the 4th respondents were concerned, their tender was entertained and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance were well founded, the appellant would be entitled to maintain the writ petition. The question is whether this grievance was justified in law and the acceptance of the tender of the 4th respondents was vitiated by any legal infirmity.

Now, there can be no doubt that what paragraph (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered 2nd class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by the 1st respondent and since the 4th respondents did not satisfy this standard or norm, it was not competent to the 1st respondent to entertain the tender of the 4th respondents. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated-

1031

ed by Mr Justice Frankfurter in *Viteralli v. Seton*(1) where the learned Judge said:

"An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defective procedure, even though generous beyond the requirement that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

This Court accepted the rule as valid and applicable in India in *A. S. Ahuwalia v. Punjab*(2) and in subsequent decision given in *Sukhdev v. Bhagatram*,(3) Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought



to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's Administrative Law 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. To-day with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or

(1) 359 U. S. 535: 3 Law.Ed. (Second series) 1012

(2) [1975] 3. S. C. R. 82.

(3) [1975] 3. S. C. R. 619.

1032

exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set-forth by Harry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in "democracy Equality and Freedom," "substantial agreement is in justice thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

To-day the Government, is a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs contracts, licences, quotas, mineral rights etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationship to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of business or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largess in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose

money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public Land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largess and with the increasing

1033

magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorised." "The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position as a private individual

We agree with the observations of Mathew, J., in *V. Punnath Thomas v. State of Kerala*(1) that: "The Government is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal". The same point was made by this court in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal*(2) where the question was whether black-listing of a person without

(1) AIR 1969 Kerala 81.

(2) [1975] 2 S.C.R. 674.

10-409 SCI/79

1034

giving him an opportunity to be heard was bad? Ray, C. J., speaking on behalf of himself and his colleagues on the Bench pointed out that black-listing on a person not only affects his reputation which is in POUNDIAN terms an interest both of personality and substance, but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be supported without fair hearing. It was argued for the Government that

no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason, exclude any person from dealing with it or take away largess arbitrarily. The learned Chief Justice said that when the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

Now, it is obvious that the Government which represents the executive authority of the State, may act through the instrumentality

1035

Or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. In the early days, when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge governmental functions, which were of traditional vintage. But as the tasks of the Government multiplied the advent of the welfare State, it began to be increasingly felt that the framework of civil service was not sufficient to handle the new tasks which were often of specialised and highly technical character. The inadequacy of the civil service to deal with these new problems came to be realised and it became necessary to force a new instrumentality or administrative device for handling these new problems. It was in these circumstances and with a view to supplying this administrative need that the public corporation came into being as the third arm of the Government. As early as 1819 the Supreme Court of the United States in *Mac Cullough v. Maryland*(1) held that the Congress has power to charter corporations as incidental to or in aid of governmental functions and, as pointed out by Mathew, J., in *Sukhdev v. Bhagat Ram* (supra) such federal

corporations would ex-hypothesi be agencies of the Government. In Great Britain too, the policy of public administration through separate corporations was gradually evolved and the conduct of basic industries through giant corporations has now become a permanent feature of public life. So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of Government is to be found in the Government of India Resolution on Industrial Policy dated 6th April, 1948 where it was stated inter alia that "management of State enterprises will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this." It was in pursuance of the policy envisaged in this and subsequent resolutions on Industrial Policy, that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally through its service personnel, but the instrumentality or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though

(1) 4 Wheat 315  
1036

in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations. But the question is how to determine whether a corporation is acting as instrumentality or agency of Government. It is a question not entirely free from difficulty.

A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act 1956 or the Societies Registration Act 1860. Where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matter. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition, there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control? Should the functions which the corporation is charged to carry out possess any particular characteristic or feature, or is the nature or the functions immaterial? Now, one thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of

Government. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of directors appointed by Government, though this consideration also may not be determinative, because even while the directors are appointed by Government, they may be completely free from governmental control in the discharge of their functions. What then are the tests to determine whether a corporation established by statute or incorporated under law is an instrumentality or agency of Government? It is not possible to formulate an all-

1037

inclusive or exhaustive test which would adequately answer this question 'there is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not.

The analogy of the concept of State action as developed in the United States may not, however, be altogether out of place while considering this question. The decisions of the court in the United States seem to suggest that a private agency, if supported by extraordinary assistance given by the State, may be subject to the same constitutional limitations as the State. Of course, it may be pointed out that "the State's general common law and statutory structure under which its people carry on their private affairs, own property and contract, each enjoying equality in terms of legal capacity, is not such State assistance as would transform private conduct into State action". But if extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an extensive that the corporation is an instrumentality or agency of Government. The leading case on the subject in the United States is *Kerr v. Eneck Pratt Free Library*(1). The library system in question in this case was established by private donation in 1882, but by 1944, 99 per cent of the system's budget was supplied by the city, title to the library property was held by the city, employees there paid by the city payroll officer and a high degree of budget control was exercised or available to the city government. On these facts the Court of Appeal required the trustees managing the system to abandon a discriminatory admission policy for its library training courses. It will be seen that in this case there was considerable amount of State control of the library system in addition to extensive financial assistance and it is difficult to say whether, in the absence of such control it would have been possible to say that the action of the trustees constituted State action. Thomas P. Lewis has expressed the opinion in his article on "The meaning of State Action" (60 *Columbia Law Review* 1083) that in this case "it is extremely unlikely that absence of public control would have changed the result as long as 99% of the budget of a nominally private institution was provided by government. Such extensive governmental support should be sufficient identification with the Government to subject the institution to the provisions of the Fourteenth Amendment".

(1) 149 F. 2d. 212.

1038

It may, therefore, be possible to say that where the financial assistance of the State is so much as to meet

almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. But where financial assistance is not so extensive, it may not by itself, without anything more render the corporation an instrumentality or agency of government, for there are many private institutions which are in receipt of financial assistance from the State and merely on that account, they cannot be classified as State agencies. Equally a mere finding of some control by the State would not be determinative of the question "since a State has considerable measure of control under its police power over all types of business operations". But 'a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characteristic an operation as State action" vide *Sukhdev v. Bhagatram*(1). So also the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. It may also be a relevant factor to consider whether the corporation enjoys monopoly status which is State conferred or State protected. There can be little doubt that State conferred or State protected monopoly status would be highly relevant in assessing the aggregate weight of the corporation's ties to the State. Vide the observations of Douglas, J., in *Jackson v. Metropolitan Edison Co.*(2)

There is also another factor which may be regarded as having a bearing on this issue and it is whether the operation of the corporation is an important public function. It has been held in the United States in a number of cases that the concept of private action must yield to a conception of State action where public functions are being performed. Vide Arthur S. Miller: "The Constitutional Law of the Security State" (10 *Stanford Law Review* 620 at 664). It was pointed out by Douglas, J., in *Evans v. Newton*(3) that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State". Of course, with the growth of the welfare State, it is very difficult to define what functions are governmental and what are not, because, as pointed out by Villmer, L.J., in *Pfizer v. Ministry of Health*,(4) there has been, since mid-Victorian times, "a revolution in political thought and a totally different conception prevails today as to what is and what is not within the functions of Government".

(1) [1975] 3 S. C. R. 619 at 658.

(2) 419 U. S. 345: 42 L. ed. 2nd 477

(3) 382 U S. 296: 15 L. ed 2nd 373.

(4) [1964] I Ch. 614.

1039

Douglas, J., also observed to the same effect in *New York v. United States*(1): " A State's project is as much a legitimate governmental activity whether it is traditional or akin to private enterprise, or conducted for profit." Cf. *Helverillg v. Gerhardt*(2). A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable. It may be noted that besides the so called traditional functions, the modern State operates a multitude of public enterprises and discharges a host of other public functions. If the functions of the corporation are of public importance and closely related to governmental

functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J., in Sukhdev v. Bhagatram (supra) where the learned Judge said that "institutions engaged in matters of high public interest or performing public functions are by virtue of the nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions."

This was one of the principal tests applied by the United States Supreme Court in Marsh v. Alabama<sup>(3)</sup> for holding that a corporation which owned a Company town was subject to the same constitutional limitations as the State. This case involved the prosecution of Marsh, a member of the Johevah's witnesses sect, under a state trespass statute for refusing to leave the side walk of the company town where she was distributing her religious pamphlets. She was fined \$ 5/- and aggrieved by her conviction she carried the matter right upto the Supreme Court contending successfully that by reason of the action of the corporation her religious liberty had been denied. The Supreme Court held that administration of private property such as a town, though privately carried on, was, nevertheless, in the nature of a public function and that the private rights of the corporation must, therefore, be exercised within constitutional limitations and the conviction for trespass was reversed. The dominant theme of the majority opinion written by Mr. Justice Black was that the property of the corporation used as a town not recognisably different from other towns, lost its identification as purely private property. It was said that a town may

(1) 326 U.S. 572.

(2) 304 U.S. 405, 426, 427.

(3) 326 U.S. 501: 19 L. ed. 265.

1040

be privately owned and managed but that does not necessarily allow the corporation to treat it as if it was wholly in the private sector and the exercise of constitutionally protected rights on the public street of a company town could not be denied by the owner. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation". Mr. Justice Frankfurter, concurring, reduced the case to simpler terms. He found in the realm of civil liberties the need to treat a town, private or not, as a town. The function exercised by the corporation was in the nature of municipal function and it was, therefore, subject to the constitutional limitations placed upon State action.

We find that the same test of public or governmental character of the function was applied by the Supreme Court of the United States in Evans v. Newton (supra) and Smith v. Allwright.<sup>(1)</sup> But the decisions show that even this test of public or governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a corporation, which is otherwise a private

entity, would be an instrumentality or agency of Government by reason of carrying on such activity. In fact, it is difficult to distinguish between governmental functions and non-governmental functions. Perhaps the distinction between governmental and non-governmental functions is not valid any more in a social welfare State where the laissez faire is an outmoded concept and Herbert Spencer's social statics has no place. The contrast is rather between governmental activities which are private and private activities which are governmental. (Mathew, J. Sukhdev v. Bhagatram (supra) at p. 652). But the public nature of the function, if impregnated with governmental character or "tied or entwined with Government" or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government. Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference.

(1) 321 U. S. 649.

1041

It will thus be seen that there are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of Government. We have referred to some of these factors and they may be summarised as under: whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance whether there is any other form of assistance, given by the State, and if so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation by the State and what is the nature and extent of such control, whether the corporation enjoys State conferred or State protected monopoly status and whether the functions carried out by the corporation are public functions closely related to governmental functions. This particularisation of relevant factors is however not exhaustive and by its very nature it cannot be, because with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the corporation and Government calling for flexibility, adapt ability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unflinching answer to the question whether a corporation is governmental instrumentality or agency. Moreover even amongst these factors which we have described, no one single factor will yield a satisfactory answer to the question and the court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of a particularised inquiry into the facts and circumstances of each case. "the dispositive question in any state action case," as pointed out by Douglas, J., in Jackson v. Metropolitan Edison Company (supra) "is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility." It is not enough to examine seriatim each of the factors upon which a corporation is claimed to be an instrumentality or agency of Government and to dismiss each individually as being insufficient to support a finding of that effect. It is the aggregate or cumulative affect of all the relevant factors that is controlling. G

Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The



rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily

1042

and enter into relationship with any person it likes at its sweetwill, but its action must be in conformity with some principle which meets the test of reason and relevance.

This rule also flows directly from the doctrine of equality embodied in Art. 14. It is now well settled as a result of the decisions of this Court in *E. P. Rayappa v. State of Tamil Nadu*(1) and *Maneka Gandhi v. Union of India*(2) that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in *Erusian Equipment and Chemicals v. State of West Bengal* (supra) where the learned Chief Justice pointed out that "the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person The Government cannot choose to exclude persons by discrimination. The order of black-listing has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting.... A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling....It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the

(1) [1974] 2 S. C. R. 348.

(2) 1978] 2 S. C. R. 621.

1043

goods." It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard

or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground.

It is interesting to find that this rule was recognised and applied by a Constitution Bench of this Court in a case of sale of kendu leaves by the Government of Orissa in *Rashbihari Panda v. State of Orissa*.<sup>(1)</sup> The trade of kendu leaves in the State of Orissa was regulated by the Orissa Kendu Leaves (Control of Trade) Act, 1961 and this Act created a monopoly in favour of the State so far as purchase of kendu leaves from growers and pluckers was concerned. Section 10 of the Act authorised the Government to sell or otherwise dispose of kendu leaves purchased in such manner as the Government might direct. The Government first evolved a scheme under which it offered to renew the Licences of those traders who in its view had worked satisfactorily in the previous year and had regularly paid the amount due from them. The scheme was challenged and realising that it might be struck down, the Government withdrew the scheme and instead, decided to invite tenders for advance purchase of kendu leaves but restricted the invitation to those individuals who had carried out contracts in the previous year without default and to the satisfaction of the Government. This method of sale of kendu leaves was also challenged by filing a writ petition on the ground inter alia that it was violative of Articles 14 and 19(1)(g) and this challenge, though negatived by the High Court, was upheld by this Court in appeal. The Court pointed out that the original scheme of offering to enter into contracts with the old licences and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade and the new scheme under which the Government restricted the invitation to make offers to those traders who had carried out their contracts in the previous year without default and to the satisfaction of the Government was also objectionable, since the right to make tenders for the purchase of kendu leaves being restricted to a limited

(1) [1969] 3 S.C.R. 374.

1044

class of persons, it effectively shut out all other persons carrying on trade in kendu leaves and also the new entrants into that business and hence it was ex-facie discriminatory and imposed unreasonable restrictions upon the right of persons other than the existing contractors to carry on business. Both the schemes evolved by the Government were thus held to be violative of Articles 14 and 19(1)(g) because they "gave rise to a monopoly in the trade in kendu leaves to certain traders and singled out other traders for discriminatory treatment". The argument that existing contractors who had carried out their obligations in the previous year regularly and to the satisfaction of the Government formed a valid basis of classification bearing a just and reasonable relation to the object sought to be achieved by the sales namely, effective execution of the monopoly in the public interest, was also negatived and it was pointed out that: "exclusion of all persons interested in the trade, who were not in the previous year licencees, is ex facie arbitrary; it had not direct relation to the object of preventing exploitation of pluckers and growers of kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade, to the State".

The Court referred to the offer made by a well known manufacturer of bidis for purchase of the entire crop of kendu leaves for a sum of Rs. 3 crores which was turned down

by the Government and expressed its surprise that no explanation was attempted to be given on behalf of the State as to why such an offer, from which the State stood to gain more than Rs. 1 crore, was rejected by the Government. It will be seen from this judgment that restricting the invitation to submit tenders to a limited class of persons was held to be violative of the equality clause, because the classification did not bear any just and reasonable relation to the object sought to be achieved, namely, selling of kendu leaves in the interest of general public. The standard or norm laid down by the Government for entering into contracts of sale of tendu leaves with third parties was discriminatory and could not stand the scrutiny of Article 14 and hence the scheme was held to be invalid. The Court rejected the contention of the Government that by reason of section 10 it was entitled to dispose of kendu leaves in such manner as it thought fit and there was no limitation upon its power to enter into contracts for sale of kendu leaves with such persons it liked. The Court held that the Government was, in the exercise of its power to enter into contracts for sale of kendu leaves; subject to the constitutional limitation of Article 14 and it could not act arbitrarily in selecting persons with whom to enter into contracts and discriminate against others similarly situated. The Court criticised

1045

the Government for not giving any explanation as to why an offer for a large amount was not accepted, the clearest implication being that the Government must act in the public interest; it cannot act arbitrarily and without reason and if it does so, its action would be liable to be invalidated. This decision wholly supports the view we are taking in regard to the applicability of the rule against arbitrariness in State action. B

We may also in this connection refer to the decision of this Court in *C. K. Achuthan v. State of Kerala*(1), where Hidayatullah, J., speaking on behalf of The Court made certain observation which was strongly relied upon on behalf of the respondents. The facts of this case were that the petitioner and the 3rd respondent Co-operative Milk Supply Union, Cannanore, submitted tenders for the supply of milk to the Government hospital at Cannanore for the year 1948-49. The Superintendent who scrutinised the tenders accepted that of the petitioner and communicated the reasons for the decision to the Director of Public Health. The resulting contract in favour of the petitioner was, however, subsequently cancelled by issuing a notice in terms of clause (2) of the tender, in pursuance of the policy of the Government that in the matter of supply to Government Medical Institutions the Co-operative Milk Supply Union should be given contract on the basis of prices filed by the Revenue Department. The petitioner challenged the decision of the Government in a petition under Article 32 of the Constitution on the ground inter alia that there had been discrimination against him vis-a-vis the 3rd respondent and as such, there was contravention of Article 14 of the Constitution. The Constitution Bench rejected this contention of the petitioner and while doing so, Hidayatullah, J., made the following observation: "There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14, because the choice of the person to fulfil a

particular contract must be left to the Government." The respondents relied very strongly on this observation in support of their contention that it is open to the 'State' to enter into contract with any one it likes and choosing one person in preference to another for entering into a contract does not involve violation of Article 14. Though the language in which this observation is couched is rather wide, we do not think that in making this observation, the Court intended to lay down any absolute proposition permitting the state to act arbitrarily in the matter of entering into contract with

(1) [1959] Supp. 1 S C. R. 787.

1046

third parties. We have no doubt that the Court could not have intended to lay down such a proposition because Hidayatullah J. who delivered the judgment of the Court in this case was also a party to the judgment in *Rashbihari Panda v. State of Orissa* (supra) which was also a decision of the Constitution Bench, where it was held in so many terms that the State cannot act arbitrarily in selecting persons with whom to enter into contracts. Obviously what the Court meant to say was that merely because one person is chosen in preference to another, it does not follow that there is a violation of Article 14, because the Government must necessarily be entitled to make a choice. But that does not mean that the choice be arbitrary or fanciful. The choice must be dictated by public interest and must not be unreasoned or unprincipled.

The respondents also relied on the decision of this Court in *Trilochan Mishra v. State of Orissa & ors.* (1) The complaint of the petitioner in that case was that the bids of persons making the highest tenders were not accepted and persons who had made lesser bids were asked to raise their bids to the highest offered and their revised bids were accepted. The Constitution Bench negated this complaint and speaking through Mitter, J., observed:

"With regard to the grievance that in some cases the bids of persons making the highest tenders were not accepted, The facts are that persons who had made lower bids were asked to raise their bids to the highest offered before the same were accepted. Thus there was no loss to Government and merely because the Government preferred one tender to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an overall consideration to be preferred to the higher tenderer."

We fail to see how this observation can help the contention of the respondents. It does not say that the Government can enter into contract with any one it likes arbitrarily and without reason. On the contrary, it postulates that the Government may reject a higher tender and accept a lower one only when there is valid reason to do so, as for example, where it is satisfied that the person offering the Lower

1) [1971] 3 S. C. C. 153.

1047

tender is on an overall consideration preferable to the higher tenderer. There must be some relevant reason for preferring one tenderer to another, and if there is, the

Government can certainly enter into contract with the former even though his tender may be lower but it cannot do so arbitrarily or for extraneous reason.

There was also one other decision of this Court in State of Orissa v. Harinarayan Jaiswal & ors.(1) which was strongly relied upon on behalf of the respondents. There the respondents were the highest bidders at an auction held by the Orissa Government through the Excise Commissioner for the exclusive privilege of selling by retail country liquor in some shops. The auction was held pursuant to an order dated 6th January, 1971 issued by the Government of Orissa in exercise of the power conferred under section 29(2) of the Bihar & Orissa Excise Act, 1915 and clause (6) of this order provided that "no sale shall be deemed to be final unless confirmed by the State Government who shall be at liberty to accept or reject any bid without assigning any reason therefor". The Government of Orissa did not accept any of the bids made at the auction and subsequently sold the privilege by negotiations with some other parties. One of the contentions raised on behalf of the petitioners in that case was that the power retained by the Government "to accept or reject any bid without any reason therefor" was an arbitrary power violative of Articles 14 and 19(1) (g). This contention was negatived and Hegde, J. speaking on behalf of the Court observed:

"The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privilege set out in section 22 was not denied. It was also not disputed that these privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges  
(1) [1972] 2 S.C.C. 36.

1048

in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate."

It will be seen from these observations that the validity of clause (6) of the order dated 6th January, 1971 was upheld by this Court on the ground that having regard to the object of holding the auction, namely, to raise revenue, the Government was entitled to reject even the highest bid, if it thought that the price offered was inadequate. The Government was not bound to accept the tender of the person who offered the highest amount and if the Government rejected all the bids made at the auction, it did not involve any violation of Article 14 or 19(1)(g). This is a self-evident proposition and we do not see how it can be of any assistance to the respondents.

The last decision to which reference was made on behalf of the respondents was the decision in P. R. Quenin v. M. K. Tendel(1) This decision merely reiterates the principle laid down in the earlier decisions in Trilochan Mishra v. State of Orissa (supra) and State of Orissa v. Harinarayan Jaiswal

(supra) and points out that a condition that the Government shall be at liberty to accept or reject any bid without assigning any reason therefor is not violative of Article 14 and that "in matters relating to contracts with the Government, the latter is not bound to accept the tender of the person who offers the highest amount". Now where does it say that such a condition permits the Government to act arbitrarily in accepting a tender or that under the guise or pretext of such a condition, the Government may enter into a contract with any person it likes, arbitrarily and without reason. In fact the Court pointed out at the end of the judgment that the act of the Government was not "shown to be vitiated by such arbitrariness as should call for interference by the Court", recognising clearly that if the rejection of the tender of the 1st respondent were arbitrary, the Court would have been justified in striking it down as invalid.

Now this rule, flowing as it does from Article 14, applies to every State action and since "State" is defined in Article 12 to include not only the Government of India and the Government of each of the States, but also "all local or other authorities within the territory of India or under the control of the Government of India", it must apply to action of "other authorities" and they must be held subject to the same constitutional limitation as the Government. But the question arises what are the "other authorities" contemplated by Article 12 which fall within the definition of 'State'? on this ques-

(1) [1974] 3 S. C. R. 64.

1049

tion considerable light is thrown by the decision of this Court in Rajasthan Electricity Board v. Mohan Lal(1). That was a case in which this Court was called upon to consider whether the Rajasthan Electricity Board was an 'authority' within the meaning of the expression "other authorities" in Art. 12. Bhargava, J., delivering the judgment of the majority pointed out that the expression "other authorities" in Art. 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned Judge also said that if any body of persons has authority to issue directions the disobedience of which would be punishable as a criminal offence, that would be an indication that that authority is 'State'. Shah, J., who delivered a separate judgment, agreeing with the conclusion reached by the majority, preferred to give a slightly different meaning to the expression "other authorities". He said that authorities, constitutional or statutory, would fall within the expression "other authorities" only if they are invested with the sovereign power of the State, namely, the power to make rules and regulations which have the force of law. The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression "other authorities", if it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequence or it has the sovereign power to make rules and regulations having the force of law. This test was followed by Ray, C.J., in Sukhdev v. Bhagat Ram (supra). Mathew, J., however, in the same case, propounded a broader test, namely, whether the statutory corporation or other body or authority, claimed to fall within the definition of 'State', is as instrumentality or agency of Government: if it is, it would fall within the meaning of the expression 'other authorities' and would be 'State'. Whilst accepting the test laid down in Rajasthan Electricity

Board v. Mohan Lal (supra), and followed by Ray, C. J., in Sukhdev v. Bhagat Ram (supra), we would, for reasons already discussed, prefer to adopt the test of Governmental instrumentality or agency as one more test and perhaps a more satisfactory one for determining whether a statutory corporation, body or other authority falls within the definition of 'State'. If a statutory corporation, body or other authority is an instrumentality or agency of Government, it would be an 'authority' and therefore 'State' within the meaning of that expression in Article 12.

It is necessary at this stage to refer to a few decisions of this Court which seem to bear on this point and which require a little

(1) [1967] 3 S C, R 377

11-904 SCI/79

1050

explanation. The first is the decision in Praga Tools Corporation v. C. A. Imanuel.<sup>(1)</sup> This was a case in which some of the workmen sought a writ of mandamus against Praga Tools Corporation which was a company with 56 per cent of its share capital held by the Central Government, 32 per cent by the Andhra Pradesh Government and 12 per cent by private individuals. The Court held that a writ of mandamus did not lie, because Praga Tools Corporation "being a non statutory body and one incorporated under the Companies Act, there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty." (emphasis supplied). It is difficult to see how this decision can be of any help in deciding the present issue before us. This was not a case where Praga Tools Corporation claimed to be an instrumentality of government or an 'authority' within the meaning of Article 12. The only question was whether a writ of mandamus could lie and it was held that since there was no duty imposed on Praga Tool Corporation by statute, no writ of mandamus could issue against it.

The second decision to which we must refer is that in Heavy Engineering Mazdoor Union v. State of Bihar<sup>(2)</sup>. The question which arose in this case was whether a reference of an industrial dispute between the Heavy Engineering Corporation Limited (hereinafter referred to as the 'Corporation') and the Union made by the State of Bihar under section 10 of the Industrial Disputes Act, 1947 was valid. The argument of the Union was that the industry in question was "carried on under the authority of the Central Government" and the reference could, therefore, be made only by the Central Government. The Court held that the words "under the authority" mean "pursuant to the authority, such as where an agent or a servant acts under of pursuant to the authority of his principal or master" and on this view, the Court addressed itself to the question whether the Corporation could be said to be carrying on business pursuant to the authority of the Central Government. The answer to this question was obviously 'no' because the Corporation was carrying on business in virtue of the authority derived from its memorandum and articles of association and not by reason of any authority granted by the Central Government. The Corporation, in carrying on business, was acting on its own behalf and not on behalf of the Central Government and it was therefore not a servant or agent of the Central Government in the sense that its actions would bind the Central Government. There

(1) [1969] 3 S. C. R. 773,

(2) [1969] 3 S. C. R 995.

1051

was no question in this case whether the Corporation was an instrumentality of the Central Government and therefore an 'authority within the meaning of Article 12. We may point out here that when we speak of a Corporation being an instrumentality or agency of Government, we do not mean to suggest that the Corporation should be an agent of the Government in the sense that whatever it does should be binding on the Government. It is not the relationship of principal and agent which is relevant and material but whether the Corporation is an instrumentality of the Government in the sense that a part of the governing power of the State is located in the Corporation and though the Corporation is acting on its own behalf and not on behalf of the Government, its action is really in the nature of State action. This decision dealing with an altogether different point has no bearing on the present issue.

We may then refer to the decision in *S. L. Aggarwal v. General Manager, Hindustan Steel Limited*. (1) This decision has also no relevance to the point at issue before us, since the only question in that case was whether all Assistant Surgeon in the employment of Hindustan Steel Limited could be said to be holding a civil post under the Union or a State so as to be entitled to the protection of Article 311(2) of the Constitution. The Court held that Hindustan Steel Limited was not a department of the Government nor were its employees holding posts under the State within the meaning of Article 311(2). The decision was clearly right and indeed it could not be otherwise since Hindustan Steel Limited, which was a distinct and independent legal entity, was not a department of the Government and could not be regarded as State for the purpose of Article 311(2). It may be noted that the Court was not concerned with the question whether Hindustan Steel Limited was an 'authority' within the meaning of Article 12.

Lastly, we must refer to the decision in *Sarbhajit Tewari v. Union of India & ors.* (2) where the question was whether the Council of Scientific and Industrial Research was an 'authority' within the meaning of Article 12. The Court no doubt took the view on the basis of facts relevant to the constitution and functioning of the council that it was not an 'authority', but we do not find any discussion in this case as to what are the features which must be present before a corporation can be regarded as an 'authority' within the meaning of Article 12. This decision does not lay down any principle or test for the purpose of determining when a corporation can be said to be an 'authority'. If at all any test can be gleaned from the decision, it is

(1) [1970] 3 S. C. R. 363.

(2) [1975] 1 S. C. C. 485.

1052

whether the Corporation is 'really an agency of the Government'. The Court seemed to hold on the facts that the Council was not an agency of the Government and was, therefore, not an 'authority'.

We may examine, in the light of this discussion, whether the 1st respondent, namely, the International Airport Authority of India, can be said to be an authority falling within the definition of 'State' in Article 12. It is necessary to refer to some of the provisions of the International Airport Authority Act, 1971 (hereinafter referred to as the Act) for the purpose of determining this question. Sub-section (1) of section 3 of the Act provides that the Central Government shall constitute an authority to



be called the International Airport Authority of India, to whom we shall hereafter refer as the 1st respondent. Sub-section (2) states that the 1st respondent shall be a body corporate having perpetual succession and a common seal and sub-section (3) enacts that the 1st respondent shall consist of a Chairman to be appointed by the Central Government, the Director General of Civil Aviation ex officio and not less than six and not more than thirteen members to be appointed by the Central Government. The term of office of every member of the 1st respondent is prescribed by sub-section (1) of section 5 to be 3 years, but the Central Government is given under the Proviso power to terminate the appointment of any member who is not a servant of the Government after giving him notice as also to terminate at any time the appointment of any member who is a servant of the Government. The power to remove a member in certain specified circumstances is also vested in the Central Government under section 6. Section 32, sub-section (1) provides that as from the date appointed by the Central Government all properties and other assets vested in the p Central Government for the purposes of the airport and administered by the Director General of Civil Aviation immediately before such date shall vest in the 1st respondent and all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with or for the Central Government immediately before such date shall be deemed to have been incurred, entered into and engaged to be done by, with or for the 1st respondent. This sub-section also says that all non-recurring expenditure incurred by the Central Government for or in connection with the purposes of the airport upto the appointed date and declared to be capital expenditure by the Central Government shall be treated as the capital provided by the Central Government to the 1st respondent and all sums of money due to the Central Government in relation to the airport immediately before the appointed date shall be deemed to be due to the 1st respondent. The 1st respondent is also given the power to institute or continue all suits

1053

and other legal proceedings instituted or which could have been instituted by or against the Central Government for any matter in relation to the airport and every employee holding any office under the Central Government immediately before the appointed date solely or mainly for or in connection with the affairs of the airport shall be treated as on deputation with the 1st respondent. Sub-section (1) of section 12 also enacts similar provisions with regard to the air navigation services and the buildings used exclusively for such services immediately before the appointed date. The functions of the 1st respondent are specified in section 16: sub-section (1) provides that, subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the 1st respondent to manage the airports efficiently and sub-section (2) casts an obligation on the 1st respondent to provide at the airports such services and facilities as are necessary or desirable for the efficient operation of air transport services and certain specific functions to be performed by the 1st respondent are particularised in sub-section (3). These functions were, until the appointed date, being carried out by the Central Government but now under Section 16 they are transferred to the 1st respondent. Section 20 provides that after making provision for reserve funds, bad and doubtful debts, depreciation in assets and an other matters which are

usually provided for by companies, the 1st respondent shall pay the balance of its annual net profits to the Central Government. Section 21 requires the 1st respondent to submit for the approval of the Central Government a statement of the programme of its activities during the forthcoming financial year as well as its financial estimate in respect thereof at least three months before the commencement of each financial year and section 24 provides that the accounts of the 1st respondent shall be audited annually by the Comptroller and Auditor General and the accounts as certified by the Comptroller and Auditor General or any other person appointed by him in this behalf, together with the audit report thereon, shall be forwarded to the Central Government and the Central Government shall cause the same to be laid before both Houses of Parliament. The 1st respondent is also required by section 25 to prepare and submit to the Central Government, as soon as may be after the end of each financial year, a report giving an account of its activities during the financial year and this report has to be laid before both Houses of Parliament by the Central Government. The officers and employees of the 1st respondent are deemed by section 28 to be public servants and section 29 gives them immunity from suit, prosecution or other legal proceeding for anything in good faith done or intended to be done in pursuance of the Act or any rule or regulation made under it. Section 33 confers power on the Central Government

1054

to temporarily divest the 1st respondent from the management of any airport and to direct the 1st respondent to entrust such management to any other person. The Central Government is also empowered by section 34 to supersede the 1st respondent under certain specified circumstances. Section 35 gives power to the Central Government to give directions in writing from time to time on questions of policy and provides that the 1st respondent shall in the discharge of its functions, and duties, be bound by such directions. Section 36 confers rule making power on the Central Government for carrying out the purposes of the Act and power to make regulations is conferred on the 1st respondent under section 37. Section 39 provides that any regulation made by the 1st respondent under any of the clauses (g) to (m) of sub-section (2) of section 37 may make it Penal to contravene such regulation.

It will be seen from these provisions that there are certain features of the 1st respondent which are eloquent and throw considerable light on the true nature of the 1st respondent. In the first place, the chairman and members of the 1st respondent are all persons nominated by the Central Government and the Central Government has also the power to terminate their appointment as also to remove them in certain specified circumstances. The Central Government is also vested with the power to take away the management of any airport from the 1st respondent and to entrust it to any other person or authority and for certain special reasons, the Central Government can also supersede the 1st respondent. The Central Government has also power to give directions in writing, from time to time on questions of policy and these directions are declared binding on the 1st respondent. The 1st respondent has no share capital but the capital needed by it for carrying out its functions is provided wholly by the Central Government. The balance of the not profit made by the 1st respondent after making provision for various charges, such as reserve funds, had and doubtful debts depreciation in assets etc. does not

remain with the 1st respondent and is required to be paid over to the Central Government. The 1st respondent is also required to submit to the Central Government for its approval a statement of the programme of its activities as also the financial estimate and it must follow as a necessary corollary that the 1st respondent can carry out only such activities and incur only such expenditure as is approved by the Central Government. The audited accounts of the 1st respondent together with the audit report have to be forwarded to the Central Government and they are required to be laid before both Houses of Parliament. So far as the functions of the 1st respondent are concerned, the entire department of the Central Government relating to the administration of airports and air navigation services together with its

1055

properties and assets, debts, obligations and liabilities, contracts, causes of action and pending litigation is transferred to the 1st respondent and the 1st respondent is charged with carrying out the same functions which were, until the appointed date, being carried out by the Central Government. The employees and officers on the 1st respondent are also deemed to be public servants and the 1st respondent as well as its members, officers and employees are given immunity for anything which is in good faith done or intended to be done in pursuance of the Act or any rule or regulation made under it. The 1st respondent is also given power to frame Regulations and to provide that contravention of certain specified Regulations shall entail penal consequence. These provisions clearly show that every test discussed above is satisfied in the case of the 1st respondent and they leave no doubt that the 1st respondent is an instrumentality or agency of the Central Government and falls within the definition of 'State' both on the 'narrow view' taken by the majority in *Sukhdev v. Bhagat Ram* (supra) as also on the broader view of Mathew, J., adopted by us.

It is, therefore, obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, the 1st respondent was not entitled to act arbitrarily in accepting the tender of the 4th respondents, but was bound to conform to the standard or norm laid down in paragraph 1 of the notice inviting tenders which required that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to tender. It was not the contention of the appellant that this standard or norm prescribed by the 1st respondent was discriminatory having no just or reasonable relation to the object of inviting tenders namely, to award the contract to a sufficiently experienced person who would be able to run efficiently a IInd class restaurant at the airport. Admittedly the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a IInd Class restaurant should be awarded was laid down, the 1st respondent was not entitled to depart from it and to award the contract to the 4th respondents who did not satisfy the condition of eligibility prescribed by the standard or norm. If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondents. When the 1st respondent entertained the tender

of the 4th respondents even though they did not have 5 years' experience of running a IInd Class

1056

restaurant or hotel, denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years' experience of running a IInd Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with the 4th respondents for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience. The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other person similarly situate from tendering for the contract and it was plainly arbitrary and without reason. The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action.

Now, on this view we should have ordinarily set aside the decision of the, - 1st respondent accepting the tender of the 4th respondents and the contract resulting from such acceptance but in view of the peculiar facts and circumstances of the present case, we do not think it would be a sound exercise of discretion on our part to upset that decision and void the contract. It does appear from the affidavits filed by the parties that the appellant has no real interest in the result of the litigation, but has been put up by A. S. Irani for depriving the 4th respondents of the benefit of the contract secured by them. We find that a number of proceedings have been instituted for this purpose from time to time by A. S. Irani either personally or by instigating others to take such proceedings. The first salvo in the battle against the 4th respondents was fired by K. S. Irani, proprietor of Cafe Excelsior, who filed a suit challenging the decision of the 1st respondent to accept the tender of the 4th respondents, but in this suit he failed to obtain an interim injunction and his appeal was dismissed by the High Court on 19th October, 1977. It is significant that when the tenders were opened in the office of the Airport Director, Cafe Excelsior was represented by A. S. Irani, which shows that either Cafe Excelsior was a nominee of A. S. Irani or in any event K. S. Irani, proprietor of Cafe Excelsior, was closely connected with A. S. Irani. Moreover, it is interesting to note that though the tender of the 4th respondents was accepted as far back as 19th April, 1977, K. S. Irani did not adopt any proceedings immediately but filed the suit only after A. S. Irani was informed by the Airport Director on 22nd August, 1977 that a final order has been received from the Ministry

1057

requiring A. S. Irani to immediately close down his restaurant and snack bars. It is also a circumstance not without significance that A. S. Irani did not immediately take any proceeding for challenging the acceptance of the tender of the 4th respondents, but filed a suit in his own name only after the appeal of K. S. Irani was dismissed by the High Court on 19th October, 1977. These circumstances clearly indicate that the suit was filed by K. S. Irani at the instance of A. S. Irani or in any event in concert with him and when the suit of K. S. Irani failed to achieve the desired result, A. S. Irani stepped into the arena and filed

his own suit. This suit was for a mandatory injunction seeking removal of the two snack bars which had in the meantime' been put up by the 4th respondents pursuant to the acceptance of their tender by the 1st respondent. But in this proceeding also A. S. Irani failed to obtain an ad-interim injunction. It was only after the failure to obtain interim relief in these two proceedings, one by K. S. Irani and the other by A. S. Irani, that the appellant filed the present writ petition in the High Court of Bombay challenging the decision of the 1st respondent to accept the tender of the 4th respondents. Now, it appears from the record that the appellant was at the material time conducting a restaurant called Royal Restaurant and Store which was owned in partnership by three persons, namely, J. K. Irani, K. M. Irani and G. S. Irani. G. S. Irani is the brother of A. S. Irani and he was managing and looking after the restaurant of A. S. Irani at the airport. It would, therefore, be a fair inference to make that the appellant was well connected with A. S. Irani and from the manner in which proceedings with a view to thwarting the attempt of the 4th respondents to obtain the benefit of their contract, have been adopted one after the other in different names, it does appear that the appellant has filed the writ petition at the instance of A. S. Irani with a view to helping him to obtain the contract for the restaurant and the snack bars. It is difficult to understand why the appellant should have waited until 8th November, 1977 to file the writ petition when the tender of the 4th respondents was accepted as far back as 19th April, 1977. The explanation given by the appellant is that he was not aware of the acceptance of the tender of the 4th respondents but that is a rather naive explanation which cannot be easily accepted. It is not possible to believe that the appellant who was so well connected with A. S. Irani and G. S. Irani did not know that A. S. Irani had failed to obtain the contract for running the restaurant and the snack bars and that this contract had been awarded to the 4th respondents as a result of which A. S. Irani was being pressed to close down his restaurant and snack bars. We have grave doubts whether this writ petition was commenced by the appellant bona fide

1058

with a view to protecting his own interest. Moreover, the writ petition was filed by the appellant more than five months after the acceptance of the tender of the 4th respondents and during this period, the 4th respondents incurred considerable expenditure aggregating to about Rs. 1,25,000/- in making arrangements for putting up the restaurant and the snack bars and in fact set up the snack bars and started running the same. It would now be most inequitable to set aside the contracts of the 4th respondents at the instance of the appellant. The position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of the 4th respondents but the appellant allowed a period of over five months to elapse during which the 4th respondents altered their position. We are, therefore, of the view that this is not a fit case in which we should interfere and grant relief to the appellant in the exercise of our discretion under Article 136 read with Article 226 of the Constitution.

We accordingly dismiss the appeal and confirm the order of the High Court rejecting the writ petition. But in the circumstances of the case there will be no order as to costs throughout.

P.B.R

Appeal dismissed.

1059

JUDIS