IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 24TH DAY OF JULY 2015/2ND SRAVANA, 1937

WP(C).No. 19603 of 2015 (A)

PETITIONER(S):

M/S.DEENS CONSTRUCTIONS,
1ST FLOOR, MA BOOK WORK, CIVIL LANE,
BYPASS JUNCTION, PALARIVATOM, KOCHI - 682 025,
REPRESENTED BY ITS MANAGING PARTNER,
SRI. SHAHUL HAMEED.

BY ADVS. SRI.JOSEPH MARKOSE (SR.)
SRI.MOHAMMED RAFIQ

RESPONDENT(S):
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1. **M/S.BHARAT PETROLEUM CORPORATION LIMITED,**
   (A GOVERNMENT OF INDIA ENTERPRISES),
   SOUTHERN REGION, 1, RANGANATHAN GARDENS,
   OFF 11TH MAIN ROAD, ANNA NAGAR WEST, CHENNAI - 600 040.

2. **M/S. BHARAT PETROLEUM CORPORATION LIMITED,**
   (A GOVERNMENT OF INDIA ENTERPRISES), AMBALAMUGAL,
   KOCHI - 682 302.

3. **M/S. SURYA CONSTRUCTIONS,**
   ENTINEERES AND CONTRATORS, P.B. NO, 57,
   PALACE ARCADE, STATUE JUNCTION,
   THRIPPUNITHURA ERNAKULAM - 682 301.

*** ADDITIONAL R4 IMPLEADED.**

4. **THE DEPUTY COMMISSIONER,**
   COMMERCIAL TAXES, ERNAKULAM.

*** ADDITIONAL R4 IS SUOMOTU IMPLEADED AS PER ORDER DTD.13.7.2015.**

R1-R2 BY ADVS. SRI.N.N.SUGUNAPALAN (SR.)
SRI.S.SUJIN
SRI.M.GOPIKRISHNAN NAMBIAR
R3 BY ADVS. SRI.K.BABU THOMAS
SMT.MARYKUTTY BABU
R4 BY GOVERNMENT PLEADER SRI.V.K.RAFEEQ

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 24-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

msv/

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APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1: TRUE COPY OF THE E-TENDER ISSUED BY THE 1ST AND 2ND RESPONDENTS.

EXT.P2: TRUE COPY OF THE TENDER DOCUMENTS RELATING TO THE E-TENDER.

EXT. P3: TRUE COPY OF THE PRICE BID SUBMITTED BY THE PETITIONER BEFORE THE 1ST AND 2ND RESPONDENT.

EXT. P4: TRUE COPY OF THE PRICE BID SUBMITTED BY THE 3RD RESPONDENT BEFORE THE 1ST AND 2ND RESPONDENTS.

EXT. P5: TRUE COPY OF LETTER DATED 16.4.2015 ISSUED BY THE PETITIONER TO THE 1ST RESPONDENT.

EXT. P6: TRUE COPY OF LETTER DATED 20.4.2015 ISSUED BY THE PETITIONER TO THE 1ST PETITIONER.

EXT. P7: TRUE COPY OF THE E-MAIL DATED 21.4.2015 ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER.

EXT. P8: TRUE COPY OF E-MAIL DATED 23.4.2015 ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER.

EXT. P9: TRUE COPY OF LETTER DATED 4.6.2015 ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER WITH ENCLOSURE.

EXT.P10: TRUE COPY OF EXTRACT FROM THE OFFICIAL WEBSITE OF THE CHIEF MINISTER OF KERALA.

EXT.P11: TRUE COPY OF THE GOVERNMENT ORDER DTD.8.5.2014.

RESPONDENT(S)' EXHIBITS:

EXT.R1(a): TRUE COPY OF THE CONSOLIDATED COMPARATIVE STATEMENT OF THE TENDER ITEMS (PRICE) QUOTED BY ALL THE 7 BIDDERS.

EXT.R1(b): TRUE COPY OF THE LETTER DTD.19.5.2015 SUBMITTED BY THE 3RD RESPONDENT.

EXT.R1(c): TRUE COPY OF THE SPECIAL CONDITIONS OF THE CONTRACT.

EXT.R3(a): TRUE COPY OF RELEVANT PORTION OF SPECIAL CONDITIONS INCORPORATED IN THE E-TENDER NOTICE.

EXT.R3(b): TRUE COPY OF PARTICULARS OF THE PRICE BIDS SUBMITTED BY 7 BIDDERS, 4 OF THEM QUOTING 0% RATE FOR VAT AMOUNT.

Msv/

WP(C).No. 19603 of 2015 (A)

EXT.R3(c): TRUE COPY OF THE SUMMARY OF THE PRICE BID AMOUNTS QUOTED BY THE 3RD RESPONDENT AS THE LOWEST BIDDER FOR RS.14,29,82,284.11/- AND PETITIONER FOR RS.14,68,35,041.75 WITH DIFFERENCE OF RS.38,52,787/-

EXT.R3(d): TRUE COPY OF CERTIFICATE OF REGISTRATION UNDER THE VAT-TIN/PIN NO.32072087002 HAVING VALIDITY PERIOD UPTO 31.3.2016.

EXT.R3(e): TRUE COPY OF PERMISSION FOR PAYMENT OF VAT UNDER COMPOUNDING SCHEME - VALIDITY PERIOD UP TO 31.3.2016.

EXT.R3(f): TRUE COPY OF LIABILITY CERTIFICATE IN FORM NOIEE FOR PAYMENT OF BILLS WITHOUT RECOVERY OF VAT.

RESPONDENT(S)' ANNEXURES:

ANNEXURE R4(a): A TRUE COPY OF THE ORDER NO.C1-19400/2011/CT DTD.7.1.2015 OF THE COMMISSIONER OF COMMERCIAL TAXES, TRIVANDRUM.

ANNEXURE R4(b): A TRUE COPY OF THE ORDER DTD.13.2.2015 OF THE DEPUTY COMMISSIONER, COMMERCIAL TAXES, ERNAKULAM.

ANNEXURE R4(c): A TRUE COPY OF THE ORDER NO.C5-333/2014-15 DTD. 30.4.2015 OF THE DEPUTY COMMISSIONER, COMMERCIAL TAXES, ERNAKULAM.

//TRUE COPY//

P.S.TO JUDGE

Ms**v/**

K. VINOD CHANDRAN, J.

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W.P.(C) No.19603 of 2015 - A

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Dated this the 24th day of July, 2015

J U D G M E N T

The only issue raised in the above writ petition is with respect to the tax liability of each of the tenderers as shown in the respective tenders and the benefit which would accrue to the Bharat Petroleum Corporation Limited (B.P.C.L) on accepting the tender of the petitioner herein. The petitioner and the 3rd respondent were admittedly tenderors pursuant to Exts.P1 and P2 notification of the B.P.C.L.

2. The specific condition in Ext.P1 relied on by the petitioner is clause 4 and 5 and 11(a), 11(d),12(f), 12(g), 12(h) and 12(i), which are extracted hereunder:-

> 4. Please quote basic rates, VAT and service tax separately. Please note that the current composite service tax for original works is 4.944% @ 40% of 12%.
>
> 5. All taxes/other statutory levies other than VAT and Service Tax should be included in the quoted basic

rates and no claims whatsoever will be entertained after opening of bids.

xxx xxx xxx

11(a). Prices shall be quoted, in the prescribed price schedule by the bidder separately for each item of scope and in strict compliance to the format of the price schedule.

xxx xxx xxx

11(d). Prices quoted shall be basic unit price exclusive of duties, taxes, levies, cess, fees etc. towards complete scope of work. The applicable rate of statutory taxes & duties must be indicated in Annexure-III of NIT as well as in Price bid. However, Service tax on free issue materials supplied by the company would be paid extra, if applicable.

xxx xxx xxx

12(f). Bidders are required to quote VAT, as applicable in the respective state, as explained in clause 11(d). VAT credit may be considered while evaluation.

12(g). The Bidders should mention clearly in his bids whether he has opted for composition scheme or standard deduction method or Actual non-materials value method. Rate and amount of such VAT (WCT) being quoted, has to be given for evaluation. Preferred option to be followed is Composition Scheme.

12(h) Any other taxes, duties, levies, rates and Cess, if applicable, should be mentioned as explained in clause 11(d).

12(i) The taxes, duties, rates, and Cess shall be final. New tax, if any, introduced later shall be on BPCL account from the date of bid submission (or extended date, if any) upto contract period. During contractual period, any variation in existing taxes, duties, rates and cess shall be borne by BPCL. Any upward statutory

> variation in taxes, duties rates and cess (including any new tax) beyond contractual completion date shall be borne by the bidder. However, in case of downward variation, the same shall be passed on to BPCL.

3. Going by the above terms and conditions the contention of the petitioner is that while the petitioner had shown VAT of 4%, the 3rd respondent showed it as NIL. The petitioner's contention based on the tax liability shown as NIL by the 3rd respondent; is that a Government Order, (Ext.P11) enabled the BPCL to get reimbursement of the tax on works contract. Hence the BPCL would get reimbursement of the tax paid by the awardee to the Department in lieu of the work executed for the BPCL and in the present case, the BPCL would suffer insofar as not being able to collect the said amounts in accordance with the exemption and reimbursement as provided by the notification produced at Ext.P11.

4. In the wake of the controversy raised; this Court called for a report from the jurisdictional Deputy Commissioner having jurisdiction over the assessing officer of the BPCL. The

Deputy Commissioner has filed an affidavit in compliance with the direction of this Court, wherein paragraph 6 is relevant, which is extracted hereunder:-

> 6. It is respectfully submitted that as per Ext.P11 Government Order, BPCL/JV, will deposit the Works Contract Tax deducted from contractor to the Commercial Taxes Department and upon receipt of the same the said amount shall be reimbursed to BPCL/JV by the Commissioner of Commercial Taxes. The tax collected directly by the authorities ie. Commercial Taxes Department from the contractors will also be deemed to form part of the amount to be refunded to BPCL/JV subject to the production of proof adduced by BPCL. The overall limit of such reimbursement shall be Rs.750 crore (Rs.500 Crore for BPCL and 250 Crore for JV) over project implementation period of 5 years. It is further noted that the reimbursement shall be effected by the Commissioner of Commercial Taxes within 15 days from the date of deposit of tax amount and filing of return by awardee.

5. Hence whether the tax be deducted from the bills of the contractor and paid to the Department or whether the contractor pays directly to the Department, the same would be reimbursed to the BPCL to a maximum limit of Rs.750 Crore of which Rs.500 Crore is for BPCL and Rs.250 Crore is for the joint venture. Hence whatever the tax payable, the same would be

reimbursed to the BPCL. In such circumstance, it cannot be contended that the tax payable by the 3rd respondent would not be reimbursed to the BPCL.

6. The 3rd respondent has produced Ext.R3(e) and R3(f), which would indicate that the 3rd respondent is paying compounded tax @ 4% and the same is not deductible from the bill of the 3rd respondent. The 3rd respondent hence would be paying tax directly to the Department in lieu of the work carried on by the 3rd respondent as awarded by the 2nd respondent BPCL, which also would be liable to be reimbursed to the BPCL to the extent as noticed herein above. The basic price offered by both the petitioners and and 3rd respondent are indicated at Exts.P3 and P4, which shows that the offer of the petitioner was Rs.13,11,68,300/- and that of the 3rd respondent was Rs.13,62,46,240/-. While the 4% tax paid by the 3rd respondent would not be sought to be collected from BPCL; nevertheless by Ext.P11 BPCL would get it reimbursed. As for the petitioner the

7% paid by the BPCL, to the Department as tax deduction would, by virtue of Ext.P11 be reimbursed. The BPCL hence stands to ..... since by providing for NIL liability of tax, the petitioner in effect waives his right to collect tax from the awarder.

7. The service tax liability is similar in both the tenders but however the VAT is shown as NIL in the case of the 3rd respondent and in the case of the petitioner, it is shown as 7%. The indication is that the 3rd respondent would not pass over the liability as per the specific tender quotation made as per Ext.P4. Hence the 3rd respondent would be liable to pay the VAT as per compounded rate, even for the work executed in lieu of the award and the 3rd respondent would not seek passing over of the same to the BPCL. Whatever tax is paid in lieu of the work carried on by the 3rd respondent, would definitely be reimbursed to the BPCL on the basis of the specific exemption granted by way of reimbursement; however to the extent specified in the Government Order.

8. The contention of the petitioner that the BPCL would stand to benefit more by way of the 7% tax offered by the petitioner since it is reimbursed, cannot be countenanced since that is a contingency which is also related to the maximum extent of reimbursement and in any event, the same is not a condition in the tender notification which could not be insisted upon by the BPCL at the time of evaluating the bids (**Harminder Singh Arora** v. **Union of India and Others (1986) 3 SCC 247**).

For all the above reasons, the writ petition would stand dismissed, making it clear that the 3rd respondent would not be entitled to pass on any tax liability to the BPCL, for the subject work.

Sd/-
K. VINOD CHANDRAN,
JUDGE

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P.A to Judge.