* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 28th October, 2015

\+ **W.P.(C) NO.912/2010**

SWATI ENTERPPRISES ..... **Petitioner**

Through: Mr. Abhijat with Mr. Rishabh Bansal Advocates.

Versus

INDIAN OIL CORPORATION LIMITED ..... **Respondent**

Through: Mr. M.M.Kalra with Ms. Sonali Kumar, Advocates

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition impugns the disqualification by the respondent Indian Oil Corporation Limited (IOCL) of the petitioner in the selection procedure for appointment as Del Credere Associate Cum Consignment Stockist (DCA cum CS)/ Del Credere Associate (DCA) at Chandigarh.

2. The petition was entertained and vide interim order dated 15th February, 2010, which continues to be in force, any decision taken by the respondent IOCL of appointment of a agent, was made subject to result of the writ petition. Pleadings have been completed. The counsels have been heard.

3. The petitioner, in response to an advertisement published by the

respondent IOCL inviting applications for appointment as aforesaid had applied. The respondent IOCL vide its letter dated 31st August, 2009 sought certain further information from the petitioner and which also the petitioner claims to have furnished under cover of its letter dated 10th September, 2009. The counsel for the petitioner has argued that the respondent IOCL however did not inform the petitioner the outcome of its application aforesaid compelling the petitioner to seek information on 29th December, 2009 under the Right to Information Act, 2005 and in response whereto respondent IOCL on 21st January, 2010 informed that the petitioner has failed to meet the following prescribed eligibility criteria:

> *i) Average turnover (last three completed financial years) of Rs. 5 crore per annum from marketing and distribution of Polymer/Petroleum/Petrochemical/ Chemical good*
>
> *ii) Minimum average net worth of the last three completed financial years of Rs. 2 crore.*

4. Challenging the reasoning aforesaid of the respondent IOCL, this petition has been filed.

5. The counsel for the petitioner has drawn attention of this Court to the Agreement / Memorandum of Understanding (MoU) dated 1st April, 2004 signed between Mr. Ramesh Kumar Gupta, sole proprietor of M/s Swati

Enterprises and M/s Sturdy Industries Ltd. and on the basis thereof has argued that though the petitioner Swati Enterprises prior to 1st April, 2004 was the sole proprietory of Mr. Ramesh Kumar Gupta but vide said agreement / MoU became a the sole proprietory of M/s Sturdy Industries Ltd. However, on inquiry, it is informed that the said document was not filed by the petitioner alongwith its application for appointment aforesaid with the respondent IOCL. Attention is thereafter invited to the application submitted by the petitioner to the respondent IOCL in response to the advertisement aforesaid and particularly to the endorsement "All above details relate to Sturdy Industries Ltd. being proprietor of Swati Enterprises" against the column "Remarks if any", under column 5 titled "Financial details" in the form in which the application was prescribed to be made. On the basis thereof, it is contended that the petitioner had made it known to the respondent IOCL that the financial details furnished by the petitioner were the details of Sturdy Industries Ltd. being the proprietor of the petitioner. Attention in this regard is also drawn to the extract of the resolution passed in the meeting of the Board of Directors of Sturdy Industries Ltd., stated to have been filed along with the application aforesaid.

6. The counsel for the petitioner has next invited attention to the letter

dated 31st August, 2009 of the respondent IOCL seeking clarification from the petitioner and from the response dated 10th September, 2009 thereto it is shown that all the clarifications sought were duly furnished. It is thus argued that the respondent IOCL erred in treating the petitioner as not meeting the requisite qualification of having an average turnover of Rs.5 crores in the preceding three years and having minimum marketing net worth of Rs.2 crores in the previous three years. It is contended that the petitioner, on the basis of the particulars furnished by Sturdy Industries Ltd., meets both the said criteria.

7. Per contra, the counsel for the respondent IOCL has drawn attention again to the application form submitted by the petitioner to highlight that against the column name of the applicant therein, although the name of the applicant is given as Swati Enterprises but the photograph affixed and the signatures are of one Mr. Amit Gupta. Attention is also invited to the affidavit accompanying the application which is of Mr. Amit Gupta, where he has described himself as an Indian National and has referred to "our proprietorship firm M/s Swati Enterprises" and has further stated that 'he is not a Stockist/Agent/Distributor for Polyethylene and Polypropylene of any company'. Attention is further invited to the medical fitness certificate again

given of the said Mr. Amit Gupta and to the documents accompanying the application showing Swati Enterprises to be the proprietorship of Mr. Ramesh Kumar Gupta. It is thus contended that there was nothing before the respondent IOCL at that stage to know that the Sturdy Industries Ltd. was the proprietor of Swati Enterprises, to relate the financial particulars of Sturdy Industries Ltd. to Swati Enterprises. It is yet further argued that Sturdy Industries Ltd. had filed an application for appointment for a different location and which was not permissible. The counsel for the respondent IOCL has also stated that Mr. Ramesh Kumar Gupta is also a partner of M/s United Polymer Industries, stockist of GAIL India Ltd. It is however clarified that it is not so pleaded in the counter affidavit.

8. The counsel for the petitioner in rejoinder has controverted that there was any prohibition in applying for two different locations. He has in this regard invited attention to the Guidelines published by the respondent IOCL at the contemporaneous time for filling up of application forms and which provided that the applicant who is authorised Distributor / Consignment Stockist for any Indian or Foreign Plastic Raw Material Co., will have to submit an undertaking along with the application to disengage himself from such appointment, upon being selected as an agent for which application was

made. It is argued that the form of affidavit was also prescribed and Mr. Amit Gupta aforesaid has furnished the affidavit aforesaid in the said form only.

9. I have at the outset enquired, whether in pursuance to the advertisement inviting application aforesaid any appointment has been made and whether the person who so appointed has been impleaded as a party to the present petition, inasmuch as finding an error in the selection process aforesaid would necessarily entail setting aside of the agreement entered into by the respondent IOCL with any other person.

10. The counsel for the petitioner states that the petitioner has no knowledge of the same. He has further contended that no such thing has been disclosed in the counter affidavit also. He has further stated that the petitioner, even if not made an agent, would upon being successful be entitled to claim damages against the respondent IOCL.

11. Counsel for the respondent IOCL, under instructions, states that M/s GLS Industries (P) Ltd. has been appointed in 2010 itself.

12. I may in this regard notice that the petitioner, while making the query under the Right to Information Act (RTI) 2005, had also sought the result of the selection process and in response to the said RTI inquiry, the petitioner

was informed of the other applicants M/s Punjab Oil Machinery Stores, Dana Mandi, Phagwara having scored 68 marks in the selection process and M/s GLS Industries (P) Ltd. having scored 79 marks in the selection process. The petitioner was thus aware of M/s GLS Industries (P) Ltd. having scored the maximum marks in the selection process. The counsel for the petitioner however states that the response to the RTI query did not disclose the contract having been awarded to M/s GLS Industries (P) Ltd. or M/s GLS Industries (P) Ltd. having been appointed as an agent of the respondent IOCL at Chandigarh.

13. In my view, once this Court had not granted stay of appointment, as sought by the petitioner by way of interim relief and had only granted relief, of the decision making being subject to the outcome of the writ petition, it was incumbent upon the petitioner to, if did not know, find out, as to who had been selected and to implead the selected candidate with whom the contract had been entered into as a party to this writ petition, to be entitled to any final relief in this writ petition. Without the party who has been appointed being before this Court, this Court, even if finds any error in the decision of the respondent IOCL to disqualify the petitioner, would not be entitled to set aside the appointment, which I am told is not for any definite

period. The petition is thus liable to be dismissed on this ground alone.

14. Though, in view of the aforesaid, there is no need for this Court to render any finding on merits but for the sake of completeness and having heard counsels, I proceed to do so.

15. The counsel for the petitioner, to satisfy my judicial consciousness with respect to the genuineness of the agreement / MoU dated 1st April, 2004, has also taken me through the other documents pertaining to Sturdy Industries Ltd, on record. However, need to advert thereto is not felt, inasmuch as, I am of the opinion from the reading of the documents aforesaid that the petitioner though appears to have, pursuant to the agreement / MoU dated 1st April, 2004 become a sole proprietory of the Sturdy Industries Ltd. but in 2009 while making application aforesaid to the respondent IOCL did not make a clean disclosure of the state of affairs and the possibility of the respondent IOCL in the absence of the petitioner clarifying the position not knowing the relationship between the petitioner and the Sturdy Industries Ltd., cannot be ruled out. The said action of the petitioner could either be innocent or could also be guided by a desire to become an agent of the respondent IOCL with respect to two different locations under two names namely Swati Enterprises Ltd. and Sturdy

Industries Ltd. and which it admittedly was not entitled to, inasmuch as, though a company can be a proprietor of business in an assumed name, different from that of the company, but the said assumed name has no independent legal identity and the only entity which exists in law is a limited company.

16. The documents filed by the petitioner along with its application showed Swati Enterprises to be a sole proprietory of Mr. Ramesh Kumar Gupta. Though the petitioner also filed a copy of the Resolution of the Board of Directors of M/s. Sturdy Industries Ltd. authorising Shri Amit Gupta to make application on its behalf and also filed financial documents of M/s. Sturdy Industries Ltd. but without disclosing that Shri Ramesh Kumar Gupta had transferred the business being carried on by him in the name of the petitioner Swati Enterprises to M/s. Sturdy Industries Ltd. Admittedly the Agreement/MoU aforesaid signed between Shri Ramesh Kumar Gupta and M/s. Sturdy Industries Ltd. in this regard was not filed with the application. In the absence of any explanation and / or the copy of the Agreement/MoU, no error requiring interference by this Court can be found in the failure of the respondent IOCL to co-relate the financial details of M/s. Sturdy Industries Ltd. with the petitioner. I may in this regard notice that the

petitioner in the application form also described itself as a proprietory instead of as a limited company as it ought to have and nowhere stated that M/s. Sturdy Industries Ltd. was its proprietor. The fact that it was not clear to the respondent IOCL that the petitioner is a sole proprietory of M/s. Sturdy Industries Ltd. ought to have been evident to the petitioner also from the communication dated 31st August, 2009 of respondent IOCL in which respondent IOCL sought balance sheet and financial details specific to Swati Enterprises. The petitioner however in its reply dated 10th September, 2009 also did not clarify the position or forward a copy of the Agreement/MoU aforesaid between Shri Ramesh Kumar Gupta and M/s. Sturdy Industries Ltd.

17. The jurisdiction of this Court in exercise of powers under Article 226 of the Constitution of India in the matter of entering into of a contract, by a Body which qualifies as a State within the meaning of Article 12 of the Constitution of India, is limited to ensuring that decision making is not arbitrary or motivated and not guided by extraneous considerations. In the present case, the counsel for the petitioner, on enquiry, has admitted that no act of any *mala fide* on the part of any officer of the respondent IOCL in disqualifying the petitioner and / or any extraneous reason in choosing M/s

GLS Industries (P) Ltd. have been pleaded, though he contends that the same is obvious.

18. However, merely because in the light of the documents produced before this Court it is obvious that respondent IOCL erred in co-relating the financial documents of M/s. Sturdy Industries Ltd. with the application of the petitioner is no reason to hold that the decision of the respondent IOCL dis-qualifying the petitioner for the reason of ambiguity of the relationship of the petitioner with M/s Sturdy Industries Ltd. is required to be set aside or interfered with.

19. Supreme Court in ***Jagdish Mandal Vs. State of Orissa*** (2007) 14 SCC 517 held that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides* but cautioned that a Court, before interfering in a tender or contractual matter in exercise of power of judicial review, should pose to itself the questions whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no reasonable authority acting reasonably and in accordance with relevant law could have reached and whether public interest is affected. It

was further held that if the answers to the said questions are in the negative then there should be no interference under Article 226. This view has been reiterated in ***Michigan Rubber (India) Ltd. Vs. State of Karnataka*** (2012) 8 SCC 216 and in ***Maa Binda Express Carrier Vs. North-East Frontier Railway*** (2014) 3 SCC 760.

20. Similarly, in ***Nirmala J. Jhala Vs. State of Gujarat*** (2013) 4 SCC 301 it was held that the parameter of Court's power of judicial review of administrative action or decision is limited. An order can be set aside, if it is based on extraneous grounds or when there are no grounds for passing it or when the grounds are such that no one can reasonably arrive at the opinion. The Court cannot sit as a Court of appeal but it merely reviews the manner in which the decision was made. The Court will not clearly exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from *mala fide*, dishonest / corrupt practise. If the authority is found to have acted in good faith, neither the question, as to whether there was sufficient evidence before the authority can be raised / examined nor the question of re-appreciating the evidence to examine the correctness of the order under challenge arises. The jurisdiction of judicial review is circumscribed and confined to correct errors of law or procedural

error if any resulting in manifest, miscarriage of justice or violations of principles of natural justice.

21. Therefore, I do not find any merit in the petition.

22. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 28, 2015
Gj..

(corrected & released on 20th November, 2015)