THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 18.02.2015

\+ **W.P.(C) 1384/2015 & CM 2431/2015, 2629/2015 & 2630/2015**

M/S SARDA ENERGY & MINERALS LTD ... Petitioner

versus

UNION OF INDIA & ORS ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ratan K. Singh with Mr Shashi Bhushan, Mr Suraj Prakash and Mr J. K. Chaudhary
For the Respondent Nos. 1&2: Mr Sanjay Jain, ASG with Mr Akshay Makhija, Ms Devanshi Singh, Ms Aastha Jain and Mr S. Jain
For the Respondent No. 5 : Mr Ragvesh Singh

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The challenge in this petition is to the conjoint effect of Clauses 4.1.2(d) and 3.3.2 of the tender document for three coal blocks– Gare Palma IV/1, Gare Palma IV/4 and Gare Palma IV/7.

2. The case of the petitioner is that by virtue of Clause 4.1.2(d), a single company, having several end-use plants, can have multiple bids

inasmuch as a bid for each of the end-use plants is permitted. According to the learned counsel for the petitioner, this Clause, read with Clause 3.3.2 may lead to a situation of cartelization when the final auction takes place after the qualified bidders are notified. This is so because, it may so happen that the same company may have several qualified bids for participating in the electronic auction. He submits that as the bid profile suggests two or three companies have submitted several bids, one each for their specified end-use plants. According to the learned counsel for the petitioner, this essentially means that while there may be four bids for separate specified end-use plants of the same company, but that may boil down to only one bidder. And, therefore, in that sense, competition may be stifled at the electronic auction stage.

3. The said Clause 3.3.2 of the tender document reads as under:-

> "3.3.2 The two stage tender process would be conducted in the following sequence:
>
> (a) **<u>Technical Qualification:</u>**
>
> In the first stage, the Bidders would be required to submit: (i) the Bid Security; (ii) the Technical Bid in substantially the same format as specified in Annexure III along with a covering letter in substantially the same format as specified in Annexure IV; and (iii) the Financial Bid to the extent of specifying the Initial Price Offer, which should not be less than the Floor Price. The Floor Price for the Coal Mine is

INR 206.34(Indian Rupees Two Hundred Six and Thirty Four Paise) per Tonne.

The Technical Bid of each Bidder, which is duly submitted in accordance with the Tender Document along with the Bid Security shall be opened and evaluated by the Nominated Authority on the date mentioned in Clause 3.8.1, at such time and place as notified subsequently and in the presence of the Bidders who choose to attend. The Nominated Authority reserves the right to ask for any details, clarifications or any other information in writing based on Information submitted by Bidders for the purpose of evaluation of Technical Bids or otherwise.

The Technical Bid shall be evaluated against the Eligibility Conditions and against the test of responsiveness (in accordance with Clause 3.4). The Nominated Authority may appoint an evaluation committee for evaluation of the Technical Bids.

(b) **Ranking and Qualification**:

The Initial Price Offer of the Bidders who meet all the Eligibility Conditions (the "Technically Qualified Bidders") shall be ranked on the basis of the descending Initial Price Bid submitted by each Technically Qualified Bidder. Basis such ranking the Technically Qualified Bidders, holding first fifty per cent of the ranks (with any fraction rounded off to higher integer) or five Technically Qualified Bidders, whichever is higher, shall be considered to be the qualified for participating in the Electronic auction (the "Qualified Bidders").

Provided however that:

(i) In the event that the total number of Technically Qualified Bidders is less than three then no Technically Qualified Bidder shall be considered to be Qualified Bidder(s).

(ii) In the event the number of Technically Qualified Bidders is between three and five, then each of the Technically Qualified Bidders shall be considered to be the Qualified Bidders.

(iii) In the event of identical Initial Price Offers having been submitted by one or more Technically Qualified Bidders, all such Technically Qualified Bidders shall be assigned the same rank for the purposes of determination of Qualified Bidders. In such cases, the aforementioned fifty per cent shall stand enhanced to fifty per cent plus the number of Qualified Bidders, whose Initial Price Offers are Identical minus the number of such identical Initial Price Offers."

4. The said Clause 4.1.2 of the tender document reads as under:-

"4.1.2 In addition to the aforementioned conditions, a Bidder would also be required to comply with the following eligibility conditions:

(a) xxxx xxxx xxxx xxxx

(b) xxxx xxxx xxxx xxxx

(c) xxxx xxxx xxxx xxxx

(d) **<u>Limitations on total number of Bids</u>**

With respect to one Specified End Use Plant only one Bid may be submitted for the Coal Mine, either individually or as a part of Joint-venture, either directly or indirectly;

(e) xxxx xxxx xxxx xxxx"

5. The contention of the learned counsel for the petitioner is that all the technically qualified bidders should be permitted to participate in the electronic auction. As that, according to the learned counsel for the petitioner, would provide the best price for the respondents, which is their objective.

6. Mr Sanjay Jain, the learned ASG appearing on behalf of the respondents, submitted that the petition ought to be dismissed. First of all, he submitted that the petitioner, having participated in the tender process and submitted its bid, cannot challenge the conditions of the tender. Secondly, Mr Jain submitted that it is open to the respondents to specify the manner in which the auction is to be conducted. Thirdly, Mr Jain submitted that the present manner of auctioning has been put in place with the objective of getting the best possible offer in respect of the coal blocks. Two separate methods of conducting the auction have been contemplated. One is for the power sector and the other is for the non-power sector. The present petition is concerned with the non-power sector/ unregulated sector. In this sector, the floor price is indicated in the tender document and the bidders are required to give the initial price offers higher than the floor price. Thereafter, the technically qualified bidders are ranked in accordance with their initial price offers. In case there are more than five technically qualified bidders, then 50% of the technically qualified bidders or five such bidders whichever is higher, shall be considered for participating in the electronic auction. If there are only five technically qualified bidders, then all five would proceed to the

next round of electronic auction. If there are less than five but three or more than three technically qualified bidders, then all of them would proceed to the next round. In case there are less than three bidders, who are technically qualified, the auction process would be annulled and a fresh auction would be called for.

7. Mr Sanjay Jain also submitted that this procedure has been followed in eleven successfully completed auctions till date. Seven of these auctions were for the non-power/ unregulated sectors. Four of these auctions were in respect of the power sector. He has handed over a chart indicating the results of the auctions. We may take one or two examples. For example, in Kathautia (Jharkhand), the successful bidder (Hindalco Industries Limited), gave a closing bid price of ₹ 2860 per tonne of coal, as against a floor price of ₹ 679 and an applicable floor price based on the IPO of ₹ 1978/-. Another example is that of Mandla North (Madhya Pradesh), where the successful bidder was Jaiprakash Associates Limited. The floor price was ₹ 150/- per tonne. The closing bid price was ₹ 2505/- per tonne as against the applicable floor price based on the IPO of ₹ 1271/- per tonne. There are other similar examples, which we need not go into. Mr Jain submits that the auctions conducted so far indicate that

the auctioning process, as stipulated in the tender document, is working well. Having seen the results, we agree with the submission of Mr Jain. This is so because the closing bid price is many times higher than the floor price indicated by the respondents in the tender document. In fact, the closing bid price is much higher than the applicable floor price based on the IPO also.

8. After having considered the submissions made by the learned counsel for the parties, it appears that the methodology adopted by the respondents for conducting the auctions in the manner by first asking for an initial price offer and then conducting an electronic auction of the technically qualified bidders, is working well. Initially, when we had issued notice on this petition, the electronic auction process had not begun and there were fears that this might lead to cartelization, which would ultimately lead to lowering the final bid price. On the basis of the workings of the electronic auction, we do not find any such indication or evidence, even though in some of the auctions, there have been multiple bids submitted by the same company in respect of its different specified end-use plants. It is also true that once a bidder has participated in the tender process, he should not normally be allowed to challenge the

process itself. But, we have not gone on this aspect of the matter. What has convinced us is the fact that the auction process has worked out well. We also find that apart from the empirical data of the auction process in respect of the eleven electronic auctions held so far, the process by itself does not appear to us, to be arbitrary or irrational. There is, of course, no allegation that the auction process is designed to favour any particular bidder.

9. In view of the foregoing, we do not see any reason to proceed any further with this writ petition. Consequently, we vacate the interim orders. The writ petition is also dismissed. There shall be no order as to costs. All applications also stand disposed of.

BADAR DURREZ AHMED, J

FEBRUARY 18, 2015 **SANJEEV SACHDEVA, J**
SR