

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 05.10.2015

W.P.(C) 2113/2015 & CM Nos.3800/2015 and 7604/2015

M/S SYNERGY STEELS LIMITED

... Petitioner

versus

**PETROLEUM AND NATURAL GAS REGULATORY
BOARD AND ANOTHER**

... Respondents

Advocates who appeared in this case:-

For the Petitioner	: Mr Dushyant Dave, Sr. Advocate with Mr Vikas Mehta, Mr Vaibhav Gaggar, Ms Anushree Menon, Mr Nitish Sharma & Mr Rajat Sehgal
For the Respondent No.1	: Mr Anand K Ganesan, Mr Rakesh Dewan and Ms Akshi,
For the Respondent No.2	: Mr Gopal Subramniam, Sr. Advocate and Mr Parag Tripathi, Sr. Advocate with Mr Rajat Navet and Mr Amit Pathak

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J

1. Through this writ petition, the petitioner (Synergy Steels Ltd ['SSL']) seeks:-

- (a) quashing of the act of the respondent no.1 (Petroleum and Natural Gas Regulatory Board ['PNGRB']) granting extension of time to the respondent no.2 (Indian Oil – Adani Gas (P) Ltd ['IOAGPL']) for submitting the Performance Bank Guarantee;

- (b) quashing of the Letter of Intent [‘LOI’] issued by PNGRB in favour of IOAGPL;
- (c) the issuance of a writ, order or direction requiring PNGRB to declare IOAGPL as disqualified and to declare the petitioner (SSL) as the successful bidder.

2. This petition pertains to the public notice dated 26.09.2013 issued by PNGRB inviting bids for development of City Gas Distribution networks in, inter alia, Ernakulam District (Kerala) in terms of Regulation 5(5) of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 (hereinafter referred to as “the 2008 Regulations”).

3. In brief, the case of SSL is that IOAGPL, after being given the LOI dated 20.01.2015 for grant of authorization, did not furnish the requisite performance bank guarantee of Rs. 4248 crores within the period of 15 days of the said LOI and, therefore, the said LOI is liable to be quashed. It is also the case of SSL that the extension of time given to IOAGPL by PNGRB for submitting the Performance Bank Guarantee beyond the period of 15 days stipulated in the said LOI was contrary to the tender conditions and the 2008 Regulations. The Performance Bank Guarantee was submitted on 17.06.2015. The petitioner (SSL) also contends that non-submission of the Performance Bank Guarantee within the stipulated time entailed not only the cancellation of the said LOI but also the disqualification of IOAGPL and consequent entitlement of SSL to be issued the LOI being the next highest

bidder. The following decisions of the Supreme Court were referred to and relied upon by the learned counsel for SSL:-

- (1) **Reliance Energy Ltd v. Maharashtra State Road Development Corpn. Ltd: (2007) 8 SCC 1** [para 36];
- (2) **WB State Electricity Board v. Patel Engineering Co. Ltd. & Others: 2001 (2) SCC 451** (para 24).

4. The case of IOAGPL is that at the stage of consideration of financial bids, there was a tie as regards the Composite Scores between (1) Kerala GAIL Gas Ltd, (2) IOAGPL and (3) SSL and, accordingly, the tie-breaker rule stipulated in Regulation 7(3) of the 2008 Regulations as also in the tender conditions got triggered, which required the submission of additional bid bonds. It was contended that IOAGPL submitted an additional bid bond of Rs 1059 crores whereas SSL submitted an additional bid bond of only Rs 10 crores, followed by Kerala GAIL Gas Ltd which submitted an additional bid bond of Rs 3 crores only. Therefore, IOAGPL became the 'selected entity' and also furnished the bank guarantee for the additional bid bond amount of Rs 1059 crores within the stipulated time on 12.01.2015. It was contended that IOAGPL, having complied with all stipulations and timelines, was validly issued the LOI on 20.01.2015 and at that stage SSL was out of the race. The only thing remaining to be done was to furnish the performance bank guarantee which was to be four times of the bid bond (original plus additional). The performance bank guarantee of Rs 4248 crores was also furnished, though after extension of time. It was submitted that in terms of the tender conditions itself, time for furnishing the performance bank guarantee could be extended at the option of PNGRB. It was submitted on behalf of IOAGPL that the extension of time was not illegal or contrary to

the tender conditions and, therefore, could not be faulted and that IOAGPL was entitled to the issuance of the Grant of Authorization for Ernakulam District.

5. On behalf of the PNGRB it was submitted that after the LOI was issued to IOAGPL, being the 'selected entity' based on the tie-breaker rule, when IOAGPL requested for extension of time to submit the performance bank guarantee, two options were available to it – (1) to grant the extension or (2) set the entire process back in time. The first alternative was adopted as it was in larger public interest. This was so because it was in public interest that an entity submitting a substantially larger performance bank guarantee (Rs 4248 crores by IOAGPL to Rs. 52 crores that would have been required of SSL had SSL succeeded) be retained and it was also in public interest that the gas network gets set up in time. Consequently, it was submitted that writ petition be dismissed and PNGRB be permitted to issue the Grant of Authorization in favour of IOAGPL so that the gas network gets established at an early date.

Facts:

6. As mentioned above, PNGRB issued a public notice on 26.09.2013 inviting bids for development of City Gas Distribution networks in, inter alia, Ernakulam District (Kerala) in terms of Regulation 5(5) of the 2008 Regulations. The closing time and date of the submission of bids was to be 12 noon on 11.02.2014. However, that was extended from time to time and finally to 12 noon on 11.08.2014. Thereafter, inter alia, SSL and IOAGPL crossed the stage of technical qualifications.

7. At this point, it would be of benefit to refer to the relevant provisions of the 2008 Regulations and the Tender Documents.

Regulation 7(3) of the 2008 Regulations reads as under:-

“(3) Entity with the highest composite score considering the criteria under clauses (a) to (b) of sub-regulation (1) and as illustrated in Schedule C (1) shall be declared as successful in the bid. In case of a tie in the highest composite score between the bidding entities, such entities shall be asked to submit additional bid bond for an amount to be decided by the respective entity and the entity that submits bid bond for higher amount shall be declared as successful bidder.”

(underlining added)

Clause 4.2.2 of the Instructions to Bidders reads as under:-

“4.2.2 Financial Bid

All financial bids shall be tabulated and compared as per the bidding criteria specified at regulation 7 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 and amendments thereto.

Bidder with the highest composite score shall be declared as successful in the bid. In case of a tie in the highest composite score between the bidding entities, such entities shall be asked to submit additional bid bond for an amount to be decided by the respective entity and the entity that submits bid bond for higher amount shall be declared as successful bidder.”

(underlining added)

8. On 04.12.2014 the financial bids were opened. There was tie in the Highest Composite scores of Kerala GAIL Gas Ltd, SSL and IOAGPL.

9. On 09.12.2014, PNGRB issued letters to the said three entities requiring them to submit their respective additional bid bond amounts in sealed envelopes by 16.12.2014. It was also indicated that the successful bidder would be required to submit the bid bond within 15 days from the communication from PNGRB in this regard. The letter dated 09.12.2014 addressed to SSL was as under:-

“Petroleum and Natural Gas Regulatory Board
1st Floor, World Trade Centre, Babar Road, New Delhi-110001

9th December 2014

To,

Shri Anubhav Kathuria,
Authorised Signatory
M/s Synergy Steel Limited
55-B, Rama Road, Industrial Area,
New Delhi-110015

Subject: PNGRB/CGD/BID/4/2013/1/GA-Ernakulam District
(Kerala).

Sir,

With reference to the bid submitted by M/s Synergy Steels Limited against the above mentioned subject and subsequent opening of the price bid on 4th December 2014, it is to inform that the Highest Composite Scores have tied between M/s Kerala GAIL Gas Limited, M/s Indian Oil-Adani Gas (P) Limited and M/s Synergy Steel Limited. Accordingly, in terms of Regulation 7(3) of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008, these entities are required to submit additional Bid Bond Bank Guarantee (BBBG) for an amount to be decided by the respective entity and the entity that submits bid bond of higher amount shall

be declared as successful bidder. If the entities are asked to submit additional bid bond straight away, the amount of additional bid bond, based on which the successful bidder will be decided, may not remain confidential since respective bankers of the entities would have to issue the BBBGs. Hence, in the interest of entities, it has been decided to seek the amount of additional bid bond that the M/s Synergy Steel Limited would submit for determining the successful bidder for Ernakulam District (Kerala) GA.

2. Accordingly, you are advised to submit the amount of additional bid bond in a sealed envelope addressed to the Secretary, PNGRB, super-scribing with "Proposed BBBG Amount and Bid No: PNGRB/CGD/BID/4/2013/1/GA-Ernakulam District (Kerala)" by 16th December 2014 upto 1100 hrs. which shall be opened at 1500 hrs. on the same day in front of the authorized representative of the bidders whose scores have tied.

3. Since the entity that quotes the higher amount shall be declared as successful bidder, such an entity would then be required to submit additional bid bond within 15 days from the date of communication from PNGRB in this regard.

Yours faithfully,
Sd/-
K. Rajeswara Rao
OSD(R)"

10. By a letter dated 15.12.2014, PNGRB extended that date of submission of additional bid amounts to 29.12.2014.

11. On 29.12.2014, the sealed envelopes containing the additional bid bond amounts were opened. As mentioned earlier, IOAGPL submitted an additional bid bond of Rs 1059 crores whereas SSL submitted an additional bid bond of only Rs 10 crores, followed by Kerala GAIL Gas Ltd which

submitted an additional bid bond of Rs 3 crores only. Consequently, by a letter dated 29.12.2014, PNGRB required IOAGPL to submit the additional Bid Bond Bank Guarantee for Rs. 1059 crores valid upto 31.03.2015 within 15 days from the date of the said communication.

12. On 12.01.2015, IOAGPL submitted the additional Bid Bond Bank Guarantee for the amount of Rs 1059 crores. This was within the stipulated period of 15 days. Consequently, PNGRB issued the LOI for Grant of Authorization in favour of IOAGPL on 20.01.2015. The said LOI was as under:-

“Petroleum and Natural Gas Regulatory Board
1st Floor, World Trade Centre, Babar Road, New Delhi-110001

20th January, 2015

To,

M/s Indian Oil Adani Gas Private Limited,
(Attn: Shri Bhashit Dholakia, Director)
C/o Adani Gas Limited,
306, SSR Corporate Park
Sector 27-B, Delhi-Mathura Road (NH-2)
Faridabad – 121 003.

Subject: Letter of Intent (LOI) for Grant of Authorization for the GA of Ernakulam District (Kerala) awarded against bid ref. PNGRB/CGD/BID/4/2013/1/GA-Ernakulam District (Kerala).

Sir,

With reference to your bid submitted for the subject GA and the additional Bid Bond Bank Guarantee (BBBG) for an amount of Rs.1,059 Crores (Rupees One Thousand and Fifty Nine Crores Only) submitted vide your letter dated 12th January, 2015, you

have been selected for Grant of Authorization for the GA of Ernakulam District (Kerala), as per the extent shown in the Annexure-I of the bid document.

2. Hence, you are requested to submit the Performance Bank Guarantee (PBG) for an amount of **Rs 4,248 Crores (Rupees Four Thousand Two Hundred and Forty Eight Crores Only)** as per the format given in Annexure-7 of the Bid document and firm timeline for commencement of the activities of laying, building or operating CGD network, within 15 days from the date of this communication.

3. The Grant of Authorization shall be governed by the terms & conditions contained in the 'Application cum Bid Document', clarifications issued and Schedule D of the Petroleum and Natural Gas Regulatory Board (Authorizing) Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 and amendments thereto.

4. Kindly acknowledge this letter and arrange to furnish the PBG and other details within the due date.

Yours faithfully,

Sd/-

20/1/2015

(K. Rajeswara Rao)

Officer on Special Duty (R)''

13. It would be appropriate to point out that after the issuance of the LOI, the next stage was the submission of the performance bank guarantee by the successful bidder and then the Grant of Authorization by PNGRB. The

relevant provisions of the 2008 Regulations and the Tender Document are given below:-

Regulations 9 and 10 of the 2008 Regulations:

“9. Performance bond.

(1) Grant of authorization shall be issued to the selected entity after it furnishes the performance bond in the form of demand draft or pay order or bank guarantee from any scheduled bank for the amount equal to four times the amount of bid bond and the bank guarantee shall be valid initially for the period of five years and thereafter for the period of grant of authorization by the Board.

(2) The amount of the bid bond and performance bond shall be rounded off to the nearest multiple of lakh rupees and for the purpose any part of a rupee consisting of paise shall be ignored and thereafter if such amount is not a multiple of lakh, then, if the last figure in the amount is fifty thousand or more, the amount shall be increased to the next higher amount which is a multiple of lakh and if the last figure in that amount is less than fifty thousand, the amount shall be reduced to the next lower amount which is a multiple of lakh.

(3) The performance bond has been prescribed for guaranteeing the timely commissioning of the proposed CGD network as per the prescribed targets and also for meeting the service obligations by the selected entity during the operating phase of the project.

10. Grant of authorization.

(1) The selected entity shall be issued a letter of intent (LOI) to grant authorization upon finalization of the bid. The entity shall be required to furnish Performance Bank

Guarantee within 15 days of issue of LOI and complete such other formalities as may be directed by the Board. Upon furnishing the Performance of Bank Guarantee and completion of other formalities, the authorization shall be granted to the selected entity in the form of **Schedule D**.

(2) The grant of authorization is subject to the entity achieving a firm natural gas tie-up and a financial closure as per regulation 11.

(3) The grant of authorization to the entity shall not be renounced by way of sale, assignment, transfer or surrender to any person or entity during the period of **five years from the date of its issue or till the achievement of Minimum Work Programme, whichever is earlier**.

(4) The entity intending to renounce the authorization in favour of another entity after the end of the three years period shall submit a proposal to the Board at least thirty days in advance and shall provide all information as may be called for by the Board.

(5) The Board after satisfying itself that the proposal will not adversely affect the existing or proposed activities of laying, building, operating or expansion of the CGD network shall either accept the proposal in full or with such modifications as it may deem fit and in a case where the entity is permitted by the Board to take over the activities of laying, building, operating or expanding the CGD network such entity shall abide by the existing or modified terms and conditions of the authorization including compliance with the service obligations and adherence to the quality of service standards:

Provided that the Board reserves the right to reject the proposal in public interest and in such a case the Board shall provide in writing the reasons for such rejection.”

Clauses 4.5, 4.6 and 4.7 of the Instructions to Bidders:-

“4.5 PERFORMANCE BOND

- 4.5.1 Grant of authorization shall be issued to the selected entity after it furnishes a performance bond as specified in regulation 9 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008, within 15 days of such advice by PNGRB. The validity of the Performance Bank Guarantee shall be three years. It shall be the responsibility of the authorized entity to ensure that the performance bank guarantee is renewed at least one month before the due date every time the performance bank guarantee reaches the validity date till the economic life of the project is achieved.
- 4.5.2 The selected entity shall submit performance bond guaranteeing the timely commissioning of the proposed CGD network as per the prescribed targets and meetings the service obligations during the operation phase of the project.
- 4.5.3 Performance Bond shall be submitted by way of Demand Draft or Pay order or Bank Guarantee, payable at Delhi, from any scheduled bank. DD/Payorder shall be in the joint name of PNGRB and the entity, payable to either, at Delhi, Bank Guarantee shall be as per proforma of Performance Bank Guarantee prescribed at Annexure 12.

4.6 GRANT OF AUTHORIZATION

The authorization shall be granted to the selected entity as specified in regulation 10 of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008.

4.7 ACCEPTANCE TO GRANT OF AUTHORIZATION

- 4.7.1 Within 14 (fourteen) days from date of receipt of the Grant of authorization, the entity shall sign the Proforma for 'Acceptance of the Grant of Authorization' enclosed with Schedule-D of the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008. The 'Acceptance of the grant of Authorization' shall be signed by the selected entity or authorized signatory along with official seal.
- 4.7.2 After confirmation / signing, the terms and conditions contained therein take precedence over entity's bid conditions and all previous correspondence.
- 4.7.3 If, the entity does not deposit the Performance Bond within specified time period, PNGRB reserves the right to cancel the proposed authorization without prejudice to various rights and remedies including forfeiting the Bid Bond of the entity and without being liable in any manner whatsoever to the entity."

(underlining added)

14. On 28.01.2015, IOAGPL sent a letter to PNGRB requesting for extension of the target date of submission of the Performance Bank Guarantee to 31.03.2015. In response, by a letter dated 30.01.2015, PNGRB extended the date to 24.02.2015. On 20.02.2015, IOAGPL again requested for extending the target date for submission of the Performance Bank Guarantee to 31.03.2015 as originally requested. Apparently, SSL came to know of these events which occurred subsequent to the issuance of the said LOI and anticipating that PNGRB may grant the extension as requested by IOAGPL, it filed the present writ petition.

15. The writ petition came up for hearing on 03.03.2015, when we passed the following order:-

“Issue notice. Notice is accepted by the learned counsel for respondent No.1. The counter affidavit be filed within one week. Notice shall go to respondent No.2, returnable on 16.03.2015.

In the meanwhile, the respondent No.1 shall maintain status quo with regard to the subject tender.”

16. The matter was heard on 16.03.2015 and 27.03.2015 and the interim order was continued. On 23.04.2015, it was again heard and this court passed the following order:-

“We make it clear that the status quo order that has been passed in this matter does not come in the way of the respondent No.1 for stipulating the date by which the respondent No.2 has to furnish the performance bank guarantee.

The learned counsel for the respondent No.1 states that one week's time would be given to the respondent No.2 to submit the performance bank guarantee. The same may be notified by the respondent No.1 to respondent No.2 in writing so that the condition could be complied with.

Insofar as the rest of the tender process is concerned, the status quo, order will continue to apply.

Renotify on 01.05.2015.”

17. Thereafter, CM No. 7604/2015 was moved by IOAGPL seeking interim directions. On 27.04.2015, the said CM was taken up and it was directed to be listed on 01.05.2015. This court also directed that “no coercive measure be taken till then”. The petition was listed on several dates

and the abovementioned interim orders were continued. On 18.08.2015 this court passed the following order:-

“Mr Gopal Subramaniam, the learned senior counsel appearing on behalf of the respondent No. 2, states that a bank guarantee for an amount of Rs.4248 crores has been given to the respondent No.1 on 17.06.2015 and that the original bid and the bid bond has been returned to the respondent No.2. The learned senior counsel appearing for the respondent No.2 further submitted that the *status quo* order be vacated and in the least, the respondent NO.1 be permitted to issue the authorization letter to the respondent No.2 subject to final orders that may be passed in this writ petition. However, the learned counsel for the petitioner requests that before an order is passed, the petitioner’s counsel may be given an opportunity of being heard. He states that he is being led by Mr Chidambaram and Mr Khurshid, senior advocates, who are not available today, and requests for a short accommodation.

In the interest of justice, we renotify this matter on 26.08.2015.

Interim order to continue.”

The matter was finally heard on 26.08.2015 and judgment was reserved.

Case Law

18. In ***Reliance Energy Ltd*** (*supra*) the Supreme Court, inter alia, held as under:-

“36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution

embodies the principle of “non-discrimination”. However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to “right to life”. It includes “opportunity”. In our view, as held in the latest judgment of the Constitution Bench of nine Judges in *I.R. Coelho v. State of T.N.* [(2007) 2 SCC 1] , Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. “Level playing field” is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of “level playing field”. We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of “level playing field” is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. “Globalisation”, in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of “globalisation”. Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of “level playing field” embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of “equality” should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid

doctrine of “level playing field”. According to Lord Goldsmith, commitment to the “rule of law” is the heart of parliamentary democracy. One of the important elements of the “rule of law” is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of “reasonableness”, then such an act or decision would be unconstitutional.”

(underlining added)

19. In **W.B. SEB v. Patel Engg. Co. Ltd: (2001) 2 SCC 451** the Supreme Court observed as under:-

“24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of

distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.”

(underlining added)

20. In **Jagdish Mandal v. State of Orissa: 2007 (14) SCC 517**, the Supreme Court, while observing that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *mala fides*, cautioned that a court, before interfering in a tender or a contractual matter in exercise of the power of judicial review, should pose to itself the following questions:-

“(i) 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: ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached’;

(ii) Whether public interest is affected.”

The Supreme Court further held that, if the answers to the above questions were in the negative, then there should be no interference under Article 226. This view has been reiterated in **Michigan Rubber (India) Ltd v. State of Karnataka: 2012 (8) SCC 216** and **Maa Binda Express Carrier v. North-East Frontier Railway: 2014 (3) SCC 760**. In *Michigan Rubber (supra)*,

the Supreme Court, after a survey of the prior decisions on the subject, also observed as under:-

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

21. In *Maa Binda* (*supra*), the Supreme Court emphasized that:-

8. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for *bona fide* and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

Discussion:

22. Going back to the prayers in the writ petition, we find that, first of all, the petitioner has sought the quashing of the action of the PNGRB in granting extension of time to IOAGPL to furnish the performance bank guarantee; Secondly, quashing of the LOI issued by PNGRB in favour of IOAGPL has been prayed for; and thirdly, disqualification of IOAGPL is sought alongwith a declaration that the petitioner (SSL) be declared as the successful bidder. In this backdrop, it must be recalled that there is no complaint by SSL with regard to the tender process right upto and including the issuance of the LOI in favour of IOAGPL. There was a tie in the highest composite scores of three bidders – IOAGPL, Kerala GAIL Gas Ltd and SSL. Consequently, the tie-break rule enshrined in Regulation 7(3) of the 2008 Regulations and Clause 4.2.2 of the Instructions to Bidders was invoked. All the three were invited to give their additional bid bond amounts. As mentioned earlier, IOAGPL offered the highest additional bid

bond amount of Rs 1059 crores followed by a distant second-highest offer of Rs 10 crores by SSL and a third-highest offer of only Rs 3 crores by Kerala GAIL Gas Ltd. As per the 2008 Regulations and the tender terms, IOAGPL was declared as the successful bidder and was required to submit an additional bid bond bank guarantee for Rs 1059 crores within 15 days. IOAGPL complied with this and submitted a bank guarantee for the said amount of Rs 1059 on 12.01.2015. It is, thereafter, that PNGRB issued the LOI dated 20.01.2015 in favour of IOAGPL. From this sequence of events, it is clear that IOAGPL had won the 'race', as it were, fair and square insofar as the issuance of the LOI was concerned. This also meant that SSL was out of the 'race' and the competition between the competing entities was over. Till the issuance of LOI, that is, till the stage of choosing the successful bidder there is no allegation of any arbitrary action, discrimination, lack of transparency or fairness or of any deviation from the rules.

23. This takes us to the next stage. Upto the issuance of the LOI, there were three entities in the field. But, after the issuance of the LOI, only IOAGPL was left in the arena. The next stage was the issuance of the grant of authorization. That was predicated on the furnishing of a performance bank guarantee of an amount equal to 4 times the bid bond amount (original plus additional). IOAGPL was required to furnish a performance bank guarantee for Rs 4248 crores within 15 days of the LOI. IOAGPL sought extension of time for furnishing this performance bank guarantee for Rs 4248 crores. Extension was granted by PNGRB and then there was a *status quo* order by this court which was subsequently modified. Ultimately, the performance bank guarantee of Rs 4248 crores was furnished on 17.06.2015.

It must be noted that this performance bank guarantee was different from the earlier bid bond bank guarantee of Rs 1059 crores which IOAGPL had furnished in time on 12.01.2015 and whereupon the LOI was issued.

24. The grievance of the petitioner is that PNGRB ought not to have granted the extension of time for furnishing the performance bank guarantee and ought to have disqualified IOAGPL and awarded the LOI to the petitioner. The argument of the learned counsel for PNGRB needs to be examined in the context of the petitioner's grievance. The argument was that PNGRB was faced with two options – (1) to grant the extension sought for by IOAGPL or (2) cancel the proposed authorization and tender and set the entire process back in time. PNGRB chose the first option inasmuch as IOAGPL was submitting a substantially larger performance bank guarantee of Rs 4248 crores compared to a performance bank guarantee of only Rs 52 crores had SSL been the successful bidder. A higher performance bank guarantee was in public interest as it was a much greater 'guarantee' that the gas network for Ernakulam would get set-up in time and as per the stipulated parameters. Furthermore, the second option of cancelling the tender would set back the project in time which would also not be in public interest. In our view, the PNGRB cannot be faulted in going by the first option as it was in public interest and was also not in contravention of the tender conditions.

25. At this point, it would be instructive to examine clause 4.7.3 of the Instructions to Bidders which we had extracted in the earlier part of this judgment. It stipulates that "if, the entity does not deposit the Performance Bond within specified time period, PNGRB reserves the right to cancel the

proposed authorization without prejudice to various rights and remedies including forfeiting the Bid Bond of the entity and without being liable in any manner whatsoever to the entity”. This clause clearly indicates that PNGRB has the option to cancel the proposed authorization in case the Performance Bond / Bank Guarantee is not furnished within the specified time. But, the other side of the coin is that PNGRB need not cancel the proposed authorization and may extend the time for furnishing the Performance Bank Guarantee. Thus, extension of time for furnishing the Performance Bank Guarantee is not contrary to the tender terms but is, in fact, an option available to PNGRB. It chose that option in public interest and therefore the grant of extension of time cannot be faulted and the petitioner cannot claim any right to seek quashing of this action on the part of PNGRB, particularly when the petitioner lost the race at the LOI stage and there was nothing in the tender terms barring the grant of extension of time to the successful entity – IOAGPL.

26. It is now time to pose the questions which were raised in *Jagdish Mandal* (*supra*) and reiterated in *Michigan Rubber* (*supra*) and *Maa Binda* (*supra*) in the context of the present case:-

- (i) Whether the process adopted or decision made by PNGRB is mala fide or intended to favour someone ?

Or

- (ia) Whether the process adopted or decision made with regard to extension of time is so arbitrary and irrational, if at all, that this court can say: ‘the decision is such that no responsible authority

acting reasonably and in accordance with relevant law could have reached'?

(ii) Whether public interest is affected ?

The answers to all these questions, in view of the discussion above, have to be in the negative. The result is that no interference by this court is called for.

Conclusion:

27. Consequently, the writ petition is dismissed. The PNGRB is free to accept the Performance Bank Guarantee for Rs 4248 crores submitted by IOAGPL and to grant the authorization in its favour in terms of the 2008 Regulations and the tender conditions. The parties shall bear their respective costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

October 05, 2015

HJ/dutt