

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 918 OF 2015

Kartikay Exploration and Mining
Services, Pvt. Ltd.
A Company incorporated under
the provisions of Companies Act,
1956, having its Corporate Office at
199A/18, Chitnavis Marg,
Crorepati Lane, Civil Lines,
Nagpur, 440 001.
Through its Authorised signatory
Dr. Arvind Kumar
S/o. Sharda Prasad Dixit.

... Petitioner

V e r s u s

1. The National Centre for
Antartic and Ocean Research,
Ministry of Earth Sciences,
Government of India, Headland Sada,
Vasco da Gama, Goa 403 804.
Through its Director.
2. M/s. Shivganga Drillers Pvt. Ltd.,
a company incorporated under the
provisions of companies Act, 1956,
having its office at 104, Corporate
House, 1st Floor, 169 R.N.T.
Marg, Indore – 542001.

... Respondents

Mr. N. N. Sardessai, Senior Advocate with Mr. Nitin Lalwani, Mr. G. Panandiker and
Mr. P. Arolkar, Advocates for the Petitioner.

Mr. S. S. Kantak, Senior Advocate with Mr. A. Kamat, Advocate for the Respondent
no. 1.

Mr. Ankur Mody, Advocate with Mr. Jatin Ramaiyya, Advocate for the Respondent
no. 2.

Coram :- **F. M. REIS,**
 K. L. WADANE, JJ.

Date : **17th March, 2016**

ORAL JUDGMENT (Per F. M. Reis, J.)

Heard Shri Nitin Sardessai, learned Senior Advocate appearing for the Petitioner, Shri Kantak, learned Senior Advocate appearing for the Respondent no. 1 and Mr. Mody, learned Counsel appearing for the Respondent no. 2.

2. Rule. Heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the Respondents, waives service.

3. The above Petition, inter alia, prays for a writ of mandamus or any other writ commanding the Respondent no. 1 to quash and set aside LOA dated 30.09.2015 issued in favour of Respondent no. 2 and also to consider the bid of the Petitioner and to open the price bid in respect of the tender NCAOR/BGRL-KOYNA3km/01/2015.

4. Briefly, the case as stated by the Petitioner is that the Respondent no. 1 published a notice inviting tender for drilling one vertical, 3000 m deep borehole for scientific investigations in the Koyna Region, Maharashtra, bearing no. NCAOR/BGRL-KOYNA3km/01/2015. The Petitioner being interested in the said tender, on 14.07.2015, participated in the tender process and, accordingly submitted his tender. The Respondent no. 1 had sought clarification in respect of the bid submitted by the Petitioner which were responded by the Petitioner on 07.08.2015. Thereafter, further clarification was sought which was duly replied by the Petitioner by email and provided the requisite documents. It is further the

contention of the Petitioner that they were surprised to know that on 05.10.2015 from some outside sources that the bid of the Petitioner was rejected and the Respondent no. 2 was declared as a successful bidder. It is further their case that the Petitioner was not even informed about the rejection of his bid. It is further their case that after persistent inquiries, they learnt that the Petitioner could not qualify as the rig of the Petitioner was rejected. The Petitioner thereafter object to the said conduct of the Respondent no. 1 and personally met the Director of the Respondent no. 1 in connection with the rejection of the bid and after much efforts, the Petitioner was successful in coming to know from the Respondent no. 1 vide email dated 13.10.2015, the specifics of the rejection of the bid of the Petitioner. The reason was not convincing according to the Petitioner and, in fact, the same was also not in conformity with the tender documents. It is further their case that thereafter the Petitioner learnt that the rejection of the bid of the Petitioner was because the Petitioner did not submit the documents relating to the associated equipments though, according to the Petitioner, such documents were not required to be submitted. Thereafter, the Petitioner made an application under Right to Information Act seeking information relating to the tender from the Respondent no. 1 who again revealed the reasons for rejection to the bid of the Petitioner being that he had not offered a new Rig for the work in question and further that they were not in a position to ascertain whether the Petitioner would submit new equipment. Being aggrieved with the decision of the Respondent no. 1 rejecting the bid of the Petitioner, the Petitioners filed the above Petition, inter alia, seeking for the aforesaid reliefs.

5. The Respondent no. 1 has filed an affidavit and, inter alia, contended

that the contract has already been entered into with reputed service providers to carry out various activities under the Contract and that the Contractors have made procurements from various suppliers of specialised items. It is further their case that this project is in public interest as ultimate goal of the present project is to develop the ability to predict the occurrences of earthquakes in the region which will help in saving of lives and loss to property. It is further their case that this work includes drilling of 3 km deep vertical borehole in the Koyna region and the goal of the project is to study the mechanisms of the earthquakes that have been occurring persistently in the Koyna region. It is further their case that there were earthquakes way back in the year 1967 of the magnitude of M 6.3 and thereafter 22 earthquakes have occurred in the said region. It is further their contention that before the onset of the monsoons, the following activities would have to be completed namely drilling upto 3 kms depth, measurements during drilling and measurements inside the borehole after the drilling and installation of sensors inside the borehole and such drilling work is being carried out at a very remote locality on the top of a hill in the Koyna area. It is further their case that this is a prestigious project which has national and international participation and, as such, there is no justification for interference in the tender process concluded by the Respondent no. 1. It is further their case that the high level technical Committee comprising of eminent persons was constituted by the Respondent no. 1 for the purpose of carrying out a technical evaluation of the bid,. It is further their case that the Technical Committee in its meeting held on 31.07.2015, inspected the bid submitted by the three parties and decided to seek certain clarifications. It is further their case that as the Petitioners had offered a new Rig the associated equipment and the drilling tools , etc., should be new but, however, the Petitioners could not examine the status of the

associated equipments which are mandatory and critical to the operations. It is further their case that after clarification was sought, they have learnt that the rig was in fact in the Customs Bonded Warehouse at Kalamboli, Navi Mumbai. And that there was physical verification of the Rig on 10.08.2015 at the Customs Warehouse in the presence of the representative of the Petitioners. It is further their case that the Technical Committee at the meeting held on 12.08.2015, dismissed the Inspection report and it was decided to seek certain further documents and clarification from the Petitioners. It is further their case that at the subsequent meeting of the Technical Committee held on 11.09.2015, the bids along with all the clarifications received were discussed by the Committee and it was found that the bid submitted by the Petitioner does not comply with the requirements of furnishing of the technical specification of the drilling Rig which include all associated equipment and accessories and tools. It is further their case that this equipment was not available with the Petitioners at the relevant time. It is further their case that there were inconsistencies in the submission of the bid by the petitioners as enumerated at Para 34 of the affidavit. It was as such contended that the Petition be rejected.

6. The Petitioners filed an affidavit in rejoinder disputing the said contention of the Respondent no.1.

7. An affidavit in reply was filed by the Respondent no. 2. It is the contention of the Respondent no. 2 that the above Petition deserves to be dismissed as the Respondent no. 1 has already executed an Agreement with the Respondent no. 2 for the execution of the work on 04.11.2015 much before the

filing of the above Petition on 30.11.2015. It is further the case that a performance guarantee has been furnished by the Respondent no. 2 for a sum of Rs. 4,19,79,303/- on 12.10.2015. It is further their case that pursuant to the said Agreement, the Respondent no. 2 had already constructed an approach road and constructed a ramp, cellar pit, waste pits, etc., and completion of the work is stated to be till 31.03.2016. It is further the case of the Respondent no. 2 that the Petition is barred by laches.

8. The Petitioners also filed their affidavit in rejoinder to the said affidavit filed by the Respondent no. 2.

9. Shri Nitin Sardessai, learned Senior Advocate appearing for the Petitioners, has first taken us through the rejection of the technical bid of the Petitioners to point out the successive stands taken by the Respondent no. 1 only to defeat the legal tender documents submitted by the Petitioners. The learned Senior Advocate has taken us through the letter dated 7th October addressed to Mr. Dixit of the Petitioners to point out that the allegation therein is that the bid did not qualify techno-commercial evaluation as it did not conform to rig requirements of the tender and, as such, the price bid was not opened. The learned Senior Advocate has thereafter taken us through the letter dated 9th October, wherein it is stated that the accessories were not available in India under the ownership of the bidder and that there was four more months for mobilisation after issuance of LOI. Learned Senior Advocate has thereafter pointed out that the letter addressed to the Respondent no. 1 to point out that the new Rig was already available and that there were four month period for mobilisation and, as such, the Petitioners could obtain

the accessories within the said period. The learned Senior Advocate has also thereafter taken us through the letter dated 13th October, to point out that all the accessories had to be available at the time of submitting the bid. The learned Senior Advocate further pointed out that the Respondent no. 1 had given an opportunity to rectify the specifications to the Respondent no. 2 and other bidders and not to the Petitioners which itself discloses discrimination on the part of the Respondent no. 1. The learned Senior Advocate has given lot of emphasis to the tender conditions in connection with the bidders equipments at clause 6.1 and 6.2 to point out that the confirmation that the equipment was not in good condition is not applicable to cases where the bidders are offering a new and unused Drilling Rig and new and unused equipment in terms of Clause 6.2. The learned Senior Advocate has submitted that the question of examining the quality of the material or the existence of the new equipment is not within the purview of the Committee evaluating the technical bid and, as such, the whole exercise by the Respondent no. 1 is malafide as the Petitioner has been deliberately omitted from taking part in the tender process. Learned Senior Advocate further submits that the Petitioner had given an inspection of the rig at the customs warehouse and such inspection was taken by the authorised representative by the Respondent no. 1 and no grievance was raised with regard to the non-existence of the accessories and equipments for such Rig. Learned Senior Advocate further submits that in case the Respondent no. 1 had informed the Petitioners, they would have taken steps to procure the new equipment for such Rig. Learned Senior Advocate has extensively taken us through the terms and conditions of the tender document and the correspondence between the parties to point out how the Respondent no. 1 were bent on refusing the bid of the Petitioners on flimsy and untenable grounds.

Learned Senior Advocate further submits that the Petitioners are technically eligible to be considered for the tender process and the inconsistent stand taken by the Respondent no. 1 would itself suggest the falsity of the claim of the Respondent no. 1. Learned Senior Advocate further pointed out that the Petitioners would have cleared the customs duty as well as release the Rig immediately after the tender was issued to the Petitioners and taken steps to procure the new equipment as there were four months mobilisation period available to the successful bidder. Learned Senior Advocate as such pointed out that the rejection of the bid of the Petitioners be quashed and set aside and the Respondent no. 1 be directed to open the price bid of the Petitioners.

10. On the other hand, Shri S. S. Kantak, learned Senior Advocate appearing for the Respondent no. 1, has pointed out that the law is well settled about interference in the tender process by this Court in exercise of jurisdiction under Article 226 of the Constitution of India. The learned Senior Advocate has further submitted that considering the tender bids are commercial transactions it is always open to the Respondent no. 1 to examine the best person suitable for such work and it is not open for this Court to substitute its own view when there is no arbitrariness in the decision making process by the Respondent no. 1. Learned Senior Advocate further pointed out that in fact the tender bid submitted by the Petitioner was not responsive as, according to him, the relevant facts that the new Rig was in the Customs Warehouse and that there was no order nor accessories nor equipments of the Rig available with the Petitioners was not even disclosed in the tender document. Learned Counsel further submits that as there were inconsistencies with the bid submitted by the Petitioners, the Respondent no. 1 was

justified to reject the technical bid of the Petitioners. Learned Senior Advocate further pointed out that the conduct of the Petitioners itself was suspect as, according to him, the Petitioners even did not disclose the price submitted by the Petitioners for the work in terms of the tender process. This attitude of the Petitioners itself suggests their malafide intentions as they are very much apparently aware that in case the process was disclosed, the bid of the Petitioners would be rejected. The learned Senior Advocate further submits that as such the whole exercise by the Petitioners is malafide in filing the above Petition at a belated stage when the work has been substantially completed.

11. We have considered the submission of the learned Counsel and we have also gone through the records. The main grievance of the Petitioners revolves upon the interpretation of some of the terms of the tender document. Clause 6.0 dealing with the bidder's equipments reads thus :

“6.0 Bidder's Equipments

6.1 The bidder shall offer serviceable/new drilling Rig fulfilling Scope of Work and conforming to the Technical Specifications laid down in the Bid Document. The complete details of the last contract taken up, last Operator and the period during which the Rig was last in operation shall be submitted with documentary evidence in the un-priced bid. Idling period of the Rig shall not be more than 3 years continuously on the date of submission of Bid.

6.2 The Bidder shall confirm in the un-priced bid that the equipment of the offered Drilling Rig are in good working condition and shall furnish a Certificate

from any one of the Third Party Inspection Agencies like, DNV, BV, Lloyds, Oil Field Audit Services Inc., and ABS bringing out the condition, status of the Drilling Rig & the equipment (as per Appendix-2.A or Appendix-2.B of BEC, as the case may be) and confirmation to the effect that Residual Life of the Rig & its Equipment are not less than five years as on the date of opening of un-priced bid. The Certificate from TPI Agency should not be more than six months old, as on the date of opening of technical bid.

This however, shall not be applicable for bidders offering new and unused Drilling Rig and new and unused Equipment. “

12. Clause 6.1 clearly reveals that the bidder can offer a new drilling Rig fulfilling scope of work and confirming to the technical specification laid down in the bid document. No doubt, Clause 6.2 provides that issuing a certificate about the condition of the bid would not be applicable for bidders for new and unused drilling Rig and new and unused equipments. But, however, Clause 7.3 which deals with new equipments stipulates that the bidders offering new equipments shall confirm that the items/equipments are new and unused and are meeting the technical specification and should submit details as per Appendix-2 and Appendix-5 of Annexure III. Wherever Makes are specified, bidder should quote those Makes only. It is not disputed that the tender document did not disclose that the new equipment was not available or purchased by the Petitioners at the time of submitting the tender bid. It is also not disputed that the Petitioners were given different opportunities to clarify on these aspects and in fact an inspection was also carried out of the new Rig which was thereafter found to be in the Customs Bonded

Warehouse. In fact, in the letter dated 13.10.2015 addressed to the Petitioners, it has been clearly mentioned that the reason for rejecting the technical bid of the Petitioners is that as per BEC Clause 7.2 and 7.3 along with Appendix 2A or Appendix 2-Band Appendix-2 and Appendix-5 of Annexure III, the bidder was to provide the Rig and associated equipments clearly indicating whether it is old or new. In case of new equipments as per Clause 7.3, the bidder shall confirm that the items/equipments are new and unused and in this respect, the bidder should provide authenticated document to substantiate the purchase of these equipments in terms of placement of purchase order/MOU with the suppliers. On perusal of the said Clauses s referred to herein above, we find that the reasons for rejecting the technical bid by the Respondent no. 1 cannot be said to be unjustified. The Petitioners did not disclose the existence of the equipment nor certified or confirmed that such equipment was intended to be purchased or the order. In such circumstances, the contention of Mr. S. S. Kantak, learned Senior Advocate appearing for the Respondent no. 1 that the bid submitted by the petitioners was not responsive has also to be accepted. Even when the personal inspection was carried out, the Petitioners were not in a position to establish the existence of the equipment and, in such circumstances, we find no arbitrariness in the decision of the Committee to reject the technical bid of the Petitioners.

13. Apart from that, it is not disputed that the persons who were in the Committee were reputed and distinguished experts in their respective fields and, as such, the question of interfering in such decision unless there is gross arbitrariness on the part of the decision making process, it would not at all be justified to exercise jurisdiction under Article 226 of the Constitution. Even on perusal of Clause 8 of

the bid, the evaluation criteria which deals with technical rejection criteria, also specifies the different aspects to be examined whilst considering such bids. In fact, Clause 9.0 provides that the bidders should offer Custom cleared Rigs and submit clear documents of it's customs clearance along with Techno Commercial bids and shall indemnify NCAOR from any incidents of customs duty leviable in future. In fact, it is not disputed that the new rigs provided by the Petitioners, have not been cleared by the Customs authorities as they were in the Custom Bonded Warehouse nor the reasons thereof disclosed by the Petitioners. The Petitioners admittedly did not submit the custom cleared documents which has also to be examined whilst considering the Techno Commercial bid of the Petitioners. The Techno Commercial at the meeting held on 12.08.2015, had in fact noted with regard to the bid submitted by the Petitioners thus :

“(a) the well completion certificate submitted on behalf of their joint venture partner M/s. P. R. Marriot Drilling Ltd. (MDL) based outside India need to be verified for authenticity as the bidding firm does not possess the requisite experience of its own in respect of the completion certificates submitted by the other two bidders, certificates have been issued by the ONGC and have been verified, and

(b) the drilling rig is in the bonded warehouse at Mumbai and the custom clearance is yet to be obtained. This was also validated by the physical inspection of the rig at Mumbai. The bidder has also stated that the custom clearance will be obtained on receipt of work order from NCAOR. On this issue, Committee felt that it was important to know apriori the precise reasons for non-clearance of the rig from

the Custom Authority as to whether any undesirable complications are involved.”

.....

3. With regard to the techno-commercial bid of m/s. Kartikay Exploration and Mining Services Pvt. Ltd., the Committee recommended the following:

(a) The bidder may be asked to submit authenticated documents from the Custom Authority, Mumbai explicitly stating the reasons for withholding the rig in the months and the documentation and time lines required for its customs clearance. The document should be submitted to NCAOR/BGRL within 7 days from the issue of notice from NCAOR/BGRL, failing which the bid will not be considered for further evaluation.

(b) Considering the fact that M/s. MDL is a foreign company under joint venture agreement with the bidder, NCAOR/BGRL may attempt to further scrutinise the authenticity of the well completion certificates of M/s MDL as submitted by M/s Kartikay Exploration and Mining Services Pvt. Ltd.”

14. The observations of the physical inspection of the bid of the Petitioner reads thus :

“Observation :

On physical inspection of the rig the following are the observations :

a) Only the rig carrier (Trailer Mounted Unit (Towable) along with control panel and ladders are lying i.e. to say only the rig unit is lying in Mumbai.

b) M/s. Kartikay has not paid the Custom duty against the rig. That may be the reason why the rig

unit is lying in Bonded Ware House,. Therefore, M/s. Kartikay do not possess ownership of the rig as of now. The bidder may be asked to confirm the same.

c) the rig unit is brand new. The unit is covered with polythene to protect from rain water. Photographs of the unit have been taken after removing the polythene. These photographs are annexed herewith.

d) Other than the rig carrier, the other equipments/accessories which are required as per the tender such as mud pumps, mud tanks, utility house, water tanks, mud equipment, viz d-sander, de-silter, mud cleaners, d-gassers etc. are not available at Mumbai.

e) Tools which are required as tender such as fishing tools, drill pipes, drill collars, handling tools etc. could not be seen at Mumbai as these are not available with the rig.

f) The safety equipment which are life saving equipment, such as Blowout preventers (BOP). Accumulator units, Choke and kill manifold etc are not available with the rig”

15. Even on perusal of Annexure 2 in connection with the details of the rig, we find that at Clause 1 therein the Petitioners did not disclose the existence of the equipment of the rig to inter alia indicate that no such equipment was available with the Petitioners at the relevant time.

16. In such circumstances, we find that there is no arbitrariness in the decision making by the Respondent no. 1 whilst considering the technical bid of the Petitioners. The reasons recorded by the Technical Committee to reject such bid for Scientific investigation at the Koyna region cannot be said to be arbitrary or that any finding therein is ultra vires to the tender conditions. The Petitioner as pointed out herein above, did not have the new tools nor had placed an order for such purchase and, consequently, the equipment or the tools could not be physically verified. Taking note of the clauses referred to herein above, such aspects could also be examined by the Technical Committee. Apart from that, it is not disputed that the work being carried out is to ascertain the causes of the earthquakes around the Koyna region and it is in public interest to ensure the completion of the work expeditiously. In terms of the Agreement as stated in the affidavit in reply by the Respondent no. 1, substantial work had to be completed before the onset of the monsoons. The Agreement was admittedly signed in October, 2015 and such work had to be completed by March 2016 and, as such, an interference at this stage would be unjustified in the facts and circumstances of this case.

17. The Apex Court in the Judgment reported in **2012 (6) SCC 464** in the case of **Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa**, has observed at Paras 15, 16, 18, 31 and 33 thus :

“15. A challenge to the award of the project work in favour of Respondent 2 involved judicial review of administrative action. The scope and the approach to be adopted in the process of any such review, has been settled by a long line of decisions

of this Court. Reference to all such decisions is in our opinion unnecessary as the principles of law settled therefor are fairly well recognised by now. We may, therefore, refer to some of the said decisions only to recapitulate and refresh the tests applicable to such cases and the approach which a writ court has to adopt while examining the validity of an action questioned before it.

16. In *Tata Cellular v. Union of India* this Court emphasised the need to find the right balance between administrative discretion to decide the matters, on the one hand, and the need to remedy any unfairness, on the other, and observed: (SCC pp. 687-88, para 94)

“(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ...

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the

decision must not only be tested by the application of *Wednesbury principle* of reasonableness (including its other facets pointed out above) but must be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted

17. ...

18. In *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, this Court held that while judicial review cannot be denied in contractual matters or matters in which the Government exercises its contractual powers, such review is intended to prevent arbitrariness and must be exercised in larger public interest.

19. ...

.....

31. It is also noteworthy that in the matter of evaluation of the bids and determination of the eligibility of the bidders the Municipal Council had the advantage of the aid and advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of Respondent 2.

32. ...

33. Interference with the ongoing work is,

therefore, not conducive to public interest which can be served only if the scheme is completed as expeditiously as possible giving relief to the thirsty residents of Sendhwa. This is particularly so when the allotment of work in favour of Respondent 2 does not involve any extra cost in comparison to the cost that may be incurred if the contract was allotted to the appellant Company.”

Taking note of the said observations, we find that the action of the Respondent no. 1 in rejecting the technical bid of the Petitioners is not arbitrary and interference with the on going work would not be conducive to public interest which can be served only if the scheme is completed as expeditiously as possible considering the nature of the work assigned to the Respondent no. 2 based on the subject tender process. As noted herein above, the technical experts in the Committee were not in a position to ascertain the nature of the accessories and the equipments of the Rig as the Petitioners had in fact not even taken steps to purchase such equipments which is very much essential for carrying out the work intended to be allotted in terms of the said tender process. The time within which such equipment would be supplied was not even disclosed by the Petitioners and, in such circumstances, a prudent person would definitely have reservations to enter into a Contract which had to be initiated and substantially completed before the onset of the monsoons. The criteria provided in the tender document is to be strictly followed and it is not open for this Court to examine the validity or otherwise of such criteria. As already stated herein above, the Petitioners were not in a position to show that they in fact had the equipment and the tools nor had initiated the process to purchase such equipment to enable the Committee to examine the technical bid

of the Petitioners. Besides that, the Petitioners have also not disclosed the amount mentioned in the financial bid which would assist the Court to take a decision whether if at all there was any ground for interference in the tender process of the Respondent no. 1. As we find no arbitrariness in the decision making process, of the subject tender process, we find no reason to interfere in the tender process of the Respondent no. 1.

18. As such, we find no case made out for any interference in the decision making process of the Respondent no. 1 in rejecting the technical bid of the Petitioners. Hence, we find no merit in the above Petition, which stands accordingly rejected.

K. L. WADANE, J.

F. M. REIS, J.

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