

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: 17th March, 2016
Judgment Delivered on: 11th May, 2016

+ W.P.(C) 12331/2015

QUIPPO OIL AND GAS INFRASTRUCTURE
LIMITED

.... Petitioner

versus

OIL & NATURAL GAS CORPORATION LIMITED
AND ANR

.... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr P.Chidambaram, Senior Advocate and Mr Rajiv Nayar,
Senior Advocate with Mr Abhimanyu Bhandari and Ms Kartika
Sharma.

For the Respondents: Mr Sanjay Jain, ASG with Mr Sunil K.Jain, Mr Kaushik
Choudhury, Mr T.N.Durga Prasad, Ms Reeta Chaudhary, Mr
Shaantanu Jain, Ms Rhea Vorma and Ms Ruchi Jain.

+ W.P.(C) 791/2016

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CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. The Petitioner filed W.P.(C) No.12331/2015 seeking quashing/waiving off the arbitrary and discriminatory conditions encapsulated in clauses B.2.6(v) and B.2.7(v) and B.2.6(v) of the tender Nos.1, 2 & 3 respectively. W.P(C) No.791/2016 has been filed seeking a mandamus to the Respondent No. 1 to consider the bid of the Petitioner against the five subject tenders.

2. The Petitioner is a Public Limited Company engaged in the business of oil and gas drilling, providing drilling services to E& P Operators in India and overseas. It is stated to have over ten years of drilling experience across the industry and claims to be India's leading and fastest growing drilling company.

3. The Petitioner is a wholly owned subsidiary of SREI Infrastructure Finance Limited, which owns 99.90% of the shares. The share-holding pattern of the Petitioner, as on the date of the filing

of the petition, was as under:-

Name of the Shareholder	No. of shares	Share capital	Share Holding in %
SREI	29,968,000	299,680,000	99.90
Mr Hemant Kanoria (Beneficial Holder for SREI)	500	5,000/-	0.00
Mr Sandeep Lakhotia (Beneficial Holder for SREI)	500	5,000/-	0.00
Mr S.B.Tiwari (Beneficial Holder for SREI)	500	5,000/-	0.00
Mr Rupesh Kumar (Beneficial Holder for SREI)	400	4,000/-	0.00
Mr Sanjeev Sancheti (Beneficial Holder for SREI)	100	1,000/-	0.00
Mr Sandeep Bedi	30,000	300,000/-	0.10
TOTAL	30,000,000	300,000,000	100.00

4. It is contended that SREI is in full and complete control of the Petitioner Company and has full control on the operations and affairs of the Company of the Petitioner.

5. It is contended that the Respondent No.1/Oil and Natural Gas Corporation Limited (ONGC Ltd.) floated the subject tenders for deployment of drilling rigs and carrying out of 3-D seismic survey. The Petitioner is aggrieved by the financial criteria of the subject tenders, whereby the subsidiary Company is required to be a 100%

subsidiary of the parent/ultimate parent/holding Company. It is contended that since the holding Company owns 99.90% shares of the Petitioner Company, it virtually amounts to 100% shareholding and the holding Company exercises complete control in the management and the decision making of the Petitioner. It is contended that such a condition is discriminatory and aimed at excluding prospective bidders and preventing healthy competition. It is contended that the said condition of owning 100% shareholding in the subsidiary is not relevant to ensure successful execution of the work and the said condition is unreasonable, discriminatory, opposed to public policy, arbitrary and irrational. It is contended that the said condition is not an essential condition of eligibility and is merely ancillary or subsidiary with the main object to be achieved by the condition. It is contended that even the Respondent No.1/ONGC has applied the same liberally. The Respondent No.1, in its counter-affidavit filed to C.M. No. 2081/2016, has conceded that it has awarded a tender to a consortium of M/s Bumi Armada Offshore Contractor Limited (BAOCL), Marshall Island and M/s Afcons Infrastructure Limited, Mumbai wherein the BAOCL has 99% stake in its subsidiary company M/s Bumi Armada Caspian LLC (BACLLC), Russia. BAOCL has 99% of shareholding in BACLLC and the rest 1 % is with M/s Bumi Armada Russia Holdings Limited, Marshall Islands (BARHL).

6. M/s Bumi Armada Russia Holdings Limited (BARHL), Marshall Islands and M/s Afcons Infrastructure Limited, Mumbai, wherein BARHL has 90% stake in its subsidiary Company.

7. It is contended in the counter affidavit, that the same has been done because as per Russian Law, holding Company cannot hold 100% share of its subsidiary Company and, as such, 10% share was allotted to another entity. It is contended in the counter that the Respondent No.1 has never relaxed the tender condition of 100% ownership by parent/subsidiary Company in its tenders except in the case of Russian Company, which was due to valid/legal/statutory reasons, as stated above. It is contended that the said condition has never been relaxed in respect of any Indian Company, as under Indian Law, 100% subsidiary is permissible. It is contended that several anomalies or difficulties can be caused by even a single shareholder, reference is made as per Section 241 read with 244 and Section 188 of the Companies Act, 2013. It is contended that 0.10% shareholding can affect/hamper the tender process of the Respondent No.1 to a great extent.

8. It may be noted, that during pendency of the present petition, the holding Company of the Petitioner i.e. the Respondent No. 2 has acquired even the said 0.10% shareholding and now holds 100% share in the subsidiary company, i.e. the Petitioner.

9. To settle the controversy that arises in the present writ petitions, we need to examine as to whether the impugned condition is an essential condition of eligibility or is merely ancillary or subsidiary to the main object to be achieved by the condition.

10. The Supreme Court of India in **Poddar Steel Corpn. v. Ganesh Engineering Works, (1991) 3 SCC 273** has held as under:

*“6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in *C.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488]* a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in*

the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.”

(underlining supplied)

11. The impugned financial criteria of the ‘bid evaluation criteria’ of the said tenders reads as under:-

“B.2.6 FINANCIAL CRITERIA FOR TURNKEY / SERVICE CONTRACTS / SUPPLY OF GOODS

1. *Turnover of Bidders : 30% of annualized bid value or more;’*
2. *Net worth of Bidder : Positive (as per latest audited annual accounts)*

Note:

- iv). *In case the bidder is a newly formed company (i.e. one which has been incorporated in the last 5 years from the date of un-priced bid opening of the tender) who does not meet financial criteria (i.e. Turnover for 30% annualized bid value) by itself and submits his bid based on the financial strength of his promoter company, then following documents need to be submitted;*
- i. *Turnover of the promoter company/ Joint venture partner should be more than 30% of the annualized bid value.*
 - ii. *Net worth of the promoter / Joint venture partner company should be positive.*
 - iii. *Corporate Guarantee on promoter / Joint venture partner company's company letter head signed by an authorized official undertaking that they would financially support the newly formed company for executing the project/job in case the same is awarded to them, and*
 - iv. *The bidder is a newly formed company i.e. one which has been incorporated in the last 5 years from the date of un-priced bid opening of the tender*
- v) *In case the bidder is a subsidiary company (should be a 100% subsidiary of the parent/ultimate parent/holding company) who does not meet financial criteria (i.e. Turnover for 30% annualized bid value) by itself and submits his bid*

based on the financial strength of his parent/ultimate parent/holding company, then following documents need to be submitted:

- i. Turnover of the parent/ultimate parent/holding company should be more than 30% of the annualized bid value.*
- ii. Net worth of the parent company should be positive.*
- iii. Corporate Guarantee on parent/ultimate parent/holding company's letter head signed by an authorized official undertaking that they would financially support their 100% subsidiary company for executing the project/job in case the same is awarded to them, and*
- iv. The bidder is a 100% subsidiary company of the parent/ultimate parent/holding parent company.*

*****”

12. As per the financial criteria, the bidder should have a turnover of at least 30% of annualized bid value. In case a bidder does not meet the financial criteria by itself, then under para (v) of clause B.2.6 it can submit its bid based on the financial strength of his parent/ultimate parent/holding company. In case such a bidder wishes to take advantage of the financial strength of his parent/ultimate parent/holding company, then it must be a 100% subsidiary of his

parent/ultimate parent/holding company. The parent/ultimate parent/holding company of such a bidder should have a turnover of at least 30% of annualized bid value, its net worth must be positive and the bidder should submit a Corporate Guarantee on parent/ultimate parent/holding company's letter head signed by an authorized official undertaking that they would financially support their 100% subsidiary company for executing the project/job in case the same is awarded to them.

13. In contrast, if we examine para (iv) of clause B.2.6, it provides that in case a bidder does not meet the financial criteria by itself and it is a newly formed company (i.e. one which has been incorporated in the last 5 years from the date of un-priced bid opening of the tender) then it can submit its bid based on the financial strength of its promoter company. In case such a bidder wishes to take advantage of the financial strength of its promoter company, then the promoter company/joint venture partner should have a turnover of at least 30% of annualized bid value, its net worth must be positive and the bidder should submit a Corporate Guarantee on promoter company/joint venture partner company's letter head signed by an authorized official undertaking that they would financially support the newly formed company for executing the project/job in case the same is awarded to them.

14. In the case of a newly formed company, there is no requirement that the promoter company should have a 100% shareholding in the bidder. All that is required is that the promoter company should give a corporate guarantee/undertaking that it would financially support the newly formed company for executing the project/job in case the same is awarded to them. The pleas in the counter affidavit seeking to justify the requirement of a 100% shareholding by a parent company, on the ground that several anomalies or difficulties can be caused by even a single shareholder who can affect/hamper the tender process of the Respondent No.1 to a great extent, are without any basis. No such fear or apprehension is expressed in respect of a newly formed company. One cannot comprehend as to how a subsidiary would be different from a newly formed company when in both cases a corporate guarantee/undertaking is submitted from the parent/ultimate parent/holding company or the promoter company/joint venture partner that it would financially support the subsidiary company or the newly formed company (as the case may be) for executing the project/job in case the same is awarded to them.

15. We may also note that the purpose of the financial condition is that the bidder should have the wherewithal to execute the project and in case it does not have the same, then there is a corporate guarantee/undertaking by its parent/ultimate parent/holding company

or the promoter company/joint venture partner (as the case may be), which has the financial wherewithal, that it would financially support the subsidiary company or the newly formed company. One fails to understand as to how holding 100% share in the subsidiary company would make the corporate guarantee/undertaking any better than in a case where the parent/ultimate parent/holding company does not hold 100% shares of the subsidiary company. In case of default of the bidder, the corporate guarantee/undertaking of the parent/ultimate parent/holding company would be enforced, in which case, it would be immaterial whether it holds 100% share in the subsidiary company or not.

16. The hollowness of the plea of the Respondent No.1, that several anomalies or difficulties can be caused by even a single shareholder who can affect/hamper the tender process of the Respondent No.1 to a great extent, is further exposed when one considers the case of a standalone bidder which is able to meet the financial criteria on its own. A standalone company could be controlled by a simple majority of shareholders. In such a situation, the minority shareholders could still challenge the decisions of the majority and affect/hamper the tender process. How would the Respondent No.1, in such a situation, avoid the possibility of a dissent or a petition of mismanagement being filed? If in such a case there is no requirement of a 100%

shareholding then how can the Respondent No.1 insist upon such a condition in the case of a subsidiary company bidder when the bid is backed by a corporate guarantee/undertaking of the parent/ultimate parent/holding company? The ratio of the decision of the Supreme Court in **Poddar Steel Corpn (Supra)** is thus squarely applicable in the facts of the present case.

17. Further we may note that Respondent No. 1 has itself not considered the said condition as an essential condition of eligibility and has admittedly not applied the principal of holding 100% shareholding of the bidder subsidiary company in the case of the consortium Russian Company M/s Bumi Armada Offshore Contractor Limited (BAOCL), Marshall Island and M/s Afcons Infrastructure Limited, Mumbai on the ground that as per legal advice received, under Russian Law a 100% subsidiary company cannot hold 100% shares of its subsidiary company. When the Respondent No. 1 has itself not treated the impugned condition as an essential condition of eligibility in the case of the Russian Company, then how can it be permitted to contend that in the case of the Petitioner, it is an essential condition of eligibility and not ancillary or subsidiary to the main condition.

18. The Judgment of the Supreme Court of India in the case of **Michigan Rubber (India) Limited v. State of Karnataka and Others**

(2012) 8 SCC 216, relied upon by the Respondent No. 1, to contend that 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, does not further its case in as much as in the said judgment the Supreme Court has held that *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. It has also laid down that a court before interfering in tender or contractual matters, in exercise of 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"? and (ii) Whether the public interest is affected. If the answers to the above questions are in the negative, then there should be no interference under Article*

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19. In the present case, clearly the decision of the Respondent No. 1 to selectively apply the impugned condition in the case of the Petitioner and not the Russian company, smacks of arbitrariness. Further, as discussed hereinabove, the applicability of the impugned condition in the case of a subsidiary company bidder and not in the case of a newly formed company bidder or any other bidder company is clearly arbitrary and irrational.

20. In view of the above discussion, we are of the view that the impugned condition is not an essential condition of eligibility but merely ancillary and subsidiary with the main object to be achieved by the said condition and thus the Respondent No. 1 cannot insist upon the strict literal compliance of the said condition. The writ petitions are allowed. The Respondent No. 1 is prohibited from rejecting the bid of the Petitioner on this ground. There shall be no order as to costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

MAY 11 , 2016/‘sn’