THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.6143 of 2017

ORDER:

This writ petition is filed under Article 226 of the Constitution of India praying for a Writ of Mandamus to_

a) Declare the action of the second respondent in trying to enter into Power Supply Agreement with the third respondent as arbitrary, illegal and violative of Articles 14, 19 (1) (a) and 21 of the Constitution of India and consequently quash the same.

b) Declare the action of the second respondent in revoking LOA vide letter dated 23.02.2017 to the petitioner company as arbitrary, illegal and violative of Articles 14 and 19 (1) (a) and 21 of the Constitution of India and consequently quash the same.

c) Direct the second respondent to enter into Power Supply Agreement with the petitioner company for 200 MW before entering into Power Supply Agreement with the third respondent or any other bidder in this process and the same to be placed on record in accordance with law as earliest as possible.

2. The facts and circumstances of the case, leading to the filing of the present writ petition, are as follows:

2.1. The Andhra Pradesh Southern Power Distribution Company Limited (hereinafter called 'APSPDCL') issued a Request For Qualification (RFQ), dated 23.03.2015 for 1000 MW for a period of 12 years, starting from 31.03.2016 and the second respondent thereafter revised the Request For Qualification on 26.05.2015. In response to the same, petitioner and the third respondent along with others made their offers and the second respondent announced the 4 bidders as successful including the petitioner and the third respondent in the RFQ process and in furtherance of the same, the APSPDCL invited the RFQ qualified bidders to participate in Request For Proposal and issued RFQ and draft PSA (Power Supply Agreement) to the successful bidders and a public hearing was held by APERC which granted approval on 12.01.2016. Thereafter, the second respondent revised the RFQ and the draft Power Supply Agreement, incorporating various suggestions of the qualified bidders on 21.10.2016 with the date of supply revised to 01.06.2016.

2.2. According to the petitioner, petitioner company submitted RFQ along with the required documentary evidence by its letter dated 05.02.2016 and also submitted all the documents and furnished the clarifications to the satisfaction of the second respondent including those already given at the qualification stage on 21.05.2016. It is further stated that the Bid Evaluation Committee of the second respondent approved the petitioner as lowest qualified bidder/L1 with the tariff of Rs.4.439 per KWH and the third respondent as L3. Thereafter, the second respondent issued Letter Of Award (LOA) on 20.09.2016 in favour of the petitioner and asked the petitioner to accept the LOA within 7 days, and thereafter, according to the petitioner, it accepted the LOA and signed the copy of acknowledgment of LOA along with company seal on 27.09.2016.

2.3. On 25.10.2016, the APSPDCL issued a final draft PSA (Power Supply Agreement) with a request to the petitioner to provide details such as office address and the filled in schedules for completion of PSA and the same was responded to by the petitioner. It is further pleaded that the petitioner requested to furnish the date of signing final draft and subsequently vide letter dated 19.11.2016 petitioner requested the second respondent to inform the date of signing of Power Supply Agreement. According to the petitioner, petitioner company and the third respondent are part of the same RFP (Request For Proposal) and the petitioner being the L1 has the first right to sign PSA, but the APSPDCL signed PSA with the third respondent for 400 MW.

2.4. The second respondent herein issued a show cause notice of cancellation of the Bid to the petitioner herein and the petitioner submitted its reply on 02.02.2017.

3. In the above background, initially the petitioner herein filed the present writ petition. The APSPDCL vide Lr.No.CGM/IPC/APSPDCL/D.No141 dated 23.02.2017 revoked the LOA issued in favour of the petitioner earlier on 20.09.2016. Thereafter, the petitioner sought amendment of the prayer and this Court vide order in WPMP.No.8771 of 2017 permitted the said amendment.

4. Heard Sri A.Sudershan Reddy, learned Senior Counsel, representing Sri I.V.Siddhivardhana, learned counsel for the petitioner on record, learned Advocate General for the State of Andhra Pradesh for respondents 1 and 2 and Sri Katragadda Gopala Chowdry, learned counsel for the third respondent apart from perusing the material available before this Court.

5. It is contended by the learned Senior Counsel, appearing for the petitioner that the impugned action is highly illegal, arbitrary, discriminatory and violative of Articles 14, 19 (1) (a) and (g) and 21 of the Constitution of

India. It is further contended that the reasons assigned in the impugned order of revocation of LOA are neither rational nor sustainable in the eye of law. It is further submitted that though the third respondent failed to comply with the conditions, the second respondent did not raise any objections against the third respondent. It is further contended that the second respondent grossly erred in revoking the LOA on the ground of violation of conditions of PSA which was never signed. It is also the submission of the learned Senior Counsel appearing for the writ petitioner that till now no Fuel Supply Agreement has been furnished by the third respondent, as such, the action of the second respondent is discriminatory. The learned Senior Counsel places reliance on *RAMANA DAYARAM SHETTY v. INTERNATIONAL AIRPORT AUTHORITY OF INDIA AND OTHERS*[1] and *W.B.STATE ELECTRICITY BOARD v. PATEL ENGINEERING CO.LTD. AND OTHERS*[2].

6. It is contended by the learned Advocate General, representing the respondents 1 and 2 that there is no illegality nor there is any procedural infirmity in the impugned action and in the absence of the same the present writ petition is not maintainable and the petitioner herein is not entitled for any relief from this Court under Article 226 of the Constitution of India. It is further contended that strictly adhering to the principles of natural justice, the second respondent herein revoked the LOA, as such, the same is not amenable for any judicial review under Article 226 of the Constitution of India. It is further contended that since the petitioner did neither furnish the Firm Fuel Supply Agreement to the second respondent within time nor it obtained the prior approval for change of ownership, the APSPDCL is perfectly justified in revoking LOA. It is further contended that the present

[1] (1979) 3 SCC 489
[2] (2001) 2 SCC 451

writ petition is not maintainable in view of the availability of alternative remedy to the petitioner under Section 86 (1) (f) of the Electricity Act, 2003 before the A.P. Electricity Regulatory Commission.

Learned Advocate General has placed reliance on *GUJARAT URJA VIKAS NIGAM LTD v. ESSAR POWER LTD*[3] and *GOVIND RUBBER LIMITED*[4] *v. LOUIS DREYFUS COMMODITIES ASIA PRIVATE LIMITED*[5]

7. Sri Katra Gadda Gopala Chowdary, representing the third respondent, contends that by any stretch of imagination the writ petitioner herein cannot be construed as a aggrieved party against the third respondent nor the writ petitioner herein can complain against the allocation in favour of the third respondent which is evident from the request made by the petitioner herein. It is further contended that the contention of the petitioner that the request of the petitioner should be considered first before signing any agreement with the third respondent as it emerged as L1 is neither sustainable nor tenable in view of the express clauses in the bid documents. It is further submitted that once there is a matching of the figure quoted by the L1, the question of emerging as successful bidder for consideration and the question of treating L1 as successful bidder alone for entire invitation would not arise. It is further contended that the petitioner herein made its offer only for 200 MW where as the third respondent offered for 400 MW out of the total 1000 MW, invited by the second respondent. It is further contended that the third respondent has complied with all the conditions.

[3] (2008) 4 SCC 755
[4] (2015) 13 SCC 477
[5] (2015) 13 SCC 477

8. In the above background, now the issue that emerges for consideration of this Court under Article 226 of the Constitution of India is_ “Whether the petitioner herein is entitled for any relief from this Court?

9. The information available before this Court reveals that the APSPDCL/second respondent herein issued a Request For Qualification for Power Supply Agreement for procurement of electricity of 1000 MW capacity under long term on Design, Built. Finance, Own and Operate (DNFOO) basis from power supply stations using imported coal from captive Coal Mines and fuel vide RFQ No.APSPDCL/02/DBFOO, dated 23.03.2015.

10. Petitioner herein and the third respondent participated in the bids with offered capacity of 200 MW and 400 MW respectively. In the process of bidding, the second respondent declared the petitioner and the third respondent as successful bidders and the writ petitioner being the L1. There is absolutely no dispute that the third respondent matched the figure of the petitioner herein who has emerged as L1. On 20.09.2016, the second respondent issued LOAs in favour of the petitioner and the third respondent simultaneously for 200MW and 400 MW respectively.

11. The APSPDCL/the second respondent, issued a show-cause notice vide Lr.No.CGM/IPC/APSPDCL/D.No.47, dated 24.01.2017, asking the petitioner to show-cause as to why LOA should not be revoked, indicating the following lapses: (1) Non-submission of Firm Fuel Supply Agreement (FSA) with PT. Prima Multi Artha and PT Borneo Indobora Mine owners within 90 to 180 days to declare as selected L1 bidder i.e., on 21.05.2016, (2) Change of ownership of bidder without seeking prior approval for procurement as per Clause 5.3 of PSA.

12. In response to the said show-cause notice dated 24.01.2017 issued by the second respondent, petitioner herein submitted an explanation/reply on 02.02.2017 and the second respondent on 23.02.2017 revoked the LOA issued in favour of the petitioner. The said order of revocation of LOA passed by the second respondent is under challenge in the present writ petition.

13. It is significant to note that as per instruction 2.2.3 (e) annexed to the Request for Qualification dated 23.03.2015, the bidder is required to fulfil certain eligibility criteria and to produce certain documents in support thereof. According to the same, if the bidder is sourcing imported coal through long term Fuel Supply Agreement, it is obligatory on the part of the bidder to produce copy of Fuel Supply Agreement with coal supplier co-terminus with PSA for a period mentioned in Clause 1.1.1 for quantity of coal required for the Power Station and the applicant shall submit computations for demonstrating coal supply and it is also mandatory to produce a letter from the coal supplier that it owns the mine and has obtained all licences required and has complied with all conditions under the law to supply/export coal to the applicant. There is no dispute that the petitioner herein has emerged as L1 and that the petitioner and the third respondent offered for 200 MW and 400 MW respectively out of 1000 MW covered by RFQ. In this connection, it is appropriate and apt to refer to Clause 1.2.5 of RFQ, which reads as follows:

> "Generally, the Lowest Bidder shall be the selected Bidder. The remaining Bidders shall be kept in reserve and may, in accordance with the process specified in the RFP, be invited to match the Bid submitted by the Lowest Bidder in case such Lowest Bidder withdraws or is not selected for any reason or in case the capacity required as per clause 1.1 is not fully met by the Lowest Bidder. It is hereby clarified that the Utility will not accept the entire capacity offerd of the last Lowest Bidder in the order of progression, in the event the Capacity Required gets fulfilled by a part thereof. In the event that none of the other Bidders match the Bid of the Lowest Bidder, lthe Utility

may, in its direction, invite fresh Bids from the remaining Bidders or annul the Bidding Process, as the case may be. Further, it is clarified that any single Bidder cannot quote part capacity from different stations."

14. There is no dispute that the third respondent emerged as L2 and also matched the figure offered by the petitioner/L1 i.e., Rs.4.439 for KWH. It is not the case of the petitioner herein that the petitioner offered for the entire 1000 MW supply covered by RFQ and the reality remains that the petitioner offered 200MW and the third respondent offered 400 MW out of 1000 MW. Therefore, once the matching of rate takes place, it is not open for the petitioner herein, though it is L1, to claim priority on the entire offer covered by RFQ nor it can raise any objection about the consideration of bid of L2 for the extent covered by the bid of L2. It is pertinent to note that vide Lr.No.607/CGM/IPC/APSPDCL, dated 20.06.2015, the APSPDCL in terms of Clauses 2.20.1 and 2.20.2 of RFQ sought the following clarifications:

1. Appendix II – Power of Attorney for signing application, hence, submitted does not have correct project name and Utility name. Please mention "Procurement of electricity for 1000 MW capacity under long term by APSPDCL on DBFOO basis from Project proposed or being procured by the Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) (the "Utility").

2. Power of Attorney for signing agreement has been executed on 9th June 2015. But applications and relevant documents have been signed by the Attorney on 8th June 2015. Please furnish an affidavit to ratify action of executed on 8th of June 2015.

3. With regard to the documentary evidence in respect of assured access to fuel, please clarify/submit:

a) Letter from coal supplier confirming that the term of the FSA will be extended to meet RFQ requirements.

b) Fuel Supply Agreement between GDF Suez Energy Trading and the back-back coal mining companies for the term and quantum as required by the RFQ."

15. In response to the said clarifications sought by the second respondent the petitioner herein addressed a letter on 23.06.2015 as follows:

"CPT/PH-1/Commercial/APSPDCL/2015-16/53 dt:23rd June 2015

To
Mr.M.Lakshminarayana,
The Chief General Manager (P & MM, IPC/APSPDCL),
Representative of Lead Procurer,
O/o the Chief Engineer (IPC & PS/APPCC),
401/A, Vidkyut Soudha,
Hyderabad -500082.

Sub: Request for Qualification (RFQ) for procurement of electricity for 1000MW capacity under long term by APSPDCL on DBFOO basis -0 certain clarifications on the Bid and documents received therein – Reg.

Ref: APSPDCL/02/RFQ/DBFOO/23.3.2015 your letter dated 20 June 2015.

Dear Sir,

With reference to your letter cited in reference 2, please find herewith the MEPL clarifications 1. "Appendix II- Power of attorney for signing application, hence, submitted does not have correct project name and Utility name. Please mention "Procurement of electricity for 1000 MW capacity under long term by AOPSPDCL on DBFOO basis from Project proposed or being procured by the Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) . (the Utility)"

MEPL Response: Please refer the attached Affidavit with required modification.

2. Power of Attorney for signing agreement has been executed on 9th June 2015. But applications and relevant documents have been signed by the Attorney on 8th June 2015. Please furnish an affidavit to ratify action of executant on 8th of June 2015

MEPL Response: Please refer the attached Affidavit with required modification.

3. With regard to the documentary evidence in respect of assured access to fuel, please clarify/submit

a. Letter from coal supplier confirming that the term of the FSA will be extended to meet RFQ requirements.

MEPL Response: The coal suppliers have already shown their interest to supply required quantum of coal within the framework of the existing Coal Supply and Transportation Agreement (CSTA) dated 25.11.2013 (already enclosed as a part of submissions), the firm FSA Meenakshi Energy Private Limited will be executed within 90 – 180 days of MEPL being declared as successful Bidder and the LOI issued by the Utility, please note that the LOI's issued by the coal suppliers indicate their willingness to supply coal as required in the F\RFQ.

b. Fuel Supply Agreement between GDF Suez Energy Trading and the back-back coal mining companies for the term and quantum as required by the RFQ.

MEPL Response: Please refer a letter from the coal GDF Suez Energy Trading stating possible extension of existing PSA for further period.

Thanking you,

Yours faithfully,

For Meenakshi Energy Private Limited
Piyush Tandon
Commercial-Director"

16. Obviously, taking into consideration the above said assurance given by the petitioner herein, the second respondent issued LOA bearing Lr. No.850/CGM/IPC/APSPDCL dated 20.09.2016, for 200 MW in favour of the petitioner herein subject to the following terms and conditions:

Terms:

By signing this LOA, the Utility conveys its intention to sign and execute the PSA under the following terms and conditions.

4. The Bidder; shall unconditionally accept the LoA and record on one (1) copy of the LOA, "Accepted Unconditionally", under the signature of the authorized signatory of the Bidder and return such copy to the Authorized Representative of the Utility within seven (7) days of isue of LOA (Clause 3.3.5 of RFP)

2.. Bidder, to whom the LOA has been issued does/has not fulfil(ed) any of the conditions specified in prequalification criteria specified in RFQ and REP, as per clauses 2.6.2 and 2.6.3 of RFP, the Utility/Authorized Representative reserves the right to annul and award of the Letter of Award of such Bidder. Further, in such a case, the provisions of Clause 2.16 of RFP shall apply.

3.. The PSA shall be executed by seller and procurer within 30 days of award of LOA as per REP clause 1.3.

4.. The offer and Financial Bid for contracted capacity of 200 MW agreed to by seller and procurer are as follows:

Particular	Unit	Evaluated
Bid Parameter for evaluation – Tariff	Rs/kwh	4.439
Fixed charge	Rs/kwh	2.194
i.. Fixed Charge without taxes and Duties	Rs/kwh	2.146
ii..Taxes and Duties	Rs/kwh	0.048
Fuel Charge	Rs/kwh	1.603
i.. Cost of imported fuel (w/o taxes & duties)	Rs/kwh	1.065

ii.. Cost of transportation of shipment for imported coal (w/o taxes & duties	Rs/kwh	0.320
iii Cost of inland transportation of imported fuel (w/o taxes & duties)	Rs/kwh	0.087
vi.. Taxes and Duties	Rs/kwh	0.131
Transmission charges	Rs/kwh	0.479
Transmission Losses	Rs/kwh	0.163

17. The second respondent also issued LOA for 400 MW in favour of the third respondent herein on the same date. In this context, it may be appropriate to refer to Clause 2.6.3 of RFP which reads as follows:

> "In case it is found during the evaluation or at any time before signing of the PSA or after its execution and during the period of subsistence thereof, including the Contract thereby granted by the Utility, that one ore more of the pre-qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Supplier either by issue of the LOA or entering into of the PSA, and if the Selected Bidder has already been issued the LOA or has entered into the PSA, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Utility to the Selected Bidder or the Supplier, as the case may be, without the Utility being liable in any manner whatsoever to the Selected Bidder or Supplier. In such an event, the Utility shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Utility under the Bidding Documents and or the PSA, or otherwise."

18. Keeping in view the above clauses, the second respondent/APSPDCL issued a show-cause notice dated 24.01.2017 and rejected the LAO on the ground of non-production of firm Fuel Supply Agreement. It is not the case of the petitioner herein that the petitioner company produced the same. It is to be noted that in response to the letter 20.06.2015, the petitioner herein by

way of letter dated 23.06.2015 sought 90-180 days time. Obviously, taking the same into consideration, the second respondent granted LOA in favour of the petitioner herein on 21.05.2016. Despite the said assurance given, admittedly the petitioner herein did not furnish the Fuel Supply Agreement as agreed and assured. In the instant case, petitioner herein was declared as L1 on 21.05.2016. Even as per the Request For Qualification, it is obligatory on the part of the petitioner herein to produce the same which the petitioner failed to do. Therefore, the reason assigned by the second respondent i.e., failure to supply FSA in the impugned order of revocation of LAO, in the considered opinion of this Court, cannot be found fault with having regard to the latches on the part of the petitioner herein.

19. Coming to the second reason assigned by the second respondent in the impugned order of revocation, ie., failure to seek prior approval for change of ownership - it is the submission of the learned Senior Counsel appearing for the writ petitioner that since the PSA (Power Supply Agreement) is yet to be signed, the Clauses in the same are not binding. In order to consider the validity of the same, it may be appropriate to refer to Clauses in the relevant documents. Clause 1.2.3 of RFP (Request for proposal) reads as under:

> "1.2.3. The Bidding Document include the draft PSA for the Project which is enclosed. Subject to the provisions of Clause 2.1.3, the aforesaid documents and any addenda issued subsequent to this RFP Document, will be deemed to form part of the Bidding Documents."

20. It is very much evident from a reading of the above Clauses that the bid documents include PSA also. As per Clause 2.7.2 of RFP the draft PSA provided by the utility as part of bid documents shall be deemed to be part of

RFP. In this connection, it may be appropriate to extract Clause 2.11.2 of the RFQ, which reads as under:

> "2.11.2. The documents accompanying the Bid shall be placed in a separate envelope and marked as "Enclosures of the Bid". The documents shall include:
>
> (a) Bid Security in the format at Appendix-II;
>
> (b) Power of Attorney for signing of Bid in the format at Appendix-III;
>
> (c) If applicable, the Power of Attorney for Lead Member of Consortium in the format at Appendix-IV; and
>
> (d) A copy of the draft PSA with each page initialled by the person signing the Bid in pursuance of the Power of Attorney referred to in Clause (b) hereinabove.

21. Clause 5.3 of Power Supply Agreement reads as under:

> "5.3. Obligation relating to Change in Ownership
>
> The Supplier shall not undertake or permit any Change in Ownership, except with the prior written approval of the Utility."

22. It is very much evident from the above clauses that it is obligatory on the part of the supplier not to undertake or permit any change in ownership except with the prior written approval of the second respondent. Admittedly, in the instant case, even according to the petitioner herein, there is change of ownership and the fact remains that no prior approval was obtained by the petitioner herein.

23. In view of the above express clauses in various documents, which are binding on the petitioner herein, in the considered opinion of this Court, petitioner herein cannot justify its action in failing to take prior written approval of the second respondent. Therefore the contention advanced by

the learned Senior Counsel for the petitioner with regard to change of ownership cannot be sustained in the eye of law and is accordingly rejected. Except stating that though there is a delay in signing PSA the second respondent accorded permission to the third respondent, the writ petitioner did not point out any infirmity in the action of the second respondent in granting LOA in favour of the third respondent. In fact, in the counter affidavit filed by the second respondent herein, it is clearly and categorically stated that the third respondent owns mines and the said statement is not denied by way of filing reply. In the facts and circumstances of the case, the judgments cited by the learned Senior Counsel appearing on behalf of the petitioner herein would not render any assistance to the petitioner herein.

24. Coming to the judgments cited by the learned Advocate General - in the case of *GOVIND RUBBER LIMITED* (*supra* 4), the Hon'ble Apex Court at paragaph 12 held as under:

> 12. There may not be any dispute with regard to the settled proposition of law that an agreement even if not signed by the parties can be spelt out from correspondence exchanged between the parties. However, it is the duty of the court to construe correspondence with a view to arrive at the conclusion whether there was any meeting of mind between the parties which could create a binding contract between them. It is necessary for the court to find out from the correspondence as to whether the parties were ad idem to the terms of contract."

25. To support his submission with regard to non maintainability of the writ petition before this Court, learned Advocate General placed reliance on *GUJARAT URJA VIKAS NIGAM LTD (supra 3),* The Hon'ble Apex Court at paragraph No.60 of the said judgment held as follows:

> "60. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dtd. 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute."

26. In view of the above reasons and having regard to the law laid down in the above referred judgments, this Court does not find any merit in the present petition and the petitioner is not entitled for any relief from this Court under Article 226 of the Constitution of India.

27. For the aforesaid reasons, the writ petition is dismissed. As a sequel, miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date:13.06.2017
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THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.6143 of 2017

Dated13.06.2017

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