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

Reserved on: 16.05.2017
Pronounced on: 03.07.2017

\+ **W.P.(C) 1504/2017, C.M. APPL.6855/2017 & 9166/2017**

M/S. HARYANA CARRIERS AND ORS. ..... Petitioners

Through: Sh. Akhil Sibal, Sr. Advocate with Sh. (Appearance not given).

Versus

UNION OF INDIA AND ORS. ...... Respondents

Through: Sh. Arpit Shukla, GP, for Ministry of Petroleum.
Sh. Rajat Navet with Sh. Rohan Yadav, Advocates, for BPCL.
Sh. M.M. Kalra, Advocate, for IOCL.
Sh. Rikesh Singh, Advocate, for HPCL.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAVIN CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. Indian Oil Corporation Ltd. (Respondent No.3, hereafter "IOCL"), Bharat Petroleum Corporation Ltd. (Respondent No.2, hereafter "BPCL") and Hindustan Petroleum Corporation Ltd. (Respondent No.4 "HPCL"), all of whom are Oil Marketing Companies, had in 2014, invited through e-tender dated 01.09.2014 Region/Zone wise offers/bids for transportation of

Bulk LPG by road in Tank Trucks (TTs) from various loading locations to bottling plants of their customers for three years ("the said Tender"). The bids were invited under a two-bid system. The eligibility criteria as prescribed in the tender was that a bidder should have fulfilled the following conditions:

> *"(i) Own at least One Bulk LPG/PROPANE tank trucks as on closing date of tender.*
>
> *(ii) The age of the above Tank Truck quoted should not be more than 15 years as on 31.10.2014 from the date of registration.*
>
> *(iii) Tank Truck quoted must have valid license from Petroleum Explosive Safety Organization (PESO) as on closing date of tender. In case any tank trucks quoted by the bidders are found to be more than 15 years old as on 31.10.2014 from the date of first registration or not having valid license from Petroleum Explosive Safety Organization (PESO) as on closing date of tender, then such tank trucks will be rejected."*

2. The credential bids were to be opened on 24.09.2014 and thereafter, the price bids of the bidders who would have qualified in the credential bids were to be opened on a subsequent notified date. In case the number of TTs on offer was more than the required number, the ranking was to be done as provided in Clause 4 of the Tender. The credential bids were opened on 24.09.2014. Thereafter, the process of evaluation of the price bids of the eligible bidders was undertaken by the Regional Offices of the Oil Companies. The requirement for the northern region was 963 Tank Trucks, for which 276 transporters submitted their bids offering 1572 ready Tank Trucks. These bidders also offered 116 proposed Trucks. The total number

of eligible tank trucks on L1 rates for the Northern Region of BPCL were 1498 ready TTs, and LOIs to 963 TTs were issued.

3. In the meanwhile, some bidders had approached this court through a writ petition (W.P.(C) 964/2015 - *Bajrang International v Indian Oil Corporation Ltd)* complaining that bidders whose vehicles did not conform to tender specifications were being considered and their tenders accepted. The response to this petition was that the condition in question, i.e. the TTs needing to be fitted with IEFC valve [hereafter "IEFCV"], was inessential, because the Petroleum Energy Safety Organization (PESO) had by guidelines, dated 10.06.2013, modified the guidelines so that trucks without such valve could be used. By judgment dated 24.09.2015, this court allowed the petition and held that tender stipulations were non-derogable; it was held that:

> *"It was open to the tender inviting authority to stipulate in addition to a valid PESO Licence a condition that the vehicle shall be fitted with the IEFC Valve as per PESO guidelines and that is what has been done in the present case."*

4. After the initial requirement of 963 trucks was fulfilled, on account of changes in the logistical scenario and due to business requirements, IOCL fell short of Tank Trucks for transportation of bulk LPG and it decided to induct additional tank trucks on *ad hoc* basis for which a notice dated 20.03.2015 was issued to all existing bulk LPG Transporters of the said Tender, including the Petitioners. On 23.10.2015, an advertisement was issued to induct additional 400 Tank Trucks for the period coinciding with the earlier tender, published in 2014 [which was the subject matter of *Bajrang International (supra)]*. Here, the court noticed that the endeavor of

the respondents was to make eligible those who had been disqualified according to the judgment in *Bajrang International (supra).* The court analysed and compared the two sets of tender conditions, and after weighing the rival conditions held that:

> *"27. It is apparent that the requirement as stipulated in the 2015 Tender is in fact the requirement of the 2014 Tender, which was then estimated/projected. It is apparent that what the 2015 Tender seeks to, do is to provide an avenue to the bidders who were disqualified in terms of the judgment-dated 24.09.2015 to bid afresh -for the requirement under the 2014 Tender. There is merit in the submission of the petitioners, that the respondents are trying to nullify the effect of the judgment dated 24.09.2015."*

5. After quoting some fresh tender conditions, the court held as follows:

> *"29. Clause 11 (b) of the General Terms and Conditions of the 2015 Tender reads as under:*
> *b) No tank truck will be offered under this tender which- is presently in Contract with any Oil Company (including Private Company) for a Period beyond the commencement date of this contract i.e. date of placement of LOI.*
>
> *30. What the corrigendum dated 05-12-2015 seeks to do is to permit, the tank trucks, which were disqualified in view of the judgment dated 24.09.2015 for not having been fitted with the IEFC valve as on 22.09.2014, to be offered irrespective of their enrolment under any contract with any Oil Company (including Private Company) on the date of LOI of that tender. Whereas the tank-trucks which were not disqualified earlier were not permitted if they were under any contract with any Oil company as on the date of the LOI. This clearly establishes that the respondent corporation wants to nullify the effect of the judgment dated 24-09-2014 by entering into a contract with*

the bidders who were disqualified thereby..”

6. In the present proceeding, the petitioners’ grievance is that the Respondents are resorting to the services of the TTs owners over and above their projected requirements mentioned in the 2014 tender. It is stated that IOCL had been engaging the TTs owners/bidders who had qualified under the 2014 tender and who in their tender bidding itself had given the numbers of additional and proposed TTs and had also deposited a sum of ₹50,000/- towards additional EMD for such additional and proposed TTs. IOCL’s Letter of Intent for proposed trucks dated 18.07.2016 in fact invited those bidders who had chosen to give the figures of additional and proposed TTs in their original tender and also in the Letter of Intent dated 23.09.2016. It is alleged that IOCL issued a Letter of Intent to 161 bidders for 244 TTs. This action was taken in accordance with the order dated 30.5.2016 passed by this Court in W.P.(C) 11400/2016 [*M/s Suman Bulk Movers & Ors Vs. Indian Oil Corporation Limited (IOCL)*]. Copies of the Letters of Intent dated 18.07.2016 and 23.09.2016 sent by the Respondent No. 3 to various bidders are annexed to the writ petitions. The petitioners highlight that the 2014 tender was a joint tender floated by the Oil Companies. During various litigations, this Court decided several issues relating to the said tender and the order dated 30.05.2016 in *M/s Suman Bulk Movers (supra),* was also passed in line with the various other orders /judgments. It is alleged that while IOCL followed the orders passed by this Court, BPCL in utter disregard of the orders passed by the Court has issued work orders to various operators who in their bidding have not given any number of proposed or additional TTs. They also did not submit additional EMD of ₹50,000/- per

Truck as was required for such proposed or additional TTs. It is alleged that BPCL is taking shelter under clause 24 of the general terms and conditions of the 2014 tenders and has favored several outsider TT owners for reasons best known to them only. Though the various work orders during currency of the present tender i.e. the 2014 tender were given allegedly on an *ad hoc* basis, yet neither has discontinued their work orders after their initial terms of *ad hocism* for few months was over, nor did they ever bother to invite the bidders like the Petitioners for meeting the requirements.

7. It is argued by counsel for the petitioners that under the cloak of clause 24 of the General Terms and Conditions, BPCL has till now engaged about 1000 TTs over and above their original requirement of 963 TTs. Most of these about 1000 TTs were taken from those operators who in their original bid did not at all mention their proposed or additional TTs, while the Petitioners herein in their original bids have clearly offered, mentioned and stipulated the additional and proposed TTs and have also deposited EMD of ₹50,000/- per truck for all such additional and proposed TTs. Notices for induction of TTs on *ad hoc* basis dated 20.03.2015, 01.12.2015, 30.3.2016 and 14.10.2016 issued by BPCL are produced and relied upon.

8. Learned Senior Counsel argues that the respondents, particularly BPCL, are duty bound to comply with the tender conditions, which render the offers of TTs compliant with specifications as well as additional proposed TTs eligible, before any third party non-bidders' vehicles are taken on hire. Highlighting that the respondents have spared no effort to side step and skirt the judgments of this court, including tweaking with conditions through corrigendum and seeking to induct as contractors those who were ineligible and could not have been given the work, furthermore, suffering a

string of adverse verdicts, the present attempt to deny hiring of TTs offered by the petitioners and other eligible bidders, is also to overreach the court. It is submitted that the bidders as well as the respondents, as state agencies, are bound by the terms of the tender. According to the tender, those TTs which qualify for being hired, having regard to the estimated numbers indicated in the tender, and additional TTs, which are needed, after exact working out, can be taken only if they are proposed for hire in the bids submitted. In not taking such additional vehicles on hire, the respondents have violated tender conditions and Article 14 of the Constitution of India.

9. The respondents, particularly BPCL, resist the claim. It is urged by BPCL that the Petitioners, who are companies controlled and managed by the Bansal Family, have themselves participated in the tender process for induction of additional tank trucks sought by it (BPCL) through the Notice dated 20.03.2015. Petitioners had offered 48 TTs, owned by three companies (i.e. Petitioner Nos. 6, 7 & 9) which were thereafter inducted by the second respondent. Details of Tank Trucks offered by the Petitioners and inducted by BPCL pursuant to this notice have been provided. It is stated that out of the 48 TTs offered by the Petitioners under the notice dated 20.03.2015, after the judgment in the case of *Bajrang International (supra)*, 15 TTs were inducted under the 2014 Tender, whereas the remaining 33 TTs continue to operate with BPCL under the Notice dated 20.03.2015. These facts, stresses BPCL, have not been disclosed and have been concealed by the Petitioners. It is argued that since the petitioners have participated and taken the benefit of induction of their TTs on *ad hoc* basis, which TTs are still operating with the BPCL till date, they are now estopped from challenging the said process of induction on *ad hoc* basis. The writ petition is liable to be dismissed on

this ground itself. Furthermore, the Petition is also liable to be dismissed on the ground of concealment of material facts. BPCL submits that the petition is also liable to be dismissed on the ground of delay and laches, inasmuch as, the induction of TTs on *ad hoc* basis in terms of Clause 24 of the said Tender(which is being sought to be challenged in the writ petition)has been done on four occasions since 2014 i.e. on 20.03.2015, 01.12.2015, 30.03.2016, & 14.10.2016. The Petitioners did not challenge these for almost two years (the first induction having been undertaken in terms of Notice dated 20.03.2015) are, therefore, guilty of delay and laches, and the writ petition is liable to be dismissed on this ground itself.

10. BPCL urges, furthermore, that the petition seeks to raise an issue which has already been determined by this Court in a previous Writ Petition [W.P.(C) 8673/2015 titled *Khushwant Singh HUF & Ors. vs. Hindustan Petroleum Corporation Limited & Anr*.] which was filed on the same issue with respect to the same Tender which is the subject matter of the petition under reply. By judgment dated 23.11.2015, the Court held that Clause 24 of the said Tender gives absolute freedom to the Oil Marketing Companies to hire any truck for fulfilling the additional requirements, as has been done by the BPCL in the present case.

11. BPCL states that its action, in inducting Tank Trucks on *ad hoc* basis in terms of Clause 24 of the said Tender is in terms of, and as per, the provisions of the said Tender and is neither discriminatory nor arbitrary and as such, no justifiable ground exists for challenging the said action. Furthermore, all the Petitioners, who are also existing transporters of the answering Respondent have always been put to notice regarding induction of additional TTs calling upon them to offer TTs in terms of the said Notices.

The Petitioners have chosen to sometimes participate and sometimes not participate in the said process(es). In view of this conduct they are not entitled to challenge the said process. It is also submitted that the entire basis of the Petitioners' writ petition is that they had participated in the said Tender and had also offered additional and proposed Tank Trucks for which they had submitted additional EMD @ ₹50,000/- per truck. It is the contention of the Petitioners that since they deposited EMD of ₹50,000/- per Truck for additional and proposed Trucks, as and when additional Trucks were required, they had the right of first consideration. In this regard, BPCL submits that all EMDs submitted by bidders for additional/proposed trucks under the said Tender have either been refunded to the bidders or as per the request of the bidders stand adjusted towards security deposit of TTs inducted under the said Tender. Similarly, the EMDs submitted by other bidders of the 2014 Tender, who were not issued LOIs (i.e. beyond 963 TTs) were also returned by BPCL. It is submitted that as such, as on date there are no existing bids of any transporter under the 2014 Tender except for those already inducted. The respondent BPCL states that therefore, on the date of filing of the writ petition, none of the Petitioners have any EMD deposited with it in regard to any proposed Truck or any existing Truck. The petitioners cannot consequently contend that because they had submitted an EMD towards proposed Trucks at the time of submission of the bids (which stand returned) they ought to be given preference for induction of additional Tank Trucks.

12. It is further argued that in the previous judgment of this Court in *Khushwant Singh (supra)*, the claim of a waitlisted bidder, who was unsuccessful in securing any Letter of Intent (LOI) for the trucks offered,

when the additional trucks were required, was rejected. Learned counsel for the respondents relies upon the judgment to say that no bidder – irrespective of success in the main bid or his being kept in the waiting list, can claim a vested right to be awarded the contract. It is submitted that the omission of the petitioners to mention that in fact they, as a group, were awarded 48 additional or *ad hoc* trucks, after the initial bids were accepted and the tender was exhausted for the indicated figure of 963, disentitles them to any relief in the present proceedings. Furthermore, the observations in *Khushwant Singh (supra)* that clause 24 confers discretion upon the oil company concerned to hire additional trucks, having regard to its conditions which may be stipulated at that time, are highlighted.

13. From the above discussion, it is evident that the petitioner's grievance is a narrow one. It is that though they were successful and awarded LOIs which matured into contracts for hiring of TTs from out of the originally contemplated 963 proposed trucks, the complaint is that when additional trucks are hired on *ad hoc* basis, they have been not afforded a chance and the trucks proposed by them have not been hired.

14. In this regard, it would be appropriate and relevant to notice clause 24, which the respondents, i.e. the oil companies rely upon, particularly, BPCL. The said clause reads as follows:

> *"24. During the period of the contract due to business requirement of the Corporation, contracting Corporation reserves the right to shift/induct/move TTs as per the requirement. In case at any point during the pendency of the contract as per Contracting Corporation's assessment, additional tank trucks more than the contracted tank trucks is envisaged then Contracting Corporations reserve their rights to hire any tank truck, over and above the tank trucks accepted*

pursuant to this tender at any point of time and in such circumstances, Contracting Corporations will be free to hire tank trucks for such purpose as may be required by Contracting Corporations from the existing transporters at a rate not higher than their existing rates, and the trucks should not be running in any other Contract with any other Corporation including Pvt. Parties/Companies and subject to other terms and conditions which the Corporation may stipulate for this purpose."

15. The records would show that the respondent BPCL proposed to take on hire a certain number of additional TTs (according to BPCL, it is 116). The petitioners claim that the offers made towards additional TTs by them, were deliberately ignored and rank outsiders have been awarded contracts for the hiring of such additional TTs. The BPCL's argument, countering the petitioner's claim is that firstly, the former does not have any vested right to seek a declaration that the contract must be awarded to it. More fundamentally, it submits that the petitioner, and its group of individuals and other entities, forming the Bansal group of concerns, was in fact awarded 48 additional *ad hoc* TTs. It furthermore submits that those individuals or bidders whose proposals for additional TTs and *ad hoc* vehicles were not accepted were in fact returned their EMDs. This aspect as well as the fact that 48 additional TTs were hired from the petitioners, according to the respondents, has been omitted from the petition, which has resulted in withholding material facts. As a matter of fact, the pleadings do testify to this omission.

16. The tenor of clause 24 in the present case, - as interpreted by this Court in *Khushwant Singh (supra)* suggests that there is no particular method by which bidders, who offer their vehicles for hire, are to be awarded contracts. What clause 24 does suggest is that while exercising discretion, the

oil company concerned should draw from amongst those who had furnished bids and were successful in bids whether they were awarded contracts or were kept in the waiting list. That much emerges from a reading of *Khushwant Singh (supra). Khushwant Singh (supra)* also supports the respondents to the extent it states that the condition confers absolute freedom to the oil company to hire any truck company fulfilling the additional requirements and that the corporations can even hire trucks from existing transporters. That apart, in the present case, what is material is that the last part of clause 24 stipulates that the contracting corporations are at liberty to take on hire from existing transporters vehicles at a rate not higher than their own existing rates, with the further condition that the truck should not be running any contract with any other corporations, including private parties or companies and rather significantly, *"subject to other terms and conditions which the corporation may stipulate for this purpose."*

17. Now in the present case, the stipulation, which the oil company had insisted upon, is that the additional TTs should have been fitted with IEFCV. These IEFCVs should have been fitted before 22.09.2014. During the course of hearing, it was argued on behalf of the respondent BPCL that given this aspect, the trucks offered by the petitioners did not comply with such condition – they were not fitted with those valves before 22.09.2014 but rather were fitted with it later. This aspect is a factual controversy, which the Court should ordinarily avoid. Yet, at the same time, the Court is conscious also of the fact that the notification to the general public for induction of *ad hoc* or additional vehicles was made much prior to the petitioners approaching this Court in these proceedings; these notifications were made in 2015. At that stage, the petitioners were not aggrieved. In fact, the

indications are – a fact not controverted, that in all, a number of petitioners, i.e. Haryana LPG Carriers, Axis Carriers and Satguru LPG Carriers were awarded an aggregate of 48 TT LOIs over and above what they were initially offered. In other words, 48 additional and *ad hoc* vehicles or TTs were hired pursuant to the notice of 20.03.2015. The BPCL has filed a list of the contracts, their numbers and their relative particulars, along with its affidavit. The list discloses that three petitioners were in fact awarded contracts to the extent of 48 TTs. Therefore, the Court is of the opinion that there is no substance or merit in the contention that by not hiring trucks offered, as additional or proposed TTs, the respondents violated tender conditions or Article 14 of the Constitution.

18. The above conclusion, in the opinion of the Court, would also apply to those petitioners who were not awarded any additional TTs. This is because clause 24 is cast in rather wide terms. None of the petitioners have given any particulars as to whether indeed the TTs additionally offered by them were fitted with valves before the cut-off date, according to the notices issued by the respondents. On the other hand, the notices are very clear that the cut-off date for the fitting of the IEFCV was 22.09.2014. That this condition was essential, is now concluded by the first decision of the Court in *Bajrang International (supra)*. In these circumstances, given the wider nature of discretion reserved to the oil companies to hire additional TTs, having regard to the contemporaneous requirements and its further conditions stipulating that the IEFCVs should have been fitted at least on or before a particular date, the claim or complaint in these proceedings that the respondents oil companies have violated the tender conditions or Article 14 of the Constitution cannot be countenanced.

19. In view of the above conclusions, the Court finds no merit in the petition. It is accordingly dismissed without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAVIN CHAWLA
(JUDGE)

JULY03, 2017