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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 24th April, 2017

Pronounced on: 08th May, 2017

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W.P.(C) No.2604/2017 & CM No.11275/2017

QUIPPO OIL AND GAS INFRASTRUCTURE LTD

..... Petitioner

Through : Ms.Kartika Sharma, Advocate.

versus

**OIL AND NATURAL GAS CORPORATION
LIMITED AND ANR**

..... Respondents

Through : Mr.Sunil K Jain, Mr.Pawanshree
Agrawal, Ms.Reeta Chaudhary &
Mr.Punya Garg, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The first respondent – Oil and Natural Gas Corporation Limited (ONGC) is a public sector undertaking of the Government of India and is under the administrative control of the Ministry of Petroleum and Natural Gas. It issued various tenders for charter hire of the drilling rigs of 2D seismic data amongst others.

2. The petitioner, a public limited company, engaged in providing oil and gas rigs on rent with related services, claim that a direction

should be issued to ONGC to consider its bid for a tender bearing No.P26AC16006 dated 05.12.2016 and also seeks a direction restraining ONGC from awarding the letter of intent to M/s Globe Ecologistic Private Limited for the said tender. The second Respondent herein owns 100% share holding in the petitioner company and is its ultimate holding company for all practical purposes, including the financial criteria mentioned in the tender. It is urged that no other corporate entity holds any share in the petitioner company other than the second respondent.

3. ONGC had issued a tender for hire of services for 2D seismic data acquisition in unappraised “on land” areas of Sedimentary Basins of India for sector 3,4,6 & 10. The offer contained the following bid evaluation criteria in the tender document for the prospective bidder viz, (i) the technical eligibility criteria and (ii) the financial eligibility criteria. The tender demanded the following **financial criteria** to be fulfilled by the bidder for financial qualification viz, **(a)** turnover of the bidders : 30% of annualised bid value or more; **(b)** net worth of bidder : positive (as per latest audited annual accounts.)

4. It is alleged by the petitioner that ONGC had made a provision in all its tenders stating *inter alia* that in the event any of the criteria **(a)** or **(b)** above is not met with by the bidder, it can submit its bid on the basis of the qualification of its 100% subsidiary or 100% parent holding company. It is alleged that the petitioner did not have positive net worth as on 31.03.2016, but it had always submitted its

bid to the tenders floated by ONGC by relying upon the positive net worth of its parent holding company i.e. second respondent and that ONGC on past occasions had always considered the petitioner's bid by relying upon positive net worth of the holding company for example, in **(a)** tender No.ZNSVC15004/14.04.2015 (Rig); **(b)** tender No.BN6PC15007 /17.04.2015 (Rig); and **(c)** tender No.L26BC16030 /12.08.2016 (Seismic).

5. Further, it is urged that ONGC had issued tender Nos.P26AC15002 (Sectors 01-06) and No.P26AC15003 (Sector 07-11) for the same service and sectors; containing identical provisions and that the petitioner duly participated and submitted its bid. The bid of the petitioner was opened, but since it was not declared L1, the contract was awarded to some other companies. However, L1 could not furnish the performance bank guarantee for certain sectors. Therefore, ONGC re tendered it.

6. The petitioner argues that ONGC had also issued a circular No.10/2017 dated 01.03.2017 where it confirmed that the net worth of the supporting company shall be considered in case the bidder relies on the financial strength of such supporting company. It is alleged that the ONGC in the said circular dated 01.03.2017 categorically stated that if the bidder does not meet the financial criteria by itself and relies upon the financial capacity of its parent company, then in such event, the financial parameters viz turnover, net worth, working capital, debt/equity ratio of the supporting

company will be considered for evaluation and the financial accountability of the bidder entity will not be considered for evaluation.

7. The petitioner urges, and Ms.Kartika Sharma, its counsel argues, that since it was allowed to bid in the other tenders floated by ONGC, on the basis of the positive net worth of its parent company, it could not now have denied such opportunity for tender No.P26AC16006 dated 05.12.2016 for hiring of 2D seismic data acquisition, through the tender. It is the case of the petitioner that the conduct of ONGC as also its past practices had led a legitimate expectation, which had to be factored and fulfilled by ONGC. The petitioner, argues Ms.Sharma, can enforce such legitimate expectations. Learned counsel placed reliance on the judgment reported as *Ram Pravesh Singh v State of Bihar* 2006 (8) SCC 381; *Punjab Communications v Union of India* 1999 (4) SCC 727 and *Food Corporation of India v Kamadhanu Cattle Feed* 1993 (1) SCC 71.

8. ONGC had been asked to produce its record; it did so during the hearing. Its counsel, Mr.Sushil Jain, argues that the petitioner's bid was deemed non-compliant for the reason that its net worth was not positive. Learned counsel contests that there can be any estoppel in regard to tender conditions so as to oblige ONGC to accept the petitioner's bid on the basis of its holding company's positive net worth. It was highlighted that though the petitioner is a 100%

subsidiary of the second respondent, yet the latter did not choose to place the bid; rather it preferred the subsidiary to do so. This meant that when it came to financial commitment in terms of contract execution, and solvency, the petitioner was on its own. Learned counsel also countered the petitioner's submission that the holding company was willing and did provide guarantees for the required amount. Though factually correct, that consideration alone did not entitle the petitioner to urge that the net worth positive condition could be overcome.

9. Learned counsel also submitted that the petitioner was aware that its bid would be treated as non compliant, and had therefore, sought an amendment to ONGC through its letters dated 26.12.2016 and 03.03.2017. It was submitted that the amendment suggested by the petitioner and the interpretation given in the letter of 26.12.2016 *after* submitting its bid on 23.12.2016 was unacceptable. The petitioner ought to have known this because when it did furnish its tender, the condition with respect to the bidder having to possess positive net worth existed. Its later amendment, through sleight of interpretation could have been unfair for those otherwise eligible, but who had not given the bid, because of negative net worth.

10. It was argued that the reliance on the doctrine of legitimate expectation in the present case is misplaced, because it is premised on the past *non-compliance with an essential condition*. A practice or representation that is supported by law or otherwise within the

framework of any binding policy can only be considered, if at all. However, a practice that violated an essential condition and conferred advantages to some or one, cannot be considered legitimate; it cannot result in any advantage in the future.

11. It is not in dispute that petitioner was allowed to bid on the basis of the positive networth of its parent company in various tenders before, as stated above yet it is also equally true that with respect to this tender ONGC issued a circular No.07/2017 seeking dispensation on the issue of negative networth of the petitioner. The said circular reads as under:-

“Circular No. 07/2017

No: MAT/PMC/13(108)/2017

Dated: 23.02.2017

Sub: Seeking dispensation on the issue of negative networth of M/s Quippo Oil and Gas Infrastructure Ltd., New Delhi.

Reference is invited to BEC clause no. B.2.6 and note (iv-a) of Financial Criteria of Standard BEC for Service Contracts, for ascertaining the Financial Capability of a bidder.

EPC in its meeting (03/2017) held on 24.01.2017 noted that in the past, dispensation has been granted by EPC on the issue of negative networth of M/s Quippo in number of tenders of different work centers of ONGC. EPC further noted that as Financial year has been changed and Audited Annual Accounts of Financial Year 2015-16 have been finalized, compliance to the ONGC tender terms & conditions should be ensured by M/s Quippo.

In view of the above, EPC directed that the

work centers should not put up any case for seeking dispensation on the issue of negative networth of M/s Quippo to EPC in future.

Above guidelines should be meticulously followed by all concerned.

(Ashwini Nagia)

ED-Chief MM Services

Distribution: (Through ONGC's intranet website 'ongcreports.net').

All concerned may download the circular from the site. Hard copies are not distributed separately.

Copy to:

1. EO to CMD, ONGC, New Delhi.

2. CEA to Director (T&FS)/Director (Offshore)/Director (HR)/Director (Exploration)/Director (Onshore)/Director (Finance), ONGC, New Delhi

3. CVO, ONGC, New Delhi."

12. Thus, with this circular the ONGC clarified that the work centres should not put up any case for dispensation of the issue of negative networth of the petitioner in future

13. Further, the bid evaluation criteria in the tender document especially, Clause No.6.0 and its sub clause (iv-(a)) makes the issue clear:-

"6.0 Financial Criteria

"1. Turnover of Bidders:30% of annualized bid value or more

2. Net worth of Bidder: Positive (as per latest audited annual accounts).

Notes:

(i) xxxx xxxx xxxx

(ii) xxxx xxxx xxxx

(iii) xxxx xxxx xxxx

(iv) xxxx xxxx xxxx

(iv-(a)) 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/ultimate 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 awarded to them, and

iv. The bidder is a 100% subsidiary company of the parent/ultimate/holding parent company. ”

Thus, a bare perusal of the bid evaluation criteria for this tender reveals that it is only in those cases where the subsidiary company does not meet the financial criteria (viz, turnover of bidders - 30% of annualised bid value) by itself and submits its bid based on the financial strength of its parent company, that the documents showing the positive networth of the parent company need to be submitted. However, in the present case, interestingly, the bidder met the standards set in sub-clause No.(i) of Clause 6.0 viz the financial criteria, but failed in criteria (b) above. Therefore, ONGC cannot be said to be at fault in disallowing the petitioner's bid for tender.

ONGC's Circular No.07/2017 is clear on the subject and seeks to ensure that work centres should not put up any case for seeking dispensation on the issue of negative networth of the petitioner in future. This cannot, in the opinion of this Court, be construed as ONGC's relieving the bidders of the obligation to comply with eligibility conditions in regard to the subject tender.

14. As the petitioner had failed to meet the above eligibility criteria, ONGC was justified in rejecting the bid of the petitioner.

15. Is ONGC's position contrary to the petitioner's legitimate expectations? In *Ram Parvesh Singh & Ors vs. State of Bihar and Ors* (2006) 8 SCC 381 it was held that :-

"15. What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any

representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above 'fairness in action' but far below 'promissory estoppel'. It may only entitle an expectant: (a) to an opportunity to show cause before the expectation is dashed; or (b) to an explanation as to the cause for denial."

16. Further, in *Punjab Communications Ltd vs. Union of India* (1999) 4 SCC 727 it was held as under:-

"... In sum, this means that the judgment whether public interest overrides the substantive legitimate expectation of individuals will be for the decision-maker who has made the change in the policy. The choice of the policy is for the decision-maker and not for the court. The legitimate substantive expectation merely permits the court to find out if the change in policy which is the cause for defeating the legitimate expectation is irrational or perverse or one which no reasonable person could have made."

17. The public interest or change in policy may be sufficient to negate the concept of legitimate expectation. Thus, if ONGC had decided that a subsidiary company applying for tender should have a positive networth, it rather safeguarded compliance of the project and hence acted in public interest. The employer's interest is always in completion of its project rather than to secure financial guarantees for such project.

18. In the present case, the condition that a bidder should have

positive net worth was not imposed mid course; it always existed. That the petitioner's bids were accepted and evaluated in the past, ignoring such a condition, does not in any manner make it inessential for the present tender. As to its premise, the court is not equipped to discern the *rationale*. Perhaps it is not enough for the public agency to be satisfied that any possible default can be financially addressed through a guarantee issued by the principal or holding company and that alone may not be sufficient. It may wish to safeguard against insolvent contractors, whose lack of lines of credit may imperil the smooth performance of contract, or worse – such as seizure or attachment of movable assets onsite. Therefore, the insistence on such conditions cannot be belittled, nor can legitimate expectation be pressed into service as an actionable ground.

19. The Court also notes that the petitioner did not question as arbitrary the condition at the time it furnished the bid. Had it really thought it to be discriminatory or lacking in *rationale*, it should have questioned it before the court, on appropriate grounds, immediately upon publication of the tender. Having allowed the bid to stand, even furnished the tender, now to seek exemption from the condition would be asking the court to direct an unfair consequence, i.e permit an ineligible bidder to nevertheless be evaluated, though similarly placed ineligible bidders, quite correctly interpreting the tender terms kept away from the process. Granting relief in such circumstances would not be enforcing a legitimate expectation, but court directed discrimination.

20. The Court is satisfied that neither the process of evaluation, nor the consideration given to the petitioner's tender, suffers from illegality, lack of *bona fides* or procedural irregularity. The interpretation given to the tender by the ONGC is also not arbitrary or unreasonable. The writ petition and miscellaneous application are therefore dismissed.

YOGESH KHANNA, J

S. RAVINDRA BHAT, J

MAY 08, 2017

M/RS

