IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2794 OF 2016

Core Offshore Services Private Limited … Petitioner
Vs.
Oil and Natural Gas Corporation Limited, Mumbai Region
through its Regional General Manager and another … Respondents

Mr. A. Y. Sakhare, Senior Advocate a/w. Mr. Pol i/b. Pol Legal Juris for Petitioner.
Dr. Birendra Saraf a/w. Mr. Rohan Agarwal I/b. MDP & Partners for Respondents.

CORAM : SHANTANU KEMKAR &
R. G. KETKAR, JJ.

DATE : FEBRUARY 20, 2018

<u>ORDER</u> : **(PER R. G. KETKAR, J.)**

Heard Mr. A. Y. Sakhare, learned Senior Counsel for petitioner and Dr. Birendra Saraf, learned Counsel for respondents at length.

2. By this Petition under Article 226 of the Constitution of India, petitioner has prayed for setting aside letter dated 16.09.2016 at exhibit-U, page 426 by which the respondent No.1 - Oil and Natural Gas Corporation Limited (for short '**ONGC**') released bid bond bank guarantee against tender No.P76KC14001 for Charter hire of Barge with suitable Tugs. Petitioner has also sought declaration that the circular dated 05.04.2016 issued by the **ONGC**, so far as it only permits sharing of Independent External Monitor's (for short '**IEM**') opinion with the complainant and not allowing it to share it with the aggrieved party i.e. concerned bider against whom such opinion is given, is *ultra vires* and unconstitutional being contrary to the principles of natural justice and /

or direct the respondent No.1 not to consider the **IEM's** opinion. Petitioner has also prayed for setting aside fresh tender No.P76KC17001 dated 01.02.2017 at exhibit-V.

3. Respondent No.1- **ONGC** had floated a tender being tender No.P76KC14001 for Charter Hire of Barge with suitable Tugs for Mumbai Offshore. The tender forms were available online between 21.01.2015 and 04.02.2015. The unpriced techno-commercial bid closing date was 25.03.2015 at 1600 hours and opening date and time was 25.03.2015 at 1700 hours. The bid validity was upto 120 days from the date of opening of unpriced bid and the bid bond validity was upto 150 days from the date of opening of unpriced bid. On 25.03.2015, petitioner submitted its tender along with all the requisite documents, processing fees and EMD. Respondent No.1 opened the technical bids on 25.03.2015 including the bid submitted by the petitioner. At the request of the respondent No.1, petitioner had extended the bid validity and bid bond validity. On 03.09.2015, notice was issued to the petitioner among others informing that price bid will be opened in the e-portal on 09.09.2015 at 1500 hours (IST). On the same day, petitioner received letter from **ONGC** informing that petitioner's offer has been shortlisted for the barge(s) and tugs, more particularly set out therein. Petitioner was requested to confirm the availability of the shortlisted barge(s) and tugs latest by 08.09.2015. By letter dated 08.09.2015, petitioner confirmed availability of barges in order to provide the required services against the subject tender. On 09.09.2015, price bids were opened and the bid of the petitioner was declared as the lowest (L1) among the other qualified bidders. The petitioner was awaiting for award of contract. On 05.10.2015, petitioner was informed that one of the bidders - Halani Shipping Private Limited (for short '**Halani**') had lodged a complaint against the petitioner with **IEM**. On the same day,

petitioner addressed a letter to **IEM** bringing on record the true and correct facts by enclosing all the relevant documents and also sought personal hearing. On 12.10.2015, petitioner was informed that a meeting with **IEM** under Integrity Pact Programme is scheduled on 16.10.2015 so as to enable the petitioner to present its case before the **IEM**. Accordingly, petitioner's representative attended the meeting with **IEM** on 16.10.2015 and submitted all the relevant documents. On 03.11.2015, **IEM** reiterated its opinion given earlier on 12.10.2015. On 12.10.2015, **IEM** gave opinion after giving opportunity of explaining the complainant **Halani** their grievances in the presence of officials of **ONGC**. After hearing **ONGC** as well as **Halani**, **IEM** opined that sanctity of the tender process had been compromised.

4. In pursuance thereof, **ONGC** had taken decision to issue fresh tender. Petitioner has instituted the above Writ Petition claiming the reliefs set out hereinabove.

5. In support of this Petition, Mr. Sakhare mainly attacked the decision making process. He submitted that in the present case, on 22.09.2015, **Halani** had made complaint to **IEM**. On 30.09.2015, **IEM** heard the complainant. On 05.10.2015, petitioner had addressed a letter to **IEM** bringing out the true and correct facts by enclosing all the relevant documents and also sought personal hearing. The petitioner however, was not heard by **IEM**. **IEM** heard only the complainant - **Halani** and **ONGC** and gave opinion. On 12.10.2015, petitioner was informed that a meeting with **IEM** under Integrity Pact Programme was scheduled on 16.10.2015. On 16.10.2015, petitioner was heard by **IEM**. **IEM** however, reiterated its opinion given on 12.10.2015. In particular, he invited our attention to paragraphs 4 and 4.1 which are to the following effect:

> “4. We have heard **ONGC** and **COSPL** and have gone through the papers produced before us. Our opinion is given below:
>
> 4.1 On the issue of acceptance by ONGC of Bourbon Tugs Themis and Thetys offered by COSPL through a commitment letter from the operator of these tugs and not through the owners, our observations in para 3.2.2 above may be noted. We reiterate our opinion as given earlier on 12.10.2015 that this offer was non-compliant with the BEC Clause B.1.10.2.”

6. He submitted that the **IEM** reiterated its earlier opinion given on 12.10.2015. Thus, the hearing conducted on 16.10.2015 was an empty formality. The decision was already a foregone conclusion. He submitted that the decision making process in the present case is vitiated. The petitioner is, therefore, entitled to reliefs claimed in the present Petition.

7. On the other hand, Dr. Saraf supported the impugned decisions. He submitted that initially **ONGC** had floated tender for hiring barges and two tugs. However, it later on transpired that **ONGC** is already having tugs and therefore, decided to float fresh tender inviting offers only for hiring barges. He has taken us through fresh tender issued on 01.02.2017. He submitted that **ONGC** has not blacklisted the petitioner and petitioner is free to participate in the fresh tender process. He has also taken us through the affidavits filed on behalf of the **ONGC** and also opinion of **IEM** which recorded that as per Bid Evaluation Clause (for short '**BEC**') B.1.10.2, the owners of the Tugs Themis and Thetys have to submit offers. In the present case, the owners of Tugs Themis and Thetys did not submit the offer but the operators have submitted the offer. Thus, the petitioner did not satisfy the condition of submission of offers by the owners of the tugs. He submitted that there is a significant change in the scope of work, special conditions of contract, **BEC**, price format and other tender conditions. The said changes have substantial

implications on the bid value. Accordingly, the old tender No.P76KC14001 dated 04.12.2015 was cancelled and the fresh tender with a revised scope of work, **BEC** and other conditions was issued. He submitted that it is settled principle that re-tendering is permissible when there is a change in the scope of work. Accordingly, **ONGC** had cancelled the subject tender and invited a fresh tender as Charter Hire of Barge (without tugs) with revised scope of work, **BEC**, price format and other tender conditions. He submitted that issuing fresh tender in the instant case is a considered business decision taken by the management of the **ONGC** in the light of the various developments having taken place during material time. He, therefore, submitted that no case is made out for invocation of powers under Article 226 of the Constitution of India.

8. We have considered the rival submissions advanced by the learned Counsel appearing for the parties. We have also perused the material on record. As noted earlier, on 22.09.2015, **Halani** had made a complaint to **IEM**. **IEM** heard **Halani** and **ONGC** and submitted report dated 12.10.2015, which is at pages 473 to 485 of the Petition. It is no doubt true that petitioner was not heard at that time. On 12.10.2015, **ONGC** informed the petitioner that a meeting with **IEM** under Integrity Pact Programme was scheduled on 16.10.2015. Accordingly, petitioner's representative attended the meeting with **IEM** on 16.10.2015 and had also submitted relevant documents. Petitioner does not dispute that the petitioner was heard by **IEM** on 16.10.2015. The grievance of the petitioner is that this hearing was an empty formality and the **IEM** reiterated its earlier opinion. We do not find merit in this submission. Basically, **IEM** found that acceptance of petitioner's offer of Barge rigs was in violation of **BEC** clause B.1.10.2. **ONGC** had accepted Tugs Themis and Thetys offered by the petitioner through a commitment

letter from the operators of these tugs and not from the owners. Mr. Sakhare was not in a position to demonstrate any illegality in that regard. That apart, as noted earlier, **ONGC** had taken a conscious decision of cancelling the earlier tender and has invited fresh tender. Petitioner is entitled to participate in the tender process.

9. In the case of ***Tata Cellular Vs. Union of India***, **AIR 1996 SC 11** as also in ***Asia Foundation Vs. Trafalgar House***, **(1997) 1 SCC 738**, the Apex Court has held that it is not for the Court to determine whether a particular decision taken in respect of a tender is fair. It is only concerned with the manner in which the decisions have been taken. Court interference is warranted only if the decision of the public authority is laced with illegality, irrationality or impropriety. In the case of ***Siemens Public Communication Networks Vs. Union of India***, **AIR 2009 SC 1204**, the Apex Court has held thus,

> "A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bonafide and in public interest, Courts will not exercise the powers of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna."

10. In view thereof, we do not find any merit in the submission of Mr. Sakhare that the decision making process is vitiated in the instant case. After perusing the opinion of **IEM** dated 12.10.2015 and having regard to the fact that **ONGC** has invited fresh tender, no case is made out for invocation of powers under Article 226 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.) **(SHANTANU KEMKAR, J.)**

Minal Parab