IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 21.12.2018

Coram:
The Honourable Mr. Justice T.Raja

Writ Petition Nos.33293 and 29613 of 2016
and WMP.Nos.28765 and 25645 of 2016

M.Hema Arun Prakash,
Proprietor, Golden Ventures,
Old No.65, New No.22/11,
Gowder Street, L.S.Puram,
Mettupalayam - 641 301. ... Petitioner in W.P.No.33293/16

Golden Transport & Co.,
Rep. By its Managing Director,
Mr.S.Murugan,
Old No.65, New No.22/11,
Boriaha Gowder Street,
L.S.Puram,Mettupalayam-641301. ... Petitioner in W.P.No.29613/16

vs.

1.Indian Oil Corporation (Marketing Division),
Rep. By its Deputy General Manager,
Tamil Nadu State Office,
No.139, Mahatma Gandhi Road,
Chennai - 34. .. 1st respondent in both WPs

2.Sree KGM Transport,
Rep. By M.Sri Selvi,
3/1, ATR Nagar, FCI Road,
Ganapathy Post,
Coimbatore - 641 006.

3.VLN Transport,
Rep. By K.Natarajan,
11/16, Sastri Street,
U.M.Palayam, G.N.Mills Post,
Coimbatore - 641 029.

4.Sulur Lorry Urimaiyalargal Sangam,
Rep. By Mr.C.Pakkiappan,
No.13-B, Trichy Road, Sulur,
Coimbatore - 641 402.

5.Sri Ranganathar Fuels,
Rep. By Mrs.R.Brindha,
No.488/542, Avinasi Road,
Peelamedu,
Coimbatore-04.

6.Pricol Limited,
Rep. By Mrs.Vanitha Mohan,
No.218/219, Mettupalayam Road,
Periyanaickanpalayam,
Coimbatore - 641 020.

7.Shanthi Social Services,
Rep. By Mr.S.Srinivas,
S.F.No.128/2/2249, Trichy Road,
Singanallur, Coimbatore - 641 005.

8.Sriram Agencies,
Rep. By Duraisamynaidu Ramakrishnan,
120, Palani Main Road,
Udumalpet.

9.Sri Muthukumaran Traders,
Rep. By Mrs.S.Kavitha,
No.251, Komarapalaiyam, Coimbatore- 39 .. Respondents 2 to 9

(R2 to R9 have been impleaded in WP.No.33293/16 as per order dated 21.02.2018 by KRCBJ in WMP.No.4142/2018 in W.P.No.33293/2016)

Prayer in W.P.No.33293/16 :- Writ Petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorarified mandamus to call for the records of the first respondent pertaining to the Tender No.RCC/SR/TNSO/PT-42/15-16 and quash the LOIs/work orders issued to the respondents 2 to 9 and consequently direct the first respondent to strictly adhere to the procedure contemplated under the Tender Document for the Transportation of Bulk Petroleum Products - MS/HSD/Branded Fuels.
Prayer in W.P.No.29613/16 :- Writ Petition filed under Article 226 of the Constitution of India for issuance of a writ of declaration to declare that the process followed by the first respondent in selecting the bidders pertaining to the Tender No.RCC/SR/TNSO/PT-42/15-16 for Transportation of Bulk Petroleum Products - MS/HSD/Branded Fuels as null and void since the same is not in accordance with the tender conditions/procedure stipulated in the tender document and consequently direct the first respondent to strictly adhere to the procedure contemplated under the Tender Document.

W.P.No.33293/16
For Petitioner : Mr.T.Shanmugananda Vijayakumar

For R1 : Mr.Mohammed Fayaz Ali
For R2 to R9 : No Appearance

W.P.No.29613/16
For Petitioner : Mr.P.Raja

For Respondent : Mr.R.Ravi

COMMON ORDER

Challenging the Letter of Intents (LOI) / Work Orders issued to the respondents 2 to 9, the petitioners, who are father and son, have filed these writ petitions seeking further direction to the first respondent / Deputy General Manager / Indian Oil Corporation (Marketing Division), Chennai, to strictly adhere to the procedure contemplated under the Tender Document for Transportation of Bulk Petroleum Products – MS/HSD/Branded Fuels.

2. Since the facts involved in both the writ petitions are interconnected, they are disposed of by this common order.

Mr.T.Shanmugananda Vijayakumar, learned counsel for the petitioner in W.P.No.33293 of 2016 submitted that the petitioner is a Tanker Truck (TT) operator carrying on the business of transportation in the name and style of Golden Ventures, a proprietary concern, which is registered as a Small Unit as per the categorization done under Micro, Small and Medium Enterprises (in short "MSME") and to that effect, they have also issued with the Certificate by the Ministry of MSME, Government of India.

2.1. Whileso, the first respondent called for tenders for "road transportation of bulk petroleum products" vide Tender No.RCC/SR/TNSO/PT-42/15-16 for transporting the petroleum products from Coimbatore Terminal of the first respondent to various locations of the dealers, as per which, there was a requirement of 94 Tanker Trucks. In response to the said tender, the petitioner had applied for 5 Tanker Trucks owned by him under MSME category, for which, there is a 20% reservation of the total quantity under Section IV Clause (B-1) of the tender document. It is further stated that keeping in view of the policy of the Government of India to provide reservation for MSME category to encourage entrepreneurship, the first respondent had provided for 20% reservation of the total quantity in procurement of these trucks. Moreover, when the tender was under the two-bid system comprising of Technical Bid and Price Bid, the petitioner had applied under the technical bid and they were ranked L-1 in the price bid. Amongst the MSME tenderers, the petitioner had quoted L1 rate of -10% below the base rate, another tenderer, namely, Golden Transport & Co. had quoted 3% above the base rate and a third tenderer, who is the third respondent herein, had quoted 5% above the base rate.

2.2. Explaining further, it is stated that as per the tender norms, the base rate is assumed at 100 and hence, the bidders are expected only to indicate their bid in terms of percentage by either increasing or decreasing from 100, in the range between 90(-10) and 110 (+10), therefore, any bid amount +/- 10% shall be treated as disqualified and their tender shall be rejected as per the tender norms in Clause III-3 and Clause V-3. To make it easy, e-tender portal has been designed in such a way that it does not accept any value that is beyond +/- 10%.

2.3. When the matter stands as above, since the petitioner was the only bidder amongst the MSME transporters, who had offered L-1 rate, he was confident that he would certainly be issued with LOI and then awarded with contract as well, because in the light of Clauses 4, 5 and 6 of Section III of the Tender Document, the petitioner enjoys the priority in selection. Whileso, when the petitioner was expecting to get full quantity of 5 Tanker Trucks, he was surprised to receive a call from an official of the Irugur Terminal on 09.08.2016 asking him to come to Coimbatore and receive the LOI for 4 Tanker Trucks, therefore, the petitioner was at loss to understand why only 4 Tanker Trucks were offered to him when he had offered 5 and was the only person to have quoted L-1 rate under the MSE category. Hence, he wrote a letter dated 10.08.2016 addressed to the first respondent seeking to know why he was allotted only 4 of the 5 trucks offered by him and again, he had sent various reminders dated 12.08.2016, 14.08.2016 by RPAD. Again, when the respondent had not come forward to allot all the 5 trucks despite being L-1 tenderer, the petitioner had signed the offer on 13.08.2016 by writing as "under protest" in the copy of the LOI. Subsequently, he received a letter dated 18.08.2016 requiring him to give unconditional acceptance of the LOI, failing which, the respondent would take further action as per the tender conditions.

2.4. Adding further, it is stated that after some time, the petitioner came to know that the second respondent was offered 8 Tanker Trucks against 9 Tanker Trucks offered by him, which is beyond the scope of tender conditions, for, L1 bidder should have been offered first and only thereafter, other bidders could have been offered, that too, on acceptance of L1 rate. Again, referring to the financial evaluation, it is submitted that the financial evaluation was not over even as on 30.08.2016, therefore, the question of offer and acceptance of

L1 rate prior to that date simply does not arise.

2.5. Emphasizing further that the first respondent has favoured the second respondent, learned counsel for the petitioner stated that the second respondent was awarded LOI on 09.08.2016 itself, when financial evaluation was under process even as on 30.08.2016 as seen from the e-portal of the first respondent, therefore, he contended, awarding of Tanker Trucks to the second respondent is in breach of express conditions set out in the tender document, hence, the same is liable to be set aside.

2.6. It is further stated that the third respondent is not eligible to be considered under MSE Category as he has not even applied under the said category, for, as per the information available in the e-portal of the first respondent, the third respondent has quoted his bid under the category of 'others', therefore, when the third respondent himself has not quoted L1 rate, he ought not to have been considered under MSE category because that would deprive the rights of the L1 tenderers. It is further stated that when the third respondent himself has offered only under 'others' category, awarding of 9 Tanker Trucks under MSME category in his favour is invalid and also running contrary to the Tender Condition IV, for, as per the tender condition IV (B-2), even tenderer submitting the tender under MSME category shall produce a certificate from the competent authority to show that the tenderer is registered as MSME rendering transport services.

2.7. Again placing the various mistakes committed by the first respondent, learned counsel stated that when the e-portal of the first respondent shows that the tender stage is still under financial bid opening as on 30.08.2016, no LOIs can be issued until the completion of all the subsequent stages involved in the tender process, but, contrary thereto, LOIs were issued as early as on 09.08.2016. Again, it is stated that the petitioner has been issued with LOI without any formal written intimation to him but merely through a phone call. The LOIs can be issued to others only after dealing with the L-1 tenderers, therefore, the second respondent ought not to have been offered with the L-1 rate, as he has quoted beyond the rate of L-1 (+15%), hence, the work orders issued to him offering 8 Tanker Trucks are liable to be quashed.

2.8. Assailing the work orders given to the third respondent, it is submitted that the third respondent ought not to have been considered under MSE category as he has applied under the category 'others'. While this being the position, the third respondent has not only been considered under MSE category, but also has been given LOIs / work orders for the full quota of 9 TTs as offered by him. Thus, it is contended that the above facts clearly show that the first respondent has willfully violated their own tender conditions discriminating the petitioner and other private respondents, therefore, the process adopted by the first respondent is totally unfair, arbitrary and illegal.

2.9. Taking support from a judgment of the Delhi High Court in Dezhou Shengli Pipeline Crossing Engineering India Pvt. Ltd. Vs. Ministry of Petroleum & Natural Gas & Others [CDJ 2018 DHC 696], it is stated that the Delhi High Court, while dealing with the Micro, Small and Medium Enterprises Development Act, 2006, which applies to the present case, has given a direction to the Central Government to promote Micro and Small Enterprises, therefore, it goes without saying that the tenderer under MSE category should be given first priority by the first respondent, but, the same has not been done so in the present case. On this basis, he prayed for allowing the writ petition filed by him.

3. In respect of W.P.No.29613 of 2016, Mr.P.Raja, learned counsel appearing for the petitioner submitted that pursuant to the tender notification issued by the respondent, the petitioner had offered for 7 Tanker Trucks owned by him under MSME category so as to avail 20% reservation of the total quantity under Section IV Clause (B-1) of the tender document. As per the records, there were only three tenderers under the MSME category and amongst them, Golden Ventures, owned by his son/petitioner in W.P.No.33293 of 2016, had quoted the L-1 rate of -10% below the base rate, the petitioner herein had quoted 3% above the base rate and a third tenderer had quoted 5% above the base rate. Finally, the tender was opened on 03.02.2016 and that the petitioner had also received an email on the said day itself stating that the technical bids have been opened and admitted. Whileso, on 27.05.2016, he had received another email stating that his bid has been rejected in view of his wrong enclosure of MSE existence certificate. Immediately, on 27.05.2016 itself, the petitioner had sent a mail to the official email id of the first respondent, namely, ksrajagopalan@indianoil.in stating that his bid ought not to have been rejected on account of the fact that he had submitted the Udyog Aaadaar Memorandum. Subsequently, he had received an email dated 30.05.2016 from the respondent stating that the tender process has been revoked and went back to the bid opening stage. In the meanwhile, the petitioner had received another mail on 30.05.2016 stating that his technical bid has been accepted after evaluation, and that the financial bids would be opened on 31.05.2016 at 3.30pm. However, the financial bids were not opened on 31.05.2016, as the petitioner did not receive any email from the respondent for the same. Subsequently, on 06.06.2016, he had received a phone call from an officer of the respondent asking him to respond to the counter offer of L-1

rate. Immediately, he had responded to the respondent by writing a mail to the official mail id for the tender related correspondence stating that he has not received any such mail on the counter offer of L-1 rate, for which, the respondent, by replying to him, stating that they had earlier sent the mail on 03.06.2016 to goldentransportandco@gmail.com, forwarded the same mail once again directing to him to indicate whether he was willing to operate at L-1 rate on or before 3pm on 08.06.2016.

4. Continuing further, learned counsel for the petitioner submitted that the mail id in which the respondent communicated to him is not functional as he had disconnected the same long time back, therefore, the respondent ought to have sent the email to his communication id i.e. murugan1012@gmail.com. Finding fault with the procedure adopted by the respondent, it is contended that since the price bid was opened only on 08.06.2016, it is not know how the respondent could have offered the L-1 rate to the petitioner or anyone else on 03.06.2016, particularly, on the said date the price bid was not opened at all. Since the entire tender process was shrouded in mystery because the tender process was not conducted in accordance with the procedure contemplated under the tender document, they are wholly arbitrary, unfair, biased, discriminatory and illegal, he contended. On this basis, he prayed for declaring the entire tender process as null and void.

5. Per contra, Mr.Mohammed Fayaz Ali, learned counsel appearing for the first respondent / Indian Oil Corporation, submitted that the tender was issued by the first respondent for transportation of bulk petroleum products, namely, Motor Spirit (MS), High Speed Diesel (HSD) and Branded Fuels from the Coimbatore Terminal to various dealers' locations, requiring 83 Tanker Trucks of 12KL, 11 Tanker Trucks of 18KL and above. In the tender documents, it was specifically mentioned that the candidates bidding under MSE category were entitled for 20% reservation and as such, 17 Tanker Trucks in 12 KL capacity and 2 Tanker Trucks in 18 KL capacity were reserved for MSE candidates. After evaluating the bids of tenderers, it was found that four bidders have submitted the MSE certificates and offered their Tanker Trucks as follows:-

Name of Bidder	Category	12KL TT	18KL & above TT	Total Tank Trucks offered
Golden Ventures (petitioner)	MSE	0	5	5
VLN Transport (3rd respondent)	MSE	6	0	6
Golden Transport & Co.	MSE	7	0	7

Name of Bidder	Category	12KL TT	18KL & above TT	Total Tank Trucks offered
Sree KGM Transport (2nd respondent)	MSE	8	0	8
Total Tank Trucks of MSME		21	5	26

5. It is further submitted that the petitioner and the third respondent had offered for L-1 rate and others also had agreed to match the L-1 rate as stated below:-

Name of Bidder	Original Quote	Rank	Agreed to Match L1 Rate
Golden Ventures	-10%	L1	-
VLN Transport	-10%	L1	-
Golden Transport & Co.	+3%	L2	Yes
Sree KGN Transport	+5%	L3	Yes

After explaining the above table, learned counsel for the first respondent further stated that although the petitioner had offered 5 Tanker Trucks of 20 KL, the requirement of Tanker Trucks 18 KL and above was only 11 numbers. Therefore, as per the reservation, 20% quota under MSE category works out to 2.2 and hence, the same was rounded off to 2 Tanker Trucks and the petitioner was allotted the full available quota of 2 Tanker Trucks under the reservation for MSE category. Thereafter, 2 Tanker Trucks out of the remaining 3 Tanker Trucks were allotted to the petitioner as per the seniority criteria. When the requirement of 18 KL Tanker Trucks were only 11, out of which, 2 were allotted to the petitioner under the reservation category of MSE and the remaining 7 Tanker Trucks were alloted to the RO dealers as per Clause 8 of the Tender conditions to lift their own supplies, which are stated below:-

Sulur Lorry Urimaiyalargal Sangam	1
Sri Ranganathar Fuels	1
Pricol Limited	1
Shanthi Social Services	2
Sriram Agencies	1
Sre Muthukumaran Traders	1
Total	7

7. Continuing his arguments, it is submitted that when 7 Tanker Trucks of 18 KL were allotted to the RO dealers as per Clause 8 of the tender conditions and that the tender

requirement of 18KL Tanker Trucks was being only 11, 2 were allotted to the petitioner as per the reservation under MSE category and 7 were allotted to RO dealers in terms of Clause 8, hence, only 2 Tanker Trucks were required, therefore, the remaining 2 TTs were allotted to the petitioner as per his seniority. Thus, on this basis, he contended, in the light of the above, the petitioner could not be offered contract for his remaining one Tanker Truck.

8. Concluding his arguments, it is contended that when the first respondent has scrupulously followed the tender conditions and allotted the tender to the eligible candidates strictly as per the tender conditions and that the petitioner was allotted 4 out of 5 Tanker Trucks offered by him, he cannot question the work orders issued by the first respondent.

9. In respect of W.P.No.29613 of 2013, Mr.R.Ravi, learned counsel for the respondent/Indian Oil Corporation, by filing a detailed counter affidavit, submitted that in the entire tender evaluation process, the respondent has adopted the uniform methodology to rule out favoritism or discrimination, therefore, the question of accommodating any individual is far from acceptance. Explaining the fault committed by the petitioner, it is stated that had the petitioner been interested in processing his bid, he should have tendered consent for L-1 rate without any delay, instead he chose to risk his bid by not taking a decision on the counter offer of the respondent. It is further submitted that the petitioner had failed to respond to the counter offer dated 03.06.2016 of the respondent, therefore, he was rejected at price evaluation of matching counter offer stage itself, hence, giving him one more opportunity for matching the counter offer does not arise, for, he himself missed the bus as he had failed to give consent for the counter offer made by the respondent. On this count, he prayed for dismissal of the writ petition.

10. I also find merit on the above said submissions of the first respondent/Indian Oil Corporation. In respect of W.P.No.33293 of 2016, it is seen that admittedly, the total requirements of 18 KL Tanker Trucks were only 11. Among these 11 Tanker Trucks, 2 were allotted to the petitioner under the 20% reservation quota for MSE category, 7 were allotted to the RO dealers as per Clause 8 of the tender conditions and the remaining 2 Tanker Trucks were allotted to the petitioner as per his seniority.

11. Besides, it is to be noted that the petitioner had offered 5 Tanker Trucks of 20 KL and the requirement of Tanker Trucks above 18 KL was only 11 numbers. Since the 20% MSE quota of 11 Tanker Trucks works out to 2.2, the same was rounded off to 2 Tanker Trucks and thereby the petitioner was allotted full

available quota of 2 Tanker Trucks under the MSE category. Subsequently, out of 3 remaining Tanker Trucks, 2 Tanker Trucks were also allotted to the petitioner as per his seniority. Thus, since the petitioner has been allotted 4 out of 5 Tanker Trucks as explained above, I do not find any merit in the writ petition filed by him questioning the various work orders issued by the first respondent to the private respondents.

12. In respect of W.P.No.29613 of 2016, the prime contention of the petitioner is that he was not communicated about the counter offer made by the first respondent. In this context, it is apposite to refer to the email dated 08.06.2016 received at 2.24 pm. sent by the petitioner to the first respondent. Relevant portion of the said communication is quoted below:-

> "As we struggle to come to a conclusion on your counter offer, for want of time, we kindly request you extend the deadline, if possible by you, so that we could be in a better position to decide upon your counter offer."(emphasis supplied)

From the above, it is clear that although the petitioner had received the counter offer made by the first respondent, without offering his counter offer rate, he sought for extension of time. Therefore, in my considered view, the petitioner has committed a huge fault from his side which makes his candidature ineligible to the contract, hence, any further request of the petitioner cannot be considered, for the reason that originally counter offer dated 03.06.2016 was sent to the emaild id provided by the petitioner as reflected in the bidder information report, however, it is stated by the petitioner, vide his email communication dated 06.06.2016, that he has not received any communication regarding the counter offer. Thereafter, the said communication was forwarded once again to his emial id on 07.06.2016 and subsequent to that, a hard copy of the letter regarding the counter offer of L-1 rate (-10%) was sent to him through courier to the address provided by him in the tender application. In the counter offer made by the first respondent, it was categorically stated that further assessment of the tender shall be on the basis of acceptance or rejection of counter offer by the petitioner and the same should be communicated on or before 08.06.2016 at 15.00 hrs. Besides, it is stated that if acceptance is not received on or before the last date, it shall be presumed that the counter offer is not accepted by him and thereafter, the tender would be finalized from the available applications. However, the petitioner, just 36 minutes before the deadline for offering the counter offer of L-1 rate, i.e. on 08.06.2016 at about 2.24 pm., had sought for extension of time. Therefore, in view of his failure to respond to the counter offer dated 03.06.2016, he was rightly rejected at the price evaluation of matching counter offer stage itself, hence, he cannot be provided with one more opportunity as requested by him to re-submit his tender application on the basis of the counter offer dated 03.06.2016 of the respondent, especially when, being an experienced person in tender bidding system, he ought to have followed it up on a day-to-day basis so as to avoid any further delay for quoting counter offer of L-1 rate as stated supra.

13. Thus, for the reasons stated above, both the writ petitions fail and they are dismissed as devoid of any merit. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rkm

To

The Deputy General Manager,
Indian Oil Corporation (Marketing Division),
Tamil Nadu State Office,
No.139, Mahatma Gandhi Road,
Chennai - 34.

+1cc to Mr.S.Gunaseelan, Advocate, S.R.No.89518
+1cc to Mr.T.Karunakaran, Advocate, S.R.No.89748
+3ccs to Mr.T.Shanmugananda Vijayakumar, Advocate, S.R.No.89764
+1cc to Mr.Mohammed Fayaz Ali, Advocate, S.R.No.19
+3ccs to Mr.P.Raja, Advocate, S.R.No.89763
+1cc to Mr.R.Ravi, Advocate, S.R.No.46

Writ Petition Nos.33293 and 29613 of 2016
and WMP.Nos.28765 and 25645 of 2016

VSNII(CO)

rrs 29/01/2019