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

\+   **W.P.(C) 1429/2018 and CM APPL. 5900/2018 & 7205/2018**

Reserved on: 26.04.2018
Date of decision: 25.05.2018

IN THE MATTER OF:

L & T HYDROCARBON ENGINEERING LTD. ..... Petitioner

Through: Mr. Harish N. Salve, Mr. Mukul Rohatgi, Dr. A.M. Singhvi and Mr. Rajiv Nayar, Senior Advocates with Mr. Rishi Agrawala, Mr. Karan Luthra and Mr. Vishnu Tallapragada, Advocates

versus

OIL AND NATURAL GAS CORPORATION LTD. & ANR ..... Respondents

Through: Mr. Sukumar Pattjoshi, Senior Advocate with Mr. Somesh Dube and Mr. Sandeep Mahapatra, Advocates for R-1/ONGC with Mr. Shishir Agrawal, DGM (MM), I/C MM, SRM. Mr. C.A. Sundaram and Mr. Darpan Wadhwa, Senior Advocates with Mr. Arjun Syal and Mr. Shreyan Das, Advocates for the applicant in CM APPL. 7205/2018.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE PRATIBHA RANI

HIMA KOHLI, J.

1. Gone are those days when it was said that when someone does something at the "*eleventh hour*", they do it at the last possible moment. In today's day and time, when technology is advancing at lightening speed, even a fraction of a minute is akin to the "*eleventh hour*". This is amply

demonstrated in the present case, where the fate of the petitioner's bid in response to a Global Tender floated by the respondent No.1/ONGC, hangs on those very fleeting seconds.

2. We may first recapitulate the facts of the case. On 24.11.2016, the respondent No.1/ONGC had issued a Notice Inviting Tender under the International Competitive Bidding Format, in respect of the "*Offshore Process Platform (CPP & LQUIP) project for development of KG-DWN-98/2*". The bidding process comprised of a two bids system whereby the Techno-Commercial Bid was required to be submitted by the bidders. The Technical Bid had to be opened on the day of the Bid submission, followed by the opening of the Commercial Bid. The submission of the Bids was to be made on the "*ONGC e-bidding engine at http://www.etender.ongc.co.in*".

3. The petitioner, a company involved in providing complete "EPCIC solutions" for the Offshore Oil and Gas Industry, joined hands with the respondent No.2 herein, Mc Dermott Asia Pacific Pte. Ltd. to create a consortium for participating in the NIT floated by the respondent No.1/ONGC.

4. Initially, on 31.01.2017, the respondent No.1/ONGC fixed 03.02.2017, at 14:00 hours as the date and deadline for submission of the Bids. Later on, the timeline for submission of the Bids was extended on 18 occasions, commencing on 03.03.2017 and ending on 22.1.2018. The number of days for which the respondent No.1/ONGC had extended the timeline for submission of the bids was in the range of 07 days to 32 days, as detailed in para 34 of the writ petition. A total number of 17 companies purchased the tender documents, out of which only 06 participants, (i.e., 3

bids in a consortium of 2 each) including the petitioner and the respondent No.2, its consortium partner, filed their bids.

5. The methodology for submission of the tender, as displayed on the website of the respondent No.1/ONGC comprised of the following steps:-

(i) Log on to the e-procurement website of the respondent No.1 with the allotted User ID and password.

(ii) Select the relevant document from the bidder's system to be uploaded onto the System of the respondent No.1;

(iii) The said document is then attached to a pop-up window, and the same is uploaded onto the system of the respondent No.1 upon being digitally signed, using the digital signature of the bidder;

(iv) Upon digitally signing the document, an encrypted file is generated – suffixed with "*.ssig*".

(v) The said digitally signed encrypted document is then selected and saved on the portal of the Respondent No.1. The said process is repeated until all the documents sought to be uploaded are encrypted with the digital signature and saved within the Respondent's portal.

(vi) Upon successfully being saved on the respondent No.1's portal, the document will appear on the RFx, along with the time at which the said document was successfully saved. The '*status*' at this stage would show '*saved*'.

(vii) Upon being satisfied that the bid documents have been successfully uploaded, the Bidder then clicks the '*Submit Button*', pursuant to which the response message comes as '*document was successfully signed digitally*'.

(viii) The '*status*' of the Bid will then change from *'saved'* to '*submitted*'.

6. It is the petitioner's stand that it had prepared the Bid and commenced uploading the final bidding documents concerning the Technical Bid on to the system of the respondent No.1/ONGC on 04.2.2018, at 19:41:56 hrs. and had continued uploading the documents till 23:27:34 hrs. Thereafter, the petitioner had commenced uploading further documents on the next day i.e., on 05.2.2018, at 09:57:17 hrs. and had continued uploading the documents relating to the Technical Bid upto 13:41:46 hrs. In the meantime, at 13:20 hrs., the petitioner had submitted a request to the respondent No.1/ONGC to extend the timeline for submission of the bid by 3 hours i.e. upto 17:00 hrs. The said request was however rejected by the respondent No.1/ONGC at 13.24 hrs., on the very same day. Thereafter, at 13:47:33 hrs., the petitioner commenced uploading the Commercial Bid documents.

7. The petitioner has further averred in the petition that the respondent No.1/ONGC kept on amending the tender specifications on several occasions and did so as late as on 30.1.2018, thereby compelling it to revisit its tender specifications and coordinate with its respective suppliers and the said process continued upto the date of the deadline, i.e., till 05.2.2018. This is the reason why the petitioner explains that had to approach the respondent No.1/ONGC for extension of time due to last minute changes that needed to be incorporated in the tender documents. It is the petitioner's version that the last document uploaded as a part of the Bid was digitally signed on 05.2.2018 at 13:58:43 hrs. and the said Bid stood '*saved*' within the Server of the respondent No.1/ONGC immediately thereafter and before the clock had

struck 14:00 hrs., the petitioner's representative had hit the "*Submit Button*". In terms of the step-by-step process for submission of the tender, displayed on the website of the respondent No.1/ONGC, the respondent's system ought to have recognized the petitioner's Bid as "*submitted*", but it failed to change the status of the said Bid from "*saved*" to "*submitted*".

8. On seeing the aforesaid technical glitch in the system of the respondent No.1/ONGC, the petitioner had informed ONGC on 05.2.2018 itself at 14:47 hrs., about the valid submission of its Bid and sought extension of the deadline by 30 minutes to avoid any confusion and provide for time to the ONGC for its system to internally process the Bid. However, the said request was rejected on the very same day, at 20:18 hrs. When the Bids were opened by the respondent No.1/ONGC on 05.2.2018 at about 8.00PM, the petitioner's representative was asked to leave the place of Tender Opening on the ground that it had not submitted a valid Bid within the stipulated timeline. It is this action of the respondent No.1/ONGC of disqualifying the petitioner from the NIT that has made it file the present petition.

9. When the petition was listed for admission on 15.2.2018, the petitioner was duly represented by Mr. Harish N. Salve, learned Senior Advocate and though no caveat petition was filed by the respondent No.1/ONGC, Mr. Sukumar Pattjoshi, Senior Advocate was present on its behalf.

10. Mr. Salve, learned Senior Advocate had argued that the entire issue hinges on whether the petitioner's Bid was uploaded on the website of the respondent No.1/ONGC on 05.2.2018 within the stipulated deadline, i.e., on or before 14:00 hrs. (IST). It was his contention that the petitioner had uploaded the last file of the Bid documents on the website of the respondent

No.1/ONGC on 05.2.2018, at 13:58:43 hrs. and after submission of all the documents, the option provided on the web portal of the respondent No.1/ONGC was to click on the "*Submit Button*". The Joint General Manager, Offshore Domestic Marketing of the petitioner company had clicked the "*Submit Button*" at 13:59 hrs. and the system of the respondent No.1/ONGC did not reject the said Bid; instead, the response received was "*document was successfully signed digitally*". As the webpage of the respondent No.1/ONGC had retained the status "*Saved*", it made the petitioner's officer press the "*Submit Button*", a second time, which also took place before the cut off time, i.e., before 14:00 hrs. However, after the system time on the e-procurement webpage of the ONGC had struck 14:00 hrs., its system replaced the "*Submit Button*" with "*Refresh Button*".

11. It was thus canvassed that once the respondent No.1's system had accepted the petitioner's Bid, then the status ought to have changed from "*saved*" to "s*ubmitted*", which did not happen, resulting in wrongly disqualifying it from the Bid. The petitioner claimed that the aforesaid error had occurred due to a heavy load on the system of the respondent No.1/ONGC that was running slow and that no fault for the same could be attributed to the petitioner and nor could it have been disqualified from participating in the Tender.

12. Mr. Sukumar Pattjoshi, learned Senior Advocate appearing for the respondent No.1/ONGC, had vehemently disputed the above submission that the system of the ONGC was running slow or that there was a heavy load on its system due to which the petitioner's Bid was not shown as "*submitted*" and had remained "*saved*". He sought to clarify that since separate areas had been earmarked for each bidder on the server of the respondent No.1, there

was no question of any over load; that besides the petitioner, there were two other bidders, who had successfully submitted their Bids on 05.02.2018, well before 14:00 hrs., one had done so at 12:27:22 hrs. and the other at 13:46:15 hrs. He contended that if there was any malfunctioning at all, then it must have been with the petitioner's server, but certainly not at the end of ONGC.

13. After carefully considering the submissions made by learned counsels for both sides, we had opined that the aforesaid issue could be resolved if experts from an independent agency are appointed as Local Commissioners to examine the systems of both the parties, at the cost of the petitioner. The said suggestion was accepted by both sides. As a result, the Director, FSL, Rohini, Delhi was requested to depute two teams of Computer Forensic Experts to examine the servers of the petitioner and the respondent No.1/ONGC respectively, and submit their separate reports indicating *inter alia*, (i) the exact time when the last file was uploaded by the petitioner on the system of the respondent No.1/ONGC on 05.02.2018; and (ii) the number of occasions when the "*Submit Button*" was clicked by the petitioner and if so clicked, specify the timings. Team-I was directed to visit the premises of the petitioner at Mumbai and Team-II was to visit the premises of the respondent No.1/ONGC at Delhi. With the aforesaid directions, the matter was adjourned to 26.2.2018, to await the reports of the two Teams.

14. On 23.2.2018, the matter was placed before the Court in view of an application (C.M. No. 7205/2018) moved by the intervener, Afcons Infrastructure Ltd., seeking impleadment on the ground that it has also submitted a Bid in response to the NIT of the respondent No.1/ONGC and has a direct interest in the present petition. On the said date, a letter dated 22.2.2018 issued by the Director, FSL stating *inter alia* that the inspection

would be conducted on 08.3.2018, was brought to the notice of the Court. Opining that any delay in executing the commission, would in turn delay the proceedings in the petition, the Director, FSL was requested to advance the date of inspection to be conducted by Team-I and Team-II. The date already fixed i.e., 26.2.2018, was cancelled and the matter was adjourned to 12.3.2018, to await the Reports of the Local Commissioners.

15. On 20.3.2018, an officer from the FSL Rohini, Delhi was present with the Reports in two separate sealed covers along with a CD. The sealed covers were opened, the Reports were directed to be paginated and directions were issued to the Registry to furnish copies thereof along with a soft copy, to the learned counsels for the parties for their perusal. It was further directed that Senior officers leading Team-I that had visited the petitioner's premises at Mumbai and Team-II that had visited the premises of the respondent No.1/ONGC at Delhi, would remain present on the next date of hearing for the Court to interact with them and seek necessary clarifications.

16. In the Report dated 19.3.2018, submitted by Team-I, it was stated that examination of the petitioner's server was conducted on 08th and 9th March, 2018. The conclusion arrived at by Team-I is extracted herein below for ready reference:-

> *"On the basis of the observation of the committee members, it is concluded that:*
> *1. The last file upload date was 05.02.2018 at 13:58:43 reflects in Annexure-"A" (at page 9), the firewall log reflects the activity at 13:58:33 on 05.02.2018 in Annexure-"C" (at page 2) and the same are also highlighted for reference.*
> *2. The status of the bid is shown as 'Saved' in place of 'Submitted' in Larsen & Toubro's e-tender (ONGC's) login account reflects in Annexure-"A" (at page 8 and 9) and the same are also highlighted for reference.*

3. The firewall logs were also thoroughly reviewed where the 'Action' tab of the firewall log table reflects 'Accept' for both dates i.e. 4th & 5th February, 2018 before the cut-off time 14:00:00 hours. The firewall logs on 05.02.2018 also reflects the activity before the cut-off time 14:00:00 hours (13:59:02 & 13:59:19) which are highlighted in Annexure-"C" (at page 2) for reference."

17. Similarly, the report of Team-II dated 19.3.2018, stated that they had visited the premises of the respondent No.1/ONGC on 06.3.2018 and 14.3.2018. The conclusion arrived at by Team-II was as follows:-

"On the basis of observations following points were concluded:-

- *The attached files were saved by the Vendor ID 'V153581' on the website of ONGC at 13:58:56 on dated 05.02.2018.*
- *It could not be possible to co-relate number of activities performed by vendor 'V153581' after saving attachments with the audit security logs of server due to no activity recorded in the security audit logs of the ONGC server 'srmapp01' as well as in the procurement Framework of ONGC performed by the vendor ID 'V153581' between 13:58:46 to 14:00:50 on dated 05.02.2018 as well as by any other vendors between 13:58:59 to 14:00:07 on dated 05.02.2018."*

18. On 03.04.2018, Dr. Jagjeet Singh, Sr. Scientific Officer (Documents/CFU), who had led Team-II that had visited the premises of the respondent No.1/ONGC and conducted an examination on 06.3.2018 and 14.3.2018, was present along with other officers from FSL, Rohini, Delhi. After interacting with the said officers and having regard to the submission made by counsels on both sides that the technical terms used in both the Reports needed to be simplified in layman's language for the Court and the parties to understand the answers furnished to the two queries posed on the

very first date, it was deemed appropriate to direct the Local Commissioners to prepare a common report of Team-I and Team-II by referring to the earlier Reports submitted by them in Court and the matter was adjourned to 16.4.2018.

19. On 16.4.2018, it was recorded that the joint report directed to be filed by Team-I and Team-II had been placed on record in a sealed cover along with a letter dated 12.4.2018, signed by the Director, FSL Rohini. Learned counsel for the parties were served with copies of the joint report dated 12.04.2018. However, the leaders of Team-I and Team-II were absent on the said date. Extracted below is the joint report:-

> *"As per the directions of the Hon'ble High Court of Delhi on 03.04.2018, a common report has been prepared with reference to the FSL reports submitted earlier vide FSL Nos. FSL-2018/SOC-0085 (respondent's server) & FSL-2018/SOC-0087 (petitioner's server) date: 19.03.2018 by both the teams. The observations & conclusion w.r.t. activity examined before the cut off time i.e. 14:00:00 on 05.02.2018 are mentioned below:-*

Activities	***Team-1 Activities Examined w.r.t. petitioner's server on 05.02.2018***	***Team-2 Activities Examined w.r.t. respondent's server on 05.02.2018***
Last file upload by L&T (Vendor ID ***V153581***	*L&T Firewall Server Log at* ***13:58:33*** *& further reflects on e-tender website at* ***13:58:43****.*	*ONGC Server Log at* ***13:58:46*** *& further reflects on procurement framework at* ***13:58:56****.*
Activity after last file upload time & before 14:00:00	*L&T Firewall Server Log at 13:59:02 & 13:59:19.*	*No Activity recorded after 13:58:56 on ONGC Server Log as well as procurement framework.*

***Conclusion**:-*

On cumulative consideration of both the reports it is concluded that two activities were recorded at 13:59:02 and 13:59:19 before the cut-off time i.e. 14:00:00 on 05.02.2018 in the firewall logs of the L&T Server after saving the attachment on the ONGC server by the vendor ID 'V153581' whereas no activities were recorded on ONGC server 'srmapp01' by vendor ID 'V153581' between 13:58:46 to 14:00:00 as well as by any other vendors between 13:58:59 to 14:00:00 on dated 05.02.2018.

Note: The report has been sealed with the seal of DOC FSL.

Team-I ***Team-II***

(Dr. Virendra Singh) ***(Dr. Jagjeet Singh)***
Assistant Director (DOC/CFU) ***Senior Scientific Officer (DOC/CFU)"***

20. Dr. A. M. Singhvi, learned Senior Advocate, who had appeared for the petitioner on one date, had submitted that once the portal of the respondent No.1/ONGC had displayed a prompt, "*document successfully signed digitally*" at 13:58:56 hrs. on 05.2.2018, the obvious inference was that the documents of the Bid had been duly submitted by the petitioner before the cut off time. The said submission was however disputed by Mr. Sukumar Pattjoshi, Senior Advocate for the respondent No.1/ONGC, who had canvassed that the joint report filed by Team-I and Team-II reflected that the petitioner had not clicked the "*Submit Button*" at 14.00 hrs. due to which, their documents were saved on the server of the respondent No.1/ONGC, but they could not be opened.

21. Observing that the whole purpose of calling for a joint report from Team-I and Team-II was to understand its import after interacting with the officers of both the Teams and finding that none of the officers from FSL,

Rohini were present on 16.04.2018, Dr. Virendra Singh, Assistant Director (Document/ CFU), leading Team-I, and Dr. Jagjeet Singh, Sr. Scientific Officer (Document/CFU), leading Team-II, were directed to remain present on the next date, i.e. 19.4.2018.

22. On 19.4.2018, the leaders of Team-I and Team-II were present and the Court as also learned counsels for the parties had the occasion to interact with them to understand the nuances of the technical terms used in the Reports. The experts had furnished necessary clarifications in respect of their initial Reports and the Joint Report filed by them subsequently. Thereafter, arguments were addressed by learned counsels for the parties on 19.4.2018, 24.4.2018 and 26.4.2018. We had the benefit of hearing arguments advanced by Mr. Harish N. Salve, Mr. Mukul Rohtagi, Dr. A. M. Singhvi and Mr. Rajiv Nayyar, Senior Advocates on behalf of the petitioner, Mr. Sukumar Pattjoshi, Senior Advocate on behalf of the respondent No.1/ONGC and Mr.C.A. Sundaram and Mr. Darpan Wadhwa, Senior Advocates on behalf of the applicant/intervener.

23. The gravamen of the arguments addressed on behalf of the petitioner is that the report submitted by the FSL bears out the fact that all the eight documents uploaded by the petitioner's officer individually at different times upon a fresh digital signature being put after the '*Submit Button*', had got saved in the system of the respondent No.1/ONGC on 05.02.2018, prior to 14:00:00 hrs., at a common time, at 13:58:56 hrs., which fact could be co-related from the activity recorded on the server of the respondent No.1/ONGC; that all the documents had been digitally signed and a combined digital signature of the said documents occurs on pressing of the '*Submit Button*', a process that has been explained in the "*e-procurement*"

manual of the ONGC; that the joint report of the FSL states that two activities were recorded in the petitioner's firewall system at 13:59:02 hrs. and 13:59:19 hrs., which indicates that the petitioner had pressed the '*Submit Button*' again. However, the report had noted that there was no corresponding activity recorded on the server of the respondent No.1/ONGC either relating to the petitioner, or any other bidder between 13:58:59 hrs to 14:00:00 hrs. It was contended that admittedly, the portal of the respondent No.1/ONGC was not being used exclusively for the subject tender, but was also being used contemporaneously for other tendering activities and therefore, it would be too stark a conclusion that no activity whatsoever was recorded on its server between 13:58:59 hrs. to 14:00:00 hrs.

24. The argument that there was an apparent time lag of about one minute between pressing of the '*Submit Button*' by the petitioner and recording of said submission in the server of the respondent No.1/ONGC was sought to be fortified by learned counsels for the petitioner by referring to one of the other bidders ('V171825'), who had submitted its bid by pressing the '*Submit Button*' at 13:46:15 hrs. whereas the report submitted by FSL showed the activity of the said bidder was recorded in the server of the ONGC only at 13:47:08 hrs. In this context, reliance was also sought to be placed on the submission made by the experts from FSL, Delhi, who had appeared in court on 19.4.2018 and stated that there was a passivity for fleeting seconds in ONGC's server, to urge that the petitioner could not be blamed for the same.

25. Lastly, reference was made on behalf of the petitioner to the provision of Sections 13(1) and (2)(a)(i) of the Information Technology Act, 2000 (in short '**I.T. Act**'), which prescribes the time and place of dispatch and receipt of electronic record to canvass that fundamental principle to be kept in mind

in a case like the present one is to identify the stage at which it can be said that the electronic record once made by the originator, was beyond recall by him having entered the designated computer resource of the addressee, which event in the instant case, had taken place prior to the submit deadline, i.e., 14:00 hrs., on 05.02.2018. An analogy was also sought to be drawn from Section 27 of the General Clauses Act, 1897, that explains the manner of service by post and prescribes that a service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the documents required to be served by post and unless it is proved to the contrary, it must be deemed to have been effected at the time when the letter would be delivered in the ordinary course of post. Drawing a parallel from the said provision, it was argued on behalf of the petitioner that once its officer had pressed the "*Submit Button*", before the deadline, irrespective of the claim of the respondent No.1/ONGC that the petitioner's Bid was not received in its server by 14:00 hrs., by no means could the petitioner have retrieved/altered/modified it thereafter and therefore, its bid ought to have been treated as valid.

26. The aforesaid submission was however countered by Mr. Sukumar Pattjoshi, Senior Advocate appearing for the respondent No.1/ONGC, who laid much stress on the fact that ONGC uses standard software 'SAP SRM' for its 'e-Tender' process, developed by SAP AG Germany for 'e-procurement' (e-tendering), which is used by several other public sector undertakings and in the corporate sector; that the said site was set up and running since the year 2005 and 5,000 tenders have been floated by ONGC on the same website, which had invited 15,000 successful responses from

various vendors including global vendors. Therefore, there was nothing wrong with ONGC's system.

27. Learned counsel for the respondent No.1/ONGC explained that the ONGC 'SRM' system has two gateways and the access to a vendor is through either a gateway described as "srmapp01" or the other one, described as "srpci". He stated that merely because there was inactivity in "srmapp01", does not mean that the system had any load problem. The reason therefor is that the activity reduces near the submission deadline, as all the vendors, as a matter of practice, would have submitted their responses well in time. Learned counsel alluded to the records submitted by FSL to point out that the other gateway, "srpci" had shown activities on 05.2.2018, during the period from 13:57:33 hrs. to 14:03:43 hrs., which itself demonstrates that the ONGC system was up and running. It was stated that even on "srpci", no activity was recorded between 13:57:33 hrs. to 13:58:33 hrs. and again between 14:00:19 hrs. to 14:02:40 hrs., which is a normal phenomenon. Similarly, lack of any activity on "srmapp01" from 13:58:56 hrs. to 14:00:09 hrs., was explained by stating that no bidder was accessing the server of the ONGC during non-peak hours.

28. It was further stated on behalf of the respondent No.1/ONGC that the data submitted by the FSL, Rohini indicates that there were 266 entries in the firewall log report of the petitioner, on 05.02.2018, from 09:38:32 hrs. to 14:10:57 hrs. but these logs do not reveal the various nature of activities that were actually carried out by the petitioner and therefore, no firm conclusion can be arrived at that there was completeness in the uploading of all the files, more so, when the tender floated by the ONGC does not specify the number

of files required to be uploaded by the bidder as a part of the Technical Bid and the Price Bid.

29. It was also submitted on behalf of the respondent No.1/ONGC that in order to submit the Bid, a vendor is required to create a login ID and generate a password, pursuant to which a unique vendor ID is generated, which enables the system to identify the vendor. Once the unique ID is created, it remains with the vendor for all future purposes and in the instant case, the petitioner was assigned a vendor ID "V153581". The documents are uploaded by the vendor in the area demarcated for it within the server of the ONGC to which it does not have any right or access. This is to ensure that the Bid submitted by the vendor on the ONGC website remains confidential. The said procedure is analogous to a physical Bid created and kept in an envelope by a vendor at its end and till the vendor drops the said envelope in the tender box, it remains within its control. Similarly, only after the status of the Bid uploaded by the petitioner in the designated area of the server of the ONGC was "*saved*" and then, a response was received that it had been "*submitted*", can the said bid be treated as complete in all respects, which process in this case had remained incomplete. Therefore, the petitioner had been rightly disqualified by the respondent No.1/ONGC from participating in the subject Tender.

30. Mr. C.A. Sundaram, learned Senior Advocate, who had appeared for the applicant/intervener, Afcons Infrastructure Ltd. in CM APPL. 7205/2018, had cited the judgment of the Supreme Court in <u>Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and Anr.</u> reported as **(2016) 16 SCC 818**, to state that being an eligible bidder, the applicant/intervener has a *locus standi* for being impleaded and heard in the present petition. Firstly, he

endorsed the submissions made by learned counsel for the respondent No.1/ONGC to oppose the petition. Learned counsel had strenuously urged that the averments made by the petitioner in para 16 of the writ petition run contrary to the e-mail dated 05.02.2018 that was addressed to the ONGC at 1:20 PM. While the petitioner has averred in para 16 of the petition that its officer had commenced uploading the Commercial Bid documents on the system of the ONGC at about 13:47:33 hours on 05.02.2018 because such Bids are filed at the last moment to preserve confidentiality and also due to the fact that latest amendment by the ONGC to the tender specifications carried out on 30.01.2018, which had forced it to revisit its tender specifications and coordinate with its suppliers, it is not understandable as to why it had asked for extension of time till 17:00 hours, in the e-mail dated 05.02.2018 sent to the ONGC at 1:20 PM, claiming *"slow uploading of documents on ONGC website due to heavy internet traffic"*. It was further argued that no inference in favour of the petitioner can be drawn from the alleged passivity of the server of the respondent No.1/ONGC as there is nothing on record to prove that there was any technical malfunctioning in ONGC's system. To buttress his argument that disqualification of the petitioner by the respondent No.1/ONGC on the ground that it had failed to upload its Techno-Commercial Bid on the e-bidding portal of the respondent No.1/ONGC on or before the deadline, was a justified decision and warrants no interference by the Court, the decision of the Supreme Court in the case of Maharashtra Housing Development Authority vs. Shapoorji Pallonji and Company Private Limited and Others. reported as **(2018) 3 SCC 13**, was cited.

31. In his rejoinder arguments, Mr. Rohtagi, learned Senior Advocate appearing for the petitioner had disputed the submission of the respondent No.1/ONGC that there was a malfunctioning of the petitioner's server or that appearance of a common time for all the eight documents uploaded by the petitioner is a result of its officer having pressed the *"Saved Button"* at one go. He explained that the *"Saved Button"* was pressed at the time of uploading each document and not commonly for all the documents and that the petitioner had uploaded and saved eight digitally signed documents in a sequence at different times starting at 13:47:33 hrs. and ending at 13:58:43 hrs., which would be apparent from the screenshot of the web portal of the ONGC at page 668, that forms a part of the report dated 19.03.2018 submitted by Team-I that had visited the petitioner's premises. It was contended that on pressing the *"Submit Button"*, all the documents were collectively digitally signed, as a result of which, the system of the respondent No.1/ONGC shows a common time of 13:58:56 hours in respect of all the eight documents at page 656, which forms a part of the report of the Team-II that had visited the premises of the respondent No.1/ONGC.

32. Learned counsel for the petitioner vigorously argued that the very fact that the eight documents with the changed time were transmitted before the submit deadline and are available in the area demarcated for the ONGC within its own server, amply demonstrates the fact that the bid process had been completed by the petitioner in all respects by 14:00 hrs. on 05.02.2018 and on uploading all the documents, there was no step prescribed by the respondent No.1/ONGC in its manual that required pressing of the *"Saved Button"*. The only step that was left to be taken was to press the *"Submit Button"*, that the petitioner had done, which is borne out from the joint report

dated 12.04.2018 filed by Team-I and Team-II of FSL, Rohini, Delhi, that states that two activities were recorded in the firewall server log of the petitioner on 05.02.2018, at 13:59:02 and 13:59:19 hours, before the cut off time of 14:00 hrs.

33. Learned counsel for the petitioner further stated that all the eight documents referred to above are part of the Financial Bid of the petitioner and once encrypted, they are openable after the petitioner's Technical Bid is opened; that the response created by the petitioner on the e-tender website of the respondent No.1/ONGC, shows that the said documents stood travelled to ONGC's area at 13:58:43 hours at the petitioner's end and were lodged at 13:58:56 hours at the end of the respondent No.1/ONGC, just before the deadline. The judgment in the case of Shapoorji Pallonji (supra) relied on by learned counsel for the applicant/intervener was sought to be distinguished and it was submitted that it had no application to the facts of the case in hand. Arguments were concluded by stating that the balance of convenience lies in favour of the petitioner, who had no advantage to gain by lodging the Bid belatedly and nor would any prejudice be caused to the respondent No.1/ONGC or any other bidder if the petitioner is permitted to participate in the bidding process.

34. We have heard the arguments advanced by learned counsels for the parties, perused the records and carefully gone through the three set of reports submitted by the Computer Forensic Experts of FSL, Rohini, Delhi.

35. It may be noted at the outset that due to the urgent nature of the relief prayed for in the present petition, it was agreed by the parties that completing of the pleadings will be dispensed with. Instead, parties would proceed to address arguments immediately on receipt of the reports prepared and

submitted by the experts from the FSL, Rohini, Delhi. All the same, both sides were given an opportunity to file their written submissions, which they did, while exchanging copies with each other.

36. In the first instance, it is considered expedient to refer to the relevant terms and conditions of the NIT dated 24.11.2016 issued by the respondent No.1/ONGC alongwith the instructions to the bidders and the general conditions incorporated therein. The records reveal that the date and time of submission of the bids on the ONGC's e-bid engine for both, the Techno-Commercial and the Price Bid was changed from time to time and lastly fixed by the respondent No.1/ONGC on 22.01.2018, as 05.02.2018, at 14:00:00 hours (IST). The tender documents were to be uploaded by the bidders on to the ONGC's e-bidding portal at http://etender.ongc.co.in. In Part-I of the NIT that relates to the instructions issued to bidders, para 8 deals with the amendment/addendum of bidding documents. Para 8.3 is relevant and reproduced hereinbelow:-

> *"**8.3** In order to afford prospective bidders reasonable time in which to take the amendment/addendum into account in preparing their bids, the company may allow two weeks time to bidders for submission of bids after issuance of such amendment/addendum."*

37. The aforesaid clause is adverted to because the petitioner has taken a plea that the respondent No.1/ONGC had amended the tender specifications belatedly on 30.01.2018, due to which it had to revisit its tender specifications and coordinate with its suppliers and all this took time. Given the fact that para 8.3 contemplates that in the event of any amendment/addendum to the Bid, ONGC could extend the time for the bidders to submit their bids upto two weeks, and such a timeline was

extended by ONGC for various reasons on 18 occasions in the past, the petitioner had a *bonafide* expectation that the respondent No.1/ONGC would extend the deadline this time too, which it did not, thereby placing it in a precarious position.

38. Para 10 of the NIT explains the process of the bidding system, which has already been elaborated in para 5 hereinabove. Para 18 relates to the submission of bids. For the purpose of this petition, Para 18.1.1 and 18.1.4 are relevant and are reproduced hereinbelow for ready reference:-

> *"**18.1.1** The bid along with all appendices and copies of documents should be submitted in eform only through ONGC's e-Procurement System duly digitally signed by authorized representative of the bidding company. Power of attorney for the signatory, issued by the biding company should be submitted along with other documents in physical form. However, the documents as mentioned at para 10.0 should necessarily be submitted in physical form in sealed envelope superscribed as "Physical documents against eprocurement Tender Number ……., opened on ………", To be opened by only Tender Opening Officers at 1500 Hrs, on……….." [As indicated in "Invitation to Bid", the documents should reach to the purchaser's office before 1400 Hrs. of the 7th calendar day after opening of bids submitted through the e-bidding portal. Hence, bidder should indicate the date falling on 7th calendar day after opening of bids submitted through the e-bidding portal]."*
>
> *The price bids submitted in physical form against e-procurement tenders shall not be given any cognizance.*
>
> *18.1.2 XXX XXX XXX*
>
> *18.1.3 XXX XXX XXX*
>
> ***18.1.4** The duly completed bid with no system error message can be submitted in SRM any time before the submission deadline is reached. The bidder shall also be permitted to make change in his bid and re-submit the same in SRM till the*

submission dead line. The final submitted version of bid only shall be considered by ONGC.
No bid can be submitted after the submission dead line is reached. The system time that will be displayed on e-procurement web page shall decide the submission dead line. Bidders are advised in their own interest to ensure that bid is uploaded in system well before closing date and time of the bid."

39. Para 19 that deals with the deadline for submission of bids is relevant and states as follows:-

*"**19.1** Bids must be submitted before dead line specified in e-procurement site.*
***19.2** The Company may at its discretion extend the deadline for the submission of Bids by amending the Bidding Documents in accordance with clause 8.0 in which case all rights and obligation of the Company and Bidders previously subject to the deadline will thereafter be subject to the deadline as extended.*
19.3 XXX XXX XXX"

40. Coming lastly to the stipulations in relation to late bids, Para 20 states as follows:-

*"**20.1** Any bid received by the Company after the deadline for submission of Bids prescribed by the Company pursuant to Clause 19.0 will be rejected and will not be opened for further consideration.*
20.2 Deleted"

41. As the dispute before us hinges on the transmission and storage of information in electronic form, it is necessary to refer to the Information Technology Act that was notified on 09.06.2000. The statement of objects and reasons for introducing the Bill proposing the legislation takes note of the new communication systems and observes that digital technology has

made dramatic changes in the manner in which business is being transacted. Highlighting the fact that the information stored in electronic form has several advantages, namely, it is cheaper, easier to store, retrieve and speedier to communicate, it was observed that the public at large is still reluctant to conduct business or conclude any transaction in the electronic form, in the absence of an appropriate legal framework. Acknowledging that the two principal hurdles standing in the way of facilitating electronic commerce and electronic governance are the requirements as to writing and signature for recognition and noticing the lacunae in the existing legal provisions in this regard, the need for switching over from traditional paper based transactions to electronic commerce, was underscored.

42. In the above context, reference was made in the statement of objects and reasons to the United Nations Commission on International Trade Law (UNCITRAL) that had adopted the Model Law on Electronic Commerce in 1996 and the General Assembly on United Nations Resolution No.51/162 dated 30.01.1997, which recommended that at the time of enactment/revision of their laws, all States should favourably consider the said Model Law, which provides for equal legal treatment of users of electronic communication and paper based communication. The Legislature also recognized the need to bring in suitable consequential amendments in the existing laws of the country and facilitate e-commerce by providing legal recognition of electronic records and digital signatures, with the object of concluding contracts and creating rights and obligations through the electronic medium.

43. It can be seen from the above that the underlying object of the I.T. Act is to recognize transactions carried out by means of electric data interchange and electronic communication instead of the traditional paper based methods

of communication and storage of information. The Act provides for a regulatory regime to supervise Certifying Authorities issuing Digital Signature Certificates. It enables conclusion of contracts and creation of rights and obligations through the electronic medium and provides for civil and criminal liabilities in the event of contravention of the provisions. To meet the said needs, amendments have also been incorporated in the Indian Penal Code and the Indian Evidence Act, 1872, wherever the relevant provisions deal with the offences relating to documents and paper based transactions. The relevant provisions of the I.T. Act for purposes of deciding the instant case are as follows:-

> *"**2(za)** 'originator' means a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;"*

44. Chapter IV of the I.T. Act deals with attribution, acknowledgement and dispatch of electronic records. Reliance has been placed by the petitioner on Section 13 that falls under Chapter IV and particularly deals with the time and place of despatch and receipt of electronic record, is material. The relevant extract of Section 13 is as follows:-

> ***13. Time and place of despatch and receipt of electronic record.*** *-*
> *(1) Save as otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters a computer resource outside the control of the originator.*
> *(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:-*
>> *(a) if the addressee has designated a computer resource for the purpose of receiving electronic records,-*

(i) receipt occurs at the time when the electronic record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(3) XXX XXX XXX

(4) XXX XXX XXX

(5) XXX XXX XXX"

45. Reverting to the case in hand, the dispute raised in this petition lies in a narrow compass. This Court is required to decide as to whether the petitioner's bid had entered the e-tender website of the respondent No.1/ONGC before the submit deadline, i.e., 14:00 hrs. on 05.02.2018 and if so, would it be entitled to participate in the bidding process. As noted above, on the very first date of hearing, the dispute was crystallized and with the consent of the parties, the Director, FSL, Rohini, Delhi was requested to depute Computer Forensic Experts to examine the systems of both the parties and submit their reports separately, indicating *inter alia* the exact time when the last file was uploaded by the petitioner on to the e-bidding portal of the respondent No.1/ONGC, on 05.02.2018 and further state as to the number of occasions when the *"Submit Button"* was clicked by the petitioner on the said date and if so clicked, specify the timing.

46. As recorded hereinabove, after the two Expert Teams had visited the premises of the petitioner at Mumbai and of the respondent No.1/ONGC at Delhi, they had submitted two sets of reports alongwith the relevant records,

one by Team-I and the other by Team-II. On reviewing the firewall log server of the petitioner pertaining to the ONGC e-tender server, by logging in with its vender ID *"V153581"* and password, the screenshots of the stored details of the files saved in the petitioner's login section through ONGC's e-tender website were captured and saved by Team-I. On reviewing the said data, Team-I concluded in its report that the last file was uploaded on the website of the respondent No.1/ONGC on 05.02.2018, at 13:58:43 hours and the status of the bid is shown as *"saved"* in place of *"submitted"* in the login account of the petitioner, maintained in the system of the ONGC. Further, Team-I noted that there was some activity recorded in the firewall server log of the petitioner in the ONGC's server at 13:59:02 and 13:59:19 hours on 05.02.2018.

47. Coming to Team-II that had visited the premises of the respondent No.1/ONGC at Delhi, on examining the security audit logs of ONGC's servers, 'srpci' and 'srmapp01' (described by learned counsel for the respondent No.1/ONGC as the two gateways made available to the bidders) and the response status of the petitioner, who was assigned vender ID, *"V153581"*, on the ONGC's website, it was observed that on 05.02.2018, between 13:00 to 14:00 hours, the petitioner had logged in thrice on ONGC's server, 'srmapp01' at 13:04:07, 13:44:49 and 13:45:22 hours. Further, in the third logged session, the petitioner had performed one activity at 13:58:46 hours and entry of eight attached files pertaining to the petitioner were found saved at 13:58:56 hours, as displayed in the time column of the procurement framework of ONGC's website. For purposes of reconstructing the entire bidding process, Team-II had also undertaken a dummy filing of the e-tender. The report of Team-II concluded by stating that the attached files of

the petitioner were saved on the website of the respondent No.1/ONGC at 13:58:56 hours on 05.02.2018 but it was not possible to correlate the number of activities performed by the petitioner after saving the attachments with the audit security logs of the server of the respondent No.1/ONGC, for the reason that no activity was recorded in ONGC's server, 'srmapp01', relating to the petitioner, between 13:58:46 hours to 14:00:50 hours as also by any other vender between 13:58:59 hours to 14:00:07 hours, on 05.02.2018.

48. Upon going through the reports of Team I and Team II, there appeared some ambiguity in respect of the second limb of the query posed in para 7 of the order dated 15.02.2018, relating to the number of occasions when the *"Submit Button"* was clicked by the petitioner on 05.02.2018, before the deadline and if so, specify the timing. This had caused us to direct Team-I and Team-II to correlate their data and submit a joint report which they did vide their common report dated 12.04.2018, reproduced in para 17 above. The observations of Team-I and Team-II in their respective reports were considered and correlated by the experts with the activities recorded on the server of the petitioner and the system of the respondent No.1/ONGC relating to the petitioner's bid before 14:00 hrs., on 05.02.2018. What emerges from the joint report is that the last file was uploaded by the petitioner in the firewall server log at 13:58:33 hours, which has been reflected on the e-tender website of the respondent No.1/ONGC at 13:58:43 hours. In the ONGC's server log, the last file logged in by the petitioner was recorded at 13:58:46 hours, which is registered on the procurement framework of the ONGC, at 13:58:56 hours.

49. Coming next to the activity, if any, after the last file was uploaded by the petitioner at 13:58:46 hrs. and before 14:00:00 hours, the joint report

clearly states that Team I had noted that two activities were recorded in the firewall server log of the petitioner, firstly at 13:59:02 hours and secondly, at 13:59:19 hours, whereas Team-II has stated that after 13:58:56 hours, no activity relating to the petitioner was recorded in the ONGC's server log as well as its procurement framework on 05.02.2018. The joint report concludes by stating that no activities relating to the petitioner were recorded on the ONGC's server, 'srmapp01' between 13:58:46 to 14:00:00 hours and nor was any activity by any other vender recorded between 13:58:59 to 14:00:00 hours on 05.02.2018. However, two activities of the petitioner were undoubtedly recorded in the firewall logs of the petitioner's server after saving the eight attachments, on ONGC's server before the cut off time of 14:00:00 hours, and recorded at 13:59:02 hours and 13:59:19 hours, on 05.02.2018.

50. The contention of the learned counsel for the petitioner is that after the petitioner had clicked the *"Submit Button"* to submit its bid, there ought to have appeared a pop-up on the screen for confirmation and the vender was required to choose the digital signatures to be used and click on "ok". Once the petitioner's documents were successfully signed digitally and saved and the status on the screen had shown so, since the message that came on the screen was that *"documents were successfully signed digitally",* then the status of its bid ought to have changed from *"saved"* to *"submitted"*, which did not happen despite the officer of the petitioner pressing the *"Submit Button"* twice.

51. On correlating the reports of the two technical Teams, it transpires that though no activity was recorded on the server of the respondent No.1/ONGC and its procurement framework after 13:58:56 hours, on 05.02.2018, two

distinct activities were duly recorded on the petitioner's firewall server log on the same day, at 13:59:02 and 13:59:19 hours, after the last file was uploaded on the server of the ONGC at 13:58:56 hours, which activities were recorded well before the deadline of 14:00:00 hours. In our opinion, we would be entering into the realm of speculation if the contention of the respondent No.1/ONGC is accepted that after the last file had been uploaded, besides clicking the *"Submit Button"*, the following activities could have performed by the petitioner by using the "edit mode":-

(i) Read only (Abort)
(ii) Check
(iii) Visit to Technical Documents
(iv) Close
(v) Save
(vi) Delete
(vii) Load remaining files

52. Even on applying simple logic, we do not find any force in the aforesaid submission. After the petitioner had virtually reached the last step in the bidding process and had uploaded all the eight documents, which formed part of its Financial Bid and had signed them digitally so that they had got saved on the e-portal of the respondent No.1/ONGC at 13:58:56 hours, knowing very well that it was running against time and had just about one minute left before the submit deadline, instead of taking the last step of clicking the *"Submit Button"*, no reasonable person would be expected to take a step back and go to the "edit mode" to undertake any of the seven activities cited above. On coming so close to the deadline, the next plausible course of action was to straightaway click the *"Submit Button"*. In this background, the report of FSL to the effect that two activities were duly

recorded in the petitioner's firewall server log, one at 13:59:02 and the other at 13:59:19, on 05.02.2018, assumes significance and cannot be overlooked.

53. It is noteworthy that when the officers leading Team-I and Team-II were summoned by the Court to understand the complexity of the matter relating to transmission and storage of electronic data and pointed queries were posed to them as to the conceivable reason for the non-reflection of the aforesaid two activities in the server of the ONGC, they had stated that this could have happened for various reasons, one of them being that the server of the respondent No.1/ONGC could have remained in a passive mode for a fraction of a second or so, meaning thereby that no activity was recorded in that duration and once the activity did commence, a time lag of few seconds could have taken to get the server activated. The other reason could be that the server of the respondent No.1/ONGC was passive as there was simply no activity at that point in time.

54. To highlight the passivity of the server of the respondent No.1/ONGC at various points in time on 05.02.2018, learned counsel for the petitioner had drawn the attention of the Court to the records relating to the logs procured from the server of the respondent No.1/ONGC and enclosed with the report of Team-II, as Annexure A, which reflect that no activity was recorded in the gateway, 'srpci' between 13:13:03 hrs. to 13:13:24 hrs. and thereafter, till 13:13:49 hrs. (page 641). Similarly, there was a gap of one minute two seconds between 13:13:10 hrs. and 13:14:12 hrs. on the other gateway, 'srmapp01' on the ONGC's server, on 05.02.2018. A gap of one minute nineteen seconds was also recorded on 'srmapp01', between 13:47:22 hrs. to 13:48:41 hrs. (page 651).

55. As noted above, Section 13(1) of the I.T. Act declares that despatch of an electronic record occurs when it enters a computer resource outside the control of the originator. Sub-section (2)(a)(i) further clarifies that unless agreed otherwise, for determining the time of receipt of an electronic record in a situation where a computer resource has been designated by the addressee, receipt occurs when the said record enters the designated computer resource. The originator in the present case is none other than the petitioner, who was required to transmit its data through an electronic message to the computer resource of the addressee, i.e., respondent No.1/ONGC. There is no dispute about the fact that the respondent No.1/ONGC had designated a computer resource and carved out areas in its server that were demarcated for each vender, who was assigned an ID and a password to access the said area and read any file there. In the very same server is an area that was carved out exclusively for the respondent No.1/ONGC, where the Bid was ultimately required to be transmitted by the petitioner and other bidders. Till the submit deadline, i.e. till 14:00:00 hours on 05.02.2018, the respondent No.1/ONGC could not have had any access to the area demarcated for the petitioner or any other bidders, but after close of the bids, neither the petitioner, nor any other bidders could access the area where their electronic data was stored on the server of the respondent No.1/ONGC. After the deadline, only a designated person of the respondent No.1/ONGC was authorized to have reading access to the said bids.

56. The joint report of the FSL dated 12.04.2018, clearly states that on 05.02.2018, eight documents were uploaded by the petitioner between 13:47:33 hrs. to 13:58:43 hrs. on the e-portal of the ONGC and this sequence of events is duly reflected on its framework that shows a common time of

13:58:56 hours in respect of all the said documents. Therefore, the steps contemplated in Sections 13(1) and (2)(a)(i) of the Act stood concluded on the electronic record of the petitioner (originator) entering the server of the respondent No.1/ONGC (addressee) at 13:58:56 hours. On expiry of 64 seconds reckoned from 13:58:56 hours, i.e., on the system time displaying 14:00:00 hours on the e-procurement webpage of the ONGC, the eight documents in question, which the petitioner states relate to its Price Bid, were outside its control, having travelled electronically into the area demarcated for the respondent No.1/ONGC in its server. Once the said electronic data that is still available and lying encrypted, is directed to be decrypted by the respondent No.1/ONGC and retrieved, then the petitioner's bid will be available for being considered alongwith the other bidders.

57. Given the aforesaid narrative of the facts and circumstances where two distinct activities were recorded by the FSL Teams in the petitioner's area demarcated on the server of the respondent No.1/ONGC, one at 13:59:02 and the other at 13:59:19 hours on 05.02.2018, the version of the petitioner rings true that the said two activities that had taken place at the nick of the time, just before the submit deadline, i.e., 14:00:00 hours on 05.02.2018, were nothing but the last and final step of pressing the *"Submit Button"*, which for some technical reason, did not register in the server log of the respondent No.1/ONGC.

58. We are of the opinion that the judgment in the case of Shapoorji Pallonji (supra), relied on by learned counsel for the applicant/intervener, Afcons Infrastructure Ltd. is distinguishable on facts. The said case also relates to transmission and storage of electronic data uploaded by the respondent/bidder on the website of the appellant, who had floated a tender.

The version of the respondent/writ petitioner was that though it had uploaded its Technical and Financial Bids on the website of the appellant therein at 12:16 hours on 27.07.2017, which was prior to the cut off time of 13:00 hours, it could not get an acknowledgement of the bid having been submitted, despite having pressed the *"Freeze Button"*. The bidder was referred to the NIC that had designed and maintained the e-portal on which the bids were submitted. NIC had opined that there was no technical glitch in the system and because the respondent/writ petitioner had omitted to press the *"Freeze Button"*, its bid was defective. Aggrieved thereby, the respondent/writ petitioner had filed a writ petition before the High Court of Bombay. Vide judgment dated 28.09.2017, the writ petition was disposed of with directions issued to NIC to access the files containing the bid documents of the bidder and transfer/make them available to the petitioner for purposes of decrypting and the said bid be considered alongwith others in the fray.

59. Aggrieved by the said decision, the petitioner in the captioned case had approached the Supreme Court that had identified two issues for a decision. Firstly, whether the bid documents that were uploaded by the respondent/writ petitioner could be retrieved or were irretrievably lost. Secondly, assuming that the bid documents could be retrieved, whether the first respondent was at all entitled to consideration of the bid submitted by it. On directions, NIC had filed an affidavit before the Supreme Court stating *inter alia* that the data uploaded by the respondent/writ petitioner was irretrievably lost and could not be retrieved under any circumstances and it had reiterated its stand that the said bid was invalid since the *"Freeze Button"*, which alone would have completed the bid process, was not pressed. Given the aforesaid position, the Supreme Court concluded that when NIC that had developed the portal, had

stated that retrieval of documents even jointly with the petitioner was not feasible and further, in the absence of any glitch in the technology that would strongly indicate that the bid submitted by the respondent/writ petitioner was a valid bid, it could not be granted a second chance by virtue of the orders passed by the High Court.

60. The fact situation in the instant case is entirely different. The expert agency, namely, FSL has clearly stated in its reports that after clicking the *"Saved Button"*, the area demarcated for the petitioner in the server of the respondent No.1/ONGC had recorded two activities before the cut off time, at 13:59:02 hrs. and 13:58:56 hrs. The inevitable conclusion is that the said two activities were a step in aid of pressing the *"Submit Button"*. Absence of any corresponding activity recorded in the server log of the respondent No.1/ONGC, cannot be attributed to the petitioner. Once the data was put in the course of transmission by the petitioner to the designated computer resource of the respondent No.1/ONGC, as contemplated in Section 13 of the I.T. Act, and it had lost control over the said data, then drawing a parallel with Section 27 of the General Clauses Act or viewing the matter from the prism of Section 4 of the Contract Act, 1872, that determines when a communication of a proposal is complete as against the proposer and declares that it is complete when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it, the acceptance in this case would have to be treated as complete in all respects as against the petitioner.

61. Thereafter, the petitioner has no role to play insofar the lack of timely response of generating an acknowledgment within the system of the respondent No.1/ONGC is concerned, which glitch could have occurred for

several reasons, as was stated before us by the experts. Without going into the reasons for the occurrence of the said technical glitch, suffice it is to note that there were two perceptible activities recorded in the area demarcated for the petitioner in the server of the respondent No.1/ONGC that would strongly indicate that the petitioner had managed to beat the clock and had submitted its Techno-Commercial Bid just before the submit deadline, i.e., 14:00:00 hours, on 05.02.2018.

62. On a conspectus of the discussion recorded hereinabove, the present petition succeeds. We are of the opinion that the petitioner had submitted its Bid within the deadline. Since we have noted above that the eight attached files of the petitioner have been encrypted and *"held"* in the security audit logs of the respondent No.1/ONGC, it is now for the ONGC to decrypt the said files. On the respondent No.1/ONGC retrieving the Bid of the petitioner, it shall be permitted to participate in bidding process alongwith the other bidders.

63. The present petition is accordingly allowed and disposed of on the above terms, while leaving the parties to bear their own expenses.

(HIMA KOHLI)
JUDGE

(PRATIBHA RANI)
JUDGE

MAY 25, 2018
ap/rkb