IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17378 of 2018

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Subhash Kumar Singh son of Shri Ramautar Singh Resident of at Hawaspur, P.O. Bihat, District-Begusarai-851135.

... ... Petitioner/s

Versus

1. The Bharat Petroleum Corporation Ltd.
2. The General Manager Bharat Petroleum Corporation Ltd. Regional Office, Kolkata.
3. The Chief Manager, Transport, Bharat Petroleum Corporation Ltd. Regional Office, Kolkata.
4. The Territory Manager Bharat Petroleum Corporation Ltd. Barauni, Begusarai.
5. The Depot In Charge, Bharat Petroleum Corporation Ltd., Barauni, Begusarai.

... ... Respondent/s

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Appearance :
For the Petitioner/s : Mr.Gautam Kumar Kejriwal
For the Respondent/s : Mr.Sanjay Singh

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
C.A.V. JUDGMENT
Date : 30.05.2019

The present writ petition has been filed for quashing the email message dated 24.08.2018, whereby the petitioner was intimated about the rejection of his technical bid, which was submitted by the petitioner for award of contract of transportation of petroleum products belonging to the respondent Bharat Petroleum Corporation Limited (hereinafter referred to as the 'BPCL'). The petitioner has further prayed for declaring the reasons assigned by the respondent BPCL in the impugned email message for rejecting the petitioner's technical bid to be highly technical and, therefore, unsustainable in the eyes of law.

The brief facts of the case, as per the petitioner herein, are that the respondent Corporation had published a notice inviting tender seeking applications from the intending applicants for award of contract of transportation of Bulk Product, Ex. Barauni Terminal, of the respondent BPCL through tank lorries. The petitioner had applied by submitting the application along with all the required documents on 16.12.2017, which was submitted online and all the documents were scanned and enclosed with the said application as attachments. The petitioner is stated to have offered a total number of 21 tank lorries in his tender. It is submitted that out of the 21 tank lorries offered by the petitioner, as on the date of submissions of bids, before the respondent BPCL, 17 of such tank lorries were the once which were initially attached with the Indian Oil Corporation Limited but later detached. In this regard, it has been stated that earlier the petitioner had been awarded similar contract by Indian Oil Corporation for transportation of Bulk Petroleum Products from Barauni Terminal where the petitioner had supplied 39 tank lorries and the said contract was initially for a period of two years whereafter the same was extended from time to time and lastly it was extended up to 28.02.2018 vide letter dated 29.01.2018, however, as far as the letter of extensions of the aforesaid contract by the Indian Oil Corporation Limited is concerned, the same pertains to only 13 tank lorries out of the initially offered 39 tank lorries, hence 26 tank lorries had been taken out by the petitioner from the aforesaid contract with the Indian Oil Corporation. In nutshell, the submission of the learned counsel for the petitioner is that out of the 21 tank lorries, offered by the petitioner to the BPCL, 17 tank lorries belong to the aforesaid group of 26 tank lorries which had been withdrawn by the petitioner from the contract with Indian Oil Corporation prior to submission of the present tender with the BPCL and four other tank lorries were fresh vehicles. Nonetheless, the respondent BPCL had rejected the technical bid of the petitioner without assigning any reason by an email message dated 24.08.2018, whereafter the petitioner had requested the respondent BPCL to furnish the reason for rejection of the technical bid of the petitioner whereupon the respondent BPCL had forwarded the scanned email message whereby it was stated that:- As per evaluation committee’s report, TL’s rejected as per attachment 8 and 9 of NIT and total number of qualified TL’s became less than 5 T/Ls (as per NIT clause no. 3 of page-6) hence technically rejected as per point no. Kc page no. 17 i.e. " number of tank lorry offered is not in line with the tender requirement".

The learned counsel for the petitioner has submitted that the petitioner has not committed any error nor the petitioner is in default in terms of the requirements of the notice inviting tender inasmuch as the petitioner has offered a total number of 21 tank lorries out of which four tank lorries are fresh and 17 tank lorries, which were earlier attached with Indian Oil Corporation, have been detached with effect from 15.12.2017. It is further submitted that the fault is on the part of the Indian Oil Corporation and its authorities in not deleting the aforesaid 26 tank lorries, which included 17 such tank lorries which have been offered to the respondent BPCL, from their initial website wherein the sets of the said tank lorries still might have been reflected to be working for the Indian Oil Corporation. It is stated that technical bid of the petitioner has been rejected on hyper technicalities, hence bid of the petitioner is required to be considered afresh. The petitioner has also filed a supplementary affidavit annexing a certificate dated 31.08.2018 issued by the Indian Oil Corporation Limited stating therein that 26 tank trucks of the petitioner herein, registration number whereof are mentioned therein, have not been utilized at Barauni Terminal in between the period 16.12.2017 to 28.02.2018 i.e. during the tender extension period. In fact no objection certificate dated 05.09.2018, issued by the Indian Oil Corporation, has also not been brought on record by the petitioner herein. The learned counsel for the petitioner has relied upon a judgment rendered by the Hon'ble Apex Court, reported in ***(1991) 3 SCC 273 (Poddar Steel Corporation vs. Ganesh Engineering Works & Ors.)***, paragraph no. 6 whereof is reproduced herein below:-

> *"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomative Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories- those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other case s it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate*

cases. This aspect was examined by this court in C.J. Fernandez v. State of Karnataka a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty vs. International Airport Authority of India but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs."

The learned counsel for the petitioner has also relied upon a judgment rendered by the Hon'ble Apex Court in the case of ***G.J. Fernandez vs. the State of Karnataka & Ors***., reported in ***(1990) 2 SCC 488***, paragraph no. 15 whereof is reproduced herein below:-

"15. Thirdly, the conditions and stipulations in a tender notice like this have two types of

consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness of discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standard results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these *situations is present here. Shri Vaidyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to court with any such grievance. The question, then, is whether the course adopted by the KPC has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana case will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. The appellant had no doubt also urged that the MCC had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant vis-a-vis MCC are* *however, a matter for the KPC (counselled by the TCE) to decide and not for the courts. We were, rightly not called upon to go into this question."*

Lastly, the learned counsel for the petitioner has relied upon a judgment rendered by Hon'ble Apex Court reported in ***(2006) 11 SCC 548 (B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. & Ors.)***, paragraph no. 66 and 67 whereof are reproduced herein below:-

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could

not be relaxed and thus the same was wholly illegal and without jurisdiction.

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

67. Law operating in the filed is no longer res intergra. The application of law, however, would depend upon the facts and circumstances of each case. It is not in dispute before us that there are only a few concerns in India who can handle such a large quantity of coal. Transportation of coal from various collieries to the thermal power stations is essential. For the said purpose, apart from transportation job, the contractor is required to see that coal of appropriate grade is supplied. The appellant herein is in business for the last 52 years. It has been taking part in contracts involving similar jobs in various part of India. It had all along been quoting a law rate. According to it, despite the same it has been generating profits."

The learned counsel appearing for the respondent BPCL, by referring to the counter affidavit as well, has submitted that apart from the technical bid of the petitioner herein being rejected, on account of the total number of qualified tank lorries, having become less than five, the technical bid of the petitioner was also rejected on account of the petitioner failing to submit a 'no objection certificate' from the O.M.C's for tank lorry running under OMC regular contract, in terms of clause-24 of General Instructions to tenderers. It is further submitted that the respondent B.P.C.L. verified the fact as to whether the offered T/Ls by the petitioner were under OMC regular contract and it was discovered that 17 out of 21 T/Ls so offered were attached with the Indian Oil Corporation Limited under regular contract, hence the said factual position, discovered by the respondent BPCL, falsify the undertaking and declaration given by the petitioner in attachment 8 and 9, entailing disqualification/rejection under clause-Kc of the General Instructions to Tenderers which reads as follow:-

"Number of tank lorries offered is not in line with the tender requirement"

It has been further submitted by the learned senior counsel appearing for the respondent BPCL that the petitioner in his tender's covering letter has ticked in column no. 20, to suggest that he has submitted the NOC from other oil companies, as required, however, the fact is that the petitioner has misrepresented inasmuch as no 'NOC' was submitted by the petitioner along with his bid. Lastly, it is submitted that the financial bid of the eligible bidders have already been opened on 30.7.2018, as such the present writ petition has become infructous.

I have heard the learned counsel for the petitioner as also the learned senior counsel appearing for the respondent BPCL and have perused the materials on record. I find that though the petitioner might be to some extent, correct in contending that out of the initial 39 tank lorries attached with the Indian Oil Corporation, the petitioner had detached 26 tank lorries from the initial contract with the Indian Oil Corporation at the time of extensions granted to the petitioner by the Indian Oil Corporation vide letters dated 07.12.2017, 22.12.2017 and 29.01.2018, hence while applying for the tender in question, in pursuance to the NIT issued by the respondent BPCL the petitioner had offered 21 tank lorries, 17 belonging to the aforesaid group of 26 tank lorries and four fresh tank lorries, however, no document or proof has been shown by the petitioner or brought on record of this case to even remotely demonstrate that on the last date of submission of the tender i.e. 16.12.2017, the Indian Oil Corporation had detached, rather for that matter released 17 truck lorries of the petitioner.

I may point out that acceptance letters issued by the Indian Oil Corporation Limited dated 07.12.2017, 22.12.2017 and 29.01.2018, nowhere state that the original work order has been modified and the extension is only with regard to 13 tank lorries whereas on the contrary the said extension letters state as follows:-

"Please note that all the terms and conditions of the original tender and work order will remain same and will be integral part of this contract extension."

In fact the said extension letters issued by the Indian Oil Corporation specifies that the extension is with regard to original work order of the subject tender which admittedly is for 39 tank lorries. This court further finds that clause-24 of the General Terms and Conditions mentioned in the NIT provides for the tenderers to submit no objection certificate (NOC) from OMC's for tank lorries not running under OMC's regular contract at the time of submitting the application but the petitioner has failed to submit NOC from the Indian Oil Corporation Limited while submitting his tender on 16.12.2017 and it is the allegation of the respondent BPCL that the petitioner, in the tenderer's covering letter has nonetheless ticked in column no. 20 to the effect that the NOC from the other oil companies is being submitted, which has admittedly not been submitted, hence the petitioner has given a false declaration and misrepresented this aspect of the matter. I further find that after the petitioner had failed to submit any NOC to the effect that the offered tank lorries were not running under any OMC regular contract with other OMC's, the respondent BPCL had verified the fact as to whether offered tank lorries were under any OMC's regular contract or not and it was discovered that 17 out of 21 tank lorries so offered by the petitioner were attached to the Indian Oil Corporation under regular contract, hence the undertaking and declaration given by the petitioner in attachment 8 and attachment 9 also becomes false and the consequence is rejection of the tender of the petitioner herein on account of number of tank lorries offered being not in line with the tender requirement inasmuch as if the aforesaid 17 tank lorries are removed from the offered 21 tank lorries, the figure would fall below the minimum requirement of five tank lorries, as per clause-Kc of the Tender Terms and Conditions.

The argument advanced by the learned counsel for the petitioner that the respondent BPCL was being hyper technical and the said condition of submitting NOC was not an essential condition, hence the same could have been waived, does not in any manner impress this Court inasmuch as firstly if the tenderers/applicants are not having the requisite number of tank lorries, not running under any OMC regular contract as well as are not in a position to submit NOC from the OMC's regarding the same, such tenderers/applicants are ineligible to apply for the tender process in question. Moreover, this Court finds that the requirement of minimum number of requisite tank lorries being offered, having not been withdrawn from any other contract with any other oil company or any other location of the BPCL or being attached with any other parties/contractor/distributor and having not been withdrawn without their prior consent etc., is an essential prerequisite condition for applying for the tender in question and waiver of such condition cannot be resorted to, as is apparent from the general terms & conditions as also the general instructions to tenderers for e-tendering. In such view of the matter, the judgments referred to herein above by the learned counsel for the petitioner in the case of G.J. Fernandez (supra) & Poddar Steel Corporation (supra) are distinguishable in the facts and circumstances of the present case. As far as the judgments rendered in the case of B.S.N. Joshi and Sons Limited is concerned, para 65 thereof only goes to buttress the case of the respondent BPCL inasmuch as in case there is no power of general relaxation, no relaxation can be granted and moreover essential conditions are required to be adhered to.

The issue under consideration can be looked at from a different angle as well i.e. from the perspective of the respondent BPCL inasmuch as without obtaining NOC from the bidders regarding their tank lorries not running under OMC regular contract, the respondent BPCL is not in a position to assess as to whether the bidder is offering tank lorries, free from any encumbrances or not and in case misrepresentation is made by the bidders, the respondent BPCL can obviously fall into a trap, incurring heavy losses.

Yet another aspect of the matter is that though the petitioner had submitted his bid on 16.12.2017 and the technical bid of the petitioner was rejected, as communicated to the petitioner by an email message dated 24.08.2018, the petitioner had never bothered to obtained NOC from the OMC's as provided under clause-24 of the tender terms and conditions and only after the financial bid of the eligible applicants was opened on 30.08.2018, he appears to have obtained a NOC dated 05.09.2018 from the Indian Oil Corporation Limited which states that the Corporation has no objection if the tank trucks are utilized anywhere after 28.02.2018, meaning thereby that as on date of filing the bid, the tank trucks of the petitioner were not free, hence definitely the petitioner was ineligible to apply in pursuance to the NIT in question. Similarly, the certificate dated 31.08.2018 issued by the Indian Oil Corporation Limited is also of no avail to the petitioner inasmuch as firstly the same has been issued on a date when the financial bid of the successful bidders had already been opened by the respondent BPCL and secondly the same merely states that the tank trucks of the petitioner, registration number whereof are mentioned in the said certificate, were not utilized at Barauni Terminal between 16.12.2017 to 28.02.2018, however, the said certificate is not explicit in its content.

In view of the discussions made in the preceding paragraph herein above, this Court is of the view that the technical bid of the petitioner has been rightly rejected on account of the reason stipulated under clause-Kc of the tender terms and conditions which reads as follows:-

A. rejection criteria; when number of tank lorries offered is not in line with the tender requirement.

The respondent BPCL upon enquiry and verification of the fact as to whether the offered tank lorries by the petitioner were under any OMC regular contract or not, discovered that 17 out of 21 tank lorries, so offered were attached to the Indian Oil Corporation under regular contract and the petitioner had failed to furnish 'no objection certificate' from the Indian Oil Corporation for the tank lorries not running under OMC regular contract, as was required to be submitted by the tenderers at the time of application as per stipulation under clause-24 of the Tender Terms & Conditions as also had given a false undertaking under attachment 8 and 9 that the tank lorries so offered under contract to BPCL had not been either withdrawn from any other contract with any other oil company without their prior consent or were not attached with any other party/contractor/distributor and have not been withdrawn without their prior consent, hence the requirement of offering minimum five number of tank lorries was not fulfilled by the petitioner, resulting in the technical bid of the petitioner having been rightly rejected.

Having regard to the facts and circumstances of the case and for the reasons mentioned herein above, I do not find any merit in the present writ petition, accordingly, the same is dismissed, however, without any order as to costs.

(Mohit Kumar Shah, J)

S.Sb/-

AFR/NAFR	NAFR
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