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

Date of decision: 07.11.2019

\+ W.P.(C) 3517/2019

M/S INDO BRIGHT PETROLEUM PVT. LTD. ..... Petitioner

Through: Mr.Vipul Ganda, Mr.Vikas Yadav, Ms.Dipika Ganda and Mr.Aman Chaudhary, Advts.

versus

UNION OF INDIA AND ANR. ..... Respondents

Through: Ms.Meenakshi Arora, Sr.Adv. with Ms.Mala Naryan, Ms.Neha Dawar, Mr.Rahul Narayan and Mr.Digvijay, Advts. for R-2/IOCL.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S.SISTANI, J. (ORAL)

This petition has been filed by the petitioner under Article 226 of the Constitution of India seeking a writ of mandamus against the respondents to quash decision dated 26.03.2019 of respondent No.2, whereby it is contended that the technical bid of the petitioner was rejected without giving justifiable reasons and with the sole motive to favour another bidder.

2. Some necessary facts which are required to be noticed for disposal of this writ petition are that on 11.07.2018, a notice was issued by respondent No. 2 inviting E-tender for setting-up new LPG Bottling facility at 60 different locations from private bottlers having ready built plant/willing to construct new LPG bottling facility.

3. Accordingly, a common tender for all 60 identified locations was floated. The object was that the successful bidder should be able to create adequate plant and infrastructural facilities and possess competence to engage in the activities required for handling of the LPG bottling operations with caution and safety.

4. The petitioner claims to be a registered MSME company dealing in LPG products since last many years and having vast experience in refilling LPG cylinders. The petitioner also claims to have 10 years experience in running bottling plants and a sound financial track record to carry-out the work of refilling LPG cylinders by establishing new bottling plants.

5. The petitioner company participated in the E-tender issued by respondent No.2 for six locations *i.e.* Bikaner, Sikar, Dehradun, Rohtak, Satna and Saran and submitted the required documents. After evaluation of the pre-qualification criteria, eligibility criteria and technical bid documents in Round I, the petitioner was found eligible for Round II ; and was interviewed on 14.01.2019, when original digital records were submitted on the e-portal. After the interview, the petitioner was found eligible for Round III and was called for site-inspection.

6. The complaint of the petitioner is that the technical bid of the petitioner has been rejected after site-inspection in Round III, without respondent No. 2 giving any cogent grounds/reasons for doing so.

7. Mr. Ganda, learned counsel for the petitioner submits that within 24 hours of rejection of the petitioner's technical bid, respondent No. 2 hurriedly fixed the time for opening of financial bid on 27.03.2019 at 4.10

p.m. Mr. Ganda submits that the rejection of the technical bid by respondent No. 2 is baseless, *mala fide* and arbitrary ; and has been done with a view to accommodating particular parties, in whose favour respondent No. 2 had pre-decided that the tender should be awarded.

<u>Site at Bikaner</u>

8. Mr. Ganda submits that the purported ground of rejection of the technical bid of the petitioner in respect of the location at Bikaner is unfounded since, contrary to what is alleged by respondent No. 2, there is no overhead electrical line passing through the plot that the petitioner has offered for the bottling plant. He contends that the existing electricity distribution line runs over the land comprised in the road abutting the offered plot, which cannot be a disqualification as per the wording of the tender. Besides, the tender documents also say that there should not be a 'high-tension' electrical wire ; and considering the definition of 'transmission lines' under the Electricity Act, 2003, even the electrical line passing-over the road in not a high-tension electrical wire. Mr. Ganda further relies upon one of the terms of the tender document, under the head of 'Plant Layout', which reads as under:

> *"2.1 LOCATION & SAFETY DISTANCES*
> *2.1.1 LOCATION :*
> *While assessing the suitability of any site for location of LPG storage facilities, the following aspects shall be considered :*
> *a) In addition to the requirements for safety the plant should be located in such a manner so as not to be contiguous to any industry having open flame. Property line of the plant shall be away from the central line of the road/railways as per statutory requirements and overhead*

high tension wire shall not traverse through the battery limit of the plant."

9. Mr. Ganda has also relied upon the certificate issued by the Patwari as per which there are no overhead wires on the offered plot.

10. Ms. Meenakshi Arora, learned senior counsel appearing for respondent No.2 however submits that the technical bid of the petitioner for the site at Bikaner was rejected since there was a overhead electrical line/wire running through the offered plot, as noticed in course of the site-inspection. Ms. Arora submits that the eligibility criteria contained in Clause 8 (iii) of the tender documents specifically stipulate that a plot offered has to be free from any overhead power transmission cables/wires, mobile towers or any other type of electrical structure etc. She submits that in view of the specific tender eligibility criteria, respondent No. 2 was well within its right to reject the petitioner's bid with respect to the location at Bikaner. Clause 8 (iii) is reproduced hereinbelow:

> *"8. Additional eligibility criteria: Bidders also need to fulfil the set criteria as mentioned in the Tender document in various sections. Any deviation to the set criteria observed at any stage shall lead to rejection of the Bid/Offer at the particular Round in the selection process-*
>
> *xxxx xxxx xxxx xxxx*
>
> *(iii) the Ready Built Plant and/or Offered land should be one contiguous plot, free from live overhead power transmission cables/wires, mobile towers or any type of electrical structure etc."*

11. To support her submissions, learned counsel for respondent No. 2 has placed reliance on the inspection report dated 01.03.2019, as per which, at

the site at Bikaner an overhead electrical wire ran 1.5 metres inside the offered plot. Ms. Meenakshi Arora has also drawn the attention of the Court to the photographs taken by the Committee members annexed at page 287 of the petition, which she states clearly show the electrical wire passing-over the offered plot.

Site at Sikar

12. Mr. Ganda submits that the decision of respondent No. 2 rejecting the technical bid for the site at Sikar is based on the ground that out of six co-owners of the offered plot, lease was executed by the petitioner with only one co-owner. Counsel submits that the total land at Sikar is a large plot having six co-owners, out of which the petitioner has offered a piece of land which is in the ownership/possession of only one of these co-owners ; and the other co-owners of the land have given No-Objection Certificates for the lease granted by the concerned co-owner to the petitioner. Mr. Ganda relies upon the Assent Letter/No-Objection certificate annexed at Page 158 of the petition in support of his contention. Mr. Ganda further submits that only after such lease deed, documents and extract of land from revenue department were submitted and duly scrutinized by the Tender Inviting Authority, did the petitioner qualify for Rounds I and II of the qualification process. Therefore, rejection of the technical bid of the petitioner for Sikar in Round III on this ground is again baseless.

13. Ms. Meenakshi Arora on the other hand submits that the rejection of the technical bid of the petitioner with respect to the site at Sikar is on two grounds. The first ground for rejection is that out of six co-owners of the

offered plot, lease is executed with only one co-owner. To buttress this argument, learned senior counsel for respondent No. 2 relies upon the following part of the tender document:

"Part II. For Bidders Willing to Construct. New Bottling Plant at the advertised Location

A. Technical	*(i)*	*Land admeasuring at least 3.0 Acres with either clear title owned by the Bidder AND / OR have registered lease in the name of the bidder, AND/ OR Firm allotment letter from State Govt. or State Govt. body situated in the "Advertised location" and willing to construct LPG Bottling Plant as per OISD-169 guidelines on the offered land at his own cost.*	*a.Self attested Copy of Clear Title deed in the name of bidder/Registered Lease deed for the land upon which the Bottling plant is constructed.*

14. Ms. Arora submits that the second ground for rejection is that the No-Objection Certificate was not submitted to respondent No. 2 on or before the closing date i.e. 28.09.2018; but was submitted on 28.02.2019 *i.e.* much after closing the date. For this purpose she relies upon the No-Objection Certificate annexed at page 289 of the petition. Ms. Arora further relies upon Clause 9 (Round I) of the E-Tender document which states that in case the petitioner fails to submit any documents or submits incomplete documents, the bid will be rejected. Clause 9 (Round I) is reproduced as under :-

"9. Selection / Evaluation Procedure:

<u>Round I – Evaluation of Technical Bid Documents:</u>

... ... Despite the above in case of any shortfall in the documents, the bidder shall be provided with only ONE opportunity provided with only 01 (One) and final chance to submit any shortfall of documents which will be communicated to them on the e-portal within a time bound period of 7 (seven) days. It will be the bidder's responsibility to access the e-tendering portal on a daily basis to check communication in this regard. In case the bidder fails to submit any documents or submits incomplete documents within the given time, the bid will be rejected..."

<u>Site at Dehradun</u>

15. Mr. Ganda submits that the ground of rejection of the technical bid of the petitioner in respect of the location at Dehradun is also unfounded since there is no overhead electrical wire crossing the offered plot. There is only a low tension electrical service cable on the east side of the plot, crossing from one edge of the plot and is only 2 metres inside the proposed site. He submits that moreover, the petitioner has already moved an application for shifting that electrical line before the issuance of Letter of Interest and the application for shifting is annexed at page 165 of the petition. He further submits that the presence of a low tension wire is nowhere restricted in the tender document ; and the tender document only says that there should not be a 'high-tension' electrical wire over the offered plot. He again relies upon the definition of 'transmission lines' under the Electricity Act, 2003 in support of his contention. Mr. Ganda also relies upon one of the terms of the

tender documents, under the head of 'Plant Layout', as reproduced in a foregoing para.

16. Mr. Ganda further submits that the decision of respondent No. 2 to reject the tender is also based on the purported ground that out of the twelve co-owners of the offered plot, lease was executed by the petitioner with only four co-owners. Learned counsel submits, yet again, that the total land at Dehradun is a large plot with twelve co-owners, out of which the petitioner has offered a piece of land which is in the ownership/possession of only four co-owners ; and the other co-owners of the entire land have given their No-Objection Certificates for the lease granted to the petitioner. Mr. Ganda relies upon the Assent letter/No-Objection Certificate annexed at page 170 of the petition. He submits that only after the lease deed, other documents and extract of land from revenue department were submitted and duly scrutinized by the Tender Inviting Authority, did the petitioner qualify Rounds I and II ; and therefore, the rejection of the technical bid of the petitioner for Dehradun in Round III on this ground is also baseless.

17. Ms. Meenakshi Arora, learned senior counsel for respondent No. 2 on the other hand submits that the rejection of the technical bid of the petitioner with respect to the site at Dehradun is on three grounds. She submits that the first ground for rejection is that there was overhead electrical line/wire passing through the plot of land that was offered. Ms. Arora submits that the eligibility criteria as contained in Clause 8 (iii) of the tender documents specifically stipulate that a plot offered has to be free from overhead power transmission cables/wires, mobile towers or

any other type of electrical structure etc. She further submits that in view of the specific tender eligibility criterion, respondent No. 2 was well within its right to reject the petitioner's tender with respect to the site at Dehradun. She again relies upon Clause 8 (iii) which is reproduced in a foregoing para.

18. Learned counsel for respondent No. 2 further submits that respondent No. 2 has also rejected all other bids where the inspection committee members had during their site inspection found that the proposed plot had electrical line/wire passing through the plot.

19. Ms. Meenakshi Arora submits that the second ground of rejection is that out of twelve co-owners of the offered plot, lease was executed by the petitioner with only four co-owners. To buttress this argument, learned counsel for respondent No. 2 relies upon Part II of the Tender Document which is already reproduced in a foregoing para. Ms. Arora further submits that the third ground of rejection is that the No-Objection Certificate from other co-owners in this case was not submitted on or before the closing date i.e. 28/9/18 ; and that the No-Objection Certificate was submitted on 06/3/19, much after the closing date and for this purpose she relies upon the No-Objection Certificate annexed at page 170 of the petition. She further relies upon Clause 9 (Round I) of the Tender document, which states that incase the petitioner fails to submit any documents or submits incomplete documents, the bid will be rejected.

20. In all fairness Mr. Vipul Ganda, learned counsel for the petitioner submits that he is not pressing the reliefs claimed with respect to sites at

Rohtak, Satna and Saran.

21. We have heard learned counsel for the parties and have considered their rival contentions.

22. For the site at Bikaner, the respondents have found the tender to be non-responsive on the ground of presence of overhead electric line over the offered land. Counsel for the petitioner submits that no such line exists within the boundary of the offered land ; and that the overhead electrical line is beyond the boundary of the plot in question. Ms. Arora, however submits that this submission is factually incorrect and placing reliance on the site inspection report, she points-out that inspection was carried-out by three officials of three different oil companies in the presence of a representative of the petitioner. The original report has been handed-over for perusal in court. In the check list prepared in this case, the Committee has observed as under :

> *"LT line is passing through from proposed boundary wall of Plant on Eastern side. This LT line is approximately 1.5 m inside the offered land and passing from the entire frontage length of 100 meters. "*

23. This report is signed by three members of the verification committee i.e. Mr. M.M. Prasad, Chief Manager, LPG Ops NWZ of Hindustan Petroleum Corporation, Mr. Yadvendra Chandel, Territory Coordinator (TC), Bikaner LPG Plant of Bharat Petroleum Corporation and Mr. Gaurav Verma, Engg. Officer, Bikaner LPG Plant of Indian Oil Corporation. Alongwith the report, photographs have also been placed on record. The photographs also appear to show that the electrical line is running within the

boundary of the offered plot, inspite of this being denied by Mr. Ganda.

24. *Prime facie* it appears to us that the electrical line is running within the boundary wall. In any case, disputed questions of fact cannot be decided in the present proceedings. Thus the objection raised must be taken to be without merit.

25. We have also examined the tender document, more particularly Clause 8(iii), extracted above. The purpose of such tender condition has been explained in para 3(b) of the counter-affidavit of respondent No. 2 which is reproduced as under :-

> "*3(b) … … … The safety aspects also require that within the area marked / offered for the plant no naked electricity Line can be allowed. It may be pointed out that the Electricity supply is taken inside the Plant through armored cables, Flame proof/Intrinsic Equipments to avoid any accident which can occur on account of even a spark inside the Plants. In premises used for filling and storing flammable gases in cylinder of LPG Plants, all electrical equipment such as motors, switches, starters, etc., installed in the premises used for Compressing and filling of flammable gases are required to be of flameproof construction conforming to IS : 2148./IEC60079 (in lieu of IS 2148). Similarly all electric meters, distribution boards, switches, fuses, plugs and sockets, all electric fittings, fixed lamps, portable hand lamps and motors, are required to be of flame proof construction conforming to IS or IEC-60079-1, IS or IEC 60079-11 or any other standard as approved by the Chief Controller Explosives and the same are also required to be effectively earthed. The entire electrical wiring installed within the Plants for the storage of flammable compressed gases is*

required to be of insulated armored cables of approved type. The cables are required to be mechanically continuous throughout and effectively earthed away from the vessels."

26. Although Mr. Ganda has also relied upon a certificate issued by the Patwari to the effect that there are no overhead electrical wires on the offered plot, we are unable to correlate this certificate with the photographs placed on record. Hence, the certificate cannot be relied upon.

27. As far as the site at Sikar is concerned, as per respondent No. 2 the lease deed provided was not signed by all the land owners. While admitting that the lease deed was not so signed, Mr. Ganda has explained that the entire area belongs to six co-owners ; and since the offered land belongs to only one co-owner, the rest of the co-owners have given their no-objection. Mr. Ganda also submits that express no-objection from all co-owners has been furnished and should have been favourably considered ; and the bid of the petitioner should have been accepted. Ms. Arora has however placed reliance on Clause (A) of Part II of Qualification Criteria, as reproduced above, in support of her contention that as per this clause, an applicant must provide title deed in the name of the bidder/registered lease deed for the proposed land. Reliance is also placed on second para of Round I (Clause 9), to show that in case the bidder fails to submit any document within the given time, the bid would be rejected.

28. The aforementioned condition in the tender makes it abundantly clear that incomplete documents would not be accepted. Counsel for the petitioner submits that alongwith the lease deed, related documents were also supplied which is disputed by learned senior counsel for respondent No. 2.

29. Be that as it may, if the petitioner had entered into a lease in respect to the offered plot which was to be partitioned as between the co-owners to facilitate construction of the LPG bottling plant, the co-owners should have been made confirming parties or their no-objections should have been annexed alongwith the lease deed. Although no-objection was filed from other co-owners, the same has been filed well beyond the cut-off date and the same would be of no value. Thus, we find no merit in the petitioner's contentions even with respect to the site at Sikar.

30. An allegation is made that the documents of a bidder by the name of Sh. Ranjeev Duggal were accepted beyond the cut-off date. Ms. Arora, on instructions, denies this allegation ; and submits that in none of the matters, any documents were taken on record after the cut-off date. She further submits that this issue was raised in a similar matter in W.P.(C) No. 3100/2019 titled ***M/s S.O. Gas Products Pvt. Ltd. Vs. Union of India and Anr.***, wherein this court had considered this contention and had rejected the same ; and the order of this court has attained finality since the Special Leave Petition against the said judgment has been dismissed.

31. As far as the site at Dehradun is concerned, the bid for the same has been rejected since, yet again, the lease deed submitted has not been executed by all co-owners of the offered land and the No-Objection Certificate dated 06.03.2019 from other co-owners was submitted beyond the cut-off date. The submissions of Ms. Arora with regard to objection at Dehradun is identical to the objection raised with regard to the site at Sikar, since at the time of submission of the lease deed, it was not clarified that other co-owners had given their no-objection to the transaction.

32. Mr. Ganda has relied upon a letter dated 26.02.2019, which is claimed to have been handed-over at the time of inspection, wherein seven days time was provided to the petitioner to submit the names of the co-owners, details of plot offered including revenue records, area of land, khatauni number, khasra number and other documents being NOCs from any joint owners of the land. We are of the view that in the face of the clear terms and conditions of the tender, such letter will not change the position or amend any of the tender conditions.

33. The law on the scope of judicial review in tender matters is well-settled. A brief reference to some judicial precedents may not be out of place. In the case of ***Tata Cellular v. Union of India*** reported as (1994) 6 SCC 651, the Supreme Court held as under:

> *"70. ...the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."*

xxxx xxxx xxxx xxxx

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

34. Thereafter in the case of ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another*** reported as (2016) 16 SCC 818, the Supreme Court held as under:

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us."

xxxx xxxx xxxx xxxx

"13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision."

35. Following the principles of ***Tata Cellular*** (supra) and ***Afcons Infrastructure Limited*** (supra) the Supreme Court in ***Municipal Corporation, Ujjain and Another v. BVG India Limited and Others*** reported as (2018) 5 SCC 462, has further held as under:

"64. Thus, the questions to be decided in this appeal are answered as follows:

64.1. Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

64.2. ...

64.3. It is not open to the court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the court ordinarily should exercise judicial restraint."

36. Also, in ***Silppi Constructions Contractors v. Union of India and Another*** reported as 2019 SCC OnLine SC 1133, the Supreme Court has held as under:

"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act

fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

37. In view of the above discussion, we do not find any ground to interfere in the decisions taken by respondent No. 2. We accordingly find no merit in the petition ; which therefore stands dismissed.

CM APPL. 16116/2019

38. In view of the order passed in the writ petition, the application also stands dismissed.

G.S.SISTANI, J

ANUP JAIRAM BHAMBHANI, J

NOVEMBER 07, 2019/Ne