$~62

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

Date of decision: 18th February 2020

\+ W.P.(C) 1797/2020 & CM APPL. No. 6257/2020

DBL- JPL CONSORTIM ..... Petitioner

Through: Mr. Manoj K. Singh, Mr. Vijay K. Singh & Ms. Kanishka Prasad, Advs.

Versus

NTPC LIMITED & ANR ..... Respondents

Through: Ms. Maninder Acharya, ASG with Mr. Puneet Taneja, Mr. Manmohan Singh Narula, Ms. Shefali Jaiswal, Mr. Shikhar & Mr. Viplav Acharya, Advs. with Mr. A.K. Dash (Officers) for NTPC.

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

The respondent/NTPC invited online bids on Single Stage Two Envelope Bidding Basis (Envelope-I: Techno-Commercial Proposal &

Envelope-II: Price Proposal) with Reverse Auction from eligible bidders for Development and Operation of Talaipalli Coal Block, Raigarh District, State of Chhattisgarh on 19.08.2019. After Corrigendum No. 4 was issued, the last date for receipt of bids for Techno-Commercial Proposal and Price Proposal was 18.10.2019.

2. A Consortium Operating Agreement was executed between M/s. Dilip Buildcon Limited and M/s. Jindal Power Limited on 29.10.2019, which led to the joint venture making the bid in the present case. The Techno-Commercial Bid of the petitioner was opened on 15.11.2019 and was declared as admitted by the tender committee. Thereafter, the petitioner was issued a communication dated 10.12.2019, asking to furnish a certificate from the Statutory Auditor of JPL, which was replied *vide* email/letter dated 13.12.2019. Since the petitioner did not receive any information from the respondent, the petitioner approached this court by filing W.P.(C) No.1556/2020, which was dismissed as withdrawn, with a direction to the respondents to inform the petitioner the reasons for rejection of its Techno-Commercial Bid ; and with the liberty to take appropriate steps in accordance with law, if not satisfied with the reasons for rejection ; which has led to the filing of the present writ petition.

3. Admittedly, the petitioner had submitted its bid claiming to be qualified under tender condition No. 7.1.1, which we reproduce below:

"7.1.1 The Bidder should have, <u>in the preceding 7 (seven) years</u> reckoned from the date of opening of the Techno-commercial Bids <u>developed</u> & <u>operated</u> single coal / lignite mine having coal/lignite reserves of at least 150 million tones & annual capacity of at least 6 MTPA and produced at least ***2 million tones*** *of coal/lignite from such mine."*

(Emphasis Supplied)

4. The respondents have rejected the bid of the petitioner *vide* communication dated 13.02.2020 citing the reasons as detailed in the following extract:

"2.0 In your Techno Commercial Proposal Covering Letter at Appendix-7, you have confirmed that M/s. Dilip Buildcon Ltd. (Consortium Leader) and M/s Jindal Power Limited (Consortium Member-2) have formed a Consortium and submitted Bid for the subject package under ROUTE - 3 (Consortium) of the Qualifying Requirements. Further, as per Appendix-7C of your proposal, you have confirmed that you are meeting technical QR mentioned at 7.1.1 of ITB, Vol-I on the strength of M/s Jindal Power Limited (JPL).

As per Appendix-7C Exhibit-1<u>, in support of fulfillment of the stipulations of QR against clause 7.1.1, you have furnished the details of</u> Gare Palma IV/2 & IV/3 Coal Block (single reference work) and have furnished the JPL's Statutory Auditor (S. S. Kothari Mehta & Company) Certificate dated 25.10.2019 and 31.10.2019 giving details of activities performed for "Development" of the Mine & Year wise quantity of "OB Removal" & "Coal produced".

As per CI 7.1.1 of ITB, "the Bidder should have, in the preceding seven (7) years reckoned from the date of opening of Techno-Commercial Bid "Developed & Operated" single Coal/Lignite Mine having Coal /Lignite Reserves of atleast 150 MMT and Annual Capacity of atleast 6 MTPA & produces atleast 2 MMT of Coal/ Lignite from such Mine".

Without Prejudice

Further, as per Note (ii) of QR in Chapter- 7 of 1TB, the word "developed" means that the Bidder should have performed the necessary activities of Land Acquisition/assisted in Land Acquisition, Statutory clearances/assisted in Statutory clearances and carried out 'Infrastructure development' on its own or through sub-contracting.

Further, as per Note (iii) of QR, "Infrastructure development" as per (ii) above means construction of CHP, Buildings, Workshops, in a coal/lignite mine.

As per JPL's Statutory Auditor Certificate dated 25.10.2019 and 31.10.2019, date of Completion of Mine Development Activities were not mentioned. Hence, in order to establish that JPL has carried out aforesaid activities of "Development" of the Mine during preceding seven (07) Years (Techno-Commercial Bid opened on 15.11.2019, hence the period of seven years starts w.e.f 16.11.2012), NTPC vide letter dated 10.12.2019, sought Clarification regarding actual date of completion of Mine Development activities.

3.0 We would like to inform you that as per the Statutory Auditor Certificate of M/s Jindal Power Ltd (Consortium

> *Member-2) dated 13.12.2019 as well as its addendum dated 16.12.2019, furnished by you in reply to our letter dated 10.12.2019, the date of completion of CHP, Service Buildings and Workshop is 10.04.2008,15.10.2007 and October 2008 respectively.*
>
> *4.0 It is observed from the above Certificates that M/s Jindal Power Ltd. (JPL) has Completed Infrastructure Development Activities of the Mine, as per Note (ii) & (iii) of QR in Chapter- 7 of ITB, before 16.11.2012. Hence, JPL (on whose strength you have proposed to meet the QR in your Bid) has not been considered to have developed the Mine which inter alia includes Infrastructure Development activities related to Construction of CHP, Workshop & Buildings during the preceding seven (7) years from the dated of opening Techno-Commercial Bid, as per Qualifying Requirements of Clause 7.1.1 of ITB. Accordingly, your Techno-Commercial Bid has been rejected."*
>
> *(Emphasis Supplied)*

5. Urging that the petitioner has complied with tender condition No.7.1.1, counsel for the petitioner submits that the word 'developed' used in tender condition No 7.1.1 is not the primary criteria for evaluation, which is evident from the fact that this word is not used in tender condition No 7.1.2. While relying on the clarification issued by him in response to respondent No.1's letter dated 10.12.2019 the petitioner submits that he has been operating the mines since 2011-12; the restriction imposed by tender condition No. 7.1.1 of having experience in developing and operating mines in the preceding 7 years is superfluous; and an operator who has produced over 30 million

Bank Cubic Metres (BMC) of aggregated volume and 15 billion BMC of composite volume cannot be disqualified on such basis, which action of the respondents is wholly irrational.

6. Reliance is placed on the case of ***Tata Cellular vs. Union of India*** reported as (1994) 6 SCC 651, para 77 of which is reproduced below :

> *"77. The duty of the court is to confine itself to the question of legality. Its concern should be :*
>
> *1. Whether a decision-making authority exceeded its powers?*
>
> *2. Committed an error of law,*
>
> *3. committed a breach of the rules of natural justice,*
>
> *4. reached a decision which no reasonable tribunal would have reached or,*
>
> *5. abused its powers.*
>
> *Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :*

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex-Brind, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these case the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention."

7. Counsel for the petitioner further submits that the petitioner had been successfully operating its mines till 31.03.2015.

8. Learned Additional Solicitor General appearing for the respondents, on the other hand, submits that the present writ petition is not maintainable for the reason that after the bid of the petitioner was rejected and the petitioner was duly informed about the rejection, he was also called upon to take back the bank guarantee furnished by it; which bank guarantee has since been collected by the petitioner without any protest and without even reserving any liberty to assail the order of rejection. It is urged that the petitioner has therefore accepted

the rejection of its bid ; and on this ground alone, the writ petition deserves to be dismissed.

9. Learned ASG further submits that the respondents have acted in a fair and just manner, which is evident from the fact that upon examining the bid of the petitioner, communication dated 10.12.2019 was issued to the petitioner seeking clarification, which communication reads as under:

> *"**Ref. No.:01/CS-7014-602(R)-9-PRA***
>
> ***Date: 10th December, 2019***
>
> ***M/s DBL-JPL Consortium.***
> ***Plot No.5, Chuna Bhatti***
> ***Kolar Road***
> ***Bhopal-462016***
>
> ***Attn.: Mr. Ram Bahadur Singh, AVP (Mining)***
>
> ***Sub.: Development and Operation of Talaipalli Coal Block***
>
> *Dear Sir,*
>
> *This has reference to your Techno-Commercial Bid for the subject Package opened on 15th November 2019.*
>
> *JPL's Statutory Auditor vide Certificate dated 25.10.2019 & 31.10.2019, furnished by you in the bid, certificate that activities of Land Acquisition, Statutory Clearance and carrying out of infrastructure Development have been carried out by JPL. However, the date of completion of these activities by JPL or their sub-contractors, is not mentioned in the aforesaid Certificate.*

Accordingly, you are requested to furnish a certificate from the Statutory Auditor of JPL confirming the date of completion of these activities i.e. Land Acquisitions, Statutory Clearance and Infrastructure Development (i.e. Construction of CHP, Buildings and Workshops in the Gare Palma IV/2 & IV/3 Mine)

Further, approved Mining Plan for Gare Palma IV/2 & IV/3 Mine may also be furnished.

*You are requested to furnish the information/document as sought for, so as to reach this office **latest by 13th December, 2019.***

Thanking you,

Yours faithfully

Sd/-

(Abhay Anand)
Manager (CS)"

She submits that in para 3 of the above communication, petitioner was given an opportunity to furnish a certificate from the Statutory Auditor of JPL confirming the dates:

(i) of land acquisition ;

(ii) of obtaining statutory clearances ; and

(iii) of completion of infrastructure development (i.e. construction of the Coal Handling Plant (CHP), buildings and workshops in the Gare Palma IV/2 and IV/3 mines)

10. Furthermore the approved mining plan for Gare Palma IV/2 and IV/3 mine was also required to be furnished by the petitioner. She submits that a reply was sent by the petitioner on 13.12.2019; and a copy of the annexure to the reply, being the certificate issued by the statutory auditors, is scanned below:-

470

S S KOTHARI MEHTA
& COMPANY
CHARTERED ACCOUNTANTS

Resettlement & Rehabilitation		Not applicable as the mining area under the approved mine plan did not have any village habitation.
Statutory Clearances	a) Mine Plan 6.25 MTPA received on 29/01/2001 b) Mine Plan (revised) 6.25 MTPA received on 05/03/2009 c) Mine Closure Plan Approval from MOC received on 07/07/2014	Own
	Environment Clearance from MOEF	Own (received on 22/03/2004 for 6.25 MTPA & 12/08/2012 for 6.25 MTPA)
	Forest Clearance Stage I from MOEF	Own (received on 08/06/2004)
	Forest Clearance Stage II from MOEF	
	Consent to Establish from CECB	Own (received on 31/12/2004 for 6.25 MTPA & on 28/01/2013 for 6.25 MTPA)
	Consent to operate from CECB	Own (received on 27/01/2005 for 6.25 MTPA & on 04/01/2014 for 6.25 MTPA)
	Mining lease from Govt of Chattisgarh	Own (received on 07/10/2005)
	Surface Right for mining from DMO	Own (received on 22/03/2006, 23/04/2007, 23/11/2011, 21/03/2013
Infrastructure Development	CHP (completed on 10/04/2008)	Subcontracting under JPL's technical supervision
	WASHERY (completed on 26/07/2010)	
	CCPS (completed on 16/10/2008)	
	Approach Road (completed on 16/10/2007)	
	Service Buildings (completed on 16/10/2007)	
	Residential Buildings	

BHOPAL

Page 3 of 4

11. Ms. Acharya submits that none of the statutory clearances and infrastructural development activities in question were falling within the preceding 7 year period as was required in the tender conditions; and thus the bid of the petitioner was correctly rejected.

12. We have heard learned counsel for the parties, have examined the tender document and have considered their submissions.

13. The two crucial words used in tender condition No. 7.1.1 *i.e.* 'developed' and 'operated' have been defined in the tender document. 'Developed' has been defined as under :

> *"(ii) The word "**developed**" means that the Bidder should have performed the necessary activities of Land Acquisition / assisted in Land Acquisition, Statutory clearances/assisted in Statutory clearances and carried out 'Infrastructure development' on its own or through sub-contracting.*
>
> *(iii) "Infrastructure development" as per (ii) above means construction of CHP, Buildings, Workshops, in a coal/lignite mine."*

14. In view of the above cited definitions, we do not find any force in the submission made on behalf of the petitioner that the word 'developed' is superfluous. It is neither for this court to re-write the tender conditions nor is it for this court to declare any word or condition to be superfluous, as held *inter-alia* in the decision rendered by Supreme Court in the case titled ***Vidharbha Irrigation Development Corporation vs. Anoj Kumar Garwala*** reported as

(2019) SCC OnLine SC 89, the relevant paras of which are reproduced below :

> *"16. However, learned counsel appearing on behalf of the appellant strongly relied upon Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818, and paragraphs 14 and 15 in particular, which state:*
>
> > *"14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.*
> >
> > *15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."*

"17. It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous - they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

15. As far as the compliance with tender condition No. 7.1.1 is concerned, having scanned the response of the petitioner including the certificate issued by the statutory auditors, there is no room for doubt that tender condition No. 7.1.1 has not been complied with as none of the clearances and other requirements stand fulfilled in the preceding 7 years.

16. The petitioner has also very fairly disclosed that the mines the petitioner was operating have not been operated after 31.3.2015 since the same were de-allocated as per the orders of Supreme Court of India of September, 2014.

17. Although, it is not for this court to re-write the tender conditions, yet we did seek clarification from the learned ASG regarding to the importance and relevance of the criteria requiring certain actions in the preceding 7 years from the date of opening of the Techno-Commercial Bids. Learned ASG has explained that the purpose behind the criteria of requiring that certain aspects be fulfilled only within the preceding 7 years, is that the statutory clearances and

the infrastructural development activities should have been obtained, updated and performed as per the latest/modern technology; and in compliance with various other norms contemplated under the tender and also in compliance with CVC Guidelines.

18. In this backdrop we do not agree with the submissions of the learned counsel for the petitioner that there is any illegality, irrationality or procedural impropriety in the tender process as contemplated in para 77 of ***Tata Cellular*** (supra). We do not think that tender condition No. 7.1.1 is irrational; or that there has been any procedural irregularity; or that the decision making authority has exceeded its powers or committed any breach of the rules of natural justice. In fact, in an act of abundant fairness, before rejection of the bid, the petitioner was called upon to furnish certain documents to verify compliance with tender condition No.7.1.1; and it was found that the said tender condition had not been complied with.

19. Resultantly, we find no ground to interfere by way of the present proceedings.

20. The present petition is accordingly dismissed.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

FEBRUARY 18, 2020/*uj*