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

\+ W.P.(C) 5612/2020 and CM APPL. 20342-43/2020

THE MINING AND ENGINEERING CORPORATION..... Petitioner
Through: Mr. Anish Roy, Advocate

versus

UNION OF INDIA & ANR. ..... Respondents
Through: Mr. Vikram Jetley, CGSC with Mr. Kavindra Gill, Advocate for UOI.
Mr. Ratan K. Singh and Mr. Nikhilesh Krishnan, Advocates for R-2.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

O R D E R

% **25.08.2020**

HEARD THROUGH VIDEO CONFERENCING

1. The instant writ petition has been filed by the petitioner under Article 226 of the Constitution of India for issuance of a writ of mandamus, directing the respondents to consider its technical bid for Tender No.BBNLIMM/PIA for BharatNet Project/Andaman & Nicobar/2020/004 issued on 18.05.2020, in the light of a Gazette Notification No.CG-DL-E-01 062020-219680 dated 01.06.2020 bearing S.O.1702(E), issued by the Ministry of Micro, Small and Medium Enterprises and for a writ of mandamus, putting on hold the opening of the financial bid for the aforesaid tender till the petitioner's bid is considered in the light of the Gazette Notification dated 1.6.2020.

2. Shorn of details, the brief facts leading to the present petition are as follows:-

a) The petitioner, a sole proprietorship firm which is owned by a private limited company under the name of Vindhya Industries Private Limited, is engaged in the business of execution of works contract in various States in the country.

b) The respondent No.2 issued a Notice Inviting Tenders (NIT) vide Tender No.BBNLIMM/PIA for BharatNet Project/Andaman & Nicobar/2020/004 issued on 18.05.2020, for selection Project Implementation Agency (PIA) for Bharat Project in the Union Territory of Andaman & Nicobar.

c) The petitioner states that the Notice Inviting Tender mentions that bidders (MSEs), who are registered with the appropriate authority, are exempted from payment of EMD and Tender Fee.

d) Initially, the last date and time for submission of the bids was 15:00 hrs, on 15.06.2020. The last date was extended periodically and vide letter dated 22.06.2020, the last date and time for submission of the bids was fixed at 15:00 hrs on 2.07.2020.

e) The petitioner states that the Government of India issued Gazette Notification No.CG-DL-E-01 062020-219680 dated 01.06.2020, which changed the gradation for classification of micro, small and medium enterprises and from 1.6.2020, the petitioner had become a MSE instead of being a MSME. Under the said Notification, for a Micro Enterprise, the investment in Plant and Machinery or Equipment does not exceed Rs.1 crore and turnover does not exceed Rs.5 crores; in case of a Small Enterprise, the investment in Plant and

Machinery or Equipment does not exceed Rs.10 crores and turnover does not exceed Rs.50 crores and in case of a Medium Enterprise, the investment in Plant and Machinery or Equipment does not exceed Rs.50 crores and turnover does not exceed Rs.250 crores

f) The petitioner states that it was earlier an MSME, having investment in plant and machinery to the tune of Rs. 5 crores but by virtue of the said Notification dated 1.06.2020, which came into effect from 01.07.2020, it became eligible to participate in the tender process as a MSE and therefore, was exempted from paying EMD and the Tender Fee.

g) The petitioner states that it was facing difficulty in submitting the tender documents online due to the delay in updation of the portal in compliance of the Gazette Notification dated 01.06.2020 (supra), issued by Government of India, but it was able to upload the documents on 2.07.2020, at about 2:30 pm. The petitioner also states that since the Notification is dated 1.06.2020, which came into effect with effect from 1.07.2020, it was not able to obtain the Certificate of registration from the Competent Authority.

h) The petitioner claims that its authorized representatives had gone to the office of the respondent No.2 to submit the offline tender documents in the drop box, but since the tender documents could not be inserted due to the narrow opening, the petitioner's authorized representatives had handed it over to a person there who claimed to have been deputed for collecting such papers from the intending bidders. The petitioner’s authorized representatives were told that no receipt was required to be given since it was presumed that the documents submitted in offline mode, would be a reproduction of the online documents.

i) The petitioner states that when its application was rejected on the ground that "*EMD Exemption Certificate not received*", it gave a representation on 9.07.2020, stating *inter alia* that it had submitted all the relevant documents and therefore, its bid could not have been rejected.

j) The petitioner states that it had sent a letter to the Minister of Communication, Government of India on 20.07.2020 and another one on 4.08.2020, but it did not receive any response.

k) The petitioner received a letter dated 4.08.2020 from the respondents No.2 and 3, stating that the technical bid was not opened because its offline documents were not received. On the very same day, the petitioner sent a reply to the said letter.

l) On 11.08.2020, the petitioner was informed that the offline documents had not been received and as per the Notice Inviting Tender, there is no provision to call for or to accept the offline bid documents after opening of the Tender. Aggrieved by the same, the present petition has been filed.

3. Mr. Anish Roy, learned counsel for the petitioner has reiterated his contentions as raised in the writ petition and states that there was no necessity for the petitioner to submit the security deposit on the ground that it had become a MSE by virtue of the Notification dated 1.6.2020. He states that the representatives of the petitioner had supplied the offline documents for which no receipt was given and the bid of the petitioner ought not to have been rejected on the said ground.

4. *Per contra*, Mr. Ratan K. Singh, learned counsel for the respondent No.2 states that the petitioner has not informed this court that the Notification dated 1.6.2020, relied upon by it, has been superseded by another Notification dated 26.06.2020 being S.O. 2119 (E), which states that in case of reverse-graduation of an enterprise, whether as a result of re-classification, or due to an actual changes in the investment in plant and machinery or equipment or turnover or both, and whether the enterprise is registered under the Act or not, the said enterprise will continue in its present category till closure of the financial year and it will be given the benefit of the changed status only with effect from 1st April of the financial year following the year in which such a change took place. He contends that the benefit of the Notification dated 1.6.2020 would be available to the petitioner only from 1.04.2021 and therefore, it had to deposit the EMD and Tender Fee. He also points out that the present petition is belated inasmuch as the technical bid was opened on 2.07.2020 and the financial bid was opened on 21.08.2020. Indian Telephone Industries Ltd., a PSU which was found to be L-1, has already been awarded the contract. Therefore, the instant petition ought not to be entertained and should be dismissed on the ground of delay and latches alone.

5. We have heard Mr. Anish Roy, learned counsel for the petitioner and Mr. Ratan K. Singh, learned counsel for the respondent No.2 and perused the record.

6. Admittedly, the petitioner was an MSME. Government of India had issued Gazette Notification dated 1.06.2020, which reads as under:-

> *"S.O. 1702(E). – In exercise of the powers conferred by sub-section (1) read with sub-section (9) of section 7 of the 'Micro, Small and Medium Enterprises*

Development Act, 2006 (27 of 2006) and in supersession of the notification of the Government of India, Ministry of Small Scale Industries, dated the 29th September, 2006, published in the Gazette of India, Extraordinary, Part II, Section3, Sub-section(ii), vide S.O. 1642(E), dated the 30th September 2006 except as respects things done or omitted to be done before such supersession, the Central Government, hereby notifies the following criteria for classification of micro, small and medium enterprises, namely:— (i) a micro enterprise, where the investment in Plant and Machinery or Equipment does not exceed one crore rupees and turnover does not exceed five crore rupees; (ii) a small enterprise, where the investment in Plant and Machinery or Equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees; (iii) a medium enterprise, where the investment in Plant and Machinery or Equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees. This notification shall come into effect from 01.07.2020."

7. The petitioner states that by virtue of the above Notification, it became a MSE and was therefore, exempted from depositing EMD and the Tender Fee. Instructions to the bidders under the NIT stipulated that the bidders (MSEs) who are registered with the Appropriate Authority, are exempted from payment of EMD and Tender Fee. Clause 8 provides that the documents, which are to be uploaded on the e-tendering portal and the list of documents as per Annexure E, are also to be supplied offline. Clause 8 reads as follows:-

"8 ***Cover- I (To be uploaded on CPPP-NIC e-tendering portal)***

8.1 Scanned copy of EMD and Tender Fee (as mentioned in this RFP)

8.2 The original Bank Guarantee I Demand Draft for EMD and Tender Fee respectively, must be submitted in a sealed envelope mentioning "EMD and Tender fee< MENTION NIT No.>" before last Date and Time for OFFLINE Submission of Bids as mentioned in Section I-Invitation to bids.

8.3 The bidders (MSEs) who are registered with Appropriate Authority are exempted from payment of EMD and Tender Fee. A proof regarding registration of MSE with Appropriate Authority will have to be attached along with the bid. Their eligibility as per the terms and conditions of the tender in question would also be examined.

8.4 List of Documents to be submitted OFFLINE: ***Please refer Annexure-E****"*

8. Clause 5 of Annexure E appended to the Special Instructions to Bidders reads as follows:-

"5. ***Offline Submissions:***

The bidder is requested to submit the following documents offline to Chief General Manager (MM), Bharat Broadband Network Limited, 3rd Floor, Office Block· 1, East Kidwai Nagar, New Delhi -110023 before the last date and time of bid submission in a Sealed Envelope otherwise the bid shall not be opened:

5.1 Original copy of the Bid Security in the form of a Bank Guarantee/ Demand Draft/ Bankers cheque in accordance with the details mentioned in Detailed NIT (Section-1).

5.2 Demand Draft/ Bankers cheque of an amount of Rs. 4720/- (Rupees Four Thousand Seven Hundreds and

Twenty only) including GST. in favour of BHARAT BROADBAND NETWORK LIMITED, drawn on any nationalised I scheduled bank and payable at New Delhi, shall have to be submitted towards tender feej cost of the tender documents as mentioned in Detailed NIT (Section-l)

5.3 The bidders (MSEs) who are registered with Appropriate Authority are exempted from payment of EMD and Tender Fee. A proof regarding registration of MSE with Appropriate Authority will have to be attached along with the bid. Their eligibility as per the terms and conditions of the tender in question would also be examined.

5.4 0riginal copy of the letter of authorization shall be indicated by written power-of-attorney.

5.5 Integrity Pact duly signed by the bidder.

5.6 Other such relevant documents, as desired in the tender, on the letter head of company viz. Bidder's / PIA Profile, Technical Bid Letter, Details of Litigation(s), Compliance Document, Financial Bid Letter, RFP Acknowledgement Letter, Details of Exoerience of Responding Firm, Bis Security Form, MAF, Self Certification on PMA, Power of Attorney, Declaration Letter for Non- Blacklisting of the Bidder, Undertaking from OEM for Service Center Support in Andaman & Nicobar, Authorization Certificate from OEM, Self-Certificate from OEM."

9. Clause 15.2 of the NIT which also stipulates that proof of registration of MSE with the Appropriate Authority, must be attached with the bid, reads as follows:-

"15.2 The bidders (MSEs) who ore registered with Appropriate Authority are exempted from payment of EMD. A proof regarding registration of MSE with Appropriate Authority will have to be attached along with the bid."

10. A perusal of Clauses 8 and 15.2 shows that for being exempted from paying the EMD and Tender Fee, a MSE ought to be registered with the Appropriate Authority and proof regarding the registration of the MSE with the Appropriate Authority had to be attached along with the bid.

11. Admittedly, the petitioner has not attached the proof of its registration with the Appropriate Authority. Even assuming that the petitioner had become a MSE by virtue of the Notification dated 1.06.2020, it had to furnish proof of registration with the Appropriate Authority for being eligible for exemption from payment of EMD and Tender Fee. In any event, the Notification dated 26.06.2020 stipulates that the benefit of the Notification dated 1.6.2020 in view of reverse-graduation of an enterprise, will be available from 1.4.2021. Relevant portion of the said Notification reads as follows:-

> *"S.O. 2119(E).—In exercise of the powers conferred by sub-section (1) read with sub-section (9) of section 7 and sub-section (2) read with sub-section (3) of section 8, of the Micro, Small and Medium Enterprises Development Act, 2006, (27 of 2006), hereinafter referred to as the said Act, and in supersession of the notifications of the Government of India in the Ministry of Micro, Small and Medium Enterprises number S.O.1702 (E), dated the 1st June, 2020, S.O. 2052 (E), dated the 30th June, 2017, S.O.3322 (E), dated the 1st November, 2013 and S.O.1722 (E), dated the 5th October, 2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (ii), except as respects things done or omitted to be done before such supersession, the Central Government, after obtaining the recommendations of the Advisory Committee in this behalf, hereby notifies certain criteria for classifying the enterprises as micro, small and medium enterprises and specifies the form and procedure for filing the memorandum (hereafter in this*

notification to be known as —Udyam Registration‖), with effect from the 1st day of July, 2020, namely:--

xxx

8. Updation of information and transition period in classification.—

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(6) In case of reverse-graduation of an enterprise, whether as a result of re-classification or due to actual changes in investment in plant and machinery or equipment or turnover or both, and whether the enterprise is registered under the Act or not, the enterprise will continue in its present category till the closure of the financial year and it will be given the benefit of the changed status only with effect from 1st April of the financial year following the year in which such change took place."

12. Mr. Ratan K. Singh, learned counsel for the respondent No.2 is therefore correct in submitting that the Notification dated 01.06.2020 has been superseded by the Notification dated 26.06.2020 and the benefit of being a MSE was available to the petitioner from 01.04.2021 and therefore, it was not exempted from paying EMD and the Tender Fee. Even otherwise, in the absence of proof of being registered with the Appropriate Authority, the petitioner could not have been exempted from payment of the EMD and Tender Fee. Just because of that, the petitioner cannot claim that after issuance of the Notification dated 1.06.2020, its status was converted from MSME to MSE and resultantly, it is entitled to be considered as a MSE and exempted from payment of EMD and Tender Fee.

13. The petitioner has categorically stated in its representation that it had made possible attempts to obtain the certificate in pursuance of the Notification dated 1.06.2020, issued by the Government of India but it was unable to obtain the said certificate due to the non-updation of the portal.

14. In the light of the admissions made in the writ petition and in the absence of the proof of registration with the appropriate authority, the petitioner is not entitled even to the benefit of the Notification dated 1.06.2020, since the Tender documents make it mandatory that the MSEs intending to get the exemption from payment of EMD and Tender Fee, have to supply the proof regarding registration of MSE with the Appropriate Authority and that certificate had to be attached along with the bid in order to be eligible for exemption.

15. The petitioner has also averred that its representatives had gone to the office of the respondent No.2 and had submitted the documents offline. In fact, the petitioner had received a letter dated 4.8.2020, stating that the respondents had not received any document offline. In its reply to the said letter which was sent on the very same day, i.e. on 4.8.2020, the petitioner did not categorically state that it had submitted the documents in the office of the respondent No.2. The said letter reads as follows:-

> *"We are shocked and surprised to receive your above referred letter in reply to our letter dated 09/7/2020 after expiry of 24 days informing us that our technical bid was not opened since the offline documents were not received at your end.*
>
> *In this regard please note that we had submitted all the required documents and information on line on your portal and offline in your office in a sealed cover well within the due date and time specified in your corrigendum -2 dated*

22/6/2020 and therefore we are shocked to note now that you had not received offline documents.

Apart from the above we are also surprised to know from your above referred letter that our technical bid was not opened since the offline documents was not received whereas while checking in Government eprocurement portal system website it is found that you have rejected our bid on 03/7/2020 at 6.09 PM on the ground EMD Exemption Certificate not received, therefore we do not understand which reason for not opening our technical bid is correct either which is given in Government eProcurement portal system website he one which you are informing us today after expiry of 24 days.

ln this connection it is not out of point to state that the you all are very well aware of the fact that we are a MSE bidder and are exempted from submission of Tender fee and EMD. This document is already shared with you all before submission of the bid also.

We hope by going through the facts stated above you will understand that our bid is being rejected on false and mala fide ground at the behest of someone who do not want us to participate in the tender. In this connection it is not out of point to state that one of the bidder who participated in this tender had made threatening call and sent WhatsApp message to the undersigned of dire consequence if we do not come into an understanding for middle ground with other bidders.

On going through the facts stated above you will realize that there is something fishy going on in your office because of the vested interest of one of the bidder and that is why our offline documents submitted are not traceable and our bid was not opened as per your above referred letter.

Under the circumstances, we request you to do proper investigation as to how and on whose behest our offline document are missing from your office and either accept *our bid or cancel this tender and call for fresh bid so that justice is given to us.*

We also hereby confirm that we are ready to produce/ submit you any/ all the documents uploaded in the website online and submitted in your office offline for verification in original if desired by you."

16. There is not a whisper in the entire letter affirming that the documents had been submitted offline on a particular date, as required in the Notice Inviting Tender. As the petitioner has not cared to mention the date on which the said documents were submitted offline, an adverse inference will have to be drawn against it. This court cannot accept the mere *ipse dixit* of the petitioner that the documents were filed offline as mandated under the Tender. The veracity of such a bald statement cannot be tested while exercising jurisdiction under Article 226 of the Constitution of India. In view of the above, the respondents were justified in rejecting the bid of the petitioner.

17. Admittedly, on 9.07.2020, the petitioner knew that its technical bid had been rejected for non-payment of EMD and the Tender Fee. However, the petitioner has filed the instant petition after a month and a half, on 17.08.2020. In the interregnum, the technical bid and the financial bid have been opened and the contract has been awarded to Indian Telephone Industries Ltd., a PSU. The delay has been sought to be explained by the petitioner by stating that it was submitting representations to the respondent No.2 and was writing letters to the Minister of Communication. It is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution of India is discretionary and normally, courts do not come to the aid of the indolent and lethargic. In State of M.P. and

Ors. v. Nandlal Jaiswal and Ors., **(1986) 4 SCC 566**, the Supreme Court has observed as under:-

> *"24. **Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction.** The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. **When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction.** We do not think it necessary to burden this judgment with reference to various decisions of this Court where it has been emphasised time and again that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal. We may only mention in the passing two decisions of this Court one in **Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489]** and the other in **Ashok Kumar Mishra v. Collector [(1980) 1 SCC 180]** . We may point out that in R.D. Shetty case, even though the State action was held to be unconstitutional as being violative of Article 14*

of the Constitution, this Court refused to grant relief to the petitioner on the ground that the writ petition had been filed by the petitioner more than five months after the acceptance of the tender of the fourth respondent and during that period, the fourth respondent had incurred considerable expenditure, aggregating to about Rs 1.25 lakhs, in making arrangements for putting up the restaurant and the snack bar. Of course, this rule of laches or delay is not a rigid rule which can be cast in a strait jacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But, such cases where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the court; ex hypothesi every discretion must be exercised fairly and justly so as to promote justice and not to defeat it." (emphasis added)

18. As stated above, the contract has already been awarded and third party rights have been created. Therefore, the writ petition cannot be entertained on the ground of delay and latches, apart from the fact that even on merits, the petitioner has not been able to make out a case for this court to exercise jurisdiction under Article 226 of the Constitution of India as it has failed to file the requisite documents, as stipulated in the Notice Inviting Tender. The writ petition is accordingly dismissed as meritless.

SUBRAMONIUM PRASAD, J

HIMA KOHLI, J

AUGUST 25, 2020

jitender/rkb