

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO.951 OF 2021**

O.K. Marine,
Through its Sole Proprietor,
Mr. Munawar Amirali Mukadam .. Petitioner
v/s.
Oil And Natural Gas Corporation Ltd. And Ors. .. Respondents

....

Mr. R.D. Soni, i/b. Irvin D'souza, for the Petitioner.

Dr. Abhinav Chandrachud, a/w. Mr. Nishit Dhruva, Mr. Prakash Shinde,
Ms. Khushbu Chhajer, Mr. Abhishek Bhavsar and Ms. Alisha Shah, i/b.
MDP & Partners, for Respondent Nos. 1 and 3.

Mr. Kunal Gaikwad, for Respondent No.4.

Mr. Karl Tamboly, a/w. Mr. Ramiz Shaikh and Mr. Akshay Bafna, i/b. Bafna
Law Associates, for Respondent No.5.

....

**CORAM: S.C. GUPTE &
M.S. KARNIK, JJ.**

DATE : 8 JUNE, 2021.

ORAL JUDGMENT (Per S.C. Gupta, J.):

. Heard learned Counsel for the Petitioner and learned Counsel
for Respondent No.1 - ONGC and Respondent Nos. 4 and 5, who are the
rival contractors, who have been awarded the subject contract pursuant to
a bidding process, which is the subject matter of challenge in the present
petition at the instance of the Petitioner.

2. The Petitioner claims to be a sole proprietor of a firm carrying on business of fresh water supply through barges. The Petitioner has been one of the contractors supplying water to Respondent No.1 ONGC. On 26 November 2020, Respondent No.1 invited Indigenous Open Tender for e-procurement for supply of water to its offshore facilities, including the Nhava Supply Base. The tender was a two bid system – a technical bid followed by a commercial bid. The Petitioner was one of the contractors, who submitted a bid. There were three others, who had also submitted bids. These others included Respondent Nos. 4 and 5, who have been successful bidders, whilst the third bidder was one Royal Traders, which happens to be a sole proprietorship of the Petitioner's father. Whilst the Respondent ONGC had cleared the technical bids of all four bidders, including the Petitioner and his father, at the stage of consideration of commercial bids, the bids of both the Petitioner and his father were not opened. That was on the footing that upon evaluation of offers submitted by the Petitioner and M/s. Royal Traders, it had come to the notice of Respondent ONGC that the proprietors of the two firms were, respectively, the son and father. Considering that the two would have access to vital information pertaining to the bid submitted by the other, including the prices quoted by each other, the employer came to a conclusion that both bidders have an undisclosed understanding (formal or informal) with each other, which would restrict competitiveness or introduce cartelisation in the bidding process, thereby offending Section 2 of the Integrity Pact.

3. Section 2 of the Integrity Pact is quoted below:

Section 2 - Commitments of the Bidder/contractor

2. The Bidder/Contractor will not enter with other Bidders into any undisclosed agreement or understanding, whether formal or informal. This applies in particular to prices, specifications, certifications, subsidiary contracts, submission or non - submission of bids or any other actions to restrict competitiveness or to introduce cartelisation in the bidding process.

4. It is the Petitioner's case that whilst it is correct that the Petitioner and the proprietor of Royal Traders are a son and father duo, that circumstance by itself does not imply any undisclosed agreement or understanding between the two, whether formal or informal, or amount to any action so as to restrict competitiveness or introduce cartilisation in the bidding process.

5. After this matter was heard earlier by this Court, this Court, by its order dated 29 April 2021, permitted the Petitioner to file a representation with the competent authority of Respondent ONGC and the latter was directed to pass a reasoned order on that representation. Pursuant to this order, the Petitioner did file a detailed representation to the competent authority of ONGC, who, by its detailed order dated 5 May 2021, rejected the representation on a composite statement of reasons. In the meantime, it appears that the subject contract was awarded to Respondent Nos. 4 and 5, who were successful bidders, upon opening of commercial bids; the award was notified on 12 February 2021 and, pursuant to the award, formal contracts were executed on 8 March 2021 and 22 March 2021, respectively.

6. Learned Counsel for the Petitioner challenges the impugned award of contract to Respondent Nos. 4 and 5 by denying opportunity to the Petitioner, on the following grounds:

- (a) It is, firstly, submitted that the Petitioner's bid does not involve any breach of the Integrity Pact. It is submitted that there is no prohibition on relatives participating in the tendering process. It is submitted that the original clause prohibiting relationship of a bidder with another, directly or through common parties, that put them in a position to have access to each other's information about, or to influence, the other bid has been expressly done away with. It is submitted that the modified provision simply prohibits entering into with other bidders of an undisclosed agreement or understanding, whether formal or informal, such understanding being in particular reference to prices, specifications, certifications, subsidiary contracts, submission or non-submission of bids, or any other actions so as to restrict competitiveness or to introduce cartilisation of the bidding process.
- (b) It is submitted that the conclusion of the Respondent employer of breach of the Integrity Pact is a matter of inference and presumption. It is submitted that the Petitioner's tender cannot be rejected simply on the basis of surmises, especially when his bid has been found to be technically responsive.

- (c) It is submitted that once a technical bid is accepted upon the bidder being found eligible, without opening his commercial bid, he cannot be disqualified from participating, or being considered, further in the tender process.
- (d) It is submitted that there is no case of cartilisation in the facts of this case and, in any event, cartilisation, if any, can be assessed only after all commercial bids are opened, since one of the important ingredients of cartilisation concerns pricing.
- (e) It is submitted that as an end result of its action, the Respondent State is put to a loss of about Rs.45 lakhs, since the Petitioner's bid had offered a price of Rs.241/- per ton of potable water, whilst the successful bids of Respondent Nos. 4 and 5 had offered Rs.249/- per ton.
- (f) Lastly, it is submitted that the final decision of ONGC, after considering the Petitioner's representation in pursuance of the order of this Court, contains various reasons, which were not disclosed in the original order of rejection of the Petitioner's tender. It is submitted that in a tender matter, reasons for the employer's original action cannot be supplemented. Learned Counsel relies on the cases of **State of Punjab vs. Bandeep Singh**¹ and **Tata Cellular vs. Union of India**² in support of this proposition.

1 Civil Appeal Nos.629 and 630 of 2006 decided on 25.8.2015

2 (1994) 6 SCC 651

7. None of the grounds urged by the Petitioner in support of his challenge to the acceptance of the bids of Respondent Nos. 4 and 5 by the employer ONGC commends itself to us. Firstly, it has been borne out by the record that the Petitioner and his father, though shown as proprietors of different concerns, operate from the same premises. The letterheads of the two bear the same address, though, after this matter was brought before this Court, changes have been made in their respective letterheads in hand, suggesting that whereas the Petitioner operates from Room Nos. 1 and 2 on the first floor of the building, his father operates from Room Nos. 3 and 4 on the same floor. The address of the two is borne out by their respective MSME (Micro, Small and Medium Enterprises) certificates. It is also a matter on record that in an earlier contract involving another employer, namely, Bombay Port Trust, the Petitioner has not only acted both for himself and his father, but has also issued cheques from the same account towards the contracts of himself and his father. This being a purely administrative matter, to fault a decision of the Respondent employer, there must be a case of either perversity in the decision or a colourable exercise on the part of the employer. Though scrutiny of such decision does not even go strictly by Wednesbury principles, even applying those principles, the decision cannot be faulted. The decision of the Respondent employer has been supported by some material on record; it does not take into account any irrelevant or non-germane fact or circumstance; it is clearly a possible decision based on the materials available before the employer. Even if the State cannot act in a matter of commercial contract in a wholly unreasonable or arbitrary or capricious manner, its administrative decision cannot be put on the pedestal of a quasi-judicial decision. Yet, as we have pointed out above,

even by those standards, the present decision cannot be faulted.

8. A conclusion such as the one that the Respondent employer has arrived at in the present case, namely, that there is a clear likelihood of an undisclosed agreement or understanding, formal or informal, between the two bidders in reference to either prices, specifications, certifications, etc., which has the tendency of restricting competitiveness or introducing cartilisation in the bidding process, has essentially to be a matter of inference based on material available before the decision maker; no direct evidence of any such agreement or understanding is ever likely to be available before such decision maker. As long as the decision is reasonably supported by material on record and there is no case of victimisation or colourable exercise, the decision cannot be faulted.

9. There is nothing sacrosanct about finding the technical bid of a bidder responsive in a two bid system so as to make it obligatory on the employer to open the commercial bid. The employer may well come upon knowledge of some relevant information, which disqualifies the particular bidder, and in that case may choose not to open his commercial bid. If his disqualification is supported by some material on record, there is nothing further for this Court to inquire. It cannot be suggested that in all cases after his technical bid has been accepted, the bidder cannot be disqualified, except after opening of his commercial bid.

10. It is not necessary for the employer to come to a conclusion of a possible case of cartilisation only after opening of commercial bids. There may be other tell-tale circumstances, which clearly suggest a case of

cartilisation. In any event, cartilisation *per se* is not a ground on which the Petitioner's bid has been rejected; what was relevant for rejection of the Petitioner's bid was a probable undisclosed agreement or understanding, formal or informal, which has the tendency of restricting competitiveness.

11. The end result of the difference in pricing is not such as would invite this Court's interference in its writ jurisdiction in the facts of the case particularly narrated above.

12. There is no substance in the submission that further reasons could not be given by ONGC. In this particular case, this Court in terms directed ONGC to pass a reasoned order after allowing the Petitioner to make a representation. The Petitioner's representation has been dealt with at great length by Respondent ONGC and, in keeping with the directions of the Court, it has passed a reasoned order rejecting that representation. So long as these reasons have a material bearing on the decision itself, they cannot be faulted.

13. There is, accordingly, no merit in the grounds of challenge urged by the Petitioner. In any event, ONGC has gone ahead with award of the contract. Contracts have been executed with Respondent Nos. 4 and 5, as noted above, in March 2021. Both contractors have made arrangements, including hiring of barges for the contract supplies, and have expended sizable amounts towards preparedness for executing the supplies.

14. There is, accordingly, no merit in the petition. The petition is dismissed. No order as to costs.

15. The subject matter of the present petition also involves a show cause notice issued by the Respondent ONGC to the Petitioner for blacklisting him. Whilst we do not make any observation on this particular issue, we make it clear that this notice shall be decided by the Respondent ONGC on its own merits without reference to the present order. All rights and contentions of the parties in that behalf are kept open.

(M.S. KARNIK, J.)

(S.C. GUPTE, J.)