IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.03.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.6237 of 2021

MBG Commodities Private Limited
CIN : U51101TG2012PTC082575
Regd. office at # 8-2-293/174/A/26
2nd Floor, Road No.14, Banjara Hills
Hyderabad 500 034
Telangana
rep. by its authorised signatory
Venkata Srikanth. ... Petitioner

Vs.

Tamil Nadu Generation & Distribution
Corporation Ltd. (TANGEDCO)
rep. by its Chairman / Managing Director
144, Anna Salai, Chennai
Tamil Nadu 600 002. ... Respondent

Prayer: Petition under Article 226 of the Constitution of India praying for a writ of Certiorarified Mandamus calling for the records of the respondent's Tender Specification No: Coal - 74DT. 18.01.2021 for supply of 20.00 Lakhs Tonnes of imported coal of any region having GCV 6000 kcal/kg (ADB) at Kamarajar Port, Ennore for the period from May 2021 to May 2022 (E-Tender) and quash the Clause 1.18 (xvi) under Section II - General Instruction to Tenderers and Clause 7.14.2 under Section III - Commercial and consequently, direct the respondent to accept the proposal / bid of the petitioner for the Tender Specification No: Coal - 74DT. 18.01.2021 without insisting on the Export License from the petitioner.

For Petitioner : Mr.AR.L.Sundaresan, S.C.
For M/s. Fox Mandal and Associates

For Respondent : Mr.Vijay Narayan
Advocate General
Assisted by
Mr.N.Damodaran

ORDER

(Made by the Hon'ble Chief Justice)

The writ petitioner has put in a bid pursuant to a notice inviting tender issued by first respondent TANGEDCO for import of 20 lakh ton of coal of specified calorific values. According to the petitioner company, it qualifies to participate in the tender process, in the sense that all the essential eligibility criteria are met by it. However, the petitioner complains that one of the clauses in the tender documents, which requires an export license to be held by the bidder, stands in the petitioner's way.

2. The petitioner refers to paragraph 1.18 under the Section II of the General Instructions in the tender documents. Clause (viii) of such part provides as follows:

> "(viii) The documentary evidence for BQR for Clause No.7(iii) of Tender Specification Coal-74 dated 18.01.2021 i.e. Schedule - G: Letter from Mine Owner and Schedule-P (Filled up Schedule-G and Schedule-P) to be uploaded as scanned copy of Original."

3. According to the petitioner, what the clause quoted above implies is that a person agreeing to supply coal to TANGEDCO in terms of the NIT would have to have an agreement with the mine-owner to be assured of the quantity of supply and for TANGEDCO to be satisfied as to the source of the coal, so as to be able to ascertain the quality and the price thereof. The petitioner says that he has no quarrel with clause (viii) above and has furnished the agreement and documents in the forms sought. However, the petitioner refers to clause (xvi) of the same part that provides as follows:

> "(xvi) A scanned copy of original Export License from the respective country for export of the coal."

4. The petitioner says that as long as a bidder has an agreement with the mine-owner to obtain the requisite supply and make over the same to TANGEDCO, the electricity company should be satisfied since the origin of the coal is assessed, the price is known and the quality is easily ascertainable. In such circumstances, the tender documents insisting that the bidder should also have an export license in his name issued in the country of origin of the coal intended to be supplied is unnecessary and it is an attempt to weed out indian bidders from the process. The petitioner has, in such context, placed clause 7.14.2 under the heading "Bidder's Responsibilities" that specifies that the bidder should have the valid export license, meaning thereby that the export license ought to be in the name

of the bidder.

5. The respondent asserts that it is for a party inviting offers to set the rules of the game and, in view of the observations of the Directorate of Revenue Intelligence in respect of previous supplies, TANGEDCO has been constrained to devise a completely new set of rules and to ensure that middlemen are not involved in effecting supplies at inflated rates, so that the quality sought may be obtained at the lowest possible price. In such context, the respondent relies on a letter dated March 31, 2016 issued by DRI, New Delhi, to all the Principal Chief Commissioners of Customs and other officials and intituled as "Modus Operandi / General Alert Circular No.11/2016-CI".

6. It appears that from the relevant documents circulated by the DRI that in respect of several coal imports, Indonesian coal was directly shipped from Indonesian port to importers in India, but the import invoices were routed through several other countries only for the purpose of artificially inflating the value of the coal. The respondent says that in the light of such observation, it has taken the step to ensure that the bill of lading is in the name of the bidder, so that the bidder is, in a sense, rooted to the country of origin of the product and no middlemen can come into play.

7. Ordinarily, in matters pertaining to tender terms, Courts are slow to interfere unless the terms are found to manifestly unjust or utterly absurd or having no nexus with the purpose of the notice.

8. In the instant case, it appears to be somewhat strange that despite a bidder having an agreement with a coal mine-owner to demonstrate the bidder's capacity to deliver the quantum sought by TANGEDCO, the bidder is further required to furnish an export license in the name of the bidder. Indeed, if the export license is in the name of the mine-owner and, on the strength of the agreement with the bidder, the goods are shipped to TANGEDCO, that may suffice for TANGEDCO.

9. However, considering the observations of the DRI and the fact that re-routing of the invoices may be completely stopped if the name of the export licensee appears in the bill of lading, the relevant clause cannot be regarded as utterly absurd or completely unnecessary. Further, it is submitted on behalf of the respondent that the exercise of importing coal is a regular feature and it is now to be undertaken on a six-monthly basis. The respondent submits that now that the rules of the game, so to say, have been completely altered pursuant to the DRI observations, if in course of this or the next supply it is

perceived that the requirement of an export license in the name of the bidder causes the price to be increased, corrective steps may then be taken. For the moment, the respondent says that in deference to the DRI observations, it has been constrained to incorporate the relevant clause so as to ensure that the invoices are not routed through other countries as may be possible if the bill of lading does not reflect the name of the bidder.

10. Since Courts have to allow even government bodies a degree of play-in-the-joints in matters pertaining to tenders, it cannot be said that the impugned clause is completely without basis or absurd or made with a view to exclude a class of persons or the writ petitioner in particular. Courts have to yield to the better judgment of the PSUs or other Government bodies, particularly in commercial matters, unless a case of malafides or absurdity is made out.

11. For the aforesaid reasons, no interference is called for at this stage, more so as the bids have already been opened. W.P.No.6237 of 2021 is disposed of without any order in petitioner's favour. Hopefully, the current exercise may educate TANGEDCO to drop the offending clause, if as a result thereof the bid price appears to be higher. There will be no order as to costs. WMP Nos.6854 and 6855 of 2021 are closed.

Sd/-
Assistant Registrar (CS-VII)

//True Copy//

Sub Assistant Registrar

kpl

To

The Chairman / Managing Director
Tamil Nadu Generation & Distribution
Corporation Ltd. (TANGEDCO)
144, Anna Salai, Chennai
Tamil Nadu 600 002.

+1cc to Mr.Fox Mandal Associates, Advocate, S.R.No.18119

W.P.No.6237 of 2021

SKY(CO)
GN(29/03/2021)