

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

Judgment reserved on: 12.10.2021

% **Judgment delivered on: 09.12.2021**

+ **W.P.(C) 9575/2021 & CM APPL. 29637-29639/2021**

UNDERWATER SERVICES COMPANY LIMITED Petitioner

Through: Mr. Parag P. Tripathi, Senior Advocate with Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Mr. Ankit Banati, Ms. S. Priya, Ms. Vishakha Nagaraj and Mr. S. Srinivasan, Advocates.

versus

INDIAN OIL CORPORATION LIMITED Respondent

Through: Mr. V.N. Koura and Mr. Sirish Kumar, Advocates for respondent No.1/IOCL.
Mr. Chetan Sharma, ASG with Mr. Apoorv Kurup (CGSC) and Ms. Akshata Singh, Ms. Vinay Yadav, Mr. Akshay Gadeock, Mr. Sahaj Garg and Mr. Amit Gupta, Advocates for respondent No.2.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH**

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner has preferred the present writ petition to seek quashing of the communication dated 31.08.2021 issued by the respondent. The

petitioner also seeks a direction to the respondent to restore the letter dated 17.08.2021 and allow the petitioner to use its option of Right of First Refusal (RoFR).

2. The case of the petitioner is that the petitioner was the first commercial diving company in India. It has expanded into various ancillary businesses, including SPM Maintenance, offshore diving including saturation and mixed gas, plus salvage and wreck removal. The petitioner is the incumbent contractor at the Paradip Port providing maintenance and operation of offshore terminals and other facilities, and similar services at other ports in India, including at IOCL Vadinar, Bharat Oman Refinery at Singach, BPCL at Kochi, HMEL at Mundra, Reliance at Hazira and Sikka Port and Terminal Limited – Reliance Group Company.

3. The respondent No.1/ Indian Oil Corporation Limited (IOCL) invited a tender for “*Maintenance and Operation of Offshore Terminals & Facilities at Paradip, Orissa*” for a period of three years from eligible bidders. The “*Type of tender*” was described as “*Open (Global), Tender Cum Reverse Auction*”.

4. The commencement date of the work under the tender, by the selected contractor was fixed as 14.11.2021 or any other date as notified by the Engineer-in-charge in that behalf.

5. The petitioner participated in the tender. The terms & conditions laid down in the tender provided for preferential treatment to the domestic shipping industry by providing the domestic players (i.e. those offering Indian Flag Vessel) the RoFR by matching the most competitive bid if the

L-1 bidder was the one offering a Foreign Flag Vessel. Relevant clauses in this regard were incorporated in Clause 23.9.0 and 23.10.0 of the tender document which were premised on the Circular No.2/2002 issued by the Director General of Shipping, Mumbai under Sections 406 & 407 of the Merchant Shipping Act, 1958. Clause 23 of the tender document prescribed the mechanism of Price Evaluation and Comparison of Bids”. Clause 23.9.0 and Clause 23.10.0 are relevant, and read as follows:

“23.9.0 Due consideration will be given to Vessels / Boats with Indian Flag as per the S.D. Circular-2/2002 dated 08.11.02 issued from the Office of the Director General of Shipping, Mumbai and any amendments issued subsequently thereof.

23.10.0 The detailed S.D. Circular-2/2002 can be seen on internet at web site

www.dgshipping.com/

http://www.dgshipping.com/dgship/final/notices/sdcir2_02.htm)
the official site of the Office of the Director General of Shipping, Mumbai. Some of the relevant clauses under ‘Chartering of Vessels done through Tender Process for all types of Requirements’ are reproduced here:

- Unless the Indian vessel becomes successful in the evaluation of the technical bid, it will not of course be eligible for any consideration and support under the provisions of Section 407 of the M.S. Act, 1958.***
- Whenever charter of vessel is undertaken through a tender process, open, closed or global tender, or any other process of tender, the provisions of these guidelines are required to be incorporated. Whether the guidelines have been incorporated in any tender or not, the said guidelines would be deemed to have been incorporated as a part of the tender documents.***

• *Every tender process would provide scope for Indian Citizens/ Companies/ Cooperative Societies having Indian flag vessels to participate in the said tender. Where the said Indian Citizens/Companies/ Co-operative Societies have failed either to participate or obtain the order, they cannot be allowed to obtain the same or part of the same work at any cost merely through the provisions found in Section 407 and Section 406 of the M.S. Act, 1958. In the said tender process, **the right of first refusal will remain with the Indian vessel owner on his showing readiness to take up the job at the lowest price indicated by the foreign flag vessels.***

• *"Right of first refusal" is a right which accrues to a bidder in a tendering process - who offers an Indian flag vessel and whose rate though not being the lowest - to be awarded the tender, subject to his matching of the lowest rate offered by a bidder who offers a foreign-flag vessel. This right is conferred based upon the practices of the industry, and the deliberate intention of the Central Government towards encouragement and development of the Indian shipping industry.*

• *Right of first refusal will be applicable to:*

(a) A vessel, which has been offered by an Indian bidder, and which remains under foreign flag on the date of the price bid opening, would be treated as a foreignflag vessel for the purpose of bid evaluation. Accordingly, the lowest Indian-flag vessel would be granted the right of first refusal against the foreign-flag vessels including the foreign flag vessel(s) which are offered with an undertaking to convert to Indian flag prior to commencement of operations.

(b) Above the lowest tender with a foreign-flag vessel, where there are more than one Indian tenderer offering Indian flag vessel(s), then the first right of first refusal will be given to the lowest among such Indian tenderers, and on his failure to match the lowest tender, the next higher Indian tenderer will be given the offer and so on.

(c) The offer of any foreign flag vessel by an Indian bidder with an undertaking to convert it to Indian flag prior to commencement of operations but later than the price bid opening can be considered only when and if the Indian bidder/s offering Indian-flag vessel/s have failed to match the lowest price offered by the foreignflag vessel. In such event the tender-awarding authority shall incorporate deterrent penalties in the award of tender to ensure that the bidder will convert the vessel to Indian flag before commencement of operations.

(d) Similarly, an Indian bidder who offers an Indian flag vessel(s) for a particular tender will not be granted licence by D. G. Shipping to charter a foreign flag vessel(s) for the same work either at the commencement of charter or at any time during the tenure of the charter. The Indian bidder will not be allowed to substitute the Indian flag vessel(s) with a vessel that was being constructed, contracted or flying a foreign flag at the time of bidding but was to be converted to Indian flag prior to commencement of operations, but later than the price bid opening. Nor will he be allowed to bring in another Indian-flag vessel from elsewhere hoping to replace it with a foreign-flag vessel, irrespective of whether tender process was followed or not. Such a request to grant licence for a foreignflag vessel will not be granted by D.G. Shipping to replace an Indian-flag vessel.

(e) In short, both in (c) and (d), equity will be maintained to ensure a balance between both the objectives of encouraging the existing Indian-flag vessels on the one hand, and of encouraging the acquisition of new Indian tonnage, but with a slight tilt in favour of existing Indian-flag vessels since the investment here has already been made.” (emphasis supplied)

6. The case of the petitioner is that it offered an All-Indian Fleet, i.e. Indian Built, Indian Flag and Indian Owned Vessels. The petitioner further submits and it is not in dispute that the petitioner and one other bidder – who offered a foreign flag vessel, were found to be technically compliant. The

Financial Bids of the petitioner and the other bidder were opened and it was found that the other bidder, namely Coastal Marine Construction & Engineering Ltd. (“COMACOE”) was the L-1 bidder. However, since the petitioner had offered an All Indian Fleet, i.e. Indian Flag and Indian Owned Vessel, as opposed to the foreign flag vessels offered by the L-1 bidder, the petitioner was extended the RoFR by the respondent on 17.08.2021. It was informed that the lowest quote offered in respect of the tender in question was Rs.2,28,33,33,655.92 (including fuel cost & GST). Since the Indian flag vessel was offered by the petitioner, in line with, *inter alia*, the DG (Shipping) S.D. Circular No.2/2002, the respondent offered to the petitioner the opportunity to match the composite effective price of the L-1 bidder. It was further stated *“The composite effective price matching/ the Right of first refusal rests with M/s USCL, for price matching with L-1 bidder. Though the rates offered by M/s USCL are not the lowest, the tender shall be awarded to it subject to matching of the lowest rate offered by the L-1 bidder (who has offered foreign-flag vessel).”*.

7. The petitioner accepted the offer made by the respondent on 19.08.2021 by stating that *“The petitioner hereby confirm to match composite effective price of the L-1 bidder”*.

8. On 26.08.2021, the respondent required the petitioner to extend the validity of its offer up to 31.10.2021 unconditionally. On the same day, the petitioner granted the unconditional extension of its offer till 31.10.2021.

9. The petitioner states that it was shocked to receive the impugned communication dated 31.08.2021, wherein the respondent took the stand that it had been clarified by the D.G. Shipping, Government of India that the said contract would be governed by the guidelines of DGS Circular

No.2/2021 dated 14.01.2021, and not by the earlier Circular No.2/2002 referred to in their letter dated 17.08.2021 (which offered the RoFR to the petitioner). The respondent took the stand that in terms of Clause 21.2 of DGS Circular No.2/2021, the provisions of the said Circular are deemed to have been automatically incorporated as a part of the tender document, whether specifically incorporated in the tender, or not.

10. It was further stated that, whereas, under DGS Circular No.2/2002 the RoFR was not subject to bid margin, Clause 21.3.3 read with Clause 21.3.5 of the DGS Circular No.2/2021, provided that the RoFR would only be applicable if the rate quoted is not more than 20% above the price quoted by the L-1 bidder. The respondent claimed that since the final price quoted by the petitioner was more than 20% above the price quoted by the L-1 bidder, the petitioner was not eligible to avail of the RoFR under DGS Circular No.2/2021 dated 14.01.2021. It was claimed that the letter dated 17.08.2021 offering the First Right of Refusal to the petitioner had been erroneously issued, and therefore, the same was sought to be withdrawn.

11. Aggrieved by the said action of the respondent, the petitioner first made a representation on 31.08.2021. Since the petitioner did not receive any positive response, it has preferred the present writ petition to seek the reliefs aforesaid.

12. When the writ petition came up for preliminary hearing on 03.09.2021, we directed impleadment of Director General of Shipping, Mumbai as a party respondent. Mr. Apoorv Kurup appeared on behalf of the Director General of Shipping and accepted notice. The respondents were granted time for filing their counter-affidavits. The operation of the impugned communication dated 31.08.2021 issued to the petitioner by the

respondent/ IOCL was stayed till the next date. On the next date, i.e. 13.09.2021, the petitioner – on instructions, made a statement through the counsel that in case the commencement of the new contract is delayed on account of the pendency of the present petition and the petitioner – which is the existing contractor, is required to provide services beyond the period for which the existing contract is in operation, the petitioner shall continue to provide the services for the additional period at the new rates found as the L-1 rates in the tender process in question. The rates quoted by the L-1 bidder were lower than the rates prevailing under the existing contract with the petitioner.

13. Since the pleadings were complete, we heard arguments and reserved judgment on 06.10.2021.

14. During the course of preparation of the judgment, we felt it necessary to call for certain clarifications from the learned counsels. Accordingly, vide order dated 08.10.2021, we directed the matter to be listed for directions on 12.10.2021.

15. On 12.10.2021, we heard learned senior counsel for the petitioner Mr.Parag Tripathi; Mr. Kurup on behalf of respondent No.2/ DGS as well as Mr. Shirish Kumar on behalf of the respondent No.1/ IOCL. We sought clarifications, particularly, in relation to Clause 23 of the NIT. Thereafter, the judgment was again reserved.

16. The submission of Mr. Tripathi – learned senior counsel for the petitioner, is that the NIT not only stipulated that due consideration will be given to vessels/ bids with Indian Flag as per S.D. Circular No.2/2002 dated 08.11.2002 issued from the Office of the Director General of Shipping, Mumbai, and any amendments issued subsequently thereto, but it also went

on to extract some of the relevant and salient clauses of the said Circular. It was clearly represented by the respondent/ IOCL in the NIT that the RoFR will remain with the Indian vessel owner on his showing the readiness to take up the contract at the lowest price offered by the foreign flag vessel. The Right of First Refusal was also clearly explained as a right which accrues to a bidder in a tendering process, i.e. the right to the bidder who offers an Indian Flag Vessel and whose rate, though not being the lowest, derives the right to be awarded the tender subject to his matching the lowest rate offered by a bidder who offers a foreign flag vessel. It was clearly stated that this right is based upon the practices of the industry, and that it was the deliberate intention of the Central Government to encourage and develop Indian Shipping Industry.

17. Mr. Tripathi submits that the acceptance of the RoFR by the petitioner on 19.08.2021 vested rights in the petitioner to be awarded the contract. He submits that the issuance of the impugned communication dated 31.08.2021, purporting to withdraw the RoFR after the same had been accepted is illegal inasmuch, as, the same was not preceded by a show-cause notice and an opportunity to the petitioner to meet the ground taken by the respondent/ IOCL premised on DGS Circular No.2/2021 dated 14.01.2021.

18. Mr. Tripathi submits that reliance placed by the respondents on DGS Circular No.2/2021 is misplaced in the facts and circumstances of the case, for the reason that the NIT in question makes absolutely no reference to the said circular. On the contrary, it clearly stipulates that the NIT would be governed by the DG (Shipping) S.D. Circular No.2/2002 dated 08.11.2002. Not only that, it also goes on to incorporate in the NIT itself the clause relating to the Right of First Refusal available to Indian Flag Vessels,

without any limitation on the said right, as was sought to be introduced by the DGS Circular No.2/2021 dated 14.01.2021. He further submits that since the petitioner has agreed to match the price of the L-1 bidder, there is no loss to the exchequer and it would be most unfair to deny the RoFR to the petitioner, as the petitioner participated in the tender in question on the representation held out by the respondent IOCL – that the RoFR available to Indian owned and Indian Flag Vessels is without any limitation on price margin. Had the petitioner been put to prior notice of the margin limits, as prescribed in the DGS Circular No. 2/2021, the petitioner would have structured its bid in the light of the said Circular. Thus, the respondent IOCL is estopped– at this stage, to deny the RoFR to the petitioner, after the petitioner has already exercised the said right.

19. On the other hand, the submission of Mr. Kaura – learned senior counsel appearing for the respondent No.1/ IOCL, and Mr. Kurup – who appears for the Director General of Shipping, is that the Circular No.2/2002 stands specifically superseded by the Circular No.2/2021 dated 14.01.2021. They further submit that the RoFR contained in Circular No.2/2021 has introduced the limitation that RoFR shall be applicable to all inquiries of in-charter of foreign flagged vessel within a 20% margin of price preference (price band), i.e. the maximum extent to which the price quoted by an Indian company may be above the L-1 for the purpose of purchase preference.

20. Clause 21.3.5 of the Circular No.2/2021 is referred to, which reads as follows:

“21.3.5. Further, RoFR shall be applicable to all inquiries for in-charter of foreign flagged vessels with in a 20% margin of purchase preference (price band) i.e. the maximum extent to

which the price quoted by an Indian Company may be above the L1 for the purpose of purchase preference.”

21. It is argued on behalf of the respondents that since the price quoted by the petitioner did not fall within the price band, i.e. within the 20% margin of purchase preference, the petitioner was not entitled to be given the RoFR, even though the petitioner is an Indian company offering Indian Flag Vessels. It is argued that the aforesaid clause has been incorporated in DGS Circular No.2/2021 since the Indian companies offering Indian Flag Vessels were not bidding in a responsible way, and were offering high and unreasonable rates, as they enjoyed the comfort of having the RoFR to meet the lower offer made by the foreign origin, foreign flag vessel as L-1 bidder. It is argued that the said clause puts deterrence on the Indian bidders offering Indian Flag Vessels to bid in a competitive way, and not to unduly exploit the fact that they are entitled to the RoFR.

22. Learned counsels for the respondents have also argued that even the NIT clearly stipulated that due consideration will be given to vessels/ bids with Indian Flag as per S.D. Circular No.2/2002 dated 08.11.2002 issued from the Office of the Director General of Shipping, Mumbai “*and any amendments issued subsequently thereof*”. It is argued that Circular No.2/2021 dated 14.01.2021 is on the same subject, and amends the terms & conditions on which the RoFR may be availed of by vessels/ bids with Indian Flag. Thus, the petitioner should have known that its RoFR would be governed by Circular No.2/2021, and not by Circular No.2/2002 which gave an unlimited RoFR to Indian bidders with Indian Flag Vessels. Thus, it is argued that even the NIT prescribed that any subsequent Circular issued by

the Director General of Shipping on the subject on which S.D. Circular No.2/2002 dated 08.11.2002 was issued, would hold the field.

23. We have considered the rival submissions of the parties in the light of the relevant documents. We have also considered the statutory provisions contained in Sections 406 & 407 of the Merchant Shipping Act, 1958 and the two circulars issued by the Director General Shipping above referred to.

24. Before we proceed further, we need to first examine as to what is the nature of the Circulars issued by the Director General, Shipping by resort to Sections 406 and 407 of the Merchant Shipping Act, 1958. These Sections read as follows:

*“406. **Indian ships and Chartered ships to be licensed.**—(1) No Indian ship and no other ship chartered by a citizen of India or a company [or a co-operative Society] shall be taken to sea from a port or place within or outside India except under a licence granted by the Director-General under this section:*

Provided that the Central Government, if it is of opinion that it is necessary or expedient in the public interest so to do, may, by notification in the Official Gazette, exempt any class of ships chartered by a citizen of India or a company [or a co-operative Society] from the provisions of this sub-section.

(2) A licence granted under this section may be

(a) a general licence;

(b) a licence for the whole or any part of the coasting trade of India; or

(c) a licence for a specified period or voyage.

(3) A licence granted under this section shall be in such form and shall be valid for such period as may be prescribed, and

shall be subject to such conditions as may be specified by the Director-General.

407. Licensing of ships for coasting trade.—(1) *No ship other than an Indian ship or a ship chartered by a citizen of India [or a company or a co-operative society which satisfies the requirements specified in clause (b) or, as the case may be, clause (c) of section 21], shall engage in the coasting trade of India except under a licence granted by the Director-General under this section.*

(2) *A licence granted under this section may be for a specified period or voyage and shall be subject to such conditions as may be specified by the Director-General.*

(3) *The Central Government may, by general or special order, direct that the provisions of sub-section (1) shall not apply in respect of any part of the coasting trade of India or shall apply subject to such conditions and restrictions as may be specified in the order”*

25. Section 406 prohibits an Indian ship or a ship chartered by a citizen of India or a company, or a cooperative society in India from being taken to sea from a port, or place within or outside India, except under a license granted by the Director General under the said Section. The Central Government has the authority to exempt any class of ships chartered by a citizen of India or a company, or a cooperative society in India from the requirement of obtaining a license from the Director General, by issuing a notification in the Official Gazette. The different kinds of licenses which may be granted by the Director General are enlisted in Clause (a) (b) & (c) of sub-section (2). The license that the Director General may grant can be made subject to such conditions as may be specified by the Director General.

26. Section 407 is the more important and relevant provision for our purpose. It seeks to place an embargo on a ship – other than an Indian ship, or a ship chartered by a citizen of India, or an Indian company, or cooperative society, from engaging in the coasting trade of India except under a license granted by the Director General under the said Section. The license granted under the said Section may be for a specified period of voyage, and shall be subject to such conditions as may be specified by the Director General. Like in the case of Section 406, sub-section (3) of Section 407 empowers the Central Government to, by a general special order, direct that the provisions of sub-section (1) shall not apply in respect of any part of the coasting trade of India, or shall apply subject to such conditions and restrictions, as may be specified in the order.

27. The source of authority of the two Circulars aforesaid dated 08.11.2002 and 14.01.2021 is stated to be Sections 406 and 407 of the Act. The circular dated 08.11.2002 itself makes it clear that the same purports to contain “*Guidelines.*” These guidelines have been made applicable to all vessels as defined in the Merchant Shipping Act. Similarly, the Circular No. 2 of 2021 dated 14.01.2021 also purports to issue “*Guidelines, for right of first refusal in chartering or engagement of foreign vessels.*”

28. The guidelines issued by the Director General, Shipping by resort to Sections 406 and 407 have effect of incorporating rights and limitations in the license issued by the DG, Shipping, to both – Indian and foreign vessels. However, these guidelines do not constitute a law, and they do not have statutory force. They are administrative orders. The Merchant Shipping Act provides in Section 457, a general power to make Rules by the Central

Government “*generally to carry out the purposes of this Act.*” Section 458 stipulates that all Rules and Regulations “*made under this Act shall be published in the Official Gazette*”. The guidelines issued by the Director General by resort to Sections 406 and 407, are not made by the Central Government by resort to the rule making power of the Central Government. The said guidelines have not been shown to have been gazetted as stipulated in Section 458 of the Act. Therefore, clearly, the guidelines contained in the two Circulars i.e. S.D. Circular No. 2/ 2002 dated 08.11.2002 and S.D. Circular No. 2 of 2021 dated 14.01.2021 do not have statutory force, though they may be binding as administrative orders, as they seek to incorporate the terms and conditions in the licenses issued to Indian and foreign vessels.

29. Now, we may move on to the terms and conditions stipulated by the respondent IOCL in their tender document itself. We have extracted Clauses 23.9.0 and 23.10.0 of the tender hereinabove. The said Clauses clearly hold out to all prospective bidders, that due consideration will be given to Vessels / Boats with Indian Flag as per the S.D. Circular-2/2002 dated 08.11.02 issued from the Office of the Director General of Shipping, Mumbai, and any amendments issued subsequently thereof. The tender goes on to provide the web link where the said S.D. Circular No. 2/ 2002 can be seen, and also culls out some of the relevant Clauses of the said circulars which, *inter alia*, set out the Right of First Refusal available to Indian vessel owner. The said Right of First Refusal is without any limitation whatsoever. Pertinently, the tender in question was issued by the IOCL on 26.02.2021. The DGS Circular No. 2 of 2021 had already been issued on 14.01.2021. Therefore, the respondent IOCL should have been aware of the same.

Evidently, the IOCL omitted to take notice of the said circular No. 2 of 2021 and, instead, proceeded on the basis of the S.D. Circular No. 2/2002, while issuing the NIT. Though, clause 23.9.0 stated that due consideration will be given as per S.D. Circular No. 2/2002, dated 08.11.2002 issued by the DGS, Mumbai “*and any amendments issued subsequently thereof*”, the fact remains that the respondent IOCL itself omitted to notice the S.D. Circular No. 2 of 2021 dated 14.01.2021. Pertinently, S.D. Circular No. 2 of 2021 dated 14.01.2021 by the DGS, Mumbai did not purport to merely amend the earlier Circular No. 2 / 2002, but to override it. Therefore, clearly, the petitioner was misled by the respondent IOCL itself into believing that the tender in question would be governed by the DGS Circular S.D. No. 2/ 2002 dated 08.11.2002, and not the latest circular i.e. Circular No. 2 of 2021. The reason for the aforesaid could well be the fact that the tender in question was issued in close proximity of the date when the Circular No. 2 of 2021 dated 14.01.2021 was issued. It could well be that the tender in question was already in the process of being drafted when the DGS Circular No. 2 of 2021 was issued, and due to lack of communication, the same was neither noticed by the respondent IOCL, nor brought to the notice of the petitioner. Both parties, therefore, apparently proceeded on the basis of the DGS Circular No. 2/2002 dated 08.11.2002 in respect of the tender in question. Moreover, the tender expressly defines as to what is the Right of First Refusal available to an Indian bidder offering an Indian flag vessel. The said right clearly was without any limitation of margin. It was in that light that the petitioner had made its bid. Had the petitioner been made aware, and put to notice of the DGS Circular No. 2 of 2021 – which contained a limitation on the RoFR, the petitioner would have been alerted to make its bid being mindful of the

fact that it may not be offered the RoFR despite being an Indian bidder with Indian flag vessels, if its bid does not fall within the range of 20% of the L1 bidder who may be a bidder offering a foreign vessel. Since, the Circulars issued by the DGS being Circular Nos. 2/2002 and 2 of 2021 are not statutory in character, there is no bar against invocation of the principles of Estoppel against the respondent IOCL. The respondent IOCL led the bidders – including the petitioner into believing that they are covered by DGS Circular No. 2/2002 dated 08.11.2002, and the petitioner acted on that premise to make its bid. The respondent IOCL is, therefore, liable to be bound by its equivocal representation, and it cannot renege on the same.

30. So far as the respondent IOCL is concerned, the petitioner has already exercised the RoFR and offered to perform the contract on the rates quoted by the L1 bidder. Therefore, the financial rights of the respondent IOCL are completely protected and no prejudice would be suffered by the IOCL even if they are bound down to their tender conditions, and the acceptance of the RoFR offered by them to the petitioner.

31. There is also merit in the petitioner's submission that the acceptance of the RoFR created a vested right in favour of the petitioner. The acceptance of the RoFR made to the petitioner, by the respondent, brought about a binding relationship between the parties. Merely because the formal contract may not have been executed before the withdrawal of the RoFR – which stood accepted, would make no difference to the rights acquired by the petitioner. The respondent could not have unilaterally withdrawn the RoFR subsequently on 31.08.2021 on the premise that they had acted under a mistaken belief that Circular No. 2/2002 of the DGS, Mumbai was

applicable, and that the DGS Circular No. 2 of 2021 dated 14.01.2021 placed a limitation on the RoFR within a margin of 20% of the L1 bidder.

32. Even if, one were to take a different view with regard to the legal character and status of the DGS Circulars 2/ 2002 and 2 of 2021, and take a strict view that the DGS Circular 2021 was bound to be enforced by the IOCL in respect of the tender in question as a whole, the result would be that the tender in question would have to be scrapped since the same clearly goes contrary to the said DGS Circular No. 2 of 2021 inasmuch, as, it incorporates the RoFR as contained in Circular No. 2/2002 and not the limited RoFR available under DGS Circular No.2 of 2021.

33. Considering the fact that the petitioner is the incumbent contractor and the respondent IOCL has not pleaded any lack of performance of the contract by the petitioner under the existing contracts, and the fact that the respondent IOCL itself issued the tender in question containing the terms and conditions taken note of hereinabove; the fact that the petitioner participated in the tender in the light of the terms and conditions contained in the tender and has been found to be technically compliant; considering the fact that the petitioner upon emerging as the L2 bidder was given the RoFR to match the price of the L1 bidder – which the petitioner has done within time and, therefore, no financial loss would be caused to the respondent IOCL, we are inclined to allow this petition and to quash the impugned communication dated 31.08.2021 issued to the petitioner which we, accordingly do. We further direct the respondent IOCL to act in terms of the RoFR exercised by the petitioner on 19.08.2021. We also further direct that the petitioner shall be bound by the undertaking given by it before the Court

on 13.09.2021 i.e. that the work performed by the petitioner from 14.11.2021 onwards shall be governed by the rates of the L1 bidder received in response to the tender in question.

34. The petition is allowed in the aforesaid terms leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(JASMEET SINGH)
JUDGE

DECEMBER 09, 2021



न्यायमेव जयते