28.07.2022
sayandeep
Sl. No. 03
Ct. No. 05

WPA 14420 of 2022

Sandip Kuila
-Versus-
Indian Oil Corporation Limited & Ors.

Mr. Kishore Dutta
Ms. S. Shaw
..... for the petitioner
Mr. Jishnu Saha
Mr. Amit Kr. Nag
....for the IOCL
Mr. Chayan Gupta
Mr. Niladri Banerjee
Mr. Deepankar Tahkur
.....for the respondent Nos. 5,7,8,12,13,14,16,17,26,29,30,32,34,35 & 40

Mr. Kumar Jyoti Tewari
Ms. Rajlakshmi Ghatak
Mr. Aniruddha Tewari
....for the respondent Nos. 6,37,39,41

The petitioner seeks setting aside of a contract awarded by the respondent no. 1 Indian Oil Corporation Limited (IOCL) to the private respondents on 30th June, 2022 and the letter of acceptance of the private respondents (5 – 44) dated 2nd July, 2022. The ground of seeking cancellation is that the IOCL has used the tender conditions to the prejudice of the petitioner and has modified the same in favour of the private respondents.

Learned counsel appearing for the petitioner submits that IOCL failed to adhere to the tender conditions as well as the provisions of The Motor Vehicles Act, 1988 and The Central Motor Vehicles

Rules, 1989. Counsel submits that IOCL has also failed to apply the tender conditions uniformly for all the bidders and has shifted the goal-post after start of the game by selective interpretation of the tender conditions to the detriment of the petitioner.

Learned counsel appearing for the IOCL refers to two decisions of the Supreme Court upholding interpretation of the tender document by the authority which floated the tender. Counsel refers to the limited scope of judicial review in tender matters. Counsel submits that the documents submitted by the petitioner are temporary certificates of registration and do not contain any particular date of issuance by the registering authority. It is further submitted that the alleged variation of the tender conditions arose from the ambiguity in the documents offered by the bidders in relation to the date of manufacturing of their vehicles and IOCL was hence constrained to approach the three manufacturers for confirmation of the date of manufacture of the vehicles offered by the bidders. It is further submitted that the tendering authority (IOCL) was duty bound to enquire into the complaints received in respect of furnishing the date of manufacturing of the vehicles offered by the bidders.

The tender was floated by the IOCL for induction of trucks for transportation of Indane LPG cylinders in vertical position on unit rate basis for a period of 3 years with a provision for two yearly extensions. Clause 14 of the Tender Schedule required that the maximum age of any quoted truck (as reckoned from the month and year of manufacturing in RTO Registration) should not exceed 14 years as on the closing date of the tender. The dispute relates to Clause V(A)(d) (Conditions governing the offers of trucks) of the Notice Inviting e-Tender which provides for the following conditions:

> (i) Age of the quoted truck shall not exceed the limit as specified in the Notice Inviting Tender (NIT) as on the closing date of the tender submission reckoned from the month and year of manufacturing as mentioned in RC book.
>
> (ii) In case only year of manufacturing is mentioned in the RTO Registration, the age should be reckoned from 1st January of the year of manufacturing.
>
> (iii) In case both month and year of manufacturing is mentioned in the RTO Registration, the age should be reckoned from 1st day of the month of manufacturing.
>
> (iv) In case manufacturing year or month and year are not entered in the RC book, the bidders would have to submit the copy of original invoice as a proof of establishing the date of manufacturing of Truck offered.
>
> (v) In case Original Sale Invoice is not available, then the Certificate issued by Manufacturers is to be submitted.

(vi) In case the manufacturing date cannot be established from any of the documents then the relevant quoted truck will be rejected.

The above conditions are repeated in the Pre-qualification Criteria with reference to the age of offered trucks.

The criterion hence is the age of the truck; i.e. the youngest truck would be eligible for selection, in other words, the truck bearing a month and year which is the latest in point of time in comparison to the other contender trucks offered by the bidders.

The case made out by the petitioner is that the Certificate issued by Ashok Leyland, the manufacturer, indicates that all the vehicles of the petitioner were manufactured on 18th January, 2022. This date would also appear from the Excel Sheet furnished by the petitioner to IOCL and also finds place in the Certificate of the Sales Department of Ashok Leyland stating that the chassis of the trucks was made on 18th January, 2022. The sale letter of the dealer also mentions the petitioner as the buyer and mentions 18th January, 2022 as the month and year of manufacture.

The short point which arises for consideration is whether the tendering authority/IOCL varied the tender conditions, and if yes, whether the same was done to the detriment of the petitioner. The undisputed fact is that IOCL approached the three manufacturers to establish the date of manufacture of the trucks offered by the bidders. IOCL relies on Clause 9 of the General Instructions to Bidders to say that IOCL reserved the right to verify the originals of the submitted documents at any stage of the tender. IOCL also relies on the Tender Evaluation Criteria to urge that IOCL was entitled to verify the date given by the bidder in the Excel file for establishing the manufacturing date of each truck. Clause V(A)(d), which is the material clause in the present case, lays down the criteria by which IOCL was to ascertain the age of the truck. All the four conditions indicate that IOCL would have to depend on the month and year of manufacturing as mentioned in the RC book. The presumption whether the age would be reckoned as 1st of January of the year of manufacturing or 1st day of the month of manufacturing along with the year, would also depend on the RC book/RTO Registration. The third step indicates that the bidders would have to submit the copy of the original invoice as proof for establishing the date of manufacturing in case neither the year nor the month and year is entered in the RC book. The fourth step is when the original invoice is not available, in which case the Certificate issued by the manufacturers would have to be submitted by the bidder.

The aforesaid makes it clear that Clause V(A)(d) does not envisage intervention of IOCL at any of the four stages for ascertaining the date of manufacturing of the Truck offered. The bidders would have to submit documents in the successive stages of the particular clause. The month and year of manufacturing in the RC book, the RTO Registration, the original sale invoice and the Certificate of the manufacturers are all documents which would have to be submitted by the bidders under the said clause. Clause 2 of the Pre-qualification Criteria also contains identical conditions.

It is therefore established that IOCL varied the tender conditions in Clause V(A)(d) by approaching the three manufacturers for ascertaining the date of manufacture of the trucks offered. The question which would then arise is whether by such variation IOCL disturbed the level-playing field of the bidders who have participated in the tender including the petitioner. Admittedly, the petitioner relies on 18th January, 2022 as the month and year of manufacture of its offered trucks. IOCL says that there is no corroborative material to support this date.

The point is not whether 18th January, 2022 is the correct date, the point is whether all the bidders including the petitioner got the benefit of IOCL approaching the manufacturers for a clarification of the date and year of manufacturing of the trucks offered. The successive stages of the conditions in Clause V(A)(d) make it evident that IOCL agreed to accept the age of the truck as 1st January of the year of manufacturing where only the year is mentioned (Stage 1) and the first day of the month of manufacturing where both the month and year of manufacturing is mentioned (Stage 2). Hence, by the time IOCL acted on the alleged complaints received from the bidders and approached the manufacturers for verification of the date of manufacture, those bidders who came within Stage 1 and Stage 2 had already been classified in terms of their age of vehicle on fulfillment of the conditions of Stage 1 and Stage 2. The need for further verification arose only from Stage 3 and Stage 4, where neither the year, nor month and year of manufacture, is entered in the RC Book or where the original sale invoice is not available, respectively. Although, these stages do not envisage intervention of IOCL at any point, the determination of the age through the original sale invoice or the certificate of the manufacturers comes only if Stages 1 and 2 are not satisfied.

Therefore the conclusion follows that the trucks which had already been affixed with a presumed date and year of manufacture lost the benefit to the subsequent furnishing of particular date of manufacture by the three manufacturers which were approached by IOCL in the successive stages of Clause V(A)(d). In other words, IOCL modified the rules of the game after a few of the players had entered the field and played by the rules which existed when the match began. IOCL should have been aware that there was every possibility of the manufacturers putting in a date which was later in point of time compared to the assumed dates of the other bidders in Stage 1 and Stage 2 of the tender conditions. The possibility became a reality when at least two of the manufacturers, except Ashok Leyland, indicated specific dates of manufacture for the private respondents who were then chosen as successful bidders depending on the age of the trucks offered by them. Simply put, the later the date, the younger the vehicle, the greater the likelihood of the truck being selected.

Note ii of Clause II of the Pre-qualification Criteria or Clause 9 of the General Instructions to Bidders by which IOCL reserved its rights to verify the originals of the submitted documents at any stage of the tender is not an answer to the variation of the terms. The aforesaid clauses make it clear that IOCL's rights were restricted to verification of the originals of the submitted documents, namely, the documents submitted by the bidders. The right to complete the evaluation based on the details furnished by the bidders also cannot improve on the fact of IOCL not extending the benefit of the dates put in by the manufacturers in the later stages of the tender condition to all the bidders.

The statutory position under The Motor Vehicles Act, 1988 and the Central Motor Vehicles Rules, 1989 is also significant and should be stated. Rule 122 read with Form 23A of the Rules states that certain category of motor vehicles manufactured on or after 1st April, 2009, shall bear the identification number including the month and year of manufacture. The vehicle details in Form 23A only mentions "Manufacturing Month and Year (mm/yyyy). Form 21- Sale Certificate which has to be issued by a manufacturer or dealer also mentions only the month and year of manufacture.

Besides this, Clause 5.1.1.5.1 of the Automotive Industry Standard - Statutory Plates and Inscriptions for Motor Vehicles, their Location and Method of attachment – Vehicle Identification Numbering System states that month and year of production shall be indicated by a suitable code decided by the vehicle manufacturer.

Therefore, fixing a specific date of manufacture for trucks by two of the manufacturers approached by IOCL is not statutorily permitted. IOCL should have adhered to the relevant statutory Rules as stated above and stuck to the same conditions as envisaged in Clause V(A)(d) for all the trucks offered by the bidders participating in the tender. IOCL should have also called for clarification of the month and year of manufacture from all the bidders in case of confusion or complaints received from the bidders and not intervened in the process of determination of the age of the trucks by approaching the manufacturers and benefitting the private respondents to the exclusion of the other bidders including the petitioners.

The fact that the terms and conditions of a tender have to be strictly adhered to was held in *Sorath Builders vs. Shreejikrupa Buildcon Limited; (2009) 11 SCC 9*. In *W.B. State Electricity Board vs. Patel Engineering Co. Ltd.; (2001) 2 SCC 451* the Supreme Court held that discrimination and arbitrariness will be encouraged if the tender conditions are given a go-by. In *B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd.; (2006) 11 SCC 548*, the Supreme Court also came to a similar finding that the essential tender conditions must be strictly followed and that these conditions cannot be varied at a later stage of the tender. The decision of the Supreme Court in *Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers vs. New J.K. Roadways, Fleet Owners and Transport Contractors; 2020 SCC OnLine SC 1035*, has been shown as a general proposition as to the restricted scope of judicial review in the decision taken by a tendering authority unless the decision is held to be arbitrary or mala fide. The Supreme Court came to a similar view in *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited; (2016) 16 SCC 818* in holding that constitutional courts are expected to exercise restraint in interfering with administrative decisions and ought not to substitute their views for that of the administrative authority.

Since this Court has come to a specific finding that IOCL could not have varied the tender conditions after some of the bidders including the petitioner had laid their cards on the table, the decisions cited by IOCL cannot come to its assistance. As held in *Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation; (2000) 5 SCC 287*, a term of the tender being deleted after the players entered the arena is akin to changing the rules of the game after it had begun. The Supreme Court agreed with the view taken by the Bombay High Court that in such cases a fresh process of tender was the only permissible alternative.

WPA 14420 of 2022 is allowed by directing the respondent authorities to cancel the communication made to the petitioner by mail dated 30.06.2022 rejecting the petitioner's bid and all steps taken by the tendering authority pursuant thereto. The writ petition is disposed of accordingly. The tendering authority shall be at liberty of calling for a fresh tender under the accepted framework of Rules governing such tenders.

Urgent Photostat certified copies of this order, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)