

IN THE HIGH COURT OF ORISSA, CUTTACK

W.P.(C) No.12446 of 2022

In the matter of an application under Article 226 of the
Constitution of India.

M/s. Panchasakha Carrier Petitioner

-Versus-

Indian Oil Corporation Ltd.,
New Delhi & others Opp. Parties

For Petitioner:



M/s. Devashis Panda,
S. Panda, A. Mehta &
D.K. Panda

For Opposite parties

M/s. P.K. Rath,
S.K. Pattanayak,
A. Behera, S.K. Behera,
P. Nayak, S. Das,
S.B. Rath &
S. Mohapatra

P R E S E N T:

JUSTICE BISWAJIT MOHANTY
JUSTICE SAVITRI RATHO

Date of Hearing: 11.10.2022

Date of Judgment: 19.10.2022

B. Mohanty, J. This writ application has been filed by the petitioner
praying for quashing of the orders under Annexures-1 & 4/1

reflecting rejections of the petitioner's bid in connection with the tender for road transportation of bulk petroleum products by bottom loading tank trucks. Further prayer is to direct the opposite party No.2 to consider the petitioner's tender on merits as per the Tender Call Notice and award it the work of transportation of I.O.C.L's. bulk petroleum products ex-I.O.C.Ls Paradeep Terminal.

2. The present case relates to the Tender Call Notice issued by the opposite party No.1 under Annexure-2 inviting tender for road transportation of bulk petroleum products by bottom loading tank trucks vis-à-vis Paradeep Terminal for the year 2021-2022. Vide Annexure-A/1, it was made clear that clarification end date vis-à-vis the Tender Call Notice under Annexure-2 was 27.07.2021 and the document download/sale end date/bid submission end date was 14.08.2021 and bid opening date was 16.08.2021. Clause 1.1 of the Tender Call Notice made it clear that all the tank trucks would be subject to third party inspection and fabrication has to be carried out on a new tank from a PESO approved fabricator. Serial No.3 of Clause 1.3 made it clear that legible copies to be submitted with regard to valid R.T.O. registration and PESO license for the tank trucks (for short 'TTs') offered and TTs offered without these documents, would not be considered for evaluation. As per Clause 1.4.7 of the Tender Call Notice, a tenderer will have to offer TTs in the ratio of number of

TTs required capacity wise i.e. 12-16 KL : 18-40 KL. It also made it clear that one tenderer can offer maximum 6 TTs in the ratio of 2 numbers TTs of 12-16 Kilo Litres (for short 'KL') capacity and 4 numbers TTs of 18-40 KL capacity. Like this minimum TTs which can be offered by a tenderer shall be in the ratio of one number of TT in 12-16 KL capacity and two numbers of TTs in 18-40 KL capacity. It also made it clear that that the TTs which would fall under the ratio specified shall be considered under LOT-1. In case a tenderer has offered TTs not in the desired ratio, then the TTs falling in desired ratio shall be considered as LOT-1 and other TTs offered beyond the ratio shall be considered in LOT-2. While allocation of TTs within L-1 rate is finalized, the offers from LOT-1 will be allocated and if the requirement is still not met, then allocation will be made from LOT-2. It also laid down the ranking procedure. At clause 1.4.9 it was made clear that all ready built TTs offered should have valid R.T.O. registration and PESO license as indicated earlier and as per Clause 1.4.12, the tenderer shall fill the details of ownership of TTs, R.T.O registration, PESO license etc. as applicable in the particulars of TTs offered. It also provided for reservation criteria which included reservation in favour of the S.C., S.T and MSEs. At Clause 1.11, it laid down the process of evaluation of tenders. At clause 1.12 (c) it was made clear that the tenderer's offer complete in all respect must be submitted on or

before the due date of closing of the tender in line with the instructions given. As per Clause 1.12(d), claims and objections due to ignorance of existing conditions or inadequacy of information would not be considered after submission of the bid and during the implementation. Further as per Clause 1.12 (e) it was made clear that the tenderer shall give an undertaking on their letter head that the content of the bidding document has not been altered or modified and any change in the bid documents or conditional bid is liable to be summarily rejected.

In the “Instructions to Tenderers for participation in E-Tendering” under Annexure-2, it was made clear that no bids should be submitted after the last date and time of submission has reached and if the tenderer intended to revise the bid already submitted, they may change or revise the same on or before the last date and time of submission of bid. It also made it clear that no bid can be modified after the dead line of submission of bids. The said instructions also stipulated that the relevant documents as mentioned in the tender are to be submitted online only and the opposite party No.1 will not be responsible in any way for failure on the part of the tenderer to follow the instructions and the tenderers were advised in their own interest to ensure that the bids are uploaded in e-Procurement system well before the closing date and time of bid.

The document under Annexure-2 also includes the application form to be filed by the tenderers. For our purpose Sl. No.20 under the heading of “List of Documents required for Technical Evaluation” forming part of the said form is relevant and the same is quoted hereunder.

Sr.	Description of Document	Requirement	Submitted/Not Submitted
XXXX	XXXX	XXXX	XXXX
20.	All the Tank Trucks are subject to Third Party Inspection	3rd Party Inspection report for Ready Built Tank Trucks. <u>Third party Inspection report confirming that the Ready Built Tank Trucks are fitted with equipment to facilitate bottom loading and vapor recovery system conforming to OISD RP167 & API RP 1004 Standard.</u> The 3rd Party Inspection report can be obtained from any PESO approved fabricator (Garage) confirming the above. Certificate from PESO that the Fabricator is a PESO Approved Fabricator, also to be submitted along with the Certificate.	
XXXX	XXXX	XXXX	XXXX

It appears that the petitioner offered his tender by e-mail dated 13.08.2021 offering six fully built TTs, two with capacity in

between 12-16 KL, four with the capacity in between 18-40 KL. It appears from the application form filed by the petitioner that the petitioner has given a tick mark against Sl. No.20 which gives an impression that it had uploaded third party inspection reports of all the six TTs confirming that the TTs were fitted with equipment to facilitate bottom loading and vapor recovery system conforming to OISD RP 167 & API RP 1004 Standard. But the factual position of this case reveals that though the petitioner had offered six TTs, however with regard to two TTs bearing Registration Nos.OD04P5643 & OD04P5743 in 18-40 KL capacity, no such inspection reports were submitted while uploading the tender documents. In such background, vide Annexure-B/1 filed by the opposite parties, the petitioner was given an opportunity to submit such reports by 24.09.2021 which should be valid on the closing date of tender i.e. 14.08.2021. Accordingly, the petitioner submitted a document dated 23.09.2021 under Annexure-C/1 on 24.09.2021. From the tender summary report under Annexure-1 uploaded on 02.12.2021, the petitioner came to know that its bid has been rejected. When the petitioner made queries, it came to know that the work orders have been issued in favour of the successful bidders on 18.03.2022 and on finding out the real reasons of rejection i.e. on account of absence of Third Party Inspection Reports/Fabrication Certificates with regard two TTs

bearing Registration Nos.OD04P5643 & OD04P5743, it submitted a representation on 21.03.2022 vide Annexure-4 to include its two TTs as it has already submitted the required Certificate on 24.09.2021. It also prayed to consider its case as the above noted two TTs are already running outside the State on existing contract at Paradeep Terminal from 04.11.2020 for I.O.C.L. However, on 05.04.2022 vide Annexure-4/1, the prayer of the petitioner was rejected referring to Sl. No.20 of the list of documents quoted earlier and Clause No.21 of the tender document as indicated at page-31 of the said documents, both of which require that the TTs quoted in these tender should have valid PESO license and R.T.O. registration certificate at the time of submission of the bids. There it was made clear that though the petitioner offered six number of TTs however, during scrutiny it was observed that in two numbers of TTs namely Nos.OD04P5643 & OD04P5743, the petitioner had not submitted third party inspection reports confirming that the said ready built tank trucks were fitted with equipment to facilitate bottom loading and vapor recovery system confirming to OISD RP167 & API RP 1004 standard. It was also indicated in Annexure-4/1 that though the petitioner was given an opportunity vide Annexure-B/1 to submit the same with the clear-cut requirement that the reports should be valid as on the closing date of the tender i.e. 14.08.2021 and though the petitioner submitted the third party

inspection report vide Annexure-C/1 but from that document it was clear that on the date of closing of the tender i.e. 14.08.2021, the petitioner did not have the third party inspection reports in respect of the above noted two TTs confirming to the above mentioned requirements. Hence, the above two number of TTs out of six TTs offered by the petitioner were rejected. It also drew attention of the petitioner to the representation under Annexure-4 where it has admitted committing the mistake vis-à-vis the above two TTs. Therefore, in such background, the petitioner did not get any allocation of TTs and challenging such rejection, the present writ application has been filed.

3. Mr. D. Panda, learned counsel for the petitioner at the outset fairly submitted that the third party inspection reports confirming that the ready built tank trucks are fitted with equipment to facilitate bottom loading and vapor recovery system confirming to OISD RP167 & API RP 1004 standard were not submitted by the petitioner in respect of the TT Nos. OD04P5643 & OD04P5743. However, he contended that as both the trucks have already been engaged by the opposite party No.1 for bulk transportation of petroleum products since 2020 pursuant to the work order under Annexure-3, the opposite party should not have rejected those two TTs. Secondly, he submitted that even as per their direction under Annexure-B/1, the petitioner has submitted

the required third party inspection reports on 23.09.2021 under Annexure-C/1 on 24.09.2021. In such background, also those two TTs should not have been rejected and its case should have been considered under the desired ratio of 2:4 as it had offered six TTs. Thirdly, he contended that such rejection violates Clauses 1.3 & 1.4.7 to 1.4.12 of the Tender Call Notice. Lastly, he submitted that such rejection has been done with a mala fide intention to favour some other transporters.

4. Mr. P.K. Rath, learned counsel for the opposite parties submitted that as per the conditions enumerated in the Tender Call Notice under Annexure-2, Clause 1.1 made it clear that all the TTs were subject to third party inspection and as per Sl. No.3 under Clause 1.3, all the TTs were required to submit valid R.T.O. registration and PESO license and if these documents are not submitted then such TTs will not be considered for evaluation. He also submitted that Sl. No.20 under the heading “List of Documents Required for Technical Evaluation” which forms part of the application form, required each tenderer to submit third party inspection reports confirming that its TTs were fitted with equipment to facilitate bottom loading and vapor recovery system conforming to OISD RP 167 & API RP 1004 Standard, which was also indicated in Clause 1.1 and by putting a tick mark against such column, the petitioner has acted in a mischievous manner as

it had not submitted such third party inspection reports in respect of two out of six TTs. Relying upon sub-clauses (c)(d)(e) of Clause 1.12 of the Tender Call Notice and the “Instructions to Tenderers for participating in E-Tendering” at internal pages 20 & 21 of the Tender Call Notice, he reiterated that third party inspection reports in respect of each of the TTs should have been submitted before the last date which was never done in this case so far as two TTs are concerned. Moreover though the petitioner was given an opportunity to submit the third party inspection reports in respect of those two vehicles by 24.09.2021 showing them to be valid as on the last date i.e. 14.08.2021, however the same were never supplied by the petitioner. Document at Annexure-C/1 dated 23.09.2021 submitted by the petitioner nowhere showed that those two vehicles had valid third party inspection report as on 14.08.2021. He also submitted that the petitioner having admitted its mistake in its representation under Annexure-4 and in view of the detailed reasoning given in the impugned order under Annexure-4/1, this Court should not interfere with the decision making process of the opposite parties, which cannot be described as arbitrary, irrational, perverse or mala fide in the facts and circumstances of the case. In this context, he relied upon the decisions of the Supreme Court as rendered in the case of **Afcons Infrastructure Limited Vrs. Nagpur Metro Rail Corporation**

Limited and Another, (2016) 17 SCC 818 and **Silppi Constructions Contractors Vrs. Union of India and another,** (2020) 16 SCC 489. With regard to mala fide, he contended that no specific allegation on this issue pointing fingers at specific persons have been made in the writ petition and since the allegation relating to mala fide is vague, the same should not be accepted. Lastly, drawing our attention to the affidavit dated 12.09.2022 filed on behalf of opposite parties which gives the details relating to reservation and ranking system given at page-10 under Annexure-F/1, he submitted that the petitioner fell under general category. For such category, in 12-16 KL capacity, 10 TTs were required as per Table Nos.1, 2 & 5 and for 18-40 KL capacity, 19 TTs were earmarked via-vis the Table Nos.1, 3 & 5. In this context, he took us through the tables and Notes attached to such tables clearly explaining the above noted figures of 10 & 19 earmarked for two categories of TTs. As per Table No.6, taking into account the desired ratio in LOT-1 to be 2:4, the merit list got exhausted at Sl. No.5 as up to that stage the TTs offered in the desired ratio of 2:4 were accommodated. With reference to Table No.7, he submitted that conceding for a moment that even if two more TTs are allotted, then the allocation can move up to Sl. No.6 in the ranking list and since the petitioner occupied Sl. No.8, there was no question of issue of any work order in its favour as by that time after rejection

of two of its TTs, all the slots of general category have been exhausted. In this context, he submitted that though Annexure-F/1 contains 7 Tables, as only 3 have been numbered, he prayed that rest of the Tables be treated as Tables No.4, 5, 6 & 7 serially. He also submitted that the allegations made by the petitioner against successful bidders are to be rejected as those bidders have not been impleaded as parties to this case.

5. Heard Mr. D. Panda, learned counsel for the petitioner and Mr. P.K. Rath, learned counsel for the opposite parties.

6. From a perusal of records which includes the counter and various affidavits filed by the opposite parties and the rejoinder and various affidavit filed by the petitioner, it is clear that the petitioner never submitted the third party inspection reports in respect of two TTs Viz. OD04P5643 & OD04P5743 though the application form required that all the TTs were subject to third party inspection. Further, the petitioner put a tick mark against Sl. No.20 of the Application Form without submitting the reports in respect of two vehicles. However, since Mr. Panda has fairly submitted that no such third party inspection reports were submitted vis-à-vis the above noted two vehicles, we are not taking a serious view of the matter. But non-filing of those reports clearly made the offer of the petitioner in respect of these two vehicles, incomplete. The plea of Mr. Panda that since those two TTs have

already been engaged by the opposite party No.1, those two TTS should not have been rejected, cannot be accepted because as per Clause 1.1, Serial No.3 of Clause 1.3 so also as per Sl. No.20 under the “List of Documents Required for Technical Evaluation” etc. submission of third party inspection reports in respect of all the TTs was mandatorily required. Sub-Clause (c) of Clause 1.12 of the tender documents under Annexure-2 required that the tenderer’s offer should be complete in all respects. Since such reports were not supplied with regard to two TTs, clearly the offer of petitioner remained incomplete. Assuming that the above noted two TTs had the required reports by the last date i.e. 14.08.2021 however, there is nothing to show that this was brought to the notice of the decision making authority at any point of time vis-à-vis the Tender Call Notice under Annexure-2 either by the last date i.e. 14.08.2021 or in response to Annexure-B/1 by 24.09.2021. Though the petitioner could have sought clarification on this aspect by 27.07.2021, which was the last date for clarification but there is nothing to show that the petitioner sought for the same prior to filing its tender documents. Further, it may be noted that when the petitioner got an opportunity, though it submitted the report on 24.09.2021 under Annexure-C/1 but a perusal of the same does not show that those third party inspection reports were valid on the last date of submission of the bid i.e. 14.08.2021. It

only shows those report to be valid till 20.08.2023 and since the certificate under Annexure-C/1 was issued on 23.09.2021, an ordinary interpretation of the said document would be that the report is valid from 23.09.2021 till 20.08.2023. Therefore, the document at Annexure-C/1 cannot be of much help to the petitioner. Accordingly, we are not willing to accept the second contention of Mr. Panda. All the above noted shortcomings have been highlighted by the well reasoned rejection order under Annexure-4/1.

7. With regard to allegation of Mr. Panda that there has been violation of Clauses 1.3, 1.4.7 to 1.4.12.7 of the Tender Call Notice, a perusal of the same do not reflect any violation in the facts and circumstances as already discussed. Clause 1.3 at Sl.No.3 rather makes it clear that legible copies of valid R.T.O. registration of PESO license for TTs offered be submitted and without these documents, the offer will not be considered. A reading of Clauses 1.4.7 to 1.4.12 also does not offer much help to the petitioner as these deal with stipulations relating to the ratio system, the desired ratio and the ranking procedure etc. Rather the Ratio and LOT system as explained at Clause 1.4.7 makes it clear that tenderer is required to offer TTs in desired ratio and those TTs falling in the desired ratio shall be considered in LOT-1 and in case the tenderer has offered TTs, not in desired ratio then such TTs

would be considered in LOT-2 and when offers from LOT-1 do not meet the requirement then allocation will be made from LOT-2. Since two TTs of the petitioner were rightly rejected, the authorities took the total TTs offered for LOT-1 in 1:2 ratio i.e. one under 12-16 KL capacity category and two others under 18-40 KL capacity for the purpose of LOT-1 as reflected in Table No.6 at page 10 of Annexure-F/1 attached to affidavit dated 12.09.2022 filed by the opposite parties. However, since the Table-6 of Annexure-F/1 clearly show that vis-à-vis the available slots of 10 in 12-16 KL capacity category and 19 in 18-40 KL capacity category, TTs with the desired ratio of 2:4 were available till merit list No.5 and further since the desired slots got exhausted at Sl. No.5 and since the petitioner stood at Sl. No.8 the petitioner did not have a chance of getting its TTs allotted.

8. With regard to the allegation of mala fide as made by the petitioner, since as per the settled position of law specific and detailed allegations have not been made with supporting materials and since against those whom allegations have been made, they have not been made parties in person, we refuse to take cognizance of such allegation.

9. All these discussions would clearly show that despite requirement for submitting third party inspection reports in respect of all the vehicles, the petitioner did not submit such

reports in respect of two vehicles by the last date and even though it was given an opportunity thereafter, it did not submit the document showing that by the last date, the two vehicles had such inspections reports. Further, though vide Annexure-A/1, 27.7.2021 was indicated as the last date for clarification, there is nothing on record to show that the petitioner made an effort to get any clarification with regard to supply of third party inspection reports in respect of two vehicles which according to it were already working for opposite party No.1 pursuant the order under Annexure-3.

For the above noted reasons, we do not find any wrong has been committed by the opposite party No.1 in not issuing any work order in favour of the petitioner particularly in the background of its ranking as indicated at Table No.6 of Annexure-F/1 enclosed with the affidavit dated 12.09.2022 filed by the opposite party. Since the decision making process has not been affected by arbitrariness, irrationality, perversity and mala fide, we find no reasons to interfere in the matter. As per the decisions of the Supreme Court rendered in the case of **Afcons Infrastructure Limited** (supra) and **Silppi Constructions Contractors** (supra) it has been made clear that Constitutional Courts should exercise a lot of restraint while exercising their power of judicial review in contractual and commercial matters and Courts must give “fair

play in the joint” to the Government and public sector undertaking in such matters and unless a case of mala fide, arbitrariness, irrationality and perversity is made out, the Constitutional Courts ought not to interfere in such matters while exercising their power of judicial review. Further it is settled in both the decisions that the authority who floats the tender and had authored the tender documents is the best judge as to how such documents are to be interpreted and the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. Therefore, in the background of non-furnishing of third party inspection reports when submission of such reports was a mandatory requirement as per the Tender Call Notice under Annexure-2 as discussed above, it cannot be said that the authority has committed any illegality in rejecting the bid of the petitioner and in not awarding the work to it.

10. For all these reasons, this writ petition is without any merit and is dismissed hereby. No costs.

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Biswajit Mohanty, J.

I agree

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Savitri Ratho, J.

Orissa High Court, Cuttack
The 19th October, 2022 /Prasant