ORISSA HIGH COURT: CUTTACK

<u>W.P(C) NO. 15722 OF 2022</u>

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

AFR Sita Devi More & Anr. ..... Petitioners

-Versus-

The Indian Oil Corporation Ltd. through its Chairman, New Delhi & Ors. ..... Opp. Parties

For Petitioners : Ms. Mamta Tripathy, Advocate

For Opp. Parties : M/s. P.K. Rath, A. Behera, S.K. Behera, P. Nayak, S. Das, S.B. Rath & S. Mohapatra, Advocates

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR JUSTICE G. SATAPATHY

Date of hearing : 21.10.2022 : : Date of Judgment : 28 .10.2022

DR. B.R. SARANGI,J. Smt. Sita Devi More, who is the partner of M/s. MORE TRADERS, Bhadrak, is the petitioner no.1 and Smt. Sujata Shaw, who is the proprietress of M/s. MEGHA FUELS, Balasore, is the petitioner no.2. Both M/s. MORE TRADERS, Bhadrak and M/s. MEGHA FUELS, Balasore are the dealers/transporters of Indian Oil Corporation Limited and registered as a Micro & Small Enterprises (MSE). By way of this writ petition, both the petitioners seek to quash the action of the opposite parties in denying them transportation contract despite being L-1 and further to issue direction to the opposite parties for issuance of Letter of Acceptance (LOA) in respect of their six numbers of Tanker Trucks (TT) (12-16 KL) Transportation Contracts, pursuant to e-Tender No.RCC/ERO/37/2020-21/PT-232 for Road Transporta-tion of Bulk Petroleum Products-MS/HSD/ Branded Fuels, Ex Location-Balasore Depot issued by opposite party no.2 (Operation Department) Odisha State Office, Bhubaneswar.

2. The factual matrix of the case, in brief, is that the Marketing Division of opposite party no.1 floated e-Tender dated 19.03.2022 inviting bids from intending bidders for Road Transportation of Bulk Petroleum Products-MS/HSD/Branded Fuels. The petitioners, being the Micro and Small Enterprises (MSE) owned by women entrepreneurs, applied for and participated in the bid process. As per terms and conditions of Notice Inviting

Tender, every applicant (save and except SC & ST where it is two in number) has to be in possession and offer minimum of 3 nos. of Tanker Trucks for applying for transportation contract. In the said notice, the date of end of clarification was fixed to 26.03.2022, pre-bid meet was fixed to 27.03.2022, date of submission of tender was fixed to 13.04.2022 and the date of opening of bid was fixed to 14.04.2022. In compliance of the same, the petitioners were informed as L1 by opposite party no.1 on 02.06.2022. Despite L1, they were not issued with LOA and it was issued to other tenderers on 09.06.2022. On 13.06.2022, though the authorized representatives of the petitioners made query, but no satisfactory reply was received. Therefore, on 17.06.2022, petitioner no.1 wrote letter to opposite party no.3, but she did not receive any reply. Hence, this writ petition.

3. Ms. Mamta Tripathy, learned counsel appearing for the petitioners vehemently contended that MSME Development Act, 2006 and Public Procurement Policy for Micro and Small Enterprises (MSEs) Orders, 2012 and 2018 mandate reservation of 25% for MSEs sector and 3%

for female MSEs entities/participants. It is contended that both the petitioners, being only two female MSEs tenderers and additionally being adjudged as L1, non-issuance of LOA/contract in their favour is not only contrary to the procedure of law but flagrant violation of the Constitutional mandates as well as the MSME Act and the Public Procurement Policy for Micro and Small Enterprises (MSEs) Orders, 2012 and 2018. It is further contended that in terms of MSEs quota/reservation for SC/ST candidates as well as women, if there are no such qualifying applicants, the same will flow to the General MSEs quota. Despite being L1, the petitioners have been denied issuance of LOA for having claimed preferential treatment under the womens' quota and have not been awarded the contract. Therefore, the action of the authorities is arbitrary, unreasonable and contrary to the provisions of law. It is further contended that the petitioners are the transporters of IOCL and their vehicles are still plying under the existing contract, but they have been illegally and arbitrarily denied for issuance of LOA. It is also contended that if the statutes/orders/provisions made to enhance and ensure women's participation and pursuant to the same, the petitioners participated and also found L1, non-issuance of LOA in their favour cannot sustain in the eye of law, as it is hit by the mandates of Articles 14, 15 and 16 of the Constitution of India. It is further contended that rejection of their tenders has to be adjudicated by this Court, in view of Clause-22 of the tender documents, wherein it has been stated that the Court of jurisdiction till the placement of LOA is High Court of Kolkata and thereafter the High Court of Cuttack during the contract period. Therefore, it is contended that since a part of cause of action arises within the jurisdiction of this Court, it has jurisdiction to entertain this writ petition and rejection of their tender by not issuing LOA in their favour cannot sustain in the eye of law and, therefore, seeks for interference of this Court. To substantiate her contentions, she has relied upon the judgment of the apex Court in ***Ritesh R. Sah v. Dr. Y.L. Yamul***, (1996) 3 SCC 253 and also the judgments cited by learned counsel appearing for the opposite parties.

4. Mr. P.K. Rath, learned counsel appearing for the opposite parties contended that the petitioners have approached this Court to quash the action of the opposite

parties for non-issuance of LOA amounting to deemed rejection of their bids under MSEs Women category with a direction to grant transportation contract in their favour. It is further contended that the opposite parties, while ranking the bidders, has strictly abided by the Micro and Small Enterprises Act, 2012 and 2018. It is also contended that the IOCL has already issued LOAs in favour of all the selected bidders, which includes seven MSE general and 2 MSE SC and because of the tie between the two petitioners, allocation under MSE women category is lying vacant. In view of pleadings made at paragraphs-16 & 23 of the writ petition, the petitioners have asserted to avail reverse selection criteria to be considered as MSE General in place of MSE woman category, for which they have applied for. It is further contended that the petitioners have chosen themselves to apply under MSE Women category and accordingly as per bid declaration under MSE Women category, the opposite parties evaluated their bids. It is further contended that with reference to reservation and evaluation criteria, the petitioners have been given opportunity to raise their queries in Pre-Bid Minutes and, as such, they have not raised any queries**.** It is contended that if the petitioners had applied under MSEs Women category, their claim under MSE General category subsequently is in violation of Clause-1.13(e) of the Tender Conditions. Therefore, it is contended that on the basis of undertaking furnished by the petitioners their case having been considered under MSE Women Category, by way of subsequent deviation their case cannot be considered under MSE General Category. In view of such position, no illegality or irregularity has been committed by the opposite parties by not issuing LOA in favour of the petitioners and thereby seeks for dismissal of the writ petition. To substantiate his contentions, he has relied upon the judgments of the apex Court in ***Silppi Constructions Contractors v. Union of India***, (2020) 16 SCC 489; ***Agmatel India Private Limited v. Resoursys Telecom***, (2022) 5 SCC 362; ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited***, (2016) 16 SCC 818 and ***Vidarbha Irrigation Development Corporation v. Anoj Kumar Agarwala***, (2020) 17 SCC 577.

5. This Court heard Ms. Mamta Tripathy, learned counsel appearing for the petitioners and Mr. P.K. Rath,

learned counsel appearing for the opposite parties in hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties this writ petition is being disposed of finally at the stage of admission.

6. For just and proper adjudication of the case, relevant clauses of the Notice Inviting Tender are extracted below:-

> "***1.5 RESERVATION CRITERIA:***
>
> *The provision of reservation shall be 15% (fifteen percent) & 71/2% (seven and a half percent) for Scheduled Castes (SC) and Scheduled Tribes (ST) respectively on all India basis as per Govt. of India directives. The SC/ST tenderers shall not be eligible for any price preference or relaxation of any standards other than whatever mentioned in the tender document.*

Category	*12-16 KL Capacity TTs*	*18-40KL Capacity TTs*
SC	*0*	*2*
ST	*2*	*0*

> *In line with "Public Procurement policy for Micro and Small Enterprises (MSEs) order 2012 & Amendment order 2018", 25% of the total quantity shall be earmarked for procurement from MSEs. Out of the above 25 percent, a sub-target of 16% (i.e., 16% out of 25%, which is 4%) is earmarked for Micro and Small Enterprises owned by the Scheduled Caste or the Scheduled Tribe entrepreneurs and a sub-target of 3% is earmarked for Micro and Small Enterprises owned by women entrepreneurs.*
>
> *MSEs owned by Women Entrepreneur shall mean:*
>
> *i. In case of proprietary MSE, proprietor shall be women.*

ii. *In case of partnership MSE, the Women partners shall be holding at least 51% shares in the enterprise.*

iii. *In case of Private Limited Companies, at least 51% shares shall be held by Women promoters.*

Note: For Women owned MSE, the bidder shall submit suitable documentary evidence as per above

1.6 EARNEST MONEY DEPOSIT (EMD):

The detailed procedure for payment opf EMD online is given in the tender document.

Sr.	Category	Amount
1	Tenderers participating with ready built TT i.e, along with RC & PESO licence	Rs. 5000/- per TT offered
2	General category Tenderers participating with Purchase Invoice containing Chasis No.	Rs. 100,000/- per TT offered
3	SC/ST Tenderers participating with ready built TT or Purchase Invoice of Chasis or with Booking Slip	Rs. 5000/- per TT offered
4	MSE tenderers including MSE-General & MSE-SC/ST	EMD exempted for MSE tenderers having valid registration certificate
Tenders without EMD as prescribed above are liable to be rejected.		

Example: In case a general category tenderer is participating/offering 3 ready built TTs (having RTO registration & PESO licence) and 1 nos. TTS with Purchase Invoice of the chassis, then the EMD payable shall be Rs. 1,15,000/-.

1.11 EVALUATION OF TENDERS:

xxx xxx xxx

RANKING IN LOT SYSTEM:

i. ***LOT-1 - TTs offered in NIT*** *ratio:-Tenderers offering highest number of TTs in LOT-1 will be ranked in the top. In case of more than one tenderers are in the same position in LOT-1, further ranking among them shall be based on the average age of their fleet (considering only TTs of LOT-1). Newest age fleet shall be preferred. In case the average age is also the same, then allocation will be divided proportionately among such tenderers.*

ii. ***LOT-2 - All the TTs (having RTO Registration & PESO licence)*** *falling outside the ratio mentioned above will be segregated into LOT-2, where TTs will be ranked based on age of TT Capacity cluster wise (e.g 12-16 Kl and 18 -40KL, etc irrespective of the tenderer. In case the age of TT Capacity cluster wise (e.g 12-16 Kl and 18 -40KL, etc is also the same, then allocation will be divided proportionately among such tenderers.*

These shall be considered, in case of shortfall of TTs after exhausting TTs in LOT-1.

iii. ***LOT-3 - TTs offered on Purchase Invoice of Chassis and Booking Slip -*** *These shall be considered, in case of shortfall of TTs after exhausting TTs in LOT-1 & LOT-2. List of offered TTs in LOT-3 shall be maintained tenderer and Capacity cluster wise. Then the ratio of offered TTs capacity Category wise by all tenderers shall be calculated. (Priority to be given with more numbers of Tank offered with same Ratio mentioned for the location). Accordingly, selection will be done with higher ratio getting priority. In case the Ratio is also same then allocation to be done based on the newest age of the purchase of Invoice / Booking slip.*

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h) ***MSE Reservation:*** *In line with "Public Procurement policy for Micro and Small Enterprises (MSEs) order 2012 & Amendment order 2018", 25 % of the total quantity shall be earmarked for procurement from MSEs, with a sub target of 16% (i.e. 16% of 25% which is 4 %) shall be further earmarked for procurement from MSEs owned by Scheduled Caste or the Scheduled Tribe Entrepreneurs and a sub target of 3% shall be further earmarked for procurement from MSEs owned by women Entrepreneurs. Provided that, in the event of failure of such Micro and Small Enterprises to participate in tender process or meet tender equirements and L-1 price, 4% sub-target for procurement* *earmarked for Micro and Small Enterprises owned by Scheduled Caste or Scheduled Tribe entrepreneurs and 3% sub-target for procurement earmarked for Micro and Small Enterprises owned by women entrepreneurs shall be met from other Micro and Small Enterprises.*

The above provision will be subject to MSEs quoting price within price band (L-1+15%); i.e. L-1 plus 15% and bringing down their price to L-1 in a situation where the L-1 price is from someone other than an MSEs. In case of more than one such MSEs, the supply shall be shared proportionately from the MSE bidders.

In case the L-1 tenderer is an MSE bidder, the ranking criteria as elaborated for General category shall prevail amongst the MSE tenderers and allocation will be done upto the location's requirement.

In case MSE tenderer do not accept to match the L-1 rate, the unfulfilled quota under MSE will be met from General Category and no carry forward will be done for any other tenders.

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e) *Further, tenderer shall give an undertaking on their letter head that the content of the bidding document has not been altered or modified. Any change in bid document or conditional bid is liable to be summarily rejected.*

'How to submit On-line Bids / Offers electronically against E-tendering?

Vendors / Tenderers are advised to read the following instructions for participating in the electronic tenders directly through internet:

xxx xxx xxx

iii) No bid can be modified after the dead line for submission of bids.

H) RESERVATION — MSE Tenderers:

Selection of vendor [1 No; i.e. L-1 (for 100% Qty.)] will be based on "lowest financial outgo of the Corporation over the period of contract"; and also as described below; under (B-1), (B-2) and (C).

(B-1) *In line with "Public Procurement policy for Micro and Small Enterprises (MSEs) order 2012 and Amendment order 2018", 25% of the total quantity shall be earmarked for procurement from MSEs, and out of the above 25 percent, a sub-target of 16 per cent (i.e. 16 percent out of 25 percent, which is 4%) is earmarked for Micro and Small Enterprises owned by the Scheduled Caste or the Scheduled Tribe entrepreneurs and a sub-target of 3% is earmarked for Micro and Small Enterprises owned by women. Provided that, in the event of failure of such Micro and Small Enterprises to participate in tender process or meet tender requirements and L-1 price, 4% sub-target for procurement earmarked for Micro and Small Enterprises owned by Scheduled Caste or Scheduled Tribe entrepreneurs and 3 % sub-target for procurement earmarked for Micro and Small Enterprises owned by women shall be met from other Micro and Small Enterprises.*

(B-2) *The above provision will be subject to MSEs quoting price within price band (L-1+15%); i.e. L-1 plus 15% and bringing down their price to L-1 in a situation where the L-1 price is from someone other than an MSEs. In case of more than one such MSEs, the supply shall be shared proportionately from the MSEs party. In case the L-1 tenderer is MSE party, then the ranking as detailed in tender shall prevail and NOT proportionately shared among tenderers within L1+15%.*

Necessary certificate issued by Authorized body under the Ministry of Micro, Small & Medium Enterprises shall be valid as on the date of closing of the tender. All the technical specifications/techno commercial terms and conditions and the pre qualification criteria are also to be fulfilled by the MSEs. Tenderer submitting the tender under MSE category shall produce a certificate from the competent authority to show that the tenderer is registered as MSE rendering transport services. The tenderer submitting the tender under MSE shall satisfy that they have valid certificate from the competent authority before claiming the benefit under MSE act.

In the event of failure of such Micro and Small Enterprises to participate in tender process or meet tender requirements and match L-1 price, the unfulfilled quota under MSE will be met from General Category and no carry forward will be done for any other tenders."

7. On the basis of the above clauses of the tender documents, the petitioners placed their bids by making necessary application under 'MSE-Women' Category, which comprises a sub-target of 3% out of 25% total reservation provided of total quantity required. The quota in the present tender floated for total of 52 nos. (39+13), which works out to 1 TT for MSE Woman. Although the petitioners came out successful, they were ranked in similar position as per their declared TT capacity cluster-wise under LOT-2, in which case it was impossible under the tender condition to award the bid by issuance of LOA to both petitioners placed on the same rank in LOT-2 by dividing the allocation proportionately. Thus, the quota was kept unfulfilled as per the tender conditions. The evaluation of the tender following the ranking in Lot System is mechanized to conduct the bidding process in a fair and transparent manner. Reason being, the petitioners were given opportunity to raise three (3) TTs in the Pre-Bid query. As per clause-1.4.3 of the tender documents, the minimum requirement of TTs is only for qualification criteria, however, IOCL may award the work to tenderer for lesser no. of TTs to meet the total requirement of TTs.

Therefore, having chosen not to do so and participated in the tender process, the same cannot be permitted to challenge the bid conditions/clauses which might not suit them and/or convenient to them.

8. It appears that much reliance has been placed with regard to reservation policy laid under the MSME Development Act, 2006 and the Public Procurement Policy for Micro and Small Enterprises (MSES) Act, 2012 and 2018. The same has been duly adhered to in view of fact that the tender under clause 1.5 of NIT provides reservation of 25% of total quantity for procurement to MSEs, out of which sub-target of 3% is reserved for MSE owned by woman besides sub-target of 16% of 25%, which is 4% earmarked for MSE owned by ST/SC. The contentions that the petitioners are the L1 and the LOA should be issued in their favour cannot have any justification in view of fact that even though they came out L1 in no way entitled them for awarding of the contract as L1 tenderers still required to clear the ranking in LOT system of evaluation under clause-1.11 of NIT. As the petitioners could not qualify LOT-1 Ranking System, acceptable TTs available in LOT-2

under MSE-Women category was more than the NIT requirements, allocation was to be done from LOT-2 only. Therefore, the petitioners having applied under the MSME-Women category could not have been considered under the General Category in absence of any directive to that effect under the NIT. Consequentially, the opposite parties had no authority to change the rules of the game by surpassing the rank in LOT evaluation, much after the commencement of the bidding process or during the time of evaluation. Evidently, the bids of ST/SC/MSE tenderers were to be ranked separately as per clause 1.11(f) of NIT, giving them the complete benefit of reservation putting them outside the competitive bidding arena of General Category.

9. Therefore, there is no iota of doubt to the extent that the petitioners had applied under MSE-Women Category and participated in the said category being aware of the evaluation process for the said category under clause-1.11(a)(i) of NIT along with a separate ranking under clause 1.11(f) of NIT. Having done so, the petitioners should not have questioned the tender terms at this stage, when those did not suit them favourably or were not found

convenient to them. It is of relevance to mention, the evaluation procedure laid by the tender terms and conditions being followed scrupulously, the petitioners cannot agitate, when the decision taken by authorities is manifestly in consonance with the language of the tender documents and subserving the purpose for which the tender is floated. As such, exercise of power conferred under judicial review cannot be interfered with.

10. The applications submitted by the petitioners, which are placed on record as Annexures-C/1 and E/1 to the counter affidavit, reveal that the petitioners had applied under the MSEs Women Category. But, subsequently, they made an effort to be considered under the MSE General Category even though the principle of reservation derived from Article 15(3) of the Constitution of India does not apply to the commercial transactions/tenders merely because tender issuing authority is the State.

11. Reliance was placed on behalf of the petitioners on ***Ritesh R. Sah*** (supra), wherein reservation in the matter of selection for admission to the MBBS course was the subject-matter of consideration and, therefore, the

principle laid down therein has no application to the present case, as because the tender is a commercial transaction and, as such, the authorities are guided by the terms and conditions of the tender documents itself. If the tender documents do not specify that any reserved category would go to general category, the claim made by the petitioners cannot be admissible. As such, the opposite parties have allowed the reservation policy in obedience to statutory mandate provided in MSEs owned by women. Therefore, even if the petitioners have been shown as L-1, no right has been accrued in their favour to issue LOA as the quota meant for MSEs women being 1 (one) it cannot be given to 3 (three). Therefore, if the determination has been made following the conditions stipulated in the tender documents, in that case the petitioners' claim for issuance of LOA being L-1 against the reserved category of MSEs cannot sustain in the eye of law.

12. In ***Silppi Constructions Contractors*** (supra), the apex Court held that the authority floating the tender is the best judge of its requirements and, therefore, the Court's interference should be minimal. The authority

which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.

13. In ***Agmatel India Private Limited*** (supra), the apex Court in paragraph-26 of the judgment held as follows:

> *"The above-mentioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given".*

14. In ***Afcons Infrastructure Limited*** (supra), the apex Court in paragraph-15 held as follows:

> *"We may add that the owner or the employer of a project, having authored the tender documents,*

> *is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given".*

15. In ***Vidarbha Irrigation Development Corporation*** (supra), the apex court in paragraph-16 of the judgment held as follows:

> *"It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous–they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court".*

16. In view of the above propositions of law laid down by the apex Court, it is made clear that the authority floating the tender is the best judge of its requirements. Therefore, the Court's interference should be minimal. More so, the authority which floats the contract or tender and has authored the tender

documents is the best judge as to how the documents have to be interpreted. Since tender issuing authority is the best judge as to how the documents are to be interpreted, if two interpretations are possible then the interpretation of the author must be accepted. It is also clarified that if its interpretation is manifestly in consonance with the language of the tender documents or subserving the purpose of the tender, the Court would prefer to keep restraint. A caution has also been given that the Constitutional Courts must defer to the understanding and appreciation of the tender documents, unless there is *mala fide* or perversity in the understanding or appreciation or in the application of the terms of the tender conditions.

17. The counter affidavit filed by the opposite parties is clear to the extent that on the basis of tender documents since the petitioners had applied for MSEs-Women Category and 3% reservation has been made for such category out of total reservation of 25%, in that case even though the petitioners are L1, no LOA can be issued in their favour. As such, the opposite parties are

well justified in not issuing LOA in favour of the petitioners even though they are L1 in the bid itself. Consequentially, this Court does not find any illegality or irregularity or arbitrariness or *mala fide* in the action of the opposite parties so as to warrant interference of this Court.

18. For all the above reasons, the writ petition merits no consideration and the same is hereby dismissed. But there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

G. SATAPATHY, J. I agree.

(G. SATAPATHY)
JUDGE

Orissa High Court, Cuttack
The 28th October, 2022, Alok