Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8850 OF 2021

Mahatma Agrico Agro Industries (MAAI) Pvt Ltd …Petitioner

Versus

The Union of India & Ors …Respondents

Mr AY Sakhare, Senior Advocate*, with Joel Carlos, for the Petitioner.*

Mr Pankaj Sawant, Senior Advocate*, with Roop Basu, i/b M/s The Law Point, for Respondents Nos. 2 to 4.*

CORAM G.S. Patel & Madhav J. Jamdar, JJ.

DATED: 15th February 2022

PC:-

SHEPHALI SANJAY MORMARE
Digitally signed by SHEPHALI SANJAY MORMARE Date: 2022.02.18 10:07:40 +0530

1. The Petitioner is a private limited company. After amendment, it seeks various writs of mandamus. The only one that is actually pressed is prayer clause (c) at pages 34A-34B which read thus:

> "c. That this Hon'ble Court be pleased to issue a writ in the nature of mandamus or any other appropriate writ order or direction calling for the records and proceeding relating to the expression of interest (EOI) No. 1000374174 (System ID 86996) opened on 17/9/2021, Letter of Intent dated 13/11/2021, List of statewise short listed bidders dated

> 18/10/2021 and 1/11/2021 in case of Maharashtra and after examining the legality and validity of the same be pleased to direct the Respondents to exhaust the annual design and offtake quantity offered by the Petitioner which is 100 KLPD or 3.30 Crore litres per annum before proceeding to the entity next in rank to the Petitioner."

2. Shortly stated what the Petitioners want is that the oil companies, joined as Respondents Nos. 2, 3 and 4, must consume or take up the entire production of 100 kilolitres per day (KLPD) or 3.3 crores litre of ethanol from the Petitioner — the entirety of its production capacity — before proceeding to the next eligible selected vendor.

3. For the reasons that follow, we are unable to accept this contention. Not only is the case of the Petitioner contrary to settled law of several decades in the matter of Government tenders, but is, in our view quite possibly against the public interest. This is one of the criteria that the Supreme Court said in *Tata Cellular v Union of India*[1] is also a factor that will weighed with the Court.

4. The three oil companies, Bharat Petroleum Corporation Limited, the 2nd Respondent, Hindustan Petroleum Corporation Limited, the 3rd Respondent, and Indian Oil Corporation Limited, the 4th Respondent issued an expression of interest for long term agreements with dedicated ethanol plants in ethanol-deficit States. The EOI required bidders to offer ethanol supplies meeting certain

1 (1994) 6 SCC 651.

specifications required to blend ethanol with petrol at various depots across the country.

5. The terms of the tender are not complex. The EoI document is at Exhibit "B". There is no doubt that the bidders' ethanol production plants are meant for producing ethanol for, and only for, the oil companies. In the sense, this is captive production, for the suppliers cannot sell their products to other parties without the express written permission of the oil companies in question. But this is quite different from saying that the requirement is that the oil companies must, in some sort of a guaranteed fashion, take up all the production of these dedicated ethanol manufacturing plants. A list of the estimated ethanol quantities required is set out in the EOI.

6. We come next to the provisions of the EOI for the selection of bidders for signing long-term bipartite agreements. This is the heart of Mr Sakhare's case. Clause (iv) and its 10 sub-clauses of the EoI are set out below.

> " **iv) Selection of bidder for signing long term bipartite agreement.**
>
> (i) All bidders within one deficit state/UT as per table 1 will be categorized under one lot for evaluation.
>
> (ii) **Under each lot (For each deficit state/UT), all bidders who have scored 35 or more marks will be ranked in descending order of their marks obtained.**
>
> (iii) **The estimated requirement as mentioned in table 1 will then be offered as offtake assurance to the bidder from the rank list till the deficit quantity is exhausted.**

(iv) The bidders who are given offtake assurance as per (iii) above will be considered as short listed bidders with whom OMCs will sign Long term bipartite agreement for the offtake assurance quantity.

(v) List of bidders who are shortlisted under this EOI for signing long term bipartite agreement will be displayed on ethanolforindia.com portal.

(vi) Since the state-wise quantities of ethanol given in the table 1 for deficit states are an estimate, OMCs reserve the right to increase/decrease the quantities for which they will enter into long term agreement and the decision of OMCs in this regard shall be final and binding

(vii) In case of two or more bidders ranked at the same level, OMCs reserve the right to distribute the requirement as offtake assurance amongst these bidders to facilitate setting up larger number of plants in order to cater to higher demand in future.

(viii) In case adequate applications are not received from bidders proposing to set up dedicated ethanol plants in Delhi NCT, the bidders who are proposing to set up dedicated ethanol plants in a radius of 250 Kms of Delhi (OMC supply location in Delhi with lat-long) and have submitted applications in this EOI for consideration in Delhi & NCT may be considered.

(ix) **OMCs reserve the right to sign long term bipartite agreement for quantity <u>lower than applied for in this EOI to ensure better availability as in such case plants can be set up for a higher capacity than the agreement quantity</u>. The extra capacity may be covered by OMCs through normal registration and procurement process.**

> (x) The OMCs will not be liable for any action against the bidders for any other liabilities. Bidders are fully responsible for setting up and operating their plants."

(*Emphasis added*)

7. Mr Sakhare argues that clauses (ii) and (iii) above provide a mechanism by which, only once the offtake of production of one ranked producer is exhausted, the procurement must only then proceed to the next supplier.

8. Instead, what has happened is shown at Exhibit "G" at page 157 where, in Maharashtra, the offtake quantity offered and being taken up by the oil companies is distributed amongst multiple industries. The Petitioner is one of these. Its name is shown. It manufactures 100 KLPD. The companies have offered to take up 40% or 40 KLPD. This list has been since revised but the entire offtake has admittedly not been assured by the oil companies to the Petitioners.

9. Mr Sakhare's argument overlooks one important factor. Clause (ix) of the same selection-of-bidders clause (extracted above) makes it clear that the oil companies reserve the right to sign these long-term bipartite agreements for a quantity *lower* than applied for in the EOI to ensure better availability, as in such cases plants can be set up for a higher capacity than the agreement quantity.

10. This is not just an adequate reason. It is probably an excellent reason. It means that the oil companies are distributing their risk —

so to speak — and are providing margins of safety since the ethanol requirement is critical to the supply of fuel oil. If the entire offtake is being taken as a guarantee, and should there be an interruption in that supply, the consequences could be catastrophic and nationwide. It is to avoid this that the oil companies have intelligently agreed to take *less* than the installed manufacturing capacity. When there is requirement for more they can go back to the ethanol producers and take more. At the same time, the risk of disruption is minimized.

11. In the face of this express clause (ix), it is not possible to accept Mr Sakhare's argument that by some process of circuitous reasoning or necessary implication we must accept the Petitioners' argument that there is a guaranteed 100% offtake simply because the producers have a point-based ranking system.

12. The argument also overlooks the terms of the letter of intent of 13th November 2021 at Exhibit "J". The annual offtake offered is part of clause 3 and clauses 3 (b), 3(c) and 3(d) read thus:

> "**3. Annual Offtake Quantity offered:**
>
> b. **The annual off take quantity offered to shortlisted bidders as above for signing LTOA for supply of denatured anhydrous ethanol to OMCs may be less than the annual design capacity offered by the shortlisted bidder in his application.**
>
> c. The shortlisted bidder is free to set up plant up to the annual design capacity offered in his application. This additional capacity, over and above the annual offtake quantity offered in

3a. above, also needs to remain dedicated ethanol plant only.

d. **Ethanol so produced from additional capacity stated in point no. 3c above, may be procured through the prevailing Ethanol procurement process followed by OMCs and/or Pvt. OMCs on need basis.**"

13. This further fortifies our view as expressed above.

14. As the decisions of the Supreme Court have consistently said, the author of a tender document is the party or entity best placed to assess or judge its interpretation.[2]

15. We see no merit in the Petition. It is rejected. There will be no order as to costs.

16. All concerned will act on production of a digitally signed copy of this order.

(Madhav J. Jamdar, J) **(G. S. Patel, J)**

2 *Agmatel India Pvt Ltd v Resoursys Telecom & Ors*, 2022 SCC OnLine SC 113; *Vice-Chairman and Managing Director, CIDCO v Shishir Realty Pvt Ltd & Ors*, 2021 SCC OnLIne SC 1141