



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

Date of decision: 02nd JUNE, 2023

IN THE MATTER OF:

+ **W.P.(C) 6613/2023 & CM APPLs. 25961/2023, 25962/2023**

KALINGA COMMERCIAL CORPORATION LTD Petitioner

Through: Mr. Rajshekhar Rao, Senior Advocate
with Ms. Amrita Panda, Mr. Debesh
Panda, Mr. Sri Aditya Kumar and
Ms. Yamini Mookherjee, Advocates

versus

STEEL AUTHORITY OF INDIA Respondent

Through: Mr. Chetan Sharma, ASG with
Mr. Sharat Kapoor, Mr. R. V. Prabhat,
Mr. Amit Gupta, Mr. Vinay Yadav,
Mr. Saurabh Tripathi, Mr. Subh
Kapoor, Mr. V. Senthil Kumar and
Mrs. Bhavyah Garg, Advocates for
Respondent/ SAIL.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. Aggrieved by the action of the Steel Authority of India (**Respondent/SAIL**) in rejecting the Petitioner's bid in respect of a tender bearing NIT No. RSP/ROU/PROJ/NIT/TIM/22-23/03 dated 02.07.2022 (*hereinafter referred to as Impugned Tender*) by way of a letter dated 10.05.2023 (*hereinafter referred to as Impugned Letter*), the Petitioner has



filed the instant writ petition challenging the decision taken *vide* the said letter.

2. Shorn of details, the brief facts leading to the filing of instant writ petition are as under:

- i. The Respondent floated the Impugned Tender on 02.07.2022 for engagement of Mine Developer-cum-Operator (MDO) for Development & Operation of Mines at Taldih (7.0 Mtpa ROM feed) along with installation of 10 Mtpa Loading facility at Barsua Valley.
- ii. It is stated that the Petitioner submitted its techno-commercial bid in lieu of the Impugned Tender on 12.09.2022.
- iii. On 19.02.2023, the Respondent informed the Petitioner that it was in the process of evaluating offers for the Tender and provided its observations on the offer made by the Petitioner. The Petitioner replied to the said e-mail confirming and accepting the observations made by the Respondent and withdrew the deviations from the bid document submitted by it along with the Tender documents.
- iv. Thereafter, on 22.02.2023, the Respondent sought a declaration from the Petitioner to the effect that the quantity shown in the certificate of production is the billed quantity dispatched to the loading siding and not the ROM. It is stated that the Petitioner, provided the aforesaid declaration on 22.02.2023.
- v. Subsequently, on 11.03.2023, the Respondent requested the Petitioner to submit clarification/confirmation/lacking documents with respect to two aspects. The first aspect highlighted by the



Respondent is that there is an alleged deviation between the Net Worth enumerated in the Statutory Auditor's certificate, which values the Net Worth of the Petitioner at Rs. 400.69 crores, whereas as per the calculation of the Respondent from the audited financial statement for the year of Financial Year 2021-22, the Net Worth of the Petitioner is Rs. 393.73 crores, therefore reasons were sought from Petitioner regarding this variation. The second aspect highlighted by the Respondent is that the Petitioner has allegedly submitted certain certificates that was not duly certified by the Statutory Auditor and requested a certified copy of the same.

- vi. It is stated that the Petitioner clarified the position regarding both the aforesaid queries *vide* letter dated 15.03.2023. The Petitioner provided a break up of its Net Worth for the financial year 2021-22, taking into account Deferred Tax Liability in addition to Paid-up Share Capital and Surplus.
- vii. Thereafter the Respondent wrote to the Statutory Auditor of the Petitioner on 10.04.2023 seeking clarification on financial certificates issues to the Respondent with substantiated documents. The Petitioner's Statutory Auditor replied to the aforesaid query *vide* letter dated 11.04.2023. The relevant extract of the said letter is being reproduced as under:-

"We have prepared the certificate on the basis of the following.

- a. Shareholders' Fund forms part of the NETWORTH which consists of Paid up Capital and Reserves.*



- b. Calculation of NETWORTH under Indirect method does not include Deferred Tax Liability because it is not a outside liability.*

In view of that Deferred Tax liability needs to be included for calculation of NETWORTH under Direct Method. Moreover, Deferred Tax liability is appropriation of the profit in compliance to AS 22 (Accounting of Taxes on Income) issued by the ICAI. This is ultimately reversed and transferred to Reserves in future years not being a outside liability. Hence this can be considered as free reserves on a given date and no specific liability exists against the same as on date.

Our view as above is on the basis of generally accepted accounting principles. "

- viii. On 19.04.2023, the Petitioner wrote a letter to its statutory auditor informing the Petitioner that it has asked for an opinion from the ICAI and also enclosed a certificate from an independent CA firm i.e. M/s P.A. & Associates and an opinion from an independent Registered Value, CA Dr. Prithvi Ranjan Parhi to support the authenticity of treatment of Deferred Tax Liability in computing Net Worth.
- ix. Thereafter, the Petitioner, on 22.04.2023 wrote to the Respondent stating that it had requested to the Statutory Auditor to have an opinion from the Institute of Chartered Accountants of India (ICAI) regarding treatment of deferred tax liability for computation of Net Worth and requested the Respondent not to take any adverse steps until the opinion of ICAI is obtained.



- x. It is stated that the Respondent refused to take into consideration the clarification provided by the Petitioner's Statutory Auditor, the Independent CA Firm as well as the Independent Registered Valuer and chose to reject the Petitioner's offer stating the same was not suitable for further consideration as per eligibility criteria (Financial), and so the Petitioner approached this Court byway of the instant writ petition.
3. Mr. Rajshekhar Rao, learned Senior Counsel for the Petitioner, submits that the action of the Respondent in rejecting the Petitioner's bid is erroneous, arbitrary and unsustainable in law as it is based on a criterion which is outside the terms of the NIT.
4. Mr. Rao submits that at the time of submitting its bid documents on 12.09.2022, the Petitioner stated its net worth to be Rs. 400.69 crores in compliance with Clause 6.1.2 (II) of the NIT, and submitted a certificate dated 07.09.2022 from its statutory auditor certifying Petitioner's net worth as on 31.03.2022 to be Rs. 400.69 crores in compliance with Clause 6.3.4 of the NIT.
5. Mr. Rao highlights Clause 3.28 of the NIT defines "Net Worth" to mean the sum total of paid up capitals and free reserves which is *pari materia* with Section 2(57) of the Companies Act, 2013. He states that deferred tax liability is part of free reserves since it only a provision that is required to be made due to the difference in computation of depreciation under the Companies Act and the Income Tax Act.
6. Mr. Rao further submits that in the present case, the amount shown towards deferred tax liability is not an actual liability and no payment of the



same has been made. Since the said amount gets reversed, it is not an actual liability and added to the reserves in the next financial year. He relies upon Section 115 JB of the Income Tax Act, 1961 and Rule 11 UA of the Income Tax Rules, 1962 in furtherance of his arguments.

7. Mr. Rao placed reliance upon judgment of the Hon'ble Supreme Court in J K Industries v. Union of India, **2007 (13) SCC 673** in support of his arguments that deferred tax liability has to be included in the balance sheet and it is not an actual liability to the company.

8. It is submitted by Mr. Rao that the Petitioner's have complied with all requirements of the Respondent and has even provided expert opinion of an independent auditor as well as an independent registered valuer with ICAI, and both of them have opined that Deferred Tax Liability is calculated as part of net worth. He submits that the failure of the Respondent to consider the method of calculation adopted by the aforesaid experts is contrary to the law laid down by the Hon'ble Supreme Court in Silppi Constructions Contractors v. Union of India, **(2020) 16 SCC 489**.

9. Heard learned Counsels for the parties and perused the material on record.

10. The short question which arises for the consideration of this Court is whether the action of the Respondent in rejecting the bid of the Petitioner on the ground that Net Worth of the Petitioner is not in compliance with the eligibility criteria (financial) is correct or not and whether it warrants interference by this Court while exercising its jurisdiction under Article 226 of the Constitution of India.



11. At this juncture, it is apposite to reproduce Clause 3.28 of the Bid which defines “Net Worth” and Clause 6.1.2 of the Bid Document, which provides the qualifying criteria (financial) of the NIT reads as under:-

"3.28 “Net Worth”: Net Worth is the sum total of paid up capital and free reserves. Free reserves means all reserves credited out of the profits and share premium account but do not include reserves credited out of revaluation of assets, write back of depreciation provisions and amalgamation. Further, any debit balance of profit and loss account and miscellaneous expenses to the extent not adjusted or written off, if any, shall be reduced from reserves and surplus.

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6.1.2 Financial Criteria

Bidder has to satisfy the following financial criteria of turnover and net worth in order to be considered for the Price Bid Stage (Part 3) of the bidding process:

(I) Bidder should have an average annual financial turnover of at least Rs. 700.00 crore (Indian Rupees Seven Hundred Crore only) or its equivalent in foreign currency during last three consecutive financial years ending 31.03.2022/31.03.2021 based on their financial accounting year. In other words, cumulative turnover of the bidder during the above three years should be at least Rs.2100 crores (Indian Rupees Two Thousand One Hundred Crore only).

(II) Bidder should have net worth of at least Rs. 400.00 crores (Indian Rupees four hundred crores only) as on the end date of the financial accounting year ending 31.03.2022/31.03.2021.



(III) The Bidder shall have to fulfill the average annual cash accrual of at least Rs. 100 Crore (Indian Rupees one hundred crore only) during the last three completed Financial Years immediately preceding year of NIT. The Bidder shall have a positive cash accrual for the last completed financial year immediately preceding year of NIT."

12. The law relating to interference by Courts in matters of tender is well settled. The authority issuing the tender is the best person to know the requirements of the tender and the clauses contained therein. Courts can interfere with the decisions taken by the authorities issuing the tender only if the decision is arbitrary or perverse or intended to favour someone or is biased against the person whose bid is sought to be rejected.

13. The Apex Court in Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, after relying on various judgments has observed as under:-

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any



role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

14. The law regarding interference by a Court with the actions of a tendering authority in exercise of its jurisdiction under Article 226 of the Constitution of India is well settled. The Apex Court in Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., **2016 (16) SCC 818**, has observed that constitutional courts must defer to the understanding and appreciation of the author of the tender documents unless there is malafide or perversity in the understanding or appreciation in



application in the terms of the tender. The relevant extracts of the aforesaid judgment are reproduced as under:-

“14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. 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 Silippi Constructions Contractors v. Union of India, **2019 SCC OnLine SC 1133**, the Supreme Court, while discussing the aspect of judicial intervention in matters of contract involving state instrumentalities had held that the authority which floats the contract or tender, and has authored the tender documents is the best judge regarding interpretation of the same. Any interference by the Court has to be for the purposes of preventing



arbitrariness, irrationality, bias, *mala fides* or perversity. The said principle has been reiterated by the Apex Court in Galaxy Transport Agencies, Contractors, Trader, Transporters and Suppliers v. New J K Roadways, Fleet Owners and Transport Contractors & Ors., **2020 SCC OnLine SC 1035**.

The Supreme Court in Silippi Constructions (supra) has observed as follows:

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise 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.

*25. That brings us to the most contentious issue as to whether the learned Single Judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. **We must remember that we are dealing with purely administrative decisions. These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a State within the meaning of Article 12 of the Constitution.** These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every*



stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. Respondents 1 and 2 were entitled to give reasons in the counter to the writ petition which they have done.”

(emphasis supplied)

16. The Petitioner has not been able to demonstrate as to how the decision arrived at by the tendering authority in rejecting the bid of the Petitioner as not being compliant of Clause 3.28 and Clause 6.1.2 of the bid document is perverse. The tender issuing authority cannot be asked to wait for an unlimited period awaiting an opinion which is sought to be procured by the tenderer. The tender has been evaluated by experts and this Court is not inclined to sit as an Appellate Authority over the Tender Evaluating Committee which has come to the conclusion that the bid of the Petitioner does not meet with the financial criteria.

17. The judgment in J K Industries (supra) does not support the case of the Petitioner as the Apex Court in the said judgment has stated that the balance sheet of a company is not an indicator of its net worth. The calculation of net worth and the preparation of a balance sheet are two separate exercises. In this view, merely because deferred tax liability is to be included in the balance sheet of a company does not mean that the same should be included in calculating the net worth of a company.

18. Similarly, the reliance placed upon by Mr. Rao on Section 115 JB of the Income Tax Act, 1961 and Rule 11 UA of the Income Tax Rules, 1962 also is incorrect. Section 115 JB of the Income Tax Act is a special provision which describes what 'book profit' of a company means for the purposes of determining the total income of a company for the purposes of



payment of tax. Whereas Rule 11 UA of the Income Tax Rules, 1962 deals with the determination of fair market value for the purposes of determining income from other sources under Section 56 of the Income Tax Act. Both the provisions deal particularly with determining the income of a company for the purposes of payment of tax. The calculation of the net worth of a company and the calculation of income of a company for the purposes of payment of tax are two separate exercises and cannot be equated. It is, therefore, difficult for this Court to agree with the submission made by Mr.Rao that deferred tax liability should be included for the purposes of calculating the net worth of a company.

19. A perusal of Respondent's letter dated 11.03.2023 shows that the net worth of the Petitioner as calculated by the Respondent by referring to audited financial statements of the Petitioner for the FY 2021-22 shows that the net worth of the company is Rs.393.73 crores. The Respondent vide letter dated 10.04.2023 had sought clarification from the Respondent pertaining to the consideration of deferred tax liability as part of net worth. The Petitioner replied to the same clarifying its stance by relying upon a report of its statutory auditor, a certificate from an independent chartered accountancy firm and a registered valuer in support of its treatment of deferred tax liability in computing net worth. The Petitioner also stated that they have sought an opinion from the ICAI regarding the same. However, *vide* the Impugned letter, the Respondent had rejected the bid of the Petitioner. The purpose of calculating net worth should be primarily left with the tender issuing authority and the evaluating committee and the Court cannot dictate as to how the net worth should be calculated unless the decision is contrary to law.



20. In the opinion of this Court, it cannot be said that the action of the Respondent in not considering deferred tax liability as a part of net worth and rejecting the bid of the Petitioner for not meeting the qualification criteria is so arbitrary that it would warrant interference by this Court under Article 226 of the Constitution of India.

21. With these observations, the petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

JUNE 02, 2023

Arsh/hsk

