In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.26454 of 2023

Black Diamond Resources and Another
Vs.
Indian Oil Corporation Limited Indian Oil Explosives and others

For the petitioners	:	Mr. Abhrotosh Majumdar, Mr. Chayan Gupta, Mr. Rajesh Upadhyay, Mr. Eshaan Saroop, Mr. Shoham Sanyal
For the respondent no.1	:	Mr. Sabyasachi Chaudhury, Ms. Manju Bhutoria, Mr. Arjun Mookherjee, Mr. Amit Meharia, Ms. Paramita Banerjee, Ms. Subika Paul, Ms. Amrita Das
Hearing concluded on	:	28.11.2023
Judgment on	:	07.12.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioner no.1 is a partnership firm and has set up a unit in Bharuch, Gujarat for converting High Density Ammonium Nitrate Melt to High Density Ammonium Nitrate Solid. The respondent no.1 Indian Oil Corporation Limited Indian Oil Explosives (IOCL) floated a tender

for transportation and conversion of High density Ammonium Nitrate Melt procured from GNFC (Gujarat Narmada Valley Fertilizer and Chemicals Limited) into High Density Ammonium Nitrate Solid and transportation thereof to various consignee locations for the period from April 2024 to March 2026.

2. The petitioners have challenged the said tender on the ground that the same is tailor-made for six big operators in the field. A chart has been given in paragraph no.15 of the writ petition showing that there are six established companies doing the said business as contemplated in the tender. That apart, there are three start-ups in the field including the petitioner, one of which has become obsolete now.

3. The tender conditions, it is argued, were tailor-made to suit the purpose of the said six big operators and specifically exclude start-ups without any reasonable basis for such discrimination.

4. By placing reliance on the Evolution Criteria and Tender Ranking under lot system in the tender document, it is pointed out by learned senior counsel for the petitioners that as per the said document, indicative quantities of all the plants mentioned in the tender document will be distributed among six eligible bidders in the ratio of 27:23:19:15:10:6 subject to total quantity offered by the bidders/declared licence capacity of the bidder.

5. As per the bid document, in case a start-up is interested in supplying the tendered item but does not meet the Pre-Qualification Criteria (PQC) indicated in the tender document, it is requested to write a detailed proposal separately and not against the present tender

requirement, which would be accompanied by relevant document in support of the start-up. Such proposal shall be examined by IOCL, after which a detailed offer may be sought from the start-up with the intent to place a trial or test order provided the start-up meets the quality and technical specifications. In case the start-up is successful in the trial order, it shall be considered for PQC exemption for the next tender provided the status of the start-up does not change. Such condition is discriminatory, it is argued, since start-ups which otherwise meet the PQC cannot, on any justifiable basis, be precluded from participating in the present contract.

6. It is next argued that Clause 4(a) of the tender document provides that an entity shall be considered as start-up up to a period of seven years from the date of incorporation/registration. The said provision is contrary to a Notification dated February 19, 2019, bearing GSR 127(E) issued by the Ministry of Commerce and Industry which provides that an entity shall be considered as a start-up up to a period of ten years from the date of incorporation/registration. Being contrary to the said notification, the said clause in the tender is also vitiated.

7. When the petitioners sought explanation for precluding start-ups, the respondents have cited Rule 160(i)(a) of the General Financial Rules (GFR), 2005 issued by the Government of India, Ministry of Finance, Department of Expenditure which provides that the bidding document should contain *inter alia* the criteria for eligibility and qualifications to

be met by the bidders such as minimum level of experience, past performance, etc.

8. It is argued by the petitioners that the said provision has been superseded by the GFR, 2017, which was in force at the time when the tender was floated. Rule 173(i) of the same provides that the condition of prior turn-over and prior experience may be relaxed for start-ups (as defined by the Department of Industrial Policy and Promotion) subject to meeting quality and technical specifications and making suitable provisions in the bidding document.

9. Thus, as per the said GFR, the tender document ought to have contained such relaxations for start-ups.

10. Next relying on the Manual for Procurement of Goods issued by the same Ministry, as updated in June 2022, it is argued that as per Clause 4.13.4(ii) the PQC should be unrestrictive enough so as not to leave out even one capable vendor/contractor; otherwise, it can lead to higher prices of procurement. On the other hand, these criteria should be restrictive enough so as not to allow even one incapable vendor/contractor and thus vitiate fair competition for capable vendors/contractors to the detriment of the buyer's objectives. Such fair competition has been curtailed in the present impugned tender, it is argued.

11. A scientific study of High Density Ammonium Nitrate properties, it is argued, was conducted by the CSIR, that is, the Central Institute of Mining and Fuel Research, a premier institute in the country, which

in its interim report acknowledged the competence of the petitioners to participate in the tender. A copy of the same is handed over in Court.

12. Learned senior counsel for the petitioners next cites an Action Plan dated January 16, 2016, tagged as "startupindia", issued by the Department of Industrial Policy and Promotion of the Ministry of Commerce and Industry, Clause 5 of which provides that in order to promote start-ups, the Government shall exempt start-ups in the manufacturing sector from the criteria of "prior experience/turn-over" without any relaxation in quality standards or technical parameters.

13. It is submitted that the said Action Plan has also not been adhered to by the respondents in the present tender.

14. Learned senior counsel cites *Meerut Development Authority Vs. Association of Management Studies and another*, reported at *(2009) 6 SCC 171*, in paragraph no.26 of which it has been held by the Supreme Court that the terms of the invitation to tender cannot be open to judicial scrutiny; however, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made as to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The Supreme Court stressed on the proposition that the bidders participating in the tender process have no other right except the right to equality and fair treatment.

15. It is, thus, argued that the tender should be scrapped and/or modified to the extent that start-ups are not permitted to participate therein.

16. Learned counsel for the respondent no.1-IOCL controverts the submissions of the petitioners and argues that the petitioners participated in the pre-bid meeting and got clarification that a trial order was required to be undergone by a start-up prior to get an opportunity in the next tender. Thus, it cannot be said that the petitioners were not aware of the said Clause.

17. Moreover, in October-November, 2021, a two-year tender was floated by the IOCL for similar work, in which the petitioners did not participate. The petitioner no. 1 only got its PESO (Petroleum Explosive Safety Organization) Licence in the year 2020 and as such cannot cast the responsibility on the IOCL to permit it to participate as a start-up, only because the statutory period of expiry of its tenure as a start-up ends in the year 2024. May 2024, it is argued, is the cut-off date before which the petitioner no. 1 is now desperate to utilize its status as a start-up at the expense of the IOCL. Apart from IOCL, there are several other organizations floating similar tenders and the IOCL cannot be burdened with responsibility to accommodate the petitioners.

18. It is argued that the petitioners are also an MSE and having failed to take advantage of the subsidies and benefits given in the capacity of MSE, has resorted to the start-up criterion.

19. The petitioner no. 1 failed to meet the technical criteria as a start-up when it participated in a similar short tender for six months floated in the year 2022. The said tender ultimately did not go through, since there was no participant having previous experience and the only two

bidders were start-ups. Hence, the respondents could not obtain any yardstick to go through with the tender.

20. It is argued by the respondents that the same trial order policy is in force since 1998 and nobody including the petitioners ever challenged the same.

21. The petitioner no.1 itself sought a trial order but failed to meet the PQC in the 2022 short tender. Since no price discovery was possible as there were no technically qualified bidders, the said tender had to be scrapped. Thus, the petitioner no. 1 cannot now claim to be eligible as start-up, having failed on the previous occasion and having known all along regarding the provision of trial orders applicable to start-ups.

22. It is submitted that the relevant Office Memorandum dated September 20, 2016 and not the general Action Plan of 2016 prevails, which makes it optional for operators floating tenders like the respondent no.1 to make relaxations for start-ups. Such option may, at the discretion of the Tender Issuing Authorities, be adopted or not. Learned counsel for the respondents submits that the petitioners' argument on discrimination is misconceived, since start-ups cannot be said to be on similar footing as other operators having prior experience in the field. Thus, there being intelligible differentia for such distinction between start-ups and operators having previous work experience, also keeping in view the public safety factor since the tender pertains to explosives, there cannot be said to exist any violation of Article 14 of the Constitution of India.

23. Although the petitioners have lost their chance under the present tender, it is submitted that the respondent no.1 is still willing to give a trial order to the petitioners if the petitioners are otherwise eligible to get it.

24. The rabbit-hole theory favouring the chosen six operators previously working in the field, argued by the petitioners, is controverted by learned counsel for the respondent no.1 on the ground that there was no irrational discrimination between equals since start-ups are on a different footing than the other operators having past experience for similar works.

25. The respondent no.1 cites *Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and another,* reported at *(2016) 16 SCC 818* for the proposition that a mere disagreement with the decision-making process of the administrative authority is no reason for a constitutional court to interfere. The threshold of *mala fides*, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional courts interferes with the decision-making process or the decision.

26. In reply, learned senior counsel for the petitioners argues that the petitioners did not have a PESO licence prior to 2022 and, as such, could not have participated previously. It is further argued that there was no provision for trial order before the six-month-tender of 2022. Hence, the argument that the petitioners were all along aware but never challenged the trial order condition is incorrect.

27. It is submitted that the respondents are trying to make a micro-classification with regard to start-ups, since start-ups being otherwise eligible cannot be restrained otherwise.

28. Learned counsel next cites *Shri Ram Krishna Dalmia Vs. Shir Justice S.R. Tendolkar and others*, reported at *AIR 1958 SC 538* for the proposition that there cannot be any discrimination between similarly situated entities. In determining the validity or otherwise of a statute, in the said case, it is held that the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together from those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute.

29. In the present case, it is argued that the tender relates to explosive substances and public safety is involved, for which the classification between start-ups and entities having previous experience was justified and reasonable.

30. Upon hearing learned counsel for the parties, the moot question which arises is whether the relevant clauses of the tender documents were tailor-made to suit the six big operators in the field.

31. For deciding such issue it has to be kept in mind that merely because there are six such big operators who have past experience, the requirement of the tender for six eligible contractors cannot be vitiated *per se*.

32. It has to be considered whether the discrimination alleged by the petitioners is arbitrary or discriminatory or if the Clause-in-question was tailor-made to suit the six existing big operators.

33. It is an admitted position that there are six operators having past experience and two operational start-ups including the petitioners in the field which do not have past experience.

34. The petitioner no.1, in this context has relied on an Action Plan of January 16, 2016. An Office Memorandum of the same year is also relevant and operates in the field. In the said Office Memorandum, relied on by the respondent, the expression "may" has been used, thereby leaving it to the discretion of the Tender Issuing Authority whether and how far to relax the participation criteria for start-ups.

35. Clause 5 of the 2016 Action Plan provides that in order to promote start-ups, the Government shall exempt start-ups in the manufacturing sector from the criteria of prior experience/turn-over without any relaxation in the quality standards or technical parameters and the start-ups will also have to demonstrate requisite capability the execute the project as per the requirement.

36. However, the said Action Plan is general in nature, providing the broad guideline for start-ups but has to be read in proper context, in the facts and circumstances of the work contemplated under each tender.

37. The Manual for Procurement of Goods has updated in July 2022 provides that PESO should be unrestrictive so as not to leave out even one capable contractor. In the same breath, the criteria should be

restrictive enough so as not to leave out even one incapable contractor. The said provision is neither here nor there, since the same does not provide any special relaxation for start-ups but generally referred to capability of contractors. It depends on the Tender Issuing Authority, who has to be given a fair play in the joints, to ascertain as to what extent it would go to while floating tenders. In the notion of the IOCL, the capability of a vendor has opposed to incapability may very well be take into consideration the past experience, keeping in view the serious impact of the work contemplated, which is for transportation and manufacture of components of explosives.

38. Keeping in view the magnitude and the scale of the operations, it can very well be the decision of the IOCL to be restrictive up to a particular point even as per the said Manual. The GFR 2017, in Rule 173(i) also uses the expression "may", leaving it on the discretion of the Tender Issuing Authority to consider as to how far the condition of prior turn-over and experience is to be relaxed for start-ups.

39. It is well-settled that the perception of the employer/Tender Issuing Authority is paramount in ascertaining the yardsticks to be met by the bidders in a particular work or project or procurement contemplated under the tender.

40. The petitioner has placed reliance on *Meerut Development Authority (supra)*, where the Supreme Court, in no uncertain terms, held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract,

which is a usual norm in such cases. The limited judicial review contemplated in the said judgment is restricted to cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The Supreme Court went on to observe that the bidders participating in the tender process have no other right except the right to equality and fir treatment in the matter of evaluation of competitive bids offered by interested persons in response to Notice Inviting Tenders in a transparent manner and free from hidden agenda.

41. The present challenge does not pertained to evaluation of competitive bids but challenges the terms of the tender itself, which broadly within the domain of the authorities. The petitioners bank on the eligibility ratio of allotment of work between six eligible participants to harp on the argument of the Clauses being tailor-made.

42. To ascertain the veracity of such argument, the relevant evaluation criterian is required to be looked into. It is provided in Clause 1 of the evaluation criteria that considering the overall volume requirement, criticality of supply which is very high and also to retain flexibility for sourcing of the material from any of the vendors at any point of time for any plant as per IOCL convenience, indicative qualities of all the Plants mentioned in the tender document would be distributed among six eligible bidders in the ratio as stipulated therein. The modalities in that regard have been elaborately prescribed in the evaluation criteria,

leaving no manner of doubt as to the reason for distribution of the work among six eligible bidders.

43. Even if it is assumed for arguments sake that, as per the admitted position of the petitioners, there are six big operators having past experience in the field, merely because the tender conditions are restrictive to those six, it cannot be said that the tender conditions were tailor-made to suit them, in the absence of other existing operators having similar experience. The question is whether the criteria of classification were intelligible/reasonable and whether such distinction had reasonable proximity with the object of the tender. The work contemplated under the tender is transportation and conversion of High Density Ammonium Nitrate Melt into High Density Ammonium Nitrate Solid and transportation thereof to various consignee locations. In the definition Clause of the tender document itself, the product has been specified. The tender document clearly indicates that the purpose of the work pertains to explosive manufacturing/supplies. In the evaluation criteria, the IOCL has clearly mentioned that the overall volume requirement is huge and the supply is highly critical.

44. Thus, on such grounds there were sufficient intelligible reasons for the IOCL to distinguish between operators having past experience and start-ups, who are starting in the field.

45. Taking into consideration the magnitude and the criticality as well as the public safety aspect of the matter, such distinction cannot be said to have been vitiated *per se*.

46. Start-ups as rightly argued by the respondent no.1 cannot be placed on an equal footing as established operators in the field of manufacture of explosive and/or components required for such manufacture.

47. In fact, Clause 4 of the tender document has envisaged sufficient opportunity to start-ups, contemplating a separate proposal to be given to the IOCL by start-ups in which case such proposal shall be examined by the IOCL and a detailed offer may be sought from the start-up with the intent to place a trial or test order provided the start-ups meets the PQC otherwise. In such case, a successful start-up in the trial order would be considered for PQC exemption for the next tender. The said provision is sufficiently inclusive and gives ample opportunity to start-ups to participate in the very next tender subject to their success in the trial or test order.

48. In case of the petitioners, the petitioner no.1 had in fact participated in a short six-month trial in the year 2022 but had failed to meet the technical criteria. Although the said tender did not fructified because there were no technically successful participants, the fact remains that the petitioner no.1 was unsuccessful on the technical eligibility criteria. Having failed to meet such conditions, it cannot be said logically that the petitioners must be permitted to participate in the present tender.

49. Seen from another perspective the petitioners cannot get indirectly what they could not get directly. The petitioner no.1 participated in the recent previous six month tender of 2022 knowing fully well that

the same was a trial/test order and if the petitioner no.1 was successful there, it would be eligible for relaxation of PQC regarding prior experience in the next tender, that is the present tender. Having failed to meet the technical criteria there, the petitioners cannot resile from such position and turn around to say that they must be permitted to participate in the present tender.

50. As observed by the Supreme Court in *Shri Ram Krishna Dalmia (supra)*, the court would only interfere if there is no reasonable basis for classification deducible from the surrounding circumstances or on the face of it. In the present case, there is sufficient reasonable differentia between the petitioners and the other start-ups operating in the field on the one hand and the established operators having past experience on the other. Such grouping was based on sufficient intelligible differentia and, thus, cannot be faulted merely because the convenience of the petitioners was not suited.

51. Insofar as the *Afcons Infrastructure Limited (supra)* is concerned, the Supreme Court clearly observed that the threshold of *mala fides*, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process. In the present case, there is nothing to indicate patent *mala fides*, arbitrariness or intention to favour any particular operator based on a line of distinction which is not reasonable or intelligible. Hence, the requisite criteria for interference are not met. Thus, the arguments of the petitioners cannot be accepted.

52. In such view of the matter, WPA No.26454 of 2023 is dismissed on contest without, however, any order as to costs.

53. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

Later:

When the above judgment is passed, learned counsel for the petitioner seeks a limited stay in order to prefer a challenge to the above order.

Such prayer is opposed vehemently by learned counsel for the IOCL on the ground that the tender process is being delayed indefinitely.

However, keeping in view that the petitioner has a right to prefer an appeal, the interim order which was granted during pendency of the writ petition stands extended for a fortnight from date.

(Sabyasachi Bhattacharyya, J.)