(2025) 03 CAL CK 1051

In the Calcutta High Court, Appellate Side

Case No : MAT No. 2470 Of 2023

Black Diamond Resources And Anr APPELLANT

Vs

Indian Oil Corporation Limited And Ors RESPONDENT

Date of Decision : 21-03-2025

Acts Referred:

Constitution of India, 1950 — Article 14
General Financial Rules, 2017 — Rule 173(i)

Citation : (2025) 03 CAL CK 1051

Hon'ble Judges : T.S. Sivagnanam, CJ;Chaitali Chatterjee (Das), J

Bench : Division Bench

Advocate : Abhratosh Majumdar, Chayan Gupta, Rajesh Upadhyay, Shoham Sanyal, Surabita Biswas, Sabyasachi Chowdhury, Urmila Chakraborty, Amit Meharia, Paramita Banerjee, Subika Paul, Tamoghna Chattopadhyay, Avishek Guha, Shilpa Das

Final Decision : Dismissed

Judgement

Chaitali Chatterjee (Das), J

1. This intra court appeal filed by the writ petitioner challenging the judgment and order dated 7th December, 2023 passed by the Hon’ble Single Bench whereby the writ petition was dismissed.

The fact of the case in a nutshell is that;

1. The writ petitioner is a partnership firm and has set up a unit in BHARUCH, Gujrat for converting High density Ammonium Nitrate melt to High density Ammonium solid .Since the unit is involved with the Hydrogen Ammonium it had obtained the required licence from Petroleum and Exclusive Safety Organization (PESO) and the certifying authority being DPITT granted the recognition as a start up to this appellant. The Respondent no 1 regularly floats tenders for “transportation& conversion of High Density Ammonium Nitrate Melt procured from GNFC into high density Ammonium Nitrate Solid and transportation thereof

to various consignee locations”. It may be noted that the job description for the said tender reads as follows:-

“IOCL (Indian Oil Explosives) shall be purchasing High Density Ammonium Nitrate Melt (HDAN Melt) from GNFC, Bharuch (Gujrat). The tenderer will transport High Density Ammonium Nitrate Melt (HDAN Melt) from GNFC, Bharuch to tenderers’ works, thereafter unload the HDAN Melt at tenderer works for its storage & conversion to High Density Ammonium Nitrate solid (HDAN Solid) with an invisible loss of maximum upto 1% and transport AN solid TO IOCL plant locations.”

1) The petitioner being aggrieved by the manner and method in which the tender conditions have been formulated, designed and alleging that it was to award the contract arbitrarily to the bidders, had filed the writ petitioner to recall and/or set aside the Tender bearing No 10E/HDANMS/2024-26 and also for a direction to set aside or recall any letter of intent /letter of award issued in pursuance of the aforesaid Tender. The Learned Writ Court after hearing the parties was pleased to dismiss the Writ Petition with the observations inter alia that ‘it is well settled that the perception of the employer /Tender Issuing Authority is paramount in ascertaining the yardstick to be met by the bidders in a particular work or project or procurement contemplated under the tender .

The instant appeal has been filed mainly on the ground that the terms of the Tender are tailor made in such manner so that the contracts only remains within the six private Respondents.

Submissions

2. Mr. Abhrotos Majumdar the Learned senior advocate appearing on behalf of the Appellant submits the scope of work clearly indicates that the successful bidder would have to lift HDANM from GNFC and convert the same into HDAN and transport it to the consignees’ location of IOCL. The bidders should have valid license(s) issued by the Petroleum and Explosive Safety Organization (PESO) (issued to appellant on April 8, 2022) to convert the HDANM to HDANS and to possess for sale or use of Ammonium Nitrate and also to transport Ammonium Nitrate in compliance with the Ammonium Nitrate Rules 2012 .

3. The appellant made an investment of about Rs.30 crores for setting up the factory at BHARUCH, GUJARAT and has installed capacity to convert 1,20,000 MT of HDANM to HDANS per annum with its state of art plant and machineries .The respondents no.2 to 7 and the appellant established the infrastructure as downstream Industries of GNFC for facilitating such conversion according to the requirement of the oil company. The Department of Promotion of Industry and Internal Trade under the aegis of the Ministry of commerce &Industries, Government of India (DPIT) issued a certificate of start up recognition on September 7, 2021 with retrospective effect from the date of registration of the appellants as partnership firm that is May 23, 2014 for a period of 10 years which is valid till May 22, 2024. On the strength of such certificate the appellants

participated in the short term tender notice as start up for the period from April 2023 to September 2023 for conversion and transportation of 31250 MT HDANS. According to the appellants none of the 6 existing suppliers participated in the said tender process. IOCL declined to accept the offer made by the appellants as the appellants did not fulfil the PQC laid down in the said NIT and the said tender was cancelled /withdrawn.

4. The Learned Senior advocate strenuously argued that apart from respondent 2 to 7 no other manufacturer would be able to satisfy the PQC specified in the NIT. This approach is monopolistic by IOCL over the procurement of HDANM, wherein over 80% of the HDANM produced by GNFC is exclusively produced by IOCL, as a consequence no new manufacturer can reasonably meet the prescribed criteria. The appellants also gave objection in writing in the public grievance portal during its pre-bid meeting but by way of an email dated November 20, 2023, IOCL rejected the objections raised by the Appellant.

5. It is contended that the Pre qualification Criteria for the service period 2020-2022 in the Notice Inviting Tender required new tenderer to have supplied a minimum of 900 MT of High Density Ammonium Nitrate in the last five years. However no such experience criteria were applied to existing convertors, thereby favouring them. The Learned senior advocate relied on the decision in Meerut Development Authority v. Association of Management studies & Anr, (2009) 6 SCC 171, where the Hon’ble Apex Court held that the judicial review of the terms of the tender would be permissible when the terms of the NIT would be 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 points taken by the Appellant are;

a) They were recognized as start up by the DPIT, GOI so they could avail the benefit as a Start Up only from the date of issue of the certificate that is September 7, 2021.

b) They obtained the PESO licence on April 8, 2022

c) They made all attempts to participate in the short term tender notice for the period from April 2023 to September 2023.

d) The IOCL rejected the tender submitted on the ground of non-fulfilment of PQC and ultimately the said tender was cancelled /withdrawn without granting the trial order to them when the Rule 173(i) of the General Financial Rules, 2017 clearly provides that condition of prior turn over/prior experience may be relaxed for Start up(as defined by DPIT) subject to the meeting of quality and technical qualification and making suitable provisions in the bidding document.

6. In order to encourage the start-ups the Ministry of Finance ,Government of India vide office Memorandum dated September 20,2016 ,GFR 2016 –

issued the Manual for Procurement of Goods ,relaxing the conditions regarding the prior turn over /prior experience as defined by DPIT to be applicable only to all start-ups subject to meeting of quality and technical qualifications. It is the specific case of the appellant that that the respondent no 1 intentionally added a rider in the said tender and diluted the true spirit of start-up, violating the intention of Government to encourage the start-ups to participate in the prospective tenders on immediate commencement of production thereby providing an equal platform. Several communications were exchanged between the appellant and the respondent no 1 for trial orders but no such facility was provided to them despite having all statutory permissions and readiness with the infrastructure on the part of the appellant.

7. The Learned Senior Advocate appearing on behalf of the appellant strenuously argued that as per Department of Expenditure, Office Memorandum dated September 20,2016, relaxation regarding the prior turn over /prior experience would be applicable to all start ups recognized by DPIT subject to meeting of quality and technical qualification. The Department of Expenditure (Procurement Policy Division) under the agencies of Ministry of Finance vide circular no 1(2)(1) /2016-MA DATED 10TH March ,2016 has clarified that all CPSU'S may relax conditions of prior turnover and prior experience with respect of MSE's in all public procurement subject to meeting of quality and technical specification . So it is apparent that the procuring agency ,except for cases covered by paragraph -3 of OM dated September 20,2016 , should relax prior turn over or prior experience for start ups but the respondents have failed to adhere to the same.

8. It is further contended that the tender was basically a tailor made tender in order to enable the other bidders to participate who are otherwise at par with the present appellant .The attention of this court has been drawn to the specific terms of the contract where there is provision for inspection and satisfaction and it is argued that experience cannot be the criteria for disentitlement as a start–up .It is further argued that there is relaxation of norms for start–ups and there are opportunity to start–ups and specific evaluation criteria and tender ranking under lot of system in the contract itself which clearly suggests that the power and authority lies with the respondent no 1 to verify the eligibility criteria for the start-up and thereafter to treat them equally with other bidders. The Learned Senior Advocate relied upon the decision in Meerut Development Authority(supra) wherein the Hon'ble Supreme Court observed that the terms of the invitation to tender would be subject to judicial scrutiny where it is established, the terms of invitation to tenderer so tailor made to suit convenience of any particular person with the view to eliminate all others from participating in the bidding process.

9. The case of the Respondents no 1,a public sector undertaking company, is that admittedly the appellant has asserted his right as a start-up to claim exemption and dispensation of pre qualification Criteria to participate in the tender .The appellant was incorporated in 2014 as a start up and its privilege as start up expired on May ,2024 that is after expiry of 10 years from the date of its incorporation and as such they have lost their start –up recognition .The

Appellant obtained the PESO license on April 8,2022 and therefore admittedly the appellant no1 is no longer a start-up and therefore the appeal has become a fait accompli.

10. It is specifically argued that the provision of Article 14 of the Constitution of India can be attracted when there is discrimination between otherwise equals and not between unequals . The appellant no 1 considers itself to be an unequal as a start-up so claimed to be different from the other experienced bidders who have qualified in the said tender, who have the experience to deal with the work envisaged under the Tender. Rule 173 (i) of the General Financial Rules, 2017 also uses the expression "may' leaving it to the discretion of the Tender issuing Authority as to how far such relaxation can be made for the start-ups as such it cannot be stated that clause 4 of the tender document does not meet the requirement of Article 14 of the Constitution of India. It is further contended that in the previous tender the appellant had participated but failed to meet the technical criteria but the said tender did not fructify on account of non availability of successful participants. During the pendency of present appeal the appellant no 1 was awarded first trial order in respect of the contract but the Appellant No 1 refused to accept the trial order as it has ceased to be a start-up by then. Furthermore 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 locations which pertains to explosive manufacturing /supplies of huge volume and of critical import concerning the public safety the single Bench rightly observed 'taking into consideration the magnitude and the criticality as well as the public safety aspect of the nature ,such distinction cannot be said to have been vitiated per se.' In this regard the decision reliance was placed on Afcons Infrastructure Limited vs. Nagpur Metro Rail corporation limited &another (2016)16 SCC 818 where it has been observed by the Hon'ble Apex Court on '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 any interference by the constitutional courts'. Accordingly prays for dismissal of this appeal.

11. We have elaborately heard the submissions of the learned advocates of both the parties and carefully perused the, materials on record.

12. The following facts would be germane to decide as to the correctness of the order and direction passed by the Learned Single Judge and further to ascertain whether there were any arbitrariness or malafides on the part of the Respondent Authorities in rejecting the participation of the appellants in the tender process as a start up.

13. The IOCL floated the Tender being Tender no IOE/HDANMS/2024 -26 for Transportation and Conversion of 2,50,000/- MT of HIGH DENSITY AMMONIUM Nitrate melt procured from GNFC into high density ammonium nitrate solid and

transportation thereof to various consignee locations for the period from 2024 to March 2026 .The respondent No 1 is a public sector undertaking and is under Ministry of Petroleum and Natural Gases, Government of India.

14. The contract contained various terms and conditions including the Prequalification Criteria (PQC) where it was clearly mentioned:-

“They should have the experience of being the Converter of Ammonium Nitrate (High Density Ammonium Nitrate melt to high density ammonium Nitrate Solid) engaged by IOC during last 5 years (Up to the last day of the month previous to the one in which tenders are being invited)and should possess valid licence to convert Ammonium Nitrate melt to solid,(Form of licence-P1) valid licence to possess for sale or use of ammonium Nitrate(Form of licence –P3)& valid licence to transport Ammonium Nitrate (Form of licence –P4) ion compliance to ammonium nitrate Rules 2012. It was also mentioned they must enclose copy of Purchase Orders as a proof of engagement by IOC for the aforementioned criteria”.

15. It is evident from the terms of the contract that experience for a period of 5years along with a valid licence is the prerequisite condition to participate in the tender process. The Appellant obtained the PESO licence on April 8, 2022. The Appellant on the strength of such licence participated in the short term tender notice as start-up. Admittedly the Appellant asserted their right as start up and therefore prayed for exemption and dispensation of pre qualification criteria. The opportunities to be given to start up has been dealt with in the contract which clearly mentioned that the start ups who are interested to supply the items but does not meet the PQC will have to give a proposal separately and not against the present Tender requirement and if submitted 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 order provided the Start Up meets the quality and technical specification .Clause 4.1 of the tender deals with of Relaxation of Norms for Start-ups as follows :-

“ No turnover and prior experience criteria with respect to start up shall be considered subject to meeting the quality and technical specification of the tendered items where tendered items/services are not critical in nature ” .

16. Rule 173(i) of the General Financial Rules 2017 was referred to by the Learned Senior Advocate for the appellant to content that prior turn over and prior expenses has to be relaxed for start ups. What is relevant to note is that Rule 173(i) uses the expression “may” while dealing with relaxation of turnover / expense for start up, thus giving enough powers to the tender inviting authority to exercise discretion in the matter and the appellant cannot contend that the tender inviting authority “shall” relax the prior turn over /expense for start ups. As noted above the product which is subject matter of the tender is a explosive substance and the IOCL was well within their jurisdiction to impose condition as it deems fit to ensure public safety. Further in OM dated 20th September 2016

issued by Ministry of Finance sensitive departments have been kept out of the relaxed norms.

17. The appellant wanted to take the benefit of clause 4.1 of the Tender document after asserting his right as start-up. The appellants also raised objection regarding various terms and conditions of NIT and one of such was the terms of furnishing the valid licence from PESO. Therefore the stand taken by the appellant on one hand asking for the benefit of Start up and on the other hand challenging the very terms of the tender is not sustainable. In Afcons Infrastructure Limited v Nagpur Metro Rail Corporation Limited and Another the Hon’ble Apex Court categorically discussed them odes of entering into a Government Contract.

12. In Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay MANU/SC/0330/1989 : (1989) 3 SCC 293 it was held that the constitutional Courts are concerned with the decision making process. Tata Cellular v. Union of India MANU/SC/0002/1996 : (1994) 6 SCC 651 went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa MANU/SC/0090/2007: (2007) 14 SCC 517 as mentioned in Central Coalfields.

13. In other words, a mere disagreement with the decision making process or the decision 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 Court interferes with the decision making process or the decision.

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 MANU/SC/0048/1979: (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.

18. The nature of product as described in the Tender document shows it as a High Density Ammonium Nitrate Solid HDAN (Melt) and that the work pertains to explosive manufacturing /supply of huge volume and of critical import concerning public safety.

19. In the decisions cited by the Appellant reported in (Meerut Development Authority v Association of Management Studies and anr.) (supra)the Hon'ble Supreme Court observed that a limited Judicial review may be available in cases where the it is established that the terms of the invitation is 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 Hon'ble Apex court in the said case dealt with four aspects

a) What is the nature of rights of a bidder participating in the Tender process /

b) The scope of Judicial review in contractual matter

c) Whether the decision of the Authority is vitiated by any arbitrariness and therefore hit by Article 14 of the constitution of India and

d) Whether the decision is not in public interest?

It is further observed that in absence of clear conclusion that the interpretation given by respondent was perverse or mala fide or intended to favour one of the bidders, High court ought not to interfere with the decision.

20. The appellant has never made out a case that they submitted a proposal for supply of HDNS in terms of the Tender document and that was not considered. They participated in the Tender as a bidder claiming themselves as a Start up when their privilege as start up expired in May 2024 after a period of 10 yrs from the date of its incorporation and hence their start up recognition fails. The certificate of Recognition shows the validity of such certificate is upto 22.5.24. In fact the Appellant participated in the short term tender notice for the period from April ,2023 to September ,2023 for conversion and transportation of 31250 MT HDANS and the offer was not accepted as none was found to meet the PQC as indicated in the tender and hence the said tender was withdrawn/cancelled . In terms of the specific terms as envisaged in the tender document the participants must meet the PQC and in case of non- availability the tender was rightly cancelled. The Appellant as start up failed to meet the required criteria in the said tender process .The Hon'ble Apex court if Afcons Infrastructure limited vs Nagpur Metro Railways Corporation Limited and in catena of decisions specifically discourages the constitutional court to interfere with the decision making process in accepting or rejecting bid unless it suffers from malafides or is intend to favour someone. Mere disagreement with the decision making process or decision of the authority is no reason for the constitutional court to interfere. Further it was held 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 document Constitutional court must defer to this understanding and appreciation of tender documents unless there is perversity in understanding or appreciation or in application of terms of tender conditions. The parallel stand taken by the writ petitioner/ appellant herein ,one he being a start up, the authority ought to have relaxed the norms in accordance with the government notification and on the other hand challenges the terms of the contract being so tailor to fit in the six bidders only appears to be mutually destructive . The appellant's claim of violation of Article 14 of the Constitution of India does not find legs to stand on as Article 14 can be attracted only when the discrimination is between the equals.

21. The Learned Single Judge while refusing to accept the prayer of writ petitioner specifically took note of the fact that the petitioner despite participating in another tender failed meet the PQC though the said tender did not fructify for non availability of successful bidders since it was a trial run test the qualification of the appellant/Writ petitioner would have more stronger footing for this tender.

22. The decision relied on behalf of the appellant in State of West Bengal vs. Anwar Ali Sarkar, (1952) 1 SCC 1 would support the case of the respondent, wherein it was held all persons simultaneously circumstanced shall be treated like both in privileges conferred and liabilities imposed. The classification drawn between a start up and established industry can neither be termed untenable or based on artificial or evasive grounds. Start Ups have been dealt with in the tender document as separate class, not to be dealt with the established /main stream industries. Thus we find no error in the clarification adopted by IOCL.

23. Further the appellant has admitted that they are not equal to other players in the market as they claim to exercise their right as a start-up in other words they admit that they are unequal .A reading of Clause 4 of the tender condition would amplify this aspect.

24. In Shri Ram Krishna Dalmia (in CA no,455 of 57) versus Shri Justice S.R. Tendolkar and others (In CAs Nos. 455 to 457 of 57)it is held by the Hon'ble Apex Court while discussing the principles enunciated in Article 14 of the Constitution of India which are as follows:

A statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification.

After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself.

A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the Government to select and classify the persons or things to whom its provisions are to apply but may at the same time lay down a policy or principle for the guidance of the exercise of discretion by the Government in the matter of such selection or classification, the court will uphold the law as constitutional, as it did in Kathi Raning Rawat V. State of Saurashtra.

25. On considering the documents relied upon by the appellant we also do not find any reason to interfere with the same. The fact remains the product is hazardous in nature and for the public safety the Authority exercised the discretion with ample reasoning and stipulated certain parameters as PQC making the fulfilment of the same as mandatory and was applicable to the participants whether a start up or non start-up. The Appellant claimed relaxation of norms claiming to be the start up which was not considered .In the light of the above discussions we hold that the tender inviting authority is empowered to exercise the discretion and we fail to find any incorrectness in the stipulating such terms.

26. Therefore upon conspectus of the entire fact and circumstances we do not find any merit in the instant appeal and find no reason to interfere with the order passed by the Learned Single Judge .

27. Accordingly the Appeal stands dismissed. The order passed by the learned single Judge is hereby affirmed. No costs.

28. Urgent Photostat certified copy of the Judgement if applied for be given to the parties on priority basis.

