

(2021) 12 OHC CK 0060

In the Orissa High Court

Case No : Writ Petition (Civil) No.26548 Of 2021

M/s Mythri Infrastructure And Mining India Pvt Ltd And
Another

APPELLANT

Vs

State Of Odisha And others

RESPONDENT

Date of Decision : 10-12-2021

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2021) 12 OHC CK 0060

Hon'ble Judges : Dr. S. Muralidhar, CJ;B.P. Routray, J

Bench : Division Bench

Advocate : Ramesh Singh, Amit Pattnaik, Gautam Misra, P. K. Muduli, Pinaki Misra, Naveen Kumar, Rajiv K. Mahanta

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ.

1. The difficulty faced by the Petitioner No.1 in submitting its Initial Price Offer (IPO) online, for reasons purportedly beyond its control, in respect of its bid for the ?Karlapat Bauxite Block?, has led the Petitioner No.1 (Company) and its Chairman-cum-Director (Petitioner No.2) to approach this Court with the present petition under Article 226 of the Constitution of India.

Background facts

2. The background facts are that Petitioner No.1 is engaged in civil constructions and mining operations, extraction and transportation of major minerals. A notice inviting tender (NIT) was floated by the Government of Odisha on 7th July, 2021 for e-auction of the Karlapat Bauxite Block.

3. In terms of the NIT, the tender was a two-stage process. The bidders had to initially submit their Technical Bids and Financial Bids comprising of the ?Initial Price Offer? (IPO). Thereafter the preferred bidder would be selected through a

process of second round of e-auction. Once the technically qualified bidder (TQB), based on the technical bids submitted is determined, the financial bid of such TQB is to be opened to determine its IPO. The lowest 5 of 50% (whichever is higher) of the TQBs, based on their IPOs, are allowed to participate in the second round of e-auction with the highest IPO among such bidders being the floor price for the auction. If there are between 3 to 5 TQBs, then all such bidders are allowed to participate in the second round. For consideration of the financial bid, the IPO has to be higher than the reserve price of 35% of the value of mineral dispatched for the mineral block as set out in Clause-9 of the NIT. The bidder with the highest final price offer in the second round of auction process will be chosen as the preferred bidder.

4. The bids had to be submitted in terms of the NIT on the website of MSTC Limited (Opposite Party No.3) being the designated e-portal for the tender.

5. In terms of Clause-13.1.2 of the NIT, the bidders were to physically submit the technical bid along with the original documents in the office of the Director of Mines, Bhubaneswar (Opposite Party No.2) while simultaneously uploading the technical bid as well as the IPO on the website of Opposite Party No.3.

6. In the first round, the bidders were required to submit their bids "on or prior to 15:00 hours (IST) on Tuesday, 24th August, 2021." It must be noted here that under the title ?Important Information? enclosed with the tender document, it was inter alia indicated in Clause 1.12 as under:

"1.12. Bidder shall be responsible for any problem at the bidder?s end like failure of electricity, loss of Internet connection, any trouble with bidder?s computer etc. which may cause inconvenience or prevent the bidder from bidding in e-auction."

7. Petitioner No.1 (Company) states that it submitted its technical bid physically in the office of Opposite Party No.2 along with the bid security of Rs.50,00,00,000/- in the form of Bank Guarantee and all documents in original in a sealed envelope on 23rd August, 2021. Thereafter on the following day i.e. 24th August, 2021, it uploaded the documents for its technical bid in the prescribed format on the designate e-portal of Opposite Party No.3 and received the conformation. The screenshot of such confirmation has been enclosed with the writ petition.

8. According to the Petitioners, on successful submission/uploading of the technical bid of Petitioner No.1, the link/button for the IPO was activated on the e-portal of Opposite Party No.3. The Petitioners state that upon the link/button being clicked, they were directed to a webpage for filling up the IPO figure. After filling in the IPO when the Petitioners clicked on the final submission button "unexpectedly, on account of technical glitches on the server of MSTC, the relevant page on the MSTC portal kept expiring at frequent intervals which prevented the Petitioner from affixing its Digital Signature." It is stated that despite repeated attempts to save/submit the IPO and click on the final submission button prior to the deadline of 3 PM on 24th August, 2021, the web

page maintained by Opposite Party No.3 kept expiring "without any fault of the Petitioner No.1." Copies of the screenshots of e-portal of Opposite Party No.3 showing the expiry of the page for submission of IPO has been enclosed with the petition as Annexure-7 series.

9. It is stated that the IPO of Petitioner No.1 was higher than the reserve price of 35% as stipulated under Clause-9 of the NIT. It is claimed that despite attempting to communicate with the Help Desk of Opposite Party No.3 on several occasions, the problem could not be resolved. Petitioner No.1 states that it did not receive any acknowledgement from the Opposite Party No.3 on acceptance of its IPO. The Petitioners then submitted a representation dated 28th August, 2021 by e-mail to the Opposite Parties and requested that they should accept the IPO and allow Petitioner No.1 to participate in the tender process.

10. In a reply e-mail dated 30th August, 2021, Opposite Party No.3 informed the Petitioners that there was no technical glitch at the MSTC server side and "every minute there is activity recorded from different bidders." It was further stated that "MSTC helped many bidders till the last minute, before closing of the events." It was noted in the letter that tender closed on 24th August, 2021, "but we have not received a call or complaint on 24th from your end."

11. The Petitioners have averred in para 5 of the writ petition that they have reliably learnt that only four other bidders had participated in the e-tender. The evaluation of the technical bids by the Opposite Parties was underway and the list of TQBs was to be published between 16th and 27th September, 2021. Only thereafter, the second and final round of auction would take place. It was further submitted that the Petitioners had reliably learnt that the technical bid of Petitioner No.1 was stored on the website of MSTC Limited and was accessible to both the MSTC Limited and the State Government.

The present petition

12. In the circumstances, on 31st August, 2021, the present petition was filed praying for a issuance of a mandamus to the Principal Secretary, Department of Steel and Mines, State of Odisha (Opposite Party No.1) and the Director of Mines (Opposite Party No.2) to show-cause why the technical bid and financial bid of Petitioner No.1 shall not be considered for evaluation and a mandamus to Opposite Party No.3 to retrieve the bids of Petitioner No.1 from its portal/server/website and share with the Opposite Party Nos.1 and 2 for evaluation under the terms of the NIT and a further mandamus to Opposite Parties 1 and 2 to allow the Petitioner No.1 to participate in the second round of auction if its bid was found to be technically qualified.

13. The writ petition was first listed for hearing on 3rd September, 2021 when an advance copy was asked to be served on Opposite Party No.3. Thereafter, the petition was heard on 9th September, 2021 and an order was passed on that day while directing issuance of notice that the tender dated 7th July, 2021 for auction of the Karlapat Bauxite Mining block including the second round of auction "shall

remain stayed till the next date."

14. Pursuant to the notice issued, a reply has been filed by Opposite Party No.3. Another separate reply has been filed by Opposite Parties 1 and 2. The Petitioners have filed a rejoinder affidavit.

15. A separate intervention application has been filed being I.A. No.14739 of 2021 by M/s. Anrek Aluminum Limited, which is one of the 4 bidders who had successfully uploaded the IPO.

Submissions on behalf of the Petitioner

16. Mr. Ramesh Singh, learned Senior Counsel appearing on behalf of the Petitioners submitted as under:

i. The failure by Petitioner No.1 (Company) to submit its IPO on the web portal of Opposite Party No.3 was for the reasons entirely beyond the control of Petitioner No.1;

ii. Copies of the screenshots of the log record enclosed with the counter affidavit of Opposite Party No.3 showed that Petitioner No.1 had in fact made repeated attempts to upload the IPO. Merely because there was no technical glitch at the end of MSTC Limited, it need not be assumed that there was no genuine difficulty faced by the Petitioners in uploading the IPO.

iii. Once it was clear that 3 attempts were made between 2 and 3 PM by Petitioner No.1, after it had successfully uploaded the technical bid, to enter the IPO and click the submission button, there should be no doubt as to the bona fides of Petitioner No.1. Since its failure to upload the IPO was entirely on account of factors beyond its control, it should not be kept out of the tender process altogether but should be allowed to participate.

iv. Reliance was placed on the decisions of the Supreme Court in *Ganesh Prasad Sah Kesari v. Lakshmi Narayan Gupta* (1985) 3 SCC 53 and *D.L.S. Shiksha Mahavidhyalay v. National Council for Teachers Education* (2018) 12 SCC 55. Additionally, reliance was placed on the decision of the Delhi High Court in *AIMIL Pharmaceuticals (India) Ltd. v. Government of NCT of Delhi* (decision dated 22nd October, 2018 in W.P.(C) No.11277 of 2018) and the order dated 28th February, 2019 of the Supreme Court of India in S.L.P. (C) 1779 of 2019 (*Government of NCT of Delhi v. AIMIL Pharmaceuticals (India) Ltd.*) affirming the order of the Delhi High Court. It was submitted that the facts of the present case are similar to the case of *AIMIL Pharmaceuticals (supra)* and just as was ordered by the Delhi High Court in the aforementioned case, in the interests of justice, Petitioner No.1 should also be allowed to participate in the tender;

v. By allowing the Petitioner No.1 to participate, no prejudice whatsoever would be caused to any of the other four bidders since their bids were kept encrypted and not in the public domain. In any event, the mere submission of the IPO would not determine the successful bidder.

The process involved a second stage before the final price offer could be determined. It was in the interest of everyone that in a competitive bidding process a TQB is not kept out and allowing Petitioner No.1 to participate would only increase the competition which would be in the best interest of the Opposite Parties.

Submissions on behalf of MSTC Ltd.

17. Mr. Gautam Misra, learned Senior Counsel appearing on behalf of Opposite Party No.3 submitted that:

i. The Petitioners need not have waited till the last minute to upload the IPO. There was sufficient cautionary advice in the NIT documents that the bidder should have been aware of. In particular, it was made clear that MSTC Limited had no responsibility for the glitches at the bidders' end. This was a case where the web portal of MSTC Limited worked perfectly well. It continuously received bids online i.e. both the technical bids as well as IPOs without any hitch from several bidders on 24th August, 2021 in the forenoon as well as post lunch sessions. These bidders participated not just in the tender for the Karlapat Bauxite Mining block but other blocks as well;

ii. The NIC itself set out the Help Desk numbers for assistance. The relevant clauses in this regard read as under:

"...It may be noted that bidders need not visit any of the offices of MSTC Limited for submission of the documents. However, the bidders may contact any office of MSTC Limited for seeking assistance on the logging process details of which are available on MSTC website www.mstcindia.co.in or you may contact MSTC's help desk number "033-40645207/ 40609118/40645316" for assistance in any technical or system related issues. Once the complete set of documents and requisite registration fee are received from a bidder, MSTC shall activate the bidder's login after verification/scrutiny of the documents. MSTC Limited reserves the right to call for additional documents from the bidder if needed and the bidder shall be obliged to submit the same."

Furthermore, the relevant clause in Schedule-III of the NIT read as follows:

"MSTC shall ensure that the bidding process is smooth and bidders do not face any problem in bidding. However, MSTC shall not be responsible for any problem at the bidder's end like failure of electricity, loss of Internet connection, any trouble with bidder's computer etc. which may cause inconvenience or prevent the bidder from bidding in any e-auction."

18. Mr. Misra pointed out that after waiting for 3 days the Petitioners wrote to MSTC on 28th August, 2021. This was a relatively long gap making it even more difficult for Opposite Party No.3 to alter the schedule. He pointed out that there was no complaint from any bidder whatsoever regarding technical glitches on the website of MSTC. Reliance was placed on the decision in *Maharashtra Housing Development Authority v. Shapoorji Pallonji and Company Private Limited* (2018)

3 SCC 13 to urge that this Court should not interfere with the bidding process.

Submissions on behalf of the other counsel

19. Mr. Pinaki Misra, learned Senior Counsel for the Intervener submitted that allowing Petitioner No.1 to now participate would be virtually giving it a second chance, which would completely destroy the sanctity of the schedule attached to the tendering process.

20. Mr. Muduli, learned Additional Government Advocate for the State also supported the stand of Opposite Party No.3 and submitted that the failure by Petitioner No.1 in submitting its IPO before the last date and time i.e. 15:00 hours on 24th August, 2021 should mean that Petitioner No.1 has lost its chance to participate. He pointed out that 122 bidders had submitted their bids with their respective IPOs and it is only the Petitioner No.1, who was unable to do so. He drew attention to Clause-8.1(A) of the tender, which will be referred to hereinafter.

Analysis and Reasons

21. The above submissions have been considered. Clause 8.1(A) of the tender document makes it abundantly clear that the bidders "must not submit the initial price offer physically." The said Clause reads as under:

"The Technical Bid and the initial price offer must be submitted electronically as provided in Schedule-III (Technical details regarding online electronic auction). The duly executed original physical copy of the Technical Bid must be hand delivered to the Joint Director or the Designated Officer of Government of Odisha for this specific purpose on the address specified in Clause 13.1.2 so that they are received on or prior to the Bid Due Date, failing which the Technical Bid shall be deemed to be not received. In case of a conflict between documents submitted electronically and document hand delivered physically, the documents hand delivered physically shall prevail. It is clarified that only the Technical Bid is required to be submitted physically, and the Bidders must not submit the initial price offer physically. In case the Bidder submits the initial price after physically, the Technical Bid and the initial price offer will be summarily rejected. In case the Bidder fails to submit the Technical Bid electronically, the Technical Bid and the initial price offer will be summarily rejected."

22. In the present case a High-Level Committee (HLC), chaired by the Development Commissioner-cum-Additional Chief Secretary on the auction of the Major Mineral which was held on 13 th September, 2021 examined the issue raised by the Petitioners. The relevant portion of the minutes of the HLC reads thus:

".....the Committee was apprised that Mythri Infrastructure and Mining India Private Ltd. has submitted Technical Bid in physical form against Kalarapat Bauxite Block but has not committed has Initial Price Offer in the online Technical Bid. Thus the online technical bid has not deem captured in MSTC portal.

Therefore, as per the above condition of the Tender Document, the physical bid of the said bidder was not opened..."

23. Therefore, and rightly, the bid documents of Petitioner No.1 submitted physically were not taken into consideration or opened. Now requiring Opposite Parties to allow Petitioner No.1 to submit its IPO physically will indeed amount to changing the terms of the tender document.

24. While the Petitioners might contend that their inability to upload the IPO was for reasons entirely outside their control, the fact remains that there was no technical glitch on the side of Opposite Party No.3. The log enclosed with its counter affidavit makes it abundantly clear that none of the other bidders encountered any difficulty in uploading the technical bid as well as the IPOs. While the log does show that the Petitioners' three attempts at uploading the IPO prior to 3 PM on 24th August, 2021 were unsuccessful, this is not conclusive proof of the technical glitches at the end of the Petitioners being for reasons entirely outside their control. Even assuming in this regard in favour of the Petitioners, the fact remains that they need not have waited till the last minute to upload the IPO. The tender documents made it clear that Opposite Party No.3 would not be responsible for any problem at the bidder's end. In fact, this is the reason why MSTC Limited had offered help to bidders. The instructions in this regard were specific and read as under:

"Attached Documents

After uploading these documents, the bidder shall have to attach them with the specific tender for the concerned mine for which it is intending to submit the Technical Bid. It may be noted by the Bidder that in case it intends to use the same supporting document for more than one mine, it does not need to upload the same document every time. The supporting document, once uploaded, can be attached with Technical Bid for multiple mineral block(s), if desired.

The bidder should note that only a file which is "attached" with a specific mine(s) shall be considered during evaluation of the Technical Bid. Files which are not attached to any mine(s) shall not be considered for evaluation.

The Bidder should also note that a Bid will be considered as submitted if and only if the Bidder has submitted the Initial Price Offer. Only such Bids will be opened for which Initial Price Offer has been submitted. It is further clarified that saving of Technical Bid without saving of the Initial Price Offer will be treated as non-submission of bid.

Upon successful submission of Initial Price Offer, the Bidder shall receive a bid acknowledgment from the system automatically.

The Bidders may note that the Technical Bid and the Initial Price Offer submitted online as above will be encrypted by the MSTC's own software before storage in the database. This will be done to protect the sanctity and confidentiality of the Bids before the actual opening of the same.

The Bidder has an option to edit Technical Bid and initial price offer as many times as it wishes till the final submission." (emphasis supplied)

25. In similar circumstances, in *Shapoorji Pallonji (supra)*, the Supreme Court disapproved of the High Court having interfered and allowed the Respondent therein to participate in the tender process. In that case, the deadline for submission of online bids was 13:00 hours. Respondent No.1 had submitted its proposal at 12:16 hours. It was claimed that it pressed the "freeze button" but could not get any acknowledgement. Its bid was therefore rejected. The system had generated an acknowledgement for other bidders and therefore it was held that there was no glitch in the system as far as the host of web portal i.e. the National Informatics Centre (NIC) was concerned. The Supreme Court came to the following conclusions:

"9. If NIC, which had developed the e-portal in which bids were to be submitted and maintenance and upkeep of which was its responsibility, had stated in its affidavit what has been indicated above, we do not see how the repeated statements made on behalf of the first respondent that the bid documents can still be retrieved, if required by travelling beyond the Government of India Guidelines, should commend to us for acceptance. The opinion rendered in this regard by the consultant of the first respondent Mr. Arun Omkarlal Gupta on which much stress and reliance has been placed by the first respondent could hardly be determinative of the question in a situation where NIC which had developed the portal had stated before the Court on affidavit that retrieval of the documents even jointly with Maharashtra Housing Development Authority is not feasible or possible. That apart, lack of any timely response of the first respondent when the system had failed to generate an acknowledgement of the bid documents in a situation where the first respondent claims to have pressed the "freeze button"; the generation of acknowledgements in respect of other bidders and the absence of any glitch in the technology would strongly indicate that the bid submitted by the first respondent was not a valid bid and the directions issued by the High Court in favour of the first respondent virtually confer on the said respondent a second opportunity, which cannot be countenanced.

10. In the above view of the matter, we are inclined to take the view that the High Court was not correct in issuing the directions extracted above as contained in paragraph 29 of the impugned judgment/order dated 28-9-2017. The same are, therefore, interfered with. The appeal is allowed accordingly."

26. The present case is more or less similar on facts. The Court is therefore inclined not to accept the plea of Petitioner No.1 that it should be allowed to participate in the second round of bidding by requiring the Opposite Parties to accept its IPO, which would be submitted physically.

27. The scope of interference by the writ Court in such matters is limited. The legal position in this regard has been explained in *Michigan Rubber (India) Ltd. v.*

State of Karnataka (2012) 8 SCC 216. The decision of the High Court of Karnataka in Mahindra Sanyo Special Steel Private Ltd. v. Union of India, ILR 2018 Kar 5587 is instructive. To the same effect is the decision in Silpi Constructions Contractors v. Union of India, (2020) 16 SCC 489, where it was observed as under:

"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."

28. Turning now to the decision in AIMIL Pharmaceuticals (supra), the Court finds that it turned on an entirely different set of circumstances. There was no occasion for the Delhi High Court to consider the law as explained by the Supreme Court in Shapoorji Pallonji (supra). It is likely that the said decision was not brought to the notice of the Delhi High Court. It is equally possible that if it had, the decision might have been different. The in limine dismissal of the Special Leave Petition against the said decision would not necessarily affirm its correctness.

29. As far as the D.L.S. Shiksha Mahavidhyalay (supra) is concerned, again this was a short order and not in the context of uploading of tender documents online. It involved a technical defect which did not have much bearing on the outcome of the process. Here it must be noted that in a competitive bidding process, permitting one of the bidders who has missed the bus to participate, may have serious repercussions on the sanctity of the bidding process itself. It will amount to giving the Petitioner No.1 a second chance, which would give it an unfair advantage over other bidders who have taken precautions to ensure that they strictly adhere to the online bidding process.

30. The timelines in a tender and the process itself ought not to be lightly interfered with as was observed in Uflex Ltd. v. Government of Tamil Nadu 2021 SCC OnLine SC 738 as under:

"In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying

the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular²⁶ and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them."

"47. Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate."

31. For all of the aforementioned reasons, this Court is not persuaded to grant the reliefs prayed for by the Petitioners. The writ petition is accordingly dismissed, but in the circumstances, with no order as to costs. The interim order is vacated.

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