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**(2017) 03 GAU CK 0003**  
**In the Gauhati High Court**  
**Case No : WP(C) No.2856 of 2016**

Plaban's Trade & Agency

APPELLANT

Vs

Indian Oil Corporation

RESPONDENT

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**Date of Decision :** 02-03-2017

**Acts Referred:**

Constitution of India, 1950 — Article 299

**Citation :** (2017) AIR(Gauhati) 67 : (2017) 2 GauLT 186

**Hon'ble Judges :** Mr. Arup Kumar Goswami, J.

**Bench :** Single Bench

**Advocate :** Mr. B.J. Talukdar, Ms. S. Sarma and Mr. P. Talukadar, Advocates, for the Petitioner; Mr. M.K. Choudhury, Senior Advocate, for the Respondent Nos. 1, 2 and 3; Mr. S. Biswas, Advocate, for the Respondent Nos. 4, 5 and 6; Mr. G. Phukan, Advocate, for the Respondent Nos. 7, 8, 9 and 10; Mr. C.P. Sarma and Mr. A. Chamuah, Advocates, for the Respondent Nos. 11 to 17; Mr. A. Barkataki, Mr. N. Baruah, Mr. S.C. Biswas, Mr. S. Biswas, Ms. J. Borah, Mr. D. Thakur, Ms. H. Kalia, Ms. K. Barpujari and Mr. U. Saikia, Advocates, for the Respondents

**Final Decision :** Partly Allowed

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## Judgement

Mr. Arup Kumar Goswami, J.— Heard Mr. B.J. Talukdar, learned counsel, appearing for the petitioner. Also heard Mr. M.K. Choudhury, learned Standing counsel, Indian Oil Corporation Ltd. (IOCL), appearing for respondent Nos.1, 2 and 3, Mr. C.P. Sarma and Mr. A. Chamuah, learned counsel, appearing for respondent Nos.11 to 17, Mr. G. Phukan, learned counsel, appearing for respondent Nos.7 to 10 and Mr. S. Biswas, learned counsel, appearing for respondent Nos.4, 5 and 6.

2. The case of the petitioner, in short, is that the petitioner firm is carrying on business of transportation and had executed works relating to transportation of LPG cylinders under the IOCL. The petitioner owns three trucks. On 23.01.2015, the IOCL authorities issued an e-tender notice (for short, "NIT") for transportation of packed LPG cylinders, in vertical position, to various locations from their Bottling Plants (BP) under Northeast Integrated State Office [NEISO],

wherein plant-wise number of trucks required were indicated and, from the requirements indicated in the tender notice it appears that the total requirement of trucks was 1148 numbers. In response to the aforesaid NIT, the petitioner participated and submitted its bid. By a communication dated 13.09.2015, the petitioner was informed that its bid was accepted during technical evaluation and that opening of the financial bids was fixed on 15.10.2015. However, the petitioner subsequently came to learn that contracts had been awarded to some bidders and allotment of all the notified vehicles had been completed. The petitioner filed an application under Right to Information Act, 2005 (RTI Act), on 19.03.2016, before the IOCL authorities requiring information, amongst others, as to whether any list of successful bidders had been published in connection with the said tender notice in respect of North Guwahati BP and Sarpara BP and, if any such list was published, to provide the same to the petitioner. By a letter dated 07.04.2016, the petitioner was furnished with the information that his ranking in the bidding was L-25 and he was not selected for the purpose of issuance of Letter of Intent (LOI) because the requirement of trucks, as per the NIT, had been covered by L-13. In the said reply, it was also indicated that the requirement of additional trucks was not assessed till then. Subsequently, the petitioner came across a NIT dated 26.04.2016 issued by the IOCL authorities inviting applications from the existing transporters of the IOCL for induction of additional 259 numbers of trucks.

3. It is against the aforesaid NIT dated 26.04.2016 that the instant writ petition is filed for setting aside the NIT dated 26.04.2016 and for issuance of a writ of mandamus directing the respondent authorities to proceed with the award of contract work in respect of the additional requirement of trucks from L-14 onwards as per the original NIT.

4. In the writ petition, the petitioner has not specifically stated in respect of which BPs it had submitted its tender. However, in the application made under the RTI, the petitioner was seeking information with regard to North Guwahati BP and Sarpara BP, which were also notified BPs in the NIT dated 23.01.2015.

5. From the affidavit filed by the respondent Nos. 1, 2 and 3, it appears that the petitioner was a bidder in respect of North Guwahati BP and Sarpara BP only. It also appears from the said affidavit that in respect of North Guwahati BP, the petitioner was placed at L-25 and in respect of Sarpara BP it was ranked at L-17. In the said affidavit, it is stated that the total number of trucks offered by the technically eligible bidders for North Guwahati BP was 525 against the NIT requirement of 352 and, therefore, the same were called from L-1 to a portion of L-13 bidders. Similarly, the total number of trucks offered by the technically eligible bidders for Sarpara BP was 177 against the NIT requirement of 131 and trucks were called from L-1 to L-8 bidders. Further stand taken in the affidavit of respondent Nos.1, 2 and 3 is that the NIT dated 26.04.2016 was based on the immediate requirement as found out after closure of tender and, as such, the same cannot be regarded as a continuation of its earlier NIT dated 23.01.2015

and, for additional requirement of trucks, the IOCL is to follow the circular dated 20.11.2015 as well as the directions contained in the judgment of the Calcutta High Court rendered in MAT No.1385/2015 with CAN No.8821/2015 and the order of the Delhi High Court, dated 23.11.2015, passed in WP(C) No.8673/2015.

6. Mr. B.J. Talukdar, learned counsel for the petitioner has submitted that in view of the stand taken in the affidavit of respondent Nos.1, 2 and 3, it is clear that the requirement of additional trucks is not in continuation of the earlier NIT dated 23.01.2015 and, therefore, the authorities were obliged to have issued fresh NIT. Alternatively, placing reliance on the terms and conditions of the NIT dated 23.01.2015, it is submitted by him that even if it is assumed that the NIT dated 26.04.2016 is a continuation of the earlier NIT dated 23.01.2015, then also the authorities could not have procured the 259 numbers of additional trucks from the existing contractors, who had been allotted contract in terms of the NIT dated 23.01.2015, and the authorities should have proceeded to allot the contract, in respect of the additional requirement of trucks, from L-14 onwards. He has submitted that the reliance placed in the affidavit on the judgement of the Delhi High Court and the Calcutta High Court is absolutely misplaced because the aforesaid judgments were rendered on the basis of a clause, being Clause No.24 of the terms and conditions of the contract, which was the subject-matter of dispute in the aforesaid cases, and, in the NIT dated 23.01.2015, there was no such clause similar to the aforesaid Clause 24, which permitted allotment of additional requirement to the existing contractors during the period of contract.

7. Mr. M.K. Choudhury, learned Senior counsel, appearing for the respondent Nos.1, 2, and 3 has abided by the stand taken in the affidavit. In addition to the reliance placed on the judgements of the Delhi High Court and the Calcutta High Court, as indicated herein above, he has also placed reliance on a judgement of the Madras High Court, rendered in the case of Southern Region Bulk LPG Transport Owners Association v. Hindustan Petroleum Corporation Limited [WP(C) No.4275 of 2016] rendered on 29.02.2016. It is submitted by him that after finalization of the contract pursuant to the NIT dated 23.01.2015, it was observed that the trucks which were inducted and which were estimated in the tender, are not sufficient to run the plants smoothly and, accordingly, a decision was taken to induct additional trucks under the existing finalized contract based on a letter dated 25.04.2016, on the subject of "Induction of additional packed trucks at LPG BPs under IOAD from the existing transporters/dealers/distributors", which he has produced before the Court. Mr. Choudhury has drawn the attention of the Court to the prayer made in the writ petition to contend that, at any rate, no prayer having been made by the petitioner for award of contract against the additional requirement of trucks from L-8 in respect of Sarpara BP, the prayer of the petitioner ought to be limited only to North Guwahati BP.

8. Mr. C.P. Sarma and Mr. A. Chamuah, learned counsel for respondent Nos.11 to 17, have submitted that the IOCL authorities were justified in requiring only the existing transporters and distributors/dealers of the IOCL having readily available

trucks to apply/offer for induction of additional trucks. Mr. Sarma has highlighted that in the NIT dated 23.01.2015, the requirement of trucks as shown was only approximate. In support of his submission, Mr. Sarma lays special emphasis upon Clause 1.16(l) of the NIT dated 23.01.2016. He has also pressed into service Clauses 5.0, 5.5, 5.5(i), 5.5(ii), 5.6 and 5.71. Reliance is placed on the judgments of the Supreme Court in *New Bihar Biri Leaves Co. and Others v. State of Bihar and Others*, reported in (1981) 1 SCC 537 and *Central Coal Fields Ltd. v. SLL-SML (Joint Venture Consortium) and Others*, reported in (2016) 8 SCC 622.

9. Mr. G. Phukan, learned counsel, appearing for respondent Nos.7 to 10, and Mr. S. Biswas, learned counsel for respondent Nos.4, 5 and 6, have adopted the submission of Mr. Choudhury and Mr. Sarma.

10. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

11. At the very outset, it will be appropriate to take note of the fact that under the heading "Evaluation Criteria of Tender", all tenderers are to be ranked as L-1, L-2, L-3, etc. and such ranking shall be decided on the basis of a standing order of financial outgo to the IOCL based upon the rates quoted by the tenderer. In case rates quoted by L-1 tenderers are acceptable to the IOCL, trucks offered by the L-1 tenderers will be allocated up to the requirement. After induction of trucks from original L-1 tenderers, if requirement of trucks, as per the NIT, is not met, then finalized L-1 rate shall be offered first to Indane Distributors, in order of their ranking, for their acceptance. In case the number of trucks offered by L-1 tenderers and Indane Distributors do not meet the full requirement then L-1 rate shall be offered to the other tenderers, in order of their ranking and matching with L-1 rate, for acceptance. If, after undertaking such exercise also the full requirement of trucks is still not met, the IOCL reserves the right to induct more trucks at negotiated L-1 rates, other than what have been originally offered, from the parties who have already accepted L-1 rates and if, even after this exercise the deficiency of trucks still persists, then negotiations and counter-offer exercises will be conducted with the balance parties in their order of ranking till the full requirement of trucks is met. It is also indicated that a tenderer placed in the lower order of ranking may not get an opportunity of induction of his trucks if requirement of trucks is met from the tenderers ranked above them.

12. In the aforesaid context of evaluation of criteria of tender, it will be appropriate to note that the IOCL reserves its right to negotiate with tenderers under Clause 1.16. Clause 1.16(e) provides that if requirement of trucks is not met by L-1 tenderers, the Corporation may negotiate/offer negotiated L-1 rate to other tenderers, in order of their ranking, for their acceptance/response and the process, in terms of Clause 1.16(f), is to continue till the requirement of trucks is fully met against the tender. The significance of the word "this tender" in Clause 1.16(f) cannot be lost sight of. Clause 1.16(j) provides that induction of trucks shall be undertaken in line with the evaluation criteria, which have already been

noted, to meet the requirement of trucks.

13. Clause 1.16(I), on which particular emphasis was given by Mr. Sarma, provides that in case requirement of trucks is not met after carrying out the process of negotiation with the tenderers, who participated in the tender, Corporation reserves the right to induct additional trucks (other than the quoted trucks) from the tenderers, in order of their ranking, at the finalized L-1 rate.

14. Note-4 of the NIT dated 23.01.2015 refers to approximate plant-wise number of truck requirement. The requirement of trucks under the NIT dated 23.01.2015 was met in respect of the BPs. It is not the case that requirement of additional trucks had arisen before finalization of the contract and, therefore, the word "approximately", as occurring in Note-4 has no import. Clause 1.16(1) comes into play only when requirement of truck under the notified tender is not met, which is not the case here. What Clause 1.16(1) visualizes is that if the requirement of trucks is not met after carrying out the negotiation process with the tenderers participating in the tender, the Corporation may invite the tenderers, in order of their ranking, at the finalized L-1 rate to induct additional trucks from them beyond what was quoted by them.

15. In the instant case, after finalization of the contract requirement of more trucks had arisen. The choice of the word "additional requirement" in tender notice dated 20.04.2016", after finalization of the tender is inappropriate. None of the clauses of the NIT dated 23.01.2015 permits the IOCL to invite tenders only from the existing contractors after finalization of the contract in respect of trucks for which requirement is felt. The Circular No. 80 dated 20.11.2015 on which reliance is placed by Mr. M.K. Choudhury, learned Senior counsel, provides that additional Tank Truck induction (except to dealers for their own use) should be avoided within one year of tender finalization. Clause-4 of the Circular No. 80 reads as follows:

"After closure of tender, additional TTs requirement, either within the original NIT number or the revise NIT number can be inducted as under:

- i) From existing dealer/dealer-transporter/general transporters as per the provisions of DOA at established L1 rates.
- ii) In case demand is not fulfilled by action taken at 4(i) above, the Public Expression of Interest (EOI) is to be floated seeking offer at established L1 rates for the balance period of the contract."

16. In fact, Clause-4 of the said Circular is the sheet anchor of the case projected by the IOCL to justify the NIT dated 26.04.2016. The question is as to whether, in absence of any stipulation in the NIT permitting such course of action, the IOCL can, on the strength of the Circular adopt a course of action as envisaged under Clause-4?

17. It may be mentioned at this point that in the subject tender, which had fallen for consideration before the Delhi High Court, the Calcutta High Court and the

Madras High Court in the cases cited above, there was a clause, namely Clause-24. The said clause has a direct bearing on the question posed hereinbefore and, therefore, it will be necessary to take note of the said Clause-24 and the same is reproduced below :

"24. During the period of the contract due to business requirement of the Corporation, contracting Corporation reserved the right to shift/induct/move TTs as per the requirement. In case at any point during the pendency of the contract as per Contracting Corporation's assessment additional tank trucks more than the contracted tank trucks is envisaged then Contracting Corporation reserve their right to hire any tank truck, over and above the tank trucks accepted pursuant to this tender at any point of time and in such circumstances, Contracting Corporation will be free to hire tank trucks for such purpose as may be required by Contracting Corporations from the existing transporters at a rate not higher than their existing rates, and the trucks should not be running in any other Contract with any other Corporation including Pvt. Parties/Companies and subject to other terms and conditions which the Corporation may stipulate for this purpose."

18. Clause-24, thus, stipulates that during the pendency of the contract, if additional trucks beyond the trucks mentioned in the tender are required, then the IOCL authorities had reserved their right to hire any Tank Truck over and above the trucks accepted pursuant to the tender and the IOCL authorities were free to hire Tank Trucks from the existing transporter. The Delhi High Court had held that Clause-24 gives absolute freedom to the authorities to hire any truck from the existing contractors.

19. Clause-4 of the tender, which was the subject-matter in the case before the Delhi High Court, was in connection with evaluation of tenders, which is more or less similar to the evaluation of tender in the present case. In paragraph 16 of the Delhi High Court judgment, it is noted as follows :

"16. A conjoint reading of clauses 4 and 24 shows that while clause 4 deals with situations where the eligible TTs offered under the tender available fall short of the tender requirement and prescribes the procedure for filling up the same, clause 24 gives liberty to the corporation to fill up additional requirement from the existing transporters. Neither of the clauses obliges the respondents to fill up the requirement that has arisen after the filling of the original requirement from any particular category of bidders or transporters."

20. The Calcutta High Court also noted that Clause-4 and Clause-24 operate in two different fields and they have no meeting point. It was held by the Calcutta High Court that whereas Clause-4 contemplates the machinery as regards allocation of trucks, Clause-24 of the tender provides for the right of the Corporation to call upon the contractors to supply additional trucks which may be required by the Corporation during the subsistence of the contract. The Calcutta High Court had held that in the absence of any provision to the contrary, the

right of the Corporation to call upon the existing transporters to supply additional truck, under Clause-24, shall become its obligation and the same shall give a corresponding right to the existing transporters to insist upon the demand for additional trucks being met by the Corporation from the existing contractors.

21. The Madras High Court had also taken a similar view. The petitioners therein, who were existing contractors had contended that Clause-24 of the contract was breached by the NIT. In the facts of the case, the existing transporters having not been able to supply the total additional demand after offer had been made by the Corporation, the High Court held that in the circumstances of the case the Corporation was justified in issuing fresh NIT.

22. In *New Bihar Biri Leaves* (supra), the Hon"ble Supreme Court reiterated the "maxim qui approbate non reprobat" (one who approbates cannot reprobate). In the context of a contract, it means that if a person on his own accord accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which prove advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The principle laid down is not attracted in the facts of the case. In *Central Coalfields Limited* (supra), the Supreme Court laid down that the issue of acceptance or rejection of the bid of a bidder should be looked at not only from the point of view of an unsuccessful party but also from the point of view of the employer. It was also held that the terms of the NIT cannot be ignored as being redundant or superfluous and they must be given a meaning and necessary significance. This case rather than helping the case of the respondent Nos.4 to 17, advances the case of the petitioner as none of the terms and conditions of the NIT dated 23.01.2015 permitted award of contract for additional requirement of trucks after finalization of the contract by inviting tenders from the existing contractors only.

23. In the present NIT, in absence of a clause similar to Clause-24 in the NIT which fell for consideration before the Calcutta High Court, the Delhi High Court and the Madras High Court, the Circular No. 80, dated 20.11.2015, which has been relied upon by the IOCL authorities in the present case, cannot confer any right upon the IOCL authorities to issue the impugned NIT dated 26.04.2016 restricting participation only to the existing contractors, who were appointed pursuant to the tender process which had already been finalized. The only way the respondent corporation could have inducted additional trucks, which were required in terms of the NIT dated 26.04.2016, was by way of a general NIT without restricting the same only to the existing transporters.

24. In view of the above discussions, the writ petition stands partly allowed. The impugned NIT dated 26.04.2016 is set aside and quashed in respect of North Guwahati Bottling Plant and Sarpara Bottling Plant. No cost.