

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO. 211 OF 2016
AND
IA NO.457 OF 2016, IA NO.458 OF 2016
&
IA NO.521 OF 2016**

Dated: 02nd June, 2017

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. B.N. Talukdar, Technical Member (P&NG)**

In the matter of:-

H-ENERGY PRIVATE LIMITED)
514, Dalamal Towers,)
Nariman Point,)
Mumbai – 400 021) ... **Appellant**

AND

PETROLEUM AND NATURAL GAS)
REGULATORY BOARD,)
First Floor, World Trade Centre,)
Babar Lane, Barakhamba Road, New)
Delhi - 110001) ... **Respondent(s)**

Counsel for the Appellant(s) : Mr. Ramji Srinivasan, Sr. Adv.
Mr. Atul Chitale, Sr. Adv.
Mr. R. Sudhinder
Mr. Siladitya Chatterjee
Ms. Prerna Amitabh
Mr. Vivek Paul Oriel
Mr. Tushar Bhardwaj
Mr. Gurjyog Sethi
Ms. Akansha Ghosel

Counsel for the Respondent(s) : Mr. Prashant Bezboruah
Mr. Saurav Agarwal
Mr. Sumit Kishore

Mr. Rakesh Dewan
Ms. Ashta Gaur for R-1
Ms. Rimali Batra
Mr. Bani Dikshit
(in I.A. No. 521/16)

J U D G M E N T

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON:

1. In this appeal, the Appellant H-Energy Private Ltd. has challenged order dated 15/07/2016 passed by the Petroleum and Natural Gas Regulatory Board ("**the Board**"). By the impugned order the Board has cancelled the entire bid process initiated for grant of authorization for laying building, operation and expanding of a 715 kms long natural gas pipeline ("**Pipeline Project**") through State of West Bengal and Odisha. The Appellant being the lowest bidder (L-1) was declared the successful bidder for the Pipeline Project. The bid process was cancelled *inter alia* on the ground that the tariff bid submitted by the Appellant is found to be leading to negative cash flows during the prescribed project life of 25 years and therefore the Pipeline Project is not viable on standalone basis. While cancelling the bid the Board expressed as under:

"(iii) Based on the tariff quoted by HEPL and corresponding cash in-flows for the subject pipeline project against the capex and opex planned to be incurred, the subject pipeline

project on its own is not economically viable. This is the first instance where the Board has received such type of bid in respect of natural gas pipeline. Since the current regulations have no checks to avoid such bid outcomes, necessary review of Regulation and bid document shall be undertaken to facilitate re-bidding of the pipeline so as to avoid recurrence of such type of bidding by the entities.”

2. Mr. Ramji Srinivasan learned counsel appearing for the Appellant has assailed the impugned order on number of grounds. The gist of his submissions is as under:

- (a) In a statutory appeal it is incumbent upon the court to hear the matter on merits on question of law and fact (**UOI v. K.V. Lakshman & Ors¹**).
- (b) As per Regulations 7(4) and 9(1) of the PNGRB (Authorising Entities to Lay, Build, Operate or Expand Natural Gas Pipelines) Regulations 2008 (**“Authorisation Regulations”**) the Board was under a statutory obligation to award letter of authorization to the Appellant.

¹ (2016)13 SCC 124

- (c) The Board's action of bid cancellation relying on a provision of the bid document without any such power being present in Authorisation Regulations, amounts to exercise of discretion which is not contemplated in law.

(Vodafone International Holdings B V v. Union of India & Anr²).

- (d) IRR/Cash flows/economic viability cannot be a bidding parameter. Rejection of the Appellant's bid on the ground of negative cash flow has no statutory backing.

(Dutta Associates (P) Ltd v. Indo Merchantiles (P) Ltd³ ; Orion Security Solutions Pvt. Ltd v. Govt of NCT of Delhi & Ors. ⁴ ; Om Detective Security Services v. District Collector and Chairman, Selection Committee and Anr⁵)

- (e) Any provision of bid document which happens to be inconsistent with statutes or regulations is void. Statutory provisions must prevail over executive institutions. **(Smart Chip Limited & Anr v. State of**

² (2012)6 SCC 613

³ (1997) 1 SCC 53

⁴ [233 (2016) Delhi Law Times 181 (DB)]

⁵ (AIR 2007 AP 308)

UP & Ors. ⁶, Virender Singh Hooda v. State of Haryana⁷; Union of India V. Arun Kumar Roy⁸; Union of India, v. Madras Telephone SC & ST Social Welfare Association⁹; Shish Ram v. State of H.P.¹⁰).

- (f) Requirement of IRR to remain positive throughout the authorisation is imported in the old requirement subsequent to opening of financial bids.
- (g) There is a violation of principles of natural justice in this case. Economic viability is not prescribed as a relevant criterion for CGD projects. Hence opportunity of hearing should have been given to the Appellant to substantiate its case through evidence and pleadings. This appeal therefore deserves to be admitted.
- (h) Invitation of fresh bids at this stage will prejudice Appellant's chances of securing the project. It will also cause huge delay. Hence, this Tribunal being court of first appeal must admit this appeal.

⁶ (AIR 2003 All 80)

⁷ (2004) 12 SCC 588)

⁸ (1986) 1 SCC 675)

⁹ (2000) 9 SCC 71

¹⁰ (1996) 10 SCC 166

3. Mr. Prashant Bezboruah counsel for the Board on the other hand submitted that the Bid document permits the Board to cancel the entire bid process. None of the bidders has any vested right to be selected. Hence no interference is necessary with the impugned order.

4. Relying on **K.V. Lakshman**, Mr. Ramji Srinivasan has urged that in a statutory appeal the court must hear the matter on merits, on question of law and fact. There can be no doubt about this proposition. But this rule is subject to certain exceptions. The Supreme Court has clarified when such an appeal can be dismissed at the stage of admission. If a statutory appeal does not raise any arguable question of fact or of law the court can dismiss it at the admission stage giving reasons. In this connection we may refer to the judgment of the Supreme Court in **Bolin Chetia v. Jagadish Bhuyan & Ors.**¹¹ where the Supreme Court considered whether a statutory appeal provided under Section 116-A of the Representation of People Act, 1951 could be summarily dismissed. Following observations of the Supreme Court are relevant.

¹¹ (2005) 6 SCC 81

“9. The discretion conferred on the appellate court to dismiss the appeal at its threshold is a judicial discretion and cannot be exercised arbitrarily or by whim or fancy. The appellate courts exercise the discretion in favour of summary dismissal sparingly and only by way of exception. However, that does not tantamount to saying that the appellate court does not possess the power to dismiss an appeal summarily and at the threshold. Such power to summarily dismiss can be exercised, depending on the facts and circumstances of a given case, before issuing notice to the respondent and even before sending for the record of the inferior forum. Where the appellate court exercises its discretion in favour of dismissing the first appeal without issuance of notice to the respondent, it is expected that the reasons for doing so are placed on record. Such recording of reasons is necessary where the order of summary dismissal is open to challenge before a superior forum. This rule of practice does not apply to the Supreme Court as it is the final court and as no appeals lie against the decisions of this Court, including a decision by which an appeal is summarily dismissed.

xxx

xxx

xxx

xxx

16. It is thus clear that the appellate courts including the High Court do have power to dismiss an appeal summarily. Such power is inherent in appellate jurisdiction. The power to dismiss summarily is available to be exercised in regard to first appeals subject to the caution that such power will be exercised by way of exception and if only the first appellate court is convinced that the appeal is so worthless, raising no arguable question of fact or of law, as it would be a sheer wastage of time and money for the respondent being called upon to appear, and would also be an

exercise in futility for the court. The first appellate court exercising power to dismiss the appeals summarily ought to pass a speaking order making it precise that it did go into the pleas – of fact and/or law – sought to be urged before it and upon deliberating upon them found them to be devoid of any merit or substance and giving brief reasons.....”

5. Having carefully perused the impugned order, the Bid document and the Authorization Regulations and having regard to the law on the point to which we shall soon advert, we are of the opinion that this appeal does not involve any arguable question of law or fact and, hence, deserves to be dismissed at the admission stage. We must, however, give reasons for this view as stated by the Supreme Court in **Bolin Chetia**. We shall, therefore, proceed to give reasons.

6. We shall first have a look at certain paragraphs of the Bid document. Following are the relevant paragraphs.

(a) Para 14 of the Invitation for Application-cum-Bid for grant of authorisation reads as under:

“14. PNGRB reserves the right to accept/reject any or all Application-cum-Bids without assigning any reason(s) whatsoever.”

This para undoubtedly conveyed to the bidder the Board’s right to accept or reject any Application-cum-Bid without assigning any reasons.

(b) Para 4 of the Instruction to Bidders is important. It reads thus:

“4. PNGRB’S Right to accept any bid and to reject any or all bids

4.1 PNGRB reserves the right to accept or reject any or all bid(s) and to annul the Application cum Bid process and reject all bids at any time prior to award of work without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the PNGRB’s action.”

(c) Para 5.14 states when the bid process will be over. It reads thus:

“5.14 Application cum Bid process will be over after the issue of authorisation letter to the selected bidder.”

(d) The disclaimer clause is as follows:

“.....The issue of this bid does not imply that the Board is bound to select a Bidder for the Project and the Board reserves the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever.....”

Thus the bidders were sufficiently informed that the Board had right to accept or reject any or all bids without incurring any liability and the Application cum Bid process will be over after the issue of authorization letter to the selected bidder. It is now necessary to see the law on the point.

7. In **Meerut Development Authority v. Association of Management Studies and Another**¹², Meerut Development Authority (MDA) issued advertisement inviting tenders. AMS responded to the advertisement. AMS was allotted land subject to certain conditions. AMS raised certain objections. MDA as per decision taken in its meeting issued a fresh advertisement on 15/04/2002. AMS filed a petition in the Allahabad High Court challenging the said action. The High Court by an interim order permitted MDA to allot land pursuant to the advertisement dated 15/04/2002 but made the allotment subject to the decision of the

¹² (2009) 6 SCC 171

writ petition. MDA carried an appeal to the Supreme Court.

While allowing the appeal the Supreme Court observed as under:

“27. The bidders participating in the tender process have no other right except the right to equality and fair 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. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority’s action in accepting or refusing the bid must be free from arbitrariness or favouritism.

*33. The terms and conditions of the tender were expressly clear by which the Authority as well as the bidders were bound and such conditions are not open to judicial scrutiny unless the action of the tendering authority is found to be malicious and misuse of its statutory powers. (See *Tata Cellular v. Union of India* [(1994) 6 SCC 651], *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617], *Directorate of Education v. Educomp Datamatics Ltd.* [(2004) 4 SCC 19], *Assn. of Registration Plates v. Union of Inida* [(2004) 5 SCC 364], *Global Energy Ltd. v. Adani Exports Ltd.* [(2005) 4 SCC 435] and *Puravankara Projects Ltd. v. Hotel Venus International* [(2007) 10 SCC 33].)”*

8. In *State of Uttar Pradesh & Anr. v. Al Faheem Meetex Private Limited & Anr.*¹³ the Supreme Court reiterated the above view. In that case the Government had constituted Bid Evaluation Committee (“**BEC**”) with regard to the operation of animal slaughterhouses. A notice was issued inviting tenders of Request for Qualification. Pursuant thereto bids were received. BEC in its meeting dated 08/09/2010 opened the sealed tenders. Respondent No.1 Al Faheem was selected by BEC for recommendation as a developer. Pursuant to the suggestions of the Finance Department the matter was placed before the BEC for re-invitation of tenders. BEC in its meeting dated 22/11/2010 cancelled the decision taken in its earlier meeting dated 08/09/2010 and decided to re-invite fresh tenders. This decision was challenged in the Allahabad High Court. The Allahabad High Court quashed the decision of the BEC dated 22/11/2010 to invite fresh tenders. The appeal carried by the State was allowed by the Supreme Court. While setting aside the High Court’s order, the Supreme Court held that the High Court was not justified in interfering with the decision of the BEC to invite fresh tenders. The Supreme Court held that the authority has right to

¹³ (2016) 4 SCC 716

accept or reject any bid or even to annul the whole bidding process. The Supreme Court further held that when there was no acceptance of the bid by the competent authority, the decision making process had not reached any finality. Therefore no right, much less enforceable right, had accrued to Al Faheem. Similar view was taken by the Supreme Court in **U.P. Avas Evam Vikas Parishad v. Om prakash Sharma**¹⁴.

9. The present case is completely covered by the above decisions of the Supreme Court. Having regard to the above law laid down by the Supreme Court, we do not find force in any of the submissions made by Mr. Ramji Srinivasan. We, therefore, reject his submissions. There is no requirement that before cancelling the bid, the Board has to give hearing to all the bidders. So there is no violation of principles of natural justice. We have already reproduced the provisions of the Bid document. PNGRB has specifically reserved its right to accept/reject any or all Application-cum-Bids without assigning any reasons whatsoever. Para 5.14 of the Bid document makes it clear that Application-cum-Bid process will be over after the issue of

¹⁴ (2013) 5 SCC 182

authorization letter to the selected bidder. No authorisation letter had been issued to the selected bidder. Therefore no right much less enforceable right has accrued to the bidders, to challenge the cancellation of bid.

10. In terms of the Bid document PNGRB has absolute right to cancel the entire process of bid. The only rider which the Supreme Court has added in **Meerut Development Authority** is that such action must be free from arbitrariness or favouritism. Having perused the impugned order and having taken into consideration facts and circumstances of the case we are unable to come to a conclusion that PNGRB's action is arbitrary or that PNGRB has shown any favouritism. Since the entire bid is cancelled, there is no question of showing any favouritism. The bidders can bid again when fresh bids are invited. There is no arbitrariness in PNGRB's action. It has given valid reasons for cancellation of bid.

11. In view of the above, in our opinion, the appeal is without any merit and, hence, it is dismissed. We may mention here that

by a separate order, we have dismissed the appeal filed Indian Oil Corporation challenging the same impugned order.

12. Needless to say that the pending IAs, if any shall stand disposed of.

13. Pronounced in the Open Court on this **02nd day of June, 2017.**

B.N. Talukdar
[Technical Member (P&NG)]

Justice Ranjana P. Desai
[Chairperson]

✓ **REPORTABLE/NON-REPORTABLE**