

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

**APPEAL NO. 43 OF 2017
AND
IA NO.115 OF 2017 & IA NO.116 OF 2017**

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:-

**INDIAN OIL CORPORATION)
LIMITED)
Scope Complex, Core-2, 7,)
Institutional Area, Lodhi Road, New)
Delhi – 110 003) ... Appellant(s)**

AND

1. **PETROLEUM AND NATURAL)
GAS REGULATORY BAORD)
1ST Floor, World Trade Centre,)
Babar Lane, Barakhamba Road,)
New Delhi – 110001)**
2. **H-ENERGY PRIVATE LIMITED)
Through Shri Manish Tiwari,)
GM-OTM,)
12th Floor, Knowledge Park,)
Hiranandani Business Park,)
Powai, Mumbai – 400 046)**
3. **RATNAMANI METALS & TUBES)
LIMITED)
Through Shri Manoj Sanghvi,)
Business Unit Head,)
Panchsheel Plaza, B Wing,)
2nd Floor, 55, Gamdevi Road,)**

Near Dharam Palace,)
Mumbai – 400 007)

4. **ADANI PORTS & SEZ LIMITED**)
Through Shri Jay Singh Khurana)
1st Floor, Infrastructure House,)
Mithakali Six Road,)
Navarangpura,)
Ahmedabad – 380 009) **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Tushar Mehta, Sr. Adv.
Ms. Rimali Batra
Ms. Nikita Choukse
Ms. Shruti Sarma Hazarika
Ms. Bani Dikshit

Counsel for the Respondent(s) : Mr. Prashant Bezboruah
Mr. Saurav Agarwal
Mr. Sumit Kishore
Ms. Ashta Gaur for **R-1**

Mr. Ramji Srinivasan, Sr. Adv.
Mr. Atul Chitale, Sr. Adv.
Mr. R. Sudhinder
Mr. Siladitya Chatterjee
Ms. Perna Amitabh
Mr. Vivek Paul Oriel
Mr. Tushar Bhardwaj
Mr. Gurjyog Sethi
Ms. Akansha Ghosel for **R.2**

J U D G M E N T

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

1. In this appeal, Indian Oil Corporation Ltd. has challenged orders dated 15/07/2016 and 06/09/2016 passed by the Petroleum and Natural Gas Regulatory Board, the 1st Respondent

herein (“**the Board**”). Respondent No.2 is H-Energy Private Ltd. Respondent No.3 is Ratnamani Metals & Tubes Limited and Respondent No.4 is Adani Ports and SEZ Limited.

2. The matter relates to cancellation of bid by the Board. The gist of facts leading to this appeal needs to be stated.

(a) On 28/10/2015, the Appellant participated in the bid invited by the Board for grant of authorization for laying building, operation and expanding of a 715 Kms long natural gas pipeline (“**Pipeline Project**”) through States of West Bengal and Odisha.

(b) On 23/03/2016 the technical bids were opened and the Appellant, Respondent No.2-H-Energy Private Ltd.(“**H-Energy**”), Respondent No.3 and Respondent No.4 were found to be technically qualified. On 12/05/2016 the financial bids were opened. H-Energy secured highest composite score as per bidding parameters and therefore H-energy was the lowest bidder (L-1).

H-Energy was declared the successful bidder for the Pipeline Project.

- (c) On 27/05/2016, the Appellant made a representation to the Board seeking its interference with the bid submitted by H-Energy for being an incomplete and a financially unviable bid which is liable to be rejected summarily and also for further consideration of granting the bid to the next lowest bidder.
- (d) By the impugned order the Board annulled the entire bid process for the Pipeline Project *inter alia* on the ground that the tariff bid by H-Energy is found to leading to negative cash flows during the prescribed project life of 25 years and therefore the Pipeline Project is not found to be viable on standalone basis. While cancelling the bid, the Board also 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.”

(e) The Appellant preferred a review petition to the Board requesting it to review the above order and grant authorization to the Appellant who is the next eligible bidder. By order dated 06/09/2016 the Board rejected the review petition on the ground that there was no provision in the relevant regulations to consider the other bidders for grant of authorization. The Board also held that the review petition does not satisfy the conditions laid down in Order 47 Rule 1 of the Civil Procedure Code.

3. Being aggrieved by order dated 15/07/2016 and order dated 06/09/2016, the Appellant has filed the present appeals.

4. We have heard at some length Mr. Tushar Mehta learned Additional Solicitor General appearing for the Appellant, Mr.

Prashant Bezboruah learned counsel appearing for the Board and Mr. Ramji Srinivasan learned counsel appearing for H-Energy.

5. Mr. Tushar Mehta submitted that the Board committed a great error in cancelling the entire bid process. In public interest the Board should have granted the bid to the Appellant who was the next lowest bidder. Mr. 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.

6. We have given anxious consideration to the submissions advanced by the parties. In our opinion this appeal has no substance and deserves to be dismissed at the admission stage. That even a statutory appeal can be dismissed at admission stage is no more *res integra*. If the appeal does not raise any arguable questions of fact or of law the court can dismiss it at admission stage by giving reasons. In this connection, reliance can be

placed on **Bolin Chetia v. Jagadish Blyan & Ors**¹. Following observations of the Supreme Court are relevant.

“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

¹ (2005) 6 SCC 81

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.....”

Having regard to the above law laid down by the Supreme Court, we proceed to give reasons why we are inclined to dismiss this appeal at admission stage.

7. At the outset it is necessary to note certain paragraphs of the Bid document.

(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.

8. In **Meerut Development Authority v. Association of Management Studies and Another**², 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 writ petition. MDA carried an appeal to the Supreme Court. While allowing the appeal the Supreme Court observed as under:

² (2009) 6 SCC 171

“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].)”*

9. In **State of Uttar Pradesh & Anr. v. Al Faheem Meetex Private Limited & Anr.**³ 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

³ (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**⁴.

10. 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 the submissions made by Mr. Tushar Mehta. 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 authorization letter to the selected bidder. No authorisation letter had been issued to the selected bidder. Therefore no right much less enforceable

⁴ (2013) 5 SCC 182

right has accrued to the bidders, to challenge the cancellation of bid.

11. 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. In fact, the Appellant had complained about selection of H-Energy as L-1 bidder. The Appellant has no vested right to be selected because it is the next lowest bidder.

12. In view of the above, in our opinion, the appeal is without any merit and, hence, it is dismissed.

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

14. 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~~