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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 8220/2024 & CM APPL. 33782/2024**

PRIMATEL FIBCOM LTD

..... Petitioner

Through: Mr. Rohit Gandhi, Mr. Hargun Singh,
Mr. Navdeep Kumar, Ms. Akshita
Nigam and Ms. Nikita Sharma, Advs.

versus

INDIAN OIL CORPORATION LIMITED & ORS. Respondents

Through: Mr. Raman Kapur, Sr. Advocate with
Mr. Amit Meharm, Ms. Tannishtha
Singh and Mr. Sambhav, Advs. for R-
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Mr. Rajeev Virmani, Sr. Advocate
with Mr. Tushar A. John, Mr. Arjun
Maheshwari, Advocates for R-2

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Date of Decision: 01st June, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

CM APPL. 33783/2024(for exemption)

Allowed, subject to all just exceptions.

Accordingly, the present application stands disposed of.

W.P.(C) 8220/2024 & CM APPL. 33782/2024



1. Present petition has been filed under Article 226 of the Constitution of India seeking the following reliefs:

- (i) Cancellation of the Award of Tender No. PLCC/MPPL P-25/IT/23006 ('subject tender') awarded by Respondent No.1 i.e., Indian Oil Corporation Limited ('IOCL') to Respondent No.2 i.e., Commtel Networks Pvt. Ltd.
- (ii) Direction to the Respondent No.1 to take action against Respondent No.2 and Respondent No.3 i.e., Tejas Network Limited for violation of Clause 5.1.6 of the subject Tender.
- (iii) Direction to Respondent No.1 to adhere strictly to the prescribed procedures for bidding and awarding contracts as delineated in the terms of the subject Tender.
- (iv) Direction to the Respondent No.1 to decide the complaint filed by the Petitioner on 23rd October, 2023, in a time bound manner. In addition, the Petitioner seeks stay of the operation of the award of the subject Tender in favour of Respondent No. 2.

2. Petitioner is a registered company engaged in the business of manufacturing and marketing of telecommunication and networking equipment. Petitioner is stated to be one of the only two Indian Original Equipment Manufacturers ('OEM') of SDH¹ equipment.

2.1 It is stated that Respondent No.1 issued the subject Tender on 16th February, 2023 for the development of an oil pipeline project in Gujarat, Rajasthan and Haryana.



2.2 It is stated that Respondent No.4 i.e., Honeywell Automation India Ltd approached the Petitioner herein requesting for a quotation for the equipment to be supplied by the Petitioner. It is stated that Petitioner vide e-mail dated 21st April, 2023 submitted its quotation to Respondent No. 4 along with requisite documents as required for the submission of the bid. It is stated that on the basis of the said quotation, Respondent No. 4 indeed submitted its bid on 05th May, 2023.

2.3 It is stated that during the evaluation of the technical bid, Respondent No. 4 had requested the Petitioner to issue a Commitment Certificate for onward submission to Respondent No. 1. It is stated that this Commitment Certificate was as per the format of the Annexure P-VIII of the subject Tender.

2.4 It is stated that while Respondent No.4 qualified in the technical bid, but was rejected in the financial bid and the subject Tender was awarded to Respondent No.2 on 13th September, 2023

2.5 It is stated that the aforesaid facts evidence that the Petitioner was involved in the subject Tender and if Respondent No. 4 would have been successful, the Petitioner as well would have been the direct beneficiary of the award of the subject Tender.

2.6 It is stated that upon review of the Tender Summary Report, the Petitioner learnt that the technical bids of Respondent Nos. 2, 3 and 4 had qualified. It is stated that however, Respondent No. 2 is the distributor of Respondent No. 3 and has a direct relationship with each other. It is stated

¹ Synchronous Digital Hierarchy.



that both Respondent Nos. 2 and 3 could not have simultaneously submitted separate bids for the subject Tender as it negates Clause 5.1.6 of the subject Tender. It is stated that Clause 5.1.6 stipulates that if two bidders have a conflict of interest, which substantially affects the fair competition, said bidder shall not be eligible to bid for the subject Tender.

2.7 It is stated that the Petitioner made representation to Respondent No.1 on 23rd October, 2023, calling upon Respondent No.1 to take action against Respondent Nos.2 and 3 and further cancel the tender awarded to Respondent No.2.

2.8 It is stated that thereafter, the vigilance department of Respondent No.1 sought details with respect to alleged contravention done by Respondent Nos.2 and 3. It is stated that since various correspondences between the Petitioner and Respondent No.1, were taking place, but nothing concrete was being done, the Petitioner sent a reminder letter dated 06th February, 2024 but to no avail. Therefore, the Petitioner has approached this Court in the present petition.

3. Learned counsel for the Petitioner contends that, since Respondent No.2 is the distributor of Respondent No.3, they have a direct relationship with each other and therefore, as per Clause 5.1.6 of the tender document their bid was in conflict with interest, which substantially affected the fair competition.

3.1 He states that the Clause 5.1.6 is intended to ensure that there is no cartelization, however, Respondent Nos.2 and 3 have frustrated the entire tender process.



3.2 He states that Respondent No.1 has failed in its duties to take prompt action on the complaint filed by the Petitioner against the misconduct by Respondent Nos.2 and 3.

4. In reply, learned senior counsel appearing for Respondent No. 2 states that the subject Tender was awarded in November, 2023 and Respondent No. 2 has initiated execution of the project and 20% progress has already been achieved. He states the fact that Respondent No. 4's financial bid had not succeeded was known since 13th September, 2023 and the present petition filed nine months later is barred by delay and laches. He relies upon the judgment of the Supreme Court in *Ramana Dayaram Shetty v. International Airport Authority of India & Ors.*²

4.1 He states that the present petition is not maintainable before this Court on the ground of lack of territorial jurisdiction. He states that the subject Tender has been issued by the Tendering Authority located in Noida, Uttar Pradesh for work that is to be done in Gujarat, Rajasthan and Haryana. He states that no cause of action has arisen within the territorial jurisdiction of this Court. He states that the Petitioner is aware of the said fact and therefore, the relevant para 38 in the writ petition makes a bald assertion with respect to territorial jurisdiction.

4.2 He states that Petitioner admittedly did not submit its independent bid in the Tender process. He states that Petitioner as on OEM could have directly submitted its bid. He states that Respondent No. 4 has not challenged the award of Tender in favour of Respondent No. 2 and



Respondent No. 4 alone could have had the locus to challenge the award of Tender, assuming there was any error. He states the Petitioner being a third-party cannot challenge an award of the said Tender to Respondent No.2.

4.3 He states that by entertaining this petition this Court cannot allow the Petitioner to set at naught the entire tender process, when the contract/tender awarded is being executed and is already 20% complete. In this regard he relies on the judgment of the Supreme Court in *Tata Motors Limited v. Brihan Motors Electric Supply & Transport Undertaking and Ors.*³

4.4 He states that in view of the aforesaid submissions, he is raising a preliminary objection to the maintainability of the petition and reserves his right to respond on merits.

5. Learned senior counsel appearing for Respondent No. 1 states that he adopts the objections of Respondent No. 2. In addition, he states that the scope of the work under the subject Tender is supply, installation, commissioning of telecommunication system comprising of SDH equipments, CCTV systems, EPABX system, etc., at the New MPPL Project⁴ plus a comprehensive annual maintenance for five years. He states the Petitioner herein had joined hands with Respondent No. 4 only for supply of the SDH equipment which is approximately 15% component of the entire project.

5.1 He states that in these facts the contention of the Petitioner that it has a substantial stake in the award of the Tender is misconceived. He states that

² (1979) 3 SCC 489, Para 35

³ 2023 SCC OnLine SC 671, Para 52.

⁴ New Mundra Panipat Crude Oil Pipeline.



the project pertains to the crude oil pipeline connectivity and is of national importance; he states that it would be against public interest if this Court entertains this petition at the behest of the Petitioner who is a third party and who elected to remain outside the bidding process.

6. In response to the preliminary objection on the locus standi of the Petitioner to maintain the writ petition, learned counsel for the Petitioner states that he relies upon the judgment of a learned Single Judge of this Court in *Suresh Kumar Jain v. Lt. Governor & Ors.*⁵

7. We have heard the learned counsel for the parties and perused the record.

8. The first question to be decided is whether the Petitioner herein can maintain independent proceedings against Respondent No. 1 for impugning the award of subject Tender in favour of Respondent No. 2. In our considered opinion, the answer to the question is in the negative and in this regard, we may refer to a judgment of the Supreme Court in *NHAI v. Gwalior-Jhansi Expressway Limited.*⁶ The relevant para 20 reads as under:

*20. While considering the relief claimed by the respondent (claimant), the same should have been tested on the touchstone of the principle governing the tender process, especially when the validity of the tender document has not been put in issue or challenged before any competent forum. Going by the terms and conditions in the tender documents, as already alluded to in para 10 above, there is no tittle of doubt that the right of the claimant (respondent) to match the bid of L-1 or to exercise ROFR would come into play only if the respondent was to participate in the tender process pursuant to the notice inviting tenders from the interested parties. **The objective of tender process is not only to adhere to a transparent mechanism but to encourage competition and give equal opportunity to all tenderers with the end result of getting a fair offer or***

⁵ 2006 SCC OnLine Del 879, Para 15.

⁶ 2018 (8) SCC 243.



value for money. *The plain wording of the eligibility clause in the tender documents and the incidental stipulations make it explicit that the respondent was required to participate in the tender process by submitting its sealed bid (technical and financial). The fact that a deeming clause has been provided in the tender document that if the respondent was to participate in the bidding process, it shall be deemed to fulfil all the requirements of the tender Clauses 3 to 6 of RFP, being the existing concessionaire of the project, does not exempt the respondent from participating in the tender process; rather the tenor of the terms of the documents made it obligatory for the respondent to participate in the tender process to be considered as a responsive bidder, along with others. **Having failed to participate in the tender process and, more so, despite the express terms in the tender documents, validity whereof has not been challenged, the respondent cannot be heard to contend that it had acquired any right whatsoever. Only the entities who participate in the tender process pursuant to a tender notice can be allowed to make grievances about the non-fulfilment or breach of any of the terms and conditions of the tender documents concerned. The respondent who chose to stay away from the tender process, cannot be heard to whittle down, in any manner, the rights of the eligible bidders who had participated in the tender process on the basis of the written and express terms and conditions. At the culmination of the tender process, if the respondent had not participated, in law, the offer submitted by the eligible bidders is required to be considered on the basis of the stated terms and conditions. Thus, if the claim of the respondent was to be strictly adjudged on the basis of the terms and conditions specified in the subject tender document, the respondent has no case whatsoever.***

(Emphasis supplied)

9. The Petitioner herein admittedly did not participate in the bidding process and elected to remain outside the said process. The fact that Petitioner was the intended supplier of SDH equipment of Respondent No. 4 would not give any locus to the Petitioner to challenge the tender process and maintain these proceedings. The issuance of a Commitment Letter dated 02nd June, 2023 by the Petitioner to Respondent No. 4 does not make it a 'bidder' in the tender process. In view of the aforesaid judgment of the Supreme Court, it is clear that a party which has not participated in a tender



process does not have any locus to challenge the award of the Tender and cannot be heard to make any grievances as such a party does not acquire any right in the tender.

10. The reliance placed by the Petitioner on the judgment of the learned Single Judge in *Suresh Kumar Jain* (supra) is not applicable to a challenge made by a third-party to a tender process.

10.1 In that case, the petitioner therein was a manufacturer of LVL products and had been empaneled as an approved vendor by Delhi Development Authority ('DDA') vide letter dated 30th June, 2003 for its housing projects.

10.2 Subsequently, the petitioner therein entered into an agreement with the approved contractors of DDA for the construction of a housing project being undertaken by DDA. Pursuant to the said agreements, petitioner manufactured and supplied LVL products to the DDA contractor for use in the housing project.

10.3 However, on 20th July, 2004 DDA issued a letter to its contractor for discontinuing the use of the petitioner's LVL products as it had failed to meet the stipulated parameters. The petitioner was aggrieved of this letter dated 20th July, 2004 issued by DDA to its contractor and it filed the writ petition challenging the findings in the said letter qua the petitioner's products and the directions to the contractor to discontinue use of the petitioner's products.

10.4 It was in these facts that the learned Single Judge observed that though petitioner was in effect a sub-contractor, since the letter dated 20th



July, 2004 only ousted the petitioner's products, the Court held that the petitioner has the locus standi to maintain a challenge to DDA's letter dated 20th July, 2004. The learned Single Judge, however, observed that the disputed questions of fact with respect to the quality of the product of the petitioner would have to be adjudicated in a Civil Court and on that ground dismissed the writ petition.

10.5 Thus, the issue of challenge to a tender process was not a subject matter in the aforesaid writ petition. And, the petitioner therein had a direct relationship with DDA as it was empaneled as an approved vendor with DDA on 30th June, 2003 and was therefore directly aggrieved by DDA's letter dated 20th July, 2004 directing discontinuation of the use of petitioner's products.

11. Moreover, the Petitioner herein does not dispute the submission of the Respondent Nos. 1 and 2 that the work has already commenced after the award of the Tender and has been executed substantially. The Petitioner on its own showing was aware that Respondent No. 4 stood disqualified in September, 2023 and the Tender was awarded to Respondent No. 2 herein. The present petition is, therefore, barred by delay and laches. And, keeping in view the observations made by Supreme Court in *Tata Motors Ltd.* (supra), we find that any interference at this belated stage would not be in public interest.

12. In view of the findings above on lack of locus standi, we are refraining from adjudicating on the issue of territorial jurisdiction.



13. The present petition is without any merits and is accordingly, dismissed. Pending application is disposed of.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

JUNE 1, 2024/msh/sk