IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 21287 of 2023

Vedanta Ltd., BBSR ….. ***Petitioner***

Dr. A.M. Singhvi, Sr. Advocate and
Mr. A.K. Parija, Sr. Advocate along
with Mr. P.K. Nayak, Advocate

Vs.

Union of India and others ….. ***Opposite Parties***

Mr.P.K. Parhi, DSGI along with Mr. J. Nayak, CGC (O.P.1) &

Mr. K.K. Venugopal, Sr. Advocate, Mr. Ashok Gupta, Sr. Advocate,
Ms. Pami Rath, Sr. Advocate along with
Ms. Sucheta Gumansingh, Advocate (O.P.2)

CORAM:
DR. JUSTICE B.R. SARANGI
MR. JUSTICE MURAHARI SRI RAMAN

ORDER
13.07.2023

Order No.
05. This matter is taken up through hybrid mode.

2. Heard Dr. A.M. Singhvi, learned Sr. Advocate and Mr. A.K. Parija, learned Sr. Advocate along with Mr. P.K. Nayak, learned Advocate for the petitioner; Mr. P.K. Parhi, learned DSGI along with Mr. J. Nayak, learned CGC for Union of India-opposite party no.1; and Mr. K.K. Venugopal, learned Sr. Advocate, Mr. Ashok Gupta learned Sr. Advocate, Ms. Pami Rath, learned Sr. Advocate along with Ms. S. Gumansingh, learned Advocate for NALCO-opposite party no.2.

3. The petitioner is a company incorporated under the Companies

Act, 1956 and is engaged in the business of manufacturing and selling of Aluminum products. With an investment close to Rs.45,000.00 crores, the petitioner had established an SEZ Unit at Burkhamunda in the district of Jharsuguda, Odisha which includes aluminum smelter with production and sale close to 1.25 MTPA Aluminum per annum. It has filed this writ petition seeking to set aside the eligibility conditions (i), (ii) and (iv) in the Tender Document dated 30.06.2023 under Annexure-1 issued by the NALCO for sale of Calcined Alumina. It has further prayed to restrain opposite party no.2-NALCO from excluding Domestic Bidders or Special Economic Zone (SEZ) Units situated in India, from participating in the tenders for purchase of Calcined Alumina from NALCO; and to permit the petitioner's SEZ Unit to participate in the Tender for sale of Calcined Alumina issued by opposite party no.2 vide tender notice dated 30.06.2023.

4. The factual matrix of the case in hand is that the opposite party no.2-NALCO has an Aluminium Smelter Capacity of 0.48 MTPA and Alumina Refinery of 2.3 MTPA in Damanjodi, Odisha. NALCO utilizes 1 MTPA Alumina for Captive consumption and balance 1.3 MTPA is sold via tenders only to overseas buyers. Accordingly, Bid Invitation for Export Sale of Calcined Alumina was issued on 30.06.2023 vide Annexure-1 as per the terms and conditions mentioned therein. Annexure-II of such invitation deals with the eligibility criteria, which reads as follows:-

> "*(i) Only overseas bidders intending to import the calcined alumina to a foreign destination outside the territory of India will be eligible to participate in the tender.*
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> *(ii) The shipment will be effected on FOB Visakhapatnam India basis after getting the "Let Export Order" under Section 51 of the Customs Act, 1962 from the proper officer of Customs.*
>
> *(iii) NALCO's overall responsibility in regard to the calcined*

alumina ceases to exist once the goods are loaded on board the ship FOB Visakhapatnam.

(iv) The invoice representing the sale transaction will be issued only in the name of the participating successful overseas bidder.

(v) Conditional offer, if any from any bidder will be summarily rejected."

5. The petitioner is grossly aggrieved by the eligibility clauses as prescribed under Clauses-(i), (ii) and (iv). By imposing such condition, the domestic manufacturers and even SEZ Units located in India have been disqualified. This is done by way of insistence on a "Let Export Order" (LEO) under Section 51 of the Customs Act, 1962. An LEO is only issued when goods are exported to a territory outside India. Even SEZ Units, which are otherwise deemed to be territories outside the customs frontier of India as per Section 53 of the SEZ Act, have been barred from participating in the tender. As a result of these conditions, Alumina is first shipped to the high seas (200 nautical miles) outside Indian territory and then shipped back to Indian ports, before it is finally sent to the SEZ unit of the petitioner. Being aggrieved by such condition, the petitioner has approached this Court in the present writ petition.

6. Dr. A.M. Singhvi, learned Senior Advocate and Mr. Ashok Kumar Parija, learned Senior Advocate appearing along with Mr. P.K. Nayak, learned counsel for the petitioner vehemently contended that similar question had come up for consideration before this Court in W.P.(C) No. 3634 of 2019 [***M/s. Vedanta Ltd & Anr. Vs National Aluminium Company Ltd.*** (NALCO)] and this Court vide judgment dated 26.03.2019 permitted the SEZ Units to participate in NALCO's Tender dated 01.02.2019, wherein only "overseas buyers" were

eligible to participate. This Court held that an SEZ is deemed to be a territory outside India. Thus, the SEZ Unit qualifies as an overseas buyer and must be allowed to participate in NALCO's Tender. Accordingly, this Court at paragraphs 47.1, 48 and 50.1 held as follows:-

> "*47.1 If the contention which has been raised by the petitioners is not accepted, they have to import the raw material i.e. Calcina through import Alumina and in that process spend huge amount of ship fare which will add cost to the company in question, whereas if it is allowed to purchase from NALCO, then the Indian raw material can be used within India and will serve the purpose of new policy of the Central Government i.e. "Make in India". Merely because some resolution is passed by the opposite party-NALCO in 2005 and it has not been challenged for 15 years, it is not sine qua non nor is it a rule. It has to be interpreted when it is challenged before the Court.*
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> *48. The argument of the opposite party-NALCO cannot be accepted because in on one hand, it refuses the petitioner to participate in the tender, on the other hand, the opposite party has allowed the petitioner to apply through its sister concern based in London and spend huge Forex to transport to London and call it back for its use at SEZ, does not find favour with the commercial sense. By allowing them to participate not only there will be a competition as we have seen the first tender has gone 388.5 and the last was gone about 400, 12 Dollars was increased in a month which itself shows that even threat of participation by the petitioners has increased the price of material to be disposed of.*
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> *xxx xxx xxx*
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> *50.1. Taking into consideration the provisions of the SEZ Act, 2005, more particularly, Section 2(u) a Bank Branch situated in the special zone 83 which has taken permission under the Banking Regulation is to be considered "Offshore Banking Unit" coupled with the other provisions which are referred by learned Senior Counsel for the petitioners. The conclusion which is inevitable is that the 'Industry' or the 'Commercial Establishment' situated in Special Economic Zone is not an Indian Company and is Foreign legal entity by legal fiction.*

6.1. The above judgment was challenged by NALCO before the Supreme Court, which passed a detailed order on 14.01.2020

laying down a mechanism for supply of Alumina to the SEZ Unit. But the same having not been adhered to, the petitioner filed Contempt Petition No. 691 of 2020 which was disposed of vide order dated 28.04.2022, whereby the Supreme Court laid down an arrangement for sale of Alumina to the Petitioner's SEZ Unit in a manner to ensure that if NALCO does not forego any duty drawback benefits, it would have otherwise been entitled to in the case of an export. It was also ensured that NALCO does not lose export benefits and avoid an unnecessary situation of carrying the cargo from Vishakhapatnam Port to international waters, i.e. 200 NM and back to Vishakhapatnam. Vide order dated 28.04.2022, NALCO was given the right to impose fresh tender conditions, for future tenders. On 03.06.2022, the impugned eligibility conditions were imposed, which contravened the orders passed by this Court and the Supreme Court. Accordingly, the petitioner filed a writ petition before the Supreme Court on 12.05.2023 under Article 32 of the Constitution of India, bearing W.P.(C) No.629 of 2023 challenging the fresh eligibility conditions dated 03.06.2022 with a prayer to quash such conditions and the same were identical which are impugned in the present writ petition. But the Supreme Court by way of an order dated 05.07.2023 disposed of the same granting liberty to the petitioner to approach this Court and raise all contentions in accordance with law against the eligibility conditions imposed by NALCO on 30.06.2023, since this constitutes a fresh cause of action. As a consequence thereof, the petitioner approached this Court by filing the present writ petition.

6.2 Dr. Singhvi, vehemently contended that the eligibility conditions are not based on any principle and are wholly unreasonable, since NALCO will get all duty and forex benefit even if

the SEZ unit participates in the tender. More so, it is contended that the eligibility conditions are manifestly arbitrary and, therefore, this Court has jurisdiction to entertain such application. It is further contended that even if the petitioner-SEZ participates, then it will not cause prejudice to the opposite party-NALCO, which will, in turn, will get same duty drawback benefits, which is evident from NALCO's letter dated 18.04.2022 under Annexure-16 and letter from SEZ authorities dated 20.07.2022 under Annexure-12. Rule 23 of SEZ Rules, 2006 provides for identical export benefit on supply to SEZ. It is also contended that NALCO admittedly received duty drawback benefits against 90 KT alumina sold pursuant to the order of the Supreme Court dated 28.04.2022 on the basis of GST invoice to SEZ-Vedanta, the petitioner herein. Therefore, this is proven by the past experience. Therefore, the differentiation between overseas buyers and the SEZ Unit is wholly arbitrary, non-intelligible and has no nexus with the object to be achieved, thereby violates Article 14. He further contended that the eligibility conditions are against public interest, reason being that NALCO being a Government company must ensure utilization of mines and natural resources in India for value addition in the domestic market. In the guise of eligibility conditions, NALCO is choosing to sell India's natural resource at a lower price to the overseas entities, while excluding the petitioner's SEZ Unit. This act is not only prejudicial to the mineral development in India, but also devoid of commercial sense. If the alumina were to be used domestically, the chain of value addition would happen in India and this will aid a number of collateral industries. Further, the impugned conditions violate the Doctrine of Public Trust and also involves sale of a critical natural resource and, therefore, the eligibility conditions

are required to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. It is also contended that NALCO is a Central Public Sector Enterprise established for the development of the Aluminum Sector in India. It has been allotted several mines in India free of many fetters. Therefore, it also carries the additional duty of disposing of these mined natural resources in consonance with the Public Trust Doctrine under Article 39 (b) i.e. in a manner which sub-serves public interest. The eligibility conditions are also violative of the National Mineral Policy, 2019, which provides that minerals shall be mined in a manner so as to promote domestic industry and to ensure that the needs of domestic industry are fully met. According to him, participation of petitioner will ensure the natural resources fetched the higher price and the eligibility conditions are contrary to SEZ Act, 2005 and SEZ Rules, 2006.

6.3 To substantiate his contention, he relied on ***Natural Resources Allocation, In RE, Special Reference No. 1 of 2012***, (2012) 10 SCC 1 and ***M.P. Power Management Company Limited, Jabalpur v. Sky Power Southeast Solar India Private Limited and others***, (2023) 2 SCC 703.

7. Per contra, Mr. K.K. Venugoal, learned Senior Advocate along with Mr. Abhishek Gupta and Mrs. Pami Rath, learned Senior Counsel appearing along with Ms. S. Gumansingh, learned counsel appearing for the opposite party-NALCO by refuting the contention raised by learned Senior Counsel appearing for the petitioner contended that the judgment of this Court in W.P.(C) No. 3634 of 2019 passed on 26.03.2019 with regard to quashing of eligibility

condition to the extent that it requires that the bidders should be overseas buyers was challenged before the apex Court in Civil Appeal No.262 of 2020 and vide order dated 14.01.2020, the apex Court passed the following orders:-

> *"In these circumstances, we consider it appropriate to set aside the impugned judgment and order passed by the High Court of Orissa and dispose of the writ petition being W.P.(C) No. 3634 of 2019 as withdrawn."*

7.1 Thus, it is contended that the ratio decided by this Court having been set aside, the contention raised by the learned Senior Counsel appearing for the petitioner cannot be sustained in the eye of law, because it has not got the legal sanction by the Supreme Court of India. Rather, as desired by NALCO in its affidavit dated 10.01.2020, the petitioner undertakes to provide to NALCO the bill of export and certification of goods having been admitted into the SEZ by the concerned officer of the SEZ as per Rule 30 of the SEZ Rules. With the set aside of the judgment of this Court passed in W.P.(C) No. 3634 of 2019, the criteria for fixation of eligibility criteria have also made confirmed by the apex Court. But due to non-adherence to the conditions stipulated in the order dated 14.01.2020, the contempt application was filed by the petitioner, by which a mutual acceptable arrangement was arrived at between NALCO and the petitioner and in terms of which the Civil Appeal was disposed of. As the same was not adhered to, as alleged, the Contempt Petition No.691 of 2020 was filed and the apex Court in paragraphs-11,14 and 15 passed the following orders:-

> *11. The submission which has been urged on behalf of NALCO by the Attorney General is that unless all procedural requirement of NALCO are duly fulfilled, NALCO would not be in a position to receive duty drawback benefits from the Union Government since*

the tenders for calcined alumina are intended for the sale of goods to foreign purchasers. The Attorney General urged that though payment is being made by VRL UK, the goods are sought to be utilized by the SEZ at Jharsuguda. Hence, it is apprehended that NALCO may not receive drawback benefit.

xxx *xxx* *xxx*

14. During the course of the hearing, Mr. A. Sundaram has submitted that though the total quantum covered by the six orders for which VRL UK was the H-1 bidder stands at 1,80,000 MT, VL would fairly leave the amount which would be supplied to it to a fair resolution.

15. At this stage, it would also be necessary to record the submission of the Attorney General that for the future NALCO reserve its right to modify the tender condition to specifically stipulate that the tender enquiries which are being issued by NALCO are only for the purpose of sale of calcined alumina to parties situated outside the territory of India and specifically to the exclusion of SEZs situated within India.

The apex Court also issued directions in paragraph-16 of the aforesaid order to the following extent:-

"16. In the above backdrop, we issue the following directions:

(i) NALCO shall, from the period commencing on 1 May 2022 and ending on 31 July 2022, allocate a total quantity of 90,000 MT to VRL UK in full and final settlement of the entire outstanding quantity which has remained to be executed in respect of the entire period of dispute;

(ii) The price which shall be payable by VRL UK to NALCO shall be at the weighted average of the six subject bids of VRL UK where it was the highest bidder;

(iii) In advance of the actual delivery of each consignment at Vishakhapatnam Port on an FOB basis and at least two working days prior thereto, VL SEZ, Jharsuguda, Odisha shall provide a revolving corporate guarantee in favour of NALCO to cover the entirety of the export benefits estimated by NALCO to

accrue to NALCO on account of the concerned sale. In the event that, for any reason, NALCO is unable to realize the export benefits, it would be at liberty to invoke the corporate guarantee in which event payment to NALCO shall be made within a period of two working days of the date of invocation without any demur or objection. In addition to the corporate guarantee, an undertaking shall be submitted to this Court recording its obligation to abide by the terms of the present order;

(iv) The GST invoices shall be raised in the name of VL SEZ, Jharsuguda, Odisha; and

(v) The entirety of the sale price which is payable to NALCO shall be payable in foreign currency by VL SEZ, Jharsuguda, Odisha in terms of the order of this Court dated 19 August 2020."

In paragraphs- 17 and 18, the apex Court passed the following orders:-

"*17 The above arrangement represents a comprehensive resolution of all disputes in respect of past tenders. The terms of the existing arrangement shall continue until NALCO substitutes the existing tender conditions with a fresh set of tender conditions applicable to future tenders, which it is at liberty to do."*

18 This Court has had no occasion to render any adjudication on the validity of the new tender conditions proposed by NALCO."

7.2 Therefore, there is a clear-cut finding that the apex Court had no occasion to render any adjudication on the validity of the new tender conditions proposed by NALCO, rather disposed of the said contempt application, vide order dated 28.04.2022. It is contended that once the terms and eligibility condition having been set aside by this Court and the same was challenged before the apex Court, where it was set aside, in that case the present terms and conditions which have been fixed in the tender documents, cannot be found faulted

with so as to cause interference of this Court. To substantiate his contention, he has relied upon the judgments of the apex Court in the cases of ***Air India Limited v. Cochin International Airport Ltd.***, (2000) 2 SCC 617 and ***Tata Cellular v. Union of India***, (1994) 6 SCC 651.

In ***Air India*** (supra), the apex Court in paragraph-7 held as under:-

> *"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in R.D. Shetty v. International Airport Authority, 1979 (3) SCC 488; Fertilizer Corporation Kamgar Union v. Union of India, ; Asstt. Collector, Central Excise v. Dunlop India Ltd, , Tata Cellular v. Union of India, ;. Ramniklal N. Bhutta v. State of Maharashtra, and Raunaq International Ltd. v. I.V.R. Construction Ltd., . The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with*

great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

In ***Tata Cellular*** (supra), the apex Court in paragraph-94 of the said judgment held as under:-

"94. The principles deducible from the above are : (1) The modem trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of

this case since they commend to us as the correct principles.

2. Whether the selection is vitiated by arbitrariness?

7.3 It is further contended that in view of the law laid down by the apex Court, there should be judicial restraint in administrative action and, as such, this Court cannot sit as a court of appeal but merely reviews the manner in which the decision was made. It is contended that the court does not have the expertise to correct the administrative decision. The terms of the invitation to tender cannot be opened to judicial scrutiny because the invitation to tender is in the realm of contract. More so, the tendering authority must have freedom of contract and, as such, quashing decisions may impose heavy administrative burden on the administration and lead to increase and unbudgeted expenditure. Thereby, it is contended that the award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. More so, the price need not always be the sole criterion for awarding a contract. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. Therefore, once the bid invitation of expert sale has been issued inviting bids for specifying eligibility criteria, the decision making process has not yet been started. So far as the conditions stipulated for fixing eligibility criteria is concerned, the same is within the domain of the tendering authority and, as such, the same cannot and could not have been interfered with

by the Court in exercise of power under judicial review, save and except the decision making process. Once the decision making process has not been started, the writ petition so filed by the petitioner challenging the condition stipulated in the bid invitation, cannot be sustained in the eye of law. Consequentially, dismissal of the writ petition is sought for.

8. Having heard learned counsel for the parties and after going through the records, this Court is of the considered opinion that the matter requires consideration.

9. Issue notice to the opposite parties.

10. Since the parties have entered appearance through their respective counsel, they are called upon to file their counter affidavits within a period of four weeks so that the matter can be disposed of at the stage of admission.

(DR. B.R. SARANGI)
JUDGE

(M.S. RAMAN)
JUDGE

I.A. No. 10153 of 2023

06. This matter is taken up through hybrid mode.

2. This application has been filed by the petitioner seeking ad interim ex-parte direction permitting it to participate in the tender dated 30.06.2023 for sale of Calcined Alumina issued by opposite party no.2-NALCO for the period from 01.08.2023 to 31.03.2024 for a quantity of 2,40,000 MT of alumina and consequentially permits the petitioner to purchase alumina for use in its Special Economic Zone unit at Jharsuguda, Odisha and to allow the Special Economic

Zone unit at Jharsuguda to directly lift the material from Ex-work Damanjodi, Koraput district, Odisha or alternatively from the Vishakhapatnam Port on Free on Board (FOB) basis by issuing GST invoice and without furnishing a Let Export Order under Section 51 of the Customs Act, 1962.

3. In view of the elaborate arguments advanced by the respective parties, as mentioned above, 12.07.2023 being the last date of submission of bid by the parties, it will not be practicable to permit the petitioner to participate in the tender, as the matter was heard after lunch, i.e., at 2.00 P.M. As this Court is considering the eligibility criteria, in view of the arguments advanced by the respective parties and allowing the opposite parties to give their reply, this Court is not inclined to pass any interim order at this stage.

4. Accordingly, the I.A. stands dismissed.

(DR. B.R. SARANGI)
JUDGE

Arun/Ashok

(M.S. RAMAN)
JUDGE