

**IN THE HIGH COURT OF KARNATAKA AT BENGALURU
DATED THIS THE 10TH DAY OF NOVEMBER, 2016**

BEFORE

THE HON'BLE MR. JUSTICE A S BOPANNA

WRIT PETITION No.48493/2016 (GM-TEN)

BETWEEN:

M/S. SCANIA COMMERCIAL VEHICLES
INDIA PRIVATE LIMITED
CIN U35999KA2011FTC056984
PLOT NO 64-66, 88-97
NARASAPURA KIADB INDUSTRIAL AREA
ACHHATANAHALLI VILLAGE
NARASAPURA HOBLI,
KOLAR DISTRICT - 563133
REP. BY MR V SIVAKUMAR,
DIRECTOR SALES

... PETITIONER

(BY SRI. UDAY HOLLA, SR.ADV. A/W
SMT. SHWETHA RAVISHANKAR, ADV.)

AND:

1. GOVERNMENT OF KARNATAKA
VIDHANA SOUDHA
B R AMBEDKAR VEEDHI
BENGALURU - 560001
REP. BY ITS CHIEF SECRETARY
2. DEPARTMENT OF TRANSPORT
M S BUILDING,
B R AMBEDKAR VEEDHI,
BENGALURU -560001
REP.BY ITS PRINCIPAL SECRETARY
3. BENGALURU METROPOLITAN
TRANSPORT CORPORATION

A GOVERNMENT OF KARNATAKA
 UNDERTAKING, CENTRAL OFFICES
 SHANTI NAGAR, BENGALURU-27
 KARNATAKA INDIA
 REP. BY ITS MANAGING DIRECTOR

4. THE E-PROCUREMENT CELL
 CENTRE FOR E- GOVERNANCE
 DEPARTMENT OF PERSONNEL AND
 ADMINISTRATIVE REFORMS
 GOVERNMENT OF KARNATAKA
 ROOM NO 141, GATE NO 2,
 M S BUILDING, DR. AMBEDKAR VEEDHI
 BENGALURU - 560001
 REPRESENTED BY ITS
 CHIEF EXECUTIVE OFFICER
5. VOLVO INDIA PRIVATE LIMITED
 YALACHAHALLY VILLAGE
 TAVAREKERE POST,
 HOSKOTE TALUK
 BENGALURU - 560122
 REP. BY ITS MANAGING DIRECTOR
6. JBM AUTO LIMITED
 601, HEMKUNT CHAMBERS 89,
 NEHRU PLACE,
 SOUTH WEST DELHI
 DELHI - 110019
 REP. BY ITS MANAGING DIRECTOR

... RESPONDENTS

(BY SMT. PRATHIMA HONNAPURA, AGA. FOR R1, 2 & 4
 SRI. P.D. SURANA, ADV. FOR R3
 SRI. SAJAN POOVAIAH, SR.ADV. A/W
 SMT. NALINA MAYEGOWDA, ADV. FOR R5)

THIS PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, WITH A PRAYER TO CALL FOR THE ENTIRE RECORDS PERTAINING TO THE CASE OF THE PETITIONERS AND DIRECT THE R-3 TO ACCEPT THE BID OF THE PETITIONER AS HAVING BEEN DULY SUBMITTED ON TIME AND TO CONSIDER THE SAME IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE TENDER DTD.20.07.2016 VIDE ANNEX-B.

THIS WRIT PETITION HAVING BEEN RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING :

ORDER

The petitioner is before this Court seeking issue of mandamus to direct respondent No.3 to accept the bid of the petitioner as having been duly submitted on line and to consider the same in accordance with the terms and conditions of the tender.

2. The respondent No.3 issued the Request For Proposal (RFP) on 20.07.2016 for design, manufacture, supply and commission of AC bus as per the specifications indicated therein. The submission of bids was to be made on-line through the Karnataka Government e-procurement portal. The last date which was fixed therein was extended up to 25.08.2016 and the bids were to be uploaded on the said date before 5.30 p.m. (17:30 hrs). The petitioner and the respondents No.5 and 6 are stated to have responded to the same. The case of the petitioner is that the petitioner having prior experience in participating in similar bids had maintained the appropriate system

settings and the software to ensure the compatibility to submit its bid online through e-portal. The petitioner claims to have kept its digital signature and the scanned copies of the bid documents for the said purpose.

3. Accordingly, on the last date for submission of bids the petitioner started the process of submitting the technical and financial bids at 4.30 p.m. On uploading, the system prompted for encryption of the documents by using the digital signature and the petitioner encrypted the documents by using the digital signature. At that stage, the system prompted the petitioner 'sign and encryption'. As such the same was complied after which the petitioner was directed to the main page to key-in certain date manually under the heading 'Item wise bid financial offer'. The further process was also carried on as prompted from the system and when the 'sign and encryption' was attempted using the digital signature, a message 'unexpected error' was displayed. Though the draft had been uploaded the process was not completed due to the indication of such

error. Hence the petitioner contacted the customer care of respondent No.4 for help but the assistance provided was not of any help despite the petitioner clarifying the position and indicating the error and seeking for a solution to complete the process. The petitioner accordingly contacted the respondent No.4 on the next day by stating with regard to the problem encountered and also submitted the hard copies by dropping it in the box kept for the said purpose as it is also a requirement under the RFP. A further request was also made on 27.08.2016 and again up to 31.08.2016. However since the respondents No.3 and 4 did not accede to the request of the petitioner, the petitioner has approached this Court.

4. The respondent No.3 in their objection statement have referred to the tender being floated on 20.07.2016 for procuring 150 AC premium buses and 350 non-AC midi buses involving the cost of 250 crores. The procurement is under the scheme of the Central Government and the procurement is to be completed before 31.03.2017. Insofar as the instant tender

process, it is stated that though initially the last date for submission was fixed as 20.08.2016 the petitioner through the letter dated 19.08.2016 requested for extension of time. Similarly another bidder M/s. Ashok Leyland also addressed a letter dated 19.08.2016 requesting extension of time. Accordingly on considering the requests the time for submission of the bid was extended up 25.08.2016 by fixing the cut off time at 17:30 hrs. As such all bids were required to be uploaded before the said time on the last date. The bids are invited through e-portal of the fourth respondent so as to ensure transparency. The bidder, for the purpose of uploading the tender in the e-portal is required to map the digital signature before uploading the bid. It is contended that the petitioner had attempted to upload its bid without mapping its authorized digital signature which had resulted in the display of the message 'unexpected error'. The digital signature is to be secured from the certifying authority authorized under the provisions of the Information Technology Act, 2000. The petitioner was able to secure the digital signature

after 25.08.2016 at 17 hrs 7 minutes and 31 seconds which is noted by the certifying authority. The bid can be uploaded only after securing the digital signature.

5. The display of the message as 'unexpected error' in the e-portal of respondent No.4 was not due to any technical glitch but was due to the fault of the petitioner in not mapping the digital signature. In that view it is contended that the petitioner not having validly uploaded the bid within the time provided, cannot make out any grievance nor can they have objection for the evaluation of the bid submitted by respondents No.5 and 6. The reason assigned by the petitioner for starting the process to upload towards the closure time to ensure that it is not leaked is disputed. It is contended that such contention is misplaced as the e-portal system of respondent No.4 is built in such a manner that it cannot be opened till the expiry of the time fixed for opening of the bids. Though the petitioner wrote a letter dated 26.08.2016 in this regard, the request could not be accepted since respondent No.3 on obtaining clarification from respondent No.4 had

confirmed that the error was due to the bid of the petitioner not being encrypted. Since it was the lapse of the petitioner in not uploading the bid within time, no further consideration was required. The respondent No.3 cannot accept the bids submitted after the expiry of the time and as such the correspondence addressed by the petitioner is without purpose. Hence it is contended that when the bid was not submitted within the time as provided under the notification, the petitioner cannot seek any relief from this Court.

6. The respondent No.4 has filed a separate statement of objection. The respondent No.4 is the centre for e-governance which caters to the need of e-tendering in the matter of procurement of goods, works and services for all government procurements and as such the third respondent floated the tender, inviting bids through the e-portal of respondent No.4. Insofar as the procedure for uploading the bids it is stated that the bid of the tenderer can be uploaded only after the digital signature of the authorized person is mapped in the e-portal. The bidder has to register

himself to participate in the bidding with the e-portal of respondent No.4. Such registered bidder will be given the unique user-ID and will have his own password which is permitted for use to enable to upload the bid. Without feeding the password the bidder cannot access the e-portal for uploading and submitting the bids. The digital signature so authorized has to be mapped in the e-portal of respondent No.4 before the bidder can participate in the tender process. A bidder who fails to follow the requirement of mapping the digital signature will not be able to participate in the e-bidding. If an attempt is made to upload the bid before mapping the digital signature, the e-portal will display that there is an unexpected error.

7. It is contended that the attempts said to have been made by the petitioner has failed as the petitioner had not mapped the digital signature before making attempts to submit the bid. The petitioner has made multiple attempts to upload their bid on 25.08.2016 between 17:12:03 hours to 17:14:19 hours and the attempt at uploading has failed due to the digital

signature not being mapped with the e-portal of respondent No.4. The petitioner had contacted the e-portal customer center/help desk on 25.08.2016 to know why they could not upload their bid and it was clarified to them that their digital signature had not been mapped. Thereafter the digital signature of the petitioner was mapped in the e-portal on 25.08.2016 at 17:31:55 hours by which time, the time for submission had lapsed. It is due to the said reason the petitioner could not upload and not due any technical glitch as contended by the petitioner. Hence such contention is misleading. It is stated that between 15 to 18 hours on 25.08.2016, 231 bids relating to various tenders have been uploaded in the e-portal of the respondent No.4. It is submitted that the system is built in such manner that no person can have access and even the Tender Inviting Authority cannot open before the closure time. Hence the reason given by the petitioner to start the process of uploading at the last moment is disputed. The flow chart relied on by the petitioner is also disputed. In effect it is contended that

there was no defect whatsoever in the e-portal and it was entirely due to the fault of the petitioner the uploading was not possible as the digital signature was not mapped and as such it remained in the 'draft' state. The digital signature got certified only after 17:07:31 hours on 25.08.2016 and bid submission was after the time had expired. The system generated log message sheet is produced to refer to this fact. The e-mail exchanged relating to the clarification is relied. In order to establish that there was no technical glitch in the e-portal, the list of the bids that had been uploaded between 0 hours to 23:59:59 hours on 25.08.2016 is produced. Hence it is contended that non uploading is due to the fault of the petitioner themselves and the petition is liable to be dismissed.

8. The respondent No.5, another bidder who has successfully uploaded its bid has filed its objection statement. The case as put forth with regard to the technical glitch is denied. It is contended that the petitioner who is aware that they would not qualify in the tender process are unnecessarily interfering with

the process by filing this petition. It is contended that respondent No. 5 has submitted its bid much earlier to the deadline as per the requirement and are eligible to qualify. Hence they seek that the petition be dismissed.

9. The petitioner has filed its rejoinder and reiterated its averments. The fact that the digital signature is to be mapped before uploading the bid is admitted but it is denied that the petitioner had attempted to upload the bid without mapping the digital signature. It is denied that the message "unexpected error" was displayed for that reason. It is asserted that there was technical glitch and for that reason the message was displayed despite the digital signature being mapped. The digital signature was used twice during the uploading process and the bid documents got uploaded and appeared in the e-portal as 'drafts'. It is contended that despite there being a glitch the respondent No.4 has not noticed it. As e-portal is a software programme based application whether there was a glitch can only be assessed by a technically qualified person. The petitioner seeks to blame the poor

quality of the core application and the server software. Details with regard to the signature verification having failed earlier and the same being successful later is referred. In effect the petitioner has sought to reassert that the uploading was not possible due to the fault in the e-portal and not due to the fault of the petitioner and hence seek the bid uploaded by them and available in the 'draft' form should be accepted and considered. The respondent No.4 in reply has produced the entire log sheet to contend that there was no defect in the e-portal.

10. In the above background I have heard Sri. Udaya Holla, learned senior counsel for Ms. Shwetha Ravishankar, Sri. Sajan Poovayya, learned senior counsel for Ms. Nalina Mayegowda, Sri. P.D.Surana, learned counsel, Ms. Prathima Honnapura, learned Government Advocate appearing for the respective parties and perused the petition papers.

11. From the contentions urged, the admitted position is that in respect of the tender process in issue

the bids were to be uploaded on the e-portal before 17:30 hours on 25.08.2016. The fact that the petitioner had started the process of accessing the e-portal and uploading at 17:07:31 hours on 25.08.2016 cannot be in dispute as it is demonstrated from the documents produced along with the petition. The log details produced by the respondents No.3 and 4 including the document at Annexure- R4B will also indicate that even as per the records of the respondents the process of uploading by the petitioner has been in progress at 17:08:06:082 hours. From this what is clear is that the petitioner has commenced the process well in advance before the expiry of the time on the last day. The process of uploading was however complete only at 17:31:55:876 hours with the indication 'Supplier Certificate Action. register'. Since the uploading process was completed 1 minute 55 seconds after the closing time of 17:30 hours the 'drafts' uploaded are locked in the e-portal of the respondent No.4 without accessibility to the respondent No.3 which is the Tender Inviting

Authority. In that view the bid of the petitioner is not accepted as available for consideration.

12. The petitioner contends that the delay is not due to the fault of the petitioner as the system threw up a message 'unexpected error', which is due to the glitch in the e-portal and the message displayed on the screen did not pertain to the digital signature. The respondents No.3 and 4 however contend that though the petitioner had commenced the process they had not mapped the digital signature, without which the encryption is not possible. Since the digital signature was not mapped the system not being in a position to encrypt had indicated the message 'unexpected error'. The petitioner made enquiries at that stage and the reason was informed to the petitioner, whereupon the petitioner obtained certification of the digital signature and continued the process by mapping the signature, by which period the time for submission of bids had lapsed.

13. On the question as to whether there was a glitch in the e-portal, the learned senior counsel on

referring to the flow chart at Annexure- C about the procedure followed, points out that the process was commenced at 17:07:31 as indicated in Annexure-F. It is contended that after the uploading was done the message 'unexpected error' was displayed on the screen as at Annexure-D which was at 17:22:02 i.e., well within the closing time. The server log of supplier, relating to the petitioner produced at Annexure R4E is referred in portions as hereunder:

at 17:08:06:082	SupplierCertificationAction.create';
at 17:08:14:184	SupplierCertificationAction.register';
at 17:09:38:471	'SupplierCertificationAction.create';
at 17:10:15:782	'SupplierCertificationAction.register';
at 17:10:56:022	BidDocumentsAction.initBidDocuments';
at 17:11:28:270	'BidEncryptionHelperBean.getUserSigning Certificate';
at 17:11:28:270	'BidDocumentsAction.saveBidCriteriaDocs';
at 17:11:34:831	'BidDocumentsAction.getDocumentsAsXML';
at 17:11:43:324	'BidDocumentsAction.saveEncryptedCriteria Documents';
at 17:11:57:756	'BidSubmissionMainAction.initBidSubmission';
at 17:12:03:188	'Signature Verification failed. Please check your registered Certificate User';
at 17:12:15:173	'BidCommercialAction.backCommercialBid'
at 17:12:23:093	'Signature Verification failed. Please check your registered Certificate User'.

In that regard, it is contended with regard to the discrepancy in the reasons assigned. The time gap in the log entries is referred to contend that it is due to the glitch in the system. The clarification sought by the

petitioner is also referred by pointing out to the e-mail that was exchanged. A technical report produced along with the Memo dated 20.10.2016 is sought to be relied on to contend that the said report does not rule out the possibility of technical glitch.

14. The learned counsel for the respondents No.3 and 4 would however dispute the position and would contend, though the petitioner commenced the process at 17:07:31, the Validity End date depicted in Annexure-F will indicate that the digital signature was not valid and available. In that light the server log details will indicate that the efforts have failed as the digital signature was not mapped. That is the reason it is indicated as 'Signature Verification failed'. Only thereafter on approaching respondent No.4, the authentication of the digital signature was obtained and the mapping was done and thereafter uploaded successfully but the two clicks made at 17:31:55:876 and 17:31:58:399 will indicate that the process was complete after the time had elapsed. The 'draft' will therefore remain in the e-portal. The details at

Annexure- R4D is relied to contend that 231 bids of different Tender process has been uploaded on the e-portal of respondent No.4 between 00:00:00 to 23:59:59 hours on 25.08.2016 including the bid validly submitted by the respondents No. 5 and 6 in respect of the instant tender.

15. Having analyzed the contentions on that aspect, though the petitioner has sought to rely on a technical report to suggest there is possibility of a technical glitch, the said report cannot readily be relied on by this Court. The said report has been obtained by the petitioner themselves and not based on the order of this Court. That apart the report is based on the material made available to the technical expert by the petitioner and not based on the physical study of the e-portal and the other material available with respondent No.4 to thereafter arrive at a conclusion. On the other hand, it is seen that e-portal of the respondent No.4 is a common platform provided for all government organizations as an initiative of e-governance and there was no reason to deliberately exclude the petitioner by

respondent No.3 nor is malafide alleged against them. In the said process, on the material noticed above it is seen that apart from the petitioner, the respondents No.5 and 6 have also uploaded at the same time and were successful. That apart respondent No.4 has also brought on record the bids relating to the other tender procurements being uploaded on 25.08.2016 on the same e-portal without any impediment. Further from the Server log details irrespective of the other details, the fact remains that at 17:12:03,188 itself it is indicated as 'Signature Verification failed' though not displayed on the screen which will indicate that the only probability is that the signature not being mapped was the error. Thereafter the petitioner has taken the clarification and on obtaining the certification of the digital signature has been successful in uploading. Hence, though this Court does not have the expertise to determine as to whether there was a glitch or not, the contention of the respondents and the surrounding circumstance will have to be accepted based on preponderance of probability.

16. Despite this conclusion, the further consideration required is as to whether even in that circumstance the respondent No.3 should be directed to receive and evaluate the bid of the petitioner. The learned senior counsel for the petitioner contends that in the instant case the bid submitted by the petitioner is already on the e-portal as 'draft' which contains all details of the bid submitted. As such if the same is retrieved and considered, no prejudice will be caused to the respondents which includes the other bidders. In fact it will only encourage proper competition which is in public interest. It is contended that presently only two tenderers are left in the field, of whom the respondent No. 6 does not qualify on the face of it and as such the bid of respondent No.5 will virtually be the sole bid without competition. It is submitted that effort should be to encourage competition. The decision of this Court in the case of ***Electronic Enterprises -vs- Karnataka Power Corporation Ltd. (ILR 1994 Kar 125)*** is relied on. In the that case, after referring to the other decisions it is held that there is a difference

between the case where a person is excluded from an opportunity to carry on a trade, and a case where, a person is permitted to enter the competition in the field or trade. In the former case, opportunity is denied, resulting in the violation of Article 14 of the Constitution; similarly, exercise of the fundamental right to trade under Article 19(1) is prevented. Competition is inherent in the trade and in fact efficiency and service to the general public will be increased only by a proper competition in the trade. That is why, an opportunity created to expand the scope of competition among the traders is not restrained in the exercise of writ jurisdiction.

17. The learned counsel for the respondents No. 3 and 4 however contends that as per the KTPP Act and Rule 19(b) of the Rules only the bids submitted within time can be opened. In that view it is contended that as per the tender condition the commercial offer through e-procurement can alone be considered and only such of those valid bids will be available for viewing. The cut off time being mandatory, the offer given late is no offer at

all. The learned counsel has relied on the following decisions;

i) The case of *Tata Cellular -vs- Union of India* (AIR 1996 SC 11) wherein the parameters for interference is held to be only when there is malafide, bias and arbitrariness to the extent of perversity. In that regard it is held, for a tender to be a valid tender the requisite is that it must conform to the terms of obligation and must be made at the proper time. While examining, there should be judicial restraint in administrative action and should not sit in the nature of appeal but must merely review the manner in which the decision was made. The Court does not have the expertise to correct the administrative action and substitute its own decision. The Government must have the freedom to contract but must be free from arbitrariness not affected by bias or actuated by malafides.

ii) The case of *Natural Resources Allocation, In Re Special Reference No.1 of 2012 [(2012) 10 SCC 1]* wherein the scope of Article 14 of the Constitution is

considered and taking its negative term it is observed that it does not directly purport to confer any right on any person as some of the other articles.

iii) The case of ***Meerut Development Authority vs- Association of Management Studies and another*** [(2009) 6 SCC 171] wherein it is held that 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. 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.

iv) The case of ***Government of Andhra Pradesh and others vs- N.Subbarayudu and others*** [(2008) 14 SCC 702] wherein it is held that there may be various considerations in the mind of the executive authorities due to which a particular cut-off date has been fixed. It could be financial, administrative or other considerations. The Court must exercise judicial

restraint and ordinarily leave it to the executive authorities to fix the cut-off date.

v) The case of ***Michigan Rubber (India) Limited -vs- State of Karnataka and others*** [(2012) 8 SCC 216] wherein, on a consideration certain principles relating to the consideration by Court in tender matters was laid, among which it was also laid down that if the State or its instrumentalities act reasonably, fairly and in public interest in awarding the contract, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

vi) The case of ***W.B.Electricity Board -vs- Patel Engineering Co. Ltd. and others*** (AIR 2001 SC 682) wherein it was argued that mistakes in some items was due to the fault of the computer, on taking note of the nature of mistakes it was held that it was not beyond the control of the bidder to correct the same before the submission of the bid. Had they been vigilant in checking the bid documents before the submission the mistakes could have been avoided. Permitting such

corrections after one and a half month of opening of the bids will also be violative of the terms of tender. The nature of international competitive bidding was taken note and it was observed that it postulates keen competition and high efficiency. The bidders should have the assistance of technical experts.

18. The learned senior counsel for the respondent No.5 has also relied on the decisions to contend that the indulgence sought by the petitioner to accept the bid submitted after the time prescribed and that too in the physical form when The Information Technology Act, 2000 provides for electronic governance and also makes provision for authentication of electronic records by digital signature and electronic signature cannot be accepted. The decisions relied upon are as follows;

i) The case of ***M/s. KRK Infraprojects India Pvt Ltd. -vs- State of Telangana rendered by the High Court of Andhra Pradesh (reported in 2015 SCC online Hyd 34)*** wherein it is held that the very basis of calling for the tender on e-procurement basis would be defeated if the documents are accepted in physical form.

In that view since the essential condition being violated the contention was not accepted. In the said case, the issue arose for consideration at the stage of evaluation and when it was noticed that one of the essential document, an undertaking, was not uploaded but was thereafter submitted in the physical form and was considered. It is in that circumstance the decision was rendered.

ii) The case of **Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium) and others [(2016) 8 SCC 622]** wherein on taking note of the compliance of the essential terms of the tender a consideration was made with regard to change being made after the process has commenced being prejudicial to the others was taken note and it was held that if permitted the other bidders who had not bid could well contend that if they had known the format was not mandatory, they too could have participated. The goalpost cannot be rearranged or be asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

19. On the principle of law as delineated in the decisions cited supra or otherwise there can be no quarrel. Therefore, as a matter of course, the law is well settled that there is limited scope available to the Courts to interfere except in the circumstances as noted above. Further in relation to the tender process, it is also clear that essential terms are to be strictly adhered, which includes the valid uploading of the bid within the time prescribed and in the case of e-procurement the documents submitted in the electronic mode alone can be considered. However, on the factual matrix in which it was considered as against what arises for consideration herein is also to be kept in perspective and an examination is required to be made herein.

20. in the above backdrop, it is to be noticed that the case on hand is not a case where the petitioner had not responded to the tender by attempting to upload their bid either on the date indicated or within the time prescribed and it is also not a situation where after the closure of the e-tender process the petitioner without

even attempting earlier is seeking that their bid be accepted in the physical form as the e-tender process has closed and is neither seeking that the bid in the physical form be evaluated. On the other hand even as per the records of the respondent No.4, as against the closing time of 17:30 hours the petitioner has started the process of uploading the bid at 17:08:06:082 hours and about 22 minutes were left for the closing time. If the time taken by the respondent No.5 to upload its bid is taken into consideration, if the message of 'unexpected error' was not displayed in the case of the petitioner, the bid of the petitioner also would have been uploaded within that time. However in the process, as noticed above, despite all the confusion the signature was mapped and the process of uploading was completed but it was after 1 min. 55:876 seconds from the closing time and what is uploaded is available as 'draft' in the e-portal of respondent No.4. The question is only about the acceptance of the same and not to add anything to it or uploading any further documents, but only by retrieving, viewing and evaluating the same.

21. In that regard, what is to kept in view is that in the process though the uploaded bid had not reached the Tender Inviting Authority, i.e., the respondent No.3, the bid with all the details is available in the 'draft' stage in the e-portal of the respondent No.4 which is the common platform. It is in that light the petitioner has sought that a direction be issued to consider it as having been submitted within time and evaluate the same. In the case on hand it is an instance where the petitioner is not seeking to join the race mid way without reaching the starting point. Instead the petitioner has been at the starting point and has run the race but has not reached the finishing line on time due to certain discrepancies for which the reasons are many which cannot be investigated in a proceedings of the present nature except to deduce from the records as being probable. Though the discrepancies are blamed on each other, this Court not having the expertise has no doubt accepted the contention of the respondent No.3 and 4 as the probable version that there was no glitch in the server or the e-portal. Yet in a matter of the

present nature there are other aspects which are to be kept in view and at the same time it is to be ensured that the process of e-procurement is adhered to and the sanctity of the same is not compromised.

22. To take into consideration that aspect, even if the contention of the respondent No.3 that the validity of the digital signature certificate obtained by the petitioner had expired at 17:07:31 on 25.08.2016 when the process of uploading was started is kept in perspective, it is however seen that when the petitioner started the process of uploading even as per the server log details of the respondent No.4, as early as at 17:08:14,184 it is denoted as 'Supplier Certification Action, register' and after certain other recording, at 17:12:03,188 it is recorded as 'Signature Verification Failed. Please check your registered Certificate User'. Though such recording is at the back end of the system, what was displayed on the screen was as 'Unexpected Error' which made the petitioner to contact the help desk, get clarification and act accordingly which

resulted in loss of time. Hence an appropriate software to display the exact reason on the screen would have been beneficial, which should also be the object if one is to boast of adopting e-governance in its true intent. In these circumstances when there is marginal delay of less than 2 minutes in completing the process, if an opportunity is granted and that too when it is not an insertion or addition as fresh material, it will neither be contrary to the Rules or the terms of the tender requiring consideration of bids submitted through e-process. It will also not be contrary to the dictum laid down in the above cited decisions.

23. If such benefit is granted, in my opinion it will in fact be in public interest. As noticed the tender floated is for procurement of 150 AC premium buses and 350 non-AC buses involving the cost of Rs.250 crores. The petitioner is a well known manufacturer of buses and if they are allowed to remain in the field it will only increase the competition though ultimately it will all depend on the technical as well as financial evaluation and that too subject to the entire details

being available in the 'draft' that is already uploaded. On the other hand if an opportunity is not granted only because of the delay of less than 2 minutes and that too in the circumstance stated above, it will leave only the respondents No.5 and 6 in the field without much competition. To allow a tender of such magnitude to the benefit of one or two tenderers due to default rather on merit, it certainly is not in public interest. While stating so, this Court is also conscious of the fact that it should not cause prejudice to the bidders who are already in the field. The petitioner should therefore have benefit of only the details which is in the digital form as 'draft', in the e-portal of the respondent No.4, which only shall be enabled by the respondent No.4 to be retrieved, viewed and noted by respondent No.3 and no other addition or subtraction can be permitted. Since the tender condition requires the bidders to submit the physical documents of the uploaded documents also, the documents submitted by the petitioner pursuant to the interim order or the set which has already been dropped in the box, if it matches with the uploaded documents

available as 'draft' alone shall be considered. That apart, keeping in view the nature of procurement, the specifications of the buses manufactured and in that background the commercial bid to be considered will also ensure that there is no prejudice to the others if permitted unlike the process for certain other procurements.

24. For all the aforesaid reasons, the following;

ORDER

- (i) The respondent No.4 is directed to make provision for respondent No.3 to access the bid submitted by the petitioner as per the details in Annexure-E and available as DRAFT in their procurement portal.
- (ii) The respondent No.3 on accessing the same shall consider it as the bid submitted by the petitioner on e-tender mode, without permitting any other additions or alterations and evaluate the same as per the terms and

conditions of the tender in comparison with the other bids received.

- (iii) The petition is disposed of in the above terms with no order as to costs.

**Sd/-
JUDGE**

akc/bms