

UNREPORTABLE

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

+ **BAIL APPLN. NOS. 1037/2010 & 1038/2010**

% Reserved on: 7th July, 2010
Date of decision: 9th July, 2010

SK DIXIT Petitioner in Bail Appln. 1037/2010.
KS BAKSHI Petitioner in Bail Appln. 1038/2010.
Through Mr. Siddharth Luthra & Mr. Sushil
Kumar, Sr. Advocates with Mr. Anil Airi, Mr.
Aditya Kumar, Mr. R.K Chandna, Mr. Lavkesh
Sawhney & Ms. Meenakshi Grover, Advocates.

versus

CBI Respondent
Through Mr. Pawan Sharma, Standing
Counsel with Ms. Laxmi Chauhan, Advocate
along with Mr. Om Prakash Parida, Addl. S.P.
(CBI).

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J.:

1. These bail applications under Section 439, Code of Criminal Procedure (hereinafter referred to as Cr.P.C., for short) have been filed by Mr. K.S. Bakshi and Mr. S.K. Dixit, Managing Director and Chief Executive Officer, respectively, of Oriental Structures Engineers Pvt. Ltd. (OSEL, for short). The two applicants were arrested by C.B.I.

in R.C. No. 9A/2010 registered against S.K. Nirmal and others. It is stated that the two applicants have been in jail for about the last 45 days.

2. Learned counsel for the applicants has drawn my attention to the FIR and the allegations made therein. It has been pointed out that there are factual inaccuracies in the FIR and the following facts are highlighted. The National Highways Authority of India (NHAI, for short) had published an advertisement on 7th December, 2009 inviting applications from experienced and capable contractors to submit Request for Qualification (RFQ, for short) for the next stage of bidding i.e. Request for Proposals. RFQs were invited for “Four laning of Nagpur-Betul Section of NH-69 from k.m. 137.000 to k.m. 257.000 in the State of Madhya Pradesh and from k.m. 59.300 to k.m. 3.000 in the State of Maharashtra under NHDP Phase IV on design, build, finance, operate and transfer (annuity) basis.”

3. It is stated that 17 applications were filed and not 13 as mentioned in the FIR. These applications were scrutinized on 6th April, 2010 and the applications of 8 companies were rejected and not 4 companies as mentioned in the FIR. It is pointed out that the bids were given by 5 companies and the bid given by OSEL was the lowest and therefore accepted. It is submitted that the bids were given by the 5 companies on 10th May, 2010 and were opened immediately for the purpose of ascertaining the lowest proposal. It is thus submitted that

the allegations of undue favour to OSEL and reduction of time limit from 45 days to 35 days made in para 6 of the FIR are incorrect and false. There was no extension of time for giving of bids to extend any favour to OSEL. Learned counsel for the applicants has submitted that the OSEL was not successful in several cases/tenders as their bids were not the lowest and contracts were not awarded to them. My attention was drawn to the writ petition filed by Larsen & Turbo Ltd in the Delhi High Court making similar allegations. The said Writ Petition was withdrawn on 21st May, 2010. It is pointed out that the FIR in question was registered on the very next date i.e. 22nd May, 2010. Counsel for the applicants have relied upon the following decisions: ***S.K. Alagh versus State of Uttar Pradesh and Others***, (2008) 5 SCC 662, ***Ravi Singhal versus Union of India***, 51 (1993) DLT 133, ***Smt. Runu Ghosh versus State (CBI)***, 64 (1996) DLT 474, ***Paturu Rama Rao versus State (CBI)***, 64 (1996) DLT 455, ***Sukh Ram versus CBI***, 64 (1996) DLT 633, ***Shameet Mukherjee versus CBI***, MANU/DE/o863/2003, ***Anurag Vardhan versus CBI***, 105 (2003) DLT 594, ***Dharambir khattar versus State (CBI)***, 110 (2004) DLT 366, ***Suresh Nanda versus CBI***, ***Ravinder Chadha versus State [Delhi]***, 2008 [4] JCC 2836, ***Prof K. Narayana Rao (In J.C.) versus CBI [Delhi]***, 2009 [4] JCC 2551 and ***R. Vasudevan versus CBI***, 166 (2010) DLT 583.

4. Filing of the writ petition and withdrawal of the same is one

aspect. The writ petition could have been withdrawn for a number of reasons including making a complaint, which was pending before the CBI. One is not required to go into the said aspect or reasons. In the present bail applications, we are concerned with the allegations against the two applicants and whether or not the allegations show commission of an offence and the whether or not the applicants are entitled to bail. In cases involving non bailable offences, the considerations which weigh while examining an application for bail are the nature and seriousness of the offence, the character of evidence, a reasonable possibility of presence of the accused being secured in trial, whether there is reasonable apprehension of tampering with witnesses, circumstances peculiar to the accused and larger interest of the State/ public.

5. As per the prosecution, searches in the houses of the two officers of NHAI, Mr. N.K. Jain and Mr. S.K. Nirmal, have led to recoveries of cash of Rs.2.48 crores and Rs.42 lacs, respectively. Learned counsel for the CBI has also produced before me some original files and has pointed out that 17 RFQ offers/bids were received out of which 4 persons had withdrawn their RFQ offers. Thus, in all, 13 companies had submitted RFQs at the first stage.

6. Clauses 2.13.1 and 2.13.2 of the terms and conditions for RFQ read as under:

“2.13.1. The Applicant shall submit the Application in the format specified at Appendix-1, together with the documents specified in Clause 2.13.2,

and seal it in an envelope and mark the envelope as “APPLICATION”. The Applicant shall seal the original and the copy of the Application, together with their respective enclosures, in separate envelopes duly marking the envelopes as “ORIGINAL” and “COPY”. The envelopes shall then be sealed in an outer envelope which shall also be marked in accordance with Clauses 2.13.2 and 2.13.3.

2.13.2. Each envelope shall contain :

(i) Application in the prescribed format (Appendix-1) along with Annexes and supporting documents;

(ii) Power of Attorney for signing the Application as per the format at Appendix-II;

(iii) if applicable, the Power of Attorney for Lead Member of Consortium as per the format at Appendix-III;

(iv) copy of the Jt. Bidding Agreement, in case of a Consortium, substantially in the format at Appendix-IV;

(v) copy of Memorandum and Articles of Association, if the Applicant is a body corporate, and if a partnership then a copy of its partnership deed; and

(vi) copies of Applicant’s duly audited balance sheet and profit and loss account for the preceding five years.
.....”

7. It is pointed out that the clauses do not specifically require furnishing of original documents to be attached with the application. In sub clauses of clause 2.13. 2 the word “copy/copies” is used. The application for RFQ and a copy of the application for RFQ were required to be enclosed and sealed in two separate envelopes.

8. As per the prosecution, in accordance with the tender

conditions the RFQs submitted by these 13 companies were to be scrutinized on 6th April, 2010. On 31st March, 2010, a note was initiated by Mr. Nitin Jain proposing that “cognizance should not be taken of any scanned document/certificates submitted alongwith the RFQ applications henceforth, where the requirement of original document is stipulated”. Mr. S.K. Nirmal and other senior officers of NHAI agreed and processed the said proposal with great haste and hurry. Even opinion of General Manager (Legal) was not obtained as is normally done. The General Manager (Legal), it was recorded, was busy in meetings. A draft circular was prepared on 1st April, 2010 and was directed to be issued on 2nd April, 2010. 2nd April, 2010 was a gazetted holiday being Good Friday. However, as per the prosecution their investigations have revealed that Mr. Gautam Das, GM (Coordination) was compelled to issue Circular No. 54/2010 dated 2nd April, 2010. Relevant portion of this circular reads:-

“It has been frequently noticed while evaluating the RFQ applications that many of the applicants submit photocopies, scanned copies, fax copies etc. of experience certificates, Power of Attorney, Joint Bidding Agreements etc. with their applications which are not in conformity with the requirement of submission of documents with the application as per RFQ conditions.

2. xxxx

3. It has been henceforth decided that the documents not submitted by the applicant in conformity with the above clause shall not be taken into cognizance and subsequent submission of original documents would not be entertained. It is also clarified that the vital documents like Power of Attorney, Experience Certificates, Joint Bidding Agreements submitted with the application in

original would only be considered while evaluating the applications.

4. The Policy Circular No. 17/2008 on the subject stands superseded.”

9. As per the original file shown to me, in the meeting dated 6th April, 2010, 8 RFQ applications were rejected in view of the aforesaid circular and, therefore, recording that the said applicant does not meet the technical or financial threshold.

10. As noticed above, RFQ applications were received on 21st January, 2010 and this circular dated 2nd April, 2010 was issued in great haste just before 6th April, 2010, when the applications were to be considered. Only the successful RFQ applicants were entitled to give financial bids. At RFQ stage financial bids/proposals are not furnished nor examined. Elimination of an RFQ applicant, is obviously beneficial and ensured less competition at the subsequent stage when financial bids by approved parties are given and examined. This alteration and issue of circular dated 2nd April, 2010 as per the prosecution was done at the behest and on the asking of the applicants to favour OSEL and oust the competitors.

11. The prosecution has pointed out that the minutes dated 6th April, 2010 rejecting 8 RFQ applications, do not mention the specific document of which a copy and not the original was furnished, resulting in the application being rejected. Examination of the note sheet in the original file reveals a note dated 2.4.2010, which reads:

“.....Clause 2.13.1 was checked up and says submission in two envelopes; ‘original’ and ‘copy’. In original envelop therefore we must

insist on original documents unless explicitly marked otherwise.”

12. It is submitted by the prosecution that this is a perverse and perverted interpretation with mala fide intention to help the applicants. It is also submitted that no opportunity was granted to the rejected applicants to comply and meet the requirements of the circular dated 2nd April, 2010 and not reject the RFQ applications/offers.

13. My attention was drawn to the earlier noting of Mr. Nitin Jain dated 11.3.2010 that out of 13 RFQ applicants, only 2 applicants did not meet the technical threshold capability and their further evaluation was not required. In 9 cases including OSEL, clarifications were required and the said applicants were given 7 days to respond. No time to respond or furnish originals was given to the 8 RFQ applicants after 2nd April, 2010 though they were affected and were being rejected on basis of circular dated 2nd April, 2010, which was issued after RFQ offers made by the applicants on or before 21st Jan., 2010.

14. Counsel for the applicants has submitted that the circular dated 2nd April, 2010 was modified by a subsequent circular dated 26th April, 2010 and all RFQ offers were reconsidered on the basis of a report given by a consultant on 30th April, 2010. The relevant portion of the corrigendum dated 26th April, 2010 reads:

“2. In this regard, it is further clarified that the copy of the JBA if submitted with the application

be considered while evaluating the applications, as the same is permitted in the RFQ vide clause 2.13.2 (iv).

3. Further, in line with the accepted practice & norms followed with respect to submission of documents in the country, it is also clarified that certified (bearing the certified true copy stamp alongwith proper signature & stamp of the signatory)/attested copies (attested by a Notary Public) of the experience certificates may also be considered while evaluating the applications.”

15. In this connection, it is submitted on behalf of the prosecution that this exercise was a sham and the report of the consultant states that 6 RFQ applicants had enclosed photocopies/scanned copies of their technical and financial experience certificates/documents which were not attested or certified in terms of the corrigendum dated 26th April, 2010, partly modifying the circular dated 2nd April, 2010. Application of one of the applicants was rejected on the ground that though the concerned document was stamped as a true copy with initial of an authorized signatory and round stamp of the applicant, but the requirement of the corrigendum that the certification should be under proper signature and the stamp of signatory, was not satisfied.

16. During investigation the prosecution has been able to get hold of data from an e-mail account of Mr. S.K. Dixit. Data down loaded from the said account and inbox and outbox folders reveals that Mr. S.K. Dixit was in constant touch with officials of NHAI including Mr. Nitin Jain and Mr. S.K. Nirmal during the period in question. On 25th

February, 2010, Mr. Nitin Jain had sent to Mr. S.K Dixit draft bid documents “Schedule ‘C’, Schedule ‘D’, Schedule ‘A’ Bridge condition survey, Inventory, and Road inventory structure of culvert and bridge, Road condition survey, and Road inventory documents, etc. for Nagpur-Betul Project. It is pertinent to mention here that the draft bid documents were made available to other bidders after the result of RFQ stage on 6th April, 2010. E-mails for purchase of air tickets for wife of one of the officials of NHAI have also been downloaded. The prosecution has stated that Mr. Divakar Negi, an employee of OSEL has confirmed that payments of these air tickets were debited to the corporate account of the said company.

17. Counsel for the applicants have submitted that in several corruption cases, courts have granted bail after the accused has been detained for a period of about one month. It is not possible to accept the contention that these decisions lay down as a ratio that in Prevention of Corruption Act cases bail should be granted after an accused has suffered incarceration for a period of 30/40 days. Further the statement that the accused is well of, has status and roots in society, cannot by itself alone without other reasons, justify grant of bail. Offence of corruption, specially by high officials and those dealing with infrastructure projects of high value, is a serious and a grave offence. They affect the entire economy, government finances and public at large. These offences have to be viewed seriously. In

***Surain Singh versus State of Punjab*, 2009 II AD (SC) 589**, it

has been observed as under:

“7. Day in and day out the gigantic problem of corruption in the public servants is on the increase. Large scale corruption retards the nation-building activities and everyone has to suffer on that count. Corruption is corroding like cancerous lymph nodes, the vital veins of the body politics, social fabric of efficiency in the public service and demoralizing the honest officers. The efficiency in public service would improve only when the public servant devotes his sincere attention and does the duty diligently, truthfully, honestly and devotes himself assiduously to the performance of the duties of his post. (See: ***Swatantar Singh versus State of Haryana*** (1997 (4) SCC 14) and ***State of M.P. versus Shambhu Dayal Nagar*** (2002 (1) SCC 1).”

18. It is submitted that the offence, if any, has been committed by the company, the Director/CEO cannot be made vicariously liable. Reference is made to S.K. Alag’s case (supra). In the said case there was dispute between two private parties and allegations of criminal breach of trust was made but no role or allegation was made against the “individuals” as such, except that they were director/managing director. The present case is not of vicarious liability as such. Role and acts of the two applicants are in question.

19. It was submitted that Mr. S.K. Bakshi has undergone knee operations and Mr. S.K. Dixit’s father is suffering from prostate cancer. However, prosecution has pointed out that Mr. S.K. Dixit has a married son who is well placed and looking after his grandfather. At this initial stage itself, I do not think there is any special reason or

medical reason to justify grant of bail. It is not the case of the applicants that they are suffering because of lack of medical attention or care.

20. It was submitted that at best the applicants can be prosecuted under Part II of Section 120 B of the Indian Penal Code. Reliance is placed on the order dated 29th April, 2008 passed in the Bail Application No. 748/2008 in ***Suresh Nanda versus CBI and other cases***. The said decision has been considered and distinguished in the order dated 8th September, 2008 passed in Criminal M.C. No. 1945/2007 and CRL.M.A. No.11358/2007 ***Pankaj Kumar versus State***. Learned counsel for the prosecution has also relied upon paragraph 387 of judgment in ***Ram Narain Poply versus CBI***, (2003) 3 SCC 641. In this decision it has been held that cases of this type are not conventional offences and have to be scrutinized and examined carefully. These cases require detailed investigation. Further, offences of conspiracy of the present nature are a matter of inference which is normally detected from acts of parties. Privacy and secrecy are normally characteristics of conspiracy. The investigation in such matters requires time and detailed scrutiny and examination of documents. In the present case, after the registration of the case till 10th June, 2010, 12 witnesses including employees of NHAI and OSEL have been examined. 32 voluminous files and 184 incriminating documents have been seized during the searches. These documents require detailed scrutiny,

examination and investigation. It may not be proper at this stage to release and grant bail to the applicants when investigation is at the initial stage itself and not complete. The investigating agency is in the process of collecting requisite materials. Charge sheet has not been filed.

The bail applications are dismissed. It is clarified that the observations made in this order are for the purpose of deciding the present bail applications and will not be binding on the learned Trial Court who shall independently apply its mind.

(SANJIV KHANNA)
JUDGE

JULY 9, 2010.
P/VKR