

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

% Reserved on: 09.02.2011
Date of decision: 10.03.2011

+ WP (C) No.6833 of 2010

M/s. GAYATRI-DLF CONSORTIUM & ORS. ...PETITIONERS
Through: Mr. Arun Kathpalia & Mr. Angad Mehta, Advocates.

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR. ...RESPONDENTS
Through: Mr. Sudhir Nandrajog, Sr. Advocate with Ms. Padma Priya, Ms. Saahila Lamba & Ms. Meenakshi Sood, Advs. for Respondent No.1/NHAI.
Mr. Ravinder Agarwal, Advocate for Respondent No.2/ UOI.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE RAJIV SHAKDHER

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

SANJAY KISHAN KAUL, J.

1. Petitioner No.1 is a consortium joint venture of petitioner Nos. 2 & 3, M/s. Gayatri Projects Limited and M/s. DLF Infra Holdings Limited. The National Highways Authority of India (for short 'NHAI')/respondent No.1, vide its Invitation for Qualification dated 17.3.2009 invited applications for pre-qualification from applicants

interested in designing, engineering, financing, procurement, construction, operation and maintenance of the Six Laning of NH-4 from Tumkur to Chitradurga of approximate length of 114.000 kms. excluding Tumkur and Chitradurga Bypass in the State of Karnataka on Build, Operate and Transfer (BOT) Toll basis for a pre-agreed concession period under NHDP Phase-V. The bidding process was divided into two stages. The first stage was the qualification stage and the second was the bid stage. In the qualification stage interested parties were required to obtain the Request for Qualification (for short 'RFQ') and submit their applications along with information sought for in the RFQ. Such of the applicants who fulfilled the criteria specified in the RFQ were to be shortlisted as eligible for Request for Proposal (for short 'RFP'). Petitioner No.1, thus, submitted its RFQ for the said project on 17.3.2009 and was informed by NHAI/respondent No.1 that it had been shortlisted for consideration for subsequent bidding.

2. Petitioner No.1 was informed by the same letter that it could collect the documents of RFP on payment of ₹1.80 lakh and submit their bid along with the Bid Security Amount of ₹16.78 crore.
3. Petitioner No.1 submitted its bid (RFP) on 3.5.2010 along with the requisite Power of Attorney. However, petitioner No.1 was informed vide letter dated 21.6.2010 that its bid had been declared non-responsive and that 5 per cent of the Bid Security Amount was liable to be forfeited in terms of Clause 2.20.7(a) of the RFP. The reason for declaration of the bid of the Petitioners as non-responsive was stated to be a defect in the Power of Attorney which is an

authorization to present the bid. The Power of Attorney was stated not to be in conformity with the RFP. The Power of Attorney authorizing one of the members of the consortium as Lead Member by the other was stated not to be signed by all members of the consortium as mandated by the RFP.

4. The aforesaid position was disputed by the petitioners vide their letter dated 1.7.2010 informing that a proper Power of Attorney was executed in the prescribed format and this was the same Power of Attorney which had been submitted with the RFQ at which stage no objection had been raised. Petitioner No.3 had executed the Power of Attorney in favour of petitioner No.2 as Lead Member and thus there was no necessity of petitioner No.2 to have signed the Power of Attorney, as the Principal could not appoint itself. This issue is stated to have been referred to the Technical Committee for further consideration when the petitioners were called for their oral submissions. The petitioners made written as well as oral submissions before the Technical Committee.
5. The decision of respondent No.1 was communicated only vide letter dated 28.9.2010 that the Technical Committee upheld the decision to declare the bid of petitioner No.1 as non-responsive and also upheld the right of respondent No.1/NHAI to forfeit 5 per cent of the Bid Security Amount as per clause 2.20.7 of the RFP and the failure to deposit the said amount within a period of seven (7) days from the date of issuance of the letter would result in respondent No.1 being constrained to encash the bank guarantee for the Bid Security Amount to the extent of the required amount equals to ₹89.30 lakh.

6. In view of the aforesaid threatened action of respondent No.1, the petitioners preferred the present writ petition under Article 226 of the Constitution of India. The petition was listed for the first time on 6.10.2010 when it was admitted for hearing. The writ petition was accompanied by an application for interlocutory relief, which was disposed of on the same date by a reasoned order. The counsel for the petitioners at that stage submitted that in view of the conduct of respondent No.1/NHAI, the petitioners were only interested in release of the bank guarantee given as Bid Security Amount, which was sought to be invoked by respondent No.1/NHAI. This Court restrained respondent No.1/NHAI from invoking the bank guarantee in respect of the contract in question or from forfeiting and appropriating the Bid Security Amount of the petitioners till the final decision in the writ petition. On an application filed by respondent No.1/NHAI an agreed order was passed on 29.10.2010 that the bank guarantee dated 13.1.2010 would be kept alive by the petitioners to the extent of the demand, which is stated to be 5 per cent of the bank guarantee amount, but in case the petitioners succeed in the writ petition, the question of reimbursement to the petitioners of charges for the bank guarantee would be examined by the Court at the final hearing stage.
7. In the counter affidavit filed by respondent No.1/NHAI, a preliminary objection was taken about the Power of Attorney on the basis of which the writ petition had been filed. In order to obviate the stated defect, the petitioners sought to file an additional document being a Special Power of Attorney, which was duly filed.

8. In the aforesaid factual matrix two questions arise for consideration:
- i. Whether the Power of Attorney submitted by the petitioners was defective and/or alleged defect was of such a nature which could be termed as a technical irregularity or was it fatal to the bid?; and
 - ii. Whether respondent No.1 were entitled to encash the bank guarantee for the bid security amount treating the bid of the petitioner as non-responsive and/or whether the clauses contained in the RFP in this behalf can be said to be unconscionable or penal?
9. In order to appreciate the controversy it would be appropriate to examine some of the relevant clauses of the RFP. The RFP contains in the second chapter 'Instructions to Bidders' where Part A contains general instructions. Clause 2.1 deals with 'general terms of bidding'. The relevant clauses dealing with the bid security amount are clauses 2.1.7 to 2.1.10, which read as under:

“2.1.7 The Bidder shall deposit a Bid Security of ₹16.78 Crores (Rupees Sixteen Crores and Seventy Eight Lakhs Only) in accordance with the provisions of this RFP. The Bidder has the option to provide the Bid Security either as a Demand Draft or in the form of a Bank Guarantee acceptable to the Authority, as per format at Appendix-II.

2.1.8 The validity period of the Bank Guarantee or Demand Draft, as the case may be, shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder. The Bid shall be summarily rejected if it is not accompanied by the Bid Security. The Bid Security shall be refundable no later than 60 (sixty) days from the Bid Due Date except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the Concession Agreement.

2.1.9 The Bidder should submit a Power of Attorney as per the format at Appendix-III, authorizing the signatory of the Bid to commit the Bidder.

2.1.10 In case the Bidder is a Consortium, the Members thereof should furnish a Power of Attorney in favour of the Lead Member in the format at Appendix-IV.”

10. Part B of Chapter 2 deals with ‘documents’. Clause 2.7.1 includes as appendices *inter alia* the format of the Power of Attorney for signing of bid. The forfeiture of Bid Security Amount is dealt with in Part D of Chapter 2. The relevant clauses of which are as under:

“D. BID SECURITY

2.20 Bid Security

2.20.1 The Bidder shall furnish as part of its Bid, a Bid Security referred to in Clauses 2.1.7 and 2.1.8 hereinabove in the form of a bank guarantee issued by a nationalized bank or a Scheduled Bank in India having a net worth of at least ₹1,000 crore (₹ One thousand crore), in favour of the Authority in the format at Appendix-II (the “**Bank Guarantee**”) and having a validity period of not less than 180 (one hundred eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any nationalized bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934.

.....

2.20.6 The Authority shall be entitled to forfeit and appropriate the Bid Security as Damages *inter alia* in any of the events specified in Clause 2.20.7 herein below. The Bidder, by submitting its Bidding pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP. No relaxation of any kind on Bid Security shall be given to any Bidder.

2.20.7 The Bid Security shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, *inter alia*, time cost and effort of the Authority without prejudice

to any other right or remedy that may be available to the Authority thereunder, or otherwise, under the following conditions:

- (a) If a Bidder submits a non-responsive Bid;
Subject however that in the event of encashment of Bid Security occurring due to operation of para 2.20.7 (a), the damage so claimed by the Authority shall be restricted to 5% of the value of the Bid Security.
- (b)
- (c)
- (d)
- (e)”

11. The evaluation of the bids is dealt with in Part 3. Clause 3.2 deals with the Tests of responsiveness of the bid and the relevant clause reads as under:

“3.2 Tests of responsiveness

3.2.1 Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive if:

-
- (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;
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3.2.2 The Authority reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Authority in respect of such Bid.”

12. Para 5 deals with ‘Pre-Bid Conference’ and the same reads as under:

“5. PRE-BID CONFERENCE

5.1 Pre-Bid conferences of the Bidders shall be convened at the designated date, time and place. Only those persons who have purchased the RFP document shall be allowed to participate in the Pre-Bid Conferences. A maximum of five representatives of each Bidder shall be allowed to participate on production of authority letter from the Bidder.

5.2 During the course of Pre-Bid conference(s), the Bidders will be free to seek clarifications and make suggestions for consideration of the Authority. The Authority shall endeavour to provide clarifications and such further information as it may, in its sole discretion, consider appropriate for facilitating a fair, transparent and competitive Bidding Process.”

13. We have already noticed above that Appendix IV gives the format of the Power of Attorney for a Lead Member of the consortium as per clause 2.1.10. Since the controversy revolves around this Power of Attorney, we consider it appropriate to reproduce the format of the same:

***“APPENDIX IV
Power of Attorney for Lead Member of Consortium
(Refer Clause 2.1.10)***

Whereas the National Highways Authority of India (“the Authority”) has invited bids from pre-qualified and short-listed parties for the Six laning of Tumkur-Chitradurga (Excluding Tumkur-Chitradurga Bypasses) section from Km75.00 to Km 189.00 of NH-4 (approx. 114.00 km) in the State of Karnataka to be executed as BOT (Toll) project of DBFOT Pattern under NHDP Phase V Project (the “Project”).

Whereas, _____, _____ and _____ (collectively the “Consortium”) being Members of the Consortium are interested in bidding for the Project in accordance with the terms and conditions of the Request for Proposal (RFP) and other connected documents in respect of the Project, and

Whereas, it is necessary for the Members of the Consortium to designate one of them as the Lead Member with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium’s bid for the Project and its execution.

NOW THEREFORE KNOW ALL MEN BY THESE PRESENTS

We, _____ having our registered office at _____, M/s. _____ having our registered office at _____, and M/s. _____ having our registered office at _____, (hereinafter collectively referred to as the “Principals”) do hereby irrevocably designate, nominate, constitute, appoint and authorise M/s _____ having its registered office at _____, being one of the Members of the Consortium, as the Lead Member and true and lawful attorney of the Consortium (hereinafter referred to as the “Attorney”) and hereby irrevocably authorise the Attorney (with power to sub-delegate) to conduct all business for and on behalf of the Consortium and any one of us during the bidding process and, in the event the Consortium is awarded the concession/contract, during the execution of the Project and in this regard, to do on our behalf and on behalf of the Consortium, all or any of such acts, deeds or things as are necessary or required or incidental to the

submission of its bid for the Project, including but not limited to signing and submission of all applications, bids and other documents and writings, except the Letter of Award participate in bidders' and other conferences, respond to queries, submit information/documents, sign and execute contracts and undertakings consequent to acceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with the Authority, and/ or any other Government Agency or any person, in all matters in connection with or relating to or arising out of the Consortium's bid for the Project and/or upon award thereof till the Concession Agreement is entered into with the Authority.

AND hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us/ Consortium.

IN WITNESS WHEREOF WE THE PRINCIPALS ABOVE NAMED HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS DAY OF 20.....

For (Signature, Name & Title)

For (Signature, Name & Title)

For (Signature, Name & Title)

(Executants) (To be executed by all the Members of the Consortium)

Witnesses:

- 1.
- 2.

Notes:

The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.

Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.

For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention, 1961 are not required to be legalized by the Indian Embassy if it carries a conforming Apostille certificate”

14. The bid has to be accompanied by a declaration in the form provided in Appendix-I of the ‘letter comprising the Bid’ and contains the following relevant clauses:

“7. I/We declare that:

(a) I/We have examined and have no reservations to the Bidding Documents, including any Addendum issued by the Authority; and

(b)

(c)

(d)

(e)

8. I/We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive nor to invite the Bidders to Bid for the Project, without incurring any liability to the Bidders, in accordance with Clause 2.16 of the RFP document.”

15. In view of the aforesaid clauses, we now proceed to examine the rival contentions:

The validity of Power of Attorney:

16. The Power of Attorney submitted with the bid of the petitioners has been placed on record. There is no dispute that it is in the proper format as per Appendix IV. It is also relevant to note that as per Clause 2.1.10 if the bidder is a consortium the members thereof are required to furnish a Power of Attorney “in favour of the Lead Member” as per Appendix-IV. The manner of wording of the Power of Attorney also shows that other members of the consortium whose description are given and are collectively called as the ‘Principals’

irrevocably designate, nominate, constitute, appoint and authorize one of the members of the consortium whose description is given therein as the Lead Member to be true and lawful attorney. Thus, it is in the nature of a unilateral document by one set of consortium members in favour of the Lead Member. In the present case the Lead Member is petitioner No.2. The Power of Attorney was executed by petitioner No.3 in favour of petitioner No.2, there being only two members of the consortium. At the designated place where Executants have to sign the expression used is “(Executants) (To be executed by all the Members of the Consortium)”.

17. The aforesaid is the bone of controversy as it is the plea of respondent No.1 that both the consortium members being petitioners 2 & 3 which include petitioner No.2 as the Lead Members ought to have appended their signatures at this point. On the other hand the submission on behalf of the petitioners is that when the phraseology “Executants” is given and the document is a unilateral one in favour of the Lead Member, it can only be signed by all members of the consortium excluding the Lead Member as the alternative would be an absurdity where the Lead Member would be authorizing itself.
18. Learned counsel for the petitioners has also drawn our attention to the Power of Attorney Act, 1882 where the Definition clause Section 1A reads as under:

“**1A Definition.** – In this Act, “power of attorney” includes any instrument empowering a specified person to act for and in the name of the person executing it.]”

19. It is, thus, submitted that in the present case it is an instrument empowering petitioner No.2 to act for and in the name of executing party, petitioner No.3.
20. On examination of the rival contentions, we are in complete agreement with the submissions made on behalf of the petitioners. If we may say so, the stand of respondent No.1/NHAI borders on absurdity. The purpose of the Power of Attorney is to authorize a person to submit the bid so that the bidder is bound by the bid. Not only that, considerable money is spent even to purchase RFP which itself shows the seriousness in the bid, which is a sum of ₹1.80 lakh in the present case. The RFP was to be submitted along with the Bid Security Amount which in the present case is ₹16.78 crore. There can, thus, be no lack of seriousness on the part of the party submitting the bid.
21. The RFP gives the format to be filled in by respective parties. The RFP is preceded by the RFQ which analyses the competency of a party which makes the RFP. The petitioners have explained that in the RFQ, in the same very format the Power of Attorney signed only by petitioner No.3 in favour of petitioner No.2 was submitted and the RFQ was processed which ultimately resulted in the eligibility of petitioner No.1 to submit the RFP.
22. The Power of Attorney in the present case has to be examined in terms of the format prescribed by respondent No.1. The Power of Attorney to be executed is by one set of persons in favour of other person. The first set of persons are the members of the consortium other than the Lead Member. The Lead Member nominated is the

second set of person in whose favour the first set of persons execute the documents. It is the first set of persons who are “Executants”. At the end of the Power of Attorney it is to be signed by the Executants. This aspect is clarified by stating that it has to be signed by all members of the consortium. The second part, i.e. “(to be executed by all members of the consortium)” has to be understood in the context of the first phrase “(Executants)”. Any other interpretation would be an absurdity. Thus, all consortium members must execute the documents in favour of the Lead Member.

23. In the present case there are only two consortium members and thus one member has executed the Power of Attorney in favour of the other member, i.e. the Lead Member.
24. We have to also keep in mind the notes given at the base of the format of the Power of Attorney which prescribe that the mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law. It is in this context that the Power of Attorney Act has been referred to aforesaid.
25. The petitioners had given elaborate written submissions before the Technical Committee which dealt with all aspects in question. It had been pointed out that even in the RFQ Clause 2.2.6(c) prescribed Power of Attorney as per format to be signed by all other members of the consortium, i.e. other than the Lead Member. This RFQ submitted on behalf of the petitioners had been scrutinized by the concerned authorities.
26. A factual aspect pointed out in the present case that the members of the consortium had entered into a Joint Bidding Agreement dated

28.1.2010 under clause 2.2.6(g) of the RFQ whereby petitioner No.2 was a Lead Member and therefore as per Section 1A of the Power of Attorney Act was an agent/attorney of petitioner No.3. There was, in fact, no need to execute a Power of Attorney but that being the format provided for by respondent No.1, it was duly completed.

27. We have no hesitation in concluding that the Power of Attorney was executed in a proper format and in a proper manner as prescribed in law and as required by the terms of the RFP. The wordings immediately following “NOW, THEREFORE, KNOW ALL, MEN BY THESE PRESENTS” uses the word “We”. However, the word “We” is used in the context of multiple members of consortium whose names have to be set out who in turn appoint as per the format one of the members of the consortium as the Lead Member whose name had to be given thereafter. It cannot be that after “We” the name of the Lead Member is also to be given and then while authorizing the Lead Member the name is again to be given as the Lead Member would not nominate itself.

28. We may notice that in Poddar Steel Corporation Vs. Ganesh Engineering Works & Ors. (1991) 3 SCC 273 it was held that deviations from non-essential or ancillary/subsidiary requirement being a minor technical irregularity can be waived. In the present case, however, there is not even a minor technical irregularity which can be stated to arise.

29. The declaration of the bid of the petitioners as non-responsive on the aforesaid ground is, thus, completely illegal and set aside. However, the petitioners did not claim a right to award of the contract on the

first date of hearing itself. Thus, the only question is the ramification of the same on the demand of 5 per cent of the Bid Security Amount on account of the bid of the petitioners having been declared as non-responsive which would certainly not arise in view of our finding that the bid is responsive.

Forfeiture of Bank Guarantee:

30. We have already held that the bid is responsive and thus there is no question of forfeiture of the Bid Security Amount. We may, however, notice that submissions were advanced by parties as to why even if the bid of the petitioners is treated as non-responsive on account of the Power of Attorney the Bid Security Amount was not liable to be forfeited. This was, in fact, a common question involved in three writ petitions filed against respondent No.1 in which arguments took place on the same date. We have separately pronounced an order in WP (C) No.8418/2010 where we have dealt with this issue. We do not want to record a discussion on this aspect and consider it appropriate to extract our discussion and finding on this aspect as contained in WP (C) No.8418/2010 as under:

“50. Learned counsel for respondent No.1 submitted that the bid security amount was a specific term of the RFP clause 2.1.7. Respondent No.1 was entitled to forfeit and appropriate damages inter alia in the event specified in Clause 2.20.7 in view of what is set out in clause 2.20.6. The said clause also provides that the bidder is deemed to have acknowledged and confirmed that the authority will suffer loss and damage on account of withdrawal of its bid or for any other default by the bidder during the period of bid validity as specified in the RFP. Clause 2.20.7 states that the amount is mutually agreed genuine pre-estimated compensation and damages payable to the authority for inter alia time cost and effort of the Authority. The conditions under which it applies includes where a bid is a non-responsive bid. However, as per the latter part of sub-clause

(a) of clause 2.20.7 if the bid is a non-responsive bid, the damages are restricted to 5 per cent of the value of the bid security. The question, thus, arises whether in case of a non-responsive bid could it be said that 5 per cent of the value of the bid security was the genuine pre-estimate of damages?

51. It must be borne in mind that the stage for submission of the RFP is the second stage in the tendering process. There is an earlier scrutiny in pursuance of the RFQ submitted by the parties in terms whereof certain parties are enlisted for submitting the RFP. At the stage of the RFP a sum of ₹3.00 lakh is paid to procure the documents. This amount cannot be the cost of the form but is really a pre-estimated cost of processing the RFP. A non-responsive bid is one where at the threshold on the opening of the bid it is found to be defective on one account or the other and is, thus, shut out from the process of scrutiny. This can have no co-relation with the value of the bid which would be the eventuality even if 5 per cent of the bid amount is encashed.

52. Learned counsel for respondent No.1 sought to canvass that the objective is to prevent non-serious persons from submitting the bids. This, in our considered view, is taken care of by charging an amount for purchase of RFP documents and in other eventualities of say a party backing out, the bid security amount being forfeited. The occasion for non-responsive bid would only be a defect in submission of the RFP.

53. Learned counsel for respondent No.1 could not seriously dispute that the amount really is in the nature of a penalty. If it is so it cannot be said to be a reasonable pre-estimate of damages and the parties suffering losses must prove that it is suffering damages to that extent. We are of the view that there is hardly any quibble over the settled legal position in this behalf. Suffice it to say that in *Maula Bux Vs. Union of India* AIR 1970 SC 1955 the scope and ambit of Section 74 of the Contract Act, 1872 (hereinafter referred to as the 'Contract Act') was discussed. It was observed that if the forfeiture of earnest money is in the nature of penalty Section 74 of the Contract Act would apply. In such a case proof of actual loss or damage would be essential. However, if the forfeiture amount is reasonable pre-estimate, it would not fall within Section 74 of the Contract Act. The legal position in this behalf has not changed. Section 74 of the Contract Act reads as under:

“74- Compensation for breach of contract where penalty stipulated for- [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other

stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

54. The 5 per cent of the bid security amount would be ₹73.95 lakh approx. This cannot be said to be the charges for processing the bids. That charge, in fact, already stands recovered which had been pre-estimated at ₹3.00 lakh for purchase of the RFP document.

55. We have no hesitation to hold that the aforementioned clause permitting 5 per cent bid security amount to be forfeited in case of a non-responsive bid is clearly penal in nature and thus provisions of Section 74 of the Contract Act would apply. It cannot be categorized as a reasonable pre-estimate of damages for a non-responsive bid and thus the bank guarantee for 5 per cent of the bid amount cannot be encashed in such an eventuality.

56. Thus, even on the second issue we are of the view that even if the bid was non-responsive, the 5 per cent of the bid security amount could not have been forfeited.”

31. The result of the aforesaid is, thus, the same even in the present case.

Conclusion:

32. We are, thus, of the view that the RFP submitted by the petitioners being responsive as also by reason of our finding that there could not have been forfeiture of the Bid Security Amount to the extent of 5 per cent, the action of respondent No.1 in seeking to demand the said amount and threatening to forfeit the bank guarantee in default of the same is illegal and all communications addressed in this behalf by respondent No.1 are accordingly quashed.

33. We had already observed in our order dated 29.10.2010 that if the petitioners succeed in the writ petition cost of keeping the bank guarantee alive to the extent of 5 per cent of the bank guarantee

amount for a further period would be liable to be reimbursed to the petitioners by respondent No.1. We, thus, permit the petitioners to obtain a certificate from their bankers for bank guarantee charges in this behalf and to forward the same to respondent No.1 for reimbursement within a period of fifteen (15) days of receipt of the same. The bank guarantee would stand discharged forthwith.

34. The writ petition is allowed in the aforesaid terms.

35. We had asked the parties to file their bill of fee & costs. The amount stated by the petitioners is ₹6.00 lakh while respondent No.1 has filed a total bill of ₹1,24,100.00. In view of what we consider as absolutely illegal and unreasonable stand of respondent No.1 and taking into consideration the nature of controversy, we grant actual costs to the petitioners of ₹6.00 lakh to be reimbursed by respondent No.1.

SANJAY KISHAN KAUL, J.

MARCH 10, 2011
b'nesh

RAJIV SHAKDHER, J.