

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

Judgment reserved on: 01.11.2012

% **Judgment delivered on: 12.12.2012**

+ **W.P.(C.) No. 3817/2012**

M/S SUPREME INFRASTRUCTURE INDIA LIMITED

..... Petitioner

Through: Ms. Kanika Sinha, Mr. Tanmaya
Sinha & Mr. Ankit Bhatnagar,
Advocates

versus

RAIL VIKAS NIGAM LIMITED AND ANOTHER

..... Respondents

Through: Mr. Anil Seth & Mr. M.K.Pathak,
Advocates for Respondent No. 1
Mr. Sameer Parekh, Mr. D.P.Mohanty
& Ms. Shweta Sharma, Advocates for
Respondent No.3.
None for Respondent No.2.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner has preferred the present writ petition under Article 226 of the Constitution of India to seek a writ of mandamus directing

respondent No. 1 – Rail Vikas Nigam Limited (RVNL) to award the contract to the petitioner arising out of the tender floated by respondent No. 1 bearing No. IFB No. RVNL/BANGALORE/HOSPET-TINAI GHAT/2011/02 dated 03.06.2011 for execution of doubling of Hospet/Tinai Ghat in Hubli division of South Western Railway in the State of Karnataka, on the rates of TM.T. Fe-500 reinforced steel at Rs.54,000/- per metric ton (M.T.). The petitioner also seeks the quashing of the communications dated 04.05.2012 and 25.06.2012 issued by respondent No.1. The petitioner also seeks restraint against respondent No.1 from invoking the bank guarantee dated 11.08.2011, as extended on 20.4.2012 for Rs. 2 crores issued by respondent No. 2 bank, i.e., the State Bank of Patiala, First Floor, Atlanta Building, Nariman Point, Mumbai – 400 021.

2. The petitioner is a listed public limited company. The petitioner claims to have pan India presence and undertakes construction of infrastructure projects like highways, flyovers, projects, multi-storeyed building etc. both on engineering, procurement and construction, i.e., EPC basis, and build, operate and transfer, i.e., BOT basis. Respondent No. 1 RVNL is a wholly owned government company under Section 617 of the Companies Act, 1956, under the Ministry of Railways. On 03.06.2011, RVNL invited the bids under the aforesaid tender calling upon interested parties for bid for execution of doubling of Hospet-Tinai Ghat line in Hubli division of South Western Railway in the State of Karnataka (India). The bids could be submitted in three packages, or combinations thereof. The nature of the work to be executed under the three packages was identical - only the sections/stretchers were different. In package No. 1, work was to be

executed between Hospet and Harlapur; in package No. 2 work was to be executed between Harlapur to Hebsur and Hubli to Dharwad; and, in package No. 3 work was to be executed between Kambarganvi and Londa.

3. The petitioner along with M/s Bharat Rail Automation Private Limited, jointly submitted their bid as a joint venture - M/s Supreme Bharat (JV) for all the three packages separately, and also in combination for packages 1 and 3. Item No. 2061 of the Bill of Quantities (BOQ), schedule 2(c) in all the packages pertained to the supply of steel items. The bidders were required to specify the rate for T.M.T. Fe-500 reinforcement steel. Since the estimated quantities of the various items were mentioned in the BOQ, the bidders were also required to fill the total amount after multiplying the estimated quantity provided in the BOQ with the specified rate.

4. The case of the petitioners is that since the work involved in all the three packages was identical, the petitioner offered the rate of Rs.54,000/- per M.T. under the said item 2061, schedule 2(c) of the BOQ in all the packages uniformly, and also stated the respective total amounts corresponding to the said rate. The same rate of Rs.54,000/- per M.T. was quoted in the combination package Nos. 1 and 3 for the aforesaid BOQ item as well.

5. It appears that the petitioner was found to be technically qualified in the bidding process vide respondents communication dated 07.04.2012 and the price bids of the eligible bidders were opened on 23.04.2012. According to the petitioner, at the time of the opening of the

price bids, the total amount quoted by the petitioner and the JV partner was read out. The petitioner along with the JV partner were found to be lowest and most competitive bidder in respect of package 1, its total price bid aggregating to Rs.158,76,29,854/.

6. The petitioner submits that on 04.05.2012, it received the first of the impugned communication from the respondent No. 1 stating that for item No. 2061 in Schedule 20(c), i.e., for supply of steel item, the petitioner had quoted the rate of Rs. 2820/- per M.T. for package 1. Respondent no.1 claimed that by calculation (i.e., by multiplication of the estimated quantity with the rate), the total amount for this item comes to Rs.79,52,400/-. However, the petitioner had indicated the total amount against this item as Rs.15,22,80,000/-. The respondent referred to clause 33.1 of the 'Instructions to Bidders' (ITB) which states that if there is a discrepancy between the unit price and the total price, i.e., the price obtained by multiplying the unit price with the quantity, it is the unit price which will prevail and the total price shall be corrected unless, in the opinion of the employer, there is an obvious mistake in the decimal point in the unit price. The respondent stated that since in the rate quoted there is no decimal involved, the price quoted by the petitioner for supply of TM.T. Fe-500 steel has to be taken as Rs. 2820/- per M.T. The respondent also referred to clause 33.2 of the ITB to state that if the bidder who submits the lowest evaluated bid does not accept the correction of errors, its bid shall be disqualified and its bid security may be forfeited. The petitioner was called upon to accept the correction in the amount which was sought to be

arithmetically corrected. As per clause 33.1 of the ITB, the respondent sought the petitioner's acceptance within a week.

7. The submission of the petitioner is that when the said communication was received, the petitioner realized that in its bid document pertaining to package No. 1, in respect of the aforesaid item No. 2061 of the BOQ, schedule 2(c), i.e., for supply of TM.T. Fe-500 reinforcement steel, a writing/typographical error had crept in inasmuch, as, in the column where the rate was to be quoted, the person filling in the bid document had inadvertently filled in the figure "Rs.2820/-" both in figures and words. The error is explained by pointing that the estimated quantity of this item as mentioned in the BOQ form was 2820 M.T. The submission is that this was an obvious typing/typographical error inasmuch, as, the total amount for this BOQ item was mentioned by the petitioner as Rs.15,22,80,000/- which would be the total amount if the rate of Rs.54,000/- per M.T. is multiplied by the estimated quantity of 2820 M.T. His further submission is that the rate of Rs. 54,000/- per M.T. for this BOQ item had uniformly been quoted by the petitioner in respect of the other bids made by it in respect of packages 2, 3 and the combined package 1 and 3. The submission of the petitioner is that, in fact, there was no arithmetical error and the same was a bona fide human error which occurred on account of fatigue and tiredness of the person filling the tender form as a result of repetitive work. To appreciate this submission of the petitioner, we may extract herein below the relevant entry in the BOQ which contains the rates/amounts mentioned by the petitioner:

“Package -1: HOSPET – HARLAPUR SECTION
BOQ PART – 1

Schedule 2C Supply of Steel Items

S. No.	Description of item	Unit	Qty	Rate (Rs.)		Amount (Rs.) in Fig.
				In Fig	In words	
2061	Supplying TM.T. Fe-500 reinforcement steel conforming to IS:1786-1985 including de-coiling, straightening, cutting, bending, placing in position, binding with 1mm dia GI binding wire. Note: Reinforcement, shall be measured in length for different diameters used in the works and then paid as per standard weights as per IS 1732. Wastages, overlaps, coupling, welded joints, space bars, chairs and binding wire shall not be measured and cost	M.T.	2820	Rs. 2820/-	Rs. Two thousand eight hundred twenty only	Rs. 15,22,80,000/-

	of these items shall be deemed to be included in the rates					
	Total for Bill 2 C (Carried forward to Summary of Part – 1)					<i>Rs. 15,22,80,000/-</i>

(Rs. Fifteen Crore Twenty Two Lakh Eighty Thousand only) ”

The words and figures filled in by the petitioner in hand have been put in italics above.

8. The petitioner sent its reply to the aforesaid communication on 09.05.2012 clarifying that the rate quoted for item 2061 schedule 20(c) of the BOQ was, in fact, Rs. 54,000/- per M.T. , which was the uniformly quoted rate for packages 1, 2, 3 and 1 & 3 (combination). It was pointed out that even the basic rate of this steel item is around Rs. 50,000/- per M.T. This being the position, there was no question of the petitioner quoting the rate of Rs. 2820/- per M.T. The petitioner called upon the respondent to award the contract to it as the petitioner was the lowest bidder in respect of package 1. The petitioner also called upon the respondent not to forfeit the bid security.

9. The respondent No. 1, however, did not accept the petitioner’s clarification and proceeded to invoke the bank guarantee furnished by it to the tune of Rs.2 crores vide impugned communication dated 25.6.2012 issued to respondent No.2 bank. It is at this stage that the petitioner filed the present writ petition. Along with the writ petition, the petitioner also moved an application to seek interim relief being C.M. No. 7998/2012, seeking a

restraint against the respondents for invoking the bank guarantee in question for Rs.2 crores, and also seeking stay of the impugned communications dated 04.05.2012 and 25.06.2012 as aforesaid.

10. When the writ petition was taken up by this Court on 02.07.2012 for the first time, the preliminary objection of the respondents with regard to the non-impleadment of the other JV partner, namely, M/s Bharat Rail Automation Pvt. Ltd. was redressed by the petitioner by stating that the said entity would also be impleaded as a party petitioner. The Court while issuing notice in the writ petition restrained respondent No. 1 – RNVL from invoking the bank guarantee dated 18.08.2011 as extended on 20.4.2012 for the amount of Rs. 2 crores. Respondent No.2 bank was also restrained from making payment under the said guarantee. Respondent No.1 was granted time to file its counter affidavit within two weeks. The same stands filed.

11. The petitioner thereafter moved C.M. No. 8760/2012 to seek further interim protection. It was stated that respondent No. 1 had disclosed that the contract in respect of package 1 stands awarded to the L-2 bidder. The petitioner submitted that the bid of L-2 was more expensive by about Rs. 7 crores. The petitioner consequently sought an order of restraint against respondent No.1 from awarding the contract in respect of package 1 to any party, including to the L-2 bidder. The petitioner also sought a status-quo in respect of the contract in question. This application being C.M. No. 8760/2012 was taken up by the Court on 17.07.2012. On this date, counsel for respondent No. 1 stated that the tender had been awarded to M/s Larsen & Toubro Limited, ECC Division (Engineering), Construction &

Contractors, vide letter of acceptance dated 25.06.2012. In view of the aforesaid statement, we were not inclined to grant any interim stay in the working of the contract, however, it was made clear that the award of tender would not prejudice the rights of the petitioner in the writ petition, nor create any special equities in favour of any party. We also directed the impleadment of M/s Larsen & Toubro Limited as a party respondent and issued notice to them. Consequently, M/s Larsen & Toubro Limited was impleaded a respondent No.3. Upon issuance of notice, they have put in appearance and filed their reply. Respondent No.2 bank has, however, chosen not to appear or file its reply, presumably for the reason that it has no stake or interest in the matter.

12. The stand of the respondent No.1 is that it has evaluated the bid of the petitioner strictly in terms of the bid conditions on the basis of the unit rate quoted by the petitioner both in figure and words. It is argued that if the contention of the petitioner is accepted, the same would result in changing the bid price after opening of the bids and changing the conditions of the bid, which is not permissible. In this regard, reference is made to clauses 24.3, 27.1 and 36.2 of the bid document. It is also submitted that the bids have not only been evaluated by the senior officers of the respondent No.1 in terms of the bid conditions, but also examined by the Asian Development Bank (ADB) which has financed the project in question as the tender in question was a global tender. It is submitted that the work has been awarded to respondent No.3 after the evaluation of the tender was approved by the ADB.

13. At this stage, we consider it appropriate to take notice of some of the relevant terms and conditions of the bid document:

“24. Withdrawal, Substitution, and Modification of Bids

24.1 A Bidder may withdraw, substitute, or modify its Bid – Technical or Price – after it has been submitted by sending a written notice, duly signed by an authorized representative, and shall include a copy of the authorization in accordance with ITB 20.2 (except that withdrawal notices do not require copies). The corresponding substitution or modification of the bid must accompany the respective written notice. All notices must be:

(a) prepared and submitted in accordance with ITB 20 and ITB 21 (except that withdrawal notices do not require copies), and in addition, the respective envelopes shall be clearly marked “WITHDRAWAL”, “SUBSTITUTION”, “MODIFICATION”, and

(b) received by the Employer prior to the deadline prescribed for submission of bids, in accordance with ITB 22.

24.2 Bids requested to be withdrawn in accordance with ITB 24.1 shall be returned unopened to the Bidders.

24.3 No bid may be withdrawn, substituted, or modified in the interval between the deadline for submission of bids and the expiration of the period of bid validity specified

by the Bidder on the Letter of Bid or any extension thereof.

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27.

Clarification of Bids

27.1

To assist in the examination, evaluation, and comparison of the Technical and Price Bids, the Employer may, at its discretion ask any Bidder for a clarification of its bid. Any clarification submitted by a Bidder that is not in response to a request by the Employer shall not be considered. The Employers request for clarification and the response shall be in writing. No change in the substance of the technical bid of prices in the price bid shall be sought, offered, or permitted, except to confirm the correction of arithmetic errors discovered by the Employer in the evaluation of the Price Bids, in accordance with ITB 31.
- 27.2

If a Bidder does not provide clarifications of its Bid by the date and time set in the Employer’s request for clarification, its bid may be rejected.

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31.

Nonmaterial Nonconformities

31.1

Provided that a bid is substantially responsive, the Employer may waive any nonconformities in the Bid that do not constitute a material deviation, reservation, or omission.

- 31.2 Provided that a Technical Bid is substantially responsive, the Employer may request that the Bidder submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial nonconformities in the Technical Bid related to documentation requirements. Requesting information or documentation on such nonconformities shall not be related to any aspect of the Price Bid. Failure of the Bidder to comply with the request may result in the rejection of its Bid.
- 31.3 Provided that a Technical Bid is substantially responsive, the Employer shall rectify nonmaterial nonconformities related to the Bid price. To this effect, the Bid Price shall be adjusted, for comparison purposed only, to reflect the price of a missing or non-conforming item or component. The adjustment shall be made using the method indicated in Section 3 (Evaluation and Qualification Criteria)

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- 33. Correction of 33.1** During the evaluation of Price Bids, the Employer shall correct arithmetical errors on the following basis:
- (a) if there is a discrepancy between the unit price and the total price that is obtained by multiplying the

unit price and quantity, the unit price shall prevail and the total price shall be corrected, unless in the opinion of the Employer there is an obvious misplacement of the decimal point in the unit price, in which case the total price as quoted shall govern and the unit price shall be corrected.

- (b) If there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; and
- (c) If there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed in words is related to an arithmetic error, in which case the amount in figures shall prevail subject to (a) and (b) above.

33.2 If the Bidder that submitted the lowest evaluated bid does not accept the correction of errors, its Bid shall be disqualified and its bid security may be forfeited.

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36. Evaluation of Price Bids 36.1

36.2 To evaluate the Price Bid, the Employer shall consider the following:

- (a) the bid price, excluding Provisional Sums and the

provision, if any, for contingencies in the Summary Bill of Quantities, but including Daywork items, where priced competitively;

- (b) price adjustment for correction of arithmetic errors in accordance with ITB 33.1;
- (c) price adjustment due to discounts offered in accordance with ITB 14.4;
- (d) converting the amount resulting from applying (a) to (c) above, if relevant, to a single currency in accordance with ITB-34;
- (e) adjustment for nonconformities in accordance with ITB 31.3;
- (f) application of all the evaluation factors indicated in Section 3 (Evaluation and Qualification Criteria);

36.3

36.4

36.5 If the Bid, which results in the lowest Evaluated Bid Price, is seriously unbalanced or front loaded in the opinion of the Employer, the Employer may require the Bidder to produce detailed price analyses for any or all items of the Bill of Quantities, to demonstrate the internal consistency of those prices with the construction methods and schedule proposed. After evaluation of the price analyses, taking into consideration the schedule of estimated Contract payments, the Employer may require that the

amount of the performance security be increased at the expense of the Bidder to a level sufficient to protect the Employer against financial loss in the event of default of the successful Bidder under the Contract.”

14. Learned counsel for the petitioner submits that the error in writing the rate of the BOQ item in question is a mere obvious typographical/writing error and that there is no arithmetical error committed by the petitioner. She submits that respondent No.1 ought to have resorted to clause 27.1 read with clause 33.1 of the ITB and sought a clarification since the error is as obvious as an error in the placement of the decimal point. She submits that the respondent No.1 cannot act mechanically and has to act with common sense and rationality while deciding the L-1 bidder, as it affects the public exchequer. She further submits that there was no justification for invocation of the petitioner’s bank guarantee in the facts of the case, and the conduct of respondent No.1 is mischievous.

15. On the other hand, the submission of learned counsel for the respondent No. 1 is that the petitioner having submitted their technical and financial bids, were not entitled to withdraw, substitute or modify the same between the deadline for submission of bids and the expiration of the period of bid validity (clause 24.3). It is argued that upon examination of the petitioner’s bid in question, there was a clear discrepancy between the unit rate quoted by the petitioner for the BOQ item in question at Rs.2,820/- per M.T. and the total price which was mentioned as Rs.15,22,80,000/-. Clause 33.1(a) of the ITB provides that if there is a discrepancy between the unit

price and the total price that is obtained by multiplying the unit price and the quantity, the unit price shall prevail and the total price shall be corrected. It is argued that the petitioner was, therefore, bound by the unit price quoted by it of Rs.2820/- per M.T. and it was the total price which was liable to be corrected to Rs.79,52,400/- in place of Rs.15,22,80,000/-.

16. The submission of respondent No. 1 is that the impugned communication dated 04.05.2012 strictly complied with the aforesaid procedure. It is also submitted that the petitioner may have consciously quoted the rate for the BOQ item in question at Rs.2,820/-, and on finding that even with the total price of Rs.15,22,80,000/- for the BOQ item in question its price bid is the lowest, the petitioner is now seeking to take advantage of the situation by contending that the rate quoted by it should be read as Rs.54,000/- per M.T. for the BOQ item in question. It is further argued that respondent No. 1 failed to carry out the correction of error and, consequently, under Clause 33.2 the respondent No. 1 was entitled to forfeit the bid security of Rs.2 crores.

17. Learned counsel for respondent No.1 further submits that the only exception provided for in Clause 33.1 is where, in the opinion of the Employer, there is an obvious misplacement of the decimal point in the unit price, in which case the total price as quoted shall govern and the unit price shall be corrected. In the petitioner's case there was no issue with regard to the misplacement of the decimal point in the unit price. Consequently, the petitioner was bound to accept the unit price as Rs. 2,820/- per M.T. for the BOQ item in question.

18. Learned counsel for respondent No. 1 further submits that the petitioner having realized its mistake, apparently gave up its claim for the tender in question and was only interested in saving the security deposit made by it. Reference is made to the reply of the petitioner dated 09.05.2012 requesting the respondent No. 1 not to forfeit their bid security.

19. Mr. Seth, learned counsel for the respondent No.1 has placed reliance of the Supreme Court decision in ***W.B.State Electricity Board Vs. Patel Engineering Co. Ltd. and others***, (2001) 2 SCC 451; ***Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India & Ors.***, 155 (2008) DLT 621 (SC); ***National Highways Authority of India Vs. Ganga Enterprises and Another***, (2003) 7 SCC 410; ***State of Maharashtra & Ors. Vs. A.P.Paper Mills Ltd.***, AIR 2008 SC 1788; ***Villayati Ram Mittal (Pvt.) Ltd. Vs. Union of India & Anr.***, AIR 2011 SC 301; and ***Kanhaiya Lal Agrawal Vs. Union of India and others***, (2002) 6 SCC 315.

20. Mr. Seth further submits that merely because the price bid of the petitioner was lower than that of respondent No.3, the respondent RVNL could not have accepted the petitioner's bid in contravention of the bid conditions.

21. On behalf of respondent No.3, Larsen & Toubro Ltd., Mr.Sameer Parekh, Advocate, has made his submissions. Apart from adopting the submissions made by Mr. Seth on behalf of respondent No.1, he submits that the petitioner was extremely callous in its approach inasmuch, as, the bids were invited by respondent No. 1 on 03.06.2011; they were submitted on 19.08.2011; and the financial bids were opened on

24.02.2012, yet the petitioner took no steps to correct its financial bid in respect of the BOQ item in question. He places reliance on clause 24.3 of the bid document which states that no bid may be withdrawn, substituted or modified in the interval between the deadline for submission of bids and the expiration of the period of bid validity specified by the bidder on the letter of bid or any extension thereof. According to him, the petitioner is seeking to substitute or modify its bid by changing the rate from Rs.2,820/- per M.T. in respect of supply of T.M.T. Fe-500 reinforcement steel of the required specification to Rs.54,000/- per M.T. He also placed reliance on clause 27.1 which deals with the aspect of clarification of bids by submitting that no change in the substance, inter alia, of the price bid can be sought, offered or permitted except to confirm the correction of arithmetic errors discovered by the employer in the evaluation of the price bid in accordance with clause 31. Clause 31.1 permits the respondent No.1 - employer to waive non-conformities in the bid that do not constitute a material deviation, reservation or omission. According to him, the change sought to be made by the petitioner in respect of the quoted price for the BOQ item 2061 constituted a material deviation.

22. Mr. Parekh, learned counsel for the respondent No.3 also placed reliance upon clause 33 which permits only a limited correction in the price bid in the case of a discrepancy between the unit price and the total price when there is obvious misplacement of the decimal point in the unit price. He submits that if there is a discrepancy between the unit price and the total price that is to be obtained by multiplying the unit price and the quantity, the unit price shall prevail and the total price shall be corrected.

This is exactly what respondent No.1 has done while issuing the impugned communication dated 04.05.2012. He submits that the real grievance of the petitioner is in respect of the encashment of its bank guarantee. He submits that respondent No.3 has no concern with this aspect and points out that under clause 33.2, it is not obligatory for respondent No.1 to forfeit the bid security as the said clause provides that upon non-fulfillment of the conditions prescribed therein, the bid of the bidder “shall” be disqualified and its bid security “may” be forfeited. He, thus, submits that since in the same clause, both the expressions, “shall” and “may” have been used, it was not mandatory for respondent No. 1 to forfeit the petitioner’s bid security. Mr. Parekh has also produced before this Court the circular issued by the Central Vigilance Commissioner bearing No. 4/3/07 dated 03.03.2007 on the subject of negotiations with the L-1 bidder. This circular stipulates that as post tender negotiations could often be a source of corruption, it is directed that there should be no post tender negotiations with L-1 except in certain exceptional situations. He submits that the present case does not fall in those exceptional situations. Mr. Parekh, Advocate, has also placed reliance on the decisions of the Supreme Court in *Glodyne Technoserve Limited Vs. State of Madhya Pradesh and Others*, (2011) 5 SCC 103, and *Patel Engineering Co. Ltd. and Others* (supra).

23. At this stage itself we may take notice of the fact that during the course of hearing on 9th October, 2012 we had inquired from Mr. Parekh, whether his client would be willing to match the financial bid of the petitioner by reducing the price. Mr. Parekh had sought time to take

instructions on this aspect. On 30.10.2012, Mr. Parekh informed the Court that his client is not willing to match the price of the petitioner.

24. In her rejoinder, learned counsel for the petitioner reiterates that there is no arithmetical error in the present case. The error is purely and simply a typographical/writing error which is evident from the facts and circumstances of the case. She also points out that not only in the relevant column of the total amount the figure of Rs.15,22,80,000/- had been quoted, but even in the summary sheet of Bill of Quantity Part I, at Sr. No. 2 C, against “Project Work, supply of steel items” the same figure of Rs.15,22,80,000/- had been quoted by the petitioner. Thus, there was no scope for any doubt that the typographical/writing error had occurred in filling up the column pertaining to the rate of the said BOQ item. She submits that a bare perusal of the form submitted by the petitioner in respect of BOQ ITEM 2061 would show that it is only a typographical/writing error. She submits that clause 33 of the bid conditions has no application since it deals with correction of arithmetical errors which is not the case in hand. She points out the distinction between the facts of the present case and that decided by the Supreme Court in the case of *Patel Engineering Co. Ltd.* (supra), relied upon by the respondents.

Discussion & Findings

25. A bare perusal of the BOQ filled up by the petitioner in respect of package I, item No. 2061 leaves no manner of doubt that the present is nothing but a case of mere typographical/writing error on the part of the

petitioner in filling up the unit rate. This is evident from the following circumstances:

- (i) The quantity mentioned in the BOQ in respect of item No. 2061 is 2820 M.T. This figure has been printed in the BOQ form. The bidder was required to quote its rate in the next column, firstly, in figures and then, in words. The petitioner penned in hand the rate of Rs.2,820/- and also in words the same rate was filled in. The explanation furnished by the petitioner that the penning down of the same figure, as the estimated quantity, on account of mental fatigue or carelessness appears to be completely plausible;
- (ii) The total amount quoted by the petitioner, however, is much larger, i.e., Rs.15,22,80,000/-. If one were to compute the rate on the basis of which the total amount of Rs.15,22,80,000/- was quoted by dividing the same by the BOQ quantity of 2820, one would arrive at the rate of Rs.54,000/- per M.T.;
- (iii) The petitioner submitted its bids in respect of packages 2, 3 and combination of packages 1 and 3. In respect of the same BOQ item, the rate quoted by the petitioner, admittedly, is Rs.54,000/- per M.T.;
- (iv) The respondents had not disputed the fact that the market rate of the said BOQ item is in the range of Rs.50,000/- per M.T. Therefore, even otherwise, it does not make any sense for any bidder to quote a rate which is about twenty times lesser than the prevalent market rate; and,

- (v) The petitioner quoted the final amount for the said BOQ item at Rs.15,22,80,000/- not only against BOQ item No. 2061, but also while furnishing the figures in the summary sheet of BOQ, Part I. The respondent also adjudged the petitioner as L-1 bidder on the basis of the final amount of Rs.158.76 crores and not on the basis of the unit rate quoted against the said BOQ item No. 2061.

26. During the course of arguments, we enquired from learned counsel for the respondent No. 1 whether the bids in respect of other packages were also simultaneously processed by the same officers, and the answer is in the affirmative. Therefore, respondent No. 1 was well aware that the petitioner had quoted the rate of Rs.54,000/- per M.T. in respect of BOQ item in question while submitting its bid for packages 2, 3 and the combination package of packages 1 and 3. In spite of this being the position, we fail to understand why the respondent No.1 did not deem it appropriate to invoke its power of seeking clarification under clause 27.1 and, instead, proceeding to issue the communication dated 04.05.2012 which, to say the least, appears to be mischievous.

27. Under clause 27.1, it was open to respondent No. 1 to seek clarification from the petitioner of its price bid. The discretion vested in respondent No.1, i.e., whether or not to ask the bidder to furnish a clarification, has to be exercised reasonably and not arbitrarily. The limitation is that while seeking such clarification, the bidder cannot “*change in the substance*” the prices in the price bid. However, the bidder is permitted to confirm the correction of arithmetic errors that may be

discovered by the employer in the evaluation of the price bids in accordance with ITB 31. When respondent No.1 examined the petitioner's bid and found that the petitioner had penned down the rate in respect of the supply of TM.T. – Fe 500 reinforcement steel at Rs.2, 820/-, which incidentally was also the quantity mentioned in the BOQ and, at the same time, total amount quoted was Rs.15,22,80,000/-, which translates to nearly twenty times the amount which would have been arrived at by multiplying the quantity of 2820 M.T. by the rate of Rs.2,820/- per M.T., the respondent ought to have felt the need to seek a clarification particularly when the market rate for the said BOQ item is in the range of Rs.50,000/- per M.T. and the respondent was simultaneously processing the other bids of the petitioner in respect of packages 2 and 3 and combination packages 1 and 3, wherein the petitioner had uniformly quoted the rate of Rs.54,000/- per M.T. for the same BOQ item. Had the respondent No. 1 done a little exercise of reverse calculation, i.e., of dividing the total amount of Rs.15,22,80,000/- by the quantity of 2820 per M.T., it would have arrived at the rate of Rs.54,000/- per M.T. which was also quoted by the petitioner in respect of other packages. Had respondent No. 1 not shut its eyes and mind, as unfortunately it did, it would have been clear to it as day light that there was an obvious typographical/writing error in filling the unit rate by the petitioner.

28. Clause 31.1 gives the employer the power to waive any non-conformities in the bid that do not constitute a material deviation, reservation or omission. Clause 31.3 provides that where the technical bid is substantially responsive, the employer shall rectify non-material, non-

conformities related to the price bid. To this effect, the bid price shall be adjusted, for comparison purposes only, to reflect the price of a missing or non-conforming item or component. In our view, the typographical/writing error committed by the petitioner is nothing more than a non-conformity related to the bid price, since the petitioner correctly quoted the total amount for the BOQ item in question, not only in the relevant column of the BOQ form but also in the summary sheet/Bill of Quantity, Part I.

29. In our view, there is merit in the petitioner's submission that this is not a case of an arithmetical error. An arithmetical error would mean an error in the carrying out the arithmetic exercise of additional/ subtraction/ multiplication or division and where the base figures/numbers on which such arithmetical exercise is carried out are correctly inscribed/ typed. But where a particular base figure/number is itself wrongly noted on account of a typographical/writing error, which is otherwise obvious, the error in the bid document cannot be treated as an arithmetical error. Therefore, in our view, clause 33, in fact, had no application in the facts of the present case, which should have been sorted out by invoking clause 27.1 read with clause 31 of the bid conditions. However, even if one were to examine the present case in the light of clause 33 of the bid conditions which deals with correction of arithmetical errors, to us, it appears that clause 33.1(a) permits the respondent No.1 to correct obvious errors in the price bid. In our view, the mention of the "*obvious misplacements of the decimal points in the unit price*" is only one such instance mentioned as an illustration of an obvious typographical/writing error, and not the only instance when resort could have been had to clause 33.1.

30. We cannot agree with the submission of learned counsel for the respondent that the petitioner was seeking to either withdraw, substitute or modify its price bid, after having submitted the same. Respondent No.1 being a public authority dealing with public funds, owes a public duty to not out rightly reject a bid and that too the lowest bid, on such flimsy and superficial grounds as taken by it in the present case. The result of the actions of respondent No. 1, if sustained, would be that the public exchequer would be poorer by about Rs. 7 crores, since the price quoted by the petitioner - who was otherwise found to be technically qualified, was lower by the said amount. When compared to the bid of respondent No. 3, if the process of evaluation of bids is to be done so mechanically as done in the present case, and without the use of mental faculties, intellect and exercise of human discretion, the exercise could have been left to be completed by machines/computers. However, that is not done because, in the matter of evaluation of bids in a tender process, the employer – particularly when it is a public body dealing with public funds, is expected to function and conduct itself with reasonable prudence expected of any common man in the business. The employer cannot get bogged down by the literal rule, even if there be one (which we do not find in the present case), and throw to winds the basic common sense approach and shut its eyes to such obvious errors, to defeat not only the rights of a deserving bidder, but also sacrifice public interest in the process. Respondent No.1 has failed to prudently exercise the discretion vested in it by the tender conditions to deal with the aforesaid situation. It is clearly a case where the price bid with the full bid amounts has been correctly submitted, but a typographical/writing error has crept in, in respect of one of the items in the BOQ which is but obvious. Therefore,

the reliance placed by Mr. Seth on clauses 24.3 appears to be wholly misplaced.

31. We may examine the case from another perspective. If the respondents would have acted with prudence and reasonableness, and in the given factual background entertained the petitioner's bid by treating the rate for the BOQ item in question as Rs.54,000/- per M.T. (may be after obtaining a clarification, if one was required), could respondent No.3 have entertained a legitimate grievance and successfully assailed the action of respondent No. 1 in a Court of law? In our view, the answer to this question is an emphatic "No". This is so because, in that eventuality the respondent no.1 could have pointed out the obvious and patent typographical/ writing error, as pointed out by the Petitioner, and defended its action as being fair, reasonable and in public interest.

32. We may take notice of a decision of the Calcutta High Court in ***Gouranga Lal Chatterjee and Others Vs. State of West Bengal***, (2002) 253 ITR 678 (Cal) : MANU/WB/0302/2002, wherein the challenge by the petitioner bidder was to the acceptance of the bid of other bidders. The challenge was founded upon the case that the bids of the successful bidders did not conform to the tender condition. The Bank Guarantee furnished was for a duration short by 2 days. The Court rejected this submission by referring to ***Patel Engineering Co. Ltd.*** (supra) in the following words:

"42. In Patel Engineering, MANU/SC/0024/2001 : [2001]1SCR352 the Hon'ble Supreme Court held that clauses in ITB "should be complied with scrupulously" and "adherence to the instructions cannot be given a go-by by branding it as a pedantic approach". It has also been stated that "adherence to

the ITB or rules is the best principle" and in "the best public interest". (see para 24)

43. But the factual context of the case in Patel Engineering, MANU/SC/0024/2001 : [2001]1SCR352 should be considered to appreciate those observations. In Patel Engineering, the learned judges of the Supreme Court found, on facts, that the errors which were sought to be corrected are not mere clerical or mechanical ones. If those errors are allowed to be corrected, that would result in re-writing unit rates in 37 entries and also appending an explanation regarding the splitting of unit rates.

44. The Court held that neither Clause 27 nor 29 or any other clause in ITB permits such a correction (see para 22, page 467). In the context of those facts, the observations about the interpretation of clauses in ITB made in Para 24 of the judgment in Patel Engineering, MANU/SC/0024/2001 : [2001]1SCR352 must be understood.

45. Normally the clauses in a contract cannot be read as one reads the statutory provision. They must be read keeping in mind the intentions of the parties.

46. On a close scrutiny one finds that Clause 16.3 of ITB has two parts. The first part requires that a bid is to be accompanied by an acceptable bid security and secondly it must be secured as indicated in Sub-clauses 16.1 and 16.2. The bank guarantee of a nationalized bank is certainly an acceptable bid security. Now so far as its validity period is concerned, it is stated in the Bank Guarantee dated 13-9-2001 "This guarantee will remain in force upto and including the date 24th February 2002, i.e. 165 days after the deadline for submission of Bids" (page 18 of the Affidavit-in-Opposition by the State). So the intention of the private respondent is to keep the bid security valid upto 165 days after the deadline for submission of bids. Here the intention being clear, the bid of the private respondent cannot be totally thrown out of consideration Just because there was an error in the counting of 165 days from the date of the deadline, in this background

the Court has to keep in mind the factual aspect that the form prescribed for submission of Bank Guarantee clearly provides that the date upto which the Bank Guarantee is to remain "should be inserted by the employer before the Bidding documents are issued".

47. There is, therefore, a clear obligation on the employer to furnish the date. Here, admittedly the employer did not discharge its obligation of furnishing the date. Now will it not be unfair on its part to reject the offer of a qualified tenderer on the ground that the bank guarantee furnished by the tenderer with the clear intention to keep it valid for 165 days falls short by two days by an error of calculation. It is very likely that the errors might have been induced by the failure of the employer to furnish the date. It is not disputed that immediately on detection and before evaluation of the technical bid, the validity period was amended and extended much beyond 165 days.

48. Can the Court, in the aforesaid facts and circumstances describe the action of State respondents to be unfair just because the tender of the private respondents is not rejected on that ground. On the other hand the State respondents considered the tender of the private respondents and also the tender of another party whose bank guarantee was also similarly amended along with the tenders submitted by others including that of the petitioner. It appears from the report dated 28-9-01 of the Evaluation Committee of Technical Bids that the bid securities submitted by the bidders were considered along with the amendments. Therefore, no special favour was shown to the private respondents. Similar treatment was accorded to another tenderer namely Shapoorji Pallorni & Co. Ltd.

49. It has not even been urged by the petitioners that there is any malice in fact or mala fide operating with the State respondents against the petitioner. No such case has been made out.

50. In the context of the facts pointed out above, the conscience of the Court is not disturbed by the action of the State

respondents and it cannot hold that the action of the State is either unreasonable or unfair. On the contrary this Court finds that the State respondents have followed 'relevant, rational and non-discriminatory standards' and that is all what is required of them, as succinctly put by Justice Bhagwati in Ramana, MANU/SC/0048/1979 : (1979)IILLJ217SC in the concluding portion of paragraph 12, after noticing the observation of Justice Frankfurter in Vitraelli v. Seaton, (1959 (359) US 535) in Paragraph 10.”

33. The submission of learned counsel for respondent No.1 that the tender in question being a global tender- the same having been financed by the ADB, their concurrence was required for negotiations with Respondent No. 3 or to deal with the petitioner, is wholly misplaced. Though learned counsel for respondent No.1 has produced before this Court a compilation of internal documents, it has not been shown to us that the case of the petitioner was placed before the ADB in the correct perspective as set out above. The documents only suggest that ADB was not in favour of negotiations with respondent No. 3 since it was projected before the ADB by respondent No.1 that respondent No. 3 is the L-1 bidder, which it was not. For the same reason, reliance placed by respondent No.3 on circular No. 4/3/07 dated 03.03.2007 on the subject of negotiations with the L-1 bidder has no application in the facts of the present case, since the very foundation of the assumption that respondent No.3 was the L-1 bidder appears to be misplaced.

34. The submission of Mr. Parekh that the petitioner is guilty of delay and latches inasmuch, as, even though its bid was submitted on 03.06.2011, at no stage thereafter, the petitioner took steps to correct the error in the rate quoted by it in respect of the BOQ item in question, does not

appear to be correct. This is for the reason that the petitioner had quoted the total amount correctly. The error was only a typographical/writing error which, it appears, did not come to the petitioner's notice till respondent No.1 issued the impugned communication dated 04.05.2012 purporting to make the "correction" of the quoted gross amount for the BOQ item in question. The submission of the petitioner that at the time of the opening of the price bids only the total quoted amounts were read out and that the individual rates quoted in the BOQ were not read out, and on that basis the petitioner was found to be the L-1 bidder, has also not been countered by the respondents. Therefore, the said error did not come to the notice of the petitioner even after the tender opening.

35. The main stay of the respondent's case is the decision of the Supreme Court in the matter of *Patel Engineering Co. Ltd. and Ors.* (supra). We have carefully perused the said decision of the Supreme Court. It appears that the said decision on principles supports the case of the petitioner rather than the case of the respondents. On facts it appears to be a totally different case as we will notice presently. It was because of the facts of that case that the Supreme Court decided against the bidder who had made mistakes and committed omissions in submitting the bid document.

36. Respondents' no.1 to 4, before the Supreme Court, upon opening of the price bids were found to have submitted the lowest bid. While the details of the bid were under scrutiny on 25.10.1999, Respondents no.1 to 4 informed the employer/ appellant that there was "*repetitive systematic computer typographical transmission failure*" and requested that it be corrected. On 17.12.1999, they sent another letter stating that they had

reason to believe the appellant was evaluating their price bid by illogical and incorrect application of the instructions to the bidders (“ITB”). They also pointed out that the mistake indicated in their letter dated 25.10.1999 was that Indian Rupee unit rate stated in the first line, item 0.2 was repeated in the next two succeeding lines, which is clerical in nature and not an arithmetic error. They emphasized that their bid was lowest at Rs. 647.90 Crores and assured that they would maintain the said bid price.

37. The appellant, like in the present case, maintained that there were a good number of arithmetic errors discovered which the appellant sought to correct by implementation of the rules in the ITB (similar to Clause 33 in the case in hand). After correction, they were communicated to respondents’ no.1 to 4. Respondents’ no.1 to 4 assailed the said action of the appellant before the Calcutta High Court. The High Court quashed the appellant’s communication making the corrections and permitted respondents no.1 to 4 to correct their bid. The appellant assailed the order of the High Court before the Supreme Court. The Supreme Court overturned the decision of the High Court in part. The direction of the High Court permitting respondent Nos. 1 to 4 to correct their bid was set aside in the facts of the said case. The factual considerations which weighed with the Supreme Court, which are quite distinct and stand in contrast with the facts of the present case are evident from the following extract from the said decision:-

“15. ...Taking up the first question first, it will be necessary to understand the nature of errors, correction made by the appellant and the relief sought by Respondents 1 to 4 in respect of 37 items in the bid documents.....

16. A perusal of the price bid statement 'A' shows that the unit price filled in by the bidder in the first line against Item 02 — work item — "Rock Excavation" is repeated in two lines — in the second line of the same item and in the first line of Item 03 — work item — "Impervious Core Embankment". In the quantity column, '1000' is noted by the appellant. The unit rate for rock excavation is given by Respondents 1 to 4 in the first line in Indian Rupee as Rs 148.08 both in figures as well as in words. In the amount column Rs 148,077.97 is entered which is arrived at by multiplying quantity, 1000, by unit rate, Rs 148.08. It contains an arithmetical error; instead of Rs 1,48,080.00, it is noted as Rs 1,48,077.97. It has been noticed above that under clause 29.1(b) of the ITB, such an error in the line total in the amount column is amenable for correction and not the unit rate noted by the bidder in the figure column. In the second line, the same entry is repeated though that line should contain unit rate in US Dollar which is rupee equivalent of the unit rate mentioned in the first line. Respondents 1 to 4 seek correction of '148.08' in the second line as '3.38' in the figure column and also in words to conform to 3384.64 which is noted in the amount column, to wit as US Dollar equivalent of 1,48,077.97 Indian Rupee in the first line. This appears to be the import of their letter of 17-12-1999.

17. Respondents 1 to 4 seek correction of the entries in the third line also which is the first line against work item "Impervious Core Embankment". It is plain that against this work item the entries in the first line are quite different. The quantity column is blank, though '3900' should have been noted therein. In that line also the entries in the first line are repeated. There the correction sought is that the figure column should read as 84.21 both in figure and words. It is stated that in the second line the unit rate 1.92 both in figures and words, represents US Dollar equivalent of 84.21 Indian Rupee which is now sought to be inserted. The errors in the other 36 items are said to be similar...

18. With regards to the mistakes in the bid documents, for the first time Respondents 1 to 4 informed the appellant in their letter of 25-10-1999 which runs as follows:

*‘Re: Purulia Pumped Storage Project Lot No. 4
Main Civil Works — Resubmittal Price Bid.*

Dear Sirs,

We regret that certain repetitive systematic computer typographical data transmission failure have occurred in items as per attached annexure in our bid submitted to you on 8-9-1999.

In order to dispel any doubts, we hereby unconditionally declare that we stand by the amounts (both INRs and US \$) against the affected Schedules A to I, announced at the opening of the revised price bid on the 8th of September at WBSEB and reiterate that there is no change in the price or substance of our bid. Our unit bid prices should be computed accordingly for the aforesaid items.

This letter is strictly without prejudice to our rights and contentions.’

19. It may be noticed that in this letter they informed that certain mistakes had crept in the items mentioned in the annexure to the letter and declared that no change in the price or substance of the bid was asked for and that they stood by the amounts announced at the time of the bids on 8-9-1999. **However, the actual mistakes are not pointed out.**

20. In their letter of 17-12-1999 they attempted to clarify the position. The relevant excerpt of that letter may be quoted here...

...Here, though the nature of mistakes are pointed out yet the scope of the correction sought is not indicated.

22. Now, reverting to the relief of correction of errors, Mr Chidambaram has argued that in the two lines against each of the work items, the first line denotes 50 per cent of the quoted unit rate in Indian Rupees and the second line represents the other 50 per cent of the unit rate in US Dollars. According to him the actual rate quoted for quantity 1000 is the sum total of the two lines i.e. 148.08 in Indian Rupees plus 3.38 in US Dollars. This is not noted either in Statement 'A' or in Statement 'B'. Be that as it may, quoting the unit rate 50 per cent in Indian Rupees and 50 per cent in US Dollars is not provided for in the ITB. Nothing is brought to our notice to justify splitting of unit rate in that ratio. There is no indication of this fact in the price bid documents submitted by the said respondents to explain that the unit rate has been so quoted. This is also not in conformity with clause 15 of the ITB which, as noted above, requires a bidder to quote unit rates and prices in Indian Rupees and either in US Dollars or Japanese Yen. The learned Additional Solicitor General, in our view, is right in his submission that till the representation was made by the said respondents on 23-12-1999, after the interim direction of the High Court, the appellant was unaware of the quoted unit rate being in such proportion. A combined reading of the ITB and the annexure, extracted above, makes it clear that the second line against each work item is meant for writing US Dollar or Japanese Yen equivalent of the "unit rate and line total in the amount column" entered in the first line and not for writing bifurcated unit price in different currencies in the ratio of 50:50. On these facts, the errors cannot be termed as mere clerical or mechanical. Permitting correction of such errors, if they can be so called, would result in not only rewriting unit rates in 37 entries in which such errors are said to have been committed but also appending an explanation thereto regarding splitting of unit rates in terms of representation dated 23-12-1999 of Respondents 1 to 4. Neither clause 27 and 29 nor any other clause in ITB permits such corrections.

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25. For all these reasons, in such a highly competitive bid of global tender, the appellant was justified in not permitting Respondents 1 to 4 to correct the errors of the nature and the magnitude which, if permitted, would have given a different complexion to the bid. The High Court erred in directing the appellant to permit Respondents 1 to 4 to correct the errors in the bid documents.

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28. In the instant case, we have also noted that the mistakes in the bid documents of Respondents 1 to 4, even though caused on account of faulty functioning of computer, could have been discovered and notified by the said respondents with exercise of ordinary care and diligence. Here, the mistakes remained in the documents due to gross negligence in not checking the same before the submission of bid. Further clauses 24 and 27 of the ITB permit modification or withdrawal of bids after bid submission but before the deadline for submissions of the bids and not thereafter. And “equity follows the law”. Having submitted the bid they did not promptly act in discovering the errors and informing the same to the appellant. **Though letters were written on 25-10-1999, and 17-12-1999, yet the real nature of errors/mistakes and corrections sought were not pointed out till 23-12-1999 when representation was made after interim direction of the High Court was given on 21-12-1999. Indeed it appears to us that they improved their claim in the representation. In our view the said respondents are not entitled to rectification of mistakes/error for being considered along with the other bidders.** (emphasis supplied)

38. The clear factual distinctions which emerge in the present case contrasted with the case before the Supreme Court are as follows:

- (i) The errors in the case before the Supreme Court were numbers – as many as 27 as opposed to 1 in the present case;
- (ii) Respondent Nos. 1 to 4/bidder did not clearly point out the exact errors in the bid in the first go. It made a bald statement in the first letter dated 25.10.1999 and some disclosure of the errors in the subsequent letter dated 17.12.1999. In fact, during the course of hearing before the Supreme Court, the Id. Counsel for respondent Nos. 1 to 4 sought to point out “errors” which were even borne out from the record (as noticed in para 22 quoted above). In contrast, the petitioner clearly disclosed not only the error but the reason therefore, and even gave its justification in its first prompt communication dated 09.05.2012 in response to the impugned communication dated 04.05.2012.
- (iii) As noticed hereinabove, the final decision of the Supreme Court concluding that respondents no.1 to 4 could not be permitted to correct errors was founded upon the nature and magnitude of the said errors and because the Supreme Court found that, if permitted, correction of such errors would give a “different complexion” to the bid. However, in the present case the typographical/ writing error is all too obvious and it certainly cannot be said that the correction of such an error by the petitioner would give a different complexion to the petitioner’s bid, or that its nature or magnitude is such that the correction of the same would give any undue advantage to the petitioner or cause any loss to the exchequer.

39. We are fortified in our view by various other findings and observations of the Supreme Court in this very judgment which, we would now like to refer to.

40. While dealing with the errors pointed out by respondents no.1 to 4 in relation to work item “Impervious Core Embankment” as extracted hereinabove, the Supreme Court went on to observe :-

“17....Had the errors been confined to these aspects, it would not have resulted in material change in the unit rate because the unit rate in one of the permissible currencies is correctly given and there will be no discrepancy as envisaged in sub-clause (b) of clause 29.1. It would not really be a case of incorporating a new unit rate but a case of either recording US Dollar equivalent of the unit rate already noted in Indian Rupee or vice versa as given in statement ‘B’ above. In such a case, perhaps, they would have been entitled to equitable relief of rectification of mistake. But here, as would be shown presently, the position is different.”

41. In respect of the two communications issued by respondents no.1 to 4 dated 25.10.1999 and 17.12.1999, seeking to make corrections and offer clarifications in their price bid, the Supreme Court observed as follows:-

“21. The appellant could not have ignored these letters. Had the appellant taken note of these letters and the mistakes occurring due to repetition of entries in 37 items in the bid documents, it would not have proceeded with correction of such mistakes and evaluation of their bid without first seeking clarification from Respondents 1 to 4 under clause 27.1. We have already referred to the gist of that clause. The only prohibition contained therein is that no change in the price or

substance of the bid after its opening can be sought, offered or permitted. In that regard they had made their position clear. The prohibition is, therefore, not attracted. In these circumstances any reasonable person in the position of the appellant would have sought clarification from Respondents 1 to 4 under clause 27.1. Even assuming that after the letter of 17-12-1999, no further clarification was required to be sought by the appellant, we cannot but hold that correction of the errors taking note of the unit rates which are mere repetition of the unit rates quoted for a different work item, is mechanical and without application of mind by the appellant. In our view such a correction is far beyond the scope of clause 29. From the description of the mistakes, noted above, and the correction and evaluation made by the appellant, it is evident that except the error in the first line against the work item "Rock excavation" and Schedule 'N' day work, all other mistakes/errors are beyond the scope of clause 29.1, so clause 29.2 will not be attracted. It follows that the corrections in the bid documents of Respondents 1 to 4 carried out by the appellant, evaluation of bid under clause 29.2 and the impugned communication of the appellant dated 18-12-1999 are unsustainable and of no consequence."

(emphasis supplied)

42. The aforesaid observations of the Supreme Court show that the respondent no.1 herein could not have sought to make corrections in the petitioner's price bid by treating the quoted rate as Rs.2820 per M.T. and, on that basis, to correct the total quoted price for the BOQ item in question to Rs.79,52,400/- from Rs.15,22,80,000/- . The aforesaid extract also shows that the correction sought to be made by respondent no.1 in the petitioner's bid vide their impugned dated 4.5.2012 is mechanical, and without application of mind. The said correction goes far beyond the scope of Clause 33 of the ITB. The aforesaid extract also shows that the respondent no.1 should have sought clarification from the petitioner under Clause 27.1,

since the total price bid of the petitioner in the aggregate in respect of the BOQ item in question, had repeatedly and consistently been correctly stated. That was the only reasonable way for respondent no.1 to proceed in the facts of the present case.

43. We may also take note of the general principles culled out by the Supreme Court in Para 27 of its judgment from the decision of the Supreme Court of USA, (relied upon by respondents no.1 to 4 therein), in ***Moffett, H. and C. Co. vs. Rochester***, 178 US 373 : 44 L Ed 1108, which reads as follows :-

“27. Exceptions to the above general principle of seeking relief in equity on the ground of mistake, as can be culled out from the same para, are:

(1) Where the mistake might have been avoided by the exercise of ordinary care and diligence on the part of the bidder; but where the offeree of the bid has or is deemed to have knowledge of the mistake, he cannot be permitted to take advantage of such a mistake.

(2) Where the bidder on discovery of the mistake fails to act promptly in informing to the authority concerned and request for rectification, withdrawal or cancellation of bid on the ground of clerical mistake is not made before opening of all the bids.

(3) Where the bidder fails to follow the rules and regulations set forth in the advertisement for bids as to the time when bidders may withdraw their offer; however where the mistake is discovered after opening of bids, the bidder may be permitted to withdraw the bid.”

(emphasis supplied)

The Supreme Court in the facts before it held in para 28 that respondent's no.1 to 4 had failed to point out at the real nature of the errors/ mistakes and the corrections sought to be made at the earliest, which is a clear distinction in the facts of the present case. In the present case, respondent No. 1 – the offeree clearly sought to take advantage of an obvious error committed by the petitioner, even though the petitioner pointed out the mistake at the earliest when it came to their notice.

44. The Supreme Court has also dealt with and distinguished another judgment of the Superior Court of New Jersey, USA, in *Spina Asphalt Paving Excavating Contractors. Inc v. Borough of Fairview*, 304 NJ Super 425, relied upon by respondents' no.1 to 4. We consider and appropriate to extract para's 29 and 30 from the Supreme Court decision which not only sets out the decision of the Superior Court in *Spina* (supra) but also the distinctions sought to be made by the Supreme Court.

“29. Mr Chidambaram relied upon a decision of the Superior Court of New Jersey in *Spina Asphalt Paving Excavating Contractors. Inc. v. Borough of Fairview* [304 NJ Super 425] to justify the claim for rectification of mistakes. In that case, the Borough of Fairview invited tenders. Spina and one Tomaro participated in the bid. The bid was on a unit price basis and the proposals were submitted on forms supplied by the Borough. The bid specifications provided, inter alia:

“In the event there is a discrepancy between the unit price and the extended total, the unit price shall prevail. The Borough reserved the right to waive any informality if deemed in the best interests of the owner.”

In the evening when the bids were opened, Spina discovered that its secretary had erroneously indicated the unit price for

one of the items as 400 dollars per square yard though it should have been 4 dollars per square yard as reflected in the total bid for that work. Spina faxed the Borough indicating that the intended unit price was 4 dollars per square yard. On the basis of 400 dollars per square yard Spina's bid was calculated which obviously worked out far higher than the intended bid amount. Taking note of that amount the Borough awarded the contract to Tomaro. Spina instituted action claiming that the Borough arbitrarily failed to recognise that its bid was lower than that of Tomaro. The Law Division held that the error in the bid was non-material and subject to waiver. The Superior Court while agreeing with the Law Division observed that *they did not hold that generally an error in the statement of a price could be treated as immaterial and it was only when as in that case the error was patent and the true intent of the bidder obvious that such an error might be disregarded*. The Superior Court held that when as in that case the failure to waive the deviation would thwart the aims of the public bidding laws, the municipality was obliged to grant the waiver. (emphasis supplied)

30. Though clause 29 in this case appears to be similarly worded as in the bid documents in *Spina case* [304 NJ Super 425] a close reading of these clauses shows that no power of waiver is reserved in the case on hand. That apart, the nature of the error in these two cases is entirely different. There, the error was apparent \$ 400 for \$ 4, non-material and waivable by the Corporation; in the present case the errors pointed out above are not simply arithmetical and clerical mistake but a deliberate mode of splitting the bid which would amount to rewriting the entries in the bid document and cannot be treated as non-material. Therefore, the judgment in *Spina case* [304 NJ Super 425] does not help Respondents 1 to 4.”

In our view, no such distinction can be drawn in the facts of the present case.

45. The Supreme Court culled out the principles of law laid down in *Tata Cellular vs. UOI* (1994) 6 SCC 651, which, inter alia, are that the modern trend points to judicial restraint in administrative action; the Court does not sit as a Court of appeal, but merely reviews the manner in which the decision was made; and, that the Government must have freedom of contract i.e. there should be fair play in the joints to enable an administrative body to function in its field. However, the decision must not only be tested by application of Wednesbury Principle of reasonableness, but must be free from arbitrariness, not affected by bias or actuated by mala fides.

46. The observations made by the Supreme Court in Para's 23 and 24 of its decision in *Patel Engineering Co. Ltd. and Ors.* (supra), relied upon by the respondents have to be understood in the context of the other observations made in the very same judgment as extracted above. So far as delay is concerned, in our view there was no delay as the petitioner responded promptly and exhaustively once the respondents pointed out the mistake committed by the petitioner and sought to take undue advantage of it. Moreover, the ITB conditions in the present case and in particular Clause 31 dealing with and "non-material non-conformities" either does not appear to have been present in the tender conditions considered by the Supreme Court in *Patel Engineering Co. Ltd. and Ors.* (supra), or appears not to have been brought to the notice of the Supreme Court and not considered by it. The tender conditions in the present case, in our view, provide sufficient elbow room to respondent no.1 to intelligently and by use of good discretion to deal with such like situations with a view to preserve and protect the public interest and act in a prudent business like manner. There would have

been no question of any discrimination, arbitrariness or favoritism, had respondent no.1 called for the petitioner's clarification and treated the petitioner's quotation, as in other bid packages, of Rs. 54,000 per M.T. for the BIQ item in question.

47. The judgment of the Supreme Court in *Ganga Enterprises and Anr.* (supra), relied upon by respondent No.1, pertained to an entirely different issue from the one arising in the present case. In the said case, the issue was whether the security deposit in the form of a bank guarantee, submitted along with the offer could be forfeited when the offer stood withdrawn. There is no such withdrawal of its offer by the petitioner in the present case. For the same reason the judgment of the Supreme Court in *A.P. Paper Mills Ltd.* (supra) also has no bearing on the case at hand

48. The petitioner's bid security could not have been forfeited, not only for the reason that the action of the respondent in treating the quoted rate of the petitioner at Rs.2,820 per M.T. in place of Rs. 54,000 per M.T. for the BIQ item in question is completely erroneous, but also because Clause 33.2, as pointed out by even respondent no.3, uses both the expressions "shall" and "may" in the same sentence. It provides that if the bidder that submitted the lowest evaluated bid, does not accept the correction of errors, "*its bid shall be disqualified and its bid security may be forfeited*". Therefore, the forfeiture of the bid security is not a mandatory and respondent no.1 is required to use its discretion in every case to take an informed and reasonable decision whether, or not, to forfeit the bid security in the facts of the case. In our view, the facts of the present case certainly did not justify the impugned action of respondent no.1 in seeking to forfeit

the petitioner's bid security. It is not a case of the bidder intentionally backing out and withdrawing from its bid after having consciously made the same. At the highest, it could be said that it was a case of an unintended error in the making of the bid- which could not visit such a bidder with an exorbitant penalty of Rs.2 crores, by forfeiture of the bid security.

49. In ***Kanhaiya Lal Agarwal*** (supra), the issue before the Supreme Court was whether an offer along with a rebate, conditioned upon acceptance within a stipulated time, could have been accepted when the tender/bid conditions did not contemplate any attachment of rebate conditions. There is no issue of rebate in the present case and, as such, the said decision would not come to the aid of the respondents' case.

50. ***Villayati Ram Mittal (Pvt.) Ltd.*** (supra), relied upon by respondent no. 1 was a case of material deviation, wherein the tenderer by correcting its initial offer with regards to the cost of work, failed to stand by its original offer on account of which the contract could not come through. Since such is not the position in the present case, as explained hereinabove, the said decision of the Supreme Court would be of no avail.

51. The judgment of the Supreme Court in ***Seimons Public Communication Networks Pvt. Ltd & Anr.*** (supra), relied upon by respondent No.1 dealt with entirely different set of facts when compared to the present case and, as such, does not advance its case. In that case, at the time of submitting the bid, the appellant inserted the words "As Required" in the column of "Quantity" against the Item No.11 and its unit price in the "Unit Price" column. The "Total Price" Column was left blank. Thereafter,

when the commercial bids were opened, the contractor sought to explain that the quantity quoted be read as “1”, and it also sought to fill up the “Total Price” Column. The High Court upheld the action of the respondent No.2 in not accepting the substituted bid of the appellant, which came to be affirmed by the Supreme Court in appeal.

52. The decision in *Goldyne Technoserve Limited* (supra) is also not relevant for the present purposes since the same, unlike the present one, was a case wherein the bid was rejected on account of incomplete documentation.

53. In the light of the aforesaid discussion, we are clearly of the view that the petitioner is entitled to succeed in the present writ petition. The conduct of respondent No. 1 has clearly harmed the interest of the petitioner and the bid of the petitioner, who was L-1 bidder, has been wrongly rejected.

54. The question which arises for our consideration is what is the relief to be granted to the petitioner in the facts of the present case. The stand of respondents is that the contract in question was awarded to respondent No. 3 on 20.06.2012 i.e. about 5 months ago. The entire work, as per the date of completion is required to be completed within 42 months. The work in question entails the construction of roadbed, major and minor bridges and tack linking, S & T, General Electric Works in connection with doubling between Hospet (including) to Harlapur (including) – Km 143.22 to 74.000 on Hubli division of South Western Railway in Bellary, Koppal and Gadag Districts in Karnataka State.

55. From the above, it follows that less than 1/8th i.e. about 12.5% of the time has elapsed and major portion of the work is yet to be undertaken. We had put the respondents to caution vide our order dated 17.07.2012 (i.e. less than one month from the date of the award of the work to respondent No. 3) that the award of the tender to respondent No. 3 would not prejudice the rights of the petitioner and would not create any special equities in favour of any party. Therefore, the factum of award of the work under tender to respondent No. 3 and of the passage of about 5 months thereafter would not give the respondents the right to claim that the contract, which is underway, should not be disturbed. At the same time, we are equally concerned about the public interest involved in the matter as the works being undertaken by the respondents is a public work and its completion within the stipulated period is in larger public interest. Disruption of the contract awarded to respondent No. 3, unless it becomes unavoidable, should therefore be avoided. We are equally concerned that the enormous loss has been caused to the exchequer due to the illegal conduct of respondent No. 1 as the price bid of the petitioner is significantly lower when compared to that of respondent No. 3.

56. Having considered all these aspects, we pass the following directions:

- (i) We grant one opportunity to respondent No. 3 to match the price bid of the petitioner within 7 days from today. In case the respondent No. 3 accepts to do the work in question at the said price, respondent No. 3 shall continue to perform the contract awarded to it. In that eventuality, the petitioner shall be entitled to ad hoc damages

quantified at Rupees Five Crores [considering that the tendered value of the work is Rs. 158,76,29,854/- (Rupees One Hundred Fifty Eight Crores Seventy Six Lakhs Twenty Nine Thousand Eight Hundred and Fifty Four Only)] and it shall be open to the petitioner to claim any further damages that it may have suffered from respondent No. 1 on account of being denied the right to perform the work in question.

We have quantified ad hoc damages, as aforesaid, keeping in view the fact that the rate of return in engineering and construction contracts is generally accepted as 7.5% as per industry norms. Reference in this regard may be made to the Office Memorandum ('O.M.') No.: DGW/MAN/184 dated 08.06.2009 issued by the Director General of Works, Central Public Works Department. This O.M. seeks to clarify earlier O.M.'s and states that the contractors profit is assumed at 7.5%. However, considering the fact that the present is a large contract we can safely assume the profit margin at 5% of the tendered cost. Thus computed, the returns for the petitioner, had the contract in question been awarded to it, would have been Rs. 7,93,81,492/- (Rupees Seven Crores Ninety Three Lakhs Eighty One Thousand Four Hundred and Ninety Two only) on its tendered costs of Rs.158,76,29,854/- (Rupees One Hundred Fifty Eight Crores Seventy Six Lakhs Twenty Nine Thousand Eight Hundred and Fifty Four Only). However, since the petitioner is being awarded the damages now, without waiting for the entire period to get exhausted and without having to undertake the risks associated with the working of the contract, we are of the view that the return/ damage/ loss of profit

needs to be discounted further. Consequently, we have awarded damages to the petitioner at Rupees Five Crores.

- (ii) In case respondent No. 3 is not willing to reduce its contract price to the price offered by the petitioner within 7 days, the award of the contract in question by respondent No. 1 to respondent No. 3 vide letter of acceptance dated 25.06.2012 shall stand quashed and respondent No. 3 shall stop the work forthwith. The remaining works under the contract then shall be awarded to the petitioner being the L-1 bidder who shall complete the work on its tendered rates, by reading the rate for BOQ item No. 2061 Schedule 2(c) i.e. for supply of TMT – Fe 500 reinforcement steel of the specified specification at Rs. 54,000/- per M.T. Since the contract in question is a rate contract, we do not foresee any complication in the petitioner carrying out the remaining work under the contract. For the same reason, we do not foresee any complication in the measurement and payment of the work done by respondent No.3.
- (iii) We quash the impugned communication dated 04.05.2012 issued by respondent No. 1 purporting to make corrections in the petitioner's price bid in respect of BOQ item No. 2061 Schedule 2(c), and direct that the rate for the said item be read as Rs. 54,000/- per M.T. We also quash the communication dated 25.06.2012 issued by respondent No. 1 to respondent No. 2 bank invoking the bid security of the petitioner and restrain respondent No. 1 from invoking the said bid security on the ground that the petitioner has not accepted the

correction made by respondent No. 1 by its impugned communication dated 04.05.2012.

57. The writ petition, accordingly, stands disposed of in the above terms.

58. The petitioner shall also be entitled to costs payable by respondent No. 1, quantified at Rs. 25,000/-. Costs be paid within 30 days.

(VIPIN SANGHI)
JUDGE

(SANJAY KISHAN KAUL)
JUDGE

DECEMBER 12, 2012

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