

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

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Date of decision: 8th September, 2015

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W.P.(C) No.2037/2012 & CM No.4421/2012 (for stay)

GVR INFRA PROJECTS LTD.

..... Petitioner

Through: Mr. A.D.N. Rao, Mr. A. Venkatesh
and Ms. Neelam Jain, Advs.

Versus

**NATIONAL HIGHWAY AUTHORITY OF INDIA
AND ORS**

..... Respondents

Through: Ms. Meenakshi Sood, Adv. for NHAI.
Mr. Vikas Mahajan, CGSC with Mr.
Rohan Gupta, Advs. for R-3.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition was filed impugning the letters dated 13th March, 2012 and 2nd April, 2012 of the respondents No.1&2 National Highways Authority of India (NHAI), (respondent No.3 is Union of India) to the petitioner notifying the petitioner that the bid submitted by it to the tender for construction of new bridges / structures, repair of existing four lane highway from Baleshwar to Kharagpur Section of NH-60 in the State of Orissa / Odhisha & West Bengal was incomplete (non-responsive) and asking the petitioner to, in terms of the tender conditions, deposit 5% of the value of the bid security i.e. Rs.23.55 lakhs with the respondent No.1 NHAI

within seven days and threatening to otherwise partially encash the Bank Guarantee (BG) submitted by the petitioner along with the bid.

2. The petition was entertained and referring to the judgment dated 10th March, 2011 of the Division Bench of this Court in W.P.(C) No.8418/2010 titled *M/s. Madhucon Projects Ltd. Vs. National Highways Authority of India*, the encashment of BG by the respondents No.1&2 NHAI was stayed, subject to the petitioner keeping the BG submitted alive to the extent of Rs.23.55 lakhs.

3. The respondents No.1&2 NHAI has filed a counter affidavit. The order dated 19th May, 2015 records that the Special Leave Petition (SLP) preferred by the respondents No.1&2 NHAI against the judgment aforesaid in *M/s. Madhucon Projects Ltd.* supra was dismissed by the Supreme Court on 17th March, 2015.

4. The counsels have been heard.

5. Clause 3.2.2 of Volume No.I titled “Instruction to Bidders” of the tender documents provided for the “Tests of Responsiveness” and Clause 2.20.7(a) under the head of “Bid Security” provided for the consequence of

payment of damages restricted to 5% of the value of the bid security for submitting a non-responsive bid.

6. The respondents No.1&2 NHAI vide the impugned letter dated 13th March, 2012 informed the petitioner that upon opening of the bids in the presence of the representative of the petitioner, the online bid submitted by the petitioner was found to be incomplete and vide impugned letter dated 2nd April, 2012 asked the petitioner as aforesaid to deposit 5% of the value of the bid security amounting to Rs.23.55 lakhs.

7. The counsel for the petitioner has raised two contentions. Firstly, it is contended (i) that the bid, as per the tender conditions, was required to be submitted in a hard copy as well as online; (ii) that no default was found in the bid submitted by the petitioner in the form of hard copy; (iii) though the petitioner had submitted the same bid online but the same, for reasons beyond the control of the petitioner and owing to technical glitches, remained to be received by the respondents No.1&2 NHAI; (iv) the petitioner thus cannot be said to have submitted a non-responsive bid; and, (v) that once the bids were required to be submitted in physical form as well as online, even if the bid in the online form remained non-responsive, the same was immaterial, since the same was only by way of abundant caution

and the bid submitted in physical form was enough. Reliance in this regard is placed on ***Poddar Steel Corporation Vs. Ganesh Engineering Works*** (1991) 3 SCC 273 in para 6 whereof it was held that as a matter of general proposition, it cannot be said that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail and is not entitled to waive even a technical irregularity of little or no significance.

8. The second contention of the counsel for the petitioner is that the Division Bench of this Court in ***M/s. Madhucon Projects Limited*** supra has held the said clause of payment of 5% of the bid security for submitting a non-responsive bid to be bad in law. However, the counsel has fairly stated that the respondents No.1&2 NHAI in this regard is relying on the order dated 18th March, 2015 of the Supreme Court in Civil Appeal No.3053/2015 titled ***National Highways Authority of India Vs. MEIL-EDB LLC (JV)*** with respect to the same clause *inter alia* holding that the question whether any damage has occurred to the respondents No.1&2 NHAI owing to submission of non-responsive bid should be left to be considered by the Civil Court and a Writ Court should refrain from adjudicating the said controversy. The counsel for the petitioner thus fairly admits that the judgment of the Division Bench of this Court in ***M/s. Madhucon Projects***

Limited supra holding the said clause to be *per se* bad, can no longer be said to be good law.

9. It thus follows, that if NHAI claims to have suffered a loss on account of the bid submitted by petitioner being a non-responsive one and claims to invoke the BG therefor and the petitioner controverts, the same question has to be adjudicated in a Civil Court and not in a writ jurisdiction.

10. As far as the first of the aforesaid contentions of the petitioner is concerned, in my view the adjudication thereof also would require examination and cross-examination of witnesses, to determine whether the bid submitted by the petitioner indeed was responsive or non-responsive. Even otherwise, it is felt that once the claim is to be relegated to the Civil Court, there should not be any piecemeal adjudication and the entire controversy should be decided by the same Court. Such piecemeal adjudication has always been deprecated. Reference in this regard can be made to ***Moolchand Khairati Ram Hospital & Ayurvedic Research Institute Vs. Secretary (Labour), GNCTD*** MANU/DE/1135/2001, ***Al-Qahtani Pipe Coating Terminal Vs. Minerals Sales (P) Ltd.*** MANU/MH/1278/2008, ***Claridges Hotel Pvt. Ltd. Vs. M.M. Bhagat & Co.*** 92 (2001) DLT 61 and also to ***D.P. Maheshwari Vs. Delhi Administration***

(1983) 4 SCC 293. It will have to be determined, whether the requirement of submitting the online bid was a superfluous requirement for the said clause to be covered by the dicta of the Supreme Court in *Poddar Steel Corporation* supra. Moreover, in *Poddar Steel Corporation* the question was, whether the authority inviting the tender is entitled to vary the non-essential terms thereof or not and whether the acceptance of the bid can be challenged on this ground. Conspectus of the controversy in *Poddar Steel Corporation* supra was thus in an entirely different context from as has arisen in the present case. Here, it is not the respondents No.1&2 NHAI which is seeking to tweak with the tender conditions but it is the bidder, who after having agreeing to the tender terms and of submitting a bid, is now wanting to contend that non-compliance with one of the conditions of the tender would not invite the penal clause. I am therefore of the view that in terms of the judgment of the Supreme Court in *MEIL-EDB LLC (JV)*, the parties, for adjudication of the said controversy also, are required to be relegated to the Civil Court.

11. It is however found that the respondent NHAI, in the impugned letters dated 13th March, 2012 and 2nd April, 2012, demanded the amount aforesaid of Rs.23.55 lakhs being 5% of the value of Bid Security, merely in

accordance with Clause 2.20.7 of the tender document and without claiming to have suffered any damage. Even in the counter affidavit filed to this petition, no plea of having suffered any damage or to the extent of Rs.23.55 lakhs is to be found. Now, the Supreme Court, in **MEIL-EDB LLC (JV)** supra has held that it is for the Civil Court to determine whether any damage is suffered by NHAI and if so, whether deduction of 5% was a fair pre-estimate or was punitive in nature. However, before the said adjudication is relegated to the Civil Court, as done in the judgment supra, it is deemed appropriate that first NHAI takes a decision in this respect in the light of the said judgment of the Supreme Court. If NHAI itself, which till now was claiming in the said amount under the belief that it was due under Clause 2.20.7 supra, decides that now, in the light of dicta of the Supreme Court it is not to be claimed, there would be no need to relegate the parties to the Civil Court.

12. Accordingly, this writ petition is disposed of with the following directions:

- A. NHAI to, on or before 31st October, 2015 take a decision afresh on its claim for the aforesaid sum of Rs.23.55 lakhs against the

petitioner and if decides to persist in the claim, to communicate the same, with reasons, to the petitioner before the said date; else the BG furnished by the petitioner for the said amount be released / discharged by the said date.

B. If the NHAI persists in its claim, the petitioner shall be entitled to contest the same by instituting a suit / arbitration, as may be applicable and if the said suit is instituted by the petitioner on or before 4th December, 2015, the same shall be entertained on its merits without going into the aspect of limitation.

C. The petitioner shall keep the BG, as was being kept alive during the pendency of this petition, till 31st January, 2016.

D. The question, whether the petitioner is entitled to stay of encashment of BG beyond 15th January, 2016 shall be decided in the fora invoked by the petitioner.

E. If there is no stay after 15th January, 2016 against encashment of BG, NHAI shall be entitled to invoke the same and realize monies thereunder subject of course to decision in the proceedings aforesaid.

13. Needless to state that it having been held that this Court is not the appropriate Court to adjudicate the *lis*, none of the observations contained in this order would influence the decision in the proceedings aforesaid.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 8, 2015

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