

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.09.2015

+ **W.P.(C) 8016/2015 & CM 16406/2015**

M/S S. B. TRANSPORT COMPANY

.... Petitioner

versus

CONTAINER CORPORATION OF INDIA AND ANRRespondents

+ **W.P.(C) 8238/2015 & CM 17285/2015**

T.N. SINGH

....Petitioner

versus

CONTAINER CORPORATION OF INDIA LTDRespondent

Advocates who appeared in this case:-

For the Petitioner in WPC 8016/2015 : Ms Maninder Acharya, Sr Advocate with
Mr Vikas Sethi and Mr Kunal Jungid

For the Petitioner in WPC 8238/2015 : Mr Sandeep Sethi, Sr Advocate with
Mr Abhijeet Sinha, Mr Arijit Mazumdar,
Mr Gautam Bajaj and Mr Sindhu Sinha

For the Respondent / Container : Mr Rishi K. Awasthi
Corporation of India

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V. KAMESWAR RAO

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. These petitions deal with the same subject matter and, therefore, are being considered together. We shall first of all take up WPC 8238/2015

(T.N. Singh v. Container Corporation of India Ltd.) and then consider WPC 8016/2015 (M/s S.B. Transport Company v. Container Corporation of India and Anr.).

2. These petitions pertain to a notice inviting tender through e-tendering mode which was issued on 07.05.2015. It was an Online Open Tender under a Two Bid System for the Contract for Terminal Transportation of Loaded / Empty DSO/ISO containers at ICD/TKD. Paragraph 3 of the tender notice was as under:-

“3. Complete tender papers duly accompanied with requisite EMD shall be received online as per date and time mentioned below and may be opened in presence of the bidders or their authorized representatives.

Tender No.	CON/NR/TC/TKD/TTO/2015
Name of Work	Terminal Transportation of Loaded/Empty Containers at ICD/TKD
Estimated Cost	Rs 13,07,55,000/- Per Annum
Period of Contract	4 years +1 year
Earnest Money Deposit	Rs 5,00,000/- through e-Payment.
Cost of Document	Rs 1000/- inclusive of all taxes and duties through e-payment.
Tender Processing Fee	Rs 10,112/- Inclusive of all taxes and duties (Non-refundable) through e-payment.
Date of Sale (Online)	From 07.05.2015 at 15:00 hrs. to 03.06.2015 (upto 16:00 hrs.)
Pre-Bid meeting	21.05.2015 at 15:00 Hrs.

Issue of Corrigendum, if any	On or after 23.05.2015 at 15:00 Hrs. on www.tenderwizard.com/CCIL only
Date & Time of submission of tender	04.06.2015 at 15:00 Hrs.
Date & Time of opening of tender	06.06.2015 at 15:30 Hrs.”

From the above extract, the points which are relevant for consideration of these writ petitions is that an earnest money deposit of Rs 5 lakhs through e-payment was required. Another aspect which needs to be kept in mind is that the cost of the tender document was Rs 1,000/- which was also inclusive of all taxes and duties to be paid through e-payment.

3. Paragraph 4 of the said tender notice stipulated that the EMD was to be paid through e-payment and the receipt of the same was required to be scanned and uploaded in the e-tendering website given therein. The said paragraph also stipulated that the bid document could be downloaded from the website (www.tenderwizard.com/CCIL) and that the intending bidders should submit the document sale price of Rs 1000/- through e-payment at the time of making the online request. At the end of the notice there were several notes which were as under:-

“Note:

1. Tender Document/sets shall be provided free of cost to Micro & Small enterprises (MSE's) registered with the listed agencies.

2. MSEs registered with the agencies for the item tendered will be exempted from payment of Earnest Money Deposit (EMD).
3. MSEs who are interested in availing themselves of these benefits and preferential treatment, the MSEs will enclose with their offer the proof of their being MSE registered with any of the agencies mentioned in the notification of Ministry of MSME indicated below along with the bid.
 - (i) District Industries Centers
 - (ii) Khadi and Village Industries Commission
 - (iii) Khadi and Village Industries Board
 - (iv) Coir Board
 - (v) National Small Industries Corporation
 - (vi) Directorate of Handicraft and Handloom
 - (vii) Any other body specified by Ministry of MSME
4. The MSEs must also indicate the terminal validity date of their registration.

Failing (3) & (4) above, such offers will not be liable for consideration of benefits detailed in MSE notification of Government of India dated 23.03.12”

It would be seen from the above that as per note 1, tender documents were to be provided free of cost to Micro and Small Enterprises (MSEs) registered with the listed agencies. Note 2 prescribed that MSEs registered with the agencies for the item tendered would be exempt from payment of Earnest Money Deposit (EMD).

4. Clauses 4, 5, 7 and 9 of the instructions to tenderers are relevant and they read as under:-

“4. All the Bids received shall be opened on the date and time mentioned above in the tender notice. Financial Bid of the qualified bidders shall be opened on a subsequent date through process of e-tendering, which will be notified to such bidders. The sequence of opening shall be :

- i) **Earnest Money Deposit(EMD)**
- ii) **Pre-qualification Bid.**
- iii) **Financial Bid.**

Note : One representative from each bidder shall be authorized and permitted to attend the bid opening.

5. Evaluation of E-Bids: First, Earnest Deposit will be opened in the presence of the bidder/bidders' representatives who may choose to attend at the time, date and place specified and the bids accompanied with valid bid security will be taken up for opening of the Technical e-Bid documents. At any stage during the evaluation of E-Technical bid, if the EMD is found invalid, the respective Bidder's bid will be summarily rejected (EMD) Exempted for Micro & Small Enterprises)

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7. EMD to be paid through e-payment and the receipt of the same should be scanned and uploaded on the e-tender website, www.tenderwizard.com/CCIL. At any stage during the evaluation of e-bid, if the EMD is found invalid, the respective bidder's bid will be summarily rejected.

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9. Only online "Pre-Qualification Bids", will be opened at 15:30 hours on **06.06.2015**. The Pre-Qualification Bids so received will be evaluated as per eligibility criteria laid down in the tender to determine the suitability of all tenderers. "Financial Bids" of only those tenderers, who qualify after consideration of the "Pre-Qualification Bids", will be opened on a subsequent date and time, to be notified to the qualified tenderers only.”

5. Clause 4 of the Instructions to the Tenderers clearly stipulates the sequence of opening of the bids. First of all, the EMD would be opened

followed by the next stage, that is, the opening of pre-qualification bids and, finally, the third stage which is the opening of the financial bid. Clause 5 of the Instructions to the Tenderers deals with the evaluations of the e-bids at the stage of the opening of EMDs. It clearly stipulates that at any stage during the evaluation of the e-technical bid, if the EMD is found invalid, the respective bidder's bid 'will be summarily rejected'. It also stipulated that EMD for Micro and Small Enterprises would be exempt.

6. Clause 7 which has been extracted above once again makes it clear that if at any stage during the evaluation of e-bid, the EMD is found invalid, the respective bidder's bid 'will be summarily rejected'. Clause 9 as will be seen from the above extract relates to the next stage, that is, the opening of the pre-qualification bids and consideration thereof. The pre-qualification bids were to be opened on 06.06.2015 at 15:30 hours and, in fact, they had been opened at that date and time. The pre-qualification bids were to be evaluated as per the eligibility criteria laid down in the tender conditions to determine the suitability of the tenderers. It is only those tenderers who qualify after consideration of the pre-qualification bids who would progress to the next and final stage of opening of the financial bids which was to be done at a subsequent date.

7. Mr Sandeep Sethi, the learned senior counsel appearing for T.N. Singh, also referred to clause 2 of the tender conditions which related to earnest money deposit. The said clause 2 reads as under:

“2. EARNEST MONEY DEPOSIT:

- 2.1 Each tenderer shall be required to deposit a sum of Rs 5,00,000/- (Rupees Five Lakhs only.) as *Earnest Money along with the Pre-Qualification Bid through E payment at the time of submission of the bid. No interest shall be allowed on the Earnest Money deposited.
- 2.2 Cheques, war bonds, guarantee bonds and Government securities (Stock certificates, bearer bonds, promissory notes, cash certificates) will not be accepted towards the earnest money referred to above.
- 2.3 The documents submitted without EMD will be summarily rejected.
- 2.4 The Earnest Money of the unsuccessful bidders will be returned as soon as possible, after the tender has been finalized.
- 2.5 The earnest money deposited by the successful tenderer will be adjusted towards the security deposit. In case of the bidder choosing any other option, it will be refunded after receipt of the Security Deposit in full.”

On going through the said clause 2 and, in particular, clause 2.3 it is once again evident that documents submitted without EMD would be summarily rejected. Clause 2.5 is also relevant to the extent that the earnest money deposit by the successful tenderer is required to be adjusted towards the security deposit. This was referred to by Mr Sethi in support of the argument that now that the tender had already progressed beyond the stage of issuance

of LOI (Letter of Intent), the requirement of earnest money was no longer a necessity inasmuch as, as will be seen from the facts narrated later, the said T.N. Singh had already given a bank guarantee of Rs 25 lakhs by way of security deposit. It is in this context that Mr Sethi also referred to clause 9 of Chapter II of the Tender Conditions which specifically dealt with security deposit. In particular, he referred to clauses 9.1 and 9.3 which are extracted herein below:-

“9. SECURITY DEPOSIT:

- 9.1 The successful tenderer will be required to furnish a security deposit of **Rs 25,00,000/- (Rupees Twenty Five lakhs only)** towards successful performance under this contract within [15 days] from the date of communication of award of contract in his favour by CONCOR.

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- 9.3 Should a bidder, whose tender has been accepted, decline or fail to remit the security deposit and/or execute an agreement to take up the contract within fifteen days of the acceptance of the tender or within the extended time permitted by ED/CGM, whichever is later, the Earnest Money Deposit mentioned above can be forfeited by CONCOR in full, without prejudice to any other rights or remedies in this regard for breach of contract.”

In the backdrop of the above two clauses Mr Sethi submitted that the relevance of the requirement of an earnest money deposit was that in case the bidder whose tender was accepted declined or failed to remit the security

deposit, the EMD could be forfeited by CONCOR (Container Corporation of India Ltd.) in full without prejudice to any other rights or remedies with regard to breach of contract. It was contended by Mr Sethi that as T.N. Singh had, subsequent to the issuance of the Letter of Intent, submitted a bank guarantee of Rs 25 lakhs by way of security deposit, the requirement of earnest money deposit was no longer relevant.

8. We shall now place on record certain facts. We have already indicated that the notice inviting tender was issued on 07.05.2015 and the last date of submission of the bids was 03.06.2015. It is important to note that T.N. Singh submitted the bid on 02.06.2015 but without the earnest money deposit of Rs 5 lakhs. In fact, T.N. Singh had also not paid any charges towards the bid documents of Rs 1000/-. The exemption from furnishing the EMD and from paying of the bid documents was claimed by the said T.N. Singh on the ground that it was a registered MSME firm. In the covering letter which was furnished along with the bid on 02.06.2015, T.N. Singh had, *inter-alia*, made the following statement:-

“We have not paid EMD of ‘5,00,000/- (Rupees Five Lakh only) through E payment for this tender, for Terminal Transportation of Loaded /Empty Container at ICD/TKD and receipt of the same is uploaded alongwith pre qualification bid as we are an MSME registered firm, registered and approved for a Medium Enterprise. I/ We hereby declare that

his tender on acceptance communicated by you shall constitute a valid and binding contract between us. Date:"

From the above statement two things are evident. First of all, that T.N. Singh has not paid the EMD of Rs 5 lakhs and, secondly, that T.N. Singh claimed to be an MSME registered firm which was registered and approved for medium enterprise. It is, therefore, clear that T.N. Singh was not a micro or small enterprise and this is an admitted position. This is relevant because the exemption for not furnishing the EMD was available only to micro and small enterprises and did not extent to a medium or other enterprises.

9. Subsequent to the submission of the bids on 11.06.2015, CONCOR sent a letter to T.N. Singh pointing out deficiencies in the documents which were submitted by T.N. Singh and, *inter-alia*, required T.N. Singh to submit an acknowledgment in support of its registration under MSME which would entitle it to get the benefit of exemption of EMD and tender fee. In response, on 12.06.2015, T.N. Singh sent a reply submitting a notarized copy of the MSME acknowledgment amongst other documents. The MSME acknowledgment was issued by the Directorate of Micro, Small and Medium Enterprises, Government of West Bengal and clearly indicated that the items of manufacture / type of services rendered by T.N. Singh was 'transport,

hiring and cargo handling services'. The date of issue has been indicated as 02.03.2015, the nature of activity has been shown to service and the category of the enterprise has been shown as 'medium'. It is, therefore, confirmed from the MSME registration itself that T.N. Singh was not a micro or small enterprise but was medium enterprise.

10. At this juncture, we may point out that there was some controversy between CONCOR and S.B. Transport Company on the one hand and T.N. Singh on the other as to whether T.N. Singh was even qualified to be a medium enterprise. But, we need not go into that aspect of the matter and we are refraining from doing so. This is because we are only concerned with the question as to whether T.N. Singh was a micro or small enterprise. It is an admitted position from the above narration of facts that T.N. Singh was not a micro or small enterprise and, therefore, was not entitled to the exemption from submitting the tender fee / price of the document or from furnishing the EMD of Rs 5 lakhs.

11. Continuing with the sequence of events, the technical evaluation was carried out by CONCOR and on 30.07.2015 CONCOR issued a letter to T.N. Singh, as it did to other pre-qualified bidders, informing T.N. Singh that it

had been qualified in the technical bid and that the financial bids were scheduled to be opened on 30.07.2015 at 1600 hours. The financial bids were opened at the stipulated time and place on 30.07.2015 and T.N. Singh's bid along with the others was considered and it was found that T.N. Singh was the L-1 bidder. M/s S.B. Transport Company was found to be L-2. On 03.08.2015 a Letter of Intent was issued to T.N. Singh. The Letter of Intent stipulated that in terms of clause 9, Chapter II of the Tender Conditions, T.N. Singh was required to deposit Rs 25 lakhs towards security deposit within 15 days from the date of communication of the Letter of Intent. Subsequently, on 04.08.2015, T.N. Singh sent a letter accepting the Letter of Intent and thereafter on 08.08.2015 furnished the bank guarantee for the sum of Rs 25 lakhs by way of security deposit. It was also contended by Mr Sethi that based on the Letter of Intent T.N. Singh had altered his position to his detriment. Details whereof were stated in paragraph 13 of the writ petition.

12. Thereafter, S.B. Transport Company filed WPC 8016/2015 on 20.08.2015, *inter-alia*, claiming that the Letter of Intent given in favour of T.N. Singh ought to be cancelled and that the contract be awarded to S.B. Transport Company because T.N. Singh was disqualified and S.B. Transport

Company was, in the real sense, the L-1 bidder. An interim order was passed on 21.08.2015 to the following effect:-

“CM No.16407/2015(exemption)

Exemption is allowed, subject to all just exceptions.

W.P.(C) 8016/2015 & CM No.16406/2015(stay)

The learned counsel for the petitioner submits that the respondent No.2 was found to be L-1 in the subject tender and the petitioner was L-2. She further submitted that the Letter of Intent has apparently been issued to the respondent No.2 on account of it being L-1. She further submits that the respondent No.2 had misrepresented that it was a micro/small scale enterprise when in fact it was not. She has drawn our attention to Annexure P-7, which is at page-293 of the paper book, which is a document issued by the MSME Development Institute, Government of India, Ministry of MSME dated 04.08.2015 which does indicate *prima facie* that the respondent No.2 could not have taken the benefit as a micro/small scale enterprise. The respondent No.2 had participated in the subject tender without submitting any earnest money as it claimed to be exempted on account of it being a micro and small scale enterprise.

Issue notice, returnable on 27.08.2015.

In the meanwhile, no further steps be taken pursuant to the Letter of Intent dated 04.08.2015 issued in favour of the respondent No.2.

Dasti under signature of the Court Master.”

It so happened that on the same date, that is, on 21.08.2015 CONCOR issued a letter to T.N. Singh cancelling the Letter of Intent dated 03.08.2015 with the immediate effect. The cancellation letter is impugned by T.N. Singh in WPC 8238/2015. The said cancellation letter dated 21.08.2015 reads as under:-

“Dated: 21.08.2015

To,

M/s T.N. Singh
Ward- 75, Garden Beach Road
Khidderpore,
Kolkata 700023

Sub: Notice for Withdrawal/Cancellation of Letter of Intent dated 04.08.2015 with immediate effect.

Sir,

It has been found by the Competent Authority that you have deliberately concealed and misrepresented to CONCOR while participating in the E-Tender process for open tender of terminal transportation of Loaded/Empty Containers at Inland Container Depot, Tughlakabad, New Delhi 2015. It has also been observed that you have not only violated the terms and conditions of Tender but have also mischievously with an intention to fraudulently obtain the tender has made and submitted false information with CONCOR.

It is important to mention here that you had been awarded the contract for terminal transportation for ICD/ TKD. You applied as MSME bidder and enclosed with the bid, an EMI II acknowledgment issued by the Directorate of Micro Small and Medium Enterprises, Govt. of West Bengal, Kolkata. You did not submit the EMD and tender cost, while exercising the option available in E-tender (online) for exemption of EMD and tender cost. You were contractually and legally bound to observe and perform all the terms of the Tender Condition in letter and spirit.

However, in response to a clarification sought on 16.06.2015 by the NCR from MSME, Kolkata regarding MSME status of M/s TN Singh in respect of the open tender for H & T works in NCR, the Dy. Director (G&C)/SENET has clarified vide his letter no. F.No_EI/MPM/2013-14 that "This is to inform that as per EM II submitted by the unit, it is a Medium Sector Enterprise in the service sector. Hence, it is not eligible for any exemption in earnest money deposit as the same is permissible only to MSEs (Micro and Small Enterprises)". Hence, you have breached the terms of the Bid and have wrongfully availed the benefit meant for MSEs.

Clause 7.6(c) of the Tender Conditions stipulates that:

"If the tenderer deliberately gives wrong information or suppresses/conceals any information/facts in his tender to make his bid favorable for acceptance of his tender or creates circumstance for the acceptance of his tender fraudulently, then CONCOR reserves the right to reject such tender at any stage of execution without any financial liability. Any loss suffered by CONCOR on this account will be recovered from the contractor. This will be done without prejudice to CONCOR's right to seek any other remedy under law."

Clause 5.2 of the Tender Document provides that "Further, in case if it comes to the notice of CONCOR that the bidder/contractor has forged documents or misrepresented the facts in any manner either to get the contract or during the pendency of the contract, in all such cases CONCOR at its sole discretion may terminate the contract and debar such contractor for a period ranging 1 to 3 years, as deemed fit...."

Hence, in light of the aforesaid facts and circumstances, the Letter of Intent dated 04.08.2015 issued by this office stands withdrawn/ cancelled with immediate effect.

Further, you are liable and responsible to indemnify and compensate this office for all the losses and damages that may be sustained and or incurred due to the aforesaid fraudulent act on your part.

This office also reserves the right to claim damages suffered on account of the misrepresentation and the bank guarantee submitted by you stands withheld and the same shall be encashed after ascertaining the actual loss and damages, in case the loss and damages exceeds the amount of Bank Guarantee, this office reserves its rights to initiate further necessary action against you, as may be available under law at your costs and expenses to recover and realize such excess amount.

Further, the debarring process has been initiated against you and you shall not be able to participate in any future bid by CONCOR for a period of 1 to 3 years.

A copy of this Letter has been retained in this office for future reference.

For:

CONCOR"

The reasons given for cancellation, *inter-alia*, include the fact that although T.N. Singh was neither a micro nor a small enterprise, it had participated in the tender process without furnishing the EMD and without paying the tender fee when it was not entitled to exemption from either. We are not going into the other issues in the impugned letter which indicate that CONCOR has initiated a debarring process and that would take its own course. We are making it clear that we are not expressing any opinion as to whether CONCOR would be within its right to debar T.N. Singh or not.

13. The points urged by Mr Sethi on behalf of T.N. Singh are that the earnest money deposit is no longer relevant because the bidding process has proceeded far beyond that stage and the Letter of Intent has also been issued. The EMD was only relevant till the stage of issuance of the Letter of Intent whereupon if the successful bidder did not furnish the security deposit then the EMD could be forfeited. He submitted that that has not been happened in the present case inasmuch as T.N.Singh has furnished a bank guarantee for the said sum of Rs 25 lakhs and now the non furnishing of the EMD is no longer a relevant consideration. He also submitted that the requirement of furnishing the EMD was not an essential condition of the tender and that non

submission of the EMD was a mere irregularity which, in any event, is now no longer relevant. Mr Sethi placed reliance on **G.J. Fernandez v. State of Karnataka & Ors: (1990) 1 SCR 229**. He placed reliance on the following passages:-

“ Interesting as this argument is, we do not see much force in it. In the first place, although, as we have explained above, para V cannot but be read with para I and that the supply of some of the documents referred to in para V is indispensable to assess whether the applicant fulfills the pre-qualifying requirements set out in para I, it will be too extreme to hold that the omission to supply every small detail referred to in para V would affect the eligibility under para I and disqualify the tenderer. The question how far the delayed supply, or omission to supply, any one or more of the details referred to therein will affect any of the pre-qualifying conditions is a matter which it is for the K.P.C. to assess. We have seen that the documents having a direct bearing on para I viz. regarding output of concrete and brick work had been supplied in time. The delay was only in supplying the details regarding "hollow cement blocks" and to what extent this lacuna affected the conditions in para I was for the K.P.C. to assess. The minutes relied upon show that, after getting a clarification from the General Manager (Technical), the conclusion was reached that "the use of cement hollow block masonry may not be required at all and instead the brick masonry may be used". In other words, the contract was unlikely to need any work in hollow cement blocks and so the documents in question was considered to be of no importance in judging the pre-qualifying requirements. There is nothing wrong with this, particularly as this document was eventually supplied.

Secondly, whatever may be the interpretation that a court may place on the N.I.T, the way in which the tender documents issued by it has been understood and implemented by the K.P.C. is explained in its "note", which sets out the general procedure which the K.P.C. was following in regard to N.I.T.s issued by it from time to time. Para 2.00 of the "note" makes it clear that the K.P.C. took the view that para I alone incorporated the "minimum pre-qualifying/eligibility conditions" and the data called for under para V was in the nature "general requirements". It further clarifies that while tenders will be issued only to those who comply with the pre-qualifying conditions, any deficiency in the general

requirements will not disqualify the applicant from receiving tender documents and that data regarding these requirements could be supplied later. Right or wrong, this was the way they had understood the standard stipulations and on the basis of which it had processed the applications for contracts all along. The minutes show that they did not deviate or want to deviate from this established procedure in regard to this contract, but, on the contrary, decided to adhere to it even in regard to this contract. They only decided, in view of the contentions raised by the appellant that para V should also be treated as part of the pre-qualifying conditions, that they would make it specific and clear in their future N.I.T.s that only the fulfillment of pre-qualifying conditions would be mandatory. If a party has been consistently and *bona fide* interpreting the standards prescribed by it in a particular manner, we do not think this Court should interfere though it may be inclined to read or construe the conditions differently. We are, therefore, of opinion that the High Court was right in declining to interfere.

Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of paras III, V or VI of the N.I.T., it is open to the K.P.C. to decline to consider the party for the contract and if a party comes to Court saying that the K.P.C. should be stopped from doing so, the Court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the K.P.C. cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the K.P.C. made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these situations is present here. Sri

Vaidhyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to Court with any such grievance. The question, then, is whether the course adopted by the K.P.C. has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxations of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in *Ramana's* case (supra) will be readily applied by Courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, M.C.C. is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the M.C.C. and in the K.P.C. going in for a choice of the better on the merits. The appellant had no doubt also urged that the M.C.C. had no experience in this line of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant visa-vis M.C.C. are, however, a matter for the K.P.C. (counselled by the T.C.E.) to decide and not for the Courts. We were, therefore, rightly not called upon to go into this question.

For the reasons discussed above, this appeal fails and is dismissed. But we make no order as to costs.

Appeal dismissed”

He also placed reliance on another decision of the Supreme Court in **Poddar Steel Corporation v. Ganesh Engineering Works And Others: (1991) 3 SSC 273.** Specific reliance was placed on paragraph 6 of the said decision which reads as under:-

“6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank Clause No. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held 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. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in *G.J. Fernandez v. State of Karnataka* ([1990] 2 SCC 488) a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489] but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.”

Finally, Mr Sethi Placed reliance on a decision by a Division Bench of this court in ***Pes Installation Pvt. Ltd. And Ors. V. Union of India and Ors.***:

WPC 1351/2015 decided on 27.03.2015 (= AIR 2015 Delhi 108). Reliance

was placed on paragraphs 23 and 24 of the said decision which read as under:-

“23. Furthermore, the earnest money deposit is required to protect the purchasers against the risk of the bidder’s conduct, which would warrant the forfeiture of the EMD. The EMD is to be forfeited in case the Petitioner withdraws or amends its tender or impairs or derogates from the tender in any respect within the period of forfeiture of its tender or, in case, any information/document furnished in the tender is incorrect, false, misleading or forged. Further, the successful bidder's earnest money is liable to be forfeited, in case, the successful bidder fails to furnish the required performance security within the specified period. None of the stipulated eventualities have arisen. The Petitioner has furnished the EMD, though the same was short by a period of 07 days but the error was rectified immediately on the bid opening and prior to the scrutiny, evaluation and consideration of the bids of the various bidders. The plea of the Petitioner that the discrepancy and error had occurred on account of the amendment of the bid document by the respondents from time to time is plausible. The object of securing the Respondent against the risk of the bidder’s conduct was not, in any way, threatened or imperiled. No unfair advantage had been gained by the petitioner in this process. The petitioner is not stealing a march over any of its competitors by altering its bid amount.

24. The deviation, in our view, is not a material deviation of an essential condition. It is settled law, that as a matter of general proposition it cannot be held 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. The requirements in a tender notice can be classified into two categories “those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition”. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases [Poddar Steel Corporation (Supra)].”

14. The learned counsel appearing on behalf of CONCOR submitted that the earnest money deposit was an essential condition of the tender. Only micro and small enterprises were entitled to exemption from furnishing the EMD. It was contended that T.N. Singh had concealed the fact that it was not a micro or small enterprise and it wrongly claimed exemption from furnishing the EMD. He further submitted that since this was an online bidding process a specific question is put to the bidders as to whether it would be availing of the benefits given to micro and small enterprise or it would be bidding as a general bidder. T.N. Singh specifically opted for the former implying thereby that T.N. Singh held himself out to be a micro or a small enterprise when in fact he was not. It was subsequently found out by CONCOR that T.N. Singh was not eligible to participate in the tender process without having furnished the EMD and it is on realizing this mistake on the part of CONCOR that the letter of cancellation which is impugned by T.N. Singh was issued. The sum and substance of the argument on behalf of CONCOR was that the condition stipulating the furnishing of an EMD was an essential condition of the tender. T.N. Singh was not eligible for exemption. T.N. Singh had not furnished the EMD and, therefore, T.N. Singh's bid ought to have been rejected at the threshold in terms of the

notice inviting tender, the Instructions to Tenderers and the tender conditions which have been extracted above. Therefore, no wrong has been committed by the CONCOR in cancelling the contract which had been awarded to T.N. Singh.

15. We have also heard Ms Maninder Acharya, the learned senior counsel, appearing on behalf of S.B. Transport Company which also participated in the tender process. She also submitted that the requirement of EMD was an essential condition of the tender and unless and until that condition was satisfied, a bidder could not progress to the next stage of pre-qualification and to the final stage of financial bids. She submitted that CONCOR ought to have rejected T.N. Singh's bid at the threshold when it did not furnish the EMD. She further contended that the argument raised by Mr Sethi that the bank guarantee has been furnished for the security deposit and the EMD is now not a relevant consideration would not be tenable. She submitted that the validity of a bid has to be determined at each stage as was the requirement under the tender conditions. It has to be seen at the stage of opening of the earnest money deposits as to whether a particular bidder was qualified or not qualified on that account. At that point of time, T.N. Singh was required to furnish EMD and it had not done so and, therefore, its bid

was liable to be rejected summarily. She submitted that, therefore, there is nothing wrong in CONCOR cancelling the contract which was awarded to T.N. Singh. She, however, in view of the averments made in her writ petition in WPC 8016/2015 claimed that the award of the contract should be made to S.B. Transport company in view of the fact that because T.N. Singh was ineligible, S.B. Transport Company, in reality, was the L-1 bidder. In support of this contention she placed reliance on a decision of a Division Bench of this court in **Inderjit Mehta v. Union of India & Ors.:** WPC **5685/2015** decided on 01.09.2015, where, under similar circumstances, the successful party had been declared as L-1 and the petitioner therein had been declared as L-2 but it was subsequently found that successful party was disqualified as it has submitted an incorrect affidavit. In that context it was held that the successful party could not have been considered at all and as a result, the tender process had to proceed as if that party had not participated. Consequently, the rates quoted by the petitioner therein was regarded as L-1 and the contract was ultimately directed to be awarded to L-1 i.e., the petitioner therein.

16. She also submitted that the decisions in **G. J. Fernandez** (*supra*), **Pes Installations Pvt. Ltd.** (*supra*) and **Poddar Steel Corporation** (*supra*) were

all distinguishable and the factual circumstances in each of these cases were different. She submitted that in **G. J. Fernandez** (*supra*), there was a clear demarcation between para I and para V of the tender conditions, whereas some of the stipulations in para I of the tender conditions were regarded as essential, not all the conditions of para V were construed to be essential but were regarded as ancillary. She submitted that in the present case, there is no such bifurcation as it is abundantly clear that the requirement of furnishing the EMD was an essential condition and not an ancillary one and, therefore, non submission of the EMD would be fatal to the bid and was not a curable irregularity. With regard to the **Poddar Steel Corporation** (*supra*), she submitted that the facts of that case are stated in paragraphs 2, 3 and 4 which read as under:-

“2. In response to a notice inviting tenders by the Diesel Locomotive Works, Indian Railways, in connection with disposal of one lot of Ferrous Scrap, a number of tenders were submitted by the appellant, the respondent 1 and other intending purchasers. The tenders of the respondent 1 and some other bidders were rejected as defective and the appellant's offer being the highest was accepted, and accordingly the appellant deposited a sum of about Rs. 15 lacs. Respondent 1 challenged the decision by a writ petition before the Allahabad High Court contending that there was no defect in its tender and that the tender of the appellant could not have been validly accepted as the necessary condition of payment of Rs. 50,000 as earnest money with the tender had not been complied with. The application was resisted on the grounds (i) that the respondent 1 having not deposited the earnest money at all was not entitled to a consideration of its tender and has no locus standi in the present matter; and (ii) that the appellant had substantially complied with

the requirement by sending with its tender a Banker's Cheque marked and certified by the Union Bank of India as good for payment. The High Court accepted the appellant's first ground, holding that the tender of the respondent had been rightly rejected for failure to deposit the earnest money, but allowed the writ petition on the finding that the appellant also did not satisfy the condition 6 of the tender notice as the earnest money was offered by the Banker's Cheque of a bank other than the State Bank of India mentioned in the said clause. The High Court directed the authorities to consider the other valid tenders and further observed that should the other tenders be found to be unacceptable it would be open to the authorities to invite fresh tenders. The present appeal is directed against this judgment.

3. The case of the appellant has been that its tender mentioned the highest amount of one and a half crores rupees for the 2000 M.T. of Ferrous Scrap which was a very fair price, and the authorities were absolutely right in accepting the same. With respect to the alleged deficiency in the matter of deposit of the earnest amount, the stand is that a Banker's Cheque is as good as cash and especially so when a verification from the bank in question about its authenticity was made and the Bank's assurance to honour the same was obtained. Admittedly, the Tender Committee had taken the precaution of getting the matter confirmed from the appellant's bank before deciding to accept his tender.

4. The relevant Clause 6 of the notice required the tender to be accompanied by earnest money calculated at 5% of the offer under the tender subject to a maximum of Rs. 50,000 and in terms permitted the deposit by cash or by demand draft drawn on the State Bank of India. The defect pointed out by the respondent 1 and accepted by the High Court is in the appellant sending the cheque of the Union Bank of India drawn on its own branch and not on the State Bank. By the impugned judgment it has been held that in view of this defect the authorities had no power to accept the appellant's tender.”

The above extract would reveal that the earnest money of Rs 50,000/- was to be either by deposit in cash or by demand draft drawn on State Bank of India. What had happened was that the bidder therein had submitted a banker's cheque which had been marked and certified by the Union Bank of

India and not on the State Bank. Because of this ‘defect’, the tender of the bidder therein had been rejected. The High Court had accepted the fact that the tender had been rightly rejected for failure to deposit earnest money. The Supreme Court in **Poddar Steel Corporation** (*supra*), however, held that there are two categories of conditions one, which are essential conditions of eligibility and the other which are merely ancillary or subsidiary. The Supreme Court in **Poddar Steel Corporation** (*supra*) followed its earlier decision in **G. J. Fernandez** (*supra*). The Supreme Court held that the High Court had relied upon the decision in **Ramana Dayaram Shetty v. International Airport Authority of India: (1979) 3 SCC 489** but had failed to appreciate that the said case belonged to the first category of cases (which relate to essential conditions of eligibility) where strict compliance of the conditions could be insisted upon. In **Poddar Steel Corporation** (*supra*) the Supreme Court felt that the furnishing of the cheque drawn on Union Bank of India as against the requirement of State Bank of India did not violate an essential condition of eligibility and they had condoned this so-called ‘defect’. It is in this light that the Supreme Court decided the case in **Poddar Steel Corporation** (*supra*) on an entirely different set of facts.

17. With regard to the decision of this court in **Pes Installations Pvt. Ltd.** (*supra*), Ms Acharya submitted that that was also a case where the facts were entirely different from the present case. In that case what had happened was that the bid submission date was being changed from time to time as a result of which the petitioner therein had to alter the validity dates of the bank guarantee which was to be submitted in lieu of the EMD. After the 9th change in the bid submission date, the petitioner therein had furnished the bank guarantee whose validity was short by 7 days. It was not a case where no EMD had been furnished at all and in any event in that case immediately after submission of the EMD which was short by 7 days, the said error was immediately rectified even prior to the scrutiny, evaluation and consideration of the bid of the various bidders. It is in those circumstance and, particularly, in view of clause 28 of the tender conditions therein, that the Division Bench held that the deviation was not a material deviation of an essential condition. It was submitted that in the present case the requirement of furnishing the EMD was an essential condition which had not been complied with by T.N. Singh and, therefore, there was nothing wrong in the cancellation by CONCOR.

18. Having considered the facts of the case and the arguments submitted by the learned counsel for the parties, in our view, the requirement of submitting the EMD was an essential condition of the tender. This is clearly discernible from the mandatory language used in the Instruction to Tenderers as also in the tender conditions. We have already pointed out clause 5 of Chapter 1 of the tender conditions which clearly stipulated that if at any stage during the evaluation of the technical bid, the EMD was found to be invalid, the respective bidder's bid would be summarily rejected. Furthermore, in clause 2.3 of Chapter 2 of the tender conditions it was categorically provided that documents submitted without EMD 'will be summarily rejected'. Clause 7 of Chapter 1 of the tender conditions also stipulates that if the EMD is found invalid at any stage during the evaluation of the e-bid, the respective bidder's bid would be summarily rejected. All these stipulations have been provided without any relaxation or any other condition which would enable us to take a view that the requirement of furnishing the EMD was not an essential condition of the tender. Therefore, this much is clear that the requirement of furnishing the EMD was an essential condition of the tender. It is also an admitted position that T.N. Singh had not furnished the EMD on the ground that it had an MSME

registration. We have also noted the submission made by the learned counsel for CONCOR that this was an online bidding process in which the bidder was specifically required to indicate as to whether it was exempt as a micro or small enterprise or whether it was applying under the general category. T.N. Singh had exercised the option indicating that it was bidding as a micro / small enterprise. Admittedly, T.N. Singh was neither. Therefore, T.N. Singh was required to submit the earnest money deposit which it failed to do. In our view since the requirement of earnest money deposit was an essential condition and T.N. Singh had not complied with the same, he was not eligible to proceed to the next page, that is, of consideration of pre-qualification bid and / or to the further stage of consideration of the financial bids. We agree with the submission made by Ms Acharya that the decisions in **G. J. Fernandez** (*supra*), **Poddar Steel Corporation** (*supra*) and **Pes Installations Pvt. Ltd.** (*supra*) were on entirely different sets of facts and circumstances. There is no dispute with the principles of law laid down in those decisions but the factual matrix of the present case is entirely distinct and different from those obtaining in the said cases. It is clear that there can be two types of conditions – essential and ancillary. If an ancillary condition is deviated from, then there may be

scope for consideration of a particular bid. But if an essential condition which does not permitting any deviation, is not complied with, then the bid is to be rejected summarily and cannot be considered at all. The consequence of this discussion is that T.N. Singh was not entitled to proceed to the next stage beyond the consideration of the EMD and, therefore, there is no question of T.N. Singh being regarded as the L-1 bidder or the successful bidder and in that respect the decision of CONCOR in cancelling the Letter of Intent cannot be faulted.

19. This takes us to the consideration of writ petition filed on behalf of S.B. Transport Company. In view of our decision that T.N. Singh was ineligible and that the cancellation of the Letter of Intent by virtue of the letter dated 21.08.2015 was valid, the next point for consideration is what is to be done with regard to the subject tender. In this regard, we feel that the approach adopted by this court in **Inderjit Mehta** (*supra*) could very well be adopted in the present case also. Since T.N. Singh's bid was not to be considered at all, the tender process would have to be considered as if T.N. Singh had not participated in the same. That being the case, the bid of the S.B. Transport Company would become L-1. CONCOR would have to be treat S.B. Transport Company as L-1 and proceed with the tender process

there from. We may also note that Ms Maninder Acharya on instructions from Shamal Singh, Proprietor, S.B. Transport Company and who is present in court also stated that, so that there is no loss to the public exchequer, they are willing to match the quote made by T.N. Singh. That being the case CONCOR shall consider the bid of S.B. Transport Company as L-1 at the reduced rate equivalent to that which had been offered by T.N. Singh and to award the contract to S.B. Transport Company provided that they comply with all other conditions and formalities.

20. The writ petition No. 8238/2015 is dismissed and writ petition No. 8016/2015 is allowed to the aforesaid extent.

BADAR DURREZ AHMED, J

SEPTEMBER 03, 2015
SU

V. KAMESWAR RAO, J