IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.23734 of 2013

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Nilkamal, Bito Storage Systems Pvt. Ltd., an Indo-German Joint Venture having its registered office at Nilkamal House, Street No. 14, MIDC, Andheri (East) Mumbai - 400093 through its authorized signatory Shri Uday Pankaj Dwivedi son of Late K.N. Dwivedi resident of Chowkshikarpur, P.O. Begumpur, Patna – 800009.

.... Petitioner

Versus

1. The Bihar Medical Services and Infrastructure Corporation Limited through Its Managing Director, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.
2. The Managing Director, Bihar Medical Services and Infrastructure Corporation Limited, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.
3. The Deputy General Manager (Supply Chain), Bihar Medical Services and Infrastructure Corporation Limited, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.
4. The General Manager (Finance and Admin), Bihar Medical Services and Infrastructure Corporation Limited, 5th Floor, Biscomaun Bhawan, Gandhi Maidan, Patna.

.... Respondents

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Appearance:

For the Petitioner : Mr. Ashish Giri, Advocate
For the Respondents : Mr. Lalit Kishore, Sr. Advocate
Mr. Prabhat Kumar Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

Date: 22-09-2016

Heard learned counsel for the petitioner and Sri Lalit Kishore learned senior counsel for the respondents.

2. The present writ petition has been filed for the following reliefs –

> "(i) To issue an appropriate writ/order/direction in the nature of certiorari for quashing the order dated 29.05.2013 passed by the respondent BMSICL forwarded through its General Manager (Finance and Admin.) by which the Branch Manager, IDBI Bank Ltd. which is the

guarantor bank of the petitioner has been directed to transfer an amount of Rs. 6 lac pursuant to B.G. No. 120386IBGB00261 dated 30.11.2012 as the same has been decided to be encashed due to breach in condition 1(a) i.e. for withdrawing its bid during the period of bid validity specified by the bidder in the bid form (Annexure-7).

(ii) To issue an appropriate writ/order/direction in the nature of mandamus directing the respondent authorities to refund the amount of Rs. 6 lacs so encashed pursuant to B.G. No. 120386IBGB00261 dated 30.11.2012 along with interest.

(iii) To hold and declare that in the facts and circumstances of the case condition 1(a) was not attracted as the petitioner had not withdrawn its bid and therefore question of encashing the bank guarantee was not warranted.

(iv) To any other relief or reliefs for which the petitioner is found to be entitled in the facts and circumstances of the case”.

3. According to the petitioner, an Indo-German joint venture, the short facts of the case are that it participated in the tender notice issued in the month of November, 2012 for supply, installation and commissioning of Pallet Racks for Bihar Medical Services and Infrastructure Corporation Limited (for short, “BMSICL”) warehouses in Bihar and the earnest money deposit of Rs. 6,00,000/- was also

furnished by way of bank guarantee vide B.G. No. 120386IBGB00261 dated 30.11.2012 drawn on IDBI Bank. The price bid was opened on 11.01.2013 and out of five participants, the petitioner was found to be the lowest bidder. It appears that on being asked by the Tender Committee whether the petitioner could actually supply the materials, the petitioner in its letter dated 11.01.2013 (reiterated subsequently in an identical letter dated 14.01.2013) stated that a mistake had been committed in quoting the prices, as transportation and installation costs had erroneously not been included. It was therefore stated that if the order were to be placed, the petitioner was not in a position to execute the same and would incur huge losses. The petitioner therefore requested the respondents to take a sympathetic view by permitting rectification of the mistake. By letter dated 04.02.2013 in the nature of show cause, BMSICL informed the petitioner that its financial bid had been rejected by the Tender Committee on the basis of the petitioner's letter dated 11.01.2013 and recommended forfeiture of the petitioner's EMD in form of bank guarantee of Rs. 6,00,000/-. An opportunity was granted to file a representation against the proposed action. In reply to the letter dated 04.02.2013, the petitioner requested for return of the EMD on the ground that the work order had not been awarded to it. By the impugned order dated 29.05.2013, BMSICL then invoked the bank guarantee in view of the petitioner's breach of condition no. 1(a) as the petitioner had withdrawn its bid during the period of bid validity. The

IDBI Bank was required to transfer the amount of Rs. 6,00,000/- to its bank account accordingly.

4. Learned counsel for the petitioner, Mr. Ashish Giri, assails the impugned order of BMSICL invoking the bank guarantee, submitting that the petitioner had never withdrawn its bid during the period of bid validity. He submits that a bare perusal of the letter dated 11.01.2013/14.01.2013 would indicate that it had sought permission for rectification of its calculation mistake in not having included the transportation and installation costs in the rates quoted by it. The petitioner had merely invoked the sympathy of the respondents to permit it to rectify the mistake in order to avoid loss being incurred in case the order came to be placed with it. Such intention was made clear in the petitioner's subsequent letters dated 03.06.2013 and 06.06.2013 asserting that the quoted price remained valid and the bid had not been withdrawn. It is further submitted that the bank guarantee has been invoked by stating the reason to be withdrawal of the bid by the petitioner being a breach of condition 1(a) of the bank guarantee. However, the show cause dated 04.02.2013 indicated that the financial bid of the petitioner had been rejected without reference to the breach of condition 1(a) of the bank guarantee. He relies on the decision of the Hon'ble Supreme Court in *Gorkha Security Services vs. Govt. (NCT of Delhi),* (2014) 9 SCC 105, to support the contention that the specific nature of default was required to be stated show cause notice for

which adverse action was proposed to be taken against the petitioner.

5. On the other hand, Mr. Lalit Kishore, learned senior counsel for the respondent-BMSICL, strongly opposes the writ petition. He submits that the respondents have acted in accordance with law and the decision to invoke the petitioner's bank guarantee cannot be faulted as it is in consonance with the terms thereof as well as the tender. It is pointed out from the show cause notice dated 04.02.2013 that forfeiture of the petitioner's EMD was proposed in the light of the petitioner's letter dated 11.01.2013 itself, wherein the petitioner had, in clear and unequivocal terms, expressed its inability to proceed with the work, if awarded to it, unless the petitioner was permitted to rectify the mistake by adding the transportation and installation cost which had erroneously been missed to be included in the quoted price. The petitioner had clearly communicated to the respondents that -

> "Being the lowest-1, if the order is placed on us, we will not be in a position to execute the same. Even if we are to execute, then considering the freight from our factory situated at Jammu upto your destination, it would be huge loss to us."

Such communication was thus rightly treated as withdrawal of the petitioner's bid even if the petitioner had not specifically used the word 'withdrawal' while communicating its inability to perform the work. It is submitted that the question of any upward revision of quoted price by the lowest tenderer after opening of the financial bid did not arise and such request on the part of the petitioner clearly signified withdrawal of its bid by the petitioner. It is submitted that the word 'rejection' used in the show cause notice has to be understood in the backdrop of these facts.

6. Having heard the parties and on careful consideration of the materials on record, this Court finds the writ petition to be devoid of merit. The petitioner's letters dated 11.01.2013/14.01.2016 clearly indicated its inability to execute the contract at the quoted price, if awarded to it. Acceding to the petitioner's request would have the effect of an upward revision in the quoted rates of the lowest tenderer after opening of the price bid, which would be impermissible. This Court finds it difficult to attach meaning in such communication other than a 'withdrawal' of bid by the petitioner. The petitioner's letters dated 03.06.2013 and dated 06.06.2013 after invocation of the bank guarantee are in the nature of an afterthought and hence of little consequence. It must therefore be held that invocation of the bank guarantee was in accord with condition 1(a) thereof, notwithstanding that BMSICL in its letter dated 04.02.2013 may have stated that the bid of the petitioner was rejected. It is well-settled that if the enforcement is in terms of the bank guarantee, then courts must not interfere as otherwise it would have serious repercussions on commerce, except on two counts, namely, fraud or misrepresentation, neither of which has been pleaded in the instant case. It must also be held that as regards

the show cause notice, the guidelines and directions of the Hon'ble Supreme Court in *Gorkha Securities Services* case (supra) have been adequately and substantially complied with in terms of the BMSICL's letter dated 04.02.2013 issued to the petitioner.

8. This Court is thus not satisfied that circumstances exist in order to justify interference by this Court in its extraordinary writ jurisdiction. The writ petition accordingly stands dismissed.

(Vikash Jain, J)

B.T/Chandran

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	27.09.2016
Transmission Date	N.A.