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

% Judgment delivered on: 16.05.2016

\+ **W.P.(C) 1955/2016 & CM No.8423/2016 (stay)**

CONCLAVE PHARMA PVT LTD. ..... Petitioner

versus

GOVT OF NCT OF DELHI & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Kirti Uppal, Sr Advocate with Mr Rajan Bajaj and Ms Wamika Trehan, Advocates.

For the Respondent : Mr Peeyoosh Kalra with Mr Ankit Khurana, Advocates for respondent Nos.1 and 2.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

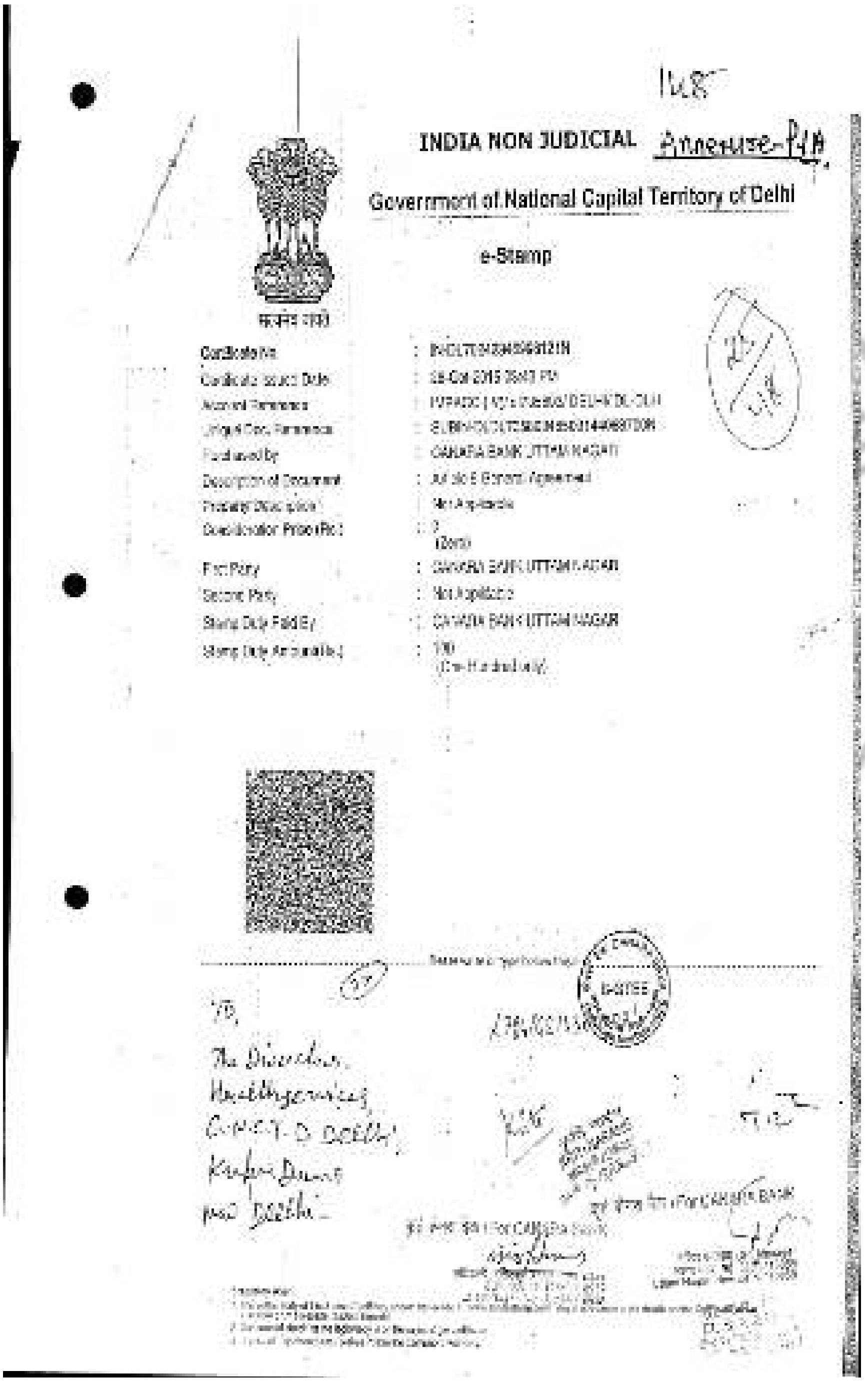
JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

W.P.(C) 1955/2016 & CM No.8423/2016 (stay)

1. This writ petition pertains to an invitation for E-tender for the supply of Anaesthesia and Bio-medical Waste Items being Tender No.1514 issued in September 2015 by the Govt. of NCT of Delhi (Directorate of Health Services). The petitioner participated in the tender. As per the tender conditions and, particularly, Clause 3.1 of the

Instructions To Bidders, the bidders were required to submit an earnest money deposit. The petitioner submitted the EMD by way of a bank guarantee. The bank guarantee submitted by the petitioner is as under:-


INDIA NON JUDICIAL

Government of National Capital Territory of Delhi

e-Stamp

Certificate No.	: [illegible]
Certificate Issued Date	: [illegible] 2015 [illegible] PM
Account Reference	: [illegible] DELHI [illegible]
Unique Doc. Reference	: [illegible]
Purchased by	: CANARA BANK UTTAM NAGAR
Description of Document	: [illegible] Agreement
Property Description	: Not Applicable
Consideration Price (Rs.)	: 0 (Zero)
First Party	: CANARA BANK UTTAM NAGAR
Second Party	: Not Applicable
Stamp Duty Paid By	: CANARA BANK UTTAM NAGAR
Stamp Duty Amount(Rs.)	: 100 (One Hundred only)

To,
The Director,
Health services,
G.N.C.T.D. Delhi,
Karkar Duma
New Delhi

149

BANK GUARANTEE FORMAT FOR FURNISHING EMD

Jemas Condave Pharma Pvt Ltd 19 New Market Ramesh Nagar New Delhi 110015 (Hereinafter called the "Tenderer") has submitted their offer dated......28.10.15...................................... for the supply of Consumables (Hereinafter called the "tender") against the purchaser's tender enquiry No. 1514 [illegible] 2015-16 ......KNOW ALL MEN by these presents that WE ..Canara Bank................... of ..Uttam Nagar................Having our Registered office at ..J.C. Road, Banglore..................... are bound unto ..27/10/17.. (Hereinafter called the "Purchaser) in the sum of Rs 5, 00,000 (Five Lacks) for which payment will and truly to be made to the said Purchaser, the Bank binds itself, its successors and assigns by these presents. Sealed with the Common Seal of the said Bank this...27th.... day of ..Oct.......2015..

THE CONDITIONS OF THIS OBLIGATION ARE:

(1) if the tenderer withdraws or amends, impairs or derogates from the tender in any respect within the period of validity of this tender.

(2) if the tenderer having been notified of the acceptance of his tender by the Purchaser during the period of its validity:-

a) If the tenderer fails to furnish the Performance Security for the due performance of the contract.

b) Fails or refuses to accept/execute the contract.

WE undertake to pay the Purchaser up to the above amount upon receipt of its first written demand, without the Purchaser having to substantiate its demand, provided that in its demand the Purchaser will note that the amount claimed by it is due to it owing to the occurrence of one or both the two conditions, specifying the occurred condition or conditions.

This guarantee will remain in force up to and including 45 days after the period of tender validity and any demand in respect thereof should reach the Bank not later than the above date.

..27/10/2017.......

(Signature of the authorized officer of the Bank)

....

....

Name and designation of the officer

....

Seal, name & address of the Bank and address of the Branch

Bank Gtee No:- [illegible]

Date of Issue :- 27/10/2015

Date of Expiry :- 27/10/2017

Duration :- 2 years

कृते केनरा बैंक / For CANARA BANK

[illegible] / Manager

उत्तम नगर, नई दिल्ली-110059

Uttam Nagar, New Delhi-110059

कृते केनरा बैंक / For CANARA BANK

वरिष्ठ प्रबंधक / Sr. Manager

उत्तम नगर, नई दिल्ली-110059

Uttam Nagar, New Delhi-110059

D. S. [illegible]

2. The last date of submission of the bids was 03.11.2015. One day prior to that, the period of the bank guarantee dated 27.10.2015 for Rs 5,00,000/- was extended by the Bank (Canara Bank, Uttam Nagar, New Delhi). The said letter reads as under:-

"UTTAM NAGAR

"WZ-259, Saheed Chander Marg, Uttam Nagar, New Delhi 110 059 Ph:25375091/92 Tel

fax:25376750

LETTER FOR EXTENSION OF PERIOD OF GUARANTEE

Date: 02/11/2015

To
The Director,
Health services,
G.N.C.T.D,
Delhi

Dear Sir,

Sub: Our Guarantee no.L78GPGE153000001 Dated 27/10/2015 FOR Rs.500000/- Issued to you on behalf of M/S CONCLAVE PHARMA PVT. LTD.

1. The period of the subject guarantee issued in your favour on behalf of M/S CONCLAVE PHARMA PVT LTD O is. Hereby extended up to 27/01/2018.

2. Our liability under this guarantee shall be restricted to an amount not exceeding Rs.500000/- (Rupees Five lacs only) unless a demand or claim under the guarantee hereby renewed/extended is made on us in writing on or before 27/01/2018. We shall be discharged from all liability under the said guarantee thereafter.

3. Notwithstanding anything herein contained our liability under the guarantee hereby renewed/extended shall:

    a) Be limited to a sum of Rs.500000/- (Rupees five lacs only)

    b) Stand completely discharged and all your rights under the guarantee shall stand extinguished if no claim or demand is made upon us in writing on or before 27/01/2018.

c) This letter forms an integral part of the original guarantee referred to above and may be kept attached thereto.

Yours faithfully,

For CANARA BANK

Sd/-

Sr. Manager."

3. The technical bids were opened sometime in January 2016. The petitioner is aggrieved by the letter dated 03.02.2016, which was addressed to it, whereby the EMD submitted by it in the form of the said bank guarantee dated 27.10.2015, issued from the Canara Bank for the said amount of Rs 5,00,000/- in respect of the subject tender was released. No reasons were communicated to the petitioner as to why the bank guarantee was returned.

4. Mr Kalra, appearing on behalf of the respondents, has brought the relevant files with him and, based on the said documents, he submitted that the bank guarantee was non-compliant and, therefore, the petitioner's bid was found to be non-responsive. According to Mr Kalra, the bank guarantee was non-compliant because the petitioner had incorrectly filled in the date “27/10/17” after the words “are bound unto.......”. In that place in the format of the bank guarantee, the petitioner, according to the respondents, was required to fill in **-** “The Director Health Services, GNCT of Delhi, Karkardooma, New Delhi.” According to Mr Kalra, this was an error of a substantial nature in respect of an essential condition of eligibility. It was further submitted that the condition requires strict literal compliance and since the bank guarantee was incorrectly filled in, the respondents were left with no option but to reject the petitioner’s bid as being non-responsive.

5. On the other hand, Mr Uppal, Senior Advocate, appearing on behalf of the petitioner, submits that this was an inadvertent error and did not, in any way, diminish the liability of the bank towards the respondents. He pointed out that the stamp paper itself clearly indicated that the bank guarantee was addressed to the Director, Health Services, GNCT, Delhi, Karkardooma, New Delhi. Secondly, the third line of the bank guarantee itself referred to the “purchaser’s tender enquiry No.1514 dated 28.10.2015” and it is only the respondents which could be construed as being the purchaser and the bank was bound unto the purchaser. Furthermore, it was pointed out that this inadvertent mistake had occurred in the recital whereas in the main clause where the bank binds itself, there is no error, as the bank has undertaken to pay the purchaser, which clearly happens to be the respondents.

6. In any event, prior to the last date on which the bids were to be submitted, the bank also issued a letter for extension of the period of the bank guarantee. The very same guarantee is referred to by the said bank and the subject matter itself indicated that the said bank guarantee had been issued to the Director, Health Services, GNCT, Delhi on behalf of the petitioner. Clearly, the bank had bound itself under the guarantee to the respondent. This is also evident from paragraph 3(c) of the letter dated 02.11.2015, issued by the bank, which reads as under:-

> "This letter forms an integral part of the original guarantee referred to above and may be kept attached thereto."

In other words, the bank had clearly bound itself under the guarantee to the respondent on 02.11.2015 itself i.e., before the last date of submission of bids, which was 03.11.2015.

7. We agree with the submissions made by the learned counsel for the petitioner that the bank guarantee read alongwith the extension letter dated 02.11.2015 clearly indicates that the bank had bound itself under the said guarantee to the respondent. We also agree that the mistake of filling in "27/10/17" after the words "are bound unto", appearing in the bank guarantee, was an inadvertent mistake and did not alter the liability of the bank under the said bank guarantee.

8. The decision of this Court in ***PES Installations Pvt. Ltd v. Union of India:*** **AIR 2015 Del 108** has been correctly relied upon by Mr Uppal. Taking a cue from the said decision, we are clear that no unfair advantage had been gained by the petitioner because of the inadvertent mistake and that the petitioner was not stealing a march over any of its competitors because of it. The bank had also categorically bound itself under the guarantee to the respondent when the bank guarantee and the extension letter dated 02.11.2015 are read together in the correct perspective. Rejecting the bid of the petitioner in these circumstances would be a very hyper-technical view of the matter when the position of the respondents was not, in any way, altered to their detriment.

9. The decision cited by Mr Kalra, on behalf of the respondents, in the case of ***Titagarh Wagons Ltd. v. Container Corp. of India Ltd.***: **2009(2)**

AD (Delhi) 748 is distinguishable and not applicable in the facts of the present case. In that case, the petitioner was required to submit an unconditional bank guarantee which it did but the bank guarantee was short by 30 days. Subsequently, an extension of a bank guarantee was submitted but that extension was conditional. The Court found that the petitioner's extension of the bank guarantee had been done only for the purposes of the said writ petition and that the petitioner therein did not deserve to have the benefit of the equitable jurisdiction of a writ Court. The facts in the present case are entirely different as already noted above.

10. Consequently, the letter dated 03.02.2016 is quashed and the petitioner's bid is to be treated as responsive on this ground.

11. The writ petition is allowed as above.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

MAY 16, 2016
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