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

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Judgment delivered on: 19.04.2016

+ **WP(C) No. 3267/2016**

ABHI ENGG. CORPORATION PVT. LTD.

.... Petitioner

versus

NTPC LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Anil Sapra, Sr. Adv. with Mr Kartik
Nagarkatti, Mr Abhinav Malhotra

For the Respondent : Mr Sanjay Jain, ASG with Mr Bharat Sangal,
Ms Ruchi Jain, Mr Sarfaraz Ahmad and Ms Varnika

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition pertains to the notice inviting on-line bids dated 09.02.2016 issued by the NTPC Limited (the respondent herein) for Ash Dyke Package for Mouda Super Thermal Power Project, Stage-II (2x660 MW) located at Mouda in Nagpur district, State of Maharashtra, India. The petitioner participated in the said bidding process and submitted its on-line bid on 22.03.2016. The petitioner is aggrieved by the letter dated

31.03.2016 which it received from the respondent on 07.04.2016 whereby the bid security offered by the petitioner in the form of the bank guarantee dated 18.03.2016 for the value of Rs. 1,42,94,000/- issued by State Bank of India, Nagpur, was returned on the ground that the bid security was not as per the bidding document.

2. It is an admitted position that the bank guarantee which was submitted by the petitioner was not in the exact format as prescribed under bidding documents. The bank guarantee as submitted by the petitioner along with its bid contained an additional clause which was to the following effect:-

“Notwithstanding anything contrary contained in any law for the time being in force or banking practice, this guarantee shall not be assignable or transferable by the beneficiary. Notice or invocation by any person such as assignee, transferee or agent of beneficiary shall not be entertained by the Bank. Any invocation of guarantee can be made only by the beneficiary directly.”

NTPC requires that this clause in the bank guarantees which were issued earlier by the State Bank of India be deleted because it restricted the power of NTPC to assign the bank guarantee. In point of fact, after the proforma for the bank guarantee for the bid security, which was part of

the bid documents there are several notes appended. Notes 4 and 5 are relevant and they read as under:-

“4. While getting the Bank Guarantee issued, Bidders are required to ensure compliance to the points mentioned in relevant Form of Bank Guarantee Verification Check List enclosed in Section-VII of bidding document. Further, Bidders are required to fill up this Form and enclose the same with the Bank Guarantee.

5. In case, Bank Guarantee is getting issued from State Bank of India, Bidder to take note of NTPC letter ref. NTPC/FC/CS/BG/01 dated 03.09.2014 and SBI letter ref. CAG-1/AMT-1/2014-15/370 dated 04.09.2014 attached with Terms & Conditions of Contract.”

3. Note 4 extracted above clearly draws the attention of bidders to submit the bank guarantee after the verification check list is gone through and answered as “Yes” or “No” against each of the items specified therein. Serial No.6 of the bank guarantee verification check list of bid security requires the bidder to answer the question- “Does the bank guarantee compare verbatim with the proforma prescribed in the bidding documents?” Similarly serial no.9 requires the bidder to answer the question – “whether the bank guarantee has been issued by a bank in line with the provisions of bidding documents?” Both these questions have to be answered either in the affirmative or in the negative. It is fairly stated

by the learned counsel for the petitioner that both these questions were answered in the affirmative. In other words, the petitioner had confirmed that the bank guarantee submitted by them as bid security was comparable verbatim with the proforma prescribed in the bidding documents and secondly that the said bank guarantee issued by the bank (State Bank of India) was in line with the provisions of the bidding documents.

4. But, as pointed out above, the bank guarantee submitted by way of bid security by the petitioner, in fact, did not compare verbatim with the proforma bank guarantee stipulated under the bidding documents. The bank guarantee submitted by the petitioner contains the above extracted clause which has been specifically deleted by the respondents by virtue of the bidding documents.

5. Furthermore, note 5 referred to above clearly drew the attention of the bidder that in case the bank guarantee for bid security was to be issued by the State Bank of India, the bidder was to take note of the NTPC letter dated 03.09.14 and the State Bank of India letter dated 04.09.2014 which were attached with the terms and conditions of the contract. The two letters dated 03.09.2014 and 04.09.2014 are as under:-

“Ref. No. NTPC/FC/CS/BG/01

Date: 03rd September 2014

Deputy General Manager,
State Bank of India,
CAG Branch,
12th floor, Jawahar Vyapar Bhavan, 1, Tolstoy Marg,
New Delhi 110 001

Kind Atten: Sh. Sandeep Mishra

Sub: Format of the Bank Guarantee (BG) issued by State
Bank of India- reg.

Dear Sir,

NTPC Limited is India's largest Power Company and a Maharatna PSU' with a significant presence in the entire value chain of power generation business. The procurement process of NTPC requires its participating Bidders to submit Bank Guarantees (BGs) as Bid security/other securities in a fixed format provided by NTPC. It has been observed recently that BGs issued by various branches of State Bank of India are inserting the following additional clause.

QUOTE

Notwithstanding anything contrary contained in any law for the time being in force or banking practice, this guarantee shall not be assignable or transferable by the beneficiary. Notice or invocation by any person such as assignee, transferee of agent of beneficiary shall not be entertained by the bank. Any invocation of guarantee can be made only by the beneficiary directly.

UNQUOTE

The inclusion of the aforesaid clause in the BGs restricts the rights of NTPC under the BG and it may not be possible for NTPC to accept the aforesaid clause in the BGs submitted to us by our Bidders. It may also be mentioned that incorporation of the above additional clause in the BG results in the BG being returned by NTPC and consequently rejection of the bids of parties that have submitted such BGs.

In view of the above, it is requested that please take up at appropriate levels so that suitable instructions are issued to all your branches not to incorporate any such additional clause and henceforth BGs may be issued strictly as per NTPC format only.

Kindly acknowledge the receipt of this letter.

Yours faithfully,
Sd/-
(K.P. Gupta)
General Manager (Finance)

Copy for kind information : ED(CC&M)”

“Shri K.P. Gupta,
General Manager (Finance),
NTPC Limited
Scope Complex, 7, Institutional Area,
Lodhi Road,
New Delhi: 110 003.

CAG-11/2014-15/370

04.09.2014

Dear Sir,

Format of the Bank Guarantee (BG) issued by State Bank of India

We refer to your letter dated 3rd September 2014 wherein you have requested for excluding bidders/vendors of NTPC from insertion of additional Clause restraining assignment/ transferability of BG.

Looking at our relationship with NTPC, as a very special case, we have since obtained waiver from our Authorities for excluding NTPC from insertion of the referred clause for BGs issued in your favour.

We are taking steps to issue suitable instructions to our offices for exclusion of this clause for BGs issued in favour of NTPC. In case any bidder or vendor submits to you a Bank Guarantee issued by any of our Branches containing the additional clause as mentioned above, request you to please bring it to our notice and advise us so that we can take-up with the concerned Branch for excluding it.

This is for your information and necessary action please.

Yours faithfully,

(Sandeep Mishra)
Deputy General Manager &
Relationship Manager, AMT-1”

It is, therefore, clear from the above that the petitioner was made aware of the fact that the bank guarantee was not to contain the clause referred to above.

6. Clause 5 of the Invitation for bids stipulated as under:-

“5.0 All bids must be accompanied by Bid Security for an amount of INR 1,42,94,000/ (Indian Rupees One Crore Forty Two Lacs Ninty Four Thousand only). Bid Security and Integrity Pact shall be submitted in a sealed envelope separately offline by the stipulated bid submission closing date and time at the address given below. Any bid without an acceptable Bid Security and Integrity Pact shall be treated as non-responsive by the employer and shall not be opened.”

Clause 14.2, 14.3 and 14.4 of the instructions to bidders are also relevant and they read as under:-

“14.2 The Bid Security offered shall, at Bidder's option, be in one of the forms out of a crossed Demand Draft / pay orders/ Banker's Cheque or an unconditional and irrevocable Bank Guarantee from a Bank, as specified in Bid Data Sheet. The format of the Bank Guarantee towards Bid Security shall be in accordance with the format prescribed in the Bidding Documents.

14.3 The Bid Security shall remain valid for a period of forty five (45) days beyond the original bid validity period or beyond any extension in the period of bid validity subsequently requested. The Bank Guarantee Verification Checklist duly filled in as per format given in the Bidding Documents will also be submitted in this regard. Bidder shall ensure that all the points of check list are replied in "Yes".

14.4 Any bid not accompanied by an acceptable Bid Security in accordance with the aforesaid provisions shall be rejected by the Employer and returned to the Bidder without being opened.”

On reading the above clauses it is evident that the respondent required a bidder to submit the bank guarantee by way of bid security after strictly complying with the form prescribed in the bidding documents. It also stipulated that the bank guarantee verification check list should be duly filled in as per the format given in the bidding documents and the bidder was to ensure that all the points of the check list were replied with “Yes”.

7. Mr Sapra, the learned senior counsel appearing on behalf of the petitioner made two submissions. The first submission was that the initial bank guarantee which had been submitted by way of bid security carried the additional clause which was an inadvertent oversight. It had merely requested the State Bank of India at Nagpur to issue the bank guarantee which it did in the usual format available with the said bank. Unfortunately that format contained the clause which had specifically been deleted as per the correspondence between the respondent and State Bank of India to which we have already alluded to above.

8. Mr Sapra also submitted that as soon as it received the communication dated 31.03.2016 on 07.04.2016 from the respondent, the petitioner contacted its bank (State Bank of India, Nagpur) and got the bank guarantee rectified by deleting the said clause. The rectified bank guarantee was sent to the respondent on 11.04.2016. Thus, according to Mr Sapra as soon as the petitioner got to know of its mistake, it rectified the same.

9. The second point urged by Mr Sapra was that deletion of the said clause from the earlier format of bank guarantee which was being furnished by State Bank of India was really not an essential condition of the bid and in any event the petitioner had substantially complied with the bid condition. He placed reliance on the following decisions:-

1. **Poddar Steel Corporation v. Ganesh Engineering Works and Other:** (1991) 3 Supreme Court Cases 273;
2. **Kapsch Metro JV v. UOI & Anr:** 2007 (95) DRJ 668 (DB);
3. **M/s Telecommunications Consultants India Ltd. v. M/s Bharat Sanchar Nigam Ltd:** 2014 SCC On Line DEL 7013; and
4. **B. Himmatlal Agrawal v. Western Coalfields Ltd.:** 2010 (7) Mh. L.J. 350.

10. On the other hand Mr Sanjay Jain, the learned ASG, appearing on behalf of the respondent submitted that the petitioner might have had a

case if the petitioner had not been specifically made aware of the deletion of the said clause from the bank guarantees which were to be given by State Bank of India on behalf of the bidder. He specifically referred to note 5 after the bank guarantee format which clearly drew the attention of the bidders to the two letters, one by NTPC and other by State Bank of India dated 03.09.2014 and 04.09.2014, respectively. We have already extracted those letters above. He further pointed out that the instructions to bidders also clearly stipulate that the bid documents must be in strict conformity with the prescribed proforma and that the bidder should also go through the bank guarantee verification check list and ensure that each of the points is checked and replied with the word “Yes”. Therefore, according to Mr Jain, the bidders were specifically made aware of the fact that the bank guarantee format which had been given in the bidding documents had to be strictly complied with and no deviation was acceptable. It was also pointed out that because of these specific notes and clauses it is evident that the requirement of the bank guarantee for the bid security amount being in complete conformity with the proforma prescribed was an essential condition which could not be deviated from. Secondly, Mr Jain submitted that the respondent cannot be faulted for not opening bid of the petitioner and returning the bid security which was

submitted by way of the bank guarantee dated 18.03.2016. Mr Jain also referred to the Supreme Court decision in the case of W.B. State Electricity Board v. Patel Engineering Co. Ltd. And Others- (2001) 2 Supreme Court Cases 451. A specific reference was made to the following passages:-

“23. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as "a repetitive systematic computer typographical transmission failure". It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondent Nos.1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one and a half month of opening of the bids will also be violative of Clauses 24.1, 24.3 and 29.1 of ITB.

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

26. Mr.Chidambaram, however, submitted that in equity respondent Nos.1 to 4 would be entitled to relief of correction of mistakes. He invited our attention to para 84 of the American Jurisprudence (Second Edition, Volume 64, Page No.944). It will be useful to quote the relevant part of that para here:

"As a general rule, equitable relief will be granted to a bidder for a public contract where he has made a

material mistake of fact in the bid which he submitted, and where, upon the discovery of that mistake, he acts promptly in informing the public authorities and requesting withdrawal of his bid or opportunity to rectify his mistake particularly where he does so before any formal contract is entered into."

The principle is based on the judgment of the Supreme Court of U.S.A. in *Moffett. H. & C. Co. Vs. Rochester*². There the plaintiff gave proposals by way of bid for two works of excavation of earth, quoting the unit rate 1.5 Dollar instead of 15 Dollars and 50 cents instead of 70 cents per cubic yard. The City of Rochester which called for tenders, was promptly informed of the mistake by the plaintiffs agent as soon as it was discovered but before entering into contract. However, the proposal of the plaintiff was accepted by the City of Rochester in regard to one work and the other work was allotted to another bidder. The plaintiff declined to enter into a contract with the City of Rochester which took steps to enforce execution of the contract. The plaintiff filed the suit for correction of proposals to conform to the asserted intention in making them and for execution of the contract on corrected rates or alternatively for the recession of the proposals. It also sought injunction against the officers of the City of Rochester declaring it to be defaulter, its bond forfeited or enforced. It was found that the price noted was grossly inadequate and far below what would be the actual cost of the work under the most favourable circumstances. The trial court decreed the suit holding that the proposals of the bidder be rescinded, cancelled and declared null and void, and of no effect and granting the injunction prayed for. But on appeal the decree was reversed by the circuit court of appeals. On further appeal to the Supreme Court of U.S.A., it was observed that both the courts below found that there was a mistake and while the trial court opined it was clear, explicit and undisputed, the court of appeal was of the view that it was not a mistake in any legal sense but was a negligent omission arising from an inadequate calculation of the cost of the work and held that the mistake was not sufficient to preclude a claim for relief if the mistake justified it. The Supreme Court relied on

the following observation in an earlier judgment of that Court in Hearne Vs. New England Marine Ins. Co³.

"A mistake on one side may be a ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified."

And it was concluded that the last two propositions might be claimed to be pertinent to that case even though the transactions between the parties be considered as a completed contract and held that the action of the City of Rochester in awarding one contract to another bidder and forcing the plaintiff to enter into the second contract after it had declared there was a mistake in its proposal was inequitable.

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."

11. After having heard the arguments advanced by the learned counsel we are of the view that the principles laid down in ***W.B. State Electricity Board*** (*supra*) would have to be applied in the backdrop of the facts of the present case. As a general principle or a general rule it has been stated that equitable relief could be granted to a bidder for a public contract where the bidder had made a material mistake of fact in the bid submitted by him and where, upon the discovery of that mistake, the bidder had acted promptly in informing the public authorities and requesting either withdrawal of the bid or an opportunity to rectify the mistake and particularly before entering into any formal contract. But this general principle is subject to exception as indicated in paragraph 27 of the said decision. While Mr Sapra sought to take benefit of the fact that the second exception would not apply because the petitioner took prompt action in rectifying the bank guarantee by having the clause in question deleted, he cannot get out of the other exceptions and particularly the first exception which clearly stipulates that where a bidder has or is deemed to have knowledge of the mistake he cannot be permitted to take advantage of that mistake. In the present case the bidder clearly had knowledge of the fact that the clause was not to be incorporated in the bank guarantee and that instructions had been issued

by the head office of State Bank of India to all its branches for not including the clause in question in bank guarantees in favour of NTPC. Even if it is assumed for the sake of argument that the petitioner did not have direct knowledge of this fact, it can certainly be deemed to have knowledge of the mistake. In any event the mistake could have been avoided by exercise of ordinary care and diligence on the part of the bidder particularly when the petitioner was required under the bidding terms to fill out and go through the verification check list. The petitioner, in fact, did go through the check list and answered “Yes” to the questions that as to whether the bank guarantee submitted by way of bid security was verbatim comparable with the prescribed proforma.

12. In these circumstances we are of the view that the petitioner cannot be permitted to take advantage of the mistake committed by it as the petitioner’s case clearly falls within the first exception referred to in ***W.B. State Electricity Board*** (*supra*). The decisions cited by Mr Sapra in support of his proposition with regard to his requirement of the clause being not an essential condition of the bid, cannot also be accepted because at various places the respondent had specifically stipulated that the bank guarantee had to be in complete conformity with the prescribed proforma and any deviation there from would render the bid to be non-

responsive. Therefore, the decisions referred to by Mr Sapra would not be applicable in the facts and circumstances of the present case.

13. In view of the foregoing discussion, there is no merit in the writ petition. The same is dismissed. However, there shall be no orders as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

APRIL 19, 2016
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