

\$~

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

RESERVED ON: 12.07.2017
PRONOUNCED ON: 28.07.2017

%

+ W.P. (C) 2785/2017, CM APPL.12049/2017

ABC BEVERAGES PRIVATE LIMITED Petitioner
Through: Mr. Subhiksh Vasudev, Advocate.

Versus

INDIAN RAILWAY CATERING & TOURISM CORPORATION
(IRCTC) LTD. & ANR. Respondents
Through: Mr. Sunil Malhotra, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

S.RAVINDRA BHAT, J.

1. The Petitioner is engaged in carrying out the business of manufacturing and trading of water, beverages, distilled water etc. It is aggrieved by the rejection of its technical bid by the first respondent (hereafter "IRCTC") on 07.03.2017. The bid was submitted in response to a Notice Inviting Tender ("NIT") dated 06.10.2016 for selection of developer for setting up & operation of "Rail Neer" Packaged Drinking Water Plants at Sankrail (Howrah) & Dist. Hapur (UP.).

2. IRCTC had originally floated the NIT on 06.10.2016, and thereafter revised it on 21.12.2016. The Petitioner submitted its technical and financial bids on 09.01.2017 in accordance with the procedure prescribed in the revised NIT. In accordance with Clause 3.4 of the

revised NIT, the technical bids contained in Envelope No. 1 were opened on 11.01.2017 by IRCTC. No deficiency in the bids was pointed out to the petitioner at that time. On the contrary, minor deficiencies in the bids of some other bidders, for instance, non-submission of certain documents in the bid of Ion Exchange (India) Limited, were pointed out by IRCTC. Thereafter, on 07.03.2017, it came to the petitioner's knowledge, from IRCTC that its technical bid was rejected on the ground that a notarial stamp was not affixed on certain Tender documents i.e. APPENDIX - II, III & IV, (though those documents were duly attested and notarized), as was required by sub-clauses (b) to (d) of Clause 2.12.1 (i) of the revised NIT.

3. The technical bid of the petitioner was rejected outright on the ground of absence of a notarial stamp on certain documents. *Per contra*, Letter of Award (LOA) of the tender for the Hapur project - site had already been issued by IRCTC to Surya Infrastructure Pvt. Ltd. (the second respondent, hereafter "Surya"), after permitting it to correct lacunae in its bid submission and allowing them to furnish the document mentioned at sub-clause (e) of Clause 2.12.1 (i) of the NIT i.e. the "*Notarized true copy of Incorporation Certificate Memorandum and Articles of Association*" which was not filed originally at all. It was to be notarized subsequently as late as in March, 2017, a date that was not prior to 11.01.2017, when the technical bids were opened.

4. The Petitioner filed writ petition W.P.(C) No.2439/2017 titled *ABC Beverages Private Limited vs. Indian Railway Catering & Tourism Corporation (IRCTC) Ltd.* before this Court seeking quashing of the

impugned letter dated 07.03.2017 and seeking directions for the consideration of its financial bid; the matter came up for hearing before a Division Bench of this Court. Counsel for IRCTC produced a letter of award dated 10.03.2017 to suggest that tender had been awarded in favour of the second respondent. In the said circumstances, the Petitioner sought liberty to withdraw W.P.(C) No.2439/2017 and to seek other remedies in law in light of the said development. The writ petition was dismissed as withdrawn with the aforesaid liberty. The petitioner thereafter filed the present writ petition.

5. The Petitioner, contending that its bid was rejected on purely frivolous grounds cited the judgment of this court in *Satish Chander Saxena v. Delhi Administration & Ors* (2001) 92 DLT 2008, where it was held that absence of affixation of notarial stamp on a transfer document is not fatal to a person's claim for being accepted as a member of a co-operative society. The decision in *Indian Oil Corporation Ltd. vs. Kapil Bagri* [(2015) 222 DLT 461 (DB)], where it has been held that minor curable defects cannot be a ground to defeat the substantive rights of an applicant who cannot be knocked out on frivolous technical pleas was highlighted. In that case, absence of signatures of Notary Public on one of the affidavits was held to be a curable defect and the application of the respondent in that case could not be knocked out on the said technical grounds.

6. The IRCTC in its reply and in the submissions made on its behalf by Sh. Sunil Malhotra, learned counsel argues that the rejection of the petitioner's bid was justified in the circumstances of the case. It is stated

that the petitioner was informed on 07.03.2017 that the NIT had clearly stipulated that tender documents in appendix-II, III and IV had to be executed on non-judicial stamp paper and also had to be attested by a public notary or executive magistrate with a notary stamp. As these requirements were not complied with, the bid was rejected. This condition was embedded in clause 2.12.1 of the NIT, which further stipulated that failure to adhere to them would result in tender rejection. It was argued that the omission to affix the notarial stamp means that the documents filed - even with the seal and stamp of the notary were invalid. This applied with greater force to the power of attorney documents authorizing Sh. Neeraj Gupta, the petitioner's MD to sign the tender and file it on its behalf as a consortium. Furthermore, in the absence of consortium authorizing such as power of attorney, the bid itself was unresponsive and therefore incurable through late improvement.

7. Sh. Malhotra, learned counsel submitted that the IRCTC could not be faulted for not opening the petitioner's financial bid for the simple reason that the technical bid failed. Consequently, whether the petitioner's bid was the lowest was not known. Furthermore, Sh. Malhotra submitted that there way too many authorities that the terms of tender cannot be altered by the Court nor can they be decided on the yardstick of unreasonableness. Learned counsel relied upon the *Assistant Excise Commissioner and Ors. V. Issac Peter and Ors.* 1994 (4) SCC 104 and *GRIDC Ltd. v. Sri Sadananda and Ors* AIR 2012 SC 79. It was submitted that the Court would be in effect exercising appellate authority

over the merits decision of the IRCTC, which cannot be done under Article 226. Learned counsel lastly submitted that failure to fix the stamp is contrary to Section 42 of the *Indian Stamp Act, 1899* which rendered invalid the documents itself.

8. It is submitted that the second respondent, Surya, was permitted to place the copies of its memorandum and articles of association after the tender was filed because in the bid it had clearly mentioned the registration number of the company. In the circumstances, there was neither improvement in the bid nor any deviation - substantial or otherwise. The grant of opportunity to bring the tender/bid in conformity with the stipulated NIT conditions is not unreasonable.

9. The second respondent, Surya, represented by Sh. Kirti Uppal, learned senior counsel urges that the NIT clearly stipulated that the three documents were not only to be attested by notary public but also that the copy had to be affixed with the appropriate stamp. This was an essential condition of the contract, which could not have been departed from. The second respondent supports IRCTC's contention that the petitioner's bid was unresponsive as its bid did not annex the legally admissible documents and that any attempt on its part to improve upon the tender offer was impermissible.

10. During the hearing, the Court had required production of the financial file. After discussing the turnover, the technical capacity of the petitioner and other related particulars, the tender committee in its proceeding of 27.02.2014 observed as follows:

“The total turnover of M/s. ABC Beverages Pvt. Ltd. and M/s. Shree Shivashakti Bakers Private Limited is Rs.48.15 crore which is more than minimum requirement of Rs.15 crore for one plant.

Further, following discrepancies were found in the documents submitted by the bidder:

- i. (i) Certificate of net worth issued by CA instead of by Statutory Auditor in case of Consortium Member II.*
- ii. (ii) The three legal documents, i.e. appendix-II, III and IV, have been attested by Notary but without any notarial stamp.*

It is the view of the TC that CA certificate submitted for net worth is also a valid document and hence it can be considered. As per the tender document, the power of attorney and joint bidding agreement (Appendix-II, III and IV) should be executed on non judicial stamp paper of Rs.100/- and to be attested by executive magistrate/notary public with notarial stamp. Convener stated that since above documents have been attested by notary public without notarial stamp, hence these documents are not considered valid as per tender requirement. Further, it is opined by Law Officer in this regard (copy placed at S. No.27) that said documents should bear notarial stamp as required under Article 42 of Stamp Act (Schedule 1A of rates of stamp duty in Delhi). It is further stated by Law Officer that said documents cannot be taken as record as the same suffers from irregularities which cannot be cured at this stage. Accordingly, the convener stated that the attestation of notary without notarial stamp is not treated as legally tenable. Therefore, the bidder is not considered suitable for opening of its financial bid.”

11. In relation to Surya, the second respondent, the Committee observed as follows:

“The total turnover of M/s. Surya Infraventure Pvt. Ltd. & M/s. Hiemens Bottling Machines is Rs.49.66 crore which is more than minimum requirement of Rs.15 crore for one plant.

Further, following discrepancies were found in the documents submitted by the bidder:

- i. (i) *Notarized Incorporation Certificate, Memorandum & Articles of Association for Member-I, not enclosed. However, company has mentioned the registration no. & date of incorporation in Annexure-I.*
- ii. (ii) *Certificate (s) from Statutory Auditors for hourly capacity, financial turnover and/or project cost as per clause 3.4.4(a) not submitted.*

It is the view of the TC that documents related with Notarized Incorporation Certificate, Memorandum & Articles of Association of member-I may be asked from the bidder as these are only ancillary documents and above discrepancy does not have bearing on the technical qualification of the bidder for opening of its financial bid.”

12. In the present case, it is evidently a situation where the technical bid of the Petitioner was rejected by the IRCTC on technical grounds; the rejection was meted out in an arbitrary and discriminatory manner, since Surya, the second respondent was made aware of similar discrepancies for their correction, after the submission of bids. The distinction sought to be made between the filings in the petitioner’s documents and those of Surya, in the opinion of the Court, is artificial. In the petitioner’s case, at least, the public notary had attested the relevant documents in the

Annexures-II, III and IV. Only the notary's stamp was missing. That *per se* did not undermine the effectiveness of the documents. Possibly, in a court of law, the inadequacy of stamp would have resulted in impounding of the instrument leading to payment of penalty and the requisite stamp amount. However, that view would have arisen, only in the event of a dispute pertaining to the contents or dispute impinging upon something where the documents occupied a center stage. In other words, the documents were not in issue; a notary public attested them. Likewise, in the case of Surya, the second respondent, the requisite documents were not on the record. However, the tender committee observed that such documents were *merely ancillary* given that the registration number of the company was disclosed.

13. Concededly, there is no tender condition, which demarcates between basic or primary and secondary or ancillary documents. Likewise, there is no indication that all conditions would be deemed essential or that some are inessential. In these circumstances, the option exercised by the tender committee to treat the petitioner's documents as non-compliant and the omission or failure of second respondent to file documents deemed necessary in the NIT, is exercise of arbitrary power. Furthermore there is substantial case law to show that procedure is a device of justice and is not to be used to thwart the same purpose. The Supreme Court cases of *T. M. Jacob v. C. Poullose & Ors.* AIR 1998 SC 2939, *Uday Shankar Triyar v. Ram Kalewar Prasad and Anr.* AIR 2006 SC 269 and *Haryana State Coop. Supply and Marketing Federation Ltd. v. Jayam Textiles and Anr.* 2014 (4) SCC 704 all speak of how minor

procedural defects which are curable should not be allowed to defeat substantive rights or to cause injustice.

14. For instance, in *Haryana State Coop. (supra)*, the relevant paragraph states as follows:

“7...In any case, in our opinion, if the Courts below were not satisfied, an opportunity ought to have been granted to the Appellant -Federation to place the document containing authorization on record and prove the same in accordance with law. This is so because procedural defects and irregularities, which are curable, should - not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use.”

Similarly, in *Uday Shankar Triyar (supra)* it was held as follows:

“17. Non-compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The well recognized exceptions to this principle are:

- i) where the Statute prescribing the procedure, also prescribes specifically the consequence of non-compliance.*
- ii) where the procedural defect is not rectified even after it is pointed out and due opportunity is given for rectifying it;*
- iii) where the non-compliance or violation is proved to be*

deliberate or mischievous;

iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court.

v) in case of Memorandum of Appeal, there is complete absence of authority and the appeal is”

15. By not giving the due and equal consideration to the Petitioner, in considering their technical bid, as was given to the other bidders - as in the case of Surya, IRCTC has acted in a capricious manner resulting in discrimination. Their rejection of the Petitioner's technical bid based on the evidently curable defect of a missing notarial stamp on some of their tender documents is thereby untenable and bad in law.

16. For the above reasons, the Court is of the opinion that the rejection of the petitioner's bid in the circumstances was unjustified. The award of the tender pursuant to the NIT in question to the second respondent is hereby quashed. However this would not result in the undoing of the entire tender process itself. The jurisprudence, which has evolved over the last two decades, in respect of commercial contracts, is that there ought to be minimal interference with the State or agency's decisions. In case of illegality, procedural irregularity *mala fides* or manifest arbitrariness, the courts' exercise of jurisdiction under Article 226 of the Constitution is warranted (*Tata Cellular v Union of India* 1994 (6) SCC 651; *Union of India v. Dinesh Engineering Corpn.*, (2001) 8 SCC 491; *Michigan Rubber (India) Limited Vs. State of Karnataka & Others* (2012) 8 SCC 216; *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.* 2016 (16) SCC 818; *JSW Infrastructure v*

Kakinada Seaports 2017 (4) SCC 740 etc.) In the present case, the interpretation which ousted the petitioner's tender bid was both arbitrary and discriminatory. Yet, the rule of minimal interference has to be followed. Rather than setting aside the entire tender process, the appropriate course would be to correct the decision-making and direct the first respondent to open the financial bid of the petitioner. In case the procedure results in a fresh evaluation vis-à-vis the successful bidder, i.e., the second respondent, i.e., Surya, IRCON shall proceed to evaluate the two bids (i.e., the petitioners' and that of Surya) afresh and finally decide whom to award the contract, in accordance with the NIT and the law. This process shall be completed within 3 weeks.

17. The writ petition succeeds and is allowed in the above terms. There shall be no order on costs.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JULY 28, 2017