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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 6782/2010 & CM 13417/2010**

ATLANTA PBA JV MUMBAI

..... Petitioner

Through Mr Chirag M. Shroff, Advocate with
Ms Monisha Suri, Advocate.

versus

NATIONAL HIGHWAY AUTHORITY
OF INDIA AND ORS

..... Respondents

Through Ms Gunjan Sinha Jain, Advocate with
Ms Bhavana Singh, Mr Mukesh Kumar,
Advocates NHAI.
Mr Srishti Nigam, Advocate for SBI.
Mr Atul Kumar, Advocate for R4, Canara
Bank.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
19.09.2017

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VIBHU BAKHRU, J

1. The petitioner is a consortium comprising of two companies - M/s Atlanta Ltd. and M/s PBA Infrastructure Ltd. The petitioner has filed the present petition, *inter alia*, praying as under:-

- “i) to issue a writ of certiorari thereby quashing the letter No. NHAI/BOT/11019/02/05/07/335 dated 14.9.2010;
- ii) to issue a writ of prohibition restraining respondent No. 1 from invoking/partially invoking the bid security provided by the petitioner in the nature of form of bank guarantees bearing No. 0505010BG0002405 and BG-162-10 issued by respondents No. 3 & 4

respectively;

- iii) that pending the hearing and final disposal of the petition, this Hon'ble Court be pleased to issue an order and injunction restraining respondents No. 3 & 4 from honouring any invocation or enforcement of the bank guarantees 0505010BG0002405 and BG-162-10, by the respondent No. 1;
- iv) that pending the hearing and final disposal of the petition, this Hon'ble Court be pleased to pass an order restraining respondent No. 1 from invoking the bid security in the nature of bank guarantees 0505010BG0002405 and BG-162-10;
- v) for ad-interim reliefs in terms of prayers (iii) & (iv) above,"

2. Respondent no.1 (hereafter 'NHAI') had invited tenders for the work of four-laning of the Jetpur – Somnath Section of N.H. 8 – D from Km 0.000 to Km 127.600 in the State of Gujarat under NHDP, Phase III to be executed as BOT (TOLL) on Design, Build, Finance, Operate and Transfer (DBFOT) basis (hereafter 'the Project'). On 22.12.2009, NHAI invited Requests for Qualification (RFQ) to shortlist the applicants for the aforesaid project. The petitioner submitted its RFQ on 09.02.2010. The petitioner states that certain clarifications were sought from the petitioner, which were duly responded to and on 21.06.2010, the petitioner was declared as pre-qualified to submit its bid for the project.

3. The petitioner states that, thereafter, the petitioner was issued RFP documents (Request for Proposal) on payment of approximately ₹2,00,000/-. And, on 09.08.2010, the petitioner submitted its bid along with the requisite enclosures as mentioned in the bid document. The petitioner also furnished a

bid security in the form of a bank guarantee in the sum of ₹8,28,00,000/-.

4. In terms of RFP documents, the petitioner also submitted the necessary Power of Attorneys (hereafter 'POAs'). M/s Atlanta Ltd (the lead member of the consortium) issued a POA in favour of Sh. Ulhaas N. Bhole to act on its behalf. The said POA was signed by the Managing Director of M/s Atlanta Ltd. The certified copy of the Board Resolution was also enclosed. Similarly, POA executed on behalf of PBA Infrastructure Ltd. authorising Mr Vishal Wadhawan, was also filed along with bid documents. In case of M/s Atlanta, the POA dated 28.07.2010 was notarized on 06.08.2010 and the POA issued by M/s PBA Infrastructure Ltd. was dated 27.07.2010 and was notarised on 28.07.2010.

5. According to the petitioner, the POAs were typed earlier but were executed and notarised on the dates as endorsed by the notaries. The petitioner, accordingly, furnished letters of the concerned notaries conforming that the POAs were executed before them.

6. The petitioner received a letter dated 14.09.2010 (which is impugned in the present petition), communicating that the petitioner's bid had not met the test of responsiveness, *inter alia*, for the reason that POAs for signing the bids were dated prior to the date of attestation. In case of PBA Infrastructure Ltd., the common seal of the company had also not been affixed.

7. Mr Shroff, learned counsel appearing for the petitioner contended that the POAs were valid and had been executed before the respective notaries and the same had been confirmed by them. Since the text of the POA was

printed earlier, a prior date was typed and that was an inadvertent error. He submitted that since there was no deviation from the RFP terms, the petitioner's bid could not be termed as non-responsive and NHAI was not entitled to forfeit any part of the bid security.

8. He further submitted that an inadvertent error as to the date of attestation could not render the petitioner's bid as 'non-responsive'. He referred to the decision of a Division Bench of this Court in ***Madhucon Projects Ltd. v. National Highways Authority of India (W.P.(C) No. 8418/2010) decided on 10.03.2011*** in support of his contention.

9. Ms Gunjan Sinha Jain, learned counsel appearing for NHAI conceded that the facts in the case of ***Madhucon Projects Ltd. (supra)*** were similar to the facts in the present case and the said decision would be applicable. However, she submitted that in that case the Division Bench had referred to the decision of the Supreme Court in ***Poddar Steel Corporation v. Ganesh Engineering Works and Ors.: (1991) 3 SCC 273***,. The said decision was considered by the Supreme Court in a later decision in ***Central Coalfields Limited and Anr. v. SLL-SML (Joint Venture Consortium) and Others: (2016) 8 SCC 622***, wherein the Supreme Court had observed that the participation principle as laid down in ***Ramana Dayaram Shetty v. International Airport Authority of India: (1979) 3 SCC 489*** had been ignored by the Supreme Court in ***Poddar Steel (supra)***. She submitted that in this view the decision in ***Madhucon Projects Ltd. (supra)***, ought to be reconsidered.

10. Undisputedly, the decision of the Division Bench in case of

Madhucon Projects Ltd. (*supra*) is applicable in the facts of the present case. In that case the court had held that “*A typographical error of a date in the Power of Attorney when it is duly signed, accepted and notarized can at worst be a technical defect*”. A plain reading of the judgment clearly indicates that the Court did not accept that a typographical error in the POA could be considered as a deviation and, therefore, directed that the bid, in that case, be considered as responsive. NHAI had appealed against the aforesaid decision by filing a Special Leave Petition before the Supreme Court of India (SLP (C) 15738/2011, which was subsequently converted to Civil Appeal No. 3055/2015 on leave being granted). By an order dated 17.03.2015, the Supreme Court granted leave but did not interfere with the decision of the Division Bench except to set aside the costs imposed. The Supreme Court, *inter alia*, held that “*since the Division Bench has applied Fateh Chand vs. Balkishan Dass AIR 1963 SC 1405 and thus had found no legal propriety in the deduction of 5% of the Bid Security, this Appeal does not call any further consideration*”.

11. In view of the above decision, the question whether any part of the bid security submitted by the petitioner can be forfeited, is no longer *res integra*.

12. The decision of the Supreme Court in ***Central Coalfields Limited and Anr.*** (*supra*) is not applicable. In that case, the Supreme Court had held that the issue regarding acceptance or rejection of a bid should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. It was observed that the question “*whether a term of NIT is essential or not is a decision taken by the employer which should be respected*”; it is in this context that the Supreme Court had referred to the

decision in *Poddar Steel* (*supra*). In the present case, it is nobody's case that the requirement of furnishing a duly notarised POA is not an essential term; the issue, essentially, is whether the said term had been complied with.

13. Given that the date typed on the POA was a typographical error, the POA could not be considered to be not in conformity with the RFP; such typographical would not render the POA non-complaint with the RFP.

14. In view of the above, the petition is allowed and the communication dated 14.09.2010 is set aside. NHAI is directed to return the bank guarantee furnished by the petitioner along with its bid. The pending application also stand disposed of. The parties are left to bear their own costs.

SEPTEMBER 19, 2017
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VIBHU BAKHRU, J