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

+ **W.P.(C) 7036/2010 & CM 13962/2010, 2307/2011**

PUNJ LLOYD INFRASTRUCTURE LTD Petitioner

Through: Mr S. Venkatesh, Mr Varun singh
and Mr Sandeep Rajpurohit,
Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY
OF INDIA AND ANR

..... Respondents

Through: Ms Gunjan Sinha Jain, Advocate with
Ms Bhavana Singh, Mr Mukesh
Kumar, Advocates NHAI.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
19.09.2017

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VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying as under:-

“a) Issue a writ of Certiorari or any other appropriate writ quashing the Impugned Communication No. NHAI/BOT/DBFO/11019/02/07/336 dated September 14, 2010 issued by the Respondent No.1 to the Petitioner;

b) Issue a writ of Prohibition or any other appropriate writ restraining Respondent No.1, its principal officers, servants, agents and all other persons acting for and on its behalf from invoking/partially invoking Bank Guarantee No.

2181GBID000310 dated August 6, 2010 issued by Respondent No.2; and restraining Respondent No.2 from honouring any invocation of the Bank Guarantee No. 2181GBID000310 by the Respondent No.1;

c) Award the costs of the present proceedings in favour of the Plaintiff and against the Defendant No.1.”

2. The petitioner had submitted a bid for executing the works of *"Development and Operation/Maintenance of the 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 DBFOT Pattern Project"* ("the Project"). The aforesaid bid was submitted pursuant to a Request for Quote (hereafter "RFQ") issued by the respondent no.1 (hereafter 'NHAI'). The petitioner was shortlisted as one of the technically qualified bidders and in May, 2010 NHAI issued a Request for Proposal (hereafter 'RFP') upon payment of ₹1,66,000/-.

3. Thereafter, 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/- as well as the Power of Attorney (hereafter 'POA') dated 26.07.2010 in favour of Mr Rajat Vijay Seksaria, General Manager, authorizing him to sign and submit the bid documents. The petitioner also submitted a certified copy of a resolution of its Board of Directors passed on 20.07.2010, whereby Mr Seksaria was authorized to sign the documents on behalf of the petitioner.

4. The POA was duly notarized on 26.07.2010; however, it incorrectly mentioned the date 29.07.2010. According to the petitioner, this was an

inadvertent mistake committed by the Notary while authenticating the POA. On discovering this mistake, the petitioner sent a letter dated 18.08.2010, enclosing a certificate dated 17.08.2010 issued by the Notary acknowledging the said error and certifying that the POA was, in fact, attested on 26.07.2010. The NHAI treated the petitioner's bid as non-responsive and by a letter dated 21.09.2010, communicated the same to the petitioner. The petitioner was further informed that in terms of clause 2.20.7 (a) of the RFP, 5% of the petitioner's bid security would be forfeited. (the said communication is impugned in the present petition).

5. The petitioner filed a suit being CS (OS) 2000/2010, *inter alia*, seeking an order restraining NHAI from encashing the bank guarantee (bid security). However, by an order dated 27.09.2010, passed by a coordinate bench of this Court, the plaint was rejected, leaving it open for the petitioner to file a suit for recovery.

6. Thereafter, the petitioner filed the present petition and by an order dated 21.10.2010, the encashment of the bank guarantee, as furnished by the petitioner, was restrained.

7. The learned counsel for the petitioner submitted that POA was submitted as per the format provided under the RFP documents and petitioner's bid could not be turned down as non-responsive. He further submitted that an inadvertent error as to the date of attestation could not render the petitioner's bid to be termed as 'non-responsive'. And, consequently, NHAI could not forfeit any part of the bid security. 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.

8. 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***, which 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.

9. 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*”.

10. 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*.

11. 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.

12. Given that the date of attestation was a typographical error, the POA could not be considered as not in conformity with the RFP. A typographical error did not render the POA non-complaint with the RFP.

13. 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 applications are also stand disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

SEPTEMBER 19, 2017

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