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

\+ **<u>W.P.(C) 8327/2017</u>**

SABARKANTHA ANNUITY PVT LTD ..... Petitioner

Through: Mr Chirag M. Shroff, Advocate.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Respondent

Through: Mr Sandeep Sethi, Senior advocate with Ms Gunjan Sinha Jain, Mr Mukesh Kumar, Advocate

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **23.10.2017**

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

> "a) Issue an appropriate Writ, Order or Direction directing the Respondent NHAI that the Bank guarantee proposed to be furnished by the Petitioner from Punjab Maharashtra Cooperative Bank be accepted by the Respondents or ALTERNATIVELY, direct the Respondents to extend the time for the Petitioners so as to enable the Petitioners to get the Bank Guarantee from Nationalized Bank as demanded;
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> b) Issue an appropriate Writ, Order or Direction in the facts and under the circumstances of the case stated above directing the Respondent Authority not to take any coercive steps in the matter including termination of the Contract and invocation of Bank Guarantees; (BID SECURITIES)

> c) Issue an appropriate Writ, Order or Direction in the facts and under the circumstances stated above directing the Respondent to fulfil it's obligations under the Contract."

2. In the year 2016, the respondent (NHAI) invited bids for construction, operation and maintenance of six laning from km 401.200 to km 494.410 of NH - 8 in the State of Gujarat on Hybrid Annuity basis. The project cost was estimated at ₹1092.71 crores. In terms of clause 2.1.6 Request for Proposal (RFP) a bidder was required to deposit a bid security of ₹10.93 crores. This was to be returned without any interest upon signing the concession agreement and furnishing the performance security in accordance with the RFP. In terms of the RFP, M/s Atlanta Limited furnished a bid security of ₹10.93 crores at the time of submission of its bids. The NHAI accepted bid of Atlanta Limited and issued the Letter of Award (LOA) on 24.01.2017.

3. In terms of the RFP as well as the LOA, the petitioner was obliged to furnish the Performance Bid Security within a period of 30 days of executing the Concession Agreement.

4. In terms of clause 1.3 of RFP, the Contractor was required to incorporate a Special Purpose Vehicle (SPV) for the purpose of performance of the obligations and execute the Concession Agreement within a period of 45 days of the issue of LOA.

5. The petitioner was incorporated as a SPV and documents regarding the same were submitted to NHAI on 23.03.2017.

6. In terms of clause 9.1 of the Concession Agreement, the Concessioner was required to provide irrevocable and unconditional bank guarantee from

a bank for a sum equivalent to ₹64.6 crores in the form as set forth in Schedule F of the RFP. Clause 9.1 is set out below:-

"**9.1 Performance Security**

9.1.1. The Concessionaire shall, for the performance of its obligations hereunder, provide to the Authority no later than 30(thirty) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Bank for a sum equivalent to Rs.64.6 crore (Rupees Sixty Four crore Sixty Lakh Only) in the form set forth in Schedule-F (the "Performance Security"). Until such time the Performance Security is provided by the Concessionaire pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the Performance Security pursuant hereto, the Authority shall release the Bid Security to the Concessionaire.

9.1.2 Notwithstanding anything to the contrary contained in this Agreement, in the event Performance Security is not provided by the Concessionaire within a period of 30(thirty) days from the date of this Agreement, the Authority may encash the Bid Security and appropriate the proceeds thereof as Damages, and thereupon all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and this Agreement shall be deemed to have been terminated by mutual agreement of the Parties."

7. The Concession Agreement was executed on 28.04.2017 and, therefore, in terms of clause 9.1 of the Concession Agreement, the petitioner was obliged to submit the Performance Security within a period of 30 days of entering into the said agreement; that is, on or before 27.05.2017.

8. Admittedly, the petitioner failed to do so within the time specified. On 25.05.2017, the petitioner requested for further time for submission of the Performance Security. By a letter dated 03.07.2017, NHAI called upon the petitioner to submit the Performance Guarantee even though the specified period for doing so had expired.

9. Thereafter, the petitioner submitted two bank guarantees for a sum of ₹8,00,00,000/- and ₹6,60,00,000/- under the cover of its letter dated 01.07.2017. The petitioner further stated that the balance amount of ₹50 crores would be submitted separately from State Bank of India in due course of time as the proposal for issue of such guarantee was pending approval of the Wholesale Banking Credit Committee (WBCC) of SBI. On 08.07.2017, the petitioner once again sent a letter stating that it would furnish the Performance Security Bank Guarantee within seven days of approval of the aforesaid Committee of SBI.

10. On 25.08.2017, NHAI sent a letter giving a last opportunity to the petitioner to deposit the balance Performance Bank Guarantee for a sum of ₹50 crores within a period of five days, failing which action as contemplated under clause 9.1.2 of the Concession Agreement and termination of the agreement would be initiated.

11. The petitioner was unable to provide the Performance bank guarantee within the extended period as provided by NHAI and on 14.09.2017 sent another letter, *inter alia*, stating that Performance Bank Guarantee limit of ₹50 crores had been sanctioned by Punjab and Maharashtra Cooperative Bank Limited and the same would be submitted

before 20.09.2017.

12. According to NHAI, Punjab & Maharashtra Cooperative Bank Limited does not fall within the definition of bank in terms of the RFP as its net worth is less than ₹1000 crores. The petitioner disputes the same and claims that the net worth of Punjab & Maharashtra Bank was more than a thousand crores as on 31.03.2017.

13. NHAI claims that since the petitioner had failed to provide the Performance Bank Guarantee within the time provided, NHAI terminated the contract by a letter dated 15.09.2017.

14. Mr Chirag M. Shroff, learned counsel appearing for the petitioner disputes the same and states that the said letter has been issued after the petitioner had moved the present petition on 16.09.2017. He referred to certain communications and submitted that even though the letter dated 15.07.2017 terminating the contract had been issued on 18.09.2017, NHAI was proceeding on the basis that the contract still subsists. He further submitted that the petitioner was ready and willing to provide the Performance Bank Guarantee and NHAI ought to be called upon to accept the same. He stated that the petitioner was ready and willing to provide the performance Bank Guarantee as required by NHAI

15. Ms Jain, learned Counsel appearing for NHAI contended that the contract provided for strict time lines, which had admittedly been accepted by the petitioner. She further submitted that the present petition is not maintainable as there was an arbitration agreement between the parties. She relied on the decision of the Supreme Court in ***Joshi Technologies***

International Inc. v. Union of India and Others : ***(2015) 7 SCC 728*** in support of her contentions.

16. Mr Sethi, Learned Senior Counsel appearing for NHAI submitted that submission of the Performance Bank Guarantee was only one of the steps towards financial closure which is required to be achieved within a period of 150 days from execution of the contract. He further referred to the letter issued by Punjab & Maharashtra Cooperative Bank Limited and submitted that although the petitioner claims that the said Bank has sanctioned Bank Gurantee limit a plain reading of the letter indicates that it is contingent on the petitioner complying with various conditions and there is no confirmation that such conditions have been complied with. He submitted that such letter could not be construed to be a final sanction.

17. Mr Shroff countered the aforesaid submissions and submitted that existence of an arbitration agreement would not preclude the petitioner from challenging any arbitrary or unreasonable action on the part of NHAI. He relied on the decision of the Supreme Court in ***Union of India and Anr. v. Tantia Construction Private Limited*** : ***(2011) 5 SCC 697*** in support of his contention.

18. It is apparent from the above narration that serious disputes have arisen between the parties. This Court is of the view that it would be apposite to examine such disputes in these proceedings.

19. In ***Joshi Technologies International v. Union of India and Others*** (*supra*), the Supreme Court had, *inter alia*, observed as under:-

> "**69.** The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies within the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:
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> **69.01.** The Court may not examine the issue unless the action has some public law character attached to it.
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> **69.2.** Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration."

20. Undisputedly, this Court has the jurisdiction to entertain a petition under Article 226 of the Constitution of India even in contractual matters and this court has interfered where it is found that action of the State is *ex facie* arbitrary or unreasonable.

21. However, in the facts of the present case, it is difficult to accept that NHAI's action is manifestly arbitrary. Admittedly, the petitioner has failed to submit the Performance Bank Guarantee within the stipulated time. NHAI's action in declining further time of a few days to submit Performance Bank Guarantee does seem, *prima facie*, harsh. However, it cannot be accepted that the same is ex facie arbitrary; the RFP expressly provides that the Performance Bank Guarantee would be submitted within 30 days of

execution of the contract and the petitioner had voluntarily accepted the above terms. Further, although the petitioner states that it is ready and willing to furnish the Performance Bank Gurantee, the fact is that the petitioner has not for the balance amount of ₹50 Crores as yet.

22. Admittedly, there is an arbitration agreement between the parties and the petitioner has recourse to an alternate dispute resolution mechanism. Thus, it would not be apposite to further examine the disputes in this petition.

23. For the reasons stated above, the present petition is dismissed. The interim order dated 16.09.2017 is vacated. However, NHAI will not encash the bid security for a period of one week from today.

24. Needless to mention, it will be open for the petitioner to invoke the arbitration and seek alternate remedies including interim orders under Section 9 of the Arbitration and Conciliation Act, 1996. It is clarified that nothing stated in the above order or the order dated 16.09.2017 should be construed as an expression of opinion on the merits of the disputes and any proceedings that the petitioner may institute shall be examined uninfluenced by any observations made by this Court in these proceedings.

25. Order *dasti*, under the signature of the Court Master.

VIBHU BAKHRU, J

OCTOBER 23, 2017
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