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

% Judgment delivered on: 03.11.2017

\+ LPA 684/2017 & CM APPL. 38211/2017

SABARKANTHA ANNUITY PVT. LTD. ..... Appellant

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Respondents

<u>Advocates who appeared in this case</u>:

For the Appellant	:	Mr. Dayan Krishnan, Sr. Adv. with Mr. C.M. Shroof and Ms. Neha Sangwan, Advs.
For the Respondent	:	Mr. Sandeep Sethi, Sr. Adv. with Ms. Gunjan Sinha Jain and Mr. Mukesh Kumar, Advs.

CORAM:-
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

<u>SANJEEV SACHDEVA, J.</u>

1. The parties have produced the copy of the impugned judgment dated 23.10.2017 which was not available when the appeal was filed. The same is taken on record.

2. The appellant impugns the judgment dated 23.10.2017 whereby the petition filed by the appellant *inter alia* seeking a direction to the respondent-National Highways Authority of India (NHAI), to accept the bank guarantee proposed to be furnished by the petitioner from Punjab &

Maharashtra Cooperative Bank Ltd. or alternatively to extend the time for furnishing the bank guarantee from a nationalized bank and further to restrain the respondent from taking any coercive steps of termination of contract and invocation of bank guarantee (bid security), has been dismissed.

3. The respondent-NHAI invited the 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.

4. In terms of the Request for Proposal (RFP), a bidder was required to submit a bid security of Rs. 10.93 crores which was liable to be returned without interest upon signing of the Concession Agreement and furnishing of performance security in accordance with RFP.

5. In terms of the RFP, M/s Atlanta Ltd. furnished bid security of Rs. 10.93 crores at the time of submission of this bid. The bid of the appellant was accepted and Letter of Award (LOA) was issued on 24.01.2017.

6. In terms of the RFP as well as LOA, the M/s Atlanta Ltd. was to furnish a performance security within a period of 30 days of executing the concession agreement. Further in terms of the RFP, the contractor was required to incorporate a Special Purpose Vehicle (SPV) for the purposes of performance of the contract and execution of the concession agreement. The appellant is the SPV incorporated for the said purpose.

7. In terms of the Clause 9.1 of the concessions agreement, the concessioner was required to provide an irrevocable unconditional bank guarantee of Rs. 64.6 crores from a qualified bank.

8. The concession agreement was executed on 28.04.2017 and accordingly in terms of Clause 9.1 of the RFP, the Appellant was obliged to furnish the performance security of Rs. 64.6 crores within 30 days of entering into the said agreement i.e. on/or before 27.05.2017.

9. On 25.05.2017, the appellant requested for extension of time for submission of the performance security. The request was acceded to by the respondent vide letter dated 03.07.2017. The appellant submitted two bank guarantees in the sum of Rs. 8 crores and Rs. 6.6 crores by its letter dated 01.07.2017. By the said letter, the appellant contended that it would furnish the performance seeking guarantee for the balance amount of Rs. 50 crores from State Bank of India in due course, on the premise that a proposal for the same was pending before the Wholesale Bank Credit Committee of SBI. Thereafter, further time was sought on 08.07.2017 by the appellant for furnishing the balance performance guarantee.

10. On 25.08.2017, the respondent gave last opportunity to the appellant to deposit the balance performance guarantee in the sum of Rs. 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 appellant failed to even comply with the said extension of time. On 14.09.2017, the appellant informed the respondent that performance bank guarantee limit of Rs. 50 crores had been sanctioned by Punjab & Maharashtra Cooperative Bank Ltd. and the same would be submitted on 20.09.2017. The respondent refused to accede to the request and terminated the contract by letter dated 15.09.2017.

12. The appellant thereafter approached this court by filing the subject petition under Article 226 of the Constitution of India, which as noticed above has been rejected by the impugned order.

13. One of the contentions of the respondent was that Punjab & Maharashtra Cooperative Bank Ltd. did not fall within the definition of 'Bank' in terms of RPF as its net worth is less than Rs. 1000 crores. This was disputed by the appellant contending that the net worth of the said bank was more than Rs. 1000 crores as on 31.03.2017. The respondent further contended that since the performance bank guarantee was not provided within time stipulated and that the contract should terminated by letter dated 15.09.2017.

14. On 26.10.2017 in the present appeal, the appellant sought for an adjournment to arrange for a bank guarantee in the sum of Rs. 50 crores from a bank answering to the description of the contract stipulation. Today, the appellant contends that they have arranged for a bank guarantee in the sum of Rs. 50 crores from a bank answering to the description of the contract stipulation.

15. The respondent-NHAI has refused to accept the bank guarantee on the premise that the contract already stands terminated because the bank guarantee was not furnished within the time stipulated by the RFP and LOA and the further extensions granted to the appellant.

16. It is further contended that not only is the bank guarantee not in accord with the format prescribed and not submitted within time, the appellant was also to obtain financial closure which it has not been able to

achieve so far.

17. It is further contended that the writ petition was not maintainable as there was an arbitration agreement between the parties. Further, it was submitted that the submission of a performance bank guarantee was only one of the steps towards financial closure and the letter issued by Punjab & Maharashtra Cooperative Bank Ltd. which was claimed to be a sanction of bank guarantee limit was not a final sanction but was contingent upon the appellant complying with various conditions and there was no confirmation that the said condition had been complied with.

18. By the impugned judgment, learned Single Judge has declined to entertain the petition noticing that there are serious factual disputes between the parties. Further learned Single Judge has held that it is difficult to accept that the respondent's action is ex-facie arbitrary.

19. As noticed above, the appellant was required to submit the performance bank guarantee in the sum of Rs. 64.6 crores within a period of 30 days of execution of the concession agreement. The concession agreement was executed on 28.04.2017 and the time for furnishing the performance security was to lapse on 27.05.2017. At the request of the appellant, the respondent extended the period from time to time and finally on 25.08.2017 a last opportunity was granted to the appellant to furnish the balance performance bank guarantee of Rs. 50 crores within five days i.e. by 30.08.2017. Admittedly, the appellant did not furnish the performance bank guarantee in accordance with the RFP condition i.e. by 27.05.2017 or within the extended period i.e. till 30.08.2017. It is only on 26.10.2017 that a further effort was made by the appellant to furnish the bank guarantee.

20. The appellant who was to furnish the bank guarantee within a period of 30 days from 28.04.2017 failed to obtain and furnish the bank guarantee for period of over six months.

21. Perusal of the alleged sanction letter of Punjab & Maharashtra Cooperative Bank Ltd. shows that the letter dated 14.09.2017 is in fact not a sanction letter. The letter enlists various terms and conditions, inter-alia, requiring the submission of documents, registration of mortgages and pledge of fixed deposits. It further records that the same is a provisional offer and final sanction would be subject to compliances. The letter records that the offer shall stand revoked or cancelled on the happening of the events stipulated therein. The letter clearly shows that the there was no sanction in favour of the appellant of the balance sum of Rs. 50 crores. Even the letter is issued after nearly four months of the last date stipulated by the RFP and LOA.

22. It may further be noticed that the appellant was also required to achieve financial closure by 24.09.2017. Though it is not necessary in these proceedings to examine the clauses or reasons for not obtaining financial closer as the same would be subject matter of consideration in appropriate proceedings if so initiated by the appellant, suffice to say that admittedly the appellant has admittedly not furnished the performance security in terms of the RFP and LOA within the stipulated and the extended time and has till date not achieved financial closure.

23. We find no infirmity in the view taken by the learned Single Judge that there are several disputed questions of fact and the action of the respondent is not ex-facie arbitrary or unreasonable. Accordingly, we do

not find any infirmity with the view taken by the learned Single Judge in declining to entertain the subject petition.

24. In view of the above, we find no merits in the appeal, the appeal is accordingly dismissed leaving the parties to bear their own costs.

25. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

NOVEMBER 03, 2017
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