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

+ **WP(C) 10690/2016**

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Reserved on: 26th July, 2018

Pronounced on: 20th September, 2018

TRIL ROADS PRIVATE LIMITED

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Petitioner

Through: Mr. Dayan Krishnan, Sr. Advocate with
Ms. Amrita Narayan and Mr. Ishaan Duggal, Advs.

Versus

NATIONAL HIGHWAY AUTHORITY OF INDIA...

Respondent

Through: Mr. Keshav Mohan, Mr. Rishi K.
Awasthy, Ms. Ritu Arora and Mr. Piyush
Choudhary, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

Tril Roads Private Limited ('petitioner' for short) has invoked writ jurisdiction under Article 226 of the Constitution of India, to challenge action of the National Highway Authority of India ('respondent' for short) in forfeiting their bid securities of Rs.10.32 crores under package I and Rs.12.40 crores under package II, in terms of Clauses 2.20.6 and 2.20.7 of the Request for Proposal (collectively 'RFPs' for short) in the following projects:

- a. Six laning of Kishangarh to Gulabpura section of NH 79 A and NH 79 in the State of Rajasthan (length 90,000 Km) on DBFOT (Toll) under NHDP Phase V (**“Package I”**)

b. Six laning of Kishangarh-Udaipur-Ahmedabad Section from 9,000 (near Gulabpura) to KM 214.870 of NH-79 in the State of Rajasthan, Package 2 under NHDP, Phase V on BOT (Toll) mode (**“Package II”**).

2. This forfeiture of the security bids as per the respondent was in view of withdrawal of the bids placed by the petitioner for package Nos. I and II.

3. The petitioner contends that as the bids submitted by them were unresponsive, at best the respondent could have deducted 5% from the bid securities under Clause 2.20.7(a) of RFPs and not the full or entire security bids. Reliance is placed on *Kailash Nath Associates Vs. Delhi Development Authority & Another*, (2015) 4 SCC 136.

4. The respondent has raised a preliminary objection to the petitioner invoking writ jurisdiction for adjudication of commercial disputes relating to terms of the tender documents, i.e. RFPs, which constitute a binding agreement. The petitioner it is submitted must take recourse to ordinary civil remedy for adjudication of the factual and legal disputes.

5. We find merit in this objection raised by the respondent and would elaborate and expound our reasons why we should exercise our discretion and not entertain and decide the present writ petition on merits.

6. The factual matrix in brief in the context of the present *lis* is as follows. The petitioner pursuant to the RFPs had submitted hard copies of their bids/applications on 22nd July, 2016 along with a covering letter to the respondent. They had also furnished bid security in the form of bank guarantees of Rs.10.32 crores and Rs.12.40 crores for package Nos. I and II, respectively. In accordance with the terms of the RFPs, the petitioner had uploaded their bids for package Nos. I and II through e-tendering portal on 26th July, 2016 at 10:30 hours and 10:46 hours, respectively. RFPs had

mandated that the bidders should submit/upload their bids at the e-tendering portal on or before 11:00 hours on 26th July, 2016, the “bid due date” as defined in Clause 2.12 of the RFPs.

7. In terms of the RFPs the bids submitted including the bids given by the petitioner were opened at 11:30 hours on 26th July, 2016. Again in terms of the RFPs evaluation of bids were made and completed on 16:20 hours on 26th July, 2016.

8. After the bids had been opened at 11:30 hours, the petitioner at 14:30 hours on 26th July, 2016 had sent the following facsimile (fax) message to the Chairman of the respondent/authority:

“After submission of our Bids we discovered that there are some shortcomings in our documentation. We therefore have no objection to NHAI, declaring our Bids as non-responsive.

We regret the inconvenience caused.”

This was followed by communication dated 1st August, 2016, addressed to the Chairman of the respondent/authority that the petitioner had observed certain errors in the bids submitted by them because of wrong interpretation of the RFPs. Thereupon, the petitioner had made immediate attempt to withdraw their online bids but were unsuccessful. However, before "opening" of the bids, the petitioner had informed that they would not object if their bids were treated as non-responsive. The petitioner had stated that the Letter of Award for the tenders should not be issued to them, as they would not be able to proceed with the projects. Further, as the petitioner had made a genuine and *bona fide* mistake while submitting the bids they should not be penalized by forfeiture of the bid securities. By this letter, the petitioner had

also requested that they be allowed to replace the bank guarantees with demand drafts towards bid securities.

9. As per the respondent the bids given including the bids by the petitioner were opened and examined in accordance with the RFPs. The petitioner upon consideration was declared the “selected bidder”, and accordingly informed by the respondent by two letters both dated 11th August, 2016 in terms of Clause 3.3 of the RFPs. Petitioner was also informed that as per Clauses 2.20.6 and 2.20.7 of the RFPs, that they would suffer forfeiture of bid securities of Rs.10.32 crores and Rs.12.40 crores due to withdrawal of the two bids. The respondent had agreed to accept the request to replace the bank guarantees with the demand drafts as bid securities, provided they were to be furnished within a period of seven days. The petitioner had thereupon by two letters dated 16th August, 2016 furnished demand drafts of Rs.10.32 crores and Rs.12.40 crores in favour of the respondent. By letters dated 30th August, 2016 the respondent returned the two bank guarantees to the petitioner and the petitioner was informed that the respondent had exercised the right to forfeit the bid securities of Rs.10.32 crores and Rs.12.40 crores under package Nos. I and II, respectively. Accordingly, the demand drafts furnished would be appropriated. The petitioner by their letter dated 30th August, 2016 to the respondent had asserted that the petitioner had given qualified or conditional bids and at best, they were liable to pay 5% of the bid securities. Their bids should have been treated as un-responsive under Clause 2.20.7 (a) of the RFPs. Their action did not amount to withdrawal of the bids and the entire bid security amount should not have been forfeited.

10. There cannot be any doubt or debate that the dispute between the petitioner and the respondent relates to the terms set out in the RFPs. The petitioner had submitted the bids agreeing and accepting the terms mentioned in the RFPs. The petitioner asserts that their bids were un-responsive as per Clause 3.2 of the RFPs and reliance is placed upon Clause 2.20.7(a). The contention of the respondent, on the other hand, is that responsiveness is to be determined with reference to Clause 3.2.1 of the RFPs. Further, the Respondent had the right to determine and decide whether the bids were responsive. Relying on Clause 2.15.1 of the RFPs the respondent state that the bidder could modify, substitute or withdraw their bid after submission, prior to "bid due date". Bids could not have been modified, substituted or withdrawn by the bidder on or after the bid due date i.e. 11:00 hours on 26th July, 2016. Therefore, this was a case of withdrawal of the bids and not un-responsive bids.

11. The petitioner relying on *Kailash Nath Associates* (Supra) submits that the dispute involves interpretation of the terms of RFPs and application of law or ratio in the above case. The respondent on the other hand relies on judgment of the Supreme Court in *National Highways Authority of India Vs. Ganga Enterprises and Anr.*, (2003) 7 SCC 410 and *National Thermal Power Corporation Limited Vs. Ashok Kumar Singh & Ors.*, (2015) 4 SCC 252, stating that their right to forfeit the earnest money or security bids is paramount and as per the agreement and law.

12. In the present judgment the primary issue relates to the invocation of writ jurisdiction of this court in this *lis* arising and relating to right to forfeit the security bids as per terms of the RFPs including the questions emanating from withdrawal of the bid post the bid due date. The Supreme Court in

Joshi Technologies International Inc. Vs. Union of India, (2015) 7 SCC 728 had examined the issue as to whether and when a writ petition should be entertained in commercial contractual disputes. It was observed that there were a plethora of decisions that when a contract is entered into between the State and a person and the issues and disputes that arise between them are non-statutory and purely contractual, no writ order should be issued under Article 226 of the Constitution of India to compel the authority to remedy a breach of contract. The party complaining of breach of contract should ordinarily approach the Civil Court and not invoke the extraordinary writ jurisdiction. Referring to the other line of decisions wherein writ courts had exercised and entertained the writ petitions, it was highlighted that this was because the impugned action had some public law character attached to it. Even in ***ABL International Limited & Another Vs. Export Credit Guarantee Corporation of India Ltd. & Ors.***, (2004) 3 SCC 553, it was held that only in appropriate cases writ petition could be entertained when factual disputes arise for consideration and the consequential relief sought is for monetary claim. However, exercise of writ jurisdiction is not appropriate, unless the action of the State is arbitrary, oppressive, violates constitutional mandate of Article 14 or there is other valid and legitimate reason. The position of law was summarized in ***ABL International Ltd & Another*** (Supra) as under:

“52. On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the appellants in a writ petition when a suitable efficacious alternate remedy is available by way of a suit. The answer to this question, in our opinion, lies squarely in the decision of this Court in the case of *Shrilekha Vidyarthi* [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] wherein this Court held: (SCC pp. 235-37, paras 20-22 & 24)

The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Article 14 and contractual obligations are alien concepts, which cannot coexist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the preamble. Therefore, total exclusion of Article 14 — non-arbitrariness which is basic to rule of law — from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in

contractual matters. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

53. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution. Thus if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of the State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs 16 lakhs. On facts we have found that the terms of the policy do not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when the Kazakhstan Government failed to fulfil its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by

misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner.”

13. In *Joshi Technologies International Inc.* (supra), the Supreme Court had cautioned the Courts from exercising writ jurisdiction in contractual matters, culling out the following principles:

“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 with 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:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

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.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm

of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.”

14. The petitioner has relied on decision of the Division Bench of this Court in *Simplex Infrastructure Limited Vs. National Highways Authority of India & Anr.*, (2017) 239 DLT 324 (DB) in which the writ petition was

allowed, observing that forfeiture of the entire bid security was penal and absolutely unreasonable. The said decision, in our opinion, would have no application in the present case as in the said case no objection was raised as to the maintainability or entertainment of the writ petition. Moreover, the factual matrix was also entirely different as the bid placed by the petitioner therein had been rejected. The pre-bid security deposit was forfeited and appropriated as damages. Pertinently show-cause notice had been issued by the Chief Engineer, PWD Assam for debarring the petitioner from all future works of PWD Assam for a period of two years. The petitioner therein was served with the show cause notice on the same date when they had submitted their bid.

15. The petitioner had also placed reliance on judgment by a Division Bench of this Court in *Madhucon Projects Limited Vs. National Highway Authority of India*, W.P.(C) 8418/2010 decided on 10th March, 2011. In this case the petitioner therein had filed a writ petition for quashing the decision of the respondent declaring their bid as unresponsive and to restrain the respondent therein from awarding the contract to a third party. It was held that the bid should not to have been treated as non-responsive and at best clarification could have been sought about the doubt. Accordingly, direction was issued that the bid of the petitioner therein should be opened and processed. The issue of forfeiture of bank guarantee was a direct consequence of bid being declared as non-responsive, which act was set aside. In that context, observations were made, and that that the clause permitting forfeiture of 5% of the security deposit would be penal, and therefore provision of Section 74 of Contract Act would apply. Before us, it was submitted that the special leave petition preferred by the respondent

against the said decision was dismissed. The decision in ***Madhucon Projects*** (Supra) is distinguishable as the primary issue examined and decided was whether the action of the respondent declaring the bid as non-responsive was arbitrary and contrary to law. Immediate and prompt decision and adjudication was required. The question and issue related to enforcement of right to participate and fair consideration in award of contract. The finding that the bid was non-responsive was over-turned and in that context observations were made. Petitioner has not invoked writ jurisdiction for fair consideration. Petitioner is not pressing its claim or right to enter into a contract.

16. The petitioner had also relied upon an order of the Supreme Court dated 18th March, 2015 passed in Civil Appeal No.3053/2015 arising out of S.L.P (Civil) No. 15689/2011 ***National Highways Authority of India Vs. MEIL – EDB LLC (JV)***, which observes that a writ court, while referring to the question of forfeiture of the bid security, may take a preliminary view whether the damages imposed by the authority were amenable to the writ jurisdiction, such as whether the clause was indubitably punitive or not, but the writ court should abstain from going into minute calculation. This controversy should be left to the civil court to decide. The relevant paragraph of ***MEIL – EDB LLC (JV)*** (supra) reads as under-

“We are confronted with a situation when there is a contract between the parties, duly signed by the Respondent which restricts forfeiture of 5% of the value of the Bid Security ostensibly not by way of a penalty. Of course, as is to be expected, the Respondent disagrees and on the contrary submits that the deduction/forfeiture is in *terrorem* and is punitive in nature. A writ court may at least as a temporary or preliminary view decide whether the damages imposed by an Authority amenable to writ jurisdiction such as

NHAI indubitably are punitive or not, but should abjure from going into the minute calculation. That controversy should be left to be the Civil Court to decide, i.e. whether the deduction/forfeiture, in the present instance of 5% of the value of the Bid Security is punitive or otherwise. We think that the course that commends itself to us is to relegate the parties to the Civil Courts to determine whether any damages had been suffered by the National Highways Authority of India and if so whether the deduction of 5% was fair pre-estimate or was punitive in nature. Since the parties have been bona fide prosecuting writ proceeding in the event of the plaintiff seeks enlargement/extension of time for filing of a suit, the Courts in seisin will keep all the circumstances in view before passing an order.”

Aforesaid ratio and dictum would not help and assist the petitioner. The Supreme Court had observed that the controversy whether deduction or forfeiture of 5% in the said case was punitive, should be left to be determined by the civil court. The contractor therein was therefore directed to take recourse to civil proceedings by filing a suit. For identical reasons, we would also refrain and not exercise writ jurisdiction in the present case and would not examine the question of forfeiture of the security bids in terms of the RFPs or the quantum that should be forfeited under the applicable and relevant clause. We would leave it open to the petitioner to take recourse to civil remedy as per law.

17. Having examined the nature of the dispute raised and the factual matrix in light of the case law, we hold that the issue and dispute relates to commercial contractual transactions.

18. In view of the aforesaid discussion, we are not inclined to entertain and decide the present writ petition on merits. It would be appropriate and proper for the petitioner to invoke ordinary civil remedy for redressal of their claim and adjudication of disputes with the respondent. We, however, clarify that

the observations made in the present order are for disposal of the writ petition and would not be construed and treated as observations on merits, which are binding on the parties. We further deem it appropriate to clarify that the petitioner would be at liberty if required, to move an application under Section 14 of the Limitation Act, 1963, which if filed will be dealt with in accordance with law. In the facts of the present case, there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

SEPTEMBER 20th, 2018

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