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

Reserved On 22.05.2019
Pronounced On 27.05.2019

+ **O.M.P.(I) (COMM.) 462/2018 & I.A. 17429/2018, I.A. 3606/2019,
I.A. 5098/2019**

GIESECKE & DEVRIENT MS INDIA PVT. LTD..... Petitioner
Through: Mr.Pancham Surana, Adv.

versus

ORIENTAL BANK OF COMMERCE Respondent
Through: Mr.S.L. Gupta, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

I.A. no.5098/2019, I.A. no. 17429/2018, I.A. no. 3606/2019 and
O.M.P.(I) (COMM.) 462/2018

1. Interlocutory Application (I.A.) no. 5098/2019 has been filed by the respondent i.e. Oriental Bank of Commerce (hereafter referred to as "OBC"), for vacating interim order dated 18.12.2018 passed in I.A. No.17429/2018 filed in OMP(I)(COMM.) No.462/2018.
2. In order to adjudicate upon the instant matter the following facts are required to be noticed:
3. On 11.4.2018, OBC had floated a Request for Proposal (hereafter referred to as "1st RFP") for Empanelment of a Service Provider to Supply, Print and Personalization of Welcome-Kits of ATM-cum-Debit EMV Dual Interface Card (with Contact and Contactless chip and Magstripe) (hereafter referred to as "old-card").

4. Consequently, pre-bid meetings were held between prospective bidders and representatives of OBC. The petitioner i.e. Giesecke & Devrient MS India Private Limited (hereafter referred to as “GDPL”) preferred its bid amongst others. The 1st RFP envisaged a two-stage bidding process. In the first stage, the technical bids were opened and those who were declared technically qualified progressed to the second stage, which involved the opening of commercial bids.

4.1 Evidently, GDPL, amongst others, was intimated on 27.7.2018 that commercial bids would be opened on 1.8.2018.

4.2 Furthermore, the technically qualified bidders were informed that OBC would conduct an online reverse-auction after commercial bids were opened.

5. On 1.8.2018, OBC opened the commercial bids. Resultantly, on 15.9.2018, OBC intimated the successful bidders that it would be initiating the reverse-auction process. Concededly, in the online reverse-auction held on 28.9.2018, GDPL’s bid was found to be the lowest. The formal intimation, though, was transmitted to GDPL by OBC vide communication dated 29.9.2018.

6. I may also note that, in the interregnum, on 4.9.2018, OBC had sent an e-mail to GDPL with regard to the shortcomings found, generally, during technical evaluation of bids submitted pursuant to the 1st RFP.

6.1 This e-mail adverted to the fact that OBC in line with the recent guidelines received from Ministry of Finance, Department of Financial Services (DFS), Government of India (GOI) whereby it had been advised to issue Near Field Communication (in short “NFC”) enabled contact/contactless cards, had decided to revise the bifurcation in quantity of cards to be procured in the following manner:

Type	Visa	Rupay	Mastercard
EMV + Magstripe (EMV Contact Cards)	40Lac		--
EMV + Contactless + Magstripe cards (Dual Interface Cards)	80 Lac		5 Lac

7. Continuing with the narrative, GDPL upon being declared as L1, wrote to OBC on 13.11.2018, primarily, with a view to obtaining a green-signal as to when to take the project forward.

8. Concededly, there was no response from OBC. The reason, perhaps, was that OBC was mulling with the idea of annulling the 1st RFP. This appears to be so as OBC had, evidently, received a copy of communication dated 21.8.2018, which was addressed by the Director, Ministry of Finance, DFS, GOI to various Chairpersons/Managing Directors and CEOs of public and private sector banks including Chairpersons of RRBs. Via this communication, the GOI, *inter alia*, required public sector and private sector banks to adopt the National Common Mobility Card (in short “NCMC”) eco-system. The general idea being that the NFC/contactless cards as per the GOI directives were, henceforth, required to be NCMC compliant.

9. It appears that upon receiving the directive contained in GOI’s letter dated 21.8.2018, OBC decided to annul the 1st RFP and issue a fresh RFP with an additional feature that would require it to be NCMC compliant. In other words, OBC, it appears, in the backdrop of the GOI directive took a decision to issue a card which would have not only all the features of the old-card but in addition a new feature enabling the cardholder to access multiple service areas such as —make payments for passes, season tickets, online e-commerce payments, toll charges, parking charges and payments to

retailers.

10. Consequently, on 21.11.2018, OBC announced on its e-portal the annulment of the 1st RFP.

11. GDPL, being aggrieved, conveyed its dismay to OBC via its communication dated 30.11.2018. While there was no response to GDPL's communication, on 1.12.2018, OBC issued a new RFP for Empanelment of a Service Provider for Supplying, Printing and Personalization of Welcome-Kits of ATM-cum-Debit Dual Interface Card (with Contact and Contactless EMV chip and magstripe) with NCMC (hereafter referred to as "2nd RFP").

12. As indicated above, the 2nd RFP had NCMC as its additional feature. GDPL, hoping to get OBC to reverse its stand, served a notice dated 5.12.2018 on OBC demanding justice to be done in the matter.

13. Since there was no resolution of the grievance articulated by GDPL, it took recourse to legal remedies. Accordingly, GDPL filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "1996 Act").

14. Notice in this petition was issued on 18.12.2018. As alluded to hereinabove, while issuing notice, an interim order was passed in favour of GDPL. In sum, via this order, OBC was enjoined from awarding a contract to any other party pursuant to the 2nd RFP.

15. On 12.3.2019 i.e. the returnable date, Mr. S.L. Gupta, advocate, entered his appearance on behalf of OBC. At his request, time was given to file a reply in the matter. Likewise, GDPL was given time to file a rejoinder to the reply. The matter was listed for further proceedings on 22.4.2019.

15.1 However, on 8.4.2019, OBC moved I.A. no. 5098 of 2019 for vacating the order dated 18.12.2018. Notice was issued in this application, which was accepted by Mr. Surana, Advocate, for GDPL. Liberty was

given to GDPL to file a reply. Likewise, OBC was given an opportunity to file a rejoinder to the reply.

15.2 Thereafter, arguments were heard in the captioned matter from time to time and final judgment in the matter was reserved on 22.5.2019.

15.3 I must also indicate that in the meanwhile, GDPL has moved a petition under Section 11 of the 1996 Act which is numbered as Arb.P.207/2019. This petition came up for hearing before me on 4.4.2019 when a notice was issued in the matter. The returnable date in this petition is 27.5.2019. The arguments on behalf of GDPL have been addressed by Mr. Surana while submissions on behalf of OBC have been advanced by Mr. Gupta.

16. The main thrust of Mr. Surana's submission was that since GDPL had been declared L1, it was the obligation of OBC to commence and undertake the next steps in relation to the 1st RFP, which, *inter alia*, required placement of a purchase order on the bidder and entering into a contract with the bidder within a period of 30 days of the award of work or within such extended period, based on the provisions of the 1st RFP, purchase order and such other terms and conditions that the purchaser may put in place.

17. In this regard, my attention was drawn to Clauses 14 and 17 of the 1st RFP. Emphasis was laid by the learned counsel on the fact that Clause 17, in addition to what is indicated above, *inter alia*, also provides that till such time contract was executed between the parties, the terms and conditions set out in the purchase order and RFP shall constitute a "binding contract" between the parties.

17.1 Furthermore, learned counsel highlighted the fact that while OBC had a right to terminate the 1st RFP at any stage without assigning any reason, it could do so only upon giving GDPL at least 90 days prior notice in writing

and that too in respect of events of default as set out in Clause 38 of the 1st RFP. Furthermore, Mr. Surana submitted that if the termination was for the reason that GDPL had committed breach of its obligations undertaken by it under the 1st RFP, OBC was required to accord GDPL at least 30 days, from the date of the notice, to cure the breach. In other words, according to the learned counsel, only if GDPL failed to give a reasonable plan acceptable to OBC to cure the breach pointed out within a period of 30 days, could it terminate the 1st RFP.

18. It was emphasized by Mr. Surana that the annulment order dated 21.11.2018 was issued without giving any reasons and sans any opportunity of personal hearing.

19. The submission was that the impugned annulment order dated 21.11.2018 was passed in violation of the terms of the 1st RFP and, therefore, railed against the principles of natural justice.

19.1 In support of this submission, my attention was drawn to the notice dated 5.12.2018 issued by GDPL.

20. To establish OBC's pattern of not responding to GDPL's communication, my attention was also drawn to letters dated 13.11.2018, 20.11.2018 and 30.11.2018.

21. On the merits of the decision taken by OBC to embark upon the issuance of the 2nd RFP, Mr. Surana referred me to the e-mail dated 4.9.2018. As noted hereinabove, this communication revised the bifurcation of quantities pertaining to the old-card.

22. According to Mr. Surana, the old card, which, GDPL was required to provide OBC for use of its customers could be also used by technically reconfiguring it in a manner that it could provide for an offline wallet. Mr. Surana, thus, submitted that the old card could be used both online as well as

offline and, therefore, contrary to what was suggested by OBC, it could be used for all the services which are envisaged under the 2nd RFP.

23. Mr. Gupta, on the other hand, drew my attention to the prayers made in the Section 9 petition filed under the 1996 Act. Learned counsel emphasized the fact that a perusal of the prayers would show that all that GDPL required the Court to do was to ensure that the impugned annulment order dated 21.11.2018 issued in respect of the 1st RFP be stayed and that OBC be restrained from procuring and issuing the cards to its customers as envisaged under the 1st RFP.

24. Mr. Gupta also highlighted the fact that GDPL, in effect, had sought directions from the Court that it should restrain OBC from taking recourse to any further measures (apart from what it had already done which was to issue the impugned order of annulment order) and, to restrain OBC from awarding a contract to another person/entity under the 1st RFP. The submission was that given the manner in which the petition was framed it was evident that the reliefs sought veered only around the 1st RFP.

24.1 Mr. Gupta, thus, argued that since OBC was not carrying forward the 1st RFP, therefore, the reliefs sought by GDPL had become infructuous.

24.2 According to Mr. Gupta, OBC had decided (pursuant to the GOI directive contained in its communication dated 21.8.2018), to procure a new-card for its customers which would have accompanied by NCMC as an additional feature.

24.3 In other words, according to Mr. Gupta, the new-card which OBC was desirous of procuring, for which it had already received bids including a bid from GDPL, could be used both online and offline. Mr. Gupta, during the course of his submissions, elaborated on the technical features of the new-card and thus, sought to establish that the card would create an offline wallet

which could be used not only as a debit-card or as an ATM-card but could be also used at Metro stations, retail outlets and for other transactions, which a customer may like to carry on by taking recourse to e-commerce platforms.

25. Furthermore, Mr. Gupta highlighted the fact that the matter *vis-a-vis* the 1st RFP was only at the stage of GDPL being declared as L1. It was emphasized that OBC had not formally accepted the offer made by GDPL and that OBC had no such obligation to do so as provided in Clause 9 of the 1st RFP. Mr. Gupta emphasized the fact that OBC could reject the lowest or any other offer received in response to the 1st RFP.

26. Besides this, Mr. Gupta also relied upon on Clause 16 of the 1st RFP. Based on this clause, learned counsel contended that OBC had the right to reject any or all the bids and “scrap” the bid process at any stage without assigning any reason. The only requirement, according to Mr. Gupta, was that once OBC took that step, it was obliged to return the earnest money deposit made along with the bid.

26.1 To buttress his submission, Mr. Gupta also relied upon Clause 17 of the 1st RFP.

27. According to Mr. Gupta, rights, if any, could have fructified in favour of GDPL if a contract had been executed between the OBC and GDPL.

Reasons

28. I have heard the learned counsel for the parties and perused the record. According to me, what clearly emerges from the record is as follows:

- (i) On 11.4.2018, the 1st RFP was issued.
- (ii) GDPL was declared as L1 on 29.9.2018.
- (iii) OBC issued the impugned annulment order on 21.11.2018 via

its e-portal.

- (iv) OBC gave no reasons for annulling the 1st RFP.
- (v) On 1.12.2018, OBC issued the 2nd RFP.

29. Based on the aforesaid facts, what clearly gets underscored is that OBC had not issued any communication accepting the offer made by GDPL. The matter was positioned at a stage of opening bids and having them ranked. Consequently, GDPL upon responding to the 1st RFP, which is in the nature of invitation to bid, was declared by OBC after due scrutiny as L1, that is, the lowest bidder.

30. It is at that stage that OBC decided to procure a new-card with an NCMC feature. This decision was based on the directive contained in GOI's communication dated 21.8.2018. Therefore, the moot question which arises for consideration is: was OBC right in annulling the 1st RFP and thereafter proceeding to issue the 2nd RFP? To my mind, Clauses 9 and 16 of the 1st RFP can give an answer to this poser. Thus, for the sake of convenience, Clauses 9 and 16 are set forth hereafter:

“9. No Commitment to Accept Lowest or Any Bid

PURCHASER shall be under no obligation to accept the lowest or any other offer received in response to this tender notice and shall be entitled to reject any or all offers including those received late or incomplete. PURCHASER reserves the right to make any changes in the terms and conditions of purchase. PURCHASER will be under no obligation to meet and/or have discussions with any bidder, and/or to entertain any representation.

16. Rejection of Bids:

The PURCHASER reserves the right to reject any or all the bids or scrap the bidding process at any stage without assigning any reason. The Earnest Money Deposits in such

event will be returned by the PURCHASER. However, the participation fee will not be refunded.”

31. A perusal of Clause 9 would show that OBC is vested with a power to reject the "lowest or any other" offer. That this power could be exercised without assigning any reason by OBC is articulated in Clause 16 of the 1st RFP. As a matter of fact, this very Clause confers power on OBC to scrap the entire bidding process at any stage, which is exactly what it did by issuing the annulment order dated 21.11.2018.

32. Thus, the argument advanced by Mr. Surana that the new feature could be incorporated in the old-card, to my mind, *prima facie*, does not help GDPL's case. I am consciously not making any definitive observation with regard to whether or not the card i.e. the new card, sought to be procured under the 2nd RFP is similar to what was sought to be obtained under the 1st RFP as that could compromise GDPL's case if the matter were to be tried on merits. However, broadly, OBC appears to have established *prima facie* at this stage that the features in the two cards were not similar.

33. Mr. Surana's argument based on the provisions of Clause 17 of the 1st RFP, which, *inter alia*, provides that the terms and conditions of the purchase order and the 1st RFP shall constitute a binding contract till a formal contract is executed between GDPL and OBC, in my opinion, only highlights the fact that the clauses in the 1st RFP would bind the parties, which would include the provisions of Clauses 9 and 16 contained therein. In this case, as noticed hereinabove, GDPL was only declared as L1. Concededly, OBC had not proceeded to the next stage, that is, execution of a purchase order and/or execution of a formal contract with GDPL.

34. Therefore, for the foregoing reasons, I am of the view that GDPL has failed to establish that it has a good *prima facie* case for the continuation of

the injunction order. I must also indicate that the balance of convenience is in favour of OBC, as it is argued on its behalf that based on the GOI's directive of 21.8.2018, other public sector banks and private sector banks have already commenced issuance of a card with NCMC as the additional feature. OBC's stand is suggestive of an emerging scenario, which is, that continuation of injunction order will eat into its business. Given this situation, the balance of convenience appears to be in favour of OBC.

35. In the event, to my mind, if GDPL were to ultimately prove its case, it could always be accorded pecuniary compensation qua the alleged breach committed by OBC.

36. Thus, for the reasons given above, I am inclined to allow the prayer made in I.A. No. 5098/2019.

37. Accordingly, the interim order dated 18.12.2018, passed in I.A. No. 17429/2018 shall stand vacated.

38. Resultantly, the petition i.e. O.M.P.(I) (COMM.) 462/2018, filed under Section 9 of the 1996 Act preferred by GDPL as also I.A. No.17429/2018 will have to be dismissed. It is ordered accordingly.

39. Consequently, I.A. no. 3606/2019 shall stand dismissed.

40. There shall, however, be no order as to costs.

RAJIV SHAKDHER
(JUDGE)

MAY 27, 2019/pmc