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

Date of decision: 2nd February, 2021

\+ **W.P.(C) 336/2021**

M/S DWARKA DAS AGARWAL ..... Petitioner
Through: Mr. Vibhor Verdhan, Advocate. (M: 9711961483)

versus

UNION OF INDIA AND ORS ..... Respondents
Through: Mr. Sushil Kumar Pandey, Sr. Panel Counsel with Mr. Rahul Mourya for R-1. (M:9873588234)
Mr. Saurabh Banerjee, Standing Counsel for NHAI with Mr. Ankit Srivastava, Advocate. (M: 9810282282)

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u>(Oral)

1. This hearing has been done through hybrid mode (physical and virtual hearing).

<u>CM APPL. 887/2021(for exemption)</u>

2. Allowed, subject to all just exceptions. Application is disposed of.

<u>CM APPL. 2358/2021(for additional documents)</u>

3. This is an application for taking additional documents on record. The same is taken on record. Application is disposed of.

<u>W.P.(C) 336/2021 & CM APPL. 886/2021 (for stay)</u>

4. The Petitioner, in the present case, seeks a direction to restrain the Respondent from invoking the bank guarantee bearing no. 3116320BG0000006, dated 2nd June 2020, furnished by the Petitioner in favour of the Respondent, for a sum of Rs.50,00,000/-.

5. The case of the Petitioner is that Respondent No.2- National Highway Authority of India (*hereinafter, "NHAI"*) had floated a financial bid on 1st October, 2019 for collection of user fee through a contractor/ bidder, in respect of the Section of highway located at Bagaliya fee plaza at Km 84.850 and Baggar Fee Plaza at Km 136.137 for Beawar Gomti Section from Km 58.245 to Km 177.050 of NH-8 in the State of Rajasthan. The Petitioner firm M/s Dwarka Das Agarwal was one of the successful bidders, in the pre-qualification bid, and had submitted a bank guarantee through the State Bank of India, Kothari Corner, Dr. Ambedkar Circle, Hospital Road, Bikaner branch, amounting to Rs. 50, 00,000/-.

6. Pursuant to the Request For Qualification (*hereinafter, "RFQ"*) document issued on 1st October, 2019, the said bank guarantee was furnished as a "common bid security" for the purpose as indicated in the RFQ. The financial bid commenced on 11th November, 2020 in which the Petitioner participated and submitted a bid amount of Rs. 44,21,88,888/- as the amount payable annually. On 26th November 2020, the authority opened the bid and awarded the bid in favour of the Petitioner. The 'Letter of Award' was issued to the Petitioner Company on 2nd December, 2020 and a performance security of Rs. 3,68,50,000/- was required to be submitted by the Petitioner within 14 days of the said letter being issued.

7. According to the Petitioner, immediately after the letter of award of tender was given in favour of the Petitioner, the farmers nationwide agitation against the Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020, commenced, and hence the Petitioner communicated to the Respondent vide letter dated 8th December 2020, that it does not wish to accept the letter of award, dated 2nd December 2020, due to

the said ongoing agitation. In view of the same, Respondent No. 2- NHAI wrote a letter dated 11th December, 2020, calling upon the Petitioner to deposit the amount equal to the bid security of Rs.36,90,000/- failing which, it would invoke the bank guarantee which was already submitted in its favour by the Petitioner. The Petitioner then made a representation vide letter dated 21st December 2020, requesting the NHAI not to invoke the bank guarantee. The Petitioner, in the said letter, relied on the doctrine of *force majeure* as stipulated in the Request for Proposal (Bid, Financial and Draft Contract Agreement), dated 11th November 2020 (*hereinafter, "RFP"*) to argue that the farmers agitation would constitute *force majeure*.

8. Mr. Vibhor Verdhan, ld. counsel for the Petitioner, relies upon various portions of the RFP document in support of his case. The primary reliance is placed on the force majeure clause in the contract. According to ld. counsel for the Petitioner, the farmers agitation would be a *force majeure* event in terms of Clause 25(b)(iii) and 25(b)(iv) of the RFP document. He, therefore, submits that the bank guarantee ought not to be invoked against the Petitioner by the Respondent.

9. On behalf of Respondent No. 2- NHAI, it is firstly submitted by Mr. Banerjee, ld. Standing Counsel, that this court does not have the territorial jurisdiction to entertain this petition, as the toll plaza is locked in Rajasthan. Secondly, it is submitted that the said bank guarantee is irrevocable, as is clear from clause 3 and 4 of the said bank guarantee issued for "common bid security". The same is set out below:

> *"3. We, the Bank, do hereby unconditionally undertake to pay the amounts due and payable under this Guarantee without any demur, reservation, recourse, contest or protest and without any reference*

to the Bidder or any other person irrespective of whether the claim of the Authority is disputed by the Bidder or not, merely on the first demand from the Authority stating that the amount claimed is due to the Authority by reason of failure of the Bidder to fulfil and comply with the terms and conditions contained in the RFQ/ Bidding Documents including failure of the said Bidder to keep it BID open during the BID validity period as set forth in the said RFQ/ Bidding Documents for any reason whatsoever. Any such demand made on the bank shall be conclusive as regard amount due and payable by the Bank under this Guarantee. However, our liability under this Guarantee shall be restricted to an amount not exceeding ***Rs. 50,00,000/-(Rupees Fifty Lakh Only)****."*

4. This Guarantee shall be irrevocable and shall remain in full force upto 31-03-2021 inclusive of a claim period of 60 (sixty) days or for such extended period as may be mutually agreed between the Authority and the Bidder, and agreed to by the Bank and shall continue to be enforceable till the amounts under this Guarantee have been paid."

10. He further submits that fraud and irretrievable injustice has not been pleaded in the petition, and hence according to him there is no case made out for the grant of an injunction restraining the invocation of the said bank guarantee.

11. Finally, ld. counsel for the Respondent NHAI submits that even as per clause 2.4 of the RFQ document, which provides for the common bid security, if a bidder withdraws from the financial bid, the Respondent Authority is entitled to forfeit the amount furnished as the common bid security.

12. Heard ld. counsels for the parties. The Court, in this case, is exercising writ jurisdiction under Article 226 of the Constitution, and the only question that is to be looked at, at this stage, would be whether there is any case made out for restraining the invocation of the bank guarantee in favour of the Respondent No.2 - NHAI.

13. On the question of jurisdiction, ld. counsel for the Petitioner has relied upon clause 4 of the RFQ document and corresponding clause 5 of the RFP document, to argue that Courts in Delhi have the exclusive jurisdiction with respect to disputes arising out of the said contracts. Clause 4 of the RFQ document reads as under:

> "***4. MISCELLANEOUS***
> *4.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts at New Delhi shall have exclusive jurisdiction over all disputes arising under, pursuant to and/or in connection with the Bidding Process."*

14. The said clause is applicable *mutatis mutandis* for the RFP in terms of clause 5 of the said RFP document. In view of the said clauses, this court has the jurisdiction to entertain the present writ petition.

15. Secondly, insofar as the claim of *force majeu*re is concerned, the question that arises is whether the Petitioner has made out a case to show that the highway, in the present case, has been blocked for more than 15 days, or if there is any other factor which could be invoked as a reason to qualify the event as a *force majeure* as contemplated within the contract.

16. The Force Majeure clause in the RFP reads as under:

*"25. **FORCE MAJEURE***

*(a) **NON-FORCE MAJEURE EVENT**:*

An event (i) which involves diversion of traffic of any kind, including but not limited to any diversion ordered/implemented by local authority or any State/Central Government for a period not exceeding 15 days in continuation: or (ii) where the road users opt to access/ travel through the existing alternate free User Fee(Fee) roads due to deteriorated road conditions/ maintenance of road section. This may result into bypassing of User Fee Plaza/ User Fee Collection Booths and user of any part of the said Section of the national Highway/said bridge by the users"

*(b) **FORCE MAJEURE EVENT:***

Except as stated in Clause(a) above, Force Majeure event means an event or circumstances or a combination of events and circumstances referred to in this clause which are beyond the reasonable control of the Party or Parties to this Contract and which party could into have prevented or reasonably overcome with the exercise of its reasonable skill and care in relation to performance of its obligations pursuant to this Contract and which are of the nature, without limitation of those described below:

(i) Publicly declared strike by registered and recognised association of Transporters exceeding 7 days. The date of going on strike and withdrawal or start of movement of traffic will be inclusive for the purpose of calculation of 7 days under this clause.

(ii) Floods/ Earthquake having materially adverse impact i.e., complete blockade of road.

(iii) Act of war, invasion, armed conflict or act of foreign enemy, unexpected call up of armed forces, blockade, embargo, revolution, riot, sabotage, terrorism or act of such threat, <u>or as any other political or social event having material adverse impact on the performance of</u>

obligations of the parties thereof.

(iv) Expropriation, acquisition, confiscation or nationalisation of the User Fee collection.

(v) Any change in law which has a material adverse effect on the obligation of the parties hereto.

(vi) Any decision or order of a court or tribunal, which has a material adverse effect on the performance of obligations of the parties to this Contract.

(vii) Suspension of traffic on the said section of National Highway/ said bridge or any part thereof, exceeding 15 (fifteen) days at a stretch.

(viii) Any event or circumstances of a nature analogous to the foregoing.

Contractor shall be entitled to invoke this clause and give notice in writing to the Authority, if the period of continuance of the Force Majeure event, under this Contract to the extent that such performance is impeded by an event of Force Majeure prevailing continuously for more than 7 (seven) days at a time (or continuously for more than 3) (three) days at a time in case of no user fee collection at all at the fee plaza) for reasons not attributable to the Contractor. However, the contractor has to keep remitting to the Authority full remittance during the intervening period of serving of notice for force majeure claim till the decision of Authority in this regard, which shall be given within 7 days/30 days as given below for interim relief/final relief.

The contractor has to keep remitting to the Authority full remittances in case the claim of the contractor is rejected by the Authority even if he disputes such decision of the Authority.
xxxx"

A perusal of the *force majeure* clause, extracted above, shows that in order to constitute a *force majeure* event, the Petitioner would have to establish, on record, that there was an event that took place which has an adverse material impact on the performance of its obligations, or that there has been a suspension of traffic at the site of performance for 15 days at a stretch.

17. A specific query was put to the Petitioner to establish if there is any material on record to show that the farmers agitation had a material or adverse impact on the highway in question, which is the subject matter of the present petition and the site of the performance of the contract, or if traffic on the said highway has been suspended for more than 15 days. At this juncture, ld. counsel for the Petitioner submits that he does not have any material on record to show the same.

18. Moreover, the question as to whether there was any material or adverse impact or any other *force majeure* event as stated under clause 25 of the RFP document, would also be a question of fact. Unless there is any irrefutable evidence on record to show the existence of a *force majeure* event, or its occurrence thereof is clear or admitted, no inference, thereto, can be made.

19. A perusal of the clause relating to the furnishing of Bid Security clearly stipulates that if the bidder withdraws for any reason, the same would be liable to be forfeited. The relevant clause of the RFQ reads:

> ***"2.4 Common Bid Security:***
> *xxx*
> *<u>The Bid Security of individual fee plaza(s) shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and as damages payable to the Authority for inter-alia, time, cost and effort of the Authority</u>, without prejudice to any other right or remedy that may be available to the Authority hereunder, or otherwise, under the following circumstances:*

(a) If a Bidder at Financial Bid or e-quotation stage submits a non-responsive Financial Bid or e-quotation, subject to, however, that in the event of encashment of Bid Security occurring on this account, the damages so claimed by the Authority shall be restricted to 5% of the value of the Bid Security.

(b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in this RFQ.

(c) <u>If a Bidder withdraws its Financial Bid or e-quotation during the period of Bid Validity as specified in bid stage and as extended by mutual consent of the respective Bidder(s) and the Authority;</u>

(d) If the Bidder does not accept the correction of the bid price quoted in financial bid/e-quotation.

(e) In the case of the Selected Bidder, if it fails within the specified time limit

(i) to sign and return the duplicate copy of LOA; or

(ii) to furnish the Performance Security within the time prescribed therefore in the Financial Bid or e-quotation stage.

The Authority shall be entitled to forfeit and appropriate a portion of the Common Bid Security as damages interalia in any of the events specified above. The Bidder, by submitting its Financial Bid or e-quotation at bid stage, shall be deemed to acknowledge and confirm that the Authority will suffer loss and damage on account of withdrawal of its Financial bid/e-quotation or any other default by the bidder during the period of validity of the Financial bid or e-quotation.

xxxx"

20. The clause extracted above is categorical to the effect that the withdrawal of the bid by the bidder would result in forfeiture. Thus, at the time when the Petitioner withdrew from the bid, it was well aware of the consequences under the bid documents.

21. Considering the fact that the bank guarantee is irrevocable and there is no material on record to show the existence of a *force majeure* event, this Court is not inclined to restrain the bank guarantee from being invoked or encashed.

22. Another circumstance that persuades this Court, not to restrain the invocation of the bank guarantee, is the fact submitted by ld. counsel for Respondent No.2 – NHAI, that after the Petitioner withdrew from the tender, another third- party bidder has since then, already been awarded the said tender at the same price for the same location, and has already taken possession of the toll plaza at the site of performance. The said agreement is stated to have been entered into between Respondent No. 2- NHAI and the third-party bidder on 30th December, 2020.

23. In view of the above facts and the settled law relating to bank guarantees, the relief sought in the present petition is not liable to be granted.

24. Insofar as the amount is concerned, since the bank guarantee is for a sum of Rs.50,00,000/-, the Respondent would be entitled to encash only to to the tune of Rs.36,90,000/, i.e. the amount of the common bid security. The remaining amount shall be refunded to the Petitioner within a period of two weeks from today.

25. The petition and all pending applications are disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 2, 2021
dj/Ak

Corrected & released on 5th February, 2021