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

\+ **Date of Decision: 18.11.2021**

% **W.P.(C) 11755/2021 and C.M. Nos. 36382/2021& 36383/2021**

JASBIR SINGH & ORS. .....Appellants

Through: Mr. Sourabh Kirpal, Senior Advocate with Mr. Keshav Sehgal, Advocate.

versus

DELHI JAL BOARD .....Respondent

Through: Mr. Rahul Mehra, Senior Advocate with Ms. Sangeeta Bharti, Standing Counsel and Mr. Jordan Rohmingthanga & Mr. Chaitanya Gosain, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

JASMEET SINGH, J. *(ORAL)*

1. The present petition has been filed by the petitioner seeking the following substantial prayers:

> *a) Issue appropriate Writ(s) of Mandamus or any other appropriate Writ, Order, direction thereby quashing the Emails dated 05.10.2021/Impugned Notices issued to the Petitioners communicating the rejection of the technical bids (Annexure - 1 (colly) as invalid, non-est and null and void, and the Impugned list (Annexure - P2) uploaded by the Respondent depicting outcome of the technical bid to the extent of rejection of bids of the Petitioners; and*
>
> *b) Issue appropriate Writ(s) of Mandamus or any other*

appropriate Writ, Order, direction declaring the Petitioners to be eligible in the Technical Bid and further directing the Respondent to consider the Financial Bids of the Petitioners for finalisation of the NIT dated 30.07.2021 and Award the tender in favour of the Petitioners, if found to be lowest (L-1) bidder; and

2. Briefly stating the facts giving rise to the filing of the present writ petition that the petitioners who are 36 in number, are predominantly belonging to under privileged sections of the society engaged as manual scavengers or SafaiKaramcharis. The petitioners are also stated to be members of Scheduled Caste/Scheduled Tribe community.

3. Respondent No. 1 is Delhi Jal Board which is a statutory body established under Delhi Water Board Act, 1988 and *inter-alia* entrusted with the function of cleaning, treatment, and disposal of domestic sewage in Delhi.

4. Respondent issued a Notice Inviting Tender("NIT") on 30.07.2021 for the work of '*Deployment of 300 Nos. of Septage Cleaning Machines (combination of 150 big and 150 small) from 150 Nos. of bidders for Collection, Transportation and Disposal of Septage from unsewered, unauthorized Colonies at designated SPSs/STPs/ISPs of the Delhi Jal Board for a period of 05 years.*'

5. As per the NIT dated 30.07.2021, the tender had been floated not only for the purpose of reducing pollution levels in River Yamuna caused on account of discharge of untreated waste and providing basic amenities to the residents of Delhi free of cost, but also with the

objective of empowering manual scavengers and their dependents such as the petitioners.

6. The relevant portions of the NIT regarding the objective of the NIT is reproduced:

> *"Since DMCs and Other Civic agencies are not taking any interest/ failing to fulfil their obligations as per "Delhi Water Board Septage Management Regulation 2018" Delhi Jal Board has decided to put in place a mechanism whereby, vehicles fitted with necessary equipment shall be hired for collection, transportation and disposal of septic tank waste from such households of unsewered areas/ unauthorized colonies free of cost.*
> *The objective of the tender, apart from providing the services of septic tank cleaning of all unauthorised unsewered colonies as basic civic enmity (according to us should have been 'amenity') at no cost until sewerage connections are provided in the area. This must include the objective of affirmative action of empowering manual scavengers and their dependents, safaikaramcharis, SC/ST economically and socially so as to enable them to lead a dignified life and join the mainstream of the society".*
> (emphasis supplied)

7. The petitioners submitted technical and financial bids with regard to NIT dated 30.07.2021 on 31.08.2021. The petitioners are stated to have undergone training in "Operation and Safety of Mechanized Septage Cleaning" for submitting bids in the NIT.

8. On 11.08.2021, pre-bid meeting in terms of the NIT was held and several clarifications were sought from the respondent. The respondent also uploaded the response to the queries raised in the

meeting.

9. As per the petitioner, the respondent vide letter dated 04.09.2021 wrote to the training institute of the petitioners namely, M/s Abhinav Institute of Technology & Management seeking Trainer's details and his certificate obtained from Skill Council for Green Jobs ("SCGJs"). As per the petitioner, this exercise was beyond the terms of NIT.

10. On 10.09.2021, the respondent issued a letter to all the bidders including the petitioners to attend their office on 13.09.2021 or 14.09.2021 for verification of their caste certificate and documents uploaded in the NIT. There are numerous other allegations which are made in the petition but the same are not being adverted to as they are neither relevant nor germane to the issue in controversy or our reasoning for adjudication. What is relevant is that the petitioners were informed that the affidavit/undertaking submitted by the petitioners to the respondent was not in terms of Clause 2.6 of the tender document as the same was required to be furnished from 'manufacturer'. The letters which were submitted by the petitioners were from authorized dealers, namely M/s Triumph Auto (CV) Pvt. Ltd., M/s Cargo Motors (Delhi) Pvt. Ltd., M/s Pascos and M/s Johar Automobiles, who are the authorized dealers of the manufacturer, M/s TATA.

11. Immediately upon receipt of this information from the respondent, the petitioners obtained the undertakings in terms of the NIT from M/s TATA. As per the petitioners they obtained a letter dated 14.09.2021 from M/s TATA which stated that "*below mentioned are our*

authorized dealers and competent to offer our products to customers on our behalf".

12. On 28.09.2021, the respondent issued an e-mail seeking clarification from the petitioner. The respondent immediately replied to the e-mails on 01.10.2021. On 01.10.2021, the bids of the petitioners were rejected.

13. When the matter came up before this Court on 12.10.2021, we passed a detailed order which is reproduced as under:

> *"1. Issue notice. Ms. Bharti, learned standing counsel accepts notice on behalf of the respondent-Delhi Jal Board. She is assisted by her officers from the Department.*
> *2. The submission of Mr. Kirpal, learned senior counsel for the petitioners is that they have not been communicated reasons for rejection of their technical bid and the communication only says that the bids of the petitioners are "not admitted by the committee". Consequently the financial bids could not be approved. Mr. Kirpal submits that though reasons have not been provided, from the communication of the respondent dated 28.09.2021,the petitioners could only guess the plausible reason for the rejection of the petitioner's technical bid. By the impugned communication clarifications were sought by the respondent which were provided by the petitioners. The extract of the communication by which clarifications were sought is as follows:*
>
> > *1. The Stamp paper in lieu of affidavit submitted by you while verification of documents on dated. 13.09.2021, 14.09.2021and 17.03.2021, it is observed that stamp paper was not purchase for DJB tender purpose and also not attested by notary.*
> > *2. As per NIT conditions, the backup letter from the only vehicle manufacturer should be submitted with technical*

bid. But you have submitted letter issued from the manufacturer dealer in support of vehicle backup letter.

3. Training certificate submitted by you is not from the approved trainer from Skill Council for green jobs.

4. You have not submitted any financial support for the purchase of vehicles/machine. Please provide your financial capability with proper documents for supply the machine.

3. Ms. Bharti submits that on the e-procurement portal, the reasons for rejection of the technical bids of each of the petitioners have been disclosed. However, the document is not on record. She informs that bids of 67 bidders were rejected out of 275 whereas 208 bidders have qualified for the financial bids. The respondent is directed to file their counter affidavit within 10 days. Along with the counter affidavit the respondent should place on record the documents produced by at least 10 of the qualified bidders which, according to the respondent, have not been produced by the petitioners. Till the next date we direct that in case the respondent opens the financial bids of the technically qualified bidders, the financial bids of the petitioners would also be opened separately without prejudice to the rights and contentions of the parties. Since the respondent is proposing to appoint 150 contractors, in case any of the petitioners figure in the 150 lowest bidders, they shall not be awarded the contract till the next date. However, sufficient number of vacancy shall be maintained to accommodate the petitioners in case they succeed in the writ petition. The result of the said financial bid opening shall also be placed before the Court on the next date.

4. List on 18.11.2021."

14. The said order was challenged by the respondent by filing SLP(C) No 17199/2021 which was dismissed by the Supreme Court on 08.11.2021.

15. Pursuant to our dated 12.10.2021, the respondent Delhi Jal Board has

filed a counter affidavit as well as the documents sought by us with regard to other bidders. The reason for the rejection of the bids of the petitioner is primarily three-fold and has been reproduced below (as was provided in the counter affidavit):

" *….B) The Bid is rejected due to the following reasons:-*

1. The bidder has not submitted EMD declaration form which is not accepted as per terms and conditions of NIT,
D) The Bid is rejected due to the following reasons:-
1. The bidders have not attended physical documents verification and hence treated as non-responsive bidder.
... ... …..

J) The Bid is rejected due to the following reasons:-
1 ... ...
2 ... ...

3. The bidder has submitted training certificate from Abhinav Institute of Technology & Management. The same has been verified from the skill council vide email dtd. 4/9/2021 and it is found that the trainer's certificate has been expired in May 2021. So, the training certificate of the bidder is not valid therefore bid not accepted as per NIT terms & conditions.
4. As per clause 2. 6. of NIT bidder shall provide the backup letters from vehicle manufacturer. However, bidder has submitted backup letter from the dealers. The back-up letter reply submitted physically on 01.10.2021 is not as per eligibility of tender document therefore bid is not accepted as per NIT terms & conditions.
5. The Bidder has not submitted the reply of email dtd.28/09/2021 in which the Bidder has to submit "No Deviation Certificate" on letter head within 3 days. But the Bidder has not submitted the same. "

16. The petitioner has filed a rejoinder to the counter affidavit of the

respondent denying the averments of the counter and reiterating the contents of the petition.

17. We have heard learned Senior Counsel, Sourabh Kirpal appearing for the petitioner and Mr. Rahul Mehra, learned senior counsel appearing for the respondent.

ANALYSIS:

18. Clause 2.5 and 2.6 of the tender condition reads as under: -

> *'2.5 The bidder must possess a certificate as trained on "Operation and safety of mechanized septage cleaning" issued by an agency authorized by Central Govt. under the Ministry of Skill Development, GOI, or any other competent authority.*
>
> *2.6 The bidder shall provide the backup letter from the vehicle manufacturer/OEM of Machine manufacturer confirming warranty of vehicle for the period of 12 months after supply of vehicle components along with after sales service support regarding availability of spare parts for the period of 05 years which can be further extended as per requirement of Delhi Jal Board.'*

19. This was a mandatory condition of the tender and the purpose for obtaining the said certificate have been elaborated by a respondent in his counter affidavit to state:

> *"12. That the Petitioners failed to meet the requirements under Clause 2.6 of NIT which mandated that "The bidder shall provide the backup letter from the vehicle manufacturer/OEM of Machine manufacturer confirming warranty of vehicle for the period of 12 months after supply of vehicle components along with after sales service support regarding availability of spare parts for the period of 05 years which can be further extended as per requirement of*

Delhi Jal Board.

13. That the said mandatory condition was not met by the Petitioners as they failed to provide the certificates from the manufacturer and had suo motu provided the certificates from dealers which was contrary to the term and conditions of the NIT, as dealers may shut shop at any time during the subsistence of the project which would be detrimental as after sales support was vital during the 7 year period of implementation of the project."

20. One of the sample certificates from the authorized dealer initially filed by the petitioner initially was as under:

Triumph Auto (CV) Private Limited TATA MOTORS
Commercial Vehicle Dealer
Chassis Manufacturers Authorization Certificate

To,
Executive Engineer (SDW)-VI
Delhi Jal Board
West Sewage Treatment Plan
Outer Ring Road,
New Delhi- 110018

Subject: Authorization Letter for Supply and After Sales Support for Chassis

This is reference to the tender called upon by Delhi Jal Board (NIT No. 06 (2021-2022) EE (SDW) VI dated 30.07.2021, We hereby also confirm that we shall supply the chassis of Make: TATA Motors – 407g Gold SFC CNG/Suitable Model Confirming tender specifications to Mr. Jasbir Singh (UID: 6671 6676 4760) having addressed: R-Z-7, Shankar Park, Near Post Office, New Delhi, West Sagar Pur, South West Delhi, Delhi-110046

We also confirm the warrantee for the chassis for period of 12 months and also shall provide after sales service support & support regarding availability of spares parts for period of 08 years.

Thanking You
Manufacturer's Name
Signature"

21. After the pre bid meeting, the certificates produced by the petitioners from OEM read as under:

"*TATA*

To,
The Executive Engineer
Delhi Jal Board

Sub: Tata Authorized dealers M/s Triumph auto (cv) Pvt Ltd, M/s Cargo Motors (Delhi) Pvt Ltd, M/s Pascos, Delhi and M/s Johar automobiles.

Dear Sir,

We wish to inform you that below mentioned are our authorized dealers and competent to offer our products to customers on our behalf:
1. M/s Triumph Auto (CV) Pvt. Ltd, AG-90, Sanjay Gandhi Transport Nagar, New Delhi
2. M/s Cargo Motors (Delhi) Pvt Ltd, 219/220, Village Budhpur, G. T Kamal Road, Delhi
3. M/s Pascos, B 1/ 1 3 Mohan Cooperative Industrial Area, New Delhi
4. M/s Johar automobiles, 44/1, Main Mathura Road, Seekri, Ballabhgarh,Faridabad

Regards
Authorized Signatory"

22. We are afraid that neither of the two certificates (pre-bid meeting and

post-bid meeting) complies with the mandatory condition of Clause 2.6 of the tender condition. All other successful bidders have provided certificates from the vehicle manufacturers, such as, EICHER, TATA, Ashok Leyland. The respondent, being a public body, could not have made an exception for the petitioners by accepting certificates from dealers or manufacturers not in strict compliance with the tender condition. The certificates produced by other successful bidders- samples of which are annexed by the respondent with its counter affidavit, read as under:

"ASHOK LEYLAND

25th Aug 2021

To whom so ever it may concern

Subject: NIT NO 06 (2021-2022) EE(SDW)VI invited by Delhi Jal Board.

To,

DULHARIYA ENTERPRISES
CHANDER PRAKASH
H NO 67-A NAI BASTI DEVIL VILLAGE SOUTH DELHI

Ashok Leyland ltd. as vehicle manufacturer confirms the warranty of the model "Ashok Leyland DOST CNG BSVI Cabin and Chassis "for the period of 12 months from the date of supply.
We further confirm to provide the after sales service support regarding availability of the spare part for the period of 7 years on SOS basis.

Yours Faithfully
For Ashok Leyland Ltd.
(LCV Division)
Sd/-
Authorized Signatory

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EICHER

TRUCKS AND BUSES

To whom so ever it may concern

BACKUP/MANUFACTURER AUTHORIZATION LETTER

Subject: Delhi Jal Board Tender NIT NO. 06 (2021-2022)

EE(SDW)VI

To,

M/s DULHARIYA ENTERPRISES
CHANDRA PRAKASH
HNO 67-A STREET NO 4 NAI BASTI DEVLI VILLAGE
SOUTH DELHI 110062

VE Commercial Vehicles Limited as vehicles Manufacturer confirms the Warranty of model "PRO 2050 CNG BS6 cabin and chassis" for the period of 12 months from the date of supply.

We further confirm to provide after sales support regarding availability of spare parts for the period of 7 years on SOS basis.

Yours faithfully
VE Commercial Vehicles Limited
Sd/-
Authorized Signatory

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TATA

TML/DJB/0821/609g/30

Date: 8/23/2021

To whom so ever it may concern

BACK UP/MANUFACTURER AUTHORISATION LETTER

Sub:- NIT NO, 06(2021-2022) EE(SDW)VI invited by Delhi Jal Board

To,

Mr. RITIK KANDERA
RK ASSOCIATES
H.NO-162, MCD SCHOOL HIRANKI NORTH WEST, DELHI-110036 9289637302

Tata Motors Ltd, as vehicle manufacturer confirm thewarranty' of the model "609g SEC DCR33CBC 85B6M5" for the period of 36 months/ 3 lakh Km (whichever is earlier) from the date of supply.

We further confirm to provide the after-sales service support regarding availability of spare parts for the period of 7 years on SOS basis.

Yours Faithfully
For the Tata Motors Ltd.
Sd/-
Authorized Signatory.

23. Mr. Mehra, learned Senior Counsel appearing for the respondent has made a statement before us that there are 208 successful bidders, out of which, tender is to be awarded to 150 bidders, as per Clause 2.1 being the present criteria. All 208 successful bidders have filed

certificates from the manufacturers as detailed by us above.

24. In this view of the matter, we are afraid that the petitioners having failed to fulfil material condition of the tender, cannot succeed in the present writ petition. Mr. Kirpal has argued before us that in terms of the judgment of the Supreme Court in *Poddar Steel Corporation v. Ganesh Engineering Works and Others*[1] substantial compliance of tender condition was sufficient, and, hence, the financial bid of the petitioner must be opened. Relevant portion of Poddar Steel reads as under:

> ***"6.** It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488] a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the*

[1](1991) 3 SCC 273.

judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs."

25. We are afraid that the Judgment of *Poddar Steel* (Supra) is not of assistance to the petitioners. Clause 2.6 enumerated above is an essential condition of the tender for the reasons as stated above in para19.

26. The petitioner having participated in the tender with open eyes, cannot now challenge the tender condition as being onerous. The petitioner has chosen not to challenge the condition 2.6 before participating. If we were to relax the rigors of Clause 2.6, the same would upset the level playing field and also be violative of Privilege of Participation as per the principles of law as observed in *Central Coalfields Ltd. v. SLL-ML (Joint Venture Consortium)*[2]. The above

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[2] (2016) 8 SCC 622.

judgment though did not overrule *Poddar Steel (Supra)* but struck a dissenting view. The relevant paragraphs are reproduced herein:

> ***"39.****Poddar Steel [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] was a rather interesting case and added a new dimension to the discourse. The decision of the Allahabad High Court records that the relevant clause in NIT gave the bidder the option of depositing the earnest money in cash or by a "demand draft drawn on DLW Branch of SBI in favour of Assistant Chief Cashier, DLW Varanasi" [Ganesh Engg. Works v. Union of India, 1990 All LJ 1140 : 1990 SCC OnLine All 628] . As many as 21 parties had responded to NIT, but 8 of them had not deposited any earnest money at all and the remaining 13 bidders had "deposited the earnest money by one mode or the other but not necessarily in the manner provided in NIT except perhaps a few". The Tender Committee deviated from the terms of NIT and considered the bids of these 13 bidders and accepted the bid of Poddar Steel, who had given the earnest money not by cash or a demand draft but by "a loose cheque drawn on its C/D account in Union Bank of India, Sonarpura, Varanasi". On the issue of discriminatory treatment, the contention of the employer was that since all the 13 bidders who had made the earnest money deposit were treated equally, there was no issue of any discriminatory treatment.*
>
> ***40.*** *However, the High Court took the view, following Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] and the privilege-of-participation principle, that it was possible that if those who did not deposit any earnest money had known that a crossed cheque (drawn on a bank other than SBI) towards earnest money was acceptable to the employer, they too could have been in the fray. Under these circumstances, the High Court held that excluding them from competition, through this unannounced deviation affecting bidders and potential bidders alike, rendered the bidding process unfair. The High Court introduced an "essential term" concept and held that the clause*

in NIT relating to deposit of earnest money was an essential term thereof and could not be deviated from. The Allahabad High Court held: (Ganesh Engg. Works case [Ganesh Engg. Works v. Union of India, 1990 All LJ 1140 : 1990 SCC OnLine All 628] , SCC OnLine All para 24)

> *"24. The mere fact that all the tenderers who had deposited the earnest money, whether in terms of Clause 6 or not had been treated alike cannot make any difference. It is quite possible to visualise that the parties who had failed to deposit the earnest money may also have been in the fray had they known that earnest money through cheque was also acceptable. Thus, they have obviously been deprived from competing with others and this makes the action of Respondents 1 to 5 unfair when Condition 6 of NIT so specifically points out that deposit of earnest money in any other mode except in cash or by demand draft would not be acceptable. It leads us to think that this was an essential precondition for submitting tenders and the respondents were not entitled to deviate from this. All tenders which were not accompanied by deposit of earnest money strictly in the manner indicated in NIT deserved to be rejected. We reject the contention of the respondents that the earnest money could be accepted even when it was deposited by some mode other than those in NIT. We also hold that Clause 6 of NIT is not merely ancillary or subordinate condition but in view of the language in which it is couched the same was a crucial and essential term of the tender which could not be deviated from."*

***41.** In appeal, this Court in Poddar Steel [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] accepted the theory of essential and non-essential or ancillary or subsidiary terms of an NIT. It was held that the cheque of Union Bank of India issued by Poddar Steel (though a deviation from the terms of NIT) was sufficient for meeting the conditions of NIT, the condition being ancillary or* *subsidiary to the main object to be achieved by the condition and that the employer could waive the "technical literal compliance" of the earnest money clause of NIT "specially when it was in its interest not to reject the said bid which was the highest". In other words, this Court concluded that an essential term of the tender document could not be deviated from but an ancillary or subsidiary or non-essential term could be deviated from, and that the deviation could be without any reference to potential bidders.*

42. *Unfortunately, this Court in Poddar Steel [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] did not at all advert to the privilege-of-participation principle laid down in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] and accepted in G.J. Fernandez [G.J. Fernandez v. State of Karnataka, (1990) 2 SCC 488]. In other words, this Court did not consider whether, as a result of the deviation, others could also have become eligible to participate in the bidding process. This principle was ignored in Poddar Steel [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273.".*

27. Additionally, in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd*[3], the Supreme Court has observed that, "*the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance.*"

28. Even though there are pleadings of violation of Clause 2.5 of the NIT, the same was neither pressed nor argued before us and hence, we need not advert to the same. In this view of the matter, we need not go any further or deal with any other contentions of the petitioner as they

[3] (2016) 16 SCC 818.

have failed to cross the first hurdle of meeting the eligibility condition of Clause 2.6 of the NIT.

29. For the reasons stated above, the writ petition is dismissed, and the interim directions issued on 12.10.2021 are vacated.

JASMEET SINGH, J.

VIPIN SANGHI, J.

NOVEMBER 18, 2021/ 'dm'