



W.P.No.25010 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.09.2023

Pronounced on : 04.10.2023

CORAM : JUSTICE N.SESHASAYEE

W.P.No.25010 of 2023
and WMP.Nos.24438, 24439 & 24440 of 2023

M/s.SSTECH Salem Commercials Pvt Ltd.,
14, I Floor, Arulmigu Sugavaneshwarar
Commercial Centre, Cherry Road
Salem - 636 001.
Represented by its Director
M.Tamilarasan

... Petitioner

Vs.

1.The Special Chief Engineer
Groundwater Circle
WRD CSIR Road
Taramani
Chennai - 600 113.

2.The Chief Manager
State Bank of India (SBI)
Velachery Branch
No.37-A, Velachery Main Road
Vijaya Nagar, Velachery
Chennai - 600 042.

3.The Chief Manager
International Banking Division



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State Bank of India (SBI)
Commercial Branch, Chennai
Bombay Mutual Bldg. 232
NSC Bose Road
Chennai - 600 001.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus calling for the records of the first respondent in the impugned letters bearing No. / JDO / F / TNUIFSL - RTFDSS / 2022 dated 09.08.2023 and Letter No.45M / JDO / TNUIFSL - RTFDSS / 2022 dated 16.08.2023, and quash the same and all consequential proceedings or actions thereto as illegal and arbitrary, and consequently direct the first respondent to accept the bank guarantee submitted by the petitioner and proceed with the award of Letter of Acceptance / Contract Agreement in respect of the subject under tender bearing reference CRTFF / WRD / 01 /2022 dated 21.07.2022.

For Petitioner : Mr.Satish Parasaran, Senior Counsel
Assisted by Mr.Rahul Balaji

For Respondents : Mr.C.Kathiravan
Special Government Pleader for R1

Mr.K.Chandrasekaran for R3

R2 - No Appearance



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ORDER

1.1 The petitioner herein is a registered company participated in a tender floated by the first respondent for setting up of '*Real Time Data Acquisition system, Hydro Modelling Flood Control Room*', at few places in Chennai. The petitioner sailed through both technical bid and price-bid and was issued with a Letter of Acceptance, dated 13.03.2023.

1.2 As per clause 44.1 of the tender, the awardee of the contract has to provide the performance security in a prescribed format. The prescribed format says that the bank guarantee ***must be obtained from a recognised bank for the sum specified***, and ***did not go to qualify the bank*** beyond what it actually states.

1.3 The petitioner tried to furnish the bank guarantee obtained from M/s.UniBanque S.A., U.K., a foreign bank, but vide communication dated, 09.08.2023, the first respondent informed the petitioner that such foreign bank must have corresponding financial institution in this country for easy



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enforceability. This was followed by another correspondence dated, 16.08.2023, where the first respondent reiterated its earlier stands, and required the petitioner to “*furnish bank guarantees from any reputed bank through its corresponding bank located in India for assuring its enforceability*”, or to face annulment of the Letter of Acceptance issued to the petitioner. These two correspondences of the first respondent dated 09.08.2023 and, 16.08.2023, are now under challenge.

2. To go to the specifics of the the petitioner's case, it is stated:

- a) On confirmation of petitioner's bid, the petitioner vide his correspondence dated 19.04.2023, furnished a bank guarantee issued by M/s.Euro Exim Bank, but the first respondent vide its reply dated 26.04.2023 rejected it. The grounds it stated are: (i) that the above performance security is not in the format prescribed; (ii) it does not conform to the values and the validity period as specified in SCC 18.1, and the letter of acceptance issued by the first respondent on 13.03.2023; and (iii) that the draft performance guarantee is not furnished by a Nationalised/Schedule Bank in India as required in GCC Clause 18.3.



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- b) Then the petitioner offered the performance guarantee in the prescribed format and for the values and validity dates in conformity with the tender conditions. The first respondent, vide communication dated 11.05.2023, again raised the issue that the performance security as furnished by the petitioner was not in conformity with the format prescribed, and required the petitioner to provide five separate bank guarantees for the value stated for five different validity periods. It is here the first respondent makes a statement that the bank guarantee to be furnished as prescribed *shall be presentable to any recognised Bank in India.*
- c) On 16.06.2023, the petitioner presented five draft copies of performance security for the value and the validity dates issued by M/s UniBanque to the first respondent, with SBI, Velacherry bank, the 2nd respondent, as an advising bank to authenticate the performance guarantee of M/s.UniBanque.
- d) This was not accepted by the first respondent and it was communicated to the petitioner vide correspondence, dated, 19.06.2023 that unconditional performance guarantee obtained must conform to the format in the name of the prime bidder, and



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presentable in any bank in India. Now, vide its correspondence, dated, 28.06.2023, the petitioner furnished five instruments of performance guarantee issued by UniBanque as per the prescribed format appended to the tender document. It also provided a tabular form detailing the five performance guarantee of UniBanque.

- e) On 05.07.2023, the first respondent would inform the petitioner that *"since the Bank Guarantees are obtained from a Foreign Bank, citing State Bank of India, Velachery as Advisory Bank, you are requested to submit an undertaking from the State Bank of India to the effect of confirming the enforceability of the Bank Guarantees with an undertaking to pay the first respondent upon first written demand without with cavil or argument, any sum or sums within the limits of the amount of guarantee."* What in effect, the first respondent now requires is that it requires SBI to be a counter guarantor or a co-guarantor. In other words, the first respondent is not worried overly about the choice of UniBanque as issuing Bank of bank guarantee, but is worried about its enforceability.

- f) It is in this backdrop, on 12.07.2023, the first respondent addressed a



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communication to State Bank of India, Velachery Branch informing the latter about the visit of the SWIFT message from the petitioner, and also about the SBI being cited as an advisory Bank by the UniBanque, and required SBI to confirm the same. Alongside, it also requested the SBI to confirm the enforcement of the Bank guarantee by SBI and make payment in case of a claim.

g) SBI in turn replied vide its mail, dated, 24.07.2023, that the performance guarantee furnished by UniBanque is genuine, that SBI acts only as an advising bank, and if the bank guarantee is invoked, it would be honoured only by the issuing bank, namely the UniBanque.

h) UniBanque was also addressed to by the respondent, and the former replied through its mail, dated, 11.08.2023, wherein it *inter alia* confirmed that any bank / financial institution in India can send a SWIFT for presentation of the request for invocation, and that the SBI, Velachery branch, has been made as an advisory/corresponding bank in India.



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i) On the same date (11.08.2023), there was a meeting of the nominee of the Additional Secretary to the Government, first respondent, the petitioner, and officials of the SBI, along with the project consultant, and the issue relating to performance guarantee was discussed.

j) Subsequently, on 17.08.2023, SBI addressed a mail to the first respondent, wherein it has stated that the bank-guarantee beneficiary has to submit their claim through their bankers to the issuing bank. The issuing bank (UniBanque), upon receipt of the claim, will honour the claim for payment to the beneficiary (the first respondent), and invocation of inward/outward Foreign bank guarantee issued is subject to URDG 758 or other Regulations to the extent it's not contravening with any of the clauses contained in the URDG 758/ Regulations and/or otherwise agreed.

3. It is in this back drop, the first respondent came out with the impugned communications, and it is changing the rules in the middle of the game, when it seeks to qualify the expression, '*recognised bank*', in the format prescribed for providing performance guarantee as nationalised bank, or a



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scheduled bank in India. Hence, this petition.

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4. The first respondent / the Tender Inviting Authority (hereinafter would be referred to 'TIA'), has filed its counter and its core-contentions are:

- (a) As per the tender conditions, the petitioner ought to have provided the performance guarantee within 21 days, but it always has been keen to furnish the performance guarantee issued by a foreign bank. First it has obtained the bank guarantee from M/s.EURO EXIM Bank. St.Lucia, West Indies, but this was in incorrect format and was also not in conformity both as to the value of the guarantee as well as the validity period.
- (b) The petitioner then moved to M/s.UniBanque SA, UK., and also addressed at least four banks namely Bank of Maharashtra, Union Bank of India, Bank of Baroda and SBI, to act as an Advisory of M/s.UniBanque, but none responded except SBI, Velacherry. The SBI merely opted to act as Advisory Bank, but it cautiously exempted itself from ensuring enforceability of the bank guarantee.
- (c) The petitioner was granted time well beyond the stipulated time only to ensure that the contract is saved.



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- (d) The letter of the Finance (BPE) Department in Lr.No.34542/Finance (BPE)/2021 dated 18.09.2021 insists that the bank guarantee shall be issued by the banks listed by RBI. This list though includes Scheduled Banks, Nationalised Banks and Foreign Banks, this UniBanque, U.K. is not one among them. UniBanque is a non-banking financial company governed by the laws of Great Britain.
- (e) As per the World Bank procurement guidelines, where security is issued by a financial institution located outside the country of the borrower, such financial institution shall have a correspondent financial institution located in the country of borrower to make it enforceable. This term now stands breached if the performance guarantee issued by Unibanque were to be accepted, as it does not have operations in India. The insistence of foreign bank with a corresponding bank in India, does not add or alter the terms of the tender notice, but it conforms to the requirement of the approved guidelines of the World Bank.

5.1 Heard Mr.Satish Parasaran, the learned senior counsel for the Petitioner,



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and Mr. C. Kathiravan, the learned Special Government Pleader for the respondent.

5.2 The contentions of Mr.Satish Parasaran, in essence are:

- (a) The description of the bank from which a successful bidder must obtain the performance guarantee is stipulated in the format enclosed with the tender notice. All that this format states is that it must be from a 'recognised' bank. M/s.UniBanque SA, U.K., admittedly is a recognised Bank. Nowhere, either in the tender form or in the format for providing bank guarantee, is there a stipulation that where the issuing bank is a foreign bank, it must have a corresponding bank in India.
- (b) The bank charges payable on bank guarantee issued by the foreign bank are several folds less than that which is charged by the banks in this country. This gives a competitive edge to the petitioner, and hence he has opted for UniBanque.
- (c) The insistence that the foreign bank must have a corresponding bank in India is a new term which the first respondent has now included after the petitioner has been declared to be a successful



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bidder. There is no rational basis for the same, and the first respondent has acted whimsical and arbitrarily.

5.3 In response, the learned Special Government Pleader argued:

- a) The bids were invited as National Competitive Bidding procedure of the World bank Guidelines, and it is made clear in clause 3 of the tender. The chapter on performance security and retention money as provided in the aforesaid guidelines is dealt with in clause 2.39. It states that the security shall be provided in an appropriate form and amount, and as specified by the borrower in the bidding document, and a format indicated therein is qualified as *"the format of the performance security shall be in accordance with the SBDs and shall be issued by a reputable bank or financial institution, such as an insurance, or bonding or surety company, selected by the bidder. If the security is issued by a financial institution located outside the country of the borrower, such financial institution shall have a correspondent financial institution located in the country of the Borrower to make it enforceable. Bidders shall be allowed to submit bank guarantees directly issued by the bank of their choice located*



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in any eligible country." In terms thereof, the bank guarantee which the successful bidder need to offer must be if it is a case of a foreign bank then that bank which has a face or a market presence in India.

b) In its communication from the second respondent (M/s SBI), dated, 08.08.2023, it had made a statement that it is only a bank for authenticating the bank guarantee provided by the UniBanque SA, UK, and that the second respondent is not a bank for servicing the bank guarantee, nor is it a bank for correspondence. Indeed, the SBI has made it clear that serving the guarantee will be the obligation of the issuing bank, namely the UniBanque.

c) This apart, the Finance Department, vide its Letter No.34542/Finance (BPE) / 2021, dated 18.09.2021, has given a list of instructions to The Chief Executive Officers of all State Public Sector Undertakings/Statutory Boards vis-a-vis the bank guarantees, and it reads,

"..it is absolutely necessary on the part of the Government department/Government entities to ensure that the bank guarantee, being accepted is issued by a bank that finds place in



the latest list of scheduled commercial banks [which includes 12 public sector banks, 22 private sector banks and 44 foreign banks] notified by Reserve bank of India on 13.04.2020 (copy enclosed) or any updated list notified by the Reserve bank of India from time to time are strictly followed”.

In particular it is instructed,

“(iii) ensure that a separate clause is included in the tender documents wherever necessary specifically to the effect that (a) the Bank guarantees shall be obtained from the nationalised/Scheduled Commercial Banks only, (b) the bids shall become invalid/rejected and the bidder shall forfeit Earnest Money Deposit, Security Deposit etc. and”

Now, in the context of the bank guarantee now offered, UniBanque is not one of the 44 foreign banks listed by the RBI. Therefore, even if Clause 2.39 of the World bank Guidelines are kept aside, the aforesaid communication of the Finance Department, dated 18.09.2021 cannot be flouted, and the aforesaid instructions of the government cannot be ignored.

- d) Performance of guarantees are insisted upon only as a cushion to meet any contingency involving breach of contract by the awardee of the



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contract, and that the Government cannot be forced to travel to the UK to enforce the performance guarantee to litigate, if the foreign bank refuses to perform its commitment. It is hence, the first respondent insists that performance guarantee be produced from a bank in India, and even if it is a foreign bank, it must have a corresponding bank in India. And, it has not annulled the contract as yet. And, in case any construction of a term of the tender is required, then the intention which the TIA holds shall prevail.

Reliance was placed on the ratio in *Agmatel India (P) Ltd., Vs Resoursys Telecom & others* [(2022) 5 SCC 362], *Silppi Constructions Contractors Vs UOI & another* [(2020) 16 SCC 489] and *Tata Cellular Vs UOI* [(1994) 6 SCC 651]

6. Has the TIA, changed the condition of tender when it insisted that the issue-bank for the performance guarantee must be a nationalised bank, or a foreign bank with operation in India. This is the short question. The TIA relies on clause 2.39 of the World Bank Guidelines to project a point that '*recognised bank*' in the format prescribed in the tender-form connotes only a nationalised bank, or a foreign bank with direct business operation in



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India, and backs it up with the letter of the Finance Department, dated, 18.09.2021.

7. Mr.Satish Parasaran, the learned senior counsel appearing for the petitioner, replied:

- a) The tender conditions read alongside the prescribed format only insists that the awardee of the contract must furnish a performance guarantee from a recognised bank. And, it is not the case of the first respondent that M/s. UniBanque SA, U.K. is not a recognised bank. It may be that it is headquartered outside the country, but then to ensure its easy performance, the same has been authenticated by M/s. State Bank of India (SBI), though SBI may not have any liability, and the commitment will be honoured by the UniBanque through SWIFT messaging from any of the banks in India. Going by the international commercial practice, the arrangements now made available by the petitioner conforms to those standards. And, the first respondent is now attempting to introduce certain clauses which are not originally there.
- b) If the first respondent is keen that the performance guarantee must be



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given by the petitioner only from a nationalised bank, or any bank operating in India, that should have been made as a specific condition in the tender-condition itself. Admittedly, it was not so, but is now being inserted or introduced or given a new construction, midway through the tender-process, after confirmation of the petitioner's bid and before formally awarding the contract. Secondly, if the first respondent were to rely on the letter of the Finance Department, dated 18.09.2021, then it should have been disclosed in the tender condition, or at least in the format provided for the bank guarantee. The petitioner participated in the tender only on its understanding of the phrase 'recognized bank' as in the format.

- c) According to the respondent, tender was invited conforming to the World Bank guidelines on Procurement of Goods, Works, and Consulting services. The World Bank guidelines has 3 Sections and few appendices. Section I of the guideline deals with the Title and Introduction, Section II deals with International Competitive Bidding and Section III Other Methods of Procurement. National Competitive Bidding, which is now involved in this case, comes under Section III of the said guideline. Section 3.3 broadly says that bidding shall



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conform to Section I, the Introductory Section in the guidelines. In as much as 'Section 2.39', which the respondent relies on comes under Section II and not under Section III or Section I. It cannot be lifted and telescoped by the respondent after the tender process is over.

- d) Turning to the tender conditions as concerning the tender now involved in this case, Section I thereof introduces the nature of the tender. In clause 3 Section I of the tender, it is specifically stipulated that bidding will be conducted through the National Competitive Bidding (NCB) procedures consistent with the World Bank Guidelines. The bidding is open to all eligible bidders as defined in the Bank's Procurement Guidelines. In addition, please refer to paragraphs 1.6 and 1.7 of the Guidelines setting forth the World Bank's policy on conflict of interest.
- e) Clause 2.39 thereof deals with 'Performance, Security and Retention Money'. Clause 2.39 reads "*Contract for works and single responsibility contracts shall require security in an amount sufficient to protect the Borrower in case of breach of contract by the Contractor. This security shall be provided in an appropriate form and amount, as specified by the Borrower in the bidding*



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document." Now it is only a foot note to this clause it is insisted that such performance security "shall be issued by a reputable bank or financial institution, such as insurance, or bonding or surety company, selected by the bidder. If the security is issued by the finance institution located outside the country of the borrower, such financial institution shall have a correspondent financial institution located in the Country of the borrower to make it enforceable. Bidders shall be allowed to submit bank guarantees directly issued by the bank of their choice located in the eligible country."

- f) As stated earlier, clause 3 in effect deals essentially with Section I of the World Bank Guidelines and not with Section II thereon. So far as performance security is concerned, this is governed by Clause 44.1 of the tender condition and it merely stipulates that a successful bidder shall furnish Bank guarantee in a prescribed form within 21 days. There is no reference anywhere that such performance guarantee must be furnished only by a Nationalised Bank.
- g) Now, unless it is specifically stipulated in the tender condition that the performance security shall be furnished in terms of GCC clause 18.3, it is impermissible for the respondent to change the Rules that came



after it has commenced.

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Discussion & Decision:

8.1 It is not in dispute that the tender is invited as per National Competitive bidding Procedure. As rightly contended that this comes under Section III of the World Bank Guidelines, whereas clause 2.39, with qualifying note in footnote (which the first respondent relies on) is part of Section II of the said Guidelines which unquestionably relates to International Competitive Bidding. It is in the footnote to Clause 2.39, it is underscored that where the bank guarantee is offered by a foreign bank then it shall have a corresponding bank in the country of the borrower for its enforceability.

8.2 Turning to National Competitive Bidding, the Guidelines describes it as *“a competitive bidding procedure normally used for public procurement in the country of the Borrower, and may be the most appropriate method of procurement of goods, works and non-consulting services which, by nature or scope, are unlikely to attract foreign competition.”* It further goes on to state that, *“..To be acceptable for use in Bank-financial pocurement, these procedures shall be reviewed and modified as*



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necessary to assure economy, efficiency, transparency, and broad consistency with the provisions included in Section I of these Guidelines.”

8.3 In this background, if the tender conditions are perused, it merely states, that, “ *the bidding is open to all eligible Bidders as defined in the (World) Bank's Procurement Guidelines.*” This eligibility criterion is prescribed in Clause 1.8 of the WB Guidelines, and it does not state anything about bank-guarantee. If one sails through the Tender, WB Guidelines vis-a-vis the bank guarantee, more particularly whether the issuing bank must be a nationalised bank, is concerned, a strict construction of these documents do not provide an aid to resolve the issue involved in this case. The tender nowhere insists that the issuing bank vis-a-vis the performance guarantee should be a nationalised bank, or a foreign bank with operation in India (which the first respondent would term as 'the corresponding bank, something which appears to have been borrowed from the footnote of clause 2.39 of Section II of the WB Guidelines). And, since National Competitive Bidding is dealt with under Section III of the WB Guidelines, clause 2.39 of Section II may not have an automatic application. Therefore, this Court may does not readily agree with the contentions of the TIA.



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9. Now, *de hors* clause 2.39 with its foot-note in the WB Guidelines, whether the TIA has any authority to qualify an existing term of the tender-conditions after the bidding process is complete and before the contract is awarded, and limit the choice available to a tenderer in choosing a bank for issuing the performance guarantee? And, whether the attempt to qualify it as has been now made by the TIA amounts to changing the condition of the tender, after the process has commenced?

10. The matter concerning tender and its interpretation falls within the domain of contract and the Courts are consistently showing their reluctance to interfere with it. In the celebrated ***Tata Cellular Vs Union of India*** [(1994) 6 SCC 651], the Hon'ble Supreme Court has captured the essence of the judicial attitude in tender/contract-jurisprudence while negotiating judicial power in writ jurisdiction. It states:

"94. The principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.*
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
- (3) The court does not have the expertise to correct the*



administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

- (4) *The terms of **the invitation to tender** cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
- (5) *The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*
- (6) *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."*

11. In ***Agmatel India Private Limited Vs Resoursys Telecom and Others***

[(2022) 5 SCC 362], the issue before the Hon'ble Supreme Court involved a



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question of legitimacy of an interpretation given by the TIA to an eligibility criteria prescribed for the bidders in the tender notice. There a tender was floated for supply of tablets for school children, and one of the eligibility criteria prescribed regarding the past experience of a tenderer was that the bidder must have supplied at least 80% of the total number required to be supplied of the "*same or similar category of products*". While the tenderer equate his past experience of supplying smart phones, the TIA did not agree to this. This was challenged by the bidder, and the High Court relying on the ratio in ***Reliance Engery Limited Vs Maharashtra State Road Development Corpn. Ltd.***, [(2007) 8 SCC 1], has held that there shall not be any vagueness and subjectivity in the norms, as it may result in unequal and discriminatory treatment and that it also violates the doctrine of level-playing field". This was challenged by TIA before the Hon'ble Supreme Court. Dealing with the role of the Court in interfering with the matters relating to contract, after relying on ***Galaxy Transport Agencies Vs New J.K.Roadways, Fleet Owners & Transport Contractors*** [(2021) 16 SCC 808], the Hon'ble Supreme Court has held that the TIA is the best judge to interpret the condition of the tender, and the Court should be reluctant to interfere with the same. It has held :



"28. In relation to the contention that the tender inviting authority was the best judge to interpret the conditions of tender and the Court should not interfere, the High Court referred to an observation by this Court in *Reliance Engery Limited Vs Maharashtra State Road Development Corpn. Ltd.*, [(2007) 8 SCC 1] that when tenders are invited, terms and conditions must indicate norms and benchmarks with legal certainty. In that case, the said observations came in the backdrop of the facts that in the eligibility conditions of the tender before the Court, one of the criteria had been of the consortium net cash profit of Rs.200 crores but, the State had not specified the accounting norms with clarity for calculation of net cash profit; and one of the two acceptable methods of calculation of net cash profit was not taken into account without any reason. In the given facts, the decision of the authority concerned was found to be arbitrary, whimsical and unreasonable.

30. It has also rightly been pointed out by the appellants, with reference to the decision in *Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corpn. Ltd.*, [(2016) 16 SCC 818], (as extracted in the quotation hereinabove), that an interpretation by owner or employer of a project to the tender document may not be acceptable to the constitutional courts but that, by itself, would not be a reason for interfering with the interpretation given. In the aforesaid view of the matter, the long-drawn exercise by the High Court on the dictionary meaning of the words and on semantics, in our view, had been entirely



unnecessary."

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In ***Silppi Constructions Contractors Vs Union of India*** [(2020) 16 SCC 489], the Hon'ble Supreme Court has catalogued a catena of authorities on the point, and held as below :

"19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary



expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the Courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible, then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."



See also *Tata Motors Limited Vs The Brihan Mumbai Electric Supply & Transport Undertaking (Best) and Others* [2023 SCC OnLine SC 671].

12. This court is now required to understand if the TIA insisting on a foreign bank with operations in this country for the petitioner to obtain the performance guarantee is an attempt to change a vital rule of the game in the midstream of a tender process, and also the extent of authority this court has to accommodate this plea within the framework of tender-jurisprudence which the Courts have evolved, expounded and developed over the years. On a close understanding and appreciation of the issue, this Court considers that the petitioner appears to be exaggerating the issue and that this Court may not be inclined to be on the same page with it. And, the reasons are:

- a) The tender condition required that a successful bidder must provide a performance guarantee from '*a recognised bank*' for a certain sum for specified periods. This clause has not been changed. The phrase '*recongised bank*' includes both Indian and foreign banks, and, the TIA does not differ on it.
- b) The TIA is not particular that the performance guarantee must be



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obtained only from a specified foreign bank. Therefore, the freedom a bidder has on the choice of the foreign bank is also not taken away.

- c) All that the TIA insists is that, if the petitioner is keen to obtain a performance guarantee from a foreign bank, let that be a foreign bank which has a corresponding bank in this country. Here it needs to be underscored that performance guarantee is obtained not for the benefit of the successful bidder, but for securing the due performance of the contract, and is intended for enforcement to negotiate a contingency arising out of any breach of performance of the contract. The apprehension of the TIA is that, if the issuing bank of the performance guarantee is a foreign bank without an operational face in India, then it might pose difficulties in enforcing the guarantee. But, what is wrong with it? By insisting on a foreign bank with a corresponding bank in India, the TIA only appears to intend that the contract be in an auto-mode with least anxiety at any time during its working, which includes encountering litigation-situations. As held by the Hon'ble Supreme Court, the TIA is the best judge, and its requirements and its perception about it requires to be respected. Therefore, the TIA's insistence that the guarantee-issuing bank must



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have a corresponding bank in India cannot be considered as arbitrary or whimsical, to borrow the very expressions of the Hon'ble Supreme Court in *Agmatel India case*. And the petitioner having secured a contract, it is only required to abide by the larger public interest.

- d) The petitioner claims, with a SWIFT through any bank in India, UniBanque would honour its commitment, but SWIFT is only a messaging tool which may enable a prompt compliance when the guarantee is enforced, but still it may not provide the comfort which the TIA may wish to have.
- e) On 13.04.2020, the RBI has notified *inter alia* a list of 44 foreign banks for obtaining bank guarantees, and UniBanque is not one in that list. (This finds a reference in Letter No.34542 of the Finance Department, dated 18.09.2021)
- f) Behind every intended contract through a public tender by the Government or its instrumentalities, including statutory corporations, there is an invisible participation of the citizens in it, if only these entities are considered as the trustee of and for the citizens. Their interest is paramount and it cannot be put to peril.



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13. For the foregoing reasons, this court does not consider that this petition is entertainable. In the result, this petition is dismissed, and the petitioner is now required to furnish a bank guarantee satisfying the requirements of the first respondent / TIA, within a period of one week from today, since this Court is equally anxious that the contract is saved, as it has a larger purpose to address. No costs. Consequently, connected miscellaneous petitions are closed.

04.10.2023

Index : Yes / No

Internet : Yes / No

Speaking order / Non-speaking order

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To:

- 1.The Special Chief Engineer
Groundwater Circle
WRD CSIR Road
Taramani, Chennai - 600 113.
- 2.The Chief Manager
State Bank of India (SBI)
Velachery Branch
No.37-A, Velachery Main Road
Vijaya Nagar, Velachery
Chennai - 600 042.
- 3.The Chief Manager



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International Banking Division
State Bank of India (SBI)
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Chennai - 600 001.



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W.P.No.25010 of 2023

N.SESHASAYEE.J.,

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Pre-delivery order in
W.P.No.25010 of 2023

04.10.2023