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

Date of Decision: 24th January, 2023

\+ **W.P.(C) 6896/2020**

KASHYAPI L&N JV ..... Petitioner

Through: Mr. Sanjeev Agarwal & Mr. Ekansh Agarwal, Advocates. (M: 9717911621)

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Vikram Jetly, CGSC with Ms. Shreya Jetly, Advocate for R-1. (M:9811157321)
Mr. R.K. Joshi, Mr. Ojusya Joshi & Mr. Abhinav Sharma, Advocate for R-2. (M:9811086445)

CORAM:
JUSTICE PRATHIBA M. SINGH

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

1. This hearing has been done through hybrid mode.

2. The present petition has been filed by the Petitioner- Kashyapi L&N JV under Article 226 seeking quashing of the impugned order dated 28th August, 2020 passed by Respondent No.2- Container Corporation of India *(hereinafter 'CONCOR')*. Vide the impugned order, the Earnest Money Deposit (EMD) and other dues of the Petitioner have been forfeited as also the Petitioner has been debarred from participating in re-tender.

3. CONCOR had issued an e-tender dated 19th November, 2019 for construction of three warehouses and allied works at MMLP, Barhi, Sonipat, Haryana. In response to the said e-tender, the Petitioner submitted its bid. The technical bids were opened on 13th December, 2019. Along with the bid,

the Petitioner had also submitted an EMD to the tune of Rs.15,40,650/-.

4. The contract was awarded to the Petitioner vide Letter of Acceptance (LOA) dated 28th February, 2020 which was to be counter signed by the Petitioner and the same was accepted. As per the said letter, performance Bank Guarantee (BG) was to be submitted by the Petitioner in two parts. First part of the BG was to be submitted by the Petitioner for 5% of the contract value of Schedule A to I, for a sum of Rs.99,36,162/-. Second part of the BG amounting to 10% of the contract value of Schedule J for a sum of Rs.50,660/-. The said BG was to be submitted within 30 days from the LOA, which could be extended to 60 days.

5. However, on 19th February, 2020 itself, the Government of India had announced the triggering of the *force majeure* clause owing to the covid-19 pandemic and the subsequent lockdowns. In view of the pandemic, on 9th April, 2020, the Petitioner sought extension of time for submission of the performance BG. Again, lockdowns were imposed and extended in view of the pandemic. During this entire period, CONCOR continued to give extensions to the Petitioner for submission of the performance BG vide letters dated 7th April, 2020, and 1st May, 2020.

6. Since the BGs were not supplied and furnished, on 28th July, 2020, CONCOR put the Petitioner to notice, to submit the performance BG, the work plan and also start the work within two days, however, the Petitioner chose not to do so. On 10th August, 2022, another reminder was given by CONCOR and it was made clear in the said letter that if the performance BG is not furnished, the EMD would be forfeited. Finally, on 28th August, 2020, the EMD was forfeited vide the impugned order and the Petitioner was debarred from participating in the re-tender of that particular project. The

impugned order is set out below:

> *"Dear Sir,*
> *The above-mentioned work has been awarded to you vide LOA no. CON/EP/MMLP/Barhi/Ph-II/2019 dt. 28.02.2020 with an advice to submit Performance Guarantee within 30 days of issue of LOA without interest and within 60 days with penal interest of 15% per annum.*
> *As requested by you and considering COVID-19 pandemic situation, date of submission of Performance Guarantee has been extended and same has been communicated to you. Kindly refer this office various letters dt. 28.07.2020 10.08.2020 & 21.08.2020, vide which you have been advised to submit performance guarantee of Rs. 99,36,162/- latest by 24.07.2020 without interest and by 24.08.2020 with penal interest of 15% per annum beyond 24.07.2020.*
> ***As you have failed to submit Performance Guarantee, despite number of reminders. above mentioned contract has been terminated duly forfeiting EMD and other dues, if any payable against this contract. Further, you have been debarred from participating in re-tender of this work as per clause 1(4) of CCC.***
> *Kindly acknowledge the receipt of this letter"*

7. It is the case of the Petitioner that it was prevented from furnishing the performance BG due to closures of the Bank, affected by the lockdown, and since the *force majeure* clause had been triggered, as per the General Conditions of the Contract, no penalty or forfeiture could be effected by CONCOR. Ld. counsel for the Petitioner relies upon the fact that Office Memoranda have repeatedly been issued by the Government announcing the outbreak of the pandemic and directing lockdown. He also relies upon the letter of the HDFC bank which stated that the delay in opening of the bank

account is due to the pandemic.

8. Mr. Joshi, ld. Counsel for Respondent No.2, on the other hand, submits that CONCOR was conscious of the lockdowns and the Office Memorandums issued by the Government. It was in view of this that repeated opportunities were granted till August, 2020 to the Petitioner to submit the BG. In fact, Mr. Joshi, ld. Counsel points out that the real reason why the Petitioner did not submit the BG was because of the fact that the bank account of the JV was not opened and also because of the fact that the GST registration could not be obtained. He submits that these two reasons are not sufficient for setting aside the forfeiture of the EMD as CONCOR cannot be blamed for this particular purpose. He relies upon print outs of HDFC Bank's website to argue that a 'Current Account' can be opened in the said Bank in a short period of time with simple documentation being furnished and the excuse being cited by the Petitioner is not valid.

9. The Court has perused the correspondence on record and heard ld. Counsel for parties. There are two documents which are relevant in the present case. The first documents is an email sent by the Petitioner to CONCOR dated 28th August, 2020, i.e., the date on which the termination took place. The said email reads as under:

> *"Dear Sir,*
> ***This is in furtherance of our trail mail. We requested for time extension till 07-09-2020 due to problems in getting GST registration and consequently getting JV current account opened with bank.*** *Today we received a letter issued by your goodself for termination of the work awarded due to non-submission of performance bank guarantee.*
>
> *Sir,*
> *We submitted before your goodself that while we*

accept the delay in submission of Performance Bank Guarantee, it is also pertinent to mention here that the delay is attributable to prevalent pandemic circumstances across the globe and it has hampered the working of all be it private sector be it Government sector and Sir, you will appreciate that private sector is facing the wrath of Government's restrictions mostly as private sector, by & large, doesn't qualify being categorised as "provider of essential services".

Sir,

In view of above, we once again request your goodself to please recall the termination letter issued by your goodself today, and give us time for submission of performance bank guarantee till 07-09-2020, as requested earlier.

we shall be highly grateful to you for this gesture."

10. This email is sought to be supported later by a letter of the HDFC Bank dated 31st August, 2020 which reads as under:

"***I/We had processed a Joint venture Account of Kashyapi L and N JV but this was on hold as GST Certificate is not received.*** *We processed this account after we received the GST Certificate on dated 17/08/2020 and same is under processing. Due to Covid 19 back office is running with 30 percent staff and after resolving all the pendency in account, we will provide Account on priority."*

11. A perusal of the above two documents shows that while the Petitioner continued to ask for extensions for furnishing the performance BG, finally the reasons for which it could not be furnished appears to be two-fold:

i. None opening of the JV Current Account with the HDFC Bank.

ii. Non-availability of GST registration of the JV.

12. In the opinion of the Court, both these reasons are not reasons which

are related to the pandemic or for which CONCOR can be blamed. The correspondence between the parties from time to time are clear that CONCOR gave a 30 days period to submit the BG without interest and thereafter 60 days period was given for submitting the BG with interest during the entire lockdown period. The said period was extended multiple times on request of the Petition on account of the pandemic.

13. The reasons for non-furnishing of performance BG being unconnected to the pandemic, this Court is not inclined to interfere and direct refund of the EMD. Reliance can be placed upon the recent judgment of the ld. Division Bench of this Court in ***Las Ground Force Pvt. Ltd. v. Advocate Authority of India 2021 SCC Online Del 5063*** where the Court held as under:

> "*63. The second consideration that the Petitioners have put forth is force majeure clause made applicable by Office Memorandum issued by the Government. It is our view, that the Petitioners have failed to make a case for the same. In February, when the Bank Guarantees had to be submitted, the second wave of the pandemic had still not hit the nation. The situation was the same in March. It was only in April and May, 2021 that the situation worsened drastically. Even a perusal of the articles that Petitioners had attached for lockdown in Greece, show that banking services were operational for essential tasks. Therefore, we are of the view that force majeure principle would not be applicable in this case, especially because it was not the sole reason for non-compliance. The Petitioners were also unsure because of the ongoing writ petitions in the related tender matters that did not have anything to do with the tender in question. The same has also been highlighted in the letter dated 23.03.2021*

reproduced above. We are also helped in our view by the following extract from M/s. Halliburton Offshore Services Inc. v. Vedanta Limited & Anr.1, with which we agree.

"62. The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition. The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.

63. It is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in Energy Watchdog (supra) it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a 'real reason' and a 'real justification' which the Court would consider in order to invoke a Force Majeure clause."

64. Therefore, we do not think COVID-19 would justify non-compliance……"

14. In view of the above judgment, this Court is of the opinion that the forfeiture of the EMD by CONCOR is justified. However, it is made clear that the debarment of the Petitioner is only for re-tendering for the same

project in respect of which the impugned order has been passed and there is no blacklisting or debarment by CONCOR *qua* the Petitioner that would prevent it from participating in any future tenders.

15. With these observations, the present petition, along with all pending applications, is disposed of.

PRATHIBA M. SINGH
JUDGE

JANUARY 24, 2023
dj/sk