

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

% Reserved on: 09.02.2011
Date of decision: 10.03.2011

+ WP (C) No. 235 of 2011

IVRCL INFRASTRUCTURES & PROJECTS LTD. ...PETITIONER
Through: Mr. M.Y. Deshmukh, Advocate.

Versus

NATIONAL HIGHWAYS AUTHORITY
OF INDIA ...RESPONDENT
Through: Mr. Sudhir Nandrajog, Sr. Advocate
with Ms. Padma Priya, Ms. Saahila
Lamba & Ms. Meenakshi Sood, Advs.
for Respondent.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The National Highways Authority of India (for short 'NHAI')/respondent herein, invited bids/tenders for the work of operation and maintenance of Madurai-Tirunelveli- Panagudi Section (Km 0.00 to Km 211.140) of NH-7 in the State of Tamil Nadu on Operate, Maintenance and Transfer (OMT) Basis at an estimated cost of ₹112.00 crore. The bidding process was divided into two stages. The first stage was the qualification stage and the second was the bid

stage. In the qualification stage interested parties were required to obtain the Request for Qualification (for short 'RFQ') and submit their applications along with information sought for in the RFQ. Such of the applicants who fulfilled the criteria specified in the RFQ were to be shortlisted as eligible for Request for Proposal (for short 'RFP'). Petitioner, thus, submitted its RFQ for the said project on 14.2.2010 and was declared as pre-qualified on 23.6.2010. The due date for submission of RFP was 30.8.2010 when a total of 8 bidders including the petitioner submitted the bid.

2. The pre-bid meetings were scheduled for 26.7.2010. The petitioner submitted its bid under the cover of the letter dated 28.8.2010 being the RFP/bid after having obtained the bid documents for ₹1.00 lakh.
3. The RFP submitted by the petitioner was accompanied by a bank guarantee of ₹15.00 crore as Bid Security Amount as per requirement. The petitioner, however, claims to have come to know that the respondent was treating the petitioner's bid as non-responsive on account of an alleged defect in the Power of Attorney submitted along with the RFP document, the purpose of which was to authorize a person to submit the bid on behalf of the bidder. The petitioner, thus, addressed a letter dated 31.8.2010 to the respondent explaining its stand. Mr. K. Ashok Reddy, Executive Director of the petitioner company signed the Power of Attorney in favour of Mr. R.K. Singh, COO and the common seal of the company was put in the presence of two witnesses, Mr. T.G.R. Krishna Reddy and Mr. A. Shree Niwas. The Power of Attorney was duly accepted by Mr. R.K. Singh and was notarized by a notary, Shri A. Sambhi Reddy. This Power of

Attorney was executed in pursuance to a meeting of the Executive Committee of the Board of Directors of the petitioner company held on 25.8.2010 resolving that the petitioner company would participate in the tender in question and authorizing Mr. R.K. Singh, COO, Transportation Division on behalf of the petitioner company to participate in the tender and to do all or any of the acts as set out therein on behalf of the petitioner company. It was resolved that the common seal of the petitioner company be affixed on the Power of Attorney being issued either in the presence of Mr. R. Balarami Reddy, Executive Director, Finance & Group CFO or Mr. K. Ashok Reddy, Executive Director, who shall sign the same in token thereof and that Mr. B. Subrahmanayam, Company Secretary shall counter sign the same. It was claimed in the letter dated 31.8.2010 that the Power of Attorney was independent of the resolution since Mr. K. Ashok Reddy was authorized by the Board earlier to sign on behalf of the Company to exercise powers in relation to the business of the Company and had also been duly authorized to take actions to sub-delegate his authority.

4. The respondent, however, informed the petitioner vide letter dated 13.10.2010 that the bid submitted by the petitioner had been found to be non-responsive for want of valid Power of Attorney in pursuance to clause 3.2.1(e) of Volume I of the RFP document. The Power of Attorney is stated to have turned invalid for not having been issued in compliance to the decision taken during Board resolution dated 25.8.2010 whose certified true copy had been submitted along with the bid. Not only that, in pursuance to clause 2.20.7(a) of Volume I

of the RFP document, the petitioner was called upon to pay damages amounting to 5 per cent of the value of the Bid Security Amount, i.e. ₹70.00 lakh, within seven (7) days of the receipt of the letter or the respondent would be constrained to recover the same by encashment of the Bid Security Amount in conformation with the aforesaid clause.

5. The petitioner thereafter addressed a letter dated 18.10.2010 to the respondent stating that the intention of the Board of Directors in appointing Mr. R.K. Singh as the authorized person to sign documents was clearly reflected on all papers submitted by the petitioner and the petitioner was not backing out of its decision in having him so authorized. The Power of Attorney was in the standard format given by the respondent and thus the same should be treated as valid document. The only reason why the Power of Attorney was stated to be not valid was that while the Board Resolution dated 25.8.2010 required the Company Secretary to also sign the Power of Attorney, the same was not so signed by the Company Secretary. The petitioner requested for a personal hearing. The petitioner also pointed out that the Power of Attorney had been signed by Mr. K. Ashok Reddy who was the delegatee of the Board of Director vide its Resolution dated 28.5.2008; a copy of which was enclosed. The last aspect pointed out was that since all other bids had been opened and the price quotations are known, even if the petitioner's bid is considered responsive it would not result in the petitioner being awarded the contract in view of the price quoted by others.

6. It may be noticed here that since the petitioner has not pressed and the petitioner undertook not to have any claim qua the award of the contract, the controversy, in any event, is presently restricted to only encashment of bank guarantee representing 5 per cent of the Bid Security Amount.
7. The respondent granted personal hearing to the petitioner before the Review Committee on 9.11.2010 vide letter dated 2.11.2010. The respondent communicated to the petitioner vide letter dated 23.12.2010 that pursuant to the personal hearing on 9.11.2010 and the submissions made thereafter vide letter dated 15.11.2010 the matter had been reconsidered and petitioner's bid had been found non-responsive. The letter, once again, called upon the petitioner to deposit ₹70.00 lakh as 5 per cent of the Bid Security Amount within seven (7) days of the issuance of the letter. The petitioner was thereafter informed by its bankers, Canara Bank, about the invocation of the bank guarantee to the extent of ₹70.00 lakh and calling upon the petitioner to make necessary arrangements for payment.
8. The petitioner filed the present writ petition under Article 226 of the Constitution of India seeking quashing of the letter dated 13.10.2010, whereby the petitioner's bid was declared as non-responsive and also the invocation and encashment by the respondent of the bank guarantee to the extent of ₹70.00 lakh which incidentally stood encashed by the time the matter came up before the Court for the first time on 14.1.2011.
9. The writ petition is opposed by the respondent / NHAI, which has filed its counter affidavit. It is the case of the respondent that the

extract of the Board Resolution dated 25.08.2010 required that Power of Attorney should have the common seal of the Company Secretary on it to be executed in the presence of the Executive Director and the Group CFO or the Executive Director, who shall sign the same in token thereof and that the Company Secretary shall counter sign the same. The Power of Attorney submitted along with the bid documents was not counter signed by the Company Secretary and, thus, the Power of Attorney was invalid being not in conformity with the Board Resolution dated 25.08.2010. Thus, the bid was declared as non-responsive.

10. Insofar as the earlier Board Resolution dated 28.05.2010 is concerned, the same was filed only with the representation and produced during the hearing and, thus, that document could not be taken into account.
11. In the aforesaid factual matrix, two questions arise for consideration:
 - i. Whether the Power of Attorney submitted by the petitioners was defective and/or alleged defect was of such a nature which could be termed as a technical irregularity or was it fatal to the bid?; and
 - ii. Whether respondent No.1 were entitled to encash the bank guarantee for the bid security amount treating the bid of the petitioner as non-responsive and/or whether the clauses contained in the RFP in this behalf can be said to be unconscionable or penal?
12. In order to appreciate the controversy. it would be appropriate to examine some of the relevant clauses of the RFP. The RFP contains

in the Second Chapter 'Instructions to Bidders' where Part A contains general instructions. Clause 2.1 deals with 'General Terms of Bidding'. The relevant clauses dealing with the bid security amount are clauses 2.1.7 to 2.1.10, which read as under:

“2.1.7 The Bidder shall deposit a Bid Security of ₹14 Crores (Rupees Fourteen Crores Only) in accordance with the provisions of this RFP. The Bidder has the option to provide the Bid Security either as a Demand Draft or in the form of a Bank Guarantee acceptable to the Authority, as per format at Appendix-II.

2.1.8 The validity period of the Bank Guarantee or Demand Draft, as the case may be, shall not be less than 180 (one hundred and eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder. The Bid shall be summarily rejected if it is not accompanied by the Bid Security. The Bid Security shall be refundable no later than 60 (sixty) days from the Bid Due Date except in the case of the Selected Bidder whose Bid Security shall be retained till it has provided a Performance Security under the Concession Agreement.

2.1.9 The Bidder should submit a Power of Attorney as per the format at Appendix-III, authorizing the signatory of the Bid to commit the Bidder.

2.1.10 In case the Bidder is a Consortium, the Members thereof should furnish a Power of Attorney in favour of the Lead Member in the format at Appendix-IV.”

13. Clause 2.6 deals with 'Verifications and Disqualification' and the respondent has the right to reject a bid inter alia if the bidder does not provide any supplemental information. The relevant clause is as under:

“2.6 Verification and Disqualification

2.6.1. The Authority reserves the right to verify all statements, information and documents submitted by the Bidder in response to the FRQ, the RFP or the Bidding Documents and the Bidder shall, when so required by the Authority, make available all such information, evidence and documents as may be necessary for such verification. Any

such verification or lack of such verification, by the Authority shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of the Authority thereunder.

2.6.2 The Authority reserves the right to reject any Bid and appropriate the Bid Security if:

(a) at any time, a material misrepresentation is made or uncovered, or

(b) the Bidder does not provide, within the time specified by the Authority, the supplemental information sought by the Authority for evaluation of the Bid.

... ..”

14. Part B of Chapter 2 deals with ‘Documents’. Clause 2.7.1 includes as appendices inter alia the format of the Power of Attorney for signing of bid. The forfeiture of Bid Security Amount is dealt with in Part D of Chapter 2. The relevant clauses of which are as under:

“D. BID SECURITY

2.20 Bid Security

2.20.1 The Bidder shall furnish as part of its Bid, a Bid Security referred to in Clauses 2.1.7 and 2.1.8 hereinabove in the form of a bank guarantee issued by a nationalized bank or a Scheduled Bank in India having a net worth of at least ₹1,000 crore (₹ One thousand crore), in favour of the Authority in the format at Appendix-II (the “**Bank Guarantee**”) and having a validity period of not less than 180 (one hundred eighty) days from the Bid Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. In case the Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any nationalized bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934.

.....

2.20.6 The Authority shall be entitled to forfeit and appropriate the Bid Security as Damages inter alia in any of the events specified in Clause 2.20.7 herein below. The Bidder, by submitting its Bidding pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the

Authority will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP. No relaxation of any kind on Bid Security shall be given to any Bidder.

2.20.7 The Bid Security shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority thereunder, or otherwise, under the following conditions:

- (a) If a Bidder submits a non-responsive Bid; Subject however that in the event of encashment of Bid Security occurring due to operation of para 2.20.7 (a), the damage so claimed by the Authority shall be restricted to 5% of the value of the Bid Security.
- (b)
- (c)
- (d)
- (e)”

15. The evaluation of the bids is dealt with in Part 3. Clause 3.2 deals with the Tests of responsiveness of the bid and the relevant clause reads as under:

“3.2 Tests of responsiveness

1.2.1 Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive if:

-
- (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;
-

1.2.2 The Authority reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the Authority in respect of such Bid.”

16. Para 5 deals with ‘Pre-Bid Conference’ and the same reads as under:

“5. PRE-BID CONFERENCE

5.1 Pre-Bid conferences of the Bidders shall be convened at the designated date, time and place. Only those persons who have purchased the RFP document shall be allowed to

participate in the Pre-Bid Conferences. A maximum of five representatives of each Bidder shall be allowed to participate on production of authority letter from the Bidder.

5.2 During the course of Pre-Bid conference(s), the Bidders will be free to seek clarifications and make suggestions for consideration of the Authority. The Authority shall endeavour to provide clarifications and such further information as it may, in its sole discretion, consider appropriate for facilitating a fair, transparent and competitive Bidding Process.”

17. We have already noticed above that Appendix III gives format of the Power of Attorney for signing of bid. The format of the Power of Attorney is reproduced hereunder:

“APPENDIX-III
Power of Attorney for signing of Bid
(Refer Clause 2.1.9)

Know all men by these presents, We.....(name of the firm and address of the registered office) do hereby irrevocably constitute, nominate, appoint and authorise Mr/ Ms (Name), son/daughter/wife of and presently residing at, who is presently employed with us/ the Lead Member of our Consortium and holding the position of, as our true and lawful attorney (hereinafter referred to as the “Attorney”) to do in our name and on our behalf, all such acts, deeds and things as are necessary or required in connection with or incidental to submission of our bid for the Operation and Maintenance of Madurai-Tirunelveli-Panagudi Section (Km 0.000 to Km211.140) of NH-7 in the State of Tamilnadu to be executed on OMT basis Project.(Lot 1, Package 6) proposed or being developed by the National Highways Authority of India (the “Authority”) including but not limited to signing and submission of all applications, bids and other documents and writings, participate in bidders’ and other conferences and providing information/responses to the Authority, representing us in all matters before the Authority, signing and execution of all contracts including the Concession Agreement and undertakings consequent to acceptance of our bid, and generally dealing with the Authority in all matters in connection with or relating to or arising out of our bid for the said Project and/ or upon award thereof to us and/or till the entering into of the Concession Agreement with the Authority.

AND we hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us.

IN WITNESS WHEREOF WE,,
THE ABOVE NAMED PRINCIPAL HAVE EXECUTED
THIS POWER OF ATTORNEY ON THISDAY OF
..... 20.....

For.....
(Signature, name, designation and
address)

Witnesses:

1. (Notarised)
- 2.

Accepted

(Signature, name, designation and address of the Attorney)

Notes:

The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.

Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.

For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention, 1961 are not required to be legalized by the Indian Embassy if it carries a conforming Apostille certificate”

18. The respondent, however, retained certain rights in the context of Clause 2.15.3 in para 6 under the heading of ‘Miscellaneous’ where clause 6.2 provides as under:

“6. Miscellaneous

6.2 The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;

(a) Suspend and/or cancel the Bidding Process and/or amend and/or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;

(b) Consult with any Bidder in order to receive clarification or further information;

(c) Retain any information and/or evidence submitted to the Authority by, on behalf of, and/or in relation to any Bidder; and/or

Independently verify, disqualify, reject and/or accept any and all submissions or other information and/or evidence submitted by or on behalf of any Bidder.”

19. The bid has to be accompanied by a declaration in the form provided in Appendix-I of the ‘letter comprising the Bid’ and contains the following relevant clauses:

“7. I/We declare that:

(a) I/We have examined and have no reservations to the Bidding Documents, including any Addendum issued by the Authority; and

(b)

(c)

(d)

(e)

8. I/We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive nor to invite the Bidders to Bid for the Project, without incurring any liability to the Bidders, in accordance with Clause 2.16 of the RFP document.”

20. In view of the aforesaid clauses, we now proceed to examine the rival contentions.

The validity of Power of Attorney:

21. The Power of Attorney submitted with the bid of the petitioner has been placed on record. It is not in dispute that the Power of Attorney is in the proper format and has been executed by duly authorized person Shri K. Ashok Reddy and witnessed by two witnesses. Not only that, the Power of Attorney has been accepted by Mr. R.K. Singh, CEO – Transportation Division and the Power of Attorney is duly notarized.
22. A reading of the aforesaid Power of Attorney shows that it is Mr. R.K. Singh, CEO, who is duly authorized in pursuance of the Board Resolution. Section 48 of the Companies Act, 1956 prescribes execution of deeds and reads as under:

“48. EXECUTION OF DEEDS.

(1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place either in or outside India.

(2) A deed signed by such an attorney on behalf of the company and under his seal where sealing is required, shall bind the company and have the same effect as if it were under its common seal.”

23. The reason for declaring the Power of Attorney as not valid is the Resolution passed by the Executive Committee of the Board of Directors held on 25.08.2010. The said Resolution reads as under:

“Sub: Participation in tender under NHAI (Employer) in relation to Operation and Maintenance of Madurai-Tirunelveli-Panagudi Section (Km 0.000 to Km 211.140) of NH-7 in the State of Tamilnadu Project (the “Project”)

through Public Private Partnership (the PPP) on Operate, Maintained, Transfer (the OMT) basis and Issuance of Special Power of Attorney to Mr. R.K. Singh, C.O.O., Transportation Division in relation to participate in tender – Reg;

The committee perused the note submitted and after some discussion it was:

RESOLVED THAT, the company do participate in the tender under NHAI (Employer) in relation to Operation and Maintenance of Madurai-Tirunelveli-Panagudi Section (Km 0.000 to Km 211.140) of NH-7 in the State of Tamil Nadu Project (the “Project”) through Public Private Partnership (the PPP) on Operate, Maintained, Transfer (the OMT) basis **and Mr. R.K. Singh**, COO, Transportation Division, be and is hereby authorized, on behalf of M/s. IVRCL Infrastructures & Projects Ltd., to participate in the tender and to do all or any of the following acts for and on behalf of the Company and that the Common Seal of the Company be affixed on the Power of Attorney being issued in the presence either of Mr. R. Balarami Reddy, Executive Director-Finance & Group CFO or Mr. K. Ashok Reddy, Executive Director who shall sign the same in token thereof and that Mr. B. Subrahmanayam, Company Secretary shall countersign the same.

1) signing and submission of all applications, bids and other documents and writings, participate in bidders and other conferences and providing information / responses to the Authority, representing us in all matters before the Authority, signing and execution of all contracts including the Concession Agreement and undertakings consequent to acceptance of our bid, and generally dealing with the Authority in all matters in connection with or relating to or arising out of our bid for the said Project and/or upon award thereof to us and/or till the entering into of the Concession Agreement with the Authority.

2) AND we hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to add in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us.

RESOLVED FURTHER THAT, Mr. B. Subrahmanyam, Company Secretary be and is hereby authorized to communicate the copy of the above said resolution duly certified to the concerned.”

24. The aforesaid minutes of the meeting of the Executive Committee, thus, duly authorized Mr. R.K. Singh to do the needful and a deed signed by an Attorney on behalf of the company and under his seal is to bind the company.
25. In pursuance of the aforesaid Resolution requiring the Power of Attorney to be executed by either of two persons, Mr. K. Ashok Reddy has signed the same. The Power of Attorney bearing a common seal of the company, thus, complies with the requirements of Section 48 of the Companies Act. However, the Board Resolution also requires the Company Secretary to sign, which has not been done in the case of the Power of Attorney in question.
26. We may also notice that there is an earlier Board Resolution, *albeit* not submitted with the bid, passed on 28.05.2008 by the Board of Directors in terms whereof Mr. K. Ashok Reddy as Executive Director has been authorized to exercise various powers and functions including to negotiate and to enter into contracts and agreements. He has also been authorized to delegate by way of Power of Attorney or otherwise in writing all or any of the powers, authorities and discretions for the time being vested in him. It is pertinent to note that this resolution is that of the Board of Directors (in short 'BoD'), in which, while conferring a power on Mr. K. Ashok Reddy to execute a Power of Attorney, consciously the BoD has perhaps not inserted any caveats in the form of counter signatories. The caveat that the Company Secretary should also counter sign the Power of Attorney has its origin in a subsequent resolution dated 25.8.2010; albeit of the Executive Committee of the BoD.

27. It is in the aforesaid context, it has to be examined, whether the absence of the signatures of the Company Secretary can be said to be fatal to the Power of Attorney? In our considered view, the answer to this is in the negative.
28. We cannot lose sight of the fact that the authority, which was vested in Mr. K. Ashok Reddy originated from the Board Resolution of 28.05.2008. The minutes of the meeting of 25.08.2010 are of the Executive Committee of the Board of Directors, which in respect of the particular contract bid authorized the Power of Attorney to be executed, but in no manner take away the general powers vested in Mr. K. Ashok Reddy in pursuance of the Resolution of 28.05.2008. As noticed above, a bare perusal of the resolution dated 25.8.2010 would show that the Executive Committee which was a delegatee of the BoD exceeded its powers in putting in caveats which did not find mention in the BoD's resolution dated 28.5.2008. Even if the document / resolution of 26.08.2010 is considered in isolation, the alleged defect, if any, is of a very minor and insignificant character in the Power of Attorney and does not take away from the authorization of Mr. R.K. Singh to present the bid.
29. It cannot be lost sight of that the seriousness of the bid cannot be disputed as even the RFP papers are purchased after paying lakhs of rupees and the bid is supported by the EMD of ₹14 Crores. If at all, there was any doubt in the mind of the respondent regarding the same, a clarification or information could have easily been sought from the petitioner in terms of sub-clause (b) of Clause 2.6.2 of the RFP which gives adequate discretion to the respondent to consult

with any bidder in order to receive clarification or further information. We may also refer to Clause 2.6.2(b) where the authority has the right to reject a bid if the bidder did not provide the supplemental information sought for. In the present case, the petitioner itself volunteered the information even of the earlier Board Resolution dated 28.05.2008 under the cover of its letter dated 18.10.2010 reiterating the authority of Mr. R.K. Singh and undertaking to abide by the bid.

30. There is no doubt about the proposition that the terms & conditions of a tender document must be strictly adhered to. However, the legal position in this behalf is enunciated in Poddar Steel Corporation Vs. Ganesh Engineering Works & Ors. (1991) 3 SCC 273. It was held that deviations from non-essential or ancillary / subsidiary requirement being a minor technical irregularity can be waived. The issue, thus, arises whether the discrepancy in the present case can be stated to be of such minor technical nature.

31. We must keep in mind the objective of execution of the Power of Attorney, which is to give authority to the person to bind the bidder. The petitioner had already *suo moto* given a clarification. The Power of Attorney was in the proper format. It was only the supporting Board Resolution which created some doubts in the mind of the respondent, which could have easily been clarified. There was no modification sought in the sense of some additional material sought to be incorporated in the bid.

32. We are further fortified by two judgments of this Court both of the Division Bench. In Ramunia Fabricators SDN BHD & Ors. Vs. Oil

and Natural Gas Corpn. Ltd. & Ors., 150 (2008) DLT 1, the distinction between essential and non-essential conditions in a contract was emphasized. In the facts of the case, the bids were submitted by a subsidiary on the basis of the documents purchased by another subsidiary of a single parent company. The petitioner not only submitted the requisite Memorandum of Understanding, but also answered other queries and clarifications. The bid submitted by the petitioner was held to be perfectly in tune with the terms of the bid. T.S. Thakur, J. (as he then was) observed that whether or not a condition is an essential would depend upon the fact situation of each case and the nature of the conditions while relying upon the judgment in Poddar Steel Corporation's case (supra).

33. In another judgment in Kapsch Metro JV Vs. Union of India & Anr., 140 (2007) DLT 378, it was emphasized that public interest requires a wider participation of bidders to ensure healthy competition especially keeping in mind the dictum laid down in Poddar Steel Corporation's case (supra). The deficiency of 17 days' period in the EMD of 180 days' validity period which too was subsequently altered in order to conform to the prescribed requirement was held to be a technical irregularity of little significance and worthy of being waived.

34. We are, thus, of the view that the bid of the petitioner could not have been treated as non-responsive on account of the absence of the seal of the Company Secretary on the Power of Attorney. Since the petitioner has itself set out that it would not be the L-1, the only

consequence would be that the amount of the bid security amount to the extent of 5% amounting to ₹70 lakhs be refunded by the respondent to the petitioner forthwith.

Forfeiture of Bank Guarantee:

35. We have already held that the bid is responsive and thus there is no question of forfeiture of the Bid Security Amount. We may, however, notice that submissions were advanced by parties as to why even if the bid of the petitioners is treated as non-responsive on account of the Power of Attorney the Bid Security Amount was not liable to be forfeited. This was, in fact, a common question involved in three writ petitions filed against respondent No.1 in which arguments took place on the same date. We have separately pronounced an order in WP (C) No.8418/2010 where we have dealt with this issue. We do not want to record a discussion on this aspect and consider it appropriate to extract our discussion and finding on this aspect as contained in WP (C) No.8418/2010 as under:

“50. Learned counsel for respondent No.1 submitted that the bid security amount was a specific term of the RFP clause 2.1.7. Respondent No.1 was entitled to forfeit and appropriate damages inter alia in the event specified in Clause 2.20.7 in view of what is set out in clause 2.20.6. The said clause also provides that the bidder is deemed to have acknowledged and confirmed that the authority will suffer loss and damage on account of withdrawal of its bid or for any other default by the bidder during the period of bid validity as specified in the RFP. Clause 2.20.7 states that the amount is mutually agreed genuine pre-estimated compensation and damages payable to the authority for inter alia time cost and effort of the Authority. The conditions under which it applies includes where a bid is a non-responsive bid. However, as per the latter part of sub-clause (a) of clause 2.20.7 if the bid is a non-responsive bid, the damages are restricted to 5 per cent of the value of the bid security. The question, thus, arises whether in case of a non-responsive bid could it be said that 5 per cent of the value of the bid security was the genuine pre-estimate of damages?”

51. It must be borne in mind that the stage for submission of the RFP is the second stage in the tendering process. There is an earlier scrutiny in pursuance of the RFQ submitted by the parties in terms whereof certain parties are enlisted for submitting the RFP. At the stage of the RFP a sum of ₹3.00 lakh is paid to procure the documents. This amount cannot be the cost of the form but is really a pre-estimated cost of processing the RFP. A non-responsive bid is one where at the threshold on the opening of the bid it is found to be defective on one account or the other and is, thus, shut out from the process of scrutiny. This can have no correlation with the value of the bid which would be the eventuality even if 5 per cent of the bid amount is encashed.

52. Learned counsel for respondent No.1 sought to canvass that the objective is to prevent non-serious persons from submitting the bids. This, in our considered view, is taken care of by charging an amount for purchase of RFP documents and in other eventualities of say a party backing out, the bid security amount being forfeited. The occasion for non-responsive bid would only be a defect in submission of the RFP.

53. Learned counsel for respondent No.1 could not seriously dispute that the amount really is in the nature of a penalty. If it is so it cannot be said to be a reasonable pre-estimate of damages and the parties suffering losses must prove that it is suffering damages to that extent. We are of the view that there is hardly any quibble over the settled legal position in this behalf. Suffice it to say that in *Maula Bux Vs. Union of India* AIR 1970 SC 1955 the scope and ambit of Section 74 of the Contract Act, 1872 (hereinafter referred to as the 'Contract Act') was discussed. It was observed that if the forfeiture of earnest money is in the nature of penalty Section 74 of the Contract Act would apply. In such a case proof of actual loss or damage would be essential. However, if the forfeiture amount is reasonable pre-estimate, it would not fall within Section 74 of the Contract Act. The legal position in this behalf has not changed. Section 74 of the Contract Act reads as under:

“74- Compensation for breach of contract where penalty stipulated for- [When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.”

54. The 5 per cent of the bid security amount would be ₹73.95 lakh approx. This cannot be said to be the charges for processing the bids. That charge, in fact, already stands recovered which had been pre-estimated at ₹3.00 lakh for purchase of the RFP document.

55. We have no hesitation to hold that the aforementioned clause permitting 5 per cent bid security amount to be forfeited in case of a non-responsive bid is clearly penal in nature and thus provisions of Section 74 of the Contract Act would apply. It cannot be categorized as a reasonable pre-estimate of damages for a non-responsive bid and thus the bank guarantee for 5 per cent of the bid amount cannot be encashed in such an eventuality.

56. Thus, even on the second issue we are of the view that even if the bid was non-responsive, the 5 per cent of the bid security amount could not have been forfeited.”

36. The result would be the same even in the present case.

Conclusion:

37. We are, thus, of the view that the RFP submitted by the petitioner being responsive, the forfeiture is illegal and invalid and the petitioner is entitled to refund of the said amount from the respondent. This is apart from the reason, set out hereinabove, that the provision permitting forfeiture of 5 per cent of the Bid Security Amount, even for a non-responsive bid, being penal in nature, was illegal. Accordingly, we direct refund of the Bid Security Amount within a period of 15 days from today, failing which, it will carry simple interest at the rate of 15% p.a.

38. The writ petition is allowed in the aforesaid terms with costs quantified at ₹50,000.00 since the petitioner has failed to file the bill of fee and costs though directed.

SANJAY KISHAN KAUL, J.

MARCH 10, 2011
b'nesh/madan

RAJIV SHAKDHER, J.