



2024:DHC:9304-DB



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

% Judgment reserved on: 11.11.2024  
Judgment delivered on: 02.12.2024

+ W.P.(C) 5564/2024, CM APPL. 22939/2024

VRC CONSTRUCTION (INDIA) PRIVATE LIMITED ....Petitioner

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA ....Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr. Aayush Agarwala, Mr. Nilesh Kumar, and  
Mr. Prakash Jha, Advocates.

For the Respondent : Mr. Santosh Kumar, Standing Counsel with Mr.  
Devansh Malhotra, Ms. Bani Brar, Mr. Adithya  
Ramani and Ms. Nidhi Rani, Advocates.

**CORAM:**

**HON'BLE THE CHIEF JUSTICE**

**HON'BLE MR. JUSTICE TUSHAR RAO GEDELA**

**J U D G M E N T**

**TUSHAR RAO GEDELA, J.**

1. Present writ petition has been filed under Article 226 of the Constitution of India seeking to declare the Annulment Notice dated 14<sup>th</sup> March, 2024; impugned communication dated 9<sup>th</sup> April, 2024; Notice Inviting Bid dated 14<sup>th</sup> March, 2024 as arbitrary and illegal and in violation of Articles 14 and 19(1)(g) of the Constitution of India, 1950. The petitioner further seeks direction to the respondent/National Highway Authority of India (for short 'NHAI') to award the Project to the petitioner in terms of



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Tender for '6 – laning with both sides Service Road of Ayodhya Nagar Bypass of Bhopal city section of NH-46 from Design Km 0.000 near Ashram Tiraha to Design Km 16.439 at Ratnagiri Tiraha (Design Length – 16.439 Km) Under NH(O) in the state of Madhya Pradesh on Hybrid Annuity Mode (Tender ID: 2023\_NHAI\_169732\_1)'.  
2. The facts, shorn of unnecessary details and germane to the issue at hand, are as follows:-

- a) The respondent/NHAI issued Notice Inviting Bid on 5<sup>th</sup> October, 2023 for 6 – laning with both sides Service Road of Ayodhya Nagar Bypass of Bhopal city section of NH-46 from Design Km 0.000 near Ashram Tiraha to Design Km 16.439 at Ratnagiri Tiraha (Design Length – 16.439 Km) Under NH(O) in the State of Madhya Pradesh on Hybrid Annuity Mode. The last date of submission of bid was 22<sup>nd</sup> February, 2024.
- b) The Tender was revised *vide* Corrigendum VI dated 20<sup>th</sup> February, 2024, that is, two (2) days before the last date of submission. *Vide* Corrigendum VI, the respondent/NHAI increased the estimated cost to Rs.1048.65 crores and consequently increased the bid security by Rs.4 lakhs, from Rs.10.45 crores to Rs.10.49 crores and the last date of the bid was extended to 27<sup>th</sup> February, 2024.
- c) In pursuance of the bid conditions, the petitioner submitted the original Bank Guarantee (for short 'BG') of Rs.10.45 crores drawn on 13<sup>th</sup> February, 2024. In view of the revised bid, the petitioner arranged the additional bank guarantee (for short 'ABG') of Rs.4 lakhs for the bid and submitted the same on 22<sup>nd</sup> February, 2024 with



the respondent by Structured Financial Messaging System (for short 'SFMS'). However, the copy of this ABG of Rs.4 lakhs was not uploaded on the Tender submission portal. The Tender was closed on 27<sup>th</sup> February, 2024.

- d) The petitioner claims that on 4<sup>th</sup> March, 2024, the respondent/NHAI declared it ineligible on account of the bank guarantee being short by Rs.4 lakhs and the disqualified bidders were asked to submit objections within three (3) days. It is claimed that the same error was also found with the bid of one *Apco Infratech Private Ltd.*, another bidder.
- e) It is claimed that on 5<sup>th</sup> March, 2024, the petitioner submitted a clarification that the ABG for Rs.4 lakhs had been transmitted through SFMS gateway but inadvertently, the physical scanned copy was not uploaded on the Tender portal. In support thereof, the copy of the ABG of Rs.4 lakhs dated 22<sup>nd</sup> February, 2024 was also enclosed.
- f) It is further stated that on 9<sup>th</sup> March, 2024, the respondent/NHAI accepted the clarification of the petitioner and declared it to be technically eligible. The bid was opened and the petitioner was declared the lowest bidder (L-1) at Rs.861.46 crores i.e., 17.85% below the estimated cost.
- g) It is the case of the petitioner that unilaterally and arbitrarily, the respondent/NHAI annulled the Tender *vide* notice dated 14<sup>th</sup> March, 2024 despite it having been declared L-1. Surprisingly, on the same day, the respondent issued another Notice Inviting Bid for the same



work.

- h) The petitioner sent a letter dated 15<sup>th</sup> March, 2024 seeking review of the annulment and to award the Tender to the petitioner. Receiving no response, the petitioner filed a writ petition being W.P.(C) 4838/2024 before this Court, seeking response to the letter dated 15<sup>th</sup> March, 2024. *Vide* order dated 3<sup>rd</sup> April, 2024, this Court directed the respondent to decide the petitioner's letter within a week. In compliance thereof, the respondent/NHAI issued a communication dated 9<sup>th</sup> April, 2024, stating that on account of the petitioner's ABG being short of Rs.4 lakhs, the respondent/NHAI annulled the Tender itself.
- i) Aggrieved by the impugned communication dated 9<sup>th</sup> April, 2024, the petitioner filed the present writ petition.

3. As per order dated 11<sup>th</sup> November, 2024, with the consent of the parties, the writ petition is taken up for final disposal.

**CONTENTIONS OF THE PETITIONER:-**

4. Mr. Aayush Aggarwala, learned counsel appearing for the petitioner submitted that the original Tender was issued on 5<sup>th</sup> October, 2023 for works estimated at Rs.1045.15 crores with bid security of Rs.10.45 crores. He submitted that the petitioner submitted its bid with the correct bid security of Rs.10.45 crores. However, on account of revision of the estimated cost of the works to Rs.1048.65 crores, the bid security was also revised to Rs.10.49 crores. Though the petitioner had submitted its original bid with the bid security of Rs.10.45 crores, the last date of submission was extended to 27<sup>th</sup> February, 2024 on account of such revision. In pursuance



thereto, petitioner submitted the shortfall of Rs.4 lakhs in its bid security amount by way of ABG with respondent/NHAI by way of SFMS on 22<sup>nd</sup> February, 2024. He fairly admitted that though the petitioner was in possession of the original ABG of Rs.4 lakhs, yet inadvertently, the same was not uploaded in the respondent's portal.

5. He stated that on account of the petitioner and another bidder being declared ineligible on 4<sup>th</sup> March, 2024, due to shortfall in ABG of Rs.4 lakhs, the respondent/NHAI invited objections within three (3) days. Pursuant thereto, the petitioner clearly specified the error of not having uploaded the original ABG due to inadvertence and enclosed the copy of the same in support of its case *vide* letter dated 5<sup>th</sup> March, 2024. He emphasised that the ABG was drawn on 22<sup>nd</sup> February, 2024, five (5) days before the extended bid closure date, indicating that there was no delay on the part of the petitioner in submission of ABG. He thus contended that the annulment of Tender *vide* Annulment Notice dated 14<sup>th</sup> March, 2024, on this ground is absolutely unfounded, false and frivolous. According to him, a mere delay in uploading the ABG cannot entail annulment of Tender, particularly when the same was submitted well within the extended date of 27<sup>th</sup> February, 2024, by way of a prescribed mode of SFMS.

6. He also laid emphasis on the fact that apart from the petitioner, another bidder, that is, *Apco Infratech Private Ltd.*, was also found ineligible due to the shortfall of Rs.4 lakhs in the bid security amount and yet once the shortfall was made good, both the petitioner and *Apco Infratech Private Ltd.* were found to be eligible *vide* result of Technical Evaluation dated 9<sup>th</sup> March, 2023. He strenuously contended that once the



original bid security amount of Rs.10.45 crores and the ABG of Rs.4 lakhs was found to be proper and the petitioner declared eligible, and after the submission of the required original documents as per Clause 2.11.2 of Request For Proposal (for short 'RFP'), the question of revisiting the Tender for the purposes of annulment is arbitrary, whimsical, unjust and contrary to the well laid principles of law by the Supreme Court. He vehemently contended that not only was the petitioner found eligible, but was also declared as L-1 bidder having the lowest bid amongst the successful bidders. He strongly argued that once the tender process reached the stage of declaring a bidder L-1, the cancellation or annulment of such Tender cannot be for the mere asking and there has to be very strong and valid reasons before such drastic action is undertaken. According to him, in the present case, there are no reasons at all. He submitted that in case the annulment is on account of a shortfall of ABG amounting to Rs.4 lakhs, the tender process *qua* the petitioner would have been terminated at that stage itself. Having afforded an opportunity to submit its clarification and declaring the petitioner to be eligible after being satisfied with such explanation as tendered, it does not lie in the mouth of the respondent/NHAI to resile from its procedure.

7. He also doubted the intention behind the Notice Inviting Bid for the new Tender dated 14<sup>th</sup> March, 2024, on the same date of the cancellation of the earlier Tender dated 5<sup>th</sup> October, 2023. In fact according to him, the entire exercise to annul the previous tender process was arranged to benefit the successful L-1 bidder in the fresh Tender.

8. He candidly admitted that the petitioner participated in the fresh



Tender and submitted its bid of Rs.984.91 crores on 8<sup>th</sup> August, 2024. He stated that the previous bid amount of Rs.861.46 crores at which the petitioner was declared L-1, was already out in the open and in the knowledge of the fresh bidders. He submitted that this information enabled the fresh L-1 bidder to bid at the amount which was lower in the re-tendered NIT dated 14<sup>th</sup> March, 2024. He also stated that it is pertinent to appreciate that the fresh L-1 bidder had not participated in the earlier Tender dated 15<sup>th</sup> October, 2023. According to him, the entire effort of respondent/NHAI seems to point to an oblique motive to award the contract to the fresh L-1 bidder and to the detriment of the petitioner. He stated that apparently, it was on this basis, that the respondent/NHAI has filed the C.M. APPL. No.65696/2024.

9. Learned counsel for the petitioner also vehemently disputed the explanation of the respondent/NHAI that the decision taken by the Chairman to annul the Tender is valid. He argued that once the Committee had accepted the explanation/clarification tendered by the petitioner respecting the ABG and cleared the bid of the petitioner as L-1, there is no tender condition that empowers the respondent/NHAI to recall such a decision and annul the Tender. He vehemently contended that as per Clause 8.1 of the NHAI Guidelines, 2017 dated 21<sup>st</sup> August, 2017, the Chairman has no power of delegation at the time of the recommendation for the award, as the full powers lie with the CGM (HQ). That apart, he contended that Clause 8.3 of the said Guidelines empowering the Chairman to take a decision, is limited only to signing of the agreement and declaration etc. He argued that Clause 8.3 had no relation to the case of the petitioner. On the



above basis, he vehemently contended that the declaration of petitioner as L-1 could not be reviewed by anyone, much less the Chairman. He thus contended that the impugned action is fraught with illegalities.

10. He also forcefully contended that the settled decision of the Committee was unsettled by a lone Member (Mr. Subhash Khurana, General Manager, Finance – II). According to him, a single Member has no power, authority or jurisdiction to refer the matter to the Chairman particularly when the whole process had culminated in the petitioner being declared as L-1. He stated that this being contrary to the procedure, tender conditions and guidelines of the respondent/NHAI, the impugned action of annulment of Tender be quashed.

11. He also strenuously argued that Clause 6.2 of the tender conditions whereby the respondent/NHAI could cancel/annul any tender cannot be exercised arbitrarily or capriciously. According to him, it is settled law that the State is required to act fairly even in commercial transactions and its action is liable to judicial review if found to be excessive or unfair. For the said proposition, he relied upon the judgements of the Supreme Court in *Mihan India Ltd. vs. GMR Airports Ltd. & Ors.*, 2022 SCC OnLine SC 574, *G.J. Fernandez vs. State of Karnataka & Ors.*, (1990) 2 SCC 488 and *Poddar Steel Corporation vs. Ganesh Engineering Works & Others*, (1991) 3 SCC 273. He laid particular emphasis on para no.73 in the case of *Subodh Kumar Singh Rathour v. Chief Executive Officer & Ors.*, 2024 SCC Online SC 1682 as also para nos. 69 to 71 & 85.

12. That apart, according to learned counsel for the petitioner, Clause 6.2 of the tender conditions, cannot be deemed to empower arbitrary exercise of





power and the decision must be reasoned and fair. He stated that in the present case, the same is lacking. Resultantly, the impugned notifications and the Notice Inviting Bid dated 14<sup>th</sup> March, 2024, be quashed and set aside and the contract be awarded to the petitioner.

**CONTENTIONS OF THE RESPONDENT/NHAI:-**

13. Mr. Santosh Kumar, learned counsel appeared for the respondent/NHAI at the outset submitted that no stay from further processing the fresh Tender was passed by this Court except directing it to obtain specific permission in case the work was to be awarded to the successful bidder. In support thereof, he referred to the observations in the order dated 15<sup>th</sup> May 2024.

14. He submitted that the petitioner had submitted its original bid on 22<sup>nd</sup> February, 2024 with a bid security in the form of BG for a sum of Rs.10.45 crores. He also brought attention to the Standard Covering Letter for Letter of Guarantee issued by the Punjab National Bank, dated 13<sup>th</sup> February, 2024 for a sum of Rs.10.45 crores submitted by the petitioner. He, however, forcefully contended that though the petitioner claims to have furnished the ABG for Rs.4 lakhs on 22<sup>nd</sup> February, 2024 by SMFS mode, yet, did not upload the physical copy of the said ABG. He explained that under the SMFS mode, it is only the bank of the respondent/NHAI which is intimated about the ABG and no information was communicated to the respondent/NHAI either by the petitioner or its banker. He emphasised that the requirement of uploading ABG on its portal was to facilitate it to cross verify the correctness and authenticity of such ABG. This procedure not having been followed by the petitioner, there was no way the



respondent/NHAI could affirm or confirm the furnishing of ABG. As a result, according to him, the conclusion that the petitioner had not covered the shortfall within time cannot be found fault with. In order to buttress this contention, he drew attention to Clause 2.20.6 of the RFP to submit that no relaxation of any kind on the bid security was to be given to any bidder.

15. That apart, learned counsel for the respondent/NHAI contended that even otherwise, the respondent/NHAI, being the author of the RFP and the bid documents, had the right, authority and jurisdiction to cancel/annul the Tender at any time without assigning any reason whatsoever. According to him, the claim of the petitioner that the respondent/NHAI is obligated to provide reasons for such action stems from ignorance of the clauses of the RFP. Thus arguing, he invited attention to Clause 2.16.1 of RFP which supports the aforesaid submission. He stated that in fact, in furtherance of the same clause, post annulment, the respondent/NHAI issued a fresh Tender on 14<sup>th</sup> March, 2024 inviting bids from all the previous bidders, including the petitioner. He also stated that the petitioner did participate in the fresh Tender and quoted a bid price of Rs.984.91 crores, which is higher than the successful bidder of the fresh Tender by almost Rs.150 crores. In such a situation, according to him, the petitioner has no locus to file a fresh petition challenging the impugned action after fully participating in the fresh Tender. In support of the contentions, he relied upon the judgements of the Supreme Court in *IJM Corporation Berhad vs. National Highways Authority of India*, SLP(C) No. 10811/2022 decided on 5<sup>th</sup> July, 2022 and *Vidarbha Irrigation Development Corporation &Ors vs. Anoj Kumar Agarwala & Ors.*, (2020) 17 SCC 577.



16. Learned counsel for the respondent/NHAI also drew attention to para no.5 of the application bearing CM APPL. No. 65696/2024 to impress upon this Court the urgent necessity to permit it to award contract to the successful bidder of the fresh Tender. He stated that the widening of 2-lane carriageway to a 6-lane carriageway along with service roads on both sides is necessitated to address the issue of frequent accidents/fatalities owing to black spots such as *Karond Chauraha* and *Ratnagiri Tiraha* as also the traffic congestion. He also stated that the respondent/NHAI owns the project land and therefore there are no hindrances or objections to commence the developmental works. In other words, he contended that the project brooks no more delay.

17. Learned counsel for respondent/NHAI distinguished the ratio of the judgement in *Subodh Kumar (supra)* and stated that in the said case, the petitioner therein had already been awarded the works contract and was executing the same when action was taken against it. To support the said contention, he read through para nos.4 and 7 of the said judgement. He stated that in contradistinction to the same, in the present case, the original Tender was annulled as per authority vested in NHAI by RFP even before the contract was awarded to the petitioner. He also pointed out that the petitioner participated in the fresh Tender too. Hence, he cannot raise any grievance in respect of the annulment of the previous Tender. Thus, the respondent/NHAI has been fair and transparent on that count too. Thus, the present case being different from that of *Subodh Kumar(supra)*, the ratio laid down by the Supreme Court cannot be made applicable here.

18. To the submission of the petitioner regarding unilateral and alleged



illegal action of one Member of the Committee taking arbitrary and capricious action, learned counsel for the respondent/NHAI stated that the same is belied by the records produced before this Court.

19. In the above context, he drew attention to the copies of the original file pertaining to the petitioner maintained by the respondent/NHAI filed on record. He submitted that at the stage of seeking approval from the Chairman, the same was put up through Note no.103 on 12<sup>th</sup> March, 2024 at 04.42 p.m. alongwith the note of one of the Committee members, i.e., GM (Finance). At para 8.1, it was stated that approving the relaxation in the delayed submission of shortfall in Bid Security/Earnest Money Deposit may be placed before the Chairman as the same may be quoted by other bidders frequently as precedent for delayed submission of shortfall. He stated that it was on such consideration that the Chairman *vide* Note no.107 dated 14<sup>th</sup> March, 2024 decided that bid security is an essential condition and cannot be relaxed. He strenuously contended that it was for proper and cogent reasons that the decision to annul the previous Tender was taken. According to him, there is no *malafide*, ill intention or arbitrariness in such a decision. He submitted that in any case, the petitioner was also invited to submit its bid in the fresh Tender, which it did. He stated that though the petitioner submitted a bid amount of Rs.861.46 crores previously, yet this time, it has quoted a bid of Rs.984.91 crores. He submitted that this bid being substantially higher than the petitioner's own previous bid and being higher by Rs.150 crores than the present L-1 bidder, there is equally no reason why the contract ought to be awarded to the petitioner. Thus, learned counsel for the respondent/NHAI submitted that the present writ petition be



dismissed and simultaneously, the respondent/NHAI be permitted to award the contract to the successful L-1 bidder in accordance with the fresh Tender.

**ANALYSIS AND CONCLUSIONS:-**

20. This Court has heard the learned counsel for the parties and perused the documents on record and considered the judgements relied upon by the parties.

21. Since the petitioner has laid a challenge to the annulment of the Tender dated 5<sup>th</sup> October, 2023 on the ground that once the Evaluation Committee had approved the petitioner as L-1, the said decision became final and binding and there was no rule, regulation or any provision in the tender documents which would entitle the Chairman to annul the Tender, it would be appropriate to first consider the said contention.

22. This Court has perused the tender conditions contained in various documents including the NHAI Guidelines/Delegation of Power dated 21<sup>st</sup> August, 2017. Learned counsel for the petitioner had vehemently argued by relying upon Clause 8.1 of the NHAI Guidelines to submit that it is only the Evaluation Committee which had the power and jurisdiction to evaluate the bids and recommend for awarding the contract to the successful bidder. In contradistinction to the above, he had also stated that the Chairman had delegated his powers to the Member (in-charge) for signing of the agreement and declaration of appointed date of commencement of the project. He argued that neither Clause 8.1 nor 8.3 conferred any power upon of the Chairman, much less the Member to annul the Tender post declaration of petitioner as L-1. In this context, this Court finds that the



respondent/NHAI had not annulled the Tender on whims or arbitrarily. It is an admitted case that the petitioner had not uploaded the copy of the ABG on the official portal of the respondent/NHAI and had only used the procedure prescribed in SFMS. The explanation provided by the learned counsel for the respondent/NHAI regarding the manner in which the SFMS works indicates that the respondent/NHAI did not have any knowledge of the petitioner having tendered the ABG on 22<sup>nd</sup> February, 2024. Though the ABG was furnished *via* SFMS, well before the closure date of 27<sup>th</sup> February, 2024, yet the respondent/NHAI did not have the requisite information in that regard. From the facts, it is apparent that subsequently, on the objections raised by the respondent/NHAI, the petitioner as also *Apco Infratech Private Ltd.* had then clarified that the ABG was furnished *via* SFMS. Keeping in view the clarification, the respondent/NHAI proceeded to evaluate the Financial Bid and held that the petitioner has L-1.

23. Since one of the Committee members, GM (Finance) had raised an objection that this acceptance of shortfall of bid security subsequently deposited by the bidder would create an unnecessary precedent which may be quoted by other bidders, the file was put up to the Chairman, NHAI for consideration. This Court notes that Note no.103 dated 12<sup>th</sup> March, 2024, entered at 04.42 p.m. gave the complete background as to why the said consideration by the Chairman was necessitated. This Court also notes that by the Note no.107 dated 14<sup>th</sup> March, 2024 entered at 11:56 a.m., the Chairman, NHAI decided that the bid security of requisite amount is an essential document of the bid and cannot be relaxed. Palpably, it was this decision of the Chairman that compelled the respondent/NHAI to annul the



Tender. To this Court, it appears that in the interest of justice, as also to obviate misuse by certain bidders, that such drastic action of annulment of Tender was taken. This Court finds the action justified in the facts of the case as also the reason appears to be compelling.

24. Significantly, the petitioner does not dispute that it did not upload the ABG in the manner prescribed and resultantly, the respondent/NHAI cannot be found fault with in not being able to verify, affirm and confirm the authenticity and veracity of the ABG from the bankers. It is apparent that to avoid the floodgates of litigation as also incessant problems, the respondent/NHAI had no choice other than to annul the Tender. Thus, this Court is of the opinion that respondent/NHAI was well within the authority to annul the Tender.

25. Besides, Clause 2.16 of RFP reserves the right for the authority to reject bid and to annul the bidding process and reject all bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons thereof. The respondents/NHAI had ample right, authority and jurisdiction conferred upon it to annul the contract without assailing any reason whatsoever as per Clause 6.2. The law in this regard is too well settled to brook any ambiguity. However, in the facts of the present case, this Court finds on a scrutiny of the record, that the reasons for annulment are justifiable. The Supreme Court in *IJM Corporation Berhad*(*supra*) held as under:-

**“Clause 2.16 provides that notwithstanding anything contained in the RFP, the Authority reserves the right to reject any bid and to annul the bidding process and reject all bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without**



**assigning any reasons thereof.** In the event the NHAI rejects or annuls all the bids, it may, in its discretion, invite all eligible bidders to submit fresh bids hereunder. Clause 3.8.2 of the Bid document clearly provides that in the event highest bidder withdraws or is not selected for any reason, the authority shall annul the bidding process and invite fresh bids. In the event the authority rejects or annuls all the bids, it may, in its discretion invite all eligible bidders to submit fresh bids.

**The NHAI had clearly reserved to itself the right to annul the bidding process. Clause 6.2 provided that the NHAI might have sole discretion and without incurring any obligation or liability, 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.**

**The petitioner submitted its tender in terms of the RFP and obviously after going through the terms and conditions of the RFP. It is not open to the petitioner to question the annulment of the tender process.**”

(emphasis supplied)

26. In any case, no prejudice whatsoever is caused to the petitioner, inasmuch as, despite having submitted a bid of Rs. 861.46 crores and knowing fully that the earlier bid was out in the open, the petitioner wholeheartedly participated in the fresh Tender and intriguingly submitted its bid of Rs.984.91 crores. It is astonishing to note that the fresh bid of the petitioner is substantially higher than its own previous bid and is almost Rs.150 crores over and above the bid submitted by the successful bidder in the fresh Tender who has been declared as L-1. Though a pointed query was put to the learned counsel for the petitioner, he was unable to answer as to why any prudent person would submit a fresh Tender which is way higher





than the previous bid when the petitioner was declared L-1. For the aforesaid reasons, this Court finds the contention in the above context untenable and is accordingly rejected.

27. From the record, this Court finds that the respondent/NHAI had revised the bid security on 20<sup>th</sup> February, 2024 and extended the time for bid security submission till 27<sup>th</sup> February, 2024. Though the petitioner appears to have taken immediate steps to furnish the ABG of Rs. 4 lakhs on 22<sup>nd</sup> February, 2024 itself, yet due to some error and inadvertence, violated the procedure while undertaking the SFMS mode to upload the ABG on the portal. Though the mistake appears to be inadvertent, yet the respondent/NHAI cannot be faulted with for having annulled the entire Tender on the basis that the action of acceptance of ABG subsequent to the date of closure of the bid may be misused as a precedent by unscrupulous bidders. Weighing the conflicting interests, this Court is of the opinion that the action of the respondent/NHAI inviting the petitioner as well as other bidders for a fresh bid has allayed the apprehension of misuse so far as the respondent/NHAI is concerned and simultaneously, provided a level playing field to the petitioner by giving it another chance to submit its bid afresh.

28. So far as the ratio laid down by the Supreme Court in *Subodh Kumar (supra)* relied upon by the petitioner is concerned, it is apparent that in that case, the appellant therein had already been issued work orders which were being executed by it. In the interregnum, the respondent therein had canceled the Tender on account of technical fault. The Supreme Court after perusing the records and the internal notings of the files maintained by the



respondent therein, found that there was nothing to suggest that there was technical fault in the Tender resulting in financial loss nor there is possibility of fetching higher License Fee. In fact it was observed by the Supreme Court that the respondent therein was of the opinion that the Tender was financially beneficial to it. Finally, the Supreme Court held that even if it was assumed that there was a technical fault, which if rectified, would possibly generate more revenue, the same could not be said to be a cogent reason for cancelling an already existing Tender. It was in those peculiar circumstances, the Supreme Court interfered with the cancellation of the Tender. In fact it was observed by the Supreme Court that since the Government of West Bengal had merely transferred the operation and maintenance of the underpasses including the right to receive the revenue from KMDA (Kolkata Metropolitan Development Authority) to KMC (Kolkata Municipal Corporation) and therefore, there will be no effect on any rights that accrued in favour of the appellant. Resultantly, the notice of cancellation was quashed. However, in the present case, this Court has already found the action of annulment of Tender justifiable. Besides, it was only at the stage of the petitioner having been declared L-1, that such annulment took place which did not prejudice it. That apart, the petitioner was afforded an opportunity to submit its bid in the freshly issued Notice Inviting Bid. Thus, the ratio could not be made applicable to the facts of this case.

29. So far as the judgment of the Supreme Court in *Mihaan India Ltd.(supra)* is concerned, there is no quarrel with the ratio laid down therein that the power conferred upon the authority to cancel or annul the Notice



Inviting Bid cannot be used arbitrarily or capriciously. There cannot also be any resistance to the ratio that the public authorities even in contractual matters do not have unfettered discretion and the decisions taken by such authorities should be fair. In the present case, this Court has found as a fact that the respondent/NHAI had cogent reasons to take such decision of annulment of the Tender. Having regard thereto, this Court is of the considered opinion that the ratio in *Mihaan India Ltd.(supra)* is fully satisfied in the present case.

30. In *Poddar Steel Corporation (supra)*, the Supreme Court after examining the facts arising therein held that 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. It was further held that the requirements in the Tender Notice can be classified into two categories - (i) those which lay down the essential conditions of eligibility; (ii) the others which are merely ancillary or subsidiary with the main object to be achieved. In the first case, the authority issuing the Tender may be required to enforce them rigidly while in the other, the authority may deviate from and not insist upon the strict literal compliance of the conditions in appropriate cases. In that case, the bidder had submitted its Tender accompanied by a cheque of the Union Bank of India and not of the State Bank of India as per Clause 6 of the Tender therein. The question posed was as to whether the said non-compliance deprived the “*Diesel Locomotive Works*” of the authority to accept the bid. It was held that the condition need not be construed strictly



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and having regard to the bid being highest, in the interest of justice, the cheque issued by Union Bank of India be treated as acceptable. In the present case, it has to be kept in mind that non-uploading of the ABG deprived the respondent/NHAI to verify as to whether the petitioner had at all furnished the ABG. That coupled with the objection that acceptance of the delayed ABG in one instance may be misused by other bidders as a precedent, appears to be the reason for annulment of the Tender. Though every situation cannot be envisaged by the Constitutional Court, yet in the facts of the present case, coupled with the apprehension of the respondent/NHAI, this Court finds it to be a justified reason for annulment of the Tender. As stated above, it is reiterated that no prejudice could be stated to have been caused as the petitioner did participate in the fresh tender process.

31. In view of the above, this Court does not find any merits in the petition and the same is dismissed along with pending applications.

**TUSHAR RAO GEDELA, J**

**MANMOHAN, CJ**

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