

Before Ajay Kumar Mittal, ACJ & Tejinder Singh Dhindsa, J.

M/S BALRAM AND CO., BARNALA—Petitioner

versus

FOOD CORPORATION OF INDIA AND OTHERS—Respondents

CWP No.13505 of 2018

May 30, 2018

Constitution of India, 1950—Art.226—Model Tender Form — Clause 5(b)(II) — Technical Bid for appointment of Handling and Transport Contractor — Rejection on ground that Special Power of Attorney uploaded by bidder did not state that Power of Attorney holder has authority to bind such other persons, or firm, as case may be, for all matters pertaining to contract by invoking Clause 5(b)(II) of Model Tender Form — Held, Digital Signature Card Holder responsible to produce Special Power of Attorney duly executed in his favour and to carry a specific wording i.e. "stating that he has authority to bind such other persons, or the firm, as the case may be, in all matters pertaining to contract" — Towards discharge of such obligation word shall has been used — Further, rectification in Clause that if Digital Signature Card Holder fails to do so, his tender shall be summarily rejected — Thus, Clause 5 (b)(II) of MTF rightly construed by Corporation as essential term of contract — Deviation and relaxation therefrom would not be permissible — Therefore, rejection of technical bid upheld.

Held, that in the facts of the present case and as per clause 5 (b)(II) of the MTF, it was obligatory for the Digital Signature Card (DSC) holder signing the tender to produce a Power of Attorney stating that he has authority to bind such other persons, or the firm, as the case may be, in all matters relating to contract. The respondent Corporation has construed Clause 5 (b) (II) of MTF to be an essential condition to the contract and for protecting its interest.

(Para 12)

Further held, that we find from a reading of Clause 5 (b)(II) of MTF that language employed therein is very much clear and categorical and there is no ambiguity whatsoever. The Digital Signature Card Holder was responsible to produce a Special Power of Attorney duly executed in his favour and to carry a specific wording i.e. "stating that he has authority to bind such other persons, or the firm, as the case may

be, in all matters pertaining to the contract". Towards discharge of such obligation the word shall has been used. Further more in the Clause itself it has been recited that if the Digital Signature Card Holder fails to do so, his tender shall be summarily rejected.

(Para 14)

Nitin Kaushal, Advocate, *for the petitioner.*

J.S. Puri, Advocate, for respondent Nos.1 and 2.

Anurag Chopra, Advocate, for respondent No.3.

TEJINDER SINGH DHINDSA, J.

(1) Petitioner is a partnership firm and has filed the instant writ petition assailing order dated 18/22.05.2018 passed by the General Manager (Region), Food Corporation of India, Regional Office, Punjab and whereby its technical bid has been rejected.

(2) Brief facts are that the Food Corporation of India (for short "the Corporation") issued Tender Notice dated 06.04.2018 inviting e-tenders under two bid system from financially sound parties for appointment of Handling and Transport Contractor, Barnala for a period of two years. The estimated value of the tender in question was Rs.18,05,94,000/-. Tender was required to be submitted online by 05.04.2018 up to 5:00 p.m. and the technical bid was to be opened on 06.04.2018. As per relevant Clauses of the Tender Application Form, the tenderer was required to upload a scanned copy of the registered deed of the partnership/MOA/ AOA as applicable and also a scanned copy (in PDF format) of the registered Power of Attorney in favour of the Digital Signature Card (DSC) holder/authorized signatory. It is the case of the petitioner firm that a Special Power of Attorney authorizing Sanjeev Kumar son of Late Sh. Balram one of the partners to act on behalf of the firm was duly uploaded on the website of the respondent Corporation. It is submitted that the Special Power of Attorney dated 02.02.2018 was signed by all the partners and registered before the Sub Registrar, Barnala on 03.02.2018. Petitioner's tender was rejected on 01.05.2018 during the process of technical evaluation. Such action was challenged by way of filing CWP No.11394 of 2018 and which was disposed of on 07.05.2018 granting liberty to the petitioner firm to make a representation within 03 days and directions were issued for such representation to be decided within 07 days thereafter. Apparently,

the representation filed by the petitioner has been rejected vide impugned order dated 18/22.05.2018 (Annexure P-6), by invoking Clause 5 (b)(II) of the Model Tender Form (MTF) and ostensibly on the ground that the Special Power of Attorney uploaded by the bidder did not state that Power of Attorney holder has the authority to bind such other persons, or the firm, as the case may be, for all matters pertaining to the contract.

(3) Learned counsel representing the petitioner has argued that the impugned order dated 18/22.05.2018 (Annexure P-6) cannot sustain as it is a non-speaking and cryptic order. Further contended that the respondent Corporation has erred in invoking Clause 5 (b) (II) of the MTF inasmuch as the Special Power of Attorney in favour of Sanjeev Kumar, one of the partners and which had been duly uploaded clearly provide that the acts of the authorized partner shall be on behalf of the petitioner firm. In furtherance of such argument, it is submitted that the Notice Inviting Tender (NIT) issued by Food Corporation of India did not provide any specific format for the Special Power of Attorney and as such under the provisions of the Powers of Attorney Act, 1882, it would be deemed that the Power of Attorney holder possesses the authority to bind the other partners as also the firm pertaining to any issue arising out of the contract. Further urged that since the authorized attorney, namely, Sanjeev Kumar was also one of the partners of the petitioner firm, there would be no matter of doubt that the action of such partner would bind all other partners of the firm and in case of default, there would be joint and several liability of the firm as well as of the partners.

(4) Per contra learned counsel representing respondent Food Corporation of India would justify the rejection of the technical bid of the petitioner firm by stating that Clause 5 (b)(II) of the MTF had been incorporated with the objective of protecting the interest of the Corporation and which was binding upon the bidder. Any bidder who participated in the tender process was obligated to read the provisions of the NIT and MTF carefully and to submit the tender after agreeing to the same. Since the Special Power of Attorney did not specifically state as regards the holder to have authority to bind the other persons or the firm in matters relating to the contract, the technical bid of the petitioner firm had been rightfully rejected.

(5) We have heard learned counsel for the parties at length.

(6) The controversy raised in the instant petition hinges on the interpretation of Clause 5 (b)(II) of Model Tender Form (MTF) and which reads as under:-

“The Digital Signature Card (DSC) holder signing the tender, or any documents forming part of the tender, on behalf of another, or on behalf of a firm shall be responsible to produce a proper Power of Attorney duly executed in his favour, stating that he has authority to bind such other person, or the firm, as the case may be, in all matters, pertaining to the Contract. If the Digital Signature Card (DSC) holder so signing the tender fails to produce the said Power of Attorney his tender shall be summarily rejected without prejudice to any other right of the Corporation under the law. The hard copy of Power of Attorney will be submitted by the successful tenderer at the time of awarding of the contract.”

(7) We have also perused the Special Power of Attorney in favour of Sanjeev Kumar son of Late Sh. Balram and which had been uploaded on the website of the Food Corporation of India at the stage of submission of tender by the petitioner firm. As per wording of the Special Power of Attorney, one of the partners of the petitioner firm, namely, Sanjeev Kumar was authorized to do the following acts on behalf of the firm i.e.

1. **“To deal with the Food Corporation of India in connection with the Handling and Transport and other contracts on behalf of the said firm.**
2. **To sign all documents on behalf of the firm.**
3. **To make statements before higher authorities i.e. General Manager/District Manager etc.**
4. **To execute any document in favour of Food Corporation of India in connection with the Handling and Transport and other contract on behalf of the firm.**
5. **To apply and sign with digital signatures (DSC) on behalf of the firm.**
6. **To draw, negotiate and /or endorse.”**

(8) Clearly, the specific wording as regards the Special Power of Attorney holder “*to have authority to bind such other person, or the firm, as the case may be, in all matters pertaining to the contract*” was missing.

(9) We are unable to persuade ourselves to contention raised by learned counsel that such stipulation would have to be read into the Special Power of Attorney by deeming fiction and by invoking the provisions of the Powers of Attorney Act 1882.

(10) The Supreme Court in *Afcons Infrastructure Limited versus Nagpur Metro Rail Corporation Limited and another*¹ had sounded a word of caution to the Constitutional Courts with regard to interference and resorting to interpretation of tender documents and the terms and conditions contained therein.

(11) Observations contained in paras 14 and 15 would be relevant and are reproduced hereunder:-

14. “We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty Vs. International Airport Authority of India was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous—they must be given meaning and their necessary significance. In this context, the use of the word “metro” in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the

¹ 2016 (16) SCC 818

**constitutional courts but that by itself is not a reason
for interfering with the interpretation given.”**

(12) In the facts of the present case and as per clause 5 (b)(II) of the MTF, it was obligatory for the Digital Signature Card (DSC) holder signing the tender to produce a Power of Attorney stating that he has authority to bind such other persons, or the firm, as the case may be, in all matters relating to contract. The respondent Corporation has construed Clause 5 (b) (II) of MTF to be an *essential* condition to the contract and for protecting its interest.

(13) In *Central Coal Fields Limited and another versus SLL- SML (Joint Venture Consortium) and others*², the Apex Court had held that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer and as such whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. It was further held that the correctness of such a decision cannot be questioned as otherwise the Courts would be taking over the function of the Tender Issuing Authority and which it cannot.

(14) We find from a reading of Clause 5 (b) (II) of MTF that language employed therein is very much clear and categorical and there is no ambiguity whatsoever. The Digital Signature Card Holder was responsible to produce a Special Power of Attorney duly executed in his favour and to carry a specific wording i.e. ***“stating that he has authority to bind such other persons, or the firm, as the case may be, in all matters pertaining to the contract”***. Towards discharge of such obligation the word shall has been used. Further more in the Clause itself it has been recited that if the Digital Signature Card Holder fails to do so, his tender shall be summarily rejected.

(15) We have no hesitation in holding that Clause 5 (b) (II) of MTF has rightfully been construed by the Corporation as an *essential* term of the contract. Deviation and relaxation therefrom would not be permissible.

(16) That apart the petitioner firm is not alleging any

² 2016 (IV) RCR (Civil) 919

mala fides or perversity in the understanding or appreciation of the terms of the Notice Inviting Tender/Model Tender Form at the hands of respondent Corporation and which in turn has led to the rejection of the technical bid vide impugned order dated 18/22.05.2018 (Annexure P-6)

(17) For the reasons recorded above, we find no merit in the instant petition and the same is, accordingly, dismissed.

(18) Petition dismissed.

Ritambra Rishi